

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

RH-TP-14-30,552

In re: 2900 Nash Pl., S.E., Unit 2

Ward Seven (7)

**DEON MITCHELL**

Tenant/Appellant

v.

**FRANK EMMET REAL ESTATE, LLC**

Housing Provider/Appellee

**ORDER GRANTING MOTION TO DISMISS APPEAL**

**June 3, 2016**

**MCKOIN, COMMISSIONER.** This case is on appeal to the Rental Housing Commission (Commission) from 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).<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, 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.

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<sup>1</sup> OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) 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 RACD were transferred to DHCD by § 2003 of the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

## I. PROCEDURAL HISTORY

Tenant Deon Mitchell, (Tenant) residing at 2900 Nash St., S.E., (Housing Accommodation) filed a Tenant Petition 2014 DHCD-TP 30,552 (Tenant Petition) against Frank Emmet Real Estate, LLC (Housing Provider) on July 22, 2014, alleging the following violations of the Rental Housing Act of 1985 (Rental Housing Act or the Act): (1) Tenant's rent was increased while the rental unit was not in substantial compliance with the housing regulations and (2) services and /or facilities were substantially reduced/permanently eliminated. Final Order, at 1, R. at 124.

After an unsuccessful mediation on October 8, 2014, an evidentiary hearing was held on December 8, 2014. At the hearing counsel for the Housing Provider raised for the first time that some of the Tenant's claims were barred by *res judicata* and/or collateral estoppel because the Tenant had two judgements against him in the Landlord and Tenant Branch of the District of Columbia Superior Court, one a Consent Judgement and the other a judgement by confession. Each party was asked by the ALJ to submit briefs by January 20, 2015, on the application of *res judicata* to the facts in this case.

In addition to the two issues listed above the ALJ listed the following sub-issues:

1. Was Tenant's unit in substantial compliance with the housing code during the period of time at issue?
2. Did the Housing Provider have notice of any housing code violations within the unit?
3. Did the Housing Provider repair any housing code violations within a reasonable time of receiving notice of them?
4. What if any, rent reduction, is the Tenant entitled to for any housing code violations of which the Housing Provider had notice and did not repair within a reasonable time?
5. Did the Housing Provider substantially reduce services and/or facilities for the tenants unit?

6. Did the Housing Provider raise the tenants rent while the Tenant's unit was not in substantial compliance with the housing code?
7. Did the Housing Provider fail to make repairs or illegally raise the rent willfully, or maliciously, or in bad faith?
8. Is Housing Provider procedurally barred from raising *res judicata* as a defense?
9. What *res judicata* effect do the two prior judgments against the Tenant in Landlord and Tenant Court have on Tenant's claims?

Final Order, at 3, R. at 122

The ALJ made the following Finds of Fact:<sup>2</sup>

### **General**

1. The housing accommodation is a rental building located at 2900 Nash Place, SE, Washington, D.C. RX 201; Testimony of Tenant.
2. Petitioner resides in unit #2 of the building, and has lived in the building for approximately 24 years. Testimony of Tenant.
3. The rent for the unit prior to November 2011 was \$643 per month. In November 2011, the Housing Provider raised the rent to \$670. Housing Provider raised the rent to \$708 in November 2012, to \$738 in November 2013, and to \$763 in November 2014. RX 261; Testimony of Tenant and Audrey Butler.
4. For each of the rent increases listed above, Housing Provider submitted a Housing Provider's Notice to Tenants of Adjustment in Rent Charged to Petitioner and filed the Notice with the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD). RX 261; Testimony of Audrey Butler.
5. At least with the November 2011 rent increase, the Housing Provider certified that the rental and common areas were "in substantial compliance with the District of Columbia Municipal Housing Regulations (Title 14) or that any noncompliance is the result of tenant neglect or misconduct" RX 261.
6. Tenant has been in poor health, affecting both his mental and physical state, for all periods relevant to these proceedings. Testimony of Harold Jones and Tenant.

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<sup>2</sup> The Findings of Fact are stated as presented by the ALJ in the Final Order.

7. Sometime in 2010 and periodically from that time to 2014 Tenant struggled to keep up with his rent. Testimony of Tenant and Audrey Butler.
8. Starting in 2012, Representatives [sic] of the Housing Provider regularly contacted the Tenant in person and by phone to ask for rent and/or tell him he had to move if he did not pay the rent. Testimony of Harold Jones, Tenant, and Audrey Butler.
9. On more than one occasion, Tenant got help from an agency to pay his rent. Testimony of Tenant and Audrey Butler. RX 207, 210.
10. In May or June 2014, Housing Provides cancelled a scheduled eviction of Tenant. Testimony of Tenant.
11. Tenant was afraid that he would be put out of his home if he complained about anything regarding the apartment. Testimony of Harold Jones and Tenant.
12. In June 2012, DC Superior Court, Landlord and Tenant Branch, entered a Judgment by Confession against the Tenant in Case No. 2012 LTB 011907. Judicial notice taken; Testimony of Tenant.
13. On November 18, 2013, the Tenant signed a Consent Judgment Praecipe, approved by DC Superior Court, Landlord and Tenant Branch, in Case No. 2013 LTD 28000. Judicial notice taken; Testimony of Tenant
14. In neither of the above-noted landlord-tenant cases did the Tenant challenge the rent level or raise the issue of housing code violations. Judicial notice taken; Testimony of Tenant.
15. By the end of 2013, Tenant had a rent balance of zero dollars. RX 200; Testimony of Audrey Butler.
16. On June 3, 2014, Tenant's rent balance was approximately one month's rent - \$737. RX 200.
17. On July 22, 2014, the date this Petition was filed, Tenant had a rent balance of \$1549.28. RX 200.

