

Public Housing Tenants in New Orleans Get Mixed Ruling From Federal Court

When other avenues failed, New Orleans public housing tenants displaced by Hurricane Katrina and the decisions made in its wake sought redress from the judicial system.¹

The *Anderson* plaintiffs formerly inhabited New Orleans public housing developments, which prior to the storm were all occupied by African-Americans. Displaced at first by the disaster, the dispossessed tenants attempted to reoccupy their units but were prevented from doing so by the Housing Authority of New Orleans (HANO), who argued that the structures were damaged irreparably by the storm. With the approval of the Department of Housing and Urban Development (HUD),² HANO continued to bar reoccupancy and took steps to plan for demolition of the developments and replacement with “mixed income” housing.

HANO repeatedly refused the tenants’ request to repair and reopen the units, which the tenants alleged remain habitable or capable of repair within a reasonable time. So the tenants brought suit in June 2006, contending that HUD and HANO had violated provisions of the Fair Housing Act, the United States Housing Act, the Constitution, and international law, in addition to claims for breach of contract and constructive eviction under state law.

Summary of the Decision

The tenants had filed a motion for a preliminary injunction to block further steps toward demolition and to require repairs that would permit reoccupancy, on which the court had earlier held an evidentiary hearing and requested further briefing. HUD had filed a motion to dismiss, and HANO had filed a motion to dismiss or for summary judgment, and the tenants had also filed a cross-motion for partial summary judgment. The court’s decision was directed at all of these pending motions.

The court’s order denied in part and granted in part the motions to dismiss, ruling that the tenants could pursue their claims that HUD and HANO failed to “affirmatively further” the Fair Housing Act and violated due process, while rejecting on the merits their claims of disparate treatment or disparate impact under the Fair

Housing Act, as well as that of equal protection. The ruling also granted judgment to HUD and HANO on the tenants’ statutory demolition claims, finding them unenforceable due to lack of a private right of action, standing, and ripeness, as well as judgment on the international law claim, finding no binding law. However, the court also permitted the tenants to pursue their breach of contract and constructive eviction claims. For all of the surviving claims, the court found that numerous factual issues requiring further development precluded partial summary judgment, while also finding that other adequate but unspecified legal remedies supported denial of the requested injunction. Thus the claims remaining for trial include the failure to affirmatively further fair housing, due process, breach of contract and constructive eviction claims.

The ruling thus keeps alive the tenants’ goal of returning to their pre-Katrina homes.

Background

Before Hurricane Katrina devastated the Gulf Region, New Orleans hosted 8,000 public housing units, of which about 5,000 were occupied. Most of these occupied units were in the city’s four largest public housing developments—St. Bernard, B.W. Cooper, CJ Peete, and Lafitte. In the immediate aftermath of the disaster, HANO completely shut down these developments and proposed to demolish them, planning to destroy thousands of affordable housing units in the process. While some residents eventually returned to their units, only an estimated 1200 units are occupied.

Wanting to return to their former homes, plaintiffs requested access to their units. Against this backdrop, federal and state officials made hostile public commentary regarding reoccupancy. For example, defendant HUD Secretary Alphonso Jackson remarked that New Orleans “is not going to be as black as it was for a long time, if ever again.”³ Another prominent official commented that “We finally cleaned up public housing in New Orleans. We couldn’t do it, but God did.”⁴ Tenants then brought suit against HANO and HUD, seeking repair and reoccupancy, based on numerous legal theories.

Legal Claims

“Failing to Affirmatively Further” Fair Housing Claim, Brought Under Section 1983 and the APA

The plaintiffs claimed that HUD and HANO’s actions violated the Fair Housing Act⁵ in several respects, including breach of the duty to “affirmatively further” fair

¹*Anderson v. Jackson*, No. 06-3298, 2007 WL 458232 (E.D.La. Feb. 6, 2007). On March 21, the House passed comprehensive Katrina-related housing legislation sponsored by Rep. Maxine Waters to address several of the issues raised by *Anderson*. See Gulf Coast Hurricane Housing Recovery Act, H.R. 1227, 110th Cong., 1st Sess. (March 21, 2007).

²HUD in fact serves as receiver for the Housing Authority of New Orleans.

³See Complaint at ¶¶ 6, 7, 70.

⁴See *id.* at ¶¶ 8, 71.

⁵42 U.S.C. §§ 3601 *et seq.*

housing.⁶ While disparate treatment and disparate impact claims under § 3604 may be brought directly under the statute's private right of action, the "failure to affirmatively further" claim⁷ requires resort to another judicial enforcement vehicle, such as Section 1983 against HANO, or the Administrative Procedure Act (APA) against HUD. HUD and HANO sought to dismiss the § 3608 "affirmatively furthering" claim as judicially unenforceable.

