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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER individually, and on behalf of all persons similarly situated,	CIVIL NO. 04-1-0069K (Contract) Class Action
Plaintiffs, vs. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, a duly organized and recognized agency of the State of Hawai`i; Defendants.	**DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT FILED ON SEPTEMBER 23, 2005; CERTIFICATE OF SERVICE** **Hearing: October 3, 2005** **Time: 9:30 a.m.** **Judge: Elizabeth Strance**

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT FILED ON SEPTEMBER 23, 2005

I. INTRODUCTION

In their opposition Memorandum[1], Plaintiffs have failed to establish any genuine issues of material fact, or to rebut the clear principles of law that entitle HCDCH to summary judgment as a matter of law. As to their First Claim for Relief, Section 21 of the ACC itself clearly prohibits lawsuits such as this one against HUD or any housing authority, for alleged breaches of its provisions. Even if Plaintiffs might be considered third-party beneficiaries of the ACC, they are only incidental beneficiaries at best, and the law is abundantly clear that an incidental beneficiary acquires "no right against the promisor or the promisee". *Restatement (Second) of Contracts § 315 (1981), at 477.*

As to their Second Claim for Relief, Plaintiffs likewise have failed to overcome the overwhelmingly fact that they were provided utility allowances in accordance with the express provisions of the Rental Agreement itself. Under fundamental principles of contract law, the express language of the Rental Agreement prevails, even if the result might arguably be unintended. Moreover, the Amended Complaint, filed August 10, 2004, itself is totally devoid of any allegation that Rental Agreements, i.e. the "contracts", were even executed between Plaintiffs and HCDCH. This is not a mere formality of pleading and it would be wholly improper for the Court to assume or imply that such privity existed at the time the Amended Complaint was filed.

[1] Plaintiffs filed their opposition Memorandum on September 23, 2005. It was postmarked to us on September 26 and received in our office on September 27, 2005.

The arguments that follow justify the granting of HCDCH's Motion.

II. ARGUMENTS

A. The ACC Clearly Prohibits No Right of Enforcement or Cause of Action Against HCDCH

Section 21 of the ACC is clear and undisputable: no third-party rights for its enforcement or for private causes of action against HUD or any Housing Authority for the breach of any of its provisions, are allowed. Plaintiffs reliance on *Ashton v. Pierce*, 716 F.2d 56 (D.C.Cir. 1983) as controlling authority is misplaced. *Ashton* involved a class action challenge by public housing residents specifically as to HUD's enforcement of the Lead-Based Paint Poisoning Prevention Act ("LBPPPA") § 302, 42 U.S.C. §4822. The Court's discussion of the ACC was only ancillary to the broader finding that Congress clearly intended HUD to implement and enforce the provisions of the LBPPPA. *Id., at 66.*

The same District of Columbia Court in *Samuels v. District of Columbia,* 770 F. 2d 184, 201, fn 14, questioned its previous ruling in *Ashton* with respect to whether the ACC allowed for private rights of action by residents brought under 42 U.S.C. §1983 for alleged violations of the Housing Act, 42 U.S.C. §1437, et seq.:

> "We therefore do not decide whether the plaintiffs could obtain relief as third-party beneficiaries of the District's annual contributions contract with HUD under which the District generally promises to obey the Act and relevant HUD regulations…
> In *Ashton v. Pierce*, 716 F. 2d 56 (D.C. Cir.), *amended* 720 F.2d 70 (D.C. Cir. 1983), this court concluded that tenants could require HUD to monitor PHA compliance with certain lead-based paint elimination standards under a similar third-party beneficiary theory. We did so, however, only in light light of Congress' clear intent to require such enforcement. (Citation omitted)… We do not believe, for example, that an individual public housing tenant could bring a section 1983 action for a public landlord's random and unauthorized failure to maintain properly her dwelling unit on the theory that such action violates the provision of the Act which calls for 'decent, safe and sanitary dwellings. 42 U.S.C. §1437… Nothing in the language or history of the Act