### **Housing Code Violations**

18. On July 29, 2011, a water tank burst causing a flood in the apartment. Testimony of

Tenant and Audrey Butler; RX 206.

19. From at least July 29, 2011, until sometime after July 24, 2014, the floor in the kitchen was damaged, with tiles peeling or missing altogether. PX 101 and 102; Testimony of Tenant.
20. From at least July 29, 2011, until sometime after July 24, 2014, electric outlets in the living room, bathroom, and bedroom sparked when used. PX 103, 104, 105, 106, 107; Testimony of Tenant.
21. From at least July 29, 2011, until sometime after July 24, 2014, the tub faucet leaked and was corroded. There was also a leak near the tub on the floor. PX 108 and 109; Testimony of Tenant.
22. From at least July 29, 2011, until sometime after July 24, 2014, the sink in the bathroom ran steadily. PX 110; Testimony of Tenant.
23. From at least July 29, 2011, until sometime after July 24, 2014, a large patch of the wall and ceiling in a corner of the kitchen was missing paint and had peeling paint. The area appears to be approximately four feet by two feet. Much of the bare wall is totally exposed, and the rest of the paint is peeling in sheets. PX 111; Testimony of Tenant.
24. From at least July 29, 2011, until sometime after July 24, 2014, on another wall in the kitchen there is another patch of wall where the paint is cracked and peeling. The area appears to be approximately three feet long and one foot high, encompassing two patches each approximately five inches by five inches where the paint has flopped over on itself, leaving the bare wall exposed. PX 113; Testimony of Tenant.
25. From at least July 29, 2011, until sometime after July 24, 2014, large patches of paint were hanging from the bathroom ceiling. Virtually the entire ceiling is affected. PX 114; Testimony of Tenant.
26. There were four windows in the apartment - two in the living room and two in the bedroom. From at least July 29, 2011, until sometime after July 24, 2014, the windows throughout the apartment were surrounded by rotting wood and peeling paint. The glass was loose and wind would whistle through and around the windows [sic], causing drafts. They also would not stay up properly. At some point the rope used to raise and lower a window in the living room broke. PX 117, 118, 119, 120, 121, 122, 123, 124; Testimony of Tenant.
27. From at least July 29, 2011, until sometime after July 24, 2014, there was a hole in the wall behind the radiator in the living room. The hole went clear through to the outside, allowing air and rodents to enter the apartment. PX 124; Testimony of Tenant.
28. From at least July 29, 2011, until sometime after July 24, 2014, paint was peeling

off the back porch floor and wall. The damage covered virtually the entire area of the wall and floor. PX 125, 126, 127, 128, 129, 130; Testimony of Tenant.

29. From at least July 29, 2011, until sometime after July 24, 2014, mice were in the apartment. Over that time, Petitioner observed three or four mice. Testimony of Tenant.
30. From at least July 29, 2011, until sometime after July 24, 2014, cockroaches were in the apartment. Over that time, Petitioner saw "some" roaches every now and then, mostly in the summer. Testimony of Tenant.
31. From at least July 29, 2011, until sometime after July 24, 2014, ants were in the apartment. Over that time, Petitioner periodically observed ants in the kitchen and around the windows. Testimony of Tenant.
32. In the winters from 2011 to present, it has been cold in the apartment. Testimony of Tenant.

#### **Notice of Violations to Housing Provider and Repairs to Unit**

33. Petitioner did not complain to the landlord in any way about any of the above-listed housing code violations until the summer of 2014. Testimony of Harold Jones, Petitioner, and Audrey Butler.
34. From 2011 to the summer of 2014, the Landlord opened exactly two repair "tickets" for the apartment, both in 2011. One was to replace a non-working key; the other was regarding the water tank and a stopped up bathroom sink in July 2011. Testimony of Audrey Butler.
35. On July 24, 2014, the Housing Provider inspected the unit and found numerous housing code violations, all of which it repaired over the next few months. The conditions in the unit on July 24, 2014, were "horrific." Her use of the word referred to the overall condition of the unit, and not merely to any belongings Petitioner had stored in the apartment. Testimony of Audrey Butler; PX 206.
36. Representatives of the Housing Provider were in the unit in July 2011, after the water tank burst. RX 206; testimony of Audrey Butler.
37. In 2012 and 2013, representatives of the Housing Provider were in the unit to replace filters and batteries in the smoke detectors. The Housing Provider also conducted other annual inspections of the unit in 2012 and 2013, including water inspections. Testimony of Audrey Butler; Testimony of Tenant.
38. If a repairman or "tech" notices a problem in a unit, it is his or her job to report it so that it can be repaired. Testimony of Audrey Butler.

