

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,150

In re: 3140 Q Street, N.W., Unit 1

Ward Two (2)

JAMES A. LINEN
Tenant/Appellant

v.

DOUGLAS LANFORD
Housing Provider/Appellee

**ORDER ON MOTION FOR EXTENSION
OF TIME TO FILE BRIEF OUT OF TIME**

May 21, 2003

YOUNG, COMMISSIONER. The decision and order involved in this appeal was issued by the Office of Adjudication on August 23, 2002. Counsel for the tenant/appellant, James A. Linen, filed a notice of appeal on September 4, 2002. On September 24, 2002, the Commission scheduled its hearing for November 13, 2002. Both parties appeared through counsel.

Prior to the Commission's hearing, on October 24, 2002, counsel for the tenant, filed Appellant's Motion for Extension of Time to File Brief Out of Time on behalf of the tenant. On November 6, 2002 the housing provider's counsel filed an opposition to the motion. Counsel for the tenant, stated in his motion:

1. Undersigned counsel is a sole practitioner. Because of the press of other business and daily necessary appearances before our local courts and administrative agencies, including, but not limited to, the Office of Adjudication and the Superior Court, counsel has been unable, since he received the Notice of Scheduled Hearing on Appeal and Notice of Certification of Record, to prepare a written brief in support of his Appeal.

2. Appellant's written brief is attached hereto, and being filed simultaneously with his request for a Commission Order allowing it to be received at this time.
3. The hearing for this Appeal is scheduled to convene on November 13, 2002. Appellant's request for an extension of time to file his written brief was served on Appellee's counsel, more than five (5) days before the hearing, in compliance with 14 DCMR Sect. 3815.1.
4. Appellant contends, as stated in his written brief, that Appellant has a good and substantial likelihood of success on the merits of his Appeal.
5. Allowing Appellant to file a written brief at this time will not result in any prejudice to Appellee, delay this proceeding, or do violence to the discharge of the Commission's duties or the administration of the Commission's calendar. To the contrary, it will, inter alia, delineate Appellant's meritorious arguments on appeal and thereby facilitate the hearing and adjudication of this matter.
6. The motion is filed in good faith and not for the purpose of delay.

Motion for Extension of Time to File Brief Out of Time at 1-2. Counsel for the Housing Provider stated in opposition to the motion to extend the time to file the brief out of time that according to the Commission's rule, 14 DCMR § 3815.1 (1991), counsel for the tenant was required to file his motion for extension of time at least five (5) days before the pleading was due, which the tenant did not do. Finally, counsel for the housing provider argues that the reason proffered by counsel for the tenant, the press of other business, is not an excuse permitted by the Commission's regulation at 14 DCMR § 3815.3 (1991).¹ Both counsel argued their respective positions on the motion at the November 13, 2002, Commission hearing. Counsel for the tenant argued those points presented in his motion and also argued that the brief was in fact filed in advance of the

¹ The applicable regulation, 14 DCMR § 3815.3 (1991) provides:

Conflicting engagements of counsel, or the employment of new counsel shall not be regarded as good cause for continuance unless set forth promptly after notice of the hearing has been given.

actual hearing. Counsel for the housing provider argued, in addition to the points raised in his opposition and motion to strike the brief, that the filing of the brief three weeks late was tantamount to surprise on the part of the tenant.

THE COMMISSION'S ORDER

A. The Law on Continuances

The Commission's rules provide: "Parties may file briefs in support of their position within five (5) days of receipt of notification that the record in the matter has been certified." 14 DCMR § 3802.7 (1991). "Parties may file responsive briefs within ten (10) days of service of the pleading to which the response is being filed." 14 DCMR § 3802.8 (1991). "There shall be no reply to a responsive brief and the Commission shall not accept the brief if submitted." 14 DCMR § 3802.9 (1991). In addition:

Any party may move to request a continuance of any scheduled hearing or for extension of time to file a pleading, other than a notice of appeal, or leave to amend a pleading if the motion is served on opposing parties and the Commission at least five (5) days before the hearing or the due date; however, in the event of extraordinary circumstances, the time limit may be shortened by the Commission.

14 DCMR § 3815.1 (1991). "Motions shall set forth good cause for the relief requested."

14 DCMR § 3815.2 (1991).

The DCCA decision in Metropolitan Baptist Church v. District of Columbia Dep't of Consumer and Regulatory Affairs, 718 A.2d 119 (D.C. 1998), states the factors for consideration for a continuance are: 1) the reasons for the continuance (or extension of time, as in this case), 2) the prejudice resulting from the denial, 3) the party's diligence in seeking relief, 4) any lack of good faith, 5) and prejudice to the opposing party. Citing Daley v. United States, 739 A.2d 814 (D.C. 1999), cited in Nezhadessivandi v. Ayers, TP 25,091 (RHC May 28, 2002).

