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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

JACK WATERS, individually, and on behalf of all persons similarly situated, Plaintiffs, vs. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, a duly organized and recognized agency of the State of Hawai`i; HHA WILIKINA APARTMENTS PROJECT, INC.; DOES 1-25, Defendants.	CIVIL NO. 05-1-0815-05 (EEH) (Contract) DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED OCTOBER 14, 2005 EXHIBITS "A" TO "E" DECLARATION OF MICHAEL J. HEE CERTIFICATE OF SERVICE DATE: NOVEMBER 2, 2005 TIME: 10:45 A.M. JUDGE: EDEN E. HIFO
HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI`I and HHA WILIKINA APARTMENTS PROJECT, INC., Defendants and Third-Party Plaintiffs, vs. •	

URBAN MANAGEMENT CORP.; MARCUS & ASSOCIATES, INC.; JOHN DOES 26-50,

Third-Party Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED OCTOBER 14, 2005

I. INTRODUCTION

Defendants are State agencies and instrumentalities that own and operate (through a managing agent) apartment buildings for low-income tenants. Third party defendants are or were the managing agents.

Plaintiffs are tenants in the apartments. Plaintiffs claim they overpaid rent. The present version of the complaint alleges two theories: breach of contract and violation of federal law.

II. STATUS AND PROCEDURAL HISTORY

DATE	EVENT
May 6, 2005	Complaint
August 4, 2005	Entry of default as to HCDCH (not HHA)
August 10, 2005	Plaintiffs' motion for class certification
August 30, 2005	Stipulation to set aside default
August 31, 2005	Defendants' answer to complaint
September 12, 2005	Defendants' amended answer to complaint and third party complaint against Urban Management Corp.
September 13, 2005	Defendants' motion to dismiss federal law claim
October 3, 2005	Order granting in part motion to certify class
October 6, 2005	First Amended Complaint
October 14, 2005	Plaintiffs' motion for summary judgment
October 18, 2005	Defendants' answer to first amended complaint and third party complaint against Urban Management Corp. and Marcus & Associates, Inc. (served 10/18/05)

Defendants have now stipulated to plaintiffs' filing a Second Amended Complaint. See Exhibit "A" attached hereto. This second amended complaint: 1) adds Stephanie Aveiro, the

executive director of HCDCH, as a party in her official capacity only; 2) deletes plaintiffs' request for damages based on the federal law claim; and 3) adds a claim for injunctive relief based on 42 U.S.C. § 1983.

Plaintiffs' proposed deletion of their federal law request for damages along with addition of an official capacity State official moots defendants' motion on that issue. Defendants intend to withdraw the motion when the second amended complaint is filed.

III. DISCUSSION

A. PLAINTIFFS' MOTION SHOULD BE CONTINUED

As shown above, this case has been at issue between plaintiffs and the State for less than two months. The entities that manage or previously managed the subject projects have been named and served, but have not yet appeared. Plaintiffs intend substantially to revise the complaint, including addition of a new official capacity defendant. There has been no discovery as to these parties and only limited discovery between the State and plaintiffs.

Accordingly this motion is premature and should be continued at least until all parties have entered an appearance.

In addition, defendants requests that this matter be continued pursuant to HRCP 56(f). The facts not presently available to present by affidavit include information concerning changes to tenants' rent as discussed below.

B. PLAINTIFFS' MOTION SHOULD BE DENIED AS TO VIOLATION OF FEDERAL LAW

As indicated in defendants' motion to dismiss, plaintiffs do not have a federal law claim against the present defendants, because of the Eleventh Amendment. Plaintiffs' motion completely misses the point. The cases they cite prove only that they could have a claim against

someone. That may or may not be true. The only relevant point at this stage of the case is that such a claim cannot be brought directly against the State.

Plaintiffs effectively concede this point by the second amended complaint, which deletes their federal law claim for damages and adds a State official (in her official capacity) as a defendant.

C. PLAINTIFFS' MOTION SHOULD BE DENIED AS TO INJUNCTIVE RELIEF

First, under the present state of the pleadings, plaintiffs' claim for injunctive relief is barred by the State's sovereign immunity, because no official capacity defendants are named.

The Hawai`i Supreme Court has consistently recognized that the doctrine of sovereign immunity precludes a suit against the State without the State's express consent. Chun v. Board of Trustees of Employees' Retirement System of State of Hawai` i, 106 Haw. 416, 432, 106 P.3d 339, 355 (2005).

At present, our case is brought only against state agencies. Sovereign immunity bars entry of an injunction against the State itself. This rule is rooted in the fundamental principle that any attempt to assert jurisdiction over a state in a private action brought without the state's express consent is barred because sovereign immunity protects against "'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) (citation omitted).

