

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

<b>JEAN MASSIE, et al.</b>	:	
	:	
<b>Plaintiffs</b>	:	
	:	
v.	:	<b>Civil Action No. 06-1004</b>
	:	<b>Ambrose, J.</b>
<b>UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.</b>	:	
	:	
	:	
<b>Defendants</b>	:	

**RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION**

**Introduction**

The January 19, 2007 Opinion and Order of Court dismissed plaintiffs' Complaint in its entirety. Plaintiffs' pending motion asks the Court to reconsider its dismissal of three of the claims for relief in this lawsuit. The motion should be denied because plaintiffs fail to advance any argument that would require a different result in this case.

**Standard of Review**

"A court may grant a motion for reconsideration if the moving party shows: (1) an intervening change in the controlling law; (2) the availability of new evidence which was not available when the court issued its order; or (3) the need to correct a manifest injustice stemming from a clear error of law or fact." *Payne v. DeLuca*, 2006 WL 3590014 (W.D.Pa. Dec. 11, 2006), citing *Max's Seafood Cafe' by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999), *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). A motion for reconsideration should not be used to present new legal theories or arguments that

could have been made in an earlier brief. *Id.* HUD's argument in opposition of reconsideration of each of the three claims is addressed separately below.

## **Argument**

### **1. Claim for Regulatory Violation.**

The argument that this Court improperly dismissed a claim for violation of 24 C.F.R. § 290.1 (Pl. Brief pages 5-7) lacks merit because no such claim for relief was brought in this lawsuit. An allegation that HUD violated the law by failing to comply with the Multifamily Property Disposition Reform Act of 1994, 12 U.S.C. § 1701z-11 and that compliance is mandated by 24 C.F.R. § 290.1 is asserted for the first time in plaintiffs' opposition to HUD's motion to dismiss (*see*, Opp. Brief at pages 12-14). The Third Circuit recently reiterated that "the notice pleading standard of Rule 8(a) applies in all civil actions..." *Thomas v. Independence Township*, 463 F.3d 285, 295 (3d Cir. 2006). Rule 8(a) provides that a claim for relief must be in a **pleading** that contains "a short and plain statement showing that the pleader is entitled to relief..." and "a demand for judgment for the relief pleader seeks." A complaint is a pleading and a brief in opposition to a motion to dismiss is not a pleading. *See*, FED.R.CIV.PROC. 7(a). Given that the complaint contains no reference at all to a claim for relief for a violation of either 12 U.S.C. § 1701z-11 or 24 C.F.R. § 290.1, plaintiffs failed to meet the Rule 8(a) "simplified" notice pleading standard to assert this claim for relief. Since no such claim for relief was ever brought in this action, it could not have been improperly dismissed as plaintiffs contend in their motion.

Even assuming *arguendo* the existence of such a claim in this lawsuit, reconsideration of the Court's dismissal of that claim is improper because plaintiffs have failed to present any facts, legal theories or legal arguments that could not have been asserted in their opposition to HUD's

motion to dismiss. *Frederico v. Charterers Mut. Assur. Ass'n*, 158 F.Supp.2d 565, 578 (E.D.Pa. 2001). Plaintiffs' new argument, at its essence, is one based solely on timing, which could have been raised before. Moreover, that argument is based on an incorrect factual allegation that Section 1715z-11a(a) was enacted three years before the 1999 adoption of the 24 CFR 290.1. Actually, the authority that the Secretary has under Section 1715z-11a(a) is the same authority that was provided in almost every annual HUD appropriation from 1995 through 2002.<sup>1</sup> Thus, Section 1715z-11a(a) was expressly reauthorized by Congress, including the without regard/notwithstanding language, through 2002, several years after the enactment of the HUD regulation at issue. Therefore, not only have plaintiffs presented an argument that could have

