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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HEIDI COOPER, on behalf of herself and all others similarly situated, Appellant, v. EAGLE POINTE ICG, LLC, a Washington limited liability company, and SECURITY PROPERTIES RESIDENTIAL, LLC, a Washington corporation, Respondents.	)	No. 39596-1-III UNPUBLISHED OPINION

STAAB, J. — Security Properties Residential, LLC, owns Eagle Pointe Apartments, which rents solely to low-income tenants under two low income rental assistance programs. Under the first program, Security Properties rents to tenants who qualify for the Housing Choice "Voucher Program," also called "Section 8" housing. These tenants receive a voucher to subsidize a portion of their rent. Security Properties also rents to tenants under the Low-Income Housing "Tax Credit Program," a program authorized by "Section 42" of the Internal Revenue Code of 1986. This program provides an income tax credit to the owners of real property who rent residential units to qualified tenants at a

reduced rental rate. It is undisputed that Eagle Pointe charges different rental rates to tenants through the two programs.

Heidi Cooper is a tenant at Eagle Pointe who receives rental assistance through the Voucher Program. When she discovered that Security Properties charges different rental rates to tenants in the Tax Credit Program, she sued claiming source of income discrimination in violation of the Residential Landlord Tenant Act (RLTA), RCW 59.18.255. As a putative class action representative, she sought statutory damages and attorney fees. The trial court dismissed her claims on summary judgment and Ms. Cooper appeals.

Under different circumstances, evidence that tenants in the Voucher Program are charged a different rate of rent than eligible tenants whose source of income is not protected might be enough to raise a genuine issue of material fact concerning source of income discrimination. But in this case, it is undisputed that all of the non-voucher tenants at Eagle Pointe Apartments participate in the Low-Income Housing Tax Credit Program, which sets their reduced rent. While the Voucher Program qualifies as Ms. Cooper's source of income, the Tax Credit Program does not qualify as a source of income to the tenants in that program.

Security Properties produced evidence that it sets each tenant's rent according to the rules and regulations of the program in which the tenant participates. Ms. Cooper counters that the rules of each program do not prevent landlords from lowering the rent

charged to tenants in the Voucher Program so that it equals the lower rents paid by tenants in the Tax Credit Program. While Ms. Cooper is correct, her argument misses the point.

The RLTA does not require all rents to be equal. Instead, it prohibits a disfavorable distinction in rent against a tenant based on that tenant's source of income. Here, Ms. Cooper's rent was set at or below fair market value according to the rules and regulations of the Voucher Program. Security Properties charged the tenants in the Tax Credit Program a lower rent because it received a tax credit for doing so. In other words, the difference in rent is based on tax credits to Security Properties, it is not based on Ms. Cooper's participation in the Voucher Program. This distinction is not prohibited by RCW 59.18.255. Therefore, the trial court did not err in granting summary judgment and dismissing Ms. Cooper's complaint.

BACKGROUND

Security Properties has owned Eagle Pointe Apartments in Spokane since 2017. All of the apartments at Eagle Pointe are rented to low-income tenants who qualify for one of two federal programs: the Low-Income Housing Tax Credit Program under Section 42 of the Internal Revenue Code, or the Section 8 housing. It is undisputed that tenants in the Tax Credit Program are charged a lower rental rate than tenants in the Voucher Program. Regardless of the program, all rental rates at Eagle Pointe are below fair market value.

Ms. Cooper has been a tenant at Eagle Pointe since approximately August 2014. For the entirety of her tenancy Ms. Cooper has participated in the Voucher Program. This program is administered by the Spokane Housing Authority.

In September 2018, Ms. Cooper sent an email to the Housing Authority inquiring into a notice she received from Eagle Pointe about an increase in her rent that had been authorized by the Housing Authority. She asked, "I guess I am curious if I can be charged more simply because I have financial help (section 8)." Clerk's Papers (CP) at 1009. The Housing Authority responded that it was its policy to require landlords "to submit a request for a rent increase in writing to [its] inspection team no later than 60 days before it takes effect." CP at 1007.

Five months later, Ms. Cooper sent another email to the Housing Authority asking whether they had any procedure to correct the higher amount of rent that she was charged for participating in the voucher program as opposed to tenants who did not participate in the program. The Housing Authority directed her to contact the Tenants Union of Washington State to assist her in looking into the issue.

