UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

COLATTA DEAN et al.,	*	
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Plaintiffs,	*	
	*	CIVIL ACTION NO.: CCB 03-1381
v.	*	
	*	
MEL MARTINEZ, et al.,	*	
	*	
Defendants	*	
	*	
	*	

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PLAINTIFFS' OPPOSITION TO MOTION OF
DEFENDANT GRAZIANO TO DISMISS

INTRODUCTION

After the Mayor and City Council (hereinafter the "City defendants") filed an initial motion to dismiss or, alternatively, for summary judgment, defendant Paul Graziano, Commissioner of defendant Department of Housing & Community Development ("HCD") has brought another motion to dismiss, alleging that the Complaint should be dismissed as to him because the relief plaintiffs seek is the same relief they seek against the City defendants.[1] The fact that plaintiffs seek the same relief against multiple defendants is not a basis for dismissing the claims against one. The question is whether plaintiffs have stated a cause of action against the defendant, with issues of liability and the apportionment of relief left to consideration of the merits.

[1] Defendant Graziano also incorporates by reference the arguments of the other City defendants set forth in the first motion.

Here, plaintiffs have stated a cause of action against every City defendant, which entitles them to maintain the action against them all.[2]

ARGUMENT

1. Defendant Graziano's effort to dismiss because plaintiffs seek the same relief against the Mayor and City Council is contrary to the well established standard for granting pre-answer motions to dismiss.

The standard for review of a motion to dismiss is well established. Motions to dismiss prior to an examination of the merits are disfavored. 5A Wright & Miller § 1357. The motion should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 102 (1957).

It is not unusual for plaintiffs to seek relief from multiple parties. Where plaintiffs have raised claims against various parties, the question of whether a claim should be dismissed is answered by examining whether the claim, as asserted against that defendant, states a cause of action for which relief can be granted. Fed. R. Civ. P. 8(a). The rules expressly permit stating separate claims. Fed. R. Civ. P. 8(e). The issue at this point is not, as defendants urge, whether similar or identical relief is sought against others. Whether relief is available from any one defendant, or from multiple defendants, cannot be answered at this preliminary stage. Fed. R. Civ. P. 20 allows the joinder of all persons "if there is asserted against them jointly, severally, or in the alternative any right of relief in respect of or arising out of the same transaction…and if any question of law or fact common to all defendants will arise in the action." See Fed. R. Civ. P. 20; *Nagler v. Admiral Corporation*, 248 F.2d 319 (2nd Cir. 1957). Defendants cite no authority for

[2] Defendants have not provided a supporting memorandum with their motion, as required by Local Rule 105(1). Plaintiffs are willing to overlook this pleading defect in order to resolve these preliminary matters

their novel proposition that a claim must be dismissed simply because the same relief is sought against another party. This theory, which flies in the face of the well-established rules of pleading and standards for assessing the sufficiency of a claim at this initial stage, should be rejected out of hand.

Moreover, it is important for the Court to have before it all of the entities whose actions are called into question. With all of the responsible actors before the Court, plaintiffs and the Court can be assured that complete relief may be afforded plaintiffs, if they prevail on their claims.

Defendant does not deny that HDC (sued through defendant Graziano in his official capacity) can provide the relief plaintiffs seek. HDC is the City agency responsible for the Uplands redevelopment and its actions and decisions are the basis for the remaining claims against the City defendants. Defendant Graziano and the Department he heads, defendant Housing and Community Development, are empowered and charged by Article 13 § 2-1 et seq. of the Baltimore City Code to redevelop and/or facilitate the redevelopment of property like Uplands. HDC is engaged in the process and the plan to redevelop Uplands referenced by Deputy Commissioner Douglass Austin, pursuant to its legal obligations and powers. The Commissioner and the Department are also empowered and charged by City law to implement the planned redevelopment of Uplands.

Thus, if plaintiffs prevail on any of their claims against the HUD or City defendants (including HCD through Mr. Graziano) that require changes to the design of the Uplands redevelopment, HCD, through its Commissioner, is the City entity whose plans and/or

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quickly and move on to the merits of their claims.

processes will be affected and required to change, and Mr. Graziano, is in his official capacity therefore a proper party to this action.

2. Plaintiffs have stated a ripe, legal claim on which relief may be grant against defendant Graziano.

Defendant Graziano incorporates by reference the arguments for dismissal of plaintiffs' fair housing claim raised by the City defendants in their first motion and reply memorandum. For the reasons set forth in plaintiffs' Opposition to the prior motion, incorporated herein by reference, those arguments are equally unsound as to defendant Graziano and should be rejected. The Reply of the City defendants further reveals the lack of merit to their contentions. Since it is expressly incorporated by reference in defendant Graziano's motion (page 1, point 2), we briefly address its new points here.

