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HARRY GURAL, Tenant/Petitioner, v. EQUITY RESIDENTIAL MANAGEMENT and SMITH PROPERTY HOLDINGS VAN NESS LP, Housing Providers/Respondents.	Case No.: 2016-DHCD-TP 30,855 *In re*: 3003 Van Ness Street, NW, S-707

FINAL ORDER

I. Introduction

For the reasons stated below, this case and Tenant Petition 30,855 are dismissed with prejudice.

II. Procedural History

On August 30, 2016, Tenant Harry Gural filed Tenant Petition 30,855. In his petition, Tenant alleges that Equity Residential Management and Smith Property Holdings Van Ness, LP (collectively referred to as 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 October 13, 2016, this matter was scheduled for mediation on November 7, 2016. On October 25, 2016, Housing Provider filed a motion for summary judgment. Tenant filed a response to Housing Provider's motion for summary judgment on November 4, 2017. Mediation was rescheduled at the request of Tenant and was held on November 16, 2016. It was unsuccessful. By order dated December 6, 2016, oral argument on the motion for summary judgment was scheduled for January 13, 2017.

At the January 13, 2017 hearing, Tenant withdrew his claim that a Notice to Vacate had been served on him in violation of D.C. Official Code § 42-3505.01 (Supp. 2008). At the conclusion of oral argument, the parties were invited to file supplemental briefs. Housing Provider submitted a brief on January 26, 2017 and Tenant submitted a brief on February 13, 2017. Tenant also filed a motion for partial summary judgment on March 3, 2017. Housing Provider filed a response to that motion on March 17, 2017.

By Order dated April 12, 2017, Housing Provider's motion for summary judgment was granted in part, Tenant's 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. A Case Management Order was issued on April 12, 2017, scheduling an evidentiary hearing on Tenant's claim for retaliation on Monday, May 22, 2017.

An evidentiary hearing was held on May 22, May 23, and May 24, 2017. Tenant appeared for the hearing and testified. Shawn Janzen and Gabriel Fineman testified on behalf of Tenant. Housing Provider was represented by Debra Leege, Esquire. General Manager Avis Duvall testified on behalf of Housing Provider. The exhibits admitted into evidence are reflected in Appendix A attached to this Final Order.

III. Jurisdiction

This matter is governed by the Rental Housing Act of 1985 (the Act), (D.C. Official Code §§ 42-3501.01 *et seq.*), Chapters 38-43 of 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.*).

IV. Preliminary Evidentiary Issues

A. Petitioner's Exhibit 104

Petitioner's Exhibit (PX) 104 is an email dated September 3, 2016 from a Visa account held by Tenant to Tenant informing him that there had been a change in his credit score. Attached as page two is a synopsis of Tenant's Tri-Bureau Credit Report and Monitoring that shows that "Equity/Archstone Van Nes" flagged Tenant's account as 30 days past due. That activity was "found on" September 3, 2016. The Report does not indicate when Equity/Archstone Van Ness reported the account as past due to the credit agencies.

Tenant offers this exhibit to prove that Housing Provider retaliated against him by reporting his account as past due when it was not. Housing Provider objects that the document is dated September 3, 2016, which is three days after August 30, 2016, the date on which Tenant

filed the petition in this matter, and as such, it falls outside of the scope of this proceeding and is not admissible.[1]

In administrative cases, "[a]ny ... documentary evidence may be received, but [the] agency shall exclude irrelevant, immaterial, and unduly repetitious evidence." D.C. Official Code § 2-209(b). Thus, the question is whether PX 104 is relevant or material. The document itself does not clearly demonstrate when Housing Provider reported the purported delinquency to the credit agencies; it only establishes that Tenant was notified of the negative report on September 3, 2016. Tenant seeks to prove that Housing Provider retaliated by, among other things, intentionally incorrectly reporting a delinquency on Tenant's account and thereby damaging his credit rating. Insofar as PX 104 makes it more or less likely that Housing Provider reported a delinquency to the credit agencies, this document is relevant and therefore admissible. PX 104 is admitted into evidence.

B. PX 108

PX 108 is a printout from Housing Provider's webpage showing that an apartment that Tenant asserts is identical to the one he rents was being offered for rent at $1,954 per month. Tenant printed this document from Housing Provider's web page some time in February, March, or April 2017. Tenant offers this document to demonstrate that the rent Housing Provider demanded for his apartment was excessive. Housing Provider objects that it is irrelevant because it represents the amount of rent demanded in early 2017, not before August 30, 2016.

What Housing Provider demanded for rent for an apartment that is not Tenant's at a time well after the tenant petition was filed is not relevant.[2] It does not tend to make it more or less

[1] *See Hawkins v. Jackson*, TP 29,201 (RHC Aug. 31, 2009) (retaliatory acts that occur after a tenant petition is filed are not properly before this administrative court).
[2] *Id.*

likely that Housing Provider retaliated against Tenant before August 30, 2016. Because it is not relevant, it is not admissible, and PX 108 is not admitted into evidence.

