DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-09-29,715

In re: 4941 North Capitol Street, N.E., Unit 21

Ward Five (5)

GELMAN MANAGEMENT COMPANY
Housing Provider/Appellant

v.

DEBRA CAMPBELL
Tenant/Appellee

DECISION AND ORDER

December 23, 2013

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a decision and order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD).[1] The applicable provisions of the Rental Housing Act of 1985 (Rental Housing Act), D.C. LAW 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501- 2-510 (2001 Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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[1] The Office of Administrative Hearings (OAH) assumed jurisdiction over the conduct of hearings on tenant petitions from the RACD and the Rent Administrator pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE §2-1831.01, - 1831.03(b-1)(1) (2001 Supp. 2005). The functions and duties of the RACD were transferred to the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (2001 Supp. 2008)).

I. PROCEDURAL HISTORY

On September 16, 2009, Tenant/Appellee Debra Campbell (Tenant), residing at 4941 North Capitol Street, N.E., Unit 21, Washington, D.C. 20011 (Housing Accommodation), filed Tenant Petition RH-TP-09-29,715 (Tenant Petition) against Housing Provider/Appellant Gelman Management Company (Housing Provider) claiming the following violations of the Act:

1. The rent increase was made while my/our units were not in substantial compliance with DC Housing Regulations.

2. Services and/or facilities provided as part of rent and/or tenancy have been substantially reduced.

See Tenant Petition at 1-2; Record for RH-TP-09-29,715 (R.) at 10-11.[2]

Evidentiary hearings were held before Administrative Law Judge (ALJ) Caryn Hines on April 8, 2010 and May 12, 2010. R. at 71-72, 76-77.

On December 15, 2010, the ALJ issued a final order, Campbell v. Gelman Mgmt. Co., RH-TP-09-29,715 (OAH Dec. 15, 2010) (Final Order). In the Final Order the ALJ made the following findings of fact:[3]

1. The housing accommodation that is the subject of the [T]enant [P]etition is located at 4941 North Capitol Street NE, Unit 21.

2. Tenant has resided in the [H]ousing [A]ccommodation since December 12, 2003. Petitioner's Exhibit (PX) 101.

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[2] On March 31, 2010, the Tenant filed a Motion to Amend Tenant Petition (hereinafter "Motion to Amend") and an Amended Tenant Petition, claiming the following additional violation of the Act: "[t]he 2007 rent increase is invalid because the Housing Provider did not file a 2007 Certificate of Rent Increase with RAD." Amended Tenant Petition at 4-5; R. at 62-63. The Tenant's Motion to Amend was granted by the ALJ on the record at the April 8, 2010 hearing. *See* Hearing CD (OAH Apr. 8, 2010). However, the Tenant subsequently withdrew this claim on May 24, 2010. *See* Petitioner's Amended Post-Hearing Memorandum (OAH May 24, 2010) at 23-24; R. at 102-103.

[3] The findings of fact are recited here using the same language and paragraph numbers as the ALJ in the Final Order.

3. Effective March 1, 2007, Tenant's rent was increased from $835 to $887. PX 115.

4. Effective March 1, 2008, Tenant's rent was increased from $887 to $910. PX 111.

5. Effective March 1, 2009, Tenant's rent was increased from $910 to $935. PX 116.

6. Effective March 1, 2010, Tenant's rent was increased from $935 to $950. PX 112.

7. Since the beginning of her tenancy in 2003, Tenant continuously contacted Housing Provider about chronic problems with air and moisture coming through all of the windows of the rental unit because of improper weatherproofing.

8. In June 2008, Tenant had problems with the living room window not opening or closing with ease and coming off its track. Tenant sent maintenance requests to Housing Provider on August 5, 2008, May 11, 2009, June 18, 2009, and June 22, 2009. PXs 106, 107, 108, 121. Housing Provider repaired the handles of the windows and put the window back on its track after the June 22, 2009, request. Tenant contacted DCRA who sent Housing Inspector Stroman to inspect the unit on September 3, 2008. Inspector Stroman cited Housing Provider for the living room window not being capable of opening or closing with ease. PX 101. Housing Provider repaired the window. The handle broke again and Tenant was unable to open the window and the window came off its track. Tenant sent a repair request to Housing Provider on September 30, 2009, PX 109, and another repair request on October 16, 2009. PX 110. After Housing Provider failed to respond to the first request, Tenant again contacted the Department of Consumer and Regulatory Affairs (DCRA), who sent Housing Inspector Harris to inspect the unit on October 10, 2009. Inspector Harris cited Housing Provider for the living room window not being capable of opening or closing with ease. PX 105. At some point prior to the April hearing, Housing Provider came to Tenant's unit to repair the window. As of April 2010, Tenant did not know if the problem remained.

9. Tenant notified Housing Provider via maintenance requests during the "rainy season" in March or April of 2007 that paint was chipping and peeling on the living room wall. Housing Provider repaired the wall and the paint chipped and peeled again in March or April of 2008. Housing Provider repaired the wall again and the paint chipped and peeled again in March or April of 2009. PX 118.

10. The inside sash of both bedroom windows had loose or peeling paint in September 2008. Housing Provider was cited for this condition on September 3, 2008 by Inspector Stroman. PX 101. Housing Provider repaired this condition but it recurred in March or April of 2009.

11. Mold accumulated on the window sill of the bedroom Tenant's grandchildren occupied during the winters of 2007, 2008, and 2009 because the window could not be shut completely and was not weatherproofed. PXs 101, 119. These conditions existed on March 1, 2007, March 1, 2008, and March 1, 2009 and were cited by DCRA Housing Inspectors Stroman and Harris on September 3, 2008 and October 20, 2009, respectively. PXs 101, 105. Tenant cleaned mold off the window once every two weeks during the winter months of 2007, 2008, 2009. Tenant sealed the window with duct tape.

12. Since the beginning of Tenant's tenancy in 2003, the bathroom window of the rental unit has leaked air. Tenant complained to Housing Provider about the condition of the bathroom window on August 5, 2008. PX 106. DCRA Housing Inspector Johnson cited this condition in her report on January 8, 2009. PX 102. Tenant sealed the window sill with duct tape and plastic in November 2009. PX 120.

13. The screens in the windows of the rental unit did not fit. Tenant provided a written complaint to Housing Provider of this condition on August 5, 2008. PX 106[.] DCRA Housing Inspector Stroman cited Housing Provider for this condition on January 12, 2009. PX 103. Housing Provider attempted to replace the screens with screens that were too short. The screens were not replaced as of the date of the May 12, 2010 hearing.

14. Tenant's unit has been infested with mice from the beginning of her tenancy through the date of the hearing. PX 123. Tenant's complaints to Housing Provider were ongoing since 2006 and she listed it in a repair request on August 5, 2008. PX 106. Housing Provider provided pest control services, plugged mice holes, and gave Tenant containers for her food but the problem was not eradicated as of the date of the May 12, 2010 hearing.

15. The concrete walkways in the back of Tenant's building have been crumbling since the beginning of her tenancy and remained that way as of the date of the May 12, 2010 hearing. PXs 124, 125.

16. The concrete sidewalks in the front of Tenant's building have been crumbling since the beginning of her tenancy and remain that way as of the date of the hearing. The step railing along the concrete sidewalk has been unsecure since Tenant moved into the housing accommodation in 2003. PXs [sic] 126, RX 235. Tenant never notified Housing Provider about the condition.

17. Housing Provider left chunks of cement behind the dumpster during the year of 2008. In March 2010, Housing Provider allowed trash to accumulate beside the dumpster located in the rear of the [H]ousing [A]ccommodation for two weeks. PX 127. Housing Provider hired a trash collection service to operate once daily six days a week. Housing Provider continues to allow trash to accumulate beside the dumpster as of the date of the May 12, 2010 hearing.

