DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-16-30,842

In re: 3003 Van Ness Street, N.W., Unit W-1131

Ward Three (3)

GABRIEL FINEMAN
Tenant/Appellant

v.

SMITH PROPERTY HOLDINGS VAN NESS LP
Housing Provider/Appellee

DECISION AND ORDER

January 18, 2018

SPENCER, CHAIRMAN: This case is on appeal to the Rental Housing Commission ("Commission") from a decision and order issued by the Office of Administrative Hearings ("OAH")[1] based on a petition filed in the Rental Accommodations Division ("RAD") of the District of Columbia Department of Housing and Community Development ("DHCD"). 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 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2016), 1 DCMR §§ 2920-2941 (2016), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01 - 1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD were transferred to DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04B (2012 Repl.).

I. PROCEDURAL HISTORY

On July 12, 2016, tenant/appellant Gabriel Fineman ("Tenant"), residing in the housing accommodation at 3003 Van Ness Street, N.W. ("Housing Accommodation") Unit W-1131, filed tenant petition 2016-DHCD-TP 30,842 ("Tenant Petition") against Smith Property Holdings Van Ness LP ("Housing Provider"). The Tenant Petition raised the following claims against the Housing Provider:

1. The Housing Provider did not file the correct rent increase forms with the RAD (RAD form 9); and

2. Improper notice of RAD form 8 to tenant (Notice in adjustment of rent charged).

Tenant Petition at 2; Record ("R.") at Tab 1.

On December 9, 2016, the Tenant filed, *pro se*, a Motion for Summary Judgment "to affirm the definition of 'rent' . . . and to require the Housing Provider to correct its incorrect and false filings with the RAD and to make future filings correctly and provide other relief as requested." Motion for Summary Judgment at 1-2; R. at Tab 10. On January 17, 2017, the Housing Provider filed an Opposition to Tenant's Motion for Summary Judgment and Housing Provider's Cross-Motion for Summary Judgment ("Housing Provider's Cross-Motion"), asserting that the Tenant's Motion for Summary Judgment should be denied and "judgment should instead be entered in favor of the Housing Provider." Housing Provider's Cross-Motion at 1-6; R. at Tab 11. On February 16, 2017, the Tenant filed a Reply and Opposition to the Housing Provider's Cross-Motion. Tenant's Response at 1-5; R. at Tab 14.

On March 16, 2017, Administrative Law Judge Ann C. Yahner ("ALJ") issued a final order, denying the Tenant's Motion for Summary Judgment, granting the Housing Provider's Cross-Motion, and dismissing the Tenant Petition with prejudice, which was captioned as:

Fineman v. Smith Property Holdings Van Ness LP, 2016-DHCD-TP 30,842 (OAH Mar. 16, 2017) ("Final Order"); R. at Tab 16.

In the Final Order, the ALJ noted that the following material facts were not in dispute:[2]

1. Housing Provider Smith Property Holdings Van Ness LP is the owner of the residential rental accommodation at 3003 Van Ness Street, NW (Housing Accommodation). Motion, Exh. A.

2. The Housing Accommodation is subject to the rent stabilization provisions of the Rental Housing Act.

3. Equity Residential Management, LLC, manages the Housing Accommodation. Motion, Exh. A.

4. Tenant has lived at the Housing Accommodation since December 22, 2013. Tenant Petition.

5. Tenant leased unit W-1131 from Housing Provider pursuant to a lease agreement which began on December 22, 2014, and expired on December 21, 2015 (the 2014 Lease). Opposition, Exh. 1.

6. The Term Sheet for the 2014 Lease includes the following provisions:

   - "Total monthly rent" is $3,274, which includes $3,114 as the apartment rent and $160 for reserved parking. *Id.*

   - "Total monthly rent" is modified by a "monthly recurring concession" of $945 per month. *Id.*

7. The 2014 Lease contains a Concession Addendum, Opposition, Exh.2, which provides:

   - The monthly recurring concession expires at the end of the lease.

