IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JEAN MASSIE, et al.	)	
	)	
Plaintiffs	):	
	)	Civil Action 06-1004
v.	)	Class Action
	)	
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.	)	**Ambrose, J**
	)	
Defendants	)	

DEFENDANTS' BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Defendants, the United States Department of Housing and Urban Development and its Secretary, Alphonso Jackson (hereinafter "HUD") hold three defaulted mortgages on a multi-family property that is owned by a cooperative incorporated as Third East Hills Park, Inc. (hereinafter the "cooperative" or "coop" or "TEHP"). The plaintiffs, seven shareholders[1] in that failed cooperative brought this action alleging that the commencement by HUD of the foreclosure proceedings was in violation of numerous laws. The complaint seeks declaratory and injunctive relief under two alternative sets of claims.

Plaintiffs argue that unlike any other secured mortgage, that the HUD held mortgages on their coop are not subject to foreclosure. They contend that a consequence of TEHP's years of

[1] The complaint is not clear regarding the status of or relief sought for an eighth named plaintiff, Zetta Brandon. The complaint alleges that Zetta Brandon is the daughter of named plaintiff Louise Bandon and that she resides with her mother who is a shareholder and resident of the Third East Hills Park development. Compl. ¶ 25. Unlike the other named plaintiffs, the Motion for Temporary Restraining Order and Preliminary Injunction did not include an executed Verification for Zetta Brandon. Although it appears that Zetta Brandon is not a shareholder in the cooperative, the complaint alleges that it is brought by the named plaintiffs "on their own behalf and on behalf of a class of consisting of all shareholders of Third East Hills Park, Inc." Compl. ¶ 32.

receiving generous federal subsidies created unique “vested ownership/equity interests” for coop shareholders, and that it is unlawful to terminate those unique interests through a foreclosure action. In support of this position, plaintiffs point out that the generous terms of the coop's federal mortgages do not require monthly payments to principal and interest; therefore, they assert, the coop has never defaulted by failing to make a scheduled mortgage payment.

Plaintiffs further contend that although the TEHP did violate the terms of its mortgages by repeatedly failing to expend the federal subsidies it received to maintain the property, those failures were "merely technical defaults” of its mortgage obligations. More properly, they are known as “covenant defaults.” They argue that HUD cannot lawfully strip the plaintiff/shareholders of their unique "vested ownership/equity interest" through a foreclose action that is based on technical rather than monetary defaults. In plaintiffs view there is no circumstance in which foreclosure would be legally permissible. Thus, they asked the court to permanently enjoin the planned foreclosure and to reinstate the abated Section 8 federal subsidies to the coop. This court determined that Plaintiff’s could not meet the burden in establishing injunctive relief, and the foreclosure sale is now set for October 5th.

In the alternative, plaintiffs contend that given the receipt by the coop of federal subsidies, the coop's shareholders are legally entitled to control the plan for disposition of the HUD held mortgages on the coop, and that they are entitled to exceptional relocation benefits and long-term housing assistance. These exceptional entitlements are allegedly required in order to compensate the shareholders in their failed cooperative for their loss of the unique “vested ownership/equity interests,” which were created by the coop's receipt of the federal housing subsidies.

Plaintiffs' claims for relief lack any merit. There is simply no legal authority for the position that the plaintiff/shareholders receipt of federal homeownership subsidies created an entitlement to extraordinary benefits upon the failure of their homeownership venture. Plaintiffs are not entitled to more than the relocation and Section 8 rental housing assistance that they have repeatedly refused to accept. All of Plaintiff's claims must be dismissed.

BACKGROUND

1. In 1972, HUD insured a mortgage for the Third East Hills Park development under Section 236 of the National Housing Act, 12 U.S.C. § 1715l (hereinafter the "236 mortgage"). The borrower/mortgagor was Third East Hills Park, Inc., a non-profit corporation, incorporated under Pennsylvania law in 1971, to own and manage the development as resident-owned cooperative housing for low-income shareholders in the corporation and non-shareholder tenants. Compl. ¶ 29.

2. The Third East Hills Park development (hereinafter the "development") is comprised of twenty six (26), two-story buildings containing 140 residential units located in the East Hills section of the City of Pittsburgh.

