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United States District Court, E.D. Pennsylvania.

Carmelia VELEZ, et al.
v.
Jack L. KEMP, et al.

Civ. A. No. 90–6449. | Feb. 17, 1993.

Attorneys and Law Firms

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Opinion

MEMORANDUM and ORDER

SHAPIRO, District Judge.

I. INTRODUCTION

***1** Plaintiffs move under Fed.R.Civ.P. 23(b)(2) for certification of a class designated as "all current and future tenants of and applicants for admission to public housing owned and operated by Defendant Chester Housing Authority ["CHA"]."

The CHA operates five public housing developments in Chester, Pennsylvania: Ruth Bennett Homes, Lamokin Village, William Penn Homes, McCaffery Village, and Chester Towers. These developments contain approximately 1700 public housing units. Named plaintiffs in this action are: Carmelia and Hector Velez, residents of Lamokin Village; Arnita Green, a resident of William Penn; Cynthia Chappell, a resident of Bennett Homes; and Tania Williams, an applicant for public housing. Plaintiffs are represented by the Delaware County Legal Assistance Association Inc ["DCLAA"]. On January 29, 1993, Lawrence J. Fox, Esq. also entered an appearance on behalf of the plaintiff class.

Defendants are the CHA and United States Department of Housing and Urban Development ["HUD"]. HUD designated CHA as a "Troubled Housing Authority" on April 15, 1991. HUD then attempted to work with CHA to cure its management defects. That process failed and HUD declared CHA in substantial breach of CHA's obligations under the Annual Contributions Contract between HUD and CHA. On November 6, 1991, HUD took over the CHA. Effective December 2, 1991, HUD contracted with the Quadel Consulting Corporation to manage CHA and remedy the problems leading to the "Troubled Housing Authority" designation.

The gravamen of plaintiffs' complaint is that defendants, by failing to maintain existing units and by engaging in discriminatory housing policies, have caused a *de facto* demolition[1] of CHA housing. Plaintiffs claim units have been *de facto* or constructively demolished by defendants' failure to fill vacant units, maintain occupied units in a habitable condition, train maintenance workers, perform routine inspections, and respond promptly to tenant complaints. As a result, plaintiffs contend that the CHA developments are overcrowded and unsafe the large number of uninhabitable vacant units has prevented overcrowded families from obtaining larger units and applicant families from acquiring units.

II. PROCEDURAL HISTORY

Plaintiffs filed an Amended Complaint and motion for class certification on October 31, 1990. The court denied plaintiffs' motion for class certification without prejudice and ordered plaintiffs to file a Second Amended Complaint. On March 29, 1991, plaintiffs filed a Second Amended Complaint seeking declaratory and injunctive relief for alleged violations of federal housing law, the Administrative Procedures Act, civil rights laws, and breach of HUD's Annual Contributions Contract. The court appointed the Honorable William Marutani as mediator with the consent of the parties and placed the case in administrative suspense. Despite negotiations throughout the spring and summer, the parties were not able to resolve their dispute.

***2** On October 25, 1991, plaintiffs filed a motion for a

preliminary injunction on the grounds that dangerous conditions threatened the lives, health, and safety of the tenants. Because HUD was hiring a professional management firm and the management of CHA was in flux, the parties agreed to continue the preliminary injunction hearing several times. On January 9, 1992, the plaintiffs withdrew their motion for preliminary injunction and the case was placed in administrative suspense to enable the parties to complete fact finding and settle this action.

The defendants conducted a Needs Assessment, prepared a Comprehensive Grant Plan according to the requirements of HUD's Comprehensive Grant Program regulations [42 U.S.C. § 1437.(a)-(o), 24 C.F.R. § 968], and implemented a plan of reconstruction and restoration. Plaintiffs remained dissatisfied and opposed defendants' plan to hire an executive director without "adequate input" from the tenants and the City of Chester. On July 31, 1992, plaintiffs filed a motion to restore the case to active status and preliminarily enjoin the appointment of an executive director.

The court held hearings on plaintiffs' motion for preliminary injunction for nine days, beginning September 25, 1992. Many tenants testified on behalf of the plaintiffs and aired general grievances against CHA management and housing conditions. The selection of a new executive director—the ostensible reason for a hearing—was scarcely mentioned. The court granted the motion to return the case to active status but held that there was no showing of irreparable harm and declined to enjoin the appointment of an executive director.

