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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FL

PRISCILLA DUNCAN, et al.,

Plaintiffs,

-vs-

CASE NO. 89-3 CIV-FtM-10(A)

SABAL PALMS I ASSOCIATES, LTD.,
etc., et al.,

Defendants.

O R D E R

Plaintiffs, past and present tenants of a federally subsidized housing project called Sabal Palms Apartments, bring this action seeking declaratory and injunctive relief as well as monetary damages against the owners of the housing project, defendants Sabal Palms I Associates, Ltd. and Sabal Palms II Associates, Ltd. (referred to as "SP Associates"). Before the Court are plaintiffs' motions for class certification and for default judgment. Defendants have not responded to plaintiffs' motions, and default has been entered against them.

Defendants, plaintiffs assert, are direct recipients of two federal subsidies from the U.S. Department of Housing and Urban Development ("HUD"): (1) the below market interest rate mortgage program, 12 U.S.C. 1715l (referred to as the §221(d)(3) program) and (2) the "Section 8" rental assistance program, 42 U.S.C. 1437f et seq. In order to receive this federal assistance, SP Associates entered into a Housing Assistance Payments Contract and a Regulatory Agreement with HUD. Participation in each of these programs required SP Associates to operate the Apartments in accordance with certain

HUD requirements. Plaintiffs allege that defendants have failed to comply with HUD regulations. Specifically, plaintiffs contend that the Apartments are unsafe and unsanitary. In addition, plaintiffs assert that defendants have both improperly charged tenants for repairs and have made false reports to third parties about outstanding debts that plaintiffs allegedly owe defendants. Plaintiffs also charge that defendants have terminated their rental assistance without proper notice. Defendants' actions, plaintiffs allege, violate Florida statutes governing housing conditions (Count I), the due process clause of the Fifth Amendment (Counts II & III), and also constitute a breach of the HUD contract and regulatory agreement (Counts IV & V).

I. Plaintiff's Motion for Class Certification (Doc. nos. 41 & 64)

Plaintiffs seek to certify a class pursuant to Fed.R.Civ.P. 23(b)(2). The class, plaintiffs argue, should include all individuals who have resided in Sabal Palms Apartments since 1985 as well as those individuals who either presently reside there or will reside there. Though defendants have not opposed plaintiffs' motion, plaintiffs still have the burden of demonstrating that the requirements of Fed.R.Civ.P 23(a) and 23(b)(2) have been met. To certify the class, plaintiff must show that

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law and fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representatives parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). In addition, plaintiffs must also demonstrate that

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2). The Court finds that plaintiffs have met their burden.

A. Numerosity

Plaintiffs have not provided a certain figure as to the size of the class. Plaintiffs do state, however, that approximately 130 families are presently residing in the Apartments. That group along with the unknown number of former tenants is large enough to make joinder of all members impracticable. Martin v. Housing Authority of Atlanta, 86 F.R.D. 320 (N.D. Ga. 1980).

B. Commonality

To meet the common question requirement, plaintiffs must show the existence of at least one issue which affects all or a significant number of proposed class members. Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982). The Rule does not require that all issues in the case be identical.

Two questions that are common to both the plaintiffs and the proposed members of the class is whether defendants have provided and maintained decent, safe, and sanitary housing to the tenants, and whether defendants have provided due process protection before assessing plaintiffs with charges for apartment repairs. Another factual questions that applies to those plaintiffs who have been terminated from the Apartments, as well as class members who might be terminated in the future, is whether defendants have provided due process protection in terminating the federal assistance of Apartment tenants. These factual issues satisfy the commonality requirement.

C. Typicality

The central inquiry in determining whether a proposed class has Rule 23(a)(3) typicality is whether the "class representative [is] part of the class and 'possess[es] the same interest and suffer[s] the same injury' as the class members." East Texas Motor Freight System v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896 (1977) quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S.Ct. 2925, 2929 (1974). The class representative's claim is typical if it stems from the same event, practice or course of conduct that forms the basis of the class claim and is to be litigated on the same legal theory. Wells v. Ramsay, Scarlett & Co., 506 F.2d 436, 437 (5th Cir. 1975).

Plaintiffs include former and present tenants. All of the plaintiffs allege that their apartments were in very poor condition or that essential appliances did not work. Four of the six named plaintiffs allege that their federal assistance was terminated without adequate notice. Two former resident plaintiffs allege that they were charged excessively for repairs, and that they received no notice of the charges and did not have an opportunity to contest them. In light of these allegations, the Court finds that plaintiffs are typical of those members of the proposed class.

D. Adequacy of Class Representation

To satisfy the prerequisite of Fed.R.Civ.P. 23(a)(4), the named plaintiffs must insure that no conflict of interest exists between them and the putative class members, and that the action will be vigorously prosecuted. Sosna v. Iowa, 419 U.S. 393, 403, 95 S.Ct.

553, 559 (1975). There are no apparent conflicts between plaintiffs and the proposed class.