Ms. Cooper also sent an email to Eagle Pointe stating her concern. She worried that, as her income increased, she would eventually be required to pay the full rent rate under the Voucher Program, which was higher than the rent charged to non-voucher tenants. Other than the conversation Ms. Cooper's email references with an Eagle Pointe

property manager, the record does not show that Eagle Pointe responded to Ms. Cooper's concerns.

On January 30, 2020, Ms. Cooper emailed Eagle Pointe property management inquiring on behalf of a friend about the rent rate for a prospective tenant with and without the Voucher Program. Eagle Pointe property management responded with two different rates: for a two-bedroom apartment the rental rate was $874 per month with a voucher and $834 per month without a voucher. For a three-bedroom apartment, the rent was $1,190 per month with a voucher, and $943 per month without a voucher. The property manager further explained that the Housing Authority calculated the tenant's portion of the rent, and that it varied with every tenant based on their household income. In February 2020, Ms. Cooper informed Eagle Pointe that she intended to report them to the local housing authorities due to the higher rent charged to tenants with a voucher, such as herself.

In August 2020, Ms. Cooper filed a class action lawsuit, on behalf of herself and others similarly situated, against Security Properties Residential, LLC, and Eagle Pointe ICG, LLC for discriminating against tenants based on their source of income, in violation of Washington's RLTA, specifically RCW 59.18.255(1)(c). Ms. Cooper alleged Security Properties quoted and charged higher rental rates to tenants participating in certain low-income housing programs than to those participating in other low-income programs or no program at all.

The trial court granted Security Properties' motion for summary judgment and dismissed Ms. Cooper's complaint. The court determined that, as a matter of law, Security Properties did not discriminate against its tenants or prospective tenants based on the housing program they participated in, "especially in light of the Eagle Pointe Apartments only offering housing to those who participate in low-income housing programs." CP at 1036. Further, it concluded Ms. Cooper failed to present evidence that Security Properties discriminated against similarly situated tenants or prospective tenants.

Ms. Cooper now appeals.

BACKGROUND ON RENTAL ASSISTANCE PROGRAMS

Before considering the specific issues raised in this case, it is important to understand the two rental assistance programs that benefit tenants at Eagle Pointe Apartments.

A. Low-Income Tax Credit Program: 26 U.S.C. § 42

The Section 42 housing is a property based tax benefit program that incentivizes private landlords to provide low-income housing. 26 U.S.C. § 42; *see* CP at 92. The statute "provides substantial federal income tax credits as an incentive for developers to construct and operate housing for low-income families." *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 644, 576 S.E.2d 316 (2003).

Under the tax credit program, a property must meet one of the two federal standards to receive a benefit: at least 40 percent of the units must be rented to tenants

with a household income of 60 percent or less of the area's median income, or 20 percent of the units must be rented to tenants with a household income of 50 percent or less of the area's median income. 26 U.S.C. § 42. Landlords agree to charge lower rent for tax credit units in exchange for tax credits. *Id.* "Generally, a resident's rent plus the utilities s/he pays for his or her unit must not exceed approximately 30% of Household income." CP at 90.

The program is not a source of income to the tenant. Instead, tenants who qualify for the program are third-party beneficiaries of the tax credit provided to property owners. A tenant is eligible to rent a tax credit unit only if their household income is 60 percent or below the area's median income. 26 U.S.C. § 42.

"Public agencies within each state administer the program and allocate the available federal and state tax credits." *Greens of Pine Glen*, 356 N.C. at 644. Per the declaration provided by Security Properties' Regional Manager, the Washington State Housing Finance Commission (WSHFC) administers the program in Washington. *See* CP at 91-93. The income limits and maximum rent that landlords can charge each year for tax credit tenants are set by the federal program and published by WSHFC.

> The total rent payable by the tenant is calculated by taking the gross rent amount that is provided to us, subtracting the utility allowance which is set by HUD and which the tenant pays directly to the utility provider, and then the different [sic] is the maximum chargeable rent that we can charge for a unit under the 24 Section 42 requirements.

CP at 92.