18. Housing Provider intermittently screwed shut the exterior exit to the laundry room since 2008. The door was sealed shut as of the date of the May 12, 2010 hearing.

19. The smoke alarm in the laundry room has not functioned since November 2009. Housing Provider properly installed the smoke alarm in the laundry room in April 2010. PX 128.

20. The laundry room has loose or peeling paint and an exposed surface. The condition has existed since Tenant moved into the [H]ousing [A]ccommodation in 2003. PX 129. DCRA Housing Inspector Johnson cited Housing Provider on January 8, 2009, for this condition. PX 101.

21. Since Tenant moved into the [H]ousing [A]ccommodation in 2003, the tub in the laundry room has overflowed when Tenant uses the washing machine once a week. Housing Provider often allows the water to stay on the floor for two days.

22. The exterior walls of the [H]ousing [A]ccommodation have holes and the brick walls are not pointed allowing for entry of mice into the unit. These conditions have existed since Tenant moved into the [Housing A]ccommodation in 2003. The conditions remained as of the date of the May 12, 2010 hearing. PX 130.

23. In June 2008, Tenant requested that Housing Provider replace her refrigerator because of a broken seal. Tenant contacted DCRA, who sent Inspector Stroman on September 3, 2008. Inspector Stroman cited Housing Provider for the refrigerator's broken seal. PX 101. Housing Provider replaced the refrigerator at a time when the temperature was warm in 2008. Tenant refused Housing Provider's attempts to replace the refrigerator three times before the refrigerator was replaced.

24. Housing Provider's resident manager, Antoinette Clemons inspects the building in which Tenant's unit is located on a daily basis.

25. On December 11, 2008, Tenant and Housing Provider filed a settlement agreement in the Superior Court of the District of Columbia Landlord and Tenant Branch (Landlord and Tenant Branch) which read in part, "this

agreement is a full and complete settlement of all claims between the parties cognizable in the landlord and tenant court up to and including the date of this agreement." RX 201.

Final Order at 3-8; R. at 168-173. The ALJ made the following conclusions of the law in the Final Order:[4]

. . .[5]

B. The consent settlement agreement dated December 11, 2008 filed with the Landlord Tenant Branch

1. Housing Provider argues that the consent settlement agreement filed with the Landlord Tenant Branch on December 11, 2008, settles all claims between the parties up until that date and therefore Tenant's claims up to December 11, 2008, are barred by the doctrine of *res judicata*. The consent settlement agreement reads, "this agreement is a full and complete settlement of all claims between the parties cognizable in the landlord and tenant court up to and including the date of this agreement" and it is stamped "MultiDoor Filed in Open Court." RX 201. The docket sheet from the Landlord Tenant Branch indicates that the case was closed on March 28, 2008.

2. Under the doctrine of *res judicata* or claim preclusion, a final judgment on the merits in an action precludes the same parties from litigating claims that were or could have been raised in that action. If the settlement agreement reached by the parties in the Landlord and Tenant Branch had been approved by the Court as a judgment on the merits or in the form of a consent decree, *res judicata* might bar [P]laintiff's [(Tenant's)] claims. But "[r]es judicata cannot operate in the absence of a judgment. A settlement agreement that has not been integrated into a consent decree [or order of a court] is not a judgment and cannot trigger *res judicata*." The settlement agreement filed in the Landlord and Tenant Branch cannot be considered under the doctrine of *res judicata* because it is not a final judgment on the merits.

3. However, the settlement agreement embodies an agreement between the parties. The consent settlement agreement reads, "this agreement is a full and complete settlement of all claims between the parties cognizable in the landlord and tenant court up to and including the date of this agreement" and it is signed on December 11, 2008 by Tenant, a representative for Housing

[4] The conclusions of law are recited here as stated by the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

[5] The Commission has omitted a recitation of the ALJ's statement of jurisdiction. *See* Final Order at 8; R. at 168.

Provider, and attorneys for both parties. Voluntary settlement of civil controversies is in high judicial favor and that [sic] a party who received such benefit of the settlement agreement will not be permitted to deny his or her obligations unless paramount public interest requires it. Settlement agreements should generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake. Tenant was represented by counsel at the time she entered into the settlement agreement and has provided no evidence that she signed the agreement under duress, by mistake, or [that] fraud existed. Because Tenant received the benefit of the settlement agreement until December 11, 2008, her claims are limited to those occurring after the settlement agreement was signed.

C. The rent increases of 2008, 2009, and 2010 were made while Tenant's unit was not in substantial compliance with the DC Housing Regulations

4. Tenant argues that her rental unit was not in substantial compliance with the D.C. Housing Regulations when Housing Provider increased her rent. The rent increases in question are: $887 to $910 effective March 1, 2008 (PX 111); $910 to $935 effective March 1, 2009 (PX 116); and $935 to $950 effective March 1, 2010. PX 112.

5. I will not consider the rent increase of 2008, because the settlement agreement covered all claims until December 11, 2008. RX 201. Tenant's rent was due on the first of each month and therefore at the time the settlement agreement was signed Tenant should have paid all of her rent for 2008 including her rent for December. PX 100.

6. Tenant experienced chronic problems with the windows throughout the unit. The windows throughout the rental unit and especially the living room did not have proper weather stripping. The windows also did not exclude rain from completely entering the rental unit. Further, the windows were not capable of easily being opened and closed by the window hardware. These conditions constitute housing code violations. The aggregate of the non-substantial housing code violations, makes them substantial.

7. Tenant's rental unit was infested with mice in 2009 and 2010 and remained that way until the date of the hearing. Rodent infestation is a substantial housing code violation.

8. Further, Housing Provider failed to maintain the step railing in good repair. The failure of Housing Provider to maintain safe railings is a substantial housing code violation.

9. Tenant argues that the front sidewalks and rear walkways were unsafe for walking purposes and that Housing Provider sealed the exterior laundry room

door and these conditions were substantial housing code violations. However, these conditions were not cited by the DCRA housing inspectors nor are they listed among the substantial housing code violations in 14 DCMR [§] 4216[.2] [(2004)].[6] Evidence of substantial noncompliance shall be limited to housing regulations violation notices issued by DCRA and those listed among the substantial housing violations in 14 DCMR [§] 4216[.2] [(2004)]. Based upon the evidence Tenant presented, these conditions are not substantial housing code violations.

10. The rent for any rental unit shall not be increased above the base rent unless the rental unit and the common elements are in substantial compliance with the housing regulations. Because substantial housing code violations existed when Housing Provider increased Tenant's rent in 2009, and 2010, those rent increases are invalid.

D. Remedy

11. Any person who knowingly demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit shall be

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[6] 14 DCMR § 4216.2 (2004) provides the following:

> For purposes of this subtitle, "substantial compliance with the housing code" means the absence of any substantial housing violations as defined in § 103(35) of the Act including, but not limited to, the following:
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> (a) Frequent lack of sufficient water supply;
> (b) Frequent lack of hot water;
> (c) Frequent lack of sufficient heat;
> (d) Curtailment of utility service, such as gas or electricity;
> (e) Defective electrical wiring, outlets, or fixtures;
> (f) Exposed electrical wiring or outlets not properly covered;
> (g) Leaks in the roof or walls;
> (h) Defective drains, sewage system, or toilet facilities;
> (i) Infestation of insects or rodents;
> (j) Lead paint on the interior of the dwelling, or on the exterior of the dwelling where the paint is in a location or in a condition which creates a hazard of lead poisoning to children or the occupants;
> (k) Insufficient number of acceptable exits for a dwelling, or from each floor of a rooming house;
> (l) Obstructed exits;
> (m) Accumulation of garbage or rubbish in common areas;
> (n) Plaster falling or in immediate danger or falling;
> (o) Dangerous porches, stairs, or railings;
> (p) Floor, wall, or ceilings with substantial holes;
> (q) Doors or windows insufficiently tight to maintain the required temperature or to prevent excessive heat loss;
> (r) Doors lacking required locks;
> (s) Fire hazards or absence of required fire prevention or fire control;
> (t) Inadequate ventilation of interior bathrooms; and
> (u) Large number of housing code violations, each of which may be either substantial or non-substantial, the aggregate of which is substantial, because of the number of violations.

held liable by the Administrative Law Judge for the amount by which the rent exceeds the rent charged and/or for a roll back of the rent to the amount the Administrative Law Judge determines. "Knowing" only requires knowledge of the essential facts which bring the conduct within the purview of the Act, and from such conduct, the law presumes knowledge of the resulting legal consequences. *Quality Mgmt., Inc. Co., v. D.C. Rental Hous. Comm'n*, 505 A.2d 73 (D.C. 1986).

