DISTRICT OF COLUMBIA
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Housing Provider's Proposed Findings Of Fact And Conclusions Of Law

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Name:	Debra F. Leege, Esq.	Telephone:	202-452-1400
Address:	Greenstein DeLorme & Luchs	E-mail address:	dfl@gdllaw.com
	1620 L Street, NW, Ste. 900	Representing:	Respondent
City, State, Zip:	Washington, DC 20036		

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Person to Whom the Papers Were Sent:

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

Method of sending:

☒ Mail
☐ Fax (Give Fax number) _____
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DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS

HARRY GURAL,

Tenant/Petitioner,

v.

SMITH PROPERTY HOLDINGS VAN NESS L.P.,

Housing Provider/Respondent.

Case No.: 2016 DHCD TP 30,855
3003 Van Ness Street, N.W., Apt. S-707

HOUSING PROVIDER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Pursuant to this Court's order, Housing Provider/Respondent Smith Property Holdings Van Ness L.P. ("Housing Provider"), by undersigned counsel, hereby submits its proposed findings of Fact and Conclusions of Law.

I. BACKGROUND

A. The First Tenant Petition

On May 12, 2016, Tenant/Petitioner Harry Gural ("Mr. Gural" or "Petitioner") filed a tenant petition, TP 30,818[2] (the "First Tenant Petition"), alleging that (i) his rent increase was larger than the increase allowed by any provision of the Rental Housing Act of 1985, D.C. Code §§ 42-3501.01, et seq. (the "Act"); (ii) the Housing Provider did not file the correct rent increase forms with the RAD; (iii) the rent ceiling exceeds the legally-calculated rent for the unit; and (iv)

[1] These also constitute Housing Provider's Closing Argument.

[2] An administrative court may take official notice of its own records. *See Sherman v. Comm'n on Licensure*, 407 A.2d 595, 598 (D.C. 1979); D.C. Code § 2-509(b).

the rent charged is in excess of the rent ceiling for my Rental Unit. In the Complaint Details, Petitioner states that:

> My rent last year (April 1, 2015-March 31, 2016) was $1,830. Equity Residential claims that my monthly rent beginning in April 2016 will be $2,192.
>
> DC rent control laws allow a maximum increase of 2% plus the CPI-W, which was 1.5% last year. The maximum allowable legal increase should thus be $1,830 x 3.5% = $1,895.
>
> However, Equity is demanding an increase of $362 monthly $1298 over the legal limit.). This increase is 19.8% - more than five times the legal maximum of 3.5%. . . .
>
> As the President of the Van Ness South Tenants Association, I have talked to many other residents who have also been demanded by Equity Residential to pay rent increases the vastly exceed what is allowed in DC law. In some cases, residents have been told that they must pay more than $1,000 monthly over the maximum allowable increase. They have also been told that they must sign new leases, which is not true under DC rent control laws.
>
> I have clear records, both in my specific case and in that of others. I can clearly show that in my case Equity Residential submitted incorrect figures for my rent to the DC Rental Accomodations [sic] Division.
>
> There is some urgency to this tenants petition because Equity Residential has filed against be in Landlord & Tenant Court. This is because for the current year (April only thus far) I paid Equity the maximum amount I owe by law ($1,895), but I have not paid the additional $298 Equity demands of me, which exceeds the legal limit. The LNT case number is 10863-16.

After Equity filed a Motion for Summary Judgment in the First Tenant Petition, Mr. Gural filed an Opposition, as well as a Motion for Voluntary Dismissal of the First Tenant Petition. In his filing, Mr. Gural provided a substantive response to the Motion for Summary Judgment but then, relying upon OAH Rule 2817, stated

> I also request voluntary dismissal without prejudice of my tenant petition because I likely will pursue remedy through the District of Columbia Superior Court's Civil Division. I plan to pursue my case

> in Superior Court because some of the issues case [sic] lie outside the scope of the Rental Housing Act. A suit in Superior Court may provide the most direct path to relief.
>
> ***
>
> I respectfully request voluntary dismissal without prejudice under OAH Rule 2817.1, so that I may seek remedy in a forum that may grant equitable relief.

Answer to Housing Provider Motion for Summary Judgment and Tenant/Petitioner Motion for Voluntary Dismissal Under OAH Rule 2817.1 at 3 (emphasis added). Consequentially, on July 28, 2016, a Final Order was issued, dismissing the First Tenant Petition.

