DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-15-30,666

In re: 300 Aspen Street, N.W., Apt. 201

Ward Four (4)

EVIE AMARILYS ILES
Tenant/Appellant

v.

BUTTERNUT WHITTIER ASSOCIATES, LLC
Housing Provider/Appellee

DECISION AND ORDER

November 10, 2016

EPPS, COMMISSIONER. This case is on appeal to the Rental Housing Commission ("Commission") from the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD").[1] These proceedings are governed by the applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 - 3509.07 (2012 Repl.), the District of Columbia Administrative Procedures Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899, 1 DCMR §§ 2921-2941, and 14 DCMR §§ 3800-4399 (2004).

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the Office of Administrative Hearings Establishment Ace of 2001, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

I. PROCEDURAL HISTORY[2]

On May 11, 2015,[3] Evie Amarilys Iles ("Tenant"), residing in Unit 201 of the housing accommodation located at 300 Aspen Street, N.W. ("Housing Accommodation"), filed tenant petition RH-TP-15-30,666 ("Tenant Petition") with the RAD against Butternut Whittier Associates, LLC ("Housing Provider"). *See* Tenant Petition at 1-4; R. at 7-10. In her Tenant Petition, the Tenant asserted that the Housing Provider violated the Act as follows:

(1) Increased her rent above that which is allowed by any applicable provision of the Act;

(2) Failed to provide the Tenant with the proper 30-day notice of rent increase within 30 days of the effective date of the increase;

(3) Did not file the correct rent increase forms with the RAD; and

(4) Increased the Tenant's rent while her rental unit was not in substantial compliance with the D.C. Housing Regulations.

Id. at 2-3; R. at 8-9.

OAH scheduled the matter for mediation on July 14, 2015. OAH Order Scheduling Mediation at 1-2; R. at 14-15. On July 10, 2015, at 4:26 p.m., the Tenant filed a hand written request to continue the mediation ("First Request") with OAH. R. at 16. OAH granted the Tenant's request and rescheduled the mediation to July 28, 2015, at 2:30 p.m. OAH Transmittal Order at 1-2; R. at 16-17.

[2] Tenant's Notice of Appeal was filed with the Rental Housing Commission on December 17, 2016. The record in this matter was received from the OAH on June 28, 2016, or about seven months after the date of filing of the Notice of Appeal. Notice of Scheduled Hearing and Notice of Certification of Record were sent to the parties on August 3, 2016, for the September 13, 2016 hearing.

[3] The Commission notes that both the Final Order and the Order Denying Reconsideration list the filing date of the instant petition to be May 29, 2015, *see* R at 53 and 142, and that the Case Management Order lists the filing date of the Tenant Petition to be May 27, 2015, *see* R at 45. The Commission's review of the record reveals, however, that the RAD date stamped its receipt of the Tenant Petition on May 11, 2015 at 2:39 p.m. *See* R at 10.

On July 23, 2015, at 5:27 p.m., the Tenant submitted, via email to OAH,[4] a request to continue the mediation that had been rescheduled to July 28, 2015 ("Second Request"). R. at 19-22. The Housing Provider filed an opposition to this second continuance request on July 27, 2015 ("First Opposition"). R. 24-27. Over the objection of the Housing Provider, OAH granted the Tenant's request to continue the mediation and rescheduled the mediation to September 8, 2015, at 2:30 p.m.[5] In granting this request, the Administrative Law Judge ("ALJ") noted that "absent extenuating circumstances, this is the second and final continuance granted." R. at 22.

The September 8, 2015, mediation proved unsuccessful. Iles v. Butternut Whittier Assocs., LLC, 2015-DHCD-TP 30,666 (OAH Oct. 21, 2015) ("Final Order") at 2; R. at 53. On September 18, 2015, the ALJ issued a Case Management Order ("CMO") setting the matter for an October 21, 2015, hearing. CMO at 1; R. at 38.

