

MARK J. BENNETT 2672
Attorney General of Hawai'i

WILLIAM J. WYNHOFF 2558
Deputy Attorney General
Department of the Attorney
General, State of Hawai'i
465 King Street, Suite 300
Honolulu, Hawai'i 96813
Telephone: (808) 587-2993

Attorneys for Defendants

CIRCUIT COURT
STATE OF HAWAII
FILED

2005 NOV 21 AM 10:17

J. KUBO
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JACK WATERS, individually, and on behalf
of all persons similarly situated,

Plaintiffs,

vs.

STEPHANIE AVEIRO, in her official
capacity as the Executive Directory of the
Housing and Community Development
Corporation of Hawai'i; 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' SUPPLEMENTAL
) MEMORANDUM IN OPPOSITION TO
) PLAINTIFFS' MOTION FOR PARTIAL
) SUMMARY JUDGMENT FILED
) OCTOBER 14, 2005
)
) EXHIBITS "F" AND "G"
)
) DECLARATION OF MICHAEL J. HEE
)
) CERTIFICATE OF SERVICE
)
) DATE: NOVEMBER 28, 2005
) TIME: 1:30 P.M.
) JUDGE: EDEN E. HIFO

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

Extra copy

I. INTRODUCTION

Defendants are State agencies and instrumentalities that own and operate (through a managing agent) two apartment projects for low-income tenants. Plaintiffs are tenants in the apartments. Plaintiffs claim they overpaid rent. Their first amended complaint alleged two theories for both damages and injunctive relief: breach of contract and violation of federal law.

Plaintiffs' second amended complaint seeks damages based on breach of contract. They seek injunctive and declaratory relief based on 1) breach of contract; 2) a direct cause of action under federal housing law; and 3) enforcing federal housing law through 42 U.S.C. § 1983.

The present motion for summary judgment is based on the first amended complaint and restricted only to one of the projects, Wilikina Apartments. The motion should be denied, because defendants are not in violation of either the contract or federal law and because there is and can be no irreparable harm to plaintiffs.

II. SELECTED PROCEDURAL HISTORY

DATE	EVENT
May 6, 2005	Complaint
August 10, 2005	Plaintiffs' motion for class certification
August 31, 2005	Defendants' answer to complaint
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 based on First Amended Complaint
October 18, 2005	Defendants' third party complaint against managing agents
October 26, 2005	Second Amended Complaint
October 31, 2005	Withdrawal of defendants' motion to dismiss federal law claim
November 1, 2005	Dismissal of third party complaint
November 3, 2005	Original hearing on motion

III. PLAINTIFFS' ARE NOT ENTITLED TO INJUNCTIVE RELIEF

First, defendants are not presently violating either the contract or federal law. The only alleged violation mentioned in the motion or anywhere else in pleadings relates to potential adjustments to the utility allowance required by 24 C.F.R. § 880.610. See plaintiffs' original memorandum at 3. Section 880.610 provides:

§ 880.610 Adjustment of utility allowances.

In connection with annual and special adjustments of contract rents, the owner must submit an analysis of the project's Utility Allowances. Such data as changes in utility rates and other facts affecting utility consumption should be provided as part of this analysis to permit appropriate adjustments in the Utility Allowances. In addition, when approval of a utility rate change would result in a cumulative increase of 10 percent or more in the most recently approved Utility Allowances, the project owner must advise the contract administrator and request approval of new Utility Allowances. Whenever a Utility Allowance for a unit is adjusted, the owner will promptly notify affected families and make a corresponding adjustment of the tenant rent and the amount of the housing assistance payment for the unit.

Emphasis added.

