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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.* EDMUND ROSNER,	:	
	:	06 Civ. 11440 (SAS)
Plaintiff,	:	**COMPLAINT OF THE UNITED STATES OF AMERICA**
- against -	:	
GLENN GARDENS ASSOCIATES, L.P,	:	
Defendant.	:	

The United States of America, by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, having filed a notice of election to partially intervene, alleges for its complaint on information and belief as follows:

PRELIMINARY STATEMENT

1. This is a civil action brought by the United States of America (the "United States") to recover Section 8 rental subsidies that defendant improperly received, and to obtain a declaration that the apartments rented by Section 8 tenants at Glenn Gardens, a residential apartment building located on Manhattan's Upper Westside, has been subject to New York

City's rent stabilization laws and regulations since on or about June 27, 2003, and continuing to date.

2. Defendant is the owner of Glenn Gardens. Prior to June 27, 2003, Glenn Gardens was regulated under the Mitchell-Lama program and had a mortgage insured by the Federal Housing Administration ("FHA"), a division of the United States Department of Housing and Urban Development ("HUD"). In 2003, defendant prepaid Glenn Gardens' FHA-insured mortgage and withdrew IPN from the Mitchell-Lama program effective June 27, 2003 (the "Exit Date").

3. Glenn Gardens' pre-payment of the FHA-insured mortgage constituted an eligibility event to allow existing, qualified tenants to receive Enhanced Vouchers pursuant to Section 8(t)(2) of the U.S. Housing Act, 42 U.S.C. § 1437f(t)(2).

4. Prior to the Exit Date, defendant encouraged the tenants at Glenn Gardens to apply for the Enhanced Vouchers.

5. Many tenants at Glenn Gardens applied for and, subsequent to the Exit Date, received Section 8 Enhanced Vouchers, which are benefits in the form of HUD's agreement to subsidize their monthly rental payments up to the market rate charged by defendant.

6. After the Exit Date, defendant charged rent to Section 8 tenants at Glenn Gardens as though Glenn Gardens was not subject to rent regulation. Funds received from HUD were used by the New York City Housing and Preservation Department, the Section 8 Contract Administrator, to pay a portion of the Section 8 tenants' rent at Glenn Gardens to defendant.

7. However, beginning in 1996, the owner of Glenn Gardens received tax abatements under New York City's J-51 program. The J-51 tax abatements were in effect as of

the Exit Date and were scheduled to expire in or about June 2008. By law, as a result of applying for and receiving the J-51 tax abatements, the apartments at Glenn Gardens became rent stabilized as of the Exit Date and remain rent stabilized to the present.

8. Defendant improperly received as rent HUD-provided Section 8 monies based on its charging market rate rents to the Section 8 tenants at Glenn Gardens after the Exit Date, as opposed to the rent stabilized rent. The United States is entitled to the return of the excessive Section 8 rental subsidies paid as a result of the rent overcharges. In addition, the United States is entitled to a declaration that the apartments rented by Section 8 tenants at Glenn Gardens are currently rent stabilized.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the claims brought herein pursuant to 28 U.S.C § 1345, as well as pursuant to the Court's general equitable jurisdiction with respect to claims one through four, and, with respect to the fifth claim (Declaratory Judgment), pursuant to 28 U.S.C. § 2201(a).

10. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b) and 1391(c) because defendant is located in this District, defendant does business in this District, and the acts complained of herein took place in this District.

PARTIES

11. Plaintiff is the United States on behalf of HUD.

12. Defendant Glenn Gardens Associates, L.P. is a domestic liability corporation in the State of New York. Defendant is the current owner of Glenn Gardens. Glenn Gardens Associates, L.P. maintains an office in Manhattan.

