UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

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REGENCY PARK RESIDENTS' ASSOC., et al.,

Plaintiffs,

v.

REGENCY HOUSING PARTNERS, L.P., et al.,

Defendants.

HON. JOSEPH H. RODRIGUEZ

Case No. 07-cv-2465 (JHR)

Civil Action

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. PRELIMINARY STATEMENT

The individually named Plaintiffs in this matter are fifteen (15) elderly and/or disabled low-income tenants living at Regency Park Apartments in Mount Holly, New Jersey.[1] Regency Park Apartments is a 163-unit publicly-assisted multifamily apartment complex in Mount Holly Township, New Jersey. In addition to a 123-unit six-floor mid-rise building with 1-bedroom apartments, there are approximately forty (40) townhomes for families across the street. Defendants United States Department of Housing and Urban Development (HUD), New Jersey Housing Mortgage Finance Agency (HMFA), and Township of Mount Holly have mortgages on the property with restrictive covenants requiring Defendant Regency Housing Partners, L.P. and John A. Jennings to rent all 123 apartments to low-income senior and disabled tenants and all 40 townhomes to low-income families. The 19-year-old mid-rise building is in good condition. Plaintiffs' expert architect has submitted a certification that in his professional opinion, the mid-rise meets all local housing codes and federal housing quality standards (HQS).

As a direct result of the gross mismanagement of Defendants Jennings and Regency Housing Partners, L.P., there are approximately 100 vacant apartments in the mid-rise and 10 vacant townhomes. In addition, the HUD-held mortgage is in default, and HUD has initiated proceedings to foreclose on the property. For about

[1] The Regency Park Residents' Association, an unincorporated non-profit association, is also a named plaintiff in this matter.

the last seven months, most of the residents have been paying their rent to the Burlington County Sheriff's Office to satisfy a lien originally about $0.5 million held by Defendant New Jersey Department of Community Affairs (DCA) from 5-year-old fines for state housing code violations. That lien within the past week has been paid in full, and almost $15,000 extra was collected with June's rent. Defendant owners' failure to pay PSE&G to maintain electricity to the apartment complex and an imminent shut-off of electricity triggered the filing of this action almost one month ago in state court. Another overdue electric bill for current service and threatened imminent shut-off of electricity now prompt Plaintiffs to seek a Temporary Restraining Order.

Plaintiffs are applying under L. Civ. R. 65.1 by order to show cause for a temporary restraining order requiring Defendant Burlington County to pay $5,030.30 of their rent money held by the Burlington County Sheriff's Office to Defendant PSE&G to avert an imminent shut-off of electricity to their apartment building. Plaintiffs also seek a preliminary injunction prohibiting Defendant Burlington County, New Jersey from terminating the Section 8 rental housing assistance vouchers of nine (9) of the Plaintiffs. Finally, also by Order To Show Cause, Plaintiffs ask this Court to schedule an expedited hearing on their Petition for Receivership of Regency Park Apartments. This relief is necessary to maintain

the units in habitable condition and prevent the hardship to Plaintiffs that would result if they were forced to move out and lose decent and affordable housing.

II. PROCEDURAL HISTORY

Plaintiffs originally filed this action in state chancery court in Burlington County on Monday, May 14, 2007. The court issued an Order To Show Cause without Temporary Restraints, granting Plaintiffs' request for a summary proceeding pursuant to state R. 4:67 on Plaintiffs' Petition for Receivership and scheduling a return date on Friday, June 1, 2007. There was no need for the court to issue temporary restraints against Defendant PSE&G because Defendant PSE&G agreed to delay a shut-off of electricity until Monday, June 3. Pursuant to the Order To Show Cause, the Complaint issued without a summons pursuant to state R. 4:52-1(b) and R. 4:67-3. Plaintiffs promptly served all parties that day with the complaint and application for Order To Show Cause. The state court held additional telephone conference calls on Tuesday, May 22, and Friday, May 25 to address Plaintiffs' concerns about payment of the electricity bill, security, and that the air conditioning was not working. The air conditioning was turned on late afternoon on May 22. At the last conference on May 25, PSE&G confirmed that Defendant Jennings paid $17,000 to PSE&G to avert a shut-off of electricity on Monday, June 3; however, a bill for current service was due and there was a potential shut-off after June 8 for failure to pay that bill.

On May 25, 2007, Defendant HUD filed a Notice of Removal to federal court. There is a related matter also pending before this Court – Regency Housing Partners LP v. Jackson, U.S. District Court, District of New Jersey (Camden), Docket No. 1:07-cv-00801-JHR-JS. Defendant owners filed an action against HUD alleging money damages resulting from HUD's failure to renew its Housing Assistance Payments (HAP) contract with the owner and HUD's failure to grant enhanced Section 8 housing assistance vouchers to tenants. HUD filed a motion to dismiss on May 14, 2007, to which no opposition has been filed. The motion to dismiss is scheduled to be decided on the papers on June 15, 2007.

III. STATEMENT OF FACTS

Plaintiffs shall rely upon the Certifications of Lisa-Marie Morris, Mildred McDowell, Jacqueline Jeter, Gray Smith, and the undersigned counsel to establish the relevant facts in support of Plaintiffs' application for a temporary restraining order seeking payment of a $5,030.30 bill to PSE&G, application for a preliminary injunction against Burlington County from terminating the Section 8 vouchers of nine (9) of the Plaintiffs, and application for an expedited hearing on Plaintiffs Petition for Receivership.

