

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001-2714
TEL: (202) 442-9094
FAX: (202) 442-4789

DISTRICT OF COLUMBIA
OFFICE OF
ADMINISTRATIVE HEARINGS

2010 JUN 24 P 2: 50

BLAKE J. NELSON AND
WENDY NELSON,
Tenants/Petitioners,

v.

B.F. SAUL PROPERTY COMPANY,
ET AL.,
Housing Providers/Respondents

Case No.: RH-TP-06-28724

In re: 3133 Connecticut Ave., N.W.,
Apt. 802

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Introduction

Petitioners Blake and Wendy Nelson filed a motion for partial summary judgment¹ on their claim that a 120 day Notice to Vacate to recover possession of their apartment to make alterations or renovations is invalid. Respondents filed an Opposition to the Motion,² Supplemental Points and Authorities, and a Second Supplemental Points

¹ "Emergency Motion for Summary Judgment Declaring Notice To Vacate Invalid, or in the Alternative to Stay Notice to Vacate, and Request for Ruling by June 25, 2010," filed June 7, 2010, with a corrected caption filed June 8, 2010 ("Petitioners' Motion").

² Respondents' Opposition to Emergency Motion for Summary Judgment Declaring Notice to Vacate Invalid, or in the Alternative to Stay Notice to Vacate, and request for Ruling by June 25, 2010," filed June 14, 2010," with an Errata sheet filed June 14, 2010 ("Respondents' Opposition").

and Authorities.³ Petitioners' Motion for Leave to File a Reply to Respondents' Opposition was granted, and a Reply was filed.⁴ In addition, Petitioners filed an opposition to Respondents' Supplemental Points And Authorities, filed June 16, 2010, and requested that it be rejected.⁵

Respondents' Supplemental Points And Authorities filed June 16, 2010, and Second Supplemental Points and Authorities filed June 22, 2010, are not authorized under OAH Rules. The rules provide for the filing of a motion, an opposition, and, if leave is granted, a reply.⁶ Respondents' Supplemental Points And Authorities, filed June 16, 2010, is short, and Petitioners have filed a response to it. Accordingly, I will accept these papers as if leave had been granted. Respondents' Second Supplemental Points And Authorities, filed on June 22, 2010, will be rejected and will not be considered, however, since leave of court was not sought, and such will not be granted *nunc pro tunc*, because, *inter alia*, Petitioners have not had an opportunity to respond to it.

As explained below, I will grant Petitioners' Motion and enter partial summary judgment on their claim that the Notice to Vacate violates D.C. Official Code § 42-

³ "Supplemental Points And Authorities In Support of Housing Providers' Opposition To Emergency Motion for Summary Judgment," filed June 16, 2010; "Second Supplemental Points And Authorities In Support Of Housing Providers' Opposition To Emergency Motion For Summary Judgment," filed June 22, 2010.

⁴ "Motion for Leave To File Reply to Housing Providers' Opposition to Tenants' Emergency Motion for Partial Summary Judgment," filed June 14, 2010; "Order Granting Motion to File Reply," dated June 15, 2010; "Reply to Housing Providers' Opposition to Tenants' Emergency Motion," filed June 17, 2010 (the "Reply").

⁵ Petitioners' "Response in Opposition to Housing Providers' Improper Sur-reply," filed June 21, 2010.

⁶ See OAH Rule 2812.7.

3505.01(f)(1)(A). Because I do not find that the violation was willful, I will not impose a fine, however.

II. Standards for Motions for Summary Judgment

OAH Rule 2828 states “[m]otions for summary adjudication or comparable relief may be filed in accordance with Rule 2812.” OAH Rule 2812 sets forth the procedures for filing motions, but does not speak specifically to motions for summary judgment. OAH Rule 2801.2 provides that “[w]here a procedural issue coming before this administrative court is not specifically addressed in these Rules, this administrative court may rely upon District of Columbia Superior Court Rules of Civil Procedure as persuasive authority.” Accordingly, the procedures in the Rules of the Superior Court of the District of Columbia pertaining to motions summary judgments are authoritative.⁷

Upon a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law.⁸ The movant may discharge his burden by demonstrating that if the case proceeded his opponent could produce no competent evidence to support a contrary position.⁹ Once the required showing has been made by the moving party, the burden shifts to the nonmoving party to show the existence of an issue of material fact.¹⁰ Super. Ct. Civ. R. 56(e) and R. 12-I (k) sets forth the procedures for opposing summary judgment. These rules provide, in pertinent part:

⁷ See, Super. Ct. Civ. R. 56 and 12-I.

