

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

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HENRY HORNER MOTHERS GUILD, et al.)
Plaintiffs,)
vs.) No. 91 C 3316
THE CHICAGO HOUSING AUTHORITY) Hon. James B. Zagel
(CHA), et al.,)
Defendants.)

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiffs have moved for certification of a class defined as:

All persons who, on or after May 30, 1991 (a) reside in the Henry Horner developments in Chicago, Illinois (the "**residents**") 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 a Registration for Housing application submitted to CHA (the "**applicants**").

Subsequently, they submitted a memorandum in support of their motion. See Memorandum in Support of Plaintiffs' Motion for Class Certification, filed July 19, 1991.

Defendants Chicago Housing Authority ("**CHA**") and Vincent Lane (collectively, the "**CHA** defendants") as well as Defendants United States Department of Housing and Urban Development ("**HUD**") and Jack F. Kemp (collectively, the "**federal** defendants") oppose the motion. See Response of Defendants Chicago Housing Authority and Vincent Lane to Plaintiffs' Motion for Class Certification ("**CHA Resp.**") and Federal Defendants' Response to Plaintiffs' Motion for Class Certification ("**HUD Resp.**"). However, because all of the

requirements of Fed.R.Civ.P. 23(a) and 23(b)(2) are satisfied in this case, this court should certify the plaintiff class as requested.

ARGUMENT

I. **THE CLASS IS SO NUMEROUS THAT JOINDER OF ALL PARTIES IS IMPRACTICABLE**

Although the federal defendants concede that the numerosity requirement of Rule 23(a)(1) has been met as to both residents and applicants (HUD Resp. at 2), the CHA defendants object to the inclusion of applicants as being overbroad and speculative. (CHA Resp. at 6.) They point out that not all 35,000 persons on the waiting list have expressed a location preference to reside at the Horner developments. Since plaintiffs have presented no evidence as to which of the applicants would actually be eligible for Horner development housing, the CHA defendants contend that plaintiffs have failed to define the class with sufficient specificity. Id. at 7.

However, at this stage of the litigation, prior to the completion of discovery, plaintiffs are not required to identify with numerical precision the number or identity of applicants who have expressed a preference for residing at the Horner developments. Plaintiffs are required to provide only a "good faith estimate" of the number of class members "where it is difficult to assess the exact class membership." Long v. Thornton Tp. High Sch. Dist. 205, 82 F.R.D. 186, 189 (N.D. Ill. 1979). "[T]he fact that the number of class members cannot be determined with precision or exactness will not defeat class certification."

Graham v. Security Sav. and Loan, 123 F.R.D. 687, 691 (N.D. Ind. 1989). If the number of class members that are sufficiently ascertainable are too numerous to practicably join, the numerosity requirement is satisfied. Jones v. Bowen, 121 F.R.D. 344, 348 (N.D. Ill. 1988). Where declaratory and injunctive relief is sought, it is appropriate to include within the class definition future claimants or applicants whose names are now unknown and unidentifiable. Tonva K. v. Chicago Board of Education, 551 F. Supp. 1107, 1109 (N.D. Ill. 1982).

Here, the CHA defendants do not contest that there are numerous applicants for housing at the Horner developments, applicants whose numbers are so large that it would be impracticable to join them all individually in this case. They also do not dispute that there will be numerous applicants in the future for housing at the Horner developments whose identities are presently unknown and unidentifiable. Nor do they dispute that plaintiffs have correctly estimated the 35,000 persons currently on **CHA's** waiting list, or that those who have **preferenced** another CHA development are not barred from changing their preferences at any time or from actually being placed at Horner if habitable units were made available. Under these circumstances, based on the above-cited authorities, the numerosity requirement is satisfied.

The cases relied upon by the CHA defendants are all readily distinguishable. In Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980), the court, even after the completion of comprehensive discovery by the parties, was unable to make a rough estimate of

the number of class members or determine a way to readily identify potential members. Id. at 603. In U.S. Dental Institute v. American Association of Orthodontists, 25 Fed. R. **Serv.2d** 969 (N.D. Ill. 1979), the court denied certification because there was no conceivable way to identify proposed class members. Id. at 971. In Independent School District No. 89 v. Bolain Equipment, Inc., 90 F.R.D. 245 (W.D. Okla. 1980), at most only 41 of the proposed 600 class members would have been affected by the litigation, and even that number was speculative. Id. at 248.

More to the point is Tinsley v. Kemp, 750 F. Supp. 1001 (W.D. Mo. 1990), a case virtually identical case to the case at bar but with even fewer class members. The court there certified a class of 170 public housing residents and 1,050 applicants in a de facto demolition case involving 118 vacant units, finding that the alternative to class certification -- the filing of over 1200 individual lawsuits -- would be so burdensome on the parties and the courts that they could not be litigated other than through the class action device. 750 F. Supp. at 1005. The court noted that the fluid nature of the class, with residents arriving and leaving, made the case **"particularly suitable for class certification."** Id. The court rejected the argument CBA makes here -- that the class is not defined with sufficient specificity -- because **"any given individual easily can be identified with precision** as being within or outside the class merely by looking at a list of residents and a list of applicants." Id. The court held that a class composed of both residents and applicants was **"not too vague,"** but was **"too**

large to accommodate by joinder." Id. The same considerations apply here.

II. THERE ARE QUESTIONS OF LAW AND FACT COMMON TO THE CLASS

The CHA defendants argue that the commonality requirement of Rule 23(a)(2) is not met here because the alleged harm suffered by each plaintiff is different and depends on the particular condition of the tenants' apartment or building. (CHA Resp. at 8.) According to CHA, this court, to resolve plaintiffs' claims, must require proof on a common area-by-common area basis as well as on an apartment-by-apartment basis where each tenants' record and history of repair requests would be a relevant consideration. Id. The federal defendants also argue that commonality is not met, but for a different reason. HUD claims that the relief plaintiffs seek, if granted, would not benefit all members of the applicant group because only a few could be housed at Horner. (HUD Resp. at 3.)

These arguments misapply the requirements of Rule 23(a)(2) which require plaintiffs to demonstrate only that there is at least one question of law or fact common to the class. Gomez v. Illinois State Board of Educ., 117 F.R.D. 394, 399 (N.D. Ill. 1987). The common legal issues here are whether defendants' conduct in allowing the vacancy rate to increase to almost 50% of the available units and in allowing the conditions of the development to deteriorate violate the United States Housing Act, the Annual Contributions Contract ("**ACC**") and the plaintiffs' leases. The fact that both applicants and residents suffer damage due to this

conduct is sufficient to satisfy Rule 23(a)(2): "[w]hen the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected." Long, 82 F.R.D. at 189.

Contrary to defendants' assertions, differences in individual cases concerning treatment or damages and factual variations among the class members' grievances do not defeat commonality. Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980), cert. denied 451 U.S. 914 (1980); Patrykus v. Gomilla, 121 F.R.D. 357, 361 (N.D. Ill. 1988); Jones, 121 F.R.D. at 349; Tonva K., 551 F. Supp. at 1111. In Tinsley, the housing authority argued, as CHA argues here, that the plaintiffs and the proposed class members have different individual facts. The court properly rejected that argument and found that the commonality element was satisfied because, as here, "[t]he few factual differences among individual persons are too insignificant, relative to what the persons allegedly have in common, to defeat certification." 750 F. Supp. at 1005.

The CHA defendants again rely on authorities that are neither relevant nor on point. They cite Minority Police Officers Association v. South Bend, 555 F. Supp. 921 (N.D. Ind. 1983) modified, 721 F. 2d 197 (7th Cir. 1983), to support their assertion that plaintiffs' class members have interests that are not aligned. Yet, in Minority Police, plaintiffs sought to certify four separate groups: (1) past minority police officers: (2) present minority

police officers: (3) all future minority police officers, and (4) all future minority applicants for employment as police officers. 555 F. Supp. at 925. However, the court found that the focus of the litigation would in reality affect only one of the proposed groups and that there was not a named plaintiff representing each group. Id. For these reasons the court held that plaintiffs failed to satisfy the commonality requirement. In this case, the focus of the litigation affects both residents and applicants, and both groups are represented by named plaintiffs.

Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982), which the CHA defendants found particularly instructive, actually supports plaintiffs' motion. The appellate court in Stewart, affirming the district court's order denying class certification, found that the physical and environmental conditions at each county jail in the state were so divergent that it was impossible to state with certainty any common issues. 669 F.2d at 335. As the district court noted, each jail was funded, administered, and operated by entirely different officials. Stewart, 87 F.R.D. 760, 769 (N.D. Miss. 1980). In addition, there was great diversity as to age, state of repair, size, extent of overcrowding, and provisions for food, clothing, and bedding. Id. Each county jail, in effect, had nothing to do with the one in the next county. The only thread that was common to all was that the state had passed a law requiring each county to have a jail. Id. at 768.

By contrast, plaintiffs in this case are tenants in, or applicants to, a uniform system administered and operated by

defendants. Funding is allocated and guidelines promulgated from one source which affects all plaintiffs. Moreover, the three different developments that comprise Henry Horner are administered by the same local CHA management office. Uniformity and commonality are integral to the federal public housing program.

III. PLAINTIFFS' CLAIMS ARE TYPICAL OF THE CLAIMS OF THE CLASS

The CHA defendants argue that plaintiffs' claims are not typical of the claims of the class because two of the claims asserted against the CHA defendants -- the third-party beneficiary claim for violation of the ACC (Count IV) and the breach of lease claim (Count V) -- are allegedly inapplicable to the applicants. (CHA Resp. at 10-11.) In addition, they again assert that the court must require proof of conditions in individual apartments and common areas, and that this requirement defeats the typicality requirement. (CHA Resp. at 11-12.) The federal defendants also contest typicality, again on the ground that only a small percentage of the applicants will benefit from the relief requested. (HUD Resp. at 4.)

All of these arguments misconstrue the requirements of Rule 23(a)(3). First of all, the typicality requirement refers to the nature of the representatives' claims and not to the specific facts from which they arise. Long, 82 F.R.D. at 190. As the Jones court found, a "representatives' claim is typical if it 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [is] based on the same legal **theory.**'" Jones, 121 F.R.D. at 349, citation omitted. Here,

while there are undoubtedly differences in the defective conditions of the named plaintiffs' apartments and the common areas in their respective buildings and those of the other class members, such differences are immaterial to a finding of typicality if these conditions arose from the same course of conduct and are actionable based on the same legal theories. Plaintiffs allege that these conditions resulted from the actions of CHA and HUD in allowing the vacancy rates to climb while at the same time failing to maintain the common areas and the apartments and allowing the conditions therein to deteriorate. Complaint, ¶¶37-39.

In addition, plaintiffs' claims and the claims of the other class members arise out of the same causes of action. Congress intended that Section 18(d) of the United States Housing Act, 42 U.S.C. §1437p, be "fully enforceable by tenants of and applicants for the housing that is threatened." H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess (1987), reprinted in U.S. Code Cong. & Admin. News 1987, pp. 3317, 3458. As the court in Tinsley found,

The deteriorating conditions -- resulting from the same action (and inaction) of defendants -
- of which resident plaintiffs complain are the same as the conditions allegedly causing de facto demolition that reduces the amount of housing for the plaintiff applicant.

750 F. Supp. at 1005. The same considerations apply regarding the ACC, as it requires CHA to operate Horner "**solely** for the purpose of providing decent, safe and sanitary dwellings . . . within the financial reach of Families of Low **Income.**" Complaint, ¶18. The

breach of the ACC affects both applicants as well as tenants.' As in Tinsley, "[t]he factual **proof** and legal theories to be applied by the named plaintiffs are precisely the same as would be **used by the** potential class members." 750 F. Supp. at 1005-1006.

Finally, the relief sought would benefit the applicants in two ways: first, to the extent that vacant apartments are made fit for occupancy, applicants will be allowed to move into housing that is decent, safe and sanitary; second, to the extent that those persons on the waiting list are housed, persons farther down on the list move up and become eligible for placement that much sooner. As found by the Tinsley court: "[t]he relief which the named plaintiffs seek is precisely the same which would relieve the alleged harm to the other potential members of the class." 750 F. Supp. at 1006.

IV. **THE NAMED PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS**

The **CHA** defendants suggest that there would be a conflict between the named plaintiffs and the members of the plaintiff class in the event the named plaintiffs' apartments are repaired because they then would have "little incentive to vigorously represent the class." (CHA Resp. at 13.) The federal defendants **also** predict conflict between the residents and the applicants. (HUD Resp. at 4.)

¹ Plaintiffs did not intend to bring the breach of lease claim on behalf of the plaintiff applicants or the Mothers Guild, as evidenced by the language in Count V alleging breach of the terms of **CHA's** "leases with Henry Horner tenants." Complaint, ¶51, emphasis added.

None of these fears are justified. All the plaintiffs stand to benefit if vacancies are reduced and more apartments **are** made **available**, if common areas are made safe for tenants to **walk** through, and if individual apartments are repaired. As in Tinsley, "[t]he plaintiffs' pleadings and supporting documentation demonstrate that they would prosecute the matter vigorously, with the assistance of qualified **counsel**." 750 F. Supp. at 1006.

v. **DEFENDANTS HAVE ACTED ON GROUNDS GENERALLY APPLICABLE TO THE CLASS. MAKING APPROPRIATE INJUNCTIVE AND DECLARATORY RELIEF**

Both the CHA defendants and the federal defendants argue that there is **"no need"** to certify a plaintiff class in this case: the CHA states that if the relief requested is granted, all persons plaintiffs seek to represent would benefit (CHA Resp. at 13.); HUD states that this case could proceed only on behalf of the Mothers Guild and still obtain the same relief sought on behalf of the class. In addition, CHA argues that it has not acted, or failed to act, in a manner generally applicable to the class as a whole. (CHA Resp. at 14.)

However, in this Circuit, as **CHA** acknowledges, if the proposed class meets the requirements of Fed.R.Civ.P. 23, a class must be certified. See Brown v. Scott, 602 F.2d 791, 795 (7th Cir. 1979) and cases cited therein. In rejecting the **PHA's "no need"** argument in Tinsley, the court noted that class certification is more than mere technical compliance with the Federal Rules. Class certification is vital for proper enforcement of the court's orders. 750 F. Supp. at 1006. Lack of class certification **may** mean that resolution of the matter would not, as a practical

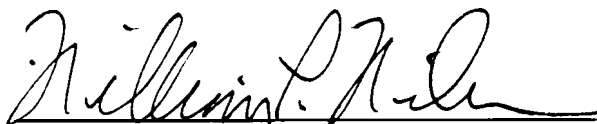
matter, benefit all of the class. Id.

Finally, there can be no doubt that defendants' actions in allowing the vacancy rate to escalate and in failing to maintain the premises are applicable to the class as a whole. As in Tinsley, "the actions (or inaction) attributed to the defendants are the same with regard to all plaintiffs and potential class members," thereby making appropriate injunctive and declaratory relief. 750 F. Supp. at 1006.

CONCLUSION

Because all of the requirements of Fed.R.Civ.P. 23(a) and 23(b)(2) are met in this case, plaintiffs request that this court allow this case to proceed as a class action.

Respectfully submitted,



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