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 MOTION FOR SUMMARY JUDGMENT

Housing Provider/Respondent Smith Property Holdings Van Ness L.P. ("Housing Provider"), by undersigned counsel, moves for summary judgment. In support hereof, Housing Provider submits the attached Memorandum of Points and Authorities.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: October 25, 2016

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Counsel for Housing Provider/Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum of Points and Authorities in Support thereof was served on this the 25th day of October, 2016, by first class mail, postage pre-paid upon:

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

Debra F. Leege

4839-7208-5049

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HOUSING PROVIDER'S MOTION FOR SUMMARY JUDGMENT

Housing Provider/Respondent Smith Property Holdings Van Ness L.P. ("Housing Provider"), by undersigned counsel, submits its memorandum of points and authorities in support of its Motion for Summary Judgment. In support thereof, Housing Provider states as follows:

I. THE CLAIMS ALLEGED

On May 12, 2016, Tenant/Petitioner Harry Gural ("Mr. Gural" or "Petitioner") had filed an earlier tenant petition, TP 30,818 (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) 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 2817.1 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.

Consequentially, on July 28, 2016, a Final Order was issued, dismissing the First Tenant Petition. See Exhibit A, Final Order. Accordingly, on August 23, 2016, Housing Provider filed a

Motion to Vacate the *Drayton* Stay in the Landlord & Tenant court. On August 30, 2016, Mr. Gural filed an Opposition to the Motion to Vacate. In that opposition, Petitioner advised that he had filed a new tenant petition. See Exhibit B, Opposition. That same day, Mr. Gural had filed the instant tenant petition "the New 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 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. However, as there was the pending Motion to Vacate the Drayton Stay, he was filing another tenant petition.

The Housing Provider has not issued a Notice to Vacate to Mr. Gural. Exhibit C.

II. FACTUAL BACKGROUND

A. The Lease and the Housing Accommodation.

Smith Property Holdings Van Ness L.P is the owner of the residential rental accommodation located at 3003 Van Ness Street, N.W. in Washington, D.C. (the "Housing Accommodation"). See Exhibit C, Affidavit of Avis DuVall. Equity Residential Management, L.L.C. manages the Housing Accommodation. *Id.* Petitioner has resided at the Housing Accommodation since March 2010. *Id.* Pursuant to a lease agreement commencing on April 1, 2014 and expiring on March 31, 2015 (the "Lease"), Petitioner leased Unit S-0707 (the "Unit"). A copy of the Lease is attached hereto as Exhibit D. The Lease identifies that the monthly rent is $2,148, including $2,048 for the apartment rent and $100 for reserved parking. *Id.* The Lease identifies that tenant is entitled a monthly recurring concession of $278 per month (the "Concession"). *Id.* The Lease includes a Concession Addendum which further explains the Concession. A copy of the Concession Addendum is attached as Exhibit E. It states:

> 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.

On January 15, 2015, Housing Provider sent notice to Tenant that the rent for the unit would be increasing from $2,048 to $2,118 effective April 1, 2015. A copy of the Notice of Rent Increase is attached as Exhibit F. Thereafter, on January 27, 2015, Housing Provider filed a Certificate of Notice of Rent Increase with the District of Columbia's Rental Accommodations Division. A copy of the Certificate of Notice of Rent Increase is attached as Exhibit G. After the Lease expired, the Housing Provider agreed to an extension of the concession even though Petitioner was now a month-to-month tenant and the Concession Addendum no longer applied. Exhibit C. Petitioner received a concession of $288 per month from April 1, 2015 through March 31, 2016. *Id.* The concession was not extended beyond March 31, 2016. *Id.*

On January 15, 2016, Housing Provider sent notice to Tenant that the rent for the unit would be increasing from $2,118 to $2,192 effective April 1, 2016. A copy of the Notice of Rent Increase is attached as Exhibit H. Thereafter, on February 2, 2016, Housing Provider filed a Certificate of Notice of Rent Increase with the District of Columbia's Rental Accommodations Division. A copy of the Certificate of Notice of Rent Increase is attached as Exhibit I.