Plaintiffs' proper course of action as to injunctive relief is to name and seek to enjoin responsible officials in their official capacity. W.H. Greenwell, Limited v. Department of Land and Natural Resources, 50 Haw. 207, 209, 436 P.2d 527, 528 (1968). Plaintiffs' second amended complaint takes exactly this action. By doing so, plaintiffs effectively concede the point and make their motion moot as to this issue.

Second, plaintiffs cannot meet the familiar requirements of injunctive relief: "(1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support granting the injunction?" Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978)."[1] "Injury is irreparable where it is of such a character that a fair and reasonable redress may not be had in a court of law." Penn v. Transportation Lease Hawaii, Ltd., 2 Haw.App. 272, 276, 630 P.2d 646, 650 (1981).

In this case, the only claim for which there is a waiver of sovereign immunity is the contract claim. But the alleged harm as to the contract is simply overpayment of rent. Plaintiffs seek "reimbursement for rent overcharges and inadequate reimbursements resulting from Defendants' violations of law and breaches of tenants' rental agreements." FAC ¶ 9. In short, plaintiffs' remedy, if they win, is payment of damages – damages that can be exactly calculated and which amount will be, if necessary, fully paid. Even if defendants fail to adjust the utility allowance going forward, that failure only increases the damages. Plaintiffs can never have irreparable harm and can never be entitled to injunctive relief.

Third, without conceding that the utility allowance has been inadequate in the past, defendants are presently doing everything possible to adjust the utility allowance. As explained in the attached declaration and exhibits, defendants cannot change the allowance without HUD's

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[1] Plaintiffs are mistaken to ask for permanent injunction, which they cannot obtain until a final judgment is entered in their favor. In any case, the standards for a permanent injunction are essentially the same as for a preliminary injunction, except the plaintiff must actually succeed on the merits. Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987); Ladd v. Thomas, 14 F. Supp.2d 222 (D.Conn. 1998); Indian Motorcycle Associates III Ltd. Partnership v. Massachusetts Housing Finance Agency, 66 F.3d 1246 (1st Cir. 1995). Irreparable harm is still required.

approval. They are actively seeking that approval (through the managing agent). A mandatory injunction from this court is neither necessary nor sufficient with respect to the adjustment.

D. PLAINTIFFS' MOTION SHOULD BE DENIED AS THE CONTRACT CLAIM

The standard contract between defendants and plaintiffs states an exact dollar amount of rent that the tenant agrees to pay. In Waters' case, he and his wife, Alvina Solomon, agreed as follows:

> The Tenant agrees to pay $50.00 for the partial month ending on 11/30/97. After that, the Tenant agrees to pay a rent of $213.00 per month. This amount is due on the first (1st) day of the month at Urban Real Estate Co., 850 Richards Street, Suite 603, Honolulu, Hawaii 96813.

Exhibit "A" to plaintiffs' motion. Accordingly, there can be no question that at the beginning of the tenancy at least there is no breach of contract. Tenants, including Waters, agreed to pay a specific dollar amount. And that is exactly how much they paid.

As pointed out by plaintiffs, the contract also contains a clause relating to changes in the agreed upon rent:

> The Landlord agrees to implement changes in the Tenant's rent or assistance payment only in accordance with the time frames and administrative procedures set forth in HUD's handbooks, instructions, and regulations related to administration of multifamily subsidy programs.

By the plain language of this clause, at most, the State may have breached the rental agreements when (and if) it changed a tenant's rent without adjusting the utility allowance "in accordance with" HUD requirements.

Clearly this is not a common issue of fact as to all plaintiff class members. The attached declaration of Michael J. Hee explains that tenants' rent is not changed until a year after they sign the original rental agreement.

On its face, the motion is already limited to defendants' alleged liability "with respect to Wilikina Apartments." The above analysis shows that, at a minimum, the motion must be further limited to tenants whose rent has been changed.

Under the circumstances, defendants respectfully request that the motion be denied without prejudice to re-filing when all parties have appeared and appropriate discovery has been undertaken.

DATED: Honolulu, Hawai'i, 10/25/5.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JACK WATERS, individually, and MARGARET MARA, individually, and on behalf of all persons similarly situated, Plaintiff, vs. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i; HHA WILIKINA APARTMENTS PROJECT, INC.; DOES 1-25 Defendants. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I and HHA WILIKINA APARTMENTS PROJECT, INC.,	CIVIL NO. 05-1-0815-05 EEH (Contract) **STIPULATION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT; EXHIBIT "A"; ORDER** Class Action No trial date set

EXHIBIT A

Defendants and Third-Party Plaintiffs,

vs.

