UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JANYCE LEWIS, *et al.*,

Plaintiffs

v. Case No. 3:12-cv-00026-GEC

CHARLOTTESVILLE REDEVELOPMENT AND HOUSING AUTHORITY, *et al.*,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

Defendants, Charlottesville Redevelopment and Housing Authority ("CRHA") and Constance Dunn, by counsel, file this Reply Memorandum in response to Plaintiffs' Memorandum in Opposition to Motion to Dismiss and in further support of their Motion to Dismiss the Amended Complaint in this action.

This case has been well briefed. In responsive pleadings to the original Complaint, Defendants filed a Memorandum in Support of Motion to Dismiss (Doc. No. 9) and a Reply Memorandum in Support of Motion to Dismiss (Doc. No. 26). Plaintiffs have filed an Amended Complaint (Doc. No. 22). Defendants filed a renewed Motion to Dismiss (Doc. No. 34), with accompanying Memorandum in Support (Doc. No. 35). The Memorandum in Support of Motion to Dismiss Amended Complaint anticipated and incorporated many of Plaintiffs' arguments as set forth in the pleadings related to the original Complaint. Plaintiffs then filed a Memorandum in Opposition to Motion to Dismiss (Doc. No. 39).

Accordingly, without waiving any objection or response to Plaintiffs' arguments in their most recent Memorandum in Opposition to Motion to Dismiss,[1] Defendants provide the following response to particular arguments advanced by Plaintiffs.

I. In the Amended Complaint, Plaintiffs Still Have Not Pled that the Allowance Is Unreasonable Based on an Energy-Conservative Household.

Despite Plaintiffs' arguments to the contrary, it remains true that Plaintiffs have not sufficiently pled that the rates are not reasonable under the Regulations.

Under federal law, CRHA must adopt a utility allowance based on the "monthly cost of a reasonable consumption of utilities … by an energy-conservative household of modest means, consistent with the requirements of a safe, sanitary and healthful living environment." 24 CFR § 965.505 (a).

Based on this standard, the Regulations further provide, "[t]he [authority's] determination of allowances, scheduled surcharges, and revisions thereof shall be … valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 24 CFR § 965.502 (e).

The Fourth Circuit has held that it is this calculus of reasonableness that is the central inquiry. For example, the Court held that the procedural requirements of notice

[1] Plaintiffs apparently criticize Defendants for providing them with a copy of the 2003 utility study, produced by an engineering firm in Atlanta, along with various other documents. Plaintiffs note, "On the morning of October 26, 2012, the same day that this reply brief was due, counsel for Defendants forwarded by email a 186 page study purported to be the missing report." Pls.' Mem. in Opp'n to Mot. to Dismiss [Amended Complaint], Doc. No. 39, at 3 n.1; *see also id.* at 17–18 (referring to denials and admissions of Defendants regarding the 2003 study). But the relevance of those documents, or the circumstances of their production, is unclear; in reviewing the present Motion to Dismiss, the Court is focused on the allegations of the Amended Complaint.

and annual review "in their entirety must inform the reasonableness of a utility allowance." *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 630 (4th Cir. 1993).

As for Defendants' argument that Plaintiffs' have failed to sufficiently allege an unreasonable allowance, Plaintiffs misconstrue Defendants' argument. It is certainly true, as Plaintiffs argue, that all residents are entitled to a reasonable utility allowance, whether or not those residents are energy-conservative households. *See* Pls.' Mem. in Opp'n to Mot. to Dismiss [Amended Complaint], Doc. No. 39 [hereinafter "Mem. in Opp'n"], at 21, 24.

However, this is not the inquiry. The inquiry is whether the rates are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," in light of the requirement that they represent a "reasonable consumption of utilities … by an energy-conservative household of modest means."

The allegation that some tenants, who are not alleged to be energy-conservative households, were assessed a surcharge, is simply irrelevant to the Court's inquiry.