3. In addition to a 236-mortgage subsidy, years ago HUD previously entered into a project-based Section 8 Housing Assistance Payment (HAP) contract with TEHP. In general, a Section 8 assistance payment covers the difference between 30 percent of a tenant or tenant/shareholder's adjusted monthly income and gross rent.

4. In 2001, TEHP restructured its debt and the Secretary of HUD became the holder of a "Restructuring Mortgage" in the amount of $1,812,482 (Def. Ex. # 1, Mortgage Restructuring Mortgage, 5/22/01) and a "Contingent Repayment Mortgage" in the amount of $186,946. (Def. Ex. # 2, Contingent Repayment Mortgage, 5/22/01) The mortgage notes were to be paid from surplus

income, after the payment of necessary operating expenses. In 2001, TEHP also entered into a new 20-year Section 8 HAP contract (Def. Ex. # 3, Section 8 "Mark to Market Renewal Contract", eff. 6/1/01). As a condition of restructuring its debt and entering into the new 20-year Section 8 HAP contract, Third East Hills Park, Inc. executed "Regulatory" and "Use" Agreements agreeing to provide sound management of the development, to maintain the project in good condition, and not to commit or permit waste of the project (Def. Ex. # 4, "Regulatory Agreement for Insured Multifamily Housing" 5/22/01); (Def. Ex. # 5, "Use Agreement for Multifamily Project" 5/22/01).

5. The new HAP contract states in relevant part that housing assistance shall only be paid for units that are occupied by eligible families and that meet Housing Quality Standards (HQS) for decent, safe, and sanitary housing, and that are in accord with all statutory, regulatory and other HUD requirements. The contract further states that the HUD contract administrator will abate HAP payments for any unit that does not meet such requirements, and that the HAP payments will be used to relocate the family. (Def. Ex. # 3, Section 8 Mark to Market Renewal Contract, ¶ 4.d(2))

6. The mortgages HUD holds on the development, i.e., "Section 236 Rehab. Grant Agreement" (Def. Ex. # 6), the "Mortgage Restructuring Mortgage" (Def. Ex. # 1), and the "Contingent Repayment Mortgage" (Def. Ex. # 2) all authorize the Secretary of HUD to declare a default and foreclose upon a breach of the terms of the "Regulatory Agreement" (Def. Ex. # 4) or "Use Agreement" (Def. Ex. # 5). The Section 8 HAP contract (Def. Ex. # 3) also provides for termination or abatement of subsidy payments for breach of the terms of the "Regulatory" or "Use" Agreements.

7. TEHP is required as a condition of receipt of federal funds to maintain the units in the development in a decent, safe and sanitary condition. See, "Regulatory Agreement" ¶ 10; HAP

Contract ¶ 4(2); "Use Agreement" ¶ 10; "Mortgage Restructuring Mortgage" ¶ 10 & 11; and "Contingent Repayment Mortgage" ¶ 2 &3.

8. In order to ensure that properties are maintained in a decent, safe and sanitary condition consistent with Housing Quality Standards (HQS), HUD performs site inspections of properties for which it holds the mortgage note. The inspections are performed every two years, or, annually, for properties with inspection scores less than 80 percent. (HUD Handbook 4350.1) HUD's Real Estate Assessment Center (REAC) evaluated the condition of the Third East Hills Park development and determined the conditions to be substandard and in failure in 1999, 2000, 2002, 2003 and 2004 (Def. Ex. # **7-**11, "REAC Inspection Reports" for 1999, 2000, 2002, 2003 and 2004). The annual physical inspection reports documenting the deficient conditions at the development were provided to THEP. Multiple photographs of the property were taken by HUD on June 22, 2004, which clearly evidence indecent, unsafe and unsanitary conditions at THEP. (T*hese photographs were introduced at the Preliminary Injunction Hearing on August 4th, as ex. 18 and reviewed by the Court. For brevity purposes and reproduction, they have not been attached hereto)*

9. In 2004, HUD inspected a large sample of the units at the Third East Hills Park development and determined that none of them met HUD Housing Quality Standards (Def. Ex. # 12, "Infante Inspection Report" 6/22/04), and (Def. Ex. # 13, "Hatala Inspection Report" 6/22/04.)

