DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-10-29,816

In re: 2703 Fort Baker Drive, S.E., Unit 1

Ward Seven (7)

RAVENIA BOYD
Tenant/Appellee

v.

SHIRLITTA WARREN
Housing Provider/Appellant

DECISION AND ORDER

June 5, 2013

PER CURIAM. This case is on appeal to the Rental Housing Commission (Commission) from a final 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 (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] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversions Division (RACD) 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 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 January 22, 2010, Tenant/Appellee Ravenia Boyd (Tenant), residing in Unit 1 at 2703 Fort Baker Drive, S.E. (Housing Accommodation), filed Tenant Petition (TP) 29,816 with RAD, claiming that the Housing Provider/Appellant Shirlitta Warren (Housing Provider) violated the Act as follows: (1) the building where the rental unit is located was not properly registered with the RAD; (2) services and/or facilities provided in connection with the Housing Accommodation have been permanently eliminated; (3) the Housing Provider had taken retaliatory action against the Tenant in violation of section 502 of the Act; (4) a notice to vacate had been served which violates Section 501 of the Act; and (5) the Housing Provider had taken action in violation of the Act. Tenant Petition at 1-2; Record for TP 29,816 (R.) at 8-9.

On May 18, 2010, Administrative Law Judge Nicholas H. Cobbs (ALJ) issued a case management order (CMO) directing the parties to appear at OAH for a hearing on June 15, 2010, at 9:30 a.m. R. at 22. The CMO cautioned that "if you do not appear for the hearing, you may lose the case." R. at 22. The CMO also informed the parties that they had the right to be represented by an attorney. R. at 21. The CMO certified that it was sent by first-class mail postage prepaid to:

Shirlitta Warren
1258 Anacostia Rd, SE
Washington, DC 20019

Final Order at 9; R. at 15.

On June 15, 2010, the ALJ held a hearing on this matter. R. at 24. The Housing Provider did not attend the hearing. R. at 24.

On February 28, 2011, the ALJ issued a final order, Ravenia Boyd v. Shirlita Warren, RH-TP-10-29,816 (OAH Feb. 28, 2011) (Final Order). R. at 25-44. The ALJ made the following factual findings in the Final Order:

1. A copy of the CMO giving notice of a hearing on June 15, 2010, at 9:30 a.m., was served on Housing Provider Shirlitta Warren by first class mail on May 18, 2010, at 1258 Anacostia Rd., SE, Washington, DC 20019. This was the address for Housing Provider given in the tenant petition. It is also the address for Housing Provider listed in a Notice of Violation prepared by the Department of Consumer and Regulatory Affairs ("DCRA"). PX 104. The case file contains no better address for Housing Provider. The copy of the CMO mailed to Housing Provider was not returned by the United States Postal Service as undeliverable. Nor did Housing Provider move this administrative court for a continuance of the hearing, although instructions for a motion for continuance were contained in the CMO.

2. Housing Provider failed to appear at the hearing. At no time before or following the hearing did Housing Provider provide any explanation for her failure to appear to this administrative court.

3. Tenant rented the Rental Unit here in August 2008. From that time, until Tenant vacated the property on February 1, 2010, Housing Provider did not have a business license for the Housing Accommodation, and the Housing Accommodation was not registered with the Rent Administrator. PX 103. At the time she vacated the apartment, Tenant's rent was $800 per month.

4. On July 15, 2009, Tenant filed a tenant petition with the Rent Administrator complaining of violations of the Rental Housing Act by Housing Provider. The parties appeared for a hearing on October 26, 2009, and agreed to mediate their dispute prior to the hearing. The parties then filed a written agreement that provided, in part, that Tenant "is dismissing my Tenant Petition RH-09-29651 with prejudice." *See Ravenia Boyd v. Shirlitta Warren*, OAH No. RH-TP-09-29651 (Final Order Nov. 18, 2009). Tenant agreed to vacate the Rental Unit by January 31, 2010.