However, the court affirmed the judicial enforceability of the § 3608 duty of the Fair Housing Act against HUD under the APA, and against HANO under Section 1983.

As judicially interpreted, the Administrative Procedure Act⁸ provides judicial review of specific agency action, while barring judicial review of general agency policies or other actions that are committed to agency discretion. Because tenants in *Anderson* sought review of specific plans to demolish particular developments and HUD's actions in failing to repair and reopen them, the court found judicial review of HUD's plans entirely appropriate.

As for the tenants' § 3608 claim against HANO,⁹ HANO had contended that the tenants could not bring this claim under Section 1983. Rejecting HANO's position, the court concluded that the tenants' claim satisfied the restrictive *Gonzaga*¹⁰ test, which is in turn based on *Blessing*.¹¹ In reaching this conclusion, the court relied upon similar results in *Langlois v. Abington Housing Authority*¹² and *Wallace v. Chicago Housing Authority*.¹³ Because disputed factual issues surround this claim, the court declined to enter judgment for either side.

Statutory Demolition Claims

The tenants asserted two demolition claims under the United States Housing Act, contending that their homes were being "constructively demolished" by HUD and HANO's failure to repair, as well as being actually demolished without compliance with the required procedures.

⁶Section 3608 provides that HUD shall administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Fair Housing Act. The tenants' disparate treatment and disparate impact claims under § 3604 were brought directly under the statute's private right of action, and are reviewed *infra*.

⁷42 U.S.C. § 3608(e)(5).

⁸5 U.S.C. §§ 701 *et seq.*

⁹Numerous courts have held that the Section 3608 duty also applies to state and local agencies. See *Anderson*, slip op. at 6, citing, e.g., *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973). See also *Wallace v. Chicago Housing Authority*, 298 F.Supp.2d 710 (N.D.Ill. 2002).

¹⁰*Gonzaga University v. Doe*, 536 U.S. 273 (2002).

¹¹*Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), established a three-pronged test to determine whether Congress intended to confer a private right of action to enforce a particular statute: (1) did Congress intend that the provision benefit the plaintiff; (2) is the right not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) does it unambiguously impose a binding obligation on the state or other state actor.

¹²234 F.Supp. 2d 33, 73 (D. Mass. 2002).

¹³298 F.Supp. 2d 710 (N.D.Ill. 2002).

The court found that 42 U.S.C. § 1437p contains no private right of action for constructive demolition, declining to follow cases decided prior to the 1998 repeal of the statutory language explicitly prohibiting PHAs from taking any action toward demolition without following the statutory requirements.¹⁴ The court's conclusion here was also influenced by its inability to find that the current statutory language satisfied *Blessing's* "rights creating" test, relevant whether the claim is made directly under the statute or via Section 1983. The court thus granted HUD and HANO judgment on the constructive demolition claim.

The tenants also pressed a claim of actual demolition against HUD and HANO, but this was successfully parried. Because HANO has not yet submitted an application to demolish the developments to HUD for approval, the court found this claim unripe and that the tenants therefore lacked standing, granting judgment to HUD and HANO. This claim could be refiled when HANO files an application and HUD makes a decision.

Other Fair Housing and Civil Rights Claims

The tenants also claimed that HUD's and HANO's actions violated the Fair Housing Act¹⁵ because they both evidenced illegal disparate treatment on the basis of race and had a disparate impact on a protected class. These claims raise no serious enforceability issue, since they could be brought directly under the statute's private right of action. The tenants also pursued an equal protection claim, alleging discriminatory intent.

Defendants challenged these claims. However, the court found the evidence wanting, since the only evidence of discriminatory intent was comments by public officials. Despite the obvious racial hostility of various public officials' comments, the court declined to link them to any determinative racial motivation attributable to HUD or HANO in deciding to demolish the units. Thus the court granted defendants summary judgment on the disparate treatment claim, as well as the equal protection claim.