⁸ *Behradrezae v. Dashtara*, 910 A.2d 349, 364 (D.C. 2006).

⁹ *Nader v. De Toledano*, 408 A.2d 31 (D.C. 1979).

¹⁰ *Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310 (D.C. 1982).

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Super. Ct. Civ. R. 56 (e).

Any party opposing . . . (a motion for summary judgment) may . . . serve and file a concise statement of genuine issues setting forth all material facts numbered by paragraphs as far as possible to correspond to the paragraphs of the movant's statement of facts claimed not to be in issue as to which it is contended there exists a genuine issue necessary to be litigated. The opponent's statement of disputed material facts shall be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement of facts claimed not to be in issue. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion. Any statement filed pursuant to this section of this Rule shall include references to the parts of the record relied on to support such statement and shall be a part of the record.

Super. Ct. Civ. R. 12-I (k).

A motion for partial summary judgment is appropriate when there is no genuine issue as to a key issue in dispute.¹¹

II. Petitioner's Motion and Respondents' Opposition

In the tenant petition, as amended, Petitioners allege, in pertinent part, that an "Eviction Notice" dated March 3, 2010, is invalid.¹² Petitioner's Motion relates solely to

¹¹ See *Alger Corp. v. Wesley*, 355 A.2d 794, 797-98 (D.C. 1976).

the legality of this Notice, and Petitioners allege that it is invalid on two grounds or for two reasons:

- 1) “The Notice to Vacate unlawfully states that relocation assistance will not be paid to tenants who are exercising their right to withhold rent: ‘To receive the [relocation] assistance, your account must be current.’ This is in direct violation of D.C. Code §§ 42-3505.01(f)(4); 42-3507.02;” and
- 2) “The Notice to Vacate unlawfully requires Tenants to vacate approximately a year before the timetable provides (sic) in the Application, in violation of D.C. Official Code D.C. Code §§ 42-3505.01(f)(4); 42-3507.02.”

Exhibit No. 1 to Petitioners’ Motion is the March 3, 2010, “120 Day Notice to Vacate for Renovations or Alterations” served on Petitioners by The Klingle Corporation. The Notice states that it purports to be in accordance with Section 501(f) of the District of Columbia Rental Housing Act of 1985, and that the notice is given 120 days in advance of an action to recover possession of Petitioners’ apartment. In addition, it states that Petitioners are entitled to relocation assistance, but gives the following warning: “To receive the assistance, your account must be current.” *Id.*

Exhibit 4 to Petitioner’s Motion is a letter dated April 29, 2010, from Respondents’ attorney claiming that Petitioners are not current in their rent payments and threatening suit.

¹² See Motion to Supplement Tenant Petition, pp. 14-15 and Order dated May 26, 2010, amending the petition to add the additional claims alleged in the motion

Exhibit 3 to Petitioner's Motion is a paper entitled "Kennedy-Warren Tenant Relocation Schedule" which Petitioners allege was part of the Section 501(f) Application. See Petitioners' Motion, p.2, n.2. The Schedule indicates that the move date for Petitioners was scheduled 470 days after the decision by the Rent Administrator approving the Application. Ex. 3 to Motion, p. 2. Petitioners allege that the Application was approved by the Rent Administrator on March 3, 2010, and, according to the schedule, they should not be required to relocate until 470 days thereafter: namely, June 16, 2011.

Respondents do not dispute any of these facts, and, in addition, in their Opposition they have supplied the following relevant historical facts and documents:

(1) On July 31, 2009, Klinge Corporation filed the Section 501(f) Application, seeking approval from the Rent Administrator to recover possession of the rental units at 3133 Connecticut Avenue, NW (the Kennedy Warren Apartments), including Petitioners', for the purpose of making alterations or renovations to the units which could not safely or reasonably be accomplished while the rental units are occupied;¹³

(2) On February 26, 2010, the Acting Rent Administrator issued a Decision and Order approving the 501(f) Application.¹⁴ In approving the application, among the conclusions of the Acting Rent Administrator are the following:

¹³ See Respondents' Opposition, p. 2.