   - Housing Provider reserves the right to increase the rent once each year and provide a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," which will reflect the "new rent charged."

   - If a tenant becomes a month-to-month tenant at the end of the lease, the monthly rent will be the "new rent charged" amount that is reflected on the Housing Provider's Notice.

[2] The material facts not in dispute are recited here using the language and numbering used by the ALJ in the Final Order.

- All parties agree that the month recurring concession is being given as an inducement to Tenant to enter into the lease[.]

8. Through an electronic transfer, Tenant paid Housing Provider rent of $2,329 monthly during the term of the 2014 Lease, from December 2014, through December 2015. That amount included $2,169 for the apartment and $160 for a reserved parking space.

9. On September 18, 2015, Housing Provider sent Tenant RAD Form 8, a notice that his rent would be increased from $3,114 to $3,161, effective December 22, 2015. Motion, Exh. B. The increase was $47%, or 1.5%. *Id.*

10. On September 22, 2015, Housing Provider filed a RAD Form 9, a Certificate of Notice to RAD of Adjustment in Rent Charged. Motion, Exh. C. Among other rents adjusted, it stated that Tenant's rent was being increased from $3,114 to $3,161. *Id.*

11. On or about October 7, 2015, Tenant sent Housing Provider a letter stating that the "current rent" he paid was $2,329, consisting of $2,169 for the apartment and $160 for the reserved parking space. Motion, Exh. D. Tenant asked Housing Provider to correct the RAD Form 8 and re-issue it. *Id.* Housing Provider neither replied nor changed the form. Motion, Exh. A.

12. Tenant signed a second lease with Housing Provider that covered the period December 22, 2015, through December 21, 2016 (2015 Lease). Opposition, Exh. 3.

13. The Term Sheet for the 2015 lease includes the following provisions:

- "Total monthly rent" is $3,321, which includes $3,161 as the apartment rent and $160 for reserved parking. *Id.*

- "Total monthly rent" is modified by a "monthly recurring concession" of $946 per month. *Id.*

14. The 2015 Lease contains a Concession Addendum which is identical to that included with the 2014 Lease. Opposition, Exhs. 2, 4.

15. Tenant relocated to Florida on or about December 8, 2016. Tenant's Notice of Change of Address.

Final Order at 3-6; R. at Tab 16.

In the Final Order, the ALJ made the following conclusions of law:[3]

A. Housing Provider Filed Accurate RAD Forms 8 and 9 with Respect to Tenant

1. Introduction

1. There is no dispute over the facts in this case. The documents say what they say and, other than Tenant's letter of October 7, 2016, to Housing Provider, there apparently was little contact between the parties on these issues. Tenant and Housing Provider agree that, for the year covered by the 2014 Lease, Tenant paid Housing Provider $2,329 a month. There is no allegation from Housing Provider that Tenant was behind in his rent payments. There is no allegation from Tenant that facilities or services were reduced. Tenant contends that the September 2015 RAD Forms 8 and 9 filed by Housing Provider with respect to him and all tenants were incorrect and must be changed. Because Tenant put Housing Provider on notice of the alleged errors and Housing Provider did not re-file corrected forms, Tenant also contends Housing Provider should be fined for intentional misstatements and perjury.

2. The dispute here focuses on the dollar amount that a housing provider must report to its tenants and to the RAD as "your current rent charged" on RAD Form 8 and "prior rent" on RAD Form 9. Tenant contends the number recorded should be the amount of rent he actually paid each month, which was $2,329 under the 2014 Lease. Housing Provider does not explicitly address the RAD form in its Opposition. Housing Provider contends that it can legally enter into concessions from the maximum legal rent in its leases with tenants.

2. The Regulatory Schema

3. The Rental Housing Act regulates the rent for each rental unit under the Rent Stabilization Program by setting terms and conditions for every increase or decrease in rent for covered units. 14 DCMR [§] 4200. The Act defines "rent" as "the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities." D.C. Official Code § 42-3501.03(28).

