IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

Chillicothe Metropolitan Housing Authority,

Plaintiff-Appellee, No. 1406

vs.

Charlene Anderson, JOURNAL ENTRY

Defendant-Appellant

Appellee filed a motion to dismiss and appellant filed a memoranda contra. Upon consideration the court finds the motion to dismiss is not well taken.

The parties are directed to advise the court within fourteen days of this entry as to whether or not oral argument is to be requested or whether or not this case might be submitted for decision immediately.

All Judges Concur.

Lawrence Grey,
Presiding Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

CHILLICOTHE METROPOLITAN HOUSING AUTHORITY,	:	
Plaintiff-Appellee,	:	Case Number 1406
-vs-	:	
CHARLENE ANDERSON,	:	APPELLANT'S REPLY MEMORANDUM TO MOTION TO DISMISS
Defendant-Appellant	:	

Appellee Chillicothe Metropolitan Housing Authority (CMHA) has filed a Motion to Dismiss claiming that the case is moot because Charlene Anderson has moved from the premises and because the premises are now relet and unavailable. Appellant now makes this reply.

I. CHARLENE ANDERSON DID NOT VOLUNTARILY MOVE FROM THE PREMISES

When Defendant-Appellant moved from the premises it was because she could not raise the supersedeas bond to prevent the eviction. This low income tenant who paid no rent (see lease) could not raise $300 in ten days and left only on the final day of the Stay of Execution. Had she not left the writ of restitution would have been executed. Not only was the move involuntary but it was done only when this indigent tenant could do nothing more to prevent the eviction.

The facts are exactly the same confronted by the Court of Appeals of Franklin County in Sandefur Management Co. v.

Minor, Case No. 84AP-220 (1985) (attached). In that case the tenant could not raise the bond and the subsidized landlord moved for dismissal as moot. In overruling the motion, the court stated that:

> [D]efendant has a continuing interest in the outcome of the appeal. She was once eligible for federal housing assistance payments, and an unfavorable court proceeding may affect her continuing eligibility for such payments. Moreover, other tenants are similarly situated and would benefit from this court's resolution of the issue which is raised in this appeal.

Id., slip op at 3.

The effect of the dismissal impacts on Charlene Anderson to deprive her of her continuing interest in the outcome of the appeal. Id. at 3. Not only does she lose her right to the subsidy, but the eviction will go on her credit record and will be reported to future potential landlords. In each case the result is solely because she could not afford the bond and was forced to move. Charlene Anderson is the victim if the appeal is dismissed.

Other courts have examined the effect of supersedeas bonds and determined that a bond which precludes a tenant from protecting legal rights is an unconstitutional deprivation of due process and equal protection. Lindsey v. Normet, 405 U.S. 56 (1972) (striking down Oregon bond statute).

Charlene Anderson did not voluntarily move -- the bond requirement forced her to move. The case is not moot simply because she is no longer in the unit.

II. THE ISSUES ARE OF PUBLIC IMPORTANCE AND REQUIRE THE CASE TO BE DETERMINED.

The issues raised in the appeal are of importance to all Ross County public housing tenants, not merely Charlene Anderson. CMHA regularly terminates tenancies in the same fashion as they did in this case. In fact, since this case was filed in the trial court, the same issues have been presented in other cases. See, e.g., CMHA v. Brown, Cases No. 87 CVE 261 and 87 CVE 439 (Chillicothe Muni. 1987).

The Sandefur court noted that when a question appealed is of great public importance the appeal is not moot. Sandefur, slip op at 3 [citing Harshaw v. Farrell, 55 Ohio App. 3d 246 (1977)]. The due process rights of public housing tenants are of great public importance so as to necessitate the decision in this case.

There is an additional public right at stake. The tenant has a right to appeal the trial court decision under Ohio Rule of Appellate Procedure 4 and this should not be conditioned on the ability of a tenant to raise the bond. In Jack Spring, Inc. v. Little, 280 N.E. 2d 208 (Ill. 1972) the Illinois Supreme Court determined that:

> [T]he right to an appeal is a matter separate and apart from the right to supersedeas during the pendency of the appeal, and in being required to furnish a bond as a condition to staying the judgment, an appellant in an action in Forcible Entry and Detainer is in no different a situation than an appellant who seeks a stay of the judgment in any other type of appeal.

