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IN THE COURT OF APPEALS OF WOOD COUNTY

Bowling Green Manor
Limited Partnership

Court of Appeals No. WD-94-125

Appellant v. Municipal Court No. 94CVG01059

v.

JL - 3 1525

Debbie Kirk

DECISION AND JUDGMENT ENTRY

Appellant

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Decided: June 30, 1995

Thomas E. Teet, for appellee.

Steve Robins, for appellant.

* * * * *

This case comes before the court on appeal from a judgment of the Bowling Green Municipal Court and is a companion case to Bowling Green Manor Limited Partnership v. LaChance (June 30, 1995, Wood App. No. WD-94-117, unreported.)

Appellee, Bowling Green Manor Limited Partnership, doing business as Bowling Green Estates, operates an apartment complex in Bowling Green, Wood County, Ohio. The complex is managed by Buckeye Management Company, which is located in Columbus, Ohio.

In 1991, appellee entered into a restrictive covenant with the Ohio Housing Finance Agency, as established by R.C. Chapter 175, acting as a housing credit agency for the state of Ohio and as described in Section 42(h) (3), Title 26, U.S. Code. Pursuant to the covenant, appellee agreed to lease one hundred per cent of the units in Bowling Green Estates as "low-income housing" for an initial term of fifteen years and an extended use period of an additional five years.

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In consideration for providing low-income housing, appellee received the benefit of the Low Income Housing Tax Credit authorized under Section 42, Title 26, U.S. Code, commencing with the taxable year ending on December 31, 1993. In March 1994, appellee was allocated approximately a \$37,000 federal tax credit for Bowling Green Estates; however, as of time of trial, it had not used this credit.

Paragraph One of the restrictive covenant reads:

"The (#5) building(s), which will constitute a qualified housing project as defined in Section 42 of the Code and regulations promulgated thereunder, the rental unit(s) which will be rented or available for rental on a continuous basis to members of the general public, shall be known as BOWLING GREEN ESTATES APARTMENTS
(the "Project"),
located at 1070, 1072, 1074, 1076, 1078
FAIRVIEW AVE., BOWLING GREEN, OH 43402"

Paragraph Six of the covenant provides that, in the event of foreclosure during the "extended use period,¹¹ that "for a three year period after such termination, no low-income tenant may be evicted, for other than good cause ***. If In addition, the restrictive covenant expressly runs with the land and is binding on all successors and assigns of each party. Further, the covenant authorizes the Ohio House Financing Agency to enter appellee's premises and inspect all books and records pertaining to the operation of Bowling Green Estates. Finally, Paragraph Eight reads:

'J" This covenant shall constitute an 'Agreement' between the parties which is enforceable in the courts of the State of Ohio by the Agency or by any individual(s), whether prospective, present, or former occupants of the Project, who meets the income limitations applicable to the Project

under Section 42(g) of the Code, said individual(s) being express beneficiaries of this Agreement."

In August 1993, appellant, Debbie Kirk, entered into a one year lease agreement with Bowling Green Estates. Kirk and her two minor children reside in the leased apartment.

The lease states that in order to qualify for a low-income housing tax credit, the annual income of each tenant must be certified. Therefore, under the lease, each tenant is required to report the number of tenants in the unit, total income and any other sources of income by the anniversary date of the lease.

The total monthly rent for the Kirk apartment was \$455. However, appellant paid only \$87 of this rent amount each month. A federally subsidized government supplement paid through the Henry County Metropolitan Housing Authority paid the remainder.

The lease provided that it terminated on August 31, 1994 and could be renewed in writing. Otherwise, the lease automatically renewed on a month to month basis until terminated by either of the parties.

On September 24, 1994, appellee served appellant with a written thirty day notice of the termination of her lease. The sole basis for termination listed in the notice was the lapse of the initial lease. Appellant did not vacate the premises by the thirtieth day.

On November 1, 1994, appellant, as a holdover tenant, received a three day notice to leave the premises. The notice stated that, pursuant to "Federal Regulations," appellant could

meet with the "owner's agent" to discuss the proposed termination and present her position. Appellant did not vacate the premises.

Thus, on November 15, 1994, appellee filed a complaint in forcible entry and detainer and asked the municipal court for a writ of restitution of possession of the premises. The complaint asserted that appellant failed to pay her security deposit and that she violated the rules and regulations of the apartment complex on numerous occasions by permitting her children and their friends to play football and other games on the lawns and parking areas of the complex.