39. The back porch is screened in and not easily observable from the outside. Testimony of Audrey Butler.
40. Tenant has boxes and bags of clothing stacked along the walls of the apartment. Those boxes and bags do not block the windows, nor do they block access to or visibility or accessibility of the peeling paint in the bedroom, bathroom or kitchen. RX 250, 251, 252, 253.
41. The Housing Provider had keys to the unit throughout the time period in question. Testimony of Tenant.
42. The Housing Provider knew or should have known of a number of the long-standing violations in the unit, due to its representatives being in the unit on July 29, 2011 after the water tank burst and its representatives being [sic] the unit to perform routine maintenance in 2012 and 2013. Testimony of Audrey Butler. The violations of which the Housing Provider knew or should have known because they were clearly visible to anyone entering the apartment are: the damaged floor in the kitchen (PX 101, 102); the paint peeling in sheets from the kitchen walls and ceiling (PX 111, 113); the tub and sink running in the bathroom - any thorough "water inspection" would necessitate entering the bathroom (PX 108, 109, 110); the patches of paint hanging from the bathroom ceiling (PX 114); and the rotting wood and peeling paint surrounding the windows (PX 117, 118, 119, 120, 121, 122, 123, 124).
43. Other violations were not immediately apparent to anyone entering the unit, so the Housing Provider had no reason to know about the following: any problem with the electric outlets (PX 103, 104, 105, 106, 107); the hole in the wall hidden behind the radiator (PX 124); the peeling paint on the back porch (PX 125, 126, 127, 128, 129, 130); any issues relating to mice, cockroaches, or ants - Petitioner testified that he saw them only "occasionally" so there is no reason to believe Housing Provider's representatives observed them during their brief visits to the unit; and the coldness in the apartment. Testimony of Tenant.
44. Although a large amount of Petitioner's belongings were stacked along the sides of the apartment, they do not prevent workers from being able to make appropriate repairs. At no point did the Housing Provider inform Petitioner that he needed to move his belongings so that repairs could be completed. RX 250, 251, 252, 253.
45. In July, 2014, Housing Provider was able to access the unit and all areas that needed repair and abated all housing code violations except the insufficient heat. Testimony of Audrey Butler; Testimony of Tenant.
46. From at least July 29, 2011 to July 24, 2014, the Housing Provider knew or should have known that the unit was not in substantial compliance with DC Housing Regulations.

The Analysis and Conclusions of Law in the Final Order were as follows:<sup>3</sup>

### **A. Prior Judgments and *Res Judicata***

On the day of the hearing, in his opening statement and again late in the proceeding, counsel for the Housing Provider raised the issue of *res judicata* for the first time. Counsel noted that in June 2012, DC Superior Court, Landlord and Tenant Branch, entered a Judgment by Confession against the Tenant in Case No. 2012 LTB 011907, and in November 2013, the Tenant signed a Consent Judgment Praecipe, approved by DC Superior Court, Landlord/Tenant Branch, in Case No. 2013 LTB 28000. Both of those cases involved the same housing accommodation as in this Tenant Petition. In neither landlord-tenant case did the Tenant challenge the rent level or raise the issue of housing code violations. Thus, the Housing Provider orally moved for partial summary judgment, arguing that the Tenant is not entitled to use any alleged housing code violations that existed prior to November 19, 2013, as the basis of an abatement of rent. As noted above, both parties submitted briefs regarding the issue.

#### **1. Potential Waiver of *Res Judicata* Argument**

First is the issue whether the Housing Provider is procedurally barred from raising *res judicata* for the first time on the day of the hearing. I conclude that the defense is not time-barred. [*Res judicata* is an affirmative defense to be pleaded and established by the proponent. *Johnson v. DC Rental Housing Comm'n*, 642 A.2d 135, 139 (D.C. 1994). However, the D.C. Court of Appeals has made clear that while "res judicata [sic] is an affirmative defense that must be pleaded. . . a trial court may raise *res judicata* grounds *sua sponte* in the interest of judicial economy. . . ." *Carrollsborg v. Anderson*, 791 A.2d 54, 60 (DC2002) (citations and internal quotations omitted); *see also Threat v. Winston*, 907 A.2d 780, 783 (DC 2006).]

[W]hile *res judicata* exists in part to shield parties from duplicative and vexatious litigation, the interests that courts protect are also often their

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<sup>3</sup> The Commission as an administrative body may in its discretion make procedural determinations in order to carry out its mandate and has summarized the ALJ's Analysis and Conclusions of Law for ease of reference. *See Prime v. D.C. Dept. of Public Works*, 955 A.2d 178, 182 (D.C. 2008) (citing *Ammerman v. D.C. Rental Accommodations Comm'n*, 375 A.2d 1060, 1063 (D.C. 1977) (administrative tribunals "must be, and are, given discretion in the procedural decisions made in carrying out their statutory mandate."); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("the [Federal Communications] Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.")).