12. Because I find that Housing Provider knowingly increased Tenant's rent when substantial housing code violations existed, Housing Provider is liable to Tenant for the amount by which the rent increase exceeds the maximum allowable rent charged from January 1, 2009 to May 1, 2010. Therefore, for January and February of 2009, the maximum allowable rent charged was $910, which is what Housing Provider charged Tenant. Housing Provider increased Tenant's rent to $935 effective March [1,] 2009 until February [28,] 2010. Tenant's rent increase exceeded the maximum allowable rent charged of $910 by $25 for twelve months. Then effective March [1,] 2010, Tenant's rent was increased to $950 until the date of the hearing. For the period of March [1,] 2010 to the date of the hearing in May 2020 [sic], Tenant's rent increase exceeded the maximum allowable rent charged of $910 by $40. Therefore Tenant is awarded $435, the total amount that the rent increase exceeded the maximum allowable rent excluding interest. Appendix B detailing Tenant's award is attached.[7]

13. Additionally, as of June 1, 2010, Tenant's rent is rolled back to $910, which is the amount in rent Tenant was charged at the time she agreed to withdraw all claims in the December 11, 2008 settlement agreement. The roll back remains in effect until Housing Provider corrects all outstanding substantial housing code violations and implements an appropriate rent increase under the Act.

E. Tenant's claims that Housing Provider substantially reduced the services and/or facilities provided as part of the rent and/or tenancy

14. Tenant alleges that Housing Provider substantially reduced the services and/or facilities provided as part of the rent and/or tenancy. At the hearing, Tenant testified concerning multiple reductions of services and/or facilities.

15. The Act provides that if related facilities provided in connection with the Housing Accommodation have been substantially decreased, the rent may be

[7] The Commission omits from this Decision and Order a recitation of the contents of "Appendix B," a chart detailing the ALJ's calculation of the rent refund awarded to the Tenant, which was attached to the Final Order. Final Order at 27; R. at 149. "Appendix B" may be viewed as part of the Commission's certified record in this case or upon request from OAH.

decreased to reflect proportionally the value of the change in facilities. The Act defines what is considered to be a "related facility."

> "Related facility" is defined as:
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> any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area.

D.C. OFFICIAL CODE § 42-3501.03(26) [(2001)].

16. To prove that a housing provider has substantially decreased a related facility, the tenant has the burden to establish that: (1) a reduction of the related service or facility occurred; (2) the duration of the reduction; (3) the housing provider was given notice of the reduction; and (4) the reduction was substantial.

17. As discussed above, Tenant's claims are limited to those occurring after December 11, 2008.

a. Windows

18. As of December 12, 2008, Tenant had chronic problems with weather proofing on all of the windows in her unit. PXs 120, 121. Tenant notified Housing Provider repeatedly about the problem including listing it in repair requests dated May 11, 2009, and September 30, 2009. PXs 107, 109. Housing Provider was also cited for this violation on January 8, 2009 and January 12, 2009. PXs 102, 103. Based upon the above, Housing Provider substantially reduced Tenant's services and facilities and Tenant is awarded a reduction of $20 from December 12, 2008 until the date of the hearing.

19. Tenant also had chronic problems with the living room window not opening or closing with ease and coming off its track. Tenant sent maintenance requests to Housing Provider on May 11, 2009, June 18, 2009, and June 22, 2009. PXs 107, 108, 121. Housing Provider repaired the handles of the windows and put the window back on its track after the June 22, 2009 request. The handle broke again and Tenant was unable to open the window and the window came off its track. Tenant sent a repair request to Housing Provider on September 30, 2009. PX 109. Tenant sent another repair request to Housing Provider on October 16, 2009. PX 110. Tenant contacted DCRA again and Housing Inspector Harris cited Housing Provider for this condition on October 10, 2009. PX 105. Because Tenant only opens the windows

during the warm months, as of May 2010, Tenant did not know if the problem remained.

20. As stated above, to prove that a housing provider has substantially decreased a related service or facility, the tenant has the burden to establish that: (1) a reduction of the related service or facility occurred; (2) the duration of the reduction; (3) the housing provider was given notice of the reduction; and (4) the reduction was substantial. Although Tenant established the existence of the living room window not opening or closing with ease and that she provided notice to Housing Provider about the problem, Tenant is unable to establish the duration of the problem. Without duration, this administrative court has no basis on which to grant an award. Tenant, as the proponent of this matter, has the burden of proof. In contested cases the proponent of an order shall have the burden of establishing each fact essential to the order by a preponderance of the evidence. Tenant has the burden of proof in this matter and has failed to meet her burden of proof.

21. Paint chipping and peeling on the living room wall was a recurring problem. Housing Provider repaired the wall in 2008, yet the problem re-emerged in March or April of 2009. Tenant testified that she reported the problem to Housing Provider in 2008, but there is no evidence in the record that Tenant notified Housing Provider that the problem returned after Housing Provider repaired it. In a complaint for reduction of services and facilities, a tenant must give the housing provider notice of the condition involving the interior of the rental unit. Because Tenant did not notify Housing Provider that this problem recurred, this administrative court is unable to grant Tenant an award.

22. The screens did not fit the windows in Tenant's unit and DCRA Housing Inspector Stroman cited this condition in her report on January 12, 2009. PX 103. This is the earliest evidence of Housing Provider being notified of the condition after December 12, 2008. The problem persisted until the date of the hearing. Tenant is awarded $25 per month from January 2009 until the date of the hearing. A chart detailing Tenant's award is attached as Appendix C.[8]

23. In the winters of 2009, and 2010, mold formed on the window sill of the bedroom occupied by Tenant's grandchildren. After Tenant scrubbed the mold from the window sill, the window sill would remain free from mold in the spring, summer, and fall; the mold would appear again in the winter. PXs

[8] The Commission notes that the entirety of "Appendix C" attached to the ALJ's Final Order contains nine (9) pages of charts detailing the ALJ's calculations of damages arising out of the reductions in services and/or facilities.. *See* Final Order at 28-36; R. at 140-48. The Commission omits from this Decision and Order a recitation of the contents of "Appendix C." Final Order at 28-36; R. at 140-48. "Appendix C" may be viewed as part of the Commission's certified record in this case or upon request of the Final Order from OAH.

105, 119. The record is unclear as to when Tenant notified Housing Provider of this problem, and therefore this administrative court can make no determination of an award.