10. Based on Third East Hills Park, Inc.'s failure to comply with its obligation to maintain the units at THEP in a decent, safe and sanitary condition, HUD warned THEP through it's President, Plaintiff Gaskins, of violations of the mortgages and Regulatory and Use Agreements (Def. Ex. # 14, "Default Notice" 7/12/04). The default notice provided THEP an opportunity to

submit a correction plan, and advised that a failure to do so would authorize HUD, without further notice, to foreclose and abate the HAP assistance payments.

11. THEP failed to take corrective action. In accordance with the Default Notice, on November 10, 2004, HUD forwarded correspondence to THEP advising it of its failure to "*satisfactorily address the Project's unacceptable physical condition as required by the notices*" (Def. Ex. # 15, "Notice of Abatement of HAP"). HUD immediately abated the Section 8 housing assistance payments to TEHP.

12. THEP requested a hearing to challenge HUD's determinations of violations of the Agreements. On November 30, 2004, a hearing was held. None of the information provided by THEP was sufficient to reverse HUD's determination that THEP was in default. THEP was advised that it would proceed with the foreclosure of the property (Def. Ex. # 16, "Letter of 1/28/05").

13. On November 17, 2004, HUD sent a "Notice of Displacement" to each resident of the Third East Hills Park development notifying them of its intent to relocate the residents due to "*health, safety and security reasons*." HUD agreed to provide reasonable relocation assistance benefits as well as a Section 8 voucher for rental assistance, which may be used anywhere in the United States. HUD retained a relocation contractor, Lord and Dominion, to facilitate the relocation process for the tenants. (Def. Ex. # 17, "Notice of Displacement")

15. HUD also scheduled a "Resident Relocation Meeting" with the tenants, the relocation contractor, HUD, and the Housing Authority to discuss the relocation plan and respond to questions. Residents also received $100 to reimburse them for transportation costs and $200 after their voucher application was completed. Other expenses covered by HUD included security

deposits, utility deposits, and the cost of a moving company or a scheduled movers fee based on unit size. For those tenants who refused to apply for a voucher or refused to move, the relocation contractor contacted each family individually by certified mail, home visits, and telephone calls. (Def. Ex. # 18, "Corres." 2/10/05 and 6/20/05.)

16. HUD also developed a "Disposition Plan" for the mortgage. It entered into a sales contract with the Pittsburgh Urban Redevelopment Authority (URA) that provides for the purchase by HUD of the property at foreclosure, and the immediate resale of the property to the URA. (Def. Ex. # 19, "Letter to Residents") As part of a comprehensive neighborhood revitalization plan, the URA plans to sell the property to a private developer who will demolish the project, and the construct on the site mixed income, rental and for- purchase housing that is affordable for low and very low income income families. This is required in the covenants that run with the land.

17. Approximately 65 shareholders accepted HUD's offer of relocation expenses and vouchers and they have successfully relocated. Only 15 shareholders have refused to accept the relocation and housing assistance that has been repeatedly offered to them. The URA will provide relocation assistance to these holdover tenants, if it acquires title to the property.

18. On July 26, 2006, the named plaintiffs, seven residents of the Third East Hills Park development and shareholder in TEHP[2] together with TEHP, filed a "Class Action Emergency

[2] The complaint is not clear regarding the status of or relief sought for an eighth named plaintiff, Zetta Brandon. The complaint alleges that Zetta Brandon is the daughter of named plaintiff Louise Bandon and that Zetta Brandon resides with Louise Brandon, who is a resident of the Third East Hills Park development and shareholder in the cooperative Third East Hills Park, Inc. Compl. ¶ 25. The complaint further alleges that Zetta Brandon resides with her mother, named plaintiff Louise Brandon. Compl. ¶ 25. In addition, unlike the other named plaintiffs, plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction did not include an executed Verification of the statement of facts for Zetta Brandon. Although the complaint does not allege that Zetta Brandon is a shareholder in the cooperative, the complaint alleges that it is brought by the named plaintiffs "on their own behalf and on behalf of a class of consisting of all shareholders of Third East Hills Park, Inc." Compl. ¶ 32.

Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction" seeking to enjoin a foreclosure scheduled for 10:00 a.m. the next day. Plaintiffs' Complaint and Motion alleged that the commencement by HUD of the foreclosure proceedings was in violation of law. On July 27, 2006, the court granted the TRO enjoining the scheduled foreclosure, and scheduled a hearing on the plaintiffs' Motion for Preliminary Injunction approximately one week later on August 4, 2006.