C. Claims for retaliation not articulated in the tenant petition

Housing Provider seeks to exclude the bases for retaliation that Tenant did not articulate in the Tenant Petition. To evaluate this argument, it is necessary to review the process of filing a tenant petition and the history of this Tenant Petition in particular.

A tenant petition is initiated by filling out and filing a form provided by the RAD. The instructions on the blank form state: "I/We believe that the following violation(s) of the Rental Housing Act of 1985 ... has/have occurred (check below)." A tenant may select from a number of complaints by checking a box next to a description of the complaint. The form also has a space for "complaint details," where a tenant is instructed to "[u]se this space to describe in detail the events, dates, experiences, and observations that cause(d) you to file this Tenant Petition/Complaint." As described above, in his Tenant Petition, Tenant checked four boxes, including the box for retaliation (Box M). Although Tenant did not specifically state what he believed Housing Provider did that was retaliatory in the "complaint details" section of the petition, Tenant did complain in that section that Housing Provider filed a motion to vacate a *Drayton* stay and about service of that motion.

On January 13, 2016, during oral argument on Housing Provider's motion for summary judgment, Tenant stated that he believed that, in addition to the first basis articulated in his petition (motion to vacate *Drayton* stay), Housing Provider retaliated against him by (2) reporting a delinquency in his account to TransUnion credit agency; and (3) obtaining a protective order in the landlord/tenant matter. At the evidentiary hearing on May 22 - 24, 2017, Tenant stated that he believed Housing Provider also retaliated against him by (4) requiring him

to sign a lease in order to obtain a rent concession; (5) filing the landlord/tenant case against him in D.C. Superior Court; (6) assessing late fees when none were due; and (7) not providing him a 30-day notice to quit before filing the landlord/tenant case in D.C. Superior Court.

Housing Provider argues that because all but the first of these bases were not articulated in the tenant petition, they should not be considered. In support, Housing Provider relies on *Parreco v. D.C. Rental Hous. Comm'n*, 885 A.2d 327 (D.C. 2005). In that case, Parreco filed a tenant petition in which he checked the box that his rent was "too high," but did not check the box that said that notice of the rent increase was deficient. Parreco did not raise the issue of the sufficiency of notice in either his opening or during his case in chief. Nonetheless, the hearing officer concluded that notice was deficient and awarded Parreco damages on that claim. The Rental Housing Commission affirmed the hearing officer's decision. In reversing the Rental Housing Commission, the D.C. Court of Appeals stated:

> The tenant's complaint that the rent was "too high" was insufficient to alert the landlord to a challenge to the adequacy of the rent increase notice. The petition form specifically prompted the tenant to raise the issue of defective notice, but the tenant did not check the box to do so, nor did he mention anything about the notice in the narrative space of the petition. The tenant had the opportunity to raise this issue in his opening statement and in his case-in-chief, but did not. 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. *See Autocomp, Inc. v. Publishing Computer Service, Inc.*, 331 A.2d 338, 340 (D.C. 1975) (holding that pleadings in a complaint did not give defendant fair notice of a separate theory of recovery that plaintiff sought to prove at trial). Given the multitude of reasons why a tenant could complain that rent is unjustifiably high, and the specific reasons listed on the petition form (*e.g.*, retaliation, discrimination, poor condition of apartment), it is unreasonable to expect the landlord to have inferred a challenge to the adequacy of the notice of rent increase, and to have been prepared to defend on that ground.[3]

This case is distinguishable from *Parreco*. In the tenant petition form, there are no boxes that a tenant can check to describe what a tenant believes a housing provider did to retaliate. The

[3] *Parreco*, 885 A.2d at 334 (D.C. 2005).

only check-a-box option is: "Housing Provider, a property manager, or other agent of the Housing Provider has taken retaliatory action against Tenant." Tenant described what he believed Housing Provider did to retaliate against him in the complaint details section of his Tenant Petition. He articulated several reasons during oral argument on January 13, 2017 and discussed those and more during his opening and his case in chief. None of the specified actions were unknown to Housing Provider. Housing Provider had the opportunity to cross-examine Tenant about each of those claims, and to present evidence regarding them.

Tenant argued that, because he appeared without the benefit of counsel, he is entitled to latitude. Indeed, because the Act is a remedial statute, and this is an administrative forum, it is appropriate to afford *pro se* litigants leeway, especially where such

> litigants bring suit under remedial statutes, particularly those involving civil rights, which rely "largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings." *Goodman v. District of Columbia Rental Hous. Comm'n,* 573 A.2d 1293, 1299 (D.C. 1990). *See also Karriem v. Gray*, 623 A.2d 112, 114 (D.C. 1993); *Johnson-El v. District of Columbia*, 579 A.2d 163, 166 (D.C. 1990); *Love v. Pullman Co.,* 404 U.S. 522, 527, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972) ("Procedural technicalities are particularly inappropriate in such a statutory scheme"); *Coles v. Penny,* 174 U.S. App. D.C. 277, 283, 531 F.2d 609, 615 (1976); *Rubin v. O'Koren*, 621 F.2d 114, 117 (5th Cir. 1980).[4]

Balancing these two competing interests (Housing Provider's right to fair notice of and an opportunity to adequately prepare for and defend against the claims Tenant makes; and the propriety of affording Tenant, as an unrepresented litigant, leeway in complying with procedural requirements), I conclude that Housing Provider had sufficient notice of the particulars of Tenant's retaliation claim to adequately prepare and defend against it. Those claims were fully and fairly litigated. Therefore, Housing Provider's motion is denied.