The Court is also satisfied that this case will be vigorously prosecuted. Plaintiffs are represented by attorneys from Florida Rural Legal Services, Inc. Counsel informs the Court that their organization has had extensive experience in representing poor persons, in actions concerning federally subsidized housing, and in class action litigation.

E. Fed.R.Civ.P. 23(b)(2)

There are two requirements to certify a class pursuant to Rule 23(b)(2): (1) "the opposing party's conduct or refusal to act must be generally applicable the class and (2) final injunctive or corresponding declaratory relief must be requested for the class."

Wright, Miller & Kane, Federal Practice and Procedure: Civil 2nd §1775, p. 447-48. Wright and Miller explain:

courts have interpreted this [first] requirement to mean that the party opposing the class either has acted in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern of activity or has established or acted pursuant to a regulatory scheme common to all class members.

Id. at 449.

As noted above, plaintiffs allege that defendants have taken several measures which violate the rights of tenants at the Apartments. The housing conditions at Sabal Palm Apartments are alleged to be uniformly bad. Other measures such as the alleged lack of reasonable termination notice and the alleged failure of defendants to allow tenants to challenge the costs of repairs assessed against them are also directed to the tenants as a whole.

From these allegations it appears that defendants have acted in a consistent manner and that their actions may be viewed as forming a pattern of conduct toward the tenants. The Court finds that injunctive and declaratory relief would be appropriate if these allegations are true.

Upon due consideration, therefore, plaintiffs' motion for class certification is GRANTED, and the Court certifies the following class pursuant to Fed.R.Civ.P. 23(b)(2):

All tenants who either are presently residing in Sabal Palms Apartments or have resided in the apartments at any time subsequent to 1985, or who will reside in Sabal Palms Apartments.

II. Plaintiffs' Motion for Default Judgment (Doc. #73)

Defendants have failed to obtain counsel as required by the Court's order (Doc. #66), and they have not answered plaintiffs' amended complaint. The Clerk entered a default against each of the defendants on January 26, 1989. Plaintiffs now move for default judgment. Defendants have not responded.¹ Plaintiffs' motion is due to be granted.

Having defaulted, defendants are considered to have admitted the well-pleaded allegations of fact contained in plaintiffs' amended complaint. Weft, Inc. v. G.C. Inv. Associates, 630 F.Supp. 1138, 1141 (E.D. N.C. 1986), aff'd 822 F.2d 56 (4th Cir. 1987). To enter a default judgment, however, the Court must evaluate the sufficiency of the complaint. Nishamatsu Construction Co., Ltd. v. Houston National Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). Each count,

¹ Plaintiffs have complied with the requirement of Fed. R. Civ. P. 55(b) that defendants receive at least three days notice of the motion.

therefore, must be examined to determine if "there is a sufficient basis in the pleadings for judgment to be entered." Id.

A. Count I - Substandard Housing

Plaintiffs claim that defendants do not comply with Florida Statute §83.51(2)(a) which imposes an obligation on landlords to maintain premises. Section 83.51(2) generally obligates the landlord of a dwelling unit to make reasonable provision for the extermination of vermin, to provide locks and keys, and to maintain clean and safe condition of common areas, provide garbage removal. The landlord is also required to comply with the requirements of the building, housing, and health codes. F.S. §83.51(1)(a). Tenants may recover for the failure to comply with this statute. F.S. §83.55.

Plaintiffs have provided ample evidence of the defendants' liability under this statute. First, plaintiffs have provided affidavits by all of the named plaintiffs which discuss the substandard conditions in their apartments. See Exhibits A - E to plaintiff's Motion. For example, plaintiffs Duncan, Trotman, and Jackson all complain of rats, mice, or bugs being in their apartments. Several of the affidavits relate that various appliances such as stoves and refrigerators did not function or that their plumbing did not work. All of the plaintiffs describe their apartments as being in general disrepair.

Plaintiffs have also amassed other evidence of substandard conditions at the Apartments. An inspector's report on the Apartments from April 24, 1989 shows that tenants suffered from severe housing conditions. Exhibit G. Plaintiffs have also included

several notices of code violations from the City of Fort Myers Building & Zoning Dept.

In light of this evidence, the Court finds that plaintiff is entitled to default judgment on count I.

B. Count II - Wrongful Termination of Housing Assistance

Plaintiffs' claim that defendants have terminated their housing assistance without notice, or with inadequate notice, in violation of their fifth amendment right to receive due process. The Court must first determine whether count II states a claim.

Tenants who receive federal rent subsidies under Section 8 have "constitutionally protected property rights in an expectation of continued occupancy and receipt of rent and utility subsidies." Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919 (11th Cir. 1982). In turn, prior to terminating a Section 8 tenancy for "good cause," the landlord must provide at least 30 days notice as to the grounds for termination. 24 C.F.R. §247.4(a) & (c). The period is substantially shorter, however, for a tenants' noncompliance with major provisions of the lease. 24 C.F.R. 247.4(c); F.S. §83.56. Private owners of federally assisted housing, such as Sabal Palms Apartments, are subject to fifth amendment restrictions because of their close involvement with the federal government. Geneva Towers Tenants Org. v. Federated Mortgage Inv., 504 F.2d 483, 487-88 (9th Cir. 1974).

