

NO. A12-2078

State of Minnesota
In Supreme Court

Housing and Redevelopment Authority of Duluth,
Appellant,

vs.

Brian Lee,
Respondent.

**BRIEF AND APPENDIX OF AMICUS CURIAE
MINNESOTA NAHRO**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF AMICUS CURIAE¹

Minnesota NAHRO is a non-profit organization created in 1955 and affiliated with the national organization known as NAHRO (National Association for Housing and Redevelopment Officials). Its members include government agencies such as the Housing and Development Authority of Duluth (the HRA), Appellant herein. Members also include non-profit agencies, private businesses and vendors. Like Appellant, Minnesota NAHRO members own and/or manage housing units assisted under the various federally subsidized housing assistance programs, including the Low Income Public Housing Program, the Section 8 programs, and multiple other federal housing programs. Minnesota NAHRO members have a direct interest in the viability and economic sustainability of the federally assisted housing they provide, particularly during times of fiscal cutbacks and restraints. Members also have a duty to follow the mandates and guidance of the federal housing assistance programs in which they participate and through which they provide safe and affordable housing to thousands of low-income Minnesota residents. As an organization, Minnesota NAHRO is dedicated to promoting laws and regulations that strengthen the ability of its members to continue to provide a

¹ Counsel certifies that this Brief was authored in whole by the listed counsel for Amicus Curiae. No person or entity other than Amicus Curiae made any monetary contribution to the preparation or submission of the Brief. The Brief is filed on behalf of Minnesota NAHRO, which was granted to leave to participate as Amicus by this Court's Order dated October 4, 2013..

critical resource to Minnesota and its low-income residents. That includes the ability to foster financially stable housing communities.

A basic and important responsibility of any tenant is the timely payment of rent. The United States Department of Housing and Urban Development (HUD) expects Public Housing Authorities (PHAs) and landlords who participate in its housing assistance programs to enforce the important and material terms of their leases with all tenants. One of the most fundamental obligations of a tenant is to pay the rent. Landlords must have an effective tool to enforce that obligation. By enacting Minn. Stat. § 504B.177(b), the Minnesota Legislature recognized the unique position of landlords participating in certain federally subsidized housing programs by permitting those landlords to impose late fees that comply with applicable federal laws, regulations or guidance rather than the 8% limit placed on late fees by Minn. Stat. § 504B.177(a). Minnesota NAHRO respectfully requests that this Court preserve that important tool by reversing the decision of the Court of Appeals in this case.

STATEMENT OF CASE AND STATEMENT OF FACTS

The parties have set forth the facts in detail, and they are not in dispute. The Respondent, Brian Lee, rents a housing unit from Appellant, the HRA. The unit is funded under the federal Low Income Public Housing Program. Under that program, the rent paid by Mr. Lee is determined based upon his income. Because Mr. Lee's only income is General Assistance of \$203.00 per month, his monthly rent was only \$50.00. The remainder of the cost of the unit is received from HUD in the form of an operating subsidy.

The Duluth HRA established a late fee \$25 that was imposed if a tenant did not pay his or her rent and any other charges that are due on or before the 5th day of the month.

When Mr. Lee fell behind on certain payments, the late fee was imposed and the HRA ultimately filed an eviction action. Mr. Lee challenged the eviction action, alleging that the late fee imposed by the HRA violated Minn. Stat. § 504B.177(a).

The issue in this case is whether the Court of Appeals was correct when it held that the HRA's \$25.00 late fee was impermissible because it violated Minn. Stat. §504B.177(a).

ARGUMENT

I. Minn. Stat. § 504B.177 permits a federally subsidized landlord to charge a late fee that complies with applicable federal laws, regulations and handbooks.

Minn. Stat. § 504B.177, the statute at issue in this case, provides:

(a) A landlord of a residential building may not charge a late fee if the rent is paid after the due date, unless the tenant and landlord have agreed in writing that a late fee may be imposed. The agreement must specify when the late fee will be imposed. In no case may the late fee exceed eight percent of the overdue rent payment. Any late fee charged or collected is not considered to be either interest or liquidated damages. For purposes of this paragraph, the "due date" does not include a date, earlier than the date contained in the written or oral lease by which, if the rent is paid, the tenant earns a discount.

