UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

TAMAM MONCUR and JOHNNIE MAE FRANKLIN, individually and on behalf of all others similarly situated,

PLAINTIFFS

-against-

HOUSING AUTHORITY OF THE CITY OF NEWARK (a/k/a Newark Redevelopment and Housing Authority), a public corporation; MILTON BUCK, individually and as Executive Director of the Housing Authroity of the City of Newark, and PEARL BEATTY, JAMES CUNDARI, MILLARD E. TERRELL, PETER YABLONSKY, CAROLYN PERRY, RUDOLPH NOVOTNY and IRIS R. RODRIQUEZ, individually and as members of the Board of Commissioners of the Housing Authroity of the City of Newark and their agents and successors in office,

DEFENDANTS

CIVIL ACTION

No. 81-306 (SA)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Upon request for the issuance of a preliminary injunction in the Third Circuit, the District Court must consider and balance four factors: (1) whether the moving party has made a strong showing that they will prevail on the merits; (2) whether the moving party will be irreparably injured absent the relief; (3) whether the grant of a preliminary injunction would substantially harm other interested parties; and (4) the public interest. A.O. Smith Corporation v. Federal Trade Commission, 530 F.2d 515 (3rd Cir. 1976) and cases cited therein at 525; Commonwealth ex rel. Creamer v. U.S. Department of Agriculture, 469 F.2d 1387 (3rd Cir. 1972), Note 1 at 1388; In Re Penn Central Transportation Co., 457 F.2d 281 (3rd Cir. 1972); Virginia

Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958).

The determination of a motion for preliminary injunction involves a balancing process - no single factor controls. However, where a particularly strong showing of success on the merits is made, the relief should issue even if the other factors are less compelling. Likewise, where ultimate success on the merits is in question, but where the injury is significant and the public interest would be served, the relief may properly be granted. Finally, where significant injury may occur to either party by the grant or denial of relief, the Court should place greater significance on the likelihood of success in deciding the issue. Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917 (3rd Cir. 1974), and see, Gulf and Western Industries, Inc. v. Great Atlantic and Pacific Tea Company Inc., 476 F.2d 687 (2nd Cir. 1972).

In the present case, the merits of Plaintiffs' claims are clearly established in governing case law and federal regulations. The plaintiffs are suffering the irreparable loss of statutorily created and constitutionally protected rights and face the disruption of their homes and family life. Conversely, the Defendants face no injury from a grant of preliminary relief and the functioning of the Defendant Authority would not be impaired. Finally, the public interest would be served in insuring that the federal program of low-cost public housing is administered fairly and properly to achieve its purposes and to insure that no frustration of those purposes takes place.

II. ARGUMENT

A. Plaintiff Will Succeed On The Merits

1. Statutory Claims

Plaintiffs' claims under the United States Housing Act, 42 U.S.C. §1437 et seq., are based on regulations promulgated thereunder by the Secretary of Housing and Urban Development (HUD)

which provide for basic due process in the administrative decision to terminate a lease by a public housing agency (PHA). The regulations provide for pre-termination notice and an opportunity to reply in accordance with the standards set forth by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Specifically, the regulations provide that a tenant receive: (1) advance notice of the proposed termination; (2) of a specified time (14 days for nonpayment of rent); (3) stating the reasons for the proposed termination; (4) advising the tenant of his or her right to an informal settlement; (5) advising the tenant of his or her right to request a grievance hearing; and (6) advising the tenant of the means by which these may be obtained. After the notice period has expired (the tenant having elected not to request any grievance hearing), if the PHA still intends to terminate the lease it is then required to serve the tenant with a notice to vacate under state law (where applicable), and thereafter proceed in accordance with state law to obtain possession. A PHA is simply not permitted under federal law and regulations to take any adverse action during the applicable "grace" period intended to, among other purposes, permit the informal resolution of tenant-PHA disputes. Should a tenant elect a grievance hearing, a PHA is still required to await the outcome of such an administrative proceeding prior to formally terminating the tenancy.

The aforesaid federal regulations are set forth in 24 C.F.R. Part 866 (attached as Appendix 1) and state in relevant part:

> Subpart A. Dwelling Leases, Procedures and Requirements
>
> 866.4 Lease Requirements
>
> (1) Termination of the lease.
>
> (2) That the PHA shall give written notice of termination of the lease of:
>
> (i) 14 days in the case of failure to pay rent;
>
> (ii) a reasonable time commensurate with the

exigencies of the situation in the case of a creation or maintenance of a threat to the health or safety of other tenants or PHA employees; and

(iii) that the notice of termination to the tenant shall state the reasons for the termination, shall inform the tenant of his right to make such reply as he may wish and of his right to request a hearing in accordance with the PHA's greivance procedure.