> indicates that Congress intended the broad policy provisions of the Act to create a federal remedy for every aspect of public landlord-tenant relations… To the extent that the plaintiffs' third-party beneficiary theory could be extended to establish a federal cause of action for such discrete and random disputes, we think it would be plainly inconsistent with the structure of federal housing law."
>
> (Emphasis added)

Accord., *Simmons v. Charleston Housing Authority*, 881 F. Supp.225 (S.D.W.Va. 1995)

It is clear, then, that *Ashton* provides no comfort for Plaintiffs to assert a "third-party beneficiary" theory under the ACC, for that same D.C. Court modified its ruling in *Samuels* by clearly indicating that the provisions of the ACC would generally bar private actions for breaches of its provisions.

In the present case, Section 21 of the ACC between HCDCH and HUD is virtually identical to the ACC provision in *Velez v. Cisneros*, 850 F.Supp. 1257, 1276-1277 (E.D.Pa. 1994), where the Court held that the language explicitly prohibited tenants from enforcing the ACC as third-party beneficiaries:

> "However, subsection 510(B) states, 'Nothing in this Contract contained shall be construed as creating or justifying any claim against the Government by any third party other than (certain bondholders and the local housing authority)'… This court disagrees with *Ashton's* conclusion that section 510 of the ACC lacks clarity; it clearly expresses the parties' intent to limit third party actions against HUD… The contract's broad, precatory language expressing an intent to benefit plaintiffs in sections 101, 201 and 209 is insufficient to allow plaintiffs to sue as third party beneficiaries under the ACC. Plaintiffs may not recover against HUD, CHA (Chester Housing Authority), or CHA/HUD as third party beneficiaries of the ACC."
>
> (Emphasis added)

Finally, the language of Section 21 in HCDCH's ACC with HUD is indeed identical to the language of the ACC in *Aristii v. Housing Authority of the City of Tampa, Florida*, 54 Supp. 2d 1289, 1296 (M.D.Fla. 1999):

> "Section twenty-one(21) of the ACC explicitly states that '(e)xcept as to bondholders…nothing in this ACC shall be construed as creating any right of any

third party to enforce any provision of the ACC or to assert any claim against HUD or the (Housing Authority)." (Dkt. 12, exhibit A). Therefore, after considering the legislative history and the language of the LPPPA, the USHA, and the ACC, the Court finds that Plaintiffs, in this instance, were not intended beneficiaries of the ACC entered between the Housing Authority and HUD. The ACC expressly provides that no rights are created in any person as a third party beneficiary." (Emphasis added.)

B. A Third-Party Beneficiary Theory Does Not Save Plaintiffs First Claim

Based on the foregoing argument and the case authorities cited, the Court is compelled to effectuate the explicit language of Section 21 of the ACC and dismiss Plaintiffs First Claim for Relief. Nothing could be clearer; Section 21 has been held to specifically bar this very type of lawsuit against housing authorities. HCDCH concedes nothing and asserts that the Court should not even get to the question of whether the Plaintiffs are third-party beneficiaries, given the plain language of Section 21. Plaintiffs cannot be considered intended beneficiaries based on the plain language of Section 21. Under Hawaii law, a party suing as a third-party beneficiary must clearly show that the "contract" was directly intended for his benefit:

> "For one to be able to avail himself of a promise in an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit…(O)ne suing as a third party beneficiary has the burden of showing that the provision was for his direct benefit. *United States v. Maryland Casualty Co.*, 323 F.3d 473 (5th Cir. 1963)."