(b) Notwithstanding paragraph (a), if a federal statute, regulation, or handbook permitting late fees for a tenancy subsidized under a federal program conflicts with paragraph (a), then the landlord may publish and implement a late payment fee schedule that complies with the federal statute, regulation, or handbook.

The statute was adopted in 2010 and amended in 2012².

² The parties have apparently agreed that the 2012 amendment does not impact the outcome of this case, and appear to have consistently referred to the 2012 version of the statute throughout this litigation.

Mr. Lee's unit is funded under the federal Low Income Public Housing Program. Under that program, the rent paid by a tenant is determined based upon the tenant's income. Because Mr. Lee's only income is General Assistance of \$203.00 per month, his monthly rent was only \$50.00. The HRA received the remainder of the cost of providing the housing through funding from HUD.

The Duluth HRA established a late fee of \$25.00 per month in the event that a tenant does not pay their rent and any other charges that are due on or before the 5th day of the month. In doing so, the HRA relied upon federal regulations that permit a PHA to charge a late fee, 24 C.F.R. §966.4(b)(3), and the Public Housing Occupancy Guidebook direction that "Lease provisions, taken as a whole, should be "reasonable" according to their plain meaning." Appellant's App. p. 61. Additionally, HUD's Model Lease for the Public Housing Program provides for the imposition of a late fee of \$1.00 per day for the overdue rent or other charges, which would result in a possible late fee of between \$28 and \$31 month. Appellant's App. p. 80.

If Mr. Lee's late fee is limited to 8% of the overdue rent amount, as required by the Court of Appeals, the late fee would be only \$4.00. That fee is insufficient to provide a meaningful incentive for a tenant to pay on time, and does not begin to compensate the landlord for the costs incurred by the late payment of rent.

In its decision, the Court of Appeals failed to recognize the clear and reasonable distinction established by the Minnesota Legislature when it passed, and then amended, Minn. Stat. § 504B.177, and in particular the provisions contained in Section (b). There is a sound public policy basis for the inclusion of Section (b) in the statute governing a residential landlord's ability to impose and collect late fees in the event a tenant fails to pay their rent in compliance with their lease agreement. While this case involved a tenancy assisted under the federal Public Housing Program, there are a significant number of other federally subsidized housing programs governed by the statute and impacted by the ruling in this case. Additional subsidy programs³ include but are not limited to, Section 8 Project Based Assistance, the Section 8 Housing Choice Voucher Program, the Section 221(d)(3)BMIR program, the Section 236 Program, the Section 231 Program, several programs under Section 202, Rural Housing Section 515 Properties and various tax credit programs.

In general, the housing programs are income-based, and provide reduced or subsidized rent as a function of the various federal housing programs. A common feature of all of the programs, however, is that a tenant pays less than the fair market rent

³ There are some federally subsidized housing programs that do not permit the imposition of *any* late fees. The Court of Appeals decision provides landlords the worst of all possible worlds: unable to impose late fees as permitted by some federal programs, but continuing to be subject to prohibitions against late fees with respect to other programs.

(FMR) for their unit, either at a fixed rate that is below the FMR or at an amount determined by the tenant's income. In return, the landlord receives financing through specific federal programs when the project is constructed or renovated, or receives a monthly subsidy amount from HUD or a PHA. In every instance, the landlord relies on the collection of rent to ensure the on-going economic viability of the housing project. The availability of financially stable affordable housing provides a significant and important community resource.

In addition to the Public Housing Program (as discussed *infra*), other federally subsidized housing programs permit the imposition of similar late fees in the event that a tenant does not pay their rent when it is due. For example, HUD Handbook 4350.3 [Occupancy Requirements of Subsidized Multifamily Housing Programs] provides that in specific programs:

Owners may assess a charge if the tenant has been given at least 5 calendar days as a grace period to pay the rent. The rent must be received by the 5th day, not postmarked by then.

