DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,099

In re: 5200 North Capitol Street, N.E., Unit 3

Ward Four (4)

EVANGELINE COVINGTON
Tenant/Appellant

v.

FOLEY PROPERTIES, INC.
Housing Provider/Appellee

DECISION AND ORDER

June 13, 2002

PER CURIAM: This case is on appeal to the District of Columbia Rental Housing Commission (Commission) from the Rent Administrator's decision and order. The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL BACKGROUND

On May 8, 2001, the tenant, Evangeline Covington, filed Tenant Petition (TP) 27,099 with the Rental Accommodations and Conversion Division (RACD). The tenant petition alleged a reduction in services and facilities, an illegal rent increase and that the housing provider in violation of § 502 of the Rental Housing Act of 1985 took retaliatory action. The Office of Adjudication (OAD) originally scheduled the petition for a hearing on September 25, 2001, but counsel for the tenant filed a motion on September 24, 2001

for a continuance due to a scheduling conflict. OAD granted the motion and rescheduled the hearing for November 8, 2001. At the scheduled hearing, neither the tenant, nor tenant's counsel was present. Counsel for the housing provider, who was present, moved to dismiss the petition with prejudice. On November 26, 2001, the hearing examiner issued the decision and order granting the housing provider's motion to dismiss TP 27,099 with prejudice.

After review of the OAD file, the hearing examiner found that "notice of the date, time, and place of the hearing was served[1] on the parties in accordance with § 216(c) of the Act, D.C. CODE § 45-2526(c) (1990)."[2] Covington v. Foley Properties, TP 27,099 (OAD Nov. 26, 2001) at 1. Accordingly, the hearing examiner held that when a party has notice of the date, time and location of the hearing, but fails to appear at the hearing, the Rent Administrator may dismiss that action. Therefore, the only issue to resolve was whether to dismiss TP 27,099 with or without prejudice. The hearing examiner issued his decision to dismiss this case with prejudice pursuant to the Rental Housing Commission standard set forth in Wayne Gardens Tenant Ass'n v. H & M Enter., TP 11,845 (RHC Sept. 27, 1985) which states:

> Rather than mandate a dismissal with prejudice whenever there is a failure to prosecute ... we look to see if there is good cause for Petitioner's failure, or good cause why prejudice should not attach because of Petitioner's failure to go forward. Prejudice attaches only in the absence of such good cause. In our review, we seek to determine if good cause exists to justify a dismissal without prejudice. If the record does not

[1] "The records in the file indicate that notice of the rescheduled hearing was sent on September 27, 2001 by priority mail to the attorneys representing the parties in this matter. Delivery confirmation of the notice of hearing was made by accessing the United States Postal Service (USPS) internet web site. Delivery was confirmed to the Tenant/Petitioner's counsel on September 28, 2001, confirmation #0300129000609545310. Delivery was confirmed to the Housing Provider/Respondent's counsel on October 1, 2001, confirmation #0300129000609545303." Covington v. Foley Properties, TP 27,099 (OAD Nov. 26, 2001) at 1-2.

[2] Currently D.C. OFFICIAL CODE § 42-3502.16(c) (2001).

> contain sufficient facts and circumstances to constitute good cause why prejudice should not attach, the Examiner's dismissal on [P]etitioner's default must be with prejudice.

In his decision to dismiss the petition, the hearing examiner noted that there was no good cause for the tenant's failure to appear because "neither the [tenant], nor her attorney, made any contact with the Office of Adjudication, either prior to or subsequent to the scheduled hearing to explain [their] absence." Covington v. Foley Properties, TP 27,099 (OAD Nov. 26, 2001) at 2.

On December 12, 2001, the tenant's counsel filed a timely motion for reconsideration of the November 26, 2001 decision and order. Counsel for the tenant argued that the hearing examiner erred in dismissing this case with prejudice. In addition, he averred that his office received notice; however, he did not read the notice until after the hearing date. For that reason he was not present for the hearing.