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<sup>1</sup> Language providing HUD the flexible authority to manage and dispose of properties it owns first appeared in Public Law 104-19, which is commonly referred to as the 1995 Rescissions Act. The purpose of the Act was to save federal dollars by rescinding over \$5 billion dollars in funds previously appropriated for HUD programs. The Act specifically provides that in allocating \$1.115 billion dollars of the rescinded funds, during fiscal year 1995 the Secretary could reduce the appropriations needs of the Department by "managing and disposing of HUD-owned and HUD-held multifamily properties without regard to any other provision of law." Pub. L. No. 104-19, 109 Stat. 194. HUD's flexible authority was extended for fiscal year 1996 in its appropriations act, which authorizes the Secretary to "manage and dispose of multifamily properties owned by the Secretary . . . and multifamily mortgages held by the Secretary without regard to any other provision of law." The Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, Sec. 401, 110 Stat. 27. Section 204 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 codified and reauthorized for "fiscal year 1997 and fiscal years thereafter" the Secretary's authority to "manage and dispose of multifamily properties owned by the Secretary and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." Pub. L. No. 104-204, Sec. 204, 110 Stat. 2894. Section 213, entitled "Enhanced Disposition Authority," in the act appropriating funds to HUD for fiscal year 1998 amended 1715z-11a by adding a provision allowing the Secretary in fiscal years 1997 and 1998 to facilitate the disposition of properties by providing grants and loans from the General Insurance Fund for the necessary costs of rehabilitation and demolition costs. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Title II, Pub. L. No. 105-65, Sec. 213, 111 Stat. 1366. The appropriations acts for fiscal years 1999, 2000 and 2001 extended and amended the provision in Section 1715z-11a(a) regarding loans and grants, while maintaining the Secretary's absolute authority to determine the terms and conditions of HUD's disposition of properties and mortgages. Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, Title II, Sec. 206, 112 Stat. 2484; Department of Veterans Affairs and Housing and Urban Development, Independent Agencies Appropriations Act 2000, Pub. L. No. 106-74, Title II, Sec. 537, 113 Stat. 1047; 2001 Appropriations Act, Pub. L. No. 106-377, Sec. 204, 114 Stat. 1441.

been made before in response to HUD's motion to dismiss, the argument that they present lacks merit.

## **2. Claim for Due Process Violation.**

In dismissing this claim, the Court explained that the "notwithstanding" clause in §1715z-11a(a) "applies to the Foreclosure Act and its implementing regulations such that the APA waiver does not apply to plaintiffs' due process claim." (*See* "Opinion and Order of Judge Ambrose" p.11, 1/19/07, Doc.#33). Plaintiffs argue that the dismissal was improperly granted because the Court "simply misconstrues the claims raised" by plaintiffs (Pl. Brief, p. 8). They state that their due process claim is not based on a violation of regulations implementing the Foreclosure Act, as suggested by HUD and adopted by the Court, but rather their claim is for a failure by HUD to provide appropriate procedural due process protections prior to depriving them of a constitutionally protected property interest.

Plaintiffs acknowledge that a constitutionally protected property interest exists only when a "legitimate claim of entitlement" to the property has been created and its dimensions are "defined by existing rules or understandings that stem from an independent sources such as state law..." or commonly understood legal principles. They then explain that their constitutionally protected property interest in the Third East Hills property was created and is defined by "the applicable mortgage documents" and, as such, HUD cannot deprive them of this interest without first satisfying the "substantive, factual statutory prerequisites" for foreclosure.<sup>2</sup> Plaintiffs do

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<sup>2</sup> Despite their allegation to the contrary, the plaintiffs do not have a constitutionally protected property interest in the Third East Hills Park development based on the "applicable mortgage documents" because the plaintiffs are not parties to the "applicable mortgage documents." The plaintiffs are seven individuals who were shareholders in a cooperative housing development based on agreements they entered into with the non-profit corporation that owned the Third East Hills Park. The coop, Third East Hills Park, Inc. (TEHP) was the mortgagor on the "applicable mortgage documents," and thus the only entity that could allege a constitutionally protected interest in the property based on the mortgage documents. On August 4, 2006, this Court struck TEHP as a party to this lawsuit because TEHP had not authorized litigation on its behalf.

not dispute that the "substantive, factual statutory prerequisites" for foreclosure of a HUD held multifamily mortgage are contained in the Foreclosure Act and its implementing regulations.<sup>3</sup>

Thus, in summary, plaintiffs object to the court's characterization of their claim as one for violation of the Foreclosure Act and its implementing regulations, explaining that the claim is actually for a violation by HUD of the "statutory prerequisites" for foreclosure, which are contained in the Foreclosure Act and its implementing regulations. Plaintiffs' circular argument does not advance any new legal theory or argument that would support reconsideration of this Court's Order dismissing their due process claim.

