

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-14-30,604

In re: 39 P Street, SW, #10

Ward Six (6)

GLENN A. DAVIS

Tenant/Appellant

v.

TEL-COURT COOPERATIVE, INC.

Housing Provider/Appellee

FINAL DECISION AND ORDER

February 18, 2016

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD).¹ The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (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.

¹ 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, D.C. 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 by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

I. PROCEDURAL HISTORY

On November 28, 2014, Tenant/Appellant Glenn Davis (Mr. Davis) filed Tenant Petition RH-TP-14-30,604 (Tenant Petition) with RAD, against Tel-Court Cooperative Inc. (Housing Provider), regarding the housing accommodation located at 39 P Street, S.W., Unit #10 (Housing Accommodation). *See* Tenant Petition at 1-2; Record for RH-TP-14-30,604 (R.) at 21-22.

On January 6, 2015, the Housing Provider filed a motion to dismiss the Tenant Petition (Motion to Dismiss), asserting that the Housing Accommodation is exempt from the rent stabilization provisions of the Act because it is federally subsidized. Motion to Dismiss at 1; R. at 34. A hearing was held on the Motion to Dismiss on February 12, 2015.

The ALJ issued a final order on April 23, 2015: Glenn A. Davis v. Tel-Court Cooperative, Inc., RH-TP-14-30,604 (OAH Apr. 23, 2015) (Final Order); R. at 47-57. The ALJ made the following findings of fact in the Final Order:²

The procedural history of this case is clearly set forth in the Superior court orders which found as follows:

1. The "Housing Accommodation" in question is located at 39 P Street, NW [sic], unit 10. The property was occupied by Mr. Davis's mother Irene Davis until her death in 2011. Glenn Davis is the Co-Personal Representative of his mother's estate, along with his sister Ms. Anderson. Mr. Davis resides in Ohio and does not live at the Housing Accommodation.
2. The Housing Accommodation is a low income cooperative that is owned by Tel-Court Cooperative, Association, Inc.
3. In the Probate case, filed on November 2, 2011, Mr. Davis alleged that his mother was the sole owner of Tel-Court Cooperative and that her estate has an interest in the property. Mr. Davis and Ms. Anderson were appointed Co-Personal Representatives on November 9, 2011. The Probate Court painstakingly analyzed the cooperative by-laws and purchasing documents. The probate case remains pending, but several interim orders have been issued deciding certain issues. *In Re: Estate of Irene Davis*, 2011-SEB-520. Based on the below findings, the Probate Court determined that the unit in question

² The findings of fact are recited herein using the language of the ALJ in the Final Order.

is a cooperative unit, that Irene Davis was a cooperative member, that the estate retained an interest in the unit, and that the value of that interest needed to be determined:

- a. In 1979, Irene Davis and her husband deeded their interest in the unit to Tel-Court for the sum of \$500, the initial subscription fee: "They were paid \$9,000 for their deed and afforded the opportunity to join the cooperative in exchange for the payment of a \$500 subscription fee. They paid the subscription fee and became members of the cooperative." *In Re: Estate of Irene Davis*, 2011-SEB-520, *Order*, March 1, 2013 at 4. The \$500 was part of initial subscription fees totaling \$13,000 used to secure a loan from Federal Savings and Loan Association. The prospectus for the cooperative reflects that the loan was to be paid from subscription fees of the members. *Id.*
 - b. Superior Court Judge Reid-Winston, found that at the time of Ms. Davis's death, her interest in the cooperative had not been terminated. Following the death of Irene Davis, her daughter (Ms. Anderson), acting as the mother's attorney in fact, gave Housing Provider a notice to vacate by April 30, 2011. However, the unit was never vacated and either Ms. Anderson or Mr. Davis continued to pay the cooperative carrying charges. In an order dated March 1, 2013, Judge Reid-Winston found that Housing Provider was estopped from relying on the notice to vacate as a basis for its claim that the Estate has no interest in the unit because Housing Provider had not at that time taken steps to enforce the notice to vacate when Ms. Anderson did not vacate by April 30, 2011. *Id.*
 - c. Judge Reid-Winston found that the terms of the Tel-Court by-laws permitted a member's membership in the cooperative to pass by will or intestate succession under certain circumstances. Mr. Davis provided Housing Provider with notice of his intent to assume the terms of the subscription and occupancy agreements and to become a cooperative member.
 - d. Housing Provider did not respond to Mr. Davis' inquiries to determine the outstanding balance due on the carrying charges, but informed Mr. Davis that he was not a cooperative member. Because Housing Provider did not comply with the by-law's requirements for transferring ownership upon the death of a member and withheld information from Mr. Davis, Judge Reid-Winston found that the estate retained an interest in the unit and determined the valuation method for the unit's worth.
4. On May 7, 2012, Housing Provider filed a complaint for possession of the rental unit in Superior Court for failure to pay carrying charges. *Tel-Court*

