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	:	

TENANT'S REPLY ON REMAND TO HOUSING PROVIDER'S

OBJECTION TO THE MOTION FOR SUMMARY JUDGMENT

Tenant/Petitioner Gabriel Fineman ("**Tenant**"), submits this reply to the Housing Provider's Opposition to the Motion for Summary Judgment on Remand. The Tenant hereby states:

I. BACKGROUND

A. The Tenant filed a Tenant Petition (the "**Petition**") asking for the Housing Provider (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 relating to unit W-1131 (the "**Apartment**").[1] The Tenant then filed a Request for Summary Judgment on the Tenant Petition (the "**Request**"). The Petition required an understanding of what was meant by the term "rent charged" as used in the Rental Housing Act (the "**Act**") as amended by the Rent Control Reform Amendment Act of 2006 (the "**2006 Amendments**") and, in particular, in the Form 8 and Form 9 where the Housing Provider is required to disclose the "Current Rent Charged."

B. The Office of Administrative Hearings (the "**OAH**") issued a final order (the "**OAH Order**")holding that the term "current rent charged" was a term of art and denying the Tenant's claim. The Tenant appealed to the Rental Housing Commission (the "**RHC**"). The Rental Housing Commission (the "**RHC**"), in its decision dated February 18, 2018 (the "**Decision**"), held that the term "rent charged" meant the actual rent paid by the Tenant after any discount. The Landlord moved for reconsideration, and the RHC issued a second decision dated March 13, 2018 captioned "Order Denying Reconsideration" (the "**Reconsideration Decision**") upholding the Decision and clarifying it in some detail. The case was remanded to the OAH for further proceedings consistent with those two decisions (together, the "**RHC Decisions**") and their accompanying orders.

C. The Landlord filed a Notice of Appeal (the "**Appeal**") with the District of Columbia Court of Appeals (the "**DCCA**"), and Tenant moved to dismiss the Notice of Appeal because the order of the OAH was not final. The Landlord objected (the "**DCCA Objection**") saying that the order was final because nothing remained to be decided by the OAH and that its issuing of a new final order

[1] "This petition is only to correct the line entitled "Your Current Rent charged" on my RAD form 8. It does not deal with the lease, how the rent is calculated, flex-leases, concession leases, rent ceilings or other items often decided in a civil court." Petition, page 3

was purely ministerial.[2] The Appeal was dismissed by the DCCA on June 5, 2018, ruling that the Landlord had "failed to demonstrate that the proceedings on remand ... in this case would be purely ministerial." The Tenant then filed a Motion for Summary Judgement on Remand (the "**Remand Request**") on its original Petition, and the Landlord filed an Objection to the Remand Request (the "**Remand Objection**").

II. ANALYSIS OF OBJECTIONS OF LANDLORD

The Landlord, in its Remand Objection, did not take issue with any of the facts, arguments or requests in the Tenant's Remand Request. Instead, it asked the OAH to dismiss the Remand Request because by electing not to pursue a civil penalty during this phase of the proceedings, the Tenant has removed the jurisdiction of the OAH.

A. First claim. The Tenant has reduced his case to the procurement of an advisory opinion and advisory opinions are not permitted.

i. Injunctive relief. The Landlord claims that "[t]his case does not seek injunctive relief because it cannot jump the hurdle of a clear showing of immediate and irreparable injury."

(i). There are multiple types of injunctive relief, including prohibitive, mandatory, permanent, interim or interlocutory injunctions.[3] The case sited was for the most common type – a prohibitive injunction to prevent the release of trade secrets.[4] However, our case is very different and asks for mandatory relief that is most akin to specific performance. Instead of needing a clear

[2] In its opposition to the Tenant's motion to dismiss its Appeal at the DCCA, the Landlord stated that all that remained to be done by the OAH was the purely administrative act of ordering the Landlord to correct its notices. DCCA Objection, pages 1-3

[3] The free dictionary https://legal-dictionary.thefreedictionary.com/injunction

[4] Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980)

showing of immediate and irreparable injury to be prevented, we need only show that this is the only appropriate remedy. The RHC found in its Decision that:

> For the foregoing reasons, the Commission determines that the Act generally requires a housing provider to file and serve notices of adjustments of the "rent charged" based on the amount of rent actually demanded or received from a tenant as a condition of occupancy of a rent-stabilized unit. *See supra* at 17-31
> Decision, Sect IV, Conclusions

Because the Landlord refuses to file and serve correct notices of adjustment of the rent charged based on the actual rent, there is no remedy other than to order it to do so.

ii. Declaratory Relief. Next the Landlord argues that this may be a case of the Tenant asking for declaratory relief and such relief should not be granted because it is not a case of actual controversy where there must be a real, substantial and immediate dispute.

