1ST CIRCUIT COURT
STATE OF HAWAII
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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

Defendants.

CIVIL NO. 05-1-0815-05 EEH
(Contract)
Class Action

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATION OF GAVIN K. THORNTON; EXHIBIT "A"; CERTIFICATE OF SERVICE

HEARING

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.; JOHN DOES 26-50,

Third-Party Defendants

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs JACK WATERS and MARGARET MARA, individually, and on behalf of all persons similarly situated, by and through their counsel, submits this reply in further support of their Motion for Partial Summary Judgment filed October 14, 2005 against Defendants Housing and Community Development Corporation of Hawaii ("HCDCH") and HHA Wilikina Apartments Project, Inc. ("HHA").

I. INTRODUCTION

Defendants do not dispute that they failed to comply with U.S. Department of Housing and Urban Development ("HUD") regulations regarding the adjustment of utility allowances at Wilikina Apartments ("Wilikina"), and that as a direct result of such failures, Plaintiffs were provided with insufficient utility allowances and were thereby overcharged for rent. Nor do Defendants dispute that their failures to comply with HUD regulations resulted in material breaches of the rental agreements for at least some of the residents of Wilikina. Instead, Defendants provide the following reasons as to why Plaintiffs' summary judgment motion should be narrowed in scope or continued:

1. Plaintiffs' rental agreements were only breached once their rent was recalculated a year after their tenancy began;

2. Plaintiffs' cannot prevail on their federal law claim against the parties to this motion;

3. Injunctive relief is not appropriate under Plaintiffs' in light of the adequacy of damages;

4. The motion should be continued because the case has been at issue between Plaintiff and the State for "less than two months," not all parties have appeared, and Plaintiffs' complaint has been amended; and

5. The motion should be continued pursuant to Haw. R. Civ. P. 56(f) because the case Defendants need to conduct additional discovery.

Each of these arguments are addressed below.

II. ARGUMENT

A. PLAINTIFFS' CONTRACT CLAIM

Defendants argue that since the Rental Agreement for Wilikina sets forth a specific dollar amount that tenants are to pay for rent, a breach of the rental agreements could have only occurred *after* a tenant resided at Wilikina for a year, and his or her rent changed from the amount listed on their original rental agreement (at which point the lease provision requiring that *changes* to the tenant's rent be made in accordance with HUD procedures and regulations would be violated). This assertion is wrong. However, even assuming arguendo that Defendants' argument had merit, summary judgment would still be appropriate for tenants of Wilikina who have resided there for over a year.

Defendants' argument that a tenant's rental agreement is breached only after their rent is changed ignores the section of the Wilikina Rental Agreement in which Defendants must certify that the tenant's rent was computed in accordance with HUD's regulations and administrative procedures. (*See* Pls.' Mot. for Partial

Summm. J., Exhibit "B" of Waters Dec.)[1] Obviously, a rental agreement that states the wrong amount of rent that a tenant must pay breaches this provision.

"[In] construing a contract, a court's principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen." *Brown v. KFC Nat'l Mgmt. Co.*, 82 Haw. 226, 240, 921 P.2d 146, 106 (1996) (quoting *University of Hawaii Professional Assembly v. University of Hawaii*, 66 Haw. 214, 219, 659 P.2d 720, 724 (1983)). The Rental Agreement as a whole clearly evidences that the intent that Defendants were to compute rent in accordance with HUD requirements. Certainly Plaintiffs did not intend to pay more rent than permitted under federal law. To set the rent at some other level would not effectuate the parties' intent.

Additionally, if the contract viewed in its entirety is ambiguous, the contract must be construed against its drafter. *Pancakes of Hawaii, Inc. v. Pomare Properties Corp.*, 85 Hawaii 300, 305, 944 P.2d 97,102 (1997) (citing to *Coney v. Dowsett*, 3 Haw. 685, 686 (1876). The Rental Agreement is a classic adhesion contract. Defendants drafted the contract and are solely responsible for any ambiguity therein. To the extent that the Rental Agreement is ambiguous because Defendants charged residents a higher amount of rent than allowed by HUD

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[1] Form HUD - 50059, Certification and Recertification of Tenant Eligibility is incorporated by reference into the Rental Agreement at Sections 3 and 27. (*See* Pls.' Mot. for Partial Summ. J., Exhibit "A" of Waters Dec.) The "Owner's Certification" section of Form HUD - 50059 requires Defendants to certify that the tenant's "eligibilty, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures...." (*See* Pls.' Mot. for Partial Summ. J., Exhibit "B" of Waters Dec.) It is clear from the face of the Rental Agreement that a Form HUD-50059 must be executed in connection with the signing of the Rental Agreement, and thus Defendants must certify that they have complied with HUD regulations regarding the setting of tenants' rents at the commencement of each tenancy, not just a year later when the rents change. (*See* Pls.' Mot. for Partial Summ. J., Sections 3 and 27 of Exhibit "A" of Waters Dec.)

regulations in spite of a contractual provision stating that Defendants would abide by HUD regulations, the ambiguity must be decided in favor of the residents.

