

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

F&Y PROPERTIES, LLC,)	Docket No. ACHD-21-036
)	
Appellant,)	Re: 931 Woodward Avenue
)	Apartment 1/2
v.)	McKees Rocks, PA 15136
)	
ALLEGHENY COUNTY HEALTH)	
DEPARTMENT,)	
)	
Appellee.)	

F&Y PROPERTIES, LLC’S RESPONSE BRIEF

F&Y Properties, LLC (“F&Y” or “Appellant”), by and through its attorney, Andrew M. Gross, files this brief in response to the Allegheny County Health Department’s (“ACHD” or “Appellee”) post-hearing brief.

I. FACTS AND PROCEDURAL POSTURE

This appeal stems from an ACHD enforcement action concerning 931 Woodward Avenue, Apartment 1/2, McKees Rocks, PA 15136 (“property”). This action arose on April 26, 2021 when the tenant of the property, Martajah Reed (“Ms. Reed”), filed a complaint with the ACHD alleging various problems with her apartment. (January 12, 2022 Hearing Transcript (“H.T.”) at 13:19-14:13). The ACHD sent a violations letter dated April 29, 2021 which has been admitted at Exhibit D-4. The ACHD sent a second letter to F&Y dated June 14, 2022 which has been admitted as Exhibit D-6 and was referred to as a Penalty Assessment Warning Letter. H.T. at 56:2-3. Said letter stated if the repairs were not completed by July 19, 2021, that a civil penalty would be assessed. Said repairs were not completed by July 19, 2021 and a civil penalty in the amount of \$2,500.00 was assessed by letter dated July 21, 2021, which was admitted as Exhibit D-7. F&Y’s position that it did not receive the April 29, 2021 letter, admitted as Exhibit D-4, as it was sent to

the incorrect address and did not receive notice from the ACHD until late May of 2021. Further, after receiving notice in late May of 2021, it attempted to make arrangements with Ms. Reed to gain entry into her apartment to make the necessary repairs but was prevented from doing so due to the lack of cooperation by Ms. Reed. F&Y does not believe that the civil penalty is warranted and believes that the evidence of record supports their position.

II. BURDEN OF PROOF

There is a dispute between the parties as to whom bears that burden of proof in this case. The matter before this tribunal is the appeal by F&Y of a civil penalty assessed against F&Y in the amount of \$2,500.00. ACHD Rules and Regulations, Article XI Hearings and Appeals, Section 1105, C. 7. states as follows:

“The burden of proceeding and the burden of proof shall be the same as at common law, in that the burden shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish by a preponderance of the evidence. In cases where a party has a burden of proof to establish the party’s case by a preponderance of the evidence, the Hearing Officer may nonetheless require the other party to assume the burden of proceeding with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

- a. The Department has the burden of proof in the following cases:
 - i. When it assesses a civil penalty.”

Counsel for the ACHD cites to cases in its brief that simply reaffirm the first portion of Section 1105, C. 7. However, the ACHD Rules and Regulations specifically allocate the burden of proof to the Department when it assesses a civil penalty, which is exactly what happened in the within case.

III. ARGUMENT

The ACHD's involvement in this case started when Ms. Reed made a complaint to the ACHD regarding a rat issue in her apartment. H.T. at 12:19-25. Environmental Health Specialist D. Anthony Lauria inspected the apartment on April 28, 2021 and in regard to the alleged rat problem, he testified on direct examination as follows.

“And so, in regards to her complaint of rats in the wall, let's keep in mind, one, I did not see any rats running around under my feet and, two, it's kind of ambiguous that something is in a wall, and I can't verify it. But I could verify that there were openings in the wall that may or may not allow entry, so that was duly cited.” H.T. at 52:16-22.

This inspection led to the April 29, 2021 letter, admitted as Exhibit D-4 being sent to F&Y Properties at the incorrect address of 676 Oxford Boulevard, Pittsburgh, PA 15243. We know that it was the incorrect address because the letter was returned and a copy of the return envelope was admitted as Exhibit A-2 and it is stamped return to sender by the United States Post Office and the words Wrong Address are hand written on the envelope. This is also a document that was and is in the possession of the ACHD and was one of the documents that they submitted prior to the hearing.

