

DISTRICT OF COLUMBIA COURT OF APPEALS  
MOTION TO DISMISS PETITION FOR REVIEW

No. **18-AA-0364**

SMITH PROPERTY HOLDINGS	)	
VAN NESS, L.P.,	)	
	Petitioner,	)
v.	)	
	)	RH-TP-16-30,842
D.C. RENTAL HOUSING COMMISSION,	)	
	Respondent,	)
and	)	
	)	
GABRIEL FINEMAN,	)	
	Intervenor.	)

**MOTION TO DISMISS PETITION FOR REVIEW**

Gabriel Fineman (the “**Tenant**”), the Intervenor in the above captioned case, moves to dismiss Petition for Review by the Petitioner (the “**Landlord**”) as being premature because the Rental Housing Commission’s Decision was remanded and is not final.

**I. Background**

**A.** This case was filed by the Tenant on July 12, 2016, seeking an order requiring the Landlord to re-file Rental Accommodations Division (RAD) Forms 8 and 9 from September 2015 using the rent actually being paid by Tenant as the “rent charged.” On March 16, 2017, the Office of Administrative Hearings (the “**OAH**”) denied the Tenant’s Motion for Summary Judgment and granted Housing Provider’s Cross-Motion for Summary Judgment. Tenant filed an appeal of the OAH’s Final Order with the Rental Housing Commission (the “**Commission**”) on March 30, 2017. The Commission subsequently reversed the Final Order of the

INTERVENOR’S MOTION TO DISMISS PETITION FOR REVIEW

No. 18-AA-0364

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OAH (“**Decision 1**”) and ordered the case remanded to the OAH “ for further proceedings consistent with this decision and order.” Decision and Order, Jan. 18, 2018, 37. Thereupon, Housing Provider filed a timely motion for reconsideration which the Commission denied on March 13, 2018 (“**Decision 2**”). On April 11, 2018, the Landlord filed a Petition for Review (the “**Petition for Review**” with this court (the “**DCCA**”) of both the Commission’s orders (the “**Decisions**”).

**B.** That same day, Landlord filed a Motion to Stay Remand with the OAH. A true and correct copy of the Landlord’s motion is attached as Exhibit 1. On April 19, 2018, Tenant filed with the OAH his Motion in Opposition to the Housing Provider’s Motion to Stay the Proceedings. A true and correct copy of the Tenants motion is attached as Exhibit 2. On April 20, 2018 the OAH issued its Order on Motion to Stay Remand. A true and correct copy of the OAH’s order is attached as Exhibit 3. The OAH Order on Motion to Stay Remand held that the OAH had no authority to proceed with the Remand while the case was pending with the DCCA.

## **II. Analysis**

**A.** The Petition for Review was filed before the Decisions were final and thus the Decisions are not appealable to the DCCA. See: Mulu Messle v. District of Columbia Department of Employment Services and Apolline Unit Owners Association, et al., No. 16-AA-1229 (Dismissal Order) (March 7, 2017); Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739, 749 n.14 (D.C. 1990); and Warner v. District of Columbia Dep’t of Emp’t Servs., 587 A.2d 1091, 1093 (D.C. 1991).

**B.** This has left the Tenant in limbo because the DCCA will not hear the case until it is final and the OAH will not proceed to finalize the case while it is still with the DCCA.

**III. Relief**

The Tenant therefore requests that the Court dismiss the Landlord's Petition for Review so that the OAH can proceed with its remand.

Respectively submitted:

May 7, 2018



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EXHIBIT 1  
LANDLORDS MOTION TO STAY  
PROCEEDINGS IN THE OAH

INTERVENOR'S MOTION TO DISMISS PETITION FOR REVIEW  
EXHIBIT 1 – LANDLORD'S MOTION TO STAY PROCEEDINGS IN THE OAH

DISTRICT OF COLUMBIA OFFICE OF ADMINISTRATIVE HEARINGS  
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, L.P.**  
Housing Provider/Appellee

DISTRICT OF COLUMBIA  
OFFICE OF  
ADMINISTRATIVE HEARINGS  
2018 APR 11 PM 3:41

**MOTION TO STAY REMAND PENDING RESOLUTION OF PETITION FOR REVIEW**

Smith Property Holdings Van Ness, L.P. (hereinafter, "Smith") respectfully moves to stay the remand of the above-captioned matter to the Office of Administrative Hearings pending the resolution of Smith's Petition for Review filed in the District of Columbia Court of Appeals. In support of this request, Smith shows the following:

