

1ST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

Plaintiff,)

vs.)

HOUSING AND COMMUNITY)
DEVELOPMENT CORPORATION OF)
HAWAII, a duly organized and recognized)
agency of the State of Hawaii; HHA)
WILIKINA APARTMENTS PROJECT, INC.;)
STEPHANIE AVEIRO, in her official)
capacity as the Executive Director of the)
Housing and Community Development)
Corporation of Hawaii; DOES 1-25)

Defendants.)
_____)

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

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT; DECLARATION OF
GAVIN K. THORNTON; EXHIBIT "A";
CERTIFICATE OF SERVICE**

HEARING

DATE: November 2, 2005
TIME: 10:45 A.M.
JUDGE: Eden E. Hifo

HOUSING AND COMMUNITY)
DEVELOPMENT CORPORATION OF)
HAWAI'I and HHA WILIKINA)
APARTMENTS PROJECT, INC.,)
)
Defendants and Third-)
Party Plaintiffs,)
)
vs.)
)
URBAN MANAGEMENT CORP.; JOHN)
DOES 26-50,)
)
Third-Party Defendants)

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs JACK WATERS and MARGARET MARA, individually, and on behalf of all persons similarly situated, by and through their counsel, submits this reply in further support of their Motion for Partial Summary Judgment filed October 14, 2005 against Defendants Housing and Community Development Corporation of Hawaii ("HCDCH") and HHA Wilikina Apartments Project, Inc. ("HHA").

I. INTRODUCTION

Defendants do not dispute that they failed to comply with U.S. Department of Housing and Urban Development ("HUD") regulations regarding the adjustment of utility allowances at Wilikina Apartments ("Wilikina"), and that as a direct result of such failures, Plaintiffs were provided with insufficient utility allowances and were thereby overcharged for rent. Nor do Defendants dispute that their failures to comply with HUD regulations resulted in material breaches of the rental agreements for at least some of the residents of Wilikina. Instead, Defendants provide the following reasons as to why Plaintiffs' summary judgment motion should be narrowed in scope or continued:

1. Plaintiffs' rental agreements were only breached once their rent was recalculated a year after their tenancy began;
2. Plaintiffs' cannot prevail on their federal law claim against the parties to this motion;
3. Injunctive relief is not appropriate under Plaintiffs' in light of the adequacy of damages;
4. The motion should be continued because the case has been at issue between Plaintiff and the State for "less than two months," not all parties have appeared, and Plaintiffs' complaint has been amended; and
5. The motion should be continued pursuant to Haw. R. Civ. P. 56(f) because the case Defendants need to conduct additional discovery.

Each of these arguments are addressed below.

II. ARGUMENT

A. PLAINTIFFS' CONTRACT CLAIM

Defendants argue that since the Rental Agreement for Wilikina sets forth a specific dollar amount that tenants are to pay for rent, a breach of the rental agreements could have only occurred *after* a tenant resided at Wilikina for a year, and his or her rent changed from the amount listed on their original rental agreement (at which point the lease provision requiring that *changes* to the tenant's rent be made in accordance with HUD procedures and regulations would be violated). This assertion is wrong. However, even assuming *arguendo* that Defendants' argument had merit, summary judgment would still be appropriate for tenants of Wilikina who have resided there for over a year.

Defendants' argument that a tenant's rental agreement is breached only after their rent is changed ignores the section of the Wilikina Rental Agreement in which Defendants must certify that the tenant's rent was computed in accordance with HUD's regulations and administrative procedures. (*See* Pls.' Mot. for Partial

Summ. J., Exhibit "B" of Waters Dec.)¹ Obviously, a rental agreement that states the wrong amount of rent that a tenant must pay breaches this provision.

"[In] construing a contract, a court's principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen." *Brown v. KFC Nat'l Mgmt. Co.*, 82 Haw. 226, 240, 921 P.2d 146, 106 (1996) (quoting *University of Hawaii Professional Assembly v. University of Hawaii*, 66 Haw. 214, 219, 659 P.2d 720, 724 (1983)). The Rental Agreement as a whole clearly evidences that the intent that Defendants were to compute rent in accordance with HUD requirements. Certainly Plaintiffs did not intend to pay more rent than permitted under federal law. To set the rent at some other level would not effectuate the parties' intent.

