IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket No. 10-15303
Lower Court Docket No. 4:09-cv-04780-SBA

PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al.,

Plaintiffs-Appellees

vs.

MORTIMER HOWARD TRUST, et al.,

Defendants-Appellants

Preliminary Injunction Appeal from an Order
Of the United States District Court
For the Northern District of California, Oakland Division
The Honorable Sandra B. Armstrong, Judge

REPLY BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants certify as follows: the only Appellant who is not an individual is the Mortimer Howard Trust, which does not issue stock.

Dated: May 10, 2010

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I. LEGAL ARGUMENT

A. THE LEGISLATIVE HISTORY OF 42 U.S.C. §1437f(t) – WHICH CONCERNS ONLY *HUD*'S OBLIGATIONS TO THE TENANT, NOT THE OWNER'S OBLIGATIONS TO THE TENANT – DOES NOT "CONCLUSIVELY DEMONSTRATE" THAT "ENHANCED VOUCHER TENANTS HAVE A FEDERAL STATUTORY RIGHT TO REMAIN" THAT "HOWARD MUST HONOR"; IN FACT, IT ACTUALLY SUPPORT HOWARD'S CONSTRUCTION OF THE STATUTE.

1. The statutory change noted by Appellees only clarifies that *HUD* cannot insist that tenants leave their apartments when the owner's project-based contract with HUD terminates; if a tenant "elects to remain," and actually does remain, HUD must provide an enhanced voucher.

In their Opposition Brief, ("OB"), the Tenant-Appellees point out that the 1999 version of 42 U.S.C. §1437f(t)(1)(B) ("Section 1427f(t)") contained the following language:

> (1) Enhanced voucher assistance under this subsection for a family shall be voucher assistance under subsection (o) of this section, except that under such enhanced voucher assistance -- . . . .
>
> (B) ***during any period that the assisted family continues residing in the same project in which the family was residing on the date of the eligibility event for the project***, if the rent for the dwelling unit of the family in such projects exceeds the applicable payment standard established pursuant to subsection (o) of this section for the unit, the amount of rental assistance provided on behalf of the family shall be determined using a payment standard that is equal to the rent for the dwelling unit. . . .

(Emphasis supplied). (OB, 11-12). In 2000, Congress passed a new version of the foregoing statute by deleting the bolded language above and substituting the following

bolded language in subsection (B):

> (B) ***the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project, and if, during any period the family makes such election and continues to so reside,*** the rent for the dwelling unit of the family in such projects exceeds the applicable payment standard established pursuant to subsection (o) of this section for the unit, the amount of rental assistance provided on behalf of the family shall be determined using a payment standard that is equal to the rent for the dwelling unit. . . .

The Tenant-Appellees claim that this change "removed any doubt that 42 U.S.C. § 1437f(t) guarantees enhanced voucher tenants an enforceable right to maintain their current residence if they so choose." (OB, at 12). To be precise, however, the only thing this change "guarantees" is that *HUD* cannot force "enhanced voucher tenants" to leave their residences upon the occurrence of an "eligibility event;" these tenants "may elect to remain," and if they do make such election, and they do remain, HUD must issue them enhanced vouchers to enable them to pay the higher rent that may now be charged by the owner.[1]

Under the 1999 statute, HUD had to issue an enhanced voucher only if the tenant continued to remain in his or her unit after the "eligibility event" (such as the expiration of the project-based contract) occurred. What was left unclear was whether HUD could

[1] And indeed, as Appellants pointed out in their Opening Brief, if Congress's intention in amending the statute in 2000 was to make absolutely clear that tenants had an absolute *right to remain*, and that "right" was enforceable against *owners,* it could easily have done so. Appellees appeared (at least briefly) to understand this when they wrote that "a tenant's receipt of voucher assistance . . . provides a tenant with the choice of where to live, ***subject to finding a willing owner. . .***" (OB, at 12).

avoid its obligation to issue an enhanced voucher altogether simply by insisting that a tenant move to less expensive housing at the time the project-based contract expired, thereby creating a situation in which a "period in which the assisted family continues residing in the same project in which the family was residing on the date of the eligibility event" never occurs, and thus no right to a voucher is ever triggered.

