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).[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, 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.

[1] 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:[2]

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 26l; 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.

[2] 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 wail 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 widows [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.

Final Order at 4-11, R. at 114-121

The Analysis and Conclusions of Law in the Final Order were as follows:[3]

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. . . ." *Carrollsburg 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

[3] 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.").

> own—or, more precisely, those of society. Courts today are having difficulty giving a litigant one day in court. To allow that litigant a second day is a luxury that cannot be afforded.... As res judicata belongs to courts as well as to litigants, even a party's forfeiture of the right to assert it ... does not destroy a court's ability to consider the issue *sua sponte*.

Stanton v. D.C. Court of Appeals, 127 F.3d 72, 77 (1997) (citations and internal quotations omitted); *But see Wilson v. Holt Graphic Arts, Inc.,* 981 A.2d 616, 618 (DC 2009) *(quoting [sic] Group Health Assn v Reyes,* 672 A.2d 74, 75 (DC 1996*)* ("[A] party that did not 'amend, or seek leave to amend, its answer to plead res judicata before trial as an affirmative defense' [has] waived that argument."')]

Although the Housing Provider did not plead *res judicata* until the last possible moment, therefore arguably waiving the issue, it is within my discretion to raise and consider it. Admittedly, the judicial economy argument holds little sway given that I held a complete evidentiary hearing, but both parties had a full opportunity to brief the *res judicata* issue, and it is in the best interest of the fair adjudication of this case for me to consider it.

I take them [Consent Judgment Praecipe (CJP) and transcript] into account to establish three facts. First, that each case was, in fact, based on non-payment of rent, rather than some other lease violation. The testimony from both parties at the hearing established as much; the CJP and the transcript merely confirm that testimony. While Petitioner is correct in his argument that the judgments could not have a *res judicata* effect if they were not non-payment of rent cases, the ALJ did not see the efficacy or justice in arguing from hypotheticals when the publicly recorded fact is easily accessible. Second, the transcript and CJP establish definitively what months were at issue in each Landlord/Tenant case. The months resolved by the Landlord/Tenant cases has a direct bearing on my ruling. Again, these are public, judicially recognizable facts. Third, that in neither case did the tenant raise the issue of housing code violations. If Petitioner had, in fact, raised housing code violations defenses in the Superior Court cases, the argument for *res judicata* barring those defenses here grows considerably stronger. My finding that he did not raise those defenses makes it a much closer question.

2. *Res Judicata* Effect of Prior Judgments

Housing Provider urges that because Tenant did not raise claims of reduction of services and facilities or substantial housing code violations in the [sic] either of the Landlord and Tenant actions, he is barred under the doctrine of *res judicata* in the tenant petition here. *See Russell v. Smithy Braedon Prop. Co.,* 1995 D.C. Rental Hous. Comm'n LEXIS 116, TP 22,361 (RHC July 20, 1995*)* at 11 (barring relitigation of identical claims between the same parties or those in privity with them, after settlement or final judgment); *Brewster v. Suitland Parkway Overlook Tenant Ass'n,* 1993 D.C. Rental Hous. Comm'n LEXIS 201, TP 22,265 (RHC Oct. 22, 1993) at 3 (barring tenant from bringing second tenant petition involving the same parties as the earlier tenant petition, alleging identical violations involving same period and where tenant entered into settlement that resulted in the dismissal of the earlier

petition); *Cromwell v. County of Sac,* 94 U.S. 351, 24 L.Ed. 195, 352-353 (1878) (a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented).] Essentially, the argument is that the prior judgments - and I focus on the November 18, 2013 [sic] Consent Judgment Praecipe (CJP) since it is the most recent - establish that the tenant agreed to the amount of rent alleged by the landlord at the time of the judgment. Thus, the tenant cannot later claim through this tenant petition that that amount was incorrect. The CJP form also specifically includes a section to list repairs, a section that was left blank. But the tenant now alleges that repairs were needed.

