UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRIGHTON VILLAGE NOMINEE TRUST, c/o SENTRY PROPERTY MANAGEMENT CORP.,	)	
Plaintiff,	)	
v.	)	
ZYMA MALYSHEV, ITA SCHEGOLEV, LIPA SMOLYAR, SEMYON CHARNEY, SHEILA DATZ, LEV UMANSKY, NIKOLAY VIRINE, LEV FILYURIN, LAZAR MERLIS, LORRAINE MOONEY, LYUBOV SCHMIDT, SEMYON SHUSTER, LEONID VANINOV, SOLOMON VIKTOR, and NAUM MANDEL,	)	
Defendants and Third-Party Plaintiffs,	)	C.A. NO. 00-12311-GAO
v.	)	
MEL MARTINEZ,[1] in his capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Third-Party Defendant.	)	

DEFENDANTS'/THIRD PARTY PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

[1]Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Mr. Martinez, as the current Secretary of HUD, is automatically substituted for the former HUD Secretary, Andrew Cuomo.

I. INTRODUCTION

The Defendants and Third Party Plaintiffs ("the Tenants") state that this action was properly removed to the U.S. District Court for the District of Massachusetts by the Third-Party Defendant, the Secretary of the U.S. Department of Housing and Urban Development ("HUD"). The Tenants are heads of fifteen low-income, elderly, disabled households whose long-time homes have been threatened due to violations of federal law by HUD and violations of state and federal law by the Plaintiff, Brighton Village Nominee Trust, c/o Sentry Management Corp., ("the Owner").[2] The Tenants live at Brighton Village Apartments ("Brighton Village"), a 68-unit development in Boston.

On or around October 6, 2000, the Owner initiated summary process eviction actions against these elderly Tenants in the Trial Court of Massachusetts, Housing Court Department, because the Tenants could not afford to pay the most recent rent increases. The Tenants raised federal claims in the state court action against the Third Party Defendant, the Secretary of HUD, in his official capacity for acts taken under color of his federal office. HUD filed a notice of removal of the action to the Federal District Court pursuant to 28 U.S.C. §§ 1441 and 1442(a)(1).[3] The Owner thereafter filed a motion to remand this action to state court, claiming that removal under 28 U.S.C. § 1441(a) was improper pursuant to the "well-pleaded complaint" doctrine. The Tenants assert that this action was subject to removal to the U.S. District Court by HUD and that this Court possesses subject-matter jurisdiction

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[2]The Tenants are Lev Filyurin (84 years old), Lazar Merlis (78), Leonid Vaninov (74), Lev Umansky (81), Ita Schegolev (72), Lyubov Schmidt (65), Zyma Malyshev(75), Solomon Viktor (67), Semyon Charny (91), Semyon Shuster (74**),** Lipa Smolyar (72), Naum Mandel (76), Nikolay Virine (72), Sheila Datz (58), and Lorraine Mooney (81).

[3] The summary process actions were given a single docket number in federal court.

over this action. The Tenants ask the Court to deny the Owner's motion to remand.

II. FACTS

A. Background of Brighton Village[4]

For more than twenty years, HUD has been involved in regulating and providing assistance to low-income tenants at Brighton Village. In 1980, HUD sold Brighton Village to the present owner, Brighton Village Nominee Trust, with a 40-year HUD-held purchase money mortgage and a 15-year rent subsidy contract authorized under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. In accordance with the Section 8 contract, tenants paid 30 percent of their incomes in rent,[5] and HUD paid the difference between the tenant's share and the full "contract" rent guaranteed the Owner. Occupancy was limited to low-income tenants. With guaranteed affordability, Brighton Village provided an invaluable housing resource for the Tenants in the present action and low-income residents in the surrounding community.

