UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RUTH DURRETT, JOHN JACKSON, ROSE VEIGA, on behalf of themselves and all others similarly situated, Plaintiffs	:	
vs.	:	C.A. NO. 86-0406 L
THE HOUSING AUTHORITY OF THE CITY OF PROVIDENCE, and THE PROVIDENCE HUMAN RELATIONS COMMISSION, and THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendants	:	

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

This is an action brought under 42 U.S.C., Sec. 1983 by three public housing tenants as representatives of a class composed of all Hartford Park and Manton Heights tenants. Hartford Park and Manton Heights are two of several public housing developments owned and operated (with the help of federal funds) by the Providence Housing Authority. The suit is against the Providence Housing Authority (PHA), the City of Providence (the City), the United States Department of Housing and Urban

Development (HUD) and the Providence Human Relations Commission (PHRC). The gravamen of the Complaint is that defendants have deprived plaintiffs of their state created right to pay rent into escrow when there are Housing Code violations which would grant escrow protection to non-public housing tenants. It is alleged that this conduct denied plaintiffs the equal protection of the laws and deprived them of property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. In the claim against PHRC, plaintiffs also aver that said body denied them property without due process of law and the equal protection of the laws by failing to follow its own rules and procedures in processing purported discrimination claims.

Plaintiffs filed their complaint in this matter on July 3, 1986. An amended complaint was filed in February of 1987. Then, in the Spring of that year defendants PHA, PHRC and the City moved to dismiss the amended complaint on a number of grounds.[1] Arguments were heard on these motions and their corresponding objections on December 4, 1987. The issues raised by these motions are now in order for decision.

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1 HUD has filed an answer in which it alleges that this Court lacks jurisdiction over the subject matter of this suit and the amended complaint fails to state a claim upon which relief may be granted, but has not filed a motion to dismiss.

PROVIDENCE HOUSING AUTHORITY MOTIONS

First of all, PHA contends that plaintiffs' amended complaint fails to state a cause of action because it does not allege deprivation of any "right, privileges or immunities secured by the Constitution and laws" of the United States as required by 42 U.S.C. Sec. 1983. In the alternative, PHA requests that the Court defer to a parallel state court proceeding which recently has been transferred from Rhode Island's Sixth Division District Court to Providence's new Housing Court. Neither of these motions has merit and, therefore, must be denied.

It is universally recognized that in order to assert a cause of action under Sec. 1983, a plaintiff must allege that he has been deprived of rights secured by the Constitution of the United States or federal law. Moreover, it is a basic principle that a motion to dismiss a complaint should not be granted "unless it appears beyond doubt 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, 45-46 (1957). Therefore, if plaintiff has averred enough facts to support a claim of violation of a federal right, then a motion to dismiss for failure to state a cause of action may not be granted. See Cloutier v. Town

of Epping, 714 F.2d 1184, 1188 (1st Cir. 1983); Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983).

Plaintiffs aver in their amended complaint that they are public housing tenants and have been denied an opportunity to have all or a portion of their rent placed in escrow to remedy certain city Housing Code violations. Plaintiffs' allege that all non-public residential tenants in the City of Providence are entitled to such a right and that the City's own inspectors have found hundreds of Code violations at Hartford Park and Manton Heights which would qualify non-public tenants for escrow protecton.

These allegations must be regarded as true for purposes of PHA's motion to dismiss. Thus, plaintiffs have established a factual predicate for ultimately showing that they have been denied a federal right: the equal protection of the laws. They have alleged that the defendants have arbitrarily excluded public housing tenants from escrow protection while according all other tenants these very rights. Consequently, it must be concluded that plaintiffs' amended complaint avers a set of facts which posits a violation of a federal right and thus the complaint satisfies the allegation requirements of Sec. 1983. PHA's motion to dismiss for failure of plaintiffs to allege a

deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States, therefore, is denied.

PHA argues in the alternative that the Court should defer to the parallel proceeding presently before the City of Providence Housing Court. That contention is equally without merit.

In Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1953), the United States Supreme Court listed six factors which, after being balanced against each other to produce an end result, may rebut the unflagging obligation of a federal court to exercise jurisdiction over a case appropriately before it. These factors are as follows:

(1) The assumption by the state court of jurisdiction over a res.

(2) The inconvenience of the federal forum.

(3) The avoidance of piecemeal adjudication.

(4) The relative progress of the suits in the state and federal forums.

(5) Whether federal law provides the rule of decision.

(6) The vexatious nature of the federal litigation. Id. at 17-18 n.20 (dictum)

Defendant PHA concedes that the first, second and fourth factors have no application to this case. That leaves the third, fifth and sixth factors for consideration.

The fifth weighs in favor of the Court exercising jurisdiction in this matter. It is apparent that fedeeral constitutional law provides the rule of decision in this case. Where this is so, district courts have been advised that such is a "major consideration weighing against surrender." Moses H. Cone, 460 U.S. at 26.

Consideration of the third factor does nothing to alter this conclusion. Piecemeal adjudication is not an issue in this case because the federal action is far more comprehensive than that presently before the Housing Court. The plaintiffs' complaint in the state court proceeding does not contain any of the due process or equal protection allegations against the PHRC that are alleged in this proceeding. Once plaintiffs' claims are resolved before this Court, there will be nothing left for the Housing Court to decide. Conversely, were this Court to defer to the Housing Court in the present matter, it might still have to decide plaintiffs' claims against the PHRC. This factor, if anything, weighs in favor of assertion of jurisdiction.

Consideration of the sixth factor does not alter this result. Plaintiffs in the present proceeding were only intervenors in the state court proceeding. The state court proceeding had already been filed against the PHA by the City of Providence when plaintiffs intervened to assert their Sec. 1983 claims. By joining a suit already in progress, plaintiffs apparently wanted to economize litigation time. They were not attempting to shop between state and federal forums in order to find the best place in which to lodge their claims. Plaintiffs' counsel has representated that they filed their Sec. 1983 claims here only because they were advised to do so by the Sixth Division District Court. Therefore, plaintiffs did not file in this Court simply to seek some procedural advantage.

The third, fifth, and sixth factors, then, when balanced against each other do not suggest any reason for this Court to refuse to assert jurisdiction in this case. The unflagging obligation of a United States district court to exercise jurisdiction, absent a contrary indication by the Moses H. Cone factors, therefore, must govern this case. Consequently, PHA's motion to dismiss because of the presence of a parallel state court proceeding is denied.

PROVIDENCE HUMAN RELATIONS COMMISSION MOTION

Defendant PHRC, moves to dismiss the amended complaint on two grounds. First, PHRC argues that it has absolute immunity from suit by reason of its judicial function. Secondly, PHRC argues that it has absolute immunity by reason of its prosecutorial function.

Plaintiffs contend in opposition, that both immunities have no application to this case. Plaintiffs argue that their action is brought against PHRC in its official capacity only, and thus the immunities asserted by the PHRC may be raised only by the individual commissioners to protect themselves from personal liability and not by the PHRC itself. It follows, plaintiffs contend, that the PHRC may not escape liability by raising the defenses of judicial and prosecutorial immunity.

The Court agrees with plaintiffs that the defendant PHRC is not protected by the doctrine of judicial and prosecutorial immunity. The Court, however, disagrees with plaintiffs' reasoning to some extent. In Kentucky v. Graham, 473 U.S. 159 (1985), the United States Supreme Court indicated the following with regards to official capacity actions.

> An official capacity suit is only another way of pleading an action against an entity of which its officer is an agent. It is not a suit against the official personally, for the real party in interest is the entity . . . when it comes to defenses to liability, an official in a personal capacity action may, depending on his position, be able to assert personal immunity defenses . . . Imbler v. Pachtman, 424 U.S. 409 (1976) [(prosecutorial immunity)]; Pierson v. Ray, 386 U.S. 547 (1967) [(judicial immunity)]. In an official capacity action these defenses are unavailable.

