DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

GABRIEL FINEMAN, Tenant/Appellant, v. SMITH PROPERTY HOLDINGS VAN NESS L.P., Housing Provider/Appellee.	:	Case No.: 2016 DHCD TP 30,842 3003 Van Ness Street, N.W., Apt. W-1131

HOUSING PROVIDER S BRIEF ON APPEAL

Housing Provider/Respondent Smith Property Holdings Van Ness L.P. ("Housing Provider"), by undersigned counsel hereby submits its Brief in Appeal in response to the brief filed by Tenant/Appellant Gabriel Fineman ("Mr. Fineman" or "Petitioner").

I. BACKGROUND

A. Procedural History

On July 12, 2016, Mr. Fineman filed a tenant petition against Housing Provider alleging violations of the Rental Housing Act of 1985, D.C. Code § 42-3501.01, *et seq*, (the "Act"). Mr. Fineman in his tenant petition checked one box, that the Housing Provider did not file the correct rent increase form with the Rental Accommodation Division and added a new claim to the pre-printed form of "improper notice of RAD form 8 to tenant". After an unsuccessful mediation, Mr. Fineman filed a motion for summary judgment on December 9, 2016. In his Motion, Petitioner asserted that he was entitled to judgment as a matter of law as the Housing Provider had filed with the Rental Accommodations Division ("RAD") a form on September 22, 2015 identified that the rent would be increased from $3,114 to $3,161, even though the Housing Provider had only debited $2,329 from his bank account. Housing Provider filed its opposition

and a cross-motion for summary judgment on January 17, 2017 (the "Opposition"). Petitioner filed his reply and opposition to Housing Provider's cross-motion on February 16, 2017. On March 16, 2017, the Office of Administrative Hearings issued a final order denying Mr. Fineman's motion and granting Housing Provider's motion ("Order"). On or about March 30, 2017, Petitioner filed a Notice of Appeal.

B. The 2014 and 2015 Leases

Smith Property Holdings Van Ness L.P is the owner of the residential rental accommodation located at 3003 Van Ness Street, N.W. in Washington, D.C. (the "Housing Accommodation"). Order at 3. Equity Residential Management, L.L.C. manages the Housing Accommodation. *Id*. Mr. Fineman has resided in the Housing Accommodation since December 22, 2013. *Id*. Pursuant to a lease agreement commencing on December 22, 2014 and expiring on December 21, 2015 (the "2014 Lease"), Mr. Fineman leased Unit W-1131 (the "Unit"). *Id*. at 4. The 2014 Lease identifies that the monthly rent is $3,274, including $3,114.00 for apartment rent and $160 for reserved parking. *Id*. The Lease identifies that tenant is entitled a monthly recurring concession of $945 per month (the "2014 Concession"). *Id*. The Lease includes a Concession Addendum which further explains the Concession.[1] It states:

> You have been granted a monthly recurring concession as reflected on the Term Sheet. The monthly recurring concession will expire and be of no further force and effect as of the Expiration Date shown on the Term Sheet.
>
> Consistent with the provisions of the Rental Housing Act of 1985 (DC Law 6-10) as amended (the Act), we reserve the right to increase your rent once each year. In doing so, we will deliver to you a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," which will reflect the "new rent charged." If you allow your Lease to roll on a month to month basis after the Expiration Date, your monthly rent will be the "new rent charged" amount that is reflected on the Housing Provider's Notice.

[1] **The Concession Addendum was attached as Exhibit 2 to the Opposition**.

> It is understood and agreed by all parties that the monthly recurring concession is being given to you as an inducement to enter into the Lease. You acknowledge and agree that you have read and understand the Lease Concessions provision contained in the Terms and Conditions of your Lease.

