DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
Marion S. Barry Building
441 Fourth Street, NW
Washington, DC 20001-2714
TEL: (202) 442-9094 • FAX: (202) 442-4789 • Email: Oah.Filing@dc.gov

HARRY GURAL, Tenant/Petitioner, v. EQUITY RESIDENTIAL / SMITH PROPERTY HOLDINGS VANNESS LP, Housing Provider/Respondent.	Case No.: 2016-DHCD-TP 30,855 *In re*: 3003 Van Ness Street, NW S-707

ORDER DENYING HOUSING PROVIDER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before me on Equity Residential Management and Smith Property Holdings Van Ness LP's (collectively referred to as Housing Provider) Motion for Partial Summary Adjudication filed on January 24, 2023. For the reasons stated below, Housing Provider's Motion is denied. A telephonic status conference is scheduled for June 14, 2023 at 10:00 a.m. Information about how to participate in that status conference is found at the end of this Order.

II. PROCEDURAL HISTORY

On August 30, 2016, Tenant Harry Gural filed Tenant Petition 30,855 in which he alleged that Housing Provider violated various provisions of the Rental Housing Act of 1985 (the Act) at 3003 Van Ness Street, NW, Apt. S-707. In particular, Tenant alleged:

(1) that the rent increase was larger than the increase allowed by any applicable provision of the Act (Box B on the Tenant Petition);

(2) that Housing Provider did not file the correct rent increase forms with the Rental Accommodations Division (the RAD) (Box D on the Tenant Petition);

(3) that Housing Provider, a property manager, or other agent of the Housing Provider has taken retaliatory action against Tenant (Box L on the Tenant Petition); and

(4) that a Notice to Vacate had been served on Tenant in violation of D.C. Official Code § 42-3505.01 (Supp. 2008) (Box M on the Tenant Petition).

By Order dated April 12, 2017, Housing Provider's October 25, 2016 Motion for Summary Judgment was granted in part, Tenant's March 3, 2017 Motion for Partial Summary Judgment was denied, and Tenant's request to withdraw his claim that he was improperly served with a notice to quit was granted. As a result, Tenant's claims that the rent increase was larger than that permitted by the Act and that Housing Provider did not file the correct rent increase forms with the RAD were dismissed. Only Tenant's claim for retaliation remained pending.

An evidentiary hearing was held on May 22, 23, and 24, 2017. After the conclusion of the evidentiary hearing, a Final Order in this matter was entered on September 12, 2017 dismissing the remaining claim. Tenant appealed, and on May 26, 2020, the Rental Housing Commission issued a Decision and Order that:

1. Reversed the dismissal of Tenant's claim that the rent increase was larger than the increase allowed by any applicable provision of the Act;
2. Remanded to continue the evidentiary hearing to provide Tenant the opportunity to call Avis Duvall (or another corporate representative of the Housing Provider) as a witness for direct examination on his rent increase claims and his retaliation claim, to the extent the latter are consistent with the Rental Housing Commission's decision; and
3. Vacated and remanded for further hearing the issue of whether Housing Provider retaliated against Tenant with respect to its lease renewal and eviction policies or practices.[1]

This case was therefore reopened for further proceedings consistent with that Decision and Order.

III. JURISDICTION

This matter is governed by the Rental Housing Act of 1985 (RHA) (D.C. Official Code §§ 42-3501.01 *et seq.*), Chapters 38-43 of Title 14 District of Columbia Municipal Regulations (DCMR), the District of Columbia Administrative Procedures Act (DCAPA) (D.C. Official Code §§ 2-501 *et seq.*), and OAH Rules (1 DCMR 2800 *et seq.* and 1 DCMR 2920 *et seq.*).

[1] *Gural v. Equity Residential Management et al.*, RH-TP-16-30,855 (RHC Feb. 18, 2020) at 26-27 (*Gural*).