Furthermore, existing law is part of a contract where there is no stipulation to the contrary. *Quedding v. Arisumi Brothers, Inc.*, 66 Haw. 335, 337, 661 P.2d 706, 709 (1983) (holding that it was implied in a contract to build a home that the contractor would comply with the requirements of the Uniform Building Code even though the Code was not expressly referred to in the contract). This rule was applied to federally subsidized housing in *Merrill Tenant Council v. U.S. Dept. of Hous. and Urb. Dev.*, 638 F.2d 1086 (7th Cir. 1981), where the U.S. Court of Appeals for the Seventh Circuit held that a state law that required interest to be paid on security deposits was implied into the terms of tenants' rental agreements despite the fact that the rental agreements did not expressly incorporate the law. 638 F.2d at 1089-1090. Thus, even if the Wilikina Rental Agreement did not explicitly state that the rents and utility allowances were to be computed in accordance with HUD regulations, the Brooke Amendment and its supporting regulations are implied terms of the contract. There is no dispute that Defendants violated those laws.

Based on the undisputed facts, summary judgment against HCDCH and HHA is appropriate with respect to the breach of contract claim for Wilikina tenants.

B. PLAINTIFFS' FEDERAL LAW CLAIM

Though Defendants have not disputed that they have violated federal law, Plaintiffs concede that it would be inappropriate to grant their summary judgment motion with respect to the federal law claim at this time since Defendant Stephanie Aviero, in her official capacity as the Executive Director of the HCDCH, is not a party to this motion. Additionally, Plaintiffs have not obtained sufficient discovery to determine whether Defendant HHA is an agency or department of the

State and thus protected by the Eleventh Amendment. Plaintiffs withdraw that portion of the motion pertaining to their federal law claim.

C. PLAINTIFFS' RIGHT TO INJUNCTIVE RELIEF

Defendants assert that injunctive relief is inappropriate because rent overcharges do not constitute irreparable injury and there is an adequate remedy at law for overcharging public housing residents. In essence, Defendants are arguing that despite the fact that they knowingly continue to overcharge Wilikina residents for rent, they may continue to do so indefinitely since Plaintiffs can always bring another suit to recover damages from the overcharges.

Residents of federally subsidized housing are low-income by definition. *See* 24 C.F.R. § 5.653(b)(2). Wilikina tenants can be charged rents as low as $25 per month depending on their income. *See* 24 C.F.R. § 5.630(a)(3). While $34 per month (the amount of the utility allowance increase Defendants have proposed to HUD) may not be significant to the general public, it is a substantial amount to the tenants of subsidized housing. Though the temporary loss of money does not usually constitute irreparable injury, exceptions to this principle have been recognized where federally subsidized housing tenants were overcharged for their rent. *See e.g.*, *Bloodworth v. Oxford Village Townhouses, Inc.*, 377 F.Supp. 709 at 719 ("If plaintiffs were in a more favorable economic position, then the impact of defendants' action would not be as great and the court would be reluctant to find the injury to plaintiffs to be irreparable. Such is not the case here."); *see also Keller v. Kate Maremount Found.*, 365 F.Supp. 798 (N.D. Cal. 1972) ("a 10 per cent increase in rent can be extremely serious for a low-income family.").

In *Meade v. Hawaii Housing Authority*, 1975 U.S. Dist. LEXIS 15229 (D. Haw. Apr. 15, 1975) (attached hereto as Exhibit "A"), the U.S. District Court for the

District of Hawaii issued an order enjoining the Hawaii Housing Authority (HCDCH's predecessor) from requiring subsidized housing tenants to pay for mandatory furniture rental to the extent that the rental charge, together with the rent for the dwelling, exceeded the rent limitation of the U.S. Housing Act. The injunction was issued in spite of the fact that tenants could (and did) recover monetary damages resulting from the rent overcharges. An injunction is appropriate, indeed necessary, in this case as well.

