DISTRICT OF COLUMBIA
Office of Administrative Hearings

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

HOUSING PROVIDER'S OPPOSITION TO TENANT'S MOTION FOR SUMMARY JUDGMENT ON REMAND AND REQUEST FOR DISMISSAL WITH PREJUDICE

By seeking a final disposition on the merits via the Tenant's Motion For Summary Judgment On Remand ("Motion"), Tenant/Petitioner (hereinafter "Fineman") has pled himself out of court. The Motion abandons any claim for a civil fine due to a willful filing of a false document. This was only proper.[1] But, by abandoning the penalty claim, Fineman has reduced his case to

[1] Fineman sought a statutory fine for a "willful" false statement in a filed document in violation of DC Code § 42-3509.01(b)(2). Tenant Petition/Complaint, July 12, 2016, p. 4 of 4. This Code section mandates proof of "intent" on the part of the Housing Provider. It makes him/her "subject to" a civil fine if a violation is proven. It does not mandate a fine. In the circumstances of this case, it is obvious why Fineman has abandoned any claim for a civil fine against Housing Provider. The Rental Housing Commission's January 18, 2018 Decision And Order amply demonstrates how it is impossible to prove that the September 18, 2015 RAD Form 8 or 9 was deliberately inaccurate:

- "The Commission finds the statute [i.e., 'rent charged'] to be ambiguous." (p. 22).
- "The Act . . . is also suggestive, though not explicit, that rent stabilization operates by establishing a maximum legal limit and authorizing periodic adjustments to that limit." (p. 23).
- "The literal language [of § 42-3502.10(c)(3)] thus seems to provide, nonsensically, that an amount of money charged shall not be calculated as part of the money charged when determining the amount of money charged." (p. 25).
- "In sum, the Commission's review of the plain language of the Act, as amended, does not reveal a consistent use or meaning of the term 'rent charged'." (p. 26).
- "The Commission determines . . . that the meaning of the phrase 'rent charged' in the Act's sometimes conflicting text should, ordinarily, be construed based upon the Act's definition of 'rent' . . . ." (p. 31).
- "In short and in my view, the City Council is the appropriate venue to directly address, and resolve policy disputes regarding the legal status, merits, and regulation of rent concessions in lease agreements by amendment to the Act." (Concurrence By Commissioner Szegedy-Maszak, p. 39).

Given these rampant uncertainties about how to apply, interpret and operate under the Act, it is not possible for anyone to have willfully violated it by simply filling out a single "rent charged" line on a RAD form.

procurement of an advisory opinion. This violates the basic doctrines of justiciability and eliminates subject matter jurisdiction. The case must therefore be dismissed.

On the record of this case, Fineman leased apartment W-1131 at 3003 Van Ness Street for two successive lease terms: 12/22/14 to 12/21/15 ("14-15 Term") and 12/22/15 to 12/21/16 ("15-16 Term"). Final Order Dated March 16, 2017, pp. 4-5 (hereinafter "Final Order"). His out-of-pocket payments during the 14-15 Term were $2,329.00 per month. Id. His out-of-pocket payments during the 15-16 Term were $2,375.00 per month. Id. This is an increase of $46.00, or 1.98%. The $46.00 increase was less than the annual CPI adjustment permitted by law. D.C. Code § 42-3502.08(h)(2)(A). Fineman still complained; but not about money. His problem was formalistic: the RAD Form 8 he received on September 18, 2015 informing him of a proposed $46.00 increase in his rent for the 15-16 Term was incorrectly filled out because it did not describe his out-of-pocket payments during the 14-15 Term. Final Order, p. 5. Instead, the Form 8 for the 15-16 Term, like its RAD Form 9 counterpart of the same date, reflected the "current rent charged" as the dollar amount on file with the Rental Accommodations Division as the unit's lawful rent, i.e., $3,114.00. Even though this view of "rent charged" was generally accepted in the District for completing RAD forms, Fineman thought it was incorrect. So, ten months later and after accepting the $46.00 increase in a written lease for the 15-16 Term, Fineman filed his Petition on July 12, 2016.