FACTUAL AND REGULATORY BACKGROUND

A. The Section 8 Program

13. The federal government provides rental assistance for low and moderate income families, the elderly, and the disabled through what is known as "the Section 8 program." Congress added Section 8 to the United States Housing Act of 1937 in 1974, by enacting the Housing and Community Development Act of 1974, Pub.L. No. 93-383, § 201(a), 88 Stat. 633, 662-66 (1974) (codified as amended at 42 U.S.C. § 1437f). The express congressional "purpose" of the Section 8 program is "aiding low-income families in obtaining a decent place to live and . . . promoting economically mixed housing." 42 U.S.C. § 1437f(a).

14. The Section 8 program is managed federally by HUD, and administered locally by public housing authorities ("PHA"). The Secretary of HUD is empowered by statute to enter into annual contribution contracts with PHAs to provide funds to be used by the PHAs for the payment of rental subsidies on behalf of Section 8 tenants. 42 U.S.C. § 1437f(b)(1). The PHAs in turn enter into Housing Assistance Payment ("HAP") contracts with the building owners which establish, inter alia, the monthly rent, how and when the rent may be adjusted, and how the Section 8 rental subsidy will be calculated.

15. Section 8 tenants must sign a lease and pay a specified percentage of their income toward rent. The remainder of their rent is paid with HUD funds, provided to the administering PHA, pursuant to a HAP contract between the PHA and the owner. By statute, the tenant's lease "shall be for a term of not less than [one] year," id. § 1437f(o)(7)(A), shall "contain terms and conditions that . . . are consistent with State and local law," id. § 1437f(o)(7)(B)(ii)(I), and "shall provide that during the term of the lease, the owner 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," id. § 1437f(o)(7)(C).

16. There are two relevant variations of Section 8 tenant-based voucher assistance. Under the Standard Housing Choice Voucher program, the voucher is provided to an eligible family who may choose to live in any qualifying unit if the landlord agrees to accept the voucher and comply with the applicable statutes and regulations. The Government subsidy is limited to the difference between the amount the family is required to contribute and the payment standard for the unit as established by the PHA based on fair market rents for the area. Id. § 1437f(o)(1)(B), (o)(2)(A)-(B).

17. The second program is called the Enhanced Voucher program, a legislative creation aimed at keeping tenants in their homes despite changing market conditions. Beginning in the 1960s, the federal government subsidized and insured mortgage loans for the construction of housing for assisted tenants ("section 236 program"). See Housing and Urban Development Act of 1968, Pub.L. No. 90-448, §§ 201(a), 236(a)-(g), 82 Stat. 476, 498-503 (codified as amended at 12 U.S.C. § 1715z-1 (2000)). Owners of the housing were allowed to prepay their loans after twenty years, at which time they could exit the assisted housing program. 24 C.F.R. § 221.524(a)(ii) (1970). In the 1980s, Congress became concerned that a large proportion of assisted housing would disappear from the market when owners prepaid their section 236 loans. To prevent massive relocation and an inadequate supply of assisted housing, Congress passed a number of laws aimed at restricting the prepayment option. See Low Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, § 601(a), 104 Stat.

4079, 4249 (1990); Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, Title II, 101 Stat. 1815, 1877-91 (1988).

18. In 1999, however, Congress decided to take a different approach. It allowed landlords to prepay their mortgages but increased the available subsidy for Enhanced Vouchers up to the actual rent charged by the landlord to provide qualified tenants the option to remain in the same apartment after prepayment. See Pub.L. No. 106-74, § 538, 113 Stat. 1047, 1122-24 (1999) (currently codified as amended at § 1437f(t)). Thus, the Enhanced Voucher authority provides that "the assisted family may elect to remain in the same project in which the family was residing on the date" the loan was prepaid, and that the Government will pay to the owner the difference between the "rent for the dwelling unit" and the tenant's required contribution (usually a maximum of 30% of the family's gross income) "during any period the family makes such an election and continues to so reside" even as "rent may be increased from time-to-time." 42 U.S.C. § 1437f(t)(1)(B).

19. Unlike the payment standard for the standard vouchers, in the case of Enhanced Vouchers, the PHA must only ensure that the rent charged by the owners to Section 8 voucher tenants is reasonable. This is done through a comparison of the rent charged to the Section 8 tenant and rents for comparable unassisted units in the marketplace as well as comparable units in the project.