On August 4, 2006, immediately prior to the injunction hearing, this Court granted HUD's Motion to Strike THEP as a party (Doc. #11) since Plaintiff's failed to present written authorization on behalf of THEP Inc. to proceed with the lawsuit. Thus, the remaining plaintiffs were the seven named individuals[3] and the purported "class consisting of all shareholders of Third East Hills Park, Inc." After hearing testimony from the named plaintiffs and HUD officials, and considering exhibits introduction by HUD and Plaintiffs, this Court entered a verbal order from the bench denying plaintiffs' Motion for a Preliminary Injunction. A written order was subsequently entered on August 9th, 2006. (Doc. # 12).

18. On July 27, 2006, Plaintiff Yevorn Gaskins, the alleged President of TEHP, filed a Chapter 7 Voluntary Petition in Bankruptcy. (See, *Yevorn Gaskins t/d/b/a Third East Hills Park Coop" 06-23484*) The Petition was dismissed by the Bankruptcy court for filing deficiencies. (See, *Order of August 18th, 2006, Bruce McCullough, Judge.)*

19. Following proper notice and advertising, foreclosure has been rescheduled for October 5, 2006.

[3] See footnote number 1.

ARGUMENT

Plaintiffs assert that the plan to dispose of the coop's defaulted mortgages through foreclosure and resale of the property violates their rights under the "Fair Housing Act," 42 U.S.C. § 3601, et seq., Public Law 109-115, § 311, the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970" (Relocation Act), 42 U.S.C. § 4601, *et seq*.; the Due Process Clause of the Fifth Amendment to the United States Constitution, and the common law. (¶s 16 and 18, Complaint). Plaintiffs claims must be dismissed because (1) no applicable waiver of sovereign immunity exists for the claims brought under FHA, the Relocation Act and common law and (2) plaintiffs can prove no set of facts that would entitle them to relief under any of the claims for relief set out in the complaint.

I. STANDARD OF REVIEW

The federal defendants move for dismissal under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). The court dismisses a case under Rule 12(b)(1) for lack of subject matter jurisdiction if it lacks the statutory or constitutional power to adjudicate the case. A Rule 12(b)(1) motion may be either "facial or "factual." In considering a factual challenge to jurisdiction, the trial court does not presume the truthfulness of allegations contained in the complaint and it may consider and weigh facts outside the record to determine the existence of its jurisdiction to hear the claims. The plaintiff bears the burden of proving that jurisdiction exits. Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3d. Cir.1977).

Dismissal under Rule 12(b)(6) is required if it appears beyond doubt that the plaintiff can prove no set of facts in support the claim that would entitle it to relief. The allegations in the complaint are taken as true and all inferences are drawn in favor of the plaintiff. However, a court

may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document. Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 48 (2d Cir., 1991), cert. denied, 503 U.S. 960. A decision to dismiss the case is on the merits and based on a determination that the claims are not legally sufficient, i.e., even if the plaintiff could prove all of its allegations, it would not prevail.

II. LACK OF SUBJECT MATTER JURISDICTION

A. Plaintiffs' Claims Under the FHA and the URA Should Be Dismissed Because There is No Applicable Waiver of Sovereign Immunity.

"The United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Hercules Inc. v. United States, 516 U.S. 417, 422 (1996) (citations and internal punctuation omitted). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969). Therefore, in analyzing whether Congress has waived the immunity of the United States, waivers must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires. McMahon v. United States, 342 U.S. 25, 27 (1951); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983); Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927). Accordingly, plaintiffs may not maintain any claims against HUD absent a waiver of sovereign immunity that covers those claims, and plaintiffs are bound by any limitations, substantive or procedural, that any such waiver imposes.

Counts I through III allege violations of the Fair Housing Act, Counts V through XV allege violations of the Relocation Act and Count XVII alleges breach of contract, presumably under common law. Plaintiffs' jurisdictional statement cites the Administrative Procedures Act (APA), 5

U.S.C. § 701 et seq. as "authorizing review of agency actions." Section 702 of the APA does state a waiver of sovereign immunity. However, as we demonstrate below, the waiver does not apply to the plaintiffs' claims under the Fair Housing Act, the Relocation Act or the common law.

