UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMMANUEL KU, Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN DONOVAN as Secretary of the United States Department of Housing and Urban Development, CUTLER, TRAINOR & CUTLER, LLC as Foreclosure Commissioner, CITY OF NEWBURGH, and BURTON TOWERS, LLC, Defendants.	**MEMORANDUM DECISION** 11 CV 6858 (VB)

Briccetti, J.:

Plaintiff Emmanuel Ku brings this action asserting violations of the Multifamily Mortgage Foreclosure Act, 12 U.S.C. § 3701, et seq. (the "MMFA"), and the Fifth Amendment. Now pending are defendants' motions to dismiss the amended complaint (Docs. #16, #20, #23), and plaintiff's cross-motion for leave to file a second amended complaint. (Docs. #35, #36, #37). For the reasons set forth below, plaintiff's motion is DENIED and defendants' motions are GRANTED.

BACKGROUND

For purposes of ruling on motions to dismiss, the Court accepts all factual allegations of the amended complaint as true. Because the Court construes defendants' motions under Federal Rule of Civil Procedure 12(b)(1), the Court also reviews defendants' factual assertions.

On September 30, 2011, defendant United States Department of Housing and Urban Development ("HUD")[1] conducted a foreclosure sale on Burton Towers (the "property") pursuant to the MMFA. The property is an apartment complex that provides housing for low-income elderly tenants. At the time of foreclosure, the property was in disrepair. Eligible bidders were restricted to governmental entities, local housing development fund corporations, and lien holders.

HUD provided notice of its intent to foreclose to the relevant unit of local government and informed the local government that it could offer input as to the foreclosure. In the notice of intent, HUD specified that the purchaser would have to maintain the property as affordable rental housing for the elderly for at least twenty years, and would be required to perform all repairs necessary to ensure that it met all applicable codes and HUD repair requirements; those repairs were estimated to cost over $2 million. Defendant City of Newburgh (the "City") and the Newburgh Housing Authority expressed interest. Plaintiff sought to stop the auction sale by seeking a temporary restraining order, which was denied.

At the foreclosure sale, HUD bid the outstanding debt and obtained title to the property. HUD then transferred the property to the City for one dollar, and the City transferred the property to defendant Burton Towers, LLC ("Burton Towers"), a developer with experience rehabilitating and operating housing properties for vulnerable tenants, also for one dollar. Both transfers were subject to a requirement that a portion of any future sale or refinancing be paid to HUD, to ensure the purchasers were not unjustly enriched at HUD's expense.

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[1] Defendant Donovan is the Secretary of HUD, and defendant Cutler, Trainor & Cutler, LLP ("Cutler") acted as Foreclosure Commissioner in the transaction. HUD, Donovan, and Cutler are referred to herein collectively as the "government defendants."

Plaintiff asserts the foreclosure sale violated the MMFA in various ways. He claims the bidding restrictions were improper and amounted to a "governmental taking without due process." He also asserts HUD did not provide proper notification of the sale under the MMFA because the last publication of a copy of the notice of default and foreclosure sale was not "less than four nor more than twelve days prior to the sale date." Plaintiff also argues the sale proceeds were not properly distributed because the tax liens and assessments connected to the property were not paid prior to payment of the principal balance of the mortgage.

In addition, plaintiff asserts the foreclosure sale was part of an illicit scheme to transfer the property to Burton Towers, and that the transfers from HUD to the City, and from the City to Burton Towers, should be voided.

Plaintiff asserts he has participated in numerous HUD auctions and has established an ability to own, rehabilitate, operate, and manage multifamily housing projects in compliance with HUD regulations and requirements, and that his restriction from the bidding process deprived him of the opportunity to own and derive earnings from the property.

Plaintiff seeks a declaratory judgment that HUD impermissibly restricted the auction bidding process in connection with the foreclosure sale of the property, and wrongfully transferred the property under the MMFA. Plaintiff also seeks a permanent injunction preventing HUD from further restrictions on future foreclosure sales conducted pursuant to the MMFA, and voiding any and all deeds that resulted from the foreclosure sale of the property.