B. The New Tenant Petition

On August 30, 2016 Mr. Gural filed the instant tenant petition ("the New Tenant Petition" or the "Petition") alleging that (i) his rent increase was larger than the increase allowed by any provision of the Rental Housing Act of 1985, D.C. Code §§ 42-3501.01, et seq. (the "Act"); (ii) the Housing Provider did not file the correct rent increase forms with the RAD; (iii) the Housing Provider had taken retaliatory action against him; and (iv) a Notice to Vacate had been served on him. In the Complaint Details, Petitioner explained that he had dismissed the First Tenant Petition on advice of counsel to pursue remedies in other forums, but as there was a pending Motion to Vacate the *Drayton* stay in the L&T Court, he was filing another tenant petition predicated on the same factual background.

C. The Motion for Summary Judgment

Housing Provider filed a motion for summary judgment, which was opposed by the Petitioner and a reply was filed by the Housing Provider. The focus of the pleadings was whether concession language included in the Petitioner's lease was permitted and how that affected the "rent charged" for purposes of rent increases and filings at the Rental Accommodations Division. Thereafter, oral argument was held on Housing Provider's motion.

During the oral argument, the Petitioner withdrew his claim that a Notice to Vacate had been served on him. After the oral argument, the parties briefed the issue of whether the doctrine of laches was applicable. Thereafter, Petitioner filed a motion for summary judgment, which was opposed by the Housing Provider. On April 12, 2017, this Court issued an Order Granting in Part and Denying in Part Housing Provider's Motion for Summary Judgment; Denying Tenant's Motion for Summary Judgment; and Granting Tenant's Request to Withdraw One Claim in His Tenant Petition (the "Order").[3] The Order granted summary judgment in favor of the Housing Provider with respect to the claims that (1) the rent increase was larger than allowed by the Act and (2) that the Housing Provider did not file the correct rent increase forms after first finding that rent concessions are not contrary to the Rental Housing Act. Order at 9. Furthermore, "the rent concession as described in Petitioner's lease does not violate the Act as it relates to rent increases." *Id.* at 10.

The evidentiary hearing proceeded solely on the issue of retaliation.

D. The Evidentiary Hearing

An evidentiary hearing was conducted on May 22, 23, and 24, 2017. Petitioner and Housing Provider introduced a number of documents into evidence. A list of the exhibits is provided in Appendix A attached to this Order. During the evidentiary hearing, Petitioner proceeded *pro se*. He testified on behalf of himself and called two witnesses, Shawn Janzen and Gabriel Fineman. Housing Provider was represented by Debra Leege, Esquire. Avis Duvall ("Ms. Duvall"), the General Manager for the Housing Accommodation, testified on behalf of the Housing Provider.

[3] The Order's twenty-two (22) Material Facts Not in Dispute and the Analysis and Conclusions are incorporated by reference in these Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. The Housing Accommodation that is the subject of the Petition is located at 3003 Van Ness Street, N.W., Washington, D.C.

2. Petitioner resides in unit S707 (the "Unit"). RX 200; Testimony of Harry Gural.

3. The Housing Accommodation is owned by Smith Property Holdings Van Ness LP and is managed by Equity Residential Management.

4. The relevant period for this case is August 30, 2013 through the date the Petition was filed.

5. Petitioner signed a one-year lease on March 19, 2014 for the Unit for the period April 1, 2014 through March 31, 2015. The "term sheet" of the lease identified two "monthly recurring charges:" "Monthly Apartment Rent" of $2,048 per month and "Monthly Reserved Parking" of $100. RX 200; Order at 3.

6. The term sheet also identified a "Monthly Recurring Concession" of $278 per month. The term sheet stated: "The Total Monthly Rent shown above will be adjusted by these lease concession amounts." The concession reduced the amount Petitioner was obligated to pay to Housing Provider during the term of the lease from $2,048 to $1,870 per month. *Id.* The lease also included a "Concession Addendum." RX 200; Order at 4.

7. On or about January 15, 2015, Housing Provider provided Petitioner with RAD Form 8, "Housing Provider's Notice to Tenants of Adjustment in Rent Charged" which stated that "your current rent charged" for the Unit would increase from $2,048 to $2,118 (a 3.4% increase), effective April 1, 2015. Order at 4.

8. Petitioner continued to reside in the Unit after the written lease expired on March 31, 2015. *Id.* For the months April 2015 through March 2016, Petitioner paid to

Housing Provider $1,930 each month, which included $100 for reserved parking. Order at 5.

