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

JEAN MASSIE et al., Plaintiffs, v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT et al., Defendants.	Civil Action No. 06-1004 Class Action J. Ambrose

REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO RECONSIDERATION

The arguments raised by Defendants in opposition to the Plaintiffs' motion for reconsideration misinterpret the law.

I. Violation of 109 P.L. 115, § 311.

Defendants' argument—that Section 311 is inapplicable because HUD's use of suspended rental assistance payments to displace and relocate residents resulted in the detachment of these payments from all units at Third East Hills Park—is wrong for two reasons.

First, HUD never terminated the project-based Section 8 contract at the property. HUD merely suspended (abated) payments due under the contract. [*See* Doc. 1, ¶¶ 113, 114; Doc. 14, Ex. 15, p. 17 of 20 ("Effective this date, the Section 8 subsidy payments for all units cover [sic] by the HAP Contract for the Project are hereby suspended (abated)....")];[1] The American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Company (2004) ["'suspend.' v.: 1) To bar for a period from a privilege, office, or position, usually as a punishment…2) To cause to stop for a period; interrupt…3)a. To hold in abeyance; defer…b. To render temporarily ineffective."]. Because the project-based subsidy was never terminated, it

[1] Plaintiffs have alleged that the abatement of housing assistance payments to all 140 units based on inspection of only approximately 23 of these units was in violation of the project-based Section 8 contract to which Plaintiffs are third party beneficiaries.

remained attached to the property at foreclosure for purposes of Section 311.

Second, redirection of suspended HAP payments for displacement and relocation of residents is irrelevant to whether the subsidy contract was still in force at foreclosure, and in any event, the redirection of HAP payments was only temporary and partial.[2]

Because the Plaintiffs have pled facts in support of their §311 claim, dismissal under Rule 12(b)(6) should not be entered. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Wallace v. Federated Dep't Stores, Inc., 2007 U.S. App. LEXIS 947, 5 (3d Cir. 2007)

II. HUD's Failure to Follow Its Own Regulations.

Defendants' argument that they were not notified of Plaintiffs' claim for relief regarding HUD's failure to perform non-discretionary management related duties while controlling the property is without merit. Under the simplified notice pleading standard of F.R.C.P. Rule 8(a), a complaint needs only to give the defendant fair notice of the plaintiff's claim for relief. Thomas v. Independence Twp., 463 F.3d 285, 295 (3rd Cir. 2006). In their Complaint, the Plaintiffs pled that HUD held managerial, fiscal and physical control over the property but failed to preserve the property resulting in harm to Plaintiffs. (Doc. 1, ¶¶ 115, 116, 121, 122, and 134). Plaintiffs sought an order enjoining Defendants from "[f]ailing to take over management responsibilities at the property in order to cure any alleged deficiencies, fill vacancies and assist the Coop in finding new, suitable management." (Doc. 1, ¶147(d)). Defendants had fair notice of this claim.

Defendants' alternative argument that subsequent appropriations bills rendered inapplicable HUD's regulations exercising/implementing its "flexible authority" likewise fails. So long as the regulations remained unchanged, HUD could not proceed without regard to them. Service v. Dulles, 354 U.S. 363, 370, n. 11, 380, n. 24, 388 (U.S. 1957).

[2] See Doc. 14, Ex. 18, p. 5 of 7. Approximately 26 units remained occupied at foreclosure by residents who were not relocated with redirected housing assistance payments.

Because sovereign immunity does not preclude judicial review of this claim this Court has the power to review it. Stehney v. Perry, 101 F.3d 925, 932-933 (3d Cir. 1996).

III. Violation of Due Process.

Defendants' argument that Plaintiffs' property interests are rendered void by 12 U.S.C. § 1715z-11a(a) is incorrect as a matter of law.

Plaintiffs allege that HUD did not provide the process due under Article V of the U.S. Constitution before depriving them of their ownership/equity property interests,[3] their leasehold/ possessory property interests[4] and their property interests in continued project-based Section 8 housing assistance payments.[5] These property interests derive from contracts, law, industry usage and other rules and understandings of the assisted housing industry. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593, 601-602 (U.S. 1972). Defendants acted consistently with this common law of the industry in this case. *Id*.

