DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-10-29,875

In re: 3133 Connecticut Ave., N.W.
Units 506 and 901

Ward Three (3)

CHRISTINE BURKHARDT and
DON WASSEM
Tenants/Appellants

v.

KLINGLE CORPORATION,
B.F. SAUL COMPANY, and
B.F. SAUL PROPERTY COMPANY
Housing Providers/Appellees

DECISION AND ORDER

September 25, 2015

McKOIN, COMMISSIONER. 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 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 - 42-3509.07, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501 - 2-510 (2001), and the District of Columbia Municipal Regulations (DCMR),

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA) on October 1, 2006, pursuant to § 6(b-1)(1) of the OAH Establishment Act, D.C. Law 16-83, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of the RACD were transferred to the DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

On April 20, 2010, Tenant/Appellants Christine Burkhardt and Don Wassem (collectively, Tenants), residing at 3133 Connecticut Ave., N.W. (Housing Accommodation), Units 901 and 506, respectively, filed tenant petition RH-TP-10-29,875 (Tenant Petition) against Housing Providers/Appellees Klingle Corporation, B.F. Saul Company, and B.F. Saul Property Company (collectively, Housing Provider).[2] The Tenant Petition raised the following claims against the Housing Provider:

1. [O]ur rental unit(s) are not properly registered with the RAD.
2. Services and/or facilities provided as part of rent and/or tenancy have been permanently eliminated.
3. Services and/or facilities provide as part of rent and/or tenancy have been substantially reduced.
4. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act.
5. A Notice to Vacate has been served on [us], which violates Section 501 of the Act.

Tenant Petition at 2; Record (R.) at 34.

On September 27, 2012, Administrative Law Judge Erika L. Pierson (ALJ) issued an Order Consolidating Petitions for Hearing, Scheduling Joint Status Conference, and Orders to Show Cause (Show Cause Order). R. at 200-43. The Show Cause Order addressed six (6) tenant petitions and one (1) contested voluntary agreement that were pending before OAH and ordered

[2] The Commission notes that the Tenant Petition was additionally signed by Kenneth Mazzer, Wendy Tiefenbacher, Peter Schwartz, Margot Siegel, Lloyd Siegel, Nicole Witenstein, Blake Nelson, and Wendy Nelson. Tenant Petition at 3-4; R. at 32-33. This appeal was filed solely by Tenants Burkhardt and Wassem.

the parties to the petitions to show cause as to why certain petitions, parties, and allegations should not be dismissed. Show Cause Order at 5; R. at 239.

On November 30, 2012, the Tenants filed a "Response to September 27, 2012 Order" (Group Response). R. at 266-72. The ALJ held a hearing on the Show Cause Order on March 13, 2013, at which Tenant Burkhardt was present and Tenant Wassem appeared by telephone. Hearing CD (OAH Mar. 13, 2013). Without holding an evidentiary hearing on the Tenants' claims, the ALJ issued a final order dismissing the Tenant Petition: Mazzer v. Klingle Corp., 2010-DHCD-00083 (OAH Oct. 24, 2014) (Final Order).

In the Final Order, the ALJ made the following findings of fact, as relevant to the Tenants:[3]

1. This petition challenges 120-day notices to vacate for renovations pursuant to § 501(f) of the Act, issued by Housing Provider B.F. Saul Company on March 1, 2010.

2. In July 2008, Housing Provider filed with the Rent Administrator, an application seeking approval to temporarily vacate and relocate tenants at 3133 Connecticut Avenue, NW, known as the Kennedy-Warren (Housing Accommodation) in order to complete major renovations. The application was docketed as Case No. NV-09-001 with the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD). Tenants opposed the 501(f) application before the Rent Administrator.

3. By Order dated December 16, 2009, the Rent Administrator ordered Housing Provider to suspend solicitation of any temporary relocation agreements and commencement of work that was the subject of the 501(f) application until the Rent Administrator made a decision on the application. On December 22, 2009, Housing Provider appealed that order to the Rental Housing Commission. Housing Provider subsequently withdrew its appeal in March 2010.

