Docket + File RMB

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
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November 9, 2010

BY HAND
The Honorable Richard M. Berman
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: ***United States v. L&M 93rd Street LLC***, 10 Civ. 7495 (RMB)

Dear Judge Berman:

The Government writes in response to the letter submitted by the Real Estate Board of New York ("REBNY") on November 3, 2010.

REBNY represents real estate developers with interests divergent from those of the defendants in this matter, who have chosen to settle this suit by agreement to the Proposed Consent Decree. REBNY's letter to the Court appears to be an attempt to force the defendants in this action to bear the burdens and risks of litigating questions that those same defendants have already decided they would rather settle. REBNY has no standing, of course, to object to defendants' choice, or to block the entry of the Proposed Consent Decree, as it is not a party to this action and cannot be injured by the parties' settlement. *See, e.g., Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 59 (1st Cir. 1993) ("in instances in which the rights of third parties are the basis for blocking the entry of, or vacating, a consent decree, there must be a demonstrable injury or adverse effect upon the group not party to the decree"); *United States v. Int'l Bhd. of Teamsters*, 88 Civ. 4486 (LAP), 2006 WL 2466246, at *3 (S.D.N.Y. July 14, 2005) ("[The objector] is not a party to the Consent Decree. Nor is it a party to any of the stipulations . . . Accordingly, [it] lacks standing to seek relief here."). The Court should therefore reject any attempt by REBNY to obstruct the parties' settlement.

Moreover, REBNY's representations and arguments regarding this case are inaccurate and misleading. While we are reluctant to burden the Court with legal

doctrine and evidence that it need not consider in light of the parties' settlement of this action, we provide this brief response to highlight some of the inaccuracies and misleading information in REBNY's letter. In particular:

- **The Government Has Alleged Violations Of Both Federal And Local Law.** REBNY's basic premise – that the Government is challenging New York City accessibility laws – makes sense only if The Melar were built in compliance with that law. But, as the Government's complaint alleges, The Melar was not; instead it was designed and constructed in violation of both federal and local accessibility codes (the Developer Defendant denies this allegation). *See* Complaint ¶ 11 ("Defendants failed to comply with all applicable State and local design and construction provisions, including New York City Local Law 58."). The City's issuance of a certificate of occupancy does not prove otherwise. The FHA expressly states that "[d]eterminations of a State or unit of general local government . . . shall not be conclusive in enforcement proceedings under th[e FHA]." 42 U.S.C. § 3604(f)(6)(B).

- **Federal Law Does Not Conflict With Local Law.** Contrary to REBNY's suggestion, the FHA creates no dilemma for developers, in which they must choose between the conflicting mandates of federal and local accessibility laws. (If there were a conflict, basic principles of federal supremacy would require compliance with the FHA. *See* U.S. Const. art. VI). For instance, there are ten safe harbors under the FHA, *see* 72 Fed. Reg. 39432, 39437-38 (July 18, 2007), each of which contains certain accessibility elements not required by New York City's local law. Developers may readily comply with both local law and a federal safe harbor by following the local law and applying the elements of the federal safe harbor wherever it calls for greater accessibility. The ability to comply with these safe harbors illustrates that the FHA and local law do not set out conflicting mandates, and there is thus no basis for uncertainty. In any event, one of the advantages of settlement is that it gives the parties certainty.

- **REBNY Misreads FHA Accessibility Requirements.** REBNY purports to identify "alleged violations of the Fair Housing Act that . . . are [not] violations at all." REBNY does so, however, only by misreading the safe harbors and misstating the law. *Compare* REBNY Ltr. at 2-3 (asserting that the FHA does not require that required clear floor space be centered on ranges) *with United States v. Tanski*, 2007 WL 1017020, at *15-16 (N.D.N.Y. Mar. 30, 2007) (holding lack of a "clear floor space centered on the ranges in the kitchens" violates the FHA); *cf. United States v. Shanrie Co.*, 2007 WL 980418, at *10 (S.D. Ill. Mar. 30, 2007) (noting "common-sense reading . . . that the space [must] be centered, in order for the sink or fixture to be useable"). In any event, it is the Government's position that a developer

cannot claim the benefit of a safe harbor unless it complies with every aspect of a particular safe harbor. *See* 72 Fed. Reg. at 39438 ("once a safe harbor document has been selected, the building in question should comply with all of the provisions in that document"). Here, if this matter were litigated, the Government would prove that The Melar was not constructed in compliance with any safe harbor in its entirety. REBNY's erroneous interpretations of specific provisions would thus not even affect liability in this case.

- **Tenants Cannot Unilaterally Veto FHA Accessibility Requirements.** REBNY complains that the Proposed Consent Decree requires allegedly "unneeded, unwanted retrofits" and "removes choice from all tenants." REBNY's suggestion that retrofits should be made on the request of tenants would grant tenants, who are likely to be largely free from disabilities, a veto over bringing The Melar into compliance with the FHA. This would thwart the statute's basic purposes by preventing persons with disabilities from living in the property in the future (*i.e.*, after the termination of the three-year consent decree). Such arguments are patently insufficient to excuse defendants from bringing residences into compliance with the FHA's accessibility requirements. *See, e.g.*, *Sec'y v. Nelson*, 2007 WL 1705614 (HUD ALJ June 1, 2007) ("Respondents have a heavy burden to prove that they should not be required to comply with the requirements of the Act"); *United States v. Shanrie Co.*, No. 05-CV-306-DRH, 2007 WL 1722207, *4 (S.D. Ill. Apr. 20, 2007) ("[T]his Court, like other courts, rejects Defendants' proposal that certain repairs be made only if requested."); *Baltimore Neighborhoods, Inc. v. Rommel Builders*, 40 F. Supp. 2d 700, 707 (D. Md. 1999) (rejecting argument that "upon request" retrofits may suffice).

  Indeed, in light of the barriers to accessibility, it is the Government's view, contrary to the view of the Developer Defendant, that a person with disabilities interested in living at The Melar likely would not be able to rent there. Congress stated in passing the FHA that a "person using a wheelchair [will be] just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'" H.R. REP. No. 100-711, 1988 U.S.C.C.A.N. 2173, 2186 (1988). The retrofit provisions of the Proposed Consent Decree would not merely make The Melar more accessible to current residents, but, even more importantly, would enhance The Melar's accessibility to individuals with disabilities who may become residents in the future.

- **The Aggrieved Persons Fund Conserves The Parties' And The Court's Resources.** REBNY challenges the wisdom behind the parties' decision to achieve finality by setting exact terms for an Aggrieved Persons Fund. This challenge ignores the savings that the fund represents – in terms of time and expense. If the parties were to litigate regarding aggrieved persons, as set forth in the FHA, *see* 42 U.S.C. § 3614(d)(1)(B), there would need to be: (1) discovery, both of the defendants and third parties, supervised by this Court; (2) hearings regarding defendants' violations of victims' rights; and (3) hearings regarding proper damages awards, all of which may be subject to appeals, remands, and re-litigation. Moreover, with REBNY's suggested provision requiring that left-over funds revert to defendants, this Court and the Court of Appeals could expect disputes at every stage, as the defendants would have no incentive to identify victims and every incentive to minimize damages payments. The Proposed Consent Decree, instead, provides a discrete Aggrieved Persons Fund and a process for identifying victims and setting awards. In the absence of a provision requiring left-over funds to revert to the defendants, the Government expects neither obstruction nor unreasonable disputes from the defendants in implementing these provisions – all of which will save the judicial system from the burdens and expenses of future conflict.

- **The Accessibility Project Fund Furthers The Aims Of The FHA.** Contrary to REBNY's insistence, the Accessibility Project Fund mandates injunctive relief to further the aims of the FHA, and is not a penalty. The provision requires "the construction of facilities, or the provision of services, at The Melar for the primary benefit of persons with disabilities." The fund is set at a particular dollar amount, agreed upon by the parties, to specify on ascertainable terms the efforts the defendant must make to increase accessibility at The Melar in ways not otherwise contemplated by the specific retrofit provisions. The parties agreed to this fund as part of the overall terms of the settlement. Rather than a "Hobson's choice," the creation of this fund allows the parties to avoid the risks and burdens of litigation and to further the aims of the FHA.

These are a few of the many issues raised by REBNY's inaccurate and misleading letter. The Court need not address these issues in light of the current posture of this case – the parties have settled their disputes and REBNY lacks standing to object to the Proposed Consent Decree. The parties' two years of extensive negotiations culminated in the Proposed Consent Decree now before this Court. The Government respectfully requests that the Court enter that the Proposed Consent Decree to resolve this suit.

Thank you for considering this submission.

Respectfully submitted,

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