(i). Even if this were a request for declaratory relief, such relief should be granted because this remand action contains an actual controversy about the issuance and filing of corrected forms. The relief sought by the tenant has yet to be fulfilled. There has not yet been an order to produce the corrected form 8's or to file the corrected form 9's and these corrections have not been made.

iii. Advisory Opinion. The Landlord additionally claims that there is no authority for courts to issue declarations about rules of law that cannot affect the matter at issue. The Landlord further claims that the Tenant has no stake in RAD forms for apartment W-1131 because he does not live there or pay rent there and thus no decision in this case can affect his interest in unit W-1131 because he has none.

(i). An advisory or declaratory opinion was never sought by the Tenant. An advisory opinion is an opinion issued by a court that does not have the effect of adjudicating a specific legal case, but merely advises on the constitutionality or interpretation of a law. In this case, the Tenant's

request is clear - to get corrected form 8's – and that was the main thing originally requested in the initial Tenant Petition. The clarification or interpretation of the law has already been done by the RHC Decisions and is not asked for here by either party.

(ii). The RHC found that decisions under the Act should be based on the facts and law in effect at the time that the tenant petition was filed.[5] The Tenant does not ask on remand for any future notices to be properly filed,[6] only that the ones incorrectly filed to be corrected.

B. Second Claim. The Landlord then claims that this case is moot. It bases this claim on the assertion that "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." [7]

i. This case is not moot. In claiming that it was, the Landlord cites Brown that says:

> A case is moot 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." Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990). Brown v. District of Columbia Housing Authority, Civil Action No. 2016-1771 (D.C. 5/31/17), Page 4

a. The issuance of the form 8's and filing of the form 9's will affect the rights of the parties both now and in the future.

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[5] "The Commission, in this decision, relies only on the provisions of the Act in effect at the time of the conduct challenged by the Tenant Petition and the legislative history of those provisions." Decision, note 18

[6] The requirement that future notices be based on the actual rent paid by the tenant is clearly required by the RHC Decisions.

[7] No authority is cited for this statement that flies in the face of all history with the Act. The landlord alleges that when a tenant leaves the unit, all claims expire. According to the landlord's assertion, a tenant who was forced out by an improper rent increase has no claim because the tenant has never paid the illegal rent. Clearly, this is not something that was contemplated by the drafters of the Act.

(i). The rights of the Tenant to ask for a refund of rents improperly charged have not expired. The increased rents charged during the pendency of the tenancy were based on the proper presentation of the form 8 notices. Giving the form 8 notices are an absolute requirement for adjustment of the rent. If they were not correct (if the numbers were incorrect), then the notices were invalid and so was the rent increases.[8]

(ii). The rights of the Landlord to increase the rent for the next tenant will also depend upon the numbers in the corrected form 8's and form 9's.

b. This entire question of mootness has no relevance in cases brought under the Act. The Brown case that was cited was about housing code violations in public housing and various other District of Columbia laws as well as the Fair Housing Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. These laws are all about tenants and their relationship to programs or their treatment by housing providers. The Act, on the other hand, registers apartments and mainly regulates their pricing. Housing code violations, for example, are not remedied by issuing orders under the Act, but only by changing the allowable pricing of an apartment. The tenant is only relevant because tenant petitions are the mechanism for enforcing the Act. The housing unit and petitions concerning it do not become moot until the building is torn down; and until then, the regulation of the price of that unit continues even if a tenant moves out.

c. To put it another way, although the Landlord and the Tenant are the parties to this case, it is the apartment that is the subject of the case and the original question was if the notices

[8] "(f) Any notice of an adjustment under § 42-3502.06 shall contain a statement of the current rent, the increased rent, and the utilities covered by the rent which justify the adjustment or other justification for the rent increase." D.C. Code § 42–3502.08

given about the apartment were correct. That question was decided by the RHC decision. The case cannot be moot as long as the Landlord does not deliver the corrected notices. Even then, the case is not moot because the Landlord can always issue new corrected notices which merely mirror the prior notices so that it can charge more for the unit in the future.

C. Claim 3. The Landlord also claims that this case is no longer alive because the Tenant has now elected not to pursue its initial request that the OAH find that the Landlord made a false statement in issuing the form 8's and perjury in filing the form 9's

i. This case is as alive as it has ever been. The relief sought by the tenant has yet to be fulfilled.

ii. There has not yet been an order to produce the corrected form 8's or to file the corrected form 9's and these corrections have not been made.

iii. In its Petition, the Tenant also asked the OAH to find that the Landlord willfully violated the Act and apply appropriate sanctions. Although the Tenant has now elected not to pursue a civil penalty during this phase of the proceedings, the OAH may still do so on its own volition.

iv. A case does not have to be about money damages to be started or to remain active. A tenant can petition about many things that may not result in the tenant receiving any money. Examples on the form tenant petition (check boxes) include [a] improper registration, [g] improper rent ceiling, [l] retaliatory action, [m] improper eviction, [q] tenant association.

III. OTHER ISSUES

A. The Tenant and the Landlord now agree that the matters now to be decided by the OAH are purely ministerial.[9] What needs to be done is for the OAH to issue a final order directing the Landlord to produce corrected notices and filings for the Apartment.

B. The Landlord, in its Remand Objection, fails to understand the purposes and functions of the Rental Housing Act. The Act regulates certain activities of certain landlords (including the Landlord in this case). It functions by having tenants bring petitions before an administrative body in order to enforce the Act. So, for example, to conclude that a tenant's move (perhaps being forced out by a rent increase) moots all of the tenant's petitions would make a mockery of the Act. Likewise, to conclude that the absence of claimed monetary damages, in itself, would moot the case would mean that any claim that a rent ceiling was increased but not actually charged was moot. Neither has ever been the case with decisions under the Act.

C. The Landlord, in its Remand Objection applies a very technical argument in an attempt to have this case dismissed. The DC Courts frown upon such actions where statutes are remedial in nature and rely on persons to initiate administrative opinions pro se.[10]

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[9] "… all that remains to be done at the administrative level is the entry of an order directing Smith to correct the September 18, 2015 RAD Form 8 for apartment W-1131 at 3003 Van Ness St., N.W. to reflect the "current rent charged" as $2,329.00 instead of $3,114.00." DCCA Objection, pages 2-3

[10] "The [Rental Housing] Act is remedial in character. See Revithes, supra, 536 A.2d [1007] at 1016. Like other such legislation, it should be liberally construed to achieve its purposes. See Coles v. Penny, 174 U.S.App.D.C. 277, 283, 531 F.2d 609, 615 (1976). … Like the civil rights statute which the court construed in Coles, the Act relies largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings.[14] [Footnote 14 says: "[14] Indeed, a tenant who litigates a meritorious claim under this statutory scheme acts not only on his own behalf, but also as a private attorney general in vindicating the rights of persons of low or moderate income to afford remedial housing. See Hampton Courts Tenants Ass'n v. District of Columbia Rental Housing Commission, 573 A.2d 10 (D.C.1990); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968).] "[Procedural] technicalities are particularly inappropriate in [such] a statutory scheme." Love v. Pullman Co., 404 U.S. 522, 527, 92 S. Ct. 616, 619, 30 L. Ed. 2d 679 (1972); Coles, supra, 174 U.S.App.D.C. at 282-83, 531 F.2d at 614-15." Goodman v. DC Rental Housing Com'n 573 A.2d 1293 (1990)

D. The jurisdiction of the OAH (acting on behalf of the RHC) is based on statutory jurisdiction. There is no need to fall back on other types of jurisdiction when there is statutory jurisdiction.