Cooperative, Inc. v. Estate of Irene Davis, 2012-LTB-1185. On March 19, 2013, Mr. Davis filed a Plea of Title and the case was certified to the Civil Actions Branch and docketed as a complaint for real property, *Tel-Court Cooperative, Inc. v. Estate of Irene Davis*, 2013 CA 3001R (RP).

5. Housing Provider filed a motion to strike plea of title on the grounds that it was barred by the doctrines of *res judicata* and *collateral estoppel* stemming from Judge Reid-Winston's March 1, 2013, Order in the probate case. By order dated November 21, 2013, Judge Robert Okun granted Housing Provider's motion, but on other grounds. Judge Okun held that the March 1, 2013, Order was not a final order and therefore did not have any *res judicata* effect. However, he granted the motion to dismiss holding that "as a member of a cooperative development, Defendant [Mr. Davis] cannot establish title in the property at issue as a matter of law." *Tel-Court Cooperative, Inc. v. Estate of Irene Davis*, 2013 CA 3001R (RP), Order, 11/21/13. The court held that a "cooperative property owner holds shares of stock in the cooperative corporation that owns the apartment; the owner does not have a fee interest in the apartment where he or she resides." *Id.* at 3.
6. Therefore the civil action was dismissed and the LTB case was reinstated and remains pending. In orders issued by the presiding LTB Judge, he has made it clear that the only issue in the LTB case is the amount of the carrying charges and Mr. Davis' counterclaims for recoupment and set off, including his defense that the assessment fees exceeded the fees authorized by the bylaws.

Final Order at 3-6; R. at 52-55 (footnotes omitted). The ALJ made the following conclusions of law in the Final Order:³

1. Currently pending is Housing Provider's motion to dismiss the tenant petition for lack of jurisdiction. The parties attended a hearing in this case on February 11, 2015. At that time, Mr. Davis made arguments that his mother was not a cooperative owner in that her signature was somehow fraudulently obtained on the 1979 documents and that neither his mother nor his father were ever recipients of a federal or district subsidy, despite Housing Provider's assertions. Mr. Davis attempted to raise a similar fraud argument in the civil action in which the court held that he was barred by the statute of limitations from alleging fraud that occurred in 1979. Although the tenant petition checks most of the available allegations, the complaint details reiterate the same claims made in the three cases pending in Superior Court. Mr. Davis seeks a ruling from some court that he is entitled to ownership or possession of his mother's unit. This administrative court has no jurisdiction to determine title or right to ownership of the unit in question.

³ The conclusions of law are recited herein using the language of the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

2. The Office of Administrative Hearings has limited jurisdiction to adjudicate complaints that arise under the Rental Housing Act of 1985. OAH has primary jurisdiction over rent increases and concurrent jurisdiction with D.C. Superior Court over allegations of reductions in services and facilities, retaliation, notices to vacate, and security deposits. Remedies are limited to rent reductions and civil fines in the event of a willful violation. OAH does not have jurisdiction over Mr. Davis's claims for three reasons: (1) Mr. Davis is not and cannot be a "tenant" as defined in the Rental Housing Act; (2) the Housing Accommodation is a cooperative that is exempt from the rent stabilization provisions of the Rental Housing Act; and (3) Mr. Davis, as the personal representative of his mother, has no standing to challenge the exempt status of the Housing Accommodation.
3. In order to bring a tenant petition under the Rental Housing Act, a complainant must be a "tenant." The Rental Housing Act defines a "tenant" as a "tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." Mr. Davis does not reside in the Housing Accommodation. Although Mr. Davis asserts that he is entitled to possession or occupancy of the rental unit, he is unable at this time to establish that he is entitled to possession or occupancy as the personal representative of his mother's estate. Moreover, I am without jurisdiction to determine whether he is entitled to possession or occupancy. That issue will ultimately be determined by the Probate Court and the Landlord/Tenant court.
4. However, the Probate [C]ourt has already determined that the [sic] Mr. Davis's mother was a cooperative member and that the estate has an interest in the unit. Whether or not that interest includes the right to possession by Mr. Davis has not yet been determined. At best, the Superior Court could determine that Mr. Davis is entitled to possession or occupancy of the cooperative unit and that the unit will transfer to him as a cooperative member. A cooperative member, however, is not a tenant. Although a member of a cooperative is like a tenant in some respects, the member owns shares in the cooperative, making the member a co-owner of the property along with the other members and there is not landlord/tenant relationship. The District of Columbia Court of Appeals has held that owners of cooperative apartments are not tenants under the Rental Housing Act because their units are not "rental units" that are "rented or offered for rent" by the cooperative. *Snowden v. Benning Heights Coop., Inc.*, 557 A.2d 151, 156 (D.C. 1989) (citing current D.C. Official Code § 42-35802.03 (33) and (28)). If Mr. Davis prevails in his probate and LTB cases, he will become, at best, a proprietary lease holder/cooperative member. Mr. Davis will not however, be a tenant.

