DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

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

BRIEF OF APPELLANT/TENANT, GABRIEL FINEMAN

The Appellant/Tenant Gabriel Fineman (the "**Tenant**") hereby submits this brief in the appeal of the final order after remand (the "**Decision**") issued on October 2, 2018 by the Office of Administrative Hearings ("**OAH**"), Administrative Law Judge Ann C. Yahner presiding.

STATEMENT OF THE ISSUES

The Decision is based on cascading fallacies: (a) first it holds that OAH has no authority to provide any remedy to the Tenant[1]; (b) based on this erroneous holding, it further holds that the case is moot[2]; (c) the Decision also finds that the Tenant no longer has standing to even ask for relief be-

[1] "There does not appear to be any specific authorization to order an applicant to the RAD to do anything. I conclude that 1 do not have statutory authority to order a housing provider to correct, re-issue, and re-file forms with the RAD. Because that order is the only relief Tenant now seeks, I can provide no further relief." Decision, page 10.

[2] "Because I have determined that I cannot issue an order to Housing Provider to correct, refile, and re-issue the forms, the case is moot." Decision, page 12. "Because I cannot offer relief, the case is moot." Decision, page 15.

cause he is no longer a tenant at the 3003 Van Ness South.[3] So, let us examine these three holdings and some of the many mistakes made to reach these conclusions.

BACKGROUND

The Tenant filed a tenant petition (the "**Tenant Petition**") on July 12, 2016, claiming that the RAD form 8 notices he received and the RAD form 9 notices submitted to the Rental Accommodations Division (the "RAD") were defective because they grossly misstated his "current rent." The Tenant filed a motion for summary judgment, Smith Property Holdings Van Ness, L.P. (the "**Landlord**") filed an objection and cross motion for summary judgment, and the Tenant filed a reply to that cross motion (the "**Initial Tenant Reply**"). The OAH issued a final order (the "**Initial Order**") on March 16, 2017 and the Tenant appealed the Initial Order to the Rental Housing Commission (the "**RHC**"). After briefing by both parties and a hearing, the RHC issued a decision and order (the "**First RHC Decision**") on January 18, 2018; and, upon a motion for reconsideration by the Landlord, the RHC issued an order denying reconsideration (the two decisions, together constitute the "**RHC Decisions**"). The First RHC Decision ordered the case "remanded to OAH for further proceedings consistent with this decision and order." The Tenant petitioned the OAH to hear the remand (the "**Remand Motion**") and, after briefing by both parties, the OAH issued the Decision that almost entirely ignored the RHC Decisions and, instead dismissed the case on technical grounds. The Tenant then made the current appeal to the RHC.

ARGUMENT

There are several general mistakes underlying the Decision.

[3] "Even if I had the authority to order Housing Provider to correct, re-issue, and re-file the 2015 forms, Mr. Fineman is no longer a tenant at the Property. He does not have a personal stake in the outcome of the litigation giving him standing." Decision, page 15.

A. Ignoring Lateness. The Decision is based on new holdings that, if correct, could and should have been made at the time of the Initial Order but were not made then. All of the facts used for these erroneous holdings in the Decision were present at the time of the Initial Order, but despite now being considered fatal, these issues were not considered relevant or even mentioned in the Initial Order. Choosing to only recognize these issues now constitutes arbitrary actions and conclusions of law not in accordance with the provisions of the Rental Housing Act (the "**Act**"), which should be reversed.

a. The OAH now contends (incorrectly) that it has no authority to provide any remedy for the Tenant. Yet, no facts in the case have changed since the Initial Order where this lack of authority was not raised by the Landlord or asserted by the OAH. The OAH brought up many things in the Initial Order that were not raised by either party, including the concept that the phrase "rent charged" was a term of art that meant different things to different landlords. Surely its own purported lack of authority was known to the OAH at the time of the issuance of the Initial Order and was certainly germane to the resolution of the case at that stage of the process.