III. STANDARD FOR GRANTING SUMMARY JUDGMENT

The District of Columbia Office of Administrative Hearings ("OAH") Rule 2828.1 provides, "Motions for summary adjudication or comparable relief may be filed in accordance with Rule 2812." OAH Rule 2812 provides instructions for the filing of motions, generally, but it does not specifically address the standard to determine whether summary judgment is appropriate. Where a procedural rule is not specifically addressed by the OAH Rules, the Office of Administrative Hearings may rely upon the District of Columbia Superior Court Rules of Civil Procedure as persuasive authority. See OAH Rule 2801.2.

District of Columbia Superior Court Rule of Civil Procedure 56 provides that summary judgment is appropriate if there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." See also *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1001-02 (D.C. 1994). Only disputes over facts, viewed in the light most favorable to the non-moving party, which might legitimately affect the outcome of a trial are "material" under Rule 56. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (There is no issue to be decided at trial unless there is sufficient evidence favoring the non-moving party for the finder of fact to return a verdict for that party.); see also *Barnstead Broadcasting Corp. v. Offshore Broadcasting Corp.*, 886 F.Supp. 874, 878 (D.C. Cir. 1995) (Disputed material facts are those that might affect outcome of the suit under governing law.); *Clayton v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1381 (D.C. 1995).

Respondent may discharge its burden of showing the absence of any genuine issues of material fact by demonstrating an absence of evidence to support Petitioners' case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (The burden on the moving party "may be discharged by 'showing' – that is, pointing out to the [Court] – that there is an absence of evidence to support the nonmoving party's case."); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)

(Summary judgment is warranted in cases where the nonmoving party can produce no direct evidence on essential elements of its claim.).

IV. ANALYSIS

A. The Use of a Concession Does Not Reduce the Legal Rent; Rather it Limits the Amount Paid by a Tenant During the Concession Period

The use of a concession does not invalidate the higher, legal rent for a unit. *Maxwell v. Equity Residential Management, LLC*, 2015-DHCD-TP 30,704 (OAH April 22, 2016); *Pope v. Equity Residential Management, et al*, 2014-DHCD-TP 30,612 (OAH July 8, 2015). In both cases, the Administrative Law Judge ruled that the use of a concession was valid and the language of the concession was identical to the concession that Mr. Gural agreed to in the Lease. In *Pope,* the Administrative Law Judge ruled:

> In the District of Columbia, rent concessions are also used to offer rent controlled units at or below market value while preserving a higher legal rent level that can be charged later. There are many arguments to be made that such concessions are contrary to the abolishment of rent ceilings. Prior to the Act's amendment in 2005, a Housing Provider was able to reserve future rent increases by increasing the "rent ceiling" for a unit while actually charging a lower rent. The rent ceiling permitted a housing provider to later implement rent increases in amounts that were higher than the annual increase of general applicability. However, there is nothing in the Rental Housing Act that prohibits a housing provider from offering rent concessions as long as the rent charged does not exceed the legally authorized rent that is on file with the Rental Accommodations Division.
>
> It is well established that leases are to be construed as contracts. *Sobelsohn v. Am. Rental Mgmt. Co.,* 926 A.2d 713 (D.C. 2007). This jurisdiction adheres to an "objective" law of contracts, meaning that "the written language embodying the terms of an agreement will govern the rights and liabilities of the parties . . . unless the written language is not susceptible of a clear and definite undertaking." *Id.* at 718. Contracts should "generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake." *Akassy v. William Penn Apts Ltd P'ship,* 891 A.2d 291, 298 (D.C. *2006)(quoting Camalier & Buckley, Inc., v. Sandoz & Lamberton, Inc.,* 667 A.2d 822, 825 (D.C. 1995). Therefore, a tenant and a housing provider are free to contract to rental terms as long as those terms are not contrary to the law. In this case, Tenant knowingly