Under the 2000 amendment, however, Congress clarified that HUD may ***not*** avoid its obligation to issue an enhanced voucher by insisting that the tenant leave his or her unit when an "eligibility event" such as the expiration of the project-based contract occurs. This is clearly the purpose of specifying that a tenant "may elect to remain in the same project": if he or she makes that election, HUD must issue the tenant an enhanced voucher to cover a higher rent.[2]

Tenant-Appellees, however, argue that the statutory change demonstrates far more: they claim that by "clarifying that the choice belongs to the tenant, *not to the owner,* the legislative history conclusively demonstrates that the enhanced voucher tenants have a federal statutory right to remain in their homes *which Howard must honor.*" (OB, at 12) (emphasis supplied). The obvious flaw in this classic bootstrapping argument is that the statutory change ***only*** clarifies that tenant's "choice" to remain cannot be trumped by *HUD*, which must issue a voucher if the tenant "elects to remain" and does remain. What the change in the statute does *not* do is address (let alone clarify

[2] Contrary to Appellees' assertion (OB, at 12), Appellant do not claim that the "'election to remain' language adopted in 2000 adds nothing to the tenants' rights or a landlord's legal obligations." That language clearly does add to the tenants' rights ***vis-à-vis HUD***. It says nothing about (and adds nothing to) a landlord's obligations to anyone.

or change) the tenant's "choice" vis-à-vis the owner's choice. Neither version of Section 1437f(t)(1)(B) has anything whatsoever to do with owner's choice; neither version mentions the owner, neither version contains any restriction on the *owner*'s ability to decide whether or not to allow a tenant to remain after the owner's contract with HUD has expired, and neither version even suggests (let alone mandates) that a tenant has any "rights" whatsoever vis-à-vis an owner's rights.[3] Instead, both versions are concerned exclusively with the circumstances under which a tenant has a right to insist that *HUD* issue him or her an enhanced voucher to pay a higher rent standard than that provided in 42 U.S.C. § 1437f(o).

2. Other new language in the 2000 version of Section 1437f(t)(1)(B) supports Appellants' reading of the statute.

Although Appellees make no mention of it, the 2000 amendment to Section 1437f(t)(1)(B) actually contains other new language that supports Appellants' interpretation of the statute. Subsection B provides, in relevant part: "the assisted family may elect to remain in the same project. . . and if, during any period the family makes such election ***and continues to so reside***," HUD must issue an enhanced voucher if the new rent exceeds a certain threshold. (Emphasis supplied). It would be easy to

[3] As Appellants argued in their Opening Brief, there is nothing inconsistent about a statute's providing that HUD must issue an enhanced voucher if a tenant "elects to remain" and acknowledging that an owner who has provided proper statutory notice and waited the prescribed one-year period is entitled to make the ultimate decision whether or not to continue to provide housing to a particular tenant indefinitely. Tellingly, Tenant-Appellees' Opposition Brief simply ignores the analogy to school vouchers: a statute that provides that a student "may elect" to attend private school, and if he or she makes that election, the government must issue a voucher, would not be rendered "meaningless" simply because that statute did not grant students the "right" to be accepted at a particular school, or compel a school to accept any student with a voucher.

imagine the statute *without* the highlighted language: once the family "elects to remain," HUD automatically must issue a voucher. The fact that the family must also "continue to so reside" suggests the family's "election" is necessary but not sufficient to trigger entitlement to an enhanced voucher; ***there are circumstances in which the family may make such "election," but not "continue to so reside."*** Among these circumstances would be when *the owner decides he or she does not want to continue to participate in the Section 8 subsidy program.*[4]

B. TENANT-APPELLEES' READING OF SECTION 1437f(t) CANNOT BE RECONCILED WITH 42 U.S.C. § 1437f(c)(8).

42 U.S.C. Section 1437f(c)(8)(B), provides, in relevant part:

> In the event the owner does not provide the notice required [the one-year notice before the termination of a project-based assistance contract HUD becomes effective], *the owner may not evict the tenants or increase the tenants' rent payment* ***until*** *such time as the owner has provided the notice and 1 year has elapsed. . . .*

(Emphasis supplied). In their Opposition Brief, Tenant-Appellees claim that this statute "does not create substantive rights to evict and raise rents, but rather establishes a procedural requirement to which the right to remain was subsequently added." (OB, at 13). This statement, of course, contains an incorrect assumption: Section 1437f(t) does not contain, or refer to, any "right to remain." It is also a straw man: while Section 1437f(c)(8)(B) *does* set forth a procedural requirement which must be satisfied before an owner is permitted to evict and to raise the tenant's rent payment, it also recognizes that

[4] To continue the school voucher analogy, it is as if the statute said, "if the student elects to attend private school, *and is actually accepted at a particular school*, the government must issue a voucher for that school.

an owner *may* do so after proper notice and waiting period.[5] However, there is no inconsistency between the owner's ability to do this and Congress's subsequent passage of Section 1437f(t)(1)(B), which, as discussed above, does not create any rights or obligations of the tenant and the owner vis-à-vis each other. Only unjustifiably interpreting the HUD-related "may elect to remain" language in Section 1437f(t)(1)(B) to create a "right to remain" vis-à-vis an unwilling owner (and thereby prohibiting an *owner* from *ever* increasing "tenants' rent payments") creates a conflict with Section 1437f(c)(8)(B), which recognizes that owners do have the right to evict and to raise tenants' rent payment after complying with Section 1437f(c)(8)(A).