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[4] *Macleod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977, 980 (D.C. 1999).

V. Findings of Fact

Background

1. The Housing Accommodation located at 3003 Van Ness Street, NW, is owned by Smith Property Holdings Van Ness LP and managed by Equity Residential Management.
2. Ms. Avis Duvall has been the general manager for the Housing Accommodation since 2015, and is employed by Equity Residential Management.[5] As general manager, she oversees the operation of the community.[6]
3. Tenant has resided in unit S707 (the Unit) since at least April 1, 2014.[7]

The Lease

4. Tenant 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 and "Monthly Reserved Parking" of $100.[8]
5. The Term Sheet also identified a "Monthly Recurring Concession" of $278.[9] The Term Sheet stated: "The Total Monthly Rent shown above will be adjusted by these lease concession amounts." The concession reduced the amount Tenant was obligated to pay to Housing Provider during the term of the lease from $2,048 to $1,870 per month.
6. The Lease included a "Concession Addendum."[10] That addendum states in pertinent part:

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[5] Testimony of Ms. Duvall.
[6] *Id.*
[7] Testimony of Tenant; RX 200.
[8] RX 200.
[9] *Id.*
[10] *Id.*

> You have been granted a monthly recurring concession as reflected on the Term Sheet. The monthly recurring concession will expire and be of no further force and effect as of the Expiration Date shown on the Term Sheet.
>
> Consistent with the provisions of the Rental Housing Act of 1985 (DC Law 6-10) as amended (the Act), we reserve the right to increase your rent once each year. In doing so, we will deliver to you a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," which will reflect the "new rent charged." If you allow your Lease to roll on a month to month basis after the Expiration Date, your monthly rent will be the "new rent charged" amount that is reflected on the Housing Provider's Notice.
>
> It is understood and agreed by all parties that the monthly recurring concession is being given to you as an inducement to enter into the Lease. You acknowledge and agree that you have read and understand the Lease Concessions provision contained in the Terms and Conditions of your Lease.

7. The Term Sheet identifies "Additional Lease Addenda," which include "Residential Lease-Terms and Conditions." On page 2 of the Term Sheet, it states:

> By signing this Term Sheet, you acknowledge that each of the Additional Lease Addenda are attached to this [T]erm Sheet and are therefore made a a part of the Lease. You further acknowledge that you have read and that you agree to all of the provisions set forth in this Term Sheet and the Additional Lease Addenda.[11]

Tenant signed the Term Sheet.[12]

8. Paragraph 1 of the Lease Terms and Conditions states: "The term of this lease is set forth in the Lease Term section of the Term Sheet. At the end of your lease term, if you do not move out, your Lease will automatically renew on a month-to-month basis...."[13]

9. Paragraph 26 of the Lease Terms and Conditions states:

> In cases where 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.... In all cases, we reserve the right to report your payment history, outstanding balances,

[11] *Id.*
[12] *Id.*
[13] *Id.*

returned item fees, late fees, defaults, and other payment-related activity to consumer reporting agencies who track such information.[14]

10. Tenant did not read the Lease before he signed it.[15]

11. Through the term of the Lease, Tenant paid $1,870 per month to Housing Provider.[16] This sum equals the "Monthly Apartment Rent" and the "Monthly Reserved Parking" combined, less the "Monthly Concession." Tenant paid $100 per month for reserved parking.

Rent Negotiations

12. Tenant continued to reside in the Unit after the Lease expired on March 31, 2015.[17]

13. On January 15, 2015, Housing Provider notified Tenant the "current rent charged" for his Unit would increase by $70 from $2,048 to $2,118, effective April 1, 2015.[18]

14. For the months April 2015 through March 2016, Tenant paid to Housing Provider $1,930 each month, which amount included $100 for reserved parking.[19]

15. On January 15, 2016, Housing Provider notified Tenant that the "current rent charged" for his Unit would increase by $75 from $2,118 to $2,192, effective April 1, 2016.[20]

16. Until approximately November 2016, Housing Provider's policy was that it would only offer a rent concession if a tenant signed a written lease.[21]

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[14] *Id.*
[15] Testimony of Tenant.
[16] *Id.*
[17] *Id.*
[18] Notice attached to Housing Provider's motion for summary judgment as Exhibit F.
[19] RX 201.
[20] Notice attached to Housing Provider's motion for summary judgment as Exhibit H.
[21] Testimony of Ms. Duvall. After November 2016, Housing Provider relaxed this policy and some tenants were offered rent concessions without a written lease.