5. Although the parties had agreed to settle their dispute, it was not resolved smoothly. On November 24, 2009, the furnace in Tenant's Unit caught fire. Housing Provider at first promised to have a repairman fix the furnace. But, after no one came, a repairman that Tenant hired determined that the motor was broken and needed replacing. Housing Provider then refused to fix the furnace. On

January 25, 2010, an inspector from DCRA cited Housing Provider for multiple violations involving Housing Provider's failure to fix the furnace or to provide heat. PX 104.

6. The Rental Unit was also infested by cockroaches and mice. Tenant complained to Housing Provider about the infestation, but Housing Provider refused to pay for an exterminator to treat the property.

7. Housing Provider had previously instituted an action for possession of the Rental Unit in the Superior Court of the District of Columbia Landlord and Tenant Branch. Although Tenant thought the Superior Court case had been resolved, in January 2010, Tenant was served with a writ of possession giving notice that she could be forcibly evicted as early as January 23, 2010. PX 106. Tenant had not been present at the court proceeding in which the writ of possession had been issued and considered Housing Provider's action to be an act of retaliation.

8. Tenant attempted to keep the apartment warm with space heaters during December 2009 and January 2010. In the last week of January, Tenant had to sleep away from the Rental Unit because it was too cold. Tenant vacated the apartment on February 1, 2010.

Final Order at 2-5; R. at 40-43.

After determining that the CMO was properly served on the Housing Provider, see Final Order at 5-6; R. at 39-40, the ALJ held that the prior settlement agreement "bars Tenant from raising any claims in the present tenant petition that she could have brought in her previous tenant petition" and, therefore, the ALJ would only consider "claims concerning matters that arose or existed following the dismissal of [RH-TP-09-29,651] on November 18, 2009." Final Order at 2-5; R. at 40-43. Regarding these claims, the ALJ held that "the Housing Accommodation was not properly registered and that Housing Provider substantially reduced services or facilities provided as part of the rent or tenancy" including not fixing a broken furnace and the presence of a mice and cockroach infestation. Final Order at 5, 17; R. at 40, 28. The ALJ ordered the Housing Provider to pay the Tenant the amount of one thousand, one hundred and twenty-six

dollars and fifty-eight cents ($1,126.58) for these claims. Final Order at 17; R. at 28. The ALJ dismissed with prejudice the Tenant's remaining claims. Final Order at 5, 17; R. at 40, 28.

On March 7, 2011, the Housing Provider filed a timely notice of appeal for TP 29,816 (Notice of Appeal), in which she raised the following issues:

1. "I filed for business [license] and I have a certificate of occupancy"
2. "Tenant lease expired and was given proper notice. Tenant retaliated with multiple complaints that did not start until notice given"
3. "Rent was reduced so Ms. Boyd could move on to another property"
4. "No rats or roach infestation"
5. "Furnace in good working order"
6. "Ms. Boyd didn't pay her last 2 months of [rent] and stayed beyond her time as agreed upon. Ms. Boyd also destroyed parts of wood floors as well as left back door wide open and not secured. Back lock broken. She destroyed walls and only left because she was due for eviction. She did everything to try [and] stay [at] property."

Notice of Appeal at 1.[2]

The Commission held a hearing on April 12, 2012. The Housing Provider appeared at this hearing and admitted that the mailing address identified in the CMO is her correct address but claimed that she did not receive notification of the hearing below. See Hearing CD (RHC Apr. 12, 2012).

II. PRELIMINARY ISSUE

Whether the Housing Provider has standing to appeal the Final Order.

[2] The issues on appeal are stated in the same language as contained in the Notice of Appeal.

