



U.S. Department of Justice

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September 26, 2016

BY FAX AND ECF

Hon. Nelson S. Roman
United States District Court
300 Quarropas Street
New York, New York 10007
Fax: (914) 390-4179

Re: *United States v. Ginsburg Development Companies*, 16 Civ. 7301 (NSR)(LMS)

Dear Judge Roman:

On September 19, 2016, the United States (“Government”) initiated the above-referenced action against defendant Ginsburg Development Companies (“GDC”) to enforce the accessible design and construction provisions of the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(C) (the “FHA”). Currently, GDC is designing or constructing four rental complexes in Westchester County; and, to ensure accessibility at these buildings, the Government and GDC negotiated and executed a proposed Consent Order of Preliminary Injunction (the “Consent Injunction”). Thus, we write respectfully to submit the proposed injunction for the Court’s review.¹ Further, we also write respectfully to report on the status of parties’ ongoing settlement discussions, which, hopefully, will lead to an agreement for an overall resolution by the end of 2016. Finally, in light of these negotiations, we respectfully request that the Court (i) adjourn GDC’s deadline to answer by 60 days and (ii) postpone scheduling an initial status conference.

I. The FHA’s Accessible Design and Construction Requirements and the Government’s Enforcement Authority

Congress enacted the FHA’s accessible design and construction provisions to ensure that multifamily dwellings constructed for occupancy after March 13, 1991 would have “basic features” of accessibility that can be “eas[ily] incorporated in housing design and construction.” H.R. Rep. No. 100-711, at 26-27 (1988). Specifically, the FHA requires that (i) the “public use and common use” areas must be “readily accessible to and usable” by persons with disabilities; (ii) “all the doors designed to allow passage into and within all” covered dwellings must be “sufficiently wide to allow passage by” persons with disabilities using wheel chairs; and (iii) in “all premises within such dwellings,” (A) there must be “an accessible route into and through the dwelling;” (B) light switches, electrical outlets, thermostats, and other environmental controls must be “in accessible locations;” (C) bathroom walls must be reinforced so as “to allow for installation of grab bars”; and (D) kitchens and bathrooms must have sufficient space to allow “an individual in a wheelchair to maneuver about [.]” 42 U.S.C. § 3604(f)(3)(C).

¹ A copy of the proposed Consent Injunction is attached as Exhibit A. In accordance with Your Honor’s Individual Practices, we also transmitted the injunction to the Clerk’s Office.

To ensure compliance with these requirements, the FHA authorizes the Government to bring civil actions to seek injunctive and equitable relief. *See* 42 U.S.C. § 3614. The FHA also authorizes the Government to seek civil penalties and compensatory and punitive damages on behalf of aggrieved persons.² *See id.*; *see generally United States v. Shanrie Co., Inc.*, 669 F. Supp. 2d 932 (S.D. Ill. 2009).

In this District, the Government has in recent years filed and settled ten other cases to enforce the FHA's accessible design and construction requirements.³ Further, the Government had sought, and obtained, preliminary injunctive relief to ensure compliance where, as here, a developer that had allegedly constructed rental properties with inaccessible conditions in the past also was actively engaged in building other rental properties. *See* Consent Order of Preliminary Injunction in *United States v. The Durst Organization*, 14 Civ. 2698 (RA) [Dkt. 49]; *see generally United States v. Edward Rose & Sons*, 384 F.3d 258, 261-65 (6th Cir. 2004) (upholding entry of preliminary injunction against developer of a rental property with a primary entrance that did not comport with the FHA's accessibility requirements).

II. The Government's Allegations and Terms of the Consent Injunction

The Complaint in this case alleges that GDC recently constructed two rental complexes, called Parkside and Riverside, in Haverstraw, New York and that both properties fail to comply with the FHA's accessibility requirements in a number of respects. *See* Complaint ¶¶ 11–15. The Complaint further alleges that GDC currently is in the process of designing or constructing other rental complexes in Westchester County and that, absent injunctive relief, those rental complexes, when completed, will likely not be accessible.⁴ *Id.* ¶¶ 10, 16–17.

Prior to filing suit, the Government notified GDC of its investigation, and the parties engaged in extensive negotiations over how to ensure FHA compliance at GDC's ongoing constructions. Those negotiations led to agreement on the terms of the Consent Injunction, which the Government and GDC have both executed.

² Under the FHA, "aggrieved persons" themselves also can commence civil actions based on violations of the FHA's accessibility requirements to obtain actual and punitive damages, injunctive relief, and costs and fees. *See* 42 U.S.C. § 3613.

