DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,162

In re: 1311 Euclid Street, N.W., Unit 2

Ward One (1)

SARAH SARZYNSKI
SHERVIN MALEKZADEH
Tenants/Appellants

v.

KEN ROSS/ROSS LLC.
Housing Provider/Appellee

DECISION AND ORDER

April 3, 2008

YOUNG, CHAIRPERSON. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), 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, 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

Sarah Sarzynski and Shervin Malekzadeh, the tenants/appellants, filed Tenant Petition (TP) 28,162 with the RACD on July 26, 2004. In their petition the tenants, who occupied Unit 2 in the housing accommodation located at 1311 Euclid Street, N.W., alleged that the housing provider/appellee, Ken Ross/Ross, LLC.: 1) took a rent increase

larger than the amount of increase permitted by the Act; 2) failed to provide a proper thirty (30) day notice of rent increase before the increase became effective; and 3) failed to file the proper rent increase forms with RACD.

A hearing on the petition was held on October 20, 2004, with Hearing Examiner Saundra McNair presiding. The hearing examiner issued the decision and order on April 22, 2005. The decision contained the following findings of fact:

1. The subject housing accommodation, 1311 Euclid Street, N.W., Washington, D.C. 20009 is properly registered with the RACD.

2. The Petitioners took possession of apartment # 2 on or about August 23, 2001, and resided at the subject premises at all relevant times, without interruption.

3. The Respondent owns and manages the subject property.

4. The previous owner, Gregory M. Curtis filed a Registration/Claim of Exemption Form with the RACD purporting that he was exempt from the Rent Stabilization Act pursuant to a "small landlord" exemption by owning four (4) or fewer rental properties in the District of Columbia; this Registration/Claim of Exemption was filed with the RACD on or about January 13, 1985.

5. The Petitioners failed to provide sufficient evidence that either the previous owner, Gregory M. Curtis, rented out the units at 1311 Euclid Street during his ownership of the property or that the "small landlord exemption" granted to Mr. Curtis extended to the property and not solely to the individual person(s) receiving the exemption status granted to "small landlords."

6. The previous owner, David S. Posey, filed a Registration/Claim of Exemption Form with the RACD purporting that he was exempt from the Rent Stabilization Act pursuant to a "small landlord" exemption by owning four (4) or fewer rental properties in the District of Columbia; this Registration/Claim of Exemption was filed with the RACD on or about March 8, 2001.

7. The Petitioners failed to provide sufficient evidence that either the previous owner, David S. Posey, rented out the units at 1311 Euclid Street during his ownership of the property or that the "small landlord exemption" granted to Mr. Posey extended to the property and not solely

to the individual person(s) receiving the exemption status granted to "small landlords."

8. The current owner, Ross, L.L.C. filed a Registration/Claim of Exemption Form with the RACD purporting that the property was exempt from the Rent Stabilization Act pursuant to §206(a)(4) of the Rental Housing Act of 1980 in that the housing accommodation had been continuously vacant and not subject to a rental agreement since January 1, 1980. This Registration/Claim of Exemption was filed with the RACD on or about April 19, 2001.

9. The Petitioner failed to provide sufficient evidence that Respondent, even as an L.L.C., is not entitled to the Claim of Exemption for the subject property at 1311 Euclid Street, in that the basis for the exemption is not a "small landlord" exemption (which requires that the property be owned by no more than three (3) natural persons), but that the property was previously unoccupied and that there were no previous lease agreements on the subject property.

10. The current rent ceiling for Petitioners' rental unit is $2,058.00. In this instance, the Respondent has chosen to set the rent ceiling for the Petitioners' rental unit at $2,058.00, despite the fact that the Respondent is not required to establish a rent ceiling for a property which is exempt from the Rent Stabilization Act.

11. The Respondent filed the proper forms with the RACD to increase the base rent or the rent ceiling for the rental units in the subject property, in that the Respondent is not required to file rent increase forms with the RACD to increase either the rent charged or the rent ceiling for Petitioners' rental unit.

12. The Respondent filed a subsequent Amended Registration with the RACD on or about April 15, 2002 for the subject property when it acquired an additional rental property located at 714 Park Road, which has at least six (6) rental units. The Respondent did not need to change the registration status of the subject property at 1311 Euclid Street from Exempt to Registered due to the basis for the Claim of Exemption (previously unoccupied).