On October 20, 2015, at 4:47 p.m., OAH received, via email, a third continuance request from the Tenant ("Third Request"), asking to reschedule the next morning's hearing. R. at 46-47. The Tenant's Third Request was addressed by the ALJ during the scheduled hearing the following morning. When the matter was called on October 21, 2015, the Tenant failed to appear for the hearing. Upon the Housing Provider's oral motion, the ALJ orally denied the Third Request and dismissed the Tenant Petition because of the Tenant's failure to appear. Hearing CD (OAH Oct. 21, 2015) at 09:40-09:43.

Thereafter, a final order was issued by the ALJ, denying the Tenant Petition with prejudice for failure to prosecute. Final Order at 1-6; R. at 49-54. The Final Order contained the following findings of fact:

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[4] The record indicates this request was accepted for filing on July 24, 2015 at 9:02 a.m. R. at 20.

[5] The Tenant's Second Request was granted by Administrative Law Judge Eli Benjamin Burch. R. at 22.

1. On May 29, 2015, Tenant filed TP 30,666 with RAD of the DHCD alleging violation of the Rental Housing Act.

2. OAH issued an Order on June 22, 2015, scheduling this case for mediation on July 14, 2015. At the Tenant's request, the mediation was rescheduled for July 28, 2015.

3. Tenant requested a continuance of the July 28, 2015, mediation which Housing Provider because of a Drayton Stay was in place in a pending landlord-tenant action until this case is resolved. Over Housing Provider's objection, mediation was rescheduled for September 8, 2015. A mediation session held September 8, 2015, was unsuccessful.

4. On September 18, 2015, this administrative court issued a Case Management Order (CMO) directing the parties to appear for a hearing on October 21, 2015 at 9:30 a.m., at the Office of Administrative Hearings. The CMO cautioned that **"If you do not appear for the hearing, you may lose the case."** The CMO also ordered the parties to file, at least five days before the hearing, copies of any documents the party wished to present as evidence, and a list of any witnesses to be called to testify."

5. Housing Provider filed its exhibits and witness list on October 16, 2015. Tenant did not file any documents before the hearing.

6. The CMO further provided that if a party requests a continuance and did not receive an Order granting the request, **"you are required to appear at the date and time that appear in this Case Management Order or you may lose your case."**

7. On October 20, 2015, at 4:47 p.m., Tenant filed a request for a new hearing date because of a work scheduling conflict she had learned the day before. With that request, she provided a telephone number that is out of service. The request was not granted prior to the hearing.

8. Housing Provider appeared for the hearing as scheduled. Tenant failed to appear for the hearing.

Final Order at 2; R. at 53.

The ALJ made the following conclusions of law in the Final Order:

1. Tenant received proper notice of the hearing date. Dusenbery v. United States, 534 U.S. 161, 167-71 (2002). But, she asked for a last minute continuance.

2. OAH Rule 2812.6 allows me to grant a continuance when a party shows good cause, which has not been shown here. Since filing the tenant petition, Tenant demonstrated a pattern of dilatory tactics with two

requests to reschedule mediation and the request to reschedule the hearing. She did not file the necessary documents five days before the scheduling hearing, which suggests that she did not intend to try the case. Yet, it was on the eve of trial that she filed the request for a continuance, with no corroborating information to support her contention that she had a work conflict. On this record, the continuance is denied.

3. The OAH rules provide that if the party initiating a case fails to comply with an Administrative Law Judge's order or otherwise fails to prosecute the case, the Administrative Law Judge may, on his or her own motion or on the motion of the opposing party, dismiss all or part of the case. OAH rule 2818.1. Dismissal will ordinarily be with prejudice unless the Administrative Law Judge finds good cause to dismiss without prejudice.