Environmental Health Supervisor Christopher Zeiler testified that he sent the original April 29, 2021 violation letter to the correct address on May 20, 2021. H.T. at 71:4-5. Kirill Faerovitch (“Kirill”), one of the two principals of F&Y, acknowledged receiving the violation notice sometime at the end of May. H.T. at 83:10-12.

Upon learning of the violations that needed to be corrected, Kirill testified that they attempted to gain access to the Ms. Reed's apartment but were unable to do so. H.T. at 83:12-17. Supervisor Zeiler likewise testified that he spoke with Dennis Yevstifeyev (“Dennis”) on June 14,

2021 and that Dennis told him that they were having difficulty gaining entry into the unit. He further testified that he would send a Worker's gain entry letter to Ms. Reed. H.T. at 70:20-24. Dennis is second principal of F&Y. The contents of the conversation were drafted into a memo which was admitted as Exhibit D-8 and confirms Supervisor Zeiler's testimony. The Worker's gain entry letter was sent to Ms. Reed on June 14, 2021 was admitted into evidence as Exhibit D-5.

On the same day, the ACHD sent the Penalty Assessment Warning Letter to F&Y stating that a civil penalty would be imposed if the violations were not abated by July 19, 2021. Kirill sent an email to Ms. Reed on July 15, 2021 wherein he notified her that he had scheduled Dave McGaffin to be at her apartment at 8:00 am, Saturday, July 17, 2021 to make the repairs. H.T. at 86:21-88:2. The email correspondence is contained in F&Y's Supplemental Exhibit 2, which is attached to Appellee's brief. The email further requested Ms. Reed to reply "OK" to confirm that they were on the same page. Ms. Reed responded, "Ok thank you".

David McGaffin, was hired by Kirill to make the repairs and was scheduled to visit Ms. Reed's apartment on July 17, 2021 at 8:00 am. Mr. McGaffin testified as follows:

"Yeah, I showed up at about 5 minutes to 8:00, I knocked on the door, and there were several dogs jumping on the door and barking. I could hear someone inside, but they didn't answer the door. I stayed there about five minutes knocking on the door and then took a picture of the door and sent it to Kirill and left for the day." H.T. at 79:3-9.

Ms. Reed admitted on cross examination that Mr. McGaffin came to her apartment on July 17, 2021. H.T. 33:16-21. The following conversation then occurred between counsel for F&Y and Ms. Reed as follows:

Q. When – when did he come?

A. I'm not sure. He probably came about 7:55ish, but I left out of my house at 8:00, and no one was there because I had work. And so, when I walked out, I left. And at about 8:15, I called Mr. Kirill and told him that nobody came to my apartment.

And he said, "Actually, they did. I have pictures of him right now."

I said, "Okay, Well, let me call you back."

And so, I checked my cameras, and I seen that he came to my house, but I don't – he never rang my doorbell. I seen that he stood there. You could see him reach for something, maybe the doorbell, and he took a picture and left." H.T. 33:24-34:13.

Ms. Reed's testimony is directly contradicted by her email dated July 17, 2021 which she sent at 8:15 am wherein she stated, "I have work today I will be leaving at 8:40 as far as now it's 8:15 nobody is here yet." See Appellant Supplemental Exhibit 2. Ms. Reed did not leave her house at 8:00 am on Saturday, July 17, 2021 as she testified at the hearing. Instead, she was in house the entire time that Mr. McGaffin stood outside of her house knocking on the door while her dogs were jumping on the door and barking. Ms. Reed knew to expect Mr. McGaffin as she acknowledged in her July 15, 2021 email to Kirill confirming that she knew Mr. McGaffin would be arriving, and inexplicably, she did not open the door even though he knocked and which caused her dogs to jump on the door and bark. She also confirmed that she checked her cameras and saw him standing outside her door so there is no dispute that Mr. McGaffin was there on July 17, 2021 to complete the repairs as per the list provided by Kirill and that Ms. Reed knew that he was there.

