

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

46,823
J
22 p.
1096611

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

PLAINTIFFS' RESPONSE TO DEFENDANTS
CHICAGO HOUSING AUTHORITY AND VINCENT LANE'S
RULE 12 (b) (6) MOTION TO DISMISS THE COMPLAINT

INTRODUCTION

Defendants Chicago Housing Authority and Vincent Lane have moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted. Subsequently, they submitted a memorandum in support of their motion. See Memorandum In Support of Motion To Dismiss of the Chicago Housing Authority and Vincent Lane ("CHA Mem.").

In ruling on this motion, this court must accept the well-pleaded allegations of the complaint as true, and must view them in the light most favorable to the plaintiffs. Yeksigian v. Nappi, 900 F.2d 101, 102 (7th Cir. 1990). All reasonable inferences that follow from the allegations of the complaint must also be taken as true. Corcoran v. Chicago Park District, 875 F.2d 609, 611 (7th Cir. 1989). Moreover, the record under Rule 12(b)(6) is limited to the specific language of the complaint, which cannot be challenged or refuted by the defendants: nor may defendants present a

different set of allegations.' Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004, 1005 (7th Cir. 1990); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987). To prevail on their motion, defendants have the burden to establish beyond doubt that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. Hishon v. King & Spauldins, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accordingly, defendants must overcome "a high barrier" to prevail. Gomez, 811 F.2d at 1040.

Applying these standards, this court must deny the defendants' motion.

STATEMENT OF THE CASE

Eight of the named plaintiffs are residents of the Henry Horner Homes, Henry Horner Extension or Henry Horner Annex, three public housing developments (collectively, "Henry Horner" or the "Henry Horner developments") consisting of approximately 1,775 units located on the near West side of Chicago. Complaint ("Complt"), ¶¶1, 5-6. These plaintiffs are long-term residents of Henry Horner: four of the plaintiffs have lived there over 20 years, three over nine years, and one over four years. Complt, ¶6. They are all members of a not-for-profit corporation, the Henry Horner Mothers Guild, which was formed to improve conditions at the developments: the guild is also a plaintiff here. Complt, ¶5.

¹ Accordingly, defendants' allegations that Plaintiff Henry Horner Mothers Guild is not in good standing with the State of Illinois (CHA Mem. at 2, n.2) and that the defective conditions complained of by plaintiffs are caused by "vandalism" (CHA Mem. at 13) are improper and should be disregarded by the court.

The tenth and eleventh plaintiffs do not reside at Henry Horner but have applied to CHA to reside there. Compl't, ¶7. In spite of the high vacancy rate at the developments, these applicants have not been offered housing and have been on the waiting list for over a year. Compl't, ¶¶35-36. One of the applicants has been homeless during this time and has been residing in shelters and half-way houses. Compl't, ¶36.

The Chicago Housing Authority ("**CHA**") owns and operates the Henry Horner developments. **CHA** is a public housing authority that administers federally-subsidized and assisted low-rent housing programs as authorized by the United **States** Housing Act of 1937 ("**Housing Act**"), 42 U.S.C. 51437. Compl't, ¶9. Defendant Vincent Lane is the Chairman of the CHA Board of Commissioners and Managing Director of CHA; he is being sued in his official capacity. Compl't, ¶10. Defendants CHA and Lane are collectively referred to as the "**CHA** defendants."

Plaintiffs allege that the CHA defendants have undertaken a course of conduct (described more fully infra) that has resulted in the deterioration of Henry Horner -- including the uninhabitability of many residential units there -- to the extent that the project has been, in effect, demolished in part. Compl't, ¶¶24-39. This de facto demolition results in fewer units being available to applicants and lower quality housing for the residents. Plaintiffs primarily seek a declaratory judgment and an injunction to prevent the de facto demolition, deteriorating conditions and vacancies from continuing, as well as an order requiring defendants to repair

the units and maintain full occupancy at the developments.