4. The DCAPA provides that "In contested cases... the proponent of a rule or order shall have the burden of proof." D.C. Official Code § 2-509(b). Tenant has the burden of proof in this case. Because Tenant failed to appear at the hearing after receiving proper notice, and Tenant has not shown good cause for failing to appear, this case is dismissed with prejudice. *See DOH v. Agape Cabbage Patch/Le Mae Early Child Dev. Ctr.*, 2001 D.C. Off. Adj. Hear. LEXIS 36 at 4 (holding that where neither party appears at a hearing, a failure to appear by the party with burden of proof justifies dismissal of the case with prejudice by analogy to D.C. Super. Ct. Civ. R. 41(b)); *Cf. McFadden v. Fullington*, TP 27,122 (RHC Sept. 18, 2002) (dismissing appeal where neither party appeared at a hearing because the appellant had the burden of proof).

Final Order at 3; R. at 52.

On November 5, 2015, the Tenant filed a "Request to Change a Final Order" ("Motion for Reconsideration"). R. at 61-63. On November 19, 2015, the Housing Provider filed "Respondent's Opposition to Motion for Reconsideration" ("Opposition to Reconsideration"). R. at 137-34. Thereafter, on November 30, 2015, the ALJ denied the Tenant's Motion for Reconsideration ("Order Denying Reconsideration"). R. at 138- 42. Relying on 1 DCMR § 2828.5, the ALJ determined that:

> Although on the surface her reason seems to be a good one, she did not corroborate the alleged work conflict with any objective evidence such as a statement from an employer. The record shows that Ms. Iles has a pattern of delay at OAH and in Superior Court. Such a pattern, coupled with her late request for a continuance of the hearing, support a conclusion that the delays have been sought in bad faith, causing prejudice to Housing Provider who brought an

action in Superior Court and is defending this case. Granting the pending Motion will only extend the pattern of delay. Substantial justice supports denial.

Order Denying Reconsideration at 2; R. at 141.

On December 17, 2015, the Tenant filed a timely Notice of Appeal with the Commission ("Notice of Appeal").[6] In the Notice of Appeal, the Tenant raises the following issues:

1. Tenant had good reason for not attending the hearing.

2. Tenant is unschooled in the law.

3. Tenant believes the final order contains an error of law.

Notice of Appeal at 1. Neither party filed a brief. On September 13, 2016, the Commission held a hearing in this matter, at which the Tenant and counsel for the Housing Provider were in attendance. Hearing CD (RHC Sept. 13, 2016) at 2:03.[7]

II. PRELIMINARY ISSUE ON APPEAL

Whether the Tenant Has Standing to Appeal the Final Order

The Commission's standard of review is set forth at 14 DCMR § 3807.1 (2004) and provides the following:

> The Commission shall reverse final decisions of the [Office of Administrative Hearings] which the Commission finds to be based upon arbitrary action,

[6] Pursuant to the Commission's rules at 14 DCMR § 3802.2 (2004), a notice of appeal must be filed within ten days after a final decision is issued, plus three days if the final decision is mailed to the parties. *See, e.g.*, Novak v. Sedova, RH-TP-15-30,653 (RHC Nov. 20, 2015) at 2. Pursuant to 14 DCMR § 3816.3, weekend days and legal holidays are excluded from the computation of time periods.

[7] In assessing the Tenant's appeal, the Commission is mindful of the important role that lay litigants play in the Act's enforcement. *See, e.g.*, Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1298-99 (D.C. 1990); Cohen v. D.C. Rental Housing Commission, 496 A.2d 603, 605 (D.C. 1985). Courts have long recognized that *pro se* litigants can face considerable challenges in prosecuting their claims without legal assistance. *See* Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 134 U.S. App. D.C. 44,47, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). Nonetheless, "while it is true that a court must construe pro se pleadings liberally. . . the court may not act as counsel for either litigant." *See* Flax v. Schertler, 935 A.2d 1091, 1107 n.14 (D.C. 2007) (quoting Bergman v. Webb (In re Webb), 212 B.R. 320, 321 (Bankr. Fed. App. 1997). As the D.C. Court of Appeals ("DCCA") has stated, a *pro se* litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forego expert assistance." *See* Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 979 (D.C. 1999) (quoting Dozier v. Ford Motor, Co., 702 F.2d 1189, 1194 (D.C. Cir. 1993)).

> capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the [Office of Administrative Hearings].

The Commission has consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (other citations omitted); Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014) at 22; Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012) at 4-5; Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012)at 11-12; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) at 11-12. The Commission will review legal questions raised by an ALJ's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md) v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-03 (D.C. 2005)); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013).

The rules of OAH provide that, if a party fails to appear at a hearing, the ALJ may dismiss the case. 1 DCMR § 2818.3 (2010).[8] Moreover, it is well-established that a party who fails to appear for a hearing does not have standing to appeal an adverse judgment because of that failure. *See* DeLevay v. D.C. Rental Accommodations Comm'n, 411 A.2d 354, 360 (D.C.

[8] 1 DCMR § 2818.3 provides:

> If an attorney, representative, or unrepresented party fails, without good cause, to appear at a hearing, the Administrative Law Judge may dismiss the case, enter an order of default, decide the case on the merits, or impose other sanctions.

The Commission notes that the rules of OAH were amended, on an emergency basis, on November 6, 2015, 62 DCR 14365, and by final rulemaking on April 29, 2016, 63 DCR 6556. The Commission applies the rules that were in effect on the relevant dates.

1980); Dorsey v. Bailey, RH-TP-11-30,165 & RH-TP-12-30,222 (RHC July 2, 2014); Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013). The Commission, however, has applied an exception to this rule when the party that failed to appear did not have notice of the hearing. *See* Radwan v. D.C. Rental Hous. Comm'n, 683 A.2d 478, 481 (D.C. 1996); Dorsey, RH-TP-11-30,165 & RH-TP-12-30,222.

In Radwan, the District of Columbia Court of Appeals ("DCCA") identified four factors that the Commission must consider when determining whether to set aside an order of dismissal: (1) whether the movant received actual notice of the proceeding; (2) whether the movant acted in good faith; (3) whether the movant acted promptly; and (4) whether the movant presented a *prima facie* adequate defense. Radwan, 683 A.2d at 481 (citing Dunn v. Profitt, 408 A.2d 991 (D.C. 1979)). Against these factors, the Commission must also weigh whether there would be any prejudice to the non-moving party. Radwan, 683 A.2d at 481.

A. Whether the Tenant received actual notice of the hearing

The Commission's review of the record indicates that, regarding the first factor of the analysis under Radwan, 683 A.2d at 481, the Tenant did have proper notice of the October 21, 2015, evidentiary hearing. The issue of notice was neither addressed in the Tenant's Notice of Appeal, nor was the issue of notice raised in the Third Request.[9]

The Commission is mindful that "proper notice of an adjudicatory proceeding is mandated by the Act, case law, and traditional principals of due process of law." Williams v. Thomas, TP 28,530 (RHC Sept. 27, 2013) at 13 (quoting Prosper v. Pinnacle Mgmt., TP 27,783

[9] The Tenant's claimed reason for the request for continuance was what could be considered a last minute work conflict, rather than an expression of surprise over a lack of advanced notice of the hearing date. *See* Third Request at 1; R. at 47. Nonetheless, at the Commission's hearing, the Tenant conceded that she had received notice of the hearing. When questioned by the Commission whether she had received the CMO in which notice was contained on the first page, the Tenant recalled that she had received a one-page document notifying her of the hearing. Hearing CD (RHC Sept. 13, 2016) at 11:13:48 & 11:17:40.

(RHC Sept. 8, 2012) at 10 (quoting Wofford v. Willoughby Real Estate, TP 10,687 (RHC Apr. 1, 1987) at 2); *see* Reckord v. Peay, TP 24,896 (RHC Aug. 9, 2002) at 6. Therefore, although there is no dispute surrounding this Radwan factor, the Commission finds it appropriate to evaluate the record as it relates to the issue of the Tenant's receipt of notice.