17. At some point in early 2016, Housing Provider conducted an audit of all the rental accounts for the Housing Accommodation and discovered that Tenant was being granted a rent concession despite the fact that he had not signed a lease.[22]

18. In March 2016, Housing Provider offered Tenant a one-year lease which identified "Monthly Apartment Rent" as $2,192 and provided for a "Monthly Recurring Concession" of $297.[23] If Tenant signed the lease, he would pay $1,895 each month for rent. Housing Provider instructed Tenant that if he did not sign a lease, he would be responsible for paying the entire "Monthly Apartment Rent," or $2,192, without the benefit of a concession, effective April 1, 2016.

19. On April 1, 2016, Tenant sent Ms. Duvall an email in which he refused to sign the offered lease or to pay the "Monthly Apartment Rent" of $2,192.[24] In his email to Ms. Duvall, Tenant wrote: "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 your lawyers are so confident that they are right they should sue me."[25]

20. On March 25, 2016, Tenant paid Housing Provider $1,995, which amount included $1,895 for rent and $100 for reserved parking, for the month of April, 2016.[26]

Legal Action

21. 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 LTB Case). It was assigned case

[22] Testimony of Ms. Duvall.
[23] RX 204.
[24] *Id.* and testimony of Tenant.
[25] RX 204 and testimony of Ms. Duvall.
[26] RX 201.

number 2016 LTB 010863.[27]

22. Housing Provider considers rent to have been paid late if the full amount of rent due is not received within the grace period allowed by a lease; usually, and in Tenant's case, by the fifth of each month.[28]

23. If it is necessary to file a claim for non-payment of rent in the D.C. Superior Court, Housing Provider generally tries to do that as soon after the expiration of the grace period as possible.[29] However, Ms. Duvall usually did not review the accounts for non-payment until the 11th of each month.[30]

24. Tenant filed Tenant Petition 30,818 (TP 30,818) on May 12, 2016 alleging that Housing Provider violated various provisions of the Act.[31]

25. 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 Tenant to pay $297 per month into the court registry during the pendency of the case.[32]

26. In TP 30,818, Housing Provider filed a motion for summary judgment on June 28, 2016. In his response to that motion, Tenant stated that he wished to voluntarily dismiss the Petition without prejudice. Presiding Administrative Law Judge Vergeer granted that request and on July 28, 2016, TP 30,818 was dismissed without prejudice.

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[27] https://www.dccourts.gov/eaccess/home.page.2. I take official notice of the on-line docket sheets for D.C. Superior Court cases. The dockets are public records 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 questioned." Fed. R. Evid. 201(b)(2). Courts may take official notice of proceedings in other courts. *U.S. ex rel Robinson Racheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citing *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169 (10th Cir. 1979)).

[28] Testimony of Ms. Duvall.

[29] *Id.*

[30] *Id.*

[31] 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).

[32] https://www.dccourts.gov/eaccess/home.page.2.

27. On August 23, 2016, Housing Provider filed a motion to vacate the *Drayton* stay in the LTB Case.[33]

28. That motion was scheduled for hearing on September 1, 2016.[34] The motion includes a proof of service which states that a copy of the motion was served on Tenant by "hand delivery" on August 23, 2016.[35]

29. Tenant was out of town on August 23, 2016, and did not receive a copy of the motion until his return to his apartment in the late afternoon on August 27, 2016.[36]

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

31. 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.[37]

Tenant's Involvement in the Van Ness South Tenant's Association

32. Tenant has been President of the Van Ness South Tenant's Association (VNSTA) for several years.[38] He has been active in VNSTA "since 2013 or so," especially in assisting other tenants in their rent negotiations with Housing Provider.[39] In particular:

    a. On October 20, 2015, Tenant complained to Housing Provider about a rent increase notice given to another tenant, Gabriel Fineman.

    b. On November 25, 2015, Tenant complained to Housing Provider about a rent increase notice given to Pat Remick, another tenant.

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[33] RX 207.
[34] https://www.dccourts.gov/eaccess/home.page.2.
[35] RX 207.
[36] PX 107; testimony of Tenant.
[37] https://www.dccourts.gov/eaccess/home.page.2; testimony of Tenant.
[38] PX 110; testimony of Tenant; testimony of Ms. Duvall.
[39] *Id.*

c. On April 5, 2016, Tenant sent an email to Ms. Duvall regarding posting flyers in the Housing Accommodation to announce the upcoming VNSTA meeting.

d. On May 13, 2016, Tenant sent an email to Ms. Duvall complaining about a rent increase notice given to Justin and Emma Pennisi.

e. On June 19, 2016, Tenant sent an email to Ms. Duvall complaining about a rent increase notice given to Charlie and Amelia Finch.

f. On August 9, 2016, Tenant complained again to Ms. Duvall regarding the rent increase notice given to Justin and Emma Pennisi.[40]

Late Fees and Tenant's Credit Score

33. Housing Provider notified tenants that it was reporting rental payments to credit agencies using TransUnion Residential Credit.[41] Housing Provider posted notices in the Housing Accommodation and on its webpage, and sent notice to each tenant via email and when notice of a rent increase was provided.[42]

