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FILED
JUN 16 2005
MICHAEL W. DOBBINS
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIE BURRELL,)
)
Plaintiff,)
) No. 03 C 8776
v.)
) Judge Manning
Chicago Housing Authority *et al.*)
)
Defendant.)

**REPLY MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' MOTION TO DISMISS**

Despite appointed counsel's attempts to bolster Burrell's *pro se* complaint with argument, the fact remains that this court lacks jurisdiction under any of the statutes Burrell invokes.

I. The Court Lacks Subject Matter Jurisdiction Under the Fair Housing Act.

Since Burrell concedes that the Fair Housing Act (FHA) does not allow for a private right of action against HUD (Burrell's Combined Response to Motion to Dismiss at p. 7), the FHA allegations of his complaint must be dismissed

In its opening brief, HUD also argued that its finding of no discrimination after a compliance review of plaintiff's administrative complaint brought under the FHA and Title VI of the Civil Rights Act of 1964, was unreviewable in this court pursuant to the Administrative Procedure Act. Mem. in Support of Federal Defendant's Motion to Dismiss at pp. 2-4. HUD's initial determination in conjunction with the Title VI complaint was reviewed by HUD and denied. Ex. 1 to Mem. in

Support of Federal Defendant's Motion Dismiss. Hence, there is no statutory right for further judicial review of this administrative decision.¹

Burrell's complaint only contends there was a lack of HUD oversight and alleges no discernable affirmative discriminatory actions, only that HUD knew or should have known, of the alleged discrimination occurring. Compl. at pars. 23, 37, 46, 66, 75, 129. Contrary to Burrell's assertions, Title VI does not provide an absolute right of action against the United States by a private party, except in instances of intentional discrimination. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). Because what Burrell alleges constitutes mere negligence, Title VI does not provide a right of action against HUD and his complaint should be dismissed.

II. The Court Lacks Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1343.

Burrell alleges that HUD acted with and through the Chicago Housing Authority (CHA) to deprive him of his right to non-discriminatory equal housing. The paragraphs of the complaint cited in his response to prove this point only describe instances where HUD knew or should have known about discriminatory practices, but never allege that HUD affirmatively committed any specific actions, suggesting the omission of a duty to act on the part of HUD.

As authority for establishing jurisdiction under 28 U.S.C. § 1343(a)(3), Burrell cites a lone 1970 case in which a New York district court allowed HUD to be sued, along with city and state officials, in a slum clearance redevelopment project based on 42 U.S.C. § 1456(c)(1). *English v. Town of Huntington*, 335 F. Supp. 1369 (E.D.N.Y. 1970). However, appellate courts have generally

¹ If the court finds that judicial review under the Administrative Procedure Act is appropriate, HUD's findings could only be set aside if they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or exceeded the law and were unwarranted. 5 U.S.C. § 706.

held that where a complaint contains “ ‘only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights’ ” it will not withstand a motion to dismiss. *Brown v. City of Oneonta*, 106 F.3d 1125, 1133 (2d Cir. 1997) (quoting *Summer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983)). Essentially, Burrell would have to allege specific acts showing a conspiracy between HUD and the state actors for the federal officials to be considered to have acted under color of state law. *Strickland v. Shalala*, 123 F.3d 863 (6th Cir. 1997)(state’s participation in a cooperative federalism scheme did not provide state action for a federal official). The mere existence of a federal program, federal funding, or a hortatory federal regulation, is simply not enough. To hold otherwise would mean that every federal/state partnership would constitute a basis for the requisite “state action.” which is simply not an accurate statement of the law.² Burrell’s vague, non-specific allegations as to HUD fail to meet this high burden, and therefore should be dismissed.

III. The Court Lacks Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1331.

Burrell’s complaint fails to allege any facts which would support federal jurisdiction under 28 U.S.C. § 1331. There are no specific allegations of direct action by HUD nor is there any assertion of a duty owed to Burrell by HUD. As stated in our opening brief, Burrell claims that certain acts violated 24 C.F.R. § 964.18, a regulation which discusses resident involvement with local housing authorities, not with HUD. These regulations do not impose any obligations on HUD *vis-a-vis* the tenants, save for HUD to promote negotiation in case of a dispute between the resident representatives and the housing authority. Therefore, the complaint should be dismissed for failure to state a claim.

²Similarly, courts have held that a federal employee who arrested an individual pursuant to a state statute was not liable under Section 1983. *Williams v. United States*, 396 F.3d 412 (D.C.Cir. 2005); *Casey v. Milewski*, 327 F.3d 564 (7th Cir. 2003).

IV. The Court Lacks Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1367.

Burrell's response concedes that the complaint has no state law claims, but he argues that should some of his allegations be treated as state law breach of contract claims in the future, then there may be supplemental jurisdiction.

The simple fact is that there are no state law claims in the complaint *today*, and as such 28 U.S.C. § 1367 is irrelevant and cannot provide the court with jurisdiction.

V. The Court Lacks Subject Matter Jurisdiction Over the Tort Claims.

Trying to hide behind the cloak of a *pro se* litigant, Burrell's appointed attorneys argue that although the complaint uses terms of art typically found in tort cases, their client should be given more leeway in how the cause of action is pled. Neither Burrell nor his attorneys can have it both ways — either Burrell is *pro se* or he is represented.

More than a year has elapsed since Burrell filed his *pro se* complaint, and this court allowed appointed counsel many months to file an amended complaint. Having failed to take that opportunity, Burrell's attorneys must be bound by the complaint as it stands — woefully deficient though it may be.

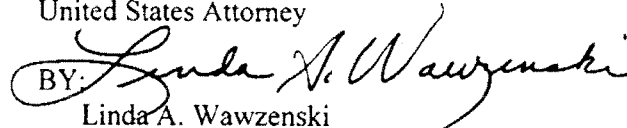
Clearly, Burrell seeks relief in tort against HUD for “monetary damages in excess of \$10,000.00 for each violation described herein.” Complaint at p. 14. Because Burrell has neither met the jurisdictional prerequisites of the Federal Tort Claims Act (FTCA) (28 U.S.C. § 2675(a)) nor sued the proper party (28 U.S.C. § 2679(a)), the court lacks subject matter jurisdiction over his claims sounding in tort.

Conclusion

For these reasons, Burrell's complaint should be dismissed.

Respectfully submitted,

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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF SERVICE BY U.S. MAIL

HERMEIN BASKIN being first duly sworn on oath deposes and says that she is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 16th day of June 2005, she MAILED a copy of

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SUBSCRIBED AND SWORN TO before me

this 16th day of June 2005

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NOTARY PUBLIC