Island Insurance Company, Ltd. V. Hawaiian Foliage & Landscape, Inc., 67 F.Supp. 2d 1183, 1186-1187 (D.Haw. 1999)

Clearly, Plaintiffs cannot be considered intended beneficiaries of the ACC when the express language of Section 21 obviates this. If at all, they might be considered incidental beneficiaries. In *Eastman v. McGowan*, 86 Haw. 21, 28 (1997), the Hawaii Supreme Court stated:

> "An incidental beneficiary is defined in 4 Corbin, *Corbin on Contracts §779C (1951)* as 'a person who will be benefited by the performance of a contract in

> which he is not a promise, but whose relation to the contracting party is such that the courts will not recognize any legal right in him.' *Id. At 40 (footnote omitted).* Additionally, *Restatement (Second) of Contracts §315 (1981)* states that '(a)n incidental beneficiary acquires by virtue of the promise no right against the promisor or the promise.'*Id at 477."*

But, as incidental beneficiaries to the ACC, this gets them nowhere. It is black-letter law that they acquire no rights and *ipso facto*, no cause of against HCDCH to enforce any of the provisions of the ACC.

It is clear and indisputable, therefore, that Plaintiffs have raised no genuine issue of fact as to their First Claim for Relief. The case authorities and law are compelling, and clearly entitle HCDCH to summary judgment as to their claim.

C. There Are No Allegations in the Amended Complaint That Plaintiffs Even Executed Rental Agreements With HCDCH

HCDCH disagrees completely with Plaintiffs statement that "Defendants do not appear to dispute that an express contract between Plaintiff and Defendant exists…". *Plaintiffs Memorandum in Opposition, at p. 9.* There is nothing in the Amended Complaint that states any semblance of fact that Plaintiffs even executed Rental Agreements with HCDCH. The Amended Complaint appears to assume such a fact, but HCDCH submits that it would be wholly improper for purposes of the present Motion for this Court to also assume such a fundamental jurisdictional "fact". It is axiomatic that a party is suing for breach of contract must allege that a contract existed, and not just refer to the provision which was allegedly breached.

The rules of civil procedure require at minimum that such a fundamental foundational fact, such as the existence of a contract, be plead. *Rule 8(a), H.R.Civ.P; Au v. Au,* 63 Haw. 210 (1981); *In re Genesys Data Technologies, Inc.*, 95 Haw. 33 (2001). " Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides

defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests". *Id., at 41.*

In *Au v. Au*, supra, the Hawaii Supreme Court upheld the dismissal of the plaintiff's count relating to "breach of the agreement of sale", because the complaint failed to "specify" what provisions of the agreement of sale were breached:

> "In the instant case, even liberally construing the pleadings of Count IV, we believe that appellant can prove no set of facts which would entitle her to relief under that claim. Count IV fails to specify what provisions of the agreement of sale were breached. Thus, this count fails to give appellees fair notice of what appellant's claim is or the grounds upon which it rests. Therefore, we hold that the dismissal of Count IV was proper."

Id., at 221.

In *Au,* the Court dismissed the breach of contract-claim because the Complaint failed to specify what specific provision of the contract was breached. However, the plaintiffs Complaint, nonetheless, factually alleged that a "contract" existed (*Id., at 221, fn. 9)*: " Count IV reads… 4. On or about October 26, 1973, vendee purchased from vendor on an agreement of sale…" Here, the converse is true: Plaintiffs Amended Complaint recites to Paragraph 5(a) which HCDCH allegedly has breached, but there is nothing in the pleading to establish that a contract existed between the parties, or that any of the named Plaintiffs were in privity with HCDCH via the Rental Agreement. The existence of this fundamental contractual relationship under the Second Claim for Relief cannot be assumed or implied into the Amended Complaint by the Court.

Clearly, HCDCH would have been entitled to a dismissal under Rule 12(b)(6), H.R.Civ.P., if limited only to the pleadings on file, and the same is truer now when the additional documents and entire record are considered for this summary judgment Motion.

D. The Explicit Language of the Rental Agreement Controls

Plaintiffs opposition Memorandum in defending their Second Claim for Relief is, at best, muddled and confused. They admit that mutual assent is a fundamental principle of contract law, but then assert that it applies only to the formation of the contract, not its "enforcement, interpretation or construction" (*Plaintiffs Memorandum in Opposition, at p. 9);* they admit that "Plaintiffs have an express contract, which Defendants have breached" (*Id., at p. 9),* but then argue that the terms are "ambiguous" (*Id., at p.11);* they argue that the "consumption allowance is indisputably applicable" (*Id., at p.10),* but there is nothing alleged in the Amended Complaint that even refers to the consumption allowance.