20. In addition to rent reasonableness, state or local rent regulations may limit the rent that the owner may charge. In that event, the rent that the owner may charge is the lesser of the PHA-determined reasonable rent and the rent regulated rent. See *Housing Choice Voucher Program Guidebook*, Chapter 9, § 9.2; 24 C.F.R. § 982.509.

B. The Construction of Glenn Gardens and Defendant's Receipt of a J-51 Tax Abatement

21. Glenn Gardens is a 266-unit residential apartment building located at 567-569 Amsterdam Avenue and 175 West 87th Street in Manhattan.

22. Glenn Gardens was constructed in or about 1976, and was rent regulated under the Mitchell-Lama program pursuant to Article 2 of the New York State Private Housing Finance Law ("PHFL"). Glenn Gardens obtained a mortgage insured by the Federal Housing Administration.

23. The Mitchell-Lama program was designed to encourage private financing of low and middle income housing where affordable housing was not otherwise provided by the private real estate market, by the creation of limited-profit housing companies. In return for offering private developers long-term, low-interest government mortgage loans and real estate tax abatements, the developers had to agree to limited rents and profits and regulation of tenant selection and transfer of the property. Accordingly, while Glenn Gardens participated in the Mitchell-Lama program, the apartments there could only be rented to moderate-income and low-income tenants.

24. After participating in the Mitchell-Lama program for more than 20 years, Glenn Gardens exercised its option, pursuant to PHFL § 35(2), to dissolve and exit the Mitchell-Lama program effective June 27, 2003.

25. However, seven years earlier, in 1996, while Glenn Gardens was rent regulated under the PHFL, it began to receive a tax abatement pursuant to New York City Administrative Code §§ 11-243, 11-244, based on a qualifying major capital improvement (the "J-51 tax

abatement"). Glenn Gardens' J-51 tax abatement had an approximate 12-year duration and was scheduled to expire in or about June 2008.

26. Glenn Gardens received the J-51 tax abatement into tax year 2007/2008. In or about March 26, 2008, at defendant's request, the New York City Department of Housing Preservation and Development ("HPD") retroactively terminated Glenn Gardens' J-51 tax abatement back to Glenn Gardens' Exit Date from Mitchell-Lama, June 27, 2003. HPD did so at defendant's request and in an exercise of its discretion.

C. Glenn Gardens' Receipt of the J-51 Tax Abatement After the Exit Date Subjected the Property to Rent Stabilization

27. The objective of the J-51 tax abatement program is to provide incentives for owners to rehabilitate and substantially improve their buildings. J-51 tax abatements are authorized and governed by the Real Property Tax Law ("RPTL"), the Administrative Code of the City of New York ("NYC Admin. Code"), and the Rules of the City of New York.

28. Eligibility for the J-51 tax abatement program is limited to owners of buildings that are subject to enumerated rent regulation, including regulation pursuant to the PHFL and rent stabilization. See NYC Admin. Code § 11-243(i)(1); see also id. § 11-243(d)(2). Likewise, a building receiving J-51 benefits is subject to rent regulation during the duration of the period of receipt of such benefits. See 28 RCNY § 5-03(f). Under this section, dwelling units in the building may be subject to any of the enumerated alternative forms of rent regulation namely, the Rent Control Law, the Rent Stabilization Law, the PHFL, any federal law providing for rent supervision or regulation by any federal agency, and the Emergency Tenant Protection Act of 1974. Id.

29. In addition, rent regulation may continue even after expiration of the J-51 benefits. Specifically, a unit in a building receiving a J-51 tax abatement shall remain subject to rent regulation "until the occurrence of the first vacancy after tax benefits are no longer being received for the building." 28 RCNY § 5-03(f)(3)(A). There is a single exception to this rule which allows a unit to become deregulated upon the expiration of the tax benefits if "each lease and renewal thereof for such unit . . . has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of the tax benefits and stating the approximate date on which tax benefits are to expire." Id. § 5-03(f)(3)(i)(B); see also NYC Admin. Code § 26-504(c) (apartments in properties receiving J-51 tax abatements remain subject to rent regulation until the first vacancy after benefits are no longer being received unless proper notice was provided in the lease, in which case the unit becomes deregulated as of the end of the tax benefit period).