Finally, Appellants agree with Tenant-Appellees that both of the statutes "serve the same purpose of protecting tenants from involuntary displacement" (OB, at 16) – but assert that by their plain language, they do so by forcing HUD to make up the difference between market rent and what the tenants had been paying for rent should the tenant want to stay in the same unit post-termination, not by silently, completely, and essentially permanently taking away the owner's right to opt out of the Section 8 program. Section 1437f(t)(1)(B) ensures that if a tenant's rent goes up to market rate because the project-

[5] The owner's right to do so was also recognized by this Court when it affirmed Judge Armstrong's February 14, 2007 order in Northern District Case No. C 06-7389 SBA. See 252 Fed. Appx. 152, 2007 WL 3101718 (C.A. 9 (Cal.)). That order, of which Appellants respectfully request that this Court take judicial notice, "enjoined [Howard] from demanding or collecting rent payments in excess of the amount the tenants were paying as of November 20, 2005, and from evicting any tenant. . . for the duration of this action *or until such time as Howard has provided the notice required by 42 U.S. C. §1437f(c)(8)(A) and one year has elapsed."* Given that Howard has spent *years* trying to comply with the requirements of 42 U.S.C. §1437f(c)(8)(A) (all the while forfeiting market rents), and has now indisputably provided satisfactory notice and observed the one-year waiting period, it is shocking that the District Court would now claim that there has always been another statute which prevents his ever evicting those tenants or opting out of the Section 8 program.

based contract expires, HUD will enable a tenant who elects to stay to pay the new rent – if the tenant actually does stay. Section 1437f(c)(8)(A) reiterates that if the project-based contract expires, HUS must "provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside." Section 1437f(c)(8)(B), however – the only part of those statutes that pertains to the rights of *owners* -- makes clear that owners may still evict or raise tenants' rent once they have complied with Section 1437f(c)(8)(A).

C. ONLY A SINGLE, NON-BINDING DISTRICT COURT DECISION FROM THE DISTRICT OF COLUMBIA SUPPORTS THE NOTION THAT HOWARD CAN BE FORCED TO SIGN HAP CONTRACTS OR NEW LEASES AGAINST HIS WILL; THIS IS AN ISSUE OF FIRST IMPRESSION IN THE NINTH CIRCUIT.

Tenant-Appellees claim that "all courts that have interpreted the enhanced voucher statute have reached the same conclusion as the District Court," (OB, at 20), implying that there is some kind of clear consensus in "all courts" around the country concerning whether owners like Howard can be forced to enter into new HAP contracts or new leases against their will. In fact, there is almost no case authority whatsoever for that proposition. *Jeanty v. Shore Terrace Realty Ass'n*, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004), an unreported District Court decision from the Southern District of New York does *not* hold that the owner must enter into new tenant-based assistance contracts with tenants who have enhanced vouchers, and thus it does not provide support for one crucial portion of the District Court's preliminary injunction order that is being challenged in this appeal: the District Court's order requiring that Howard "shall take all steps necessary to

enter into and execute housing assistance payments contracts with the Oakland Housing Authority for the acceptance of tenant based vouchers."

In *Estevez v. Cosmopolitan Assocs. L.L.C.,* 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005), another unreported District Court decision from New York, the building owners freely signed new HAP contracts. In *Barrientos v. 1801-1825 Morton LLC*, No. CV06-6437 (C.D. Cal. Sept. 10, 2007, *aff'd on other grounds*, 583 F.3d 1197 (9th Cir. 2009), the District court did not hold that an owner must enter into new HAP contracts or new leases, and the Ninth Circuit did not reach that issue on appeal.