DISCUSSION

I. Sovereign Immunity

The government defendants move to dismiss for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), arguing that plaintiff has failed to allege a waiver of sovereign immunity. "Sovereign immunity is a jurisdictional bar," Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003), and "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Dorking Genetics v. United States, 76 F.3d 1261, 1263 (2d Cir. 1996). It is plaintiff's burden to show that Congress waived sovereign immunity with respect to his claims. United States v. Mitchell, 463 U.S. 206, 212 (1983). Consent to suit must be expressed unequivocally, with any ambiguity construed strictly in favor of the sovereign. United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) (internal citations omitted).

The parties present several arguments concerning sovereign immunity. The MMFA, the statute upon which plaintiff bases his case, does not contain a waiver of sovereign immunity. See Almeida v. HUD, 2009 WL 873125, at *2 (S.D.N.Y. Feb. 11, 2009). Defendants argue the waivers of sovereign immunity found in the National Housing Act ("NHA"), 12 U.S.C. § 1701 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, do not apply because 12 U.S.C. § 1715z-11a(a)[2], the statute pursuant to which HUD disposed of the property, is outside the scope of those waivers. Plaintiff argues that the waivers of sovereign immunity found in the

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[2] For reasons explained below, the Court determines that Section 1715z-11a(a) is the controlling statute.

NHA and APA do apply to his claims.[3]

A. The National Housing Act

The NHA contains a provision explicitly waiving HUD's sovereign immunity in certain circumstances, which states: "The Secretary shall, in carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X of this chapter, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1702.

Congress has granted HUD "flexible authority" with regard to multifamily projects pursuant to Section 1715z-11a(a): "During fiscal year 1997 and fiscal years thereafter, the Secretary may 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." 12 U.S.C. § 1715z-11a(a) (emphasis added).

Defendants argue Section 1702 does not waive sovereign immunity because Section 1715z-11a(a) is not part of the NHA. Plaintiff argues Section 1715z-11a(a) is part of the NHA, and thus Section 1702 applies to HUD's administration of the foreclosure sale.

Plaintiff misreads the statute. Section 1715z-11a(a) was not an amendment to the NHA, but was enacted as part of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, §204, 11 Stat. 2874, 2894 (1996). See Codification to § 1715z-11a ("Section was enacted as part

[3] Although plaintiff does not cite either the NHA or APA in his amended complaint, he includes arguments regarding these statutes in his opposition to defendants' motion to dismiss and his cross-motion to amend the amended complaint.

of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, and not as part of the National Housing Act which comprises this chapter.") (emphasis added); Jewish Ctr. for Aged v. HUD, 2007 WL 2121691, at *5 (E.D. Mo. July 24, 2007) (Section 1715z-11a(a) is not part of the NHA and thus the Section 1702 waiver does not apply). Therefore, Section 1715z-11a(a) is excluded from the waiver of sovereign immunity found in Section 1702, and the Court may not review HUD's actions under the NHA. See Almeida v. HUD, 2009 WL 873125, at *3; Jewish Ctr. for Aged v. HUD, 2007 WL 2121691, at *5.

B. The Administrative Procedure Act

Defendants argue the waiver of sovereign immunity found in the APA is similarly inapplicable. Under the APA, agency action is not subject to judicial review when such action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2); Lunney v. United States, 319 F.3d at 558. This means that the Court has no jurisdiction if the statute or regulation governing the challenged agency action "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985) (emphasis in original). Therefore, Section 701(a)(2) requires dismissal when there is "no law to apply." Lunney v. United States, 319 F.3d at 558 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

Plaintiff argues that there is "law to apply" to HUD's actions, because the MMFA, 12 U.S.C. § 3706(b)(2)(B), provides that disposal during an auction be made pursuant to 12 U.S.C. § 1701z-11, and therefore the discretion granted to HUD by Section 1715z-11a(a) is not controlling. The MMFA and Section 1701z-11 contain guidelines for the management and

disposition of multifamily housing projects owned by HUD or subject to a HUD mortgage.

The Court concludes HUD disposed of the property pursuant to its discretionary authority under Section 1715z-11a(a), and this discretion supersedes any conflicting provisions of other statutes, including Section 1701z-11. Contrary to plaintiff's assertions, the statutes can be read together while preserving their meanings.