URBAN MANAGEMENT CORP.; JOHN DOES 26-50,

Third-Party Defendants

STIPULATION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Pursuant to Rule 15(a) of the Hawai'i Rules of Civil Procedure, IT IS HEREBY STIPULATED by and between the parties herein, through their respective counsel, that Plaintiffs may file a Second Amended Complaint in this action in the form attached hereto as Exhibit "A". There is no trial date set in this action.

DATED: Honolulu, Hawai'i, _____, 2005.

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APPROVED AND SO ORDERED:

JUDGE OF THE ABOVE-ENTITLED COURT

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JACK WATERS, individually, and MARGARET MARA, individually, and on behalf of all persons similarly situated, Plaintiff, vs. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i; HHA WILIKINA APARTMENTS PROJECT, INC.; STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawaii; DOES 1-25	CIVIL NO. 05-1-0815-05 EEH (Contract) **SECOND AMENDED COMPLAINT; CERTIFICATE OF SERVICE** Class Action

Defendants.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I and HHA WILIKINA APARTMENTS PROJECT, INC.,

Defendants and Third-Party Plaintiffs,

vs.

URBAN MANAGEMENT CORP.; JOHN DOES 26-50,

Third-Party Defendants

SECOND AMENDED COMPLAINT

I. INTRODUCTION

1. Defendants HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I ("HCDCH"), HHA WILIKINA APARTMENTS PROJECT, INC. ("HHA"), and DOES 1-25 (hereinafter cumulatively referred to as "Defendants") own, operate and/or administer federally subsidized housing projects under the "project-based Section 8 program."

2. Defendant STEPHANIE AVEIRO is the Executive Director of the HCDCH, and she is sued in her official capacity only.

3. Plaintiff JACK WATERS and MARGARET MARA and the class they seek to represent (hereinafter "Plaintiff class") are tenants of project-based Section 8 programs owned, operated and/or administered by one or more of the above-named Defendants.

4. Pursuant to the United States Housing Act, 42 U.S.C. § 1437a(a)(1)

(known as the "Brooke Amendment"), rent, including utilities, for tenants residing in project-based Section 8 developments cannot exceed a certain percentage of tenant income. 42 U.S.C. § 1437a(a)(1); *see also* 24 C.F.R. § 5.603(b).

5. The owner of a project-based Section 8 development receives a certain amount of rent to operate each unit (called the "contract rent"), which is set by a "Housing Assistance Payment Contract" between the owner and the U.S. Department of Housing and Urban Development ("HUD"). 24 C.F.R. § 880.201. To ensure that the owner receives the full contract rent for operation of a subsidized unit, HUD pays the owner the difference between the tenant's portion of the rent and the contract rent. 24 C.F.R. § 880.501(d).

6. To ensure that tenants' rents plus utilities do not exceed the Brooke Amendment's rent ceiling when tenants are directly responsible for the payment of utility service (i.e., where tenants must pay a utility provider directly), HUD regulations require that tenants are provided with a "utility allowance." *See* 24 C.F.R. § 5.603(b).

7. The utility allowance provided to tenants takes the form of a rent credit that must be equal to an amount that tenants are estimated to pay for a reasonable consumption of utilities. *Id.*

8. Each time the contract rents for a project-based Section 8 development are to be adjusted, the owner must complete and submit an analysis of the adequacy of utility allowances in light of the relevant changes since the allowances were last adjusted (e.g., changes in utility rates). *See, e.g.*, 24 C.F.R. § 880.610.

9. Where utility rates increase by 10 percent or more since the most recently approved utility allowance, the utility allowances must be increased to

account for the utility rate increase to ensure that tenants are not charged more than 30 percent of their income for rent. *See, e.g.*, 24 C.F.R. § 880.610.

10. Defendants have failed to complete and submit an analysis of the adequacy of utility allowances in connection with adjustments of the contract rents for the project-based Section 8 developments that Defendants own, operate and/or administer.

11. Additionally, though utility rates have increased in excess of 10 percent since the utility allowances were last updated, Defendants have failed to revise or request revisions to the utility allowances for the project-based Section 8 developments that Defendants own, operate and/or administer.

12. Defendants actions are in direct violation of federal law and U.S. Department of Housing and Urban Development ("HUD") procedures and regulations regarding the setting of rents for project-based Section 8 tenants.

13. Defendants' violations of the U.S. Housing Act, 42 U.S.C. § 1437a(a)(1) and its supporting regulations, were taken under color of state law and are in violation of 42 U.S.C. § 1983.

14. Defendants' violations of federal law and HUD procedures and regulations amount to a material breach of the rental agreements for tenants residing in project-based Section 8 developments owned, operated and/or administered by Defendants.

15. The Plaintiff class seeks reimbursement or rent credit for rent overcharges and inadequate utility reimbursements resulting from Defendants' violations of law and breaches of tenants' rental agreements.

16. Additionally, the Plaintiff class seeks declaratory and injunctive relief