Plaintiffs raise three separate claims for relief against the CHA defendants: (1) a claim under 42 U.S.C. §1983 for violation of Section 18(d) of the Housing Act, 42 U.S.C. §1437p; (2) a **third-party beneficiary** claim for breach of the Annual Contributions Contract; and (3) a pendant contract claim for breach of the tenants' leases.²

STATEMENT OF FACTS

The CHA is subject to extensive federal regulation by HUD in numerous areas, including demolition and disposition of public housing units or developments. The procedures, limits and requirements for demolition and disposition are set forth in 42 U.S.C. §1437p. Complt, ¶15. In addition, as a public housing authority, CHA has an Annual Contributions Contract with HUD to receive federal housing subsidies and funds for operation and maintenance of public housing in Chicago under the Housing Act. 42 U.S.C. §§1437c and 1437g. Complt, ¶¶16-20. HUD also requires CHA to enter into leases with each of its tenants that impose duties and obligations on CHA regarding maintenance and repair of the developments. Complt, ¶¶21-23.

Over the **last three** years, CHA has allowed the vacancy rate at

² The complaint also raises a statutory claim under 42 U.S.C. §1437p and an Administrative Procedure Act claim under 5 U.S.C. §702 against Defendants United States Department of Housing and Urban Development ("HUD") and HUD Secretary Jack F. Kemp (collectively, the "federal defendants"). These claims are not at issue here: the federal defendants have not filed a Rule 12(b)(6) motion but rather have answered the complaint. See Federal Defendants' Answer, filed July 29, 1991.

Henry Horner to skyrocket. In December 1988, there were approximately 600 vacant apartments at the three Henry Horner developments, which constituted about 34% of the total available units. Compl't, ¶24. By December 1989, the number of vacant units had increased by almost 30% to 775, or 44% of the total available units. Id. By December 1990, the number had increased by another 10%, to 850, or 48% of the total available units. Id. These vacant units are subject to fire or vandalism and are locations for criminal activity. Compl't, ¶2. In addition, trespassers and drug dealers have entered many of these vacant units and have threatened and injured the residents of Henry Horner. Id.

These meteoric vacancy rates come at a time when over 35,000 families are on **CHA's** waiting list for housing who could be allocated apartments at Henry Horner if these vacant units were fit for occupancy. Compl't, ¶33. **CHA's** failure to repair and make ready these apartments prevents thousands of families from moving out of substandard or overcrowded housing or homeless shelters.

In addition to allowing the vacancy rate to escalate, CHA has allowed the common areas of the development to deteriorate to such an extent **that the** conditions there threaten the health, safety and lives of the tenants. As set forth in unremittent detail in the complaint (¶25), the elevators are either non-functioning or in a state of disrepair; there are numerous darkened hallways, lobbies and stairwells throughout the developments; windows are broken, boarded-up or leaking; trash chutes are malfunctioning and refuse abounds in the hallways, lobbies and stairwells: exit, stairway,

fire escape and directional signs are missing; stairway doors are broken or missing; stairwell handrails, treads and landings are defective; human and animal waste is pervasive; screen doors and windows are broken; and there are open or missing doors on numerous vacant units and abandoned laundry rooms.

Not only are the common areas in a state of disrepair, but **the** named plaintiffs' apartments contain numerous violations of the Chicago Building Code. Compl't, ¶¶26-32. The conditions in the common areas and in plaintiffs' apartments are generally unclean, unsafe, unsanitary, indecent, and are in substantial noncompliance with applicable provisions of the Chicago Municipal Code. Compl't, ¶¶25-32.

ARGUMENT

I. PLAINTIFFS' ALLEGATION OF A **DE** FACTO DEMOLITION OF THE HENRY **HORNER** DEVELOPMENTS' STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In Count I of the Complaint, plaintiffs allege that the **CHA** defendants have allowed the vacancy rate at the Horner developments to increase to such an extent that almost half of the units are currently vacant and unfit for occupancy by eligible applicants. In addition plaintiffs allege that the **CHA** defendants have allowed the common areas of the development as well as the occupied units to deteriorate to such an extent that they are in substantial non-compliance with the Chicago Municipal Code and threaten the health, safety and lives of the tenants. Plaintiffs contend that the **CHA** defendants have thereby caused a de facto or constructive demolition of those units and common areas, and that this

demolition was not carried out in accordance with the requirements of 42 U.S.C. §1437p.

Section 1437p establishes the conditions under which a public housing authority ("PHA") may demolish or dispose of existing public housing units. The statute provides that a PHA "shall not take any action to demolish or dispose of a public housing project without obtaining the approval of the Secretary [of HUD] and satisfying the conditions specified in subsections (a) and (b) of this section." 42 U.S.C. §1437p(d).

