SUPREME COURT OF NEBRASKA

SUPREME COURT CASE NO. S-25-0798

SELDIN COMPANY, LLC

Plaintiff-Appellant

vs.

ISAIAH TUCKER AND ALINE DAVID

Defendants-Appellees

APPEAL FROM THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

Douglas County Court Case No.: CI 25-3161

The Honorable Horacio J. Wheelock, Douglas District Court Judge

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BRIEF OF AMICUS CURIAE

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INTRODUCTION

Plaintiff-Appellant the Seldin Co., LLC (Seldin) appeals from a District Court Order and Judgment holding Seldin waived its right to evict Defendants-Appellees Isaiah Tucker and Aline David (the Tenants) under Nebraska's waiver statute by accepting Housing Assistance Payments from the Omaha Housing Authority (OHA) on the Tenants' behalf under the federal Housing Choice Voucher Program (HCVP). Payments were made pursuant to a Housing Assistance Payment Contract (HAP Contract) between OHA and Seldin.

Neb. Rev. Stat. § 76-1433 provides that "[a]cceptance of ***rent*** with knowledge of a default by a tenant … constitutes a waiver of his right to terminate the rental agreement for that breach." (emphasis added). Rent is defined as "***all payments*** to be made to the landlord under the rental agreement." § 76-1410(13) (emphasis added). A rental agreement is comprised of "all agreements, written or oral, between a landlord and tenant … embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises." *Id.* § 76-1410(14). Put more succinctly, a landlord's acceptance of any payment made under the lease, irrespective of its source or what it is called, constitutes waiver under the statute.

The question presented is whether Housing Assistance Payments are payments made under the lease between Seldin and the Tenants for waiver purposes, notwithstanding the fact that such payments are made by OHA to Selding under Part B of the HAP Contract to which the Tenants are not a party? For the reasons explained in subsections B. and C. of our argument, the answer is yes.

However, before applying Nebraska's waiver statute, Amici address Seldin's preemption argument which, as discussed in subsection A. below, is misplaced.

INTEREST OF AMICUS CURIAE

The National Housing Law Project's (NHLP) mission is to preserve and expand the stock of federally subsidized affordable housing and to protect the rights of tenants of such housing. NHLP's attorneys are experts in the laws and regulations related to federally subsidized housing, including the HCVP at issue here.

Nebraska Appleseed is a nonpartisan public interest organization that fights for justice and opportunity for all Nebraskans. Nebraska Appleseed's economic justice work includes advocating for tenant rights.

This appeal deals with whether Housing Assistance Payments made to a landlord under the HCVP on a tenant's behalf are subject to the waiver doctrine. The waiver doctrine is an equitable defense to lease forfeiture that protects tenants by prohibiting a landlord from both retaining the benefits of a forfeited lease and the right to act on a past breach at any time in potentially oppressive and retaliatory ways. Ensuring that low-income HCVP participants keep this protection is in line with NHLP's and Nebraska Appleseed's mission. Amici therefore have a strong interest in this case.

ARGUMENT

A. Federal Regulations and The HAP Contract Do Not Limit Seldin's Ability to Reject Housing Assistance Payments During an Eviction, Thus Nebraska's Waiver Statute Is Not Preempted.

Seldin argues that federal regulations requiring OHA to make Housing Assistance Payments during a pending eviction require Seldin to accept those payments and thus force it to waive the Tenants' breach. Brief of Appellant (BOA) at 13-18. Seldin argues this creates a conflict which preempts Nebraska's waiver statute. *Id.* at 18. Seldin is wrong.

As the Tenants point out, the federal regulations Seldin cites only impose an obligation on OHA and do not limit Seldin's right to reject or return Housing Assistance Payments in favor of pursuing the Tenants' eviction. Brief of Appellees at 11-12. Recognizing this, Seldin argues for the first time in its Reply Brief, that it is the HAP Contract which requires it to accept Housing Assistance Payments. Reply Brief of Appellant at 8. Seldin cites paragraph 7d. of Part B of the HAP Contract which reads "Application of Payment. The monthly housing assistance payment shall be credited against the monthly rent to owner for the contract unit." *Id.* Plainly, this provision only determines the application of Housing Assistance Payments and only applies if payments are accepted. It does not require acceptance.