As a matter of course, the Commission recognizes "a presumption of receipt of notice if the agency has properly mailed it." *See* Williams, TP 28,530 at 12 (quoting Prosper, TP 27,783 at 10); *see also* Foster v. District of Columbia, 497 A.2d 100, 102 n.10 (D.C. 1985); Allied Am. Mut. Fire Inc. Co. v. Paijze, 143 A.2d 508, 510 (D.C. 1958); Belmont Crossing/KSI Mgmt./Edgewood Mgmt. Corp. v. Jackson, TP 28,292 (RHC Mar. 6, 2009) at 7; William C. Smith Co. v. Miller, TP 24,663 (RHC June 28, 2000) at 5; John's Props. v. Hilliard, TPs 22,269 & 22,116 (RHC June 24, 1993) at 5-6; Tenants of 3140 Wisconsin Ave., N.W. v. Kent, CI 20,013 (RHC May 26, 1986) at 3. Once the presumption of receipt arises, "the party claiming non-delivery has the burden of rebutting the presumption with a preponderance of evidence to the contrary." Prosper, TP 27,783 at 10 (other citations omitted); *see also* Williams v. Poretsky Mgmt., Inc., TP 23,156 (RHC Sept. 13, 1994) at 3.

D.C. OFFICIAL CODE § 42-3502.16(c) (2012 Repl.) provides:

> If a hearing is requested timely by either party, notice of the time and place of the hearing shall be furnished the parties by first-class mail at least 15 days before the commencement of the hearing. The notice shall inform each of the parties of the party's right to retain legal counsel to represent the party at the hearing.

The Commission has held that "[n]otice is considered properly mailed when the record indicates notice of the hearing was mailed to the parties at their correct addresses." Barnes-Mosaid v. Zalco Realty, Inc., TP 29,316 (RHC Sept. 28, 2012) at 6; *See*, Greene v. Eva Realty, LLC, TP 29,118 (RHC Sep. 4, 2009); William, TP 24,663 at 5; *see also* Williams, TP 23,156 at 3; Wofford, TP 10,687 at 2.

Here, the CMO's certificate of service establishes that on September 18, 2015, OAH sent a notice of the hearing by first-class mail to the Tenant. CMO at 6; R. at 33. The address OAH used was the address of record provided by the Tenant in her Tenant Petition (300 Aspen Street, NW, #201 Washington, D.C. 20012). *See* R. at 7-10, 33; CMO at 6. The Commission's review of the record reveals that there is no evidence in the record that the CMO was returned as undeliverable.[10]

Because the Commission's review of the record demonstrates that the CMO was sent by first-class mail to the address of record at least fifteen days prior to the hearing, *see* CMO at 1; R. at 38, the Commission is satisfied that OAH provided notice of the hearing to the Tenant in accordance with D.C. OFFICIAL CODE § 42-3502.16(c) (2010). *See* Barnes-Mosaid, RH-TP-08-29,316 at 5-6. Accordingly, the first Radwan factor weighs against the Tenant.

B. Whether the Tenant Acted in Good Faith

As for the second factor in Radwan, the evidence within record is contrary to the notion that the Tenant acted in good faith. *See* Radwan, 683 A.2d at 481. Good faith has been defined as "a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." BLACK'S LAW DICTIONARY 713 (8th ed. 2004); *see also* Dorsey, RH-TP-11-30,165 & RH-TP-12-30,222; Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012) (any claim of good cause was undermined by failure to timely explain absence, failure file motion to continue, as well as failure to attend hearings); Prosper, TP 27,783. Failing to appear at the hearing, not filing any

[10] During the Commission's hearing, the Tenant stated she received one, single-page notice of the October 21, 2015, evidentiary hearing. Hearing CD (RHC Sept. 13, 2016) at 11:13:43-11:13:48. The Commission's review of the record reveals no evidence in the record to support what the tenant described as a single-page notice, but rather, the record evinces that the CMO, a five-page document in length, was the only notice sent to the parties of the October 21, 2015, hearing. CMO at 1-6; R. at 33-38.

