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CITY AND COUNTY OF HONOLULU

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

BEVERLY BLAKE, STEPHANIE
CAMILLERI, ARLENE SUPAPO,
individually, and on behalf of all
persons similarly situated,

Plaintiffs,

vs.

CRAIG NISHIMURA, in his official
capacity as Acting Director of the
Department of Facility Maintenance,
City and County of Honolulu; CITY
AND COUNTY OF HONOLULU, a
municipal corporation,

Defendants.

) CIVIL NO. CV08-00281 LEK
)
) (Contract) (Declaratory Judgment)
) (Other Civil Actions)
) Class Action
)
) DEFENDANT CITY AND COUNTY
) OF HONOLULU'S AMENDED
) THIRD-PARTY COMPLAINT
) AGAINST THIRD-PARTY
) DEFENDANT HAWAIIAN
) PROPERTIES, LTD.; EXHIBIT "1";
) SUMMONS; CERTIFICATE OF
) SERVICE
)
) Trial Date: December 15, 2009
) Judge: Leslie E. Kobayashi
)
)

CITY AND COUNTY OF)
HONOLULU,)
))
Third-Party Plaintiff,)
))
vs.)
))
HAWAIIAN PROPERTIES, LTD.)
))
Third-Party Defendants.)
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_____)

DEFENDANT AND THIRD PARTY PLAINTIFF CITY AND COUNTY OF HONOLULU’S AMENDED THIRD PARTY COMPLAINT AGAINST THIRD-PARTY DEFENDANT HAWAIIAN PROPERTIES, LTD.

Defendant and Third-Party Plaintiff CITY AND COUNTY OF HONOLULU (hereinafter “CITY”), by and through its attorneys, Carrie K.S. Okinaga, Corporation Counsel, and D. Scott Dodd, Deputy Corporation Counsel, for its Amended Third-Party Complaint against Third-Party Defendants HAWAIIAN PROPERTIES, LTD. (“HPL”), and ROE DEFENDANTS 1-100 alleges and avers as follows:

PARTIES

1. Defendant and Third-Party Plaintiff CITY AND COUNTY OF HONOLULU (“CITY”) is a municipal corporation duly organized under the laws of the State of Hawaii and known as City and County of Honolulu, State of

Hawaii. CITY is deemed a resident of the City and County of Honolulu, State of Hawaii.

2. CITY is informed and believes, and based thereon alleges that Third-Party Defendant HPL is a Hawaii corporation, with its principal place of business in the City of Honolulu, State of Hawaii.

3. CITY is ignorant of the true names and capacities of Third-Party Defendants sued herein as ROE DEFENDANTS 1-100, and therefore sues these Third-Party Defendants by such fictitious names. The CITY will amend this Third-Party Complaint to allege their true names and capacities when ascertained.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343(a)(3), 28 U.S.C. §1367, and 42 U.S.C. §1983. Venue is appropriate pursuant to 28 U.S.C. §1391(b).

FACTUAL ALLEGATIONS

5. In the Complaint filed in this case by Plaintiffs Beverly Blake, Stephanie Camilleri and Arlene Supapo, individually, and on behalf of all persons similarly situated on June 12, 2008, Plaintiffs allege that, among other things, their civil rights have been violated as a result of the CITY's alleged failure to increase utility allowances and alleged failure to calculate rental amounts properly.

Plaintiffs bring this action on behalf of themselves and all other similarly situated individuals, and they seek damages and declaratory relief from the Court.

A copy of the Complaint is attached hereto as Exhibit "1" and incorporated herein by reference.

6. The CITY is informed and believes and thereon alleges that each of the named Third-Party Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiffs' damages as alleged in their Complaint were proximately caused by such Third-Party Defendants.

7. CITY is informed and believes that during all relevant times, HAWAIIAN PROPERTIES, LTD. ("HPL") was and has been the property manager for Westlake Apartments. The instant lawsuit alleges matters for which HPL has undertaken contractual obligations on behalf of the City.

8. In 2003, HPL entered into a contract with the CITY, known as Contract No. 14214 ("Contract"), to manage the City-owned housing project known as Westlake Apartments and located at 3139 Ala Ilima Street, Honolulu, Hawaii. This Contract was extended via letter dated July 18, 2005, again via letter dated September 14, 2006, and finally on December 21, 2007.

