SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-001036-96T5

SAVA HOLDING CORPORATION, Plaintiff-Respondent, vs. NELLIE MARTINEZ, Defendant-Appellant.	*CIVIL ACTION* ON APPEAL FROM JUDGMENT FOR POSSESSION OF THE SUPERIOR COURT OF NEW JERSEY SPECIAL CIVIL PART - HUDSON COUNTY *SAT BELOW* Honorable HECTOR R. VELAZQUEZ, J.S.C.

BRIEF
FOR
DEFENDANT-APPELLANT NELLIE MARTINEZ

HUDSON COUNTY LEGAL SERVICES CORP.
TIMOTHY K. MADDEN, DIRECTOR
574 Newark Avenue
Jersey City, New Jersey 07306
(201) 792-6363
FAX NO. (201) 798-8780
ATTORNEYS FOR DEFENDANT-APPELLANT
NELLIE MARTINEZ

JOHN UKEGBU, ESQ.
Of Counsel and On the Brief

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STATEMENT OF THE CASE

The "Section 8" rental assistance program is the primary federal housing program. Its purpose is to assist low and moderate income persons in affording rental housing in the private market. 42 *U.S.C.A.* §1437f. The fact pattern in this case is simple: a landlord seeks to evict an impecunious tenant for non-payment of rent even though the tenant tendered a Section 8 voucher for the rent in issue. The trial court confirmed the landlord's position: namely, notwithstanding its availability the landlord was under no duty to accept the Section 8 voucher as payment of rent, and could evict the tenant for failure to pay rent. The trial court additionally held, that even if defendant's construction of *N.J.S.A.* 2A:42-100 is correct, the statute is invalid as applied based on the doctrine of federal preemption.

Two questions are presented: 1) whether a Section 8 rental voucher is a "source of lawful rent payment to be paid" within the context of the Discrimination In Renting Act (*N.J.S.A.* 2A:42-100); and 2) whether the Discrimination In Renting Act prohibits a landlord from refusing a Section 8 voucher because of the landlord's unwillingness to participate in the Section 8 program. Each question implicates public policy and is of public importance.

STATEMENT OF PROCEDURAL HISTORY

On May 10, 1996, plaintiff Sava Holding Corporation instituted this action by filing a non-payment of rent complaint alleging that defendant Nellie Martinez owed May 1996 rent. (Da1). The return date on the summons was May 23, 1996. (Da1). On the return date defendant argued that plaintiff had refused to accept a Section 8 voucher that she had earlier tendered; accordingly, no rent was due and owing.[1]

The Court ordered the parties to brief the issue. On July 30, 1996, the Court heard arguments. On September 13, 1996, the Court issued a written opinion. (Da10). On October 7, 1996, the Court entered a judgment in favor of plaintiff. (Da25). On October 17, 1996, defendant filed this appeal. (Da27).

[1] The relevant facts in this case are undisputed. (Da10).

STATEMENT OF FACTS

Plaintiff is the owner of an 18 unit residential building located at 211 64th Street, West New York, New Jersey. (T29-25). Defendant Nellie Martinez is a sixty-three year old widow, who is a month-to-month tenant in the premises. She has resided at the premises since 1991. (Da10). Her sole income is a monthly grant of Social Security in the amount of $521.00. (T37-25; T38-1 to 8; T44-22 to 23). Out of that $521.00 Ms. Martinez has to allocate $450.00 to rent; consequently, she spends 86 percent of her monthly income on rent.[2] (Da6). One can readily understand that an 86 percent allocation of income leaves Ms. Martinez with scanty resources for life's other necessities. Mired in this conundrum, Ms. Martinez turned to the Section 8 program for help. The Section 8 program deemed her eligible for rental assistance, but plaintiff refused to accept rental payments from the Section 8 program. (Da6). Before proceeding with the chronology of this case, it is necessary for the reader to be familiar with the contours of the Section 8 voucher program.

The Section 8 Voucher Program In New Jersey[3]

42 U.S.C.A. §1437 declares:

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[2] At Ms. Martinez's request plaintiff agreed to reduce her rent to $425.00. (T6-5).

[3] The Section 8 program embraces three components: a) vouchers; b) certificates; and c) project-based assistance. This appeal deals with the voucher component; accordingly, the certificate and project-based components will not be discussed in this brief.

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a low-income housing project.

To achieve the stated policy of 42 *U.S.C.A.* §1437, the Secretary of the Department of Housing and Development (HUD) is "authorized to enter into annual contribution contracts with public housing agencies pursuant to which such agencies may enter into contracts to make payments to owners of existing dwelling units..." 42 *U.S.C.A.* §1437f(b). Under the program, a public housing agency (PHA), such as the Housing Authority of West New York, enters into an Annual Contribution Contract with HUD to receive monies which the PHA then uses to enter into Housing Assistance Payments (HAP) contracts with owners of rental premises in order to make monthly rental payments on behalf of eligible families. *Id.*

In New Jersey, State administered vouchers and certificates serve over 13,000 households; another 28,000 households are on the

waiting list. Local housing authorities in the State serve 20,000 additional households.[4] Most households that receive Section 8 rental assistance have earnings at or below 50 percent of the median county income. *See* 42 *U.S.C.A.* §1437a(b); *See also* 42 *U.S.C.A.* §1437f(0)(3)(A). In selecting families to be assisted, preference is given to families that are occupying substandard housing, that are homeless, that are involuntarily displaced, or are paying more than 50 percent of their income on rent. 42 *U.S.C.A.* §1437f (0)(3)(B).