There are three elements that must be considered and satisfied to successfully invoke *res judicata* as an affirmative defense: (1) whether the claim was adjudicated finally in the first action; (2) whether the present claim is the same claim as the claim which was raised or which might have been raised in the prior proceeding; and (3) whether the party against whom the plea is asserted was a party or in privity with a party in the first claim. *Washington Medical Ctr., Inc., v. Holle,* 573 A.2d 1269, 1280-81 (D.C. 1990).

a. Privity of parties

The third element can easily be disposed of, as the parties in each Superior Court case were identical to the parties involved in this matter. The first two elements, however, are more complicated.

b. Finality of judgment

As to the first element, the Rental Housing Commission (RHC) has held that a judgment entered in default in the Landlord and Tenant court constitutes a final judgment on the merits and can serve as the basis for application of the doctrine of *res judicata.*

Here, we have something even more powerful than a default judgment: a Consent Judgment Praecipe signed by both parties, and approved by the Superior Court. A consent judgment is an order of the court, 'indistinguishable in its legal effect from any other court order, and therefore subject to enforcement like any other court order.' " *Moore v. Jones,* 542 A.2d 1253, 1254 (D.C. 1988) (quoting *Padgett v. Padgett,* 472 A.2d 849, 852 (D.C. 1984)) (other citation omitted). It is also a contract that "should generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake." *Camalier & Buckley. Inc. v. Sandoz & Lamberton, Inc.,* 667 A.2d 822, 825 (D.C. 1995) (quoting *Moore,* 542 A.2d at 1254); *see [sic]also Fields v. McPherson,* 756 A.2d 420, 424 (D.C. 2000) (recognizing that only the most compelling reasons, such as fraud, duress or mistake, will justify modification of a voluntary settlement agreement) (citations omitted).

Indeed, Tenant argues that the CJP *should* be interpreted as a contract, within its four corners. I could not agree more. It is a contract that binds both parties - a

contract that the tenant chose to enter into rather than have an evidentiary hearing in court. That was his right. But he must live with the consequences. The Tenant's signing of the agreement may not have indicated his intentions in many respects, but it clearly established that he intended to pay the amounts listed on the document and that he agreed that he owed those amounts. In short, by agreeing to the Consent Judgment Praecipe on November 18, 2013, the Tenant agreed that his rent was the level the Housing Provider alleged in the Complaint, and that he owed that amount. *See* Respondent's Brief, Exh. 1. He also waived his right to claim that he owed less or that he had defenses to the amounts listed. *Washington Med. Ctr., Inc., v. Holle,* 573 A.2d 1269, 1280-81 (D.C. 1990).

They [tenants] are frequently unrepresented and ignorant of possible defenses or affirmative claims. There are indeed many pressures outside of the basic parameters of justice and fair play that come into consideration when a tenant signs a CJP. But, lacking any DC Court of Appeals decision to the contrary, I must conclude that lack of representation and ignorance of the law are not factors in deciding if a CJP (or a judgment by confession) is a true judgment. A CJP stands alone with whatever legal force it has, regardless of the circumstances that led to its existence. If there was reason to void such a judgment - due to lack of capacity or some other unfair circumstance - it is for the tenant to challenge that judgment in Superior Court. I do not have the authority to vacate or discount that judgment. I can only interpret its legal effect. The CJP is a valid and final judgment as to the rent level and rents owed at the time it was entered, thus satisfying the first element of *res judicata.*

c. Same claim or claim that could have been raised

The last element to consider then, for *res judicata* to apply, is whether the claims could have been brought in the prior litigation. Therefore, the analysis of whether *res judicata* applies to bar all of the claims raised in the Tenant Petition must begin by addressing the question of whether these claims could have been brought in the in [sic] the Landlord and Tenant Branch. The essence of the Tenant Petition is that the tenant is challenging the amount of rent he should have had to pay on two different fronts: (1) that the Housing Provider took illegal increases in rent based on the allegation that the unit was not in substantial compliance with the housing code when the increases were taken; and (2) that those substantial housing code violations were reductions in services and facilities that reduced the value of his rental unit, thus the rent he should have paid. Each claim necessitates a different analysis with respect to the *res judicata* effect of the prior judgments.

i. Reduction in services and facilities

The Tenant could have raised any counterclaims or defenses regarding housing code violations when he appeared in the Landlord and Tenant Branch on November 18, 2013. There was no legal or procedural barrier to the Tenant alleging that he did not owe the amount of rent that the Landlord was asking for in that lawsuit due to housing code violations or for any other reason. He did not. Instead, the Tenant

agreed through a judgment that he owed the amount of rent requested. Thus any later claims for rent reduction based on housing code violations, such as those brought here, are barred by *res judicata.* The Tenant may only raise housing code violations that existed from November 19, 2013, forward. This result, of course, works both ways. The landlord is not permitted to later claim that it was actually owed more money than the tenant agreed to pay once it signs a legal agreement - a CJP - stating what that amount is.

