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NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

REUBEN LUNA, et al.,

Plaintiffs and Respondents,

v.

THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Defendant and Appellant.

2D CIV. NO. 42571

(Sup. Crt. No. C 969 666)

COURT OF APPEAL-SECOND DIST.

FILED

MAY 29 1974

CLAY ROBERTS, Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry Pacht and Joseph A. Wapner, Judges. Judgment modified and affirmed.

Charles R. Brady and Harvey A. Sniderman, for Defendant and Appellant.

Western Center on Law & Poverty, Daniel M. Luevano, Rosalyn M. Chapman, and Philip L. Goar, for Plaintiffs and Respondents.

Plaintiffs, public assistance recipients, brought a class action on behalf of themselves and all others similarly situated against defendant, The Housing Authority of the City of Los Angeles, attacking defendant's practice of charging public assistance recipients higher rentals than were charged

other tenants with the same net income. The complaint sets forth two causes of action: a first cause of action for declaratory and injunctive relief, and a second cause of action for damages. On June 12, 1970, plaintiffs' motion for summary judgment as to the first cause of action was heard by Judge Jerry Pacht, and an order was filed on July 7, 1970, granting the motion as to the first cause of action. This order struck the answer to the first cause of action and provided that when judgment was later entered in the action, the claim of plaintiffs, as set forth in the first cause of action, was to be deemed established. A five paragraph form of "judgment" disposing of the first cause of action was set forth for incorporation in the final judgment.

The "judgment" declared it was unlawful for defendant to charge public assistance tenants a higher rent than that charged nonassistance tenants, otherwise similarly situated as to net family income and number of children. It also permanently enjoined defendant from (1) using its flat rent schedule, theretofore applicable to public assistance tenants, unless it were used for all tenants, or (2) charging a public assistance tenant a rent which is higher than the rent charged a non-assistance tenant, otherwise similarly situated as to net family income and number of children. "Net family income" was defined in said "judgment" as set forth in defendant's regulation defining it, which was attached as an exhibit.

The trial of the first and second causes of action was severed; to ensure that no unlawful rental charges were made pending trial of the second cause of action, a preliminary injunction was granted.

At the trial of the second cause of action the evidence was limited to the issues as to the propriety of, and the amount of, damages plaintiffs and other members of the class should receive on account of the unlawful rental charges of defendant. An objection was sustained to defendant's attempt to offer evidence with respect to the lawfulness of its rent schedules. Defendant submitted an accounting of the amounts of the overcharges with respect to each public assistance tenant, which plaintiffs stipulated was accurate. Testimony was received as to the effect which a money judgment, in the total of such overcharges, would have upon defendant's operations. On the basis of this evidence and the prior order granting summary judgment, a judgment on both the first and second causes of action was entered December 21, 1972. This judgment incorporated the form of "judgment" set forth in the order granting summary judgment as to the first cause of action. With respect to the second cause of action the judgment decreed that the plaintiffs and the other members of plaintiffs' class (named in an attached list) recover judgment against the defendant in the total amount of $455,299.68, owing to the plaintiffs and the members of plaintiffs' class in the amounts set forth in said list.

Defendant appeals from the judgment entered on December 21, 1972.

Statement of Facts

For the most part the facts are uncontradicted and are as stated in the findings of fact. Defendant Housing Authority is an agency of the State of California and a non-profit corporation acting as an entity pursuant to the provisions of our Housing Authorities Law (Health & Saf. Code, §§ 34200, et seq.), the federal Low-Rent Housing Law (42 USC §§ 1401, et seq.), and regulations promulgated by the Department of Housing and Urban Development, hereinafter called HUD, "for the purpose of providing low rent housing to persons and families with limited income." Plaintiffs and members of their class were, at some times between the dates November 28, 1968 and March 23, 1970, recipients of public assistance from the Los Angeles County Department of Public Social Services, and were residents of projects administered by defendant.

During the above period defendant computed the rents payable by plaintiffs and other tenants, any part of whose income was from public assistance, by using a "flat rent schedule," whereas it computed the rents of all other tenants by using a "graded rent schedule." Both schedules referred to net family income. The flat rent schedule, however, generally provided for a higher rental for the same net income because each flat rental was applicable to a wide range of income and

was the same as the highest of the many graded rentals within the income range covered by it. In application, the two schedules resulted in the public assistance tenants generally paying a higher rental in relation to net income than other tenants.

Though apparently a general, friendly discussion between defendant and an attorney with the Western Center on Law and Poverty about the budget consequences of adopting a graded rent schedule for all tenants occurred in October 1969, the first demand for a change in the rent schedule made in behalf of public assistance tenants appears to have been a "Claim for Rent Overcharges," filed with defendant on November 28, 1969. This claim was denied by operation of law, and the complaint was filed January 27, 1970.

Plaintiffs' motion for summary judgment was based upon the contention that the use of the two rent schedules was an unconstitutional discrimination against public assistance tenants solely because of their status as such recipients. As plaintiffs pointed out in their memorandum in support of the motion, the broad denials of the answer had been considerably narrowed by taking the deposition of defendant's officer who verified it, and the area of disagreement as to the facts was relatively limited. There was no dispute about the fact there were two rent schedules, that the flat rent was applicable only to public assistance recipients, and that with the same net

family income and number of children, a higher rental was payable by each of the named plaintiffs than would have been payable under the graded schedule.

The position taken by the defendant in opposition to the motion for summary judgment was: (1) to rely upon its previously made motion to dismiss upon the ground that HUD was an indispensable party; (2) to claim that the flat rent schedule had been established by negotiation with the Los Angeles County Department of Public Social Services at rates less than that agency's shelter allowance for its clients, all as directed by a manual issued by HUD's predecessor, PHA; and (3) to assert that the classification justifiably favored employed tenants on the basis of "work related expenses" which effectively reduced their income available to meet other living expenses, such as rent.

Two declarations were filed by defendant in opposition. One of these was the declaration of Virginia Hedges, General Housing Manager of defendant. It dealt with all three of defendant's contentions. In respect of HUD's alleged status as an indispensable party, it stated the declarant was administering defendant's projects "as delegated to me by Robert F. Johnson, HUD in Possession, the U.S. Government's Agent in Possession of the Housing Authority of the City of Los Angeles." However, it contained no explanation of the contractual or legal basis of such possession nor any facts suggesting either that defendant's beneficial ownership of the rents was impaired or its power to

control the rent schedules was diminished.

The second subject dealt with in the Hedges declaration was the defendant's attempted justification of the flat rent schedules as the product of negotiation with the DPSS in accordance with the HUD manual. The declaration attached an excerpt from a manual issued by HUD's predecessor, PHA, and stated that defendant was guided by it in establishing its flat rent schedules which were submitted to and approved by the regional office of HUD. The pertinent provision of the attached manual states:

> "The PHA urges that wherever possible local authorities negotiate special agreements with relief agencies, providing for flat amounts for rent, which amounts such agencies will include in the total grants to their clients." (Emphasis added.)

Reference was made in the declaration to the Hedges deposition testimony to the effect that in negotiating the flat rent rentals with the Department of Public Social Services they were established at a rate which was less than the "shelter allowance," one of the categories of need upon which the monthly welfare assistance was based. Though the declaration referred to the "shelter allowance" the public assistance tenants "would receive," the declarant conceded that by virtue of the operation of maximum amounts payable, "the maximum as stated by the DPSS barely covers the recipient/tenants' basic needs without including shelter rent."

The Hedges declaration also dealt with so-called "work related expenses," and said in this connection "the rent paying ability of a tenant is based upon his source of income. Where he is employed, he incurs work-related expenses ordinary and extraordinary which a nonemployed tenant does not have, and which defendant does not allow in computing rent-paying ability."

The other declaration in opposition, that of Harvey A. Sniderman, attorney for defendant, is almost entirely argument, and is pertinent only insofar as it contains a concession as follows:

> "If the source of a tenant's income has nothing to do with the tenant's ability to meet living expenses including rental expenses, then any classification and any rent differential on that basis would be unreasonable and arbitrary on its face."

In their moving papers plaintiffs dealt with each of defendant's contentions. With respect to defendant's contention that HUD was an indispensable party, plaintiffs pointed out defendant's pleadings admitting that it has "legal title to the projects and owns and operates them."

Plaintiffs' reply to defendant's contention that the arrangements with the Department of Public Social Services provided for the public assistance recipients to receive an allowance providing for payment of their rent was to attach the pertinent publications of the Department of Public Social

Services showing that the actual cost of housing was merely a component of theoretical need, not an amount included as such in the total grant to the public assistance recipients, and to point out that actual payments to public assistance recipients were not equal to such need.

In response to defendant's contention that the higher rent paid by public assistance recipients was justified on the basis of work-related expenses incurred by wage-earning tenants, plaintiffs pointed out that defendant had already included in its definition of "net income" appropriate deductions for work-related costs such as transportation and child care, and a standard deduction of 7 per cent of gross earned income for all working people. Plaintiffs further showed (a) that the graded rent schedule was applicable to all nonpublic assistance tenants regardless of whether their income came from earnings or from such other sources such as pensions, alimony, or social security which entailed no work-related expenses, and (b) that the flat rent schedule was applicable to all tenants who received any public assistance regardless of whether they were also employed.

On the basis of the material presented, the judge who heard the motion for summary judgment concluded there was no rational basis for the classification and that the rental schedules were unlawfully discriminatory.

When the trial of the second cause of action occurred, the evidence with respect to the remaining issues was to the

effect that though defendant had an operating reserve balance of $1,349,011.25 as of July 31, 1971, it was operating at a loss as the result of the fact that its rents were below its management, maintenance and operating costs. According to an HUD representative, a further reduction in defendant's reserves would place them "dangerously close to the minimum amount of money required for operating capital." The present rate of deficit was such as ultimately to wipe out the reserves by reason of which some action to increase income was necessary. It was shown that under current federal law, there was a limit to the amount the rent could be raised, because it was not permitted to exceed 25 per cent of the income of tenants.

Issues

1. Was a summary judgment properly granted declaring defendant's rent schedule discriminatory?

2. Is HUD an indispensable party to this action?

3. Did the court properly award damages to the plaintiffs?

The Reasonableness of the Classification

Both the federal law (42 USC § 1402) and the applicable provision of the California law (Health & Saf. Code, § 34322) vest discretion in the Housing Authority to fix rents after taking into consideration (a) "the family size, composition, age, physical handicaps, and other factors which might affect the rent-paying ability" of the tenant, and (b)

"economic factors which affect the financial stability and solvency of the project." Consequently, defendant had authority to make reasonable classifications; that is, it could validly classify tenants for rental purposes on any basis bearing a reasonable relationship to the purpose for which public housing was maintained. Furthermore, since it was dealing with matters in the area of economic regulation, its classification was invested with a presumption of constitutionality and must be sustained if any state of facts reasonably can be conceived that would sustain it. The rule in this respect was stated by the Supreme Court in Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784:

[fn. omitted]

> "As this court has previously noted, /the United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.]"

This does not mean, however, that if, upon examination, it appears that there is no reasonable relationship, the classification shall not be held invalid:

> "Article I, sections 11 and 21 of the California Constitution guarantee to every person that '[a]ll laws of a general nature shall have a uniform operation' and that '[no] citizen, or class of citizens, [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens'; the Fourteenth Amendment of the United States Constitution frames a similar commitment, mandating that no state may 'deny to any person within its jurisdiction the equal protection of the laws.' This principle of 'equal protection' preserved by both state and federal Constitutions, of course, 'does not preclude the state from drawing any distinctions between different groups of individuals' [Citation], but it does require that, at a minimum, 'persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'[Citations.]" (Brown v. Merlo, 8 Cal.3d 855, 861.)

On its face, a classification based upon the tenant's receipt of all or any part of his income from public assistance does not appear to bear any rational relationship to the legitimate purposes of the public housing statutes. Given the same amount of net income, income source does not, as such, affect "rent-paying ability." Consequently, plaintiffs' motion for summary judgment called for defendant to supply an evidentiary basis upon which the classification might be found to be reasonable.

The first such basis urged by defendant was the claim stated in the Hedges declaration that a tenant whose earnings are the product of employment "incurs work-related expenses ordinary and extraordinary which a non-employed tenant does not have." This rationale was demonstrated by plaintiffs to be simply inapplicable inasmuch as the classification was not between employed and nonemployed tenants but between public assistance tenants, both employed and unemployed, and all other tenants regardless of the source of their income, including persons whose income consisted of private pension payments, alimony, unemployment insurance or social security. If the basis of classification were employment income, as opposed to nonemployment income, its reasonableness could arguably be sustained. But this was not a classification based upon employment. The same fallacy was found to invalidate a like classification in Hammond v. Housing Authority (1971)(U.S.D.C., Ore.) 328 F.Supp. 586, where the court said, at page 588:

> "It makes no sense to classify, for example, pensioners or recipients of social security retirement benefits in the same category as working tenants. Such tenants have no greater work-related expenses than have welfare mothers. Nevertheless, defendant did so classify them.
>
> "I can find no reasonable justification for discriminating for rental purposes between nonworking welfare tenants and other nonworking tenants receiving equal income from other sources."