The Petition is straight-forward: "This petition is only to correct the line entitled 'Your current rent charged' on my RAD Form 8." Tenant Petition/Complaint, July 12, 2016, p. 3 of 4. The relief requested is more complex:

- "Please order the Housing Provider to correctly state the current rent charged and properly compute this form [i.e., the 9/18/15 Form 8] in the future both for my unit and for all other units."

- "Please fine the Housing Provider the amount listed below ($5,000.00) for willfully making a false statement in a document filed under this Act [D.C. Code § 42-3509.01(b)(2)] and a similar amount for any other false filing of a RAD Form 9 or false presentation of a RAD Form [sic] 8 for other tenants of this Housing Accommodation." Tenant Petition/Complaint, July 12, 2016, p. 4 of 4.

Fineman's Petition sought no adjustment to the rent for unit W-1131. Fineman did not complain about any RAD Form 8 for unit W-1131 prior to 2015. He did not complain about any RAD Form 8 after 2015 because he moved out of apartment W-1131 at the end of the 15-16 Term on December 8, 2016. Final Order, p. 6. Fineman moved out of the District and relocated to Florida. Id. Accordingly, as Fineman frankly admitted in his Petition, this case was always about a single RAD Form 8 for apartment W-1131 dated September 18, 2015 and whether one line on that form needs a do-over.

The Petition's relief request for "other tenants" was rejected in the Final Order. Id., p. 16. Fineman lacks standing to represent them, and he did not appeal this ruling. Fineman Notice of Appeal dated March 30, 2017. Accordingly, this case is not about anyone else's RAD Form 8 or any other apartment.

Fineman forfeited his claim for a statutory fine of $5,000.00 based upon "willfully making a false statement in a document." The Motion seeks a final judgment on the merits in Fineman's favor that orders the Housing Provider "to issue corrected RAD Form 8's and refile corrected RAD Form 9's for the Apartment." Motion, p. 2 of 5. There is no request for any other judgment order. Fineman abandoned his claim for a statutory fine. The case is now about one form of relief: an amended 2015 RAD Form 8 and 2015 RAD Form 9 for apartment W-1131. The problems for Fineman with this seemingly simple request for relief are twofold: (1) he left the unit (and the District) in 2016 and thereby sacrificed any further legal interest in unit W-1131's rent-reporting

status with the Rental Accommodations Division; (2) by abandoning his claim for a statutory fine, Fineman has lost the last justiciability leg he had back when the Petition was filed in 2016. For these reasons, the Motion must be denied, and the case dismissed with prejudice.

ARGUMENT

I. DECLARATORY RELIEF IS INAPPROPRIATE WHEN AN ACTION CEASES TO BE A "LIVE" CONTROVERSY.

This case does not seek injunctive relief because it cannot jump the hurdle of a clear showing of immediate and irreparable injury. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980).

The case is perhaps best characterized as seeking a kind of declaratory relief due to a dispute that existed between Fineman and the Housing Provider over how to properly complete a single line on the RAD Forms for apartment W-1131 in September 2015. Without conceding that declaratory relief is authorized under the Rent Stabilization Act, any suit seeking a declaratory judgment requires a "case of actual controversy." 28 U.S.C. § 2201(a); D.C. Code of Civil Procedure, Rule 57. A court may not adjudicate a difference of opinion that is hypothetical or abstract. Cat Tech LLC v. TubeMaster, Inc., 528 F.3d 871, 879 (Fed. Cir. 2008). Academic disagreements are not resolvable in court. Id. Declaratory judgments over past conduct aimed at the plaintiff are also prohibited. Gruntal & Co., Inc. v. Steinberg, 837 F. Supp. 85, 89 (D.N.J. 1993). There must be a real, substantial and immediate dispute to invoke equitable jurisdiction. Without that, there is no subject matter jurisdiction because there is no justiciable controversy within the meaning of Article III of the U.S. Constitution. Sony Elecs. Inc. v. Guardian Media Techs, Ltd., 497 F.3d 1271, 1283 (Fed. Cir. 2007).