13. The Petitioners have failed to provide sufficient evidence to meet their burden to challenge whether the rent increase was larger than the amount of increase allowed by any applicable provision of the Act.

14. The Petitioners have failed to provide sufficient evidence to meet their burden to challenge whether the Respondent failed to file the proper rent increase forms with the RACD for the subject property.

15. The Respondent stipulated to the Petitioners' allegation that a proper thirty (30) day notice of rent increase [was not served] prior to the rent increase becoming effective.

16. The Examiner lacks the jurisdiction and is barred from considering any matters pertaining to rent increases and rent ceiling increases with respect to the subject property, in that the property is exempt from Title II of the Act.

17. The Respondent did not "willfully" violate the Act.

18. All other findings of fact made by the Examiner in this Decision and Order are incorporated by reference in this section of Findings of Fact.

Sarzynki and Malekzadeh v. Ken Ross/Ross LLC., TP 28,162 (RACD Apr. 22, 2005) (Decision) at 10-12. The hearing examiner concluded as a matter of law:

1. The Petitioner has [sic] failed to prove by a preponderance of the evidence that the building in which her rental unit is located is not properly registered with the RACD, in violation of D.C. Official Code §42-3502.05(a) (2001).

2. The Respondent is in compliance with D.C. Official Code §42-3502.05 (2001) and has obtained and paid the registration fees for operating rental property in the District of Columbia; obtained a Registration /Claim of Exemption Form; and obtained a current Rental Property Business License. Each of the above are required in order to be in compliance and to operate a rental property business in the District of Columbia.

3. The Respondent s [sic] own four or fewer rental units in the District of Columbia and thereby qualify for the "small landlord" claim of exemption, pursuant to D.C. Official Code §42-3502.05(a)(3) (2001), for the property located at 609 Longfellow Street, N.W.

4. The Examiner lacks jurisdiction to adjudicate Petitioners' Title II claims of rent increases because the subject property is exempt from Title II of the Act, pursuant to D.C. Official Code §42-3502.05(a)(4) (2001) and Cooper v. Bahry, TP # 22,397 (RHC August 16, 1993).

5. The Examiner lacks jurisdiction to adjudicate Petitioners' Title II claim of failure to provide a proper thirty (30) day notice of rent increase before the rent increase became effective because the subject property is exempt from Title II of the Act, pursuant to D.C. Official Code §42-3502.05(a)(4) (2001) and *Cooper v. Bahry,* TP # 22,397 (RHC August 16, 1993).

6. The Examiner lacks jurisdiction to adjudicate Petitioners' Title II claim of failure to file the proper rent increase forms with the RACD because the subject property is exempt from Title II of the Act, pursuant to D.C. Official Code §42-3502.05(a)(4) (2001) and *Cooper v. Bahry,* TP # 22,397 (RHC August 10, 1993).

Decision at 12.

The tenants filed a timely notice of appeal in the Commission. The Commission held the appellate hearing on September 22, 2005.

II. ISSUES ON APPEAL

On appeal, the tenants stated the following:

> This Notice of Appeal of the Decision ordered on April 22, 2005 is premised on the following reasons: (1) decisions or order contains typographical, numerical, or technical errors; (2) the decision or order contains error that is evident on its face; and especially (3) incorrect application of the law. Although reasons (1) and (2) will be briefly addressed, the focus of this Notice of Appeal will be the misapplication of burden of proof requirements stipulated by *Davis v. Barac Company,* TP #24,835 (RHC October 27, 2000) as well as overlooked evidence contradicting Respondent's claim of exemption.

Notice of Appeal at 1.

III. DISCUSSION OF THE ISSUE

A. Whether the hearing examiner erred when she found that the tenants failed to provide sufficient evidence to show that the previous owners rented out units at the housing accommodation.

On appeal, the tenants assert that the hearing examiner erroneously placed the burden of proof on the tenants to show that their housing accommodation was continuously vacant prior to their occupancy. The record reflects that on April 19, 2001, the housing provider filed a Registration/Claim of Exemption Form with RACD

requesting an exemption from the Act. The record further reflects that the housing provider filed the form pursuant to D.C. OFFICIAL CODE § 42-3502.05 (2001).[1] The housing provider certified on the form that the information provided was "complete and accurate," and that he understood that, "the filing of false statements with the [RACD] is subject to a fine of up to $5,000 pursuant to the Rental Housing Act of 1985."