1. On July 12, 2016 tenant/appellant Gabriel Fineman (hereinafter, "Tenant") filed tenant petition 2016-DHCD-TP 30,842 against Smith.
2. After the completion of summary judgment briefing, Administrative Law Judge Ann C. Yahner issued a final order on March 16, 2017. The final order denied Tenant's Motion for Summary judgment, granted Smith's Cross-Motion for Summary Judgment, and dismissed Tenant's petition with prejudice.
3. On March 30, 2017, Tenant filed a notice of appeal with the Commission. Both parties filed briefs and the Commission held a hearing on August 8, 2017.
4. On January 18, 2018, the Commission entered a decision and order reversing the March 16, 2017 final order and remanding the case to the Office of Administrative Hearings for further proceedings.

4826-6240-4961.v1

INTERVENOR'S MOTION TO DISMISS PETITION FOR REVIEW  
EXHIBIT 1 – LANDLORD'S MOTION TO STAY PROCEEDINGS IN THE OAH

5. Smith filed a motion for reconsideration on February 6, 2018 and both parties submitted briefs.

6. On March 13, 2018, the RHC denied the motion for reconsideration, thus affirming the remand of the case to the Office of Administrative Hearings for further proceedings.

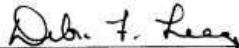
7. On April 11, 2018, Smith filed a Petition for Review with the District of Columbia Court of Appeals, attaching both the January 18, 2018 and March 13, 2018 Orders. (Exhibit 1, Petition for Review with attachments.)

8. On April 11, 2018, Mr. Fineman was contacted by email to request to this motion. Mr. Fineman responded that he does not consent.

WHEREFORE, Smith respectfully requests that the Office of Administrative Hearings stay the remand of the case until the District of Columbia Court of Appeals rules on Smith's Petition for Review.

Dated: April 11, 2018

Respectfully submitted,



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*Attorneys for SMITH PROPERTY HOLDINGS  
VAN NESS, L.P.*

DISTRICT OF COLUMBIA  
OFFICE OF  
ADMINISTRATIVE HEARINGS

2018 APR 11 PM 3:41

EXHIBIT 2

TENANT'S MOTION IN OPPOSITION TO THE LANDLORD'S  
MOTION TO STAY THE PROCEEDINGS

INTERVENOR'S MOTION TO DISMISS PETITION FOR REVIEW

EXHIBIT 2 – TENANT'S MOTION TO DISMISS LANDLORD'S MOTION IN THE OAH

No. 18-AA-0364

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**DISTRICT OF COLUMBIA  
Office of Administrative Hearings**

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GABRIEL FINEMAN,	:	
	:	
Tenant/Petitioner,	:	
	:	
V.	:	Case No.: 2016 DHCD TP 30,842
	:	3003 Van Ness Street, N.W., Apt. W-1131
	:	Administrative Law Judge: Ann C. Yahner
	:	REMAND
SMITH PROPERTY HOLDINGS VAN NESS L.P.,	:	
	:	
Housing Provider/Respondent	:	
	:	

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**TENANT’S MOTION OPPOSING STAY**

Tenant/Petitioner Gabriel Fineman (the “**Tenant**”), submits this Motion in Opposition to the Housing Provider’s (the “**Landlord**”) motion to stay the proceedings. Tenant hereby states:

**Background**

The Tenant filed a Tenant Petition (the “**Petition**”) asking for the Landlord to be required to correct its “Housing Provider’s Notice to Tenant of Adjustment in Rent Charged” notice (“Form 8”) and its “Certificate of Notice to RAD of Adjustment in Rent Charged” (“Form 9”) filings with the RAD. The Tenant then filed a Request for Summary Judgment on the Tenant Petition. The Petition required a determination of what was meant by the term “Current Rent” as used in the Rental Housing Act (the “**Act**”) as amended by the Rent Control Reform Amendment Act of 2006 and, in particular, in the Form 8 and Form 9 where the Housing Provider is required to disclose the “Current Rent”.