On this, Plaintiffs attempt to obfuscate the present Motion by asserting that the "consumption" schedules are applicable is a bare ploy to "create" an issue of fact to prevent summary judgment against them. The consumption schedules are totally irrelevant to their Second Claim. If they were relevant, then Plaintiffs still lose because their pleading, i.e. the Amended Complaint, contains no reference about them, a clear violation of the rules of pleading.

Simply put, the explicit language of the Rental Agreement controls. It is undisputed that residents were provided utility allowances in accordance with the terms of the Rental Agreement and with the "applicable" schedules that were in effect at the time. This is what was plead, and Plaintiffs are barred from now going beyond the allegations contained in the Amended Complaint. They cannot try to "amend" their pleading now by referring to matters obtained during discovery and now claiming that this is what the Amended Complaint really meant. In that regard, Plaintiff Rodelle Smith's Declaration must be totally discounted as being unreliable and untrustworthy, since she cannot even pinpoint the date in 2005 when she purportedly obtained the utility schedule. For that matter, her Declaration is totally irrelevant because the Plaintiffs are locked into the facts alleged as of the date of filing of the Amended Complaint, not

what might have been obtained in 2005. Plaintiffs remedy, based upon their possession of HCDCH documents produced during discovery, should have been to amend their Amended Complaint.

Lastly, HCDCH reiterates what it has argued in its previous Memorandum in Support, that the Court must only look at the express language of the Rental Agreement, and not imply in fact or in law, any additional or supplemental contractual terms. As previously argued, the State and its agencies has waived its sovereign immunity under section 661-1, H.R.S. only as to express contracts but has complete sovereign immunity from suits based on contracts implied in fact or in law.

III. CONCLUSION

Plaintiffs filed this lawsuit against HCDH and requested two claims for relief: the first, based on HCDCH's alleged breach of the ACC between it and HUD, and the second, based on HCDCH's alleged breach of the Rental Agreement between it and the residents. As has been clearly shown by the undisputed facts and authorities, their First claim fails because of the express language contained in Section 21 of the ACC itself which prohibits the very type of cause of action which Plaintiffs seek here. Their reliance now on their status as "third-party" beneficiaries to the ACC is totally inapposite to the applicable law and does not save their claim.

As to the Second claim, the undisputed facts of record negate Plaintiffs attempt to create an issue of material fact, i.e. by now asserting that the "consumption" schedules apply. The express language of the Rental Agreement controls, and any other contractual theory against HCDCH, i.e. implied contract in fact or in law, is strictly barred under the doctrine of sovereign immunity. Moreover, their Amended Complaint is fatally deficient in not pleading even a semblance that Plaintiffs executed a Rental Agreement with HCDCH. The mere reference to the

specific paragraph in the Rental Agreement that was allegedly breached is insufficient to cure this. The basic contractual relationship, i.e. privity with HCDCH, cannot be assumed.

Finally, it is apparent that Plaintiffs request for a continuance under Rule 56(f), H.R.Civ.P., is probative that even Plaintiffs realize they cannot prevail on this Motion based on the undisputed facts and applicable law.

For all the foregoing reasons, HCDCH respectfully reiterates its request that the Motion for Summary Judgment be granted, that an Order be issued dismissing the case with prejudice, and that the Court deny the Plaintiffs Cross-Motion for Summary Judgment.

DATED: HONOLULU, HAWAII September 29, 2005.

Respectfully Submitted,

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ATTORNEYS FOR HCDCH

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RODELLE SMITH, et al.,	)	CIVIL NO. 04-1-0069K
	)	(Contract)
Plaintiffs,	)	Class Action
	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, a duly organized and recognized agency of the State of Hawai`i;	)	
	)	
Defendants.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the above-mentioned parties on this date, by depositing said copy, postage prepaid, first class, in the United States Post Office, Honolulu, Hawai'i, as addressed above.

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