In her evaluation and analysis of the evidence, the hearing examiner stated:

> In determining the validity of the April 19, 2001 claim of exemption, the issue to be resolved is whether the Petitioner [the tenants] can establish that the building in which [their] rental unit is located has not been continuously vacant and was not subject to a rental property lease agreement since January 1, 1980.

Decision at 6 (emphasis added). Accordingly, in her decision, the hearing examiner placed the burden of proof on the tenants to establish that the housing accommodation was previously vacant.

The District of Columbia Court of Appeals (DCCA) has determined that, "[t]he burden of proof for a claim of exemption from the Act is with the person seeking the exemption, the housing provider." Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293 (D.C. 1990); Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007 (D.C. 1987). The Court has held that statutory exemptions in the Act are to be narrowly construed. See Goodman, supra, cited in Charles E. Smith Residential Realty, L.P. v. Filippello, TP 24,401 (RHC July 30, 1999).

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[1] The Act, D.C. OFFICIAL CODE § 42-3502.05 (2001), provides in pertinent part:

> (a) Sections 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except:
>
> . . .
>
> (4) Any housing accommodation which has been continuously vacant and not subject to a rental agreement since January 1, 1985, any housing accommodation previously exempt under § 206(a)(4) of the Rental Housing Act of 1980, provided that upon rerental the housing accommodation is in substantial compliance with the housing regulations when offered for rent.

The standard for satisfying a housing provider's burden of proof of exemption is "credible, reliable evidence." See Revithes, 536 A.2d at 1017, citing Bernstein v. Lime, 91 A.2d 841, 843 (D.C. 1952). The Commission has previously held that a party must provide evidence to carry or satisfy the burden of proof on his claim. Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005); Montgomery v. Offurum, TP 27,676 (RHC Apr. 18, 2005); Davis v. BARAC Co., TP 24,835 (RHC Oct. 27, 2000); Rosenboro v. Askin, TP 3991 (RHC Feb. 26, 1993). "A landlord's mere assertion [of exemption] … contained in a claim of exemption will be insufficient to satisfy a landlord's burden of proof of exemption." Goodman, 573 A.2d at 1297.

In the instant case, contrary to the hearing examiner's holding, the housing provider had the burden of proof regarding the claim of exemption.[2] He had the further burden of producing "credible, reliable evidence." The decision of the hearing examiner further states:

> Kenneth Ross, President of Respondent Ross, L.L.C. testified that he did not know whether the property had previous tenants and that he registered the property with the RACD after speaking with the prior owner and being told that he would have to register the building with the RACD. The Respondent further testified that he was told by RACD Contact Representatives that because Ross, L.L.C. was a Limited Liability Company it was not eligible for an exemption.

Decision at 7. The housing provider also testified that he requested the §42-3502.05(a)(4) exemption pursuant to the instructions of the RACD staff, and alternatively, that a neighbor at the 1311 Euclid Street housing accommodation informed him that the accommodation had previously been vacant. In either case, the housing provider failed to provide credible, reliable evidence regarding the accommodation's entitlement to a §42-3502.05(a)(4) exemption under the Act.

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[2] See D.C. OFFICIAL CODE § 2-509(b) (2001), "[i]n contested cases, … the proponent of a rule or order shall have the burden of proof."

Accordingly, because the hearing examiner erroneously placed the burden of proof on the tenants, and because the housing provider failed to establish by credible and reliable evidence that the housing accommodation was exempt, the decision of the hearing examiner finding that the housing accommodation was exempt from Title II of the Act is reversed for lack of substantial evidence in the record to support that finding. Oxford House-Bellevue, supra. This case is remanded for findings of fact and conclusions of law on the issues raised in the tenant's petition not decided by the hearing examiner. Further, on remand, the hearing examiner is ordered to make findings of fact and conclusions of law on whether the housing provider knowingly and willfully violated the Act. See D.C. OFFICIAL CODE § 42-3509.01(b) (2001);[3] RECAP v. Powell, TP 27,042 (RHC Dec. 19, 2002) at 4-5.

The Commission notes that because the hearing examiner erred when she placed the burden of proof on the tenants, she did not make findings of fact and conclusions of law on the tenants' entitlement to a rent refund. Accordingly, on remand, the hearing examiner is ordered to make findings of fact and conclusions of law on the amount of the refund due the tenants, if any, based on the evidence in the record. The hearing examiner is ordered to make findings of fact and conclusions of law on whether the rent refund due the tenants, if any, is subject to treble damages. See D.C. OFFICIAL CODE § 42-

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[3] The Act, D.C. OFFICIAL CODE § 42-3509.01(b) (2001), provides

> Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation. (emphasis added).