9. The Contract states that the Westlake Apartment project ("the Project") is subject to a mortgage insured by the Federal Department of Housing and Urban Development (HUD) under Section 221-D-4 of the National Housing

Act. The Project also has a Section 8 Contract with HUD to provide decent, safe, and sanitary housing to low and moderate income families at reasonable rents.

Because of this Federal involvement in this Project, [HPL] must meet HUD and DFM requirements listing in the Contract.

10. The Contract requires HPL to comply with all pertinent requirements of the Regulatory Agreement, the Section 8 Contract and the directives of the HUD Secretary. The Contract further requires HPL to have previous experience managing HUD and HUD-insured projects, as well as Section 8 housing assistance programs, or shall present evidence reflecting expertise to implement HUD and HUD-insured projects.

11. The Contract requires that HPL shall have the capability to provide complete management services, including but not limited to physical maintenance of the premises, establishing and collecting rents according to the procedures of the Section 8 program, depositing all Project incomes into the Project bank accounts as specified by HUD, making all Project disbursements from the Project accounts and providing accounting and reporting services according to procedures specified by HUD.

12. The Contract requires HPL to obtain and maintain at all times on behalf of the CITY comprehensive liability insurance, and to name the CITY as an additional insured in the insurance policy or policies.

13. The Contract provides that HPL shall indemnify and save the CITY harmless from all claims for losses, damages or liabilities occasioned wholly or in part by acts or omissions of HPL.

14. The Contract provides that HPL shall take any and all actions as may be necessary to comply promptly with any and all governmental order or other requirements affecting the Project, whether imposed by Federal, State or County authority.

15. The Contract provides that HPL shall indemnify, hold harmless and defend the CITY and its officers, employees, agents and representatives from all suits, actions, claims damages, and judgments of any character that may be brought against the CITY by whomsoever, on account of any injuries or damages sustained by any person or property, due to the negligent acts or omissions by HPL, or any of its officers, employees, subcontractors, assignees, or representatives, in the performance of the Contract.

16. In their Complaint, Plaintiffs' allege that under the Brook Amendment to the U.S. Housing Act, rent, including utilities, for tenants residing in Section 8 Loan Management developments cannot exceed a certain percentage of a tenant's income. Also, that the owner of a Section 8 Loan Management 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

HUD. Further, 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.

17. Plaintiffs' allege that to ensure that tenants' rent plus utilities do not exceed the Brooke Amendment's rent ceiling when tenants are directly responsible for the payment of utility services (i.e., where the tenant must pay a utility provider directly), HUD regulations require that tenants be provided with a "utility allowance." Also that 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. Further, each time the contract rents for a Section 8 Loan Management development are 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). Finally, 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, Complaint, ¶¶26 – 31.

18. Plaintiff further allege they, residents of the Westlake Apartment Project, pay their own electric utilities, and have been provided a monthly utility allowance in the amount of \$40.00. Plaintiffs allege that even though utility rates

have increased in excess of 10 percent since the utility allowances were last updated, the CITY has failed to increase the utility allowances for Westlake. Plaintiffs allege that the CITY has failed to complete and submit an analysis of the adequacy of utility allowances in connection with the CITY's requests for adjustments of the contract rents for Westlake. See, Complaint, ¶¶41 – 43.

19. Plaintiffs allege that as a result of this, they have been required to pay amounts for utility bills in excess of the utility allowance provided and thereby have been forced to pay an amount for rent in excess of 30% of their income. Plaintiffs allege that the CITY “repeatedly falsely” certified that the rents for Plaintiffs were calculated in accordance with HUD regulations and procedures. Plaintiffs allege that therefore they paid rents in excess of what they should have paid. See, Complaint ¶¶ 44 – 46.

20. Pursuant to the Contract, calculation of appropriate tenant rent at the Westlake Project was HPL's responsibility. HPL was required to be familiar with all applicable Section 8 and HUD requirements, and it was HPL's responsibility to ensure that tenant rents did not exceed the rent ceiling allowed by the Brooke Amendment. It was HPL's duty to determine if the utility allowance was appropriate in the calculation of the tenants' rent, and to request an increase in the utility allowance if necessary to ensure that the CITY was in compliance with the Brooke Amendment to the U.S. Housing Act and all other applicable laws.

COUNT I

(Breach of Contract-As Against Defendant HAWAIIAN PROPERTIES, LTD.)

21. The CITY realleges and incorporates herein by reference all of the allegations contained in paragraphs 1 through 20, inclusive, as though fully set forth herein.

22. The aforementioned acts and/or omissions of HPL constitute a breach of the aforementioned Contract for the management of the Westlake Apartment Project, as a result of HPL's not performing its duties and responsibilities, as a result of HPL's failing to calculate an appropriate tenant rent in accordance with applicable laws, rules and regulations, as a result of HPL's failing to ensure that tenant rent did not exceed the rent ceiling allowed by the Brooke Amendment, and as a result of other breaches to be proven at trial.

23. As a result of said breach(es), the CITY has been forced to incur costs and fees in defense of the present action and has suffered damages in an amount to be proven at trial.

COUNT II

(Indemnity/Contribution-As Against All Third-Party Defendants)

24. CITY realleges and incorporates by reference the allegations of Paragraph 1 through 23 above as fully set forth herein.

25. If Plaintiffs' sustained any injuries and/or damages, it was due to the negligent or otherwise tortious conduct of the Third-Party Defendants and not the CITY.

26. If the CITY engaged in any tortious conduct, such tortious conduct was passive and secondary and the tortious conduct of the Third-Party Defendants was active and primary in causing Plaintiffs' injuries, and therefore the CITY is entitled to full indemnity and/or contribution from the Third-Party Defendants.

COUNT IV

(Indemnity/Breach of Contract-As Against HAWAIIAN PROPERTIES, LTD.)

27. CITY realleges and incorporates by reference the allegations of Paragraphs 1 through 26 above as fully set forth herein.

28. At the time of the incident alleged in Plaintiff's Complaint, Contract No. 14214 between CITY and HPL was in effect. Said Contract provides:

[HPL] shall indemnify and save the City harmless from all claims for losses, damages or liabilities occasioned wholly or in part by acts or omissions of [HPL].

29. The same such Contract also provides that:

INDEMNITY. [HPL] shall indemnify, hold harmless and defend the City and its officers, employees, agents, and representatives from all suits, actions, claims, damages, and judgments of any character that may be brought against the City by whomsoever, on account of any injuries or damages sustained by any person and property, due to the negligent acts or omissions by [HPL], or any of its officers, employees, subcontractors, assignees, or representatives, in the performance of the contract.

30. The CITY has made a demand on Third-Party Defendant HPL for indemnification and defense of the CITY in the instant lawsuit.

31. Any failure of Third-Party Defendant HPL to indemnify and defend the CITY in the instant lawsuit constitutes a breach of contract.

32. The CITY has suffered damages and will continue to suffer damages as a result of Third-Party Defendant HPL's breach of contract as alleged herein.

COUNT IV

(Declaratory Relief)

33. The CITY realleges and incorporates by reference the allegations of paragraphs 1 through 32 above as if fully set forth herein.

34. Contract No. 14214 between CITY and HPL sets forth the terms and conditions regarding indemnity and defense for the CITY.

35. The CITY avers that Third-Party Defendant HPL has the duty and obligation to provide indemnity and defense for the City in the instant lawsuit.

36. A controversy exists between the CITY and Third-Party Defendant HPL with regard to the rights and obligations pursuant to said agreement.

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PRAYER FOR RELIEF

WHEREFORE the Defendant and Third-Party Plaintiff CITY prays for judgment on its Amended Third-Party Complaint as against Third Party Defendants, as follows:

A. That Plaintiffs' aforementioned Complaint be dismissed against the CITY and that the CITY be awarded its costs and attorneys' fees;

B. That if Plaintiffs' are entitled to any judgment, such judgment be rendered solely against Third-Party Defendants HAWAIIAN PROPERTIES, LTD., and/or ROE DEFENDANTS 1-100, and not against the CITY;

C. That should it be determined that the CITY and Third-Party Defendant HAWAIIAN PROPERTIES, LTD. and/or Third-Party Defendants ROE DEFENDANTS 1-100 are liable herein, that the CITY have judgment against HAWAIIAN PROPERTIES, LTD. and/or ROE DEFENDANTS 1-100 and be indemnified in full for the amount of any judgment in favor of Plaintiffs against which the CITY may pay, including costs and expenses of suit;

D. That if it be determined that both CITY and any Third-Party Defendant were negligent or the acts and/or omissions of both were otherwise wrongful with respect to the events described in Plaintiffs' Complaint, the relative and comparative degree of fault be determined for each party in accordance with