4. By Orders dated February 26, 2010, and March 3, 2010, the Rent Administrator found that the proposed renovations were necessary to bring the housing accommodation into compliance with the housing regulations and authorized the issuance of 120-day notices to vacate. *Klingle Corp. v. Tenants of 3133*

[3] The findings of fact are recited here using the same numbering, language, and terms as used by the ALJ in the Final Order.

Connecticut Ave., NW, RAD Case No. NV 09-001 (RAD Feb. 26, 2010) and (RAD Mar. 3, 2010).

5. Tenants appealed the March 3, 2010, Order to the Rental Housing Commission, which has not yet issued a decision on Tenants' appeal, other than to deny a motion that Tenants Nelson filed seeking to consolidate the appeal of NV 09-001 with TP 28,724 which is pending at OAH. *See Klingle Corp. v. Tenants of 3133/3131 Connecticut Ave., NW*, Order on Mot. for Consold. and Appeal Issues with Ten. Pet. 28,724 (RHC June 28, 2013).

6. On March 1, 2010, Housing Provider served Tenants with 120-day notices to temporarily vacate their apartments pursuant to § 501(f) of the Act. Some Tenants relocated temporarily and some never vacated. As of the date of this Final Order, all renovations have been completed. All Tenants returned to their units. Tenants Neslon and Wassem no longer reside in the Housing Accommodation. . . . .

7. On April 20, 2010, Tenants filed the instant tenant petition (TP 28,785) [sic] challenging the Rent Administrator's authority to approve the 501(f) application without a hearing, challenging the validity of the 501(f) notices to vacate, and challenging reductions in services and facilities that would occur in the future when the renovations were completed. The Rent Administrator transferred the tenant petition to this administrative court for a hearing.

. . .

9. On December 19, 2011, Tenants filed a joint status report stating that the appeal in NV-09-001 pending with the Rental Housing Commission, and their other pending tenant petitions, would affect the outcome of this tenant petition and therefore they requested this petition be stayed pending resolution of the appeal and other petitions.

10. Housing Provider filed a status report stating that the petition should be dismissed as moot because the renovations were completed and an appeal is pending with the Rental Housing Commission.

11. On December 30, 2011, Tenants Wassem and Burkhardt filed TP 30,172, which alleged improper registration, improper rent increases, reductions in services and facilities, and retaliation. TP 30,172 states that the reductions in services and facilities were related to the construction and renovation of the Housing Accommodation. An evidentiary hearing was concluded in that case on October 15, 2012, before Administrative Law Judge Goodie, and is currently pending final order. TP 30,172 also alleges improper registration for the same reasons that Tenant Wassem alleged, and was decided, in a Final Order issued in TP 28,220/TP 28,469 on August 5, 2013. *Wassem v. Marhefka et.* [sic] *al.*, OAH Case Nos. RH-TP-06-28,220 and RH-TP-06-28,649 (Final Order Aug. 5, 2013).

. . .

13. Also pending at OAH were several other petitions filed by the same tenants who filed this petition. On September 27, 2012, I issued an "Order Consolidating Petitions for Hearing; Scheduling Joint Status Conference, and Orders to Show Cause" (Show Cause Order). The Show Cause Order set forth the status of all pending Kennedy-Warren cases and ordered the parties to show cause why this petition and several other petitions or allegations should not be dismissed.

14. . . . [O]n November 30, 2012, Tenant Mazzer filed a "Group Response" to the show cause order on behalf of himself and Tenants Wassem, Burkhardt, and Siegel. On December 20, 2012, Housing Provider filed a reply to Tenants' responses.

15. A joint status conference was held on March 13, 2013. Tanya Marhefka, Vice President of B.F. Saul Company, appeared on behalf of Housing Provider and was represented by Richard Luchs, Esquire. The following tenants appeared: Christine Burkhardt, Kenneth Mazzer, Lee Cohen, and Don Wassem (by telephone). Tenants Blake and Wendy Nelson were represented by their counsel, Carol Blumenthal, Esquire.

Final Order at 2-6; R. at 315-19.

The ALJ made the following conclusions of law, as relevant to the Tenants, in the Final Order:[4]

1. Tenants Burkhardt and Wassem, similarly, have had multiple petitions at OAH that overlap in time and allegations and have claims in this petition that are moot. For the reasons discussed below, neither Tenant Burkhardt nor Tenant Wassem have any viable claims remaining in TP 29,875. Contrary to Tenants' assertions, the filing of tenant petition does not act simply as a placeholder for tenants "to preserve their rights" to raise every and any allegation that may have arose within three years of filing a petition, regardless of whether they have plead any specific allegations.