Regency Park Resident Association (herein "RPRA") consists of approximately 20 members currently living at Regency Park Apartments, a 6-floor mid-rise building located at 64 Regency Drive, in Mount Holly, New Jersey. Not

all resident association members are individual plaintiffs. Residents are a diverse community of Caucasian, African-American, and Asian persons. All of the residents are either senior citizens or disabled, or both, and most of them have very limited incomes from Social Security Disability or Retirement or Supplemental Security Income (SSI), state General Assistance, or pension benefits. Nine (9) plaintiffs have Section 8 housing rental assistance vouchers from the Burlington County Rental Assistance Program (BRAP): Nam Chan Cho, Ruth Davern, Stephen Drexler, Chaney Hallet, Ren Qiao Huo, Jacqueline Jeter, Sam Kim, Mildred McDowell, and Evangela Young. The remaining six resident plaintiff households pay approximately $638 a month rent: Lisa Marie Morris (who is the elected president of the resident association), Luvenia Callum, Pierrette Chang, Richard and Annette Halsey, Anne Luyster, and Muriel Street.

The defendants are Regency Housing Partners, L.P., the business entity owning Regency Park Apartments, and John A. Jennings, its president and General Partner (herein referred to as "defendant owners" or the owner); the United States Department of Housing and Urban Development (HUD), New Jersey Housing Mortgage Finance Agency (HMFA), and Mount Holly Township, all who have mortgages on the property; New Jersey Department of Community Affairs (DCA), who has a lien on the property for fines for housing code violations; Burlington County, New Jersey, whose Sheriff's Office has been collecting rent on the lien

held by DCA and who also operates the Burlington County Rental Assistance Program (BRAP) administering Section 8 vouchers to nine of the plaintiffs; and Public Service Electric & Gas Company (PSE&G), the public utility providing electricity to the building.

Financing for the construction and operation on Regency Park was completed almost 19-years ago in October of 1988. According to a recent title search, there are 4 mortgages on the property — HUD holds the senior mortgage of about $5.5 million, HMFA and Mt. Holly hold 2 junior mortgages both about $4.25 million each, and HMFA also holds a small 4th mortgage of about $123,500.[2]

HUD, HMFA, and Mount Holly Township each have executed regulatory agreements with the owner requiring the owner to maintain the property as viable affordable housing for lower income elderly and disabled tenants. The HUD regulatory agreement covers 60 apartments, the HMFA regulatory agreement applies to 53 apartments, and Mount Holly Township's restrictive covenants apply to about 47 apartments.[3] None of these entities has taken any legal action to compel the owner to comply with its contractual obligations, nor have they sought

[2] See Exhibit A attached to Certification of Maria Born accompanying state court application for an Order To Show Cause.

[3] Id.

other equitable remedies available to them to remedy or address the owners' mismanagement of the property.

The HUD-held mortgage was originally financed as a loan management set aside project (LMSA) under § 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715l(d)(4).[4] HUD provided a low interest federally-insured mortgage to the private owner. In exchange, the owner agreed to set aside 60 apartments for low-income residents. HUD then entered into a Housing Assistance Payments ("HAP") contract with the owner, which obligated HUD to pay the difference between the amount that the tenant can afford to pay toward rent and the HUD-approved market rent or contract rent for each subsidized apartment. Tenants then paid about 30 percent of their income directly to the owner for their share of the rent. The owner also entered into a Regulatory Agreement with HUD, which compelled the owner to maintain the project as affordable housing and operate the apartment complex in compliance with federal law. HMFA was the contract administrator for HUD for HUD's HAP contract with the owner.

[4] The purpose of the National Housing Act, 12 U.S.C. § 1701 et seq., is to assist private industry in providing housing for low and moderate income families and displaced families. 12 U.S.C. § 1715l(a). Section 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715l(d)(4), provides for one of several types of project-based assistance under Section 8 of the United States Housing Act, 42 U.S.C. § 1437f, and the National Housing Act, 12 U.S.C. § 1701 et seq. Project-based assistance is rental assistance that is attached to the structure. 42 U.S.C. § 1437f(f)(6).

After a number of renewals of the HAP contract between the owner and HUD, just over a year ago in February of 2006, the owner refused to renew the HAP contract on the 60 units over a number of issues, including the amount of the HUD-approved market or contract rent for the 60 units with rents subsidized by HUD. The owner never gave the 1-year notice to HUD and tenants required by 42 U.S.C. § 1437f(c)(8) that it was opting out. HMFA gave regular tenant-based vouchers[5] through the Burlington County Rental Assistance Program (BRAP) to about 60 residents.

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[5] Congress created the Section 8 housing assistance program under the Housing and Community Development Act of 1974. The Program, enacted as Section 8 of the United States Housing Act of 1937, is codified at 42 U.S.C. § 1437f. The United States Department of Housing and Urban Development (HUD) has promulgated regulations implementing the program at 24 C.F.R. Part 982. The Section 8 Tenant-Based Housing Choice Voucher Program is one of several rent subsidy programs aiding lower income families commonly known as "Section 8."

Pursuant to 42 U.S.C. § 1437f(a), the purpose of all of the Section 8 programs, including the Section 8 Housing Voucher Program, is to aid "lower income families in obtaining a decent place to live and of promoting economically mixed housing...." 42 U.S.C. § 1437f(a). The voucher program is designed to aid low-income families by providing rent subsidies to enable them to rent units existing in the private rental housing market.

