

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
BERK-COHEN ASSOCIATES AT :
TOR VIEW VILLAGE APARTMENTS, :
LLC, :
Plaintiff, :
 :
- against - :
 :
LOEB HOUSE, INC., COUNTY OF :
ROCKLAND, ROCKLAND COUNTY :
FAIR HOUSING BOARD, and UNITED :
STATES DEPARTMENT OF HOUSING :
AND URBAN DEVELOPMENT, :
 :
Defendants. :
----- X

08 Civ. 9963 (DLC)

ECF CASE

**MEMORANDUM OF LAW OF THE UNITED STATES
IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT AGAINST
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND CONSOLIDATE THIS ACTION WITH
UNITED STATES v. TOR VIEW, 09 Civ. 4368**

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Defendant United States Department of Housing and Urban Development (the “United States” or “HUD”) respectfully submits this memorandum of law in support of its motion to dismiss the claim for a declaratory judgment brought by Berk-Cohen Associates at Tor View Village Apartments, LLC (“Tor View”) as against HUD for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), and to consolidate this action with the United States’ own action, filed against Tor View in the United States District Court for the Southern District of New York on May 6, 2009 (United States of America v. Berk-Cohen Associates at Tor View Village Apartments, LLC, 09 Civ. 4368), pursuant to Fed. R. Civ. P. 42(a).

Preliminary Statement

Tor View’s amended complaint in this action improperly seeks to preempt a lawsuit by the United States under the Fair Housing Act, as amended (“Fair Housing Act” or “FHA”), 42 U.S.C. § 3601, et seq., by seeking a declaratory judgment that its policies do not violate the FHA. The United States’ lawsuit, filed May 6, 2009, in the Southern District of New York, seeks a declaration that Tor View’s efforts to terminate the reasonable accommodations it has previously provided for the mental and psychological disabilities of clients of Loeb House, Inc. (“Loeb House”), a social services agency in Rockland County, New York, do violate the FHA. Although Tor View appears to have amended its complaint in this action for the purpose of preempting a lawsuit by the United States, it has no basis upon which to do so, as neither the Declaratory Judgment Act, 28 U.S.C. § 2201, nor the Fair Housing Act waive the sovereign immunity of the United States or its agencies. Now that the United States has filed its own suit, however, the Court should consolidate the two actions, which involve nearly identical issues of fact and law, in the interests of judicial economy.

FACTUAL BACKGROUND

The following factual background to these cases is drawn from the original and amended complaint filed in this case, and from the United States' complaint, filed on May 6, 2009, in the Southern District of New York.

A. Tor View's Original Complaint

On November 16, 2008, Tor View, a residential apartment complex in Rockland County, New York, filed a complaint against Loeb House, an agency that provides housing services for individuals with mental disabilities, as well as the County of Rockland and the Rockland County Fair Housing Board. The complaint sought a declaratory judgment that the FHA does not require Tor View, as a reasonable accommodation to tenants with disabilities, to waive its allegedly "neutral, non-discriminatory policies," and (1) lease eight apartment units directly to Loeb House for use by individual Loeb House clients, nor does it require Tor View to (2) accept a rental guarantee from Loeb House on leases with individual Loeb House clients. See Declaration of David J. Kennedy, May 6, 2009 ("Kennedy Decl."), Exh. A, Tor View Complaint ("Tor View Cmplt."), ¶ 1(a)-(b). The complaint further sought a declaratory judgment that a Pre-Determination Conciliation Agreement and Order After Conciliation Agreement (the "Conciliation Agreement"), entered into by Tor View and Loeb House on April 30, 2002, was terminated no later than October 31, 2005. Id., ¶ 1(c).

The complaint states that Tor View "considers certain neutral criteria" when evaluating the rental applications of potential residents, and notes that it currently maintains a policy that "cosigners are not accepted [on residential leases] as supplemental income with respect to minimum income requirements." Id., ¶¶ 13, 15. The complaint further notes that although

“[p]rior to instituting this policy, Tor View leased several apartments to tenants who were Loeb House program participants, and accepted rental guarantees from Loeb House for these apartment units,” Tor View “has strictly enforced this policy since November 2006.” Id., ¶¶ 15-16. The complaint alleges that Loeb House and the Rockland County Fair Housing Board have asserted that Tor View is required to deviate from these allegedly “neutral policies,” as reasonable accommodations to “alleged tenant disabilities” under the FHA, by leasing eight apartment units directly to Loeb House and by accepting Loeb House as a guarantor on leases to Loeb House clients. See id., ¶¶ 45-46. Tor View seeks a declaratory judgment that the opposite is true. See id., ¶¶ 54, 61.