Subsection (a) requires the PHA to establish to the satisfaction of the Secretary that:

. . . the project or a portion of the project is obsolete as to physical condition, location, or other factors, making it unusable for housing purposes, and no reasonable program of modification is feasible to return the project or portion of the project to useful life: or in the case of an application proposing the demolition of only a portion of a project, the demolition will help assure the useful life of the remaining portion of the project;

42 U.S.C. §1437p(a)(1).

Subsection (b) requires the PHA to develop its application for demolition in consultation with the tenants and tenant councils who will be affected by the demolition, to provide relocation assistance to those tenants displaced, and to devise a plan for the provision of one additional dwelling unit for each dwelling unit demolished. See 42 U.S.C. §1437p(b)(1)-(3).

The CHA defendants concede that they have not secured the

approval of the Secretary to demolish units at Henry Horner or satisfied the "conditions" of 42 U.S.C. §1437p(a) and (b). (CHA Mem. at 8.) Consequently, the sole issue before this court is whether the CHA defendants' conduct in allowing almost 50% of the dwelling units to become vacant and unfit for occupancy and in failing to maintain the Henry Horner developments in a decent, safe and sanitary condition constitutes an "action to demolish or dispose of a public housing project" within the meaning of 42 U.S.C. §1437p(d).

As demonstrated below, the plain language and legislative history of §1437p compel the conclusion that de facto demolition is indeed actionable under §1437p. In two of the three cases that addressed the issue of de facto demolition after the 1987 amendment to the statute, the courts held that §1437p was violated when a public housing authority failed to maintain the premises in a decent, safe and sanitary condition. Concerned Tenants Association of Father Panik Village v. Pierce, 685 F.Supp 316, 321 (D.Conn 1988); Tinslev v. Kemp, 750 F.Supp 1001, 1007-08 (W.D.Mo 1990). The only court to find that §1437p required the PHA to engage in actual demolition in order to implicate the statutory requirements is Dessin v. Housins Authority of the City of Fort Meyers, No. 90-232 (M.D. Fla. Sept. 27, 1990) (copy attached to CHA Mem.). As we discuss infra, however, Dessin is clearly not good law, and defendants' reliance on it is misplaced.

A. The Edwards Decision and the 1987 Amendment

In Edwards v. District of Columbia, 831 F.2d 651 (D.C. Cir.

1987), the court found that under §1437p, demolition of public housing units could only occur after the Secretary of HUD determined **that the** statutory prerequisites involving obsolescence of the development, consultation with the affected tenants, and provision of relocation housing had been satisfied by the housing authority. 831 F.2d at 658. However, the majority declined to find that §1437p provided a private right of action for de facto demolition. Id. at 659-60.

Northern District of Illinois Senior District Judge Hubert L. Will, sitting by designation, while joining in the majority view that a private cause of action existed for actual demolition, went one step further. According to Judge Will, for §1437p to be meaningful and effective, it must also prohibit "a PHA, acting without prior HUD authorization, from condemning a **project** to death as effectively as if it were physically demolished by abandoning and neglecting it." Id. at 666. If the statute is not interpreted to prohibit de facto demolition, "the statutory scheme established by Congress requiring HUD approval and setting conditions for such approval can easily be avoided and is meaningless." Id. Consequently, Judge Will found that rights created by §1437p extended to de facto demolition.

In response to the majority holding in Edwards that plaintiffs' allegations of PHA abandonment and neglect did not state a claim for de facto demolition, Congress amended §1437p in 1987 by adding subsection (d) as follows:

A public housing agency shall not take any action to demolish or

dispose of a public housing project or a portion of a public housing project without obtaining the approval of the Secretary and satisfying the conditions specified in subsections (a) and (b) of this section.

Pub.L. 100-242, Title I, §121(d), 101 Stat. 1824, 1837 (Feb. 5, 1988), codified at 42 U.S.C. §1437p(d), emphasis added. According to the House Conference Report on subsection (d), the addition of this provision was intended to clarify that:

no PHA shall take any steps toward demolition and disposition without having satisfied the statutory criteria. This provision is intended to correct an erroneous interpretation of the existing statute by the United States Court of Appeals for the D.C. Circuit in Edwards v. District of Columbia and shall be fully enforceable by tenants of and applicants of the housing that is threatened.

H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess (1987), reoriented in U.S. Code Cong. & Admin. News 1987, pp. 3317, 3458.