The provisions of Brighton Village's federal mortgage documents provided for continued affordability through the term of the 40-year HUD-held mortgage in 2020. The regulatory agreement between HUD and the Owner accompanying the mortgage required the Owner to accept any offer by HUD to renew the Section 8 contract, so long as the mortgage was held by HUD. The mortgage note provided that it could "not be prepaid in whole or in part without the prior written approval of the

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[4] The factual allegations regarding Brighton Village are contained in documents obtained under the Freedom of Information Act from public agencies and from the Registry of Deeds, and are likely to be further supported after discovery and more investigation.

[5] Under federal law for the Section 8 project-based program, "rent" includes a reasonable allowance for any tenant-paid utilities. See Wright v. City of Roanoke Redvelopment and Housing Authority, 479 U.S. 418 (1987).

Secretary" of HUD.

In 1986, however, just six years after the sale, HUD granted the Owner permission to prepay the mortgage, which purportedly terminated the affordability requirements of the mortgage documents. Section 250(a) of the National Housing Act, 12 U.S.C. § 1715z-15(a) prohibited HUD from accepting an owner's offer to prepay the mortgage of a multifamily rental development unless HUD has complied with a detailed set of requirements that protect low-income residents and low-income families, including determining that the development is no longer meeting a need for rental housing for lower income families in the area or that the needs of the development's lower income families can otherwise be met, providing the tenants with notice and a meaningful opportunity to comment, and ensuring a plan for providing relocation assistance as necessary. HUD accepted the prepayment, without taking the steps to meet the mandate of Section 250(a). HUD failed to provide notice to the Tenants, failed to make any determination regarding lower-income families' needs for rental housing, and failed to ensure any relocation plan. Due to HUD's failure to provide them with the notice required by Section 250(a), the Tenants were not aware of the prepayment.

In 1995, when the Section 8 contract came up for renewal, the Owner did not accept HUD's offer to renew, because the requirement in the mortgage regulatory agreement purportedly had been terminated by the prepayment. HUD compounded the injury to the low-income Tenants by failing to ensure that the contract rents were properly adjusted to similar market area rents and to consider any actions possible to avoid termination of the contract, as federal law required at the time. See 42 U.S.C. § 1437f(c)(2) and (9). Instead, HUD offered the Owner a renewal at rents far below market, which the Owner, not surprisingly, did not accept. HUD's and the Owner's actions, taken together,

resulted in the loss of the affordability offered by the Section 8 a full twenty-five years before it would have been under the terms of the mortgage documents.

The elderly, disabled Tenants were issued individual rent vouchers, which do not have the same affordability guarantee as the Section 8 project-based contract and have not kept pace with market rents.[6] The Tenants were told that they would continue to pay their current rents with the vouchers, and were unaware that their rent share might be higher with vouchers. At the end of the first year with the vouchers, and every year since, the Owners sought substantial rent increases. Because the rent increases moved above the maximum level the vouchers would pay, the Tenants were forced to pay more than 30 percent of their incomes in rent. As a result, the Tenants have been forced to divert increasing amounts of their limited fixed incomes from basic life necessities such as food and medically related costs in an effort to cover rent and have faced eviction more than once due to their inability to pay the annual rent increases sought by the Owner.

Prior to the filing of their third party claim, the Tenants made repeated requests to HUD under the fair housing laws, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, et. seq., and the

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[6] Individual "tenant-based" rent vouchers issued by HUD also are authorized under Section 8 of the United States Housing Act, of 1937, 42 U.S.C. § 1437f. Unlike the Section 8 project-based contract program, under the tenant-based rent voucher rules (see 24 C.F.R. Part 982 generally), HUD only guarantees payment of subsidy up to a certain level (the "payment standard"), and the contract rent for the unit, at initial lease-up or at renewal, may exceed this level, with the tenant having to pay the difference between the payment standard and the contract rent. Moreover, if utilities are not included in the rent and the contract rent equals or exceeds the payment standard, the tenant's utility payments are not calculated into the 30% of income formula. Finally, if there are changes in household composition, such that the tenant is occupying a larger unit than would otherwise be required, subsidy payments are reduced, with the tenant having to absorb the difference in subsidy; under the project-based Section 8 program, subsidy payments continue at the same level until an appropriately sized unit in the development is identified for transfer.