The instant dispute between Tor View and Loeb House dates back several years. According to the complaint, on November 7, 2001, Loeb House filed a fair housing complaint against Tor View with the Rockland County Fair Housing Board, alleging “discrimination in connection with the lease of eight apartment units by Tor View to Loeb House for use by Loeb House’s program participants.” Id., ¶ 18. In an attempt to resolve the dispute, Tor View and Loeb House entered into the Conciliation Agreement, which sets forth the rental arrangements for eight apartments that were leased by Loeb House and occupied by Loeb House clients. Although the Conciliation Agreement “did not contain an express term or expiration date,” id., ¶ 22, the Rockland County Fair Housing Board had the right to “review compliance with the Conciliation Agreement for a period of three years, commencing on April 30, 2002.” Id., ¶ 21(b). Tor View takes the position that “Loeb House’s conduct confirmed that the Conciliation Agreement had expired” on October 31, 2005. Id., ¶ 28. According to the complaint, this conduct consisted of Loeb House’s execution of renewal leases on the eight Tor View apartments

as guarantor instead of tenant, for the terms November 2005 through October 2006, and November 2006 through October 2007. Id., ¶ 29-31. However, in October 2007, Loeb House attempted to sign the lease as tenant instead of guarantor, an arrangement Tor View was no longer willing to accommodate. See id., ¶ 34-35. The complaint alleges that Loeb House and the Rockland County Fair Housing Board take the position that the Conciliation Agreement has not expired and is still binding upon the parties. See id., ¶ 47. Tor View seeks a declaratory judgment that the opposite is true. See id., ¶¶ 67-68.

B. Tor View's Amended Complaint

On December 10, 2008, Tor View filed an amended complaint that added HUD, as “the agency charged with administering and enforcing the FHA,” as a defendant. See Kennedy Decl., Exh. B, (“Amended Tor View Complt.”), ¶ 10. The amended complaint is substantially similar to the initial complaint, but adds a background section detailing Tor View’s knowledge of an investigation by the U.S. Attorney’s Office for the Southern District of New York (“U.S. Attorney’s Office” or “this Office”) into possible violations by Tor View of the FHA. Specifically, the complaint recounts that, on or about June 27, 2008, Tor View received a letter from the Chief of the Civil Rights Unit of the U.S. Attorney’s Office, advising that, based on a referral from Rockland County, this Office “had opened an investigation into whether Tor View’s refusal to accept tenants with rental guarantees from Loeb House violates the FHA.” See id., ¶¶ 54-55 (internal quotations omitted). The complaint further recounts that this Office requested “a variety of documents and information from Tor View related to its compliance with the [Fair Housing Act],” and that this Office provided its views that “Tor View is required to accept rental guarantees from Loeb House as a reasonable accommodation to an alleged

disability.” Id., ¶¶ 56-57. The complaint concludes that “an actual controversy” therefore exists between Tor View and HUD, “regarding whether the policies and procedures of the plaintiff violate the Fair Housing Act.” Id., ¶ 58.

C. The Complaint of the United States

On May 6, 2009, the United States filed a complaint in the United States District Court for the Southern District of New York against Tor View for violating the Fair Housing Act. See Kennedy Decl., Exh. C. The complaint alleges that Tor View’s effort to terminate the leases of its tenants affiliated with Loeb House violates the FHA. See id., ¶¶ 11-17.

As set forth in the United States’ complaint, certain Loeb House clients have mental disabilities that impair their ability to attend to their obligations under a lease agreement. Loeb House assists these clients by guaranteeing the rent at approximately 12 Loeb House apartments, and leases an additional 8 apartments directly from Tor View. Id., ¶ 8. These two types of supported housing arrangements are tailored to address the mental disabilities of Loeb House clients and are reasonable accommodations under the FHA for persons with mental disabilities. See id., ¶ 8, 15.

The United States’ complaint further alleges that by letter dated May 16, 2008, Tor View advised the Rockland County Commission on Human Rights (“RCCHR”) that it was not legally obligated to accept Loeb House’s role as guarantor of its clients obligations’ under their leases with Tor View, nor was it obligated to lease apartments directly to Loeb House for occupancy by Loeb House clients. See id., ¶ 9. In that same letter, Tor View advised RCCHR that, after October 1, 2008, it would treat Loeb House clients living in certain Tor View apartments in the same manner as other prospective tenants, notwithstanding the mental disabilities of those

clients. See id., ¶ 10. On November 16, 2008, as discussed supra, Tor View filed this suit against Loeb House seeking a declaratory judgment in support of its position.