The federal government, through the United States Department of Housing and Urban Development (HUD), allocates funds to local public housing agencies (PHAs) throughout the nation to administer the Section 8 Housing Voucher Program. Under the regulations, the local PHA enters into a Housing Assistance Payments (HAP) contract with a property owner on behalf of an eligible family and agrees to subsidize the rental payment in an amount calculated based on the family's income. See, e.g., Baldwin v. Housing Authority of the City of Camden, New Jersey, 278 F. Supp.2d 365, 369 (D. N.J. 2003) and Franklin Tower One,

The owner of the premises has failed to properly manage and maintain the apartment complex. He was repeatedly fined by the Department of Community Affairs ("DCA") for housing violations, and while the violations were abated, he never paid the outstanding fines, resulting in DCA imposing a lien for unpaid fines and collection of rents by the Sheriff to satisfy the lien. He also failed to re-rent units as they became vacant, so that at the present time about 100 of the 123 units in the mid-rise are unoccupied. Over the past year, a large number of residents moved out, taking their Section 8 rental assistance vouchers to other private landlords. Only nine residents with tenant-based Section 8 vouchers remain in the building.

Since March of 2007, one crisis after another has jeopardized the ability of the fragile senior citizens and disabled residents to continue living in Regency Park Apartments. On March 7, a fire broke out in one apartment. Although it was contained to the individual apartment, Mount Holly Township evacuated all of the residents for their safety and would not allow them to return home for two weeks. Many of the residents lived as refugees in an old elementary school converted by the Red Cross to an emergency shelter. Meanwhile the Burlington County Rental Assistance Program (BRAP) issued new vouchers to the remaining residents with Section 8 vouchers and encouraged them to find a new place to live. Mount Holly

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L.L.C. v. N.M., 157 N.J. 602, 608-610, 725 A.2d 1104, 1107-1109 (N.J. 1999)(describing the Section 8 Voucher Program).

Township eventually contacted the owner's fire insurance company directly to effect repairs to the building. The Township then allowed residents to return home on March 21.

Another crisis arose late Friday afternoon, May 4, when a PSE&G employee posted notices in the building that the electricity would be shut off the following Tuesday, May 8. The undersigned immediately contacted defendant Jennings and his local and New York City counsel. A week later on Friday, May 11, with the imminent electricity shut-off still on the horizon, the undersigned notified opposing counsel that Plaintiffs were filing an application for Order To Show Cause in state chancery court the following Monday, May 14.

Over the course of three telephone conference calls with all counsel on May 14, May 22, and May 25, a shut-off of electricity was averted before Memorial Day weekend. Without notifying his own attorneys, Jennings paid approximately $17,000 to PSE&G, the minimum that the Board of Public Utilities ordered him to pay on a $57,000 arrearage to maintain electricity to the building. But another PSE&G bill was past due, and another electricity shut-off was imminent.

Plaintiffs delayed the filing of this application by one week and attempted to avert the necessity of seeking a Temporary Restraining Order through negotiation with counsel. As detailed in the accompanying certification by the undersigned counsel, after notice to all counsel by electronic mail on Monday night, June 4, all

counsel except counsel for HUD participated in a telephone conference call on Thursday afternoon, June 7, 2007. During that call, counsel for PSE&G reported that a bill dated May 9, 2007, for $5,030.30, remained unpaid by Defendant owners two weeks after it was due. That bill was for current service only. The balance on the account was $45,454.74. Counsel for PSE&G agreed to delay taking any action on the overdue bill for ten (10) days. Counsel for Burlington County then reported that it had collected more than enough rent money to pay in full the lien held by Defendant DCA. Counsel agreed that the Burlington County Sheriff would mail a final check for $81,329.05 to DCA. Counsel for Burlington County further reported that the Sheriff collected an extra $4,392.56. In addition, the Sheriff held $11,111 in uncashed checks from residents for rent for June of 2007, and Section 8 payments had been made to the Sheriff for May of 2007. Counsel agreed that the Sheriff would deposit the $11,111 and mail a check for approximately $15,380 to counsel for Defendants Jennings and Regency Housing Partners, L.P. Counsel for Defendant owners then would deposit the check and, as soon as it cleared, mail a check for $5,030.30 to PSE&G. At the end of the call, counsel for Defendant owners disclosed for the first time that they did not have authority from their client to enter into such an agreement. The undersigned gave counsel for Defendant owners an additional day until the close of business on Friday, June 8 to obtain authority from their client to authorize the Burlington

County Sheriff to mail the check for approximately $15,380 to his attorneys. Counsel for Defendant owners never replied to all counsel to authorize this transaction.

Since the telephone call, the undersigned learned from PSE&G that after the meter was read again on Friday, June 8, 2007, a new bill for current service was issued for $4,578.96, which is due in 15 days. Late charges of $562.47 were also added on May 26 for the $5,030.30 bill issued May 9. The total balance on the account is now $50,596.17. The undersigned also learned that Defendant owners have an outstanding water bill of $17,998.49 due to the Mount Holly MUA and that if $10,316.66 is not paid by Wednesday, June 13, the MUA will turn the outstanding bill over to Mount Holly Township for collection. The new electricity bill and outstanding water bill, both which must be addressed, are yet additional reasons for this Court not to release any money to Defendant owners.

IV. LEGAL ARGUMENT

Before a District Court may grant preliminary injunctive relief in the Third Circuit, a court must weigh four factors: (1) the likelihood of the movant's success on the merits; (2) whether the movant will be irreparably injured if relief is not granted; (3) whether the party to be enjoined will suffer irreparable injury if the preliminary relief is granted; and (4) whether the public interest will be served by the preliminary injunctive relief. Dam Things from Denmark v. Russ Berrie & Co.,

290 F.3d 548, 556 (3rd Cir. 2002); Doe v. Nat'l Bd. of Medical Examiners, 199 F.3d 146, 154 (3rd Cir. 1999); American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 8 F.3d 1471, 1477 n. 2 (3rd Cir. 1996) (en banc); In Re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3rd Cir. 1982). As discussed below, a consideration of all four factors tilts decisively in favor of granting Plaintiffs a Temporary Restraining Order and Preliminary Injunction.

