DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-11-30,165
RH-TP-12-30,222

In re: 1245½ Duncan Place, N.E.

Ward Six (6)

MICHAEL B. DORSEY
Tenant/Appellant

v.

DAVID BAILEY
Housing Provider/Appellee

DECISION AND ORDER

July 2, 2014

YOUNG, COMMISSIONER. 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 (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.

I. PROCEDURAL HISTORY

On December 12, 2011 and April 23, 2012 Michael B. Dorsey, the tenant (Tenant) of the

[1] The OAH assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs (DCRA) and Rental Accommodations and Conversion 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 DCRA, RACD were transferred to the DHCD, RAD 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)).

housing accommodation located at 1245½ Duncan Place, N.E., (Housing Accommodation) filed tenant petitions (TP) RH-TP-11-30,165 and RH-TP-12-30,222, respectively. In RH-TP-11-30,165, the Tenant alleged that his housing provider, David Bailey (Housing Provider): 1) failed to provide a proper thirty (30) day notice of rent increase before the increase became effective; 2) took a rent increase while his unit was not in substantial compliance with the D.C. Housing Regulations; 3) permanently eliminated services or facilities provided as part of his rent or tenancy of his rental unit; 4) failed to provide services and/or facilities set forth in a Voluntary Agreement filed and approved by the Rent Administrator under Section 214 of the Act; 5) took retaliatory action against him in violation of Section 501 of the Act; and 6) took actions in violation of the Act. See RH-TP-11-30,165 at 2; Consolidated Record (R.) at 11. In RH-TP-12-30,222, the Tenant alleged that the Housing Provider: 1) took a rent increase while his unit was not in substantial compliance with the D.C. Housing Regulations; 2) charged more than the legally allowed 5% monthly late fee for rent; 3) took retaliatory action against him in violation of D.C. OFFICIAL CODE § 42-3505.02 (Supp. 2008); and 4) served him with a Notice to Vacate which violated D.C. OFFICIAL CODE § 42-3505.01 (Supp. 2008) See RH-TP-12-30,222 at 4-5.

On April 23, 2013, Administrative Law Judge Erika L. Pierson (ALJ) issued a Case Management Order (CMO) scheduling the OAH hearing for July 9, 2013. CMO at 1-7; R. at 52-58. By Order dated May 21, 2013, the ALJ cancelled the July 9, 2013 hearing and granted the Housing Provider's Motion for Continuance. OAH rescheduled the evidentiary hearing for August 20, 2013, at 9:30 a.m. R. at 59-60. The Order on Motion for Continuance stated that the conditions set out in the CMO of April 23, 2013, remained in effect and cautioned the parties "if you do not appear for the hearing, you may lose the case." R. at 60. The Order certified that it was sent by first-class mail postage prepaid to:

Michael B. Dorsey
1245½ Duncan Place, N.E.
Washington, D.C. 20002

On August 20, 2013, the ALJ held the evidentiary hearing on this matter. The Housing Provider was present for the OAH hearing, however, the Tenant failed to appear at the scheduled hearing. On August 23, 2013, the ALJ issued the final order in Michael B. Dorsey v. David Bailey, RH-TP-11-30,165 and RH-TP-12-30,222 Consolidated (OAH Aug. 23, 2013) (Final Order); R. at 61-67. The ALJ made the following findings of fact in the Final Order:

1. Tenant appeared for a status conference on May 8, 2012. At that time, because Tenant was pending eviction, he was cautioned to file with OAH any change in address if he moved from the housing accommodation.

2. Tenant filed various motions and documents with OAH on May 1, 2012, May 14, 2012, June 19, 2012, July 24, 2012, July 25, 2012, July 30, 2012, and October 9, 2012.

3. In March 2013, Tenant was evicted from the housing accommodation, which has been sold to a new owner. Tenant has not filed a change of address with OAH.

4. A Case Management Order was issued on April 23, 2013, scheduling a hearing for July 9, 2013, at 9:30 a.m. The Order was mailed to Tenant at the address Tenant provided in his tenant petition. The Order was not returned by the postal authorities as undeliverable.

5. On May 21, 2013, I issued an Order granting Housing Provider's motion for acontinuance and rescheduled the hearing for August 21, 2013, at 9:30 [a.m]. The Order was mailed to Tenant at the address Tenant provided in the tenant petition. The Order was not returned by the postal authorities as undeliverable.

6. Tenant failed to appear for the hearing on August 21, 2013, and did not request a continuance. Housing Provider and his counsel appeared for the hearing.