9. On or about January 15, 2016, Housing Provider gave Petitioner another RAD Form 8. This one stated that "rent charged" for the Unit would increase from $2,118 to $2,192 (a 3.5% increase), effective April 1, 2016. *Id.*

10. Housing Provider agreed to accept $1,895 for monthly apartment rent starting April 1, 2016, provided Petitioner sign a one-year lease which identified "Monthly Apartment Rent" as $2,192 and provided for a "Monthly Recurring Concession" of $297." Order at 5. Tenant did not sign the offered lease. *Id. See also* RX 204.

11. On March 25, 2016, Petitioner paid Housing Provider $1,995, which amount included $100 for reserved parking, for the month of April, 2016. *Id.*

12. Subsequently, on April 1, 2016, Mr. Gural emailed Ms. Duvall, stating:

> Increases beyond those stipulated in rent control law are illegal. Moreover, you cannot force me to sign a lease to get the (maximum) increase allowed by law. This also is illegal.
>
> If you [sic] lawyers are so confident that they are right they should sue me.
>
> I would be happy to win this case on behalf of the residents of 3003 Van Ness and others that have been subject to Equity's predatory practices.

RX 204.

13. On April 27, 2016, Housing Provider filed a complaint for non-payment of rent in the Landlord-Tenant Branch of D.C. Superior Court (the "L&T Case"). It was assigned case number 2016 LTB 010863.[4] *Id.* at 5-6; PX 112, 115.

14. At the initial hearing in the LTB Case on May 19, 2016, a *Drayton* stay was entered by consent. Additionally, a protective order was signed requiring Petitioner to pay $297 per month into the court registry during the pendency of the case. As $1,995 per month was not in dispute, Mr. Gural was to pay that amount directly to the Housing Provider.[5] Order at 6; RX 201.

15. Housing Provider filed a motion for summary judgment in the First Tenant Petition on June 28, 2016. In his response to that motion, Tenant stated that he wished to voluntarily dismiss the Petition without prejudice. On July 28, 2016, the First Tenant Petition was dismissed without prejudice.

16. On August 23, 2016, Housing Provider filed a Motion to Vacate the *Drayton* stay in the L&T Case. Order at 6; RX 207.

17. The Motion to Vacate the *Drayton* stay was filed while Mr. Gural was away from the District of Columbia and without contacting him for consent or to coordinate his availability. PX 107; Testimony of Mr. Gural.

18. On August 30, 2016, Petitioner filed the Petition in this matter.

19. On September 1, 2016, Housing Provider's motion to vacate the *Drayton* stay was denied and the stay remains in place as of the date of this order. Order at 6.

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[4] On May 22, 2017, the Parties agreed that I would take official notice of the L&T Case. The docket is a public record available on the internet and therefore "not subject to reasonable dispute [and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be determined." Fed. R. Evid. 201(b)(2). Courts may take official notice of proceedings other courts. *U.S. ex rel Robinson Racheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citing *St. Louis Baptis Temple, Inc. v. FDIC*, 605 F.2d 1169 (10th Cir. 1979)). *See* http://ww.dccourts.gov/cco/maincase.jsf *See also* PX 115.

[5] $1,895 in rent and $100 in parking.

20. Mr. Gural testified that he engaged in protected activities between late September 2015 through the date he filed the tenant petition. Testimony of Mr. Gural.

21. Mr. Gural is the president of the Van Ness South Tenants Association (the "Association"). Testimony of Harry Gural, Testimony of Shawn Janzen, Testimony of Gabriel Fineman, Testimony of Avis Duvall, PX 101, PX 110.

22. In his role as the president of the Association, Mr. Gural has assisted other tenants in the negotiation of concessions. *Id.*

23. Mr. Gural objected to Equity's procedure that they would exclude him from email communication with the tenant on whose behalf he was negotiating. Ms. Duvall explained in her testimony that, as the Housing Provider needed to protect the privacy of the tenant, she did not include Mr. Gural in her responses. *Id. See also* RX 202.