24. After Housing Provider repaired the loose or peeling paint in the inside sash of both bedroom windows, it recurred in March or April of 2009. Tenant provided evidence that she notified Housing Provider when the problem first occurred and that Housing Provider repaired it; however, there is no evidence in the record that Tenant notified Housing Provider of the condition's recurrence. In a complaint of reduction of services and facilities, a tenant must give the housing provider notice of the condition involving the interior of a rental unit. Because Tenant did not notify Housing Provider that this problem recurred, this administrative court is unable to give her an award.

b. Mice Infestation

25. Tenant's unit continues to be infested with mice. PXs [sic] 123, PX 106. Housing Provider provided pest control services, plugged mice holes, and gave Tenant containers for her food but the problem was not eradicated as of the date of the May 12, 2010 hearing. Tenant is awarded a reduction in rent of $50 a month from December 12, 2008 to May 12, 2010, the date of the hearing. A chart detailing Tenant's award is attached as Appendix C.[9]

c. Common Areas

26. Tenants are obligated to provide notice of conditions existing within their units. However, numerous conditions existed in the housing accommodation's common areas and Housing Provider and its agents should be familiar with their existence.

27. Tenant alleges that Housing Provider reduced the services and facilities associated with the rental unit by failing to maintain the rear walkways and front sidewalks, PXs 124, 125. These conditions existed at least from December 12, 2008, and based on this, I find that Housing Provider substantially reduced Tenant's services and facilities and award Tenant a rent refund of $10 per month for failing to maintain the rear walkways and front sidewalks until the date of the hearing on May 12, 2010. A chart detailing Tenant's award is attached as Appendix C.[10]

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[9] *See supra* at p. 9 n. 7.

[10] *See supra* at p. 11 n. 8.

28. Tenant also alleges a reduction of services and facilities because Housing Provider failed to secure the step railing along the front concrete sidewalks, RX 235, and failed to prevent trash from accumulating beside the dumpster. PX 127. These conditions existed at least from December 12, 2008, and based on this, I find that Housing Provider substantially reduced Tenant's services and facilities and award Tenant a rent refund of $25 per month for failing to secure the step railing along the front concrete sidewalks and failing to prevent trash from accumulating beside the dumpster until the date of the hearing on May 12, 2010. A chart detailing Tenant's award is attached as Appendix C.[11]

29. Additionally, Tenant alleges that Housing Provider failed to repair the loose and peeling paint and the overflowing tub in the laundry room. These conditions existed at least from December 12, 2008, and based on this, I find that Housing Provider substantially reduced Tenant's services and facilities and award Tenant a rent refund of $10 per month for each of these violations until the date of the hearing on May 12, 2010. A chart detailing Tenant's award is attached as Appendix C.[12]

30. Tenant also alleges that Housing Provider failed to keep the exterior brick walls of the building pointed[,] PXs 105, 130, 131[,] and this failure allowed mice easy access to her unit. Because I have already given tenant an award for the mice infestation, I make no further award for Housing Provider failing to keep the exterior brick walls of the building pointed.

31. Since November 2009, the smoke alarm in the laundry room was not properly installed. PX 128. Housing Provider properly installed the smoke detector in April 2010. Tenant is awarded a rent refund of $10 per month for the six months that the condition existed. A chart detailing Tenant's award is attached as Appendix C.[13]

32. Tenant alleges that Housing Provider intermittently screwed shut the exterior exit to the laundry room and this is a reduction of services and facilities. Tenant testified that she felt unsafe in the laundry room because, should there be a fire in the corridor, she would be unable to get out of the laundry room. Ms. Clemons, the resident manager, credibly testified that Housing Provider screwed the exterior exit to the laundry room to protect the residents from the entry of vandals and miscreants who congregate in the laundry room. It is obvious that Housing Provider was grappling with easy access by the residents versus easy entry by vandals in that Housing Provider sometimes

[11] *See supra* at p. 11 n. 8.

[12] *See supra* at p. 11 n. 8.

[13] *See supra* at p.11 n. 8.

screwed the door shut and sometimes left it open. However, the sealed exterior door did not hinder Tenant's use of the laundry room nor did it prevent Tenant from entering or existing the laundry room. Also, if Housing Provider did not seal the door, the threat of vandals would also make Tenant feel unsafe when using the laundry room. Therefore, I find that Housing Provider's action of sealing the exterior laundry room door did not reduce Tenant's services and/or facilities.

d. Remedy

33. A related facility need only be one "the use of which is authorized by the payment of the rent charged for a rental unit." It follows that tenants can recover for reductions in related facilities that are not prescribed in the lease or required by law.

34. Prior to its amendment in August 2006, the Rental Housing Act provided for award of a rent refund "for the amount by which the rent exceeds the applicable rent ceiling . . . and/or for a roll back of the rent to the amount the [Administrative Law Judge] determines." The Rental Housing Commission has consistently interpreted the statute to limit the remedy for reduced facilities to a reduction in the rent ceiling, limiting rent reductions to cases in which the rent charged exceeded the reduced rent ceiling.

35. As of August 2006, the Rental Housing Act was amended to abolish rent ceilings. The amended Act provides that a housing provider may be held liable for "the amount by which the rent exceeds the applicable rent charged."

36. The chart below[14] summarizes the condition, its duration, when notice was given to Housing Provider of the reduction, the severity of the reduction, and the amount of the rent reduction . . . . Appendix C[15] attached to this Final Order details Tenant's award for the substantially reduced services or facilities.

Final Order at 8-22; R. at 154-68 (footnotes omitted).

On January 5, 2011, the Housing Provider filed a Notice of Appeal ("Notice of Appeal") with the Commission, asserting the following: "Gelman Management Co. hereby notes its appeal from the Final Order below, because a settlement agreement filed in the landlord-tenant branch

[14] The Commission omits from its recitation of the Conclusions of Law the ALJ's chart detailing the Tenant's award for reductions in services and/or facilities. *See* Final Order at 21-22; R. at 154-55. The Chart may be viewed as part of the Commission's public record in this case or upon request for the Final Order from OAH.

[15] *See supra* at p. 11 n. 8.

of the Superior Court, as well as the Rental Housing Act's statute of repose bars all of the petitioner's claims." Notice of Appeal at 1.

On January 24, 2011, the Tenant filed "Tenant/Appellee's Motion to Dismiss and Answer" ("Tenant's Motion to Dismiss"). The Housing Provider filed an Opposition to the Tenant's Motion to Dismiss ("Opposition") on February 2, 2011, and on February 22, 2011, the Tenant filed a Reply to the Housing Provider's Opposition. On December 7, 2011, the Commission issued an "Order on Tenant/Appellee's Motion to Dismiss Appeal" ("December 7 Order"), in which the Commission denied the Tenant's Motion to Dismiss the Housing Provider's *res judicata* claim, and granted the Tenant's Motion to Dismiss the Housing Provider's statute of limitations claim. *See* December 7 Order at 11.

The Housing Provider filed an appeal brief ("Housing Provider's Brief") on April 6, 2012. The Tenant filed a responsive brief ("Tenant's Brief") on April 20, 2012. The Commission held a hearing on this matter on April 24, 2012.

On June 12, 2012, the Housing Provider filed "Housing Provider/Appellant's Motion to Dismiss Tenant Petition for Want of Subject Matter Jurisdiction" ("Housing Provider's Motion to Dismiss"), and an accompanying Memorandum of Points and Authorities in support of the Motion to Dismiss ("Memorandum"), in which the Housing Provider asserted that the ALJ was without jurisdiction to adjudicate the Tenant's claims in the Tenant Petition because the conditions the Tenant complained of in the Tenant Petition were in existence at the time the Tenant first leased her unit. *See* Housing Provider's Motion to Dismiss at 1-2. The Tenant filed an Opposition to the Housing Provider's Motion to Dismiss on June 27, 2012. On July 10, 2012, the Housing Provider filed a "Motion for Leave to File Reply to Campbell's Opposition to Motion to Dismiss Tenant Petition" ("Motion for Leave to File Reply").