On December 26, 2001, the hearing examiner issued an order denying the motion for reconsideration. The hearing examiner reiterated the conclusion reached in his decision and order of November 26, 2001, that the judgment to dismiss this case was entered due to the failure of either the tenant or tenant's counsel to appear without prior or subsequent notice to the OAD. The hearing examiner further stated that good cause was lacking, because the hearing was scheduled for a date on which tenant's counsel had represented that he would be available.

On January 10, 2002, tenant's counsel filed an appeal with the Commission from the December 26, 2001 order denying the motion for reconsideration. On May 16, 2002, the Commission conducted its hearing on the appeal.

II. THE APPEAL

In his notice of appeal to the Commission, tenant's counsel contends:

> 1. The Examiner erred by not discussing whether the negligent [sic] by the Counsel was excusable to the extent SCR 60(b) [sic] would allow the default to be sit [sic] aside for a hearing on the merits. The Hearing Examiner made a Findings [sic] of Fact the [sic] Tenant's counsel was negligent but did not go to the next issue required by law.
>
> 2. The Examiner abused his discretion by not set [sic] aside the default [judgment] or in the alternative dismissed the case without prejudice in light of the fact that counsel have [sic] requested a continuance earlier in this case and appears [sic] that he would have requested another continuance if needed, had it not been for his negligent [sic] as found by the Examiner.
>
> 2. [sic] The Examiner erred by finding the [sic] case should be dismissed with prejudice simply because the Petitioner nor counsel appeared after finding that counsel did not get actual notice of the hearing until after the hearing was over and the strong preference for cases to be decided on its merits.

Tenant's counsel is essentially arguing that the hearing examiner erred in dismissing this case with prejudice because he was negligent, which is excusable under SUP. CT. CIV. R. 60(b). Prior to ruling on whether the hearing examiner abused his discretion, the Commission must decide whether it has jurisdiction based upon the issues raised in this appeal. The Commission may reverse "in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, ... or it may affirm, in whole or in part, the Rent Administrator's decision." D.C. OFFICIAL CODE § 42-3502.16 (2001). However, the Commission may only exercise this power on matters upon which it has jurisdiction.

Under 14 DCMR § 4013.3, "the denial of a motion for reconsideration shall not be subject to reconsideration or appeal." The Commission reviewed the tenant's appeal

and determined that it is an appeal from the order on the motion for reconsideration, which is not appealable. This appeal is based upon the December 26, 2001 order denying the motion for reconsideration. Therefore, the Commission lacks jurisdiction, and based on the regulation, 14 DCMR § 4013.3, the Commission cannot rule on this appeal.

It is evident that this appeal is based upon the order denying the motion for reconsideration for several reasons. Counsel writes in his appeal "the Decision and Order from which this appeal is taken is dated December 26, 2001."[3] Notice of Appeal at 1. Additionally, the issues as stated in this appeal are similar, if not identical, to those presented in the motion for reconsideration of the OAD dismissal. Furthermore, the hearing examiner in the December 26, 2001 order addressed these issues. Therefore, counsel for the tenant has appealed the order denying the motion for reconsideration. Consequently, the tenant's appeal violates 14 DCMR § 4013.3, which states that a denial of a motion for reconsideration is not subject to reconsideration or appeal.

[3] The decision dated December 26, 2001 is the hearing examiner's order denying the motion for reconsideration.

III. CONCLUSION

The Commission dismisses this appeal due to its lack of jurisdiction to render a decision and order on an appeal from an order on a motion for reconsideration.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,099 was mailed by priority mail with delivery confirmation postage prepaid, this 13th day of June, to

Bernard A. Gray, Sr., Esquire
2009 18th Street, S.E.
Washington, D.C. 20020-4201

Charles S. Rand, Esquire
611 Rockville Pike
Suite 100
Rockville, Maryland 20852

LaTonya Miles
Contact Representative