Although landlords cannot set rents higher than the maximum allowed under the federal program in order to receive the tax credits, Security Properties concedes they have discretion to charge less than the maximum rent set by the federal program if the market will not support the maximum rent rate and they cannot fill all of their apartments. To determine what the market in Spokane County can and cannot support, Security Properties compares rent rates and occupancy levels at other low-income and conventional rental properties in the area. Based on the reports, Security Properties can set rent for tax credit units at less than the maximum rent rate set by the federal program. In 2019 and 2020, it continued to charge the 2018 rate plus a $25 increase based on the local economy.

B. Housing Choice Voucher Program: 42 U.S.C. § 1437f

The Housing Choice Voucher Program, commonly known as Section 8, provides tenant-based rental assistance to low-income households in the form of vouchers. 42 U.S.C. § 1437f; 24 C.F.R. § 982.1. "Congress created the Housing Choice Voucher Program to 'aid [ ] low-income families in obtaining a decent place to live' and to 'promot[e] economically mixed housing.'" *Austin Apt. Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 889 (W.D. Tex. Feb. 27, 2015) (quoting 42 U.S.C. § 1437f (a)). The program is administered by state or local agencies called public housing agencies, which must comply with federal guidelines concerning housing quality standards and rent

limitations. 24 C.F.R. §§ 982.1, 982.52; *see* CP at 73. The United States Department of Housing and Urban Development (HUD) provides funds for housing and funds to administer the program directly to the public housing agencies "so eligible families can afford decent, safe, and sanitary housing." 24 C.F.R. § 982.1(a)(1).

Unlike a tax credit, the voucher subsidy is a benefit to the individual tenant rather than the unit or property. 24 C.F.R. § 982.1(b)(1). The public housing agencies determine whether individuals are eligible to receive a voucher. *Id.* at § 982.201. Once approved, tenants in the voucher program can choose any privately owned housing that meets certain program requirements and provides rent within specified limits. *Id.* at §§ 982.302(a), 982.1(b)(2). When a tenant finds a qualifying unit, the public housing agency negotiates with the landlord to determine a reasonable rent, and enters into a contract specifying the maximum monthly rent the landlord may charge. 42 U.S.C. § 1437f(c); *see* 24 C.F.R. §§ 982.1(a)(2), 982.507(a). Further, the public housing agency must approve and deem the rent reasonable any time a landowner wishes to increase rent. "At all times during the assisted tenancy, the rent to owner may not exceed the reasonable rent as most recently determined or redetermined by the [public housing agency]." 24 C.F.R. § 982.507(a)(4).

i. Housing Choice Voucher rent reasonableness in tax credit covered units

Reasonable rent is defined as a rent rate to the landowner "that is not more than rent charged: (1) For comparable units in the private unassisted market; and (2) For

comparable unassisted units in the premises." 24 C.F.R. § 982.4. The public housing agency's reasonableness calculation for tenants with vouchers looking to rent units that are also covered by tax credit is governed by 24 C.F.R. § 982.507(c). Under this regulation, a rent comparison is not required if the voucher rent does not exceed the rent for the tax credit units not occupied by the voucher program participants. 24 C.F.R. § 982.507(c)(1). If the rent for voucher recipients exceeds the tax credit rent, the maximum reasonable rent that can be charged a voucher participant is based on a comparability study and cannot exceed the lesser of the "(i) Reasonable rent as determined pursuant to a rent comparability study; and (ii) The payment standard established by the [public housing agency] for the unit size involved." 24 C.F.R. § 982.507(c)(2).

Here, because all of the Eagle Pointe apartments are also covered by the tax credit program, the maximum rent that can be charged to a voucher participant is either the same rate as tax credit units or, if greater than a tax credit unit, the lesser of the reasonable rate of comparable units based on a comparability study or established by the public housing agency for the unit size involved.

ii. Housing Choice Voucher tenant proportionate rent

Once a contract between the public housing agency and the landowner is formed, the public housing agency will make payments to the landowner on behalf of the tenant. 42 U.S.C. § 1437f(c). A tenant may not pay a landowner more than the rent amount charged minus the public housing agency subsidy payment to the landowner. 24 C.F.R. §

982.451(b)(4). "The amount of the monthly housing assistance payment by the [public housing agency] to the owner is determined by the [public housing agency] in accordance with HUD regulations and other requirements." *Id*. at § 982.451(b)(1). The calculation of the subsidy that the public housing agency must pay on behalf of a participating tenant is laid out in an extensive set of statutes and regulations. *See* 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.501-.521.