24. On May 19, 2016, Mr. Gural emailed Ms. Duvall and Marco Cruz regarding an inability to submit electronic payments for overnight parking. That same day, Mr. Cruz advised Mr. Gural that the issue should be fixed that evening. PX 113 at p. 1. Thereafter, on May 30, 2016, Mr. Gural emailed Ms. Duvall that he received a late charge. Mr. Cruz responded that late fees are automatically applied but adjustments can later be made. *Id.* at p. 2.[6]

25. Late fees are not manually applied by Housing Provider's staff. Instead, they are automatically applied when there is a balance owed. Testimony of Ms. Duvall.

26. Mr. Gural has received a credit for all late fees incurred, even though he has a balance owed. RX 201; Testimony of Ms. Duvall.

[6] PX 113 was a compilation of emails from May 19-November 16, 2016. As the relevant time period in this case concluded as of August 30, 2016, a summary of the emails after the filing of the tenant petition is not included.

27. On a regular basis, Mr. Gural contacted the Housing Provider regarding conditions in the Housing Accommodation that he believed required remedied. Testimony of Mr. Gural; Testimony of Ms. Duval. Housing Provider's policy was to make repairs in the ordinary course of business. If the repairs identified by the Petitioner were to the common areas, any required further communications would be with Mr. Gural but if the condition was in another tenant's unit, the communication would instead be directed to the tenant that resides in that unit. Testimony of Ms. Duvall.

28. In February 2016, a tenant of the Housing Accommodation's pet was electrocuted at the Housing Accommodation. Mr. Gural reported the problem to a Housing Inspector. Testimony of Mr. Gural. The Housing Provider resolved the claim with the tenant. Testimony of Ms. Duvall.

29. Beginning in June 2016, Mr. Gural began working with a reporter at the City Paper about his complaints about the Housing Provider. The Housing Provider was not on notice of those communications. Testimony of Mr. Gural.

30. In the summer of 2016, Mr. Gural was in regular contact with Joel Cohen, Esquire with the Office of the Tenant Advocate for legal advice. The Housing Provider was not on notice of those communications. Testimony of Mr. Gural.

31. In the summer of 2016, Mr. Gural was in regular contact with Councilmembers Anita Bonds and Mary Cheh, as well as their staff to work on legislation regarding concessions. Testimony of Mr. Gural. Mr. Gural testified that Housing Provider later had representation through an advocacy group for landlords but did

not identify the group or confirm that the Housing Provider was on notice of those contacts.

32. Mr. Gural has been working with the D.C. Office of Attorney General in an investigation into the Housing Provider. The Housing Provider was not on notice of those communications or the investigation. Testimony of Mr. Gural; PX 110.

33. Mr. Janzen contacted DCRA regarding issues with the elevators of the Housing Accommodation. Mr. Gural was copied on the emails. Testimony of Mr. Gural.

34. In August 2016, Mr. Gural was in contact with the fire inspector and DCRA after alarms did not go off during a fire drill. Testimony of Mr. Gural; PX 110.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Jurisdiction

This matter is governed by the Rental Housing Act of 1985 (D.C. Code § 42-3501, et seq.), Chapters 41-43 of 14 District of Columbia Municipal Regulations ("DCMR"), the District of Columbia Administrative Procedures Act (D.C. Code § 2-501, et seq.) ("DCAPA"), and OAH Rules (1 DCMR 2800 et. Seq. and 1 DCMR 2920 et. seq.).

B. Burden of Proof

The burden of proof rests upon the Petitioner in this case to prove each element of his claims pursuant to the Rental Housing Act and the DCAPA. *See* D.C. Code § 42-3502.16(g); D.C. Code § 2-509; *Allen v. D.C. Rental Hous. Comm'n*, 538 A.2d 752, 754 (D.C. 1988). Petitioner had the burden of proving, by a preponderance of the evidence, that the Housing Provider violated the Rental Housing Act as alleged. OAH Rule 2932.1. A preponderance of the evidence is such proof as leads the fact-finder to find that the existence of a contested fact is more probable than its nonexistence. *See* OAH Rule 2822.1. There must be substantial evidence in the record to support a finding. Substantial evidence means "more than a scintilla of

evidence" and is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." *See Jadallah v. D.C. Dep't of Emp't Servs.*, 476 A.2d 671 (D.C. 1984); *see also Compton v. D.C. Board of Psychology*, 858 A.2d 470, 576 (D.C. 2004).

C. Claims Considered.

In *Parreco v. District of Columbia Rental Housing Commission*, 885 A.2d 327, 334 (D.C. 2005), the Court held that

> A petition must give a defending party fair notice of the grounds upon which a claim is based, so that the defending party has the opportunity to adequately prepare its defense and thus ensure that the claim is fully and fairly litigated.