Section 8 voucher holders choose housing from the private housing market within a defined geographical area. 42 *U.S.C.A.* §1437f(r). Under the voucher program, the PHA pays the landlord the difference between 30 percent of the tenant's adjusted income and the PHA set "payment standard" (between 80 and 100 percent of the published Fair Market Rent) for the unit. 42 *U.S.C.A.* §1437f(0)(2)[5]. (The tenant must therefore pay 30 percent of his or her income as rent). *See generally Soliman v. Cepeda*, 269 N.J. Super. 151 (Law Div. 1993) (Section 8 landlord must satisfy both federal standards of good cause for termination as well as New Jersey's standards under the Anti-Eviction Act).

In order to receive rental assistance payments, the landlord is required to execute a Housing Assistance Payment (HAP) contract

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[4] Guide To New Jersey Affordable Housing, (Dept. of Community Affairs 1993).

[5] In this case, the rent falls well within the fair market rent published by HUD. Accordingly, Ms. Martinez would pay approximately 30 percent of her adjusted income as rent: (T4-16 to 23).

with the PHA. 42 *U.S.C.A.* §1437f(b)(i). The landlord is also required to execute a lease with the tenant for at least a one year term. 42 *U.S.C.A.* §1437f(d)(B). Since the objective of the program is the provision of affordable, decent, safe and sanitary housing, the PHA inspects the unit periodically and notifies the owner of any repairs that need to be made. 42 *U.S.C.A.* §1437f(0)(5).

Chronology of The Case

On April 22, 1996, the Housing Authority for the Town of West New York (PHA) issued Ms. Martinez a Section 8 rental voucher. (Da6). Customarily, Ms. Martinez would pay the rent on the first of the month, but for May 1996 rent Ms. Martinez tendered the Section 8 voucher and the requisite documents instead. (Da6). Plaintiff refused to execute the documents and accept rental payments from the PHA. (Da6). Plaintiff's refusal to accept the Section 8 rental voucher stems from its desire to avoid entanglement with the "bureaucracy" of the Section 8 program. (T29-1 to 6).

On May 10, 1996, plaintiff instituted this action by filing a non-payment of rent complaint alleging that Ms. Martinez owed May 1996 rent. (Da1). On the May 23rd return date, defendant argued that plaintiff's refusal to accept the Section 8 voucher precluded it from seeking monies it could receive from the Section 8 program. The parties were ordered to brief the issue and on July 30, 1996, the Court heard arguments.

On September 13, 1996, the Court issued a written opinion (Da10). In its opinion, the Court concluded that plaintiff lawfully refused to accept Ms. Martinez's Section 8 voucher. (Da10). The Court specifically found that the prohibition of *N.J.S.A.* 2A:42-100 against discriminatory renting practices does not encompass a landlord's refusal to accept Section 8 rental payments. (Da21). Additionally, the Court ruled that even if defendant's construction of *N.J.S.A.* 2A:42-100 is correct, the statute is preempted by section 8 of the United States Housing Act of 1937, 42 *U.S.C.A.* §1437f (1982). (Da21). Pursuant to its opinion, the Court entered a judgment in favor of the plaintiff. (Da25). Thereafter this appeal was filed. (Da27).

LEGAL ARGUMENT

POINT ONE

SECTION 8 RENTAL VOUCHERS SPRING DIRECTLY FROM A FEDERAL STATUTE AND ARE BEYOND QUESTION "LAWFUL"; CONSEQUENTLY, A HOLDER OF A SECTION 8 RENTAL VOUCHER FALLS WITHIN THE AMBIT OF THE DISCRIMINATION IN RENTING ACT.

N.J.S.A. 2A:42-100 reads in its entirety:

> No person, firm or corporation or any agent, officer or employee thereof shall refuse to rent or lease any house or apartment to another person because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the house or apartment. This section shall not apply to any owner-occupied house containing not more than two dwellings units. Nothing contained in this section shall limit the ability of a person, firm or corporation or any agent, officer or employee thereof to refuse to rent or lease any house or apartment because of the credit worthiness of the person or persons seeking to rent a house or apartment. (emphasis added)

The statute is clear: source-of-rental-payment discrimination is prohibited provided the source is lawful. There is no dispute in this case that a Section 8 rental voucher springs from a "lawful" source.[6] Indeed, the trial court explicitly acknowledged the lawfulness of the Section 8 voucher when it stated that 42 *U.S.C.A.* §1437f(a) authorizes "the Secretary of Housing and Urban

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[6] In addition, none of the exceptions of *N.J.S.A.* 2A:42-100 are applicable in this case since the premise in issue is an 18 unit residential building and Ms. Martinez's credit worthiness is not at issue. (T29-25; T60-9 to 25).

Development (HUD) to enter into annual contribution contracts with public housing agencies, who in turn are authorized to enter into contracts with private owners of housing in which some or all of the apartments are leased to 'eligible lower income families'". (Da12-Da13).

The disagreement in this case lies with the trial court's ruling that the statutory language of *N.J.S.A.* 2A:42-100 "does not encompass" Section 8 vouchers and that even if the protections of *N.J.S.A.* 2A:42-100 extended to Section 8 voucher holders the statute is preempted by 42 *U.S.C.A.* §1437f. (Da19-Da24). Ms. Martinez contends otherwise for the following reasons:

A. A Plain Reading Of *N.J.S.A.* 2A:42-100 Suggests That A Section 8 Rental Voucher Is A Source Of Lawful Rent Payment To Be Paid.

The only reported case on the issue of whether a Section 8 rental voucher is a source of lawful rent payment is the Appellate Division's opinion in *M.T. v. Kentwood Construction Co.*,[7] which will be discussed later in detail. Turning to *N.J.S.A.* 2A:42-100, the basic rule of statutory construction is that statutory language should be given its ordinary meaning absent specific intent to the contrary. *Mortimer v. Board of Review*, 99 N.J. 393 (1985). The key phrase in *N.J.S.A.* 2A:42-100 as it relates to this case is "the source of any lawful rent payment to

[7] 278 N.J. Super. 346 (App. Div. 1994)

be paid for the house or apartment." The phrase is undefined in the statute. That being the case, the phrase should be given its ordinary meaning. *Mortimer, supra.*

In examining *N.J.S.A.* 2A:42-100, the phrase "the source of any lawful rent payment to be paid for the house or apartment" must refer to sources of rental payment other than a person's income since the preceding phrase "the source of any lawful income received by the person" explicitly refers to "source of income" discrimination. *See Bioleau v. DeCecco,* 125 N.J. Super. 263 (App. Div. 1973), *aff'd.* 65 N.J. 234 (1974). (The meaning of a doubtful phrase may be ascertained by its accompanying phrase in the statute).

Furthermore, in between the phrases "the source of any lawful income received by the person" and "the source of any lawful rent to be paid for the house or apartment" is the disjunctive word "or" which suggests that the phrases are to be read separately. *Beaugard v. Johnson,* 281 N.J. Super. 162 (App. Div. 1995) (Word "and" connotes natural conjunctive import, while word "or" signifies natural disjunctive import).

Focusing on the phrase "the source of any lawful rent to be paid for the house or apartment", the legislature is presumed to be aware of sources of rental payment other than a person's income. *See Monaghan v. Holy Trinity Church,* 275 N.J. Super. 594 (App. Div. 1994) (Legislature is assumed to be thoroughly familiar with its own enactments). Examples of such sources are governmental

rental assistance programs like the Homelessness Prevention Program, the Emergency Assistance Program and the Section 8 Rental Program.[8] In addition, there are private rental assistance programs run by religious institutions, charities and non-profit organizations.[9] Furthermore, it is worth noting that *N.J.S.A.* 2A:42-101[10] which was enacted with *N.J.S.A.* 2A:42-100, explicitly excludes federal and state financed senior citizen housing projects from its protections. *See* Statement To Assembly Committee Bill No. 944 (May 1980) (Da88). This supports the conclusion that the Legislature was aware of the various federal housing programs when it enacted *N.J.S.A.* 2A:42-100, but choose to include them within the protections of *N.J.S.A.* 2A:42-100. *See GE Solid State, Inc. v. Director, Div. of Taxation*, 132 N.J. 298 (1993) (Where Legislature has carefully employed term in one place and excluded it in another, it should not be implied where excluded).

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[8] The statutes and regulations governing the Homelessness Prevention Program, the Emergency Assistance Program and the Section 8 Rental Program are *N.J.S.A.* 55:270-280 *et seq.*; *N.J.A.C.* 10:82-5.10 and *N.J.A.C.* 10:85-4.6; and 42 *U.S.C.A.* §1437 respectively.

[9] Examples of private organizations and agencies that have rental assistance programs within Ms. Martinez's community are Catholic Community Services, Jewish Family and Counseling Service, Hyacinth Foundation, Hudson County Housing Resource Center Inc. (Cornerstone Outreach Program) and North Hudson Community Action Corp.

[10] *N.J.S.A.* 2A:42-101 prohibits a landlord from refusing to rent to families with children under 14 years of age. It also prohibits the use of leases which become void upon the birth of a child to a tenant.

In conclusion, the phrase "the source of any lawful rent to be paid for the house or apartment" must mean rental payments from sources other than a person's income since construing *N.J.S.A.* 2A:42-100 to exclude rental payments from sources other than a person's income would render a part of the statute inoperative, superfluous and meaningless. *State v. Reynolds*, 124 N.J. 559 (1991).

