

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

**SUPPLEMENTAL REPLY  
MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT;  
DECLARATION OF GAVIN K.  
THORNTON; DECLARATION OF JACK  
WATERS; EXHIBITS "C"- "D";  
CERTIFICATE OF SERVICE**

HEARING

DATE: November 28, 2005  
TIME: 1:30 P.M.  
JUDGE: Eden E. Hifo

**SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' 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, submit this Supplemental Reply Memorandum in Support of Plaintiffs' 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**

There is no dispute that Defendants violated federal law by failing to analyze and request adjustments to the utility allowances at Wilikina Apartments. Nor is there any dispute that Plaintiffs are currently being overcharged for their rent as a result of Defendants' failures. Knowing of the overcharges, Defendants continue to charge and collect excessive rents from the low-income residents of Wilikina.

A hearing on this motion was held on November 2, 2005. The hearing was continued until November 28, 2005 based on Defendants' request pursuant to Haw. R. Civ. P. 56(f) to allow Defendant time to discover "information concerning changes to tenants' rent" (referring to Defendants' argument that a breach of the rental agreement only occurred once the rent for a tenant changed after residing at Wilikina for approximately one year). Defendants' Supplemental Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment contains no reference to such facts. Yet Defendants continue to seek to delay judgment on whether or not the contract was breached, and seek to delay adjusting the rents to the proper amount.

## II. ARGUMENT

### A. PLAINTIFFS' CONTRACT CLAIM

The clear intent of the Wilikina Apartments Rental Agreement is to ensure that Wilikina tenants pay a rent that is in accordance with the U.S. Housing Act and HUD rules. Contrary to Defendants' assertions, the fact that Defendants listed an exact dollar amount on the rental agreements that was not in accordance with HUD regulations does not make the contract ambiguous; Defendants listed the wrong amount.

Defendants' argument ultimately forces the question, "Did Defendants intend to charge rents in accordance with federal law, or rents that violated federal law?" Even if Defendants wanted to argue the latter, they have presented no evidence whatsoever to support that interpretation. They admit that they failed to perform their duties with respect to analyzing and requesting adjustments to utility allowances in accordance with HUD regulations. They certainly imply that their failure was not intentional. Furthermore, the intent to charge rents in accordance with federal law is clear from: (1) Section 27 of the Rental Agreement which incorporates into the Agreement a certification by Defendants that tenants' rents are computed in accordance with HUD regulations;<sup>1</sup> and (2) Section 4 of the Rental

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<sup>1</sup> In a footnote, Defendants suggest that the Form HUD 50059 may have changed from 1997 to 2004. (Def.s' Supp. Memo. in Opp. to Pl.s' Mot. for Partial Summ. J. at 4, fn.2.) Defendant did not previously dispute the validity of the HUD 50059 form attached to Plaintiffs' summary judgment motion in Defendants' original opposition filed on October 25, 2005, or at the hearing on November 2, 2005. Only now, when summary judgment is imminent, do Defendants seek to further delay judgment in this case by suggesting that the form may have changed.

There is no reason to believe that the form has substantively changed. The purpose of the form is clear from its face: It is intended to require tenants to certify that they provided accurate information regarding their income, and to require owners to certify that, using the information supplied by the tenant, the owner properly calculated the tenant's rent. Indeed, Defendants offer no evidence to support the assertion that the form attached to Plaintiffs' motion is invalid or may have changed. The mere suggestion in Defendants' legal memorandum that the form may have changed at some point, unsupported by actual evidence, is not sufficient to defeat a summary judgment motion. See Waimea Falls Park v. Brown, 6 Haw. App. 83, 97 (Haw. Ct. App. 1985). (note continued on next page)

Agreement which requires Defendants to make changes to tenants' rents in accordance with HUD regulations.<sup>2</sup> Even absent these express provisions that incorporate federal law by reference into the Agreement, existing law is part of a contract where there is no stipulation to the contrary. (See Pl.s' Reply in Supp. of Mot. for Partial Summ. J. at 5.)

Defendants have also argued that at the very least, they only breached the Wilikina Rental Agreements once a tenant's rent changed, usually after a year of residing at Wilikina. (Def.s' Supp. Memo. in Opp. to Pl.s' Mot. for Partial Summ. J. at 8.) However, Defendants have yet to offer any argument whatsoever to support their suggestion that Defendants may have somehow avoided eventually breaching the rental agreements for Wilikina tenants. It is thus absolutely clear that Defendants breached the agreements at some point, and at the very least, Plaintiffs are entitled to an order of summary judgment to that effect.

#### **B. PLAINTIFFS' RIGHT TO INJUNCTIVE RELIEF**

Defendants argue that they are currently in compliance with federal law and the terms of the Wilikina Rental Agreement because they have submitted an analysis of the Wilikina utility allowances to HUD. However, the basis of Plaintiffs' claim is that Defendants' are charging them in excess of the amount of rent permitted by the Brooke Amendment. Certainly, Defendants' rent overcharges are a result of

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To remove any possible doubt that there has been a substantive change to the form, attached hereto as Exhibit "C" is the Form - HUD 50059 signed by Jack Waters on November 10, 1997, the date on which Mr. Waters entered into his rental agreement with Defendants. Attached hereto as Exhibit "D" is the statement to which Defendant's certified by signing the 1997 Form-HUD 50059, which says, "I certify that the Tenant's eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures...."

<sup>2</sup> Section 4 alone provides sufficient indication of the intent to charge rents in accordance with federal law at the beginning of the lease term. It would be ludicrous to interpret the lease as allowing one "free" year of charging tenants any rent Defendants wish, after which Defendants would become obligated to comply with the federal rules by which they are governed.

their failures to comply with the regulations regarding utility allowances, but complying with the regulations and merely requesting a utility allowance adjustment after a lapse in compliance of almost 10 years does not address the root of the problem; that Defendants' have overcharged, and continue to overcharge, Wilikina residents for rent in violation of the Brooke Amendment.<sup>3</sup>

Defendants couch their arguments in terms of "paying" residents a higher utility allowances, suggesting that Plaintiffs are requesting Defendants to pay them more. However, Plaintiffs are simply asking that Defendants stop overcharging them for rent. Each month Plaintiffs are sent a bill indicating the amount of rent they are required to pay (Waters Decl. at ¶ 7), and each month Defendants continue to charge an amount in excess of what they are authorized to collect knowing that the amount they are charging is excessive.

Defendants argue that Plaintiffs are asking the court to ignore Hawaii law regarding when an injunction will be issued. (Def.s' Supp. Memo. in Opp. to Pl.s' Mot. for Partial Summ. J. at 5.) However, Plaintiffs do not dispute that injury must be irreparable for an injunction to issue. Instead, Plaintiffs have pointed to precedent that demonstrates that monetary damages are irreparable for low-income subsidized housing residents. Defendants attempt to distinguish these cases by arguing that they pertain to rent increases, whereas the current case involves a requested decrease. This is not the case.

Utilities are supposed to be included in tenants' rents. By failing to supply tenants with an adequate utility allowance as utility rates increased,

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<sup>3</sup> Defendants assert that "[t]he only alleged violation mentioned in [Plaintiffs'] motion or anywhere else in [sic] pleadings relates to potential adjustment to the utility allowance required by 24 C.F.R. § 880.610." This assertion is wrong. Plaintiffs clearly set forth in both their complaint and this motion that Defendants violated federal law and the Plaintiffs' rental agreements by charging rents in excess of those authorized by the Brooke Amendment. (See e.g., Pl.s' Mot. for Partial Summ. J. at 1-4, 9.)