II. ISSUES ON APPEAL

A. Whether the ALJ Had Subject Matter Jurisdiction Over the Tenant Petition

B. Whether the ALJ erred by failing to find that the claims in the Tenant Petition were barred by the doctrine of res judicata.[16]

III. DISCUSSION OF ISSUES ON APPEAL

A. Whether the ALJ Had Subject Matter Jurisdiction Over the Tenant Petition

The Commission's review of the record reveals that the Housing Provider's Motion to Dismiss is the first instance that the Housing Provider raised the issue of OAH's subject matter jurisdiction over the Tenant Petition. While the Commission ordinarily cannot review an issue that was raised for the first time on appeal (*see* Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013); Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005); Parreco v. Akassy, TP 27,408 (RHC Dec. 8, 2003)), a party may raise a subject matter jurisdiction challenge at any point in the proceedings. *See* Ashton Gen. P'ship v. Fed. Data Corp., 682 A.2d 629, 632 n.2 (D.C. 1996); Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) (citing King v. Remy, TP 20,692 (RHC May 18, 1988)).

The Housing Provider asserts in its Motion to Dismiss, that the Act's statute of limitations, at D.C. OFFICIAL CODE § 42-3502.06(e) (2001),[17] is "nonwaivable," and "deprived

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[16] The Commission, in its discretion, has rephrased the issue on appeal to clearly identify the allegation of error on the part of the ALJ, and to omit the statute of limitations issue, which was dismissed by the Commission in its December 7 Order. *See, e.g.* Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.9; Watkis v. Farmer, RH-TP-07-29-045 (RHC Aug. 15, 2013) at n.7; Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8; Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9.

[17] D.C. OFFICIAL CODE § 42-3502.06(e) (2001) provides the following:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-

the Rent Administrator of jurisdiction to consider the [Tenant] [P]etition." *See* Housing Provider's Motion to Dismiss at 1; Memorandum at 2.[18]

In opposition, the Tenant asserts that the statute of limitations is an affirmative defense that the Housing Provider waived by failing to raise it to the ALJ, and that the Commission previously dismissed the Housing Provider's statute of limitations claim on appeal in its December 7 Order. *See* Opposition to Housing Provider's Motion to Dismiss at 1-2. The Tenant also contends that the DCCA has not interpreted statutes of limitation as jurisdictional requirements. *See id.* at 3 (citing Brin v. S.E.W. Investors, 902 A.2d 784, 800 (D.C. 2006)).

The Commission observes that the Housing Provider's assertions in its Motion to Dismiss and Memorandum do not persuade the Commission that the ALJ lacked subject matter jurisdiction in this case for two (2) reasons. *See generally*, Housing Provider's Motion to Dismiss; Housing Provider's Memorandum. First, subject matter jurisdiction defines a court's authority to hear a given type of case. *See* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009). The subject matter jurisdiction of the Rent Administrator (and OAH) is defined under the Act as follows: "[t]he Rent Administrator shall have jurisdiction over those complaints

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3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

The Commission will refer to D.C. OFFICIAL CODE § 42-3502.06(e) (2001) herein as "D.C. OFFICIAL CODE § 42-3502.06(e)" or as "§42-3502.06(e)."

[18] The Commission observes that the Housing Provider primarily relies on cases outside of the District's jurisdiction in support of this proposition. *See* Housing Provider's Motion to Dismiss at 1-2; Housing Provider's Memorandum at 3-10. For example, in its Memorandum, the Housing Provider asserts that "statutes of repose are treated as being jurisdictional," citing only to state court cases from New York and Maryland. *See* Housing Provider's Memorandum at 3-4 (*citing* Maryland v. Sharafeldin, 854 A.2d 1208 (Md. 2004); Denkensohn v. Ridgway Apartments, 180 N.Y.S.2d 144 (N.Y. App. Div. 1958); In re Chiclana v. Div. of Housing & Cmty. Renewal, 2007 N.Y. Misc. LEXIS 9164 (N.Y. Sup. Ct. Oct. 9, 2007)). Furthermore, the two DCCA cases cited by the Housing Provider that arose under the Act, Majerle Mgmt. v. D.C. Rental Hous. Comm'n, 866 A.2d 41 (D.C. 2006), and Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94 (D.C. 1998), do not address OAH's subject matter jurisdiction. *See* Majerle, 866 A.2d at 49-50; Kennedy, 709 A.2d at 96-97. *See also* United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013) at 20-22, 33-34. *See also, infra* at p. 18.

and petitions arising under subchapters II, IV, V, VI, and IX of this chapter and title V of the Rental Housing Act of 1980 which may be disposed of through administrative proceedings."[19] D.C. OFFICIAL CODE § 42-3502.04(c) (2001). *See* Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012); Tenants of 3133 Connecticut Ave., N.W. v. Klingle Corp., CI 20,794 (RHC Jan. 27, 2006); Vista Edgewood Terrace, TP 24,858. The Commission observes that both of the claims in the Tenant Petition are based on subchapter II of the Act, at D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A) (2001), and D.C. OFFICIAL CODE § 42-3502.11 (2001), respectively.[20] Therefore, the Commission is satisfied that each of the two (2) claims in the Tenant Petition fell with the Rent Administrator's, and thus OAH's jurisdiction. *See* D.C. OFFICIAL CODE § 42-3502.04(c) (2001).

Second, the Commission observes that while the Housing Provider asserts that the Act's statute of limitations at § 42-3502.06(e) is a "statute of repose," and thus an issue of subject matter jurisdiction, the Commission has rejected the interpretation of § 42-3502.06(e) as a "statute of repose," in Hinman, RH-TP-06-28,728 at 45 n.42. In Hinman, RH-TP-06-28,728, the Commission rejected the housing provider's argument based on Majerle, 866 A.2d 41, and

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[19] The Rent Administrator's jurisdiction was transferred to OAH pursuant to the OAH Establishment Act. *See supra* at p.1 n.1.

[20] D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A) (2001) provides, in relevant part, the following: "(a)(1) Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless: (A) The rental unit and the common elements are in substantial compliance with the housing regulations, if noncompliance is not the result of tenant neglect or misconduct."

D.C. OFFICIAL CODE § 42-3502.11 (2001) provides the following:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

Kennedy, 709 A.2d 94, (nearly identical to the Housing Provider's argument in this case) that the DCCA had interpreted § 42-3502.06(e) as a "statute of repose," explaining as follows:

> As support for its contention that § 42-3502.06(e) is a "statute of repose," the [h]ousing [p]rovider relies on the following *dicta* by the DCCA in Majerle[, 866 A.2d 41]: "[o]nce the possibility is opened that actions taken prior to an uninterrupted three-year period may be examined, the repose that the 1985 amendment [of the Act] sought is put in doubt for the reasons we discussed in *Kennedy* and which the RHC has reflected in its decisions." *See* Majerle, [866 A.2d] at 48. The Commission does not regard a single observation by the DCCA as persuasive authority that § 42-3502.06(e) was intended by the legislature, or was interpreted by the DCCA and the Commission, to serve as a "statute of repose." The Commission also was unable to find any other reference in case precedent by the Commission or the DCCA to § 42-3502.06(e) as a "statute of repose," or even the use of the term "repose" by itself in reference to § 42-3502.06(e), [including Kennedy, 709 A.2d 94]. For the foregoing reasons, the Commission does not view the Housing Provider's single citation to Majerle[, 866 A.2d 41] as persuasive authority, by itself, that § 42-3502.06(e) is a "statute of repose."

Hinman, RH-TP-06-28,728 at p. 45 n.42 (emphasis added).