The Rental Housing Commission similarly has held that only events that occur prior to the filing of a petition are relevant matters that may be considered. In *Menor v. Weinbaum*, TP 22,769 (RHC August 4, 1993), the commission stated at footnote 6:

> we would like to clarify that conditions that occur prior to the filing of a tenant petition are the relevant matters that the parties are adjudicating...if the filing of the petition were not the cut off point for the issues to be adjudicated, the landlord would never know what was to be defended."
>
> Furthermore, simply checking a box on a petition, without more, is not sufficient to put a housing provider on notice of a claim.

See also Blake & Wendy Nelson et al v. B. F. Saul Company et al, RH-TP-08-29,205, Order Consolidating Petitions for Hearing: Scheduling Joint Status Conference and Orders to Show Cause (OAH September 27, 2012) at p. 15 (Merely checking a box in a tenant petition is insufficient for providing notice to a housing provider. Tenants were not permitted to amend the tenant petitions to elaborate as the cases had been pending for several years).

As to the issue of retaliation, Petitioner did not put the Housing Provider on notice of the basis of the claims in the Petition. Instead, Housing Provider was left to read between the lines of Mr. Gural's complaint details to ascertain what he may be trying to allege. This is inadequate

notice. Nevertheless, the Court permitted Mr. Gural's claim of retaliation to proceed as he explained his claims in further detail, within his opposition to the Motion for Summary Judgment. There, he identified three bases for retaliation: (i) that the Housing Provider's Motion for Summary Judgment seeks to deny him the right to a hearing, (ii) the charging of late fees even though he is paying into the registry of the court, and (iii) reporting unpaid rent to a credit agency. Opposition at 9. Yet, during the evidentiary hearing, Mr. Gural identified five bases for retaliation.[7] Although I analyze all five bases in detail below for purposes of a complete record, those for which the Housing Provider was not on notice prior to the evidentiary hearing, could not be used as a basis for recovery.

Further, Mr. Gural testified that he was notified on September 3, 2016 that there had been a change in his FICO score. RX 104. I took under advisement this exhibit and this claim rather than admitting it during the evidentiary hearing. This exhibit is not admitted. Mr. Gural did not know prior to the filing of the tenant petition that his credit score had been adversely affected. Furthermore, he did not put the Housing Provider on notice of the claim in the Petition nor file a Motion to Amend the Petition. In fact, Ms. Duvall testified that she did not know that the Petitioner was complaining about the late fees as a way to avoid being reported to TransUnion. In any event, Ms. Duvall testified that Housing Provider had a system in place that automatically notified the credit agency, TransUnion, of delinquent accounts. There is no doubt, even accounting for the payments made by Mr. Gural into the court registry, that there was a delinquency as Mr. Gural did not pay the entire rent charged for the months of March and April 2016.[8] RX 201. Nevertheless, Housing Provider submitted a suppression report to TransUnion.

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[7] The five bases identified were (i) requiring that he sign a lease in order to obtain a concession; (ii) filing the L&T Case; (iii) filing the Motion to Vacate the *Drayton* Stay; (iv) assessment of late fees; and (v) reporting his account to a credit agency

[8] Protective order payments began in June 2016.

Testimony of Ms. Duvall; PX 114. This had the effect of voiding the filing with the credit agency. Accordingly, the claim that Housing Provider retaliated against Mr. Gural by submitting a report to a credit agency is dismissed without prejudice as outside the relevant time period.

Additionally, I took under advisement PX 108 during the evidentiary hearing. It appears to have been created in April 2017. It is not admitted, as the document was not created during the relevant time period and as the Housing Provider was not on notice of the claim. Finally, Mr. Fineman testified that there was a change in the advertising practices of the Housing Provider as a result of the advocacy of the Association. However, as Mr. Gural presented no testimony regarding advertising, this issue is not before this Court.

D. Retaliation

Petitioner contends Housing Provider retaliated against him by: (i) requiring that he sign a lease in order to obtain a concession; (ii) filing the L&T Case; (iii) filing the Motion to Vacate the *Drayton* Stay; (iv) assessment of late fees; and (v) reporting his account to a credit agency. Retaliation under the Act is a "term of art". It is an act intentionally taken to injure or "get back at" a tenant for taking certain protected actions. 14 DCMR § 4303.1. A tenant has an available remedy if a housing provider engaged in a prohibited retaliatory act against him or her. That remedy is the imposition of a civil fine of up to $5,000, payable to the District of Columbia, if there was a willful violation of the Act. D.C. Code § 42-3509.01(b).