IV. CONCLUSIONS OF LAW AND ANALYSIS

In the present Motion, Housing Provider argues that Tenant cannot prevail on his claim that the rent increases were larger than permitted under the RHA and that I must therefore dismiss that claim. Housing Provider bases its argument on a 2021 decision authored by D.C. Superior Court Judge Yvonne Williams[2] holding that the Commission's 2018 decision in *Fineman v. Equity Residential Management*,[3] interpreting the phrase "rent charged," could not be applied retroactively. In essence, Housing Provide argues that the Commission's holding in *Fineman* – that "'rent charged' is intended to refer to the rent actually demanded or received from a tenant and that the [RHA] does not permit a housing provider to use the RAD forms to preserve a maximum, legal rent in excess of what is actually charged"[4] – cannot be applied retroactively because the Superior Court declined to do so in *Equity Residential*.

A. Standard for Summary Adjudication

An administrative law judge (ALJ) may decide a case summarily, without an evidentiary hearing.[5] Beyond allowing that a case may be decided summarily and that a motion for summary judgment must include sufficient evidence of undisputed facts and citation to controlling legal authority, the OAH Rules do not specifically address when summary judgment is appropriate. When the Rules of this administrative court do not address a procedural issue, an ALJ may be guided by the District of Columbia Superior Court Rules of Civil Procedure.[6]

Those rules allow for summary judgment if, among other things, the pleadings, discovery responses, and affidavits demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[7] The moving party has the burden of demonstrating the absence of a genuine issue of material fact.[8] Material facts are those "that might affect the outcome of the suit under the governing law."[9] Therefore, and ALJ may grant the motion

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[2] *District of Columbia v. Equity Residential Management*, 2017 CA 008334 B, 2021 D.C. Super. LEXIS 90 (D.C. Superior Court, 2021) (*Equity Residential*).
[3] RH-TP-15-30,284 (RHC March 13, 2018) (*Fineman*).
[4] *Gural* at 9-10, *citing Fineman* at 31-32.
[5] OAH Rule 2819.1.
[6] OAH Rule 2801.1.
[7] D.C. Sup. Ct. Civ. R. 56(c).
[8] *Young v. Delaney*, 647 A.2d 784, 788 (D.C. 1994).
[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

only if a reasonable finder of fact, having drawn all reasonable inferences in favor of the non-moving party, could not find for that party based on the evidence in the record.[10]

B. Retroactivity

At the center of Housing Provider's argument are two decisions from the Commission (*Fineman* and *Gural*) and a decision from the Superior Court (*Equity Residential*). In *Fineman*, the tenant rented an apartment from the Housing Provider in the same Housing Accommodation as Tenant in the instant case. The lease contract identified one amount as rent (the pre-concession amount), but also contained an addendum that granted the tenant a concession reducing the rent to a lower amount (the post-concession amount). The tenant actually paid – and Housing Provider accepted – the lower, post-concession amount of rent. The tenant claimed in his July 12, 2016 tenant petition that the rent increase was greater than that permitted by the RHA because Housing Provider based the increase on the higher, pre-concession, rather than the lower, post-concession amount. An OAH Administrative Law Judge (ALJ) issued a final order dismissing the appeal, finding that the Housing Provider's practice of basing the increase on the higher, pre-concession amount did not violate the RHA.

The tenant appealed to the Commission and on March 13, 2018, the Commission issued a decision reversing the OAH ALJ and holding that the amount of a rent increase permitted under the RHA is calculated on the amount of "rent charged," which the Commission held was defined as "the amount of rent actually demanded or received" and not a "higher amount of rent stated in *[a lease] but not actually demanded or received from the Tenant pursuant to the monthly, recurring concession as the basis for completing, filing, and serving the relevant RAD forms.*"[11] The Commission concluded that rent increases must be based on the tenant's actual rent, which was the lower, pre-concession amount.[12] Housing Provider appealed to the D.C. Court of Appeals (Court of Appeals), but the Court dismissed the appeal without ruling on the merits.[13]

In *Gural*, the Commission's February 18, 2020 decision was the result of an appeal from this instant case. There, the Commission found, and Housing Provider conceded, that *Gural* was

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[10] *Warren v. Medlantic Health Group, Inc.*, 936 A.2d 733, 737 (2007).
[11] *Fineman* at 37.
[12] *Id.*
[13] *Smith Property Holdings Van Ness, L.P. v. D.C. Rental Hous. Comm'n*, No. 18-AA-364 (D.C. June 5, 2018).

not factually distinguishable from *Fineman* because the Housing Provider and the Housing Accommodation were the same and the leases at issue contained identical language in the concession addenda (other than the amount of rent).[14] Although Housing Provider argued on appeal that the *Fineman* decision should only be given prospective application, the Commission "reject[ed] that position in the absence of a contrary decision from the [Court of Appeals]."[15] The Commission was "satisfied that Fineman ... may be applied to conduct that occurred before 2019."[16]

In *Equity Residential*, on December 13, 2017, the D.C. Attorney General filed a civil action in the Superior Court against Housing Provider alleging violations of the D.C. Consumer Protection Procedures Act (CPPA).[17] While the Superior Court ruled after a bench trial that Housing Provider violated several provisions of the CPPA by making misrepresentations or failing to disclose information which tended to mislead prospective tenants, the Superior Court held that Housing Provider did not violate the CPPA when it used as the basis for calculating the legally permissible annual rent increase the higher, pre-concession amount of rent stated in a lease (but not actually demanded or received from the Tenant pursuant to the monthly, recurring concession). The Superior Court reasoned that the Commission's decision in *Fineman* constituted "a change in the law because it 'created precise limitations where none previously existed,' and made a previously permitted industry practice an illegal method to calculate rent adjustments."[18] The Court determined that the decision in *Fineman* "constituted legislative rulemaking which was invalid without the formalities of the [D.C. Administrative Procedures Act],"[19] and that the *Fineman* decision could not be retroactively applied because the allegations at issue in *Equity Residential* occurred before *Fineman* was decided.

In the instant case, Housing Provider argues that the Superior Court decision in *Equity Residential* carries precedence and I must apply that decision to this case. In short, because the Tenant Petition in this matter was filed in 2016, before *Fineman* was decided, and because the

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[14] *Gural* at 10.
[15] *Gural* at 12.
[16] *Id.*
[17] Tenant was not a party in that case.
[18] *Equity Residential* at 25.
[19] *Id.*

Fineman decision cannot be applied retroactively, Tenant's claim that the rent increases were larger than that permitted by the RHA fails as a matter of law.

I disagree for two interconnected reasons. First, the Commission – not the Superior Court – has appellate authority to review Final Orders issued by OAH ALJs regarding matters brought under the RHA.[20] District of Columbia Municipal Regulations also give the Commission direct authority to review RHA decisions issued by OAH.[21] Review of decisions issued by the Commission are appealable to, and can only be reviewed by, the Court of Appeals.[22]

Second, that the *Fineman* decision may be applied retroactively is the law of this case and I am bound to follow it. In this matter, Tenant appealed, among other things, the dismissal of his claim that the rent increase was greater than that permitted under the RHA. The Commission reversed the dismissal of that claim and remanded the matter to this administrative court. In doing so, the Commission specifically held that the *Fineman* decision could be applied retroactively.[23] The law of the case doctrine "precludes reopening questions resolved by an earlier appeal in the same case."[24] "The general rule is that 'if the issues were decided, either expressly or by necessary implication, those determinations of law will be binding on remand and on a subsequent appeal.'"[25] "The critical question in applying the 'law of the case' doctrine is thus whether an issue was actually raised and decided…."[26]

Here, Housing Provider raised the issue of retroactivity in the prior appeal, and the Commission made a clear decision on the issue of whether *Fineman*'s interpretation of "rent charged" can be applied retroactively, and how OAH should proceed on remand. That the *Fineman* decision applies retroactively is the law of the case.

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[20] D.C. Official Code § 42–3502.02 ("the Rental Housing Commission shall decide appeals brought to it from decisions of the Rent Administrator or the Office of Administrative Hearings, including appeals under the Rental Accommodations Act of 1975, the Rental Housing Act of 1977, and the Rental Housing Act of 1980.").

[21] 14 DCMR 3802.1 states: "Any party aggrieved in whole or in part by a final order of the Rent Administrator or the Office of Administrative Hearings on a matter arising under the Act may obtain review of the order by filing a notice of appeal with the Commission."

[22] D.C. Official Code § 42-3502.19.

[23] *Gural* at 12.

[24] *Lynn v. Lynn*, 617 A.2d 963, 969 (D.C 1992).

[25] *Id.*, citing *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed. 2d 400 (1975).

