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Case Notes

Strategic Partnership Among Local Organizer, Legal Services Provider, National Support Center, and Pro Bono Counsel Leads to Ninth Circuit Decision that HUD Voucher Regulations Do Not Preempt Local Eviction Controls

[Editor's Note: Parts of this case note are adapted from articles in 37 HOUSING LAW BULLETIN 180 (Oct. 2007); 39 id. 201 (Aug. 2009), 278 (Nov.–Dec. 2009).]

Last fall the Ninth Circuit Court of Appeals affirmed the lower-court judgment that federal voucher eviction regulations did not preempt eviction protections provided under local law. In *Barrientos v. 1801–1825 Morton Limited Liability Company*, 583 F.3d 1197 (9th Cir. 2009), the Ninth Circuit found no conflict between federal regulations defining “other good cause” for eviction of voucher tenants and the good-cause eviction protections of the Los Angeles Rent Stabilization Ordinance. The Ninth Circuit also upheld the award of substantial attorney fees to the tenants as prevailing parties under their leases. This decision, along with a recent U.S. Department of Housing and Urban Development (HUD) policy clarification, should reassure standard Section 8 voucher holders nationwide that they will receive protections equivalent to their unassisted neighbors. This decision was the result of over three years of litigation conducted in collaboration among a local organizer (Coalition for Economic Survival), a legal services provider (Legal Aid Foundation of Los Angeles), a national support center (National Housing Law Project), and private pro bono counsel (Munger, Tolles & Olson). Here we highlight the legal impact of the decision and summarize the strategies used by the advocates to protect their clients.

District Court Decision

Morton Gardens, a sixty-six-unit apartment complex in Los Angeles, was developed through a federally insured loan under Section 236 of the National Housing Act. When the property's prior owner prepaid the Section 236 loan in 1998, the tenants became eligible to receive enhanced vouchers. The purpose of the enhanced voucher program is to enable tenants to remain in their homes after prepayment or opt-out. The vouchers resemble those issued under the “standard” tenant-based Housing Choice Voucher program with two distinctions: the subsidy levels for enhanced vouchers can be higher to cover the new market rent, and enhanced voucher holders have a federal statutory right to remain in

their homes. Subsequent to Morton Gardens' prepayment, tenants with standard vouchers moved into the complex as well. The plaintiffs in *Barrientos* were sixteen enhanced and six standard voucher holders.

In June 2006 a new owner (Morton LLC) served on each of the twenty-two Korean- and Spanish-speaking voucher tenants a “Ninety Day Notice to Terminate Tenancy” based on its desire to raise rents. Pursuant to federal law, during the lease term an owner participating in the Housing Choice Voucher program “shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause....” Examples of “other good cause ... may include ... a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental)” (24 C.F.R. § 982.310(d)(1)(iv), (d)(2) (2009)). The Los Angeles Rent Stabilization Ordinance, which extends to voucher units in the city of Los Angeles, does not recognize a landlord's desire to raise the rent as permissible grounds for eviction (see L.A., CAL., MUN. CODE §§ 151.01 *et seq.*) The case therefore presented the question of whether the owner could evict the tenants for reasons not recognized by local law.

In September 2007 a federal district court granted a permanent injunction allowing the tenants to remain in their apartments and entered summary judgment for the tenants on two grounds. On the enhanced voucher claim brought by sixteen tenants, the court found that applicable statutory provisions “unambiguously provide enhanced voucher tenants a right to remain in tenancy when the rent is raised.” HUD's voucher regulations allowing for evictions based on the “desire to lease the unit at a higher rental” do not apply to enhanced voucher tenants. On the local law claim brought by all tenants, the court found that Los Angeles Rent Stabilization Ordinance's eviction controls conflicted with HUD's regulations to the extent that they precluded evictions based on the desire to raise rent—one of the specific examples of “other good cause” set out in the HUD regulations. Finding that HUD exceeded its statutory authority by defining “other good cause” to include the desire to raise rent in violation of local rent and eviction controls, the court granted summary judgment for the tenants. The court enjoined the owner from evicting the tenants without complying with the rent stabilization ordinance and awarded attorney fees to the tenants (*Barrientos*, 583 F.3d at 1215–16).

Appeal to the Ninth Circuit

Morton LLC appealed to the Ninth Circuit in November 2007. Following oral argument in March 2009, the court solicited

HUD's views on whether local eviction controls such as the Los Angeles Rent Stabilization Ordinance posed an obstacle to the accomplishment of federal objectives underlying HUD's good-cause regulation. The U.S. Department of Justice, appearing on behalf of HUD, filed in June 2009 an amicus brief explaining that HUD regulations do not preempt local eviction controls and supporting affirmance of the district court decision. HUD also issued a notice clarifying that local eviction protections are not preempted by federal law. The National Housing Law Project used its contacts in the Obama administration to obtain a supportive amicus and HUD notice.