documentary evidence or witness list, coupled with the unsubstantiated continuance requests, support the ALJ's "conclusion that the delays [were] sought in bad faith." Order Denying Reconsideration at 2; R. at 141; *see* Prosper, TP 27,783; Belmont Crossing, TP 28,292; *see also* Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 979 (D.C. 1999) (*pro se* litigant should have known that he had to make at least a minimal disclosure of the substance of the evidence with which he was to prove his case); Abell v. Wang, 697 A.2d 796, 804 (D.C. 1997); Mooskin v. Bourge, TP 27,809 (RHC Dec. 11, 2003); Solomon v. Fairfax Village Condominium IV Unit Owner's Assoc., 621 A.2d 378 (D.C. 1993) (moving party failed to follow a detailed scheduling order which had been issued giving warning of exactly what needed to be completed and when).

In bold print and in all capital letters on the front of the CMO, directly below where the date of the hearing is provided, it states clearly **"PLEASE READ THE IMPORTANT INFORMATION REGARDING YOUR HEARING THAT FOLLOWS."** CMO at 1; R. at 45. On page four of the CMO, in **BOLD** it provides that "**Only an Administrative Law Judge can change a scheduled hearing date. If you do not receive an order granting the motion to continue the hearing, you are required to appear at the date and time that appear in this Case Management Order or you may lose your case.**" CMO at 4; R. at 42. The Tenant maintains that she had difficulty complying with these instructions because she is "not schooled in the law." *See* Notice of Appeal at 1-2.

As noted *supra* at n.7, the Commission acknowledges the valuable role *pro se* litigants play in enforcing the Act. *See* Goodman, 573 A.2d at1298-1299; Cohen v. D..C. Rental Housing Commission, 496 A.2d 603, 605 (D.C. 1985). The Tenant, although *pro se*,[11] filed multiple

[11] The DCCA has noted that "[i]n matters involving pleadings, service of process, and timeliness of filings, *pro se* litigants are not always held to the same standards as are applied to lawyers." Padou v. District of Columbia, 998 A.2d 286, 292 (D.C. 2010) quoting Macleod, *Id.* at 980 (other citations omitted). Nonetheless, the Commission is similarly aware that, "while it is true that a court must construe *pro se* pleadings liberally . . . the court may not act

motions for continuance as well as to invoke a Drayton stay[12] in furtherance of the litigation of these issues.[13] The Commission is unpersuaded by the Tenant's reliance on her lack of legal knowledge or representation as an explanation for failing to follow the ALJ's plainly worded instructions or failing to offer any substantiation for her inability to attend the evidentiary hearing. *See* Wade v. Park Rd. Assocs., TP 27,631 (RHC Mar. 27, 2007) (petitioner must be given notice of possibility of dismissal with prejudice); *See,* e.g. Tillman v. Reed, RH-TP-08-29,136.[14] The evidence in the record does not demonstrate that the Tenant was faithful in her duty and obligation as a party to this litigation. *See* Wade, RH-TP-07-27,631; Tillman, RH-TP-08-29,136; *see also* Macleod, 766 A.2d at 979-80; *see, e.g.,* Perry v. Sera, 623 A.2d 1210, 1219 n.23 (D.C. 1993) (a detailed scheduling order had been issued to give warnings of exactly when pretrial matters (including discovery) were to be completed; appellant demonstrated a pattern of noncooperation and dilatoriness for failing to follow court orders and rules.); Solomon, 621 A.2d 378.

The Commission cannot ignore the evidence in this record, as noted *supra* at 10-11, which indicates substantial evidence of a pattern of behavior by the Tenant of unexplained and unsubstantiated delays in this case. As such, the substantial evidence in the record undermines

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as counsel for either litigant." Flax, 935 A.2d at 1107 n.14 (quoting Bergman, 212 B.R. at 321). *See also, supra* n.7.

[12] *See* Drayton v. Poretsky Mgmt. Inc., 462 A.2d 1115 (D.C. 1983).

[13] The Commission's review of the record shows that this appeal was filed during the parties' initial trial in their related Superior Court Landlord and Tenant Branch case, which has been in litigation for more than two years. *See* TP at 1-4; R. at 7- 10; Opposition to Reconsideration at 2, para. 5; R. at 136.