A. PLAINTIFFS HAVE A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

1. The Court need not even address the merits of Plaintiffs' Petition for Receivership to grant a Temporary Restraining Order requiring Defendant Burlington County to pay the $5,030.30 electric bill to Defendant PSE&G.

Under state law in New Jersey, tenants may use their rent to pay utility bills unpaid by their landlord. N.J.S.A. 2A:18-61.1, subsection a, provides that:

> . . . any portion of rent unpaid by a tenant to a landlord but utilized by the tenant to continue utility service to the rental premises after receiving notice from an electric, gas, water or sewer public utility that such service was in danger of discontinuance based on nonpayment by the landlord, shall not be deemed to be unpaid rent.

The approximately $15,380 in the possession of the Burlington County Sheriff after it mailed a $81,329.05 check to DCA on Friday, June 8 is rent from Plaintiffs. If the lien had not been in place requiring them to pay their rent to the Sheriff, Plaintiffs could have used their rent to pay PSE&G directly and stop an

imminent shut-off of electricity. N.J.S.A. 2A:18-61.1, subsection a, enacted by amendment by the New Jersey Legislature in 2000, provides clear authority for this Court to direct that $5,030.30 of Plaintiffs' rent money for the month of June be used to pay PSE&G to avert an imminent shut-off of electricity.

2. Plaintiffs have a high likelihood of success on the merit of their claims against Burlington County for termination of their Section 8 vouchers.

Section 8 housing assistance benefits, like other public assistance benefits, are property interests that the government cannot terminate without affording the recipient procedural due process. Goldberg v. Kelly, 397 U.S. 254 (1970); Baldwin v. Housing Authority of the City of Camden, New Jersey, 278 F. Supp.2d 365, 377-78 (D. N.J. 2003); Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Richmond Tenants v. Kemp, 956 F.2d 1300 (4th Cir. 1992); Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1996).

Moreover, participants in the Section 8 Voucher Program may bring an action under 42 U.S.C. § 1983 against the state agency administering the program for violating the federal law governing the program. Baldwin v. Housing Authority of the City of Camden, New Jersey, 278 F. Supp.2d 365, 389 (D. N.J. 2003); Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1996); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987); see Farley v. Philadelphia Housing Authority,

102 F.3d 697 (3rd Cir. 1996) (public housing resident may bring § 1983 action to enforce federal regulations for grievance procedure).

Federal regulations permit the Burlington County Rental Assistance Program (BRAP) to temporarily suspend, reduce, or ultimately terminate subsidy payments to landlords only for actual, documented and serious violations of federal Housing Quality Standards ("HQS"). See 24 C.F.R. § 982.401; 24 C.F.R. § 982.404. These regulations place an affirmative duty on BRAP to inspect the units for HQS violations. 24 C.F.R. § 982.405. Pursuant to these regulations, BRAP cannot lawfully terminate the HAP contracts to the landlord unless: (1) BRAP actually inspects the rental units and finds HQS violations; (2) BRAP gives notice to the owner of any HQS violations; (3) BRAP gives the landlord time to correct such HQS violations; and (4) the landlord fails to remedy the HQS violations. 24 C.F.R. § 982.404; 24 C.F.R. § 982.405.

The undersigned provided BRAP with an expert architect's report finding that presently the building is in compliance with the Mt. Holly Township Property Maintenance Code (The BOCA National Property Maintenance Code / 1996) and conditions exceed HUD Housing Quality Standards. BRAP has not identified any outstanding HQS violations justifying a decision to terminate the Section 8 subsidies at Regency Park. No present justification under federal regulations exists to permanently terminate all Section 8 voucher subsidies at the Regency Park.

BRAP's proposed actions requiring Plaintiffs to find new apartments within 60 days places a completely unnecessary, extreme hardship and burden on resident Plaintiffs.[6] Due to BRAP's actions, fragile elderly and disabled residents with Section 8 vouchers now are faced not only with possible displacement from Regency Park Apartments but also termination of their Section 8 vouchers by BRAP. BRAP's actions as set forth herein are arbitrary, capricious, unreasonable and contrary to law.

3. Plaintiffs have a high likelihood of success on the merit of their Petition for Receivership.[7]

The material facts that the landlord, defendant Regency Housing Partners, L.P., is in significant arrears in its utility bills owed to defendant PSE&G and now is over two (2) weeks late in paying a bill for current service dated May 9, 2007, for $5,030.30 are not in dispute. It is also undisputed that shut-off of the electrical service is imminent. Similarly, the existence of excessive vacancies within the mid-rise building at Regency Park Apartments is also uncontroverted.

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[6] Federal regulations provide for only a limited number of 30-day extensions for Section 8 voucher holders to find a new place to live if their current place of residence is deemed inappropriate or if they are displaced from their current housing.

[7] State law is the controlling law for Plaintiffs' Petition for Receivership. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (In federal courts, except in matters governed by Federal Constitution or by acts of Congress, law to be applied in any case is law of the state); Hanna v. Plumer, 380 U.S. 460, 465 (1965) (Federal courts are to apply state substantive law and federal procedural law).

Given the above, plaintiffs are likely to prevail on their claims in their complaint that: (1) under Count One, appointment of a receiver is warranted pursuant to N.J.S.A. 2A:42-85 et seq., to remedy the landlord's utility arrears and the lack of security in the building; (2) under Counts Two and Three, specific performance and/or the appointment of an equitable receiver are appropriate to enforce plaintiffs' rights under their leases and under the implied warranty of habitability for provision of electrical services and adequate security in the building; and (3) under Count Four, specific performance and/or the appointment of an equitable receiver are necessary for plaintiffs, as third party beneficiaries, to enforce the "Deed Restriction and Regulatory Agreement" between the New Jersey Housing and Mortgage Finance Agency and Regency Housing Partners, L.P. — which requires Regency Housing Partners to rent out vacant units at Regency Park Apartments and to maintain the mid-rise as viable affordable rental housing for lower-income seniors and the disabled. These three points are argued below.

a. Plaintiffs Are Likely To Succeed In Having A Statutory Receiver Appointed Pursuant To N.J.S.A. 2A:42-85 Et Seq., To Remedy The Landlord's Utility Arrears And The Lack Of Security In The Building.