Moreover, Plaintiffs misconstrue the purpose of Defendants' argument regarding the affidavits of the plaintiffs in *Dorsey*. In *Dorsey*, in ruling on a Motion for Summary Judgment, the Court concluded that a high rate of surcharges, *despite* efforts to conserve energy, could be grounds for determining that the rates were unreasonable. *See Dorsey*, 984 F.2d at 630–31. The Court noted that the plaintiffs had produced evidence of tenants of "energy conservative utility consumption but who nonetheless consistently received

excessive surcharges," and that these tenants had received surcharges at a high rate despite "efforts to be energy conscious" and "efforts to economize." *Id.* at 631, 626, 628.

The evidentiary standard for Motion for Summary Judgment and a Motion to Dismiss are certainly distinct. However, the substantive analysis is the same: that is, whether the facts are sufficient to entitle one party to relief under the law. In *Dorsey*, in analyzing the applicable law in a motion for summary judgment, the Fourth Circuit noted that the plaintiffs had produced evidence of their efforts to conserve energy. Such reasoning from the Fourth Circuit should inform the Court's analysis under the present Motion to Dismiss, and should require an allegation on the part of Plaintiffs that they have been assessed surcharges despite being energy-conservative households.

In fact, Plaintiffs' allegations affirmatively establish that an energy-conservative household was able to stay within the allowance. Plaintiffs have alleged that one energy-conservative household, that is, the household of Ms. Tinsley, was able to avoid any surcharge, because she "developed and stuck to conservative usage habits." Am. Compl., ¶¶ 125, 126.

Defendants have already raised this deficiency in Plaintiff's pleadings, in Defendants' response to the original Complaint. *See* Defs.' Memo. in Supp. of Mot. to Dismiss Compl., Doc. No. 9, at 14–17. In the Amended Complaint, Plaintiffs made various amendments to address points raised by Defendants. *See, e.g.*, Am. Compl., ¶¶ 18, 130, 134, 136, 169, 175, 182 (amending allegations based on Defendants' challenge to standing of PHAR). Nevertheless, in filing their Amended Complaint, Plaintiffs did

not address Defendants' argument that their pleadings were insufficient for failing to allege that the rates were unreasonable based on an energy-conservative household.

Such a response on the part of Plaintiffs would have been relatively easy to accomplish; Plaintiffs could have simply alleged that the named Plaintiffs are conservative energy users, or, if they could not in good faith make such an allegation, Plaintiffs could have identified, perhaps through their alleged advocacy organization, PHAR, any number of alleged residents who had adopted conservative energy habits, and who had been surcharged.

But Plaintiffs failed to do so.

Accordingly, the Amended Complaint must be dismissed, with prejudice.

II. As for the Statute of Limitations, Defendants Only Argue that Plaintiffs Cannot Recover Rates from a Period Beyond the Two- or Five-Year Period.

Plaintiffs acknowledge that the five- and two-years statutes of limitations for contract claims and § 1983 claims, respectively, apply to limit any available recovery. *See* Mem. in Opp'n, at 4.

But Plaintiffs again misconstrue the scope of Defendants' argument in this regard. Despite Plaintiffs' argument to the contrary, it is not true that Defendants argue that "because CRHA started violating the law before the applicable statute of limitations, CRHA can continue to assess the unlawful charges today." Mem. in Opp'n, at 4 (citing Defs.' Mem. in Supp. of Mot. to Dismiss Am. Compl., Doc. No. 35 [hereinafter "Mem. in Supp."], at 4–5.)

Defendants do not claim that Plaintiffs' causes of action are absolutely barred. To the contrary, Defendants have consistently claimed only that the statute of limitations limits the time period over which Plaintiffs can claim any recovery.

III. PHAR Does Not Have Standing in Its Own Right.

Plaintiffs have abandoned their allegation that PHAR can sue in a representative capacity. Mem. in Opp'n, at 12. But Plaintiffs have nevertheless failed to allege sufficient facts to enable PHAR to maintain an action in its individual capacity.

Plaintiffs rightly rely on the Supreme Court's opinion of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79, 102 S. Ct. 1114, 1124–25 (1982), for the principles underlying the doctrine of standing by an organization. But unlike the plaintiff organization in *Havens Realty Corp.*, Plaintiff PHAR cannot allege a separate and distinct organizational purpose that has been frustrated by CRHA's utility surcharges.

