

RECENT DEVELOPMENTS

LANDLORD TENANT

LEASE CLAUSE THAT TENANT ACCEPTED PREMISES “AS IS” DID NOT EXCUSE LANDLORD FROM MAKING ROOF REPAIRS

4901 Main, Inc. v TAS Auto., Inc., 187 S.W.3d 627 (Tex.App.-Hous. [14th Dist.] 2006).

FACTS: Main Inc. (“Landlord”) leased commercial property in Houston to TAS (“Tenant”) for use as an automobile repair shop. Tenant accepted occupancy of the premises “as is” and acknowledged the premises were suitable for Tenant’s intended purpose. Per the lease terms, Tenant agreed to maintain and repair the premises, except for roof and structural repairs. Under the terms of the lease, if Landlord failed to comply with a lease provision, the lease agreement entitled Tenant to sue Landlord for damages or terminate the lease.

Tenant first complained about the roof a few months after moving into the premises. Almost a year later, Tenant notified Landlord by certified mail about various roof and structural damages in need of repair at the leased premises. Six months later, Tenant sent another letter notifying Landlord of the need to repair the leased premises. Landlord responded that it would review the items deemed in need of repair. Tenant filed suit against Landlord for failure to comply with the lease agreement. Landlord’s president testified that there were no leaks in the roof, but Tenant countered with more than 100 pictures showing apparent roof leakage, structural damage, and equipment damage. Landlord contended that when Tenant accepted the premises “as is,” Tenant accepted the roof and structural damage that accompanied the premises and excused Landlord from making repairs. The trial court ruled in favor of Tenant and Landlord appealed.

HOLDING: Affirmed.

REASONING: Landlord’s answer pleaded waiver and several other defenses. Waiver was defined by the court as the intentional relinquishment of a known right or intentional conduct

inconsistent with claiming that right. When questioned about the lease agreement at trial, Landlord’s president contended that the waiver clause meant that Tenant accepted the property in its current condition, as it was, similar to buying a used car. Landlord’s president also argued that waiver meant if Landlord failed in their

Landlord presented no evidence Tenant waived enforcement of Landlord’s duty to make roof and structural repair to the leased premises.

responsibility in any way that the Tenant was entitled to walk away from the lease. The court believed that the testimony did not explain how Tenant waived its right to require Landlord to repair the roof. Additionally, the court noted that the lease agreement required Landlord to repair the roof and structure of the building. Because Landlord presented no evidence showing how Tenant either intentionally relinquished a known right or engaged in conduct inconsistent with claiming that right, the court affirmed the ruling for Tenant.

PUBLIC HOUSING TENANTS MAY SUE UNDER § 1983 OVER THEIR UTILITY ALLOWANCE

Johnson v. Housing Authority of Jefferson Parish, 442 F.3d. 356 (5th Cir. 2006).

FACTS: Appellants were low-income tenants who lived in Jefferson Parish, Louisiana, and participated in a federally-funded voucher program through the U.S. Department of Housing and Urban Development (“HUD”) that subsidized their residential rents and utility expenses. The voucher program was locally administered and operated by Appellees: the Housing Authority of Jefferson Parish, a public housing authority created under state law, and the Louisiana Housing Development Corporation (collectively, the “Housing Authority”). In administering the voucher program, the Housing Authority issued vouchers that were payable directly to the participant’s landlord under a housing assistance payment contract. Generally, such payment was calculated as the amount by which the rent exceeded 30 percent of the participant family’s monthly adjusted income plus the amount allowed for tenant-paid utilities. The amount allowed for tenant-paid utilities was set by the Housing Authority and was based on the typical cost of utilities and services paid by energy-conservative households occupying housing of similar size and type in the same locality using normal patterns of consumption.

In April of 2004, Appellants filed suit in the Eastern District of Louisiana. They alleged that the Housing Authority had not provided them appropriate utility allowances as required by the statute and regulations. They contended that the Housing Authority failed to use current utility rates in calculating the utility allowance and had not revised its utility allowance schedule from 1995 to 2004 despite annual increases in utility rates of 10 percent or more in several years during that period. As a result, they claimed their rent burdens were higher than they should have been had the Housing Authority complied with the statute and the implementing regulations. In October of 2004, the district court granted the Housing Authority’s motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The district court held that the portions of the statute and implementing regulations pertaining to utility allowances did not create individual federal rights enforceable by private participants through a § 1983 action. The tenants appealed.