34. Housing Provider uses automated bookkeeping software to keep track of the rental account for each unit in the Housing Accommodation. If the full amount of rent is not recorded as paid in the software by the end of the grace period, the software automatically assesses a late fee.[43] After it has been assessed, an improperly assessed late fee can only be credited back manually.[44]

35. Starting in April 2016, Housing Provider's bookkeeping software began automatically charging late fees to Tenant because he was not paying the full "Monthly Apartment

[40] Testimony of Tenant.
[41] PX 105; Testimony of Tenant; RX 200, paragraph 26.
[42] Testimony of Tenant.
[43] Testimony of Ms. Duvall.
[44] *Id.*

Rent" to Housing Provider.[45] Housing Provider continued to assess late fees after he starting paying into the D.C. Superior Court Registry pursuant to the Protective Order in the LBT case.[46]

36. Tenant complained to Housing Provider about the assessment of late fees in emails sent on May 30, 2016, October 16, 2016, October 18, 2016, and October 22, 2016.[47]

37. Ms. Duvall and other employees investigated Tenant's complaints, and on October 26, 2016, February 3, 2017, March 10, 2017, and April 18, 2017, all late fees that had been automatically charged were credited back to Tenant's account.[48] Starting on February 8, 2017, although a late fee was assessed each month, it was credited back to Tenant within the same month.[49]

38. On September 3, 2016, a credit card company notified Tenant that Housing Provider had reported his account as past due to TransUnion.[50]

39. After Tenant notified Ms. Duvall about this, she asked TransUnion to remove the negative report from Tenant's credit score.[51] TransUnion suppressed the negative report.[52]

VI. Conclusions of Law[53]

"'Retaliatory action,' is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 [D.C. Official

[45] Testimony of Ms. Duvall and Tenant.
[46] Testimony of Tenant.
[47] PX 113.
[48] Testimony of Ms. Duvall; RX 201.
[49] RX 201.
[50] Testimony of Tenant; PX 104.
[51] Testimony of Ms. Duvall; PX 114.
[52] *Id.*
[53] The parties do not dispute that the Housing Accommodation is subject to the rent stabilization provisions of the Act.

protected act.[62] Because his activity has been ongoing and persistent since 2013, and Housing Provider was aware of Tenant's involvement with the VNSTA, each act about which Tenant complains has occurred within a six-month window of Tenant having taken a protected action. Accordingly, per D.C. Official Code § 42-3502.02, each of Housing Provider's actions are presumed to be retaliatory and the burden shifts to Housing Provider to provide clear and convincing evidence that its actions were not retaliatory.[63]

Tenant alleges that Housing Provider retaliated against him by:

1. Requiring Tenant to sign a written lease in order to obtain a rent concession;
2. Failing to file a 30-day notice to quit before filing the LTB case;
3. Filing the LTB case;
4. Obtaining a protective order in the LTB case;
5. Assessing late fees;
6. Filing a motion to vacate the *Drayton* stay in the LTB case accompanied by a proof of service that was false; and
7. Reporting a delinquency in his rental payments to TransUnion.[64]

I discuss each of these allegations in turn.[65]

1. Requiring Tenant to sign a lease in order to obtain a rent concession

Tenant argues that Housing Provider retaliated against him by demanding that he sign a lease in order to obtain a concession. During the period of his written Lease, Tenant's "Monthly

[62] D.C. Official Code § 42-3505.5(d).
[63] 14 DCMR 4303.4.
[64] Tenant does not discuss this issue in his closing argument. However, because he presented evidence regarding it during the hearing, it merits discussion here.
[65] This case is distinguishable from *Wilson v. Archstone-Smith Communities, LLC,* TP 28,907 (RHC Sept. 25, 2015) in that here, the Housing Provider's actions are presumed retaliatory. However, in determining whether Housing Provider has presented clear and convincing evidence that its actions were not retaliatory, I have considered both Tenant's and Housing Provider's arguments.

Apartment Rent" was $2,048, but he paid only $1,770[66] due to a $278 "Monthly Recurring Concession." At the end of his Lease, Tenant remained in his unit, and pursuant to the terms of the Lease, he became a month-to-month tenant, and his Lease renewed automatically on a month-to-month basis. Although Housing Provider had given him notice that his "Monthly Apartment Rent" would increase to $2,118 effective April 1, 2015, and despite the fact that Tenant had not signed another lease, it continued applying a "Monthly Recurring Concession" and accepted the $1,830 he paid each month from April 2015 through March 2016.

In January 2016, Housing Provider notified Tenant that it was increasing the "Monthly Apartment Rent" to $2,192, effective April 1, 2016. It had also conducted an audit of the rent rolls and discovered that it was applying a "Monthly Recurring Concession" to Tenant's "Monthly Apartment Rent," even though Tenant had not signed a written lease. Ms. Duvall testified, and I credit her testimony, that until November 2016, Housing Provider's policy was that no rent concessions would be applied to any tenant's "Monthly Apartment Rent" unless that tenant had signed a written lease. This policy was applied equally to all tenants in the Housing Accommodation.

