

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

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2005 OCT 25 AM 10:18

F. OTAKE
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.

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.

HOUSING AND COMMUNITY
DEVELOPMENT CORPORATION OF
HAWAII and HHA WILIKINA
APARTMENTS PROJECT, INC.,

Defendants and Third-Party
Plaintiffs,

vs.

•

) CIVIL NO. 05-1-0815-05 (EEH)
) (Contract)

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

) EXHIBITS "A" TO "E"

) DECLARATION OF MICHAEL J. HEE

) CERTIFICATE OF SERVICE

) DATE: NOVEMBER 2, 2005

) TIME: 10:45 A.M.

) JUDGE: EDEN E. HIFO

URBAN MANAGEMENT CORP.;)
 MARCUS & ASSOCIATES, INC.; JOHN)
 DOES 26-50,)
)
 Third-Party Defendants.)
 _____)

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

I. INTRODUCTION

Defendants are State agencies and instrumentalities that own and operate (through a managing agent) apartment buildings for low-income tenants. Third party defendants are or were the managing agents.

Plaintiffs are tenants in the apartments. Plaintiffs claim they overpaid rent. The present version of the complaint alleges two theories: breach of contract and violation of federal law.

II. STATUS AND PROCEDURAL HISTORY

DATE	EVENT
May 6, 2005	Complaint
August 4, 2005	Entry of default as to HCDCH (not HHA)
August 10, 2005	Plaintiffs' motion for class certification
August 30, 2005	Stipulation to set aside default
August 31, 2005	Defendants' answer to complaint
September 12, 2005	Defendants' amended answer to complaint and third party complaint against Urban Management Corp.
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
October 18, 2005	Defendants' answer to first amended complaint and third party complaint against Urban Management Corp. and Marcus & Associates, Inc. (served 10/18/05)

Defendants have now stipulated to plaintiffs' filing a Second Amended Complaint. See Exhibit "A" attached hereto. This second amended complaint: 1) adds Stephanie Aveiro, the

executive director of HCDCH, as a party in her official capacity only; 2) deletes plaintiffs' request for damages based on the federal law claim; and 3) adds a claim for injunctive relief based on 42 U.S.C. § 1983.

Plaintiffs' proposed deletion of their federal law request for damages along with addition of an official capacity State official moots defendants' motion on that issue. Defendants intend to withdraw the motion when the second amended complaint is filed.

III. DISCUSSION

A. PLAINTIFFS' MOTION SHOULD BE CONTINUED

As shown above, this case has been at issue between plaintiffs and the State for less than two months. The entities that manage or previously managed the subject projects have been named and served, but have not yet appeared. Plaintiffs intend substantially to revise the complaint, including addition of a new official capacity defendant. There has been no discovery as to these parties and only limited discovery between the State and plaintiffs.

Accordingly this motion is premature and should be continued at least until all parties have entered an appearance.

In addition, defendants requests that this matter be continued pursuant to HRCP 56(f). The facts not presently available to present by affidavit include information concerning changes to tenants' rent as discussed below.

B. PLAINTIFFS' MOTION SHOULD BE DENIED AS TO VIOLATION OF FEDERAL LAW

As indicated in defendants' motion to dismiss, plaintiffs do not have a federal law claim against the present defendants, because of the Eleventh Amendment. Plaintiffs' motion completely misses the point. The cases they cite prove only that they could have a claim against

someone. That may or may not be true. The only relevant point at this stage of the case is that such a claim cannot be brought directly against the State.

Plaintiffs effectively concede this point by the second amended complaint, which deletes their federal law claim for damages and adds a State official (in her official capacity) as a defendant.

C. PLAINTIFFS' MOTION SHOULD BE DENIED AS TO INJUNCTIVE RELIEF

First, under the present state of the pleadings, plaintiffs' claim for injunctive relief is barred by the State's sovereign immunity, because no official capacity defendants are named.

The Hawai'i Supreme Court has consistently recognized that the doctrine of sovereign immunity precludes a suit against the State without the State's express consent. Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 106 Haw. 416, 432, 106 P.3d 339, 355 (2005).

At present, our case is brought only against state agencies. Sovereign immunity bars entry of an injunction against the State itself. This rule is rooted in the fundamental principle that any attempt to assert jurisdiction over a state in a private action brought without the state's express consent is barred because sovereign immunity protects against "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) (citation omitted).

Plaintiffs' proper course of action as to injunctive relief is to name and seek to enjoin responsible officials in their official capacity. W.H. Greenwell, Limited v. Department of Land and Natural Resources, 50 Haw. 207, 209, 436 P.2d 527, 528 (1968). Plaintiffs' second amended complaint takes exactly this action. By doing so, plaintiffs effectively concede the point and make their motion moot as to this issue.

Second, plaintiffs cannot meet the familiar requirements of injunctive relief: “(1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support granting the injunction?” Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978).”¹ “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).

In this case, the only claim for which there is a waiver of sovereign immunity is the contract claim. But the alleged harm as to the contract is simply overpayment of rent. Plaintiffs seek “reimbursement for rent overcharges and inadequate reimbursements resulting from Defendants’ violations of law and breaches of tenants’ rental agreements.” FAC ¶ 9. In short, plaintiffs’ remedy, if they win, is payment of damages – damages that can be exactly calculated and which amount will be, if necessary, fully paid. Even if defendants fail to adjust the utility allowance going forward, that failure only increases the damages. Plaintiffs can never have irreparable harm and can never be entitled to injunctive relief.

Third, without conceding that the utility allowance has been inadequate in the past, defendants are presently doing everything possible to adjust the utility allowance. As explained in the attached declaration and exhibits, defendants cannot change the allowance without HUD’s

¹ Plaintiffs are mistaken to ask for permanent injunction, which they cannot obtain until a final judgment is entered in their favor. In any case, the standards for a permanent injunction are essentially the same as for a preliminary injunction, except the plaintiff must actually succeed on the merits. Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987); Ladd v. Thomas, 14 F. Supp.2d 222 (D.Conn. 1998); Indian Motorcycle Associates III Ltd. Partnership v. Massachusetts Housing Finance Agency, 66 F.3d 1246 (1st Cir. 1995). Irreparable harm is still required.

approval. They are actively seeking that approval (through the managing agent). A mandatory injunction from this court is neither necessary nor sufficient with respect to the adjustment.

D. PLAINTIFFS' MOTION SHOULD BE DENIED AS THE CONTRACT CLAIM

The standard contract between defendants and plaintiffs states an exact dollar amount of rent that the tenant agrees to pay. In Waters' case, he and his wife, Alvina Solomon, agreed as follows:

The Tenant agrees to pay \$50.00 for the partial month ending on 11/30/97. After that, the Tenant agrees to pay a rent of \$213.00 per month. This amount is due on the first (1st) day of the month at Urban Real Estate Co., 850 Richards Street, Suite 603, Honolulu, Hawaii 96813.

Exhibit "A" to plaintiffs' motion. 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.

As pointed out by plaintiffs, the contract also contains a clause relating to changes in the agreed upon rent:

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.

By the plain language of this clause, at most, the State may have breached the rental agreements when (and if) it changed a tenant's rent without adjusting the utility allowance "in accordance with" HUD requirements.

Clearly this is not a common issue of fact as to all plaintiff class members. The attached declaration of Michael J. Hee explains that tenants' rent is not changed until a year after they sign the original rental agreement.