Fair Housing Act as amended, 42 U.S.C. § 3601, et. seq., to increase the voucher payment level to allow them to remain in their homes as a reasonable accommodation based on their individual disabilities.[7] Although HUD recognized the disabled Tenants' need for reasonable accommodation, it refused to supply the full subsidy the Tenants needed to cover the rents.[8] As a result, the Tenants faced the continued prospect of eviction and diversion of their minimal resources to cover their expanding rent burden.

Subsequent to the filing of the third party claim, on December 27, 2000, Congress enacted legislation, 106 Pub. L. 569, Tit. IX, § 902, 114 Stat. 2944, extending back the qualifying date for "Enhanced Vouchers" which pay increased subsidy levels.[9] As a result, the Brighton Village Tenants

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[7] The Tenants at Brighton Village have disabilities that range from blindness to dementia to Parkinson's disease to cancer. They have special needs and expenses related to their disabilities, such as medication, handicapped accessibility, particular foods, and/or proximity and transportation to healthcare providers.

[8] In 1999, the Owner's proposed rent increase for October 1, 1999 would have required the Tenants to pay as much as 70 percent of their incomes with their Section 8 tenant-based vouchers. In September 1999, before the increase took effect, the disabled families applied to HUD for increased subsidy levels as a reasonable accommodation. In January 2000, HUD recognized the disabled Tenants' needs for a reasonable accommodation, but refused to authorize the full amount of the increase necessary to cover the rents or to grant an increase prior to January 2000, because it was not HUD's "policy and practice" to approve exceptions retroactively. Only because the Massachusetts Department of Housing and Community Development used its administrative fees to meet the three-month shortfall were the Tenants able to catch up on the rent increase and avoid displacement, and they still had to absorb a rent burden in excess of 30% of income.

In the summer of 2000, the Owner once again sought significant rent increases, effective October 1, 2000. In August 2000, the Tenants again applied to HUD to raise the voucher payment levels to allow them to remain in their homes without diverting so much of their fixed incomes as to threaten their health and disabilities. HUD took no action on that request, even after the Tenants faced eviction in the Boston Housing Court.

[9] Enhanced vouchers also are authorized under Section 8 of the National Housing Act and, unlike conventional vouchers, have payment levels that will meet reasonable market rents, as long as the

became eligible to receive these enhanced rent subsidies, which have allowed them to remain in their homes for the present and have limited their to rent share to 30 percent of their incomes.

The legislation has been an enormous relief for the Tenants. At the same time, Enhanced Vouchers, while allowing immediate relief, do not provide the Tenants with the same level of long-term security as the Section 8 project-based subsidy contract would have. At this stage in their lives, long-term security in their homes is of paramount importance to these disabled, low-income Tenants, who wish to avoid the regular prospect of eviction they have faced over the past five years. Because of differences in rules between the Enhanced Voucher program and the Section 8 project-based program, the Tenants risk displacement over time for reasons such as a change in household size resulting in a determination that their unit is the wrong size for a remaining household member, failure of the unit to pass housing quality inspections in the future, and a decrease in income insufficient to trigger a reduction in their rent share. The Enhanced Voucher program is a relatively new program,[10] and should Congress modify or eliminate it in the future, the Tenants would again risk the loss of their homes as a result of unaffordable rents. In addition, the December 2000 legislation did not provide relief for the increased rent burden which the Tenants had to absorb prior to the effective date of such legislation.

B. Federal Claims Against HUD

The Tenants in the present action have asserted claims against HUD for injunctive and

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tenant remains in the same development. See 42 U.S.C. § 1437f(t); HUD PIH Notice 2001-41.