A hearing was held before a referee. Although the parties stipulated that Bowling Green Estates was not a "public housing project," appellant argued that the acceptance of federal monies and obligations imposed by federal law required appellee to follow federal law in evicting low-income housing tenants. Appellant maintained that this law was not followed in this case due to the lack of notice of the grounds for the eviction and lack of good cause.

At the hearing, Patrick Rawlins, property manager for Buckeye Management Company, testified, without objection, that the company enters into a contract with the housing authority to accept rent payments. He stated that the contract expressly provides that the leases of tenants whose rent is subsidized under the contract can only be terminated for "good cause."

Appellee was permitted to present evidence of appellant's alleged violations of lease provisions.

In his report, the referee relied on the report of the referee in Bowlins Green v. LaChance to support a recommendation

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that a judgment of eviction be awarded to appellee and that a writ of restitution be issued. This report does not contain any findings of fact. In an amended version, which does not incorporate the prior report-and recommendation, the referee set forth several findings of fact related to Kirk's purported violations of the lease. However, this amendment contains no conclusions of law or recommendation.

This report and recommendation was adopted by an "acting judge" of the Bowling Green Municipal Court. After appellant filed objections, the trial court overruled the objections and "reaffirmed" the referee's report and recommendation.

Appellant appeals that judgment and sets forth the following assignments of error:

"THE TRIAL COURT ERRED IN GRANTING APPELLEE'S EVICTION COMPLAINT WITHOUT DETERMINING THE REQUISITE 'GOOD CAUSE' NECESSARY FOR EVICTION FROM LOW-INCOME HOUSING

"THE TRIAL COURT ERRED IN ADOPTING THE REPORT AND RECOMMENDATION OF THE REFEREE.

"THE TRIAL COURT ERRED IN NOT WEIGHING EQUITABLE CONSIDERATIONS TO DETERMINE WHETHER A FORFEITURE SHOULD BE DECLARED."

In her first assignment of error, appellant contends that the trial court erred in granting the complaint for eviction and issuing a writ of restitution because Bowling Green Estates . has characteristics of public low income housing. Therefore, appellee was required to allege and demonstrate good cause for the eviction of appellant.

The precise question before this court is whether the procedures applied when a municipal housing authority evicts a

tenant are applicable to the instant case. This is an issue of first impression in this jurisdiction.

Appellant concedes that Bowling Green Estates is not a "public housing project" within the meaning of 24 C.F.R. 966.4(1), 24 C.F.R. 882.215 or any of a number of other federal housing programs. While we may not totally agree with this concession, the lack of evidence in the record compels this court to accept this premise.

The procedural due process requirements mandated by the Fifth and/or the Fourteenth Amendment(s) of the Constitution of the United States are applicable only in instances involving state action which deprives an individual of life, liberty or property without due process of law. See, e-g., Hodses v. Metts (C.A.6, 19821, 676 F.2d 1133 (Fifth Amendment); Edwards v. Lutheran Sr. Services of Dover, Inc. (19851, 603 F.Supp. 315 (Fourteenth Amendment)). Accordingly, in order to afford appellant the due process rights to which tenants of "public housing^T" are entitled, this court must first determine that the eviction of the LaChances involved "state action." Moose Lodge No. 107 v. Irvis. (19721, 407 U.S. 163.

There is no bright line test for determining whether the conduct of a private entity constitutes state action. Moose Lodge v. Irvis, 407 U.S. at 172. Instead, the United States Supreme Court has applied a variety of state action tests and cautioned the lower courts to carefully examine the facts and circumstances of each individual case. Burton v. Wilmington Parkins Authority (19611, 365 U.S. 715 at 722; Krvnickv v. University of Pittsbursh (C.A.3, 1984), 742 F..2d 94 at 97-98.

Appellant, in essence, asserts that the "nexus test" set forth in Jackson v. Metropolitan Edison Co. (1974), 419 U.S. 345, requires a finding of state action.³ Under the nexus test, the inquiry is whether the private entity is regulated by the state and whether "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. at 351.