7. Counsel for Housing Provider reported that Tenant appeared for oral arguments in the D.C. Court of Appeals on an appeal of a Landlord/Tenant case in July 2013. Tenant had had filed the following change of address with the D.C. Court of Appeals: 1025 Connecticut Avenue, NW, #1000, Washington, DC 20036.

Final Order at 3-4; R. at 64-5. The ALJ concluded as a matter of law, the following:[2]

1. Tenant failed to appear for the scheduled hearing, failed to request a continuance, and failed to file a change of address when he was evicted from the housing accommodation. Therefore, the tenant petition is dismissed with prejudice.

2. The Case Management Order and Order rescheduling the hearing were mailed to Tenant by first class mail at the address that appears in the case file. It is unknown whether Tenant received these orders. Neither Order was returned to us as undeliverable. Tenant has an obligation to keep his address up to date. OAH Rule 2810.3 (requiring parties to file changes in addresses within three days of the change). Tenant, although *pro se,* is a savvy, knowledgeable, experienced litigant. Moreover, at the May 8, 2012, status conference, I expressly advised Tenant to file a change of address if he moved from the housing accommodation. The parties were properly served with notice of the time and place of the hearing in this matter at their addresses of record, more than 15 days before the hearing date. D.C. Official Code § 42-3502.16(c); OAH Rule 2930.1. Dismissal of this matter is authorized by OAH Rules, which provide that:

   > Except as provided in Subsection 2818.2, if the party initiating a case fails to comply with an Administrative Law Judge's order or these Rules or otherwise fails to prosecute the case, the Administrative Law Judge may, on his or her own motion or on the motion of the opposing party, dismiss all or part of the case. Dismissal will ordinarily be with prejudice unless the Administrative Law Judge finds good cause to dismiss without prejudice.

   OAH Rule 2818.1.

3. This administrative court is dismissing this matter with prejudice, in accordance with OAH Rules.

Final Order at 4-5; R. at 63-4.

On August 29, 2013, the Tenant filed a Motion for Reconsideration of the ALJ's Final Order. R. at 181-184. On October 16, 2013, the ALJ issued an order denying the Tenant's motion for reconsideration. Michael B. Dorsey v. David Bailey, RH-TP-11-30,165 and RH-TP-12-30,222 Consolidated (OAH Oct. 16, 2013) (Order on Motion for Reconsideration); R. at 185-191. On October 25, 2013, the Tenant filed a timely notice of appeal of the OAH decision in the Commission (Notice of Appeal). In the Notice of Appeal the Tenant stated in relevant part:

[2] The Commission added numbers to the ALJ's Conclusions of Law for ease of reference.

1. The judge erred by refusing to consider the circumstances of this case and to merely consider the fact that this petitioner is the victim of an eviction –an eviction in which the seller and buyer said the property should have been available for immediate, sole habitation (a fraud) and the property remains vacant seven months later. This case involves the very same issue, as the agency is allowed to avoid work and dismiss the case with prejudice, a very cruel act considering the circumstances.

2. An error was made when the case occurred without a mere telephone call to this petitioner on the day that the case was called, much the same as in Landlord and Tenant [Court] when litigants is [sic] not present. Someone should have considered it an honest mistake and allowed justice to prevail.

3. An error also occurred when Judge Pierson knew or should have known that this petitioner's address had changed because she was aware that an eviction had occurred because counsel of record informed her of the eviction.

4. An obvious error occurred when the judge was aware of the potential of this petitioner's vulnerability to becoming homeless when she admonished him at the last proceeding [to inform the agency of his new address].

Notice of Appeal at 2-3. The Tenant requests that the ALJ's order in RH-TP-11-30,165 and RH-TP-12-30,222 be set aside and the cases reinstated. The Commission conducted its appellate hearing on January 28, 2014.

II. PRELIMINARY ISSUE

Whether a party whose case was dismissed with prejudice by the ALJ due to a failure to appear has standing to appeal the merits of the decision to the Commission.