On September 18, 2015, Housing Provider sent notice to Mr. Fineman that the rent for the unit would be increasing from $3,114 to $3,161 effective December 22, 2015. *Id* at 5. Thereafter, Housing Provider filed a Certificate of Notice of Rent Increase with the District of Columbia's Rental Accommodations Division on September 22, 2015. *Id.* Mr. Finemn subsequently entered into a new lease. That lease commenced on December 22, 2015 and expired on December 21, 2016 (the "2015 Lease"). *Id.* The 2015 Lease identifies that the monthly rent is $3,321, including $3,161 for apartment rent and $160 for reserved parking. *Id.* The Lease identifies that tenant is entitled a monthly recurring concession of $946 per month (the "2015 Concession"). *Id.* at 5-6. The language for the 2015 Concession is identical to the 2014 Concession.

ii. BURDEN **OF** PROOF

At the outset it is important to note that the burden of proof rests upon the Petitioner in this case to prove each element of his claims pursuant to both the Rental Housing Act of 1985 (the "Act"), D.C. Code § 42-3502.16(g) and the District of Columbia Administrative Procedure Act, D.C. Code § 2-509. The Tenant must affirmatively prove the facts to support their claims in order to prevail. *Allen* v. *D.C. Rental Hous. Comm'n,*, 538 A.2d 752, 754 (D.C. 1988).

HI. ANALYSIS

In his brief, Petitioner argues that the 2014 Lease and 2015 Lease (collectively, the "Leases") that he entered into are irrelevant. He is mistaken. In both his brief and argument to the agency below, the Petitioner ignores the terms of the Leases, including concessions he entered into. In order to determine whether the Petitioner could prevail on his challenge that the

Housing Provider did not file the correct rent increase form with the Rental Accommodation Division as he believes it had inaccurate information, the Commission does not need to engage in statutory construction but instead examine whether the rent concessions that the Petitioner agreed to in his Leases are permitted under the Act.

A. The Use of a Concession Does Not Reduce the Legal Rent; Rather it Limits the Amount Paid by a Tenant During the Concession Period

In this case, the Lease the Parties entered into an agreement which provided Petitioner a one year concession.[2] The Parties entered into a subsequent lease in 2015, which also included a one year concession.[3] Upon the expiration of the 2014 Lease, Housing Provider was not bound to continue providing the concession thereafter. *Washington* v. *UIP Property Management, et al*, 2011-DHCD-TP 30,151 (OAH August 20, 2013) (Housing Provider permitted to provide a concession to tenant to fulfill requirements of a settlement agreement, while identifying the higher rent amount to RAD). *See also In the Matter of Missionary Sisters of the Sacred Heart, III* v. *N.Y. State Div. of Hous. & Community Renewal*, 283 A.D.2d 284, 289 (N.Y. App. Div. 1st Dep't 2001) (Concession did not obviate the terms of the lease agreement as it was clear, but the concession permitted the tenant to pay less for a specific period of time); *In the Matter of Century Operating Corp.* v. *Popolizio*, 60 N.Y.2d 483 (N.Y. 1983). As the Parties negotiated the 2015 Lease, Petitioner received the benefit of another concession.

The use of a concession does not invalidate the higher, legal rent for a unit. *Maxwell v. Equity Residential Management, LLC*, 2015-DHCD-TP 30,704 (OAH April 22, 2016);[4] *Pope* v.

[2] **See Exhibit 2 to Housing Provider's Opposition.**
[3] **See Exhibit 4 to Housing Provider's Opposition.**
[4] **A copy of the decision by the Administrative Law Judge was attached to Housing Provider's Opposition at Exhibit 6.**

Equity Residential Management, et al, 2014-DHCD-TP 30,612 (OAH July 8, 2015);[5] *Guralv. Equity Residential Management, et al*, 2016-DHCD-TP 30,855 (OAH April 12, 2017). In each case, the Administrative Law Judge ruled that the use of a concession was valid and the language of the concession was identical to the concession that Mr. Fineman agreed to in the Lease. In *Pope,* the Administrative Law Judge ruled:

> In the District of Columbia, rent concessions are also used to offer rent controlled units at or below market value while preserving a higher legal rent level that can be charged later. There are many arguments to be made that such concessions are contrary to the abolishment of rent ceilings. Prior to the Act's amendment in 2005, a Housing Provider was able to reserve future rent increases by increasing the "rent ceiling" for a unit while actually charging a lower rent. The rent ceiling permitted a housing provider to later implement rent increases in amounts that were higher than the annual increase of general applicability. However, there is nothing in the Rental Housing Act that prohibits a housing provider from offering rent concessions as long as the rent charged does not exceed the legally authorized rent that is on file with the Rental Accommodations Division.
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> It is well established that 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 written language embodying the terms of an agreement will govern the rights and liabilities of the parties . . . unless the written language is not susceptible of a clear and definite undertaking." *Id.* at 718. Contracts 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). Therefore, 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 the lease agreeing to pay the lower rent amount as a concession for one year.
>
> Tenant argues that she did not understand that the concession would expire, that Housing Provider falsely advertised the rent for the unit at the lower price, and that the paperwork regarding the concession

[5] **A copy of the decision by the Administrative Law Judge was attached to Housing Provider's Opposition at Exhibit** 5.