It is, therefore, not necessary for plaintiffs to rely upon the further fact that defendant's formula for the determination of net income purports to take into account both ordinary and extraordinary work-related expenses by allowing appropriate deductions from an employed tenant's gross income.

The second basis urged by defendant to support the classification was its claim that its flat rent schedule was negotiated with the local Department of Public Social Services as urged by the HUD manual recommending agreements providing for flat amounts of rent "which amounts such agencies will include in the total grants to their clients." If such agreements were in effect at the time the flat rent payments were made by plaintiffs there would have been a rational basis for the classification. Any public assistance recipient whose rent was thereby fully paid would ipso facto have ability to pay such rent. However, the evidence submitted in support of this assertion failed to sustain it and showed to the contrary that defendant had no such agreements in effect during the pertinent period.

The Department of Public Social Services publication produced by plaintiffs showed that the "actual cost of housing" incurred by welfare recipients was recognized for inclusion in computing the theoretical standard of need. As the court pointed out in California Welfare Rights Organization v. Carleson, 4 Cal.3d 445, 450, this standard of need was merely a yardstick for determining eligibility for public assistance and did not result in the receipt of actual aid payments in any such amount.

The opinion in that case also makes it clear that the maximums in effect in California did in fact fall far short of the standard of need. One of the emergency measures taken by the State Director of Social Welfare, increasing the benefits to avoid forfeiture of federal funds, was to establish a system of "ratable reductions" at 69 per cent of need. There was, therefore, no valid basis for defendant to claim that the flat rentals paid by the welfare recipients were included in the grants they received from DPSS.

It is thus apparent that there was no genuine issue of fact presented and that the summary judgment declaring the use of the flat rent schedule unlawful was correct.

The Indispensable Party Claim

In support of its claim that HUD is an indispensable party, defendant cites section 389 of the California Code of Civil Procedure, and in particular that portion which makes

indispensable a party whose "absence will prevent the court from rendering any effective judgment between the parties or will seriously prejudice any party before the court."

An extended argument is made based upon a resolution dated April 11, 1963, by which defendant's chairman of the board was authorized to enter into an agreement with HUD "transferring and delivering possession of the federally aided projects to HUD." Further reference is made to an agreement which was entered into with HUD to that effect. Neither the resolution nor the agreement has been made a part of the record in the case. The record is clear, however, that throughout the period of such "possession," defendant retained legal title to its property, made all leases in its name, and collected all rents. There is, moreover, no evidence that defendant did not exercise its own discretion in establishing its rent schedules. There is, therefore, nothing in the record to suggest that defendant's actions in respect to the establishment of such rent schedules was in fact action of HUD.

Defendant does not explain what could have been determined with HUD a party that would in any way improve its position over what it is under the present judgment. There is no suggestion of any basis upon which the court could have made a determination that HUD was obligated to pay anything on account of the judgment or which would foreclose HUD from taking whatever action may be appropriate under its contractual arrangements with defendant as a result of the judgment or any consequence following from it. The evidence indicated merely that HUD

contributes funds under an annual contribution contract which funds are normally available only to pay the interest on the bonded indebtedness incurred to construct the project, and not to pay the cost of operation. Whatever HUD's or defendant's rights are under such contracts, they remain unaffected by the judgment under review.

The Propriety of Awarding Plaintiffs Damages

Defendant contends that even if the rent schedules were unlawfully discriminatory, it should not have been subjected to a money judgment in favor of the plaintiffs. Two bases are asserted by defendant in support of its contention.

The first basis of defendant's objection to the award of damages is that it is akin to an award of retroactive welfare benefits where they have been unlawfully withheld. Defendant cites various federal cases where total retroactive payment was denied. There is perhaps some foundation for viewing subsidized public housing as a form of public assistance. It is, however, not a matter of statutory entitlement like the welfare payments to which defendant's cases refer. There are, moreover, California cases which have ordered payment of retroactive welfare benefits. (See County of Alameda v. Carleson, 5 Cal.3d 730; Bd. of Soc. Welfare v. County of L.A., 27 Cal.2d 81; Daley v. State Dept. of Social Welfare, 276 Cal.App.2d 801.) It does not appear that

authorities relating to the payment of retroactive welfare benefits in any way preclude the recovery of damages by plaintiffs and the members of their class in this case.