ii. Illegal rent increases

The question of whether the doctrine of *res judicata* precludes the Tenant from arguing that the rent increases taken in 2011, 2012 and 2013 were illegal, thus entitling him to a rent rollback and refund, is a much harder one. We must first look to another doctrine, that of "primary jurisdiction." The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies: "Primary jurisdiction comes into play whenever enforcement of the claim requires the resolution of issues, which under a regulatory scheme, have been placed within the special competence of an administrative body." *Bedell v. Clark* TP24,979 (RI-IC Apr. 29, 2003) at 6 *(citing [sic] Fisher v. Peters,* TP 23,261 (RHC Sept. *5,* 1996)). "Under the doctrine of primary jurisdiction, when a claim is originally cognizable in the courts but requires resolution of an issue within the special competence of an administrative agency, the party must first resort to the agency, before he or she may sue for an adjudication." *Drayton, infra,* 462 A.2d at 1118 (citing 2 Am. Jur. 2d *Administrative Law,* § 788 (1962)).

The Rental Housing Act confers primary jurisdiction upon this administrative court over the validity of rent levels and increases. *Kennedy v. DC Rental Hous. Comm 'n,* 709 A.2d 94 n.1 (DC 1998); *Drayton v. Porestsky Mgmt., Inc.,* 461 A.2d 1115, 1120 (DC 1983). As a result, the Landlord and Tenant Branch of the Superior Court may not undertake to adjudicate the validity of a rent increase because it falls solely within the jurisdiction of this administrative court.

Thus, the tenant could not, technically, raise the allegedly illegal rent increases as a defense to the non-payment of rent suit in Superior Court. So, would argue the Tenant, *res judicata* cannot apply. The question, however, is harder than that. There is still the issue that the Tenant agreed, through a valid judgment, that he owed the amount of rent requested. That is a final judgment. Now he wishes to, through another venue, challenge the very rent he agreed that he owed. An important purpose of the doctrine of *res judicata* is to create finality. *See Clement v. District of Columbia Dep't of Human Servs.,* 629 A.2d 1215, 1218 (D.C. 1993) ("A fundamental principle of litigation that has

been stressed in a variety of contexts is the importance of finality."). If the Tenant is permitted to go forward on his illegal rent level claims, the Housing Provider gained no security when it signed a CJP with the Tenant agreeing on the rent owed and the rent level. Indeed, the CJP actually acknowledges an increase in rent from $708 in October 2013 to $738 in November 2013. *See* Respondent's Brief, Exh. 1. Thus, the landlord had every reason to believe that the matters of the level of rent and amount of back rent owed were resolved once and for all when it signed the CJP. This is true despite the fact that the tenant was technically barred from challenging the rent level in Superior Court. The reason lies in the way the law has developed to accommodate the tension between the jurisdictions of Superior Court and this administrative court.

Although the Tenant was barred from directly bringing a challenge to the rent levels in Superior Court, a clear and simple mechanism had been developed through case law to prevent a Tenant from losing his ability to raise such a challenge while a Landlord and Tenant case progresses: the *Drayton* stay. *Drayton v. Poretsky Mgmt. Inc.,* 462 A.2d 1115 (D.C. 1983). In *Drayton,* the DC Court of Appeals held that "[a]pplication of the doctrine of primary jurisdiction requires that when there is pending before the [Rent] Administrator [now OAH] or the [Rental Housing Commission] RHC a challenge to a rent increase that bears upon the amount of rent owed by a tenant defending a possessory action brought for nonpayment of rent, the [Landlord & Tenant] Judge should stay the action to await the ruling of the Administrator or, if an appeal is taken to the RHC, then of that body." *Id.* at 1120 (footnote omitted).

