1999 WL 33518140
United States District Court, E.D. Virginia.

WASHINGTON PARK LEAD COMMITTEE, INC., Helen M. Person, Henrietta Harrell, Cecelia Mae High, Carol Ann Barrett, Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Carol M. Browner, Administrator, W. Michael McCabe, Regional Director City of Portsmouth, Virginia Portsmouth Redevelopment and Housing Authority, and Pneumo Abex Corporation, Defendants.

No. 2:98CV421.
|
July 12, 1999.

ORDER AND OPINION

FRIEDMAN, District J.

***1** This matter is before the Court on: (1) the United States Environmental Protection Agency's (EPA), Abex's and the City of Portsmouth's (City) motions to reconsider and to dismiss the amended complaint; (2) the Portsmouth Redevelopment and Housing Authority's (PRHA) motion to amend the Court's December 1 Order and for certification of interlocutory appeal (joined by Pneumo Abex (Abex) and the City in separate motions); (3) the PRHA's motion to dismiss the amended complaint; and (4) Abex's motion to dismiss the amended complaint. Additionally before the Court is the PRHA's motion to add the United States Department of Housing and Urban Development (HUD) to this case as a necessary party. The Court heard oral argument on each of the pending motions and took the matter under advisement.[1]

Upon consideration of the argument presented and the relevant case law, it is hereby ORDERED that for the reasons contained herein: (1) the EPA's, the City's and Abex's motions to reconsider the Court's December 1 Opinion and Order are DENIED, except that the doctrine of sovereign immunity serves as a bar to the plaintiff's claims against the EPA under the Fair Housing Act (FHA); (2) the EPA's and Abex's motions to dismiss the amended complaint are GRANTED as to the FHA claim (Count V), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) citizen suit claim is DISMISSED as to all defendants; (3) the PRHA's, Abex's and the City's motions to amend the Court's December 1 Order and for certification of interlocutory appeal on the issue of the statute of limitations are DENIED; (4) the PRHA's and the City's motions to dismiss the amended complaint are DENIED (specifically as to the FHA and Title VI claims); (5) the PRHA's motion to add HUD as a necessary party is GRANTED; and (6) the plaintiff's request to file a second amended complaint to add HUD is GRANTED.

Procedural and Factual History

On December 1, 1998, this Court issued its Order and Opinion on Defendants' Motion to Dismiss the plaintiff's complaint in this case. The facts and claims alleged by the plaintiff are set forth in the December 1 Opinion, and therefore, it is not necessary to reiterate them herein. In the Court's December Opinion, it ruled that at that stage in the proceedings, the plaintiff had raised sufficient facts to establish standing, and denied the defendants' motions to dismiss on all grounds, except that the Court dismissed Danny Cruce, an individually named defendant. The Court additionally gave the plaintiff ten days to amend its complaint to perfect certain claims made by the plaintiff (as described in the December Order). On December 15, the plaintiff filed its First Amended Complaint which, among other things, added two new claims; a FHA claim (Count V) and a claim under the CERCLA citizen suit provisions (Count VI). The pending motions are responsive to the amended complaint, and seek reconsideration of the Court's previous Order on the claims set forth in the original Complaint.

ANALYSIS

I. *The EPA's and the City's Motions to Reconsider*

***2** The EPA and the City both move this Court to reconsider its previous ruling based on what the defendants believe is both a mistake in law and a mistake in fact. To the extent that a motion to reconsider is contemplated by the Federal Rules, the standard for reconsideration is based on Rule 60(b) which provides, *inter alia,* that the court may relieve a party from the terms of an Order when a party, within a reasonable time from the entry of the order, shows that there has been a manifest error in law, that newly discovered evidence which "by due diligence could not have been discovered" exists that would change the disposition of the court, that the opposing party has engaged in some fraudulent behavior effecting the validity of the order, or for other grounds the court deems justifying reconsideration of a previous order or decision. Fed.R.Civ.P. 60; *United States v. Dickerson,* 971 F.Supp. 1023, 1024 (E.D.Va.1997).

The plaintiff claims that the EPA has violated the Fifth Amendment, and that the EPA and the City have both violated the FHA and CERCLA. *See* First Amd. Complaint at Paras. 50, 54–58. As set forth above, in December 1998, the Court denied the EPA's and City's (as well as the other defendants') motion to dismiss the claims pending in the original complaint. They now ask for reconsideration with regard to the claims brought under the Fifth Amendment, including the defense asserted under the CERCLA bar, and separately seek dismissal of the new CERCLA claim (Count VI) and the FHA claims (Count V).

The essence of the defendants' argument regarding the CERCLA bar and the Fifth Amendment is a request for the Court to reconsider what it has already thoroughly considered. The defendants do not argue that there has been a change in the law or in the relevant facts. As set forth above, the purpose of a motion to reconsider is generally to correct manifest errors of law or fact or to present newly discovered evidence. *See Dickerson,* 971 F.Supp. at 1024; *see also Harsco v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985), *cert. denied,* 476 U.S. 1171 (1986). In fact, the Fourth Circuit has held that for a motion to reconsider to be granted, the movant must show more than that evidence is newly discovered, but it must also show that the evidence could not reasonably have been discovered or produced at the prior hearing. *See Boryan v. United States,* 884 F.2d 767, 771 (4th Cir.1989).