Plaintiffs are seeking the appointment of receiver pursuant to the statutory authority granted under N.J.S.A. 2A:42-85 to -96 in order to prevent the shut-off of the electric service and to remedy the lack of security at Regency Park Apartments. According to the statute's legislative findings:

> It is essential to the health, safety and general welfare of the people of the State that owners of substandard dwelling units be encouraged to provide safe and sanitary housing accommodations for the public to whom such accommodations are offered. . . .It is necessary, in order to insure the improvement of substandard dwelling units, to authorize the tenants dwelling therein to deposit their rents with a court appointed administrator until such dwelling units satisfy minimum standards of safety and sanitation. . . .

N.J.S.A. 2A:42-85(b) & (c).

The specific grounds to institute such an action are set forth under N.J.S.A. 2A:42-88(a):

> The public officer or any tenant occupying a dwelling may maintain a proceeding as provided in this act, upon the grounds that there exists in such dwellings or in housing space thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition or conditions in substantial violation of the standards of fitness for human habitation established under the State or local housing or health codes or regulations or any other condition dangerous to life, health or safety.

N.J.S.A. 2A:42-88(a) (emphasis added). Further, N.J.S.A. 2A:42-92 empowers the Court to order that all rents at the subject premises be paid into escrow with the court clerk, and pursuant to N.J.S.A. 2A:42-93, to appoint an administrator to use such deposited rents to remedy the defective or dangerous conditions. In addition, N.J.S.A. 2A:42-92 authorizes the Court to grant "such other and further relief as to the court may seem just and proper." See generally, Drew v. Pullen, 172 N.J.

Super. 570, 575 (App. Div. 1980) (statutory authority "provides for, among other remedies, that where . . .[a] tenant proves uninhabitability and the owner is either unwilling or unable to make the necessary repairs, the court may enter an order requiring the tenant to deposit his rent with the clerk of the court and may, further, appoint an administrator. . . to effectuate the necessary work with the use of the deposited rents").

Thus, the legal rights underlying plaintiffs' claims pursuant to N.J.S.A. 2A:42-85 et seq. are well settled — the statute having been enacted more than 30 years ago in 1971. See Berzito v. Gambino, 63 N.J. 460, 471-473 (1973); Drew, 172 N.J. Super. at 575-576. Further, the statutory remedy afforded under N.J.S.A. 2A:42-85 to -96 is complimentary to the common law remedies that plaintiffs are asserting against Regency Housing Partners. See Drew, supra, 172 N.J. Super. at 576 (common law remedies and N.J.S.A. 2A:42-85 "are not mutually exclusive" and the "full gamut of appropriate remedies is simultaneously available to a tenant"); see also, Newark Housing Authority v. Scott, 137 N.J. Super. 110 (App. Div. 1975) ("there is nothing in the act to indicate that its provisions were exclusive of other court-fashioned remedies").

Hence, there is a reasonable likelihood that plaintiffs will prevail in their action under N.J.S.A. 2A:42-85 et seq., as both the impending electrical shut-off and the lack of adequate security caused by the excessive vacancies certainly

constitute "any other condition dangerous to life, health or safety" of the plaintiffs pursuant to N.J.S.A. 2A:42-88(a).

b. Plaintiffs Are Likely To Succeed On Their Claims Against The Landlord, Regency Housing Partners, L.P., For Specific Performance and Appointment Of An Equitable Receiver To Enforce Their Rights Under Their Leases And The Implied Warrant Of Habitability For Provision Of Electrical Services And Adequate Security In The Building.

Granting specific performance as a remedy for breach of contract is "a matter within the trial court's discretion which must be exercised on the basis of equitable considerations." Ballantyne House Associates v. City of Newark, 269 N.J. Super. 332, 334-335 (App. Div. 1993). Generally, specific performance "is appropriate when relief at law, money damages, provides inadequate compensation for the breach of an agreement," particularly when "the claim involves a continuing right to future benefits that cannot be satisfied by a one-time monetary payment." In re Environmental Insurance Declaratory Judgment Actions, 149 N.J. 278, 294-295 (1997). In essence, "specific performance is appropriate if it will 'do more perfect and complete justice.'" In re Environmental, at 294 (quoting Fleischer v. James Drug Stores, 1 N.J. 138, 146 (1948)).

In the present matter, specific performance is warranted in accordance with the above equitable principles. Under the leases that defendant Regency Housing Partners, L.P., has executed with plaintiffs, Regency Housing Partners is responsible for providing electrical service to the common areas and common

facilities of the mid-rise building of Regency Park Apartments. Defendant is also responsible under the leases for ensuring that adequate security exists at the building. In failing to pay for the electrical service and causing the electric's imminent shut-off, defendant Regency Housing Partners has materially breached its obligations under the lease. Defendant has also materially breached the lease by allowing excessive vacancies in the mid-rise building, jeopardizing plaintiffs' safety and security. Furthermore, defendant's actions also breach the implied warranty of habitability established by Marini v. Ireland, 56 N.J. 130 (1970) and Berzito v. Gambino, 63 N.J. 460 (1973). See also Trentacost v. Brussel, 82 N.J. 214, 226 (1980) (implied warranty of habitability encompasses adequate security within apartment building).