Subject matter jurisdiction is limited to on-going cases and controversies under Article III, including actions seeking a judicial declaration. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227,

240 (1937). While District of Columbia courts are not Article III courts, they follow the principles of standing, justiciability, and mootness applicable to federal courts for prudential reasons. Atchison v. District of Columbia, 585 A.2d 150, 153 (D.C. 1991). Accordingly, every court has a special obligation to vigilantly inquire into its own jurisdiction throughout the life of a lawsuit. Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). When a case is no longer live or the parties have no real legal interest in the outcome, the case is moot and must be dismissed. Powell v. McCormick, 395 U.S. 486, 496 (1969). Nothing about this case is going to impact the rent charged for unit W-1131 in 2015. Any decision here violates a key justiciability doctrine -- namely, the prohibition against advisory opinions. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Flast v. Cohen, 392 U.S. 83, 96 (1968). There is no authority for courts to issue declarations about rules of law that cannot affect the matter at issue. Cleveland Branch NAACP v. City of Parma, 263 F.3d 513, 530 (6th Cir. 2001) (citing Church of Scientology v U.S., 506 U.S. 9, 12 (1992). Fineman has no stake in RAD forms for apartment W-1131 because he does not live there or pay rent there. No decision in this case can affect his interest in unit W-1131 because he has none. An advisory opinion to satisfy Fineman's curiosity is not enough under the Constitution.

II. FINEMAN'S CLAIM IS MOOT.

When a plaintiff in a landlord-tenant dispute stops being a tenant, his/her claims for a declaratory judgment concerning statutory violations allegedly committed by the landlord are moot. Brown v. District of Columbia Housing Authority, Civil Action No. 2016-1771 (D.C. 5/31/17). In Brown, a tenant filed suit against the DCHA over health, safety, sanitation, and treatment issues at Section 8 apartments owned by the District. Within a year, the tenant relocated to New York City. Finding that the relocation eliminated any "judicial remediable right" for the tenant, the District Court dismissed the action for lack of subject matter jurisdiction. Fineman's

move-out on December 8, 2016 had precisely the same effect on the alleged deprivation of his "right" to a proper RAD Form 8 in September 2015. Because he has no claim for money damages and has abandoned his claim for a statutory penalty, his case is moot. It must be dismissed. Dorman v. Thornburgh, 955 F.2d 57, 58 (D.C. Cir. 1992) (a prisoner's complaint for injunction or declaratory relief regarding conditions at the prison is moot once the prisoner no longer resides at the prison.).

When no relief is available to the party raising an issue, that issue is moot and will not be addressed by the Rental Housing Commission. Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 22, 2017) citing McChesney v. Moore, 78 A.2d 389, 390 (D.C. 1951) (a court will not consider a case in which, by action of a party, it becomes unnecessary to render a decision or impossible to grant relief.).

III. FINEMAN LACKS STANDING TO PURSUE A CLAIM FOR DECLARATORY RELIEF.

"Standing" can be raised at any point in a case and, because it goes to the court's subject matter jurisdiction, may be raised *sua sponte* by the court. Steffan v. Perry, 41 F.3d 677, 697 n.20 (D.C. Cir. 1994). To possess constitutional standing, a plaintiff must show:

- He suffered an injury in fact;
- The injury is concrete and particularized;
- The injury is not conjectural or hypothetical;
- The injury is fairly traceable to the defendant's conduct;
- It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-181 (2000). It is plaintiff's burden to prove each of these elements at each stage of the litigation. Lujan v. Defs. of Wildlife,

