IN THE COUNTY COURT OF DOUGLAS COUNTY, NEBRASKA

WILLIAM STANEK, **Plaintiff,** **vs.** **JESSIE REED,** **Defendant.** **And in a separate action,** **JOHN DOE,** **Defendant**	**Case No.: CI 20-9102** **Case No.: CI 20-xxxx** **DEFENDANTS' BRIEF IN OPPOSITION** **JUDGE HARMON**

INTRODUCTION

Defendants Jessie Reed (hereinafter "Ms. Reed") and John Doe (hereinafter "Mr. Doe"), by and through their attorney, Caitlin Cedfeldt of Legal Aid of Nebraska, submit the following Brief in Opposition to Plaintiff's Complaint for Restitution of the premises located at 2557 Jones St. Omaha, NE 68105 ("Property"). The Defendants argue that the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), effective March 27, 2020 prohibits Plaintiff from filing of an eviction on the basis of nonpayment of rent because there is a preponderance of evidence that the Property participates in certain federal programs covered by the CARES Act moratorium: (1) Housing Choice Voucher Program ("Section 8") and (2) federally insured loans. In addition, Plaintiff should have affirmatively plead that the CARES Act does not apply to the Property. Ms. Reed and Mr. Doe each pray the court dismiss Plaintiff's actions with prejudice and issue order precluding the reintroduction of subsequent eviction actions against them until after July 25, 2020.

STATEMENT OF FACTS

Ms. Reed and Mr. Doe each have a written lease agreement with Mr. Stanek, the Plaintiff, for lease of units located on the Property. Both Ms. Reed and Mr. Doe were required to pay rent pursuant to their written lease agreements and were unable to pay in the months of April and May respectively. The Plaintiff served both Ms. Reed and Mr. Doe written notices to pay rent within seven (7) days or their leases would be terminated. During the seven (7) day period after the Plaintiff served Ms. Reed and Mr. Doe with notice, neither Defendant paid any further amounts to the Plaintiff nor returned possession of their units.

At each trial, Ms. Reed and Mr. Doe testified that they found the Property through an online and print source for local and national classified listings, Thrifty Nickel. The advertisement described the property's dwellings and specified that Section 8 vouchers are accepted. The Court received into evidence copies of Plaintiff's current advertisement as well as Plaintiff's advertisements in the Thrifty Nickel from April and May. Both Ms. Reed and Mr. Doe testified that to their knowledge, there were Section 8 recipients living in their building. Plaintiff, in his testimony, denied that he had Section 8 recipients living at the Property. Ms. Reed also testified that her rent was previously subsidized through Heartland Family Services, and that she believed that program was federally funded. In addition, the Plaintiff admitted that there is debt on the Property and at least one mortgage, but Mr. Stanek denied any knowledge of whether the loan was involved in a federal program. The Court received into evidence a copy of the first page of a deed of trust which represents one such loan on the Property.

ARGUMENT

There is a preponderance of evidence that the CARES Act eviction moratorium applies to the Property and should preclude the Plaintiff from obtaining evictions against Ms. Reed or Mr.

Doe. The CARES Act restricts landlords of "covered dwellings" from filing new eviction actions for non-payment of rent or other fees or charges during the first 120 days thereafter (i.e., until July 25, 2020). *See* § 4024(a)(1)(A). A "covered dwelling" means substantially any type of residential tenancy with a lease, so long as the tenant actually occupies the unit and the unit is in a "covered property." A "covered property" is defined as (1) secured by a federally backed mortgage loan, (2) secured by a federally backed-multifamily loan, or (3) participates in certain "covered housing programs" as defined under 34 U.S.C. § 12491(a), such as Section 8, Freddy Mac/Fannie May loans, HUD loans, federally insured loans, or the low-income housing tax credit program. *See* CARES Act § 4024(a).

In the cases before the Court, Ms. Reed and Mr. Doe have presented evidence and testimony that their units are "covered dwellings" and that the Property is a "covered property" under the CARES Act because the Property participates in the Section 8 program, and it is highly likely that the loan on the Property is federally insured. Lastly, the Plaintiff should be required to show the Property is not covered under the CARES Act.

1. The units in both cases before the Court are "covered dwellings" as defined by the CARES Act.

Determining whether a tenancy is covered by the federal moratorium depends on whether the unit is a "covered dwelling." CARES Act, § 4024(a)(1). The Act defines "covered dwelling" to include substantially any type of residential tenancy, so long as the dwelling (i) is occupied by the tenant pursuant to a residential lease, and (ii) the unit is in a "covered property." *See* § 4024(a)(1)(A). The question of whether the property in question is a "covered property" is discussed below. No party contested at trial whether Ms. Reed and Mr. Doe resided in their units

pursuant to residential leases. Therefore, both units satisfy the first requirement in determining whether the units are "covered dwellings."

2. **The Property in both cases before the court is a "covered property" as defined by the CARES Act because it accepts Section 8 vouchers.**

The text of the CARES Act clearly provides that participation in a VAWA-covered program on behalf of some residents would makes the entire property a "covered property." *See* CARES Act, § 4024(a)(2)(A)(i-ii).This means if a property has any participating tenants, then non-participating tenants in the same property would thereby qualify as occupants of "covered dwellings" entitled to protection against eviction for nonpayment of rent or other charges during the moratorium period. *See* CARES Act, § 4024(b). Both tenants testified that they were aware of other tenants that used the Section 8 Voucher Choice program. The Plaintiff also consistently advertised that his building accepted Section 8 vouchers. Thus, the Property is a "covered property."

Although a plain reading of the statute would indicate that any building that accepts Section 8 vouchers falls under the purview of the CARES Act moratorium, Plaintiff may argue that HUD has issued contrary guidance. HUD has taken the position in its April 21, 2020 FAQ document (hereafter "EM12") that the moratorium only applies to specific units that are receiving Section 8 vouchers. However, this is in direct conflict with the statutory text. EM12 is only interpretive guidance and was not promulgated through notice and comment or other formal rulemaking. Therefore, EM12 lacks the force of law and is not entitled to the high level of deference afforded under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, EM12 does not reflect a permissible construction of § 4024 because the statutory text unambiguously reaches all tenancies at properties *participating* in VAWA-covered programs or

the RD voucher program. *See Chevron* at 844 (no deference given to agency interpretation that is "arbitrary, capricious, or manifestly contrary to the statute").

As *Chevron* deference is not appropriate, EM12 is entitled only to deference insofar as the Court may find it to be a persuasive reading of the statutory text. Again, that interpretation is in direct conflict with a plain reading of the text of § 4024(b) and the definition of a "covered property" in § 4024(a)(2), wherein it clearly states the "term 'covered property' means any property that *participates* in a covered housing program." *Id.* (emphasis added).

EM12 also lacks any explanation for how HUD reached this interpretation of the text, stating only that "HUD does not have the authority to extend jurisdiction over unassisted tenants or the property that does not have a federal backed mortgage." This statement may accurately reflect limits specifically on HUD's ability to engage in any investigation or enforcement activity over an entity that violates § 4024(b), but HUD cannot affect the ability of Congress to regulate residential landlords under the Commerce Clause or the ability of state courts to dismiss eviction lawsuits brought in violation of that regulation.

Given the statutory text and definitions provided therein, it is clear that the plaintiff in this action participates in a VAWA program by advertising the availability of Section 8 voucher choice acceptance. Further, it is the testimony of both defendants that they are aware of other tenants who utilize Section 8 vouchers. By this participation, Plaintiff is barred from filing an eviction against defendants for nonpayment of rent until July, 25, 2020.

3. The Property is also a "covered property" under the CARES Act because of its existing mortgage.

The CARES Act defines "covered property" as any property that participates in (A) a covered housing program as defined in Section 41411(a) of the Violence Against Women Act of

1994; or (B) the rural housing voucher program under section 542 of the Housing Act of 1949; or (C) has a Federally backed mortgage loan or a Federally backed multifamily mortgage loan. *See* CARES Act, § 4024(b). The CARES Act further defines "Federally backed multi-family mortgage loan" as any loan (other than temporary financing such as a construction loan) that is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of five or more families that is made, insured, guaranteed or assisted in any way by any officer or agency of the Federal Government. *See* CARES Act, § 4023(f).

