

STATE OF MICHIGAN
COURT OF APPEALS

UNIVERSAL APPLICATORS, INC.,

Petitioner-Appellant,

v

TOWNSHIP OF GRAND BLANC,

Respondent-Appellee.

UNPUBLISHED

December 27, 2002

No. 237403

Tax Tribunal

LC No. 00-237258

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Petitioner appeals as of right the Tax Tribunal's sua sponte order dismissing its case. We reverse.

Petitioner filed a petition with the Tax Tribunal in 1996 challenging the "assessment, state equalized value and/or taxable value" of personal property located at 3085 Reid Road, Grand Blanc Township. Over time, the Tribunal granted petitioner's motions to amend its initial petition to contest the assessments for 1997, 1998, and 1999. In January 1999, petitioner filed a "motion to hold case in abeyance due to bankruptcy court proceedings," stating that it had filed a voluntary petition under Chapter 11 in Bankruptcy Court on June 29, 1998, and that pursuant to applicable law, the filing of this petition automatically stayed all proceedings involving petitioner, including the present case. The Tribunal granted petitioner's motion by order entered June 2, 1999.

In August 2000, the Tribunal issued an order requiring the parties to provide a status report on the matter due to the fact that more than one year had passed since the case was placed in abeyance. By letter dated September 14, 2000, petitioner's counsel wrote the Tribunal:

In response to the Tribunal's Order Requiring Status Report From Parties issued August 30, 2000, please be advised that petitioner believes that settlement is unlikely and that this matter should be scheduled for prehearing at a date specific at least 180 days from the date hereof to allow the parties hereto to prepare appropriate valuation disclosures.

The Tribunal mailed notice to the parties' counsel on January 16, 2001 that it had placed the case on Prehearing General Call, to commence on May 14, 2001 and continue through May

25, 2001. The notice also ordered that the parties exchange and file valuation disclosures and file prehearing statements. The parties did so.

By order entered May 10, 2001, the Tribunal scheduled a prehearing conference to begin on May 23, 2001, and mailed notice to both parties' counsel. Petitioner's counsel failed to appear at the conference.

By motion filed May 31, 2001, petitioner's counsel moved to reschedule the prehearing conference. Petitioner's brief argued:

Petitioner's counsel did not receive notice that the prehearing would take place on May 23, 2001, and therefore, was inadvertently absent from the Tribunal at the time the prehearing conference convened. Immediately upon learning of the fact that the prehearing conference had been scheduled and convened without a representative of Petitioner, Petitioner's counsel arranged to file this motion to reschedule the prehearing conference.

Although Petitioner's counsel, Randall Whately, is and was at the time of the scheduled prehearing conference, out of the office on medical leave, Mr. Whately checks both his mail and voice mail daily. Although Mr. Whately was ready to arrange to conduct the prehearing conference upon notice of the scheduled date, Mr. Whately did not receive notice of the prehearing.

Petitioner's counsel wants to ensure that neither Petitioner nor Respondent is prejudiced by his inadvertent absence from the prehearing conference. Therefore, for the convenience of the Tribunal and the parties, Petitioner suggests that a prehearing conference be held, either telephonically or in person, at the Tribunal and Respondent's earliest convenience. Petitioner will accommodate the schedules of the Tribunal and Respondent, either in attending the telephonic conference, or, in the alternative, by sending another representative of Petitioner to the Tribunal if it is determined that an in-person prehearing conference at the Tribunal is necessary.

Petitioner submits that a telephonic hearing would ensure that Respondent does not incur any additional costs in reconvening the hearing. In the alternative, if the Tribunal believes that a prehearing at the Tribunal's offices is necessary, and that notice was in fact received by Petitioner's counsel, the Tribunal could impose upon Petitioner the reasonable costs of Respondent's counsel's travel time.

Respondent has, to date, suffered no material prejudice as a result of Petitioner's inadvertent absence from the apparently scheduled prehearing conference convened on May 23, 2001. Further, Respondent will suffer no prejudice greater than the costs incurred in traveling to the rescheduled prehearing conference, if in fact, an in-person prehearing is determined to be necessary.

Under somewhat analogous circumstances, the Michigan Court of Appeals has held that the Tribunal must consider the imposition of costs as the most drastic sanction available. In Stevens v Bangor Twp., 150 Mich App 756 (1986), the

court held that where prejudice to the respondent resulting from petitioner's failure to appear at a scheduled prehearing conference *that the petitioner actually knew about* was limited to preparation for that conference, "the imposition of costs for the delay [was] the appropriate action to take." Stevens, 150 Mich App at 757.

By order entered the following day, June 1, 2001, the Tribunal dismissed the case, stating:

It appearing to the Tribunal that Petitioner, having received notice of a duly scheduled prehearing in the above-captioned case, and that Petitioner having failed to appear at said prehearing, therefore,

IT IS ORDERED that this matter is DISMISSED.

Petitioner filed a motion to set aside the dismissal on June 20, 2001, which the Tribunal denied.

I

Petitioner argues that the Tribunal erred when it dismissed the case and refused reconsideration of the order of dismissal in light of *Stevens v Bangor Twp*, 150 Mich App 756; 389 NW2d 176 (1986).