B. Ignoring Facts. The OAH choose to examine only the original Tenant Petition and the Motion for Summary Judgment on Remand and ignored all of the arguments raised in the many other briefs submitted to the OAH. These also constitute arbitrary actions and conclusions of law not in accordance with the provisions of the Act and should be reversed.

a. One example was the OAH's claim that the Tenant voluntarily left the Housing Accommodation (the "**Apartment**"). The Tenant was very clear in his submissions to the OAH that

he was being grossly overcharged for the Apartment.[4] In fact, the Tenant was constructively evicted by the Landlord when it demanded a rent that was far above the market rent for the Apartment.

C. Ignoring Issues. Although recognizing that the OAH has adjudicatory authority over adjudicated cases previously under the jurisdiction of the Rent Administrator, the OAH arbitrarily chose not to recognize issues arising from a "tenant complaint" (as opposed to a "tenant petition") despite the fact that such cases are expressly subject to the Rent Administrator's jurisdiction.[5] This refusal by OAH to acknowledge jurisdiction over "tenant complaints" again constitutes arbitrary actions and conclusions of law not in accordance with the provisions of the Act and should be reversed.

D. Ignoring Its Authority. Despite the fact that the official RAD "Tenant Petition/Complaint" form filed by the Tenant included a checkbox checked by the Tenant that said that "[t]he housing provider did not file the correct rent increase form with RAD," the OAH decided that its authority[6] to impose penalties[7] was limited to ordering the rollback of rents, imposing fines, and awarding attorney's fees, and that it had no authority to require that correct forms be filed or provide any other relief for this violation. This refusal by OAH to enforce the basic notice provisions of the Act again

[4] "After I gave notice to the Housing Provider that I was not renewing my lease for my unit ("Unit 1131") … [the Unit was listed by Equity on its web site] The listing shows the rent for Unit 1131 as $1,980 per month. I had been paying $2,169 for Unit 1131 and the last best offer from the Housing Provider in 2016 (for the 2017 term) was $2,301" Initial Tenant Reply, Exhibit 2 – Third Affidavit of Gabriel Fineman points 3-6 and Exhibit 3 to this Affidavit.

[5] "The Rent Administrator shall have jurisdiction over those **complaints** and petitions arising under subchapters II, IV, V, VI, and IX of this chapter and title V of the Rental Housing Act of 1980 which may be disposed of through administrative proceedings." D.C. Code § 42-3502.04(c) (emphasis added).

[6] "The Rental Housing Act specifies penalties that can be imposed for violation of the statute. D.C. Official Code § 42-3509.01. ALJs can rollback rent increases and hold housing providers liable for unlawful rent increases. D.C. Official Code § 42-3509.01(a). ALJs can also impose civil fines for various violations of the Rental Housing Act, including for example, making false statements or continuing to collect unlawful rent increases. D.C. Official Code § 42-3509.01(b). Attorney fees may also be awarded to prevailing parties pursuant to D.C, Official Code § 42-3509.02. There is no provision allowing an ALJ to order a housing provider to correct, re-issue, and re-file forms." Decision, page 10.

[7] Of course, requiring a party to do something that they are already required to do is not a penalty.

constitute arbitrary actions and conclusions of law not in accordance with the provisions of the Act and should be reversed.

a. The Decision claims the OAH could only undertake certain enumerated actions.[8] The Decision completely ignores other enumerated powers that confer broad authority to deal with other issues not covered by specific enumerations.[9]

b. Indeed, the Decision claims that the OAH has no authority to order anyone to do anything.[10] If true, this raises the issue of what is the very purpose of the OAH.

c. This ignores the many cases where the OAH has provided relief where there was no explicit statutory or regulatory provision for doing so. These include ordering the refund of security deposits and violations of the Right of Tenants to Organize Act.

d. In justification of these claims, the OAH relies upon the Shuman[11] case where the court struck down certain exceptional remedies fashioned by the OAH. These included ordering fines if the Office of Tax and Revenue (the "**OTR"**) did not: (a) fix or buy a new computer system within two weeks; and (b) pay the OAH $80,000 for its wasted time.[12] What the Court found improper in the Schuman case was not the numerous previous orders by the OAH to fix the computer system (including the order

[8] "None of the enumerated powers cover the situation here - ordering a private entity to correct, reissue and refile government forms." Decision, Page 10.