E. The relief that the Tenant seeks has never been declaratory relief or advisory relief but actual statutory relief. The Tenant asked that the Landlord issue corrected notices forms that are required under the Act before a rent increase is made. The Tenant did not ask for a declaration of the definition of "rent charged" although an understanding of that definition was needed by the adjudicator to determine if it should order the relief sought.

i. The OAH Order asked for further guidance when it said:

> 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. OAH Order, page 11

The RHC is responsible for issuing such regulations and forms, and it has now provided guidance in its RHC Decisions that have clarified the meaning of the term "rent charged" used in the Act.

ii. The Landlord in its DCCA Objection stated that:

> … all that remains to be done at the administrative level is the entry of an order directing Smith to correct the September 18, 2015 RAD Form 8 for apartment W-1131 at 3003 Van Ness St., N.W. to reflect the "current rent charged" as $2,329.00 instead of $3,114.00. DCCA Objection, pages 2-3

That is, the Landlord stated to the DCCA that all the OAH should do is to issue an order on the form 8's. Note that the Landlord did not claim that the OAH needed to issue an advisory opinion or a declaratory opinion or to rule upon the now withdrawn request to find that the Landlord willfully violated the Act or to apply appropriate sanctions. Indeed, those would all be non-ministerial acts that the Landlord claimed did not exist.

iii. Likewise, the Tenant in its Remand Request did not ask the OAH to issue a declaratory or advisory opinion because the RHC Decisions have already settled these questions. Instead, it

asked for corrected form 8 notices and the refiling of corrected form 9 summaries of the form 8 notices.

F. The Landlord says that the withdrawal of the request for a civil fine[11] was proper.[12] In its footnote (1) supporting this assertion, it claims that there could have been no willful false statements because the ambiguity in the Act as pointed out by the RHC Decisions[13] makes it impossible to prove such a charge.[14] 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. There was no confusion in the mind of the Landlord about current rent because the Landlord uses the word "rent" as the actual rent in every other context except its lease and the issuance of RAD for 8's and filing of RAD form 9's.[15] Willfulness can also be inferred from the fact that the Landlord continues

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[11] Although the Tenant has withdrawn its request for a civil fine, the OAH can still order one on its own volition.

[12] "The Motion abandons any claim for a civil fine due to a willful filing of a false document." Remand Objection, page 1.

[13] "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" Id, note 1

[14] It should be noted that the burden of proof is not the criminal standard of beyond a reasonable doubt, but only the civil standard of the preponderance of the evidence. See DC Code § 2–1802.03.

15 "The Housing Provider uses the term rent to mean the Actual Rent when it advertises the housing accommodations. (Exhibit 2). The Housing Provider used the term rent to mean the Actual Rent when it goes into court to evict a tenant (Section IV.2.g, above). The Housing Provider uses the term rent to mean the Actual Rent when explaining the lease to a tenant. (Exhibit 4, below). The Housing Provider uses the term rent to mean Actual Rent when it sends out monthly reminders to tenants to pay their rent. … The Housing Provider uses the Lease Defined Rent in the Lease and only to compute the Actual Rent. The Housing Provider would be correct only in its filing in those cases of non-concession leases (grandfathered) where there was no discount. Once it gives a discount, it can no longer correctly use the Lease Defined Rent on RAD form 8's and 9's. … The Housing Provider was notified that the filings were incorrect and should be corrected, but did not reply or make any correction. [Motion, Exhibit A, point 7 and Exhibit D] In addition, the incorrect filings were part of a pattern and practice of such incorrect filings in order to increase revenue and not isolated mistakes. [Exhibit 5]" Tenant's Reply to the Housing Provider's Opposition to the Motion for Summary Judgment [in the original OAH hearing], pages 14-15.

to issue these incorrect notices today, despite the RHC Decisions and its failure to even apply for a stay of the RHC Decisions.

SUMMARY

There is no dispute about any material facts in this case. For the reasons stated above, judgment should be entered for the Petitioner, and the relief sought and such other relief as the OAH feels appropriate should be granted.

Respectfully submitted,
Tenant/Petitioner

Dated: August 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to the Housing Provider's Opposition To Mr. Fineman's Motion for Summary Judgment and Cross Motion for Summary Judgment, including Exhibits 1-6 was served on August 3, 2018, by first class mail, postage pre-paid upon the attorney for the Housing Provider:

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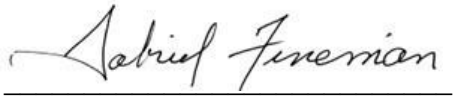

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