III. DISCUSSION

One or more members of a class may sue as representative parties on behalf of an entire class only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

Under Rule 23(b)(2), a class action may be maintained if the requirements listed above are met and if:

> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief on corresponding declaratory relief with respect to the class as a whole.

Rule 23 "provides for great flexibility ... and each case requires its own exercise of judgment." *Joseph L. v. Office of Judicial Support,* 516 F.Supp. 1345, 1350 (E.D.Pa.1981), quoting *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 F.R.D. 452, 458 (E.D.Pa.1968). The court has broad discretion in exercising this judgment. *See Allen v. Housing Authority of the County of Chester,* 683 F.2d 75, 79 (3d Cir.1982).

A. Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of all members is impracticable. Impracticability does not mean "impossibility" but only difficulty or inconvenience of joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.,* 329 F.2d 909 (9th cir.1964). If a class is large, it must also be "sufficiently definite to enable the court to determine if a particular individual is a member of the proposed class." *Pottinger v. City of Miami,* 720 F.Supp. 955, 957 (S.D.Fla.1989).

***3** The number of persons in the class of current tenants alone exceeds 6800. CHA maintains a waiting list of more than 1000 at any given time so that the total proposed class is far in excess of 7800. The current tenants are, by definition, people of low-income who could not afford to prosecute their own actions. As a practical matter, joinder of so many individual lawsuits would be too burdensome; it is impractical to litigate plaintiffs' claims other than in a class action suit. A class including all current tenants of CHA is sufficiently definite for the court to determine the composition of the class at any given time.

B. Commonality

Rule 23(a)(2) requires the existence of questions of law or fact common to the class. However, members of the class need not share every question of law or fact. "There need be only a single issue common to all members of the class." 1 Newberg on Class Actions 2d § 3.10, p. 154; 7A Wright, Miller & Kane, *Federal Practice and Procedure Civil 2d* § 1763.

Here, plaintiffs allege that the defendants have allowed the CHA developments to deteriorate and remain partially vacant so that the tenants' rights to decent, safe, and

affordable housing under the Housing Act have been violated. Plaintiffs also argue that defendants' conduct violates their civil rights and denies them benefits as the intended beneficiaries of the Annual Contributions Contract.

Plaintiffs have alleged a single source of harm affecting all class members adversely. Some members of the class may have suffered more than others from defendants' actions and only part of the class has allegedly suffered directly from defendants' putative racial discrimination but these differences among plaintiffs do not defeat certification. The points of fact and law common to all plaintiffs predominate in satisfaction of the requirements of Rule 23.

C. Typicality

Rule 23(a)(3) requires that a named plaintiff have claims that are typical of the class as a whole so that a class representative advances the claims of the entire class. *McNeill v. N.Y. City Housing Authority,* 719 F.Supp. 233, 252 (S.D.N.Y.1989). The court must determine "whether the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Hassine v. Jeffes,* 846 F.2d at 177.

The claims of the named tenant plaintiffs arise out of allegations that the defendants have engaged in conduct that denies plaintiffs their rights under federal housing and civil rights laws. All members of the class of current tenants were allegedly injured by the same pattern of conduct; the complaints of the named members of the class are founded on the same legal theories.

However, there is a conflict between current tenants and present and future applicants over the allocation of vacant units when they have been renovated and are ready for occupancy. Current tenants who desire to move into larger and renovated units and/or transfer leases to their children have interests that conflict with the interests of applicants who want the maximum number of units available for new tenants.

***4** Plaintiffs allege that CHA currently maintains a waiting list in excess of 3000 eligible applicants. Whatever the number, these applicants undoubtedly have an interest in moving into habitable units as soon as they become available even if that means that current tenants remain in the units they now inhabit. Applicants also have an interest in assuming the leases of current tenants who die or move out of CHA units.

While the conflict may not appear great now, as the housing improves in stages, the conflict will become more acute. Plaintiffs have not shown that the proposed representatives represent the interests of present applicants, future applicants, and future tenants as fairly and vigorously as they do the interests of current tenants.

D. Adequacy

Under Rule 23(a)(4), the representative parties must adequately protect the interests of the class. A named representative is adequate only if there are no antagonistic interests between the named representative and the class members and plaintiffs' counsel can represent the class competently. *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 247 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); *Glictronix Corp. v. American Telegraph & Telephone Co.,* 603 F.Supp. 552, 585 (D.N.J.1984).

The court must determine that the "putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously" and that "there is no conflict between the individual's claims and those asserted on behalf of the class." *Hassine v. Jeffes,* 846 F.2d 169, 179 (3d Cir.1988). The Supreme Court has noted that "a selection of representatives for purposes of litigation whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee,* 311 U.S. 32, 45 (1940).

The named plaintiff for the applicant class, Tania Williams, stated at her deposition that she would have no objection if tenants who currently live in overcrowded units obtain larger units before applicants are placed in those units [Williams Depo. at 40]. Williams also testified that she has no objection if grown children of current CHA tenants assume leases of their parents before applicants are offered CHA housing [*Id.* at 50]. Tania Williams cannot vigorously assert the interests of the applicant class. Other considerations make it unnecessary for the court to consider whether a different applicant class representative would have been adequate.

Classes including both tenants and applicants have been certified, *See e.g. Cason v. Rochester Housing Authority,* 748 F.Supp. 1002 (W.D.N.Y.1990); *Henry Horner Mother's Guild v. Chicago Housing,* 1991 WL 246539 (N.D.Ill), especially for settlement purposes. Here, such a class is impracticable in view of the potential and actual conflicts and the difficulty the parties have had in narrowing the issues for trial. The court does not have confidence that present counsel understands the leadership role of class counsel sufficiently to represent so

diverse a class in complex litigation.

***5** The limited resources of present class counsel further inform the court's exercise of discretion regarding class certification. This case was originally scheduled for trial on February 17, 1993. Plaintiffs moved for a continuance because personnel changes at DCLAA prevented adequate preparation for the scheduled trial. The court granted plaintiffs' motion for a continuance by order of January 7, 1993. On January 29, 1993, Lawrence J. Fox, Esq., entered his appearance on behalf of the plaintiff class but was not able to attend the oral argument on class certification held January 29, 1993 or inform the court of his role. The court considered establishing subclasses, represented by separate counsel, but was unwilling to divide responsibilities without the participation of all attorneys involved in the matter. Despite the welcomed assistance of co-counsel, DCLAA is not in a position to represent the overbroad and conflicted class it has proposed.

The class representatives and counsel are adequate to represent a class consisting of current tenants only.[2] Such a class will tentatively include those tenants not current in their rent; if these tenants develop a conflict with rent-paying tenants, subclasses represented by separate counsel will be constituted to protect the interests of each group. The court also reserves judgment on whether a separate class of applicants as of the time this action was filed may be joined in the action.

E. Fed.R.Civ.P. 23(b)(2)

Having met the requirements of Rule 23(a), the class of current tenants must satisfy one of the requirements of Rule 23(b). Plaintiffs assert that defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

The actions attributed to the defendants are substantially the same with regard to all plaintiffs; the class has requested common declaratory and injunctive relief. Although defendants' alleged discriminatory housing policies may have injured only some of the class members, the fact that not all class members were affected by all of defendant's policies does not prevent plaintiffs' satisfaction of Rule 23(b)(2). *Ortiz v. Eichler,* 616 F.Supp. 1046 (D.Del.1985), *aff'd.* 794 F.2d 889 (3d Cir.1986). The actions alleged are generally applicable to the class.

Because counsel and the class representatives are not adequate to represent plaintiffs' putative class, it will not be certified. However, counsel and class representatives are adequate to represent a class composed of current tenants. Such a class satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) as well as the requirements of Rule 23(b)(2). Certification will be granted to a class defined to include all current tenants of public housing owned and operated by the CHA or HUD. An appropriate order follows.

ORDER

***6** AND NOW, this 17th day of February, 1993, in consideration of plaintiffs' motion for class certification and defendants' opposition thereto and after oral argument on January 29, 1993, it is ORDERED that:

1) Plaintiffs' motion is GRANTED IN PART and DENIED IN PART. A class including all current tenants of public housing owned and operated by the Chester Housing Authority or the United States Department of Housing and Urban Development is certified for the reasons stated in the memorandum of this date.

2) Plaintiffs shall submit a caption in proper form on or before March 5, 1993.

Footnotes

1 Plaintiffs also complained of CHA's plan to demolish a portion of the William Penn project. HUD abandoned this plan on January 7, 1993; plaintiffs' allegation is now moot.

2 Although the proposed class includes tenants from all five CHA developments, there are no class representatives from the Chester Towers or McCaffery Village. The First Amended Complaint in this case contained twelve named plaintiffs, including tenants from all five developments. Representatives from the Chester Towers and McCaffery Village may be reinstated to render the representation adequate in this respect.