Given the ruling in *Drayton, if* the tenant here wanted to challenge the rent level and increase he agreed [sic] pay in the Consent Judgment *Praecipe [sic],* he was obligated to do so through a Tenant Petition filed at the Office of Administrative Hearings. And he was obligated to do that *prior to* legally agreeing to the rent level, not months later after the landlord relied on what seemed to be a final judgment regarding the rent level. Had the tenant timely flied such a petition, the Superior Court would have been bound by *Drayton* to stay the Landlord and Tenant action, and the matter of the proper rent level could have been addressed by the Office of Administrative Hearings (OAH), where it properly belonged. The tenant failed to file such a petition. By failing to challenge the rent level in the proper forum at the proper time, and by agreeing to a judgment that clearly set the rent level at the time and in the immediate future, the tenant waived his right to challenge that rent level at this time in this forum.

I thus conclude that the claims that the Housing Provider illegally raised the rent in 2011, 2012, and 2013 are the same claims that could have been brought at OAH, claims that, with the filing of a simple motion, would have caused Superior Court to stay any further action in Landlord/Tenant Court regarding the rent level. Those claims are thus barred by the doctrine of *res judicata* and cannot be relitigated in this case. Thus, no claims of illegal rent increases remain for me to decide.

B. Were Rent Increases Taken When the Property was not in Substantial Compliance with the Housing Code?

Under the Act, a housing provider may not increase the rent for any rental unit unless the rental unit is in substantial compliance with the Housing Regulations. DC Official Code § 42-3502.08(a)(1); 14 DCMR § 4205.5(a). As discussed above, the doctrine of *res judicata* bars the Tenant from arguing that the rent increases were taken illegally in 2011, 2012, and 2013, as all of those increases were taken prior to November 18, 2013, when the Tenant agreed to the level and amount of rent, and failed to alleged [sic] any housing code violations.

C. Tenant's Allegations of Reductions in Services and Facilities

The assessment of a tenant's claims for reductions of services or facilities requires a three-part analysis. *Karpinski v. Evolve Mgmt [sic],* RH-TP-09-29,590 (RHC Aug. 19, 2014); *Kuratu v. Ahmed, Inc.,* RH-TP-07-28,985 (RHC Dec. 27, 2010). First, the tenant must establish that a "related" service or facility was "substantially" reduced. D.C. Official Code § 42-3509.01(a). Although the Act does not state what constitutes a substantial reduction in services, the District of Columbia Court of Appeals has applied the Act's definition of a "substantial violation" as one measure of a substantial reduction in services. This requires a housing condition in violation of a statute or regulation that "may endanger or materially impair the health and safety of any tenant or person occupying the property." *Parreco v. D.C. Rental Hous. Comm 'n,* 885 A.2d at 337 *(quoting* [sic] D.C. Official Code § 42-3501.03(35)). The Rental Housing Commission has held that a determination of whether a reduction is "substantial" is "a function of the 'degree or loss'. . . substantiated by the length of time that the tenants were without the service." *Karpinski v. Evolve Mgmt [sic],* RH-TP-09-29,590 at 19 *(quoting [sic] Newton v. Hope,* TP 27,034 (RHC May 29, 2002)). The regulations also provide a non-exhaustive list of the types of housing code violations that would be deemed substantial. 14 DCMR. 4216.2(u). The list also includes a "catch-all" clause. Thus, a "[l]arge number of housing code violations, each of which may be either substantial or non-substantial, the aggregate of which is substantial, because of the number of violations" could be considered "substantial." 14 DCMR 4216.2(u).

Second, the tenant must present "competent evidence of the existence, duration, and severity of the reduced services." *Jonathan Woodner Co. v. Enobakhare,* TP 27,730 (RHC Feb. 3, 2005) at 11 (citations omitted).

Finally, a tenant must show that the housing provider had knowledge of the alleged reduction in services and that the tenant gave the housing provider reasonable access to the premises to make repairs. *Id.* If a tenant fails to prove any of the three elements, the entire claim will fail. *Karpinski v. Evolve Mgmt [sic],* RH-TP-09-29,590 at 19; *Kuratu v. Ahmed, Inc.,* RH-TP-0728,985 at 24.