Feemster v. BSA Limited Partnership, 471 F. Supp. 2d 87 (D.D.C 2007, *aff'd in part, rev'd in part*, 548 F.3d 1063 (D. C. Cir. 2008) appears to be the only case that agrees with Tenant-Appellees and the District Court that an owner must "take the steps necessary to complete the required paperwork to enable the plaintiffs to use their vouchers and renew their leases." 471 F. Supp. 2d at 97. *Feemster*, however, did not consider Appellants' argument under Section 1437f(c)(8)(B) (discussed in Section I.A.1. of Appellants' Opening Brief).[6]

D. PART C OF THE PRELIMINARY INJUNCTION ORDER IS OVERBROAD BECAUSE TENANT-APPELLEES ARE FULLY PROTECTED FROM EVICTIONS OR RENT INCREASES WITHOUT IT; MOREOVER, APPELLANTS *DID* COMPLAIN ABOUT THE SCOPE OF THE INJUNCTION AT THE HEARING

[6] Appellees also make much of the fact that HUD's own Policy Manual interprets Section 1437f(t) as containing a "right to remain" that is enforceable against the owner's will. However, as discussed in Sections I.A. and I.B, *supra*, this interpretation of the statute goes against its plain meaning, and cannot be reconciled with Section 1437f(c)(8)(B), and thus is not entitled to any deference.

ON THEIR MOTION TO STAY THAT PORTION OF THE ORDER BEFORE THE DISTRICT COURT.

Parts A and B of the Preliminary Injunction Order[7] provide:

> A. Refrain from demanding or collecting any amounts from any tenant at park Village in excess of the amount that that tenant was paying as of September 1, 2009, unless the increase is covered by the housing assistance payments from the Oakland Housing Authority or is the result of a recertification under the voucher program.
>
> B. Refrain from evicting a tenant at Park Village Apartments or taking any action to accomplish such eviction, including the filing of any action for unlawful detainer, based upon nonpayment of any rental amount that exceeds the tenant's rent contribution as of September 1, 2009, unless the increase results from a recertification under the voucher program.

(ER, at 96). Part C of the Preliminary Injunction provides, in relevant part, that Howard:

> shall take all steps necessary to enter into and execute housing assistance payments contracts with the Oakland Housing Authority for the acceptance of tenant based vouchers. . ."

(Id.)

As Howard pointed out in the Opening Brief on appeal, the Tenant-Appellees are fully and completely protected both from rent increases or from eviction based on failure to pay any increases in rent during the pendency of the case. ***They do not need Part C, which is an extremely onerous mandatory injunction, either for their own protection or to maintain the status quo on appeal.***[8]

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[7] These Parts of the Original Preliminary Injunction Order remained the same in the modified Preliminary Injunction Order entered by Magistrate La Porte.

[8] Indeed, Judge Armstrong's previous preliminary injunction order, entered in February 2007, contained only the language of Parts A and B, and clearly considered the tenants to be adequately protected pending the outcome of that case. See note 5, *supra.*

Tenant-Appellees apparently concede this point in their Opposition Brief, because they make no attempt to refute the merits of Howard's overbreadth argument (except to claim that the "District Court was well within its discretion in ordering Howard to enter into voucher assistance contracts with the housing authority). (OB, at 24). Instead, their only response is that "complaints about the scope of the preliminary injunction, if any, should be made in the district court." (OB, at 23). However, in this case, Howard *did* complain about the scope of the injunction to the District Court: at the hearing on Howard's Motion for Stay of the Preliminary Injunction before Magistrate La Porte, counsel for Appellants[9] twice raised the issue that Part C of the Preliminary Injunction Order ("PI Order") was overbroad because the Tenant-Appellees would be adequately protected by Parts A and B of the PI Order, which prohibited Appellants from raising the Tenant-Appellees' rents or evicting them for non-payment of any raised rent while the case remains pending. (ER99:5-14; 100:19-101:4) Magistrate La Porte nonetheless retained the quoted language of Part C in her modification of Judge Armstrong's original Preliminary Injunction Order.

II. CONCLUSION

For the foregoing reasons, Appellants request that this Court vacate the granting of the preliminary injunction and remand this case to the District Court with instructions.

[9] After the Motion for Stay was filed and fully briefed, Appellants obtained new counsel (its current counsel), and the case was transferred from Judge Armstrong to Magistrate La Porte.

Dated: May 10, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellants' brief is proportionately spaced, has a typeface of 14 points or more and contains 3,106 words.

Dated: May 10, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a member of the bar of this Court in good standing and counsel of record for Appellants.

The foregoing Reply Brief in PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al., v. MORTIMER HOWARD TRUST, et al., No. 10-15303, was served this date by placing copies in the United States mail, with postage prepaid thereon, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct, and that this Certificate was executed in Berkeley, California on May 10, 2010.

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