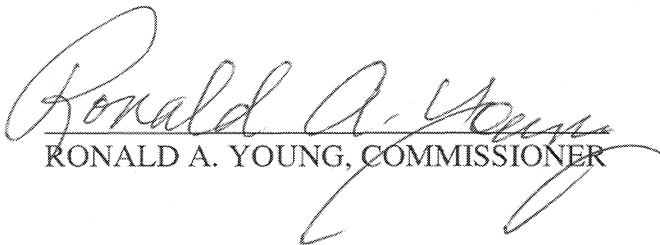
The Commission's regulation 14 DCMR § 3802.7 (1991), permitted the brief to be filed within five (5) days of the notice that the Commission had the certified record of the OAD proceeding. The regulation, 14 DCMR § 3815.1 (1991), allows for an extension of time to file a pleading, provided the motion requesting an extension is served on opposing parties and the Commission at least five (5) days before the due date. Therefore, tenant's counsel was required to file either the brief or the motion to extend the time for the brief within five (5) days of receipt of the Commission's notice that the certified record was in the Commission.

B. The Commission's Ruling

The Commission's decision to grant or deny a motion for extension of time or a continuance is submitted to the sound discretion of the Commission, and it is reviewed by an appellate court for abuse of discretion. See Metropolitan Baptist Church, supra. In the instant case, the Commission notified the parties on September 24, 2002, that the certified record in TP 27,150 was in the Commission. Therefore, briefs or motions requesting an extension of time to file briefs were due on or before October 2, 2002. The tenant's brief was filed and date-stamped in the Commission on October 24, 2002. While the Commission may consider extenuating circumstances for the late filing of briefs and requests for extensions of time to file briefs, see Nezhadessivandi v. Ayers, TP 25,091 (RHC May 28, 2002), the rules, 14 DCMR § 3815.1-.3 (1991) require the motion to

extend time to be filed prior to the due date of the event being extended. Because counsel for the tenant failed to file a brief or motion for an extension of time to file a brief on or before October 2, 2002, the Motion for Extension of Time to File Brief Out of Time is denied.

SO ORDERED.


RONALD A. YOUNG, COMMISSIONER

Banks, concurring:

Counsel for the Housing Provider argued at the Commission's hearing that it was unfair for the Tenant's counsel to file a brief at the last minute. That argument raised the issue of whether it would be prejudicial to the Housing Provider to grant the Tenant's motion for an extension of time to file the brief out of time. See Metropolitan Baptist Church v. District of Columbia Dep't of Consumer and Regulatory Affairs, 718 A.2d 119 (D.C. 1998) where the court stated one of the factors to be considered for a continuance (extension of time) is prejudice to the opposing party.

The Commission's rules on briefs and extensions of time state: "Parties may file briefs in support of their position within five (5) days of receipt of notification that the record in the matter has been certified," 14 DCMR § 3802.7 (1991). "Parties may file responsive briefs within ten (10) days of service of the pleading to which the response is being filed," 14 DCMR § 3802.8 (1991).

The Commission's notice of certification of the record was dated September 24, 2002, and the Commission's file shows that the notice was delivered the next day on

September 25, 2002. Under the Commission's rule, § 3802.7 (1991), the Tenant's counsel had five business days from September 25, 2002, to file the brief. The time to file the Tenant's brief expired on October 2, 2002, with the exclusion of weekend days pursuant to 14 DCMR § 3816.3 (1991). The Tenant's counsel was 22 calendar days late in filing the brief and the motion for extension of time, by filing both of them on October 24, 2002. The brief was filed 20 calendar days before the Commission's hearing on November 13, 2002.

The Tenant's counsel relies on Nezhadessivandi v. Ayers, TP 25,091 (RHC May 28, 2002) reconsideration denied in Nezhadessivndi v. Ayers, TP 25,091 (RHC June 19, 2002), in part, because he was counsel for the Tenant in that appeal and the Commission granted his out of time motion to file Tenant's brief out of time. There the facts were that the notice of certification and hearing was issued on February 27, 2002 for a hearing on May 14, 2002. The brief was due on March 7, 2002, however, it was filed late on May 7, 2002, with the motion to extend the time. The Commission's order granting the motion to extend the time to file the brief noted that counsel for the Housing Provider made the appropriate arguments on the merits at the Commission's hearing. Further, the Commission noted its rules made filing a brief permissive not mandatory.