On the sixth day, the owner may charge a fee, not to exceed \$5 for the period of the first through fifth day that the rent is not paid. Additionally, the owner may charge a fee of \$1 per day for each additional day the rent remains unpaid for the month.

HUD Handbook 4350.3, Part 6-23. [Emphasis in original]. Amicus App. pp. 32-33. Thus, multiple federally assisted housing programs that permit a late fee that exceeds the 8% cap contained in Minn. Stat. § 504B.177 (a).

Landlords must be given effective and efficient tools to enforce the provisions of their leases; the imposition of a meaningful late fee in order to encourage the full and prompt payment of rent is one of those tools.

Importantly, the tenant is able to avoid the imposition of a late fee by simply paying his or her portion of the rent on time. This is especially relevant in circumstances under which the rent is specifically determined to be affordable to the tenant, based on his or her income. Thus, HUD has determined that the rent is reasonable and affordable to a specific tenant with a specific income. While the housing participants have limited income, Congress and HUD expect those tenants to make their rental payments when due, and expect their landlords to take the necessary steps to collect the rents on a timely basis and any tenant may avoid the imposition of a late fee by paying the rent on time.

II. Minn. Stat. § 504B.177 should be interpreted to give effect to all of its provisions.

It is well-settled that “whenever possible, a statute should be interpreted to give effect to all of its provisions,” *Am. Family Ins. Group v. Schroedl*, 616 NW2d 273, 277

(Minn. 2000) and “no word, phrase, or sentence should be deemed superfluous, void or insignificant.” *Id.* [internal citations omitted].

The Court of Appeals’ decision has the effect of making Section (b) of Minn. Stat. §504B.177 meaningless. If the late fee in federally subsidized housing cannot exceed 8%, even if another amount is permitted by the federal laws, regulations or handbooks applicable to the federal housing program, Section (b) has no effect. Under the terms of the Court of Appeals decision, every late fee charge in Minnesota is limited to 8% of the amount due, regardless of whether a greater fee is permitted by applicable program rules or guidelines. Therefore, there would be no instance in which Section (b) would apply and it would be without application and of no effect.

In the instant case, the Court of Appeals did not interpret Minn. Stat. § 504B.177 to give effect to all of its provisions. Instead, the Court erroneously ignored the clear provisions of Section (b) of the statute, which provides an alternative calculation of the amount of the late fee in instances where the regulations or guidelines governing federally assisted housing permit an alternate calculation⁴.

⁴ The Court of Appeals held that the word “conflicts” should be analyzed using restrictive federal conflict preemption principles; Minnesota NAHRO concurs with the HRA’s argument that the appropriate analysis would give the term its “common” meaning. *See, State v. Rick*, 835 N.W.2d 478 (Minn. 2013).

Collection of appropriate late fees is an important tool for PHAs and other landlords administering housing subsidized by the federal government. While tenants pay rents that have been determined “affordable” considering their income, those tenants are expected to act responsibly and to pay the rent that is charged in a timely manner.

Congress expects PHAs to collect the rents owed. In the United States Housing Act of 1937, it required “the establishment of satisfactory procedures designed to assure the prompt payment and collection of rents...” by PHAs administering federal housing programs. 42 U.S.C. § 1437d(c)(5)(B).

Additionally, Congress recognized the need for rental income to PHAs, as well as the need to require financial responsibility from recipients of housing assistance, when, beginning in 2000, it required PHAs to adopt “minimum rent” amounts for public housing residents and participants assisted under the Section 8 program. See, 42 U.S.C. § 1437a(a)(3); 24 C.F.R. § 5.630. While federally-assisted housing is affordable housing, it is clearly Congress’ intent that those receiving assistance contribute toward their housing costs in a responsible and timely manner. The ability to impose a meaningful late fee in instances where a tenant fails to meet that obligation is an important tool to assist PHAs and landlords in effectively providing affordable housing.