30. Rent regulation cannot be terminated by the waiver or revocation of tax benefits. 28 RCNY § 5-03(f)(3)(ii).

31. Accordingly, while Glenn Gardens was in the Mitchell-Lama program and receiving the J-51 tax abatement, Glenn Gardens' rents were regulated by the PHFL. Upon Glenn Gardens' exit from the Mitchell-Lama program, Glenn Gardens became subject to rent stabilization by virtue of its receipt of the J-51 tax abatement. See 28 RCNY § 5-03(f). The proper initial rent stabilized rent for each Section 8 tenant at Glenn Gardens as of the Exit Date was the last Mitchell-Lama rent. See NYC Admin. Code § 26-512(b)(3); 9 RCNY § 2521.1(j). No notice regarding the expiration of the J-51 tax abatement was ever included in the lease for Section 8 tenants at Glenn Gardens.

D. Defendant's Overcharge of Rent to the Section 8 Tenants at Glenn Gardens

32. Despite this legal framework, upon Glenn Gardens' exit from the Mitchell-Lama program, defendant charged market rate rents to the Section 8 tenants at Glenn Gardens. This market rate rent was included in the HAP contract between the owner of Glenn Gardens and HPD.

33. As a consequence of defendant's rent overcharge to the Section 8 tenants at Glenn Gardens, substantial HUD monies were paid as rent to defendant to which it was not entitled.

FIRST CLAIM

Rent Overcharge

34. The United States incorporates by reference paragraphs 1 through 33 above as if fully set forth herein.

35. The United States seeks relief against defendant based on defendant's having charged rents to the Section 8 tenants at Glenn Gardens in excess of the rents allowed by law.

36. By operation of law, the apartments at Glenn Gardens were rent stabilized as of the Exit Date.

37. Following the Exit Date, defendant charged market rate rents to the Section 8 tenants at Glenn Gardens. These market rate rents exceeded the allowed rent stabilized rent.

38. As a result of the rent overcharge, defendant received Section 8 monies as rent to which defendant was not entitled.

39. By reason of defendant's rent overcharge, the United States has been damaged in a substantial amount to be determined at trial.

SECOND CLAIM

Payment Under Mistake of Fact

40. The United States incorporates by reference paragraphs 1 through 33 above as if fully set forth herein.

41. The United States seeks relief against defendant to recover monies paid under mistake of fact.

42. Following the Exit Date, defendant charged market rate rents to the Section 8 tenants at Glenn Gardens, as opposed to the rent stabilized rent.

43. Based on defendant's representations, the market rate rent was included in the HAP contract between defendant and the PHA.

44. The United States provided funds that were used to pay overstated rent to defendant based upon HUD's erroneous belief that defendant was entitled to payment of such funds. In making such payments, the United States relied upon and assumed the truth of defendant's representations concerning the lawful rent that could be charged at Glenn Gardens. This erroneous belief was material to the United States' decision to provide the monies that were used to pay the overstated rent to defendant. In such circumstances, the United States' payments to defendant were by mistake and not authorized.

45. Because of those payments by mistake, defendant has received monies to which it was not entitled.

46. By reason of foregoing, the United States was damaged in a substantial amount to be determined at trial.

THIRD CLAIM

Unjust Enrichment

47. The United States incorporates by reference paragraphs 1 through 33 above as if fully set forth herein.

48. The United States seeks relief against defendant to recover monies based on defendant's unjust enrichment.

49. Following the Exit Date, defendant charged market rate rents to the Section 8 tenants at Glenn Gardens. These market rate rents exceeded the allowed rent stabilized rent.