The Commission further notes that the Housing Provider has failed to distinguish or even address two DCCA cases that undermine its assertion that the Act's statute of limitations at § 42-3502.06(e) is the integral component of OAH's subject matter jurisdiction in this case: Brin, 902 A.2d at 800 (reversing the trial court's determination that "the question of the application of the statute of limitations was one involving 'subject matter jurisdiction,'" and stating that "[c]ase law is quite to the contrary"), and Feldman v. Gogos, 628 A.2d 103, 104 (D.C. 1993) (reversing trial court's determination that it lacked subject matter jurisdiction because the statute of limitations had expired). In both cases, the DCCA stated the following about the relationship between subject matter jurisdiction and statutes of limitations:

> Normally, a statute of limitations erects no jurisdictional bar, and failure to plead within the limitations period does not deprive the court of "power" to entertain the suit. Rather, as we have held, "the statute of limitations is an affirmative defense which, under [Super.

> Ct. Civ. R.] 8 (c), 'must be set forth affirmatively in a responsive pleading,' and may be waived if not promptly pleaded."

Feldman, 628 A.2d at 104 (*quoting* Whitener v. WMATA, 505 A.2d 457, 458 (D.C. 1986)) (emphasis added) (internal citations omitted). *See* Brin, 902 A.2d at 800 (*quoting* Feldman, 628 A.2d at 104-105).

The Commission is satisfied that neither that Act, nor applicable DCCA precedent, holds that § 42-3502.06(e) is a per se determinant of OAH's subject matter jurisdiction in this case. *See* D.C. OFFICIAL CODE § 42-3502.04(c) (2001); Brin, 902 A.2d at 800; Feldman, 628 A.2d at 104. Based on the foregoing, including the authority contained in the Act and relevant caselaw from the DCCA, the Commission is satisfied that OAH was vested with subject matter jurisdiction over the Tenant Petition under the Act and DCCA precedent, and thus dismisses this issue on appeal. *See* D.C. OFFICIAL CODE §§ 42-3502.02(a), -3502.04(c) (2001); Hinman, RH-TP-06-28,728; Young, TP 28,635; Tenants of 3133 Connecticut Ave., N.W., CI 20,794; Vista Edgewood Terrace, TP 24,858.

B. Whether the ALJ erred by failing to find that the claims in the Tenant Petition were barred by the doctrine of res judicata.

In the Final Order, the ALJ found that a Praecipe filed by the parties as a settlement of case number 2008 LTB 010475 in the Landlord and Tenant Branch of the D.C. Superior Court on December 11, 2008 (hereinafter "Settlement Agreement"), *see* RX 201, R. at 303-309, was not a final judgment on the merits because it had not been integrated in a consent decree or court order, and thus could not be considered under the doctrine of *res judicata*. Final Order at 9; R. at 167 (*citing* Carver v. Nall, 172 F.3d 513, 515 (7th Cir. 1999); Rodriguez v. U.S. Citizenship & Immigration Serv., 605 F. Supp. 2d 142, 146 (D.D.C. 2009); Bailey v. DiMario, 925 F. Supp. 801, 810-11 (D.D.C. 1995)). Nevertheless, the ALJ determined that the Settlement Agreement

should be enforced as written, and limited the Tenant's claims to those that occurred after the Settlement Agreement was signed on December 11, 2008. *See* Final Order at 9-10; R. at 166-67 (*citing* Moore v. Jones, 542 A.2d 1253, 1255 (D.C. 1988); Richardson v. Bezabeh, TP 23,194 (RHC Nov. 17, 1994) at 99-100).

The Housing Provider asserts on appeal that the ALJ erred in finding that the parties' Settlement Agreement did not bar the claims in the Tenant Petition under the doctrine of *res judicata*. *See* Notice of Appeal at 1. Specifically, the Housing Provider claims that, under *res judicata*, the Tenant is barred from pursuing claims after the date of the Settlement Agreement based on housing code violations and reductions in services and/or facilities that existed at the time of, or prior to, the Settlement Agreement. *See* Housing Provider's Memorandum at 1.

The Tenant asserts in opposition that *res judicata* does not apply to the claims in the Tenant Petition because (1) the claims are different than those at issue in the Landlord and Tenant case; (2) Housing Provider's interpretation of the *res judicata* doctrine is contrary to public policy because it would bar tenants from challenging ongoing housing code violations because the same violations had been present at the time of an earlier tenant petition or Landlord and Tenant case; and (3) the parties' Settlement Agreement was not a final judgment on the merits and therefore cannot form the basis of a claim of *res judicata*. *See* Tenant's Brief at 4-10 (*citing*, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Flynn v. 3900 Watson Place, Inc., 63 F. Supp. 2d 18, 22 (D.D.C. 1999); Henderson v. Snider Bros. Inc., 439 A.2d 481, 485 (D.C. 1981); Johnson v. Eugene Phifer Co., TP 11,532 (RHC July 18, 1985)).

The Commission's standard of review of the ALJ's decision is contained at 14 DCMR § 3807.1 (2004) and states the following:

> The Commission shall reverse final decisions of the Rent Administrator which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator.

The Commission will sustain an ALJ's interpretation of the Act unless it is unreasonable or embodies a material misconception of the law, even if a different interpretation may also be supportable. *See* Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (*citing* Sawyer Prop. Mgmt. of Maryland v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-103 (D.C. 2005)); Carpenter, RH-TP-10-29,841.

The doctrine of *res judicata* "precludes re-litigation in a subsequent proceeding of all issues arising out of the same cause of action between the same parties or their privies, whether or not the issues were raised in the first proceeding." Harnett v. Wash. Harbour Condo. Unit Owners' Ass'n, 54 A.3d 1165, 1174 (D.C. 2012) (*quoting* Carr v. Rose, 701 A.2d 1065, 1070 (D.C. 1997)). *See* Hensley v. D.C. Dep't of Emp't Servs., 49 A.3d 1195, 1207 (D.C. 2012); Calomiris v. Calomiris, 3 A.3d 1186, 1190 (D.C. 2010); Molla v. Sanders, 981 A.2d 1197, 1202 (D.C. 2009). *Res judicata* will not apply unless there has been a "valid, final judgment on the merits." *See, e.g.*, Hensley, 49 A.3d at 1207 (*citing* In re Al-Baseer, 19 A.3d 341, 345 (D.C. 2011)); Williams v. Ellis, TP 23,313 (RHC June 19, 1997); Bernstein v. Estrill, TP 21,792 (RHC Aug. 12, 1991) at n.3.

Initially, the Commission observes that the ALJ's determination that the parties' Settlement Agreement was not a final judgment on the merits, for purposes of *res judicata*, is not arbitrary or capricious, as it is supported by the Commission's decisions in Williams, TP 23,313, and Bernstein, TP 21,792, where the Commission held that a parties' settlement agreement does not constitute a "final judgment on the merits" for the purposes of *res judicata*. *See* Williams,

TP 23,313 (stating that "[a] settlement, where nothing was litigated, does not qualify as a final judgment rendered on the merits") *(citing* Jonathan Woodner Co. v. Adams, 534 A.2d 292 (D.C. 1987); Restatement 2d, Judgments, 27, comment (e)(1982)); Bernstein, TP 21,792 (determining that the hearing examiner had erred in finding that a praecipe filed in the Landlord and Tenant Branch constituted a final judgment for purposes of *res judicata*) (citing Henderson, 439 A.2d 481).

