DISTRICT OF COLUMBIA
Office of Administrative Hearings

GABRIEL FINEMAN,	:	
Tenant/Petitioner,	:	**Case No.: 2019 DHCD TP 31,214**
V.	:	**3003 Van Ness Street, N.W., Apt. W-1131**
	:	**Admin. Law Judge: Ann C. Yahner**
SMITH PROPERTY HOLDINGS VAN NESS L.P.,	:	
Housing Provider/Respondent.	:	

HOUSING PROVIDER'S MOTION TO DISMISS TENANT PETITION

Gabriel Fineman was a tenant at Housing Provider's building at 3003 Van Ness Street, N.W. from 2013 to 2016. Since July 2016, Housing Provider has been in active litigation with Fineman involving the calculations of his rent increases for his apartment at 3003 Van Ness. Indeed, the RHC is considering a second appeal of his initial tenant petition this month. Now, three years after his initial tenant petition was filed, Fineman has challenged the same rent increase once more, this time relying on opinions from the RHC in his initial petition and now for the first time seeking a refund of rents. Fineman is late. The statute of limitations on his claim expired months ago. What's more, Fineman waived his claim for refunded rents when he filed his first petition in July 2016 and his circular, repetitive tactics are wasteful, inefficient, and unfair to Housing Provider.

I. FACTUAL BACKGROUND

Fineman leased apartment W-1131 at 3003 Van Ness for three successive lease terms: 12/22/13 to 12/21/14, 12/22/14 to 12/21/15, and 12/22/15 to 12/21/16. On July 12, 2016, Fineman filed a Tenant Petition complaining that the RAD Form 8 he received on September 18, 2015, which informed him of a proposed increase in his rent for the 2015-16 Term, was incorrectly filled

out because it did not identify his out-of-pocket payments during the 2014-15 lease term as his "current rent charged." (Ex. A, 7/12/16 Tenant Petition (hereinafter, "First Petition").) His First Petition was straight-forward: "This petition is only to correct the line entitled 'Your current rent charged' on my RAD Form 8." (Ex. A, First Petition at 3.) Fineman sought the following relief in the First Petition:

- "Please order the Housing Provider to correctly state the current rent charged and properly compute this form [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."

(Ex. A, First Tenant Petition at 4.)

Fineman's Petition sought ***no adjustment to the rent*** for unit W-1131 for any time period 2013-2016. Fineman also did not complain about any RAD Form 8 for unit W-1131 prior to the September 18, 2015 form. He did not complain about any RAD Form 8 after 2015 because he moved out of apartment W-1131 at the end of the 2015-16 Term on December 8, 2016. Accordingly, as Fineman frankly admitted in his First Petition, this case was about RAD Forms for apartment W-1131 dated September 2015 and whether one line on those forms needed a do-over.

With regard to the First Petition, the parties each moved for summary judgment and on March 16, 2017, the OAH denied Fineman's motion and granted Housing Provider's motion on the basis that a housing provider can interpret "current rent charged" and "prior rent" on the RAD forms to refer to the amount a housing provider can charge that is the maximum authorized rent. Fineman appealed this decision to the RHC, which reversed and remanded the OAH's decision on February 8, 2018. The RHC found 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." Housing Provider then moved to reconsider, which was denied by the RHC on March 13, 2018. Housing Provider appealed to the District of Columbia Court of Appeals, which dismissed the appeal on the basis that there was no final order to review. The Court of Appeals noted that "[I]t is unclear what impact, if any, [Tenant's] decision to vacate the subject property has on the underlying tenant petition and remand order." *Smith Property Holdings Van Ness, L.P.* v. *D.C. Rental Housing Comm'n,* No. 18-AA-364 (D.C. June 5, 2018).

Shortly thereafter, Fineman filed a Motion for Summary Judgment on Remand and asserted that there were no issues of material fact and requested that the OAH order Housing Provider to reissue and refile the corrected RAD Forms 8 and 9. Housing Provider opposed the motion on the basis that the OAH lost jurisdiction of the case since the claim was moot and any opinion would be an advisory opinion. On October 2, 2018 ALJ Yahner entered a Final Order After Remand and found that the "Housing Provider violated the Rental Housing Act when it created, issued and filed the RAD Forms for Tenant's apartment in September 2015, using the unadjusted Maximum Legal Rent for the rental unit as the Current Rent Charged." However, ALJ Yahner went on to find that she did not have the authority to order the requested remedy – that is, for Housing Provider to correct, reissue, and refile Fineman's RAD forms. ALJ Yahner also concluded that the case is moot because Fineman no longer lives at the property, no money damages were sought, and no interest has been identified that a former tenant has in receiving a corrected and reissued RAD Form. In addition, ALJ Yahner found that the OAH lacked subject matter jurisdiction and Fineman lacked standing. Both parties appealed this decision to the RHC, which is scheduled to hear argument on July 17, 2019.

