IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NEWBERRY-WILLIAMSPORT LP, Plaintiff	: NO.CV 2022-00904 :
Vs.	:
NAHKITA L. JOHNSON, Defendant	: CIVIL NON JURY :

OPINION AND ORDER

This matter came before the Court for a non-jury trial on June 26, 2023. Counsel for both parties stipulated to the material facts as permitted by Rule 1038.1 of the Pennsylvania Rule of Civil procedure, and seek only a legal interpretation of the operative effect of one of the lease terms. Based upon the stipulation of counsel for the parties entered in open Court, the Court enters the following findings of fact:

1. Nahkita L. Johnson (hereinafter "Johnson") is a tenant of Newberry-Williamsport Limited Partnership (hereinafter "Newberry"), pursuant to the terms of the written lease attached to the Complaint (hereinafter the "Lease").
2. Pursuant to the terms of the Lease, Johnson rents Apartment 329 at 2500 Federal Avenue, Williamsport, Pennsylvania 17701 (hereinafter the "Johnson Apartment").
3. Because Newberry is a private entity, the Johnson Apartment is not public housing.
4. The Lease includes Attachment No. 3, which contains twenty-six (26) paragraphs, including Paragraph 18, which provides that "possession of guns, firearms, (operable or inoperable), registered or unregistered . . . are not permitted in apartments, on the property grounds or any of the common areas. Possession of any of the above will result in immediate eviction."
5. The rent paid by Johnson to Newberry under the Lease is $1,095.00 per month, composed of a payment in the amount of $475.00 per month on behalf of Johnson

through the choice voucher program of the U.S, Department of Housing and Urban Development, and the balance paid directly by Johnson.

6. The Court takes judicial notice of the fact that the housing choice voucher program of the U.S, Department of Housing and Urban Development places the choice of housing in the hands of the tenant. Johnson has chosen the Johnson Apartment.
7. Johnson does not contest the allegations at Paragraph 3 of the Complaint, which alleges that Johnson was in possession of a registered handgun at the Premises on Friday, June 24, 2022, in violation of Paragraph 18 of Attachment No. 3 of the Lease.
8. Newberry seeks to evict Johnson from the Apartment upon the basis of her possession of a handgun on June 24, 2022. Newberry did not assert any other basis for eviction.
9. Johnson contends that the prohibition against possession of the handgun set forth at Paragraph 18 of Attachment No. 3 of the Lease violates her right to possess that handgun under the terms of the Second Amendment to the Constitution of the United States of America (hereinafter the "Second Amendment").
10. The Second Amendment provides that "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Issue Presented: Whether the fact that Newberry accepts 44% of Johnson's monthly rent payment under the Lease through the housing choice voucher program of the U.S. Department of Housing and Urban Development establishes governmental action for the purpose of invoking the protections of the Second Amendment.

Conclusion of Law: The fact that Newberry accepts 44% of Johnson's monthly rent payment under the Lease through the housing choice voucher program of the U.S. Department of Housing and Urban Development does not establish governmental action for the purpose of invoking the protections of the Second Amendment. The Lease is a private transaction.

Discussion: The question presented in this matter is not whether Johnson is entitled to the protections of the Second Amendment. The question presented is whether those protections are implicated in a purely private lease transaction, solely for the reason that a portion of Johnson's rent is funded through a federal government program. In the view of this Court, they are not.

At the time of the ratification of the Bill of Rights on December 15, 1791, and for over one hundred years thereafter, it was generally understood that its protections only limit action by Congress. The United States Supreme Court originally held that its protections do not apply to the states, *Barron v. Baltimore*, 32 U.S. 243, 250-251 (1833), accord *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886). That Court has consistently ruled that the protections of the Bill or Rights do not extend to purely private conduct.