[9] This, of course, ignores three of the enumerated powers just quoted in the Decision: "(5) Issue interlocutory orders and orders"; "(10) Perform other necessary and appropriate acts in the performance of his or her duties and properly exercise any other powers authorized by law"; and "(13) Exercise any other lawful authority." Decision, page 8.

[10] "There does not appear to be any specific authorization to order an applicant to the RAD to do anything." Decision, page 8.

[11] Office of Tax and Revenue v. Shuman, 82 A. 3d 58 (D.C. 2013). This is a fascinating case that is extremely well written and well worth reading on its own.

12 Shuman, 82 A. 3d 58 at 70

being appealed) but the escalating penalties if the OTR did not promptly comply.[13] That is, where the OAH exceeded its authority was not in issuing an order for the OTR to do something, but rather in imposing escalating fines if it did not.[14] Enforcing the OAH order was a matter for the Superior Court.[15]

e. In the current case, the Tenant did not ask for such extraordinary and novel enforcement of relief. Instead, the Tenant asked the OAH to direct the Landlord to do exactly what the Landlord was already required to do under the Act – obey the law and produce correct notices. The Tenant was asking the OAH to issues an order because that is a necessary first step to have the Superior Court enforce that order.

f. The OAH relied upon the Shuman case, which struck down the exceptional remedies fashioned by the OAH in that case. The Decision claims that the core of Shuman is to prohibit the OAH from exercising its authority to: (5) Issue interlocutory orders and orders; (10) Perform other necessary and appropriate acts in the performance of his or her duties and properly exercise any other powers authorized by law; (13) Exercise any other lawful authority;[16] and to do anything else to implement a decision. A

[13] "The case must therefore turn on whether or not the de facto injunctions, and the conditional fines that followed, can be justified as remedies for failure by OTR to comply with what OAH claims to have been lawful orders. We conclude that they cannot." Id. at 71

[14] "Here, OAH sought to impose increasing coercive fines for every month that OTR did not repair or replace its computer system. These sanctions sound in civil contempt, they were based on the ALJ's analysis of the law of civil contempt, and they go far beyond any relief that an administrative agency, as opposed to a court, is authorized to issue." Id. at 72.

[15] "The appropriate forum for a suit to compel compliance with an order of OAH is the Superior Court." Id.

[16] DC Code § 2.-1831.09(b).

key finding in Shuman was that the jurisdictional argument elevated form over substance.[17]

g. Similar to our present case, in Shuman the OTR raised technical arguments as to why the OAH lacked jurisdiction.[18] Similar to our case, the OTR raised these objections six months after the case commenced.[19] The District of Columbia Court of Appeals (the "**DCCA**") dismissed these tactics as unacceptable.[20]

E. Ignoring Jurisdiction. When the Decision held that the OAH lacked subject matter jurisdiction,[21] it erroneously reached conclusions of law not in accordance with the provisions of the Act or with the facts presented. These holdings should be reversed.

a. Adjudicated case. The Decision first claims that there is no case to adjudicate. There are two possible explanations for this holding: (i) that there was no subject matter jurisdiction when the case was first heard; or (ii) that there was no subject matter jurisdiction when the case was heard on remand. The Decision holds that it has jurisdiction over contested cases and quotes D.C. Official Code § 2-502(8) for the definition:[22]

> The term "contested case" means a case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties

[17] "In our view, this jurisdictional argument, first raised six months after the case came before OAH, blinks reality and exalts form over substance to an altogether unacceptable degree." Shuman, 82 A. 3d 58 at 67-69. Cited in Sullivan v. Abovenet Communications, Inc., 112 A.3d 347 (D.C. 2015). "To hold otherwise would unacceptably exalt 'form over substance' …." Abovenet at 356

[18] In Shuman it was about the definition of "proposed assessment" and "tax refund." Shuman at 67.