[10] Congress created Enhanced Vouchers 1996, and made them available to low-income tenants following termination of project-based Section 8 contracts in 1999. In comparison, Congress has continued to fund existing project-based Section 8 contracts since the inception of the program in the 1970's.

declaratory relief under the Administrative Procedure Act, alleging violations of HUD's statutory duties. They also claim that, in withholding the increased voucher subsidies the disabled Tenants needed in order to remain in their homes and avoid diverting income from paying for necessities, exacerbating their medical problems and denying them equal access to housing, HUD violated its obligations under fair housing laws, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., and the Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended), 42 U.S.C. §§ 3601 et seq.

III. ARGUMENT

The present action was subject to removal by HUD, the Third-Party Defendant, to the U.S. District Court for the District of Massachusetts. HUD's notice of removal sought removal under 28 U.S.C. § 1441 and 28 U.S.C. § 1442(a)(1). 28 U.S.C. § 1442(a)(1) permits any agency or officer of the United States sued in an official or individual capacity for an act under color of their office to remove a civil action initiated in a state court to federal district court.[11] The Third Party Defendant is a federal officer–the Secretary of the United States Department of Housing and Urban Development. Claims were raised by the Tenants, in the state court action, against HUD for acts taken under color of

[11] The statute provides, in relevant part: "(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." 28 U.S.C. § 1442.

federal office. As such, HUD could appropriately seek removal under 28 U.S.C. § 1442(a)(1).[12]

While the original summary process complaint did not raise a federal question, the Tenants' answer and third party claims against HUD did raise federal questions and challenge the acts of a federal officer, such that the matter became removable under 28 U.S.C. § 1442(a)(1). The fact that the federal officer is a third-party defendant, rather than the original defendant, does not affect the removal analysis under 28 U.S.C. § 1442. The Secretary of HUD can appropriately invoke removal as a third-party defendant.[13] See Davenport v. Borders, 480 F.Supp. 903 (N.D.Ga. 1979); National Center for Housing Management v. Housing Authority of the City of Milwaukee, 668 F.Supp. 1230 (E.D. Wisc. 1987). This is so even if the third-party defendant might have no right to remove under 28 U.S.C. § 1441. See Fleet Bank–N.H. v. Engeleiter, 753 F.Supp. 417, 419-420 (D.N.H. 1991).[14]

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[12]A copy of the HUD's Amended Notice of Removal is attached hereto as Exhibit #1. (Amendment was required because the HUD had initially failed to designate all of the state court actions for which removal was sought.) The notice sought removal under both 28 U.S.C. § 1441 and 28 U.S.C. § 1442(a)(1). The Owner has raised questions as to removal under the jurisprudential doctrines applying to 28 U.S.C. § 1441. This does not affect, however, the appropriateness of removal under 28 U.S.C. § 1442(a)(1).

[13]At one point, the First Circuit held that a suit against a federal officer exclusively in the officer's official capacity was not subject to removal under 28 U.S.C.§ 1442(a)(1), based on its reading of International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) (International Primate Protection League found that federal agencies, as opposed to federal officers, did not have a right of removal under the statute). See American Policyholders Insurance Co. v. Nyacol Products, Inc., 989 F.2d 1256 (1st Cir. 1993), *certiorari and rehearing denied sub. nom.* Keough v. American Policyholders Insurance Co., 510 US. 1040 (1994). However, Congress subsequently amended 28 U.S.C. § 1442(a)(1) in 1996, making clear that agencies as well as federal officers may remove such actions. See State of Nebraska ex rel. Department of Social Services v. Bentson, 146 F.3d 676, 678 (9th Cir. 1998); Dalyrymple v. Grand River Dam Authority, 145 F.3d 1180, 1184 (10th Cir. 1998).