The court also rejected plaintiffs' discriminatory effect claim against HUD and HANO, also granting judgment to the defendants. To make a showing of discriminatory impact under § 3604, plaintiffs must demonstrate disproportionate harm or an illegal perpetuation of segregation. The plaintiffs had argued that because the developments were occupied by 100% African Americans, the threatened loss was necessarily discriminatory in impact. The court found this position untenable, instead commenting that preserving the developments and the pre-Katrina

¹⁴*Anderson*, at 8-11. The court relied on *Banks v. Dallas Hous. Auth.*, 271 F.3d 605 (5th Cir. 2001), which in turn had cited *Edwards v. District of Columbia*, 821 F.2d 651 (D.C. Cir. 1987), even though *Edwards* was explicitly overruled by Congress in 1988 by the now-repealed language of § 1437p(d). The opinion lacks any analysis of whether a constructive demolition claim in these circumstances could proceed against HUD under the APA.

¹⁵42 U.S.C. § 3604.

racial composition might perpetuate racial segregation. The court failed to focus on the fact that the overall demolition and revitalization plan would remove housing from African-American tenants, an exclusion which has been held sufficient to demonstrate a prima facie case of discriminatory impact.

The tenants had also claimed that HUD and HANO's actions violated international law, specifically the Guiding Principles on Internal Displacement. The court granted judgment to defendants on this claim as well, finding that those principles lacked the force of law, by their own terms.¹⁶

Due Process

Tenants claimed that HUD and HANO violated their procedural due process rights to adequate notice prior to their dispossession. Aside from a sovereign immunity defense, asserted by HUD and rejected by the court, the defendants also challenged whether the tenants in fact had a sufficient property interest, which was complicated by the circumstances surrounding the tenants' displacement. Fortunately, the court could draw upon precedent recognizing a continued property interest even in the absence of possession. Helpful for this conclusion was the fact that, whether due to Katrina or the landlord, in no way was the dispossession here due to the tenants' actions. Denying summary judgment for any party on this claim, the court ordered further factual development on "(1) the number of units, if any, that are presently habitable; (2) the extent of the repairs required to render non-habitable units habitable; (3) the number of tenants who presently wish to return and are able to return; (4) and the inadequacies of the current voucher program."¹⁷

Constructive Eviction and Breach of Contract

The tenants had also claimed that HANO's actions constituted constructive eviction and breach of the lease contract. The court denied HANO's motion for summary judgment, reserving these issues for trial. The tenants claimed that the failure to repair, as well as the boarding and locking of units, constitutes constructive eviction, which under Louisiana law, occurs when leased premises are rendered uninhabitable because of a lessor's act or omission. HANO claimed that uninhabitability was caused by Katrina, not its actions. The court concluded that only trial could determine whether HANO or Katrina is ultimately responsible for the current uninhabitable state of the properties, and that in any event, a preliminary injunction would not be an appropriate remedy.

On the tenants' breach of lease claim, the court concluded that only trial could establish what is a "reasonable time" for repair under the lease provision obligating repairs and establishing liability for breach.

¹⁶*Anderson*, at 21-22.

¹⁷*Id.* at 22.

Finding that these actions did not involve HUD, but only HANO as lessor, the court granted judgment to HUD on these claims, leaving resolution to plaintiffs and HANO at trial.

Conclusion

The *Anderson* ruling has delivered a mixed bag for tenants seeking to return to their homes. The decision keeps important portions of their case alive, permitting the battle to move forward in both the local and federal political arenas, while the case proceeds on their remaining claims. Hopefully, one day soon, they will be able to return to their repaired homes and begin the process of rebuilding their lives and communities. ■

Assessing the Economic Benefits of Public Housing

Public housing has significant economic value and benefits local and regional economies in ways that the private market could not provide or maintain without significant subsidies. These are the conclusions of a recent study released by the Council of Large Public Housing Authorities (CLPHA).¹ The study is the first to develop a framework for making quantitative estimates of the economic benefit of public housing investment and is intended to inform the ongoing debate about the role of the federal government in providing affordable housing. This article summarizes the study, its findings and conclusions.

The study, which examined ten public housing market areas,² addresses three overarching questions:

- What benefits do public housing residents derive from the program?
- What benefits accrue to local communities through the maintenance and enhancement of the existing public housing stock?
- What financial resources are necessary to maintain public housing's current value, and can the private market realistically provide those resources?

¹CLPHA, *Assessing the Economic Benefits of Public Housing*, Final Report 8 (January 2007). A copy of the study is available at <http://www.clpha.org/page.cfm?pageID=1068>. The study was conducted by Econ-sult Corporation and sponsored by CLPHA and the Housing Authority Insurance Group. It was also supported by the Public Housing Authorities Directors Association (PHADA).

²The chosen cities are: Akron, OH, Boston and New Bedford, MA, Charlotte, NC, Dallas, TX, Kansas City, MO, Miami, FL, New Bedford, MA, Oakland and San Diego, CA, and Seattle, WA.