UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 76-2222-C

RICHARD VARDENSKI

v.

CARLA HILLS, ET AL

OPINION

December 27, 1976

CAFFREY, Ch.J.

This is a class action brought by plaintiff Vardenski, a tenant in Mishawum Park, a Charlestown low and moderate income housing project which is subsidized and regulated by the Federal Housing Administration under Section 236 of the National Housing Act. 12 U.S.C. §1715z-1 (1969). Defendants are various private organizations and individuals and federal officials, namely, Mishawum Associates (hereinafter "Mishawum"), the owner and operator of Mishawum Park; Richard M. Dray, Charles F. Murphy and Frederick J. Mahoney, the general partners of Mishawum; Codman Company, manager of the project; Carla Hills, Secretary of the Department of Housing and Urban Development (HUD); William Hernandez, Director for the Boston Area of the Department of Housing and Urban Development; and finally, HUD itself. Plaintiff contends that the private defendants, with the approval and authorization of the federal defendants, have undertaken certain actions violative of rights secured to plaintiff, and the class he seeks to represent, by virtue of Section 101 of the Housing and Urban Development Act, 12 U.S.C. §1701s (1969), and the First, Fifth and Fourteenth Amendments to the United States Constitution. Declaratory and injunctive relief, as well as mandamus relief against the federal defendants is sought.

The matter is presently before the Court on defendants'

motions to dismiss the action because (1) the Court lacks subject matter jurisdiction and (2) the complaint fails to state a claim upon which relief can be granted. The motions were submitted for decision on the briefs of the parties.

When the Mishawum Park project was begun, Mishawum signed a rent supplement contract with HUD, pursuant to 12 U.S.C. §1701s. Under this contract, HUD agreed to provide rent supplement benefits for up to 67 eligible tenants of the completed Mishawum Park housing project. To be eligible for rent supplement benefits, a recipient must have a certain poverty level of income and be either displaced by governmental action, a minimum of 62 years of age, physically handicapped, or a former occupant of a dwelling destroyed by disaster. Under the legislative scheme, as administered by HUD, while the owners of a project are responsible for assuring that the rent supplement beneficiaries meet the enunciated eligibility criteria, they otherwise have total discretion with respect to tenant selection and are under no obligation to accept all eligible rent supplement applicants as tenants for their project. No standards have been established by HUD and given to the project managers by which categorically eligible people are to be selected for, or denied, rent supplement benefits. Nor does there exist any right to a hearing by the landlord preceeding his action on a rent supplement application. Finally, there is no right to a review by HUD of the landlord's denial of these benefits.

For purposes of the two questions before this Court - whether the Court has jurisdiction and whether the complaint states a cause of action upon which relief can be granted - it is not necessary to track the detailed allegations of the complaint. It is sufficient to relate those allegations which pertain to the several essential matters that are determinative of the legal issues presented.

In October of 1974, after having resided in the Mishawum Park project since August of that year, plaintiff Vardenski began to suffer from a disabling hip disease. When he was unable to meet his rent obligation for three consecutive months, Mishawum moved for his eviction without ever advising him of his eligibility for the rent supplement benefits which would greatly reduce his monthly rent for the apartment and thereby make the carrying cost of the apartment feasible. When the plaintiff independently discovered that he was eligible for such assistance, Mishawum misrepresented to him that all 67 rent supplement benefit slots were already filled and there was a long waiting list which would further diminish his hopes of getting the benefits which had become essential to his ability to continue to reside in Mishawum Park.

Plaintiff later learned that Mishawum wanted to evict him regardless of the three months rent owed by him because he was a "troublemaker". However, Mishawum never specified any reasons why the plaintiff was so considered.

Although the Boston Housing Court finally entered a judgment of eviction, plaintiff won a stay of execution from the Court of Appeals in connection with his then pending appeal of the eviction judgment. He has also, with the financial assistance of the Department of Welfare, offered to fully repay the three months' rent owed by him. Mishawum has refused to accept the tendered money, insisting instead on its eviction remedy. On December 8, 1976, the Appeals Court of the Commonwealth affirmed the decision of the Housing Court of the City of Boston permitting the non-federal defendants to evict the plaintiff. The decision of the State Court becomes effective on January 5, 1976.

The position of HUD at all relevant times, has been that Mishawum has an absolute right to act within its discretion to evict any tenants who are rent delinquent and/or "trouble-

some". Furthermore, HUD has advised Mishawum that it, as landlord, has no duty to make any eviction determination on the basis of any standards or to afford any tenant a hearing prior to moving for his eviction. Finally, HUD has stated that any eviction determination made by the landlord in the exercise of his absolute discretion is not reviewable by HUD. Plaintiff claims that since the denial to him of rent supplement benefits was arbitrary, not based on good cause, and was made without a hearing, in the absence of any standards or opportunity for agency review, his rights to due process and equal protection have been violated and that the defendants have violated their constitutional and statutory obligation to afford rent supplement applicants the benefit of minimal due process standards prior to approving or denying their applications.

Plaintiff predicates the jurisdiction of this Court on several independent bases. First, federal question jurisdiction is relied upon by plaintiff. The position here advanced is that when the claim arises under the National Housing Act, 12 U.S.C. §1701, et seq., and the Housing and Urban Development Act, 12 U.S.C. §1701s, the requisite jurisdictional amount is realized when it is acknowledged that the value of rent supplement benefits over the life expectancy of the tenant far exceeds $10,000. Groundwork for this view of the jurisdictional amount has been laid by other courts that have considered the values of various claimed rights to FHA subsidized housing. See Joy v. Daniels, 479 F.2d 1236, 1239 n. 6 (4 Cir. 1973); Bloodworth v. Oxford Village Townhouses, Inc., 377 F.Supp. 709, 714 (N.D. Ga. 1974); Anderson v. Denny, 365 F.Supp. 1254, 1259 (W.D. Va. 1973); Mandina v. Lynn, 357 F.Supp. 269, 276 (W.D. Mo. 1973). But see Winningham v. HUD, 512 F.2d 617, 620 n. 6 (5 Cir. 1975). Second, subject matter jurisdiction is said to be founded on 28 U.S.C. §1337 which applies to cases arising from an Act

regulating commerce. One circuit court has ruled that the Housing and Urban Development Act which provides for the rent supplement benefits program is an Act which does regulate commerce for the purposes of subject matter jurisdiction under §1337. Winningham v. HUD, supra. Third, jurisdiction is asserted on the basis of 28 U.S.C. §1343(3), the jurisdictional grant regarding alleged civil rights violations. The law of this circuit is that the actions of federally subsidized landlords who have formal agreements with the Boston Redevelopment Authority, are state and federal actions sufficient to sustain a civil rights action. McQueen v. Druker, 317 F.Supp. 1122 (D. Mass. 1970), aff'd 438 F.2d 781 (1 Cir. 1971). Finally, mandamus jurisdiction is invoked by the plaintiff's claim that the federal defendants owe him a duty to protect his constitutional and statutory rights to receive rent supplement benefits if he is eligible for them and they are available. Defendants' argument in opposition to this claimed jurisdictional base, namely, that such an action is barred by the twin doctrines of sovereign and official immunity, is completely without merit. Where federal officials are allegedly failing to perform a duty in contravention of another's constitutional rights, they are acting outside of the permissible scope of their powers and no immunity is available for such a failure. Mandina v. Lynn, supra, at 276. See also National Ass'n of Government Employees v. White, 418 F.2d 1126, 1129 (D.C. Cir. 1969) with respect to the propriety of a mandamus action where a claim under the Constitution has been asserted.

At this stage of the action, the allegations in the plaintiff's complaint and supporting affidavits must be accepted in the light most favorable to the plaintiff and his class.

Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2 Cir. 1970). With this perspective, I rule that plaintiff has presented a claim upon which relief can be granted.

Consideration as to whether a landlord such as Mishawum is subject to the strictures of the Fourteenth Amendment is foreclosed due to the affirmative answer given to that question in this circuit. See McQueen, supra. It is also widely recognized that a tenant in a public housing project has an expectation of some degree of permanency in his living situation, akin to a property right, which primarily forbids a public housing landlord from evicting a tenant other than for cause following notice and some sort of a hearing on the issue of cause. See generally, Note, Procedural Due Process in Government - Subsidized Housing, 86 Harv. L. Rev. 880, 905 (1973) and the cases cited therein. Massachusetts has legislatively embodied that philosophy in a statute which requires that a public housing tenancy "shall not be terminated without cause and without reasons therefor given to said tenant in writing." M.G.L.A. c. 121B, §32 (1969). However, when nonpayment of rent is the reason for the eviction this statute does not require the holding of a hearing to determine whether cause for eviction exists. Id. This also reflects judicial acknowledgement that "the landlord may legitimately seek . . . a tenant who is not delinquent in rental payments." McQueen, supra, at 1131.

The question before this Court therefore narrows to whether the nonpayment of rent, which has been traditionally recognized as a valid cause for eviction, can shelter a landlord from due process requirements in a situation where he has unfettered discretion to withhold rent supplement benefits from categorically eligible tenants when the supplement would enable the tenant to keep abreast of his rent payments. The answer to this question must be in the negative if the primary purpose of the

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ORDER

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In accordance with Opinion filed this date, it is

ORDERED: The motions to dismiss are denied.

Andrew A. Caffrey, Ch. J.