DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,631

In re: 1648 Park Road, N.W., Unit 4

Ward One (1)

JOHN H. WADE
Tenant/Appellant

v.

PARK ROAD ASSOCIATES & MORRIS MANAGEMENT
Housing Providers/Appellees

DECISION AND ORDER

March 27, 2007

YOUNG, CHAIRMAN. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Housing Regulation Administration (HRA), Rental Accommodations and Conversion Division (RACD), to the Rental Housing Commission (Commission). 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 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

The Commission's decision in Tenant Petition (TP) 27,631 is before the Commission on remand from the District of Columbia Court of Appeals (DCCA). On September 30, 2002, John H. Wade, the tenant of unit 4 at the housing accommodation located at 1648 Park Road, N.W., filed Tenant Petition (TP) 27,631 with RACD. An

RACD hearing on the petition was held on October 28, 2002, Hearing Examiner Saundra McNair presided. The hearing examiner issued a decision and order on April 7, 2004. Wade v. Park Rd. Assocs. & Morris Mgmt., TP 27,631 (RACD Apr. 7, 2004) (Decision). The hearing examiner granted TP 27,631 in part, and ordered the housing provider to pay the tenant a rent refund of $6,825.00, plus interest in the amount of $442.10, for a total refund of $7,267.10. Further, the hearing examiner imposed a fine in the amount of $750.00 on the housing provider for violating the Act. Decision at 25-26.

The hearing examiner's decision informed the parties that they had until April 28, 2004, to file either a motion for reconsideration or an appeal in the Commission. The tenant and housing provider filed motions for reconsideration on April 21 and April 27, 2004, respectively. By order dated April 29, 2004 the hearing examiner denied the tenant's motion for reconsideration. By order dated April 30, 2004 the hearing examiner granted the housing provider's motion for reconsideration. Wade v. Park Rd. Assocs. & Morris Mgmt., TP 27,631 (RACD Apr. 29, 2004) (Order). The hearing examiner's order stated:

1. The Examiner after another review of the record, vacates the Decision and Order issued on April 7, 2004.

2. The Examiner grants the Respondent's Motion for Reconsideration.

Id. at 4. The hearing examiner failed to provide any further explanation, findings of fact or conclusions of law, regarding her decision to vacate Wade v. Park Rd. Assocs. & Morris Mgmt., TP 27,631 (RACD Apr. 7, 2004). The hearing examiner advised the parties that she would reissue the decision within 25 business days of her order vacating the decision. Order at 4. The parties were advised that motions for reconsideration with

the Rent Administrator or appeals in the Commission should be filed on or before May 19, 2004.

On May 14, 2004, the tenant filed, with the hearing examiner, a Motion to Dismiss Without Prejudice, requesting that his tenant petition be dismissed. On May 28, 2004 the hearing examiner, over the objection of the housing provider, issued an order dismissing TP 27,631, however, the hearing examiner dismissed the petition with prejudice. Wade v. Park Rd. Assocs. & Morris Mgmt., TP 27,631 (RACD May 28, 2004). On June 17, 2004 the tenant filed a timely Notice of Appeal in the Commission. In his notice of appeal the tenant argued that the hearing examiner erred when she dismissed his petition with prejudice.

In her decision dismissing the tenant petition, the hearing examiner provided the following explanation as her reason for dismissing the petition with prejudice:

> The Petitioner should not be allowed to potentially have a 'second bite at [sic] the apple,' when the Petitioner had ample opportunity to present his case and have necessary parties present at the administrative hearing. The parties presented evidence and testimony under oath, and each party had an opportunity to cross-examine the other party's witnesses.

Wade v. Park Rd. Assocs. & Morris Mgmt., TP 27,631 (RACD May 28, 2004) at 2. The hearing examiner, citing the Commission's decision in Wayne Gardens Tenant Ass'n v. H&M Enter., TP 11,845 (RHC Sep. 27, 1985), concluded: "The Examiner finds that the record contains sufficient facts and circumstances to constitute good cause why prejudice should attach." Id. at 3.

