

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

RH-TP-12-30,279

*In re:* 2727 29<sup>th</sup> St., N.W., Unit 410

Ward Three (3)

**MUNEER A. SHEIKH**

Tenant/Appellant

v.

**SMITH PROPERTY HOLDINGS THREE (DC) LP**

Housing Provider/Appellee

**ORDER ON MOTION FOR ATTORNEY'S FEES**

September 3, 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 District of Columbia Department of Housing and Community Development (DHCD).<sup>1</sup> 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 -510 (2001), 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.

---

<sup>1</sup> OAH assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD) pursuant to the Office of Administrative Hearings Establishment Act, DC. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to DHCD effective October 1, 2007, by the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

## **I. PROCEDURAL HISTORY**

On August 22, 2012, Tenant/Appellant Muneer A. Sheikh (Tenant), resident of 2727 29th Street NW (Housing Accommodation), Unit 410, filed Tenant Petition RH-TP-12-30,279 (Tenant Petition) with the RAD, against Smith Property Holdings Three (DC) LP (Housing Provider). Record for RH-TP-12-30,279 (R.) at 11-24. The Tenant Petition alleged, in relevant part, that the Housing Provider implemented a vacancy adjustment under D.C. OFFICIAL CODE § 42-3502.13(a)(2) using a rental unit that is not substantially identical to the Tenant's. *See* Amended Tenant Petition at 1-2; R. at 46-47.

A final order was by issued Administrative Law Judge Erika Pierson (ALJ) on January 29, 2014, which denied the Tenant's claims. Sheikh v. Smith Property Holdings Three (DC) LP, RH-TP-12-30,279 (OAH Jan. 29, 2014) (Final Order); R. at 374-77. On May 19, 2014, the Tenant filed a timely Notice of Appeal of the Final Order (Notice of Appeal) with the Commission.

The Commission issued its decision and order on July 29, 2015, Sheikh v. Smith Property Holdings Three (DC) LP, RH-TP-12-30,279 (July 29, 2015) (Decision and Order), in which it determined that the ALJ erred by failing to compare the essential elements of the floor plans of Units 410 and 423, including the number of rooms in each unit, in light of the installation of the wall in Unit 423, and the shape and layout of the rooms in each unit, and by considering rental value where not called for by the statute. *See* Final Order at 18-19; R. at 379-80. The Commission remanded the case to the ALJ with instructions to make findings of fact and conclusions of law on whether the floor plans are essentially the same, as required by D.C. OFFICIAL CODE § 42-3502.13(b), consistent with the Decision and Order. The Commission affirmed the ALJ's determination that the burden of proving each element of D.C. OFFICIAL CODE § 42-3502.13(b) is on the Tenant.

On August 17, 2015, the Tenant filed a Motion for Attorney's Fees, and on August 28, 2015, the Housing Provider filed Housing Providers/Appellee Opposition to Tenant Petitioners/Appellant's Motion for Attorney's Fees.<sup>2</sup>

## II. DISCUSSION OF THE MOTION FOR ATTORNEY'S FEES

The Commission may award attorney's fees in accordance with D.C. OFFICIAL CODE § 42-3509.02 and 14 DCMR § 3825.1.<sup>3</sup> D.C. OFFICIAL CODE § 42-3509.02 allows the Commission to award attorney's fees to the prevailing party. The Commission's regulations create a presumptive entitlement of an award of attorney's fees for prevailing tenants. 14 DCMR § 3825.2 ("A presumption of entitlement to an award of attorney's fees is created by a prevailing tenant, who is represented by an attorney."); Hampton Courts Tenants' Ass'n v. D.C. Rental Hous. Comm'n, 573 A.2d 10, 13 (D.C. 1990) ("[T]he purposes of the attorney's fees provision are to encourage tenants to enforce their own rights, in effect acting as private attorneys general, and to encourage attorneys to accept cases brought under the Rental Housing Act[.]") (quoting Ungar v. D.C. Rental Hous. Comm'n, 535 A.2d 887, 892 (D.C. 1987)); see Loney v. D.C. Rental

---

<sup>2</sup> The Commission notes that the Housing Provider failed to timely file its opposition. The Tenant's Motion for Attorney's Fees was filed on August 17, 2015. 14 DCMR § 3814.3 states, "Any party may file a response in opposition to a motion within five (5) days after service of the motion." 14 DCMR § 3816.3 states, "When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." 14 DCMR § 3816.5 states, "If a party is required to serve papers within a prescribed period and does so by mail, three (3) days shall be added to the prescribed period to permit reasonable time for mail delivery." The Commission's calculation of the filing time period according to its regulations requires that the Housing Provider should have filed its opposition on August 27, 2015, not August 28, 2015. The Commission, accordingly, rules on the Motion for Attorney's Fees without reliance on the arguments made by the Housing Provider.

<sup>3</sup> D.C. OFFICIAL CODE § 42-3509.02 provides as follows:

The Rent Administrator, Rental Housing Commission, or a court of competent jurisdiction may award reasonable attorney's fees to the prevailing party in any action under this chapter, except actions for eviction authorized under § 42-3505.01.