5. In addition, the Rental Housing Act specifically exempts certain units including units that are owned by a cooperative association, whose proprietary leases are owned by no more than four members of the cooperative association. D.C. Official Code § 42-3502.05(a)(5). The housing regulations specifically exempt from the rent stabilization program of the Act “cooperative units occupied by cooperative members.” 14 DCMR [§] 4107.1. Unlike many of the Act’s other exemptions, such as those for small landlords, D.C. Official Code § 42-3502.05(a)(3), 14 DCMR [§] 4106.12; or for buildings constructed after 1975, D.C. Official Code § 42-3502.05(a)(2), 14 DCMR [§] 4106.11, the Regulations do not require registration of exemption claims for cooperatives. The exemption for cooperatives is contained in 14 DCMR [§] 4107, which only requires filing of a registration or claim of exemption for specific types of units, such as units rented from condominium owners. 14 DCMR [§] 4107.4(b). *See Fisher v. Peters*, TP 29,884 (RHC Sept. 5, 1996), 1996 D.C. Rental Housing Comm. LEXIS 216, and *Jerome v. Foley Prop.*, OAH Case No. 2010-DHCD-00092 (TP 29,884) (Final Order Oct. 31, 2011), D.C. Off. Adj. Hear. LEXIS 31, 6. By contrast, the exemptions governed by 14 DCMR [§] 4106 require the housing provider to file a Registration/Claim of Exemption Form before the housing provider can claim any of the exemptions of that section. 14 DCMR [§] 4106.1.
6. Further, Mr. Davis seeks to establish that the unit is not an exempt cooperative because of some fraudulent inducement in 1979 when the property became a cooperative, a claim rejected by Superior Court as barred by the statute of limitation[s]. The Rental Housing Act also contains a three year statute of limitations. D.C. Official Code § 42-3502.06. That statute of limitations is only triggered by a rent increase. Mr. Davis does not pay rent and therefore cannot allege an improper rent increase and there is nothing in the Rental Housing Act or regulations that permit a challenge to an exemption by itself. *See* 14 DCMR [§] 4214.
7. The Rental Housing Commission recently addressed the applicability of claims of exemption to tenant petitions in *Smith Prop. Holdings Consulate, LLC v. Lutsko*, RH-TP-08-29,149 (RHC March 10, 2015). In that case, the Commission discussed that it is well-established that a claim of exemption is an affirmative defense to a tenant petition. The Commission held that the regulations (14 DCMR [§] 4214) set forth the various bases for filing tenant petitions, which do not specifically provide that a challenge to a claim of exemption is a basis for filing a tenant petition. *Id.* at 41. The issue of a valid exemption arises in the context of a rent increase. If a tenant challenges the validity of an increase, a housing provider has the burden of establishing that it was entitled to take the increase because it is an exempt housing accommodation. As a cooperative, members pay carrying charges, which generally represent the operating costs of the cooperative. Those charges are determined by the by-laws and are not “rent.” One of the issues in Mr. Davis’s LTB and probate cases is the proper amount of the carrying charges,

which cannot be determined by this administrative court because carrying charges are not part of rent regulation under the Rental Housing Act of 1985.

8. I need not determine whether Mr. Davis's parents received a District of federal subsidy because the Housing Accommodation is exempt as a cooperative. Any other exemptions that Housing Provider may claim are irrelevant as long as one exemption applies. To the extent that Mr. Davis alleges fraudulent activity on the part of the Housing Provider in asserting that his parents received a subsidy does not fall within the Rental Housing Act and there is no remedy available from this administrative court.
9. Because I find that the housing accommodation was exempt and that Mr. Davis is not a tenant under the Act, there is no relief available to him under the Rental Housing Act and the tenant petition is dismissed with prejudice.