All plaintiffs have done by naming the PHRC as a party-defendant in their complaint is to state Sec. 1983 claims against the City of Providence other than those asserted against the City directly. The "official" named in plaintiffs' complaint is merely a conglomeration of the individuals who comprise the PHRC. The Commission in turn, is an "agent" of the City of Providence. A suit against the PHRC, then, is no more than a suit against the "real party in interest" or "entity" in this case, the City of Providence. The City of Providence, of course, is incapable of asserting personal defenses such as judicial or prosecutorial immunity. It follows that PHRC's motion to dismiss on the ground that it is shielded from suit by these immunities must be denied.

CITY OF PROVIDENCE MOTION

Lastly, the Court turns to the third party who has moved to dismiss plaintiffs' complaint, the City of Providence. The City contends that the amended complaint should be dismissed or the action stayed on five separate grounds.

(1) Parallel proceeding abstention.

(2) Pullman abstention.

(3) Eleventh Amendment immunity.

(4) Failure to exhaust administrative remedies.

(5) Res judicata.

The first ground has already been discussed with respect to PHA's motion to dismiss. The City's motion suffers the same fate; it is denied for the reasons previously asserted.

The City, however, contends that another form of abstention is applicable to this case. Generally, it is agreed that a federal court should abstain from entertaining a matter where it presents: 1) unclear questions of state law and 2) resolution of the state law questions will eliminate adjudication of a constitutional question. Texas v. Pullman Co., 312 U.S. 496 (1941). Where these two criteria are met and the forum state has enacted a certification statute, the recommended procedure is for the

federal court to abstain from adjudicating the case while certifying the unclear questions of state law to the forum state's highest court for decision. Once the unclear questions of state law are resolved, the federal court may adjudicate the constitutional question if it is necessary to do so.

The City contends that the present case raises the same questions which were certified by another judge of this Court to the Rhode Island Supreme Court in Ly Horn v. City of Providence. Those questions were as follows:

> (1) Are the provisions of Chapter 24.2 and 24.3 of Title 45 of the R.I. General Laws controlling over the ordinances of the City of Providence whenever there is a conflict and the state law provides a higher standard for the protection of the health or safety of the people?
>
> (2) Does the decision in Berberian v. Housing Authority of the City of Cranston, 112 R.I. 771, 315 A.2d 747 (1974), authorize the City of Providence to not follow the requirements of Chapters 24.2 and 24.3 of Title 45, even when the type of conflict described in question 1 does exist?

The City argues that this Court should defer adjudicating the claims asserted in the present proceeding until the Rhode Island Supreme Court resolves the two questions before it. Two flaws exist with this contention. First, the Ly Horn matter was terminated by order of this Court on June 5, 1987. Any decision on the certified

questions is, therefore, moot. Since the Rhode Island Supreme Court probably will never decide those questions, it would be pointless for this Court to defer adjudication of the federal claims presented in this matter.

Secondly, the first question certified to the Supreme Court of Rhode Island does not present an unclear question of state law. R.I. Gen. Laws, Sec. 45-24.3-22 (1980) provides a rule for resolving any potential conflict between state law and city ordinances. That statute provides the following:

> 45-24.3-22. Conflict of ordinances -- Effect of partial invalidity. -- In any case where a provision of this chapter is found to be in conflict with a provision of any zoning, building, fire, safety, or health ordinance or code of the corporate unit and of this state on or after January 1, 1971, <u>the provision which establishes the higher standard for the promotion and protection of the health, safety of the people shall prevail</u>. <u>In any case where a provision of this chapter is found to be in conflict with a provision of any other ordinance or code of the corporate unit or of this state existing on January 1, 1971 which establishes a lower standard for the promotion and protection of the health and safety of the people, the provisions of this chapter shall be deemed to prevail</u>, and such other ordinances or codes are hereby declared to be repealed to the extent that they may be found in conflict with this chapter. (emphasis added).