Furthermore, even if the statutes did conflict, principles of statutory interpretation support the conclusion that Section 1715z-11a(a) controls. First, the "notwithstanding clause" indicates that Section 1715z-11a(a) supersedes any other law that could hinder its objectives. See Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) (use of a "notwithstanding clause" shows drafter's intention that the section override conflicting provisions of any other section); GP-UHAB Hous. Dev. Fund Corp. v. Jackson, 2006 WL 297704, at *8 (E.D.N.Y. Feb. 7, 2006).

Second, a later enacted statute may limit the scope of the earlier enacted statute to the extent they conflict. See In re Ionosphere Clubs, Inc., 922 F.2d 984, 991 (2d Cir. 1990). Because Section 1715z-11a(a) was enacted after both Section 1701z-11 and the MMFA, Section 1715z-11a(a) is the controlling authority.

Finally, plaintiff's attempt to narrow the scope Section 1715z-11a(a) is contrary to both the plain language of the statute and the caselaw interpreting its application. See Guity v. Martinez, 2004 WL 1145832, at *4 (S.D.N.Y. May 20, 2004) (Section 1715z-11a(a) "confirms the Secretary's broad discretion in determining the manner in which HUD disposes of properties"); GP-UHAB Hous. Dev. Fund Corp. v. Jackson, 2006 WL 297704, at *8 n.17 ("[T]he 'flexible authority' provision is a generally applicable rule for all HUD owned housing."). Section 1715z-11a(a) is the applicable statute pursuant to which HUD foreclosed on

the property. The plain language of Section 1715z-11a(a) provides the Secretary with broad discretion to set the "terms and conditions" for disposing of multifamily properties and mortgages owned or held by the Secretary. See Guity v. Martinez, 2004 WL 1145832, at *4. Because the bidding restrictions at the auction were a "term or condition" pursuant to this discretion, there is "no law to apply" for APA review.

C. Policy Considerations

In addition to the discretionary language of Section 1715z-11a(a) and the lack of any statutory basis for judicial review, preclusion of court review here is supported by sound policy considerations. All of the units of the property house low-income, elderly tenants, and the property had substantial safety deficiencies. Therefore, HUD prioritized bidders with experience in administering and rehabilitating affordable senior housing, and limited the bidding process accordingly. Defendants argue that in HUD's experience, such a limitation was the most effective way to ensure that an experienced owner would purchase the property and make the necessary repairs.

The Court agrees. Although plaintiff attempts to characterize HUD's administration of the foreclosure sale as improper and without a rational basis, common sense dictates that restricting bidding on such a property is likely to advance HUD's objectives and protect the tenants who occupy the properties it administers. Although not dispositive, these considerations are worthy of deference and support the preclusion of review.

Because the government has not waived sovereign immunity with respect to plaintiff's claims, all claims against the government defendants must be dismissed.

II. Standing

As to the remaining defendants – the City and Burton Towers – plaintiff's claims fail because he has no standing to challenge the terms of the foreclosure sale, and thus the Court lacks subject matter jurisdiction to adjudicate his claims. Standing is a prerequisite to bringing suit in federal court. The Supreme Court has ruled that constitutional standing requires plaintiff to establish at minimum three elements: (1) he suffered an "injury in fact," which means an "invasion of a legally protected interest"; (2) a causal connection between the injury and defendants' conduct; and (3) a federal court decision is likely to redress the injury. Fulton v. Goord, 591 F.3d 37, 41 (2d Cir. 2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). A "legally protected interest" is one that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. at 560.

Although plaintiff alleges HUD violated the MMFA, none of the asserted violations constitutes an invasion of a legally protected interest. Plaintiff had no legally protected interest in participating in the auction because HUD has statutory discretion to set the terms of the auction. Plaintiff also had no legally protected interest in the property itself. Thus, because he cannot prove he suffered an injury in fact, he lacks standing to bring this action.

III. Constitutional Claims

Plaintiff asserts that HUD's bidding restrictions constituted a "government taking without due process." Although it is not clear whether plaintiff intended to assert a takings claim or a due process claim, neither is legally cognizable.