The United States' complaint seeks a declaration that Tor View's actions would violate the Fair Housing Act, an injunction preventing Tor View from terminating the leases of Loeb House clients who need a reasonable accommodation for their mental disabilities, monetary damages to each victim of Tor View's discriminatory practices, and a civil penalty against Tor View to vindicate the public interest. See id., Request for Relief, ¶¶ 1-4.

ARGUMENT

POINT I

THE COURT LACKS SUBJECT MATTER JURISDICTION OVER TOR VIEW'S COMPLAINT AGAINST HUD

The Court lacks jurisdiction over Tor View's claims against HUD in the present suit. "In any suit in which the United States is a defendant, there must be a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity." Presidential Gardens Assocs. v. U.S. ex rel. Secretary of Housing & Urban Dev., 175 F.3d 132, 139 (2d Cir. 1999). Because the only conceivable bases for Tor View's claims against HUD are the Declaratory Judgment Act and the Fair Housing Act, neither of which waive sovereign immunity, the Court lacks subject matter jurisdiction over Tor View's claims against HUD in this action.

A. Plaintiff Bears the Burden of Proving Subject Matter Jurisdiction

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, plaintiff carries the burden of establishing by a preponderance of the evidence that subject matter jurisdiction exists over its complaint. See Malik v. Meissner, 82 F.3d 560, 562

(2d Cir. 1996) (“The burden of proving jurisdiction is on the party asserting it.”); In re Joint E. & S. Dist. Asbestos Litig., 14 F.3d 726, 730 (2d Cir. 1993) (“[Plaintiff], as the party asserting jurisdiction, bears the burden of showing that the case is properly before the court.”). Pursuant to Rule 12(b)(1), the Court must dismiss a claim when it “lacks the statutory or constitutional power to adjudicate it.” Morrison v. Nat’l Austl. Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008) (internal quotation marks omitted). ““On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of [the] evidence that [subject matter] jurisdiction exists.”” Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004) (quoting Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 84 (2d Cir. 2001)). In considering a motion made pursuant to Rule 12(b)(1), “[a] court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of [the] plaintiff.” Raila v. United States, 355 F.3d 118, 119 (2d Cir. 2004).

B. The United States Has Not Waived Its Sovereign Immunity for Tor View’s Claim

1. Tor View Identifies No Waiver of Sovereign Immunity

“The waiver of sovereign immunity is a prerequisite to subject-matter jurisdiction.” Presidential Gardens, 175 F.3d at 139. Thus, the United States is immune from suit absent an express waiver of sovereign immunity, as are federal government agencies and officials when acting in their official capacities. See Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994). This principle extends to claims for equitable relief, as well as claims for damages. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688-89, 695 (1949) (holding that suit for injunctive relief against federal officer, acting in official capacity and within statutory and constitutional

authority, was barred by sovereign immunity). Even when the United States waives sovereign immunity, it may do so in a limited or conditional manner: the United States retains its immunity except “as it consents to be sued . . . , and the terms of its consent to be sued in any court define the court’s jurisdiction to entertain the suit.” United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

It is the plaintiff’s burden to demonstrate that sovereign immunity has been waived. See Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). In the absence of such a waiver, courts must dismiss the plaintiff’s claim for lack of subject matter jurisdiction. See id. Tor View’s Amended Complaint, however, does not identify any waiver of sovereign immunity by HUD or the United States with respect to its claim, merely indicating where HUD has its offices and certain of the work it does. Amended Tor View Cmplt. ¶¶ 8-10. In the jurisdictional allegations of its Complaint, Tor View makes no specific allegations as to the basis for subject matter jurisdiction over its claim against the United States or HUD. Instead, Tor View refers generally to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Fair Housing Act, 42 U.S.C. § 3601. See id. ¶¶ 11, 13. As a preliminary matter, Tor View has failed to carry its burden of specifically identifying a statute that waives the sovereign immunity of the United States or any of its agencies. To the extent that Tor View is relying on the Declaratory Judgment Act or the Fair Housing Act to confer subject matter jurisdiction on its claims against HUD, it is incorrect.