Here, I fully credit the uncontroverted testimony of the Tenant and of Harold Jones establishing that numerous housing code violations existed in the unit from at least July 29, 2011, and continuing through at least July of 2014. Those violations included peeling paint in the kitchen, burned out electric sockets, plumbing problems, malfunctioning windows, broken and missing floor tiles, a hole in the wall, and vermin infestation. Any or all of these, especially in combination, were a threat to the health, safety and welfare of the Tenant. The broken floors are a tripping and safety hazard; large swaths of falling paint are not conducive to the health and welfare of the tenant, even if not lead-based; the lack of ventilation and rodent and insect infestation are health hazards; electric outlets that spark and burn out are clear safety hazards.

The mere existence of these violations, however, is not enough to establish that the Tenant is entitled to a rent reduction. The Housing Provider needs to have been on notice of the violations in order for the Tenant to prevail on this point. Equally uncontroverted was the testimony that Mr. Mitchell did not report any of these problems to any representative of the Housing Provider. Both he and Mr. Jones testified to that fact, and Ms. Butler corroborated that the Housing Provider received virtually no complaints from the Tenant over the years in question. That this failure to report might have been due to the Tenant's fear of repercussions from the Housing Provider is of no moment. The fact is that the Housing Provider cannot address repair issues if it does not know about them.

The inquiry, though, does not end there. The fact that the Tenant did not report the violations to the Housing Provider does not necessarily lead to the conclusion that the Housing Provider was ignorant of the violations. I fully credit Ms. Butler's testimony that the Housing Provider inspected the apartment in the summer of 2011. She also testified convincingly that representatives of the Housing Provider were in Tenant's unit each year to change the filters and batteries, and conduct water inspections, and she made it very clear that if a Housing Provider employee or contractor notices a problem, that person is required to report it. Once reported, the Housing Provider fixes any problem. Finally, Ms. Butler testified that, when she personally saw the interior of the unit in July 2014, it was "horrific." I do not conclude that when Ms. Butler used that word to describe the unit, she was referring solely to the personal belongings Mr. Mitchell had strewn about the unit. I conclude that she was referring to the overall condition of the unit, including the obvious housing code violations.

Given the Housing Provider's representatives' repeated presence inside the unit over the years in question, I find that the Housing Provider knew or should have known about the following violations: the peeling and falling paint in the kitchen; the peeling and falling

paint in the bathroom; the missing floor parts in the kitchen; the steady running of the bathroom sink faucet; the rotting wood and peeling paint around the windows throughout the unit. Individually, and in combination, I conclude that these violations are a threat to the health, safety and welfare of the tenant. As discussed above, the existence of these violations establishes that the unit was not in substantial compliance with the housing code continuously from at least July, 2011, until at least July, 2014.

Finally, the Housing Provider also argued that, even if it had notice of the housing code violations in question, it was unable to effectuate repairs because it could not get access to the areas in need of repair. This argument fails for a number of reasons. Perhaps most telling is the undisputed fact that the Housing Provider has now completed virtually all of the repairs. Both the Tenant and Ms. Butler testified that the repairs were completed sometime shortly after July 2014, when Ms. Butler, herself, entered the unit. There was no testimony that this process was thwarted in any way by the Tenant, or that workers could not access the areas they needed access to. Nothing in the record establishes that the Tenant declined to let workers in the unit. In fact, the testimony established that the Housing Provider had key to the unit and was permitted access with prior notice to the tenant.

The photographs of the unit admitted into evidence also do not support a conclusion that Tenant prevented the repairs from being completed. While RX 250-253 depict a less than ideal amount and storage of belongings within the unit, none of the exhibits show that workers' access to the areas in need of repair was blocked. Indeed, Respondent's Exhibit 254 does show a few cans on the kitchen counter; it also shows easily accessible, broken floor tiles in the background. There are no photographs of the bathroom that show blocked access, no evidence of clutter around the broken window frames.

In sum, taking all the evidence into consideration, I conclude that the Tenant was not responsible for preventing the repairs from being completed in the unit, and that the Housing Provider knew or should have known of the housing code violations.

Here, as discussed above, the apartment contained a number of violations, the combination of which was substantial, of which the Housing Provider knew or should have known. To review, the Housing Provider knew or should have known about the following violations: the peeling and falling paint in the kitchen; the peeling and falling paint in the bathroom; the missing floor parts in the kitchen; the steady running of the bathroom sink faucet; the rotting wood and peeling paint around the windows throughout the unit. Individually, and in combination, I conclude that these violations are a threat to the health, safety and welfare of the tenant. The testimony and evidence supports the conclusion that each of these conditions existed continuously from at least July, 2011, until at least July, 2014. However, due to the *res judicata* issues noted above, the tenant is only entitled to an abatement from November 19, 2013 to July 22, 2014.