2. The September 27, 2012, Order to Show Cause stated the following about TP 29,875:

> The petition challenges the same March 3, 2010, 501(f) notice to vacate for unsafe alterations that Tenants Nelson challenged in TP 28,724. The petition also challenges the propriety of the Rent Administrator's granting of the 501(f) application, which is identical to the appeal pending with the RHC in NV-09-001. In response to an Order I issued in this case, the

[4] The conclusions of law are recited here using the same language and terms as used by the ALJ in the Final Order, except that the Commission has numbered the conclusions of law for ease of reference.

parties filed status reports in December 2011. Housing Provider's report stated that the issue was moot and the petition should be dismissed. Tenants stated that resolution of this case is contingent on the RHC's resolution of an appeal in NV-09-001 and the appeal of several individual tenant petitions. **For the reasons discussed below, Tenants' request to stay proceedings is DENIED. Tenants shall show cause why certain allegations in the petition should not be dismissed. . . . The remaining allegations shall be consolidated for hearing with TP 29,171, TP 28,724, and TP 30,056.**

Show Cause Order at 21.

1. OAH lacks jurisdiction over the 501(f) notices to vacate and the allegation is moot.

3. In regards to the notices to vacate, the only remedy available from this administrative court, under the Rental Housing Act of 1985, is to invalidate the notice to vacate. Tenants argue that a remedy would be a civil fine levied against Housing Provider pursuant to D.C. Official Code § 42-3509.01. However, a civil fine requires a finding that Housing Provider "willfully" violated the Act. D.C. Official Code § 42-3509.01(b); *Quality Mgmt, Inc. v. D.C. Rental Hous. Comm'n*, 870 A.2d 556, 558 (D.C. 2005). It is undisputed that the 501(f) notices to vacate were issued pursuant to an order of the Rent Administrator.

4. The issue of the Rent Administrator's authority to grant the 501(f) notices to vacate without a hearing is outside the jurisdiction of OAH for two reasons. First, Tenants appealed the Rent Administrator's March 3, 2010, Order to the Rental Housing Commission, which was the appropriate venue and divested OAH of jurisdiction. *See Dreyfuss Mgmt, LLC v. Neckford* [sic], RH-TP-07-28,895 (RHC Sept. 27, 2013) at 29-36 (holding that once an appeal is filed with the Commission, OAH is divested of jurisdiction to issue any orders). Second, the authority to grant 501(f) applications remains within the sole discretion of the Rent Administrator pursuant to the Rental Housing Act, D.C. Official Code § 42-3505.01(f)(1) . . . .

5. There is nothing in the Act that allows a tenant to appeal the Rent Administrator's decision to OAH. The Rent Administrator's March 3, 2010, Order included a notice of appeal rights that specifically instructed any aggrieved party to file an appeal with the Rental Housing Commission, which the Tenants did. **Therefore, Tenants' allegation that 120-day notices to vacate were issued in violation of the Act is dismissed for lack of jurisdiction.**

6. In addition, Tenants' allegations regarding the 501(f) notices to vacate are moot. Tenants Wassem and Burkhardt, in their November 30, 2012, Group Response to the Show Cause Order concede that they already vacated their apartments

pursuant to the 120-day notices to vacate, the renovations have been completed, and they have moved back into their apartments. Nonetheless, Tenants Burkhardt and Wassem assert that they suffered some unidentified harm for which they are entitled to relief. However, a notice to vacate for renovations where renovations have been completed is moot:

> A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome. Cropp v. Williams, 841 A.2d 328, 330 (D.C. 2004). Courts refrain from deciding cases if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'

Clarke v. United States, 915 F.2d 699, 701 (D.D.C. [sic] 1990) (*en banc*) (*quoting Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir 1990). The District of Columbia Court of Appeals has held that whether the court can fashion a remedy is a significant factor in determining whether a case is moot. *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006). At this point, there is no remedy for Tenants in regards to the 2010 notices to vacate. A civil fine would have no effect on the parties' rights and could not effect [sic] Mr. Wassem in the future because he no longer resides in the Housing Accommodation. Therefore, Tenant's allegation that 120-day notices to vacate were issued in violation of the Act is moot.