50. As a result of the rent overcharge, HUD provided funds that were used to pay rent to defendant to which defendant was not entitled.

51. The circumstances of defendant's receipt of these payments are such that, in equity and good conscience, it should not retain the payments.

FOURTH CLAIM

Reformation of Contract

52. The United States incorporates by reference paragraphs 1 through 33 above as if fully set forth herein.

53. The United States seeks relief against defendant for reformation of the HAP contracts entered into on HUD's behalf following the Exit Date for the Section 8 tenants at Glenn Gardens.

54. In entering into the HAP contracts for the Section 8 tenants at Glenn Gardens, defendant and the PHA understood that the PHA must ensure that the rent charged by defendant to the Section 8 tenants was reasonable.

55. In entering into the HAP contracts for Section 8 tenants at Glenn Gardens, defendant and the PHA understood that in addition to rent reasonableness, state or local rent regulations may limit the rent that defendant could charge to the Section 8 tenants at Glenn Gardens.

56. In entering into the HAP contracts for Section 8 tenants at Glenn Gardens, defendant and the PHA understood that defendant could only charge the lesser of the PHA-determined reasonable rent and the rent regulated rent.

57. Following the Exit Date, defendant charged market rate rents to the Section 8 tenants at Glenn Gardens. These market rate rents exceeded the allowed rent stabilized rent.

58. On information and belief, when defendant entered into the HAP contracts with the PHA following the Exit Date, defendant and the PHA believed, erroneously, that defendant was allowed by law to charge market rate rents to the Section 8 tenants at Glenn Gardens.

59. As a result of the mutual mistake of defendant and the PHA concerning the allowable rent that could be charged to the Section 8 tenants at Glenn Gardens following the Exit Date, the HAP contracts should be reformed to reflect the intention of the parties that defendant could only charge the lesser of the PHA-determined reasonable rent and the rent regulated rent. As a result, the HAP contracts should be reformed to reflect a rent stabilized rent for the Section 8 tenants at Glenn Gardens, which rent should be the last Mitchell-Lama rent.

FIFTH CLAIM

Declaratory Judgment

60. The United States incorporates by reference paragraphs 1 through 33 above as if fully set forth herein.

61. The United States seeks a declaration that the apartments rented by the Section 8 tenants at Glenn Gardens have been rent stabilized since the Exit Date and continue to be rent stabilized.

62. By operation of law, the apartments at Glenn Gardens were rent stabilized as of the Exit Date. The apartments remained stabilized through at least the duration of the J-51 tax abatement, which was in or about June 2008.

63. Following the Exit Date, the leases and renewal of leases for the Section 8 tenants at Glenn Gardens did not contain a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of the J-51 tax benefits and stating the approximate date on which the tax benefits were to expire.

64. By reason of the foregoing, the Court should declare that the apartments rented by the Section 8 tenants at Glenn Gardens have been rent stabilized since the Exit Date and that each such apartment shall continue to be rent stabilized until the occurrence of the first vacancy after the J-51 tax benefits had expired.

REQUEST FOR JUDGMENT

WHEREFORE, plaintiff, the United States, requests that judgment be entered in its favor and against defendant as follows:

(a) On the First, Second and Third Claims (Rent Overcharge, Payment Under Mistake of Fact, Unjust Enrichment) in an amount to be determined at trial, together with costs and interest;

(b) On the Fourth Claim (Reformation of Contract), reforming the HAP contracts between defendant and the PHA to reflect the rate for the rent charged as the rent

stabilized rent for each Section 8 tenant at Glenn Gardens, which rent should be the last Mitchell-Lama rent for each such tenant;

(c) On the Fifth Claim (Declaratory Judgment), declaring that the apartments rented by the Section 8 tenants at Glenn Gardens have been rent stabilized since the Exit Date and that each such apartment shall continue to be rent stabilized until the occurrence of the first vacancy after the J-51 tax benefits had expired; and

(d) awarding such other and further relief as is proper.

Dated: New York, New York
October 29, 2009

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