[3] Plaintiffs' protected ownership/equity property interests derive from the TEHP mortgages and other contracts incorporated therein by reference, to which Plaintiffs are third-party beneficiaries. *See, e.g.* Doc. 14, Ex. 5, p. 29 of 40, ¶15 (third party enforcement); Roedler v. DOE, 255 F.3d 1347, 1352 (Fed. Cir. 2001) (third-party beneficiary rights under federal contracts implementing statutory enactments); Lynch v. United States, 292 U.S. 571, 579 (1934) (rights against the United States arising out of a contract with it are protected by the Fifth Amendment). Further, in this case, HUD declared it was pursuing foreclosure under the Multifamily Mortgage Foreclosure Act. *See* Exhibit A attached hereto ("Pursuant to…the Multifamily Mortgage Foreclosure Act of 1981…you are hereby designated Foreclosure Commissioner to act on behalf of the Secretary of Housing and Urban Development…. The foreclosure is to be conducted pursuant to the Act, the regulations promulgated thereunder….") and Exhibit B attached hereto ("[P]ursuant to the powers vested in R. Darryl Ponton & Associates by the Multifamily Mortgage Foreclosure Act of 1981…by 24 CFR Part 27, and by the Secretary's designation of R. Darryl Ponton & Associates as Foreclosure Commissioner, notice is hereby given that…all real and personal property at [Third East Hills Park]…will be sold at public auction…."). The substantive provisions of this Act requiring cause before foreclosure are therefore applicable in this case. INS v. Yang, 519 U.S. 26, 32 (1996); Vitarelli v. Seaton, 359 U.S. 535, 539 (1959).

[4] Plaintiffs' protected leasehold/possessory property interests derive from their individual leases, which HUD is required to honor either as mortgagee in possession or owner and which survive foreclosure. Thomas v. Cohen, 304 F.3d 563, 576 (6th Cir. 2002) citing, *inter alia*, Fuentes v. Shevin, 407 U.S. 67, 87 (1972) ("It is well-established that possessory interests in property invoke procedural due process protections."); *see also* 12 U.S.C. § 3713(c) (multifamily project leases survive throughout foreclosure process).

[5] Plaintiffs' protected property interests in continued housing assistance under the project-based Section 8 contract derive from this contract, to which Plaintiffs are third-party beneficiaries. Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981) (as third-party beneficiaries of Section 8 Housing Assistance Payments contract, certified tenants have protected property interest in receiving benefits); Lynch v. United States; *accord* Goldberg v. Kelly, 397 U.S. 254 (1970).

Once the property interest is found, the availability of statutory procedures, or lack thereof, is irrelevant in determining what pre-deprivation process is due under the Constitution. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 539-541 (1985). Before an individual is finally deprived of a property interest by the government, the U.S. Constitution requires an opportunity to object to the deprivation which is meaningful in time and manner and not a mere sham. Matthews v. Eldridge, 424 U.S. 319, 333 (1976); Goldberg v. Kelly, 397 U.S. at 267-271; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951); Town of Castle Rock v. Gonzales, 545 U.S. 748, 793 (2005).

By creating the predicate for foreclosure and preventing the Plaintiffs from challenging that predicate the Defendant provided no meaningful opportunity to protect against the erroneous deprivation of vested ownership/equity property interests.[6] By abating and redirecting housing assistance payments and displacing residents without providing any opportunity to object to the abatement/redirection or displacement, HUD provided no process whatsoever to protect against the erroneous deprivation of vested leasehold/possessory property interests or vested property interests in continued housing assistance payments under the project-based Section 8 contract.

Additionally, and in the alternative, HUD's failure to adhere to its own regulations at 24 CFR 27.5 and 24 CFR Part 290, in and of itself, constituted a violation of due process. Service v. Dulles; United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Wilkinson v. Legal Servs. Corp., 27 F. Supp. 2d 32 (D.D.C. 1998); NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir. 1971); *accord* Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (in finding that an agency's failure to adhere to written policies violates the element of due process that requires ascertainable standards, the Second Circuit Court of

[6] Defendants' reliance on Lisbon Square v. U.S., 856 F.Supp. 482 (E.D.Wisc. 1994) (Doc. 37-1, n. 3) is inapposite, as the plaintiffs in that case "expressly agreed that they were in default" of the provisional workout agreement entered with HUD to cure the defaults alleged in that case. 856 F. Supp. at 489.

Appeals said: "It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. For this reason alone due process requires…'ascertainable standards'…(internal citations omitted)."); *accord* Hornsby v. Allen, 326 F.2d 605, 609, 610, 612 (5th Cir. 1964) cited in Goldberg v, Kelly, 397 U.S. at 262, n. 9.

Because sovereign immunity does not preclude judicial review of these constitutional claims this Court has the power to review them. Webster v. Doe, 486 U.S. 592, 603-605 (1988); Stehney v. Perry, 101 F.3d at 932-933, 934.

Wherefore, the Plaintiffs respectfully request that this Honorable Court reconsider the portions of its January 19, 2007 Opinion and Order holding that: 1) the Plaintiffs failed to state a claim for a violation of 109 P.L. 115, § 311; 2) the Court does not have jurisdiction to review the Plaintiffs' claim that the Agency failed to follow its own regulations implementing/exercising its "flexible authority" under 12 U.S.C. § 1715z-11a(a); and 3) the Court does not have jurisdiction to review of the Plaintiffs' claims for relief under the Due Process Clause, and deny Defendants' motion to dismiss (Doc. 13) as to these counts. In the alternative, the Plaintiffs respectfully request this Court to reconsider its dismissal of their 109 P.L. 115, § 311 claim without permitting a curative amendment.

Date: February 27, 2007

Respectfully submitted,

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