IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEWERS FALETGO, HAZEL MCMILLON, GENE STRICKLAND, TRUDY SABALBORO, AND LEE SOMMERS, individually and on behalf of a class of present and future residents of Kuhio Park Terrace., Plaintiffs, vs. STATE OF HAWAII, HAWAII PUBLIC HOUSING AUTHORITY, REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, and Does 1-20, Defendants..	Civil No. 08-1-2608 (SSM) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; NOTICE OF ENTRY Date: May 11, 2009 at 11:15 a.m. Judge: Sabrina S. McKenna

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS COMPLAINT
FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

"DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT" came on for hearing before Judge Sabrina S. McKenna on May

11, 2009. Jason Kim, Esq., appeared for Plaintiffs; Deputy Attorneys General John Cregor, Esq., John Wong, Esq., Kirsten Chun, Esq., and Jarod Buna, Esq., appeared for Defendants State of Hawaii and Hawaii Public Housing Authority (collectively "HPHA"); and Aaron Kreps, Esq., appeared for Defendant Realty Laua LLC ("Realty Laua").

This is a putative class action lawsuit brought by tenants of Kuhio Park Terrace alleging various deficiencies in Kuhio Park Terrace ("KPT"), a federally subsidized public housing project. HPHA has moved to dismiss Plaintiffs' causes of action alleging (1) breach of the implied warranty of habitability; (2) breach of the lease agreement between HPHA and Plaintiffs (and putative class members); (3) breach of the management contract between HPHA and Realty Laua, with respect to which Plaintiffs allege third-party beneficiary status for themselves and putative class members; (4) unfair trade practices in violation of H.R.S. Section 480-2; and (5) medical monitoring. HPHA's motion requests dismissal of these causes of action on the basis of Hawaii Rules of Civil Procedure Rule 12(b)(6) for their alleged failure to state legally cognizable claims. In the alternative, HPHA seeks summary judgment, alleging that there are no genuine issues of material fact, and that it is entitled to summary judgment.

The court has reviewed the record on file and applicable law, and has considered the oral arguments of counsel, and rules as follows:

1. Federal Preemption, HUD Primary Jurisdiction & Administrative Deference Arguments

On pages 15 to 16 of its motion, HPHA argues that federal preemption applies, "that HPHA and its various housing projects are so closely regulated by federal law and

regulations that state law has been preempted in that field." Accordingly, HPHA contends it is entitled to a dismissal of this case based on its understanding that the lawsuit only attempts to assert state law claims. HPHA also contends it is entitled to dismissal based on its assertion that HUD has primary jurisdiction, and that HUD's non-action entitles it to a dismissal. According to HPHA, "the issues should be determined in the first instance by HUD, which we submit has already been done. With full knowledge of the conditions at KPT, HUD has determined to take no enforcement action whatsoever. The expertise and specialized knowledge of the designated regulatory authority is entitled to great deference, indeed if not primary jurisdiction."

The court addresses these preliminary defenses.

Regarding the preemption defense, federal law preempts state law in three circumstances: (1) where federal law explicitly preempts state in law in a given area; (2) where federal law implicitly preempts state law by dominating regulation in a given area; or (3) where state law may actually conflict with federal law.

Addressing the first prong of the three prong test, the court's review of applicable federal statutes and regulations does not reveal any explicit federal preemption, and one has not been brought to the court's attention by HPHA. In fact, as pointed out in footnote 2 of HPHA's motion, the broad policy goals of the United States Housing Act of 1937 are to:

> promote the general welfare of the Nation by employing its funds and credit...to assist the several states and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income and...to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs."

[Emphasis added.]

Moreover, federal law explicitly recognizes the possible application of state law in tenant eviction situations, providing that a public housing authority ("PHA") may evict a tenant by bringing a court action or by bringing an administrative action if the law of the jurisdiction permits eviction by administrative action. 24 C.F.R. Section 966.4(l)(4)(I)&(ii). Based on the court's review of applicable federal statutes and regulations, the federal scheme appears intended to set minimum requirements that cannot be contradicted by state PHAs, but provides state public housing authorities leeway in the administration of public housing programs.