B. Plaintiffs Cannot Maintain Their Claims Under the Administrative Procedures Act.

The APA establishes a framework that generally permits courts to review agency actions, by waiving federal sovereign immunity in certain circumstances to allow equitable relief where warranted. *See* 5 U.S.C. § 702. If review is accorded, a court may "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action" that is determined to be "arbitrary, capricious, an abuse of discretion," or "short of statutory right." 5 U.S.C. § 706. The APA allows judicial review of agency actions unless the "(1) statute[] preclude[s] judicial review, or (2) [the] agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The Supreme Court has held that whether an agency action falls under prong (2), meaning it is "committed to agency discretion by law," is determined by a "construction of the substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions." Heckler v. Chaney, 470 U.S. 821, 828-29, 105 S. Ct. 1649, 1654 (1985).

In their Complaint, plaintiffs attack HUD's proposed plan for the disposition through foreclosure of the three defaulted mortgages it holds on the cooperative. Plaintiffs allege that the planned foreclosure would result in the loss of their interest as shareholders in the cooperative that owns Third East Hills Park, and that such action would violate their rights under the Fair Housing Act and the common law. They further allege that HUD's disposition plan does not include benefits to which they are entitled under the Relocation Act. The waiver of sovereign immunity in Section

702 of the APA does not apply to plaintiffs' claims because Congress expressly gave HUD the "flexible authority" to decide how to dispose of multifamily mortgages such as those it holds on the Third East Hills Park property when it enacted 12 U.S.C. § 1715z-11a.

Section 204 of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, (P.L. 104-204, 100 STAT. 2878), 12 U.S.C. S 1715z-11a, entitled "Disposition of HUD-owned properties" provides as follows:

(a) Flexible authority for multifamily projects.

> During fiscal year 1997 and fiscal years thereafter, **the Secretary may manage and dispose of multifamily properties owned by the Secretary**, including, for fiscal years 1997, 1998, 1999, 2000, and thereafter the provisions of grants and loans from the General Insurance Fund (12 U.S.C. 1735c) for the necessary costs of rehabilitation, demolition, or construction on the properties (which shall be eligible whether vacant or occupied), **and multifamily mortgages held by the secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law.**

(emphasis supplied). This provision gives HUD "unfettered discretion" in establishing the terms and conditions involved in the management and disposition of multifamily mortgages it holds. As such, the "flexible authority"provision,12 U.S.C. § 1715z-11a, supercedes the alleged requirements in the Fair Housing Act, the Relocation Act and the common law. For jurisdictional purposes, the use of the phrase "notwithstanding any other provision of law" in the statute plainly commits the decision on the disposition of multifamily mortgages to the discretion of the Secretary, and thus HUD's actions are not subject to review.

In this case, because the plain meaning of the "flexible authority" statute is that HUD's actions concerning the management and disposition of multifamily mortgages are committed to

agency discretion by law, HUD's plan for disposing of the defaulted mortgages through foreclosure is not reviewable by this court. Mays v. Cuomo, No. C-01-96-929, (S.D. Ohio May 21,1998), attached herein as "Attachment A," is directly on point. In Mays, plaintiffs were residents of three multifamily housing projects in Ohio that were foreclosed by HUD. Mays, Order at 1. HUD instituted the foreclosure because the owner of the projects failed to properly maintain the buildings. Id. at 2. HUD ultimately decided not to impose low-income use restrictions *i.e.*, restrictions ordering the buyer to maintain the property as affordable housing for low-income persons. Id. at 2-3. Plaintiffs filed suit challenging HUD's decision to foreclose, purchase the property at foreclosure and then resell the projects without any low-income use restrictions or project-based rental assistance. Id. at 1, 4. The *Mays* court granted HUD's motion to dismiss based on lack of subject matter jurisdiction, explaining that "by the language used in [12 U.S.C. § 1715z-11a], Congress clearly illustrated its intent that [the flexible authority provision] preempt other statutes and regulations. . . ." Id. at 9. The court further found that the flexible authority provision in Section 204 "authorizes [the Secretary of HUD], in making [disposition] decisions, to use his discretion, unencumbered by any statutory or regulatory guidelines." Id. at 10. The court concluded that the APA's exception to judicial review was applicable because HUD's exercise of discretion in setting the terms and conditions of disposition constituted agency action committed to agency discretion by law. Id. at 10-11. In Chicago Acorn v. HUD, No. 05 C 3049 (N.D. Illinois October 5, 2005), attached hereto as "Attachment B" the court dismissed plaintiffs' claims under various statutes, holding that "the language of section 204 leads the court to the conclusion that HUD's choice of disposing of multifamily properties like Lawndale Restoration has been

'committed to agency discretion by law,' 5 U.S.C. 701(a)(2), and is thus not subject to review under the APA.").