In *Havens Realty Corp*, the Supreme Court held that Housing Opportunities Made Equal ("HOME") had standing to sue in its own right for allegedly discriminatory practices on the part of the defendant housing authority. *Id.* The Court noted that HOME had alleged that the defendants' actions had "frustrated [HOME] in its efforts to assist equal access to housing through counseling and other referral services," and that as a result, HOME had to devote significant resources to identify and counteract the defendants' practices. *Id.*

In this case, Plaintiffs have not alleged any such separate purpose on the part of PHAR which has been frustrated by CRHA's alleged actions.

In their Memorandum in Opposition, Plaintiffs attempt to overcome this deficiency; they state, "PHAR works to empower its public housing resident members to attain financial self-sufficiency." Mem. in Opp'n, at 10.

But even if such a statement were sufficient to establish standing on the part of PHAR, this statement is unsupported by the pleadings; nowhere in the Amended Complaint do Plaintiffs allege such a goal or purpose on the part of PHAR.

Plaintiffs allege that PHAR "has expended time and resources on the issue" of utility allowances. Am. Compl., ¶ 134. They further allege, "PHAR's outreach and organizing work has improved public housing neighborhoods, including obtaining playground renovations; improvements to maintenance, customer service and safety; and incorporated residents into redevelopment planning. As the citywide public housing resident association, PHAR works on a variety of neighborhood improvement issues, as well as pioneering a successful Internship Program." Am. Compl., ¶ 135.

But such allegations are distinct from the allegations in *Havens Realty Corp.* In that case, HOME's specific goals were to help residents find housing, and the unlawful discrimination on the part of plaintiffs interfered with that particular mission.

In fact, if Plaintiffs' position were true, and PHAR could claim standing despite a showing of an injury separate from the alleged injury to the residents, then standing doctrine would be nullified. That is, if Plaintiffs' analysis of the law were correct, then any advocacy group could claim standing, merely by alleging that they had spent resources addressing the particular injuries claimed by the individual plaintiffs.

But as it stands, standing is a searching inquiry into "whether the party has alleged such a personal stake in the outcome of the controversy." *Havens Realty Corp*, 455 U.S. at 378–79, 102 S. Ct. at 1124–25 (1982) (citations and quotations omitted).

Moreover, the action itself belies any allegation that PHAR has such a personal, organizational stake in the lawsuit. In this case, PHAR does not seek any reimbursement of its own funds and resources that were allegedly expended on behalf of the residents. Plaintiffs seek numerous remedies, but do not seek any such reimbursement or damages of PHAR's resources. While this factor is expressly considered in the inquiry of standing in a representative capacity, which is no longer before the Court, this factor is certainly related to the inquiry of whether PHAR has "a personal stake in the outcome of the controversy."

Accordingly, PHAR is not a proper party to this lawsuit, and it should be dismissed.

IV. Plaintiffs' Remedies Are Prospective Only.

Defendants have consistently argued that the remedies of Plaintiffs are prospective only; that is, that the Court may order CRHA to comply with any applicable federal law, but the Court may not order reimbursement of rates paid in the past. *See* Mem. in Supp., at 27–28.

Defendants' position in this regard is bolstered by the voluntary payment doctrine. In Virginia, the voluntary payment doctrine is a defense to damage claims arising from the payment of taxes and fees later determined to be illegal. *Phoebus v. Manhattan*

Social Club, 105 Va. 144 (1906); *Charlottesville v. Marks' Shows, Inc.*, 179 Va. 321 (1942); *Crestwood Constr. Co. v. Fairfax County*, 212 Va. 6 (1971).