The problems with the kitchen tiles were a safety hazard, unaesthetic, and relatively serious compared to the other violations listed herein. I assess them to merit a $50 per month abatement in rent. The paint falling in sheets off of the walls in the kitchen and bathroom are safety hazards, unaesthetic, arguably "horrific," and the most serious of the violations. I value the violation at $80 per month. The running sink and tub in the bathroom were noisy and could lead to mold and unpleasant, unhealthful conditions. I value the sink at $15 per month and the tub at $15 per month. The peeling paint around the window frames was a minor violation. I value it at $5 per month. The total abatement is thus $165 per month from November 19, 2015, to July 22, 2014, the date of the filing of this petition. The total abatement of rent is $1,332.60.

The rules implementing the Rental Housing Act provide for the award of interest on rent refunds calculated from the date of the violation to the date of the issuance of the Final Order. 14 DCMR § 3826.2. The interest rate imposed is the judgment interest rate used by the Superior Court of the District of Columbia on the date of issuance of the decision. *See* 14 DCMR § 3826.3; *Joseph v. Heidary,* TP 27,136 (RHC July 29, 2003); *Marshall v. DC Rental Hous. Comm 'n,* 533 A.2d 1271, 1278 (DC 1987). The DC Superior Court interest rate is currently 2% per annum. The interest on this judgment is calculated in Appendix B, Chart II, as totaling $35.08.

D. Willfulness, Malice, or Bad Faith

The Rental Housing Act permits an award of treble damages in circumstances where a housing provider has acted in bad faith. DC Official Code § 42-3509.01(a). A finding of bad faith requires that the housing provider acted out of "some interested or sinister motive" involving "the conscious doing of a wrong because of dishonest motive or moral obliquity." *Third Jones Corp. v. Young,* TP 20,300 (RHC Mar. 22, 1990) at 9. The record here does not reveal such a motive or consciousness of wrongdoing concerning Housing Provider's rent increases or failure to repair the unit. There was no evidence submitted that would support such a claim. The Housing Provider's rent increases appear to be no more than an attempt to lease the property for what Housing Provider considered to be a fair market value. There is no evidence that Housing Provider knew that the rent increases were illegal at the time they were implemented or imposed them out of any dishonest motive.

There is also no evidence that the Housing Provider did not make repairs due to malicious motives. Although the Housing Provider knew or should have known about the severe housing code violations, the tenant did not complain about them, and any failure to repair was likely due to poor communication or not prioritizing tenant's unit.

Final Order at 11-31, R. at 94-114

On August 15, 2015, the Tenant filed a Notice of Appeal and on August 20, 2015, an Amended Notice of Appeal. The Tenant filed his brief on April 5, 2016, and the Housing Provider

filed its brief on April 21, 2016. The hearing was scheduled for April 26, 2016. At the hearing the parties were offered the opportunity for mediation of their issues. The parties consented to participating in mediation and the hearing was concluded. The parties signed a Settlement Agreement on May 5, 2016. On June 1, 2016, the Tenant/Appellant filed a Motion to Dismiss with prejudice.[4]

II. DISCUSSION

In Proctor v. District of Columbia Rental Hous. Comm'n, 484 A.2d 542 (D.C. 1984), the District of Columbia Court of Appeals (DCCA) held that the Rental Housing Commission must consider any settlement agreement which the parties before the Commission enter in an attempt to resolve a dispute under the Act. The Commission's regulation 14 DCMR § 3824, provides the following with regards to the withdrawal of an appeal before the Commission:

> 3824.1 An appellant may file a motion to withdraw an appeal pending before the Commission.
>
> 3824.2 The Commission shall review all motions to withdraw to ensure that the interests of all parties are protected.