Additionally, the APA does not waive sovereign immunity for the claim that HUD's plan for disposition of the defaulted mortgages on the property owned by the coop violates HUD's general, global duty under the Section 3608 of the Fair Housing Act to administer "programs and activities relating to housing and urban development" in a manner "affirmatively to further the policies of the act." Under the rationale of the Supreme Court decision in Norton v. Southern Utah Wilderness Alliance, 5 U.S. 55 (2004), the Plaintiffs are not entitled to specific relief, because the statutory duty they seek to enforce through the APA "lack[s] the specificity requisite for agency action." Id. at 64. In Norton, the Supreme Court determined that the respondent could not receive declaratory or injunctive relief under the APA for a discrete action the Department of the Interior failed to take because Congress left the statutory mandate of "preserving wilderness areas" too vague and amorphous, thereby providing a court no basis for assessing the degree of the Department's compliance or noncompliance therewith in the Department's allowance of the use of off-road vehicles in a wilderness area. The Court held that the APA does not contemplate that courts determine whether an agency has complied with such a vague statutory mandate because any such ruling would constitute judicial interference with the Agency's discretion. Id.

Like the statute in Norton, the Fair Housing Act's direction that HUD affirmatively further fair housing in the administration of its programs does not mandate that HUD perform any particular action, let alone the action sought by plaintiffs in their complaint. Therefore, this Court should dismiss the claim.

III. PLAINTIFF'S HAVE FAILED TO PROPERLY STATE A CLAIM FOR RELIEF.

A. Claims For Violations of the FHA, the Relocation Act and Common Law Fail Because HUD Has Unilateral Discretion to Dispose of Multi-family Mortgages That It Holds.

The flexible authority provision in Section 204, discussed above, provides that HUD may "**manage and dispose**" of **"multifamily mortgages held by the secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law."** (emphasis supplied). Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, 12 U.S.C. §1715z-11a. The "notwithstanding *any* other provision of law" clause in Section 204 unequivocally supercedes other laws that directly, or may be interpreted to, affect HUD's management and disposition of defaulted multifamily mortgages. Inclusion of the word "*any*," which has an expansive meaning, emphasizes the Congressional intent to override every other authority, and provides HUD unilateral discretion to determine the terms and conditions of its disposition of the defaulted mortgages on the Third East Hills Park property. See Department of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002). Section 204 negates any rights asserted by plaintiffs under the FHA, the Relocation Act and the common law.

The Supreme Court, in Cisneros v. Alpine Ridge, 508 U.S. 10 (1993), recognized that a law containing "notwithstanding language" supercedes all other laws because a "clearer statement [of Congressional intent] is difficult to imagine." Id. See also Conyers v. Merit Systems Protection Bd, 388 F.3d 1380, 1382 (D.C. Cir. 2004) ("We think that the 'notwithstanding any other provision of law' language renders inapplicable general federal statutes that otherwise would apply to the Under Secretary's power . . ."); Springs v. Stone, 362 F. Supp. 2d 686, 698 (E.D. Va. 2005) ("It

matters not whether the conflicting provisions are in the same statute or a different one; a 'notwithstanding' clause as broad as the one used here by Congress provides a blanket exemption.'"); Tucker v. Ridge, 322 F. Supp. 2d 738, 743 (E.D. Tex. 2004) ("When Congress states that a law will apply 'notwithstanding any other provision of law,' the court must assume that Congress means what it says - namely, that the law applies even when it would violate otherwise applicable statutes."); Orelski v. NCS Pearson, 337 F. Supp. 2d 695, 704 (W.D. Pa. 2004) (same).

Long-standing constitutional principles on statutory construction dictate that, in light of Congressional intent expressed in Section 204, the plaintiffs fail to state a claim under any law. A fundamental principle of statutory construction dictates that, if the statute is clear on its face, the analysis begins and ends with the language of the statute. Burlington No. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (when "the terms of a statute are unambiguous, judicial inquiry is complete"). Moreover, the absence of any legislative history on Section 204 is of no consequence because "reference to legislative history is inappropriate when the text of the statute is unambiguous." Rucker, 125 U.S. at 132. Here, the plain meaning of the statute is clear. Section 204 authorizes HUD to dispose of the defaulted mortgages it holds on the Third East Hills Park property on whatever terms and conditions it deems appropriate.