This Court's review is typically limited to whether the Tribunal's decision was authorized by law and whether its factual findings were supported by competent, material, and substantial evidence on the record. Const 1963, art 6, § 28; *Professional Plaza, LLC v Detroit*, 250 Mich App 473, 474; 647 NW2d 529 (2002). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. *In re Payne*, 444 Mich 679, 692 (Boyle, J.), 698 (Riley, J.); 514 NW2d 121 (1994). When there is sufficient evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

This Court reviews the Tribunal's decisions to dismiss petitions for failure to comply with the Tribunal's rules or orders for an abuse of discretion. *Professional Plaza, supra* at 475, citing *Kostyu v Dep't of Treasury*, 170 Mich App 123, 131; 427 NW2d 566 (1988); *Stevens, supra* at 761. "An abuse of discretion exists where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Professional Plaza, supra* at 475, citing *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

TTR 270.11 applies to prehearing conferences and states that "[f]ailure to appear at a duly scheduled prehearing conference may result in the dismissal of the appeal or the scheduling of a default hearing." 1999 AC, R 205.1270(11). "An order of dismissal may be set aside by the tribunal for reasons it deems sufficient." 1999 AC, R 205.1247(4).

TTR 247 provides that, “[i]f a party has failed to plead, appear, or otherwise proceed as provided by these rules or as required by the tribunal, then the party may be held in default by the tribunal on motion of another party or on the initiative of the tribunal.” 1999 AC, R 205.1247(1). “Failure to comply with an order of default may result in the dismissal of the case or the scheduling of a default hearing as provided by [Rule 247].” 1999 AC, R 205.1247(1). A party’s failure to “comply with these rules, or comply with an order of the tribunal is cause for dismissal of the appeal or the scheduling of a default hearing for the respondent.” 1999 AC, R 205.1247(4).

In *Stevens, supra*, the Tribunal dismissed the case after the petitioner’s counsel failed to attend a “counsel conference” as required by the Tax Tribunal under TTR 250. This Court concluded that the Tribunal abused its discretion in dismissing the petition and found that the Tribunal had erred when it concluded that the respondent had “suffered substantial prejudice.” This Court noted that the only prejudice to the respondent that was apparent on the record was wasted preparation time. This Court concluded that “under the circumstances of the case, the Tribunal’s imposition of the harshest available sanction was an abuse of discretion.” *Stevens, supra*, at 762.¹

We conclude that although the Tribunal had the discretion to sua sponte dismiss the petition, under the circumstances presented here it abused its discretion by failing to set aside that order upon consideration of petitioner’s motion to reschedule and motion to set aside dismissal. Petitioner had complied with the Tribunal’s requirements that it file a valuation disclosure and prehearing statement. Petitioner’s counsel of record, who was on medical leave at the time, failed to receive actual notice of the date certain of the prehearing conference. Once petitioner’s counsel became aware that the prehearing conference had occurred, he immediately filed a motion to reschedule the prehearing conference. That motion was pending when the Tribunal sua sponte dismissed the petition. Under these circumstances, where petitioner had substantially complied with the Tribunal’s directives, and where there was no evidence that petitioner’s counsel’s failure to appear was for any reason other than not receiving notice of the prehearing conference date, the Tribunal should have reconsidered its dismissal. See 1999 AC, R 205.1247(4) (“An order of dismissal may be set aside by the tribunal for reasons it deems sufficient.”) We note that in denying relief, the Tribunal observed that the notice of prehearing conference was sent to petitioner’s authorized representative and was not returned as undeliverable, and therefore petitioner was properly notified of the conference. It did not find that counsel received actual notice of the hearing.

In light of this conclusion, we do not address petitioner’s due process claims regarding notice to the bankruptcy trustee except to observe that while neither the trustee nor petitioner informed the Tribunal of the trustee’s status in this case until July 31, 2001, the trustee’s affidavit, filed below, stated that she did not learn of the matter pending in the Tribunal until

¹ We recognize that *Stevens, supra*, concerned a counsel conference and the instant case concerns a prehearing conference. Nevertheless, in *Stevens*, the failure to conduct the conference was a violation of the Tribunal’s order directing that such a conference be held, and in *Stevens*, this Court recognized that the power of the Tax Tribunal to dismiss a petition because of a petitioner’s noncompliance with a rule or order of the Tribunal is unquestionable, but nevertheless found an abuse of discretion.

some time after May 23, 2001, and that she then sought to have counsel appointed, and obtained an order to that effect in July 2001. Respondent did not controvert below the trustee's affidavit's averments. Although the handling of this matter could have been better organized, we conclude that dismissal is too harsh a sanction and unduly punishes the petitioner's creditors under the circumstances that petitioner had been in compliance before its counsel failed to appear at the prehearing conference, and given the trustee's lack of knowledge of the matter pending in the Tribunal until after the prehearing conference occurred. On remand, respondent is encouraged to seek compensation for the time it expended in connection with the May 23, 2001 prehearing conference.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Christopher M. Murray