2. The Declaratory Judgment Act Does Not Waive Sovereign Immunity

Tor View cannot bring its claim against HUD pursuant to the Declaratory Judgment Act because the Declaratory Judgment Act does not waive sovereign immunity. In essence, Tor

View misunderstands the purpose and scope of the Declaratory Judgment Act. “It is settled law that the Declaratory Judgment Act, 28 U.S.C. § 2201, does not enlarge the jurisdiction of the federal courts . . . and that a declaratory judgment action must therefore have an independent basis for subject matter jurisdiction.” Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep’t of Env’tl. Conservation, 127 F.3d 201, 206 (2d Cir. 1997) (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); Albradco, Inc. v. Bevona, 982 F.2d 82, 85 (2d Cir. 1992)). As Judge Weinfeld has explained, in the context of a civil rights case: “Contrary to the plaintiff’s belief, the declaratory judgment act does not constitute a consent by the United States to be sued.” Morpurgo v. Board of Higher Education in City of New York, 423 F. Supp. 704, 714 (S.D.N.Y. 1976) (citing, *inter alia*, Skelly Oil, 339 U.S. 667). Instead, “the declaratory judgment act simply makes available a new remedy when an independent jurisdictional basis exists.” Morpurgo, 423 F. Supp. at 714 n.22; *see also* Chapel Farm Estates, Inc. v. Moerdler, 01 Civ. 3601 (MBM), 2003 WL 21998964, at *8 (S.D.N.Y. Aug. 22, 2003) (“A declaratory judgment plaintiff must have an independent basis for federal jurisdiction.”) (quoting Albradco, 982 F.2d at 85). The Declaratory Judgment Act, therefore, does not confer subject matter jurisdiction over Tor View’s claims against HUD, or against any defendant, for that matter.

3. The Fair Housing Act Does Not Waive Sovereign Immunity

The only other conceivable basis for Tor View’s claims against HUD is the Fair Housing Act, 42 U.S.C. § 3601. Amended Tor View Cmpl. ¶ 11. Yet while the federal Fair Housing Act provides that the United States may sue to enforce its provisions, *see, e.g.*, 42 U.S.C. § 3614 (entitled “Enforcement by Attorney General”), nowhere does the federal Fair Housing Act permit

the United States to be sued.¹ In the absence of any statutory language conferring subject matter jurisdiction over its claims, therefore, Tor View cannot sue HUD under the Fair Housing Act. See, e.g., Zhu v. Gonzales, 04-1408 (RMC), 2006 WL 1274767, at *5 (D.D.C. May 8, 2006) (“[T]he Fair Housing Act does not waive sovereign immunity to permit suits against the federal government.”); Boyd v. Browner, 897 F. Supp. 590, 595 (D.D.C. 1995) (“[T]he Fair Housing Act does not ‘unambiguously waive’ the government’s sovereign immunity defense . . .”), aff’d 107 F.3d 922 (D.C. Cir. 1996). Tor View cannot compensate for the absence of a waiver of sovereign immunity by detailing some of the investigative steps that the United States Attorney’s Office has taken in this matter. Amended Tor View Cmplt. ¶¶ 53–58. That the United States has a Fair Housing Act claim against Tor View pursuant to statute, 42 U.S.C. § 3614, does not confer upon Tor View a reciprocal cause of action authorized nowhere by statute.

Finally, Tor View’s complaint also references the general federal question jurisdiction statute, 28 U.S.C. § 1331. Amended Tor View Cmplt. ¶ 11. Section 1331 states that district courts have original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” Id. However, “section 1331 implies no general waiver of sovereign immunity[],” and thus cannot confer subject matter jurisdiction. A.L. Rowan & Son, Gen. Contractors, Inc. v. Department of Hous. and Urban Dev., 611 F.2d 997, 1000 (5th Cir. 1980); see also Mack v. United States, 814 F.2d 120, 122 (2d Cir. 1987) (“The district court was clearly correct in holding that the general federal question jurisdictional statute, 28 U.S.C. § 1331, does not constitute a waiver of sovereign immunity by the United States.”); Desiderio v.

¹ It is also unclear whether there is any subject matter jurisdiction over Tor View’s claims against Loeb House. Tor View is not an “aggrieved person” as defined by 42 U.S.C. § 3602(i), or § 3613, the provision of the Fair Housing Act that permits suit by private parties.

Nat'l Ass'n of Secs. Dealers, Inc., 2 F. Supp. 2d 516, 522 & n.8 (S.D.N.Y. 1998) (citing Mack), aff'd on other grounds, 191 F.3d 198 (2d Cir. 1999). None of the federal statutes upon which Tor View relies constitute a waiver of sovereign immunity.

For these reasons, the Court lacks subject matter jurisdiction over Tor View's claim against HUD, and the United States respectfully requests that HUD be dismissed as a defendant from this lawsuit.

POINT II

THIS ACTION SHOULD BE CONSOLIDATED WITH THE UNITED STATES' ACTION AGAINST TOR VIEW, 09 Civ. 4368

Upon dismissing HUD as a defendant, the Court should consolidate this action with the United States' action against Tor View, filed in this court on May 6, 2009. A court may consolidate two or more actions pursuant to Federal Rule of Civil Procedure 42(a) where the actions involve "a common question of law or fact." Fed. R. Civ. P. 42(a); see also Johnson v. Celotex Corp., 899 F.2d 1281, 1284 (2d Cir. 1990) (trial court has broad discretion to consolidate actions under Rule 42(a)). Consolidation is appropriate in order to serve the interests of "judicial economy." Johnson, 899 F.2d at 1285. Specifically, consolidation of cases with common questions of law or fact is favored "to avoid unnecessary costs or delay," id. at 1284, and to "expedite trial and eliminate unnecessary repetition and confusion," Devlin v. Transp. Commc'ns Int'l Union, 175 F.3d 121, 130 (2d Cir. 1999) (citation omitted). Accordingly, consolidation should be considered when "savings of expense and gains of efficiency can be accomplished without sacrifice of justice." Consorti v. Armstrong World Ind., 72 F.3d 1003, 1007 (2d Cir. 1995), vacated on other grounds, 518 U.S. 1031 (1996). In addition, cases may be consolidated

even where, as here, certain defendants are named in only one of the complaints. See *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co., Inc.*, 229 F.R.D. 395, 402 (S.D.N.Y. 2004).

There can be no dispute that the claims of the United States have questions of law in common with this action. In the present case, Tor View is seeking a declaratory judgment that:

- (a) [Tor View] is not required to lease the eight (8) apartment units directly to Loeb House and waive its neutral, non-discriminatory policies that the individual occupants of the apartment units (i) be party to the landlord-tenant relationship, and (ii) demonstrate that they are able to pay monthly rent;
- (b) [Tor View] is not required to continue to accept rental guarantees from Loeb House and waive its neutral, non-discriminatory policy that cosigners are not accepted as supplemental income with respect to Tor View's minimum income requirements.

Amended Tor View Compl., at 15. In its Complaint, the United States is seeking declaratory relief and an injunction that:

1. Declares that defendant's discriminatory practices violate the Fair Housing Act, as amended, 42 U.S.C. § 3601 et seq.;
2. Pursuant to 42 U.S.C. § 3614(d)(1)(A), enjoins defendants, their agents, employees, and successors, and all other persons in active concert or participation with them, from:
 - a. Maintaining and enforcing their policy prohibiting a party that is not a residential tenant from signing the lease agreement where the residential tenant has mental disabilities preventing them from meeting their obligations under the lease agreement;
 - b. Maintaining and enforcing their policy prohibiting a party that is not a residential tenant from meeting rental obligations under the lease where the residential tenant has mental disabilities preventing them from meeting their rental obligations under the lease agreement; or
 - c. Discriminating on the basis of disability against any person in any aspect of the rental or use of a dwelling.

United States' Complaint, at 5-6. Both actions also raise virtually identical factual issues, including issues regarding the past and current relationship among Tor View, Loeb House, and the Loeb House clients that have occupied Tor View apartments over the past several years. Given the substantial similarities between the issues raised by these two complaints, the cases should be consolidated pursuant to Fed. R. Civ. P. 42(a).

Consolidation would further the goal of judicial economy because discovery in each case is likely to be identical, motion practice and trial in the two cases would almost certainly cover the same facts and identical issues of law, and allowing the two cases to proceed separately would be repetitive, costly, and could potentially result in inconsistent verdicts. Furthermore, no injustice would result by consolidating the two suits. Accordingly, this action brought by Tor View, and the United States' action against Tor View, should be consolidated pursuant to Fed. R. Civ. P. 42(a).

Conclusion

For the foregoing reasons, the Court should dismiss the amended complaint as against HUD, and grant the United States' motion to consolidate this action with the United States' action against Tor View.

Dated: New York, New York
May 6, 2009

Respectfully submitted,

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