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IN THE COURT OF APPEALS OF WOOD COUNTY

Bowling Green Manor
Limited Partnership

Court of Appeals No. WD-94-117

Trial Court No. 94-CV-G-912

Appellee

v.

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS

Jodi and Marc LaChance
JUL - 3 1995

DECISION AND JUDGMENT ENTRY

Appellants

Decided: June 30, 1995

Rebecca E. Shaer
* * * * *

Thomas E. Teet, for appellee.

Steve Robins, for appellants.

* * * * * ,_&

This case comes before the court on appeal from a judgment of the Bowling Green Municipal Court.

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) (31, Title 26, U.S. Code. Pursuant to the covenant, appellee agreed to lease one hundred percent of the units in Bowling Green Estates as "low-income housing" ('affordable to individuals with incomes at or below fifty percent of the area gross median income) for an initial term of fifteen years and an extended 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, in the event of foreclosure during the "extended use period," that "for a three year period after such termination, no low-income tenant may be evicted, for other than good cause ⁱ***.I' In addition, the restrictive covenant expressly runs with the land, must be recorded in the public records of the county in which the project is located, 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:

"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."

On August 13, 1993, appellants, Marc and Jodi LaChance, signed a one year lease for the rental of an apartment in Bowling Green Estates. The apartment was occupied by appellants and their two minor children.

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 LaChance apartment was \$425. However, for at least the months of June, July and August 1994, the LaChances paid only a small portion (\$29) of this rent amount each month. A government supplement paid through the Henry County Metropolitan Housing authority provided for the remainder of the monthly rent.

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 August 31, 1994, appellee served appellants with a written thirty day notice of the termination of their lease. The sole basis for termination listed in the notice was the lapse of their initial lease. Appellants did not vacate the premises by the thirtieth day.

On October 3, 1994, appellants, as holdover tenants, received a three day notice to leave the premises. The notice stated that, pursuant to "Federal Regulations," appellants could meet with the "owner's agent" to discuss the proposed termination and present their position. Appellants did not vacate the premises.

Thus, on October 14, 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. Appellee also requested damages, i.e., rent for September and October 1994, damages for any unreasonable wear and tear, interest, costs and attorney fees.

A hearing was held before a referee. Although the parties stipulated that Bowling Green Estates was not a "public housing project," appellants 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. Appellants maintained that this law was not followed in this case thereby depriving them of their constitutional due process rights.

When appellee attempted to present evidence of appellants' alleged violations of lease provisions, appellants objected. The referee sustained this objection.

Pat Rawlins, property manager for Buckeye Management Company, was, however, allowed to testify that the LaChances failed to recertify their income (for the purpose of receipt of the housing tax credit allocation) as required by the lease. He also stated that any rent subsidies received by appellants were

the result of a "HUD" (United States Department of Housing and Urban Development) contract between the LaChances and the Henry County Metropolitan Housing authority. Rawlins further testified that he informed the housing authority that Bowling Green Estates would not sign the contract. Jodi LaChance maintained that the housing authority stopped tendering its share of the rent because appellee refused to sign the contract.

One of the exhibits is a letter addressed to Jodi LaChance, which states:

"The Department of Housing and Urban Development requires that we periodically review your income and family composition to determine if you are still eligible to receive housing assistance.

"To complete our review of your income and family composition, you must schedule a recertification interview with the Rental Office and supply required information. Please contact us as soon as possible and set up an appointment.

"If you do not respond to this letter by the date indicated above, your lease gives us the right to raise your rent." v

In his report and recommendation, the referee concluded, among other things, that Bowling Green Estates was not a "public housing project" subject to federal rules and regulations. The referee recommended that a judgment of eviction be awarded to appellee and that a writ of restitution be issued. This report and recommendation was adopted by an "acting judge" * of the Bowling Green Municipal Court. After appellants filed objections, the trial court overruled the motion and "sustained" the referee's report and recommendation.

The trial court also granted appellants' motion for a stay during the pendency of appeal upon the posting of a \$4,250 supersedeas bond. Appellants asked this court to modify the terms of the stay. However, this court denied this motion.

In its brief, appellee asserts that appellants were unable to post the stated bond and are no longer in possession of the premises. They therefore urge that the instant appeal is moot. Appellants maintain, on the other hand, that the issue on appeal is, inter alia, one of great public importance; therefore, their appeal is not moot. We agree. See Franchise Developers, Inc. v. Cincinnati (1987), 30 Ohio St.3d 28. Moreover, where others who are similarly situated would benefit from the resolution of an appeal, it will not be dismissed as moot. See Stacy v. Carr (Feb. 20, 1992), Adams App. No. 519, unreported; Sandefur Manasement Co. v. Minor (Apr. 18, 1985), Franklin App. No. 84-AP-220, unreported. The question of whether appellee is "public housing" for the purpose of eviction procedures is one with far reaching effects. Further, appellee has followed the same procedure in evicting at least two other tenants. See Bowling Green Manor Limited Partnership v. Kirk (June 30, 1995), wood App. No. WD-94-125, unreported. We therefore find that this appeal should not be dismissed as moot.