The Ninth Circuit's Analysis

Writing for the Ninth Circuit, Judge Kim Wardlaw examined whether HUD's "good cause" regulations preempt the Los Angeles Rent Stabilization Ordinance's prohibition on evictions based on a desire to raise rents.

Los Angeles Rent Stabilization Ordinance Is Not Preempted by HUD Regulations. After an extensive examination of the history behind both the Housing Choice Voucher and enhanced voucher programs (a history set out at great length in the opening appellate brief through the extensive efforts of Munger, Tullis & Olson to find all positive legislative history), the appellate court held that HUD regulations did not preempt the more protective rent stabilization ordinance for two main reasons (just as the tenants had asserted). First, HUD did not intend to preempt local eviction protections. Second, in a departure from the reasoning of the district court, the Ninth Circuit held that the HUD regulation and the Los Angeles Rent Stabilization Ordinance did not actually conflict.

In finding that HUD did not intend to preempt the Los Angeles Rent Stabilization Ordinance or other similar local laws, the Ninth Circuit turned to the history behind the creation of the "other good-cause" provision and explored both its statutory and regulatory roots in the late 1970s and early 1980s. During that period HUD took steps toward minimizing the procedures and burdens of the Housing Choice Voucher program in order "to mirror the private rental market so as to encourage owner participation" (*Barrientos*, 583 F.3d at 1209). The court noted that, over the life span of the requirement, HUD refused to create one overarching definition of "other good cause" because such analysis was best left to the courts to determine on a case-by-case basis (*id.*) When it eventually did issue the "other good-cause" examples found in the current regulations, it did so using the permissive "may include" as opposed to a mandatory "shall" or "will" (*id.*) Taken together, HUD's statements and actions weighed strongly against an inference that HUD intended this regulation to preempt local protections. The appellate court observed that allowing for the preemption of local eviction controls "would lead to [the] absurd result[]" that federally assisted tenants would become "special victims of eviction" who had less protections than those tenants not receiving government housing assistance (*id.* at 1210). "Congress and HUD," the court declared, "intended to provide assisted tenants with *more* protections than unassisted tenants, not less" (*id.*)

The court also grounded its finding of nonpreemption in the absence of actual conflict between the federal regulations and the Los Angeles Rent Stabilization Ordinance (*id.*

at 1209–10). Although this departed from the district court's reasoning, the appellate court exercised its power to affirm a lower-court judgment "on any ground supported by the record" (*id.* at 1215). Two reasons supported the finding of no conflict. First, the Ninth Circuit found that the federal "other good-cause" regulation did not grant owners participating in the voucher program a "right" to evict tenants based on a desire to increase rents (*id.* at 1209–10). Second, since the rent stabilization ordinance did not present an obstacle to the accomplishment of the Housing Choice Voucher regulation's objectives, there was no conflict. The appellate court cited other statutes and regulations illustrating that Congress and HUD explicitly recognized that in some jurisdictions local law would provide additional protections for voucher tenants (*id.* at 1211). On the good-cause requirement at issue, the court noted that both HUD and the legislature "desired to maintain a uniform federal floor below which protections for tenants could not drop, not a ceiling above which they could not rise" (*id.*).

The Ninth Circuit cited HUD's position as expressed through the June 2009 U.S. amicus brief and through a HUD guidance published at the same time. In its brief the federal government took the position that HUD voucher regulations do not preempt local ordinances such as the Los Angeles Rent Stabilization Ordinance and noted the ordinance's compatibility with HUD objectives and the permissive use of "may include" in the "other good-cause" definition (*id.* at 1213–14). This position was echoed by a HUD guidance released three days later (see U.S. Department of Housing and Urban Development, Notice PIH 2009-18, State and Local Law Applicability to Lease Terminations in the Housing Choice Voucher (HCV) Program (June 22, 2009)). Notice PIH 2009-18 specifically states that the federal regulation permitting landlords to terminate voucher leases because of a desire to raise rents does not preempt any local ordinances prohibiting such lease termination. The court viewed HUD's position in light of the U.S. Supreme Court's decision in *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009), that the interpretation of a federal regulation by its responsible federal agency "is entitled to deference" because these agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed decisions" regarding how state or local law will affect the agency's regulations (*Barrientos*, 583 F.3d at 1214–15).