III. DISCUSSION

"It is a well-established principle that a party who fails to appear at a hearing below lacks standing to appeal the decision to the Commission." Prosper v. Pinnacle Mgmt., TP 27,783 (RHC Sept. 18, 2012) at 9 (quoting Greene v. Eva Realty, LLC, TP 29,118 (RHC Sep. 4, 2009) at 4-5); see also Alexandra Corp. v. Armstead, TP 24,777 (RHC Aug. 15, 2000); John's Props v. Hilliard, TP 22,269 and TP 21,116 (RHC June 24, 1993) (citing DeLevay v. D.C. Rental Accommodations Comm'n, 411 A.2d 354 (D.C. 1980). "The Commission will dismiss an appeal when the appellant lacks standing." Id. (quoting Greene v. Eva Realty, LLC, TP 29,118 (RHC Sep. 4, 2009) at 5); see also Syndor v. Johnson, TP 26,123 (RHC Nov. 1, 2002) at 4; Jenkins v. Cato, TP 24,487 (RHC Feb. 15, 2000) at 6.

"The Commission has applied an exception to this general rule when a party files a notice of appeal and asks the Commission to vacate a default judgment, because the party did not receive notice of the hearing." Id. (quoting Syndor, TP 26,123 at 4); see also Eva Realty, LLC, TP 29,118 at 5; John's Props, TPs 22,269 and 21,116 (RHC June 24, 1993); Wofford v. Willoughby Real Estate, HP 10,687 (RHC Apr. 1, 1987). "When a party petitions the Commission to set aside a default judgment based on a failure to appear at an [OAH] hearing, the Commission must determine whether the moving party satisfies the four factors as identified by the Court in Radwan v. D.C. Rental Hous. Comm'n, 683 A.2d 478 (D.C. 1996)." Id. (quoting Winn Mgmt. v. Burton, TP 28,370 (RHC May 12, 2008) at 23); see also Eva Realty, LLC, TP 29,118 at 5; Belmont Crossing v. Jackson, TP 28,292 (RHC May 15, 2009) at 4. Those factors are: "(1) whether the movant had actual notice of the proceeding; (2) whether he [or she] acted in good faith;

(3) whether the moving party acted promptly: and (4) whether a prima facie adequate defense was presented. Against these factors, prejudice to the non-moving party must be considered." Radwan, 683 A.2d at 481 (quoting Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)).

"Regarding the initial factor in the test under Radwan, there arises a presumption of receipt of notice if the agency has properly mailed it." Prosper, TP 27,783 at 10 (quoting Eva Realty, LLC, TP 29,118 at 5); see also Foster v. District of Columbia, 497 A.2d 100, 102 n.10 (D.C. 1985); Allied American Mut. Fire Ins. Co. v. Paijze, 143 A.2d 508, 510 (D.C. 1958); Belmont Crossing, TP 28,292 at 6; William C. Smith Co. v. Miller, TP 24,663 (RHC June 28, 2000) at 5; John's Props., TPs 22,269 and 21,116; Tenants of 3140 Wisconsin Ave., N.W. v. Kent, CI 20,013 (RHC May 26, 1986) at 3. "Once the presumption of receipt arises, 'the party claiming non-delivery has the burden of rebutting the presumption with a preponderance of evidence to the contrary.'" Prosper, TP 27,783 at 10 (quoting Wofford, HP 10,687 at 2); see also Williams v. Poretsky Mgmt., Inc., TP 23,156 (RHC Sept. 13, 1994) at 3.

"Proper notice of an adjudicatory proceeding is mandated by the Act, case law, and traditional principles of due process of law." Id. (quoting Reckord v. Peay, TP 24,896 (RHC Aug. 9, 2002) at 7). D.C. OFFICIAL CODE § 42-3502.16(c) (2001 Supp. 2010) provides:

> If a hearing is requested timely by either party, notice of the time and place of the hearing shall be furnished the parties by first-class mail at least 15 days before the commencement of the hearing. The notice shall inform each of the parties of the party's right to retain legal counsel to represent the party at the hearing.[3]

[3] The Commission notes that on March 3, 2010, D.C. Law 18-111 substituted the phrase "by first-class mail" for "by certified mail or other form of service which assures delivery of the petition" in D.C. OFFICIAL CODE § 42-3502.16(c) (2001 Supp. 2010).