In their first assignment of error, appellants contend that the trial court erred in granting the complaint in eviction and issuing the petition for writ of restitution because appellee could be characterized as a "public landlord;" therefore, appellee was required to allege and demonstrate good cause for the eviction of appellants.

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.

Appellants concede that Bowling Green Estates is not a "public housing project" within the meaning of 24 C.F.R. 966.4111, 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 appellants the due process rights to which tenants of "public housing" are entitled, this court must first determine that the eviction of the LaChances involved "state action." Moose Lodse No. 107 v. Irvis (1972), 407 U.S. 163.

There is no bright line test for determining whether the conduct of a private entity constitutes state action. Moose Lodse 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. Wilminston

Parking Authority (1961), 365 U.S. 715 at 722; Krvnickv v. University of Pittsburgh (C.A.3, 19841, 742 F.2d 94 at 98.

Appellants evidently assert that the "nexus test" set forth in Jackson v. Metropolitan Edison Co. (19741, 419 U.S. 345, requires a finding of state action.² 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. Metrooolitan 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) (11, 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 tlrent-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 142(d) (3) and (71, 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 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, at least in the case of appellants, entered into a written agreement to receive some type of federally assisted rent payments.

Based upon all of the facts and circumstances of this case, we find that Bowling Green Estates 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. Accordingly, appellee's eviction of appellants constituted state action.

Further, the facts of this case support a finding that appellants' interest in continued, stable housing is a property interest for the purpose of due process analysis. As stated in Jeffries v. Georgia Residential Finance Authority (C.A.11, 1982), 678 F.2d 919 at 925:

"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 Regents v. Roth C(1972)], 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.) I¹

Thus, in the case before us, we must examine the actual workings of the program to determine whether appellants, 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 appellants had an entitlement, or property interest, to continued occupancy in Bowling Green Estates beyond the mere expiration of their lease. Therefore, appellants could not be evicted without good cause. Accordingly, that provision of appellants' 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 appellants' 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 appellants' lease. Thus, in this case, appellee was required to, among other things, provide appellants 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, appellants' first assignment of error is found well-taken.

In their second assignment of error, appellants argue that the trial court abused its discretion in ordering appellants to post a supersedeas bond of \$4,250. We decline to address this issue because, as noted by appellants in their first sentence under this assignment of error, this court previously determined that the lower court did not abuse its discretion in setting bond. The principles of res iudicata and law of the case prevent this court from revisiting an issue already litigated between these same parties. See Charles A. Burton, Inc. v. Durkee (1954) 116.2 Ohio St. 433, 437; Nolan v. Nolan (1984), 11 Ohio St.3d 1, 2-3.

Accordingly, appellants' second assignment of error is found not well-taken.

Appellants' third assignment of error asserts that the trial court erred in adopting the report and recommendation of the referee, claiming noncompliance with Civ.R. 53(E)(5).

Civ.R. 53(5) states, in pertinent part:

"The referee's findings of fact must be sufficient for the court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment order."

Arguably, due to our disposition of appellants' first assignment of error, we need not reach this issue. However, a review of the disputed report and recommendation reveals that it does contain sufficient findings of fact upon which the municipal court could conduct the mandated independent analysis.

Appellants' third assignment of error is found not well-taken.



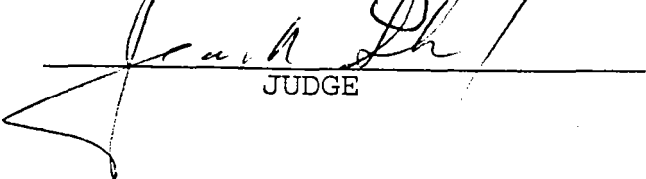
The judgment of the Bowling Green Municipal Court is reversed. Costs of this appeal are assessed to appellee.

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.


JUDGE

JUDGE

JUDGE

1As defined in Section 42(h) (6) (D), Title 26, U.S. Code, an "extended use period" is a period beginning on the first day in which a building is part of a qualified low income housing project and ending on a date specified by the housing credit agency in the agreement or the date which is fifteen years after the close of the compliance agreement.

²Other specific tests which have been applied to determine state action are the "symbiotic relationship" test, the "state compulsion" test and the "public function" test. See Krvnickv v. University of Pittsbursh, 742 F.2d at 98 and at 98 n-4.

CERTIFICATE TO COPY

ORIGINAL ON FILE

The State of Ohio, Wood County.

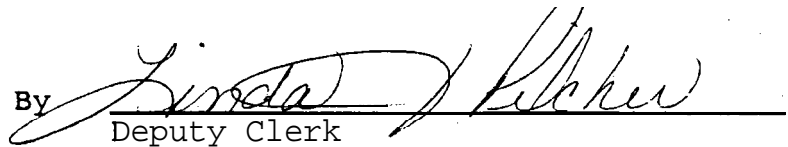
Common Pleas Court
Court of Appeals

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