Further, "[i]n reading the plain language of a statute, the 'cardinal principle of statutory construction is to save and not destroy.'" Tucker, 322 F. Supp. at 743, citing, United States v. Menasche, 348 U.S. 528, 538-39 (1955) (citations omitted); TRW, Inc. v. Andrews, 534 U.S. 19, 34 (2001). In interpreting a statute, the court must give effect, if possible, to every clause and word of the statute. Id. To allow the plaintiffs in the instant action to proceed with their claims, this Court would have to ignore the plain meaning of the 'notwithstanding' clause in § 1715z-11a(a) and

"trench upon the legislative powers vested in Congress by Art. I, S 1, of the Constitution." Rucker, 125 U.S. at 135, citing, United States v. Albertini, 472 U.S. 675, 680 (1985).

In Section 204, Congress provided HUD with unfettered discretion to determine the terms and conditions under which it would dispose of the defaulted mortgages it holds on Third East Hills Park "notwithstanding any other provision of the law." See, GP-UHAB v. Jackson, No. CV 05-4830 (E.D. New York February 7, 2006), attached hereto as " Attachment C; (Court dismissed plaintiffs' challenge of HUD disposition decisions brought under the FHA holding that the "Title VIII provision [of the FHA] is trumped by the more recent 'flexible authority' provision. Accordingly, the plaintiffs' Fair Housing Act claims are barred as a matter of law and must be dismissed."). Given HUD's authority to foreclose and resell the property to the URA, notwithstanding any other provision of the law, plaintiffs fail to state a claim for alleged violations of the FHA, the URA and common law.

B. Plaintiff's Claim Under Section 311 Fails Because HUD Neither Owns Nor Holds THEP.

On November 30, 2005, the law containing the HUD 2006 appropriation was enacted. See, "Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act", 2006, H.R. 3058, 109th Cong. Plaintiffs claim a violation by HUD of Section 311 of the 2006 appropriation act because the planned disposition of the defaulted mortgages on the Third East Hills Park property does not maintain project-based Section 8 subsidy payments. Plaintiffs claim is without merit because the disposition action here does not fall within the terms of the statute.

Section 311 provides, in pertinent part,

> Notwithstanding any other provision of law, in fiscal year 2006, in managing and disposing of any ***multifamily property that is owned or held*** by the Secretary of Housing and Urban Development, the Secretary shall maintain any rental assistance payment under section 8 of the United States Housing Act of 1937 that are ***attached to any dwelling units in the property***....

By its terms, Section 311 applies to the disposition by HUD of any multifamily property that it owns or holds. It does not apply to the disposition of HUD held multifamily mortgages. HUD neither owns nor holds the Third East Hills Park property; it continues to be owned and held by the coop. In fact, plaintiffs allege that they continue to own the property and object to the foreclosure because it will divest them of their "vested ownership/equity interests."

Further, it is not possible to maintain Section 8 rental assistance payments ***"attached to dwelling units in the property"*** because no rental assistance payments have been attached to the unit in the development for almost two years. In a notice dated November 10, 2004, (ex. 9) to Plaintiff Gaskins as the elected President of the coop Board of Directors, HUD abated the Section 8 Contract. At that point, in accordance with the terms of the HAP contract, the subsidy that had been attached to units was redirected to pay for the relocation of the residents to housing that was decent, safe, and sanitary. Therefore, Section 311 does not apply.

C. Plaintiff's Due Process Claim Equally Lacks Merit

Plaintiffs assert that HUD violated the Fifth Amendment by failing to provide a "pre-deprivation opportunity to protect against the erroneous deprivation of their property interest without due process of law." Compl. ¶ 142. The property interest alleged is unique "vested ownership/equity interests" held by each of remaining resident shareholders in the cooperative.

Compl. ¶ 110 and ¶ 140. The facts alleged by plaintiffs in their complaint and the facts in the Background Section of this brief (all of which are supported by documentary evidence that was admitted by this Court) negate the plaintiffs apparent contention that the cooperative did not receive legally sufficient notice of its default under the three HUD held mortgages, and legally sufficient notice of the planned foreclosure action.