(Emphasis added). Additionally, this Commission has held that "[n]otice is considered properly mailed when the record indicates notice of the hearing was mailed to the parties at their correct addresses." Barnes-Mosaid v. Zalco Realty, Inc., TP 29,316 (RHC Sept. 28, 2012) at 6 (citing Eva Realty, LLC, TP 29,118 at 5; Wofford, HP 10,687 at 2).

In the instant case, the CMO certifies that on May 18, 2010, notice of the hearing was sent by OAH by first class mail to Shirlitta Warren, 1258 Anacostia Rd SE, Washington, D.C. 20019. See R. at 15. The Housing Provider admitted in the Commission's hearing that this is her correct mailing address. See Hearing CD (RHC Apr. 12, 2012). There is no evidence that the CMO was returned as undeliverable. Inasmuch as the record demonstrates that the CMO was sent by first-class mail to the Housing Provider's correct address at least fifteen (15) days prior to the hearing, see R. at 22, the Commission is satisfied that OAH properly mailed notice of the hearing. See D.C. OFFICIAL CODE § 42-3502.16(c) (2001); Barnes-Mosaid, TP 29,316 at 6. While the Housing Provider asserts that she did not receive notice of the hearing, she points to nothing in the record demonstrating she did not receive the CMO. The Commission is therefore satisfied that the Housing Provider failed to rebut with a preponderance of evidence the presumption that she received notice of the hearing. See e.g., Prosper, TP 27,783 at 10 (quoting Wofford, HP 10,687 at 2); Poretsky Mgmt., Inc., TP 23,156 at 3. Accordingly, the Housing Provider fails the first Radwan factor.

With respect to the second factor under Radwan, 683 A.2d at 48, good faith is defined as "a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek

unconscionable advantage." Black's Law Dictionary 713 (8th ed. 2004); see also Prosper, TP 27,783; Eva Realty, LLC, TP 29,118; Belmont Crossing, TP 28,292. There is no evidence in the record indicating that the Housing Provider did not act in good faith. Accordingly, the Housing Provider satisfies the second Radwan factor.

As to the third factor under Radwan, 683 A.2d at 48, the record does not contain evidence that the Housing Provider did not act promptly in contesting the claim that she did not receive proper notice of the hearing. Although she did not file a motion for reconsideration, her appeal was timely. See 14 DCMR § 3802.2 (2004). Accordingly, the Housing Provider met the third Radwan factor. See e.g., Prosper, TP 27,783; Eva Realty, LLC, TP 29,118.

The final factor under Radwan, 683 A.2d at 481, is whether the movant presented a *prima facie* adequate defense. "A meritorious defense is 'something more than [a] bald allegation, but certainly something less than a pretrial hearing on the merits.'" Eva Realty, LLC, TP 29,118 at 7 (quoting Clark v. Moler, 418 A.2d 1039, 1043 (D.C. 1980)); see also Johnson v. Sollins, TP 23,498 (RHC Oct. 20, 1997). "Therefore, the movant must set forth circumstances, that if proven, would defeat a claim." Id. (citing Jones v. Hunt, 298 A.2d 220, 222 (D.C. 1972)). "All that is required is that the moving party provide 'reason to believe that vacating the judgment will not be an empty exercise or a futile gesture.'" Frausto v. U.S. Dept. of Commerce, 926 A.2d 151, 157 (D.C. 2007) (quoting Nuyen v. Luna, 884 A.2d 650, 657 (D.C. 2005)); see also Murray, 52 F.3d at 355.

In this case, the Housing Provider asserted six issues in the Notice of Appeal. See Notice of Appeal at 1. The Commission is satisfied that the first, second, third, and sixth

issues do not present *prima facie* adequate defenses because they do not undercut or challenge the ALJ's central holding that "the Housing Accommodation was not properly registered and that Housing Provider substantially reduced services or facilities provided as part of the rent or tenancy . . . ." See Final Order at 17; R. at 28. Therefore, the Housing Provider's first, second, third, and sixth issues in the Notice of Appeal have failed to "set forth circumstances that if proven, would defeat a claim." See Eva Realty, LLC, TP 29,118 at 7 (citing Jones, 298 A.2d at 222).