Every year, HUD releases the fair market rents for different geographic regions. 24 C.F.R. § 982.503. The fair market rents are determined by the area's rental market conditions, and are relied on to determine the subsidy amount provided to each voucher program participant. 24 C.F.R. § 982.503. The public housing agency uses the fair market rent to establish local "payment standard" for the geographical areas within its jurisdiction. 24 C.F.R. § 982.503(c)(1). The payment standard is the maximum monthly subsidy amount a public housing agency will pay for a specific type of apartment within the area. 24 C.F.R. §§ 982.503(b), 982.505(a). The payment standard is generally set between 90 percent and 110 percent of the fair market rent for that area. 42 U.S.C. § 1437f(o)(1)(B), 24 C.F.R. § 982.503(a)(1)(i).

Tenants under the program generally must contribute 30 percent of their monthly income, unless an exception applies allowing them to pay less. 42 U.S.C. § 1437f(o)(2)(A). Depending on the situation of the tenant, they may be exempt from paying the general minimum rent of 30 percent of their adjusted monthly income, and

may be eligible to pay a minimum rent between $0.00 and $50.00. 24 C.F.R. § 5.630; *see* CP at 76-77. However, if an apartment costs more than the payment standard, tenants are required to make a larger contribution. "Such tenants must *also* pay any amount by which their rent exceeds the established payment standard." *Nozzi v. Hous. Auth. of the City of Los Angeles*, 806 F.3d 1178, 1184-85 (9th Cir. 2015).

iii. Ms. Cooper's rent

According to Security Properties and undisputed by the parties, the Spokane Housing Authority is the local public housing agency that administers the federally funded voucher program and determines the reasonable rent rate for each voucher participant within Spokane.

Since she began renting at Eagle Pointe, Ms. Cooper's total rent has varied. In 2014, her rent was set at $820 per month. In 2020, at the time she filed this lawsuit, her total rent was set at $1,007 per month. Ms. Cooper's personal responsibility for rent beyond the voucher is based on her income, not on the total rent charged. During that same period of time, the portion of rent that Ms. Cooper was personally required to pay in addition to the voucher ranged from $0.00 to $640.00 per month.

Ms. Cooper admits that she could qualify for a reduced rent under the Section 42 tax credit program, and that if she were to chose this option her personal share of rent would actually increase. Wash. Ct. of Appeals oral argument, *Cooper v. Eagle Pointe*

ICG, LLC, No. 39596-1-III (Apr. 24, 2024), at 9 min., 54 sec. through 9 min., 55 sec. (On file with court).

ANALYSIS

We review de novo the superior court's order dismissing Ms. Cooper's complaint on summary judgment. *Lockett v. Saturno*, 21 Wn. App. 2d 216, 221, 505 P.3d 157 (2022). "Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

In order to determine if Ms. Cooper has raised a genuine issue of material fact sufficient to survive summary judgment, we must interpret the statute. Our goal in interpreting this statute is to ascertain the legislative intent. *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). We do this by first looking to the plain language of the statute. *Id.* "'When the plain language [of a statute] is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise.'" *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 696, 335 P.3d 416 (2014) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). If this inquiry leads to more than one reasonable interpretation, the statute is ambiguous. *State v. Dennis*, 191 Wn.2d 169, 172-73, 421 P.3d 944 (2018). When a statute is ambiguous, it is appropriate for this court to refer to the legislative history and other aids of statutory construction. *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012).

RCW 59.18.255(5) was passed in 2018 as part of the RLTA. *See* LAWS OF 2018, ch. 66, § 1. It was enacted to create remedies for tenants by providing protection for tenant interests vulnerable to a landlord's upper hand, "especially during times of housing shortages." *Lockett*, 21 Wn. App. 2d at 221. The purpose of the amendment was to "'ensur[e] housing options.'" *Id*. (alteration in original) (quoting LAWS OF 2018, ch. 66, § 1).

The relevant portions of RCW 59.18.255 provide:

> (1) A landlord may not, based on the source of income of an otherwise eligible . . . current tenant:
>
> . . . .
>
> (c) Make any distinction, discrimination, or restriction against a . . . current tenant in the price . . . relating to the rental . . . of real property.