That determination was made by the Rental Housing Commission (the “**RHC**”) in its decision dated February 18, 2018 (the “**Decision**”). The Landlord moved for reconsideration and the RHC issued a second decision dated March 13, 2018 captioned “Order Denying Reconsideration” upholding the Decision and clarifying it in some detail. The case was remanded to the Office of Administrative Hearings (the “**OAH**”) for further proceedings consistent with those two decisions (together, the “**RHC Decisions**”) and their accompanying orders. The Landlord filed a notice of Appeal with the District of Columbia Court of Appeals (“**DCCA**”). At about the same time, the Landlord filed a motion with the OAH to stay (the “**Motion to Stay**”) the proceedings in the OAH pending the final outcome of its appeal to the DCCA.

## **Argument**

The motion to stay the proceedings should not be granted for a multitude of reasons:

Remands are supposed to be handled by the OAH expeditiously. A stay of a case is the opposite of expediting the case. It violates the basic policy that the administrative process is supposed to expedite solutions to problems.

The OAH is not empowered to reverse or stay an order from the RHC. Although it is able to stay any of its own final orders, there is no authority for it to stay a remand order of the RHC, either pending a review (and possible reconsideration) by the DCCA (that might take years) or pending the resolution of proposed legislation in the City Council. In this case, the RHC, as part of its determination of the Tenant’s appeal, ordered and directed the OAH to reconsider and modify its decision in light of the RHC Decisions. It did not say the RHC Decisions as they may later be amended by the DCCA or the US Supreme Court or as modified

or superseded by a new law from City Council. It is unheard of for a lower judicial body to ignore or stay the orders of its appellate body. This would do away with the very concept of judicial review.

The proper procedure in this case would have been for the Landlord to have sought a stay from the RHC, and if that failed, to appeal the denial of the stay to the DCCA.

The rules of the DCCA

The Decisions and orders of the RHC are on appeal by the Landlord to the DCCA as case number 18-AA-0364. The Respondent is the RHC. The OAH is not named as a respondent. Rule 18 of the DCCA deals with stays and provides:

- a. **“Initial Motion Before the Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.”<sup>1</sup>

The rule states that the Landlord should first move for a stay before “the agency”. The agency is defined in rule 15(a)(3)(B)<sup>2</sup> that requires the Landlord to name the agency as a respondent in its petition submitted to the DCCA. The Landlord named the RHC as the only respondent and did not name the OAH.

<sup>1</sup> DCCA Rule 18 (a) (1)

<sup>2</sup> DCCA Rule 15 states (in part)

TITLE III. REVIEW OF ORDERS OF ADMINISTRATIVE AGENCIES

Rule 15. Review of Agency Orders. ...

(3) The petition must:

- (A) name each party seeking review either in the caption or the body of the ...;
- (B) name the agency as a respondent; and
- (C) specify the order or decision or part thereof to be reviewed.

INTERVENOR’S MOTION TO DISMISS PETITION FOR REVIEW

EXHIBIT 2 – TENANT’S MOTION TO DISMISS LANDLORD’S MOTION IN THE OAH

Because no motion has been made to the RHC for a stay:

- b. **The petitioner must “show that moving first before the agency would be impracticable;** or state that the agency has denied a motion for stay and state any reasons given by the agency for its action.”<sup>3</sup>

There is no claim that moving for a stay from the RHC would be impractical and the rules of the RHC provide a practical procedure for doing so. Although it is not impractical to move for a stay in this case from the RHC, it might be difficult to obtain (see section 2, below). However, even that is far from clear. In the concurring opinion one Commissioner thought that the holding, while correct, did not give the City Council a chance to provide a legislative solution to the issues decided. Perhaps, the RHC would follow that lead and grant a stay.

Because no motion for a stay was filed with the RHC, there was no motion to deny and thus no basis to even seek a stay under the rules of the DCCA.

The rules of the RHC provide that the following factors be considered in determining if the stay should be granted.<sup>4</sup>

- (a) *The likelihood of eventual success of the moving party;*

<sup>3</sup> DCCA Rule 18 (a) (2) (A)

<sup>4</sup> DCMR Section 14-3805.3

Because the DCCA uses a standard of review that is similar to the Chevron standard, with great deference to the agency, the likelihood of the appeal being successful is remote.<sup>5</sup>

(b) *The likelihood of irreparable injury to either party;*

Because there were no monetary damages involved in the Decisions, the damages to the Landlord are slight: it must only issue corrected filings.