Regarding the second prong, contrary to HPHA's arguments, the court does not see a dominance of federal law with respect to a tenant's rights upon a breach of landlord obligations. See Conille v. Secretary of Housing and Urban Development, 840 F.2d. 105 (1st Cir. 1988). As pointed out by HPHA, federal regulations do provide significant specificity as to required lease terms in federally subsidized public housing. See 24 C.F.R. Sections 966.4 (Lease requirements) & 966.6 (Prohibited lease provisions). Although Section 966.4 contains significant detail regarding a landlord's rights upon a tenant's default, however, it lacks specificity regarding a tenant's rights upon a landlord's failure to comply with landlord obligations, except for providing for rent abatement or alternative accommodations.

Although the Seventh Circuit appears to defer to HUD with respect to the enforcement of tenant rights, see Alexander, infra, in Conille v. Secretary of Housing and Urban Development, 840 F.2d. 105 (1st Cir. 1988), the First Circuit recognized federal common law rights in a tenant's lawsuit against the Secretary of HUD. In addition, in Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781

(1987), despite the availability of HUD regulatory remedies, the United States Supreme Court recognized the availability of 42 U.S.C. Section 1983 remedies to challenge public housing landlord calculations of utility allowances. Granted, these and other cases recognized federal law remedies other than those contained in public housing laws and regulations.

However, Wright also recognized that federal public housing laws and regulations provide tenants with state administrative remedies, ruling that the existence of such state remedies did not preclude a Section 1983 action. In fact, federal regulations mandate state administrative grievance remedies, in addition to providing that state laws requiring court actions for evictions can trump administrative eviction actions. 24 C.F.R. Section 966.4. In addition, other federal and state courts have explicitly recognized applicability of state law rights in public housing cases. See, e.g., Kingston Square Tenants Association v. Tuskegee Gardens, Ltd., 792 F.Supp. 1566 (S.D.Fla. 1992); Housing Authority of the City of Newark v. Scott, 137 N.J. Super. 110, 348 A.2d 195 (1975).

Furthermore, even in the area of ERISA, where federal preemption is clear as to certain areas covered by ERISA, the Ninth Circuit has ruled that state law claims, such as breach of contract, negligent misrepresentation, and professional negligence, are not expressly or conflict-preempted under ERISA. Paulsen v. CNF Inc., 2009 WL 723996 (9th Cir. 2009); The Meadows v. Employers Health Insurance, 47 F.3d 1006 (9th Cir.1995).

Accordingly, the court finding no dominance of federal law with respect to a tenant's rights upon a breach of landlord obligations in federally subsidized public housing, the court deems inapplicable the second prong of the federal preemption test.

Turning to the third prong, federal preemption can apply if state law conflicts with federal law. The First Circuit Court in Conille, while recognizing a federal common law IWOH, refused to recognize a state law IWOH claim because state law for IWOH remedies conflicted with federal limitations on liability of the Secretary of HUD. However, that case concerned a direct case against the Secretary of HUD, and federal law clearly applied. HPHA has not brought to the court's attention any federal or state law restrictions on remedies available against a state or local public housing authority, or any authority that would limit HPHA's Hawaii Revised Statutes Section 661-1(a) waiver of immunity for claims based on its contracts, express or implied. Thus, the court rules that the third prong of the federal preemption test does not preclude recognition of a state IWOH, as long as the state IWOH remedies do not conflict with applicable federal law. (This issue was not fully briefed.)

Even if federal preemption applies, however, HPHA would not be entitled to a complete dismissal of the case, based on the federal cases that have recognized a federal implied warranty of habitability. In addition, federal courts have also developed a federal common law regarding contract claims. Therefore, federal common law could still apply with respect to the implied warranty of habitability, breach of lease and third-party beneficiary causes of action. In fact, Plaintiffs' memorandum in opposition shows that Plaintiffs also allege applicability of federal common law to these claims.