"'Source of income'" includes "benefits or subsidy programs including housing assistance, public assistance . . . and other programs administered by any federal, state, local, or nonprofit entity." RCW 59.18.255(5).

To date, no court has developed the elements of a cause of action under this statute, and the parties here do not make any attempt to do so. Nor do the parties offer or suggest a framework for applying the facts to the law. Still, we must decide the preliminary question of whether Ms. Cooper has produced evidence to raise a material issue on whether she is charged a different rate of rent based on her source of income.

RCW 59.18.255(1) does not require a landlord to charge the same rent to all tenants. And it does not prevent a landlord from charging different rents when the difference is based on a legal reason apart from where a tenant obtains their income. Importantly, RCW 59.18.255(1) does not prohibit a landlord from reducing rent based on a tax credit to the landlord. Instead, the statute prohibits a landlord from making any discrimination or distinction in rent against a current tenant "based on" the source of the tenant's income, i.e., where the tenant gets their income. In other words, Ms. Cooper has to show not only that she is charged more rent than other eligible tenants, but that the reason she is charged more rent is because she receives a voucher to supplement her income.

Ms. Cooper fails to produce any evidence that she is charged more rent because she receives a voucher that is used to augment her income. The undisputed evidence is that Ms. Cooper's rent is set at or below market rate and subject to approval by the housing authority. While it is true that the rental rate charged to participants in the Tax Credit Program is different than the rent charged to Ms. Cooper, there is no evidence that this distinction is based on Ms. Cooper's source of income. Instead, it is based on a program that provides tax credits to the landlord; tax credits that do not qualify as a source of income to the tenants in that program.

Nevertheless, Ms. Cooper contends that as between her and the Section 42 tenants, she is the one paying a different rate. She does not provide any authority or reasoning to

support this position. Given the circumstances of this case, we disagree. The two programs at issue here presume that the tenants in the Voucher Program will pay rent at or near market rates, while tenants in the Tax Credit Program will pay a reduced rent. Thus, according to the regulations for each program, it is the tenants in the Tax Credit Program that pay a different rate, not Ms. Cooper.

Moreover, the difference between the two programs is not simply theoretical. By complying with the regulations from each program, Security Properties is able to sustain its business model while continuing to provide options for low-income tenants. While we do not decide the question of federal pre-emption, we note that the different rent rates charged by Security Properties are not only allowed by the two federal programs but encouraged. Indeed, there is a specific regulation that sets different rental rates when a landlord rents to tenants in both the Voucher Program as well as the Tax Credit Program. When the rent charged to a tenant in the Voucher Program is higher than the rent charged to a tenant in the Tax Credit Program, the regulations provide a specific method for determining the reasonable rent that can be charged to the tenant in the Voucher program. *See* 24 C.F.R. § 982.507(c)(2). Here, there is no evidence or allegation that the rent Security Properties charges Ms. Cooper is not reasonable according to the method established by the regulations. Allowing Security Properties to set different rents based on the rules and regulations of the two programs ensures that low-income tenants have increased housing options.

The parties disagree on whether the antidiscrimination provision in RCW 59.18.255(1) is pre-empted by federal law. However, we do not need to decide this question because it presumes a defense to a statutory violation and there is no evidence of a violation here.

We hold that Ms. Cooper has failed to meet her burden on summary judgment of producing evidence that creates a genuine issue of material fact. Instead, the undisputed evidence is that Security Properties charges a different rate to Section 42 tenants based on the tax credit Security Properties receives for doing so. This tax credit is not a source of income for any of the tenants at properties managed by Security Properties.

ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal. Ms. Cooper requests costs be awarded on appeal and the issue of attorney fees preserved on remand, without providing any justification other than her claim that Security Properties discriminated against Ms. Cooper and others similarly situated. Because she does not prevail, we deny her request for attorney fees on appeal.

Security Properties requests fees pursuant to RAP 18.9(a) for a frivolous appeal. This rule provides:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or authorized transcriptionist preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been

> harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9. Security Properties bases their argument on its assertion that federal law pre-empts the state statute. We do not find Ms. Cooper's appeal to be frivolous and exercise our discretion to deny attorney fees under this rule.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.