With regard to the CERCLA bar, the EPA argues that *Reeves Bros., Inc. v. EPA,* 956 F.Supp. 665 (W.D.Va.1995), is inapplicable since, according to the EPA, it addresses only an investigative procedure and not a clean up remedy. The EPA argues that this Court's interpretation of *Reeves* and decision that the CERCLA bar does not apply in this case, and that the Court's previous opinion creates an unprecedented change in the CERCLA case law.[2] Rather than *Reeves,* the EPA continues to urge the Court to rely on *Barnett v. Thomas,* 730 F.Supp. 771 (W.D. Ky 1990), *aff'd* 927 F.2d 289 (6th Cir.1991) (finding that the plaintiff's constitutional rights were not violated). The Court has thoroughly reviewed the relevant case law on this issue and FINDS no legal reason to reconsider its previous decision regarding the applicability of the CERCLA bar in this case.

***3** In addition to their reasserted legal argument based on *Reeves* and *Barnett,* the defendants apparently in the alternative, argue that the Court should reconsider its decision arguing that the Court, in issuing the December Opinion and Order, was operating under the mistaken assumption that the Court's Opinion would have little impact on the CERCLA clean-up—what EPA characterizes as a "mistake in fact." As a result of what the EPA claims will be a disruption in the clean-up, the EPA argues that the Court should reconsider its ruling and find that the CERCLA bar prohibits the plaintiff's claims until the completion of the clean-up project. The plaintiff contends that the consideration requested by the EPA creates a new loop-hole not anticipated by Congress in CERCLA. The Court agrees, and declines to extend the CERCLA bar as requested by the EPA. As set forth in the Court's December opinion, the suggestion of the EPA that the CERCLA bar applies to cases, such as this, creates a paradox where a plaintiff claiming a constitutional violation of his or her rights would be precluded by the CERCLA bar from bringing claims until such time as the clean-up is complete and the claims are essentially moot.

Similarly, with regard to the Court's decision concerning the Fifth Amendment claim, the EPA and City argue that the Court's previous holding regarding the pleading standards was incorrect and, in their opinion, misinterpreted the Fourth Circuit's opinion in *McCauley v. Jacksonville, North Carolina,* 1987 WL 44775, 829 F.2d 36 (4th Cir.1987) (unpublished). The EPA refers the Court to *Sylvia Dev. Corp. v. Calvert Cnty, Md.,* 48 F.3d 810 (4th Cir.1995). While the EPA did not cite *Sylvia* in its initial motion to dismiss, it is not new law in this Circuit, and indeed, the Court was aware of *Sylvia* case and its progeny prior to its December Opinion and Order. Even in light of EPA's recent discovery of and citation to the 1995 *Sylvia* opinion, the Court FINDS as set forth in the December Opinion that at least at this stage of the proceedings, the plaintiff has met the pleading requirements for its claims under the Fifth Amendment.[3] *See, e.g.,* Amd Complaint Paras 12–14, 16–17, 21–24, 34–43, and 48–50.

The only argument advanced by the EPA and not specifically addressed in the Court's previous Order is the applicability of the doctrine of sovereign immunity. Essentially, the EPA argues that the Fifth Amendment and FHA claims against it should be dismissed because the federal government has not waived sovereign immunity for these claims. Certainly, the EPA, as a governmental entity of the United States, is entitled to sovereign immunity unless Congress waives that immunity and authorizes consent to suit. *See Global Mail Ltd. v. United States Postal Service,* 142 F.3d 208, 210–211 (4th Cir.1998) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also Preferred Risk Mut. Ins. Co. v. United States,* 86 F.3d 789 (8th Cir.1996), *cert. denied*, 520 U.S. 1116 (1997) (finding that because the Federal Emergency Management Act (FEMA) did not expressly waive sovereign immunity, the case could only proceed under an Administrative Procedure Act (APA), 5 U.S.C. § 501, *et seq.*, challenge that the agency's final agency action had been arbitrary and capricious).

***4** The plaintiff claims that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1342(a)(3), and 42 U.S.C. § 3601, *et seq.* However, as the EPA has correctly argued, none of these jurisdictional provisions waive the government's sovereign immunity for claims under the Fifth Amendment or the FHA. *See Montana–Dakota Utils. Co. v. Northwestern Pub. Serv. Co.,* 341 U.S. 246, 259 (1951); *see also Uhrig v. Regan,* 623 F.Supp. 968 (D.Md.1986). In the alternative, the plaintiff asserts that the APA waives sovereign immunity in cases such as this. This legal issue is not easily resolved.

Ordinarily, the APA provides a general cause of action for persons aggrieved by a federal agency's final agency action. 5 U.S.C. § 702; *see also Schneider v. United States,* 27 F.3d 1327, 1330 (8th Cir.1994), *cert. denied*, 513 U.S. 1077; *Presbyterian Church v. United States,* 870 F.2d 518, 523–24 (9th Cir.1989) (finding that Section 702 of the APA waived sovereign immunity for the church's non-monetary claim against the government and analyzing legislative history of the 1976 amendment to the APA). The Fourth Circuit, however, has not gone so far as to hold that there is an absolute waiver of sovereign immunity for non-monetary claims against the federal government. *See, e.g., Radin v. United States*, 699 F.2d 681, 684–85 (E.D.Va.1983) (finding that the *Bivens* waiver of sovereign immunity did not apply to the government agency simply because a government official might be liable under *Bivens*).