Contrary to plaintiffs' assertion, Plaintiff Gaskins, as the alleged duly elected President of the coop's Board of Directors, received numerous notices, over an extended period of time, regarding TEHP's failure to comply with the terms of its mortgages and the regulatory agreements. (See, Defendants Exhibits number 7-13), into with HUD. Defendant's Exhibits 14 through 16 are copies of notices to TEHP regarding its default, and HUD's plan to foreclose. Plaintiff Gaskins received, on behalf of the plaintiff shareholders, all legally required notices of foreclosure.

The individual plaintiff shareholders also received numerous notices of TEHP's default, the planned foreclosure, the abatement of the HAP contract and relocation assistance available to them. (See Defendant's Exhibit numbers 17 through 19) Plaintiffs do not allege facts sufficient to support a claim that HUD failed to provide them "a pre-deprivation opportunity to protect against the erroneous deprivation of their property interest without due process of law."

D. HUD Has Not Discriminated Against The Plaintiffs Under the FHA

In Count II, plaintiffs allege a violation by HUD of its duty to "affirmatively further fair housing" as expressed in Section 3608 of the Fair Housing Act. Section 3608(a) declares that the "authority and responsibility for administering this Act shall be in the Secretary of" HUD. Section 3608 (e) provides that federal departments and agencies "shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the

purposes of this subchapter." HUD plans to dispose of the HUD held mortgages on Third East Hills Parks through foreclose and resale to the Urban Redevelopment Authority (URA). As part of a comprehensive neighborhood plan for revitalization and preservation of affordable housing, the URA intends to resell the property to a developer that will demolish the distressed Third East Hills Park property, and replace it with less densely populated mixed-income housing. Compl. ¶ 141. The plaintiffs do not allege, and they could not prove, that the plan for the property does not affirmatively advance fair housing goals. Therefore, plaintiffs' claims for any purported violation of Section 3608 should be dismissed.

In Counts I and III, plaintiffs allege a violation by HUD of Section 3604 and 3617 of the FHA, which provide, in relevant part, that it is unlawful:

> To refuse to sell or rent after making a bona fide offer, or to refuse to negotiate for the sale or rental or, or otherwise make unavailable or deny, a dwelling to any person because of race . . . 42 U.S.C. § 3604(a).
>
> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race . . . . 42 U.S.C. § 3604(b).
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by section 3603, 3604, 3605 or 3606 of this title. 42 U.S.C. § 3617.

Here, the plaintiffs own the property and HUD holds mortgages on the property. Since HUD does not own or operate the Third East Hills Park property or the units contained therein, it did not discriminate in the terms or conditions of the sale or rental of "a dwelling unit to any person because of race." Accordingly, plaintiffs fail to state claims for a violation of Section 3604 or 3617.

E. Plaintiff's Claim for Violation of the Relocation Act Fails Because Its Protections Are Not Triggered by a Foreclosure Action

In Counts VI through XV, plaintiffs allege violations of various provisions of the Relocation Act and an entitlement to the various benefits provided to "persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal Financial assistance." 42 U.S.C. § 4621(b). Here, although the plaintiffs have not been displaced, they may be forced to move as a consequence of the planned foreclosure. Nevertheless plaintiffs are not entitled to Relocation Act benefits because a foreclosure of a defaulted HUD held mortgage is not an action undertaken with federal financial assistance. Instead, plaintiffs' potential displacement results from the failure of their coop to comply with the terms of its HUD held mortgages. Courts have held that non-owner residents of a property displaced by a HUD foreclosure are not entitled to benefits under the Relocation Act. Alexander v. HUD, 441 U.S. 39 (1979); Moorer v. HUD, 561 F.2d 175 (8th Cir. 1977); Caramico v. HUD, 509 F.2d 694,698 (2nd Cir. 1974). Therefore, it is apparent that the owners (or shareholders in a cooperative that owns the property) are not entitled to such benefits.

CONCLUSION

For the foregoing reasons, plaintiffs' claims must be dismissed.

Respectfully submitted,

MARY BETH BUCHANAN
United States Attorney

/s/ Gregory C. Melucci
GREGORY C. MELUCCI

Assistant U.S. Attorney
Western District of PA
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
(412) 644-3500
PA ID #56777