These required procedures are also set forth in HUD's Public Housing Occupancy Handbook 7465.1 REV. which serves as a guide to public housing authorities in their implementation of the federal regulations. The Handbook states in relevant part:

Chapter 4: Conditions of Occupancy

Section 3: Guidelines for Development and Review of PHA Dwelling Leases

4-9 APPLICABLE REGULATIONS. The HUD requirements pertaining to PHA dwelling leases are set forth in 24 C.F.R. Part 866, Subpart A.

4-11 CONFORMITY TO STATE AND LOCAL LAW. It is the responsibility of the PHA to ensure that its dwelling lease is consistent with state and local landlord-tenant laws and the PHA's enabling legialation. The Area Counsel will advise the PHA on the resolution of any apparent conflicts between state or local law and the HUD requirements.

4-16 LEASE TERMINATIONS. It is the obligation of the PHA to develop dwelling lease requirements which permit the prompt eviction of tenants who are unable or unwilling to live up to the terms of the lease. The lease requirements related to terminations must conform to the provisions of 24 C.F.R. Section 866.4(l) and to applicable state and local laws.

a. In cases involving the creation or maintenance of a threat to the health or safety of other tenants or PHA employees there is no minimum notice of termination period and the PHA must proceed as quickly as state and local landlord-tenant law permits in such situations.

b. In cases of failure to pay rent, 14 days.

c. Evictions for other reasons are not as common as the cases mentioned above and require a 30-day notice of termination. The issues involved in such terminations are more likely to be the subject of grievances and the process can be expected to take longer. (See Appendix 2).

In contrast to this regulatory scheme, the Defendant Authority terminated the leases of Plaintiffs, and terminates the leases of their class, for nonpayment of rent, either with no notice of termination or with a three (3) day notice of termiantion (See Plaintiffs' Exhibit B). When afforded, the three (3) day notice is generally delivered by Housing Authority personnel who place it under the tenant's apartment door or in the tenant's mailbox. This notice and the manner of its service, do not comply with the notice provisions of the aforesaid federal regulations, and thus clearly violates same.

The above-cited regulations as to Lease and Grievance Procedures were promulgated in response to, and to satisfy the requirements imposed under, the application of the holding of Goldberg v. Kelly, supra, to the continuing entitlement of public housing. Escalera v. New York City Housing Authority, 425 F.2d 853 (2nd Cir. 1970); Caulder v. Durham Housing Authority, 433 F.2d 988 (4th Cir. 1970), cert. den. 91 S.Ct. 1228, 401 U.S. 1003, 28 L.Ed.2nd 539; Ruffin v. Housing Authority of New Orleans, 301 F. Supp. 251 (E.D.La. 1969).

The Secretary promulgated the regulations pursuant to the rule-making authority granted in the National Housing Act of 1937, as amended, 42 U.S.C. §§1437(c) and 1437(d), to achieve the purposes of the Act. Rules made pursuant to this authority, and imposing requirements for administrative due process by PHAs in the termination of tenancies have consistently been held valid and mandatory. Thorpe v. Housing Authority of the City of Durham, 89 S.Ct. 518, 393 U.S. 268, 21 L.Ed.2d 474 (1969); Glover v. Housing Authority of Bessemer, Alabama, 444 F.2d 158 (5th Cir. 1971); Brown v. Housing Authority of the City of Milwaukee, 471 F.2d 63 (7th Cir. 1972); Housing Authority of the City of Omaha, Nebraska v. Unites States Housing Authority, 468 F.2d 1 (8th Cir. 1972); McMichael v. Chester Housing Authority, 325 F.Supp. 147

(E.D. Pa. 1971); Chicago Housing Authority v. Harris, 49 Ill.2d 274, 275 N.E.2d 353 (1971); Housing Authority of the City of Milwaukee v. Mosby, 53 Wis. 2d 275, 192 N.W.2d 913 (1972); Housing Authority of the City of Bayonne v. Isler, 127 N.J.Super. 568, 570-571 (App. Div. 1974); Ferguson v. Metropolitan Development and Housing Authority, 485 F.Supp. 517 (M.D.Tenn. 1980); Fletcher v. Housing Authority of Louisville, 491 F.2d 793 (6th Cir. 1974).

In Staten v. Housing Authority of the City of Pittsburgh, 469 F.Supp. 1013 (W.D. Pa. 1979), the Court enjoined an eviction procedure similar to that utilized by Defedant Authority. As in the case sub judice, the evictions sought in Staten, supra, were for nonpayment of rent. The Court in Staten, supra, enjoined the Housing Authority of the City of Pittsburgh from commencing, prosecuting or enforcing eviction proceedings until it complied with the procedural due process requirements of 24 C.F.R. Part 866 and state law (see Appendix 3):

> Thus, [24 C.F.R.] Section 866.4(l) addresses the procedural due process requirement that an initial notice must advise the tenant of a proposed termination. The determination to evict may not become final until the tenant has had an effective opportunity to present his grievances at a hearing. McMichael, supra, at 149. See Goldberg, supra, at 267-268. This initial notice, therefore, must adhere to the requirements of 24 C.F.R. §866.4(l) and must be couched in language conveying the proposed nature of the lease termination. During the 14 days the tenant has an opportunity to dispute the housing authority's action. If the tenant fails to present any grievance, either orally or in writing, to the housing authority within said period, the determination to evict becomes final, or if the tenant loses the grievance, the determination becomes final. 469 F.Supp. at 1016.

Plaintiffs' showing of non-compliance with the terms and procedures required by HUD in the termination of tenancies, establishes a sufficient probability of success on the merits to warrant a preliminary injunction. Chicago Housing Organization, Inc. v. Chicago Housing Authority, 512 F.2d 19 (7th Cir. 1975); McClellan v. University Heights, Inc., 338 F.Supp. 374 (D.R.I.

1972). See also, Caulder, supra.

2. Constitutional Claims

Plaintiffs' constitutional claims are grounded upon the due process clause of the Fourteenth Amendment. A tenancy in public housing is a statutory entitlement. Goldberg v. Kelly, supra. The termination of such a tenancy by Defendant Authority involves state action and therefore triggers the application of due process requirements. Escalera, supra; Caulder, supra. Because the impact of termination of the lease on the tenant is grievous and the interest of the government in providing low-cost public housing would be frustrated by an improper termination, due process must be applied prior to the termination. Goldberg, supra; Escalera, supra; Caulder, supra.

The scope of the requisite prpcedural due process was established in Goldberg, supra, and was applied in Escalera, supra and in Caulder, supra:

> Succunctly stated, Goldberg requires (1) timely and adequate notice detailing the reasons for a proposed termination; (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses; (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests; (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth; and (5) an impartial decision maker. Caulder, supra at 1004.

The termination of Plaintiffs' tenancies and order to vacate the premises by the Defendant Authority without the procedural safeguards stated above denies Plaintiffs due process of law under the Fourteenth Amendment.

3. Pendant Claims Under The Annual Contributions Contract and The Public Housing Lease

The Housing Authority of the City of Newark is a recipient of funds from the United States Department of Housing and Urban Development (HUD). As such, its operations are governed by the Annual Contributions Contract (ACC). Plaintiffs, as tenants and potential tenants of public housing in the City of Newark, are third-party beneficiaries on the ACC. (See Appendix 4).

Section 203(b) of the ACC requires Defendant Authority to give Plaintiffs written leases, which leases must contain mandated procedures for termination of the leases;

> 203. Leases
>
> B. The Local Authority shall not permit any family to occupy a dwelling in any Project except pursuant to a written lease for such dwelling..., which lease shall contain all relevant provisions necessary to meet the requirements of the [National Housing] Act and of this Contract, and which lease shall not terminate the tenancy other than for violation of the terms of the lease or other good cause. In terminating a tenancy, the Local Authority shall inform the tenant in a private conference or other appropriate manner the reasons for the eviction and give the tenant an opportunity to make such reply or explanation as he may wish.

Paragraph 10(c) of the Public Housing Lease (Lease) between Defendant Authority and Plaintiffs states that Defendant Authority may terminate a tenancy for non-payment of rent.(See Appendix 5):

> ...by the giving of written notice, as set forth in Section 9, not less than Fourteen days notice prior to the termination of this lease....

Paragraph 9 of the Lease proscribes the manner of service of the aforesaid written notice:

> Any notice required hereunder will be sufficient if delivered in writing to the Tenant personally, or to an adult member of the Tenant's family over seventeen (17) years old residing in the dwelling unit, and if after one attempt, personal service cannot be made, then service by certified mail, return receipt requested, properly addressed to Tenant postage pre-paid.

In contrast to the aforesaid requirements, the Defendant Authority terminated the leases of Plaintiffs, and terminates the leases of their class, for non-payment of rent, either with no notice of termination or with a three (3) day notice of termination (See Plaintiffs' Exhibit B). When afforded, the three day notice is generally delivered by Housing Authority personnel who place it under the tenant's apartment floor or in the tenant's mailbox. This notice and the manner of its service, do not comply with the notice provisions of the aforesaid Annual Contributions Contract and the Public Housing Lease, and thus clearly violates same.

Plaintiffs' showing of non-compliance with the terms and procedures required by the Annual Contributions Contract and the Public Housing Lease in the termination of tenancies, establishes a sufficient probability of success on the merits to warrant a preliminary injunction. Chicago Tenants Organization, Inc. v. Chicago Housing Authority, supra; McClellan v. University Heights, Inc., supra. See also, Caulder, supra.

B. Plaintiffs Will Suffer Irreparable Injury

Plaintiffs face imminent eviction actions by Defendant Authority. At stake for the Plaintiffs and their minor children is the stability of their homes and housing at a rent which they can afford and which is otherwise unavailable. In Ruffin v. Housing Authority of New Orleans, supra, the Court stated:

> The right to occupy one of its [Housing Authority's] low rent apartments is zealously sought. If a tenant is evicted, equivalent accomodations cannot be found elsewhere for the same rental. 301 F.Supp. at 253.

Unanimity exists that New Jersey is in the midst of a housing crisis. More than 10 years ago, then Governor Cahill declared:

> There is a complete inadequacy of single and multi-family dwellings; and the law of supply and demand is raising the cost of existing housing out of the range of the average man. So the problem is present, and it is critical. A Blueprint For Housing, A Special Message To The Legislature, December 7, 1970.

Similarly, in Samuelson v. Quinones, 119 N.J.Super. 338, 343 (App. Div. 1972), the Court stated:

> We take judicial notice of the fact that there is an acute shortage of low income housing in the City of Newark....

See also, Reste Realty v. Cooper, 53 N.J. 444 (1969); Marini v. Ireland, 56 N.J. 130 (1970); DeSimone v. Greater Englewood Housing Corp., 56 N.J. 428 (1970); Morocco v. Felton, 112 N.J.Super. 226 (Law Div. 1970); Stanger v. Ridgeway, 171 N.J.Super. 466 (App. Div. 1979); Floral Park Tenants Association v. Project Holding, Inc., 152 N.J.Super. 582 (Chan. Div. 1977).

The Plaintiffs' rights to pre-termination due process are presently being denied. The very imminence and pendency of state court eviction proceedings is the violation of those rights. These rights will be irretrievably lost if this Court does not enter preliminary relief.

These circumstances meet the requirements of irreparable harm in the issuance of preliminary relief. Chicago Housing Tenants Organization, supra; McClellan, supra. In light of the Plaintiffs' probable success on the merits, this harm is overwhelmingly sufficient to permit such relief.

C. Defendants Will Not Be Injured By The Granting Of Preliminary Relief

The preliminary relief sought will not injure the Defendants. The relief will not burden or prevent the functioning of the Defendant Authority in the processing of evictions. Chicago Housing Tenants Organization, supra. It would only require that Plaintiffs and their class be given proper notice and an adequate

opportunity to settle disputes through administrative procedures. This would benefit the Defendants in that it would further facilitate dispute resolution within the Defendant Authority itself, prevent the disruption of tenancies, and reduce the frequency and necessity of costly and time-comsuming state court eviction actions. Evictions could still proceed where necessary, after fulfillment of the requirements of administrative due process.

D. The Public Interest Will Be Served

The preliminary relief Sought by Plaintiffs, will also insure that the underlying public purpose of the Defendant Authority's provision of low-cost housing will not be frustrated. In holding that HUD requirements of pre-eviction due process were mandatory, the Court in Housing Authority of the City of Milwaukee v. Mosby, supra, stated:

> We conclude that this provision does not change the terms of the lease used by the parties to this action, nor does it prevent the housing authority from evicting a tenant who does not comply with the terms of the lease. It only provides for an administrative method of advising tenants of violations and making factual determinations of whether such violations exist and whether they are of such a nature as to require eviction. It also provides a means whereby a neutral person or body of persons can attempt to discuss the problems with the objective of saving the tenancy. Eviction is hardly consistent with public interest in providing housing for low income persons. This procedure promotes the underlying objectives of providing low rent public housing in the first instance. 53 Wis.2d 275, 192 N.W.2d at 917.

The public interest in providing low-cost public housing and providing it in a rational, fair and efficient manner, weighs in favor of the issuance of preliminary injunctive relief. Considered in balance with the probable success on the merits, the harm to Plaintiffs and the lack of injury to the Defendants, the weight of considerations more than satisfy the requirements necessary for preliminary relief.

Respectfully submitted,

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