Additionally, if the contract viewed in its entirety is ambiguous, the contract must be construed against its drafter. *Pancakes of Hawaii, Inc. v. Pomare Properties Corp.*, 85 Hawaii 300, 305, 944 P.2d 97,102 (1997) (citing to *Coney v. Dowsett*, 3 Haw. 685, 686 (1876)). The Rental Agreement is a classic adhesion contract. Defendants drafted the contract and are solely responsible for any ambiguity therein. To the extent that the Rental Agreement is ambiguous because Defendants charged residents a higher amount of rent than allowed by HUD

¹ Form HUD - 50059, Certification and Recertification of Tenant Eligibility is incorporated by reference into the Rental Agreement at Sections 3 and 27. (See Pls.' Mot. for Partial Summ. J., Exhibit "A" of Waters Dec.) The "Owner's Certification" section of Form HUD - 50059 requires Defendants to certify that the tenant's "eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures...." (See Pls.' Mot. for Partial Summ. J., Exhibit "B" of Waters Dec.) It is clear from the face of the Rental Agreement that a Form HUD-50059 must be executed in connection with the signing of the Rental Agreement, and thus Defendants must certify that they have complied with HUD regulations regarding the setting of tenants' rents at the commencement of each tenancy, not just a year later when the rents change. (See Pls.' Mot. for Partial Summ. J., Sections 3 and 27 of Exhibit "A" of Waters Dec.)

regulations in spite of a contractual provision stating that Defendants would abide by HUD regulations, the ambiguity must be decided in favor of the residents.

Furthermore, existing law is part of a contract where there is no stipulation to the contrary. *Quedding v. Arisumi Brothers, Inc.*, 66 Haw. 335, 337, 661 P.2d 706, 709 (1983) (holding that it was implied in a contract to build a home that the contractor would comply with the requirements of the Uniform Building Code even though the Code was not expressly referred to in the contract). This rule was applied to federally subsidized housing in *Merrill Tenant Council v. U.S. Dept. of Hous. and Urb. Dev.*, 638 F.2d 1086 (7th Cir. 1981), where the U.S. Court of Appeals for the Seventh Circuit held that a state law that required interest to be paid on security deposits was implied into the terms of tenants' rental agreements despite the fact that the rental agreements did not expressly incorporate the law. 638 F.2d at 1089-1090. Thus, even if the Wilikina Rental Agreement did not explicitly state that the rents and utility allowances were to be computed in accordance with HUD regulations, the Brooke Amendment and its supporting regulations are implied terms of the contract. There is no dispute that Defendants violated those laws.

Based on the undisputed facts, summary judgment against HCDCH and HHA is appropriate with respect to the breach of contract claim for Wilikina tenants.

B. PLAINTIFFS' FEDERAL LAW CLAIM

Though Defendants have not disputed that they have violated federal law, Plaintiffs concede that it would be inappropriate to grant their summary judgment motion with respect to the federal law claim at this time since Defendant Stephanie Aviero, in her official capacity as the Executive Director of the HCDCH, is not a party to this motion. Additionally, Plaintiffs have not obtained sufficient discovery to determine whether Defendant HHA is an agency or department of the

State and thus protected by the Eleventh Amendment. Plaintiffs withdraw that portion of the motion pertaining to their federal law claim.

C. PLAINTIFFS' RIGHT TO INJUNCTIVE RELIEF

Defendants assert that injunctive relief is inappropriate because rent overcharges do not constitute irreparable injury and there is an adequate remedy at law for overcharging public housing residents. In essence, Defendants are arguing that despite the fact that they knowingly continue to overcharge Wilikina residents for rent, they may continue to do so indefinitely since Plaintiffs can always bring another suit to recover damages from the overcharges.

Residents of federally subsidized housing are low-income by definition. See 24 C.F.R. § 5.653(b)(2). Wilikina tenants can be charged rents as low as \$25 per month depending on their income. See 24 C.F.R. § 5.630(a)(3). While \$34 per month (the amount of the utility allowance increase Defendants have proposed to HUD) may not be significant to the general public, it is a substantial amount to the tenants of subsidized housing. Though the temporary loss of money does not usually constitute irreparable injury, exceptions to this principle have been recognized where federally subsidized housing tenants were overcharged for their rent. See e.g., *Bloodworth v. Oxford Village Townhouses, Inc.*, 377 F.Supp. 709 at 719 ("If plaintiffs were in a more favorable economic position, then the impact of defendants' action would not be as great and the court would be reluctant to find the injury to plaintiffs to be irreparable. Such is not the case here."); see also *Keller v. Kate Maremount Found.*, 365 F.Supp. 798 (N.D. Cal. 1972) ("a 10 per cent increase in rent can be extremely serious for a low-income family.").

In *Meade v. Hawaii Housing Authority*, 1975 U.S. Dist. LEXIS 15229 (D. Haw. Apr. 15, 1975) (attached hereto as Exhibit "A"), the U.S. District Court for the