Waiver recognizes the practical reality that after a breach, a landlord is free to choose between "consider[ing] the estate forfeited for [the] condition broken, and proceed to recover possession, or to waive the forfeiture and consider the lease valid." *Snyder v. Hill*, 153 Neb. 721, 725 (1951). Given this freedom of choice, it is inequitable to allow a landlord to accept benefits under a lease that it has elected to forfeit. *Id.* Neither the federal regulations nor the HAP Contract robbed Seldin of this choice. Having made its choice, Nebraska's waiver statute applies to Seldin's acceptance of Housing Assistance Payments.

B. The Lease and HAP Contract Form a Single Integrated Document; Therefore Housing Assistance Payments Are Rent.

Seldin characterizes the lease and HAP Contract as separate agreements and argues the rent owed under the lease and HAP Contract are two distinct obligations. BOA at 18-22. Seldin's proposition overlooks the integrated nature of the lease and HAP Contract which is essential to carry out the HCVP's basic purpose.

"Instruments made in reference to and as part of the same transaction are to be considered and construed together, and the fact that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction." *Norwest Corp. v. State, Dept. of Ins.*, 253 Neb. 574, 584 (1997). Such instruments must be construed as one contract. *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 468 (1988). "The rule applies even when the parties to the [various] instruments are not the same, as long as the writings form part of a single transaction and are designed to effectuate the same purpose." 11 Samuel Williston, A Treatise on the Law of Contracts § 30:26 at 239-44, (Richard A. Lord ed. 4th, updated 2026); *Norwest* at 576-84 (holding that three separate agreements executed by different contracting parties were "an integrated concept comprised of several individual transactions." and "[t]herefore . . . they must be construed together as one contractual undertaking.") This is precisely the case with the lease and HAP Contract, which together form the structure necessary to facilitate the orderly transfer of Housing Assistance Payments from OHA to Seldin to pay the Tenants' rent obligation under their lease.

Following federal regulations, OHA issues vouchers to eligible tenants on their waitlist. 24 C.F.R. § 982.202. Once a family is approved, the family must find a unit and negotiate the lease terms, including rent, with their prospective landlord. *Id.* §§ 982.302(a) and 982.506. When the family finds a unit and the landlord is willing to participate in the HCVP, OHA must approve the tenancy. *Id.* § 982.302(b). Critically, Before OHA enters into a HAP Contract with a landlord, it must determine whether the lease complies with state and local law, *Id.* § 982.308(c) and E4, p. 9, ¶ 2, d. (3); the total monthly rent under the lease must be reasonable, as determined by OHA, *Id.* §§ 982.308(d) and 982.308(e); and it must incorporate word-for-word the HUD tenancy addendum, *Id.* § 982.308(f), which sets the grounds for eviction under the lease, E4, p. 15, ¶ 8. This multiparty yet singular transaction is for the purpose of effectuating an arrangement wherein a private landlord agrees to accept rent payments from the government to assist "eligible families . . .afford decent, safe, and sanitary housing." *Id.* § 982.1(a)(1).

The landlord's lease and HAP Contract are integrated in several other respects in service of this purpose. Part B of the HAP Contract provides that rental subsidy payments are for the purpose of "assist[ing] the tenant to lease the contract unit from the owner for occupancy by the family." E4, p.9, ¶ 1d. In other words, the landlord's lease is the subject matter of the HAP Contract, it is what makes the HAP Contract a valid and operable document. *Morris v. Dall*, 320 Neb. 122, 130 (2025) (holding that a contract "must identify the subject matter and spell out the essential commitments and agreements with respect thereto"). Without the landlord's lease, the HAP Contract would not exist. Likewise, the lease depends on the HAP Contract, since without it, Tenants could not afford their home. That is why Housing Assistance Payments made under the HAP Contract are defined as "[a] payment to the owner for ***rent*** [owed] to the owner ***under the family's lease,***" 24 C.F.R § 982.4(1) (emphasis added), that must be "credited toward the monthly rent to owner under the family's lease," *Id.* § 982.451(b)(2).

And the Housing Assistance Payment is determined by the rent in the lease, which the landlord sets and OHA approves. 42 U.S.C. § 1437f(c)(3) (providing that the PHA payment to the owner "shall be the difference between the maximum monthly rent which the [lease] provides that the owner is to receive for the unit and the rent the family is required to pay"); 42 U.S.C. § 1437f(o)(2)(A). Even the terms of the landlord's lease and HAP Contract are required to be the same. 24 C.F.R. § 982.309(b)(1) (providing that the term of the HAP contract begins and ends with the term of the lease); E4, p. 9, ¶ 4, b(1) (stating "[t]he HAP contract terminates automatically if the lease is terminated").