Defendants also assert that an injunction is not appropriate since they are "presently doing everything possible to adjust the utility allowance" and that the allowance cannot be changed without HUD's approval. (Defs.' Mem. in Op. to Pls.' Mot. for Partial Summ. J. at 5-6.) However, this ignores the ultimate problem in this case: Defendants are charging rents in excess of the Brooke Amendment. Defendants are not obligated to charge rents at the rent maximum set by the Brooke Amendment; they may charge less. Yet Defendants pretend that they must wait for HUD approval before they can cure their violation of federal law and breaches of tenants' rental agreements by updating the utility allowance. Nothing but Defendants' own convenience prevents Defendants from reducing the rents for Wilikina residents so that they do not exceed the maximum rents that can be charged under the Brooke Amendment. Defendants' unwillingness to do so magnifies the reason why an injunction is necessary.

D. DEFENDANTS' REQUEST FOR A CONTINUANCE BASED ON "PREMATURE" FILING OF PLAINTIFFS' SUMMARY JUDGMENT MOTION

Defendants argue that Plaintiffs' Motion for Partial Summary judgment was filed prematurely because: (1) "this case has been at issue between plaintiffs and the State for less than two months;" (2) the entities that manage or previously managed the subject projects have not yet appeared; and (3) Plaintiffs have filed a

second amended complaint, which adds a new claim and names a new defendant. Defendants do not cite to any legal authority supporting the theory that this motion should be continued based on the above-stated grounds, and indeed, there appears to be none.

Rule 56(a) of the Hawaii Rules of Civil Procedure ("Haw. R. Civ. P.") provides in part that "[a] party seeking recovery under this rule may seek relief at any time after the expiration of 20 days from the commencement of the action...." Plaintiffs' summary judgment motion meets this requirement since almost six months have elapsed since Defendants were served with Plaintiffs' complaint and this action was commenced.[2]

Though some parties to this action have not yet appeared and Plaintiffs have amended their complaint to add another party and another cause of action, this motion relates only to breaches of HCDCH's and HHA's duties to Plaintiffs. Though there may be additional matters at issue in this case, "[a] party seeking to recover upon a claim...or to obtain declaratory judgment may move...for a summary judgment in the party's favor upon all *or any part thereof....*" Haw. R. Civ. P. 56 (a) (emphasis added). The undisputed facts establish that Defendants HCDCH and HHA breached the rental agreements of Wilikina Apartments tenants. "[It] is error to deny trial when there is a genuine dispute of facts; but it is just as much error...to deny or postpone judgment where the ultimate legal result is clearly indicated...." *Keller v. California Liquid Gas Corp.*, 363 F. Supp. 123, 126 (D. Wyo. 1973)(quoting *Arnstein v. Porter*, 154 F.2d 464, 478 (2nd Cir. 1946)). Plaintiffs are entitled to an order of summary judgment on the issues presenting in this summary judgment motion.

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2 Even accepting Defendants' suggestion that their failure to file a timely answer to Plaintiffs' complaint resulted in the case "being at issue" for only two months, less than one month after the commencement of an action is all that is necessary under the Hawaii Rules of Civil Procedure.

E. DEFENDANTS' REQUEST FOR A RULE 56(f) CONTINUANCE

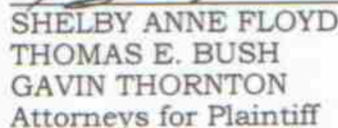
Defendants assert that this motion should be continued pursuant to Haw. R. Civ. P. 56(f). In requesting a continuance under Rule 56(f), a party "must demonstrate how a postponement of a ruling on the motion will enable him [or her], by discovery or other means, to rebut the movants' showing of absence of a genuine issue of material fact." *Josue v. Isuzu Motors Am.*, 87 Haw. 413, 416 (quoting *Wilder v. Tanouye*, 7 Haw. App. 247, 253 (1988)). Defendants have failed to satisfy this requirement.

The undisputed facts show that Defendants breached of the rental agreements of Wilikina Apartments residents. Defendants point to nothing that can rebut this showing. The only discovery that Defendants assert will affect this motion are the tenant files that "reflect whether or when tenant rent was adjusted as to current tenants." (*See* Defs.' Mem. in Op. to Pls.' Mot. for Partial Summ. J., ¶ 10 of Hee Dec.) However, this discovery is irrelevant for the present motion since, as discussed above, Defendants assertion that a breach of contract only occurred once tenants' rents were adjusted after a year of their tenancy is wrong. Assuming arguendo that their argument had merit, summary judgment would still be appropriate for tenants of Wilikina Apartments who have resided there for over a year. As such, Defendants request for a continuance must be denied.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment against Defendants HCDCH and HHA with respect to Plaintiffs' contract claim.

DATED: Honolulu, Hawai'i, October 28, 2005.