[19] In this case, the jurisdictional argument was first made in July 2018 while the Landlord's initial motion for summary judgment was filed some 18 months earlier in January 2017.

[20] See footnote 177, above.

[21] Decision, page 12.

[22] Id.

are required by any law or constitutional provision to be determined after an hearing ….

Let us see how this definition applies in the two possible situations:

i. Considering the possibility that there was no subject matter jurisdiction when the case was first heard, OAH nonetheless issued a final order in favor of the Landlord in the Initial Order that purported to resolve the legal duty of the Landlord, as required by the Act, to use a particular dollar value in a notice to the Tenant. Based on this action, the case clearly met the definition of a contested case at the time of the Initial Order.

ii. Consider the possibility that there was no subject matter jurisdiction when the case was heard on remand because there were no issues to be resolved by the OAH. Even if there were no unresolved issues, there was still a need for an order from the OAH. Otherwise, what was the purpose of remanding the case? If all cases where issues were resolved by the RHC were without subject matter jurisdiction to issue orders implementing the RHC decisions, the process for enforcing the Act would be much shorter but completely ineffective.

iii. The Decision states that OAH has authority to hear only adjudicated cases and then quotes the statute that says the hearing for an adjudicated case must be a hearing "in which the legal rights, <u>duties</u>, or privileges of specific parties are required by any law or constitutional provision to be determined after an ad-

judicative hearing of any type."[23] [emphasis added] It then proceeds to ignore the fact that it had to determine the duties of the Landlord in connection with issuing corrected RAD forms as remanded by the RHC. Those duties include: when to issue these forms; when to serve and file them; if they were to be amendments or replacements; and other exact terms.

F. Misinterpretation of Standing. Next, the Decision claims that the Tenant no longer has the ability to bring an action relating to the Apartment because he is no longer a resident of the Apartment and thus has no standing to initiate a case.[24] This is an erroneous conclusion of law not in accordance with the provisions of the Act or with the facts presented. This holding should be reversed.

a. We are not discussing the Tenant's right to initiate a Petition (that happened in 2016), but rather the obligation of the OAH to act on a case on remand. The current Tenant's Motion for Summary Judgment was not made in isolation as a de novo case, but rather in response to a remand with instructions to follow the decision of the RHC.

i. Status as a tenant. The OAH based its claim of lack of standing on an asser-

[23] "Subject matter jurisdiction defines a court's authority to hear a case. See Gelman Mgmt Co. v. Campbell, RH-TP-09-29,175 (RHC Dec. 23, 2013). Under D.C. Official Code § 2-1831.03, OAH has jurisdiction over adjudicated cases. D.C. Official Code § 2-1831.01(1) defines an " adjudicated case" as a contested case (as defined in D.C. Official Code § 2-502(8)), as well as a case involving an adjudicated hearing:

> [A] contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and **in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type**. The term "adjudicated case" includes, without limitation, any required administrative adjudicative proceeding arising from a charge by an agency that a person committed an offense or infraction that is civil in nature.
>
> Emphasis added" Id. At 12

[24] This has no bearing on whether the Tenant may pursue a case already initiated. Interestingly, a former tenant can initiate a suit for many reasons after moving, including overcharged rent during the last three years, wrongful evection as retaliation, and other reasons.

tion that the Tenant was no longer a tenant under the Act and therefore unable to pursue his claim.[25] The OAH improperly conflated the requirements for initiating a petition (that there be some connection with the housing accommodation) with the requirements to pursue a petition (none).

1. We should start with the fact that the term "tenant petition" is not defined in the Act. In general, the Act refers to the term "petition"[26] to include both actions started by tenants and by housing providers. In a few cases, it refers to specific types of petitions to differentiate them from others.[27]
2. In fact, a person does not have to be a current tenant to initiate a petition. The RAD form 23 that the Tenant used included a place to list a current address that is different from the address of the unit that was the subject of the complaint.[28]
3. A person does not have to have personally suffered direct harm to initiate a tenant petition. The RAD Form 23 says "I/We believe that the

[25] "None of these variations on the definition of 'tenant' apply to Mr. Fineman now. He no longer lives at the Property and no longer pays rent for the unit. Mr. Fineman no longer has any interest in the Property; he can be said to have only an academic interest in the problem." Id. at 14

[26] See for example: D.C. Code § 42–3502.16 (a). ("The Rent Administrator shall consider adjustments allowed by §§ 42-3502.10, 42-3502.11, 42-3502.12, 42-3502.13, and 42-3502.14 or a challenge to a § 42-3502.06 adjustment, upon a petition filed by the housing provider or tenant."); § 42–3502.16a (a). ("A tenant organization shall have standing to assert a claim in its name on behalf of one or more of its members in any petition filed pursuant to this chapter…."); and § 42–3502.22 (G). ("A pamphlet published by the Rent Administrator that explains in detail using lay terminology the laws and regulations governing the implementation of rent increases and petitions permitted to be filed by housing providers and by tenants").

[27] For example: § 42–3502.24 (g)(4). "(A) Upon recovery by the housing provider of all costs, including interest and service charges, used as a basis for a capital improvement petition or a substantial rehabilitation petition; or (B) Upon any expiration of a hardship petition granted to the housing provider."

[28] RAD Form 23, Part 1, "Current Address of Tenant(s) (if different than above)"

following violation(s) of the Rental Housing Act of 1985, as amended, (the Act) at D.C. OFFICIAL CODE §§ 42-3501.01 et seq. (Supp. 2008) has/have occurred (check below):"[29] Note that it does not say "I have suffered harm from the following violations…." Note that some of the items to be checked do not involve any quantifiable harm to the tenant, but are rather simply violations of the Act that should be corrected.[30]

4. A tenant can initiate a petition for any violation of the Act, apparently including violations that do not necessarily affect that tenant in a quantifiable way. DCMR 4214.4 says "The tenant …may, by petition … complain of and request appropriate relief for **any other violation of the Act** …." [Emphasis added].[31]

5. Indeed, to hold that a petition cannot be pursued once a tenant leaves his apartment would invite landlords to evict tenants in order to terminate tenant petitions.[32]

ii. Status in the Case. The Decision then says that because the Tenant no longer lives at the Property and no longer pays rent for the unit, he no longer has any interest in the Property. It then erroneously concludes that the Tenant now

[29] Id. Part 4, "Tenant Complaint"

[30] Id. Checkboxes A and Q.

[31] Note that this rule is from 1986 and, like all of the DCMR rules on rental housing, predates the major changes made in 2006.

[32] In this case, the Tenant maintains that he was constructively evicted when the Landlord sought to charge a rent that exceeded the market rent. See footnote 4, above.

has only an "academic interest in the problem."[33] Stop. What is the problem? It is not that the Tenant no longer has a right to occupy the Apartment. The problem is that the Tenant received improper notices when he was a tenant and that those notices have never been corrected. That is, the problem remains as real and alive as ever.

G. Claiming Case Moot. Finally, the Decision claims that the case is moot because the ALJ is unable to formulate a remedy. This is an erroneous conclusion of law not in accordance with the provisions of the Act or with the facts of the case. This holding should be reversed.

a. The claim of inability to formulate a remedy is discussed in section D, above and shown to be fallacious.

b. Although this holding relies on OAH's stated inability to formulate a remedy, it then further relies on several cases to show that mootness can spring into life after the start of a case. That issue is not relevant to the current case.

i. First, the Decision cites Cropp v. Williams, 841 A.2d 328, 330 (D.C. 2004). Cropp held that a "case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome."[34]

1. In Cropp, the Court dealt with the Inspector General Qualifications Amendment Act of 2003 and a dispute between City Council and the

[33] "He no longer lives at the Property and no longer pays rent for the unit. Mr. Fineman no longer has any interest in the Property; he can be said to have only an academic interest in the problem." Decision, page 14. "Since Mr. Fineman moved out of the unit in question on December 8, 2016, and seeks no immediate personal relief, there are no legal rights, duties, or privileges to be determined. There is no relief to be ordered." Decision, page 15

[34] "A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." Id. at 11.