Under both circumstances — defendants' breach of plaintiffs' leases and defendants' breach of the implied warranty of habitability — the typical remedies of awarding compensatory damages or abating tenants' rents are inadequate to address the serious threats posed to plaintiffs' health and safety in this matter. As such, specific performance of defendants' obligations under plaintiffs' leases and under the implied warranty of habitability is necessary to protect and vindicate plaintiffs' rights. This is especially so since, as the owner and landlord of the subject premises, defendant's obligations under the leases and the implied warranty of habitability at issue here are continuing and "cannot be satisfied by a one-time

monetary payment." In re Environmental Insurance, at 294-295. Hence specific performance is necessary in this case in order to achieve "more perfect and complete justice." Id. at 294.

In addition, for the reasons that are similar for granting specific performance as set forth above, appointment of an equitable receiver would also be an appropriate remedy in this case. Generally, Chancery Courts have inherent equitable authority to appoint receivers when warranted under the circumstances. See Barclays Bank v. Davidson Avenue Assocs., 274 N.J. Super. 519, 522 (App. Div. 1994). As argued previously concerning specific performance, the award of either compensatory damages for defendants' breach of tenants' leases or the abatement of tenants' rents for breach of the implied warranty of habitability are inadequate remedies to address the serious threats posed to plaintiffs' health and safety in this matter. Thus, the use of equitable remedies such as an appointment of a receiver is justified in this case — especially if defendant Regency Housing Partners either will not or cannot comply with specific performance. "Receiverships, like injunctions and specific performance, are the tools whereby chancery exercises its peculiar jurisdiction. . . . when the facts warrant their employment, according to the established practice of the court." Barclays Bank, supra, 274 N.J. Super. at 522 (quoting Tucker v. Nabo Construction Corp., 108 N.J. Eq. 449, 450 (Ch. 1931)). Hence, the Court's appointment of an equitable

receiver in this case — in addition to granting specific performance — would be appropriate to protect plaintiffs' rights under their leases and the implied warranty of habitability to have the electrical service maintained and to have safety and security in the building.

Accordingly, plaintiffs are likely to prevail on their claims for specific performance and appointment of an equitable receiver against defendant Regency Housing Partners for defendant's breaches of lease and the implied warranty of habitability in this matter.

c. Plaintiffs Are Likely To Succeed On Their Third Party Beneficiary Claim For Specific Performance And Appointment Of An Equitable Receiver To Enforce The "Deed Restriction And Regulatory Agreement" Between NJMHFA And Regency Housing Partners, L.P., Requiring It To Rent Out Vacant Units And To Maintain The Mid-Rise As Viable Affordable Rental Housing For Lower-Income Seniors And The Disabled.

Plaintiffs additionally are bringing suit, as third party beneficiaries, against Regency Housing Partners, L.P. for breach of provisions contained in the Deed Restriction and Regulatory Agreement ("Regulatory Agreement") executed between the New Jersey Housing and Mortgage Finance Agency ("NJHMFA") and Regency Housing Partners, L.P. on October 1, 1988, as part of the original government financing of Regency Park Apartments' construction.[8] Plaintiffs claim

[8] Defendant United States Department of Housing and Urban Development holds a mortgage of approximately $5.5 million on the property,

that Regency Housing Partners, L.P. has breached covenants within the Regulatory Agreement that require it to continuously rent the units at Regency Park Apartments, avoid actions leading to excessive vacancies, and properly manage the property as affordable multifamily housing for elderly and disabled tenants. Plaintiffs are seeking specific performance and appointment of an equitable receiver to enforce these covenants, which are essential to Regency Park Apartments' continued operation as affordable housing.

"The principle that determines the existence of a third party beneficiary status focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement." Broadway Maintenance Corp. v. Rutgers, State University, 90 N.J. 253, 259 (1982). "This is a fact-sensitive issue" whereby the "court must examine the terms and conditions of the agreement to determine whether the non-party to the contract was an intended or incidental beneficiary." Broadway, at 260; see also, Hojnowski ex rel. Hojnowski v. Vans Skate Park, 375 N.J. Super. 568, 576 (App. Div. 2005), aff'd, 187 N.J. 323 (2006).

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which has priority over the other mortgages. Defendant New Jersey Housing and Mortgage Finance Agency holds two mortgages, one for approximately $4.25 million and another for $123,500. Defendant Township of Mount Holly also holds a mortgage of approximately $4.25 million on the property. (See Exhibit A attached to Certification of Maria Born accompanying state court application for an Order To Show Cause).

The plaintiffs in this matter, as "Lower Income Occupants" as defined under the Regulatory Agreement,[9] are expressly deemed under Section 24 as the "intended beneficiaries" of the Regulatory Agreement. Section 24 states:

> The Agency and the Owner hereby further declare their understanding and intent that the benefit of such covenants touch and concern the Land by enhancing and increasing the enjoyment and use of the Land and Project by Lower Income Occupants and Persons or Families of Moderate Income, the intended beneficiaries of such covenants, reservations and restrictions, and by furthering the public purposes for which the Bonds were issued.
> (Emphasis added)

Thus, by the Regulatory Agreements' own terms, NJHMFA and Regency Housing Partners, L.P. intended lower income occupants such as plaintiffs "to benefit from the existence of the contract." Broadway, supra, at 259. As such, plaintiffs have the right to enforce Regency Housing Partners' obligations under the Regulatory Agreement that affect plaintiffs' "enjoyment and use" of the premises, such as under Section 2(d) of the Regulatory Agreement that RHP shall "manage and operate" the premises "as multifamily residential rental property," and under Section 2(d) that "all of the units in the Project will be rented or available for rent on a continuous basis. . . ." Likewise, plaintiffs can enforce

[9] Section 1 of the Regulatory Agreement defines "Lower Income Occupants" as persons or families whose total aggregate family income does not exceed 80% of the median income for the Philadelphia metropolitan area as determined by HUD.