D.C. Code § 42-3505.02 states that:

> (a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of

service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

(1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;

(2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;

(3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;

(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;

(5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or

(6) Brought legal action against the housing provider.

A tenant is entitled to a presumption of retaliation if it is established that the housing provider's conduct occurred within six months of the tenant performing a protected act listed in D.C. Code § 42-3505.02(b) or 14 DCMR § 4303.4. If retaliation is presumed, then the burden is

shifted to the housing provider to provide clear and convincing evidence[9] that its actions were not retaliatory. 14 DCMR § 4303.4; *Youssef v. United Mgmt. Co., Inc.*, 683 A.2d 152, 155 (D.C. 1996). To rebut this presumption, the housing provider must provide a legitimate, non-retaliatory reason for its action. *Gomez v. Indep. Mgmt. of Delawar*e, 967 A.2d 1276, 1291 (D.C. 2009), citing *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 865 (D.C. 1972) ("Once the presumption is established, it is up to the landlord to rebut it by demonstrating that he is motivated by some business purpose rather than by the illicit motive which would otherwise be presumed."). If the housing provider does so, the burden is shifted back to the tenant to prove by a preponderance of the evidence that the housing provider acted in a retaliatory manner. *Wilson v. Archstone-Smith Communities, LLC, et al*, TP 28,907 (RHC Sept. 25, 2015), aff'd 2017 D.C. App. LEXIS 97 (D.C. May 18, 2017). In doing so, the tenant "must prove that the Housing Provider committed a retaliatory action. . . that was intended to 'injure or get back at' the tenant for exercising a right protected by the law." *Id.* (quoting *Smith Prop. Holdings, LLC v. Lutsko*, TP 29,149 (RHC Mar. 10, 2015). In *Wahl v. Watkins*, 491 A.2d 477, 480 (D.C. 1985) the Court ruled that "[t]he retaliation statute is applicable only where a landlord takes an action not otherwise permitted by law." *See also Triplett v. Brown*, H/P 20,431 (RHC April 4, 1990); *Peterson v. Shelton*, TP 20,537 (RHC February 19, 1988); D.C. Code § 42-3505.02(a).

Mr. Gural testified that he engaged in protected activities between late September 2015 through the date he filed the tenant petition. Although I have jurisdiction over claims from August 30, 2013 through August 30, 2016, Mr. Gural limited his testimony to claims beginning in September 2015. Accordingly, the analysis here only considers events during that period.

[9] "Clear and convincing evidence is most easily defined as the evidentiary standard that lies somewhere between a preponderance of the evidence and evidence probative beyond a reasonable doubt; it is such evidence as would produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Ingersoll Trust*, 950 A.2d 672, 693 (D.C. 2008) (Internal quotations and citations are omitted).

The majority of Mr. Gural's and his witness testimony focused on Mr. Gural's protected activities.[10] However, the testimony extended into acts that involved other members of the Association rather than Mr. Gural. Although Mr. Gural was the president of the Association during the relevant time period, the Act requires an act by a petitioner for it to be considered a protected activity. *See, e.g.*, D.C. Code § 42-3505.02(b)(2) ("Contacted appropriate officials of the District government ... reported to the officials;") (emphasis added).

Based upon the testimony presented by Mr. Gural, the burden shifted to the Housing Provider to rebut the presumption of retaliation.

First, Mr. Gural alleged that he was retaliated against by being required to sign a new lease in order to obtain a concession. This claim is simply an effort to seek reconsideration of the Order, rather than a separate claim of retaliation. It is notable that this claim was not one of the three bases for retaliation alleged in Mr. Gural's opposition to the motion for summary judgment. The evidence presented, even by Mr. Gural, showed that there was a clear policy by the Housing Provider that in order to obtain a concession, a tenant would be required to execute a new lease. Mr. Gural was not singled out in this treatment. The Housing Provider had a clear policy that it did not provide the benefit of the concession unless the tenant provided the assurance of agreeing to a lease. *See* Order at 10-11.