B. The Decisions in Concerned Tenants and Tinsley

The first court to rule on whether allegations of de facto demolition stated a cause of action after the 1987 amendment to §1437p was the court in Concerned Tenants, suora. In determining the reach of the statutory scheme, the court focused on both the statutory language in §1437p(d) as well as the legislative history of that provision. The court found that the use of the words "any action" in subsection (b) and "any steps" in the House Conference Report were determinative of Congress' intent:

The use of the words "any action" and "any step" can only be reasonably construed to

encompass conduct, including an omission or failure to act, by a public housing agency that would result in the destruction of all or part of a housing project in the sense that the housing units would no longer be habitable. As reflected in the amendment, Congress intended to ensure that tenants could fully enforce compliance with the physical condition requirements of § 1437p. To limit these requirements to actual demolitions would undermine this intent.

685 F. **Supp.** at 321. Citing Judge Will's dissent in Edwards, the court found that Congress intended to prohibit both active and passive destruction of public housing projects without HUD approval. Because the result (i.e., the unapproved destruction of a housing project) is the same whether done by wrecking ball and bulldozers or by neglect that renders the units uninhabitable, the court reasoned **that the** requirements of §1437p should apply to both actual and de facto demolitions. Id. To conclude otherwise would allow public housing agencies to evade the law by simply allowing housing projects to fall into decay and disrepair. Id.

The next court to consider the issue found the reasoning of the dissent in Edwards and the court in Concerned Tenants to be persuasive. In Tinslev v. Kemp, supra, the court flatly rejected the argument made by the CBA defendants here, that in the absence of an affirmative decision to cause actual demolition, no claim is stated under §1437p.

Rather than alleging a conscious decision to demolish actively, the complaint essentially alleges that HUD passively decided not to decide to maintain the housing units. Plaintiffs allege this "**non-decision**" effectively left the units to deteriorate until overt demolition was the only available option. Plaintiffs should have the

opportunity to prove that defendants accomplished by inaction, what they were prohibited from doing actively. .. As in Concerned Tenants, plaintiffs have stated a claim sufficiently here to overcome a motion to dismiss.

750 F. Supp. at 1007-1008.

The Concerned Tenants and Tinsley courts' interpretation of §1437p is consistent with the letter and the spirit of the statute. As these courts held, there is nothing in the language or legislative history of the statute that suggests Congress intended to distinguish between actual and de facto demolition. Indeed, all of this authority suggests that it did not.

C. The CHA Defendants' Arguments

The CHA defendants rely principally upon Dessin v. Housing Authority of the City of Fort Meyers, supra, to support their position that §1437p does not prohibit passive destruction of public housing units through inaction and omission. In Dessin, the court found that statutory prohibition against PHA's taking "any action to demolish" without compliance with the statutory prerequisites did not specifically prohibit demolition by failure to maintain the property. Dessin slip opinion at 7. The court felt that Congress should have prohibited failure to maintain "in plainer terms." Id.

However, this argument ignores the purpose, language and legislative of history of subsection (d). By prohibiting a PHA from taking "any action to demolish" and requiring a PHA to comply with statutory prerequisites before taking "any steps toward demolition" (see §IA at 9-10, supra), Congress sought to correct

the very **same misinterpretation of the statute that the ~~Dessin~~** court is espousing and that CHA is urging upon this court. While it is true that **"the** interpretation of the statute must begin with its plain language," ~~Dessin~~ slip opinion at 7, the words **"any action"** and **"any steps"** are certainly broad enough and plain enough to encompass demolition by any means, including inaction, neglect, or omission. As stated by the court in ~~Concerned Tenants~~, these words:

can ~~only be reasonably construed~~ to encompass conduct, including an omission or failure to act, by a public housing agency that would result in the destruction of all or part of a housing project in the sense that the housing units would no longer be habitable. .. [to] limit **these** requirements to actual demolitions would undermine this intent.

Concerned Tenants, 685 F. Supp. at 321, emphasis added. The Dessin court's interpretation of the **scope** of the statute is simply unreasonable in light of the statutory language and its legislative history.

The court in Dessin attempts to bolster its narrow interpretation of the statute by relying on HUD's definition of demolition, which is **"the razing, in whole or in part, of one or more permanent buildings of a public housing project."** 24 C.F.R. 5970.3. The court states that this agency interpretation of the statute is entitled to **"considerable weight."** Dessin slip opinion at 7. However, this definition **is irrelevant because it was** promulgated in 1985, two years before the amendment adding subsection (d) to the statutory scheme. See 50 Fed. Reg. 50894, Dec. 13, 1985. In addition, any agency interpretation of a statute

that directly conflicts with the express intent of Congress is entitled to no deference. INS v. Cardoza-Fonseca, 480 U.S. 421, 445-48 (1987).

CHA also argues that plaintiffs have failed to allege that CHA has "reached a decision" or "created a plan" to demolish the Horner developments. (CHA Mem. at 9-11.) Without allegations of "purposeful destruction" of the type alleged in Edwards, CHA asserts that the legislative history of the statute provides no support for plaintiffs' claims. (CHA Mem. at 10-11.) However, Congress did not limit activities prohibited under the statute only to overt PHA actions involving concrete "plans" to demolish a structure. Judge Will's dissent in Edwards (which was subsequently approved as the correct statutory interpretation by Congress) interpreted the statute to apply to demolition achieved "slowly by abandonment and neglect." 821 F.2d at 670. The Tinsley court held that the statute prohibited HUD from "passively decid[ing] not to decide to maintain the housing units" and leaving units to deteriorate "by inaction." 750 F. Supp. at 1007. Both of these interpretations would apply to prohibit the failures to maintain and repair the Henry Horner developments and to preserve vacant units that are alleged in the complaint. See Compl't., ¶¶25-38.

Finally, in an apparent attempt to belittle plaintiffs' claims and the seriousness of this case, the CHA defendants argue that if this court allows this case to proceed, PHAs will "forever be in federal court litigating what is essentially a landlord-tenant dispute." (CHA Mem. at 13.) Such a statement reveals that CHA has

forgotten its statutory mission and sole reason for existence under the Housing Act: to provide "decent, safe and sanitary dwellings for families of low income." 42 U.S.C. 11437. This case is not merely a "landlord-tenant" dispute; it is a case, properly brought in federal court, where plaintiffs seek to require defendants to adhere to federal law in the administration of a vital federal program, rights that are "fully enforceable by tenants of and applicants for the housing that is threatened." House Conference Rep. No. 100-426, supra, at 3469.³

**II. PLAINTIFFS' THIRD-PARTY BENEFICIARY CLAIM AGAINST
CHA AND HUD FOR BREACH OF THE ANNUAL CONTRIBUTIONS
CONTRACT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

In Count IV, plaintiffs allege that the CHA defendants have breached the Annual Contributions Contract ("ACC") between CHA and HUD that requires CHA to maintain' Henry Horner in a proper condition. Plaintiffs claim that as third-party beneficiaries of the ACC, they may enforce its terms and conditions.

The ACC is an agreement between HUD and a PHA under which HUD disburses federal funds to the PHA on the condition that the PHA complies with the requirements of the Housing Act and HUD's regulations. 42 U.S.C. §§1437c and 1437g. The ACC requires CHA

³ CHA thereby exhibits precisely the type of attitude that Judge Will was worried about in Edwards. He was particularly concerned of the practical consequences if §1437p(d) is interpreted to allow de facto demolition, as CHA is urging this court to allow. Such a holding would "open the door to PHAs across the country embarking on similar programs to eliminate public housing projects by failing to maintain them, evacuating or evicting the tenants, permitting units to be vandalized and, after the projects are clearly uninhabitable, applying to HUD for formal permission to knock them down." Edwards, 821 F.2d at 671.

"at all times [to] operate each Project solely for the purpose of providing decent, safe and sanitary dwellings ... within the financial reach of Families of Low **Income**" and to "maintain each Project in good repair, order and **condition**." ACC, §§201, 210(A); Compl't, §§18, 19. See also Compl't, §§17, 20.

The Seventh Circuit in Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981), applying principles of federal common law,⁴ set forth the standard for determining whether plaintiffs are intended beneficiaries of federal contracts:

[A] third party may have enforceable rights under a contract if the contract was made for his direct benefit. If the agreement was not intended to benefit the third party, however, he is viewed as an "incidental" beneficiary, having no legally cognizable rights under the contract.

Holbrook, 643 F.2d at 1270, citations omitted. See also Price v. Pierce, supra, 823 F.2d at 1121 (restating test). To determine whether plaintiffs have enforceable rights under contracts, it is necessary to analyze the purposes underlying their formation. Holbrook, 643 F.2d at 1271. The purposes set out in the statute implemented by the contract are a relevant inquiry. Id. In Holbrook, residents of housing subsidized under the federal Section

⁴ Federal common law applied because a federal agency (HUD) was a party to the action and because the outcome of the case would directly affect substantial financial obligations of the United States. Holbrook, 643 F.2d at 1270, n. 16. See also Price v. Pierce, 823 F.2d 1114, 1120 (7th Cir. 1987) (because legal questions in case involve interpretation of a federal housing statute and desirability of achieving a uniform interpretation of contracts governing federally subsidized lower-income housing, application of federal common law is appropriate). In this case, all of these reasons support application of federal common law.

a program (42 U.S.C. §1437f) were found to be intended beneficiaries of housing assistance payments contracts concerning that housing between HUD and a private landlord. The court found that "Section 8 is designed to provide rent subsidies to needy families .. .[and] if the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt." Id. at 1271.

Most courts that have considered the issue have held that public housing tenants are third-party beneficiaries of the ACC and may enforce its provisions against both HUD and the PHA. Ashton v. Pierce, 716 F.2d 56, 66 (D.C. Cir. 1983), modified on other grounds, 723 F.2d 70 (D.C. Cir. 1983); Knox Hill Tenant Council v. Washinston, 448 F.2d 1045, 1057-58 (D.C. Cir. 1971); Tinslev v. Kemp, supra, 750 F. Supp. at 1012; Curtis v. Oakland Housing Authority, 746 F. Supp. 989, 997 (N.D. Cal. 1990); Concerned Tenants of Father Panik Village v. Pierce, supra, 685 F. Supp. at 324; Ayala v. Boston Housins Authority, 404 Mass. 689, 536 N.E.2d 1082, 1089 (1989); contra Perry v. Housins Auth. of Charleston, 664 F.2d 1210, 1218 (4th Cir. 1981); Boston Pub. Hous. Tenants' Policy Council v. HUD, 388 F. Supp. 493, '496 (D. Mass. 1974).

The critical question here is whether the ACC was intended to benefit the tenants. Under the statute, HUD is authorized to make annual contributions to PHAs "to assist in achieving and maintaining the lower income character of their projects." 42

U.S.C. §1437c(a). The ACC itself requires the PHA to "operate each Project solely for the purpose of providing decent, safe, and sanitary dwellings." Compl't, ¶18(a). Given these purposes, it is evident that the ACC was intended to benefit public housing tenants. As the Ashton court stated: "Indeed, it is difficult to imagine any purpose for the Contract other than to benefit tenants of public housing." Ashton, 716 F.2d at 66, citing 42 U.S.C. §1437c.

After analyzing the relevant statutory and contractual language, the court in Concerned Tenants concluded that:

The ACC, which is entered into pursuant to the Housing Act, does exhibit an intention to benefit the tenants directly. The provisions of the ACC make clear that it was executed primarily for the purpose of benefiting tenants. [citing Ashton and Holbrook] The ACC requires that defendants ... provide decent, safe, and sanitary housing. Moreover, the language of the Housing Act and its legislative history demonstrate that Congress intended **that the** regulatory contracts entered into pursuant to the Act were designed to benefit the tenants as a mechanism for ensuring they receive decent and safe housing.

685 F. Supp at 324. The court went on to distinguish the two cases that CHA relies upon here: Perry, suora, and Samuels v. District of Columbia, 770 F.2d 184, 201 n.14 (D.C. Cir. 1985). Regarding Perry, the court noted that the decision was reached "without analysis or pertinent discussion," and by inappropriate reliance "on those cases involving agreements under HUD's mortgage insurance

programs."⁵ 685 F. Supp. at 324. Similarly, the dicta in Samuels was based on that court's conclusion that congressional intent to eliminate lead-based paint as discussed in Ashton was somehow clearer than congressional intent to ensure tenants of public housing developments receive decent, safe and sanitary housing. The Concerned Tenants court found that distinction unpersuasive: "The provisions of the ACC along with the language and legislative history of the Housing Act demonstrate the intent to benefit tenants." 685 F. Supp. at 324.

The only other court that did not confer third-party beneficiary status on public housing tenants, Boston Pub. Hous.

⁵ The principal case relied upon by CHA (CHA Mem. at 14-16) for its third-party beneficiary analysis, Ansleton v. Pierce, 574 F. Supp. 719 (D.N.J. 1983), aff'd 734 F.2d 3 (3d Cir. 1984), cert. denied, 469 U.S. 880 (1984), did not involve public housing or even federally subsidized housing; rather it concerned an attempt to enforce a Regulatory Agreement between HUD and the original private mortgagor of housing developed under §207 of the National Housing Act, 12 U.S.C. 11713, housing the court described as "the major federal commitment to non-subsidized housing." 547 F. Supp. at 723. Likewise, the court in Perry, in a brief one-paragraph analysis, relied primarily on non-public housing cases involving regulatory agreements between HUD and private mortgagors: Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979) (Regulatory Agreement between HUD and private mortgagor where mortgage insured under §221(d)(3) of National Housing Act, 12 U.S.C. §17151(d)(3)); Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975) (same); Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977) (HUD Handbook imposing duties on private mortgage company for single-family mortgage insured under §235 of the National Housing Act, 12 U.S.C. §1715z); Fenner v. Bruce Manor, Inc., 409 F. Supp 1332 (D. Md. 1976) (Regulatory Agreements under §221(d)(3) and §236 of the National Housing Act, 12 U.S.C. §1715z-1). These cases are irrelevant because unlike cases involving an ACC, there is "no indication that the agreements entered into under the mortgage insurance programs were intended to benefit the tenants of housing projects . . . [rather, they] were intended to ensure the financial viability of housing projects and thus benefitted indirectly a broad group including banks, developers, and builders." Concerned Tenants, 685 F. Supp. at 323.

Tenants' Policy Council, sunra, is of little, if any, precedential value. Its unsupported two-sentence analysis merely **concluded that** tenants were **incidental beneficiaries and therefore** did not acquire **"true 'third party beneficiary' status."** 388 F. Supp. at 496. The more recent and enlightened view in Massachusetts is set forth in Avala v. Boston Housins Authority, sunra, where the court concluded that, **"The primary purpose, if not the only purpose, of the ACC was to benefit individuals such as the plaintiffs."** 536 N.E.2d at 1089 (Mass. 1989).

Perry and Samuels are unpersuasive and, in any event, are not controlling. The reasoning of the Seventh Circuit in Holbrook, in contrast, is controlling, and it and Ashton are persuasive. **"Under these two cases [Holbrook and Ashton], tenants have enforceable rights as intended beneficiaries to obtain compliance with the obligations under the ACC to provide decent and safe housing."** Concerned Tenants, 685 F. Supp. at 324. This court, like the courts in Concerned Tenants, Tinsley, and Curtis should follow them.

III. PLAINTIFFS' PENDANT CONTRACT CLAIM AGAINST
CBA FOR BREACH OF THE TENANTS' LEASES STATES
A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In Count V, plaintiffs allege that CHA has breached the leases of those "plaintiffs who reside at the Henry Horner developments."⁶ Complt, ¶52. The lease requires CHA to maintain

⁶ CHA argues that the breach of lease claim is unavailable to the plaintiff-applicants and the corporate plaintiff. (CHA Mem. at 19.) Plaintiffs never intended to bring such a claim on behalf of the applicants or the Mothers Guild, as evidenced by the language in Count V alleging breach of the terms of **CHA's "leases** with Henry

the premises and the project in decent, safe and sanitary condition, to comply with all local codes relating to health and safety, and to make all necessary repairs. Compl't, ¶23.

In their complaint, plaintiffs referred to this claim simply as a "pendent" claim. Compl't, ¶¶4, 51-53. However, under a recent amendment to Title 28 of the United States Code, it is more properly characterized as a claim over which this court has "supplemental jurisdiction" under 28 U.S.C. §1367.⁷

The new statute provides that the district courts "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The statute permits the district court to decline to exercise supplemental jurisdiction in only four specific circumstances, including if the court "has dismissed all claims over which it has original jurisdiction."

Because the lease claim is so related to the de facto demolition and third-party beneficiary claims to be part of the same case or controversy, and because both of the original jurisdiction counts state claims upon which relief should be granted, this court should exercise its supplemental jurisdiction over Count V of the complaint.

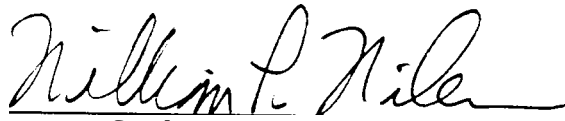
Horner tenants." Compl't, ¶51.

⁷ 28 U.S.C. §1367 was added by Pub.L. 101-650, Title III, §310(a), 104 Stat. 5113. It became effective December 1, 1990.

CONCLUSION

This court should deny the CHA defendants' motion to dismiss the complaint.

Respectfully submitted,



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