The lease and HAP Contract are inextricably intertwined and depend on each other to accomplish the basic goal of the government providing low-income individuals like the Tenants with a decent home. Hence, they form a single instrument constituting the "rental agreement" between Seldin and the Tenants as defined by Neb. Rev. Stat. § 76-1410(14). Housing Assistance Payments are therefore payments made under the rental agreement for waiver purposes.

C. Federal Law Defines Housing Assistance Payments as Rent and Are Rent in Substance.

Housing Assistance Payments are rent made under the lease for waiver purposes for the independent reasons that federal law defines them as rent and because they serve the same substantive purpose of rent owed under the landlord's lease.

Housing Assistance Payments are expressly defined as payments of rent owed under the lease that must be credited toward that obligation. 24 C.F.R. §§ 982.4(1) and 982.451(b)(2). And the Housing Assistance Payment amount is calculated to cover some portion of the rent. 42 U.S.C. §§ 1437f(c)(3); 1437f(o)(2)(A). The HAP Contract reiterates that the rent to landlord "is the sum of the portion of rent payable by the tenant plus the PHA housing assistance payment to the owner." E4, p. 18, ¶ 20. These statutory, regulatory, and contractual provisions make clear that Housing Assistance Payments are paid as consideration in exchange for Tenants' occupancy of their home.

Indeed, Housing Assistance Payments are widely understood by courts and HUD to constitute rent. See *Barrientos v. 1801-1825 Morton, LLC*, 2007 WL 7213974 (Cal. C.D. 2007) at 2 (explaining that tenants pay a portion income toward rent ". . . with the remainder of their rent covered by federal housing assistance payments"); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 12 (1993)(explaining that HUD ". . . makes assistance payments to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a contract rent") (internal quotation marks omitted); *United States* *ex. rel. Price v. Peters*, 66 F.Supp.3d 1141, 1141 (2013) (explaining that HCVP and tenant payments together "make up the monthly rent amount"); 63 Fed. Reg. 23826, 23829 (1998) (explaining that the purpose of limiting rent under a lease to market is to guard against "families [agreeing] to excess rents ***since part of the rent—often the greatest part of the rent—is paid by the Section 8 subsidy***") (emphasis added).

Most courts which considered the same question as this Court have reached the conclusion that Housing Assistance Payments and other rental subsidy payments are rent for waiver purposes. In *Hook & Ladder Apartments, L.P. v. Nalewaja*, 25 N.W.3d 867 (2025), the Minnesota Supreme Court also considered whether landlord acceptance of Housing Assistance Payments after lease forfeiture constituted waiver. *Hook & Ladder* at 870-71. In dismissing the landlord's argument that the lease between the parties did not define rent to include Housing Assistance Payments, the Court explained the exact characterization of Housing Assistance Payments was irrelevant because the payments are undoubtedly consideration for the family's occupancy of their unit and thus function as rent. *Id.* at 875-76. Because "housing assistance payments constitute much or all of the consideration that landlords receive in exchange for a tenant's occupancy," they are rent for waiver purposes. *Id.* at 876.

In *Woodridge Homes Ltd. Partnership v. Gergory*, 205 N.C.App. 365 (2010), the North Carolina Court of Appeals considered whether acceptance of rental subsidy payments under a different program constituted wavier. *Woodridge* at 375-76. Like the court in *Hook & Ladder*, the *Woodridge* Court found that even if the lease does not treat rental assistance payments as rent, they are nonetheless rent for waiver purposes because such payments are consistent with the ordinary meaning of rent: consideration paid for the use or occupancy of property. *Id.* at 378-79.