³ These cases are: *United States v. CVP I, et al.*, 08 Civ. 7194 (SHS) (consent decree entered on October 15, 2010); *United States v. L&M 93rd Street LLC, et al.*, 10 Civ. 7495 (RMB) (consent decree entered on July 22, 2011); *United States v. Larkspur, LLC, et al.*, 11 Civ. 6321 (DAB) (consent decrees entered on October 5, 2011 and January 26, 2012); *United States v. 475 Ninth Avenue Associates LLC, et al.*, 12 Civ. 4174 (JMF) (consent decree entered May 25, 2012); *United States v. 2 Gold LLC, et al.*, 13 Civ. 2679 (RPP) (consent decrees entered April 24, 2013 and June 5, 2014); *United States v. The John Buck Company, LLC, et al.*, 13 Civ. 2678 (LGS) (consent decree entered June 11, 2013); *United States v. Tower 31, LLC, et al.*, 14 Civ. 6066 (AJN) (consent decree entered August 11, 2014); *United States v. Related Companies, et al.*, 14 Civ. 1826 (SAS) (consent decrees entered December 10, 2014 and February 4, 2015); *United States v. The Durst Organization, Inc., et al.*, 14 Civ. 2698 (RA) (consent decrees entered November 13, 2015 and February 29, 2016); *United States v. Glenwood Management, et al.*, 16 Civ. 836 (JPO) (consent decrees entered February 11 and May 18, 2016).

⁴ The four rental complexes being developed by GDC are (i) Saw Mill Lofts in Hastings-on Hudson, (ii) Harbor Square Crossings in Ossining, and (iii) 1177 Warburton Avenue and (iv) River Tides in Yonkers (collectively, "GDC's ongoing constructions").

At the outset, the Consent Injunction requires GDC to comply with the FHA's accessible design and construction requirements on an ongoing basis and to retain Dominic Marinelli, an experienced accessibility consultant, as the "FHA Reviewer" for GDC's four ongoing constructions. *See* Consent Injunction ¶¶ 1–2. The Consent Injunction then establishes three mechanisms for ensuring compliance with the FHA's accessibility requirements — *first*, the FHA Reviewer will analyze the design documents for each of GDC's ongoing constructions and make recommendations about what, if any, designs need to be modified, *see id.* ¶¶ 3–6; *second*, and prior to completion of construction at each building, the FHA reviewer will conduct site visits "to identify any construction issues [resulting] in conditions that fail to comply with the FHA Guidelines and [] recommend appropriate solutions," *id.* ¶ 10; *finally*, the Government will be in a position to monitor compliance by being notified if GDC deviates from the FHA Reviewer's recommendations, having access to design and construction records, and being able to verify compliance through other means available to the public, *see id.* ¶¶ 7–8, 11, 14.

III. The Consent Injunction Should Be Approved

The proposed Consent Injunction should be approved for several reasons. First, it furthers the FHA's objective, which is to mandate "basic features of accessibility" at all properties covered by the Act. *See* H.R. Rep. No. 100-711, at 26-27. Specifically, and as summarized above, the Consent Injunction will create a structure that incorporates review, inspection, and monitoring to ensure compliance with the FHA's accessibility requirements.

Second, entry of the Consent Injunction will result in prompt action by GDC to address any compliance issues at its ongoing constructions and obviate the need for litigation or a preliminary injunction hearing. This outcome is "highly favored" in FHA cases because it encourages "cooperation and voluntary compliance," limits litigation costs, and reduces the burden on judicial resources. *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 358–59 (E.D.N.Y. 1982); *see also Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (recognizing "a clear policy in favor of [] settlements" in FHA cases).

Finally, the Court can presume the fairness of the proposed resolution because it is the product of arms' length negotiations among experienced counsel. *See In re: IPO Sec. Litig.*, 671 F. Supp. 2d 467, 480–81 (S.D.N.Y. 2009).

IV. The Parties' Ongoing Negotiations and Request to Adjourn the Deadline for GDC to Answer and to Delay Scheduling an Initial Status Conference

Beyond the ongoing constructions, the parties have also engaged in settlement discussions regarding a potential overall resolution of this case. Specifically, the parties have agreed that an inspector, who was retained by GDC and approved by the Government, will be conducting a full inspection of both the Parkside and the Riverside complexes in Haverstraw in late September or early October. The findings from that inspection will help the parties determine the scope of retrofits that need to be made at the two properties.

At the same time, counsel the Government and GDC will continue discussions regarding the other elements of an overall resolution. Those include, among other things, what changes GDC should make to its policies and practices, what education and training GDC should provide to its staff, how to compensate aggrieved persons, and the civil penalty amount.

We are hopeful that the parties, through diligent efforts, will be able to agree on the terms of an overall resolution by the end of the year. Accordingly, we respectfully request that the Court (i) adjourn GDC's time to answer by 60 days from November 18, 2016,⁵ to January 17, 2017; and (ii) postpone scheduling an initial status conference in this matter. In the meantime, we plan to update the Court by November 21 regarding the status of the parties' negotiations.

* * *

For the reasons set forth above, we respectfully request that the Court approve that Consent Injunction, adjourn GDC's time to answer by 60 days, and adjourn an initial status conference. We thank the Court for its consideration of this letter and the enclosed papers.

Respectfully submitted,

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Encl.

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⁵ On September 19, the Government requested, and GDC agreed to, waive service of summons. Under Rule 12(a)(1)(A)(ii), GDC's answer is due 60 days after September 19, *i.e.*, November 18, 2016.