However, in an opinion issued April 5, 1999, *Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180 (4th Cir.1999), the Fourth Circuit held that Title VI, and Section 1985 in particular, does not provide a general waiver of sovereign immunity. *Id.* at 191. The court found that it had a "narrow" interpretative task—to determine whether Congress had intended to create a private right of action under Title VI. After a thorough review of Title VI, the court held that Congress had not so intended. *Id.* at 191–92. Similarly, other circuits have held that the FHA (Title VIII) does not provide a waiver of sovereign immunity. *See NAACP v. Secretary of HUD,* 817 F.2d 149, 152 (1st Cir.1987) (finding that the United States has not consented to suit under the FHA); *Unimex, Inc. v. HUD,* 594 F.2d 1060, 1061 (5th Cir.1979). For this reason, the plaintiff's claims against the EPA under the Title VIII or the FHA (Count V) must be DISMISSED as a matter of law.

Therefore, the only claims remaining against the EPA are those allegations related to discrimination under the Fifth Amendment. As set forth above, the plaintiff, in its responsive brief argues that its jurisdictional basis, *i.e.*, waiver of sovereign immunity, is derived from the APA. Because the Fourth Circuit has not directly addressed this issue the issue is not so clear-cut as the FHA claim discussed *supra.* While the plaintiff has not explicitly stated a claim for relief under the APA, it contends that it need not to implicate the APA's waiver of sovereign immunity to apply, and that if it is required, that it should be given leave of Court to amend. The EPA contends that, regardless of whether the APA is required as a separate cause of action in the pleadings, if the plaintiff is relying on the APA as a waiver of sovereign immunity, then the plaintiff is limited to the remedies allowed under the APA.

***5** Specifically, the EPA argues that the APA only provides relief when a court, after a review of the administrative record, determines that the challenged final agency action[4] is arbitrary and capricious. If the Court makes such a determination based on the record, then the proper relief under the APA is a remand to the agency for additional consideration of the challenged decision. The EPA contends that because the plaintiff in order to bypass the provisions of the CERCLA bar has steadfastly insisted that it is not challenging the EPA's final agency decision in this case (*i.e.*, the remedial action), the relief available under the APA is inapplicable in this case. *See Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985); *National Labor Review Bd. v. Food Stores Employees,* 417 U.S. 1, 10 (1974); *A.L. Pharma. Inc. v. Shalala,* 62 F.3d 1484, 1492 (D.C.Cir.1995); *Chechosky v. S.E.C.*, 23 F.3d 452, 462–66 (D.C.Cir.1994). The plaintiff argues that the APA does not limit the relief available to remand and cites *NAACP v. HUD,* 817 F.2d 149, 160 (1st

Cir.1987), for the proposition that the court may "tailor its remedy to the occasion."

The Court is not convinced that the plaintiff has correctly cited the *NAACP* case, but nonetheless finds some merit in the plaintiff's argument that in a case such as this, even if the government's sovereign immunity has not been explicitly waived, dismissal under Fed.R.Civ.P. 12(b)(6) may be inappropriate. *Littell v. Morton,* 445 F.2d 1207, 1213–14 (4th Cir.1971) (holding that in some cases the policies considerations promoting the doctrine of sovereign immunity do not require the dismissal of a suit even where there has been no waiver of immunity); *Hsing v. Usery,* 419 F.Supp. 1066, 1070 (W.D.Pa.1976) (citing *Littell,* 445 F.2d at 1213) (finding that the doctrine of sovereign immunity did not serve as an absolute bar to suit against the United States where there would be no interference with government business as a result of the litigation); *see also Jersey Heights,* 174 F.3d 191 (citing APA, 5 U.S.C. § 704) (noting that the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review").

Therefore, without ruling at this time as to whether the APA provides a basis for the waiver of sovereign immunity or whether there is an available remedy if plaintiff did indeed pursue a claim under the APA,[5] after careful consideration of the plaintiff's Fifth Amendment claim, the Court is unpersuaded that the doctrine of sovereign immunity should operate to bar the plaintiff's claims which rest solely on the Constitution (Count 1). *See Davis v. Passman,* 442 U.S. 228, 242–43 (1979) (noting that a plaintiff resting directly on the Constitution (the Fifth Amendment) as a basis for relief can invoke the jurisdiction of the Federal Courts when he or she has no other effective means to vindicate constitutional rights and focusing instead on whether the petitioner has an available remedy through the courts); *but see Radin,* 699 F.2d at 684–85, n. 8 (acknowledging Tucker Act as a Congressional waiver of sovereign immunity). Therefore, except as set forth above with regard to the dismissal of the FHA claim against the EPA under the doctrine of sovereign immunity, the defendants have failed to set forth either a legal or factual reason for the motion for reconsideration.