14 DCMR § 3824. *See*, Blackwell v. Dudley Pro Realty, LLC, RH-TP-07-29,075 (RHC May 2008) (finding motion for withdrawal of appeal was in the interest of all parties where all parties agreed to the dismissal of the appeal); Assalaam v. Schauer, TP 27,915 (RHC July 12, 2004) (granting motion to withdraw appeal were parties' settlement agreement demonstrated that the interests of all parties were protected by "providing for repairs in the Tenant's rental unit and the disbursement of the funds in

[4] The Commission in its discretion will interpret the Motion to Dismiss filed by the Tenant/Appellant as a Motion to Withdraw. The Commission will refer to the motion as Motion to Dismiss (Withdraw). *See* 14 DCMR § 3824.

the registry of the court to both parties"). The Commission has consistently stated that settlement of litigation is to be encouraged. *See*, KMG Mgmt., LLC, v. Richardson, RH-TP-12-30,230 (RHC Mar. 27, 2014); Hernandez v. Gleason, TP 27,567 (RHC March 26, 2004); Bartelle v. Washington Apts., TP 27,617 (RHC Jan. 26, 2004); Kellogg v. Dolan, TP 27,550 (RHC Feb. 20, 2003).

In Proctor, 484 A.2d 542 (D.C. 1984), the DCCA established the following five (5) factors for the Commission to use in evaluating settlement agreements:

1. The extent to which the settlement enjoys support among affected tenants;
2. Its potential for finally resolving the dispute;
3. The fairness of the proposal to all affected persons;
4. The saving of litigation costs to the parties; and
5. The difficulty of arriving at a prompt, final evaluation of the merits, given the complexity of law and the delays inherent in the administrative and judicial processes.

The Commission's review of the Settlement Agreement in this case indicates the following:

1. The Tenant/Appellant participated in the settlement negotiations and signed the Settlement Agreement. The Tenant/Appellant also filed a Motion to Dismiss (Withdraw) with prejudice to rescind his Notice of Appeal.

2. The Settlement Agreement fully resolves the parties' disputes. The Housing Provider paid the Tenant an amount in full settlement of outstanding claims. The Tenant's rent will remain the same for the next twenty-four months and the Tenant will pay his rent to the Housing Provider on time. The Housing Provider will waive all late fees currently owed and due. The Tenant agrees to notify the Housing Provider of housing code violation in writing and to allow access to his unit in order to make necessary repairs.

3. The Settlement Agreement is fair to both parties in that the Tenant agreed to dismiss his claims in the Tenant Petition RH-TP-14-30,552, and both parties dismissed their actions in the Landlord and Tenant Branch of the Superior

Court of the District of Columbia (2014 LTB 14002). The Housing Provider also agreed to have the Tenant/Appellant's balance set at zero in the Rental Ledger in this proceeding and to have all funds in the Court registry released to the Tenant/Appellant.

4. This Settlement Agreement dismisses the pending appeal and Landlord and Tenant Branch proceedings, thus saving any additional litigation costs

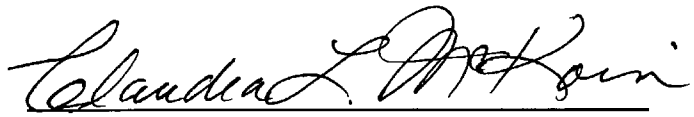
5. By reaching a settlement the parties have avoided the difficulties and delays inherent in the administrative and judicial processes by arriving at a prompt, fair and complete adjudication of the merits of each party's claims.

The Commission has found no evidence in the record to indicate that the Settlement Agreement was not knowingly and voluntarily negotiated in good faith. Based on the foregoing the Commission determines that the interests of all the parties are protected by the filing of the Motion to Dismiss.

III. CONCLUSION

For the foregoing reasons the Commission determines that the interests of each party in this appeal are protected by the Settlement Agreement, and that the withdrawal of the appeal by mutual consent of the parties is consistent with the purposes of and provisions of the Act. The Commission, therefore, grants the Housing Provider's Motion to Dismiss (Withdraw) the Notice of Appeal and dismisses the Notice with prejudice.

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 **ORDER GRANTING MOTION TO DISMISS APPEAL** in RH-TP-14-30,552 was mailed, postage prepaid, by first class U.S. mail on this **3rd day** of **June, 2016,** to:

Robert Pfeferman
1530 First Street, NW
Washington, DC 20001

Timothy Cole
Cole, Goodson and Associates, LLC
4350 East West Highway, #1150
Bethesda, MD 20814

LaTonya Miles
Clerk of Court
(202) 442-8949