In the instant case, appellee, in order to obtain a federal tax credit allocation was required to satisfy the definition of a "qualified low cost housing project" as set forth in Section 42(g)(1), Title 26 U.S. Code. The main features of a qualified low cost housing project under this portion of the Internal Revenue Code is that it serves low-income individuals, as defined in the code, and is "rent-restricted." Sections 42(g) (1) and (2), Title 26, U.S. Code. Section 42(g) (2) provides a specific meaning for and limitation on the term "gross rent" and states the procedures to be followed in, for example, instances where tenant incomes rise above the stated limits. Section 42(g) (4) expressly makes Section 42(d) (3) and (7), Title 26, U.S. Code applicable in determining whether any project is a qualified low income housing project. These sections require, at a minimum, annual determination of the incomes of tenants in the project and annual certification that the project meets the requirements of the statute.

In allocating tax credits, the "housing credit agency" (in this case, the Ohio Housing Financing Agency) is directed to give preference to projects serving the lowest income tenants and

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projects obligated to serve qualified tenants for the longest periods. Section 42(m) (B)(ii), Title 26, U.S. Code.

In the present case, many of these requirements were made part of a written restrictive covenant between appellee and the Ohio Housing Financing Authority. The covenant itself also grants the housing authority inspection rights and binds appellee's successors and assigns. Further, although the covenant does not specifically address this issue, it can be inferred from the provision dealing with foreclosure that the covenant requires good cause for lease terminations during the extended use period.

In addition to this evidence of government regulation as the result of the housing tax credit allocation, the record reveals that appellee entered into a written agreement to receive some type of federally assisted rent payments and that under the agreement appellant could be evicted only for "good cause."

Based upon all of the facts and circumstances of this case, we find that Bowling Green Estatgs was subject to government regulation and that appellee relied on the direct receipt of federal funds to carry out the business of the complex. Moreover, we conclude that there is a nexus between the challenged action, that is, eviction without cause, and the regulations placed upon appellee by the government through the restrictive covenant and the HUB agreement. Accordingly, appellee's. eviction of appellant constituted state action.

Further, the facts of this case support a finding that appellant's interest in continued, stable housing is a property interest for the purpose of due process analysis. As stated in 8.

Jeffries v. Georgia Residential Finance Authority (C.A.11, 1982),

678 F.2d 919 at 925:

I^{rr}To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it ***.I' [Board of Resents v.1 Roth [(1972)1, 408 U.S.[564] at 577, 92 S. Ct. at 2709. A property interest in a benefit may be established through existing rule or mutually explicit understandings that support the claim of entitlement to the benefit, or through the construction of statutes and regulations which define and delimit the interest asserted. (Citations omitted.) II

Thus, in the case before us, we must examine the actual workings of the program to determine whether appellant, absent good cause for termination of their lease, had a reasonable expectation of residing in Bowling Green Estates for an indefinite period. Based upon the terms of the restrictive covenant, the clear statutory purpose of providing long term low-income housing and the federally provided rent assistance which provides appellee with an assured and regular stream of income, we find appellant has an entitlement, or property interest, to continued occupancy in Bowling Green Estates beyond the mere expiration of their lease. Therefore, appellant could not be evicted without good cause. Accordingly, that provision of appellant's lease purporting to permit termination at the end of the lease term is invalid.

,Finally, we must decide what due process requirements are necessary to protect appellant's right to a continued tenancy, absent good cause. Because appellee is, for all intents and purposes, the private landlord of federally subsidized public

housing, we find that the eviction procedures required under both Ohio law and the federal regulations promulgated by HUD for Section 8 evictions must be followed by appellee in terminating appellant's lease. Thus, in this case, appellee was required to, among other things, provide appellant with a thirty day written notice of termination setting forth the specific good cause grounds for the termination, Section 880.607(c), and demonstrate a material noncompliance with the lease or other good cause, Section 880.607(b). This was not provided in this case.

For the foregoing reasons, appellant's first assignment of error is found well-taken.

In her second assignment of error, appellant contends that, under Civ.R. 53(E) (5), the referee's report was insufficient for the court to make an independent analysis of the issues and to apply the appropriate rules of law in reaching its judgment.