This policy was first developed and applied to taxing authorities. *See* David J. Marchitelli, Annotation, Voluntary Payment Doctrine as Bar to Recovery of Payment of Generally Unlawful Tax, 1 ALR 6th 229 (2008). "The policy, based on the sovereign immunity of the taxing authority, is to avoid the financial uncertainty that would be caused by taxpayer demands for refunds following the discovery that the taxing authority collected and spent monies under the illegal tax." *Id.*

This policy has been later applied to other governmental fees, such as fees related to the provision of water and sewer service. *Id.*

To avoid such a waiver inherent in the voluntary payment doctrine, the payment must be made under protest or otherwise have been paid as a result of mistake, duress, coercion, or compulsion. *Id.*

Plaintiffs have taken issue with Defendants' argument that the relief can only be prospective. Plaintiffs have cited *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 422 n.5, 107 S. Ct. 766, 770 n.5 (1987), in which the plaintiffs sought reimbursement of past fees. *See* Mem. in Opp'n, at 25.

It is unclear whether the parties in *Wright* raised an issue of waiver or estoppel based on such a defense as the voluntary payment doctrine. It is also unclear whether such a doctrine can operate as a bar to recovery of such rates under § 1983.

However, to the extent that Plaintiffs' claims for recovery of past expenses are grounded in state law, such as their claims for breach of contract, the common-law principles of voluntary payment, waiver, and estoppel do apply.

In this case, Plaintiffs have not alleged any involuntary payment.

Moreover, Plaintiffs have affirmatively alleged that the named plaintiffs were aware of the payment scheme and of their claim that it was illegal, in that a petition was signed and circulated; and Plaintiffs have affirmatively alleged that the named plaintiffs made payments of the allegedly improper rates. *See* Am. Compl., ¶¶ 68, 70, 82, 94 – 95, 108–09. For this reason, Plaintiffs' remedies are prospective only.

Therefore, at the very least, the voluntary payment doctrine operates as a bar to Plaintiffs' state-law claims as alleged, and those claims should be dismissed.

V. The 2003 Savings Bond Program Is Unenforceable During the Relevant Time Period.

Furthermore, the alleged 2003 Savings Bond Program is unenforceable during the five-year time period that is subject to the statute of limitations.

a. Plaintiffs Have Not Alleged Knowledge of, or Reliance on, the Alleged Resolution.

In their Memorandum, Plaintiffs assert that the resolution that purportedly offered a savings bond constituted a unilateral contract. *See* Mem. in Opp'n, at 32–33. Even assuming that the resolution as alleged constitutes a unilateral contract, the Amended Complaint fails to sufficiently allege the elements of such a contract.

Plaintiffs summarize general principles of law regarding unilateral contracts. *See id.* However, Plaintiffs have omitted one essential element: that is, the requirement that the promisee be aware of, and act upon, the offer.

A unilateral contract may only be accepted through performance if the promisee (in this case, the resident) has knowledge of the terms of the offer. *See Richmond Eng'g & Mfg. Corp. v. Loth*, 135 Va. 110, 115 S.E. 774, 786 (1923). In *Loth*, the Supreme Court reasoned that a unilateral contract can be accepted even if the promisor is reasonably unaware of the performance of the promisee; but the Court made clear that for a unilateral contract to be enforceable, the promisee must be aware of the offer.

In *Loth*, the Supreme Court cited with approval the following general articulation of this element of a unilateral contract: "The assent of the promisee to a unilateral contract may be indicated by an act requested by the promisor, but of which he has no knowledge unless he takes steps to inform himself; but a promise necessarily implies either communication from the promisor to the promisee, or at least some action which will normally indicate to the promisee the intent of the promisor." *Id.* (quoting Williston on Contracts, § 22).

In this case, Plaintiffs have not alleged that any resident knew of the alleged promise during any relevant time period.

To the extent that Plaintiffs' allegations could be taken to imply present knowledge on the part of any resident, there is no allegation that a resident has currently fulfilled the alleged requirements for one year and not received such a savings bond.

Accordingly, Plaintiffs have failed to allege the required elements of a unilateral contract, or of a breach of the same, by failing to allege reliance on, or even knowledge of, the alleged promise.

b. Under the Allegations of the Amended Complaint, the 2003 Resolution Is Unenforceable Debt.

Furthermore, even if the resolution could be enforceable as a unilateral contract, that resolution is unenforceable under well-established principles of governmental law.