Tenant argues that the demand was retaliatory because he had been paying less rent than Housing Provider had demanded, without the benefit of a written lease, for almost a year. However, I credit Ms. Duvall's testimony that permitting him to do so was a mistake that was discovered in an audit of all rental accounts in the Housing Accommodation. Housing Provider's policy applied to all tenants equally. Tenant was not singled out; nor was a written lease demanded for the illicit purpose of "getting back" at him for his protected actions. Housing Provider has therefore presented clear and convincing evidence of a legitimate, non-retaliatory basis for Housing Provider's actions.

[66] Tenant paid a total of $1,870 including payment for reserved parking.

2. Failure to provide a 30-day notice to quit

Tenant argues that Housing Provider's failure to provide a 30-day notice to quit was retaliatory because Housing Provider was required by law to do so. By not doing so, Housing Provider denied Tenant the ability to try to negotiate with Housing Provider or to file a tenant petition in order to determine what the proper amount of rent should be, before Housing Provider filed the LTB case.

The landlord-tenant relationship between Tenant and Housing Provider was originally embodied in the Lease. Residential leases are to be construed as contracts.[67] The District of Columbia adheres to an "objective" law of contracts, meaning that "the written language embodying the terms of an agreement will govern the rights and liability of the parties ... unless the written language is not susceptible of a clear and definite understanding."[68] A contract should "generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake."[69]

When Tenant signed the original Lease, he waived the right to receive a 30-day notice of non-payment. By its own terms, once the original term of the Lease expired and Tenant remained living in the unit, the Lease automatically renewed on a month-to-month basis. Because it automatically renewed each month, the conditions of the original lease continued to apply.[70] Thus, Tenant's waiver of his right to a 30-day notice to quit for non-payment of rent continued to be applicable, and Housing Provider was not obligated to provide him with one. Housing Provider has therefore presented clear and convincing evidence of a legitimate, non-retaliatory reason for its actions.

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[67] *Sobelsohn v. Am. Rental Mgmt. Co.*, 926 A.2d 713, 718 (D.C. 2007).
[68] *Id.*
[69] *Akassy v. William Penn Apt's Ltd. P'ship*, 891 A.2d 291, 298 (D.C. 2006).
[70] *See, e.g., Mines v Cathie Gill, Inc.*, No. 13-CV-1158, 2015 D.C. App LEXIS 444, at *6-7 (D.C. Ct. App. Aug. 13, 2015).

3. Filing the LTB case

Tenant argues that Housing Provider retaliated against him by filing the LTB case. Ms. Duvall testified that Housing Provider usually treats rent as paid late if it is not received by the date of the grace period identified in a tenant's lease; in Tenant's case, by the fifth of each month. If it is necessary for Housing Provider to file an action in the Landlord Tenant Branch of the D.C. Superior Court for non-payment of rent against a tenant, Housing Provider generally tries to do that as soon after the grace period has ended as possible, but usually not until the 11th of the month.

Here, on March 26, 2016, Tenant made a payment of $1,895 for rent for April 2016. He told Ms. Duvall that he would neither sign a lease nor pay the $2,192 "Monthly Apartment Rent" demanded by Housing Provider. Once the grace period had passed, Housing Provider referred the matter to its attorney, who filed the LTB case on April 27, 2016. Housing Provider followed a policy that was applicable to all tenants: if rent was not paid in full by the time the applicable grace period had expired, Housing Provider would seek legal recourse. This is clear and convincing evidence of a legitimate business purpose. Housing Provider was not retaliating against Tenant.

Tenant argues that Ms. Duvall's inability to remember if Housing Provider ever sought legal recourse in a situation where so little rent remained due after the grace period is evidence that Housing Provider singled Tenant out because of his protected activities. However, there is no evidence to support this argument. Ms. Duvall testified that she could not remember whether Housing Provider filed a complaint for non-payment when less than $300 was due, not that Housing Provider had never done so.

4. Obtaining a Protective Order, Filing a Motion to Vacate the *Drayton* stay, and other actions in the LTB case

Tenant claims, additionally, that individual actions taken either by Housing Provider or through its attorney within the context of the LTB case give rise to separate claims of retaliation. Tenant argues that Housing Provider's attorney's filing of a request for a protective order was a retaliatory action, and that Housing Provider's attorney's filing of a motion to vacate the *Drayton* stay and its allegedly false proof of service, were retaliatory.