Id. at 212. The court refused to dismiss an appeal because a bond could not be raised other than the monthly rent payments.

Thus there are two issues of great public importance in this case -- the due process rights of public housing tenants and the right to an appeal separate from the ability to raise the bond.

III. THE ISSUES ARE NOT MOOT BECAUSE THE PREMISES HAVE BEEN RERENTED.

CMHA argues that the issues are moot because somebody else lives in the unit in which Charlene Anderson formerly resided. However there are numerous units at Lincoln Park and the regular procedure of CMHA is to transfer tenants under a transfer policy. (Tr. at 27-28). Appellee should not now attempt to restrict this case to a single unit in which appellant resided at the time of the trial when there is no such restriction on the unit she could occupy should the case be determined in her favor. CMHA could move Charlene Anderson into the first available unit for which she was qualified. It need only be available, not the exact same unit.

CONCLUSION

The appeal is not moot and should not be dismissed. Appellant left the premises on the last day of a court-ordered stay because she was too indigent to raise a $300 bond. She left under a denial of constitutional rights alleged in the appeal. She did not voluntarily leave.

There are issues of great public importance to be determined in this case and the court should make those determinations. The fact that some of the same issues have

recurred indicate that the policy of CMHA needs to be examined as raised by appellant. The fact that other tenants of public housing face similar deprivations of rights calls for a decision by this Court.

Finally there is an adverse impact on the tenant caused merely because of her indigency. Not only was the tenant denied her rights in a trial court, but will be so denied in the future if the case is not determined. Appellant faces a loss of government housing benefits which she could regain if the case is determined in her favor. She faces negative credit ratings and future negative recommendations by CMHA to potential landlords.

Finally there is no reason why CMHA cannot provide housing for Charlene Anderson. The solution is not to harm the new tenant in the unit formerly occupied by the appellant, but simply to place appellant in the first available unit should the trial court decision be reversed.

For all these reasons, the Court of Appeals should overrule the Motion to Dismiss.

Respectfully submitted,

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Attorney for Appellant

IN THE COURT OF APPEALS OF ROSS COUNTY, OHIO

Chilli. Metropolitan Housing Auth.	:	
PLAINTIFF AND APPELLEE	:	CASE NO. 1406
-vs-	:	
Charlene Anderson	:	MOTION TO DISMISS
DEFENDANT AND APPELLANT	:	

Now comes Chillicothe Metropolitan Housing Authority, Plaintiff-Appellee, and respectfully moves this honorable Court for dismissal of Defendant/Appellant Anderson's appeal for the reason that it presents a moot issue for this Court to decide. Authority for the foregoing is more fully set forth in the Memorandum below.

Respectfully submitted,

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(614) 772-5595
Attorneys for Plaintiff-Appellee

MEMORANDUM

I. STATEMENT OF THE CASE

The matter now before the Court of Appeals arises from a forcible entry and detention action filed by Appellee in the Chillicothe Municipal Court on January 20, 1987. Anderson appeared pro se at the trial on the merits on February 18, 1987, at which time the Municipal Court found that requisite written notice had

been served on Appellant and that Anderson had violated her lease. Appellee was awarded possession of the premises. Anderson then obtained legal counsel who moved for a new trial. This motion was overruled and notice of appeal was filed immediately; the supersedeas bond was set at $300.00. Appellant did not post the bond and a writ of restitution was filed with the Court. The Court records indicate that the writ was returned unexecuted because Anderson had vacated the premises.