In short under section 880.610 defendants must present data to HUD, but may adjust the utility allowance only when HUD approves doing so. As stated at the original hearing, defendants did not submit the required analysis in the past. Arguably defendants were in violation of federal law for failing to do so. As soon as this suit was filed, however, defendants promptly submitted the required analysis and are, therefore, in compliance with the regulation at this time.¹

→ Not
as soon
as.
Futile,
still onerous

¹ Defendants freely admit they submitted the analysis both to comply with the regulation and to avoid or diminish liability in this lawsuit. There is nothing wrong with doing so. See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001) (refusing to award fees to plaintiffs in 1983 action where defendants voluntarily changed the offending conduct and rejecting argument that fee award was "necessary

Similarly, defendants are not now in violation of the lease. Section 4.f. of the Lease provides, "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." HUD has conditionally approved an increase in the utility allowance, but also stipulated that the increase applies to "any future increases in rents" and cannot take effect until HUD and defendants enter into a new Section 8 HAP Contract. Exhibits "F" and "G."

Plaintiffs also point to section 27 of the lease, which provides:

Attachments to the Agreement:	The Tenant certifies that he/she has received a copy of this Agreement and the following Attachments to this Agreement and understands that these Attachments are part of this Agreement.
-------------------------------	---

- a. Attachment No. 1 – Form HUD – 50059, Certification and Recertification of Tenant

* * *

Form HUD 50059 allegedly² contains a certification by defendants that "this Tenant's eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures." But this statement undoubtedly was true at the time for at least some plaintiffs (including Waters) at the time the lease was entered into. (There certainly is no evidence to the contrary). The lease does not incorporate future iterations of the form and the certification does not say anything about future payments or allowances. Future payments and changes to payments are instead addressed in section 4, discussed above.

*→ The lease must incorp future iterations.
→ See letter, which states that it amends lease.*

to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees.") 532 U.S. at 608.

² "Allegedly" because the Form HUD 50059 that is part of the lease is not attached. The form attached as Exhibit "B" to the motion is much later, September 20, 2004. There is no evidence as to whether the form changed in the interim.

Moreover, if plaintiffs are correctly interpreting this section, then there is a direct conflict between this provision and the specific dollar amount specified in the contract, rendering the contract ambiguous at best.

Accordingly, defendant is not now violating federal law or breaching the contract. Accordingly, plaintiffs are not entitled to injunctive relief.

Second, the plain fact is that plaintiffs do not face irreparable damage if the injunction is denied. The overwhelming weight of precedent teaches that a claim for money damages does not and cannot constitute irreparable harm. And such is the law of Hawai'i. "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).

Plaintiffs' old cases – from other jurisdictions or unreported – cannot justify their request that the court ignore controlling Hawai'i case law. In Bloodworth v. Oxford Village Townhouses, Inc., 377 F.Supp. 709, 719 (D.C.Ga. 1974) the court issued an injunction preventing "an effective fifty percent increase" in low-income housing costs. The court believed that such an increase "may be tantamount to eviction, or may impose substantial financial hardships on such families, thereby entailing large sacrifices in their standard of living." Id. In contrast, the issue in our case is whether plaintiffs' rent will be decreased. By definition, plaintiffs are already paying the rent. And defendants have voluntarily placed a moratorium on evictions from the projects. So none of the special factors present in Bloodworth are present in our case.

Rent has been increased.

In Keller v. Kate Maremount Foundation, 365 F.Supp. 798 (D.C.Cal. 1972), the court said an increase in rent sufficiently implicated plaintiffs' property to be entitled to due process

protection. The court ordered the FHA to reconsider the rent increases but specifically stated that "Pending said reconsideration, the tenants shall continue to pay the present rent rates to the defendant landlord" subject to repayment by the landlord if the increase was rescinded. 365 F.Supp. at 804.

Meade v. HHA is an unreported and cursory order issued as part of a final judgment.

The court did not discuss why the injunction was needed or what harm was at stake.

Third, it is not clear exactly what injunctive relief plaintiffs seek. Apparently plaintiffs want defendants to contact every tenant at Wilikina, unilaterally decrease that tenant's rent, and absorb the loss in defendants' own budget. (Exhibits "F" and "G" make clear that HUD will not reimburse defendants at this time.) This is a huge and complex intervention into defendants' operations, an intervention that is in the nature of a mandatory, rather than a prohibitory, injunction. Vantico Holdings S.A. v. Apollo Management, LP, 247 F.Supp.2d 437, 451 (S.D.N.Y. 2003), quoting Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995) ("A preliminary injunction is prohibitory if it 'seeks only to maintain the status quo pending a trial on the merits.' *Id.* In contrast, an injunction is a mandatory injunction, if the injunction will either 'alter the status quo by commanding some positive act' or if the injunction provides the moving party with 'substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.'")