Turning to the primary jurisdiction argument, although not cited by HPHA for this basis, in Alexander v. U.S. Dept. of Housing and Urban Development, 555 F.2d 166 (7th Cir. 1977), the Seventh Circuit refused to recognize a federal implied warranty of habitability,

apparently based on a finding of the primary jurisdiction of HUD. The primary jurisdiction doctrine applies to a claim that is originally cognizable in the courts, but which requires the resolution of issues that are "within the special competence of an administrative agency. Jou v. National Interstate Ins. Co. of Hawaii, 114 Hawai'i 122, 157 P.3d 561 (Hawai'i App. 2007).

As argued by Plaintiffs, this lawsuit alleges, inter alia, violations of local health and safety regulations, in addition to breaches of a contract between HPHA and local residents, to which state law would apply, as explained below. Also, as noted in Chase v. Theodore Mayer Brothers, 592 F.Supp. 90 (D.Ohio 1983), and based on the court's review, the federal law and HUD regulations contain no enforcement scheme for tenant rights. Furthermore, the United States Supreme Court and other federal and state courts have allowed judicial action in these types of lawsuits, without finding primary jurisdiction of HUD.

Therefore, the primary jurisdiction defense does not entitle HPHA to a dismissal of this lawsuit.

For the same reasons, the fact that HUD has allegedly not taken any enforcement despite knowledge of defects at KPT, does not require dismissal based on a defense of administrative deference.

Having addressed the preliminary defenses, the court now addresses the specific defenses to the causes of action.

1. Breach of the Implied Warranty of Habitability Claim: First Cause of Action

Contrary to HPHA's assertion in page 4 of its reply memorandum, the standard lease agreement used by HPHA at KPT (Exhibit 2 to HPHA's motion), does contain an express covenant of habitability ("Management shall, at all times ...(c) (m)ake all repairs and arrangement necessary to put and keep the premises in a habitable condition(.)") In addition, federal regulations expressly require dwelling units to be kept in a habitable condition. 24 C.F.R. Section 5.703(d). Therefore, whether or not an implied warranty of habitability (IWOH) is recognized, the issue of "habitability" is already subsumed in the second cause of action alleging breach of the lease.

In any event, the court addresses whether a common law IWOH is cognizable in this case.

HPHA asserts that although there are no binding Ninth Circuit cases, the persuasive weight of federal law refuses to recognize any IWOH for federally subsidized public housing projects.

As pointed out by the parties' memoranda, federal and state courts have reached differing conclusions on whether an IWOH is cognizable, either under federal common law or under the law of the locus state of the housing project. After reviewing the various cases cited by the parties, the court finds the cases allowing recognition of such a claim more persuasive.

The court also addresses, however, whether the federal or Hawaii state common law IWOH would apply.

According to the Restatement (Second) of Conflict of Laws § 188, " (1) (t)he

rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties...."

Applying conflicts principles to this case, which involves a landlord-tenant contract between the HPHA and Hawaii residents, Hawaii law governs. Almost all of the cases cited by the parties recognizing a federal common law IWOH involved a direct HUD landlord-tenant contract. Accordingly, in this case, if an IWOH exists, it would be under Hawaii law.

The parties did not address , however, whether other provisions of state law may make the state IWOH inapplicable. In this regard, pursuant to Hawaii Revised Statutes Section 521-7(10), the state's Residential Landlord-Tenant Code does not apply to KPT leases. However, the IWOH under state law is a common law right available to tenants against landlords in residential leases. Hawaii Revised Statutes Chapter 356D, governing HPHA and its projects, and the administrative regulations promulgated thereunder (available at "http://www.hcdch.state.hi.us/referenceinformation/admin_rule.htm") do not delineate obligations of HPHA as a landlord. In additiion, there are no prohibitions on the applicability of state common law under Chapter 356D or its regulations. Moreover, under H.R.S. Section 661-1, HPHA has waived its immunity for claims based on express or implied contracts.

Therefore, the court rules that the Hawaii state common law IWOH is applicable, and that HPHA is not entitled to a 12(b)(6) dismissal of the first cause of action alleging breach of an IWOH.

The court reserves the issue, however, whether all state remedies available for

breach of the IWOH, i.e.,, damages, formation, and/or rescission, would be available in this case, as this issue was not fully briefed.

With respect to HPHA's alternative motion for summary judgment on this claim, genuine issues of material fact preclude summary judgment.

2. Breach of the Lease Claim: Second Cause of Action

HPHA moves for summary judgment on this issue. Clearly, genuine issues of material fact preclude summary judgment.

3. Breach of the Management Agreement--Third Party Beneficiary: Third Cause of Action

This is actually a claim against Defendant Realty Laua, but HPHA moves for summary judgment on the grounds that Plaintiffs are mere incidental beneficiaries, not intended third-party beneficiaries. Hawaii law also governs this contract, based on the lack of federal preemption and the application of conflict of law principles.

It is difficult for the court to understand why HPHA cites to Section 21 of the Consolidated Annual Contributions Contract beteween HUD and HPCA in support of its argument that the Plaintiffs are not third-party beneficiaries of the management contract between HPHA and Realty Laua. This is not the contract at issue.

In actuality, HPHA has not attached the complete contract between itself and Realty Laua to the motion. The contract attached, in paragraph (1) on page 1 states that the RFP and the accepted Proposal are part of the contract. It is quite possible that these attachments

could shed additional light on whether or not Plaintiffs are intended beneficiaries.

In any event, HPHA is not entitled to summary judgment on this issue.

4. Unfair trade practices in violation of H.R.S. Section 480-2: Fourth Cause of Action

HPHA has not waived its sovereign immunity as to 480-2 claims. HPHA is obviously entitled to a 12(b)(6) dismissal of this claim. Plaintiffs opposition is patently without merit.

5. Medical Monitoring: Fifth Cause of Action

"Medical monitoring" is not a "cause of action" but a requested equitable remedy. As such, the motion to dismiss is granted to the extent medical monitoring is stated as a "cause of action," but not as a requested remedy.

DATED: Honolulu, Hawaii MAY 14 2009.

JUDGE OF THE ABOVE-ENTITLED COURT

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

NOTICE OF ENTRY

Notice is given of the entry of the foregoing document to the following through deposit into the U.S. Mail:

VICTOR GEMINIANI, ESQ.
Lawyers for Equal Justice
P.O. Box 37952
Honolulu, HI 96837

&

PAUL ALSTON, ESQ.
JASON H. KIM, ESQ.
Alston Hunt Floyd & Ing
American Savings Bank Tower
1001 Bishop St., 18th Fl.
Honolulu, HI 96813
ATTORNEYS FOR PLAINTIFFS

MARK J. BENNETT, ESQ.
Attorney General
CARON M. INAGAKI, ESQ.
DIANE K. TAIRA, ESQ.
JOHN M. CREGOR, ESQ.
JOHN C. WONG, ESQ.
JAROD M. BUNA, ESQ.
KIRSTEN CHUN, ESQ.
Deputy Attorneys General
425 Queen St.
Honolulu, HI 96813
ATTORNEYS FOR DEFENDANTS
STATE OF HAWAII & HAWAII PUBLIC HOUSING AUTHORITY

GEORGE W. PLAYDON, ESQ.
R. AARON CREPS, ESQ.
O'Connor Playdon Guben
733 Bishop St., Fl. 24
Honolulu, HI 96813
ATTORNEYS FOR DEFENDANTS REALTY LAUA LLC

DATED: Honolulu, Hawaii, MAY 14 2009.

CLERK OF THE ABOVE-ENTITLED COURT