Regarding retaliation claims, the Act provides 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.[71]

There is little law directly on point regarding a Housing Provider's filing of a complaint for non-payment of rent. However, instructive cases exist that analyze how to interpret the phrase "brought legal action" in the context of a tenant trying to establish a presumption of retaliation.[72] If a housing provider takes an allegedly retaliatory action within six months of a tenant taking certain protected acts, there is a burden-shifting presumption that the housing provider has retaliated. One such protected act by a tenant is bringing legal action.[73] The Rental Housing Commission has held that the filing of a tenant petition qualifies as bringing legal

[71] D.C. Official Code § 42-3502.2 (2016). *See also* 14 DCMR § 4303.
[72] D.C. Official Code § 42-3505.2(f).
[73] D.C. Official Code § 42-3505.02(f) and 14 DCMR § 4303.4.

action.[74] In *Triplett,* the Rental Housing Commission held that where the tenant had filed a civil action against the housing provider in 1984 that was still pending when the housing provider filed a hardship petition in 1987, the tenant had "brought" the legal action in 1984, and therefore the plain language of the Act barred the civil action from creating a presumption of retaliation based on the fact that it was still pending in 1987. The mere act of continuing to litigate the tenant petition was not sufficient to qualify as a protected act by the tenant.

Similarly, albeit conversely, the Housing Provider's continuing to litigate a case it has filed cannot give rise to additional claims for retaliation, and each act an attorney takes within the context of previously filed cases cannot give rise to additional such claims. To hold otherwise would inappropriately chill an attorney's ability to "secure justice for their clients."[75] To permit such a theory of retaliation would completely handcuff a housing provider's attorney from diligently pursuing any legal case. It would open a slippery slope that would subject an attorney and her client to dozens of claims of retaliation in the course of a single case – one for filing the case, one for appearing at the first hearing, one for filing a motion, one for making a specific representation, one for appearing at the next hearing, and on and on. I decline to interpret the statute in a way that could lead to such absurd results.[76] I conclude that individual statements, filings, and actions taken in the course of litigation cannot be considered as separate retaliatory actions.

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[74] *See Jackson v. Peters,* RH-TP-07-28,898 (RHC Feb. 3, 2012), at 17; *Triplett v. Brown,* HP 20,431 (RHC Apr. 4, 1990), at 9.

[75] *Restatement (Second) of Torts* § 586.

[76] *See, e.g., Belay v. District of Columbia*, 860 A.2d 365, 368 (D.C. 2004); *Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) (rejecting overly literal interpretations of statutes and regulations that lead to absurd results).

5. Assessing Late Fees

Tenant asserts that Housing Provider's imposition of late fees during the pendency of the LTB case was retaliatory. Tenant paid $1,895 as rent for April 2016 on March 23, 2016. Housing Provider had notified him that, absent a signed lease, "Monthly Apartment Rent" would be $2,192 per month. Because Tenant did not sign a lease, the balance due, from Housing Provider's perspective, was an additional $297. Tenant did not pay the full amount of $2,192 by April 5, 2016, and therefore, on April 6, 2016, a late fee of $44.55 was automatically assessed. On April 25, 2016, Tenant paid rent for May 2016 in the same amount of $1,895. Housing Provider charged rent of $2,192 against his account and charged a late fee of $89.10 on May 6, 2016. A protective order was issued on May 19, 2016, which required Tenant to pay the disputed amount, $297, into the D.C. Superior Court registry beginning June 5, 2016. Tenant paid the first $297 on May 31, 2016. Nonetheless, on June 6, 2016, and in every month since, Housing Provider has assessed a late fee.

However, on October 26, 2016, after Tenant complained several times to Housing Provider about the late fees, Housing Provider credited $1,423.20 in late fees back to Tenant. The late fees continued to be assessed every month, and on February 3, 2017, Housing Provider credited another $986.40 back to Tenant. Starting on February 8, 2017, although a late fee was assessed each month, it was credited back to Tenant within the same month.

Ms. Duvall explained Housing Provider's actions, and I credit her testimony. Housing Provider uses a computer bookkeeping system to keep track of the rental account for each unit in the Housing Accommodation. The system is automatic. Each month it automatically charges the amount of "Monthly Apartment Rent" for an apartment. If the "Monthly Apartment Rent" (less any applicable credits, such as a rent concession) is not paid in full within the appropriate

grace period, the system automatically assesses a late fee. Tenant was not singled out; the late fees were assessed without discretion by an automatic computer system. Housing Provider had a legitimate business reason for acting the way it did: in a large housing complex, automation increases efficiency. Furthermore, Housing Provider has credited – and continues to credit – the late fees back to Tenant each month, despite the fact that Tenant did not pay the disputed $297 either to Housing Provider or into the D.C. Superior Court registry in either April or May 2016. Housing Provider has therefore provided clear and convincing evidence that its actions in assessing late fees were not retaliatory.