To sustain a takings claim, plaintiff must demonstrate that (1) he has a property interest protected by the Fifth Amendment; (2) of which he was deprived by the government for public use; and (3) he was not justly compensated. Ganci v. N.Y.C. Transit Auth., 420 F. Supp. 2d 190, 195 (S.D.N.Y. 2005). Plaintiff cannot establish a property interest because such an interest must stem from some "legitimate claim of entitlement" and not just an "abstract need or desire" or "unilateral expectation." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). Plaintiff's desire to acquire the property was no more than a "unilateral expectation," and he had no reason to expect that he would win at the foreclosure auction. Thus, plaintiff cannot allege a takings claim.

To the extent plaintiff intended to assert either a substantive or procedural due process claim, that claim fails because he cannot establish a cognizable property interest. To assert a substantive due process claim, plaintiff must show (1) "a constitutionally cognizable property interest is at stake;" and (2) defendants' "alleged acts against [the property] were arbitrary, conscience-shocking, or oppressive in the constitutional sense, not simply incorrect or ill-advised." Ferran v. Town of Nassau, 471 F.3d 363, 369-71 (2d Cir. 2006) (internal quotation marks omitted). Procedural due process requires plaintiff to show (1) there exists a property interest which has been interfered with by the state, and (2) the procedures used to deprive plaintiff of the interest were constitutionally insufficient. Kentucky Dep't of Corrs. v. Thompson, 490 U.S. 454, 460 (1989); McMenemy v. City of Rochester, 241 F.3d 279, 286 (2d Cir. 2001). Plaintiff cannot establish a property interest under either theory because there were no rules or understandings to support the claim that plaintiff was entitled to participate in the auction. Thus, he cannot allege a due process violation. See Guity v. Martinez, 2004 WL 1145832, at *4.

Plaintiff's constitutional claims are dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

IV. Equitable Relief

Plaintiff requests both declaratory and injunctive relief. Federal courts have discretionary authority to issue a declaratory judgment in "a case of actual controversy." New York Times Co. v. Gonzales, 459 F.3d 160, 165 (2d Cir. 2006). An actual controversy exists if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In re Prudential Lines Inc., 158 F.3d 65, 70 (2d Cir. 1998). Plaintiff cannot rely on past injury, and must show a likelihood that he will be injured in the future. Chiste v. Hotels.com L.P., 756 F. Supp. 2d 382, 407 (S.D.N.Y. 2010). Because, for the reasons discussed above, plaintiff has failed to establish either past or future injury, he is not entitled to declaratory relief.

Plaintiff also seeks a permanent injunction. To obtain a permanent injunction, plaintiff must show that (1) he has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for the injury; (3) a remedy in equity is warranted considering the balance of hardships; and (4) the public interest would not be disserved by a permanent injunction. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756 (2010). Plaintiff cannot meet these requirements because (1) he has not shown he suffered an injury or is likely to suffer another injury in the future; (2) the balance of hardships tips decidedly in defendants' favor; and (3) the public interest would be disserved by unwinding such a complex and costly transaction. Therefore, plaintiff is not entitled to injunctive relief.

V. Plaintiff's Motion to Amend the Amended Complaint

Plaintiff cross-moves to amend his amended complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). Rule 15(a)(2) provides that a party may amend its complaint only with the opposing party's consent or leave of court. While leave to amend should be "freely give[n] . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), "motions to amend should generally be denied in instances of futility, undue delay, bad faith or dilatory motive . . . or undue prejudice to the non-moving party." Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 126 (2d Cir. 2008) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

In this case, amendment would be futile because the new complaint could not survive a motion to dismiss. Plaintiff's proposed amendments do not add any new claims, and his attempts to clarify his original claims do not change the fact that they fail as a matter of law. Therefore, plaintiff's motion to amend his amended complaint is denied.

CONCLUSION

Plaintiff's motion to file a second amended complaint (Docs. #35, #36, #37) is DENIED, and defendants' motions to dismiss the amended complaint are GRANTED. (Docs. #16, #20, #23).

The Clerk is instructed to terminate these motions and close this case.

Dated: May 14, 2012
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge