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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY HORNER MOTHERS GUILD, MAURINE WOODSON, BRENDA SANDERS, OSCAR AND RUBIE PLEDGER, FANNIE PIPES, SHIRLEY COPELAND, CAROL HENDERSON, DORETHA CONNER, LORETTA HOLMES and VAUGHAN MILTON, Individually and on Behalf of all Other Persons Similarly Situated, Plaintiffs,	
v.	No. 91 C 3316 Judge James B. Zagel
THE CHICAGO HOUSING AUTHORITY (CHA), an Illinois Municipal Corporation, VINCENT LANE, In His Official Capacity as Chairman, Board of Commissioners and Managing Director of CHA, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD); and JACK F. KEMP, In His Official Capacity as Secretary of HUD, Defendants.	

RESPONSE OF DEFENDANTS CHICAGO HOUSING AUTHORITY AND VINCENT LANE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

In this action, plaintiffs challenge the manner in which the Chicago Housing Authority (defendants Chicago Housing Authority and Vincent Lane are collectively referred to herein as" CHA") has cared for and the present condition of the Henry Horner Homes, the Henry Horner Annex and the Henry Horner Extension (collectively referred to herein as the "Horner developments"). They specifically charge that (1) CHA has failed to maintain and repair when necessary the Horner developments'

common areas and that the conditions of the common areas are indecent, unsafe and unsanitary, (2) CHA has failed **to maintain** and **repair** when necessary the plaintiff-tenants' apartments **and** that the conditions of the apartments are indecent, unsafe **and** unsanitary, and (3) despite **a 35,000** person waiting list for CM housing, there is a 48% vacancy rate at the Horner developments and the unoccupied apartments are presently uninhabitable. **(See** Complaint ¶¶ 24-32.) Plaintiffs allege that these conditions constitute a "de facto demolition" of the project in violation of the procedures established by **§1437p** of the United States Housing Act (the **"Act")** (42 **U.S.C. §1437 et seq.).** Plaintiffs also claim a violation of the Administrative Procedures Act, the Annual Contributions Contract between **CHA** and HUD (the **"ACC")** and plaintiffs' lease agreements with **CHA.**

Importantly for purposes of this motion, plaintiffs do not allege that CHA has sought to actually demolish or dispose of the Horner properties. Nor do they allege that there even exists a CHA plan to demolish or dispose of the Horner developments, whether-by action or inaction. Rather, this is a case based on **CHA's** alleged failure to maintain the Horner developments and the alleged state of disrepair there. Nonetheless, plaintiffs seek an order requiring **CHA** to repair **and make** habitable all of the units and common areas at the Horner developments and to immediately fill all vacant units after they have been made habitable.

Plaintiffs bring this action as a class action. The named plaintiff group consists of eight Horner tenants and two applicants for CHA housing.[1] On July 19, 1991, they moved to certify a class consisting of "all persons who, on or after May 30, 1991 (a) reside in the Henry Horner Developments in Chicago, Illinois, or (b) do not reside in the Henry Horner Developments, but have applied to live in public housing that the CHA operates (including the Henry Horner Developments) by submitting a Registration for Housing application to CHA. (Complaint ¶ 8; Motion for Class Certification, p. 1.) According to the motion for certification, this group consists of approximately 143,700 individuals. Of this number, approximately 3,700 are alleged to be tenants and the remainder are alleged to be applicants and their families.

For the following reasons, plaintiffs' motion for class certification must be denied.

ARGUMENT

I. Plaintiffs Have The Burden of Showing That Class Certification is Appropriate.

The class action device is designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982), quoting Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979). While appropriate in

[1] Named plaintiff Henry Horner Mothers Guild allegedly consists of 50 families who reside in the Horner developments. (Complaint ¶ 5.)

certain circumstances, it is well settled that to **demonstrate the** propriety of utilizing this exceptional device, the party or parties seeking certification must establish that **its** action satisfies all four of the requirements of Fed. R. Civ. P. 23(a), as well as at least one of **the** standards set forth in Fed. R. Civ. P. 23(b). Eisen v. Carlisle & Jacauelin, 417 U.S. 156, 163 (1974). Failure to satisfy any one of these prerequisites is, of course, fatal. Valentino v. Howlett, 528 **F.2d** 975, 978 **(7th** Cir. 1976). The determination of whether an action may proceed as a class action is within the discretion of the court. See' **e.g.,** In re General Motors Interchange Litiaation, 594 **F.2d** 1106, 1129 n. 38 (7th Cir.), cert. denied, Oswald v. General Motors Corp., 444 U.S. 870 (1979). Here, plaintiffs fail to meet their burden and their motion should be denied.

II. Plaintiffs' Proposed Class Fails To Meet The Requirements Of Federal Rule Of Civil Procedure 23(a).

Fed. R. Civ. P. 23(a) provides that each of the following must be satisfied for an action to proceed as a class action:

> (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 interest of the class.

Fed. R. Civ. P. 23(a). As demonstrated below, plaintiffs' class fails to meet each of these basic standards.

A. Plaintiffs Have Not Met the Numerosity Reauirement of Rule 23(a)(1).

Rule 23(a)(1) requires plaintiffs to demonstrate that "the class is so numerous that joinder of all members is impracticable." Courts interpreting this provision have required that, in addition to sheer size, the class be capable of concise and exact definition. See, e.g., Adashunas v. Nealev, 626 F.2d 600, 603 (7th Cir. 1980); U.S. Dental Institute v. American Association of Orthodontists, 25 Fed. R. Serv. 2d 969 (N.D. Ill. 1977). At the very least, "a good faith estimate of the class is necessary where it is difficult to assess the exact class membership." Lons v. Thornton Township Hish School Dist., 82 F.R.D. 186, 189 (N.D. Ill. 1979). Accordingly' mere speculation as to the number of proposed class members is insufficient' see, e.g., Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976), and where the size of the proposed class is speculative the numerosity requirement of Rule 23(a) is not satisfied. Id.; see also Waller v. Int'l Harvester Co., 98 F.R.D. 560, 563 (N.D. Ill. 1983).

Moreover, the defined class must be precisely tailored to the issues presented. See, e.g., Independent School District No. 89 v. Bolain Equipment, Inc., 90 F.R.D. 245 (W.D. Okla. 1980). In Independent School District, an antitrust action brought by Oklahoma school districts against a bus manufacturer' the court concluded that a proposed class consisting of all

school districts in the state did not satisfy the requirement of numerosity. Significantly, plaintiffs presented no evidence as to which school districts were affected by the defendant's improper conduct. Only those districts which actually had purchased buses from the defendant could be included within the proposed class. Id. at 24-i'.

Here, similarly, plaintiffs' proposed class includes, in addition to Horner tenants, all present applicants for CHA housing. (Motion for Class Certification, p. 1). Inclusion of all housing applicants for CHA housing is, in the context of a case addressing conditions specific to Horner, overbroad, speculative as to the number of class members and imprecisely tailored to the issue at hand. Plaintiffs omit from their papers, or simply do not understand, the crucial fact that only a portion of all current applicants for CHA housing could possibly be assigned apartments at Henry Horner. More specifically, the only applicants for whom housing at Horner would be available are those who have expressed a location preference for Horner and those who are willing to be housed anywhere and request an apartment with a bedroom size compatible with those apartments available at Horner. This group comprises a class smaller than the 35,000 person waiting list plaintiffs presently seek to include. Plaintiffs, however, present no evidence as to which of the applicants would actually be eligible for Horner development housing. Thus, plaintiffs fail to define the class with

sufficient specificity and the class does not meet the requirements of Rule 23(a)(l).

B. Plaintiffs Have Not Met the Commonality Reauirement of Rule **23(a)(2).**

Plaintiffs also fail to establish the requisite commonality. Fed. R. Civ. P. 23(a)(2) requires that a movant establish that there are questions of law or fact **common** to the class for certification. In addition, a class representative must have the same interest and suffer the same injury as the class members and the class members' interests *must* be aligned. **See** Minority Police Officers **Ass'n** v. South Bend, 555 F. Supp. 921, 925 (N.D. Ind.), modified, 721 **F.2d** 197 (7th Cir. 1983). Here, commonality is absent.

Stewart v. Winter, 665 **F.2d** 328 (5th Cir. **1982),** is particularly instructive. There, the plaintiffs, who were inmates in Mississippi county jails, brought an Eighth Amendment action challenging the conditions of confinement in each county jail in Mississippi. The Fifth Circuit affirmed the district court's denial of a motion to certify a class consisting of inmates at all of the county jails. The court noted that the standards for liability under the Eighth Amendment require a detailed inquiry into all of the conditions at each prison. Moreover, resolution of the issue **of conditions** at one prison would have no effect on the resolution of the same issue for **a** separate prison. Thus, common issues of law or fact were absent. **Id.** at 335-337.

Here, similarly, plaintiffs essentially allege, under a collection of theories, indecent and uninhabitable conditions. They attempt to do so, however, for all apartments and common areas over a three development area. To resolve these issues, the court will require proof of conditions on anapartment by apartment and common area by common area basis.

More importantly, because plaintiffs charge that CHA neglected to maintain and repair, there should be an assessment of the claim on a tenant by tenant basis. For example, the plaintiff-tenants may only claim that CHA failed to repair the laundry list of items in disrepair identified in the complaint to the extent repairs were requested (or to the extent CHA had knowledge of the condition). CHA may not be faulted for conditions of which it was unaware and could not have discovered. Accordingly, each tenant's record and history of repair requests will play a role. Such individual issues highlight the lack of common issues among proposed class members in what is essentially a landlord-tenant dispute over conditions.

C. Plaintiffs Have Not Met the Typicality Requirement of Rule 23(a)(3).

A named plaintiff must also establish that the claims or defenses of the class representatives are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). A federal court's analysis with respect to typicality requires the court "to focus on whether the named representative's claims have the same essential characteristics as the claims of the class at large." Jeannides v. U.S. Home, 114 F.R.D. 29, 30 (N.D. Ill.

1987), citing, De La Fuente v. Stokelv-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983). The claims should be based on the same legal theory and the nature of the claims-should be the same for all parties. See, e.g., Beckless v. Heckler, 622 F. Supp. 715, 721 (N.D. Ill. 1985); see also Patrvkus v. Gomilla, 121 F.R.D. 357, 362 (N.D. Ill. 1988); Tonya K. v. Chicaso Bd. of Educ., 551 F. Supp. 1107, 1111 (N.D. Ill. 1982). The interests of the class must also be so aligned that a community of interests exists. See, e.g., Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr., 80 F.R.D. 254, 269 (N.D. Ill. 1978). Defenses applicable to only a portion of a proposed *class* prevent typicality. See, e.g., Henderson v. National Railroad Passenaer Corp., 117 F.R.D. 620, 623 (N.D. 111. 1987).

Here, the proposed class consists of (1) present tenants of the Horner developments, and (2) all applicants for CHA housing. The inclusion of both groups in a single class is improper because they do not present typical claims or defenses.

In Count IV of the Complaint, for example, plaintiffs allege a breach of the HUD-CHA Annual Contributions Contract. They do so on behalf of both the plaintiff-tenants and the plaintiff-applicants. To satisfy the requirement of standing, it is alleged that all plaintiffs are third-party beneficiaries of the ACC. Plaintiffs are wrong.[2]

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[2] CHA does not concede that any of the plaintiffs are proper third-party beneficiaries. Indeed, it believes that none fall within that group. See CHA's Memorandum in Support of Motion to Dismiss pp. 14-19. However, for purposes of this motion, the (continued...)

The standards for assessing whether an applicant for CHA housing is a third-party beneficiary of this contract differs from that applicable to tenants. In Price v. Pierce, 823 **F.2d** 1114, 1120 (7th Cir. **1987)**, cert. denied, 485 U.S. 960 **(1988)**, for example, the Seventh Circuit, addressing a third-party beneficiary claim under a contract between the Illinois Housing Development Authority and certain developers, distinguished between tenants of public housing and applicants for the same. The court held that developers were not contractually liable to applicants, noting that third-party beneficiary status is less plausible *in* the case of **a mere** applicant for subsidized housing than for a tenant. Id. at 1121, 1122. The court further noted that to give each applicant for subsidized housing the status of a beneficiary under a contract of that nature would make almost every lower income person in the United States a potential plaintiff. Id. Thus, Price instructs that under Count IV the **claims** of, or defenses applicable to, the plaintiff-tenants and the plaintiff-applicants cannot be considered typical for purposes of Rule 23(a)(3).

Moreover, in Count V, a contract claim governed by state law and brought pursuant to the Court's **pendent** jurisdiction, plaintiffs claim a breach of their leases by **CHA.** Again, the claim is brought on **behalf of** the tenants at the Horner developments and applicants for **CHA** housing. However,

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[2](. ..continued)
applicants have a less plausible claim which is critical to the typicality analysis.

applicants are not yet parties to a lease and, as such, they-. have no claim thereunder. **See, e.g.,** Dale v. Groebe & Co., 103 **Ill.** App. 3d 649 (1st Dist. 1981); Valentin v. D.G. Swanson & co., 25 Ill. App. 2d 285 (1960). For purposes of Count V, therefore, the legal position'of the tenant portion of the proposed class differs greatly from that of the applicant portion. Again, typicality of claims and/or defenses is clearly absent.

In addition to the problems presented by a class consisting of tenants and applicants, and as noted in the discussion of **commonality,** this case will also require an inquiry into and proof of conditions in individual apartments and tenant histories in order to address plaintiffs' basic claim of indecent and unsafe living conditions caused by **CHA's** failure to maintain and repair. This also raises a typicality problem.

In Jeannides v. U.S. Home, 114 F.R.D. 29 (N.D. Ill. **1987),** the court denied **movant's** petition for certification of a class consisting of all homeowners of residences built by defendant. The court determined that the named plaintiff failed to properly plead that the claims arose out of the same event and held that "plaintiffs' claims do not arise out of the same course of conduct that gives rise to the other class members **claims."** **Id.** The controlling factor for the'cburt was that the homes constructed by defendant were not mass produced but, rather, were "constructed on an individual basis utilizing different contracts, plans, specifications, and blueprints. Numerous

employees, architects, subcontractors and other individuals have been involved. . .[and]. . .[e]ach home varies in size, design, location, age and sales price." Id. at 30. Since the named plaintiffs in Jeannides would need to present different proof than the prospective plaintiffs, and the defendant would therefore have different defenses against each plaintiff, the movant failed to establish typicality.