Final Order at 6-10; R. at 48-52. On May 8, 2015, Mr. Davis filed a motion for reconsideration (Motion for Reconsideration). On July 7, 2015, the ALJ issued an order denying reconsideration. Davis v. Tel-Court Cooperative, Inc., RH-TP-14-30,604 (OAH July 7, 2015);⁴ R. at 89-92.

Mr. Davis filed a timely appeal of the Final Order (Notice of Appeal) on July 17, 2015, raising the following allegations of error:⁵

1. That in the OAH Final Order of 22 April 2015, in **I. Introduction**, (2) through (6), the Court misstates the Appellant's/Petitioner's allegations and request for relief.
2. That in the OAH Final Order of 22 April 2015, in **II. Procedural History**, paragraph 1, the Court improperly concluded the reason for the Appellant's/Petitioner's petition.
3. That in the OAH Final Order of 22 April 2015 in **IV. Findings of Facts**, in section (2) through (6) the Court misstated or misinterpreted interlocutory orders from the DC Superior Court.
4. That in the OAH Final Order of 22 April 2015 in **V. Discussion and Conclusions of Law**, Appellant/Petitioner disagrees with the conclusions and

⁴ The Commission notes that the ALJ issued an order on June 23, 2015, extending the time to rule on the motion for reconsideration. Davis v. Tel-Court Coop., Inc., RH-TP-14-30,604 (OAH June 23, 2015); R. at 94.

⁵ The allegations of error are recited herein using the language of Mr. Davis in the Notice of Appeal.

appeals this section in its entirety. The OAH has jurisdiction in certain cooperative association matters. Additionally, the business filing and licenses, certificate of occupancy, original unit registration of 16 February 2012 and the Housing Provider/Respondent's source of income requirement are false, fraudulent and improperly registered, with the tenant George P. Davis, named as resident seven years after his death, all against District of Columbia and United States Codes and Regulations.

5. The in the OAH Order Denying Motion for [Rec]onsideration of 7 July 2015, the Court in (1) and (3) misstates the Appellant's/Petitioner's request for relief in the Motion.
6. That in the OAH Order Denying Motion for [Rec]onsideration of 7 July 2015, the Court in **1. Grounds (1), (2), (3), and (4) of the Petitioners Motion for [Rec]onsideration**, Appellant/Petitioner disagrees with the grounds and conclusions and appeals this section in its entirety.
7. That the Appellant submitted 164 exhibits on 15 April 2015 and was never allowed to present or explain his evidence or position in front of the OAH Court against no evidence supplied by the Housing Provider/Respondent on any claim.

Notice of Appeal at 1-2 (emphasis original). Mr. Davis filed a brief (Davis' Brief) on November 16, 2015, and the Housing Provider filed a brief (Housing Provider's Brief on December 10, 2015). The Commission held a hearing in this matter on January 14, 2016.

II. PRELIMINARY ISSUE

The Commission notes that the ALJ dismissed the Tenant Petition for lack of jurisdiction, having determined that Mr. Davis was not a "tenant" under the Act.⁶ Final Order at 7-8; R. at 50-51. Because the question of jurisdiction is a threshold issue, the Commission will review the ALJ's determination that she lacked jurisdiction over the Tenant Petition before addressing the substantive issues raised on appeal. *See, e.g., Woodner Apartments v. Taylor*, RH-TP-07-29,040 (RHC Sept. 1, 2015) (stating that the Commission may raise issues of jurisdiction *sua sponte*);

⁶ The Act defines a "tenant" as "a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." D.C. OFFICIAL CODE § 42-3501.03(36) (2010 Repl.).

Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) (an appellate court may *sua sponte* raise the issue of a court's jurisdiction)

The Commission's standard of review of an ALJ's decision is contained at 14 DCMR § 3807.1 (2004), which provides the following:

The Commission shall reverse final decisions of the Rent Administrator [or ALJ] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator [or ALJ].