In its decision, the Commission stated:

> In the instant case, the hearing examiner was permitted to apply the rules of the Superior Court of the District of Columbia, specifically, Superior Court Rule (Sup. Ct. R.) 41. Sup. Ct. R. 41 provides, in relevant part:

(a)*Voluntary dismissal: Effect thereof.* ...

(2) *By Order of Court.* Except as provided in paragraph (a)(1) of this Rule, the claimant may not dismiss an action or a counterclaim without order of the Court. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court. The dismissal shall be subject to such terms and conditions as ordered by the Court, and unless otherwise specified in the order, the dismissal shall be without prejudice. (emphasis added.)

The Commission stated with regard to Sup. Ct. R. 41:

It is settled that Rule 41(a) provides a plaintiff's remedy; a defendant may not initiate action under either paragraph (1) or (2) thereof. Boks v. Charles Smith Mgmt., Inc., 453 A.2d 113 (D.C. App. 1982). From its face (see n. 1, p. 2, supra), paragraph (1) of this subsection (a) applies where the plaintiff initiates dismissal before the issues are joined (a unilateral notice is filed) or when the dismissal is by consent (a joint stipulation is filed). Under paragraph (1), no order is required to be issued by the court. Paragraph (2), on the other hand, requires deliberate action (a non-ministerial order) by the Court, and applies whenever a plaintiff seeks dismissal after the issues are joined or when the motion for dismissal is opposed by the defendant. (emphasis added.)

JBG Prop. Inc. v. Van Ness S. Tenants Ass'n, Inc., TP 20,733 (RHC Mar. 25, 1987) at 3. The Commission further held in JBG Properties:

> In Park Towers Tenant Assoc'n v. Jonathan Woodner Co., TP 3,418 (RHC Aug. 28, 1986), we held that the Rent Administrator's action on a motion for dismissal under the guidance of Rule 41(a)(2) was discretionary and would be reversed only upon a finding of some abuse of that discretion. Specifically, we stated that it would be 'an abuse of discretion for the Rent Administrator to permit the withdrawal of a petition without prejudice if that [would] cause the respondent legal prejudice or real and substantial detriment.' Id. at 9, citing D.C. Transit Sys., Inc. v. Franklin, 167 A.2d 357 (D.C. 1961). However, the case cited by the Commission in Park Towers, D.C. Transit Sys., Inc. v. Franklin, further states:
>
> > The court's inquiry primarily concerns whether the defendant will be subjected to legal prejudice by the allowance [of dismissal without prejudice]. It is not

> enough that he may be forced to suffer the incidental annoyance of a second suit in another forum. To compel a favorable ruling the defendant must show a real and substantial detriment. While it is true the delay in question may have caused some inconvenience, the suit had not advanced beyond preliminary stages and there is no evidence that appellant was exposed to material hardship. (emphasis added.) (footnote omitted.)

D.C. Transit Sys., Inc. v. Franklin, 167 A.2d at 358-9. The Commission decision concluded:

> In the instant case, the hearing examiner fully considered the procedural posture of the tenant's petition before dismissing it with prejudice. In her order the hearing examiner noted that the tenant had the benefit of a full evidentiary hearing, with an opportunity to testify, enter evidence, call witnesses and cross-examine the housing provider's witnesses. Sup. Ct. R. 41 permits the hearing examiner to place conditions on a dismissal, in this case, the condition placed on the tenant's motion for dismissal was dismissal with prejudice.

Wade v. Park Road Assocs & Morris Mgmt., TP 27,631 (RHC Dec. 21, 2005) at 8-9.

The Commission denied the tenant's appeal and affirmed the hearing examiner's dismissal of the petition, with prejudice, because the Commission found no arbitrary action, capricious action or abuse of discretion in the Rent Administrator's dismissal of the tenant petition, with prejudice, because, as the hearing examiner stated, the tenant enjoyed the benefit of a full DCAPA evidentiary hearing. Subsequently, the tenant, John H. Wade, lodged a petition for review of the Commission's December 21, 2005, decision and order in the DCCA.