6. Reporting Delinquency to TransUnion

Tenant asserts that when Housing Provider reported a delinquency in his rental account to TransUnion, it was retaliating against him. Evidence presented by Tenant shows that he was informed of this report on September 3, 2016, four days after he filed his tenant petition. There is no evidence in the record to establish when Housing Provider reported the purported delinquency. If Housing Provider made the report after Tenant filed the petition, the action is not properly before this administrative court.[77]

Even if Housing Provider reported the purported delinquency before Tenant filed his petition, Housing Provider has demonstrated clear and convincing evidence of a legitimate, non-retaliatory explanation for its actions. Every tenant in the Housing Accommodation was notified in several ways that the Housing Provider reports delinquent rent payments to TransUnion. The reporting system is automated. Tenant offered no evidence to contradict that assertion. Being automated means that no individual reviews accounts, selects the delinquent ones, and takes the affirmative action of reporting the delinquencies to TransUnion. An automatic system has no

[77] *See Hawkins v. Jackson*, TP 29,201 (RHC Aug. 31, 2009) (retaliatory acts that occur after a tenant petition is filed are not properly before this administrative court).

discretion, and there is no evidence that it, or Housing Provider, singled Tenant out in order to retaliate for his protected activity. Finally, when Tenant informed Ms. Duvall about the negative mark on his credit report, she investigated and consequently TransUnion suppressed the negative mark at her request. I conclude that Housing Provider's reporting rent delinquencies to a credit agency is not retaliation.

For these reasons, Tenant has failed to meet his burden to prove that Housing Provider retaliated against him in any of the ways he claimed.

VII. Order

Therefore, it is this **12th day of September, 2017**:

ORDERED, that Tenant Petition 30,855 and this case are **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, that the reconsideration and appeal rights of any party aggrieved by this Order are stated below.

M. Colleen Currie
Administrative Law Judge

MOTIONS FOR RECONSIDERATION

Any party served with a final order may file a motion for reconsideration within ten (10) calendar days of service of the final order in accordance with 1 DCMR 2938 and 2828.3. When the final order is served by mail, five (5) days are added to the 10 day period in accordance with 1 DCMR 2812.5.

Where substantial justice requires, a motion for reconsideration shall be granted for any reason including, but not limited to: if a party shows that there was a good reason for not attending the hearing; there is a clear error of law in the final order; the final order's findings of fact are not supported by the evidence; or new evidence has been discovered that previously was not reasonably available to the party seeking reconsideration. 1 DCMR 2828.5.

In a Rental Housing Case, the Administrative Law Judge has ninety (90) days to decide a motion for reconsideration. 1 DCMR 2938.1. If a timely motion for reconsideration of a final order is filed, the time to appeal shall not begin to run until the motion for reconsideration is decided or denied by operation of law. If the Judge has not ruled on the motion for reconsideration and 90 days have passed, the motion is automatically denied and the 10 day period for filing an appeal to the Rental Housing Commission begins to run.

APPEAL RIGHTS

Pursuant to D.C. Official Code §§ 2-1831.16(b) and 42-3502.16(h), any party aggrieved by a final order issued by the Office of Administrative Hearings may appeal the final order to the District of Columbia Rental Housing Commission within ten (10) business days after service of the final order, in accordance with the Commission's rule, 14 DCMR 3802. If the final order is served on the parties by mail, an additional three (3) days shall be allowed, in accordance with 14 DCMR 3802.2.

Additional important information about appeals to the Rental Housing Commission may be found in the Commission's rules, 14 DCMR 3800 et seq., or you may contact the Commission at the following address:

District of Columbia Rental Housing Commission
441 4th Street, NW
Suite 1140 North
Washington, DC 20001
(202) 442-8949

Certificate of Service:

By First-Class Mail (Postage Prepaid):

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

Debra F. Leege, Esquire and
Richard Luchs, Esquire
Greenstein Delorme & Luchs
1620 L Street, NW
Suite 900
Washington, DC 20036

Lauren Pair, Esquire
Rent Administrator
District of Columbia Department of Housing and Community Development
Housing Regulation Administration
1800 Martin Luther King Jr. Avenue, SE
Washington, DC 20020

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 9/12, 2017 this document was caused to be served upon the above-named parties at the addresses and by the means stated.

Clerk / Deputy Clerk

APPENDIX A

Tenant's/Petitioner's Exhibits

Number	Pages	Description
PX101	10	Digest of emails from other tenants
PX104	2	Email dated 9/3/16 from service@alters.llbeanvisa.com and Tri-Bureau Credit Report and Monitoring of Tenant's credit report
PX105	2	TransUnion: build your credit with Equity Residential
PX107	2	Boarding passes dated 8/27/16
PX110	4	Affidavit of Harry Gural dated 5/17/17
PX112	2	Verified Complaint for Possession of Real Property dated 4/25/16 (Equity Residential v Harry Gural), case number 2016 LTB 010863
PX113	15	Emails regarding late fees dated 5/19/16 and 11/16/16
PX114	7	Emails regarding suppression of negative credit report dated 11/17/16 and 4/21/17
PX115	3	Electronic docket sheet for D.C. Superior Court case number 2016 LTB 010863

Housing Provider's/Respondents Exhibits

Number	Pages	Description
RX200	23	Lease dated 3/21/14
RX201	7	Ledger for Unit S-707
RX202	3	Email chain dated 5/11/16 through 5/13/16
RX204	3	Email chain dated 3/13/16 through 4/1/16
RX207	7	Motion to vacate *Drayton* stay (2016 LTB 10863) with exhibits