Plaintiffs' reading of *Button* is not supported by case law. *See* Mem. in Opp'n, at 33. The well-established restrictions on the issuance of debt do not only apply to bonds issued by a given governmental entity.

Instead, this concept of debt is much broader. In defining debt, the Supreme Court of Virginia has held that generally, an unconditional obligation requiring the payment of monies must be accounted as debt. *See Bd. of Supervisors of Fairfax County v. Massie*, 210 Va. 253, 259 (1969).

The term "debt" includes obligations which are "certain as to liability and uncertain only as to amount." *Button v. Day*, 205 Va. 629, 642 (1964).

Opinions of the Office of the Attorney General of Virginia "consistently conclude that a local governing body currently does not have the power to take actions that irrevocably bind its successors in office, unless such binding action is expressly authorized by statute." Op. Va. Att'y Gen. No. 03-108 (Dec. 15, 2003) (citations omitted).

These opinions by the Attorney General are entitled to deference from the Court, especially when those opinions relate to powers granted by statute. *Twietmeyer v. City of Hampton*, 255 Va. 387, 393 (1998) (opinion of Attorney General is not binding on the court, but is "entitled to due consideration"); *Beck v. Shelton*, 267 Va. 482, 492 (2004) ("The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view.") (quotation omitted).

Any indebtedness incurred by a Virginia locality which exceeds its power is void. *Scofield Eng'g Co. v. City of Danville*, 35 F. Supp. 668 (W.D. Va. 1940).

All persons dealing with a Virginia locality are treated as having knowledge of the limitations on its power to incur debt and, if any action exceeds such power, there may be no recovery on the debt on the basis of unjust enrichment or implied contact. *American-LaFrance & Foamite Industries v. Arlington County*, 164 Va. 1 (1935).

Under Virginia law, defendant CRHA is a "political subdivision" of the Commonwealth of Virginia. *See* Va. Code § 36-4.

The power to appropriate money for a specific purpose does not imply the power to borrow money or issue bonds for such purpose. However, no allegations are set forth in the Amended Complaint that CRHA has ever appropriated any money for the $50.00 savings bond at issue.

Therefore, even if the Resolution was binding in 2003, there is no allegation that the Resolution was renewed in subsequent years, or that funds were appropriated for it. Accordingly, that claim must be dismissed.

Conclusion

Accordingly, the Court should grant Defendants' Motion to Dismiss the Amended Complaint. Furthermore, because Plaintiffs have already amended their Complaint as a matter of right, the Court should dismiss said action, with prejudice.

Date: 11/2/2012

CHARLOTTESVILLE REDEVELOPMENT AND HOUSING AUTHORITY and CONSTANCE DUNN
By: /s/ James M. Bowling, IV
Counsel

James M. Bowling, IV (VSB # 14232)
Stephen Wills Murphy (VSB # 80733)
St. John, Bowling, Lawrence & Quagliana, LLP
416 Park Street
Charlottesville, Virginia 22902
(434) 296-7138
(434) 296-1301 *fax*
jmb@stlawva.com
swm@stlawva.com
Counsel for Defendants Charlottesville Redevelopment and Housing Authority and Constance Dunn

Certificate of Service

I hereby certify that on November 2, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice to the following CM/ECF participants:

John Conover, Esq.
Abigail Turner, Esq.
Alex Gulotta, Esq.
Brenda Castañeda, Esq.
LEGAL AID JUSTICE CENTER
1000 Preston Avenue
Suite A
Charlottesville, Virginia 22903

and

Thomas D. Domonoske, Esq.
Of Counsel
LEGAL AID JUSTICE CENTER
461 Lee Avenue
Harrisonburg, Virginia 22802,

Counsel for Plaintiffs

By /s/ James M. Bowling, IV
James M. Bowling, IV (VSB # 14232)
Stephen Wills Murphy (VSB # 80733)
St. John, Bowling, Lawrence & Quagliana, LLP
416 Park Street
Charlottesville, Virginia 22902
(434) 296-7138
(434) 296-1301 *fax*
jmb@stlawva.com
swm@stlawva.com
Counsel for Defendants Charlottesville Redevelopment and Housing Authority and Constance Dunn