> was confusing. These however, are not issues governed by the Rental Housing Act, but amount to a contractual dispute. If Tenant believes she was fraudulently induced into signing the lease, that the terms of the lease are somehow ambiguous, or that there was no meeting of minds, she must seek a remedy through D.C. Superior Court's Civil Division which has the jurisdiction to resolve equitable disputes. The jurisdiction of this administrative court is limited to applying the Rental Housing Act and I find that the rent concession was not in violation of the Rental Housing Act. That however, does not end the inquiry as Tenant alleges that the rent increase exceeded the legally calculated rent for her unit.

The analysis in *Pope* was adopted by the Administrative Law Judge in *Maxwell*.[6] Here, the ALJ also examined whether concessions violated the statutory purposes of the Act found in D.C. Code § 42-3501.01 and ultimately found that they did not. Order at 12-13.

The Administrative Law Judge ("ALJ") expanded on the analysis in *Pope* regarding construction of leases, finding:

> 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.
>
> 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.*

Order at 10.

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[6] **The analysis in *Gural* tracks the Order in this case**.

As discussed in *Pope*, there is no prohibition against providing for an adjustment in rent, but limiting the impact of that adjustment to a tenant. The Office of Administrative Hearings and the Rent Administrator have both approved Voluntary Agreements and settlement agreements whereby significant rent increases are imposed on new tenants but not existing tenants through the use of concessions. *See, e.g., In re: Petition for Rent Adjustment based on 70% Voluntary Agreement*, 2012-DHCD-VA 11,016 (OAH June 19, 2012) ("Voluntary Agreements can increase rent charged for future tenants while providing current tenants with a rent concession."); *In re: Voluntary Agreement Petition for Rent Adjustment WRF 1921 Kalorama Road, LP*, VA No. 08-011 (RAD May 7, 2009), at page 5; *In re: Infinity UIP Kenyon Acquisitions*, LLC, VA 11,001A (RAD January 11, 2011) (citing at page 3 to 14 DCMR 4204.1); *In re Park Manor Joint Venture*, VA 11-020 (RAD March 30, 2012). The use of concessions is permitted by District of Columbia law and therefore it did not reduce the legal rent, but instead reduced the amount paid by Mr. Fineman during the concession period.

In fact, the interference with the right of housing providers and tenants to negotiate for payments at a level below that legally permitted would violate the respective parties' fundamental right to contract in manner not allowed under District law. The D.C. Court of Appeals address this very issue in *Double HHousing Corp. v. David*, 947 A.2d 38, 41-42 (D.C. 2008), finding:

> Double H's brief focuses on the following issue: whether a landlord, entitled to increase the rent charged to its month-to-month tenant, may require the tenant to execute a new lease agreement as a condition of receiving a discount from the otherwise applicable rent increase. We agree with Double H that a landlord may do so, absent circumstances that would support a finding that the tenant was effectively coerced into abandoning the month-to-month tenancy that he was entitled to maintain under District of Columbia law (specifically, D.C. Code § 42-3505.01).

> … [§ 42-3505.01] does not, however, mandate that any continued tenancy must be month-to-month or preclude the landlord and tenant from agreeing to a new or renewed lease…. We therefore cannot agree that Double H was precluded from offering to charge David a discounted rent amount if he signed a new lease but charging him a higher monthly rent if he continued his month-to-month tenancy. To hold otherwise would, we think, encroach on the landlord's - and tenant's - "'basic freedom to contract as he will,'" which we have said remains one of the "rather basic rights incident to the ownership of property [that] ought not to be summarily dismissed as obsolete" even under our modem statutory rental housing law. *Goodman* v. *District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990)* (quoting *White v. Allan, 70 A.2d 252, 255 (D.C. 1949))*.

(emphasis added). *See also Wilson* v. *D.C. Rental Hous. Comm'n,* 159 A. 3d 1211 (D.C. 2017).