In *Greenwich Gardens Associates v. Pitt*, 484 N.Y.S.2d 439 (1984), the landlord argued that "housing assistance payments made by HUD on behalf of a tenant are not rent because the payments are not made by the tenant to the landlord. *Id.* at 444. Citing 42 U.S.C. § 1437f(c)(3) and implementing regulations, the court explained that Congress and HUD ". . . clearly show that Section 8 housing assistance payments are considered to be rent payments." *Id.* at 444. The court also cited several cases in support. *Id.* at 445. "Based on the relevant statutes, regulations, and case law, the court [found] that housing assistance payments made by HUD on behalf of a Section 8 tenant must be considered to be payments of rent." *Id.*

The Arizona Court of Appeals reached the same conclusion in the tax law context. In *Myrtle Manor Apartments v. City of Pheonix*, 177 Ariz. 465 (1994), property owners argued that Housing Assistance Payments were not rent, paid as consideration for the occupancy of a unit and thus not taxable as rental income. *Id.* at 470. They argued that Housing Assistance Payments are instead consideration for owners' compliance with other HUD rules. *Id.* The court dismissed this argument noting "the applicable federal statutes, regulations, and the HAP contracts make it clear" that monthly Housing Assistance Payments are "calculated as the aggregate difference between the monthly per-unit rates specified in the contract … and the amount each particular tenant is charged individually according to income level." *Id.* Therefore, "[i]n substance, these are partial payments of contractually agreed rent on behalf of low-income tenants." *Id.* The court further explained that "HAP payments constitute a part of [an owner's] gross income from the business activity of renting real property" and is therefore properly taxed as rental income. *Id.* at 472.

In toto, the relevant statutes and regulations above, as well as their progeny of cases, make clear that Housing Assistance Payments are rent for the occupancy of a unit in every sense of the concept and are therefore rent paid under the lease between Seldin and the Tenants.

Despite this, Seldin argues that because the Tenants do not have third party beneficiary rights under the HAP Contract "they are not entitled to assert a waiver defense based on the HAP Contract Payments." BOA at 13, 22-23. Seldin's argument has no basis in law.

"Waiver is one of equity's answers to an odious forfeiture." *Holt v. Warren*, 176 F.2d 473, 481 (D.D.C. 1949). Because waiver is an equitable defense designed to avoid lease forfeiture, it arises from the court's inherent equitable powers, not from a party's right to sue on a contract or a portion thereof. *Trieweiler v. Sears*, 268 Neb.952, 980 (2004) (discussing a court's broad discretion when sitting in equity).

In fact, *Midland Management Co. v. Helgason*, 158 Ill.2d 98 (1994), which Seldin cites in support of its argument, BOA at 20-21, 24, mentions nothing about a contractual right to sue as a precondition to a waiver defense. The Illinois Supreme Court expressly stated the opposite: that "[i]t is immaterial by whom the rent is paid if it is received *as rent* and on behalf of the lessee." *Id.* at 102. The logical implication of this conclusion is that acceptance of a payment by a landlord may constitute waiver, even if made by an entity or individual with whom a tenant has no contractual relationship and thus has no right to sue. Other jurisdictions are in accord. In *Hook & Ladder*, the Minnesota Supreme Court concluded the waiver doctrine applies to rent payments by third parties on a tenant's behalf, the absence of a contractual relationship between the payee and the tenant notwithstanding. *Id.* at 876. And in *Woodridge,* the North Carolina appellate court held that it was unpersuasive that the government agency payee was not a party to the lease because waiver has been found in "many examples of third parties making rental payments on behalf of actual occupants of rented premises." *Id.* at 377.

CONCLUSION

Seldin's position would allow landlords of all subsidized tenancies, not just landlords participating in the HCVP, to reap all the benefits of their lease post lease forfeiture yet maintain the right to act on the breach at any point. This would undermine the waiver doctrine's basic function of instilling "a sense of security for the tenant that the lease remain[s] in effect" through the objective act of a landlord's acceptance of benefits under the lease. *Hook & Ladder* at 873. Without it, subsidized housing landlords in Nebraska could weaponize a past breach to extract unfair concessions from a tenant, ignore repair requests, or to simply evict a tenant on pretextual grounds when it suits them, all while continuing to receive government payments for rent. This would give subsidized housing landlords a preferred status and deny subsidized tenants waiver protections enjoyed by all tenants, none of which is intended by federal law or Nebraska's waiver statute.

Such a result is untenable. For this and the reasons above the Court should reject Seldin's arguments and affirm the District Court's ruling.

Certificate of Compliance

This brief complies with the word count prescribed in Neb. Ct. R. App. P. § 2-103(C)(3)(b) and the typeface requirements of § 2-103(A)(4). The final word count is 3,463, not including this certificate and the certificate of service below. The brief was prepared using Word for Microsoft 365 version 2607.

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