See D.C. OFFICIAL CODE § 2-509(e).⁷

In the Final Order, the ALJ made the following specific finding of fact:

3. In the Probate case, filed on November 2, 2011, Mr. Davis alleged that his mother was the sole owner of Tel-Court Cooperative and that her estate has an interest in the property. Mr. Davis and Ms. Anderson were appointed Co-Personal Representatives on November 9, 2011. The Probate Court painstakingly analyzed the cooperative by-laws and purchasing documents. The probate case remains pending, but several interim orders have been issued deciding certain issues. *In Re: Estate of Irene Davis*, 2011-SEB-520. Based on the below findings, the Probate Court determined that the unit in question is a cooperative unit, that Irene Davis was a cooperative member, that the estate retained an interest in the unit, and that the value of that interest needed to be determined[.]

Final Order at 3-4; R. at 54-55. The ALJ also specifically stated in her Conclusions of Law section of the Final Order as follows:

3. . . . I am without jurisdiction to determine whether he [Mr. Davis] is entitled to possession or occupancy. That issue will ultimately be determined by the Probate Court and the Landlord/Tenant court.

Final Order at 8; R. at 50 (emphasis added).

⁷ The DCAPA, at D.C. OFFICIAL CODE § 2-509(e) provides, in relevant part, as follows:

Every decision and order adverse to a party to the case . . . shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be in accordance with the reliable, probative, and substantive evidence.

The Commission's review of the Final Order reveals that the only evidence cited by the ALJ to support the above finding of fact and conclusion of law were orders issued by various branches of the D.C. Superior Court and merely referenced by the ALJ. Final Order at 3-6; R. at 52-55. For example, the ALJ specifically cited to a March 1, 2013 order from the D.C. Superior Court Probate Branch, In re: Estate of Irene Davis, 2011-SEB-520, and a November 21, 2013 order from the D.C. Superior Court Civil Branch, Tel-Court Cooperative, Inc. v. Estate of Irene Davis, 2013 CA 3001R. *Id.* at 4-6; R. at 52-54. Additionally, the ALJ cited more generally to unnamed "Superior [Court] orders" (*see id.* at 3; R. at 55), an unspecified order from the D.C. Court of Appeals (*see id.* at 6 n.2; R. at 52), and a case pending in the D.C. Superior Court Landlord & Tenant Branch, Tel-Court Cooperative, Inc. v. Estate of Irene Davis, 2012-LTB-1185. *Id.* at 5; R. at 52.

The Commission's review of the record, however, does not reveal any orders, final or otherwise, in the official record issued by any branch of the D.C. Superior Court with respect to Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit, including In re: Estate of Irene Davis, 2011-SEB-520, Tel-Court Cooperative, Inc. v. Estate of Irene Davis, 2013 CA 3001R, or Tel-Court Cooperative, Inc. v. Estate of Irene Davis, 2012-LTB-1185. *See* 1 DCMR § 2939 (2011).⁸ The ALJ also did not make any findings

⁸ 1 DCMR § 2939 provides the following:

2939.1 The official record of a proceeding shall consist of the following:

- (a) The final order and any other orders or notices of the Administrative Law Judge;
- (b) The recordings or any transcripts of the proceedings before the Administrative Law Judge;
- (c) All papers and exhibits offered into evidence at the hearing; and
- (d) All papers filed by the parties or the Rent Administrator at OAH.

of fact regarding the status of the various cases pending before the D.C. Superior Court, whether the orders she cited were final orders, or whether the determinations in the D.C. Superior Court cases with respect to Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit were essential elements of a final decision in those cases.⁹ See Wilson, 829 A.2d at 514; Burkhardt, RH-TP-10-29,875; Final Order at 3-8; R. at 50-55. Furthermore, in the absence of the aforementioned final orders in the cited cases in the OAH record on appeal, the Commission's review of the record does not reveal that the ALJ took official notice of any of such D.C. Superior Court orders referenced in the Final Order. See D.C.

2939.2 Document attached to a petition or other filings must be offered and received into evidence at a hearing before the Administrative Law Judge can use them to establish facts.

⁹ Although the ALJ relies upon the D.C. Superior Court orders as the basis for her conclusions of law on Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit in the Final Order, the ALJ makes no reference to the seemingly applicable doctrines of *res judicata* and collateral estoppel as legal grounds for her determinations. The doctrine of *res judicata*, or "claim preclusion," operates as a bar against new litigation: (1) between the same parties to an earlier, final judgment; and (2) arising out of the same set of facts. See EDCare Mgmt. v. Delisi, 50 A.3d 448, 451 (D.C. 2012); Carmel Partners, Inc. v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014). Collateral estoppel, or "issue preclusion," on the other hand, gives controlling effect to judgments on specific issues litigated in prior cases and "can be invoked against a party where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." Wilson v. Hart, 829 A.2d 511, 514 (D.C. 2003); Johnson v. D.C. Rental Hous. Comm'n, 642 A.2d 135, 139 (D.C. 1994); Burkhardt v. Klinge Corp., RH-TP-10-29,875 (RHC Sept. 25, 2015); Levy, RH-TP-06-28,830 & RH-TP-06-28,835.