Because of the advanced age (75) of the Tenant, there exists a significant likelihood that he would die before all appeals are final thereby precluding any relief from the OAH.<sup>6</sup>

(c) *The balancing of injury as between the moving party and the other party(ies);*

Although OAH decisions are not supposed to be precedent, often a later decision will adopt the reasoning of a prior decision.<sup>7</sup> Thus granting a stay in this case could result in the granting of stays in many future cases where tenants may seek refunds of improper rent increases based on the Decisions. This would impose a substantial hardship on the tenants in such cases. On the other hand, Equity<sup>8</sup> is a \$20,000,000,000 company with a net income (profit) of

<sup>5</sup> The most recent statement of the standard used was in Wilson, 159 A.3d 1211 (2017) where the court said [quoting Sawyer, 877 A.2d 96, 102 (D.C. 2005)] “We are obliged to sustain the RHC's interpretation of those statutes and regulations unless it is unreasonable or embodies ‘a material misconception of the law,’ even if a different interpretation also may be supportable.” 159 A.3d 1211 (2017).

<sup>6</sup> This calculation is based on the probability of death in the latest tables issued by the Social Security Administration [<https://www.ssa.gov/oact/STATS/table4c6.html>], showing that the probability of death for a male at the ages 75, 76 and 77 totals over 14%. It is also possible that he would suffer a stroke or neurological disease (both more common in older people) that would prevent him from proceeding pro se.

<sup>7</sup> An example of this appears in Maxwell v Equity Residential Management [2015-DHCD-TP 30,704] that adopted the reasoning in Pope v. Equity Residential Mgmt., 2014-DHCD-TP 30, 612 (OAH July 8, 2015)

<sup>8</sup> Equity Residential Services is the owner of 3003 Van Ness through various wholly owned subsidiaries, having pur-

over \$600,000,000 a year. Any losses because of this case would be insignificant.

(d) *The effect of a stay on the public interest.*

It is in the public interest for tenants to have adequate notice of rent increases so that they can plan for either increased payments or move. A stay will allow the Landlord to continue to issue notices that do not meet this objective because the current notices only show the ceiling rent and invite the tenant to bargain for a new rent. This is not rent stabilizing or making rent predictable as anticipated by the Rent Stabilization Act.

Rules of the OAH

In those cases where the OAH stays its own decisions, the rules specified in Chapter 28 must be followed.

- a. Section 2830.3 says that the petition requesting a stay must state the reasons for granting the stay.

No reasons were stated in the Landlords petition other that there was a possibility of the holdings in the Decisions could be reversed by the DCCA. This is a reason for an appeal, but not a reason to stay the OAH proceedings for possibly years. The OAH should proceed with the remand as ordered by the RHC using the law as it existed at the time that the Petition was filed (as interpreted by the Decisions).

chased the corporation that owns the building in 2013 from Lehman Brothers as part of a \$9,000,000,000 transaction.  
[https://en.wikipedia.org/wiki/Equity\\_Residential](https://en.wikipedia.org/wiki/Equity_Residential)

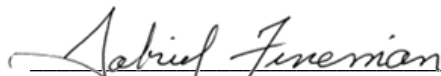
- b. Section 2830.4 lists the factors to be considered<sup>9</sup>. They are essentially the same as the factors listed by the RHC, above.

For the reasons stated above in C (1) (a)-(d), a petition to stay the original final order of the OAH would be denied. Likewise, the actual petition to stay the order of the RHC (to reconsider the case in light of the RHC Decisions) should also be denied.

## Summary

For the reasons stated above, the OAH should reject the motion of the Landlord for a stay and proceed expeditiously with the remand hearings.

Respectfully submitted,  
Tenant



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Dated: April 19, 2018

<sup>9</sup> In determining whether to grant a stay, the Administrative Law Judge may consider the following factors: whether the party filing the motion is likely to succeed on the merits, whether denial of the stay will cause irreparable injury, whether and to what degree granting the stay will harm other parties, and whether the public interest favors granting a stay. Section 2830.4.