II. LAW AND ARGUMENT

There is no question that a court exercising appellate jurisdiction should not hear an appeal when the issue giving rise to the appeal is moot. State ex rel Harsbow Chemical Co. v. Zimpher, 18 OS 3d 166 (1985); State ex rel Bd. of Trustees v. Davis 2 OS 3d 108 (1982); National Electrical Contractors v. Painsville, 36 OS 2d 60 (1973); Gaverick v. Hoffman, 23 OS 2d 74 (1970); State ex rel Stokes v. Cuyahoga Probate Court, 22 OS 2d 120 (1970); Sakacsi v. McGettrick, Sheriff, 9 OS 2d 156 (1967); State ex rel Mikus v. Chapia, OS 2d 174 (1965). Appellant's appeal is moot for two reasons: first, she voluntarily surrendered possession of the rental premises and therefore waived any claim she might assert in the Appeals Court; second, Chillicothe Metropolitan Housing Authority has relet the rental premises to a third party and therefore does not have a possessory interest to convey in the event that Anderson's appeal is upheld.

When there is an intentional relinquishment of a known

right, waiver exists. See Michigan Auto Insurance v. Van Buskirk, 115 OS 598 (1927); Parents v. Day, 16 O. App. 2d 35, 45 OO2d 104 (Cuyahoga Co., 1968). Anderson was entitled to possession of the premises until the writ issued by the Municipal Court was acted on by the Ross County Sheriff and it would be unbelievable if Appellant were to argue that she did not remove her furniture intentionally. Thus, she has waived her right to possession of the rental premises by voluntarily vacating her former apartment. Because of this factual situation, there is no justifiable issue present for the court to consider. Ohio Courts of Appeals should not hear cases when their decisions would merely govern the abstract issues extant between the parties to the appeal. See Miner v. Witt, 82 OS 237 (1910).

Second, as the affidavit of Kathleen Sims, the Executive Director of Chillicothe Metropolitan Housing Authority indicates, the apartment vacated by Anderson has been relet to a tenant who is not a party to the forcible entry action in Chillicothe Municipal Court. It is an axiom of Ohio law that a lease conveys a possessory interest in real estate. Brenner v. Spiegle, 166 OS 631 (1927). When the lease was executed transferring Appellant's possessory interest to the new tenant, Metropolitan Housing ceased to have an interest in the real estate which may be returned to Appellee pursuant to §1923.14, R.C. in the event that her appeal is upheld. Moreover, the doctrine of constructive notice cannot be asserted since the lis pendens statute would only apply if there were a complaint or a counterclaim filed against the Housing Authority. See §2703.26, R.C. Inspection of the record will indicate that Anderson did not file a counterclaim in the forcible entry action and therefore there was no service of summons to trigger the lis pendens rule. In short,

Appellee no longer has a possessory interest in the real estate to be returned to Appellant even if she wins her appeal; thus, her case is moot and her appeal should be dismissed.

Respectfully submitted,

James K. Cutright for
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(614) 772-5595
Attorneys for Plaintiff-Appellee

PROOF OF SERVICE

A copy of the foregoing Motion to Dismiss was mailed by ordinary U.S. first class mail, postage prepaid, this 22nd day of June, 1987, to the following parties:

James Buchanan, SEOLS, 15 E. 2nd St.,
Chillicothe, OH 45601.

Attorney for Plaintiff-Appellee

IN THE COURT OF APPEALS OF ROSS COUNTY, OHIO

Chilli. Metropolitan Housing Auth.	:	
PLAINTIFF AND APPELLEE	:	CASE NO. 1406
-vs-	:	
Charlene Anderson	:	A F F I D A V I T
DEFENDANT AND APPELLANT	:	

STATE OF OHIO, ROSS COUNTY, ss:

Kathleen Sims, being first duly sworn, says of her first-hand knowledge and belief the following:

1.) She is Executive Director of Chillicothe Metropolitan Housing Authority.

2.) The premises formerly occupied by Charlene Anderson, Appellant in the above-captioned matter, known as 201 Lincoln Park, Chillicothe, Ohio, has been relet to Ethel Travis as of June 19, 1987, and therefore Chillicothe Metropolitan Housing Authority has no possessory interest in said real estate.

Further affiant saith not.

Kathleen Sims PHM
Kathleen Sims, Exec. Director
Chilli. Metrpolitan Hs. Auth.

Sworn to before me this 22nd day of June, 1987.

JAMES K. CUTRIGHT
NOTARY PUBLIC, STATE OF OHIO
My COMMISSION EXPIRES AUG. 1, 1988