Accordingly, the ALJ found:

> 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 the Lease identifies the maximum legal rent as the total monthly rent and the concession from it. The Concession Addendum explains that if the concession lapses by failing to renew on a 12-month bases, the rent returns to the maximum legal rent.

Order at 12. Therefore, Housing Provider was entitled to enforce the concession language that Petitioner agreed to in the lease.

B. Petitioner Cannot Prevail on His Claim that the Rent Increase was Larger than Permitted Under the Rental Housing Act.

Mr. Fineman's challenge must fail. The Housing Provider filed the Certificate of Notice of Rent Increase with the Rental Accommodations Division prior to the implementation of that increase.[7] The Certificate shows that the rent for the Unit was increased by 3.5%, effective December 22, 2015 from $3,114 to $3,161. The 2016 Certificate shows that the rent for the Unit

[7] **See Exhibit C to Petitioner's Motion for Summary Judgment**.

was increased by 1.5%, effective April 1, 2016 from $2,118 to $2,182. Since concessions are permitted, the filing itself is proper.

Furthermore, the definition of "rent" in D.C. Code § 42-3501.03(28) does not exist in a vacuum.[8] The amount withdrawn from Mr. Fineman's bank account each month does not negate the fact a contractual agreement was made between Mr. Fineman and the Housing Provider in the 2014 Lease and the 2015 Lease. In both leases, the Housing Provider was contractually obligated to provide a concession for a specific period of time. The Housing Provider was also obligated by the Lease to provide certain related services and facilities. The Lease, in its entirety, defined other rights, obligations and responsibilities of each party. The Office of Administrative Hearings does not have jurisdiction over the terms of the Lease, to which Mr. Fineman agreed. Upon the expiration of the 2014 Concession, the Housing Provider is entitled to charge a higher rent. *See Pope*. However, Mr. Fineman and Housing Provider negotiated and executed the 2015 Lease.

Petitioner fails to address the practical effects of his theory. Under Mr. Fineman's theory, Housing Provider was obligated to file a Form 9 that identified the amount that he paid ($2,169) rather than the higher amount agreed upon in the lease ($3,114). Yet, Mr. Fineman fails to address what would have occurred had the Parties not negotiated another lease in 2015. In that situation, Mr. Fineman would have been a month-to-month tenant and the terms of the 2014 Lease specifically explain that after 12 months the concession expired and he would have therefore been obligated to pay $3,114 as he had agreed. *See* Order at 12. This was the rental amount agreed upon in the lease a year earlier, and to which a concession applied for a period of

[8] **"Rent" is defined 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. Code § 42-3501.03(28).**

twelve months. As it was not a rent increase, a Form 9 would not be an appropriate filing at that time. As such, the ALJ rejected his claim, finding:

> 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.
>
> 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 is 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."
>
> 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 decreases the rent that a housing provider will charge tenant over the term of the lease.

Order at 10-11.

C. Petitioner's Definition of "Rent Charged" is not Applicable

Petitioner, in his brief, challenges the ALJ's statement in the Order that the term "rent charged" is a "term of art". *See* Order at 11; Brief at 6. Petitioner uses this statement as an opportunity to engage in statutory construction and rely upon recently adopted legislation. Neither of these are appropriate. First, the ALJ's statement was taken out of context, as contrary to Petitioner's arguments; nowhere did the ALJ define "rent charged". Instead, the ALJ simply said:

> 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.

Order at 11. Further, Petitioner's reliance upon the recently enacted definition of "rent charged" is not helpful to him. *See* Brief at 5. As Petitioner concedes in his brief, the "Elderly and Tenants with Disabilities Protection Amendment Act of 2016" was not signed by the Mayor until February 9, 2017 and did not become effective until April 7, 2017. See Brief at 5, n. 5. The new definition was not even law at the time the Final Order was issued on March 16, 2017, much less applicable during the relevant period in this Petition.[9]

iv. CONCLUSION

For the foregoing reasons, the decision of the Administrative Law Judge should be affirmed.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: August 2, 2017

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[9] **In any event, the new definition of "rent charged" does not help the Petitioner as it does not reflect the amount paid by the Petitioner, as he argues, but rather the maximum allowable rent.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing opposition thereof was served on this the 2nd day of August, 2017, by first class mail, postage pre-paid upon:

Gabriel Fineman
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Unit 810
Chevy Chase, Maryland 20815

Debra F. Leege