¹⁴ See Respondent's Opposition, p.3, and Exhibit C thereto.

4. The Application contains a timetable for all aspects of the plan for alterations and renovations, in compliance with Sect. 42-3505.01(f)(1)(B)(i). . . .

11. Upon 120 days notice to tenants in accordance with the statute, Petitioner may recover possession of each rental unit for the immediate purpose of making alterations and renovations to the housing accommodation and each rental unit . . . pursuant to Sect. 42-3505.01(f)(1)(A);¹⁵ and

(3) On March 3, 2010, the February 26, 2010, Decision and Order of the Acting Rent Administrator was amended and modified, and the time for taking an appeal or moving for reconsideration was extended.¹⁶

Regarding the provisions in the Notice to Vacate pertaining to relocation assistance, Respondents do not dispute that the Notice specifically conditions relocation assistance on the Petitioners' account being current. In fact, Respondents concede that the Notice to Vacate was erroneous in this regard. In Respondents' Opposition it is stated:

Klinge has always intended to provide the Petitioners, and any other tenants who move pursuant to the 120 day notices, with the statutorily required relocation assistance. Such relocation assistance will be paid without regard to the status of the tenants (sic) account."¹⁷ (Original Emphasis).

¹⁵ Respondents' Opposition, Ex. C, pp. 10-11.

¹⁶ Respondents' Opposition, Ex. D.

¹⁷ Respondents' Opposition, p.12

Regarding the effect of the Notice to Vacate, Respondents concede that Petitioners must vacate their apartment by the expiration of the 120 days from the date of the Notice, namely by July 5, 2010.¹⁸

While Respondents do not dispute the material facts upon which Petitioners' Motion is based, they instead mischaracterize the motion as an attempt to set aside, or stay orders issued by the Rent Administrator in connection with the Section 501(f) Application, and they argue that the Office of Administrative Hearings has no jurisdiction over the Application or the Order of the Rent Administrator approving the Application. Petitioners' concede that they do not challenge "the 501(f) Orders or the 501(f) Application, but only the Notice to Vacate issued by (the) Housing Provider."¹⁹

III. Discussion

A motion for summary judgment should be granted whenever the court concludes that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Though the evidence must be viewed in the light most favorable to the non-moving party, mere conclusory allegations by the non-moving party are legally insufficient to preclude entry of summary judgment.²⁰

¹⁸ See Respondents' Opposition, Ex. J (Letter from the assistant manager of the Kennedy-Warren to Petitioners).

We want to take this opportunity to remind you that the 120-day notice to vacate which was served upon you expires on 7/5/2010. Therefore, you must move out on that date, unless we otherwise agree in writing beforehand. (Original Emphasis).

¹⁹ Petitioners' Reply, p.1.

²⁰ *Tobin v. Grotta Co.*, 886 A.2d 87, 89-90 (D.C. 2005).

Here there is no material fact in dispute. And I conclude that Petitioners are entitled as a matter of law to partial summary judgment, because the Notice to Vacate is invalid on the two grounds alleged by Petitioners.

As noted above, the validity, *vel non*, of the Notice to Vacate is a claim in the tenant petition, as amended. A tenant may file a petition with the Rent Administrator and complain of any violation of the Rental Housing Act of 1985, including, but not limited to, "any violation of the notice requirements of § 501 of the Act" ²¹ A hearing may be conducted and a decision made upholding or denying the validity of a notice to vacate. ²² OAH has jurisdiction to hear and decide such claims. ²³

The Notice to Vacate is invalid because it inappropriately conditions relocation assistance on Petitioners' account being "current." ²⁴ Under the law, it is only when there is an outstanding judgment for possession obtained by the housing provider against a tenant that relocation assistance is not required. ²⁵

The draft of the proposed Notice to Vacate which should have been filed by Respondents as part of the 501(f) Application for review and approval by the Rent

²¹ 14 DCMR 4214.4

²² 14 DCMR 4300.5.

²³ D.C. Official Code, § 2-1831.02(b-1),

²⁴ See D.C. Official Code §§ 42-3505.01(f)(4), 42-3507.02 and 42-3507.03.

²⁵ 42 D.C. Official Code § 42-3507.03(d).

Administrator is not before the court.²⁶ The Decision and Order of the Rent Administrator specifically provides, however, that the Notice to Vacate must be in accordance with the statute.²⁷

The Notice to Vacate is also invalid because, in derogation of the timetable upon which approval by the Rent Administrator was based, it requires Petitioners to vacate their apartment by July 5, 2010, rather than 470 days after the Rent Administrator's approval of the Application: by June 16, 2011.

In accordance with Section 501(f)(1)(B)²⁸ Klinge submitted to the Rent Administrator for review and approval, *inter alia*:

(iv) A timetable for all aspects of the plan for alterations and renovations, including:

- (I) The relocation of the tenant from the rental unit and back into the rental unit;
- (II) (II) The commencement of the work, which shall be within a reasonable period of time, not to exceed 120 days, after the tenant has vacated the rental unit; and
- (III) The completion of the work.

The "Kennedy-Warren Tenant Relocation Schedule" submitted by Klinge states that the move date for Petitioners was 470 days after the decision by the Rent

²⁶ See D.C. Official Code § 42-3505.01(f)(1)(B).

²⁷ See Respondents' Opposition, Ex. C, pp. 10-11.

²⁸ D.C. Official Code § 42-3505.01(f)(1)(B).

Administrator approving the Application.²⁹ The final approval of the Application by the Rent Administrator was on March 3, 2010, and, according to the Application as approved by the Rent Administrator, Petitioners should not be required to relocate until 470 days thereafter: namely, June 16, 2011.

IV. Remedy

No specific penalty is prescribed for serving an improper Notice to Vacate. Thus, the general penalty provision for violations of the Rental Housing Act applies, which is payment of a fine to the government of the District of Columbia, but only if the violation is willful.³⁰ Willfulness goes to the intention to violate the Rental Housing Act, as opposed to simply knowing that you have acted or failed to act in a certain way.³¹

There is nothing in the record to substantiate that the violation was willful. Accordingly, I will not impose a fine.

V. Order

It is therefore, this 24th day of June 2010:

ORDERED, that Petitioners' Motion for Partial Summary Judgment is hereby **GRANTED**, and the Notice to Vacate dated March 3, 2010, issued by or on behalf of Klingle Corporation to Petitioners is **INVALID**; and it is further

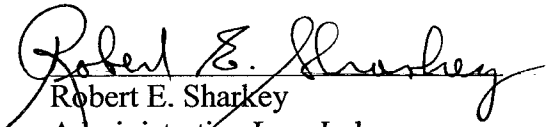
²⁹ Exhibit 3 to Petitioner's Motion.

³⁰ D.C. Official Code § 42-3509.01(b)(3).

³¹ *Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 75-76 (D.C. 1986).

ORDERED, that the said Notice to Vacate violated 42 D.C. Official Code § 42-3505.01(f); and it is further

ORDERED, that a fine shall not be imposed in connection with the said violation.


Robert E. Sharkey
Administrative Law Judge

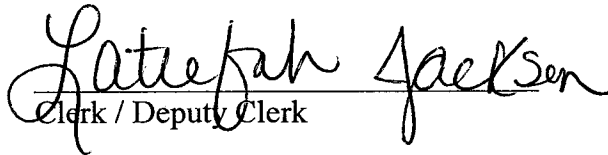
Certificate of Service

By First Class Mail (Postage Paid):

Blake and Wendy Nelson
3133 Connecticut Ave., N.W. Apt. #802
Washington, D.C. 20008

Richard Luchs, Esquire
Debra F. Leege, Esquire
Greenstein, DeLorme & Luchs, PC
1620 L Street, N.W. Suite #900
Washington, D.C. 20036

I hereby certify that on 6/24 2010,
this document was caused to be served upon the
above-named parties at the addresses listed and by
the means stated.


Clerk / Deputy Clerk