Another argument urged by defendant which has more merit is based upon the considerations found persuasive by the court in Hammond v. Housing Authority, supra, 325 F.Supp. 586. This case, upon which plaintiffs place considerable reliance to show the unlawful nature of the discrimination, is eschewed by them as distinguishable so far as it denied a money judgment. The decision of the court in that case included the following reasons for the denial of an award of money damages:

> " The remedy in this case poses more difficulty than defining the wrong. If injunctive relief were necessary, this would be an appropriate case for such relief. But in January 1970, after the plaintiffs sought legal advice, defendant voluntarily discontinued the practice of charging public assistance tenants a different rental than it charged other tenants receiving equal income. A unitary rental schedule is now in use.
>
> " Plaintiffs seek money damages from the Housing Authority to compensate them for the overcharges they claim to have suffered.
>
> " A substantial money judgment would work a hardship, not only upon the defendant Housing Authority, but upon its present tenants as well. The defendant would almost certainly have to raise the rent charged all its tenants in order to pay any judgment imposed, since the Housing Authority has no sources of income other than the rents received from its low-income tenants.

> " The plaintiffs paid a subsidized rent without protest for many years. They bear at least some of the burden of volunteers. They made no protest until very recently. When they made their protest, the policy was changed. Under all the circumstances, the plaintiffs have shown little, if any, direct damage. There is no showing that the housing, subsidized as it was, was not worth as much, or more than, the rents they paid.
>
> " Plaintiffs have proven no substantial damage. "
> (325 F.Supp. at p. 588.)

Contrary to plaintiffs' assertion, the Hammond case is distinguishable only insofar as defendant continued to employ its flat rent schedule after plaintiffs filed their claim asserting its unlawfulness on November 28, 1969. Prior to that date plaintiffs and the other members of their class were no less volunteers than the plaintiffs in Hammond. The rent they paid, like the rent paid by the plaintiffs in Hammond, was less than they would have paid for private housing. The defendant, like the defendant in Hammond, is shown by the evidence to have no source of funds to replace those used to pay the judgment except by raising all its rents within the legal limit. The tenants who will have to bear that burden are current and future tenants, not those who received some benefit in 1969 and 1970 from the discrimination against plaintiffs.

To the extent that plaintiffs have in no way contributed to the necessity that this burden be borne by those

who did not benefit, it is appropriate to spread the burden upon all of defendant's tenants and not just upon the plaintiffs. Thus, damages were properly awarded for the time after plaintiffs filed their claim on November 28, 1969, and until the discrimination was ended on March 23, 1970. Damages should not have been awarded for the earlier period during which defendant was not afforded the opportunity to remedy the matter in a more equitable fashion by redistributing the burden among its then tenants. The judgment with respect to the second cause of action should, therefore, be modified by striking therefrom the award of damages in the sum of $455,299.68 and the incorporation of the attached list of individual amounts. A new accounting by defendant showing the correct amount payable to plaintiffs and to each member of the class with respect to the period November 28, 1969 to March 23, 1970, is required. Upon approval of such account by the court, a new judgment should be entered for the total and the individual amounts shown thereby.

A modification of the judgment in one further respect is also required. The judgment with respect to the first cause of action permanently enjoins the defendant to continue in effect its then effective rule defining "net family income." Though this regulation was promulgated by defendant and was accepted as valid by plaintiffs, no basis was shown for perpetuating this regulation which applied to all tenants of defendant. As new conditions develop, defendant should not be prevented from properly exercising its discretion to establish

some other or different reasonable standard for determining net family income.

The judgment with respect to the first cause of action is modified by striking therefrom the definition of the term "net family income" as contained in paragraph 4 thereof. The judgment with respect to the second cause of action is modified by striking therefrom the figure $455,299.68 and the incorporation of the "attached list" of individual amounts. As thus modified, the judgment is affirmed. It is further ordered that a new accounting shall be furnished by defendant showing the correct amount payable to plaintiffs and to each member of the class with respect to the period November 28, 1969 to March 23, 1970, and that upon approval of such accounting by the court the new total shall be substituted for the sum of $455,299.68 and the new list of individual amounts thereby shown to be due shall be incorporated in the judgment. Each party is to bear its own costs on appeal.

POTTER, J.

We concur:

ALLPORT, Acting P.J.

COBEY, J.