On April 30, 2019, Fineman filed the instant Tenant Petition ("Second Petition") with the

Rent Administrator's office, although Housing Provider did not receive a copy until over six weeks later when it was filed with the OAH. The Second Petition alleges the following violations during the ***same period of time*** regarding ***the same apartment*** as the First Petition:

- "The rent increase was larger than the increase allowed by any applicable provision of the Act."
- "There were no proper 30-day notice of rent increases within 30 days of the effective date of the increase."
- "The Housing Provider did not file the correct rent increase forms with the RAD."
- "The vacancy adjustments were based on improper comparable rent values and are invalid."
- "Other changes to the rent charged are invalid."

(Ex. B, Second Petition at 2.) In support of his new complaints, Fineman relies exclusively on two decisions entered by the Rental Housing Commission about his First Petition. (Ex. B, Second Petition at 3-4.) Based on these decisions, Fineman claims he is entitled to a "refund of all rents made by the Tenant within the last three years that exceeded that amount." {*Id.* at 4.)

II. THE TENANT PETITION IS BARRED BY THE STATUTE OF LIMITATIONS.

The Rental Housing Act provides the following statute of limitations period for rent petitions:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. ***No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment***, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

D.C. Code § 42-3502.06(e). *Kennedy* v. *District of Columbia Rental Hous. Comm'n* is persuasive. In that case, the tenants filed a petition for rents paid in 1991 through 1994 that was based on a rent ceiling adjustment on June 30, 1986. 709 A.2d 94, 98 (1998). The tenants argued that the 1986 adjustment "created, by a domino effect, skewed ceilings for every subsequent year" until

the filing of the petition. *Id.* at 99. The Court of Appeals rejected that argument and found that the statute of limitations barred tenants' claims because "the only disputed rent ceiling adjustment occurred more than three years before the petitions' filing." *Id.* (affirming the RHC's interpretation that the statute of limitations "bars any investigation of the validity of rent levels, or of adjustments in either the rent levels or rent ceilings, in place more than three years prior to the date of the filing of a tenant petition"). Thus, in that case, any challenge to the June 30, 1986 adjustment were time barred after June 30, 1989.

Here, Fineman's Second Petition is similarly time barred. Although his Second Petition is vague, he seems to be challenging each rent adjustment (increase) he received while residing at 3003 Van Ness. (Ex. B, Second Petition at 4 ("when calculating overpayments during the last three years, those calculations can include invalid adjustments made since the 2006 Amendments").) Fineman's final rent adjustment was on September 18, 2015, when Fineman received a RAD Form 8 from Housing Provider informing him that his rent increased from $3,114 to $3,161 for the 2015-16 leasing period. Thus, the three-year limitations period began running on September 18, 2015 and any petition filed after September 18, 2018 is time barred pursuant to D.C. Code § 42-3502.06(e). Fineman filed his Second Petition on April 30, 2019, more than 7 months after the statute of limitations period expired. Accordingly, his Second Petition is time barred and should be dismissed.

III. FINEMAN WAIVED THE CLAIMS IN HIS SECOND PETITION.

The claims in Fineman's Second Petition relate to the same apartment, leases, and period of time as his First Petition and thus are barred by the waiver doctrine. In *Tenants of Minnesota Gardens, Inc.* v. *District of Columbia Rental Housing Comm'n*., the Court of Appeals affirmed the RHC's finding that tenants waived their right to challenge a Certificate of Authority in a subsequent petition because tenants failed to raise the issue during the litigation of earlier petitions

brought by the housing provider. 570 A.2d 1194, 1195-96 (D.C. 1990). The Court of Appeals rejected tenants' attempt to argue that the waiver was invalid because it was not "knowing" because there was no showing of tenant's excusable mistake or housing provider's fraud. *Id.* Here, for reasons only known to Fineman, he opted not to seek refund of rental amounts when he filed his First Petition. By making that choice, Fineman waived the right to seek a refund of rents for that apartment during that time period. *Id.* at 1196 (affirming finding that tenants waived claims). His Second Petition challenges the exact same action (calculation of rent increases), but seeks a different remedy. Fineman's approach of seeking relief piecemeal wastes judicial resources and forces Housing Provider to repeatedly defend itself against the same issue. The doctrine of waiver is intended to prevent this inequity and the Second Petition should be dismissed.

CONCLUSION

For the foregoing reasons, Housing Provider respectfully requests that the OAH dismiss Fineman's Second Petition with prejudice because his claims are barred by the statute of limitations and/or he waived them by not including them in his First Petition.

Date: July 17, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of ***HOUSING PROVIDER'S MOTION TO DISMISS TENANT PETITION*** was served via email and first-class mail this 17th day of July 2019 upon:

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