3509.01(a) (2001);[4] Meyers v. Smith, TP 26,129 (RHC Mar. 17, 2003). The Commission has held that the evidence submitted leading to an award of treble damages must demonstrate intent on the housing provider's part to misrepresent the rent ceiling, defraud the tenants, or to avoid detection by the RACD. Velrey Prop. v. Wallace, TP 20,431 (RHC Sept. 11, 1989).

B. Whether the decision of the hearing examiner contains typographical, numerical, or technical errors.

The tenants argue that the decision of the hearing examiner contains typographical errors. Conclusion of law number three (3) states:

> The Respondent s [sic] own four or fewer rental units in the District of Columbia and thereby qualify for the "small landlord" claim of exemption, pursuant to D.C. Official Code §42-3502.05(a)(3) (2001), for the property located at 609 Longfellow Street, N.W.

Decision at 12. Specifically, the tenants argue that the conclusion of law contains an address, 609 Longfellow Street, N.W., which is not associated with their petition.

The Commission's rule, 14 DCMR § 3807.4 (2004) provides: "Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error." Accordingly, the Commission corrects the plain error of the hearing examiner in Conclusion of Law numbered three (3). The address of the housing accommodation in the instant petition is 1311 Euclid Street, N.W.

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[4] The Act, D.C. OFFICIAL CODE § 42-3509.01(a) (2001), provides:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, … shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

C. Whether the decision of the hearing examiner contains clear error on its face.

The tenants argue that the hearing examiner erred when she stated in her decision that, "[t]he Petitioner testified that she[5] leased the subject property on or about August 23, 2001 and that the monthly rent charge was One Thousand dollars ($1,000.00)." The tenants argue that the testimony of record reflects that the rent paid for their unit was $1200.00.

The record (Record 2-15) reflects that the tenants initial rent charged was $1200.00. Accordingly, pursuant to 14 DCMR § 3807.4 (2004), the Commission corrects the hearing examiner's plain error.

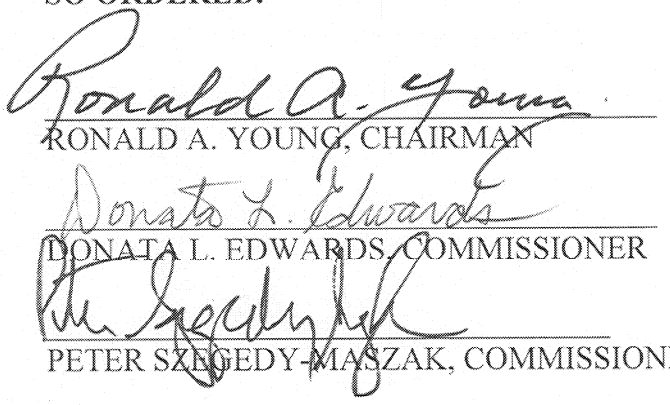
IV. CONCLUSION

The appeal of Issue A is granted, and the decision of the hearing examiner finding that the housing accommodation is exempt from Title II of the Act is reversed. The petition is remanded to the Rent Administrator for findings of fact and conclusions of law, based on the present record, on the issues raised by the tenants in their petition.

[5] Tenant, Sarah Sarzynski did not testify at the RACD hearing. The tenants' direct testimony was provided by Mr. Shervin Malekzadeh.

Further, the Rent Administrator is ordered to make findings of fact and conclusions of law regarding whether the housing provider violated D.C. OFFICIAL CODE § 42-3509.01(a) & (b) (2001), subjecting the housing provider to civil fines, treble damages or both. The appeal of Issues B and C is granted, and the Commission corrects the plain errors found in the hearing examiner's decision.

SO ORDERED.



RONALD A. YOUNG, CHAIRMAN

DONATA L. EDWARDS, COMMISSIONER

PETER SZEGEDY-MASZAK, 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
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Decision and Order** in TP 28,162 was mailed postage prepaid by priority mail, with delivery confirmation on this **3rd day of April, 2008** to:

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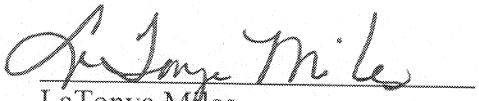

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