14 DCMR § 3825.1 provides as follows:

The Rent Administrator or the Rental Housing Commission may award attorney's fees incurred in the administrative adjudication of a petition in accordance with § 902 of the Act.

Hous. Comm’n, 11 A.3d 753, 759 (D.C. 2010); Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm’n, 677A.2d 46, 47 (D.C. 1966); Cascade Park Apartments v. Walker, TP 26,197 (RHC Mar. 18, 2005).

As required by D.C. OFFICIAL CODE § 42-3509.02, a party must prevail in its litigation under the Act in order to be awarded attorney’s fees. *See, e.g., Loney*, 11 A.3d at 760 (tenants “could not have raised the issue previously (before the hearing examiner or in their appeal to the Commission) because they were not the prevailing party until the Commission had ruled in their favor”); Smith Prop. Holdings Five (DC), LP v. Morris, RH-TP-14-28,794 (RHC Aug. 19, 2014) (tenants entitled to award of fees after prevailing on two of twelve issues raised in petition). However, a party has not “prevailed” within the meaning of fee-shifting statutes generally, including the Act, where an appellate court remands a case for further proceedings to determine the merits of a party’s claims. Alexander v. D.C. Rental Housing Comm’n, 542 A.2d 359, 361-62 (D.C. 1988) (“The Supreme Court has ruled under a similar statute that merely obtaining a reversal of a distinct court judgment and a consequent new trial is insufficient in itself to confer ‘prevailing party’ status.”) (citing Hanrahan v. Hampton, 446 U.S. 754, 758-59 (1980) (“The respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause.”));<sup>4</sup> *see also* Brown v. Secretary of Health and Human Services, 747 F.2d 878 (3d Cir. 1984) (Social Security claimant who obtains remand to agency for a new hearing on ground that decision is without substantial evidence insufficient to satisfy “prevailing party” requirement); National Coalition Against the Misuse of Pesticides v. Thomas, 828 A.2d 42, 44 (D.C. Cir. 1987) (“the court must ‘focus on the precise factual/legal condition that the fee claimant has sought to change, and then

---

<sup>4</sup> The Commission observes that Alexander has been overruled on the separate question of whether a *pro se* tenant who happens to be an attorney may be awarded fees. *See Upson v. Wallace*, 3 A.3d 1148 (D.C. 2010).

determine if the outcome confers an actual benefit or release from burden.”) (quoting Grano v. Barry, 783 F.2d 1104, 1108 (D.C. Cir. 1986)).

The Tenant raised the following issues on appeal:

1. Whether the ALJ erred in concluding that the floor plans of Units 410 were “essentially the same” for purposes of determining the validity of a vacancy rent increase taken in September 2011.
2. Whether the ALJ erred in concluding that, although the exposure of Units 410 and 423 are different, the Tenant bore the burden of proving that exposure had previously been a factor in the amount of rent charged.

Notice of Appeal at 1-2. On the first issue raised by the Tenant, the Commission remanded this case to the ALJ to make findings of fact and conclusions of law on whether the floor plans are essentially the same, as required by D.C. OFFICIAL CODE § 42-3502.13(b). The Tenant did not prevail on the second issue, because the Commission affirmed the decision of the ALJ that the burden of proving each element of D.C. OFFICIAL CODE § 42-3502.13(b) is on the Tenant.

Based on the fact that the Tenant did not prevail on the second issue and that the case was remanded on the first issue for further proceedings on the merits before OAH, the Tenant’s status as a prevailing party has not been established. *See Alexander*, 542 A.2d at 361-62 (“We think the issue of Alexander’s status as a prevailing party . . . is as yet not sufficiently determined to warrant an award of attorney fees for his appellate activities at this point.”); *Thomas*, 828 F.2d at 44 (“procedural victories of this sort, including those in which fees claimants obtain a favorable declaration of the law, do not suffice to qualify claimants as ‘prevailing parties.’”).

### **III. CONCLUSION**

The Commission denies the Tenant’s Motion for Attorney’s Fees as premature at this time because there is no final determination in this case and the Tenant is therefore not a prevailing party, as discussed above. *See* 14 DCMR § 3825.1; *Alexander*, 542 A.2d at 361-62.

If upon remand the ALJ finds in favor of the Tenant on the Tenant’s claims in the Tenant

Petition, the Tenant may refile his request for attorney's fees, including for work performed in the course of this appeal. *See, e.g., Loney*, 11 A.3d at 760 (tenants "could not have raised the issue previously (before the hearing examiner or in their appeal to the Commission) because they were not the prevailing party until the Commission had ruled in their favor. Consequently, they did not waive the issue and should not be prevented from recovering attorney's fees.").

**SO ORDERED**

  
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  
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-12-30,279 was mailed, postage prepaid, by first class U.S. mail on this **3rd day of September, 2015**, to:

Marc Borbely, Esq.  
D.C. Tenants' Rights Center  
406 5<sup>th</sup> Street, N.W., Suite 300  
Washington, DC 20001

Roger D. Luchs, Esq.  
Greenstein, DeLorme, & Luchs, P.C.  
1620 L Street, N.W., Suite 900  
Washington, DC 20036

  
LaTonya Miles  
Clerk of the Court  
(202) 442-8949