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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

IN THE UNITED STATES DISTRICT COURT

JUL 13 2005

FOR THE DISTRICT OF HAWAII

at 2 o'clock and 57 min. PM
SUE BEITIA, CLERK *[Signature]*

RODELLE SMITH, SHEILA)
TOBIAS, BARBARA BARAWIS,)
and LEWIS GLASSER individually,)
and on behalf of all persons similarly)
situated,)

CV NO 04-00309 DAE KSC

Plaintiffs,)

vs.)

STEPHANIE AVEIRO, in her)
official capacity as the Executive)
Director of the Housing and)
Community Development)
Corporation of Hawaii; HOUSING)
AND COMMUNITY)
DEVELOPMENT CORPORATION)
OF HAWAII, a duly organized and)
recognized agency of the State of)
Hawaii,)

Defendants.)

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT; GRANTING DEFENDANTS' COUNTER-MOTION FOR
SUMMARY JUDGMENT AND DISMISSING THE CASE WITHOUT
PREJUDICE

The court heard Plaintiffs' Motion and Defendants' Counter-Motion
on July 12, 2005. Gavin Thornton, Esq., and Shelby Anne Floyd, Esq., appeared
at the hearing on behalf of Plaintiffs; John C. Wong, Esq., and Margaret A. Leong,

Esq., appeared at the hearing on behalf of Defendants. After reviewing the motions and the supporting and opposing memoranda, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment; GRANTS Defendants' Counter-Motion for Summary Judgment; and DISMISSES the case WITHOUT PREJUDICE.

BACKGROUND

A. Factual background

On May 13, 2004, Plaintiffs Rodelle Smith, Sheila Tobias, Barbara Barawis, Lewis Glaser, individually and on behalf of all persons similarly situated (collectively "Plaintiffs") filed a complaint against Defendants Stephanie Aveiro and the Housing and Community Development Corporation of Hawaii (collectively "Defendants"). The complaint alleged utility allowance violations under the United States Housing Act ("Housing Act") and sought declaratory and injunctive relief.

Defendant Housing and Community Development Corporation of Hawaii ("HCDCH") is a public housing authority and Defendant Stephanie Aveiro is HCDCH's Executive Director. Plaintiffs are tenants of HCDCH.

The Housing Act requires shelter costs (including utilities) for tenants of federally subsidized public housing projects to be less than thirty percent of the

tenant's income. If tenants pay for utilities directly, public housing authorities must provide utility allowances.

Prior to May 17, 1998, Defendants established a utility allowance schedule applicable to all relevant HCDCH housing projects. This allowance schedule required tenants who exceeded their consumption allowance to pay for the excess consumption out of pocket. The allowance schedule measured electric and gas consumption. Defendants failed to review and revise these allowances annually, as required by 24 C.F.R. § 965.507(a).

Sometime prior to May 17, 1998, Defendants converted from an electric and gas consumption allowance to a monetary allowance. Defendants credited this monetary allowance to Plaintiffs' monthly rent. Defendants failed to adjust monetary allowances between May 17, 1998 and September 30, 2004, as required by 24 C.F.R. § 965.507(b).

After Plaintiffs filed their complaint, Defendants retained a consultant to update the allowance schedule and initiate a system to prevent future incidents of noncompliance. On October 1, 2004, HCDCH implemented amended utility allowances. HCDCH now requires annual review of utility rates and allowances. Finally, HCDCH promulgated amendments incorporating the federal statute into Hawaii's statutory scheme, which were recently approved by Governor Lingle.

B. Procedural background

On March 16, 2005, Plaintiffs filed a Motion for Partial Summary Judgment. On June 21, 2005, Defendants filed a Counter-Motion for Summary Judgment and an Opposition to Plaintiffs' Motion for Summary Judgment. On June 30, 2005, Plaintiffs filed a Reply in support of their Motion for Summary Judgment and an Opposition to Defendants' Counter-Motion for Summary Judgment. On July 7, 2005, Defendants filed a Reply in support of their Counter-Motion for Summary Judgment.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be entered when:

[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)). However, the moving party need not produce evidence negating the

existence of an element for which the opposing party will bear the burden of proof at trial. Id. at 323.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted).

A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. Id. The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." Id. at 255. In ruling on a motion for summary judgment, the court must bear in mind the actual

quantum and quality of proof necessary to support liability under the applicable law. Id. at 254. The court must assess the adequacy of the nonmovant's response and must determine whether the showing the nonmovant asserts it will make at trial would be sufficient to carry its burden of proof. See Celotex, 477 U.S. at 322.

At the summary judgment stage, this court may not make credibility determinations or weigh conflicting evidence. Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990). The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: whether the evidence presents a sufficient disagreement to require submission to a jury, or it is so one-sided that one party must prevail as a matter of law. Id. (internal citation omitted).

DISCUSSION

Here, there is no genuine issue of material fact. Plaintiffs and Defendants agree federal law requires: (1) an annual review of utility allowances and (2) an adjustment when there is a change in utility costs of more than ten percent from the most recent adjustment. Furthermore, Plaintiffs and Defendants agree Defendants failed to comply with these two requirements of federal law in the past. Plaintiffs request declaratory and injunctive relief be granted under 42 U.S.C. § 1983 and under the Housing Act. The Court finds, however, that

Plaintiffs' claims are moot as Defendants have already promulgated the requested changes and are in the process of implementing them.

“A claim is moot if it has lost its character as a present, live controversy.” American Rivers v. National Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997). “If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.” Id. “In the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury.” Clark v. City of Lakewood, 253 F.3d 996, 1007 (9th Cir. 2001).

Here, subsequent to this suit's filing Defendants retained a consultant to update the allowance schedule and initiate a system to prevent future incidents of noncompliance. Defendants reviewed utility allowances and on October 1, 2004 adjusted them in accordance with 24 C.F.R. §956.507, implementing an adjusted utility allowance that was retroactive to September 2004. This adjustment addressed Plaintiffs' immediate concerns regarding violations. HCDCH now also requires annual review of utility rates and allowances, which is currently scheduled to take place in January of 2006.

Plaintiffs also expressed concern that the most recent adjustment was only a temporary solution and that statutory violations would likely resume in the

future. However, HCDCH drafted amendments to its administrative rules addressing these concerns. The new state administrative rules are substantially identical to the federal standard, thereby eliminating the likelihood of future violations. The Court finds, that given the newly-devised administrative scheme, future violations are unlikely to occur and any concern regarding potential future violations would be purely speculative at this point. These new administrative rules have just been signed by Governor Lingle and will take effect 10 days from the date of her signature.

The Court finds that the relief sought by Plaintiffs has been effectuated by Defendants, therefore rendering moot Plaintiffs' requested injunctive or declaratory relief. Therefore, the court DENIES Plaintiffs' Motion for Partial Summary Judgment; GRANTS Defendants' Counter-Motion for Summary Judgment; and DISMISSES the case WITHOUT PREJUDICE. Should Defendants fail in any way to adequately implement the recently promulgated regulatory scheme and comply with the applicable federal regulations, the Court will permit Plaintiffs to refile their Complaint and proceed with their case at that point.

CONCLUSION

For the reasons stated above, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment; GRANTS Defendants' Counter-Motion for Summary Judgment; and DISMISSES the case WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 13 2005.

A handwritten signature in black ink, appearing to read 'DAVID ALAN EZRA', written over a horizontal line.

DAVID ALAN EZRA
CHIEF UNITED STATES DISTRICT JUDGE

Rodelle Smith, et al. vs. Stephanie Aveiro, et al., CV NO. 04-00309 DAE-KSC;
ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT; GRANTING DEFENDANTS' COUNTER-MOTION FOR
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