> signed the lease agreeing to pay the lower rent amount as a concession for one year.
>
> Tenant argues that she did not understand that the concession would expire, that Housing Provider falsely advertised the rent for the unit at the lower price, and that the paperwork regarding the concession was confusing. These however, are not issues governed by the Rental Housing Act, but amount to a contractual dispute. If Tenant believes she was fraudulently induced into signing the lease, that the terms of the lease are somehow ambiguous, or that there was no meeting of minds, she must seek a remedy through D.C. Superior Court's Civil Division which has the jurisdiction to resolve equitable disputes. The jurisdiction of this administrative court is limited to applying the Rental Housing Act and I find that the rent concession was not in violation of the Rental Housing Act. That however, does not end the inquiry as Tenant alleges that the rent increase exceeded the legally calculated rent for her unit.

A copy of the decision in *Pope* is attached as Exhibit J. The analysis in Pope was adopted by the Administrative Law Judge in *Maxwell.* A copy of the decision in *Maxwell* is attached as Exhibit K.

In this case, the Lease the Parties entered into an agreement which provided Petitioner a one year concession. See Exhibit D. Housing Provider was not bound to continue providing the concession thereafter. Washington v. UIP Property Management, et al, 2011-DHCD-TP 30,151 (OAH August 20, 2013) (Housing Provider permitted to provide a concession to tenant to fulfill requirements of a settlement agreement, while identifying the higher rent amount to RAD). *See also In the Matter of Missionary Sisters of the Sacred Heart, III v. N.Y. State Div. of Hous. & Community Renewa*l, 283 A.D.2d 284, 289 (N.Y. App. Div. 1st Dep't 2001) (Concession did not obviate the terms of the lease agreement as it was clear, but the concession permitted the tenant to pay less for a specific period of time); *In the Matter of Century Operating Corp. v. Popolizio*, 60 N.Y.2d 483 (N.Y. 1983). At the conclusion of that year, Housing Provider continued to provide a concession to Petitioner, even though it was no longer required. Exhibit C. Effective April 1, 2016, Housing Provider ceased providing the voluntary concession. *Id.*

As discussed in *Pope*, there is no prohibition against providing for an adjustment in rent, but limiting the impact of that adjustment to a tenant. The Office of Administrative Hearings and the Rent

Administrator have both approved Voluntary Agreements and settlement agreements whereby significant rent increases are imposed on new tenants but not existing tenants through the use of concessions. *See, e.g., In re: Petition for Rent Adjustment based on 70% Voluntary Agreement*, 2012-DHCD-VA 11,016 (OAH June 19, 2012) ("Voluntary Agreements can increase rent charged for future tenants while providing current tenants with a rent concession."); *In re: Voluntary Agreement Petition for Rent Adjustment WRF 1921 Kalorama Road, LP*, VA No. 08-011 (RAD May 7, 2009), at page 5; *In re: Infinity UIP Kenyon Acquisition*s, LLC, VA 11,001A (RAD January 11, 2011) (citing at page 3 to 14 DCMR 4204.1); *In re Park Manor Joint Venture*, VA 11-020 (RAD March 30, 2012). The use of concessions is permitted by District of Columbia law and therefore it did not reduce the legal rent, but instead reduces the amount paid by the Petitioner during the concession period. Accordingly, the tenant petition should be dismissed with prejudice.

B. Petitioner Cannot Prevail on His Claim that the Rent Increase was Larger than Permitted Under the Rental Housing Act.

Petitioner's challenge must fail. The Housing Provider filed both the 2015 and the 2016 Certificate of Notice of Rent Increase with the Rental Accommodations Division prior to the implementation of that increase (Exhibits G and I). The 2015 Certificate shows that the rent for the Unit was increased by 3.4%, effective April 1, 2015 from $2,048 to $2,118. The 2016 Certificate shows that the rent for the Unit was increased by 3.5%, effective April 1, 2016 from $2,118 to $2,182. Since concessions are permitted, the filing itself is proper and this claim should be dismissed.