### **3. Claim for Violation of Section 311.**

The Court dismissed Plaintiffs' claim for violation of Section 311 finding that the provisions of the statute did not apply to the disposition of the Third East Hills mortgages because HUD did not own or hold the Third East Hills property.<sup>4</sup> Factual developments may require a change in the reason supporting the decision to dismiss this claim.

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*....

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<sup>3</sup> Foreclosure of low-income housing units by HUD does not violate mortgagors' procedural due process rights. *Lisbon Square v. U.S.*, 856 F.Supp. 482 (E.D.Wisc. 1994).

<sup>4</sup> In its motion to dismiss, HUD argued that Section 311 did not apply to the disposition of the HUD held mortgages on Third East Hills because Section 311 only applies to the disposition of properties that are owned or held by HUD. At the time this argument was included in HUD's brief, counsel for HUD did not know that the HUD Office of Multifamily Housing Programs had determined that it would comply with Section 311 in its disposition of both multifamily properties that the Secretary owns and multifamily mortgages that the Secretary holds. HUD regrets the misstatement in its brief in support of HUD's Motion to Dismiss regarding the applicability of Section 311 to the disposition of HUD held mortgages. Inclusion of the inaccurate argument in support of dismissal of the Section 311 claim was inadvertent and unintentional.

Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, H.R. 3058, 109th Cong.

On October 26, 2006, through foreclosure HUD disposed of the three HUD held mortgages on the Third East Hills property. At the foreclosure, HUD bid the mortgage debt owed to it, took title to the property and then immediately resold the property to the Pittsburgh Urban Redevelopment Authority and the Redevelopment Authority then resold the property to a private developer. Thus, HUD did own the property for a brief period, so non-ownership no longer provides a factual basis to disallow application of Section 311 to the disposition action by HUD. Nevertheless, there is another independent basis to support the court's ruling that Section 311 did not apply to the disposition of the Third East Hills property. When the foreclosure of the property occurred there were no rental assistance payments "*attached to dwelling units*" (*emphasis supplied*) in Third East Hills Park and, therefore, Section 311 is inapplicable.

For many years, Third East Hills Park Inc. (TEHP) received section 8 rental assistance payments pursuant to a Housing Assistance Payment (HAP) contract between HUD and TEHP (Exhibit A, HAP Contract). The HAP contract states that housing assistance payments shall only be paid for units that are maintained in decent, safe, and sanitary condition and that HAP payments for a unit that does not meet this requirements will be abated from the contract and *the funds will be used for relocating or rehousing the assisted family residing in the unit* (See Doc.#14, Def. Ex. #3, "HAP Contract" ¶ 4.d(2)). Physical inspections reports provided to TEHP found the condition of the units to be substandard in 1999, 2000, 2002, 2003 and 2004 (*Id.* Ex(s) 7-11 "REAC Insp. Reports"). In addition, in 2004 HUD inspected a large sample of units and determined that none of them met the decent, safe and sanitary condition requirement (*Id.* Ex(s) 12,13 "Infante and Hatala Insp. Reports"). On November 10, 2004, TEHP was notified of a

HUD determination that it had failed to maintain the units in the condition required by the HAP contract and, as a result, in accordance with the contract, HUD was abating the rental assistance payments attached to units in the development and redirecting those payments to pay for the relocation of residents (*Id.* Ex. 15 “Notice of Abatement”). As a result, the HAP funding was no longer attached to the units that were abated.

By October 26, 2006, the date HUD disposed of the property through foreclosure, it had been almost two years since a Section 8 rental assistance payment had been attached to any dwelling unit in the Third East Hill Park development. The Section 311 obligation at disposition to maintain rental assistance payments that are attached to a unit clearly did not apply to HUD's disposition of the Third East Hills Park property. The Court's dismissal of the plaintiffs' claim for violation of Section 311 remains correct. Despite changed circumstances, Section 311 did not apply to this disposition, thus, plaintiffs failed to state a claim for violation of Section 311.

**Conclusion**

For the reasons set forth above, plaintiffs have failed to present any evidence which would require this Court to reconsider and reverse its earlier decision dismissing this case.

Respectfully submitted,

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