[26] *Burkhardt v. B.F. Saul Company et al*, RH-TP-06-28,708 (RHC Sept. 22, 2017) at 31-32.

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[25] *Id.*, citing *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed. 2d 400 (1975).

[26] *Burkhardt v. B.F. Saul Company et al*, RH-TP-06-28,708 (RHC Sept. 22, 2017) at 31-32.

Although the Commission's decision in *Fineman* was appealed to the Court of Appeals, the Court of Appeals dismissed the appeal, finding that there was no final order for its review.[27] The OAH ALJ in that case later issued a Final Order on remand from the Commission's decision, but that Final Order on remand was not appealed to either the Commission or the Court of Appeals. Thus, the issue of the retroactivity of the *Fineman* decision has not yet been addressed by the Court of Appeals – either by an appeal from a decision of the Commission or an appeal from the decision of the Superior Court in *Equity Residential*[28] – and absent a decision from the Court of Appeals directing otherwise, I am bound to follow the Commissions directions on remand. Accordingly, Housing Provider's reliance on the holding in *Equity Residential* is misplaced and the Motion for Partial Summary Judgment is denied.

V. ORDER

Therefore, it is:

ORDERED, that Housing Provider's Motion for Partial Summary Judgment is **DENIED;** and it is further

ORDERED, that the parties shall participate in a telephonic status conference on **June 14, 2023, at 10:00 a.m. If you do not appear for the status conference, you may lose the case. To participate in the hearing:**

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[27] *Smith Property Holdings Van Ness, L.P. v. D.C. Rental Hous. Comm'n*, No. 18-AA-364 (D.C. June 5, 2018).

[28] Tenant, in his Motion of Opposition to Housing Provider's Motion for Partial Summary Judgment, cites to the doctrine of primary jurisdiction as a basis for this administrative court to adhere to the Commission's decision regarding the retroactive effect of *Fineman*, rather than the D.C. Superior Court's decision. While there is some interplay between administrative actions brought under the RHA and actions brought in the Landlord-Tenant Branch of the D.C. Superior Court, that interplay is not directly applicable in this motion. Primary jurisdiction applies to claims that are brought before the Superior Court, but which could properly have been brought before either the Superior Court or an administrative agency to adjudicate the claim. *Drayton v. Poretsky Management, Inc.*, 462 A.2d 1115, 1118 (1983). If the doctrine of primary jurisdiction is invoked before the Superior Court, the Superior Court must then determine whether the issues of the claim, "under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific Railroad Co. Inc.*, 352 U.S. 59, 62–3 (1956). If it has, the claim in the Superior Court is suspended pending a decision by the administrative body. *Id.* Here, the claims in *Equity Residential* addressed violations of the CPPA, over which the Superior Court has jurisdiction. Such claims were not "placed within the special competence of an administrative body."

a. Call this telephone number: **1-202-860-2110 (you must first dial the "1")** and follow the instructions.

b. The meeting access code is: **2304 539 8554**

c. When you are asked for a participant identification number, simply press #.

This Order is dated when it is served, as certified on the Certificate of Service found at the end of this document.

/s/ *M. Colleen Currie*
M. Colleen Currie [Electronically signed]
Chief Administrative Law Judge

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/s/ *M. Colleen Currie*
M. Colleen Currie [Electronically signed]
Chief Administrative Law Judge

Certificate of Service:

By First-Class Mail (Postage Prepaid):

Harry Gural
3003 Van Ness Street, NW
S-707
Washington, DC 20008

Spencer B. Ritchie
801 17th Street NW
Suite 1000
Washington, DC 20006

Gwynne L. Booth
801 17th Street NW
Suite 1000
Washington, DC 20006

Richard Luchs
Greenstein Delorme & Luchs, P.C.
800 17th Street, NW
Suite 1000
Washington, DC 20006

Equity Residential/ Smith Property Holdings
VanNess LP
3003 Van Ness Street, NW
Washington, DC 20008

By Inter-Agency Mail:

District of Columbia Rental Housing Commission
441 4th Street, NW
Suite 1140 North
Washington, DC 20001

I hereby certify that on May 2, 2023 this document was caused to be served upon the above-named parties at the addresses and by the means stated.

___C. Draughn /S/_____
Clerk / Deputy Clerk