504 U.S. 555, 560 (1992).

Fineman lacks standing because he no longer has a personal stake in the outcome of this case. He has no concrete injury that can be redressed with a judgment in his favor. Whether or not a corrected RAD Form 8 (or 9) is made for unit W-1131 at 3003 Van Ness, Fineman's interest in stabilized rent for unit W-1131 will be unaffected because he does not live there. His well-being will be unaffected. He is in no danger of sustaining a direct injury from an outdated and superseded pair of 2015 RAD forms. Fineman is in the same position as Mr. Johnson in the case of Johnson v. District of Columbia, No. 13-2039, 2014 WL 5316644 (D.D.C. Oct. 17, 2014). Mr. Johnson, a dog lover, sued the District for injunctive and declaratory relief because the Animal Control Act made it a crime to falsely deny ownership of any animal. Even though no one had ever been prosecuted under D.C. Code § 8-1808(b), Mr. Johnson said there was a chilling effect on his First Amendment rights because his public speeches focused upon his rescued beagle, Liam. Liam, it seems, was not considered a form of property that could be owned by a human (according to Mr. Johnson). Alas, after the suit was filed, the central character – a beagle named Liam – passed away. Finding that a fear of prosecution under the Animal Control Act was neither an imminent threat nor objectively reasonable, Mr. Johnson was held to lack constitutional standing. His case was dismissed.

Since Fineman filed his July, 2016 Petition, he stopped residing in apartment W-1131. In other words, he lost his status as a "tenant" under the Rental Housing Act. A loss of "tenant" status for Fineman, like a loss of dog-owner status for Mr. Johnson, removes any chance of a particularized injury and substitutes only a conjectural or hypothetical injury.[2] When a court's

[2] The Motion itself deviates from the Petition by adding the infamous catchall form of relief, i.e. ". . . and such other relief as the court feels appropriate . . . ." Motion, p. 5 of 5. This appeal to a whatever-you-think-is-possible wish list is unavailing to create standing where it does not exist. Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth., 386 F.3d 1148, 1152 n. 2 (D.C. Cir. 2004) [availability of relief under Rule 54(c) does not establish standing or defeat mootness objections].

determination of an issue cannot have any practical effect on the outcome for a plaintiff, that plaintiff lacks a legally cognizable interest in the case. Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 161 (4th Cir. 2010). Having an abstract bone to pick in a lawsuit is not enough; Fineman lacks standing to continue with this case.

CONCLUSION

Even if a case was a live controversy at the time it was filed, justiciability doctrines require that courts refrain from rendering decisions where events have transpired in a way to make any decision incapable of presently affecting the parties' rights or having no more than a speculative chance of affecting them in the future. Clarke v. United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990). These legal principles, like the D.C. Code Sections at issue in the case, are not ambiguous. Fineman is no longer a tenant. He no longer resides in apartment W-1131. There is no relationship between him and the Housing Provider. The September 18, 2015 RAD Forms do not have and will not have any bearing on Fineman's legal rights. They simply do not matter to Fineman at all.

The Housing Provider is not the creator of any of these circumstances. There has been no attempt to evade legal scrutiny here. Fineman decided on his own what remedies to seek in his Petition and in his appeal to the Rental Housing Commission. He decided which claims to forfeit and which to pursue. Most importantly, Fineman decided when to end his landlord-tenant relationship and move out of the District. By these actions, Fineman runs afoul of the constitutional requirement that a suit must remain alive throughout the course of litigation – up to the final appellate disposition. People for the Ethical Treatment of Animals, Inc. v. U.S. Fish & Wildlife Serv., 59 F. Supp. 3d 91, 95 (D.D.C. 2014). This case is dead. The only option for it is a dismissal with prejudice for lack of subject matter jurisdiction.

Date: July 13, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of HOUSING PROVIDER'S OPPOSITION TO TENANT'S MOTION FOR SUMMARY JUDGMENT ON REMAND AND REQUEST FOR DISMISSAL WITH PREJUDICE was served via email and first-class mail this 13th day of July 2018 upon:

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/s/ Carey S. Busen
Carey S. Busen