II. *Motions to Amend Order or Certify for Appeal*

A. *Motion to Amend December 1 Order*

***6** With the notable exception of the EPA, all of the defendants have asked that the Court to either amend the December Order regarding the statute of limitations decision or to certify the issues regarding the statute of limitations for interlocutory appeal. The defendants' primary argument is that a case recently decided by the Fourth Circuit, and not specifically before the Court at the time it made the previous decision in this case, is dispositive on this issue—*Jersey Heights,* 174 F.3d at 186.

In the *Jersey Heights* decision, the Fourth Circuit affirmed a Maryland district court's opinion dismissing the plaintiff's claims for failure to state a claim under the FHA, and held that the remainder of the claims were time-barred by the six year statute of limitations. *Jersey Heights,* 174 F.3d at 186–88. With regard to the statute of limitations, the *Jersey Heights* court held that the claims arising from the challenged agencies' site selection for the proposed highway ripened and began to accrue at the latest with the issuance of the Record of Decision (ROD) under the National Environmental Policy Act (NEPA), which constituted final agency action under the APA. *Id.* at 188. The court held that the applicable statute of limitations against the United States was six years, that agency's conduct became reviewable by final agency action under the APA, and that because eight years passed between the signing of the ROD and the filing of plaintiff's complaint, the pre-ROD claims were time-barred. *Id.* (affirming district court).

By contrast, in this case the Court has previously held that the statute of limitations was triggered when the Consent Decree was signed, not when the ROD was issued. *See* Court's Opinion (Dec.1998) The defendants argue that this Court's decision is contrary to the Fourth Circuit's opinion in *Jersey Heights,* and that the Court should either amend its previous Order accordingly, or certify the question for interlocutory appeal. The Court will do neither in this case.

Specifically, as set forth in the December Order, cases involving NEPA and the APA are distinguishable from cases which involve claims brought under CERCLA or involving a decision made pursuant to CERCLA, such as this case. In the December Order and Opinion, the Court specifically considered cases similar to *Jersey Heights,* as well as the District Court's decision in *Jersey Heights,* and nevertheless held that the statute of limitations was triggered by the finalization of the Consent Decree and not the issuance of the ROD.[6]

Based on the Court's understanding of the procedural requirements of NEPA as compared to those of CERCLA, it is clear that the plain language of CERCLA, as set forth in the Court's previous Order, must control the Court's decision on this issue. CERCLA explicitly provides that, due to the necessity of allowing for public comment on the ROD, the agency's action is final when the consent decree or settlement agreement is entered. Therefore, clearly the statute of limitations is not triggered until the Consent Decree is finalized. The basis of the PRHA's argument is the same as it was on its first motion—that the Consent Decree addresses merely cost allocation and does not address any substantive decision regarding the clean-up plan. In making its argument, the PRHA ignores the major differences in the substance and requirements of NEPA as compared to those of CERCLA. For example, the provisions of NEPA do not require a Consent Decree, and the public comments do not follow the signing of the ROD. *See* NEPA, 42 U.S.C. § 4321, *et seq.* (requiring the opportunity for public comment following the issuance of the Draft Environmental Impact Statement which occurs prior to the signing the ROD).

***7** NEPA and CERCLA are both commonly classified as protective "environmental statutes," and like other environmental statutes, they each include numerous procedural guideposts and regulatory provisions which can either make or break a plaintiff's case or an agency's defense in litigation. However, aside from their "environmental" labels, the statutes are largely incomparable. NEPA is essentially an information gathering statute designed to provide for informed agency decision making. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989); *New River Valley Greens v. United States Dep't of Transportation,* 161 F.3d 3 (4th Cir.1998) (unpublished) (citing *Marsh*). CERCLA, by contrast, provides the means by which the EPA cleans-up areas, such as Washington Park, that contain environmentally hazardous materials, and collects money from "potentially responsible parties" for reimbursement for the clean-up. *See Westfarm Assoc., Ltd. v. Washington Suburban Sanitary Comm'n,* 66 F.3d 669, 677 (4th Cir.1995), *cert. denied,* 517 U.S. 1103 (1996) (citations omitted). The statutes' characterization as environmental protection oriented statutes is essentially the end of the similarities of NEPA and CERCLA. Therefore, the defendants' insistence that because the Fourth Circuit has determined that the applicable statute of limitations under NEPA is triggered by a the signing of the ROD, then the statute of limitations for an case challenging a CERCLA action should also be triggered by the signing of the ROD is ill-founded. Furthermore, the defendants' argument ignores the plain language of CERCLA and the substantive differences between NEPA and CERCLA. The Court declines to follow this approach to legal reasoning and instead after consideration of the substantive differences in NEPA and CERCLA, and the numerous cases cited by the parties, including the Fourth Circuit's recent decision in *Jersey Heights,* the Court DENIES the PRHA's and other defendants' motion to amend the order regarding the statute of limitations.

B. *Motion to Certify the Question for Interlocutory Appeal*

With regard to the request for certification, 28 U.S.C. § 1292(b) governs interlocutory appeal. 28 U.S.C. § 1292(b). It provides that when a court issues an Order not otherwise appealable, such as this Court's decision on the statute of limitations, and that order "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" then the district court may certify a specific question for interlocutory appeal. *Id.* In this case, the defendants contend that the triggering date for the statute of limitations portion of the Court's decision presents such a question, and that appeal at this point is appropriate since the statute of limitations defense is jurisdictional. However, the defendants specifically note that they will not seek a stay of the proceedings pending appeal, and that the case should proceed as usual while the appeal to the Fourth Circuit also proceeds.

***8** First, the Court recognizes that the question on the statute of limitations is a controlling question of law to the extent that if the Court accepts the defendants' interpretation, it has no jurisdiction. Conversely, if the Court adheres to its previous opinion that the triggering date is the Consent Decree, then the plaintiff's case is ripe to proceed. However, this is not a unique situation for a district court to face. In fact, in every case where the statute of limitations is raised as a defense, these are the likely impacts of the Court's decision. However, every ruling on a statute of limitations issue does not present an issue appropriate for interlocutory appeal.

Second, the Court notes that it relied specifically on Congress' statutory language contained in CERCLA in making the decision regarding the triggering of the statute of limitations. Based on the clearly distinguishing features between CERCLA and NEPA, the Court does not anticipate a substantial chance for disagreement of opinion on the issue of the statute of limitations.

Finally, based on the defendants' seemingly generous concession that it will not seek a stay in the district court during the pendency of their requested appeal, the Court fails to recognize the utility of an interlocutory appeal on this issue. Indeed, an interlocutory appeal in a case set forth trial within the next six months would simply burden the parties during a time where resources might be better expended on other trial preparation. Therefore, for these reasons, and the reasons enunciated herein and in the previous Opinion regarding the statute of limitations, the Court DENIES the defendants' motion for interlocutory appeal.

III. *Motions to Dismiss the Amended Complaint*

In December when the plaintiff filed its amended complaint, without leave of Court but apparently without any mal-intent, it added two additional claims for relief; (1)a claim under the FHA, *see* Count V, and (2) a claim under the CERCLA citizen suit provision, *see* Count VI. Each of the defendants now moves for dismissal of the new claims.

A. *The CERCLA Citizen's Suit Claim*

The plaintiff in Count VI claims that the actions of the defendants constitute purposeful discrimination and violate the provisions of CERCLA. The plaintiff claims that the EPA's current remedial plan is a product of a discriminatory agreement among the defendants to intentionally discriminate against the plaintiff and that all defendants have an obligation to remedy the continuing de jure segregation by relocation of the Washington Park residents. *See* Count VI of Amd. Complt. The defendants argue that Count VI should be dismissed because (1) plaintiff did not allege a specific violation of CERCLA, and (2) that the statutory claims raised under CERCLA are foreclosed by the CERCLA bar since the plaintiff now has launched a direct attack to the remedial plan itself. The plaintiff initially argued in its briefs that if the Court did dismiss the CERCLA claim, the plaintiff should be allowed to proceed with an Administrative Procedure Act (APA) claim challenging the EPA's final agency action of entering the consent decree. While the plaintiff's arguments would likely be unavailing due to, among other things, the CERCLA bar, the Court need not decide the merit of the arguments at this time. That is, at the hearing in this matter, the plaintiff conceded the pitfalls of its CERCLA claim and sought permission to voluntarily dismiss the same. The defendants, all represented by competent counsel at the hearing, voiced no objection to the voluntary dismissal. Therefore, the Court GRANTS the plaintiff's oral motion to voluntarily dismiss VI.

B. *The FHA Claim Under Sections 3604 and 3608 of the Fair Housing Act (FHA)*

***9** In Count V plaintiff seeks relief under Sections 3604 and 3608 of the FHA. *See* Amd. Complaint at Para. 54. The PRHA, the EPA, Abex and the City each argue that the allegations under the FHA should be dismissed since none of these defendants sell or rent property at the challenged site.

1. *The FHA's Applicability to Abex (and the EPA)*

The plaintiff alleges that the defendants violated Sections 3604 and 3608 of the FHA, 42 U.S.C. §§ 3604, 3608. The EPA and Abex argue, based on a straight-forward statutory interpretation, that the FHA only applies to programs related to housing and urban development, *i.e.*, not to CERCLA decisions, and that the FHA only applies to the sale, rental or denial of housing. Significantly, the plaintiff does not allege that the EPA or Abex are involved in the sale or rental of property to the plaintiff or others, nor does it allege that the EPA or Abex otherwise made housing unavailable. Instead, the plaintiff contends that because Title 42 Section 2000(d) provides that "all executive departments and agencies shall administer their programs related to housing and urban development ... in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary (of HUD) to further such purposes," the EPA should be made accountable for what the plaintiff alleges is a violation of its constitutional rights. The plaintiff additionally relies on the First Circuit's opinion in *NAACP* and argues that the EPA's authority under CERCLA triggered the FHA provisions which requires an agency to promote fair housing. *See NAACP*, 827 F.2d at 154. Finally, the plaintiff disputes that the FHA is limited to landlords, sellers and the like, and instead argues that under 42 U.S.C. § 3602, and 3613, the FHA allows any person who alleges to have been aggrieved by unfair housing practices to commence an action against any party engaged in the discriminatory practices.

However, with regard to the allegations under Section 3604, this Court is bound by the Fourth Circuit's recent decision in *Jersey Heights* where it definitively held that

Section 3604 of the FHA only reaches actions of landlords, sellers or persons who control the availability of housing.[7] *Jersey Heights,* 174 F.3d at 192–93 (*citing Mackay v. Nationwide Ins. Co.* 724 F.2d 419, 423 (4th Cir.1984) (finding that Section 3604 does not reach every action that "might conceivably effect the availability of housing")); *see also Anderson v. City of Alpharetta, Ga.,* 737 F .2d 1530 (11th Cir.1984).

Similarly, with regard to the plaintiff's claims under Section 3608, the EPA and Abex argue that Section 3608 only reaches agencies or entities that "administer programs relating to housing and urban development," *see* 42 U.S.C. § 3608—not private entities, such as Abex, or federal agencies, such as the EPA. The plaintiff again relies on 42 U.S.C. § 2000(e) and argues that the inclusion in the statute of "all executive agencies" places an affirmative responsibility on the EPA making the FHA directly applicable in cases such as this. The EPA correctly points out that by its own terms Section 3608 of the FHA requires agencies to "*administer programs related to housing and urban development* in a manner affirmatively to further the purposes of the [FHA]." 42 U.S.C. § 3608 (emphasis added). While courts have extended the FHA potential defendant beyond the obvious by, for example, allowing suit against real estate agents or loan guarantors, the courts have limited the cases to those that are related to the availability of housing in a way that this case is not. *See Jersey Heights,* 174 F.3d at 191 (citations omitted); *see also Jorman v. Veterans Administration,* 500 F.Supp. 460, 464 (N.D.Ill.1980) (finding that the Veteran Administration's home loan program was a program designed to promote housing and urban development); *Yarborough v. City of Warren,* 383 F.Supp. 676 (E.D.Mich.1974) (finding that the FHA loan program was a program to promote housing and urban development). Since the EPA's CERCLA program is by no stretch a "housing and urban development" program, but rather is a comprehensive statute designed to facilitate the clean-up of hazardous wastes, the Court declines to extend the FHA to either the EPA or Abex. *See Jersey Heights,* 174 F.3d at 191; *Southend Neighborhood Improvement Ass'n v. St. Claire Cnty,* 743 F.2d 1207, 1210 (7th Cir.1984).

***10** Therefore, because neither the EPA nor Abex are landlords, sellers, or persons who control public housing as required under Section 3604, and because neither is an agency with responsibilities that include housing and urban development as required under Section 3608, the plaintiff has failed to state a claim against either the EPA or Abex for which relief can be granted and the FHA claims against them must be DISMISSED.

2. *The FHA's Applicability to the City and the PRHA*

However, unlike Abex and the EPA, the plaintiff's claims against the PRHA and the City, at least at this stage of the litigation, appear more within the ambit of the FHA; *i.e.,* they are agencies or entities responsible for renting or selling property under Section 3604. Additionally, under Section 3608, the PRHA and the City administer programs related to housing and urban development. Nonetheless, the PRHA and the City argue that they should be dismissed for other reasons. Specifically, they each argue that the plaintiff has not made allegations to trigger a claim under the FHA and withstand a motion to dismiss.

The plaintiff contends that the defendants have incorrectly stated the requirements for stating a claim under the FHA. The defendants argue that there are only three possible claims for racial discrimination under the FHA: (1) a claim that the challenged action was motivated by discriminatory intent, which is similar to a claim for a violation of the Equal Protection Clause, *see Smith v. Town of Clarketon, N.C.,* 682 F.2d 1055, 1065 (4th Cir.1982); (2) a claim that the challenged action has a disparate impact, *see Betsey v. Turtle Creek Associates,* 736 F.2d 983, 987 (4th Cir.1984); or (3) a claim that the action has a "segregative effect," *see Metropolitan Housing Dev. Corp. v. Arlington Heights,* 558 F.2d 1283, 1293 (7th Cir.1977) (*Arlington Heights II*); *Edwards v. Johnston Cnty Health Dep't,* 885 F.2d 1215, 1223 (4th Cir.1989). The plaintiff conversely argues that the necessary allegations include: (1) intentional discrimination, including perpetuation of *de jure* discrimination, (2) perpetuation of discrimination, without a showing of intent, and (3) disparate treatment. Pl's Memo at 38–39 (citing *Young v. Pierce,* 628 F.Supp. 1037, 1037 (E.D.Tex.1985); *Betsey,* 736 F.Supp. at 937 n .3; and *Town of Clarkton,* 682 F.2d at 1065).

As with the plaintiff's claim for a violation of the Fourteenth Amendment, the defendants argue that the plaintiff has not met the federal pleading requirements to survive a motion to dismiss on the FHA claim. The Court is very familiar with both the federal pleading requirements necessary to survive a motion to dismiss, and the heightened requirements of what is required to survive a motion for summary judgment. As the Court noted in its December Opinion, the plaintiff faces an onerous task in proving the elements necessary to withstand a motion for summary judgment on many of its claims. However, at this stage in the litigation, the Court does not review whether the plaintiff can ultimately prove the elements of the claim, *i.e.*, racial motive, racial intent, disparate impact or segregative effect. Instead, it must determine whether any set of facts, if proven by the plaintiff, can state a claim under the FHA for which relief can be granted. As with the equal protection claim, the Court FINDS that the plaintiff has met the minimal requirement for notice pleading to survive the City's and PRHA's motion to dismiss.[8]

C. *The Title VI Claims Against the PRHA and the City*

***11** Finally, with regard to the plaintiff's claims under Title VI (Count IV), the PRHA and the City argue that the plaintiff has failed to follow the required guidelines set forth in HUD's regulations under Title VI. Specifically, 40 C.F.R. § 7, and 24 C.F.R. § 1, *et seq.*, require a plaintiff to provide notice of an alleged violation, obtain a ruling from HUD that a violation has occurred, and provide the defendants (in this case City and the PRHA) with an opportunity to respond. The City and PRHA argue that the plaintiff failed to exhaust this administrative remedy. The plaintiff disagrees as a matter of law that this requirement is applicable in this case. However, as set forth below, HUD, the agency responsible for the regulations the defendants ask the Court to interpret herein, will soon be added as a defendant in this action. Therefore, the Court DENIES the defendants' motion to dismiss Count IV without prejudice, instead deferring until HUD has the opportunity to address this issue.[9]

IV. *PRHA's Motion to Add HUD as a Necessary Party*

On January 19, the defendant PRHA moved this Court to join the United States HUD in this action as a necessary party pursuant to Fed.R.Civ.P. 19(a). The basis of PRHA's motion is that HUD is the federal agency responsible for the funding and oversight of Washington Park, a public housing project, and that HUD is assigned the ultimate responsibility for the disposition of the property. In support of its motion, the PRHA attached letters from HUD to various individuals regarding its opinion as to the relocation of the residents of Washington Park. *See, e.g.,* Letter from HUD official to Senators Robb and Warner attached as PRHA's Exs. D and E to Motion to Add HUD. HUD filed a memorandum in opposition to the PRHA's motion, arguing that the motion was premature due to the then-pending motions to dismiss and the Court's opportunity to issue a narrowly tailored ruling if the plaintiff was ultimately successful in its claims. However, at the hearing held in this matter, none of the parties indicated an opposition to the PRHA's motion.

After the Court made the parties aware of its intention of ruling of the motion to add HUD as a necessary party in this action without oral argument on the motion, on May 20, the PRHA filed a supplemental brief in order to make clear that if HUD was added, it intended to file a "liability claim against HUD." Thereafter, HUD filed a supplemental response brief on May 28, and the plaintiff filed a response June 15. In its response, the plaintiff indicated its non-opposition to PRHA's motion, and in fact, its willingness to file an amended complaint to add HUD.

Based on the Court's rulings set forth above which denies the defendant's motions to dismiss at least in part, HUD's argument that the motion to add is premature is no longer an issue. Therefore, the Court turns to the merits of the motion and finds that the pleadings filed on this issue to date make clear that HUD's interests in this case are such that its absence "may as a practical matter impair or impede those interests," and later complicate these proceedings. Fed.R.Civ.P. 19(b). For obvious reasons related to its agency function, and as evidenced from the exhibits presented by the PRHA, HUD has been an integral player in the decision-making impacting Washington Park and the plaintiff organization, and in the issues generally surrounding this case. Additionally, pursuant to Fed.R.Civ.P. 19(a), HUD's involvement in this litigation is necessary in order for the Court to fashion appropriate relief if the plaintiff is ultimately successful. Finally, as the Court indicated above, HUD's participation in this litigation is beneficial to the extent the Court is required to interpret HUD's housing regulations, *see* discussion of HUD regulations *supra* at p. 22. Therefore, for reasons including judicial economy and efficiency the Court FINDS that HUD should be added as a necessary party to this litigation.

***12** While not captioned as such, the Court will interpret plaintiff's supplemental memorandum as a motion to amend for the reasons set forth therein. HUD responded to the plaintiff's supplemental brief arguing that such an amendment would require leave of Court and that since the plaintiff has already amended its complaint once in this action, a second amendment would be unfair and prejudicial to HUD. However, because the Court herein grants the PRHA's motion to add HUD, it would also serve judicial economy and efficiency for the Court to at this time allow the plaintiff leave to amend its complaint, as requested in plaintiff's supplemental memorandum, to reflect its allegations regarding HUD.[10] For these reasons, the plaintiff's request is hereby GRANTED.

CONCLUSION

For the reasons set forth above, the PRHA's and City's motions to amend the December 1998 Order and certify the question of the statute of limitations for interlocutory appeal are DENIED. Similarly, the EPA's and the City's motions to reconsider are DENIED, except that the FHA claim against the EPA is DISMISSED pursuant to the doctrine of sovereign immunity.

The EPA's, Pneumo Abex's, the PRHA's and the City's motions to dismiss are GRANTED in part and DENIED in part. Specifically, with regard to the various motions to dismiss, the defendants' motions with regard to Title VI (Count IV) are DENIED. However, the Court hereby DISMISSES the FHA claims (Count V) as to the EPA and Pneumo Abex, and DISMISSES without prejudice the CERCLA citizen suit claims (Count VI) in its entirety based on the plaintiff's oral motion to voluntarily dismiss made on the record at the hearing in this matter. As set forth in the Court's December Order, the remainder of the claims pending against the various defendants are not suitable for dismissal, at least at this time.

The plaintiff's June 15 motion to file a supplemental brief in response to the PRHA's motion to add HUD is GRANTED, and the PRHA's motion to add HUD as a necessary party is also GRANTED. Additionally, the plaintiff's request to file an amended complaint reflecting the addition of HUD as a defendant in this action is GRANTED and the plaintiff is DIRECTED to file the second amended complaint by August 9, 1999.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 1999 WL 33518140, 50 ERC 1340

Footnotes

1 At the hearing in this matter the counsel for PRHA indicated that no "party" to the litigation objected to the motion to add HUD. The parties additionally agreed that the motion to add HUD would best be heard after the Court issued an opinion on the other pending motions. However, since that time, the Court has determined that it would be most efficient to consider the motion to add HUD along with these motions and obviate the need for an additional hearing in this case. The parties were notified of the Court's decision to consider the motion without oral argument on May 18, 1999.

2 The court in *Reeves,* as set forth in the Court's December 1998 Opinion, found that the CERCLA bar did not prevent plaintiffs from bringing constitutional challenges to the EPA's actions.

3 As the Court has attempted to make clear to all parties both in its previous opinion and at the oral argument in this matter, the ruling on the sufficiency of the plaintiff's allegations at this stage is governed by the standards for considering motions to dismiss. The Court makes no prediction as to whether the plaintiff will be able to survive a motion for summary judgment on this claim, or the other claims, and will consider that motion in due course based on the applicable standards.

4 Final agency action is defined in the APA as "the whole or part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 531(13).

5 The Court recognizes that in this case there would be a potential claim under the APA as a challenge to the EPA's final agency action, and that such a challenge must be guided by 5 U.S.C. 706(2), which limits the district court's review to a determination based on the record of whether the agency's action was arbitrary and capricious, and if it is so deemed, the remedy would be a remand to the EPA for further decision-making. The Court additionally acknowledges that the plaintiff has not sought a remand and indeed it is likely unavailable as a remedy at this time due to CERCLA's bar to litigation prior to the completion of the remedial plan. As a result, what remedy is available to the plaintiff if it succeeds on its claims against the EPA under the Fifth Amendment, if any, becomes a delicate issue which will likely require additional briefing and exploration by the parties and the Court at some a later date. *See Davis v. Passman,* 442 U.S. 228, 236–40.

6 At the oral argument on this matter, the Court specifically questioned the EPA's counsel regarding the EPA's (the agency responsible for implementing CERCLA) position as to when the statute of limitation was triggered under CERCLA. The counsel for the EPA was unwilling to commit to a legal position on this issue on the record.

7 The plaintiff attempts to distinguish *Jersey Heights* arguing that it is inapplicable because it involved the location of a road, and not a housing decision. However, the plaintiff in *Jersey Heights,* like the plaintiff here, alleged that the defendants' actions had effectively locked the plaintiff's neighborhood off from other neighborhoods, *i.e.,* effecting available housing in a discriminatory manner. The Court is unpersuaded by the plaintiff's attempt to distinguish the facts of this case from those in *Jersey Heights* as it relates to the claims under the FHA.

8 In addition to the sufficiency of the pleadings, the defendants contend that the relief requested is unavailable under the FHA. Specifically, the defendants argue that if the Court granted the plaintiff's claim for relief under the FHA, it arguably would be required to construct new housing for the plaintiff's members by using Treasury funds, rather than merely allowing a private party to build the proposed housing. The plaintiff argues that because the defendants are involved in zoning, development and management of public housing, and the implementation of the clean-up under CERCLA, relocation is an appropriate result for the plaintiff, and new construction would not necessarily be required. The Court need not address this issue at this juncture since discovery taken by the plaintiff may enlighten the parties as to the responsibilities and authority of each of the defendants. Similarly, to the receipt of federal funds is a requirement under the FHA, whether the PRHA and the City are the recipients of federal funds is an issue that is best resolved at a later date after discovery is completed.

9 The PRHA and City additionally argue that Title VI does not provide a private right of action. The PRHA's only authority for this proposition is that the Supreme Court recently granted certiorari on this issue in a case pending from the Third Circuit. *See Chester Residents Concerned for the Quality Living v. Sief,* 132 F.3d 925 (3rd Cir.1997), *dismissed as moot,* 119 U.S.22 (1998). However, because nine courts of appeal have held that a private right of action exists under Title VI, the Court will decline to dismiss Count IV based on this argument at this stage. *See* Pl's Memo at 45 (citations omitted). If in fact the Supreme Court holds otherwise during the pendency of this case, the Court will certainly modify this portion of its ruling.

10 HUD indicated in its response to plaintiff's supplemental response that it would file an opposition to any formally filed motion to amend. However, in the interest of judicial efficiency and economy, the Court herein grants the motion to amend, HUD's opposition to the Court's grant of leave to amend is so noted for the record, additional argument will not be considered with regard to the plaintiff's request for leave to amend, and therefore, a memoranda on this issue are not required.

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