SHELBY ANNE FLOYD
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GAVIN THORNTON
Attorneys for Plaintiff

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 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	CIVIL NO. 05-1-0815-05 EEH (Contract) Class Action **DECLARATION OF GAVIN K. THORNTON; EXHIBIT "A"**

DECLARATION OF GAVIN K. THORNTON

GAVIN K. THORNTON, under penalty of perjury, declares and states the following to be true and correct:

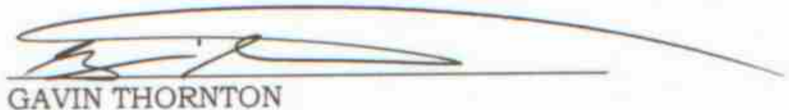
1. I am an attorney for the law firm of Lawyers for Equal Justice, counsel for Plaintiffs herein.

2. I am familiar with and have personal knowledge of the facts stated in this Declaration.

3. Attached hereto as Exhibit "A" is a true and correct copy of the United States District Court for the District of Hawaii order in *Meade v. Hawaii Housing Authority*, 1975 U.S. Dist. LEXIS 15229 (D. Haw. 1975) referred to in Plaintiffs' Reply in Support of Motion for Partial Summary Judgment.

I declare under the penalty of perjury the foregoing is true and correct.

DATED: Honolulu, Hawaii, October 14, 2005.



GAVIN THORNTON

MARION MEADE, et al., Plaintiffs, vs. HAWAII HOUSING AUTHORITY, et al., Defendants.

CIVIL No. 74-46

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

1975 U.S. Dist. LEXIS 15229

November 18, 1975

OPINION: [*1]

ORDER GRANTING FINAL JUDGMENT

This Court granted summary judgment for plaintiffs on August 19, 1975. At that time monetary relief was postponed because the amount of the mandatory charge for furniture in excess of the rent limitation of *42 U.S.C. section 1402*(1) was disputed. The parties, by stipulation filed on September 23, 1975, have now agreed that this amount is $27,170.50 as detailed in the stipulation.It is, therefore, appropriae that final judgment be entered at this time.

In accordance with this Court's order filed on August 19, 1975, final judgment will be entered enjoining defendant HAWAII HOUSING AUTHORITY, its agents and employees, and all persons in active concert or participation with it, from requiring members of the plaintiff class who reside at Admiral Cooke Apartments to pay a furniture rental to the extent that such rental charge, together with the rent for the dwelling, exceeds the rent limitation of *42 U.S.C. Section 1402*(1).

In addition, defendants, JAMES T. LYNN and CHARLES McCLURE, their agents and employees, and all persons in active concert or participation with them, will be mandated to perform their legal duty of ensuring defendant HAWAII HOUSING [*2] AUTHORITY's compliance with the judgment, and to take such action as is permitted by law in case of noncompliance.

Defendant, HAWAII HOUSING AUTHORITY will pay to the members of the plaintiff class from funds in its leased housing program the amount of $27,120.50 to be distributed in accordance with the Court's order filed on November 3, 1975, and the stipulation filed by the parties on September 23, 1975, together with interest at an annual rate of 6% from the date final judgment is entered herein.

Pursuant to *Rule 54(d), Fed. R. Civ. P.*, and *28 U.S.C. section 2412*, defendants HAWAII HOUSING AUTHORITY and JAMES T. LYNN and CHARLES McCLURE shall pay to plaintiffs their costs of this action, not including fees and expenses of attorneys.

Plaintiffs also seek prejudgment interest from the time of the illegal charge to the date of judgment. Plaintiffs have no absolute right to such interest, but the court may award prejudgment interest if convinced that justice so requires. See *United States v. Eastern Air Line, Inc., 366 F.2d 316, 321-22 (2d Cir. 1966); Robert C. Herd & Co., Inc. v. Krawill Machinery Corp., 256 F.2d 646, 953-54 (4th Cir. 1958).*

Here, although the charge is [*3] illegal, it is the mandatory nature of the charge which renders it so. As I stated earlier, I see nothing in the statute requiring or prohibiting the offering of furniture at an additional cost. Plaintiffs did, in fact, have the use of the rented furniture while being charged. Defendant, HAWAII HOUSING AUTHORITY was a mere conduit and paid this money over to the owner of the furniture, and therefore never had the use of them money. Moreover, defendant HAWAII HOUSING AUTHORITY acted in reliance upon its understanding of federal interpretation of federal law in charging for the furniture.

Under these circumstances, I do not feel that an award of prejudgment interest is appropriate.

IT IS SO ORDERED.

EXHIBIT "A"