B. Defendant's Interpretation Of *N.J.S.A.* 2A:42-100 Comports With The Legislature's Goal of Prohibiting Source-of-Rental-Payment Discrimination

The legislative intent of a statute is revealed by the language of the statute, the underlying policy and its legislative history. *Paramus Substantive Certification No. 47*, 249 N.J. Super. 1 (App. Div. 1991). The purpose of *N.J.S.A.* 2A:42-100 as correctly stated by the trial court is to make it unlawful for a landlord to discriminate by refusing to rent or lease to a person because of objections to the person's source of income. *See* Statement To Assembly Committee Bill No. 944 (May 1980) (Da88). Unquestionably, the policy underlying *N.J.S.A.* 2A:42-100 is the protection of our most vulnerable citizens from being denied housing because of the source of their rental payments. *Id.* Ms. Martinez is one of those vulnerable citizens -- she is a senior citizen whose sole income is a monthly grant of Social Security in the amount of $521.00. (T37-25; T38- 1 to 8).

More importantly, without the Section 8 rental voucher Ms. Martinez spends 86 percent of her income on rent. (Da10-Da11). To sanction plaintiff's conduct in this case would contravene the legislative intent of *N.J.S.A.* 2A:42-100 because plaintiff's refusal to accept the rental voucher deprives Ms. Martinez of needed rental assistance and jeopardizes her tenancy. *See M.T. v. Kentwood Construction Co.*, 278 N.J. Super. 346 (App. Div. 1994).

C. Defendant's Reading of *N.J.S.A.* 2A:42-100 Is Also Supported By The Appellate Division's Decision In The Kentwood Construction Company Case.

As earlier stated the only reported case as to whether a Section 8 rental voucher is a source of lawful rent payment is *M.T. v. Kentwood Construction Co.*[11] In *Kentwood Construction Co.*, the Appellate Division affirmed a trial court's ruling that a landlord is precluded from dispossessing a tenant for non-payment of rent when the rent at issue is available through the Section 8 program.[12] The facts in the *Kentwood Construction Co.* are similar to those in this case.

Like the tenant in *Kentwood Construction Co.* Ms. Martinez is an existing tenant who wishes to take advantage of a federal

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[11] 278 N.J. Super. 346 (App. Div. 1994)

[12] *Id.* at 348.

program to assist her in paying the rent.[13] Similarly, Ms. Martinez is a senior citizen who has been found eligible for federal housing assistance under the Section 8 rental subsidy program.[14]

The fact that the landlord in *Kentwood Construction Co.* accepted Section 8 rent subsidies from other tenants is of no significance because the Appellate Division specifically found that the landlord's refusal to accept the tenant's Section 8 rental voucher violated both 42 *U.S.C.A.* §1437f(t) (Repealed 1996) and *N.J.S.A.* 2A:42-100.[15]

In addition, the Court in *Kentwood Construction Co.* recognized that the landlord has certain contractual obligations.[16] Specifically, plaintiff is obligated under the implied covenant of good faith to refrain from "do[ing] anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Association Group Life Inc. v. Catholic War Veterans of U.S.*, 61 N.J. 150, 153 (1972).

Plaintiff's refusal to accept the Section 8 voucher will invariably cause Ms. Martinez undue hardship because she will either have to vacate her home of five years or continue to spend 86 percent of her income on rent. (T34 to T39). Conversely,

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[13] *Id.* at 348.

[14] *Id.* at 349.

[15] *Id.* at 350.

[16] *Id.* at 350.

there is no demonstrable evidence in the record that plaintiff will suffer any financial loss by accepting the Section 8 rental voucher. Indeed, participation in the Section 8 program would benefit plaintiff financially because the chances of Ms. Martinez defaulting on her rent would be reduced. (T38-18 to 22).

Admittedly, participation in the Section 8 program is voluntary, but the State has the right to invoke mandatory participation absent some valid non-discriminatory reason for not participating. *See* Point Two *infra*. Ms. Martinez contends that participation in the Section 8 program is no more bureaucratic than the various state and local laws with which plaintiff is obligated to comply. *See, e.g., N.J.S.A.* 55:13A-1 *et seq.* (Hotel and Multiple Dwelling Law); *N.J.S.A.* 46:8-27 *et seq.* (Landlord Registration Act); *N.J.S.A.* 46:8-19 *et seq.* (Security Deposit Act); West New York Code Ch. 182 (1982) (Regulating rents for certain buildings).

However viewed, plaintiff's refusal to accept Ms. Martinez's Section 8 rental voucher is a breach of its implied covenant of good faith because plaintiff's conduct threatens her tenancy by effectively denying her the right to obtain needed federal rental assistance.[17] Accordingly, the trial court should have invoked its equitable jurisdiction and ruled that Ms. Martinez is only liable for that portion of the rent not covered by the Section 8 rental voucher.[18]

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[17] *Id.* at 350.

[18] *Id. at 350.*

POINT TWO

AN OBJECTIVE READING OF 42 *U.S.C.A.* §1437f LEADS TO A SINGULAR CONCLUSION: CONGRESS HAS CONFERRED UPON EACH STATE A RIGHT TO INVOKE MANDATORY PARTICIPATION IN THE SECTION 8 PROGRAM AND NEW JERSEY HAS EXERCISED THAT RIGHT BY ENACTING *N.J.S.A.* 2A:42-100; ACCORDINGLY, PREEMPTION IS INAPPLICABLE IN THIS CASE.

A state statute may be preempted by federal law in a variety of ways: Congress may expressly state that state law is preempted, *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309-10 (1977); or implicitly through the enactment of a federal regulatory scheme that is so pervasive that it creates the inference Congress "left no room" for state regulation in that area, *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947); or when federal law and state law actually conflict, such as when "compliance with both federal and state regulation is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-18 (1963); or when a state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941).

Contrary to the trial court's finding, defendant argues that no bases for preemption is applicable to this case. There is

nothing in the language of 42 *U.S.C.A.* §1437f[19] that explicitly preempts *N.J.S.A.* 2A:42-100. Furthermore, despite the elaborate federal regulatory scheme that governs the Section 8 program, Congress has left room for state regulation. *See, e.g., Housing Authority of Newark v. Scott,* 137 N.J. Super. 110 (App. Div. 1975) (Public Housing Authority, as landlord under Section 8 program, is subject to habitability defense of *Marini v. Ireland,* 56 N.J. 130 (1970)); *See also R & D Realty v. Shields,* 196 N.J. Super. 212 (Law Div. 1984) (Section 8 landlord must satisfy "good cause" standard under HUD regulations and also "reasonable rent increase" standard of New Jersey's Anti-Eviction Act); *See also Soliman v. Cepeda,* 269 N.J. Super. 151 (Law Div. 1993) (Section 8 landlord must satisfy both the federal standards of good cause for termination as well as New Jersey's standards under the Anti-Eviction Act).

Certainly compliance with both 42 *U.S.C.A.* §1437f and *N.J.S.A.* 2A:42-100 is not impossible. *N.J.S.A.* 2A:42-100 is not in conflict with 42 *U.S.C.A.* §1437f since they each address different concerns. 42 *U.S.C.A.* §1437f was enacted "for the purpose of aiding low-income families in obtaining a decent place to live..."

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[19] 42 *U.S.C.A.* §1437f(a) reads:

> For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with provisions of this section. A public housing agency may contract to make assistance payments to itself (or any such agency or instrumentality thereof)...

Conversely, *N.J.S.A.* 2A:42-100 prohibits landlords from "refus[ing] to rent or lease any house or apartment to another person because of the source of any lawful income received by the person or *the source of any lawful rent payment to be paid for the house or apartment.*" (emphasis added)

Finally, *N.J.S.A.* 2A:42-100 is not an obstacle to the accomplishment of the federal policies underlying 42 *U.S.C.A.* §1437f. In fact both statutes share a common goal -- affordable, decent housing for low-income persons. (Da22). In addition, exclusive federal power is less likely to be intended in areas of local, rather than national importance. *See Goldstein v. California*, 412 U.S. 546, 93 S. Ct. 2303 (1973) (Power to grant copyrights national in scope); *Compare with Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 438, 102 S. Ct. 3164 (1982) (States have broad power to regulate housing conditions in general and landlord-tenant relationship in particular).

In sum, "it does not follow that merely because Congress provided for voluntary participation the states are precluded from mandating participation absent some valid non-discriminatory reason for not participating." *Attorney General v. Brown*, 400 Mass. 826, 828, 511 N.E. 2d 1103, 1105 (1987) (Section 8 Program, which provides voluntary participation, is not preempted by Massachusetts Anti-Discrimination In Renting Act). *But see Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272 (7th Cir. 1995) (Questioning whether states can mandate participation in the Section 8 program).

POINT THREE

PUBLIC POLICY CONSIDERATIONS BUTTRESS THE CONCLUSIONS REACHED IN POINTS ONE AND TWO

A. Public Policy of Avoiding Displacement From Affordable Housing.

The Anti-Eviction Act was passed in 1974 and "flowed from a recognition [by the New Jersey Legislature] of the severe housing shortage in the state." *A.P. Development Corp. v. Band*, 133 N.J. 485, 492 (1988). The Legislature noted that its purpose was to limit evictions to situations in which a landlord had reasonable grounds and provided suitable notice. *Id.* In amending and supplementing the Act in 1986, the Legislature reiterated its concern over the effects of the affordable housing crisis existing in New Jersey:

> It is in the public interest of the State to maintain for citizens the broadest protections available under state eviction laws to avoid such displacement and resultant loss of affordable housing, which, due to housing's uniqueness as the most costly and difficult to change necessity of life, causes overcrowding, unsafe and unsanitary conditions, blight, burdens on community services, wasted resources, homelessness, emigration from the State and personal hardship, which is particularly severe for vulnerable seniors, the disabled, the frail, minorities, large families and single parents. (emphasis added)

N.J.S.A. 2A:18-61.1a(d).

Undoubtedly, New Jersey has a strong public policy of affording its citizens the broadest protections available under the state eviction laws so as to avoid displacement from affordable housing. *See generally 447 Associates v. Miranda,* 115 N.J. 522 (1989); *A.P. Development Corp. v. Band,* 113 N.J. 485 (1988). Surely, Ms. Martinez is one of those vulnerable citizens that the state seeks to protect from falling prey to the vicious cycle of homelessness which begins when a tenant is displaced from affordable housing. N.B. she is a senior citizen who spends 86 percent of her income on rent. (Da10-Da11).

It is undisputed that Ms. Martinez needs assistance with her rent -- she spends over three quarters of her income on rent and has been deemed eligible for federal rental assistance. (T37-25; T38 - T39). (Da6). Sanctioning plaintiff's conduct in this matter would deny Ms. Martinez the opportunity to obtain needed rental assistance. Moreover, Ms. Martinez is more likely to be displaced from affordable housing, thus falling prey to the vicious cycle of homelessness.[20] Accordingly, affirmance of the trial court's decision would contravene a strongly expressed public policy of protecting our most vulnerable citizens from being displaced from affordable housing.

[20] Rents in the building occupied by Ms. Martinez are regulated by the West New York Rent Control Ordinance. (T10-2 to 12).

Furthermore, this Court has recognized that a "landlord's rights must to some extent and on general welfare grounds defer to the needs of the tenant population in this state." *Morristown Memorial Hospital v. Wokem Mortgage & Realty*, 192 N.J. Super. 182, 188 (App. Div. 1983). Here, achievement of the public policy of preventing one of our most vulnerable citizens from being displaced from affordable housing requires that plaintiff execute a Section 8 contract and accept rental payments from the PHA. Such an imposition is warranted as a reasonable exercise of the state's police power to protect the health, safety and general welfare of the people. *Id.* Accordingly, plaintiff should be compelled to execute the Section 8 contract or should be prohibited from evicting Ms. Martinez for non-payment of the amount tendered from Section 8.

B. The Experience of Other States That Have Enacted Source-of-Rental-Payment Discrimination Laws.

At least eight states besides New Jersey that have acted to prohibit discrimination in rental housing based on the source of a tenant's rental payment: Connecticut;[21] Maine;[22] Massachusetts;[23]

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[21] Connecticut General Statutes §46a - 63 (3) sets out:

> "Lawful source of income" means income derived from social security, supplemental security income, housing assistance, child support, alimony or public or general assistance.
>
> C. G. S. § 46a - 64c provides in part: (a) It shall be a discriminatory practice in violation of this section: (1) To refuse to sell or

> rent after making of a bona fide offer, or to refuse to negotiate for sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, creed, color, national origin, ancestry, sex, martial status, age, lawful source of income or familial status.
>
> (b)...(5) The provisions of this section with respect to the prohibition of discrimination on the basis of lawful source of income shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income. (Da81) (Da82) (Da84).

[22] In Maine, 5 *M.R.S.A.* §4582 declares that it shall be unlawful housing discrimination:

> For any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state or local public assistance, including medical assistance and housing subsidies, primarily because of such individual's status as such recipient. (Da90).

[23] Massachusetts General Law c. 151B §4(10) provides simply:

> It shall be an unlawful practice: For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient or because of any requirement of such public assistance, rental assistance, or housing subsidy program. (Da37).

Minnesota;[24] North Dakota;[25] Utah;[26] Vermont;[27] and Wisconsin.[28]

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[24] Minnesota Statutes c. 363.03, subd. (2)(1)(a) provides:

> It is an unfair discriminatory practice: (1) For an owner... (a) to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of race, color, creed, religion, national origin, sex, martial status, status with regard to public assistance, disability, sexual orientation, or familial status.
>
> c. 363.01, subd. 42 defines "status with regard to public assistance" as ...[T]he condition of being a recipient of federal, state or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements. (Da64)(Da73).

[25] North Dakota Century Code §14-02.4-12 provides it is an unfair discriminatory practice to discriminate against a person in any real estate transaction because of that person's status with respect to public assistance.

§14-02.4-02 defines "status with regard to public assistance" as

> ...[T]he condition of being a recipient of federal, state or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements. (Da97).

[26] Utah Code §57-21-5 provides that it is an unfair discriminatory practice to discriminate against a person in any real estate transaction because of that person's source of income. (Da117).

In addition, the District of Columbia,[29] the City of Seattle,[30] and King County, Washington State[31] have laws prohibiting

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[27] Vermont Statutes §4503 provides that it is an unfair discriminatory practice to discriminate against a person in any real estate transaction because that person is a recipient of public assistance. (Da121). As defined in §4501(6), "public assistance" includes any assistance provided by federal, state or local government, including medical and housing assistance. (Da118).

[28] Wisconsin Statutes §101.22 (renumbered 106.04 by 1995 Act 27, § 3647 eff. July 1, 1996) provides that it is unlawful housing discrimination to discriminate against a person in any real estate transaction because of that person's lawful source of income. (Da111).

[29] §1-2502 of the District of Columbia Code (1981) defines "source of income" as:

> ...[T]he point, the cause, or the form of the origination, or transmittal, of gains of property accruing to a person in a stated period of time; including, but not limited to, money and property secured from any occupation, profession or activity, from any contract, agreement or settlement, from federal payments, court-ordered payments, from payments received as gifts, bequests, annuities, life insurance policies and compensation for illness or injury, except in a case where conflict of interest may exist. (Da103).
>
> §1-2515 provides that: it is unlawful to discriminate against any individual in real estate transactions wholly or partially for a discriminatory reason based on that individual's source of income. (Da105).

[30] Seattle, Wash. Code §14.08.040 (1993) provides in pertinent part:

> A. It is an unfair real estate

source of rental payment discrimination. There are some differences in the protection afforded by the statutes of each state or municipality. Some statutes proscribe discrimination based on the source of a person's rental payment.[32] Other statutes proscribe discrimination based on a person's status as a recipient of public assistance.[33] Prior to its amendment in 1989, the Massachusetts statute was unique, in that it specifically placed "mixed motive" refusals to rent beyond the reach of its "source of rental payment" prohibitions. On its face, the pre-amended statute

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> practice for any owner, assignee, real estate broker...to discriminate by undertaking or refusing to sell, rent, lease, sublease, assign, transfer or otherwise deny to or withhold from any person because of the person's race, color, creed, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status, political ideology, possession or use of a Section 8 certificate... (Da47)

[31] King County, Wash., Ordinances §12.20.040 provides:

> that it is a discriminatory practice for any person, whether, acting for himself or another, because of race, color, religion, national origin, age, sex, marital status, parental status, participation in Section 8 program, sexual orientation, disability, or use of a trained dog guide by a person with disability: 1. To refuse to engage in a real estate transaction with a person or to otherwise make unavailable or deny a dwelling to any person. (Da54).

[32] C.G.S. §46a-64c (Connecticut); W.S. §101.22 (Wisconsin); D.C.C. §1-2515 (District of Columbia); U.C. §57-21-5 (Utah); *N.J.S.A.* 2A:42-100 (New Jersey).

[33] M.C.L.c. 151B §4 (10) (Massachusetts); M.R.S.A. §4582

prohibited discrimination against persons receiving governmental housing subsidies solely because of their status as recipients of such subsidies. *Attorney General v. Brown, supra* (1987 case interpreting the pre-amended statute, indicating that a landlord could refuse to rent to a person receiving a housing subsidy as long as the landlord also had some other (presumably) non-discriminatory reason to refuse the rental.) Prior to amendment in 1986, Maine's "source of rental payment" prohibition also included the word "solely" and the statute was also interpreted to permit mixed motive refusals to rent. *Vance v. Speakman,* 409 A.2d. 1307 (1979). None of the statutes reviewed here currently contain the word "solely".

Two of the statutes do not seem to require that the source of rental payment be "lawful".[34] New Jersey, Wisconsin and Utah do not define at all what sources of income or rental payments are included or excluded in their general prohibitions against "source of rental payment" discrimination, thus leaving the question open for litigation.[35] The statutes of Connecticut, King County, Maine, Massachusetts, Minnesota, North Dakota, Seattle and Vermont provide protection against "source of rental payment" discrimination exclusively for certain forms of rental payment,

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[34] D.C.C. §1-2515 (District of Columbia); U.C. § 57-21-5 (Utah).

[35] The United States Court of Appeals, Seventh Circuit has interpreted the Wisconsin's statute as excluding Section 8 vouchers from its prohibition against "source of income" discrimination. *See Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272 (7th Cir. 1995).

while the District of Columbia provides such protection for any conceivable form of rental payment.

Given this array of statutes, several of which have been in place for many years, it is remarkable that there are only three reported cases interpreting source of rental payment discrimination. The first of these is the Maine case of *Vance v. Speakman,*[36] which no longer has precedential value since the statute was amended in 1986. Maine's "source of rental payment" discrimination statute prior to 1986, provided that it was unlawful housing discrimination:

> For any person furnishing rental premises to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state, or local assistance, including medical assistance and housing subsides, solely because of such individual's status as such recipient.[37]

Vance v. Speakman interpreted the "solely because of such individual's status as such recipient" clause of the statute; in 1986, this clause was amended by the Maine legislature to read "primarily because of such individual's status as such recipient." The precedential value of *Vance v. Speakman* is thus limited to

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[36] 409 A.2d 1307 (1979)

[37] 5 M.R.S.A. §4582(1979)

jurisdictions where "source of rental payment" discrimination is the sole motivating factor for denying the rental.

The second case, *Attorney General v. Brown,*[38] is more significant because it addresses the issue of whether Section 8 of the United States Housing Act of 1937 preempts the Massachusetts statute prohibiting "source of rental payment" discrimination. The other issue addressed by *Attorney General v. Brown*[39] is the "legitimate business reason" defense to the charge of "source of rental payment" discrimination.

In *Attorney General v. Brown,* the Massachusetts Attorney General brought suit against a landlord who owned residential apartment units in the Boston area, alleging that the landlord discriminated against Section 8 certificate holders solely because they were recipients of housing subsidies. The landlord refused to rent to persons holding Section 8 certificates although he owned approximately 800 apartments that were within the fair market rental range allowed under the Section 8 program. The landlord claimed that M.G.L.c. 151B, §4(10) was preempted by 42 *U.S.C.A.* §1437(a); he also claimed that he had several "legitimate business reasons" for refusing to accept Section 8 tenants: he preferred renting to persons who paid the last month's rent in advance; he did not want to rent to persons who had to execute a Section 8 lease because the Section 8 lease was materially less advantageous to him than his own lease; and, he did not want to deal with

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[38] 400 Mass. 826, 511 N.E. 2d 1103 (1987)

[39] *Id.*

the administrative bureaucracy of the Section 8 program.[40]

The Massachusetts Supreme Judicial Court determined that section 8 of the 1937 Housing Act did not preempt the State prohibition against "source of rental payment" discrimination. Brown argued that the Massachusetts statute mandated a landlord's participation in the voluntary Section 8 federal program and thus violated the supremacy clause of Article 6 of the U.S. Constitution.[41] The Attorney General counter-argued that there was nothing in the federal statute prohibiting states from requiring landlords to participate in the Section 8 program.[42] Finding that the state statute did not conflict with the federal statute, the Court stated:

> It does not follow that, merely because Congress provided for voluntary participation, the states are precluded from mandating participation absent some valid nondiscriminatory reason for not participating. The Federal statute merely creates the scheme and sets out the guidelines for the funding and implementation of the program by the United States Secretary of Housing and Urban Development (HUD) through local housing authorities. It does not preclude state regulation.[43]

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[40] *Id.*

[41] 511 N.E. 2d 1103,1106

[42] *Id.*

[43] *Id.*

In addressing the second issue, however, the Court refused to hold that as a matter of law refusing to rent to Section 8 tenants because of the administrative and regulatory requirements entailed by participation in the program constituted "source of rental payment" discrimination.[44] Accordingly, the Court overturned the lower court's grant of summary judgment for the plaintiff and remanded the case for determination of whether Brown stated legitimate business reasons which were not satisfied by the protections afforded by the regulations of the Section 8 program.[45] There is no reported record of what the decision was at trial, or indeed, if the case ever made it to trial on remand. As with *Vance v. Speakman*[46] previously discussed, the precedential value of *Attorney General v. Brown*, has been eroded by the amendment which deleted the word "solely" from the statute. *See* M.G.L.c. 151B §4 (10)(Da37).

The third reported case, is *Knapp v. Eagle Property Management Corp.*,[47] a Seventh Circuit decision interpreting Wisconsin's "source of income" statute as excluding Section 8 voucher holders. In *Knapp v. Eagle Property Management Corp.*, a prospective tenant brought action against the landlord and property management company alleging they had discriminated against her because of her race and status as a recipient of federal rental

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[44] *Id.* at 1109.

[45] *Id.*

[46] 406 A.2d. 1307 (1979)

[47] 54 F.3d 1272 (7th Cir. 1995)

assistance under the Section 8 voucher program. In resolving the issue of whether the landlord and the management company discriminated against the tenant based upon her status as a Section 8 recipient, the Court found that the protections of the Wisconsin Open Housing Act do not extend to Section 8 voucher holders because Wisconsin's definition of income does not include rental vouchers.[48] Furthermore, the Court reasoned that a Section 8 voucher is more analogous to a rental subsidy than income.[49] Finally, the Court questioned whether states can mandate participation in the Section 8 Program.[50]

In conclusion, the experience of other jurisdictions that have enacted source of rental-payment-discrimination laws demonstrates: 1) housing is a uniquely local issue; 2) rental housing is more susceptible to regulation by states because of its importance as a local issue; 3) combating source of rental payment discrimination is of public importance; 4) the responsibility for combating source of rental payment discrimination rightfully lies with the states and municipalities since housing is a local issue; 5) some states have mandated participation in the Section 8 program; 6) jurisdictions that have defined "source of income" or "source of rental payment" discrimination usually include federal and state local housing assistance payments as protected sources; and finally, 7) the burden of articulating a legitimate non-

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[48] 54 F.3d at 1282.

[49] *Id.*

[50] *Id.*

discriminatory reason for non-participation in the Section 8 program lies with the landlord and should be a factual determination. The foregoing considerations support Ms. Martinez's contention that preemption is inapplicable in this case and that New Jersey has included federal rental subsidies within the ambit of *N.J.S.A.* 2A:42-100.