## EXHIBIT 3

### OAH ORDER ON LANDLORDS MOTION TO STAY

INTERVENOR'S MOTION TO DISMISS PETITION FOR REVIEW  
EXHIBIT 3 – OAH ORDER ON LANDLORDS MOTION TO STAY

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DISTRICT OF COLUMBIA  
OFFICE OF  
ADMINISTRATIVE HEARINGS  
2018 APR 20 PM 3:11

GABRIEL FINEMAN  
Tenant/Petitioner,

v.

SMITH PROPERTY HOLDINGS VAN NESS  
L.P.,  
Housing Provider/Respondent.

Case No.: 2016-DHCD-TP 30,842

*In re:* 3003 Van Ness Street, NW  
W-1131

**ORDER ON MOTION TO STAY REMAND  
PENDING RESOLUTION OF PETITION FOR REVIEW**

Tenant/Petitioner Gabriel Fineman filed Tenant Petition (TP) 30,842 on July 12, 2016, seeking an order requiring Housing Provider/Respondent Smith Property Holdings Van Ness, L.P., to re-file Rental Accommodations Division (RAD) Forms 8 and 9 from September 2015 using the rent actually being paid by Tenant as the "rent charged." On March 16, 2017, I denied Tenant's Motion for Summary Judgment and granted Housing Provider's Cross-Motion for Summary Judgment.

Tenant filed an appeal of my Final Order with the Rental Housing Commission (the Commission) on March 30, 2017. The Commission subsequently reversed my Final Order and ordered the case remanded to this administrative court "for further proceedings consistent with this decision and order." Decision and Order, Jan. 18, 2018, 37. Thereupon, Housing Provider filed a timely motion for reconsideration which the Commission denied on March 13, 2018.

INTERVENOR'S MOTION TO DISMISS PETITION FOR REVIEW  
EXHIBIT 3 – OAH ORDER ON LANDLORDS MOTION TO STAY



On April 11, 2018, Housing Provider filed a Petition for Review with the District of Columbia Court of Appeals (Court of Appeals) of both the Commission's orders. *Smith Property Holdings Van Ness, L.P. v. District of Columbia Rental Hous. Comm'n*, 18-AA-0364. That same day, Housing Petitioner filed the presently pending Motion to Stay Remand Pending Resolution of Petition for Review in this administrative court. Tenant Fineman filed his opposition on April 19, 2018.

Housing Provider asks that I "stay the remand of the case until the District of Columbia Court of Appeals rules on Smith's Petition for Review." Motion to Stay, 2. Tenant argues that I do not have authority to stay an order from the Commission. Opposition at 2. Housing Provider should have filed its motion with the Commission and, if denied, with the Court of Appeals. Tenant goes on to argue I should proceed with the case as instructed by the Commission.

When a party files a timely notice of appeal with the Court of Appeals, this administrative court loses jurisdiction over the case. *Carter v. Cathedral Avenue Coop*, 532 A.2d 681, 684 (D.C. 1987); *District of Columbia v. FOP Metro. Police Labor Comm.*, 33 A.3d 332 (D.C. 2011). There are limited exceptions to this rule. For example, the Court of Appeals has ruled that if a party files a motion for reconsideration while an appeal is pending, I would have some limited authority to entertain the motion.<sup>1</sup> *District of Columbia*, 33 A.3d at 334-335; quoting *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952).

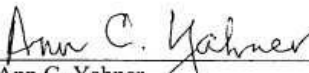
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<sup>1</sup> The general process would be for me to consider a motion for reconsideration and indicate that I would be prepared to grant the motion. *Carter*, 532 A.2d at 684. The appellate court then would remand the case for entry of that order, conceivably negating the need for further proceedings in the appellate court.

Any further proceedings at this administrative court, of necessity, would involve the core issue in this case now challenged before the Court of Appeals. This case does not involve any exception that might allow me to rule upon the pending motion.

Therefore, it is, this **20th day of April, 2018**:

**ORDERED**, that Housing Provider's Motion to Stay Remand Pending Resolution of Petition for Review is dismissed for lack of jurisdiction.

  
\_\_\_\_\_  
Ann C. Yahner  
Administrative Law Judge