[14] The DCCA has stated, a *pro se* litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forego expert assistance." Macleod, 736 A.2d at 979 (quoting Dozier., 702 F.2d at 1194); *see* Tenants of 4021 9th St., N.W. v. E & J Props., LLC, HP 20,812 (RHC June 11, 2014) at n.8; Peters, RH-TP-07-28,898. *See also, supra* n.7 & n.11.

any claims of good faith, and thus the second Radwan factor weighs heavily against the Tenant. *See* Wade, TP 27,631; Tillman, RH-TP-08-29,136.

C. Whether the Tenant Acted Promptly

The third factor of our analysis under Radwan, 683 A.2d at 481, is whether the moving party acted promptly in response to the ALJ's dismissal of her Tenant Petition. The Commission's review of the record indicates that the Tenant timely filed her Motion for Reconsideration and the Notice of Appeal from the Final Order following the ALJ's denial of the Motion for Reconsideration. *See supra* at 5; *see also,* 14 DCMR §§ 3802.2 & 3816.3. Based upon its review of the record, the Commission determines the Tenant acted promptly following dismissal of the Tenant Petition. *See* Tillman, RH-TP-08-29,136; *see also* Greene, TP 29,118; Shamma v. Cafritz Co., TP, 28,720 (RHC June 1, 2007), Joyce v. Webb, TPs 20,720 & 349 (RHC April 3, 1997). Accordingly, the third Radwan factor weighs in favor of the Tenant.

D. Whether the Tenant Presented a *Prima Facie* Adequate Defense

Consistent with the fourth Radwan factor, the Commission is satisfied that, after a review of the record (including the Tenant's Third Request, Motion for Reconsideration, and Notice of Appeal), the Tenant has not presented "a *prima facie* adequate defense" in her appeal. *See* Radwan, 683 A.2d at 481

In order to present an adequate *prima facie* defense, "all that is required is for the moving party to provide a 'reason to believe that vacating the judgment will not be an empty exercise or a futile gesture.'" Tillman, RH-TP-08-29,136 at 15 (quoting Frausto v. U.S. Dept. of Commerce, 926 A. 2d 151, 157 (D.C. 2007) (quoting Nuyen v. Luna, 884 A.2d 650, 657 (D.C. 2005)) (other citation omitted). "A meritorious defense is 'something more than [a] bald allegation, but certainly something less than a pretrial hearing on the merits.'" Belmont Crossing, TP 28,292

(housing provider made bare assertion of being exempt from the Rental Housing Act without evidentiary support from the record); Greene, TP 29,118 at 7 (quoting Clark v. Moler, 418 A.2d 1039, 1043 (D.C. 1980)); *see also* Hernandez v. Banks, 84 A. 3d 543, 551 (D.C. 2014); Joyce, TPs 20,720 & 349 at 12.

The Commission's review of the Tenant's Notice of Appeal did not reveal any reference to the original claims listed in the Tenant Petition. In addition, it did not reveal that the Notice of Appeal provided a valid explanation for the Tenant's failure to file a witness or other documentation in preparation for the hearing. Rather, the Commission's review indicates that the primary focus of the Notice of Appeal was to challenge the ALJ's determination denying the Tenant's request to continue the October 21, 2015, evidentiary hearing. Consequently, the Commission is unable to determine the legal merits of the Tenant's primary claims or defenses based on in the Tenant Petition since the Tenant raised no issues as to the legal merits of her claims in the Tenant Petition in her Notice of Appeal. Quite the contrary, the Tenant's claims on appeal are a list of alleged procedural irregularities solely related to the "unfairness of the dismissal." Hence, the Commission's review of the Notice of Appeal does not reveal any claims or issues raised by the Tenant in her initial Tenant Petition. Therefore based on the Commission's review of the record below regarding the claims in her Tenant Petition and the issues raised in the Notice of Appeal, the Commission determines that the Tenant failed to provide a *prima facie* defense or *prima facie* support for her claims in the Tenant Petition in her Notice of Appeal. Accordingly, the fourth Radwan factor weighs against the Tenant.