More importantly for purposes of this appeal, however, the Commission notes that *res judicata* is considered an affirmative defense, that is ordinarily waivable if not asserted in the answer to a complaint (or a tenant petition) or timely thereafter. *See* Super Ct. Civ. R. 8(c);[21] Group Health Ass'n v. Reyes, 672 A.2d 74, 75 (D.C. 1996) (*quoting* Goldkind v. Snider Bros., Inc., 467 A.2d 468, 471 (D.C. 1983)) (noting that raising the defense for the first time through a motion for directed verdict after all parties had presented their evidence at trial was too late and thereby resulted in a waiver of the defense); Dreyfuss Mgmt. v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) at 29. *See also* Mitchell v. Gales, 61 A.3d 678, 687 (D.C. 2013) (stating that res judicata is subject to waiver if not raised in the answer or timely asserted thereafter); Wilson v. Holt Graphic Arts, Inc., 981 A.2d 616 (D.C. 2008) (affirming lower court's finding that appellant's res judicata argument was waived). Generally, a party who attempts to raise an affirmative defense, such as res judicata, for the first time on appeal will be barred. *See* Mitchell,

[21] Super. Ct. Civ. R. 8(c) provides the following:

> Affirmative defenses. -- In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

The Commission notes that, under 1 DCMR § 2801.2 (2004) and 14 DCMR § 3828 (2004), the Superior Court Rules of Civil Procedure are applicable to proceedings before OAH and the Commission when the regulations are silent on a procedural issue, such as affirmative defenses.

61 A.3d at 687; Goldkind, 467 A.2d at 471 (citing to Fed. R. Civ. P. 8(c) and adopting federal cases' interpretation of the rule); Mann Family Trust v. Johnson, TP 26,191 (RHC Nov. 21, 2005) (citing Johnson v. D.C. Rental Hous. Comm'n, 642 A.2d 135, 139 (D.C. 1994)). *See also* Carpenter, RH-TP-10-29,840 at n.11 ("[w]here a party fails to raise an issue before the ALJ, the Commission is not permitted to consider it on appeal"); Enobakhare, TP 27,730 ("an appeal issue must be raised at the hearing level"); Parreco, TP 27,408 (dismissing issue where housing provider had failed to raise it before the ALJ).

The Commission's review of the record reveals that the Housing Provider's assertions at the OAH hearing that the Tenant's claims were barred by the Settlement Agreement, was limited to those claims that occurred prior to the date of the Settlement Agreement. *See* Hearing CD (OAH May 12, 2010) at 14:00. For example, Nicholas Pitsch, a representative for the Housing Provider, testified as follows regarding the meaning of the Settlement Agreement:

> "This agreement is a full and complete settlement of all the claims between the parties cognizable to the landlord and tenant court up to and including the date of this agreement." That means that all, any claims, anytime in the past, are all settled by this agreement, by one party getting money, and the other party doing certain work. There are no claims for any rent increases or anything else in the past. It is all washed out by this agreement.

See id. (emphasis added). Based on its review of the record, and in particular the testimony provided by the Housing Provider at the OAH hearing, the Commission determines that the Housing Provider raised for the first time on appeal the contention that the Tenant's claims of housing code violations and reductions in services and/or facilities after the date of the Settlement Agreement are barred by *res judicata*. *See* Super Ct. Civ. R. 8(c); Mitchell, 61 A.3d at 687; Wilson, 981 A.2d 616; Group Health Ass'n, 672 A.2d at 75; Goldkind, 467 A.2d at 471; Dreyfuss Mgmt., RH-TP-07-28,895 at 29; Mann Family Trust, TP 26,191. Moreover, the

Commission determines that the Housing Provider may not raise this issue for the first time on appeal. *See* Carpenter, RH-TP-10-29,840 at n.11; Enobakhare, TP 27,730; Parreco, TP 27,408. Accordingly, the Commission determines that the Housing Provider waived this issue by failing to raise it before the ALJ, and thus dismisses this issue on appeal. *See* Super Ct. Civ. R. 8(c); Mitchell, 61 A.3d at 687; Wilson, 981 A.2d 616; Group Health Ass'n, 672 A.2d at 75; Goldkind, 467 A.2d at 471; Dreyfuss Mgmt., RH-TP-07-28,895 at 29; Carpenter, RH-TP-10-29,840 at n.11; Mann Family Trust, TP 26,191; Enobakhare, TP 27,730; Parreco, TP 27,408.

IV. PLAIN ERROR

The Commission will defer to an ALJ's decision "so long as it flows rationally from the facts and is supported by substantial evidence." *See* 14 DCMR § 3807.1 (2004); Watkis, RH-TP-07-29,045 (citing 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009)); Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Sept. 28, 2012); Borger Mgmt. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009). While the Commission's review of an issue is typically limited to the issues raised in the notice of appeal, it may always correct "plain error." 14 DCMR § 3807.4 (2004). *See also,* Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984); Munonye v. Hercules Real Estate Servs., RH-TP-07-29,164 (RHC July 7, 2011); Drell, TP 27,344; Ford v. Dudley, TP 23,973 (RHC June 3, 1999).

A. Plain Error in the Calculation of Damages Awarded For Rent Increases While Substantial Housing Code Violations Existed

The Commission's review of the record reveals that the ALJ made the following conclusion of law, in relevant part, relating to the award of damages arising out of her finding

that the Tenant's rent was increased in 2009 and 2010 when the Housing Accommodation was not in substantial compliance with the housing regulations:

> 12. . . .Housing Provider increased Tenant's rent to $935 effective March [1,] 2009 until February [28,] 2010. Tenant's rent increase exceeded the maximum allowable rent charged of $910 by $25 for twelve months. Then effective March [1,] 2010, Tenant's rent was increased to $950 until the date of the hearing. For the period of March [1,] 2010 to the date of the hearing in May 2020 [sic], Tenant's rent increase exceeded the maximum allowable rent charged of $910 by $40. Therefore Tenant is awarded $435, the total amount that the rent increase exceeded the maximum allowable rent excluding interest. Appendix B detailing Tenant's award is attached.

Final Order at 12-13; R. at 163-64. The Commission's review of Appendix B, a chart detailing the ALJ's calculation of the amount of damages arising out of the improper rent increases in 2009 and 2010, shows that the ALJ indicated that the Tenant was entitled to a rent refund in the amount of $40 for the month of February 2010. *See* Final Order at 27; R. at 149.

The Commission is unable to determine that the ALJ's award of a rent refund of $40 for the month of February, 2010, is supported by substantial evidence, when the ALJ's own conclusion of law, *see supra*, states that the Tenant was entitled to a rent refund of "$25 for the period of March 1, 2009 through February 28, 2010, and a rent refund of $40 for the period of March 1, 2010 through May 2020 [sic]." *Compare* Final Order at 12-13; R. at 163-64 (emphasis added), *with* Final Order at 27; R. at 149. *See* 14 DCMR § 3807.1 (2004); Watkis, RH-TP-07-29,045; Eastern Savings Bank, RH-TP-08-29,397; Borger Mgmt., RH-TP-06-28,854. Accordingly, the Commission determines that the ALJ's calculation of damages constitutes plain error and thus remands to the ALJ for a recalculation of the damages and interest owed to the Tenant related to rent increases in 2009 and 2010 while the Housing Accommodation was not in substantial compliance with the housing code, in accordance with the ALJ's conclusion of law

numbered twelve (12). 14 DCMR § 3807.4 (2004); Lenkin Co. Mgmt., 642 A.2d at 1286; Proctor, 484 A.2d at 550; Munonye, RH-TP-07-29,164; Drell, TP 27,344; Ford, TP 23,973.

B. Plain Error in the Start Date of the Award of Damages Arising Out of Reductions in Services and/or Facilities

The Commission observes that the ALJ determined, based on the parties' settlement agreement, that the Housing Provider's liability for eight (8)[22] out of the nine (9)[23] reductions in services and/or facilities began the day after the Settlement Agreement was signed, on December 12, 2008. *See* Final Order at 13-21; R. at 156-63. The ALJ based her determination on the following language in the Settlement Agreement: "this is a full and complete settlement of all claims between the parties cognizable in the landlord and tenant court up to and including the date of this agreement." *Id.* at 9; R. at 167.