During the eviction trials of both Ms. Doe and Mr. Reed, Plaintiff conceded that there is currently a mortgage on the Property. Although Plaintiff stated at trial that he did not **he had no knowledge of whether** his mortgage was federally backed, and that he "knows it to be a commercial loan", this assertion may not take into account the above broad definition of "federally backed" within the CARES Act. The Plaintiff did not state with any certainty whether his mortgage was federally backed. The National Multifamily Housing Council estimates that the federal government underwrites or insures nearly half of all multifamily mortgage debt. *See* Nearly Half of Multifamily Mortgage Debt is Federally Backed, https://www.nmhc.org/news/nmhc-news/2020/federal-government-backs-nearly-half-of-multifamily-mortgage-debt/ (last visited on June 9, 2020). The Government Accountability Office estimates that 70% of all home loans are federally backed. *See* CARES Act provides relief to some homeowners during coronavirus outbreak, https://blog.gao.gov/2020/04/28/cares-act-provides-relief-to-some-homeowners-during-coronavirus-outbreak/ (last visited on June 9, 2020).

Given the substantial possibility that Plaintiff's mortgage is, in fact, federally backed, the Court should not enter judgment in favor of the Plaintiff because he has not demonstrated that the Property is not subject to the federal moratorium. It would be unfair and contrary to the interests

of justice for the Court to enter an eviction against Ms. Reed or Mr. Doe at this time because there is a loan on the property, and Plaintiff could not show how the mortgage was insured.

While Ms. Reed and Mr. Doe evicted during the CARES Act temporary eviction moratorium, the CARES Act protections do not absolve them of their legal responsibilities. Both Ms. Reed and Mr. Doe still face financial and legal liabilities, including eviction, after the moratorium ends. However, the Plaintiff is barred by the CARES Act Ms. Reed and Mr. Doe until after July 25, 2020.

4. The Plaintiff should have affirmatively pled that the Property is not covered by the CARES Act.

A landlord who files an eviction action during the federal moratorium period under the CARES Act has the **burden** to both plead and prove that the property at issue is not subject to the federal eviction moratorium. The landlord must affirmatively show that tenants in the property (including defendants in the eviction actions) do not participate in covered programs accepted by the landlord, nor is the property secured by a federally-backed loan. *See* CARES Act § 4024; *see also In re Response to the COVID-19 Pandemic – Eviction Filings*, 2020 WL 2048580 (Ark. Apr. 28, 2020).

Supreme courts in multiple states have held that a landlord must affirmatively show that there is not a federally backed mortgage loan or federally backed multifamily mortgage loan in order for landlords to proceed with evictions. Several other states that have adopted the Uniform Residential Landlord Tenant Act (URLTA), as Nebraska has, have affirmed that this burden falls on the plaintiff in any eviction proceeding.

Specifically, the Oklahoma Supreme Court has interpreted the protections outlined in CARES § 4024 to require a plaintiff filing any type of eviction proceeding to plead the subject

property is or is not a "covered dwelling" under the CARES Act. *See Order Regarding Coronavirus Aid, Relief, and Economic Security Act*, 2020 WL 2093065 (Okla. May 01, 2020); *see also* Supreme Court of Illinois, 2020 ILLINOIS COURTORDER 0016 (C.O. 0016) PLAINTIFF'S CARES ACT EVICTION CERTIFICATION. Here, Plaintiff did not meet their **burden** in the pleadings, as the Complaint is void of any information regarding the CARES Act and its applicability to the Property. It is also a matter of fairness and practicality that the Plaintiff should have to affirmatively plead that the CARES Act does not apply to the Property. Ms. Reed and Mr. Doe cannot be expected to have access to that information, while the Plaintiff would.

CONCLUSION

For the foregoing reasons, Ms. Reed and Mr. Doe respectfully request this Court to dismiss the Plaintiff's complaints filed in each action pursuant to the CARES Act, and an order precluding the reintroduction of subsequent eviction actions against them until July 25, 2020 at the earliest.

Dated this 10th day of June, 2020.

JESSIE REED, Defendant,
and in a separate action,
JOHN DOE, Defendant.

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