Section 10 of the Regulatory Agreement, whereby Regency Housing Partners agrees that it "will comply with. . .Agency Rules and Regulations" and "will not operate the project. . .inconsistent with Agency Rules and Regulations." See N.J.A.C. 5:80-7.2 ("a housing owner must keep units occupied to minimize vacancy loss and maintain cash flow").

Furthermore, Section 19 authorizes suit against "the Owner for a mandatory injunction or other equitable relief requiring performance by Owner of any of its obligations under this agreement." Similarly, under Section 26, if Regency Housing Partners violates the Regulatory Agreement, "any proceeding at law or in equity" may be instituted "to abate, prevent or enjoin such violation" and "to compel specific performance hereunder." These sections thus make it appropriate for the Court to order specific performance and appointment of an equitable receiver to enforce Regency Housing Partners' obligations under the Regulatory Agreement to fully rent all of the units at Regency on "a continuous basis" and to "minimize vacancy loss" at Regency Park Apartments, in order to eliminate the threat to plaintiffs' health and safety posed by the current excessive vacancies and to ensure an adequate cash flow to pay for essential services such as electricity for the mid-rise building.

Consequently, plaintiffs are likely to prevail on their third party beneficiary claim to enforce Regency Housing Partners' violations of and defaults under the Regulatory Agreement.

B. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM.

Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). Actions that negatively impact upon a party's housing condition, especially if it leads to loss of housing, have frequently been found to cause irreparable harm. "Neither an unwarranted eviction nor reduction to poverty can be compensated adequately by monetary damages awarded after a distant hearing." Crowe, supra, at 133. Such harm, especially when resulting in homelessness, is "obvious, imminent and severe." St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 420-421 (Law Div. 1983) (preliminary injunction appropriate to stop municipality from closing church's operation of a homeless shelter). Indeed, "monetary damages are not the substitute for meeting a long and firmly established public policy of achieving safe, sanitary, decent housing for the most needy." Samaritan Center, Inc. v. Borough of Englishtown, 294 N.J. Super. 437, 446 (Law Div. 1996).

In the present matter, there can be no serious dispute that PSE&G's impending termination of electrical service to the common areas of the mid-rise

building of Regency Park Apartments due to the landlord's arrearages would have a devastating impact upon plaintiffs. Although there would still be electrical service to plaintiffs' individual apartments, the building's vital facilities would be rendered inoperable and the building would have to be closed immediately. As plaintiffs' architectural expert, Gray Smith, states in his certification, among the facilities that immediately would cease to function would be the elevator to the six floors; all lighting in the corridors, hallways, lobby and exits; all emergency lighting; the fire alarm system, including automatic communications with the local fire department; mechanical heating, ventilation and air cooling for common areas; laundry equipment; and the central hot water system.

As Mr. Smith further states, loss of such services would result in numerous violations of building, health and fire codes and would pose a serious threat to plaintiffs' health, safety and welfare. Undoubtedly, this would lead to building and fire code officials ordering the immediate closure of the building and to all of the plaintiffs being rendered homeless. Indeed, the harm to plaintiffs is compounded by the fact that they are all lower-income tenants who are either elderly or disabled. While being rendered involuntarily homeless is in of itself serious harm, it is particularly acute for vulnerable senior citizens and disabled persons with very limited incomes.

Accordingly, the harm facing plaintiffs is "obvious, imminent and severe," St. John's, supra, at 420-421, justifying immediate and interlocutory injunctive relief enjoining PSE&G from terminating electrical service at Regency Park Apartments until final decision on the merits plaintiffs' claims.

C. DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM.

Defendants Jennings and Regency Housing Partners, L.P. will not suffer any irreparable harm. They are legally responsible for payment of the $5,030.30 electricity bill to PSE&G. It makes no difference whether the Burlington County Sheriff pays the bill out of rent money that was collected in excess of the amount owed on the lien held by DCA or whether Defendant owners pay directly. As for Plaintiffs' request that the Court grant a Temporary Restraining Order ordering Burlington County to withhold Section 8 voucher payments to Defendant owners, the effect is de minimus. Defendant owners have received no rental income from Regency Park Apartments for approximately seven (7) months. Another two-week delay is not likely to have a significant impact.

Nor will Defendant Burlington County Rental Assistance Program (BRAP) suffer any irreparable harm if this Court grants the requested injunctive relief. BRAP will suffer no injury if it delays making Section 8 housing assistance voucher payments to Defendant owners. There is also no harm to BRAP resulting from allowing residents to continue to use their vouchers at Regency Park, rather

than terminating the subsidies. There is no financial loss because whether Plaintiffs move or remain, approximately the same amount of Section 8 housing rental assistance would be paid to subsidize each resident's rent. Similarly, even if BRAP terminated a Plaintiff's voucher and gave it to another person, the net cost of rental assistance to Burlington County would not likely change significantly. Furthermore, since BRAP has no legal authority to terminate the subsidy at this time, the injunction would no more than require the agency to continue the payments they are legally obligated to make.

The harm to Plaintiffs therefore greatly outweighs any potential hardship that may be claimed by Defendant owners and Defendant Burlington County. See Johnson v. United States Dept. of Agriculture, 734 F.2d 774, 788-89 (11th Cir. 1984); Cole v. Lynn, 389 F. Supp. 99, 105 (D.D.C. 1975) (granting injunctive relief when faced with balancing hardships of tenants facing eviction versus any alleged harm to the Public Housing Authority); See also Bloodworth v. Oxford Village Townhouses, Inc., 377 F. Supp. 709 (N.D. Ga. 1974) (finding that a federally subsidized tenant would suffer irreparable harm if a 50% rent increase was not preliminarily enjoined).