However, the Commission's review of the record reveals the following additional provisions in the Settlement Agreement:

> (5) [P]laintiff [Housing Provider] agrees to make all of the repairs cited in the Housing Deficiency Notice dated September 3, 2008 in a workmanlike manner and in accordance with District of Columbia Municipal Regulations . . . . (7) [D]efendant [Tenant] agrees to provide access for the purpose of repairs during the week of February 23 through February 27, 2009 to the landlord for the purpose of completing repairs . . . .

Respondent/Housing Provider's Exhibit (RX) 201 at 1-2; R. at 303-304.

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[22] The ALJ determined that the Housing Provider's liability for the following reductions in services began on December 12, 2008: (1) "Windows improperly weather-stripped;" (2) "Defective window screens;" (3) "Mice infestation;" (4) "Crumbling rear concrete walkways;" (5) "Crumbling front sidewalks;" (6) "Failure to secure the step railing along front concrete sidewalk;" (7) "Accumulated trash beside the dumpster;" and (8) "Loose and peeling paint in laundry room." *See* Final Order at 13-21; R. at 156-63.

[23] The ALJ also determined that the Tenant had suffered a reduction in services arising from the Housing Provider's failure to properly install a smoke alarm in the laundry room. *See* Final Order at 19; R. at 157. However, the ALJ determined that this reduction in services did not begin until November, 2009. *See id.*

In light of the above language contained in the parties' Settlement Agreement, the Commission is unable to determine that the ALJ's conclusion that the Tenant was entitled to damages for reductions in services and/or facilities beginning on December 12, 2008 was supported by substantial evidence. *See* 14 DCMR § 3807.1 (2004); Watkis, RH-TP-07-29,045; Eastern Savings Bank, RH-TP-08-29,397; Borger Mgmt., RH-TP-06-28,854. Accordingly, the Commission determines that this constitutes plain error, and thus remands to the ALJ to make additional findings of fact and conclusions of law, based on the current record. *See* 14 DCMR § 3807.4 (2004); Lenkin Co. Mgmt., 642 A.2d at 1286; Proctor, 484 A.2d at 550; Munonye, RH-TP-07-29,164; Drell, TP 27,344; Ford, TP 23,973. Specifically, the Commission directs the ALJ to address the following on remand: whether, based on the parties' Settlement Agreement, specifically provisions (5) and (7) (cited above), the Housing Provider had until February 27, 2009 to make repairs in the Tenant's unit and restore any or all of the following reductions in services and/or facilities: (1) Windows improperly weather-stripped; (2) Defective window screens; (3) Mice infestation; (4) Crumbling rear concrete walkways; (5) Crumbling front sidewalks; (6) Failure to secure the step railing along front concrete sidewalk; (7) Accumulated trash beside the dumpster; and (8) Loose and peeling paint in laundry room. If the ALJ determines that the Housing Provider had until February 27, 2009 to make repairs to any of the above-mentioned reductions in services and/or facilities, the Commission further instructs the ALJ to amend her calculation of damages arising out of such reductions in services and/or facilities as necessary to reflect the correct start date for the Housing Provider's liability.

C. Plain Error in the End Date of the Award of Damages For An Improperly Installed Smoke Alarm in the Laundry Room

The Commission's review of the record reveals that the ALJ made the following conclusion of law, in relevant part, relating to the award of damages arising out of her finding that an improperly installed smoke alarm in the laundry room constituted a reduction in services and/or facilities:

> 31. Since November 2009, the smoke alarm in the laundry room was not properly installed. PX 128. Housing Provider properly installed the smoke detector in April 2010. Tenant is awarded a rent refund of $10 per month for the six months that the condition existed. A chart detailing Tenant's award is attached as Appendix C.

Final Order at 19; R. at 157. "Appendix C" contains a chart detailing the ALJ's calculation of the amount of damages related to the improperly installed smoke alarm for the period of November 1, 2009 through May 12, 2010. *See* Final Order at 35; R. at 141.[24]

The Commission is unable to determine that the ALJ's award of a rent refund for the period of November 1, 2009 through May 12, 2010 is supported by substantial evidence, when the ALJ's own conclusion of law states that the Tenant was entitled to a rent refund only for the period of November 2009 through April 2010. *Compare* Final Order at 19; R. at 157, *with* Final Order at 35; R. at 141. *See* 14 DCMR § 3807.1 (2004); Watkis, RH-TP-07-29,045; Eastern Savings Bank, RH-TP-08-29,397; Borger Mgmt., RH-TP-06-28,854. Accordingly, the Commission determines that this constitutes plain error, and thus remands to the ALJ for a recalculation of the damages and interest owed to the Tenant related to a reduction in services and/or facilities due to an improperly installed smoke alarm, in accordance with the ALJ's conclusion of law numbered thirty-one (31). *See* 14 DCMR § 3807.4 (2004); Lenkin Co. Mgmt.,

[24] *See supra* at p. 11 n. 8.

642 A.2d at 1286; Proctor, 484 A.2d at 550; Munonye, RH-TP-07-29,164; Drell, TP 27,344; Ford, TP 23,973.

V. CONCLUSION

Based on the foregoing, the Commission dismisses the Housing Provider's issues on appeal.

The Commission determines that the ALJ's award of a rent refund of $40 for the month of February, 2010, related to rent increases in 2009 and 2010 while the Housing Accommodation was not in substantial compliance with the housing code, constitutes plain error and thus remands to the ALJ for a recalculation of the damages and interest owed to the Tenant in accordance with the ALJ's conclusion of law numbered twelve (12).

The Commission determines that the ALJ's conclusion that the Tenant was entitled to damages for reductions in services and/or facilities beginning on December 12, 2008 constitutes plain error, and thus remands to the ALJ to make additional findings of fact and conclusions of law, based on the current record. *See* 14 DCMR § 3807.4 (2004); Lenkin Co. Mgmt., 642 A.2d at 1286; Proctor, 484 A.2d at 550; Munonye, RH-TP-07-29,164; Drell, TP 27,344; Ford, TP 23,973. Specifically, the Commission directs the ALJ to address the following on remand: whether, based on the parties' Settlement Agreement, specifically provisions (5) and (7) (cited above), the Housing Provider had until February 27, 2009 to make repairs in the Tenant's unit and restore any or all of the following reductions in services and/or facilities: (1) Windows improperly weather-stripped; (2) Defective window screens; (3) Mice infestation; (4) Crumbling rear concrete walkways; (5) Crumbling front sidewalks; (6) Failure to secure the step railing along front concrete sidewalk; (7) Accumulated trash beside the dumpster; and (8) Loose and peeling paint in laundry room. If the ALJ determines that the Housing Provider had until

February 27, 2009 to make repairs to any of the above-mentioned reductions in services and/or facilities, the Commission further instructs the ALJ to amend her calculation of damages arising out of such reductions in services and/or facilities as necessary to reflect the correct start date for the Housing Provider's liability.

The Commission determines that the ALJ's award of a rent refund for the period of November 1, 2009 through May 12, 2010 related to a reduction in services and/or facilities due to an improperly installed smoke alarm, constitutes plain error, and thus remands to the ALJ for a recalculation of the damages and interest owed to the Tenant, in accordance with the ALJ's conclusion of law numbered thirty-one (31). *See* 14 DCMR § 3807.4 (2004); Lenkin Co. Mgmt., 642 A.2d at 1286; Proctor, 484 A.2d at 550; Munonye, RH-TP-07-29,164; Drell, TP 27,344; Ford, TP 23,973.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR §3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in **RH-TP-09-29,593** was mailed, postage prepaid, by first class U.S. mail on this 23rd **day** of **December, 2013** to:

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