E. Balancing of the Four Factors against Prejudice to the Housing Provider

The Commission's review does not end with the evaluation of each of the four Radwan factors, rather, "against these factors, prejudice to the non-moving party must be considered" by

the Commission. *See* Radwan, 683 A.2d at 481. This is due to "the strong judicial policy favoring a trial on the merits; however there is a possibility for prejudice to the nonmoving party when a judgment is vacated." Lenkin Co. Mgmt. v Miller, TPs 27,191-93 (RHC June 4, 2004), at 7; *see also* Greene, TP 29,118 at 5 (citing Radwan, 683 A.2d at 481). In its response to the Tenant's Motion for Reconsideration, the Housing Provider asserted that it would be prejudiced by "any Reconsideration of the Final Order, as it will delay the ability to proceed in the ongoing Landlord and Tenant [Branch] case" in D.C. Superior Court. Opposition to Reconsideration at 3 (para. 8); R. at 135. This assertion remains unrebutted and uncontested by the Tenant.

Following review of the OAH record, the Commission is satisfied that setting aside the Final Order would prejudice the Housing Provider, because it would further delay adjudication of a pending matter in Superior Court. *See* Prosper, TP 27,783; Sellers v. Lawson, TP 29,437 (RHC Dec. 1, 2012); Tillman, TP 29,136; Lenkin Co. Mgmt., TPs 27,191-93; Solomon, 621 A.2d at 380-81.

Because only one of the Radwan factors weighs in the Tenant's favor, and in consideration of the potential prejudice to the Housing Provider, the Commission determines that the Tenant has not provided sufficient reason and evidentiary support from the OAH record to reverse the ALJ's dismissal of the Tenant Petition for failure to appear. *See* Radwan, 683 A.2d at 481. Therefore, the Tenant lacks standing to appeal the Final Order. DeLevay, 411 A.2d at 360; Dorsey, RH-TP-11-30,165 & RH-TP-12-30,222; Knight-Bey, RH-TP-07-28,888.

III. CONCLUSION

Because the record reflects that the Tenant failed to prove that she had standing to appeal the ALJ's decision and that she was improperly notified of the scheduled hearing under the test established by Radwan, 683 A.2d at 481, the Tenant lacks standing to challenge the ALJ's findings. In light of the Commission's determination that the Tenant lacks standing in this

appeal, *see id.*, the Commission will not address the other issues raised by the Tenant in the Notice of Appeal. *See* Highland Park Apts, v. Sutton, RH-TP-09-29,593 (RHC Sept. 27, 2013) at 15-16.[15]

For the foregoing reasons, the Final Order is affirmed.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

DIANA HARRIS EPPS, COMMISSIONER

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 (2016.), "[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
430 E Street, N.W.
Washington, D.C. 20001
(202) 879-2700

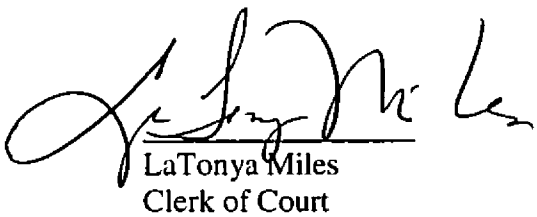
[15] In light of its disposition of this appeal, the Commission will not address or consider the issues raised by the Tenant in the Notice of Appeal. *See* Radwan, 683 A.2d at 481; Highland Park Apts., RH-TP-09-29,593.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH- TP-15-30,666 was mailed, postage prepaid, by first class U.S. mail on this **10th day** of **November, 2016,** to:

Evie Isles
300 Aspen Street, NW
Unit 201
Washington, DC 20012

Carol Blumenthal, Esq.
Blumenthal & Cordone, PLLC
7325 Georgia Ave., N.W.
Washington, DC 20012



LaTonya Miles
Clerk of Court
(202) 442-8949