Regarding the fourth and fifth issues, the Housing Provider asserts in simple declarative statements, without any legal or factual support, that: "4. No rats or roach infestation" and "5. Furnace in good working order." Notice of Appeal at 1. The Commission first observes that mere factual statements, such as these, are insufficient to present meritorious defenses. See Eva Realty, LLC, TP 29,118 at 7; Johnson, TP 23,498. Moreover, the Commission is satisfied that these factual allegations do not present *prima facie* adequate defenses inasmuch as they do not demonstrate that the Final Order was not supported by substantial evidence.

This Commission will defer to a final decision if it flows rationally from the facts and is supported by substantial evidence. Majerle Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 866 A.2d 41, 46 (D.C. 2004).[4] "Where substantial evidence exists to support the hearing examiner's findings, even 'the existence of substantial evidence to the

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[4] The Commission's standard of review is well established:

> [T]he 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 contains conclusions of law not in accordance with provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator.

14 DCMR § 3807.1 (2004).

contrary does not permit the reviewing agency to substitute [its] judgment for that of the examiner.'" Hago v. Gewirz, TP 11,552 and 12,085 (RHC Aug. 4, 2011) at 6 (citing WMATA v. D.C. Dep't of Emp't Servs., 926 A.2d 140, 147 (D.C. 2007)).

We have reviewed the record and are satisfied that the ALJ's factual findings, see supra at 3-4, are supported by substantial evidence in the record. See Hearing CD (OAH June 15, 2010). As noted supra, the Commission is unable to consider the Housing Provider's contrary factual allegations in the Notice of Appeal. See Hago, TP 11,552 and 12,085 at 6 (citing WMATA, 926 A.2d at 147). Therefore, the Commission determines that the Housing Provider's fourth and fifth issues in the Notice of Appeal have failed to "set forth circumstances, that if proven, would defeat a claim." See Eva Realty, LLC, TP 29,118 at 7 (citing Jones, 298 A.2d at 222). In the absence of any *prima facie* adequate defenses, the Commission determines that the Housing Provider has not provided sufficient "reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." Frausto, 926 A.2d at 157 (quoting Nuyen, 884 A.2d at 657). Accordingly, the Housing Provider did not satisfy the fourth Radwan element.

The DCCA in Radwan held that, in balancing these factors, prejudice to the nonmoving party must be considered. See 683 A.2d at 481. This is due to "the strong judicial policy favoring a trial on the merits; however there is a possibility for prejudice to the nonmoving party when a judgment is vacated." Lenkin Co. Mgmt., TPs 27,191; 27,192; 27,193 at 7; see also Eva Realty, LLC, TP 29,118 at 5 (citing Radwan, 683 A.2d at 481). In this case, the Commission is satisfied that setting aside the Final Order would prejudice the Tenant, who prevailed on several of her claims before the ALJ, because the case could have to be re-litigated, exposing the Tenant to attendant expenses of litigation,

the risk of an adverse judgment and the possibility of further appeals. See Prosper, TP 27,783; Sellers v. Lawson, TP 29,437 (RHC Dec. 1, 2012); Tillman v. Reed, TP 29,136 (Sept. 18, 2012).

Based upon the review of all of the evidence in the record, the Commission determines that the Housing Provider has satisfied two (2) of the four (4) factors required under Radwan. Having weighed all of the factors enumerated in Radwan, 683 A.2d at 481, the Commission determines that the Housing Provider lacked standing to challenge the Final Order. Because of this determination, the Commission will not address the issues raised in the Notice of Appeal. Accordingly, the Notice of Appeal is dismissed.

IV. CONCLUSION

For the reasons stated herein, the Notice of Appeal is dismissed.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

MARTA W. BERKLEY, 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-10-29,816 was mailed, postage prepaid, by first class U.S. mail on this **5th day** of **June, 2013** to:

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