In support of their claim, plaintiffs have supplied two affidavits (Exhibits C & E) as well as requests for admission to which defendant filed no objection (Exhibit F). In admissions #23, #24, and #25, defendants admit that their letters terminating

assistance did not describe in adequate detail the reasons for termination, did not tell tenants they could contest their terminations, and did not permit tenants to contest terminations of assistance.

The Court finds, therefore, that count II states a claim, is supported by the evidence submitted, and that default judgment should be granted for plaintiffs.

C. Count III - Violation of Due Process For Excessive Charges

Plaintiffs' claim that defendants have deprived them of property without due process by assessing miscellaneous charges against plaintiffs without adequate notice or an opportunity to dispute the charges. As in count II, defendants are subject to fifth amendment restrictions. Id.

Priscilla Duncan, for example, explains that the Apartment manager told her that she owed a substantial debt to Sabal Palm Apartments. Yet, Ms. Duncan states that she never received a bill or notice of the amount due. After Ms. Duncan moved out, the manager of the Apartments showed her a paper which said that she owed more than \$600.00. When she reapplied for housing, the manager had raised the amount to \$2,900. Plaintiff Duncan states that she was denied public housing because of this erroneous bill. In addition to admissions, this count is also supported by the allegations of plaintiff Kirk.

The Court finds, therefore, that count III is sufficient to state a claim for deprivation of property without due process.

D. Count IV - Breach of Contract

In count IV, plaintiffs assert a claim as third party beneficiaries to a contract between HUD and the defendants. Defendants and HUD entered in a "Housing Assistance Payment Contract" ("HAP") to govern the payment of federal subsidized housing for qualified tenants. (Exhibit A, Doc. #27). Whether plaintiffs have standing as third party beneficiaries under the contract was addressed in Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981). In Holbrook, the Seventh Circuit held that tenants are the intended beneficiaries of a contract between the owners of Section 8 housing and HUD and that "tenants have enforceable rights [under the contract] since the Contracts were intended to provide them with rental assistance." Id. at 1273. The defendants' HAP contract imposes a duty on defendants to "maintain and operate the contract units and related facilities so as to provide decent, safe and sanitary housing as defined by HUD." HAP §14(a). Defendants are also contractually bound to "terminate families only in accordance with applicable state and local law, the lease and HUD regulations and administrative procedures." HAP §15(j).

In count IV, plaintiffs allege that defendants have breached this agreement by failing to maintain the property and by improperly terminating tenants from receiving housing assistance. Plaintiffs' claim as third party beneficiaries is meritorious in light of the allegations and evidence discussed above. The Court is satisfied, therefore, that count IV states a claim and is supported by the evidence.

E. Count V - Breach of Contract

Similar to count IV, plaintiffs claim that they are third party beneficiaries to the "regulatory agreement" between HUD and the defendants, and that defendants have breached that agreement by failing to maintain decent, safe and sanitary housing and by failing to comply with federal regulations. See Exhibit B, Doc. #27. The National Housing Act of 1934, 12 U.S.C. §1701 et seq. provides for low interest loans to owners of low income housing. As a condition to receiving these loans, a developer of public housing, such as defendants, will enter into a "regulatory agreement" which resembles a contract for mortgage insurance. This regulatory agreement obligates the owners of HUD insured property to operate the project in accordance with HUD regulations. 24 C.F.R. §221.529.

Plaintiffs point to four provisions in the contract which, they argue, operate and are intended to benefit project tenants. Falzarno v. United States, 607 F.2d 506 (1st Cir. 1979). For example, plaintiffs state that paragraph 7 of the agreement requires owners to maintain the premises in good repair and condition. Section 7 of the contract, however, appears to be written with the mortgagee and the mortgage insurer in mind. It states that the "Owners shall maintain the mortgaged premises . . . in good repair"; and, the provision continues: "In the event all or any of the building covered by the mortgage shall be destroyed by fire . . . the money derived from any insurance shall be applied in accordance with terms of the insured mortgage." Unlike the HAP contract, the Court does not find that the regulatory agreement was intended to directly benefit the tenants. Falzarno v. United States 607 F.2d 506, 511 (1st Cir.

1979). To be sure, the overall purpose of the program was to benefit low income tenants. Yet, the regulatory agreement appears to be geared more toward providing loan insurance. As the Court noted in Falzarno: "The regulatory agreements . . . do not disclose an intent to benefit the tenants, except as they might be incidental beneficiaries . . . " Id.

Accordingly, the Court does not find that count V is sufficient such that judgment may be entered on this count.

Upon due consideration, therefore, plaintiffs' motion for default judgment is GRANTED IN PART as to Counts I - IV.

The issues regarding damages and attorney's fees and costs are REFERRED to the United States Magistrate to conduct any proceedings necessary to the making of a report and recommendation. Plaintiff is directed to submit a proposed judgment stating the declaratory and injunctive relief sought within (10) days from the submission of the Magistrate's Report.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 7th day of June, 1990.



UNITED STATES DISTRICT JUDGE