STATE OF MICHIGAN

COURT OF APPEALS

WALDMAN INVESTMENT ASSOCIATES,

Petitioner-Appellant,

v

CITY OF FERNDALE,

Respondent-Appellee.

UNPUBLISHED
August 17, 2004

No. 246686
Tax Tribunal
LC No. 00-293325

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Petitioner appeals as of right from the Tax Tribunal's sua sponte order dismissing petitioner's appeal of the 2002 assessed and taxable value of its apartment complex. The Tribunal denied petitioner's motion to set aside the dismissal. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On June 28, 2002, counsel for petitioner sent the Tax Tribunal a letter contesting the 2002 assessment and taxable value of its property, claiming it exceeded fifty percent of the true cash value of the property. Pursuant to Tribunal rules on practice and procedure, this was the proper way to initiate the appeal. 1996 MR 4, R 205.1320 (Rule 320). Rule 320 required that the Tribunal then send petitioner a form to be completed. On August 20, 2002, the Tribunal sent counsel a letter with the form, consistent with Rule 320, indicating that upon penalty of dismissal, the completed form had to be returned by the date stated on the form—September 17, 2002. On November 1, 2002, the Tribunal issued a Sua Sponte Order of Dismissal pursuant to Rules 320 and 1979 AC, R 205.1247, as amended by 1996 MR 4, (Rule 247), based on the failure to timely return the completed petition form. Subsection (4) of Rule 247, which deals with defaults, provides:

> Failure of a party to properly prosecute the appeal, comply with these rules, or comply with an order of the tribunal is cause for dismissal of the appeal or for the scheduling of a default hearing for the respondent. Upon motion made within 21 days of the entry of the order as provided by R 205.1288, an order of dismissal may be set aside by the tribunal for reasons it deems sufficient.

On November 6, 2002, petitioner filed a motion to set aside the dismissal, stating that it had mailed the completed petition form and a check for $100 on September 11, 2002. The

motion recited that a copy of the petition and the check were attached, but a handwritten note on the petition in the record states "not attached –they will fax." A fax showing that the check had been issued on September 11, 2002, was received by the Tribunal on January 22, 2003. On January 27, 2003, the Tribunal received an additional copy of the motion to set aside, with the petition attached. On January 29, 2003, the Tribunal issued an order denying the motion to set aside, stating in pertinent part:

> The Tribunal, having given due consideration to the Motion, response, and the case file, finds that (i) on August 20, 2002, the Tribunal sent Petitioner a Small Claims Petition Form for execution and filing, (ii) the Petition Form was to be returned on or before September 17, 2002, (iii) *Petitioner failed to return the Petition Form*, (iv) Petitioner failed to attach a copy of the Petition and the check to the motion to set aside default and *could not produce a copy of the check when requested to do so by the Tribunal*, (v) Petitioner has not provided proof that the Petition was mailed to the Tribunal, (vi) Petitioner has informed the Tribunal that the check for the petition fee has not been cashed, (vii) as such, Petitioner has failed to show good cause to set aside the Order of November 1, 2002, or demonstrate any palpable error by which the Tribunal or the parties were misled in the rendering of that Order[.] [Emphasis added.]

Petitioner asserts that Rule 320 supports the conclusion that mailing was sufficient, claiming it requires only that the petitioner "send" the form to the Tribunal. However, Rule 320 requires that the Tribunal "send" petitioner the form and that the form be "completed and returned" by the designated date. MCL 205.735(2) provides that a petition is timely filed if it is timely postmarked by first-class mail, but this statute does not apply to the form since it is not a petition. Although this Court held in *Aztec Air Service, Inc v Dep't of Treasury*, 253 Mich App 227; 654 NW2d 925 (2002), that a statutory requirement of certified mailing was satisfied when the mailing was sent, the Court was interpreting the statutory language in MCL 205.735(2), which applies to the filing of the petition, not the form. Since "complete and return" in Rule 320 could mean return by mail or could be read to require delivery to the Tribunal, and this Court gives deference to an agency's construction of an administrative rule, *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003), we find no error in the Tribunal's determination that Rule 320 required that it receive the form by the designated date.

Nonetheless, we conclude that the Tribunal abused its discretion in failing to set aside the dismissal. See *Professional Plaza, LLC v Detroit*, 250 Mich App 473, 476; 647 NW2d 529 (2002). In *Stevens v Bangor Twp*, 150 Mich App 756; 389 NW2d 176 (1986), the Tribunal dismissed a petition seeking review of a property tax assessment when petitioner's counsel inadvertently failed to appear for a scheduled counsel conference. This Court held that this sanction was too harsh. It could discern no prejudice to the respondent other than the time respondent's counsel wasted in preparing for the conference. Under these circumstances, this Court found that assessing costs for the wasted time would have been an appropriate sanction.

Here, there was no question that the Tribunal did not timely receive the Petition Form. However, petitioner substantially established that the petition was timely prepared and mailed. While the Tribunal stated as a reason for dismissal that petitioner failed to attach a copy of the petition to the motion to set aside, petitioner cured this omission by providing a copy before the Tribunal issued its order. Moreover, while the Tribunal charged that petitioner failed to attach

the check to the motion to set aside default and could not produce a copy of the check when requested to do so, petitioner did in fact produce documentation convincingly establishing that a check was produced on the date in question. It would be absurd to require that petitioner produce a copy of the actual check, since petitioner was claiming that the actual check was in transit or lost in transit to the Tribunal. The Tribunal's charge that petitioner did not provide proof that the Petition Form was mailed is equally flawed. While petitioner could have provided a form proof of service to establish such proof, petitioner's actual submissions, including a copy of the petition itself and documentation showing that a check was issued six days before the petition was due, was more convincing. The Tribunal also noted that the check for the petition fee had not been cashed. Obviously, if the check was not processed by the Tribunal, it would not have been cashed. Petitioner notes that the absence from the file could just as easily be attributed to the post office or Tribunal staff losing the form. Further, it claims that it should have had a reasonable opportunity to cure the default before the case was dismissed and that imposing the harshest available sanction was an abuse of discretion. Under the circumstances, especially since no prejudice has been established, we agree that the failure to set aside the dismissal was too harsh a penalty where the evidence strongly suggested that the form was mailed and was lost somewhere further along in transit.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly