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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEWERS FALETOGO; HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; and LEE SOMMERS, individually and on behalf of a class of past, present and future residents of Kuhio Park Terrace,

Plaintiffs,

vs.

STATE OF HAWAI'I; HAWAI'I PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawai'i limited liability company; and Does 1-20,

Defendants.

CIVIL NO. 08-1-2608-12 SSM

(Other Civil Action)

DEFENDANTS STATE OF HAWAI'I AND HAWAI'I PUBLIC HOUSING AUTHORITY'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, DATED MARCH 31, 2009; CERTIFICATE OF SERVICE

Hearing
Date: May 11, 2009
Time: 11: 00 a.m.
Judge: Hon. Sabrina S. McKenna

DEFENDANTS STATE OF HAWAI'I AND HAWAI'I PUBLIC HOUSING AUTHORITY'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, DATED MARCH 31, 2009

I. INTRODUCTION

First, it is necessary to place this case in its proper perspective. One must understand that Hawai'i Public Housing Authority ("HPHA") and its federally subsidized housing projects are completely under the control and supervision of the U.S. Department of Housing and Urban Development ("HUD") and the applicable federal laws, rules and regulations. All of Plaintiffs' claims and allegations fall squarely within the ambit of HUD's jurisdiction to provide "decent, safe and sanitary" housing to low-income persons, through its designated "public housing agencies" ("PHA"). 42 U.S.C. § 1437, *et seq.* This is all clearly within the intent of United States Housing Act of 1937; a uniform and consistent system of providing affordable housing to poor persons, under the supervisory administration of a central, federal agency, HUD.

A simple review of the indexes to 24 C.F.R. Part IX, demonstrates clearly that HUD's supervision and oversight of its PHA's, including HPHA, is pervasive, regulating everything the PHA does from selection of project sites, 24 C.F.R. § 941.201; contracts with third-parties, 24 C.F.R. § 941.205; admission and occupancy requirements, 24 C.F.R. §960.601; what is required in the leases, 24 C.F.R. § 966.601; how residents' grievances are to be handled, 24 C.F.R. § 966. 54; how rents are calculated, 24 C.F.R. § 960.253 and 24 C.F.R. § 966.4. And, HPHA must do all these tasks with constant reporting to, and monitoring by, HUD. 24 C.F.R. §941.614 ("HUD Monitoring and Review"), 24 C.F.R. §941.501 ("Review of PHA performance; sanctions").

Viewed thus, from the proper perspective, the overwhelming case law is simply not in Plaintiffs' favor on any of their causes of actions or claims. Any of Plaintiffs' Causes of Actions

might be sustainable, if we were dealing with private-sector housing, or market-place housing, or even Section 8 housing, which involves private landlords. But, we are not. Rather we are dealing with federally, subsidized public housing which, by its very nature, is required to follow its own set of laws and rules. Accordingly, all of Plaintiffs' claims have to be viewed in the context of, and against the backdrop of HUD's preemptive jurisdiction when it comes to the conditions at KPT.

II. ARGUMENTS

A. THERE IS NO IMPLIED WARRANTY OF HABITABILITY IN PUBLIC HOUSING LEASES.

The case law remains clear: there is no implied warranty of habitability for leases of public housing units which are regulated by HUD. *Alexander v. U.S. Dept. of Housing and Urban Development,* 555 F.2d 166 (D.A. Ind. 1977). *See also Gibson v. Gary Housing Auth.*, 754 F.2d 205, 206 (7th Cir.1985); *Hurt v. Philadelphia Housing Authority,* 806 F.Supp. 515, 527 (E.D.Pa., 1992).

As discussed in great detail in our original Memorandum, HPHA is an agent of HUD and must comply with all HUD rules and regulations in order to continue receiving federal funding. *Berger v. City of Cleveland* 1997 WL 137381, 1 (C.A.6 (Ohio (C.A.6 (Ohio),1997) (Cuyahoga County Metropolitan Housing Authority is an agent of HUD), *Shade v. Housing Authority of City of New Haven* 251 F.3d 307, 312 (C.A.2 (Conn.), 2001) (HUD acted through its local agent, the Housing Authority of New Haven); *Peyton v. Reynolds Associates* 955 F.2d 247, 249 (C.A.4 (Va.),1992). (Local public housing authority is HUD's agent). Contrary to Plaintiffs' argument, there is no difference between public housing leases for HUD-owned projects, or projects owned and managed for HUD by the multitude of public housing agencies, such as HPHA.

Plaintiffs cite several cases that claim there is an implied warranty of habitability in leases of public housing units which are regulated by HUD. *Mann v. Pierce,* 803 F.2d 1552 (C.A.11 (Fla.), 1986); *In Re Day*, 208 B.R. 358, 371-72 (Bankr. E.D. pa 1997); *Multi-Family Management, Inc. v. Hancock*, 664 A.2d 1210, 1213 (D.C. 1995). The State Defendants acknowledge that there are cases that support the Plaintiffs claim. However, these cases are either distinguishable from the facts in our case or are not as well reasoned or persuasive as *Alexander*. For example, in *Mann v. Pierce*, the court did not directly address or explain its reasoning behind the global issue of whether there is an implied warranty of habitability for leases of public housing. Instead, the court explained such a claim may be actionable because immunity did not apply. In *In Re Day*, unlike our facts, there was an express written warranty of habitability at issue. In *Management, Inc.,* defendant was a private landowner of section 8 housing, which unlike HPHA housing projects, are not subject to the same oversight by HUD.

While there are no Hawai'i nor Ninth Circuit cases directly addressing the issue of an implied warranty of habitability in public housing leases, this Court should adopt the holding and reasoning in *Alexander* because it is most persuasive on this issue.

In *Alexander*, the Riverhouse Tower Apartments were constructed by a private non-profit corporation whose loan was secured by a mortgage that was insured by HUD. When the corporation defaulted on its loan, the mortgage was assigned to HUD. Subsequently, HUD initiated a foreclosure action and after a marshal's sale, HUD acquired title to the apartments. When the apartments deteriorated to the point that HUD decided to terminate the project, tenants were notified. Similar to the facts in our case, the tenants in *Alexander* claimed the complex was infested with roaches and vermin; elevators were often inoperable; security was poor; hot water and heat were inadequate or non-existent; the buildings were often flooded; lighting was poor in

the narrow hallways which were often cluttered with garbage; plumbing was deficient, and some tenants had electrical problems. *Alexander* at 168. Tenants filed suit alleging that HUD breached a warranty of habitability implied in their leases relieving them of their obligation to pay rent. The Seventh Circuit rejected their claims and held that there was no warranty of habitability as a matter of law that could be applied against HUD or its agents.

Plaintiffs' claim that § 661-1, H.R.S., requires this Court to treat public housing leases the same as private housing leases. This is incorrect. Section 661-1, H.R.S. does nothing more than assign jurisdiction over claims against the State to the Circuit Courts. Contrary to Plaintiffs' assertion, § 661-1, H.R.S. does not create rights. Moreover, public housing, by its very nature as subsidized housing, is completely different from leases in the private sector. In the private sector, there is little or no oversight or regulation regarding the maintenance, repair or upkeep of the units, as there is with public housing agencies. The reasoning behind the judicial adoption of an implied warranty of habitability[1] is to address marketplace inequities between private landlords and tenants; it does not apply to the relationship between the Defendants herein and their tenants. That relationship is highly regulated by the federal government, and the rights and remedies under its leases are governed by federal law so that any marketplace analysis is misplaced and unnecessary. *Ford ex rel. Pringle v. Philadelphia Housing Authority,* 848 A.2d 1038, 1057 (Pa.Cmwlth.,2004)

Any implication of a warranty of habitability would undermine and indeed impermissibly supersede the authority already established by HUD, which is responsible for oversight. The construction and operation of public housing is well established as promoting a national public

[1] The implied warranty of habitability is an unwritten promise that the landlord will maintain the apartment in the condition required by the housing code and will make the repairs necessary to keep the apartment in that condition. The unwritten promise exists because the courts have ruled that all landlords have made that implied promise to their tenants.

housing policy "to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income." 42 U.S.C. §1437, *et seq.* The case law is clear: the creation of such a warranty is unnecessary, because the public housing goal of providing "decent, safe and sanitary" housing is "best left to that branch of government which established that objective." *Alexander v. United States Dep't of Hous. and Urban Dev.*, 555 F.2d 166, 17o (7th Cir.1977), aff'd, 441 U.S. 39, 99 S.Ct. 1572, 60 L.Ed.2d 28 (1979); *See also Gibson v. Gary Hous. Auth.*, 754 F.2d 205, 206 (7th Cir.1985) (no warranty of habitability for HUD-regulated and subsidized housing); *Perez v. United States*, 594 F.2d 280, 287 & n. 11 (1st Cir.1979) (no affirmative statutory duty on HUD to guarantee safety of HUD-financed housing); *Hurt v. Philadelphia Hous. Auth.*, 806 F.Supp. 515, 527 (E.D.Pa.1992); *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F.Supp. 1566, 1574 (S.D.Fla.1992).

B. THERE IS NO BREACH OF THE RENTAL AGREEMENT

The provisions in the Rental Agreement are required and established by HUD. 24 C.F.R. § 966, *et seq*. But, as argued above, HPHA's obligation to provide "decent, safe and sanitary" housing does not create a private right of action if any of the provisions in the Rental Agreement are not met from time to time. "Decent, safe and sanitary" is a term of art not open to interpretation and was not intended to create rights in third parties. 42 U.S.C. s 1437; *See also Perry v. Housing Auth. of Charleston*, 664 F.2d 1210, 1218 (4th Cir.1981) (relying on "clear" prior case law, court concluded that tenants are not third party beneficiaries of ACC under §§ 1437 *et seq.*)

Congress charged HUD with promoting and enforcing "decent, safe and sanitary" standard. *Alexander* at 171. ("[These national housing goals are]....best left to that branch of government which established the objectives"). Presently, HUD has not found the State in

violation of the "decent, safe and sanitary" standard articulated by Congress. Plaintiffs' claim for a breach of the rental agreement is without merit.

C. HPHA IS SO HEAVILY REGULATED BY HUD THAT FEDERAL PREEMPTION SHOULD APPLY

Plaintiffs correctly state that federal law preempts State law when a federal agency heavily regulates a specific area, such as public housing. *Young v. Coloma-Agaran,* 340 F.3d 1053, 1055 (9th Cir. 2003). As discussed in detail in the Memorandum, HPHA and its 67 federal housing projects are so closely regulated by federal law and HUD regulations that State law has been preempted. *See, Memorandum in Support,* at p. 15-16. Further, HUD specifically has the oversight and enforcement authority to determine if any of Plaintiffs' claims have any validity. 24 C.F.R. § 941.614. More significantly, HUD can determine if HPHA has failed in its obligation to provide residents with "decent, safe and sanitary" housing. Clearly, that is not the case. With the extensive monitoring and reporting to HUD which HPHA is required to do, HUD has been fully aware of the conditions at KPT and it is a compelling fact that it has never found HPHA to be in violation of this duty.

Lastly, it is well established that cases involving the rights and obligations of the United States or its agents under a contract entered into pursuant to authority conferred by a federal statute, must be governed by federal law, and not State law. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U. S. 630, 641 (1981); *Miree v. DeKalb County,* 433 U.S. 25, 28 (1977); *United States v. Little Lake Misere Land Co.,* 412 U.S. 580 (1073); *Krupp v. Federal Housing Administration,* 285 F. 2d 833,834 (1st Cir. 1961).

D. THERE ARE NO THIRD PARTY BENEFICIARY RIGHTS CONFERRED UPON PLAINTIFFS

There is no clearer evidence that Plaintiffs have no Third Party Beneficiary rights under

either the management Contract between HPHA and Realty Laua, or the Annual Contribution Contact ("ACC") between HPHA and HUD which establishes HPHA's obligations to the residents, than the language of the ACC itself which states explicitly that no third party rights are created. As previously argued in the Memorandum in Support (*See,* Declaration of Chad Taniguchi, Exhibit "1") Section 21 of the ACC unequivocally states:

> "Except as to bondholders, as stated in Part B (Attachment VI) of this ACC, Nothing in this ACC shall be construed as creating any right of any third party To enforce any provision of this ACC or to assert any claim against HUD or the HA." (Emphasis added)

Plaintiffs cause of action based on any Third Party Beneficiary Rights is totally unsupportable under the ACC. Therefore, Plaintiffs cannot claim any third party right under the ACC or management contract between HPHA and Realty Laua. *Perry v. Housing Auth. of Charleston*, 664 F.2d 1210, 1218 (4th Cir.1981) (relying on "clear" prior case law, court concluded that tenants are not third party beneficiaries of ACC under §§ 1437 et seq.) and *Smith v. Washington Heights Apartments, Ltd.*, 794 F.Supp. 1141, 1144 (S.D.Fla.1992) (tenants not third party beneficiaries under HAP contract) and *Reiner v. West Village Assocs.*, 768 F.2d 31 (2d Cir.1985) (tenants not third party beneficiaries of HUD mortgage insurance program contract under 12 U.S.C. § 1715n). See *Falzarano v. United States*, 607 F.2d 506, 511 (1st Cir. 1979) (based on 12 U.S.C. s 1715l); *Harlib v. Lynn*, 511 F.2d 55-56 (7th Cir. 1975) (based on 12 U.S.C. s 1715l), *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 361-62 (5th Cir. 1977) (based on HUD Handbook); *Boston Public Council, Inc. v. Lynn*, 388 F.Supp. 493, 496 (D.Mass.1974) (based on 42 U.S.C. s 1401 et seq.); *Fenner v. Bruce Manor, Inc.*, 409 F.Supp. 1332, 1349 (D.Md.1976) (based on 12 U.S.C. s 1715l, z).

E. PLAINTIFFS CHAPTER 480 CLAIM IS CLEARLY WITHOUT MERIT

Plaintiffs contend that "Defendants" have violated Hawaii Revised Statutes ("HRS")

§480-2. *See* Complaint at 17. Specifically, Plaintiffs claim that Defendants have are liable under HRS 480-2 for allegedly failing to comply with State and County building, fire, safety, health, and sanitation regulations, as well as HUD requirements. *See id.* at ¶67. The issue here is whether Plaintiffs have standing to sue, under our trade and commerce laws, for purportedly "unfair conditions" at KPT. The answer is no according to the case law. *Big Island Small Ranchers Association v. State,* 60 Haw. 228, 236 (1978); *cited in*, *Pele Defense Fund v. Paty*, 73 Haw. 574, 608 (1992); *Cieri v. Leticia Query Realty,* Inc., 80 Haw. 54, 905 P.2d 29 (Haw. 1995) (Plaintiff did not have standing to sue under Chapter 480).

HRS § 480-2 prohibits, in relevant part, "unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." HRS § 480-2 (a). Only a "consumer" can sue an account of an allegedly unfair or deceptive act. *See* HRS § 480-2 (d). The term "consumer" is defined as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase *goods or services* or who commits money, property, or services in a personal investment." HRS § 480-1 (emphasis added). The term "purchase" includes a lease. *See id.* Affording an overly generous reading of their cause of action, it appears that Plaintiffs are contending that in leasing their units at KPT, they are subjected to "unfair" living conditions. Therefore, the first question is whether Plaintiffs' lease with the State for units at KPT qualifies as a purchase, attempt to purchase, or a solicitation to purchase "goods or services".

This issue was resolved by the Hawaii Supreme Court in *Cieri v. Leticia Query Realty, Inc.*, 80 Haw. 54, 905 P.2d 29 (Haw. 1995). *Cieri* involved a home buyer's claims that the seller had failed to disclose plumbing problems with the subject home. *See id.* at 57, 905 P.2d at 32. Relying on Article 2 of the Uniform Commercial Code's definition of goods, the court held that,

for the purposes of HRS Chapter 480, "real estate and residences are not 'goods' as that term is utilized in HRS § 480-1." *Id.* at 66, 905 P.2d at 41. Therefore, the plaintiff home buyers lacked standing to sue. *See id.*

The sole distinction here is that Plaintiffs lease, and did not buy, their units at KPT. As used in HRS Chapter 480, however, the term "purchase" explicitly includes not only outright sales, but leases as well. *See* HRS § 480-1. Hence, Plaintiffs' leases with the State do not qualify as a purchase of goods or services under HRS § 480-2.

The only other way for Plaintiffs to be considered "consumers" is if each lease constitutes "a personal investment." In other words, does leasing a unit in a public housing complex constitute a "personal investment," as that phrase is used in HRS § 480-1? *Cieri* is instructive on this issue. The court there determined that "the purchase of real estate or a residence" qualifies as a "personal investment." 80 Haw. at 67, 905 P.2d at 42. Its reasoning was based on the observation that real estate is oftentimes purchased "with an intent to hold the property in anticipation of an appreciation in the parcel's resale value." *Id.*

Plaintiffs' leases, however, cannot be considered personal investments. These are public housing leases. They are not transferable, they have no market value. When the lease is terminated, there is no accrued financial benefit. Under no stretch of the word could Plaintiffs' leases be considered an investment. Rather, they are a temporary solution to a need for shelter.

In sum, Plaintiffs' leases do not qualify as a good or a personal investment. Consequently, Plaintiffs are not consumers as that phrase is used in HRS Chapter 480, and lack standing to pursue a HRS § 480-2 claim against RL. This result is reasonable. HRS Chapter 480 was intended to protect consumers from being defrauded in commercial transactions. It is not to

be used as a tool to address habitability issues. The case law is clear on this issue, Plaintiffs do not have standing to sue under HRS Chapter 480.

F. THERE IS NO "CAUSE OF ACTION" FOR MEDICAL MONITORING

There is no Ninth Circuit nor Hawai'i authority for Plaintiffs to assert Medical Monitoring as an independent "cause of action" or "claim." Contrary to Plaintiffs argument, a "claim" for "medical monitoring" is more a remedy and not an independent tort. *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965 (Cal.1993)(The court held that medical monitoring costs might be a compensable item of damages, only after the requisite elements of injury and liability were established). Plaintiffs are attempting to self-certify their own "medical" condition or allege with any credibility the etiology of their medical condition as attributable to conditions at KPT. Such averments in their Declarations should be considered worthless.

We acknowledge that one court in Pennsylvania did hold that the Medical Monitoring is a cause of action. *Redland Soccer Club, Inc. v. Department of the Army*, 696 a.2d 137 146 (Pa. 1997). However, *Redland Soccer Club* stands alone, involving, as it did, an Army base contaminated with dangerous toxic and hazardous waste. In the case, a Soccer club brought action against United States Department of Army and Department of Defense under Hazardous Sites Cleanup Act (HSCA), alleging that defendants' disposal of hazardous materials at site caused. *Id.*

While we acknowledge that Medical Monitoring may be an appropriate remedy – should this case get that far – it is not a separate claim in this jurisdiction.

III. CONCLUSION

Plaintiffs' Memorandum in Opposition fails to rebut any of the compelling facts raised in Defendants' Motion to Dismiss and also fails to overcome any of the applicable case law and

legal authorities cited therein. Accordingly, Defendants respectfully request this Court to grant the Defendants' Motion to Dismiss in its entirety.

DATED: Honolulu, Hawai'i; May 6, 2009.

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STATE OF HAWAI'I

LEWERS FALETOGO; HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; AND LEE SOMMERS, individually and on behalf of a class of past, present and future residents of Kuhio Park Terrace, Plaintiff, vs. STATE OF HAWAI'I; HAWAI'I PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawai'i limited liability company, Defendants.	CIVIL NO. 08-1-2608-12 SSM (Other Civil Action) CERTIFICATE OF SERVCE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the following parties by United States mail, postage pre-paid:

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