Kirill and Ms. Reed had to appear in court on an unrelated landlord-tenant matter on August 5, 2021 before the Honorable Bruce J. Boni. The rescheduling notice, which was admitted as Exhibit A-3, shows that the August 5, 2021 hearing, which did take place, would be rescheduled until August 26, 2021 in order to give Ms. Reed a chance to apply for ERAP funding to pay her

rent. Kirill testified that it was only at this August 5, 2021 hearing that Ms. Reed had to let Mr. McGaffin in to make the repairs. H.T. at 89:24-90:12. Ms. Reed did let Mr. McGaffin in on August 25, 2021 and all repairs were made and the apartment was reinstated by the ACHD confirming that fact.

Upon cross examination of Specialist Lauria, he confirmed that if all of the repairs had been made on July 17, 2021, that he would have not assessed a civil penalty and abated the case. H.T. at 65:11-15. Had Ms. Reed admitted Mr. McGaffin on Saturday, July 17, 2021, then we likely would not be here today. There was some dispute at the hearing on January 12, 2021, but Mr. McGaffin testified that the back door is bolted from the inside and that no one can gain entry from the outside. Mr. McGaffin did admit that he did not need to gain entry to repair the steps which were outside the apartment so even if he had been granted access and fixed all the other issues, the steps would still have needed to be repaired. H.T. at 81:7-10. Would Specialist Lauria have issued a civil penalty of \$2,500.00 if all the repairs except for the steps had been completed. We don't know because no one asked him that question. However, the main issue that Ms. Reed complained of was rats and mice and all the openings in the walls would have been sealed had Ms. Reed simply cooperated with F&Y.

IV. CONCLUSION

Appellee's argument is that F&Y's position that Ms. Reed refused to allow access is without merit and Appellant's overtures towards making repairs were half-hearted at best. The evidence at the hearing does not support that position and instead supports F&Y's position. First, it is undisputed that F&Y did not learn of the violations until late May of 2021. It is also important to point out the ACHD's own inspector did 1) not see an rats and 2) couldn't verify that there were

rats in the wall. The only thing that he found was that there were openings in the wall that may or may not allow entry.

Supervisor Zeiler testified that he spoke with Dennis on June 14, 2021 who told him that Ms. Reed was not cooperating in granting them access to make the repairs. Kirill testified to the same but further testified that he did make arrangements with Ms. Reed to send Mr. McGaffin to make the repairs on Saturday, July 17, 2021, which was acknowledged by Ms. Reed in her email response of July 15, 2021. Mr. McGaffin testified that he did show up on Saturday, July 17, 2021 and knocked on the door for five minutes while the dogs jumped on the door and barked but that no one had answered. Ms. Reed confirmed that Mr. McGaffin was there but did not open the door. She also testified inaccurately when she said that she left home at 8:00 am when her email from Saturday 17, 2021 at 8:15 am stated that she was going to leave for work at 8:40 am. Had Ms. Reed simply opened her door, we likely would not be here today. Kirill also testified that it was not until Judge Boni told Ms. Reed on August 5, 2021 that she let Mr. McGaffin in to make the repairs.

F&Y had no reason not to do the repairs and the amount that they will have to spend for legal representation in this matter greatly exceeds the amount of the civil penalty. ACHD did not present any evidence which disputes any of the facts that are addressed in this brief. The only issue in which ACHD is correct is that Mr. McGaffin could have fixed the stairs without gaining entry of to the apartment. F&Y is therefore requesting that the civil assessment be reduced to zero, or if the hearing officer believes that a fine should be issued for the stairs alone, then to adjust the amount of the civil penalty accordingly while keeping in mind that everything except for the stairs would have been completed, including the sealing of the walls, which was the reason for the initial

complaint, had Ms. Reed simply cooperated and allowed F&Y entry in order to make the repairs prior to July 19, 2021.

Respectfully submitted,

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