III. If the language of Minn. Stat. § 504B.177 (b) is found to be ambiguous, the Legislative history is clear that the 8% cap on late fees does not apply to federally subsidized housing.

“The objective of statutory interpretation is to ascertain and effectuate the Legislature’s intent.” *City of Brainerd v. Brainerd Invs. P’ship*, 827 N.W.2d 752, 755 (Minn. 2013). According to Minn. Stat. § 645.16,

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

The intent of the Minnesota Legislature when it amended Minn. Stat. § 504B.177

(b) was clear:

There were a number of changes last year to the state landlord tenant laws. They were highly negotiated between all interested parties, Housing Finance, Legal Aid, the Multi-Housing Association. We limited the late fees that landlords can charge and an issue arose in the area of subsidized housing where you might have a tenant, because their housing is subsidized, was only paying 20, 30 or 50 bucks a month for their housing and 8% of that as a late fee really doesn’t become much of a deterrent to not paying even their limited rent. There are federal regulations around these programs as well, so this would allow for the late fee to reflect the standards in the federal programs that govern the subsidized housing.

Transcript, Minn. House File 1515 (April 27, 2011). Appellant's App. p. 44. The Legislature recognized that the limitation of late fees to 8% of overdue rent was not a sufficient deterrent to protect a landlord participating in a federally subsidized housing program, and provided that such landlord could instead follow the requirements of the applicable federal housing programs. Based upon the clearly stated intent, the statute should be interpreted to permit a landlord participating in a federally subsidized housing program to impose late fees as permitted by that program, and not subject to the 8% cap.

IV. The \$25 late fee imposed by the HRA is reasonable.

The \$25.00 late fee imposed by the HRA is reasonable under the circumstances. It is less than the \$1/day late fee suggested in HUD's Model Lease for the Public Housing Program. It is less than Mr. Lee would have been charged if the Fair Market Rent for his unit--\$545.00 [See, Appellant's App. p. 95] was considered, as that would result in a late fee of \$43.60.

While the Court of Appeals determined the \$25.00 late fee to be unreasonable when compared to the amount of Mr. Lee's monthly rent, that analysis is misplaced. Late fees in rental agreements have traditionally been analyzed as liquidated damages. See, *606 Vandalia P'hip v. JLT Mobil Building L.P.*, 2000 WL 462988 (Minn. Ct. App. 2000). Provisions for liquidated damages are "prima facie valid" on the assumption that the

parties “intended the amount to be fair compensation for the injury caused by the breach of contract” and not a penalty. *Gorco Constr. Co. v. Stein*, 256 Minn. 476, 481, 99 N.W.2d 69, 74 (1959). The “controlling factor” is whether the amount is “reasonable in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances.” *Id* at 482.

While it may be tempting to consider the late payment of rent as a “minor inconvenience” for landlords, that is not the case. In the event that a tenant fails to pay his/her rent in a timely manner, the housing project does not receive the money it is expecting as revenue to fund its operation. The landlord is forced to spend staff time and resources attempting to obtain payment from the tenant. Any late fee must be of sufficient size to provide a meaningful incentive for the tenant to pay on time. Thus, the late fee as imposed by the HRA was a reasonable amount considering the cost to the landlord of his failure to make his rental payment when due.

CONCLUSION

This appeal raises significant and important issues for the landlords that provide critical affordable housing to low income residents of Minnesota. The decision by the Court of Appeals has deprived landlords who participate in federally subsidized housing programs of the ability to impose late fees that are sufficient in scope to provide a

meaningful incentive to encourage tenants to make rental payments in a timely manner and to compensate the landlord for some of the costs that are incurred when the tenant fails to do so. Minnesota NAHRO respectfully requests that the Court of Appeals' decision be reversed.

Dated: October 24, 2013

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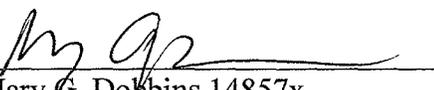
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App. P. 132.02 subds. 1 and 3 for a brief produced with proportional font. The length of this brief is 3187 words. This brief was prepared using Microsoft Word 2007.

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