III. DISCUSSION OF THE PRELIMINARY ISSUE

It is a well-established principle that a party appellant who fails to appear for an adjudicatory hearing does not have standing to challenge the results on appeal. Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013); Tenacity Group v. Abshaw, TP 28,486 (RHC Apr. 18, 2012); Johnson v. Dorchester House Assocs., LLC, RH-TP-07-29,077 (RHC June 29, 2012); Prosper v. Pinnacle Mgmt., TP 27,783 (RHC Sept. 18, 2012) at 9 (quoting Greene v. Eva Realty, LLC, TP 29,118 (RHC Sept. 4, 2009) at 4-5)). See also Delevay v. D.C. Rental

Accommodations Comm'n., 411 A.2d 354, 360 (D.C. 1980) (tenant who failed to appear at hearing did not have standing to bring an appeal); Jenkins v. Cato, TP 24,487 (RHC Feb. 15, 2000). Any issues raised appealing the Final Order on the merits will be dismissed for lack of standing. Syndor v. Johnson, TP 26,123 (RHC Nov. 1, 2002) at 4 (citing Jenkins, TP 24,487; Turner v. Ellison, TP 21,160 (RHC Mar. 22, 1990)). The Commission has applied an exception to this general rule when a party files a notice of appeal and moves the Commission to vacate a default judgment, because the party did not receive notice of the hearing. Jenkins, TP 24,487 at 4; John's Props. v. Hilliard, TPs 22,269 & 21,116 (RHC June 24, 1993). The exception is based on the strong policy favoring trials on the merits. See Radwan v. D.C. Rental Hous. Comm'n, 683 A.2d 478, 481 (D.C. 1996). When determining the issue of standing, the Commission's review is limited to the issues raised by the appellant in the notice of appeal. The appellant's notice of appeal must timely raise this issue for it to be considered by the Commission. Syndor, TP 26,123 at 4; 14 DCMR § 3807.4 (2004).[3]

The District of Columbia Court of Appeals (DCCA) has identified the following four factors that the Commission must consider in order to determine whether to set aside a default judgment: (1) whether the movant received actual notice of the proceeding; (2) whether the movant acted in good faith; (3) whether the movant acted promptly; and (4) whether the movant presented a *prima facie* adequate defense. See Radwan, 683 A.2d at 481 (citing Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)). Prejudice to the non-moving party must also be considered. Id.

Regarding the initial factor in the test under Radwan, there arises a presumption of receipt of notice if the agency has properly mailed it. See Foster v. District of Columbia, 497 A.2d 100, 102 n.10 (D.C. 1985); Allied Am. Mut. Fire Ins. Co. v. Paijze, 143 A.2d 508, 510

[3] The applicable regulation, 14 DCMR § 3807.4 (2004), provides in relevant part: "Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error."

(D.C. 1958). The 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 Greene v. Eva Realty, LLC, TP 29,118 (RHC Sep. 4, 2009) at 4-5; William C. Smith Co. v. Miller, TP 24,663 (RHC June 28, 2000) at 5; Wofford v. Willoughby Real Estate, HP 10,687 (RHC Apr. 1, 1987) at 2; see also Williams v. Poretsky Mgmt., Inc., TP 23,156 (RHC Sept. 13, 1994) 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, TP 23,156 at 3. "Proper notice of an adjudicatory proceeding is mandated by the Act, case law, and traditional principles of due process of law." Reckord v. Peay, TP 24,896 (RHC Aug. 9, 2002) at 7. D.C. OFFICIAL CODE § 42-3502.16(c) (Supp. 2010) provides:[4]

> 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.

In the instant case, the CMO certifies that on May 22, 2013, notice of the hearing was sent by OAH by first-class mail to Michael B. Dorsey. OAH used the address of record provided by Mr. Dorsey in his TP, 1245½ Duncan Place, N.E., Washington, D.C. 20009. See R. at 63-67. There is no evidence in the record that the CMO was returned as undeliverable. Inasmuch as the record demonstrates that the CMO was sent by first-class mail to the address provided by the Tenant in his petition at least fifteen (15) days prior to the hearing, see R. at 12, the Commission

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

is satisfied that OAH provided notice of the hearing to the Tenant in accordance with D.C. OFFICIAL CODE § 42-3502.16(c) (2001). See Barnes-Mosaid, TP 29,316 at 6.

On appeal, the Tenant does not contest that OAH properly mailed the notice of hearing, rather he argues that he was evicted from his residence at 1245½ Duncan Place, N.E., Washington, D.C. 20009, prior to the hearing and therefore failed to receive the CMO containing the notice of the hearing. The Tenant further argues that OAH had a valid phone number and should have contacted him by that means on the day of the hearing. The Tenant asserts that the ALJ was aware of the possibility of his eviction because she warned him to maintain a current address with OAH in the event of his eviction.

The applicable OAH rules provide:

> A party, attorney, or representative must notify the Clerk and all other parties in writing of any change in address, telephone number, or fax number within three (3) calendar days of the change.