HOLDING: Reversed and remanded.

REASONING: Under 42 U.S.C. § 1983, private individuals may bring lawsuits against state actors to enforce not only constitutional rights but also rights created by federal statutes. To bring such action, however, the federal statute in question must unambiguously give rise to privately enforceable, substantive rights. In doing so, one must show a Congressional intent to create such privately enforceable rights. The Supreme Court has applied a three-part test in determining Congressional intent: (1) Congress must have intended that the provision in question benefit the private plaintiff; (2) the right protected by the statute must not be so “vague and amorphous” that its enforcement

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would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the states, with the asserted right couched in mandatory rather than precatory terms. *Blessing v. Freestone*, 117 S. Ct. 1353 (1997).

In analyzing the *Blessing* factors, the court examined the facts in *Wright v. City of Roanoke Redevelopment & Housing Authority*, a case with virtually identical facts. 479 U.S. 418 (1987). The issue in *Wright* regarded a statute commonly known as the Brooke Amendment, which mandated that a family shall only pay rent in the amount of 30 percent of the family's monthly adjusted income. Similarly, "rent" as defined in the statute included a reasonable amount of utilities determined by the schedule of allowances for utilities supplied by the project. The Supreme Court in *Wright* concluded that it was clear the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute.

In examining the first factor of the *Blessing* test, the court found there was a congressional intent to benefit plaintiffs. The Housing Authority made several arguments to the contrary. First, they argued that the statute at issue differed from the Brooke Amendment because it allowed tenants to pay more than 30 percent, whereas the Brooke Amendment was fixed at 30 percent. The court found the difference between the statutory entitlement of the plaintiffs in *Wright* and the Appellants to be immaterial. The effect of an insufficient utility allowance was the same in either case. Second, the Housing Authority argued that, because the statute addressed rights and duties that flow directly between the public housing authority and the landlord, the focus was on fair compensation to the landlord, and the participants were merely indirect beneficiaries. The court rejected this argument because, even though the vouchers were made payable to the landlord, Congress's obvious intent was for such payment to benefit the participating tenant.

The second factor of the *Blessing* test was that enforcement of the statute would not strain judicial competence. The Housing Authority asserted that it enjoyed discretion in calculating the utility allowance schedule and that the amorphous typical cost of utilities and services paid by similar households rendered the statute and regulations unenforceable. The court found the argument unconvincing. Although the calculation and maintenance of the utility allowance schedule may not be an exact science, courts are capable of at least reviewing the actions taken by public housing authorities to ensure that they acted within

their discretion. Such statute and regulations were not so vague and amorphous as to be beyond the competence of the judiciary to enforce.

The final factor in the *Blessing* test was that the statute must unambiguously impose a binding obligation in mandatory terms. The Housing Authority argued that its obligations were only limited to HUD. It argued that, unlike the plaintiffs in *Wright*, the Appellants must reach through the statute to find the right to a utility allowance schedule that was created by a regulation. They contrasted this to *Wright* where resort to a HUD regulation was not necessary to establish such right. The statutory language in *Wright* only mentioned that rent included reasonable amounts for utilities. The court again rejected the Housing Authority's argument. The statutory language in the voucher program specifically and unmistakably provided for an amount to be allowed for tenant-paid utilities. Thus, HUD regulations were not necessary, certainly no more than they were in *Wright* where such an allowance was not even mentioned in the text of the statute itself.

Finally, the Housing Authority argued that there was already a remedy for a public housing authority's failure to comply with HUD regulations that ranged from a reduction in the amount of funding up to a complete termination from the program. The Supreme Court held in *Wright*, however, that there was absolutely no indication in the statute that Congress intended for exclusive enforcement authority to be vested in HUD. HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds were general powers which were insufficient to preclude § 1983 remedies. Both HUD oversight and private actions under § 1983 may co-exist if Congress intended so. The Housing Authority also pointed out that the regulations require public housing authorities to provide an opportunity for informal hearings concerning the application of the utility allowance schedule to a particular family's needs. However, these regulations did not require such hearings concerning the establishment of the utility allowance schedule itself. The court reasoned that the lack of a sufficient federal review mechanism regarding this issue supported the notion that Congress intended to allow § 1983 actions. The Housing Authority had failed to show that Congress intended to preclude Appellants from bringing a § 1983 action regarding their utility allowances.