[14] In Fleet Bank-N.H. v. Engeleiter, the District Court noted that in Mesa v. California, 489 U.S. 121, 129, 132-134 (1989), the Supreme Court established two prerequisites to removal under 28

The Owner states that there is no subject matter jurisdiction for removal of this action pursuant to the "well-pleaded complaint" rule enunciated in Gully v. First National Bank, 299 U.S. 109 (1936), i.e., that the original complaint (if well-pleaded) would require the construction of a federal statute or application of federal legal principles for its disposition.[15] Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 807 (1986); see also Evans v. Sentry Property Mgt. Corp., 852 F.Supp. 71, 72 (D. Mass. 1994), *quoting* Commonwealth of Massachusetts v. V & M Mgt., Inc., 752 F.Supp. 519, 521 (D. Mass. 1990), *aff'd*., 929 F.2d 830 (1st Cir. 1991).

The Tenants agree that if they, the original defendants, had filed the notice of removal pursuant to 28 U.S.C. § 1441(a), this would be the governing rule. Where, however, the notice of removal has been filed by a federal officer under 28 U.S.C. § 1442(a)(1), the "well-pleaded complaint" rule does not apply:

> "Suits against federal officers are exceptional in this regard. Under the federal officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal question element is met if the defense depends on federal law."

Jefferson County v. Acker, 527 U.S. 423, 430 (1999). The right of removal under this statute, for the

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U.S.C. § 1442(a)(1): that the case is against a federal officer for any act under color of such officer and the federal officer must raise a colorable defense arising out of its duty to enforce federal law. The District Court found removal improvident because the federal officer was not asserting a federal defense. Fleet Bank-N.H. v. Engeleiter, 753 F.Supp. at 419-420. In the present case, federal questions predominate and while HUD has not yet filed an answer to the third party complaint, it is likely that its defense will be based on its construction of federal law. Thus, this case can be distinguished from Fleet Bank-N.H.

[15] The Owner also appears to argue that the Third-Party Defendant failed to verify the notice of removal. The federal removal procedure, however, requires that a notice of removal be "signed pursuant to Rule 11" and no longer requires a verified petition. See 28 U.S.C. §1446(a).

federal officer, is absolute for conduct performed under color of federal office, regardless of whether the suit could have originally been brought in federal court. Willingham v. Morgan, 395 U.S. 402, 406 (1969); see also Arizona v. Manypenny, 451 U.S. 232, 242 (1981). In the present case, federal questions are prevalent. Indeed, the federal court may be the only forum in which the Tenants can obtain complete relief, if the state court hesitates to exercise jurisdiction over claims arising under the Administrative Procedures Act (APA).[16]

Conclusion

For the foregoing reasons, the Third Party Defendant's removal of this action to the federal court was proper under 28 U.S.C. § 1442(a)(1), and the Plaintiff's motion for remand of these proceedings to the state court should be denied.

ZYMA MALYSHEV, et al.,
Defendants/Third Party Plaintiffs,
By their attorneys,

DATED: _____ _____

[16] A lack of jurisdiction in state court over APA claims is no longer grounds for dismissal. See Bermudez v. United States Department of Housing and Urban Development, 84 F.Supp.2d 1094 (C.D. Cal. 2000); Lloyd v. FDIC, 22 F.3d 335, 336, n.2 (1st Cir. 1994). In 1986, Congress modified the general removal statute to add subsection (e) which provides:

> The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1441(e). The amendment eliminated the "derivative jurisdiction" doctrine which may have foreclosed such actions previously. See, e.g., Federal National Mortgage Assn. v. LeCrone, 868 F.2d 190, 192-193 (6th Cir. 1989), *cert. denied*, 493 U.S. 938 (1989) (commenced before effective date of Section 1441(e)). Thus, as long as a federal court would have had original jurisdiction over the APA claim, it does not matter that the state court may not have had jurisdiction over that claim.

Ann Jochnick, BBO #642674
James M. McCreight, BBO #542407
Greater Boston Legal Services
197 Friend Street
Boston, MA 02114
(617) 603-1656

Certificate of Service

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by first class mail, postage prepaid.

Date: _____ _____