1 DCMR § 2810.3 (2004).

> The most recent contact information provided by a party, attorney, or other representative under this Section shall be considered correct. A party or representative who does not keep an address current may fail to receive orders and may lose the case as a result.

1 DCMR § 2810.4 (2004). The record reflects that the hearing notice was mailed to the Tenant at the address he provided RAD. It was the responsibility of the Tenant to notify OAH of such change. See Davies v. Tenants of 1208 Evarts St., N.E., CI 20,328 (RHC Nov. 1, 1990). The Commission is therefore satisfied that the Tenant failed to rebut with a preponderance of evidence the presumption that he received notice of the hearing at his address of record. 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 Tenant fails the first Radwan factor.

The second factor under Radwan, 683 A.2d at 481, is whether the movant acted in good faith. Good faith has been 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." BLACKS LAW DICTIONARY 713 (8th ed. 2004); see also Prosper, TP 27,783; Eva Realty, LLC, TP 29,118; Belmont Crossing/KSI Mgmt./Edgewood Mgmt. Corp. v. Jackson, TP 28,292 (RHC Mar. 6, 2009). There is no evidence in the record indicating that the Tenant did not act in good faith. Accordingly, the Tenant satisfies the second Radwan factor.

Regarding the third factor under Radwan, 683 A.2d at 481, the record reflects that the Tenant did act promptly in contesting the claim that he received proper notice of the hearing. The Tenant timely filed a motion for reconsideration (R. at 68-71), and a timely Notice of Appeal in the Commission. See 14 DCMR § 3802.2 (2004).[5] Accordingly, the Tenant met the third Radwan factor. See e.g., Prosper v. Pinnacle Mgmt., TP 27,783 (RHC Sept. 18, 2012); 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,

[5] The applicable regulation, 14 DCMR § 3802.2 (2004), provides:

> A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.

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)).

In this case, the Tenant raised issues regarding his eviction in the Notice of Appeal. See Notice of Appeal at 1. The Tenant argues that he failed to receive the OAH notice of hearing as a result of his eviction from his unit in the Housing Accommodation. He further asserts that the ALJ was aware of the possibility of his eviction because she admonished him regarding the necessity of informing OAH of his new address.

The Commission is satisfied that the issues raised by the Tenant do not present *prima facie* adequate defenses because they do not undercut or challenge the ALJ's central holding that, as the ALJ concluded:

> Tenant has an obligation to keep his address up to date. OAH Rule 2810.3 (requiring parties to file changes in addresses within three days of the change). Tenant, although *pro se,* is a savvy, knowledgeable, experienced litigant. Moreover, at the May 8, 2012, status conference, I expressly advised Tenant to file a change of address if he moved from the housing accommodation. The parties were properly served with notice of the time and place of the hearing in this matter at their addresses of record, more than 15 days before the hearing date. D.C. Official Code § 42-3502.l6(c); OAH Rule 2930.1. Dismissal of this matter is authorized by OAH Rules.

Final Order at 4-5; R. at 63-64. Therefore, the Tenant's 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).

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). "[W]here substantial evidence exists to support the [ALJ's] findings, even

'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute [its] judgment for that of the examiner.'" Hago v. Gewirz, TP 11,552 & 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)).

The Commission, after reviewing the entire record is satisfied that the ALJ's factual findings are supported by substantial evidence in the record. See supra at 3. In the absence of a *prima facie* adequate defense, the Commission determines that the Tenant 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 Tenant 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,-192,-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 Housing Provider, because the case could have to be re-litigated, exposing the Housing Provider to the 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 (RHC Sept. 18, 2012).

Based upon the review of all of the evidence in the record, the Commission determines that the Tenant satisfied two (2) of the four (4) factors required under Radwan. Weighing all of the factors enumerated in Radwan, 683 A.2d at 481, the Commission determines that the Tenant lacked standing to challenge the Final Order. Accordingly, the Notice of Appeal is dismissed.

IV. CONCLUSION

The Tenant's appeal of the ALJ's Final Order dismissing his appeal of RH-TP-11-30,165 and RH-TP-12-30,222 with prejudice, is dismissed.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, 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-11-30,165 and RH-TP-12-30,222 was mailed, postage prepaid, by first class U.S. Mail on this **2nd day** of **July, 2012** to:

Michael B. Dorsey
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036

Dalton Howard, Esquire
Brooks and Howard
6701 16th Street, N.W.
Washington, D.C. 20012

Shari Acosta for LaTonya Miles

LaTonya Miles
Clerk of Court
(202) 442-8949