Mayor.[35] It found for the Mayor that the resignation of the appointee made the case moot because that was the only point in controversy.[36] The Council argued that it was seeking a broader determination that the Mayor violated his duty to enforce the law. The Court found that the matter was not ripe for determination because the there was no longer a concrete mayoral decision in dispute and the context was now abstract.[37]

2. In our case, the issue is not one of ripeness as the controversy is still very real. The points in controversy included if the Landlord must correct its improper notices of the then current rent; if the OAH could issue an order to the Landlord to do so; and if the Landlord would be liable for failure to do so. There are still practical consequences for the Landlord in that it must issue and file the corrections, for the Tenant in that he will receive the corrected notices that he first requested years ago, and for the tenants who occupied the Apartment after the

[35] "The Act changed the qualifications for the office of Inspector General of the District of Columbia, and contained a section which stated that if the incumbent — who is Charles C. Maddox — did not meet the new qualifications as of June 1, 2003, he could not 'continue to hold the position and the position shall be vacant.'" Cropp v. Williams, 841 A.2d 328, 329 (D.C. 2004).

[36] "The Mayor argues that this case is moot because the sole legal dispute between himself and the Council — whether the new qualifications which the Act contains can be applied to Mr. Maddox — has been resolved by the incumbent's resignation and departure from office." Id. at 330.

[37] "The Council contends that the matter is not moot because Mr. Maddox's individual status is not the only issue between the parties; rather, the Council is seeking a broader determination that the Mayor violated his duty to enforce the law. 'The Mayor's Charter duty to enforce the law,' the Council asserts, 'and the Council's right to have the Court determine whether the Mayor violated that duty is not rendered moot by the prospective resignation of a subordinate agency head.' **We are unwilling, however, to address an issue of competing authority between the Mayor and the Council in so abstract a context rather than in the concrete setting of a decision by the Mayor that continues to have live consequences.**" Id. [emphasis added]

Tenant's departure in that they will receive corrected notices. Those points are still in controversy and will remain so until the Landlord files and issues the corrected forms.

ii. Next was Clarke v. United States, 915 F.2d 699, 701 (D. C. Cir. 1990) that held that intervening events can occur that make the case moot.[38]

1. The OAH only cited a quote from an earlier case, Transwestern Pipeline Co. v. FERC, 897 F 2d 570, 575 (D.C. Cir. 1990), that was cited by the Court in Clarke. In the earlier Transwestern case, a pipeline company sued the Federal Energy Regulatory Commission (FERC). claiming that a regulation could unfairly interfere with its business and should be reversed. During the time in litigation, the regulation was superseded and the potential harm never occurred. There was nothing for the Court to decide because the situation had resolved itself. The Court held that the case became moot because of these supervening events.[39]
2. The Clarke case involved an attempt by Congress to nullify an earlier DCCA decision finding that Georgetown University had discriminat-

[38] "Courts refrain from deciding cases if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more than-speculative chance of affecting them in the future.' *(en banc) (quoting Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir 1990)" Clarke v. United States, 915 F.2d 699 at 701. However, the quote then continues saying "See, e.g., Friends of Keeseville, Inc. v. FERC, 859 F.2d 230, 234 (D.C. Cir. 1988) (review may not be premised on 'bare possibility' that agency action would lead to injury)."

[39] "Here, both Williams and SoCal -- Transwestern's only customers possibly affected by the GIC [gas inventory charge] under review here -- have elected not to purchase any gas from Transwestern under the newly approved certificate." Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575-576.

ed against a gay student group (in the "Armstrong Amendment") by denying federal funds to the District of Columbia unless the Council passed a bill to immunize Georgetown against that and further suits. Litigation ensued and (as in Transwestern) the law containing the Armstrong Amendment was superseded by a new appropriations act that did not include such language.[40] The court in Clarke decided that the litigation was moot because the funding condition ceased to have any effect due to intervening events.[41] Again, the situation had resolved itself and there was nothing for the court to do.

3. In our case, the intervening event on which the OAH apparently relies was the constructive eviction of the Tenant from the Apartment. This is certainly not a situation in which the case resolved itself. Instead, the relief that the Tenant originally asked for has not been provided and the need for it has not abated. The OAH must order the Landlord to correctly report the "current rent" of the Tenant to RAD, the Tenant, and other affected tenants as it was supposed to do years ago.

iii. Next was Thorn v. Walker that holds that "[a]case is moot if the parties have presented no justiciable controversy to the appellate court."[42] The claim by the OAH was different. The Decision claimed that the Thorn case held that

[40] Instead, Congress amended the D.C. Code directly, bypassing the D.C. Council.

[41] "Appellees do not claim that the Armstrong Amendment has had any residual effect on their First Amendment rights since it was superseded by the 1990 Appropriations Act. … After the 1989 Act's last extension expired, the Armstrong Amendment's funding condition ceased to have any effect." Clarke v. United States, 915 F.2d 699 at 701.

[42] Thorn v. Walker, 912 A.2d 1192, 1195 (D.C. 2006).

"… whether the court can fashion a remedy is a significant factor in determining whether a case is moot."[43] However, what Thorn actually said was "Furthermore, if a party has requested no particular relief on appeal, or the appellate court can provide no effective relief, the case is moot."[44]

1. The court in Thorn cited Graveyard Creek Ranch, Inc. v. Bell (a Montana Supreme Court case) as its only authority for this statement. Graveyard Creek Ranch was another case involving the sale of real property where the court said that it had no power to unwind real-estate titles under Montana law.[45]
2. We are getting far afield from our current case where there is no sale of real property to unwind but only the request that the OAH order the Landlord to do what it should have done in the first place – issue correct forms.
3. Perhaps the OAH should have read further in Thorn, where the court said:

> However, we declared that "a tenant's involuntary departure from the landlord's property does not render an appeal moot." Id. at 141 (citing Joyner v. Jonathan Woodner Co., 479 A.2d 308, 310 (D.C. 1984)) (other citation omitted).
> Thorn, at 1196. [The "Id", in the quote refers to Brawn v. Hornstein, 669 A.2d 139 (D.C. 1996)]

[43] "The Court of Appeals has held that whether the court can fashion a remedy is a significant factor in determining whether a case is moot." Decision, page 11.

(D.C. 2006).

[44] Thorn, 912 A.2d 1192, 1195, citing Graveyard Creek Ranch, Inc. v. Bell, 327 Mont. 491, 494.

[45] "This would not be effective relief, but a $500,000 windfall in favor of Bell. In such circumstances we are compelled to conclude that the appeal is moot." Graveyard Creek Ranch, 491, 496.

Again, in the current case, the Tenant was constructively evicted when the Landlord demanded that the Tenant pay a rent that exceeded the market rent for the Apartment.[46]

iv. Finally, the OAH cites a case[47] in which the RHC declined to rule on a motion when the resolution of the case on the merits rendered the motion moot.[48] In the Holbrook case, the RHC determined that it had the power to dismiss the appeal because the appellant failed to comply with an order of the court.[49] However, the RHC refused to decide the case on procedural grounds when it could be decided on its merits.[50] That is precisely the choice that is once again before the Commission. The OAH determined (erroneously) that it had the power to dismiss the entire remand motion of the Tenant and made the opposite decision than was made in Holbrook – to dismiss the motion on technical grounds instead of dealing with the merits of the case.

OTHER ITEMS

There are several other items that should also be noted and corrected. To allow them to persist would allow a precedent to be created that might affect the Tenant in the future.

[46] See footnote 4, above.

[47] Holbrook Street, LLC v. Seegers, RH-TP-14-30,571 (RHC July 15, 2016).

[48] Decision, page 11.

[49] "The Commission is satisfied that because the Housing Provider did not establish an escrow account or post a bond by June 21, 2016, the Commission has the authority to dismiss the Appellant's appeal." Holbrook, page 8.