Court Affirms Attorney Fee Award to Plaintiffs. Over Morton LLC's vigorous objections, the court affirmed the award of roughly \$180,000 in attorney fees to plaintiffs for their attorneys' work in the trial court, based upon a contractual prevailing-party-fee provision in their leases (*id.* at 1216–17). The awarding of these substantial fees and the subsequent media attention have served to deter other landlords from pursuing similar strategies to circumvent the Los Angeles Rent Stabilization Ordinance.

Enhanced Voucher Issues Remain Unresolved. Despite this favorable decision, the court did not explicitly hold that the federal enhanced voucher statute, 42 U.S.C. §1437(f), protected the sixteen enhanced voucher tenants against eviction where they had not breached their leases (*id.* at 1207 n.3). The district court had held that the federal statutory right to remain specifically exempted enhanced voucher holders from eviction based on landlord desire to raise rents. Although stat-

ing that “we agree that the eviction violated the Enhanced Voucher Tenants’ right to remain” (*id.* at 1207), the appellate court found it unnecessary to reach the enhanced voucher issue once it had determined that the Los Angeles Rent Stabilization Ordinance’s protections applied. While three other federal courts hold that the enhanced voucher statute establishes a right to remain (see *Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C. Cir. 2008); *Estevez v. Cosmopolitan Associates Limited Liability Company*, 2005 U.S. Dist. LEXIS 29844 (E.D.N.Y. Nov. 28, 2005); *Jeanty v. Shore Terrace Realty Association*, 2004 LEXIS 15773 (S.D.N.Y. Aug. 10, 2004)), the Ninth Circuit’s refusal to reach this issue leaves potentially vulnerable to eviction those enhanced voucher holders residing in cities without protective eviction controls.

Participation by Local Tenant Organizing Group Focused Limited Attorney Resources on Legal Issues Instead of Client Cohesion. Coalition for Economic Survival, the organizing group, first contacted the victimized tenants through the coalition’s organizing network. The coalition met with the tenants at their homes, reached out to other tenants in the building, and developed an organized tenant leadership to combat the landlord threat. When the coalition saw that an organizing solution would not be sufficient and that the tenants needed a lawyer, the coalition directly referred the case to Legal Aid Foundation of Los Angeles. Prelitigation organizing work by the coalition made the case much easier to handle because the tenants had strong leadership and the desire to fight to preserve their housing. Prelitigation organizing ensured that, throughout the ensuing three and one-half years of litigation, the limited attorney resources in the case focused on the legal issues instead of tenant organizing.

National Support Center Availed of Federal Government Support and Gave Legal Expertise. Legal Aid Foundation of Los Angeles contacted the National Housing Law Project for assistance on this litigation because of the project’s extensive expertise on national subsidized housing issues. The project provided excellent legal support for all the litigation work on the case. Because of its extensive contacts, the project was the lead partner in obtaining amicus support and the HUD notice from the federal government.

Pro Bono Counsel’s Extensive Legal Support Allowed Legal Services Provider to Litigate These Issues in Other State Actions. Between 2006 and 2008 other landlords in Los Angeles served similar eviction notices on hundreds of other Housing Choice Voucher tenants in an attempt to circumvent the city’s rent stabilization ordinance. Legal Aid Foundation of Los Angeles enlisted the assistance of the law firm Munger, Tolles & Olson to defend these evictions. Through strategic eviction defense and affirmative litigation

the law firm and Legal Aid Foundation of Los Angeles were able to preserve hundreds of rent-controlled units. Although not every case was won, the team made sure that each case was fully litigated.

Defense of these evictions by Munger, Tolles & Olson and Legal Aid Foundation of Los Angeles and the economic crisis combined to reduce the evictions to a trickle by early 2009. Munger Tolles & Olson was added to the *Barrientos* team near the end of the district court litigation when clearly the case would be appealed to the Ninth Circuit and Legal Aid Foundation of Los Angeles needed supplemental legal resources and expertise to handle the case. Munger Tolles & Olson took the lead in handling the Ninth Circuit appeal.



The Ninth Circuit’s decision, along with HUD’s amicus brief and new voucher guidance, sends the message that tenants in federally assisted housing are entitled to, at a minimum, the same protections granted to unassisted tenants. The award of attorney fees should serve to deter owners who might mistakenly believe that voucher tenants with contractual fee provisions in their leases can be denied local and federal eviction protections with little risk (see *Barrientos*, 583 F.3d at 1216–17). However, the court’s refusal to rule explicitly on the rights of enhanced voucher holders requires further litigation or policy reform by HUD or Congress for tenants elsewhere to remain secure in their homes. The intense collaboration of an organizer, a legal services provider, a national support center, and a pro bono law firm made possible the positive results of this litigation.

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