The Commission, invoking its authority to sua sponte correct or modify any error in its decisions, requested that the DCCA remand the case back to the Commission for further review of the decision. See Bookman v. United States, 197 Ct. Cl. 108, 453 F. 2d

1263 (1972), cited in Tenants of 1255 New Hampshire Ave., N.W. v. Hamilton House Ltd. P'ship, HP 20,388 (RHC Feb. 8, 1990).

II. ISSUE CONSIDERED AND DISCUSSION

Whether the hearing examiner erred when she dismissed the tenant petition with prejudice, contrary to the tenant's request to have the petition dismissed without prejudice, without first advising the tenant of the possible consequences of his request for dismissal.

Sup. Ct. Civ. R. 41 (a)(2) is identical to the Federal Rules of Civil Procedure (FED. R. CIV. P.) 41(a)(2). The Federal courts have interpreted this provision of the rules and have held that the "terms and conditions" clause of FED. R. CIV. P. 41(a)(2) grants plaintiff the option of withdrawing his motion for dismissal without prejudice if the court's conditions on the dismissal are, in the plaintiff's view, too onerous and allow him to proceed with the case instead. Marlow v. Winston & Strawn, 19 F.3d 300, 304 (7th Cir. 1994); GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 367-68 (D.C.Cir. 1981). "It upsets notions of fundamental fairness for a court, in response to a party's request for dismissal without prejudice, to grant the request by dismissing with prejudice, while failing to give the moving party notice of its inclination to impose this extreme remedy. The plaintiff here deserved such notice and an opportunity to proceed with the litigation of this case." Andes v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986). Similarly, in Dorchester House Assocs. Ltd. P'ship v. District of Columbia Rental Hous. Comm'n, 913 A.2d 1260 (D.C. 2006), the DCCA has held that the "terms and conditions" clause of Sup. Ct. Civ. R. 41 (a)(2), requires that the moving party be given notice of the [Rent Administrator's] inclination to dismiss his petition with prejudice.

In the instant case, the tenant was not advised of the possibility of dismissal of his petition, with prejudice, pursuant to his request for dismissal without prejudice.

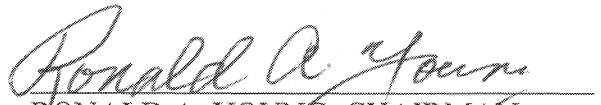
Accordingly, the Commission holds that the hearing examiner, in an exercise of fundamental fairness, was obligated to inform the tenant of her inclination to dismiss his petition with prejudice. Therefore, the decisions of the hearing examiner and the Commission are reversed and the case remanded to the Office of Administrative Hearings.[1]

III. CONCLUSION

The hearing examiner's dismissal of the tenant petition, with prejudice, is reversed. This case is remanded to the Office of Administrative Hearings for notice to the tenant of the possible consequences of his motion to dismiss and to provide the tenant an opportunity to withdraw his motion and to proceed with the litigation of this case, or to have the Office of Administrative Hearings rule on his motion.

Accordingly, this case is remanded to the Office of Administrative Hearings for further action consistent with this opinion.

SO ORDERED.



RONALD A. YOUNG, CHAIRMAN

DONATA L. EDWARDS, COMMISSIONER

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[1] The Office of Administrative Hearings Establishment Act of 2001, D.C. OFFICIAL CODE § 2-1831.01 provides:

> (a) Section 6(b-1) (D.C. Official Code § 2-1831.03(b-1)) is amended as follows:
> ...:
>
> > (1) In addition to those agencies listed in subsections (a) and (b) of this section, as of January 1, 2006, this chapter shall apply to adjudicated cases under the jurisdiction of the Rent Administrator in the Department of Consumer and Regulatory Affairs.

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,631 was mailed postage prepaid by priority mail, with delivery confirmation on this **27th** day of **March, 2007** to:

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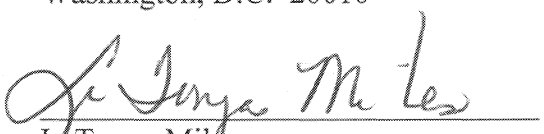

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