Any conflict between state law and city ordinances in this case may be resolved by looking to the provision which

establishes the higher standard for the promotion and protection of the health and safety of the people. That is the State law in this case and, thus, it preempts any conflicting city ordinances in this area.

There are two ramifications which flow from this conclusion. The second question need not be asked since that question assumes that there exists a conflict between state law and city ordinances which can only be resolved by resort to Berberian. Moreover, without any unclear question of state law in issue, there is no need for this Court to abstain and certify any issue to the Rhode Island Supreme Court. The City's motion "to dismiss" on this ground, therefore, is denied.

The third and fourth grounds for dismissal may be dealt with in summary fashion. The Supreme Court has held that the Eleventh Amendment immunity does not bar defendants who are municipalities from suit in federal court. See Mt Healthy City School Bd. of Education v. Doyle, 429 U.S. 274, 279-280 (1977); American Conveyor Corp. v. Municipality of Guanica, 614 F.Supp. 922, 925 (D. P.R. 1985). Providence is a municipality. The City, therefore, does not have any Eleventh Amendment protection.

In addition, the Supreme Court has held that a plaintiff need not exhaust his state judicial or administrative remedies prior to launching a Sec. 1983 action in federal court. Patsy v. Board of Regents, 457 U.S. 496, 516, (1982); Steffel v. Thompson, 415 U.S. 452, 472-473 (1974). Plaintiffs, therefore, are not required to bring their claims in the City's Housing Court prior to filing a Sec. 1983 action in this court.

The City lastly complains that plaintiffs' amended complaint should be dismissed because plaintiffs' claims are barred under the doctrine of res judicata. The City postulates that in Johnson v. the City of Providence, C.A. No. 82-0169 S (D. R.I. 1983) (proposed settlement) this Court per Selya, J. established a rent escrow procedure so that a "tenant may pay rent into the PHA's grievance escrow account in lieu of paying rent to the PHA." Therefore, the City argues that said rent escrow protection procedure applies to public housing tenants, and since plaintiffs' claims against the City in this case embrace this issue in toto, this action should be dismissed.

To assert the doctrine of res judicata as a bar to plaintiffs' claims, the City must show the following:

(1) That there has been a final judgment on the merits of an earlier claim.

(2) That the claims are the same in both matters.

(3) That the parties or their privies are the same in both matters.

Schiavulli v. Aubin, 504 F.Supp. 483, 486 (D. R.I. 1980).

Resort to the second criterion is all that is necessary to answer the City's contention that res judicata applies here. The Johnson case clearly did not involve the question of whether a public housing tenant may receive the benefit of escrow protection laws of the City of Providence or the State of Rhode Island. The claim asserted by the plaintiffs in Johnson was premised upon violation by defendants of 24 C.F.R. Sec. 966.50. The Johnson plaintiffs claimed that they were deprived of due process of the laws by defendants' failure to process their complaints regarding certain housing conditions in the manner required by federal law. As is evident, that claim is completely different in nature from the equal protection rights alleged to be violated here. The former claim arose from violation of HUD regulations; the latter claim arises from purported infringement of the Equal Protection Clause itself. Therefore, there is no identity of issues and res judicata

cannot provide a basis for granting the City's motion to dismiss. Consequently, that motion is denied.

SUMMARY

For all the above reasons, PHA's motion to dismiss for lack of subject matter jurisdiction and parallel proceeding abstention is denied. PHRC's motion to dismiss on the basis of judicial and/or prosecutorial immunity is denied. Finally, the Court denies the City's motion to dismiss on the grounds asserted: parallel proceeding abstention, Pullman abstention, Eleventh Amendment immunity, failure to exhaust administrative remedies and res judicata. It is so Ordered.

Ronald R. Lagueux
United States District Judge

8/11/88
Date