Second, Mr. Gural alleges that Housing Provider retaliated against him by filing the L&T Case. Ms. Duvall testified that the L&T Case was filed against Mr. Gural, as there was a balance owed and notification by Mr. Gural that he intended to continue paying less than the amount owed. *See also* RX 201; 204. Mr. Gural presented no evidence to rebut the fact that there was a balance owed at the time the L&T Case was filed. Instead, he focuses on the fact that typically

[10] Mr. Gural expended considerable resources attempting to show that he fit within each category of D.C. Code § 42-3505.02(b). However, as the Court notes in *Gomez,* 967 A.2d at 1289, "subsection (b) is worded in the disjunctive, and they need only fit within one of its six categories in order to trigger the presumption."

he believed that the L&T cases were not filed until a larger balance was owed and that the Housing Provider did not issue a notice to vacate. Paragraph 26 of the Lease states:

> In cases where the default is due to non-payment of rent, you hereby expressly waive the right to receive from us a 30 day notice of such payment-related lease violation, and the Lease is hereby terminated.

RX 200 at para. 26. As Mr. Gural waived the right to receive notice of the failure to pay his rent in full, Housing Provider had no obligation to provide such a notice to Mr. Gural prior to filing the L&T Case. In contrast, Ms. Duvall testified that it was not unusual to file a suit for possession for the amount that Mr. Gural owed. Furthermore, as Mr. Gural had advised that he did not intend to pay the amount in dispute (RX 204), there is no question that the arrearage was going to increase.

Third, Mr. Gural states that the filing of the Motion to Vacate the *Drayton* Stay was retaliatory. During the hearing, Mr. Gural clarified that he is not disputing that the Housing Provider had the right to file the motion,[11] but instead that the circumstances surrounding the filing of the motion were retaliatory, particularly that it was filed "under penalty of perjury" and without coordinating with Mr. Gural on the scheduling of the hearing which he asserted harmed his position in the L&T Case. As an initial matter, neither the motion nor the certificate of service were filed under penalty of perjury. *See* RX 207. Mr. Gural testified that he was away when the motion was filed and therefore did not receive a copy until his return. PX 107. However, he did not testify that he sought a continuance nor does the docket in the L&T Case reflect that he sought a continuance of the motion hearing. A motion may be set for a hearing in

[11] A party is entitled to a *Drayton* stay when there is a pending tenant petition as rent issues arising under the Rental Housing Act are within the primary jurisdiction of the Rent Administrator rather than the Landlord and Tenant Branch. *Drayton v. Poretsky Management, Inc.*, 462 A.2d 1115 (D.C. 1983); *Akassy v. William Penn Apartments LP*, 891 A.2d 291, 305 n. 18 (D.C. 2006). As Mr. Gural had voluntarily dismissed the First Tenant Petition, Housing Provider was within its right to seek to vacate the Drayton stay.

a L&T case upon ten (10) days' notice if the motion is served by hand delivery. SCR L&T 13(b)(2). The certificate of service for the motion identifies that the motion was served by hand delivery.[12] RX 207 at 3. Although some of the Superior Court Rules of Civil Procedure are applicable in the L&T branch, SCR 12-I, which requires a request for consent of the party prior to the filing of a motion, is not applicable. SCR L&T 2. Although Mr. Gural may have preferred that counsel for Housing Provider contact him to schedule the motion hearing, nowhere in the rules of the Landlord and Tenant branch is there a requirement that the parties coordinate the scheduling of a motion. Furthermore, Mr. Gural, during the evidentiary hearing showed that he fundamentally did not understand what would have occurred next if the *Drayton* stay had been lifted. Counsel for Housing Provider had objected to Mr. Gural's improper use of the terminology of "eviction" while he was cross examining Ms. Duvall. As the objection had been interposed on several prior occasions throughout the hearing, in an attempt to avoid further objections, Housing Provider's counsel clarified that even if the *Drayton* stay been lifted, Mr. Gural was still entitled to further process in the Landlord and Tenant branch. Mr. Gural conceded he was unaware of that fact.

The fourth allegation is that the Housing Provider retaliated by assessing late fees. The testimony presented by Ms. Duvall was that Housing Provider's system automatically applies late fees. Thereafter, Housing Provider removed those late fees imposed as a result of (i) Mr. Gural paying a portion of the rent into the registry of the court and (ii) failure to pay the complete rent owed [April and May 2016].