When a mandatory injunction is sought against a government agency, then the request is actually in the nature of mandamus and must be tested by the standards for mandamus. Oregon Natural Resources Council v. Harrell, 52 F.3d 1499, 1508 -1509 (9th Cir. 1995).

Mandamus may be granted when "(1) the plaintiff's claim is clear and certain; (2) the duty is 'ministerial and so plainly prescribed as to be free from doubt'; and (3) no other adequate remedy is available." Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir.1986)

(citations omitted). The extraordinary remedy of mandamus lies within the discretion of the trial court, even if the three elements are satisfied.

Id.

Even if the matter is not treated as the equivalent of mandamus, “a mandatory injunction is an ‘extraordinary remedy,’ which ‘should be used sparingly.’” Clark v. McDonald’s Corp., 213 F.R.D. 198, 211 (D.N.J. 2003) (citation omitted). Such an injunction is to restore, not disturb, the status quo, Kimbley v. Lawrence County, Ind., 119 F.Supp.2d 856, 874 (S.D.Ind. 2000) and requires the requesting party to:

... meet a higher standard of proof than ordinarily required for a preliminary injunction.” Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir.1997). Thus, Plaintiffs must also show either “clear” entitlement to relief or that “extreme or very serious damage” will result from a denial. *Id.*

U.S. Fidelity and Guar. Co. v. J. United Elec. Contracting Corp., 62 F.Supp.2d 915, 921 (E.D.N.Y. 1999).

Fourth, plaintiffs’ motion was brought pursuant to their first amended complaint.

Injunctive relief is clearly not available under that complaint. At a minimum, the motion must be refiled to seek an injunction as to Ms. Aveiro in her official capacity.

IV. PLAINTIFFS’ ARE NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT

Defendants admit and it is undisputed that defendants did not “submit an analysis of the project’s Utility Allowances” at various times in the past. The effect, however, of this failure remains at issue. Nothing beyond “an order specifying [this] fact appearing without substantial controversy,” HRCP 56(d), is appropriate.

First, as discussed in defendants’ original memorandum filed October 25, 2005, the standard contract between defendants and plaintiffs states an exact dollar amount of rent that the

tenant agrees to pay. 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.


In section 4.F. of the contract, defendants agree to "implement changes in the Tenant's rent or assistance payment" only pursuant to HUD requirements. This provision by its terms cannot come into play until the rent or assistance payment is adjusted, usually a year after the original agreement.

Plaintiffs now refer also to section 27 of the contract. We show above that the provision is not violated before adjustment. But even if the provision could be read differently there is (at best for plaintiffs) a direct conflict as to a material term of the contract, precluding summary judgment.

V. CONCLUSION

Plaintiffs' motion should be denied.

DATED: Honolulu, Hawai'i, 11/21/05.



William J. Wynhoff
Deputy Attorney General
Attorney for Defendants



U.S. Department of Housing and Urban Development
Honolulu Field Office - Region IX
500 Ala Moana Boulevard, Suite 3A
Honolulu, Hawaii 96813-4918
www.hud.gov
espanol.hud.gov

November 2, 2005

Mr. Harris Zane
Urban Real Estate Company
500 S. Beretania Street
Suite C-101
Honolulu, HI 96813

Dear Mr. Zane:

Subject: Wilkins Apartments
Section 8 Contract HI100001002

This letter is written in response to your letter dated October 19, 2005, and received in our office on October 24, 2005. The owner requested that the request for an increase in utility allowance be submitted separately for immediate review.

We reviewed the Utility Allowance Analysis Report completed by NFC, Inc. of Marietta, Georgia, and approve your request for an increase in utility allowances as follows:

- Increase the one bedroom units from ~~\$40~~ to \$74
- Increase the two bedroom units from ~~\$56~~ to \$90

The approval of the increase in utility allowance was expedited at the owner's request, and applies to the processing of the pending renewal of the Section 8 HAP Contract and any future increases in rents. The increase in utility allowance must be included on a new rent schedule once the Section 8 contract has been renewed.

If you have any questions or concerns on this matter, please call Barbara Cox, Project Manager at (808) 522-8190, extension 231.

Sincerely,

for Raymond H. Gots
Project Manager

cc: Michael Hee (HCDCH)



U.S. Department of Housing and Urban Development
Honolulu Field Office - Region IX
500 Ala Moana Boulevard, Suite 3A
Honolulu, Hawaii 96813-4916
www.hud.gov
especial.hud.gov

November 2, 2005

Mr. Harris Zane
Urban Real Estate Company
500 S. Beretania Street
Suite C-101
Honolulu, HI 96813

Dear Mr. Zane:

Subject: Banyan Street Manor
Section 8 Contract HI100001001

This letter is written in response to your letter dated October 19, 2005, and received in our office on October 24, 2005. The owner requested that the request for an increase in utility allowance be submitted separately for immediate review.

We reviewed the Utility Allowance Analysis Report completed by NPC, Inc. of Marietta, Georgia, and approve your request for an increase in utility allowances as follows:

- Increase the one bedroom units from \$31 to \$52
- Increase the two bedroom units from \$45 to \$56

The approval of the increase in utility allowance was expedited at the owner's request, and applies to the processing of the pending renewal of the Section 8 HAP Contract and any future increases in rents. The increase in utility allowance must be included on a new rent schedule once the Section 8 contract has been renewed.

If you have any questions or concerns on this matter, please call Barbara Cox, Project Manager at (808) 522-8190, extension 231.

Sincerely,

for Raymond H. Gota
Project Manager

cc: Michael Hee (HCDCH)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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)

) DECLARATION OF MICHAEL J. HEE

DECLARATION OF MICHAEL J. HEE

Michael J. Hee states under penalty of perjury:

1. I am the chief of the contract administration section of the Housing & Community Development Corporation of Hawai`i. I make this declaration on my personal knowledge.
2. My duties include supervision of staff charged with monitoring management activities of the managing agent for Wilikina Apartments and Banyan Street Manor.
3. Any adjustment to the tenants' utility allowances at Wilikina and Banyan requires approval from HUD and absolutely cannot be implemented without that approval.
4. Defendants and their managing agent have been attempting to secure, as expeditiously as possible, an adjustment to the tenants' utility allowances at Wilikina and Banyan.
5. Exhibit "F" attached hereto is a true and correct copy of a letter received from HUD relating to the utility allowance at Wilikina.

6. Exhibit "G" attached hereto is a true and correct copy of a letter received from HUD relating to the utility allowance at Wilikina.

7. I have also discussed this matter directly with HUD's representatives. As stated in the letter and confirmed in those conversations, HUD approved the increase in utility allowance, but the increase cannot take place at this time and is subject to the pending renewal of the Section 8 HAP Contracts covering the project.

8. I do not know when, if, or how any decrease in rent or increase in utility allowance not authorized by HUD would or could be paid. Such a decision would be up to the HCDCH board.

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

DATED: Honolulu, Hawaii 11/10/05



MICHAEL J. HEE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JACK WATERS, individually, and on behalf of all persons similarly situated,)	CIVIL NO. 05-1-0815-05 (EEH)
)	(Contract)
)	
Plaintiffs,)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
STEPHANIE AVEIRO, in her official capacity as the Executive Directory of the Housing and Community Development Corporation of Hawai'i; 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.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served on the following persons at the addresses shown by mail on 11/21/05:

Paul Alston
Shelby Anne Floyd
Thomas E. Bush
65-1230 Mamalahoa Hwy., Suite C-21
Kamuela, Hawai'i 96734

Gavin K. Thornton
P. O. Box 37952
Honolulu, Hawai'i 96837-0952

DATED: Honolulu, Hawai'i, 11/21/05, 2005.

William J. Wynhoff
Deputy Attorney General
Attorney for Defendants