[50] "Nonetheless, District of Columbia Court of Appeals ("DCCA") and Commission precedent 'manifest[s] a preference for resolution of disputes on the merits[.]'" Id., at page 8.

A. The Decision finds in footnote 4 that the filings by the Landlord, although incorrect, were not willful.[51] This determination was made simply based on OAH's determination that the language in the Act was ambiguous and was made without benefit of a hearing or a full record on the willfulness question. It is a factual question that has to be examined to make such a determination. The Landlord was in existence at the time of the 2006 Amendments[52] **and** had impressive legal teams, active lobbyists[53], and full knowledge of the intent of the District **Council** when it abolished rent ceilings in 2006.[54] It had huge financial incentives to misinterpret (or ignore) what to the RHC were clear mandates. The Tenant should not be bound by a predetermination of this factual issue by the OAH and foreclosed from seeking and obtaining relief in the future for the Landlord's violations of the Act.[55] Please direct the OAH to not make this a presumption without a proper proceeding on the question of willfulness.

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[51] "I do not think a fine is appropriate here. In order to impose a fine, I must find that Housing Provider's actions were willful. … Given the ambiguity in the language in the Rental Housing Act, acknowledged in the Commission's two Decisions in this case, there is no basis to conclude that Housing Provider willfully violated the Act." Decision, footnote 4.

[52] Owned by the W.C. Smith Company at the time

[53] "The working group met 7 times prior to February 17, 2006, when the Committee first met to mark-up Bill 16-457 (but recessed to consider 2 alternative proposals presented that day), on December 6 and 14, 2005, and on January 11, 18 and 25 and February 1, 2006. The group reconvened on February 9, 2006 at the request of the Mayor to consider the Mayor's reform proposals. After the Committee mark-up meeting on March 16, 2006, the group reconvened in a series of 3 meetings jointly chaired by Chairperson Graham and Deputy Mayor Stanley Jackson. Representing tenants were …. Representing housing providers were **John Ritz of the W.C. Smith Company; Nicola Whiteman, Esq. and Shaun Pharr, Esq. of the Apartment and Office Building Association**;…"
2006 Committee Report on Bill B16-0109 at pages 10 - 11 [The report is publically available at the D.C. Council web site at http://lims.dccouncil.us/Download/15437/B16-0109-COMMITTEEREPORT.pdf] [Emphasis added]

[54] "All those ambiguities were resolved by the RHC by simply looking at the legislative history. It should be noted that Equity Residential is a corporation with $23,000,000,000 in assets and a 25% profit margin. It had ample legal resources to do the same analysis." Tenants Reply to the Landlord's Objection to the Remand Motion, page 10.

[55] The Tenant has filed a tenant petition (2019 DHCD TP 31,214) to recover overcharged rents during the term of his occupancy of the unit.

B. I have repeatedly asked that all incorrect RAD notices issued to me be corrected and re-filed.[56] Unfortunately, my information requests to the RAD only resulted in its retrieval of the 2015 RAD form 9 notice for the Apartment and not the forms for 2014 or 2016. Please direct the OAH to correct RAD forms 8 and 9 for 2014 and 2016 as well as 2015.

RELIEF SOUGHT

The Tenant asks the Commission to reverse OAH on each of the errors identified above, order the OAH to direct the Landlord to issue and file corrected RAD forms 8's and 9's for 2014, 2015, and 2016 with the Tenant (RAD form 8), the Apartment's current tenant (RAD form 8 and RAD form 4), and RAD (RAD form 9), and order such other relief as may be appropriate.

Respectfully submitted,
Appellant /Tenant

Dated: June 26, 2019

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[56] I have usually used the plural terms "Form 8's" and "Form 9's" to refer to multiple forms rather than the singular for just the 2015 forms. For example: "Consistent with his original petition, the Tenant hereby requests that the OAH order the Landlord to issue corrected RAD Form 8's and refile corrected RAD Form 9's for the Apartment." Remand Motion, II.A, page 2.

DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION
★★★

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant/Tenant was served on June 26, 2019 by first class mail, postage pre-paid upon the attorney for the housing provider:

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