First, defendants insist that *Jersey Heights Neighborhood Ass'n v. Glendening*, 2 F. Supp. 2d 772 (D. Md. 1998), *aff'd in part and rev'd in part,* 174 F. 3d 180 (4th Cir. 1999) bolsters their lack of ripeness argument. *Reply Memorandum in Support of the City's Motion to Dismiss, Or in the Alternative, Motion for Summary Judgment* ("*Reply")* at 3. It does not.[3] Unlike the situation in *Jersey Heights*, the persons who will be affected by the redevelopment plan for Uplands are precisely identified: the named former residents and the members of the Uplands Apartments Tenants Association ("UATA"). They have already been forced to move and the neighborhoods where they have been able to find replacement housing are also precisely identifiable and capable of comparison to the area from which they have been displaced. The court can thus readily ascertain whether plaintiffs have been

[3] As pointed out in their previous opposition, *Jersey Heights* underscores the timeliness of this challenge. Both the District and Circuit Court decisions in *Jersey Heights* make clear that, when governmental

displaced to historically segregated neighborhoods and/or those of higher minority concentration. Mr. Austin's Affidavit makes clear that the City has a redevelopment plan.[4] Expert examination of the plan will enable the court to ascertain whether the affordability provisions in that plan will likely preclude low-income residents such as the plaintiffs and members of the UATA from returning, and whether it relegates them to ghettoized neighborhoods. The Court does not need to await any future event to ascertain whether the affordability terms of the plan and/or the loss of affordable units disproportionately deprive African American residents of housing. It is possible, for example, to compute whether low income Section 8 recipients, like plaintiffs and UATA members, will be able to afford units marketed pursuant to the affordability requirements of the plan. The Court can readily determine whether the City defendants' redevelopment plan satisfies fair housing requirements or whether, as plaintiffs contend, it consigns the former low-income, African American residents to historically segregated neighborhoods of high minority concentration and it deprives them of housing because it has set affordability requirements above those minority residents' means and makes less units available to them. Thus, as plaintiffs demonstrated in their prior Opposition and here, ripeness is simply not a barrier to review.

Second, defendants contend that plaintiffs' fair housing claim should be dismissed because "the substance" of plaintiffs' allegations is that they will be deprived of housing at a rebuilt Uplands because of income, not race. *Reply* at 4. There is no

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planning is challenged, it is critical that such a challenge be heard timely. This lesson applies irrespective of the substantive basis of the challenge – whether NEPA or the Fair Housing Laws.

question but that the former African American residents of Uplands are poor.[5] Their lack of housing options is directly related to their income. In Baltimore City, as in many others, the poverty population is disproportionately African-American. The confluence of race and poverty, however, does not absolve the City of its fair housing obligations. It not only has a duty not to discriminate intentionally on the basis of race, but it has a duty to avoid actions that have a disparate impact on minorities. The fact that an action has a disparate impact on a minority group, largely because the members of the minority group are poor, does not justify the action or take it outside the reach of the fair housing laws. To discharge their fair housing duties and avoid consequences that violate the fair housing act, municipalities may have to take into account the economic status of the minority group being affected. Indeed, that is what the disparate impact cases teach.

For example, in the seminal case of *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977), the Seventh Circuit found that the municipality could not adopt zoning policies that effectively foreclosed construction of low-income housing. It explained that such policies constituted a greater deprivation for black people than for white people "[b]ecause a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing." 558 F. 2d at 1288. In addition, the Court found that the policy perpetuated patterns of segregative housing. *Id. at 1289.* In other words, the Village's action was actionable due to the correlation

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[4] Last week, after plaintiffs submitted their Opposition, the City shared with plaintiffs' counsel information regarding their redevelopment plan. Plaintiffs have not had time to analyze the plan fully and, in any event, substantive consideration of the plan at this stage would be premature.

of race and poverty – because more of the area's poverty population was black and it was they who were denied housing opportunities. *See also Hines v. Charleston Housing Authority,* p. 13, No. 1:01CV70CDP (March 11, 2004) (defendant's decision to demolish housing violated Fair Housing Act because it reduced supply of housing for the low-income population which was disproportionately black) (decision attached as Exhibit A). Indeed, it is that profoundly troubling correlation between race and poverty that the fair housing laws were, at least in part, intended to address. *See, e.g. Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283, quoting *Otero v. New York City Housing Authority,* 484 F. 2d 1122, 1134 (2nd Cir. 1973) (Fair Housing Act intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."); *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987, 1015-16 (D.C. Pa. 1976).[6]

Plaintiffs have alleged that both the "affordability" provisions and the overall loss of units have a disparate, adverse impact on the former African American residents. In the recent case of *Hines v. Charleston Housing Authority, supra,* the U.S. District Court for the Eastern District of Missouri found that a decision that resulted in the loss of affordable units violated the fair housing laws because of its disparate impact on African Americans, who made up a high percentage of the poverty population for

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[5] The property was owned and operated as subsidized housing for many years before HUD stepped in to take over from the defaulting owner.

[6] Of course, plaintiffs' showing of a discriminatory impact does not end the ultimate analysis regarding whether the action about which they complain constitutes a violation of the law. Every Circuit, including the Fourth, has articulated a standard for testing whether facially neutral policies give rise to racially discriminatory effects that violate the law and it is that standard that will be applied to the evidence presented in a trial on the merits. The case law does, however, demonstrate how defendants' effort to look behind plaintiffs' allegations (which the court will not do in deciding a motion to dismiss) to focus solely

whom the units were provided. Once again, a court recognized that deprivation of housing for low income people can result in a violation of the fair housing laws because those low income people are disproportionately African American. Plaintiffs here have more than met the threshold requirement for pursuing a similar cause of action.

CONCLUSION

The City has had two bites at the apple to have this case dismissed. Neither survives scrutiny. The Court should deny its motions, including the instant motion to dismiss defendant Graziano, require the City defendants to answer and permit the case to move forward against both HUD and the City defendants.

Dated: August 2, 2004

/s/

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on one characteristic of the plaintiff group and to de-link race and poverty ignores an entire body of law interpreting the fair housing act and the concept of disparate impact.