In the instant appeal, the same issues are before the Commission. That is, counsel for the Tenant is identical in this case and in Nezhadessivandi; the reason for the late filed brief is identical – counsel is a sole practitioner with the press of other business before the courts and agencies; the brief was filed simultaneously with the motion for extension of time to file the brief; the brief was served on the Housing Provider's counsel more than five days before the hearing; and counsel for the Tenant asserted the motion would not

cause prejudice to the opposing party. Moreover, counsel relied on the Commission's interpretation of its rule, 14 DCMR § 3802.7 (1991), in Nezhadessivndi that briefs are not mandatory.

In the instant appeal, the opposing party, the Housing Provider, disagreed about lack of prejudice and counsel argued at the Commission's hearing that the Housing Provider was prejudiced, because the Tenant's brief was "spun" on him without adequate time to respond. The Housing Provider's counsel argued that prior to the filing of the brief four (4) weeks late on October 24, 2002, which was two weeks before the hearing on November 13, 2002, counsel for the Housing Provider was left with the impression that no brief would be filed. The late filing of the brief on October 24, 2002, (received by counsel for the Housing Provider on October 28, 2002) only allowed a mere two weeks for a response before the hearing on November 13, 2002. Clearly, Tenant's counsel's delay in filing the Tenant's brief gave himself the lion's share of time before the Commission's hearing to research and write the brief. Counsel for the Housing Provider had about half the time to prepare a brief. However, on November 7, 2002, counsel for the Housing Provider filed a document entitled "reply brief" [responsive brief], which stated it replied to the issues raised in the Tenant's brief in support of the appeal.² If the Commission disallows the filing of the Tenant's brief, then logically it should disallow the filing of the responsive brief.

The Commission has treated motions for extension of time differently depending on the facts. See Envoy Assoc. Ltd. P'ship v. 2400 Tenant Asso., TP 27,312 (RHC Apr. 9, 2003) for an example of an order that denied Tenant's motion to enlarge the time for

² Pursuant to 14 DCMR § 3802.8 (1991), "parties may file responsive briefs within ten (10) days of receipt of the pleading to which the response is being filed."

filing a brief late, due to late filing of the motion and lack of good faith. In the alternative, in Jefferson v. Hercules Real Estate, Inc., TP 27,478 (RHC Dec. 6, 2002) the Commission granted opposing counsel the opportunity to file an opposing brief post hearing. Also, in Jefferson there was no opposition to the motion to file out of time and no responsive brief was filed.

The Commission notes that in Mann Family Trust v. Johnson, TP 26,191 (RHC Feb. 20, 2003) the identical counsel for the Tenant, timely filed within five (5) days after notice of hearing, the motion to extend the time to file the brief. That allowed more than three months before the hearing date. The Commission granted the motion, and allowed late filing of the brief. The procedure used in Mann was in compliance with the Commission's rules, 14 DCMR § § 3802.7, 3815.1 (1991), for filing a motion for an extension of time within five days of receipt of the notice of certification of the record. In the instant case, counsel for the Tenant relied on Nezhadessivandi for an excuse not to comply with the Commission's rules. However, in Mann, the same counsel demonstrated his awareness and ability to timely file a motion to request an extension of time to file a brief out of time.

Accordingly, in the instant appeal, the Commission exercised its discretion to deny the motion to extend the time to file the brief out of time, because of the failure of the Tenant's counsel to follow the Commission's rules. Each time that the Commission grants an untimely filed motion to extend the time to file a brief out of time, does not mean that all future untimely filed motions and untimely filed briefs will be granted late

filing. Therefore, in this appeal, the Tenant's brief is stricken from the record and the Housing Provider's responsive brief is also stricken, because there is no brief for response.

SO ORDERED.



RUTH R. BANKS, CHAIRPERSON

CERTIFICATE OF SERVICE

I certify that a copy of the **ORDER ON MOTION FOR EXTENSION OF TIME TO FILE BRIEF OUT OF TIME** was mailed by priority mail with confirmation of delivery postage prepaid this **21st** day of **May, 2003**, to:

Morris R. Battino, Esquire
1200 Perry Street, N.W.
Suite 100
Washington, D.C. 20017

Irene M. Lindner, Esquire
Lindner & Associates, P.C.
2000 L Street, N.W.
Suite 803
Washington, D.C. 20036



LaTonya Miles
Contact Representative