Appellee argues that Civ.R. 53(E) is inapplicable to forcible entry and detainer actions. Ghose authorities cited by appellee do not stand for this broad proposition. Rather, in Colonial American Development Co. v. Griffith (1990), 48 Ohio St.3d 72, the Supreme Court of Ohio found that the automatic stay provision of Civ.R. 53(E)(7) was inapplicable to forcible and entry detainer actions. This was the same holding in Cuvahosa . Metro. Housing Auth. v. Jackson (1981), 67 Ohio St.2d 129 (finding a pre-1985 version of Civ.R. 53(E) (7) inapplicable to forcible entry and detainer actions). Indeed, the third case cited by appellee specifically states, that despite the fact that

the automatic stay provisions of Civ.R. 53(E) (7) are not applicable in forcible entry and detainer actions:

II'*** Civ.R. 1(C) has not yet been authoritatively interpreted to hold that in forcible entry and detainer cases, we dispense with the requirement that only judges grant judgments, Jackson, suora, and only on the basis of their independent analysis. Thus, where courts utilize referees in forcible entry and detainer actions, the requirement of a report and recommendation cannot be entirely dispensed with." Zellner v. Turner (Jan. 26, 1993), Greene App.No. 92-CA-41, unreported, quoting Shewman v. Coons (Mar. 29, 1990), Greene App.No. 89-CA-46, unreported.

We agree with this approach. Therefore, because a referee was utilized in this action, we find that his findings of fact must have been submitted to the trial court in such a fashion that the judge was able to establish appellee's right to the premises. Although the referee's initial report failed to include any findings of fact, the referee later amended this report to include findings of fact. Furthermore, the referee expressly referred to the referee's report in LaChance which we have found adequate for independent analysis by the trial judge. Accordingly, we conclude that the requirements of Civ.R. 53(E).(5) were met. Appellant's second assignment of error is found not well-taken.

Appellant, in her third and final assignment of error, asserts that the trial court erred by not considering the equities of the situation before declaring a forfeiture of her leasehold. Due to our disposition of appellant's first assignment of error, we need not reach this question. We note, however, that appellant did raise this argument in the trial

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court, that it is a viable argument, and that it was not considered by the court below. See Gorsuch Homes, Inc. v. Wooten (19921, 73 Ohio App.3d 426, 435.



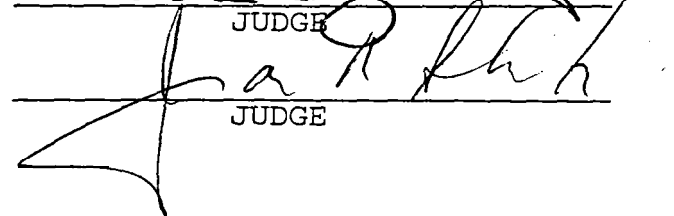
On consideration whereof, this court finds substantial justice was not done the party complaining. The judgment of the Bowling Green Municipal Court is reversed and this cause is remanded to that court for entry of our judgment. Costs of this appeal assessed to appellee. The stay imposed by the trial court and as modified by this court shall remain in effect until entry of this court's judgment by the trial court.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

George M. Glasser, J.

Melvin L. Resnick, J.

James R. Sherck, J.
CONCUR.


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'A third forcible entry and detainer action was brought by Bowling-Green Manor Limited Partnership, doing business as Bowling Green Estates, against Tammy and Mark Barfell. Issues similar to the instant case were involved in the Barfell case. Therefore, the trial court consolidated the two actions. Appellee was granted judgment against the Barfells; they appealed. Nevertheless, they later voluntarily dismissed that appeal.

CERTIFICATE TO COPY

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The State of Ohio, Wood County.

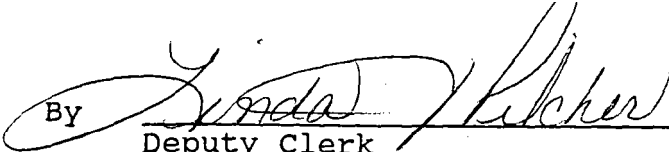
Common Pleas Court
Court of Appeals

I, the undersigned, Clerk of the Common Pleas Court and the Sixth District Court of Appeals within and for said County and in whose custody the Files, Journals and Records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the original now on file in said Court, that said foregoing has been compared by me with the original document and that it is a true and correct copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name
officially and affix, the seal of said Court,
at the Court House, in Bowlins Green, Ohio in said
County, this 7th day of July, 1995

REBECCA E. BHAER, Clerk of Courts

By


Deputy Clerk