The fifth allegation is that Housing Provider retaliated by reporting his account to a credit agency. As is discussed in more detail in Section III.D, this allegation will be dismissed without

[12] Although Mr. Gural's testimony seems to challenge proper service of the motion, this is not an issue within the jurisdiction of this court but instead would have properly been before the L&T court. This Court would note that there it appears that the Petitioner is confusing hand delivery with service of process.

further consideration as Mr. Gural failed to present evidence that the act occurred during the relevant time period or that he put the Housing Provider on notice of such claim.

I find as to each claim of retaliation the Housing Provider has provided a legitimate, non-retaliatory reason for its actions.

The fact that Housing Provider sought to negotiate concessions with tenants of the Housing Accommodation, including Mr. Gural, is not evidence of retaliation. As explained in the Order, Mr. Gural and the Housing Provider agreed when the Lease was signed to the concession language. Therefore, Housing Provider was entitled to enforce the concession language that Mr. Gural agreed to in the lease. In the same manner, Housing Provider was entitled to not enter into another concession unless Mr. Gural executed a new lease. The D.C. Court of Appeals addressed this very issue in *Double H Housing Corp. v. David*, 947 A.2d 38, 41-42 (D.C. 2008)

> Double H's brief focuses on the following issue: whether a landlord, entitled to increase the rent charged to its month-to-month tenant, may require the tenant to execute a new lease agreement as a condition of receiving a discount from the otherwise applicable rent increase. We agree with Double H that a landlord may do so, absent circumstances that would support a finding that the tenant was effectively coerced into abandoning the month-to-month tenancy that he was entitled to maintain under District of Columbia law (specifically, D.C. Code § 42-3505.01).
>
> ... [§ 42-3505.01] does not, however, mandate that any continued tenancy must be month-to-month or preclude the landlord and tenant from agreeing to a new or renewed lease.... We therefore cannot agree that Double H was precluded from offering to charge David a discounted rent amount if he signed a new lease but charging him a higher monthly rent if he continued his month-to-month tenancy. To hold otherwise would, we think, encroach on the landlord's - and tenant's - "'basic freedom to contract as he will,'" which we have said remains one of the "rather basic rights incident to the ownership of property [that] ought not to be summarily dismissed as obsolete" even under our modern statutory rental housing law. *Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990)* (quoting *White v. Allan, 70 A.2d 252, 255 (D.C. 1949))*.

See also Wilson v. D.C. Rental Hous. Comm'n, 2017 D.C. App. LEXIS 97, n. 5 (D.C. May 18, 2017).

Upon shifting the burden back to Mr. Gural, Mr. Gural has not presented evidence to show that the Housing Provider's policy on concessions was intended to retaliate against him.

Mr. Gural has conceded that the Housing Provider had the right to file both the L&T case and the Motion to Vacate the Drayton Stay.[13] Based upon these admissions, the Housing Provider has satisfied its obligation and the burden must shift back to the Petitioner. Mr. Gural has not introduced evidence to show that either the filing of the L&T Case or the filing of the Motion to Vacate the *Drayton* Stay were done for a retaliatory reason. Furthermore, as Mr. Gural has conceded that the Housing Provider had a right to file both the L&T Case and the Motion to Vacate the Drayton Stay, it is doubtful that Mr. Gural could find evidence of retaliation.

As Mr. Gural repeatedly testified during the evidentiary hearing, Equity Residential is a large corporation. As such, it has policies and procedures in place to automate its processes. This happens to include both the assessment of late fees and reporting to the credit agency. As to those claims, there is no evidence that Housing Provider affirmatively acted. Furthermore, once Housing Provider was put on notice of Mr. Gural's complaints, they took steps to make the Petitioner whole. Although Mr. Gural may believe that this was retaliatory, it is clear by the steps taken to remedy, that there was not an intent to retaliate.

[13] Mr. Gural does not contest that the Housing Provider had the right to file the L&T Case, instead he alleged that it was retaliatory to file it for the amount that he owed.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, as well as the record in this matter, it is, this __ day of _____:

ORDERED, that Petitioner has failed to meet his burden of proof and therefore, _____is hereby DISMISSED WITH PREJUDICE; and it is further

ORDERED, that either party may move for reconsideration of this Final Order within 10 days under OAH Rule 2938; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are set forth below.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: July 28, 2017

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Counsel for Housing Provider

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Proposed Findings of Fact and Conclusions of Law was served by U.S. Mail, postage prepaid on July 28, 2017, upon:

Harry Gural
3003 Van Ness Street, N.W.
Apt. S-707
Washington, D.C. 20008

Debra F. Leege