2. Tenants' allegation of improper registration is also moot because it is directly related to their challenge to the granting of the 501(f) application. In addition, Tenant Wassem challenged registration of the Housing Accommodation in previous tenant petitions (TP 28,220/TP 28,649).

7. In their petition, Tenants state that the notice to vacate was improper because a prerequisite to issuing a notice to vacate is that the Housing Accommodation must be properly registered. Because the challenge to the validity of the notice to vacate is moot, the related issue of registration is also moot. Moreover, there is nothing in the Rental Housing Act that prohibits a housing provider from issuing a notice to vacate if a housing accommodation is not properly registered. Notices to vacate are governed by D.C. Official Code § 42-3505.01 and 14 DCMR § 4302. The regulations provide that to be valid, a notice to vacate must include a statement that the property is registered with the Rental Accommodations Division and the registration number. 14 DCMR 4302.1(c). The only penalties in the Act and regulations for failing to register or not being properly registered, is a civil fine, if the failure to register was willful, and a prohibition against rent increases: "Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless: . . . (B) The housing accommodation is registered in accordance with § 42-3502.05." D.C. Official Code § 42-3502.08(a)(1)(B).

8. In addition, Tenant Wassem alleged that the Housing Accommodation was not properly registered in several other tenant petitions including the consolidated petitions TP 28,220 and TP 28,649. I issued a final order on those petitions on August 5, 2013, and found that the Housing Accommodation was properly registered between January 31, 2005 and January 31, 2008. *Wassem v. Marhefka et.* [sic] *al.*, RH-TP-06-28,220 and RH-TP-06-28,649 (Amended Final Order Aug. 5, 2013) at 36. Currently pending final order with Administrative Law Judge Goodie is TP 30,172, to which both Tenant Wassem and Burkhardt are parties. That petition, which covers the period December 30, 2008, through December 30, 2011, also alleges that the Housing Accommodation is not properly registered. Therefore, any allegation that the property was not properly registered in 2010 when the 501(f) notices were issued, is part of TP 30,172, and cannot also be raised here. **Accordingly, Tenants' allegation of improper registration is dismissed with prejudice.**

3. Tenants' allegations of reductions in services or facilities are duplicative of the allegations in other petitions.

9. The tenant petition alleges that the following services and facilities were reduced as part of the demolition and construction of the Housing Accommodation: roof deck eliminated; relocation and appropriation of parking spaces; loss of square footage due to installation of HVAC; interruption of utility service, elevator service, and laundry room access; and "other housing and fire code violations." These are the same allegations Tenants Wassem and Burkhardt made in TP 30,172 which is pending final order. TP 30,172 covers the period December 30, 2008, to December 30, 2011, and therefore necessarily includes 2010. As such, Tenants cannot challenge the same reductions in services or facilities that have already been adjudicated in TP 30,172.

10. In the November 30, 2012, Group Response to the Show Cause Order (page 2) Mr. Wassem argued that his claims of reductions in services and facilities should not be dismissed because there is a timeframe gap between his claims in TP 28,220/TP 28,649 and TP 30,172. TP 28,220/TP 28,649 had significant procedural irregularities. TP 28,220, which alleged only improper rent increases, had been filed in 2004, adjudicated by the Rent Administrator, appealed to the Rental Housing Commission, and remanded to OAH for a new hearing in 2006. Also in 2006, Mr. Wassem had filed TP 28,649, and the two petitions were consolidated for a hearing. However, in January 2008, another administrative law judge granted Mr. Wassem leave to amend the petitions to add allegations of reductions in services and facilities, improper registration, and retaliation, permitting Mr. Wassem to address these claims between 2001 and 2006, the statute of limitations period for both TP 28,220 and TP 28,649. Housing Provider, prior to and at the hearing, raised objections to the statute of limitations period for the amended allegations. In the Final Order, I held that permitting Mr. Wassem in 2008, to amend petitions that were filed in 2004 and 2006, with new and unrelated allegations, and having the benefit of the previous statute of limitations period was contrary to the law and prejudicial to Housing