4. Under the Rental Housing Act and regulations, a housing provider may increase a tenant's rent once every 12 months by an amount authorized by the Act. The most common type of rent increase is known as an

[3] The conclusions of law are recited here using the language and headings as used by the ALJ in the Final Order, except that the Commission has numbered the conclusions of law for ease of reference.

adjustment of general applicability or a "CPI-W" increase. The Rental Housing Commission (RHC) determines the amount of the adjustment annually. D.C. Official Code § 42-3502.06(b). The adjustment of general applicability allows housing providers to increase rents annually in order to keep up with inflation. For most tenants, the maximum amount their rent can be increased is the CPI-W percentage plus 2%, but not more than 10% of the current rent charged. D.C. Official Code § 42-3502.06(b). If a housing provider does not "perfect" a rent increase, the increase cannot be imposed.

5. To increase a tenant's rent, the Act requires that a Housing Provider: (a) provide the tenant with at least 30 days written notice; (b) certify that the unit and the common elements are in substantial compliance with the housing regulations; (c) provide the tenant with a notice of rent adjustment filed with the RAD; (d) provide the tenant with a summary of tenant rights under the Act; and (e) simultaneously file with the RAD, a sample copy of the notice of rent adjustment along with an affidavit of service. D.C. Official Code § 42-3502.08(f); 14 DCMR [§] 4205.4[.]

6. Under the pre-August 2006 Rental Housing Act, there were rent ceilings which placed an upper limit on the rent for each apartment. A housing provider had to take and perfect (by filing with the RAD) a CPI-W increase within 30 days of first being eligible to do so. The housing provider could, however, choose not to implement the increase and hold it in reserve for the future. 14 DCMR [§] 4205.9.

7. The August 2006 amendments abolished rent ceilings.[footnote 3][4] D.C. Official Code § 42-3502.06([a]). The current rent charged at the effective date of the amendments in rent-controlled buildings became the base rent and the maximum allowable rent for all units subject to rent control. The 2006 Amendments also abolished a housing provider's ability to hold CPI-W increases for future imposition. As long as a CPI-W increase occurs at least 12 months after the last increase, a housing provider can implement it any time in the CPI-W year.

3. RAD Forms and Leases

8. The amount recorded on the RAD forms as "current rent charged" or "prior rent" is significant for several reasons. It is notice to the tenant of the maximum legal rent for the unit. It is the basis for the calculation of a rent increase. The form itself is notice of a possible rent increase. Using Tenant's situation as an example, in 2015 the rent for the unit was increased by 1.5 percent, effective December 22, 2015. If applied to the

[4] Footnote 3 of the Final Order states, "[a]lthough rent ceilings were abolished in 2006, they live on because the rent ceilings regulations have not been amended." *See* Final Order at 8 n.3; R. at Tab 16.

rent Tenant was actually paying, the rent would have increased by $34 to $2,363. If applied to the then-maximum legal rent, the rent would have been increased by $47 to $3,161. In addition, in each succeeding year, any increase is based on the prior year's rent.

9. Tenant here argues that, in parsing the term "your current rent charged," the term "rent" must be interpreted independently of any lease between the parties. Motion at 4. As used in the definition of "rent," the words "demanded," "received" and "charged" should be given their plain English meanings. Looking to principles of statutory interpretation and various dictionaries, Tenant defines "charged" as "the price demanded for something," "an amount of money you have to pay," or "demand (an amount) as a price from someone for a service rendered or goods supplied." *Id.* at 5. Therefore, Tenant argues, the "rent charged" must be the rent that Housing Provider hoped or expected to receive each month from Tenant. Since Tenant paid $2,329 each month, under this agreement, the figure called for as "your current rent charged" and "prior rent" on RAD Forms 8 and 9 must be $2,329.