The Commission recognizes that *res judicata* and collateral estoppel are affirmative defenses that must customarily be pleaded and established by a party asserting them. Johnson, 642 A.2d at 139; Jonathan Woodner Co. v. Adams, 534 A.2d 292, 296 (D.C. 1987); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Mann Family Trust v. Johnson, TP 26,191 (RHC Nov. 21, 2005). Nonetheless, even in the absence of any party's claims or assertions of *res judicata* and collateral estoppel in this record, the Commission notes that the ALJ would have been able to cite these legal doctrines to support her conclusions of law on Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit. However, in order to adjudicate and evaluate the merits of claims of *res judicata* and collateral estoppel, "the trier of fact must 'have before it the exhibits and records involved in the prior cases[.]'" Johnson, 642 A.2d at 139 (quoting Block v. Wilson, 54 A.2d 646, 648 (D.C. 1947)). It is precisely the absence in the record on appeal of the exhibits and records from the D.C. Superior Court cases on Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit that serves as the basis for the Commission's legal conclusion in this appeal. See *infra* at 13.

OFFICIAL CODE § 2-509(b);¹⁰ *cf. In re: 70% Voluntary Agreement Application*, VA 08,004 (RHC Dec. 27, 2012) at n.9 (explaining that where the trier of fact takes official notice, she must give the parties notice in writing of the documents officially noticed, the facts relied upon from the documents, and an opportunity to contest the facts).

Accordingly, where the only evidence relied upon by the ALJ in reaching her findings of fact does not appear in the official record that was transmitted to the Commission by OAH, the Commission determines that there is not substantial evidence in the record of this case to support the ALJ's determinations that (1) the Housing Accommodation is a cooperative unit, (2) Mr. Davis is a cooperative member, and thus not a "tenant" under the Act, and (3) OAH lacks jurisdiction over the Tenant Petition. 14 DCMR § 3807.1 (2004); *see generally* Final Order at 3-8; R. at 50-55.

For the foregoing reasons, the Commission vacates the Final Order, and remands to the ALJ for revised findings of fact and conclusions of law on Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit, supported by the substantial evidence appearing in the record of this case, including all relevant D.C. Superior Court orders relied upon.¹¹ If the ALJ determines that the current record in this case does not contain sufficient evidence to make findings of fact and conclusions of law to support preliminary dismissal of the Tenant Petition for lack of jurisdiction, the ALJ is instructed to hold an evidentiary hearing on the issues raised in the Tenant Petition in accordance with the provisions of the DCAPA.

¹⁰ D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, as follows: "Where any decision of . . . any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary."

¹¹ The Commission cautions the ALJ on remand, that should she decide to take official notice of any documents, the ALJ is advised to do so in accordance with the DCAPA, D.C. OFFICIAL CODE § 2-509(b).

In light of the Commission's determination of the preliminary issue, reversing the Final Order, the Commission need not address the issues raised in Mr. Davis' Notice of Appeal.

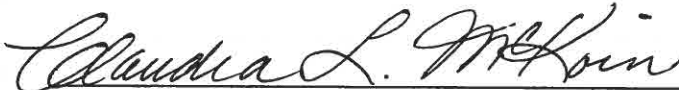
III. CONCLUSION

For the foregoing reasons, the Commission vacates the Final Order, and remands to the ALJ for revised findings of fact and conclusions of law on Mr. Davis' status as a cooperative member and the Housing Accommodation's status as a cooperative unit, supported by the substantial evidence appearing in the record of this case, including all relevant Superior Court orders.¹² If the ALJ determines that the current record in this case does not contain sufficient evidence to make findings of fact and conclusions of law to support preliminary dismissal of the Tenant Petition for lack of jurisdiction, the ALJ is instructed to hold an evidentiary hearing on the Tenant Petition in accordance with the provisions of the DCAPA.

SO ORDERED.



PETER B. SZEGEDY-MASZAK, CHAIRMAN



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."

¹² See *supra* n. 11.

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, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **FINAL DECISION AND ORDER** in RH-TP-14-30,604 was served this 18th day of February, 2016:

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