The balance of hardships unquestionably weighs heavily in favor of plaintiffs. If the Court denies plaintiffs' request for a temporary restraining order to stop the shut-off of electrical service at Regency Park Apartments pending final

disposition of their claims, the building would have to be closed immediately and plaintiffs would be involuntarily displaced from their homes through no fault of their own. Since plaintiffs are all lower income, they would have much difficulty immediately finding another affordable place to live, and thus many if not all would be rendered homeless. Because plaintiffs are also elderly and/or disabled, this would place a severe strain on their physical and emotional well being.

In contrast, if the requested temporary injunctive relief requested is granted, any inconvenience to Defendant owners and Burlington County "pales into insignificance" when compared to the extreme harm that plaintiffs would suffer if such relief is denied. St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 421 (Law Div. 1983). If plaintiffs are successful on their specific performance or receivership claims against Regency Housing Partners, PSE&G will benefit as payments would be made to them on the arrearages owed by Regency Housing Partners.[10] Accordingly, the balance of hardships favors plaintiffs in this matter.

D. GRANTING AN INJUNCTION IS IN THE PUBLIC INTEREST.

Granting a Temporary Restraining Order and Preliminary Injunction in this case is clearly in the public interest. Plaintiffs are seeking to preserve 163 units of

[10] In addition, plaintiffs are moving to have all their claims proceed on an accelerated, which, if granted, will expedite this matter and any prejudicial delay to PSE&G would be minimal at best.

publicly-assisted housing from the gross mismanagement of Defendant owners and, at the same time, prevent their own homelessness. The legal precedents are legion. See, e.g., Community Realty Management, Inc. v. Harris, 155 N.J. 212, 714 A.2d 282 (1998), and Housing Authority of the Town of Morristown v. Little, 135 N.J. 274, 639 A.2d 286 (N.J. 1994) (in which the New Jersey Supreme Court recognized the New Jersey legislature's strong public policy against homelessness and, as a result, prevented the unlawful eviction of low-income tenants living in federally subsidized housing, just like Plaintiffs.) Granting a Temporary Restraining Order and Preliminary Injunction in this case is clearly in the public interest.

E. PLAINTIFFS REQUEST THAT SECURITY BE WAIVED.

District Courts have discretion whether to order posting of a bond when granting an injunction. Temple University v. White, 941 F.2d 201 (3rd Cir. 1991), cert. den. sub. nom. Snider v. Temple University, 501 U.S. 1032 (1992). In Temple University, the Third Circuit adopted a test for waiver of bond requirements that requires the court to first consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant. Special consideration must be given to suits to enforce important federal rights or public interests, and the court must consider the impact that a bond requirement would have on enforcement of such a right, in order to prevent undue

restriction of it. In Temple University, the bond requirement was waived because the insolvent applicant would not have been able to post a bond, no risk existed for the defendant, and the applicant was acting clearly in the public interest, preserving its role as a provider of medical services to low-income patients. See also McCormack v. Township of Clinton, 872 F. Supp. 1320 (D. N.J. 1994) (bond requirement waived in case challenging township ordinance restricting political signs because township is unlikely to suffer any loss, imposition of more than a nominal bond would constitute a severe hardship to plaintiff, and vindication of a constitutional right is both a significant right and matter of tremendous public significance).

In the case at hand, the Defendant owners and Burlington County would incur no financial harm by the grant of the injunction. On the other hand, Plaintiffs are very low-income persons, eligible for free legal services, federally-subsidized housing, and other government benefits. Requirement of anything other than nominal security would render it impossible for Plaintiffs to obtain relief. Plaintiffs are seeking to vindicate important rights. Pursuant to the standards set forth by the Third Circuit in Temple University, security should be waived.

F. A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION ARE NECESSARY TO MAINTAIN THE STATUS QUO IN ORDER TO PRESERVE THE SUBJECT MATTER OF THIS LITIGATION.

Lastly, in addition to preventing irreparable harm to plaintiffs, preliminary injunctive relief is necessary in this case to preserve the subject matter of this litigation. Federal law generally follows state law. See Pfaus v. Palermo, 97 N.J. Super. 4, 8-9 (App. Div. 1967). "A preliminary injunction to preserve subject matter of litigation is an exception to the general rule and need not be based upon rights that are clear as a matter of law." Pfaus v. Feder, 88 N.J. Super. 468, 475-76 (Ch. Div. 1965) (citing Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 127 N.J. Eq. 215 (E. & A. 1940) and General Electric Co. v. Gem Vacuum Stores, 36 N.J. Super. 234 (App. Div. 1955)). See also Sherman v. Sherman, 330 N.J. Super. 638, 643 (Ch. Div. 1999) (court "may take a less rigid view in its consideration of these factors when the interlocutory injunction sought is designed only to preserve the status quo").

If the Burlington County Sheriff's Office is not enjoined to pay the outstanding bill to PSE&G for current electric service out of Plaintiffs' own rent money, for all practical purposes plaintiffs' claims in this matter would be rendered meaningless. Once the building is closed and plaintiffs displaced, their specific performance and receivership claims against Regency Housing Partners would

become "vain and useless," Poff v. Caro, 228 N.J. Super. 370, 378-379 (Law Div. 1987). Thus, the temporary injunctive relief requested is essential to preserving the subject matter of this litigation.

CONCLUSION

For all of the foregoing reasons, this Court should grant plaintiffs' application for a temporary restraining order and a preliminary injunction and order that plaintiffs' claims for receivership shall proceed as a summary action in accordance with state R. 4:67-1 et seq., as if this action had remained in state court.

Respectfully submitted,
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Dated: June 13, 2007 By: /s/ David M. Podell
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