10. Leases are to be construed as contracts. *Sobelsohn v. Am. Rental Mgmt. Co.*, 926 A.2d 713 (D.C. 2007). This jurisdiction adheres to an "objective" law of contracts, meaning that the parties' rights and liabilities are governed by the written language unless it is not clear and definite. *Id.* at 718. A contract should "generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake." *Akassy v. William Penn Apts. Ltd. P'ship*, 891 A.2d 291, 298 (D.C. 2006) (quoting *Camalier & Buckley, Inc. v. Sandoz & Lamberton, Inc.* 667 A.2d 822, 825 (D.C. 1995)).

11. In *Double H Housing Corp. v. David*, 947 A.2d 38, 46 (D.C. 2008), the Court of Appeals found, albeit outside the rent control context, that a housing provider can "condition a discount from an otherwise applicable rent increase on a month-to-month tenant's agreement to enter into a new lease." A tenant and a housing provider are free to contract to rental terms as long as those terms are not contrary to the law. In this case, Tenant knowingly signed a contract agreeing to pay a rent amount lowered by a concession for the one-year term of the lease.

12. The terms on the RAD Forms cannot be interpreted independently of the Lease. Both leases signed by Tenant identify the "total monthly rent" as the maximum legal rent, from which a "monthly recurring concession" is subtracted. 2014 Lease; 2015 Lease. Tenant himself identifies "current rent charged" by looking to the amount of rent paid after the concession provided in the lease is applied. But for the concession, Housing Provider could be demanding the total monthly rent identified in the lease. But for a 12-month lease, Housing Provider could also be demanding the total monthly rent, as explained in the Concession Addendum. *Id.*

13. Tenant argues that the definition of rent in a contract between a housing provider and a tenant should not supersede the definition of rent in the Act. Reply at 15. And the statutory definition of "rent" must be strictly applied to the terms used in the RAD forms.

14. The RAD Forms in the District of Columbia exist in the context of the Rental Housing Act and its implementing regulations. The amount debited from Tenant's account for rent exists in the context of the Rental Housing Act and its implementing regulations as well as the lease agreement. There are no statutory or regulatory provisions that constrain a housing provider from offering an apartment for lease at less than the maximum amount possible under the regulatory schema. There are no statutory or regulatory provisions that define the terms on the RAD forms to preclude using the maximum legal rent as the "current rent charged" and "prior rent."

15. Tenant maintains that any reference to the lease between a tenant and housing provider would lead to multiple definitions of the term "rent" and a distortion of the statutory definition of the term. Statutory Construction of "Current Rent Charged" at 2-3. I disagree. Tenant's lease and RAD Form 8 are consistent in identifying the maximum legal rent that could be charged for the unit. The lease is a permissible private agreement between tenant and housing provider that decrease the rent that a housing provider will charge tenant over the term of the lease.

16. The term "rent charged" has become a term of art in the rent-controlled housing industry. It is beyond doubt that newly revised regulations or revised forms with definitions of terms, consistent with the amended Act, would be useful to both tenants and housing providers. As discussed below, the Council of the District of Columbia has considered changes to the Rental Housing Act itself to address some concerns about concessions but has not enacted any changes as of yet.

4. Concessions

17. Here, Housing Provider implemented the CPI-W increase (starting December 22, 2015) by notifying Tenant of the increase through RAD Form 8 and informing the RAD of it and other unit increase by filing RAD Form 9. Housing Provider apparently was responding to market pressures when it leased the unit to Tenant at a lower rent. In Tenant's leases, Housing Provider identified the maximum legal rent as the "total monthly rent" but offered Tenant a lease which was subject to a "monthly recurring concession" in the rent. The process was transparent to Tenant as the terms of the pricing are set forth in the Lease and its Concession Addendum. Tenant signed the lease. To argue, as Tenant does, that the lease is irrelevant is simply wrong. The rent that Tenant insists should be on the RAD Forms is the rent that the parties agreed to in the Lease. But