Here, similarly, even apart from the lack of typicality between the positions of tenants and applicants, the plaintiff-tenants' case turns on a tenant by tenant review of each plaintiff's history with CHA and the conditions of separate apartments. Plaintiffs' class, therefore, lacks typicality.

D. Plaintiffs Have Not Met the Adequate Representation Requirement of Rule 23 (a)(4).

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." To determine whether the named plaintiffs adequately represent the interests of the proposed class, this Court must consider two factors: (1) adequacy of counsel; and (2) whether any conflict or antagonism exists between the interests of the named representatives and members of the class. See, e.g., Patrykus v. Gomilla, 121 F.R.D. 357 (N.D. Ill. 1988); Barkman v. Wabash, Inc., 674 F. Supp. 623 (N.D. Ill. 19.87). Here, as with commonality and typicality, inclusion of the applicants in the proposed class creates inconsistent interests. Applicants have an interest in obtaining CHA housing. Present tenants have an interest in improving the alleged conditions of their present

housing. Partial remedial measures of repairs to present -- tenants' housing would benefit the tenant portion of the class without benefiting the applicant portion of the class. In the event of such repairs to the tenants' units, they would have little incentive to vigorously represent the class or continue to prosecute the action. Given the lack of commonality and typicality of legal and factual issues, adequate representation will not exist in a class consisting of both tenants and applicants.

III. Plaintiffs Have Not Met The Requirements of Rule 23(b)(2).

In addition to satisfying the requirements of Rule 23(a), plaintiffs' action must fall within one of the three subsections of Rule 23 (b). Here, plaintiffs seek to certify a class under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief *or* corresponding declaratory relief with respect-to the class as a whole." The application of Rule 23(b)(2) is inappropriate in this case for several reasons.

First, a class is unnecessary in this action as the relief sought by plaintiffs, if ultimately granted, would benefit all persons plaintiffs seek to represent. CHA acknowledges that the rule in this Circuit is that "[i]f all requirements of Rule 23 are satisfied, class certification should not be refused because of lack of need." Brown v. Scott, 602 F.2d 791 (7th Cir.

1979), _aff'd_, _Carey v. Brown_, 447 U.S. 455 (1980); **_see also_ _Vickers v. Trainor_,** 546 **F.2d** 739, 747 (7th Cir. 1976). That line of authority indicates, however, only that need cannot be the sole reason for denying class certification. Here, where there is otherwise considerable **doubt** as to the propriety of certification under Rule 23(a), the lack of need **for** certification should be considered.

Moreover, CHA does not act, nor **has** it failed or refused to act, in a manner generally applicable to the proposed class. As has been more fully set forth in the discussions of typicality and commonality., the conditions of the Horner apartments and **CHA's** responsibility for the same depend in large part *on* an individual tenant's history and may differ from tenant to tenant and unit to unit. With respect to the applicants, only some of whom have even a colorable claim that **CHA's** role at Horner has affected them, any of a number of factors contributes to the disposition of their housing application. Many of these factors are completely unrelated to the Horner developments. There simply is no CHA action, or failure to act, generally applicable to the class as presently defined.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification should be denied.

BY: ______________________
One of the Attorneys for Defendants Chicago **Housing** Authority and Vincent Lane

James J. Casey
Bradford T. Yaker
Fred J. Posont
Stacey L. Prange
Keck, Mahin **&** Cate
8300 Sears Tower
233 South **Wacker** Drive
Chicago, Illinois 60606-6589
(312) 876-3400
Attorney No. 23382

OF COUNSEL:

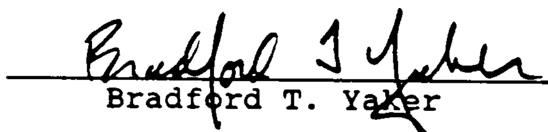
F. Willis Caruso
General Counsel
Chicago Housing Authority
c/o The Palmer House
17 East Monroe
Suite 201
Chicago, Illinois 60603

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing Response Of Defendants Chicago Housing Authority And Vincent Lane To Plaintiffs' Motion For Class Certification to be served by hand delivery to the following counsel of record on Monday, August 12, 1991:

William P. Wilen, Esq.
Legal Assistance Foundation
Of Chicago
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604

Linda A. Wawzenski, Esq.
Assistant United States
Attorney
219 South Dearborn Street
15th Floor
Chicago, Illinois 60604



Bradford T. Yaker