C. Petitioner Cannot Prevail on His Claim of Retaliation

Mr. Gural alleges Housing Provider took retaliatory action against him in violation of D.C. Code § 42-3505.02 by enforcing the concession language that Mr. Gural agreed to in his lease and once Mr. Gural voluntarily dismissed the First Tenant Petition, moving for the dismissal of the *Drayton* stay in the Landlord & Tenant Branch. D.C. Code §42-3505.02 provides that:

> 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.

Id. (*emphasis added).* Thus, in order to prevail on a claim of retaliation, he must, at a minimum, make a threshold showing that: (i) he exercised a right conferred upon him by law; and (ii) Housing Provider's actions are not otherwise permitted by law. Mr. Gural can do neither.

As articulated in Section IV.A, 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. The D.C. Court of Appeals address 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. [9] 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)).*

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. For these reasons, Housing Provider has demonstrated that none of its actions were retaliatory in nature and were "otherwise permitted by law."

D. Petitioner Cannot Prevail on His Claim that a Notice to Vacate Had Been Served

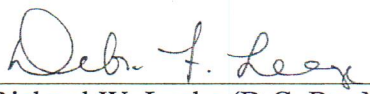
As the record is devoid of evidence of the issuance of a Notice to Vacate to the Petitioner, this claim must be dismissed without further consideration. See Exhibit C.

V. CONCLUSION

For the foregoing reasons, Housing Provider's Motion for Summary Judgment should be granted and the tenant petition should be dismissed with prejudice.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.



Dated: October 25, 2016

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STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Smith Property Holdings Van Ness L.P is the owner of the residential rental accommodation located at 3003 Van Ness Street, N.W. in Washington, D.C. (the "Housing Accommodation"). Exhibit C, Affidavit of Avis DuVall.

2. Equity Residential Management, L.L.C. manages the Housing Accommodation. *Id.*

3. Pursuant to a lease agreement commencing April 1, 2014 and expiring on March 31, 2015 (the "Lease"), Petitioner Harry Gural leased Unit S0707 (the "Unit"). Exhibit D, Lease.

4. The Lease identifies that the monthly rent is $2,148, including $2,048 for the apartment rent and $100 for reserved parking. *Id.*

5. The Lease states that Petitioner is entitled a monthly recurring concession of $278 per month (the "Concession"). *Id.*

6. The Lease includes a Concession Addendum which further explains the Concession. It states:

> 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.

Exhibit C, Concession Addendum.

7. When the Lease expired, the Housing Provider continued to provide a concession through March 31, 2016 to Mr. Gural even though he was a month-to-month tenant and the concession had expired. Exhibit C.

8. Mr. Gural received a $288 per month concession from April 2015 through March 2016. *Id.*

9. On January 15, 2015, Housing Provider sent Mr. Gural a notice that his rent would be increased from $2,048 to $2,118 effective April 1, 2015. Exhibit F.

10. On January 27, 2015, Housing Provider filed a Certificate of Notice to RAD of Adjustment in Rent Charged. It identified that effective April 1, 2015, the rent for the Unit increased by $70 from $2,048 to $2,118. Exhibit G.

11. On January 15, 2016, Housing Provider sent Mr. Gural a notice that his rent would be increased from $2,118 to $2,192 effective April 1, 2016. Exhibit H.

12. On February 2, 2016, Housing Provider filed a Certificate of Notice to RAD of Adjustment in Rent Charged. It identified that effective April 1, 2016, the rent for the Unit increased by $74 from $2,118 to $2,192. Exhibit I.

13. A Notice to Vacate has not been issued to Mr. Gural since he moved into the Unit on April 1, 2014.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: October 25, 2016

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