> Since the decision of this Court in the *Civil Rights Cases,* 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelly v. Kraemer, 334 U.S. 1, 13(1948). Beginning in approximately 1897, the United States Supreme Court has "selectively incorporated" most (but not all) provisions of the Bill of Rights to action by state and local governments, through modern interpretation of scope of the equal protection and due process clauses of the 14th Amendment. See, *Chicago, Burlington & Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897). Within only the last fifteen years,

the United States Supreme Court extended the applicability of the Second Amendment to the District of Columbia. *See District of Columbia v. Heller,* 554 U.S. 570, (2008). Two years thereafter, that Court held that the protections contained within the Second Amendment are applicable to state and local governments. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Because of the slow evolution of selective incorporation, the issue presented in most modern constitutional jurisprudence has been whether the questioned activity is private action by an individual, or action by either a state or local government ("state action"). Johnson does not claim state action. Rather, she claims that the partial funding of her monthly rent through the housing choice voucher program of the U.S. Department of Housing and Urban Development directly implicates the protections of the Second Amendment, since HUD is an agency of the federal government. Although Johnson's claim is based upon federal rather than state action, court decisions on claims of state actin are instructive, to assist the Court in its determination of whether the HUD payments are governmental action sufficient to implicate the protections of the Second Amendment.

In the matter of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, (1961), the United State Supreme Court considered whether the actions of Eagle Coffee Shoppe, Inc. (hereinafter "Eagle"), were subject to the Equal Protection Clause of the Fourteenth Amendment. It was undisputed that the Eagle was a purely private entity, but that it operated under a lease in a parking garage structure which was owned and operated by the Wilmington Parking Authority, a governmental entity. After an exhaustive examination of the facts, the Court concluded that the mutual benefits conferred upon the Authority and Eagle under the terms Eagle's lease were of such a nature as to charge create state action.

> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that

> the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that, in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings.

365 U. S. at 724-725. In the matter of *Blum v. Yaretsky*, 457 U.S. 991, (1982), the United States Supreme Court held that state regulation of private nursing homes does not convert the administrative decision of those nursing homes into state action for purposes of the 14th Amendment. Rather, action by a private entity becomes action by the state only when the state exercises coercive power or has provided such significant encouragement that the choice must be deemed to be a decision of the state.

In the matter of *Crissman v. Dover Downs Entertainment, Inc.*, 289 F.3d 231 (3rd Cir. 2001), the United States Court of Appeals for the Third Circuit held that the exclusion of Crissman from the Dover Downs race track was not state action. Writing for the majority, Judge Rendell observed that "although little is straightforward in determining whether a private actor has acted under color of state law, one directive emerges clearly from the Supreme Court's jurisprudence: the facts are crucial." 289 F.3d at 233-234. Since "the facts are crucial" in any judicial determination of whether an action can be regarded as either purely private or the actions of government, an examination of the stipulated facts in this matter is required.

The stipulated facts do not establish any involvement by either the U.S. Department of Housing and Urban Development or the Commonwealth of Pennsylvania in the operations

conducted by Newberry. Johnson does not claim that any government entity owns, operates, or controls her the apartment building, or that any government entity had any role in her choice of apartment. The only fact which supports a finding of governmental action is that the U.S. Department of Housing and Urban Development pays less than half of Johnson's rent. In the view of this Court, that is insufficient to establish governmental action.

The Court has little doubt that the limitations contained within Paragraph 18 of Attachment No. 3 to Johnson's lease would be constitutionally infirm if contained within a lease for public housing. Paragraph 18 precludes private possession of any firearm, whether legal or not, whether operable, or not. It is difficult to imagine that any state or local government could establish a compelling interest in such a broad limitation. See, *Doe et, al. v. East St. Louis Housing Authority*, 3:18-CV-545-JPG-MAB (S.D. Ill. 2019). This is not, however, a case of public housing. Simply stated, Johnson invites this Court to conclude that HUD's agreement to pay 44% of Johnson's monthly rent has the effect of turning her lease with Newberry into the equivalent of a lease for public housing. The Court declines her invitation.

And now, this 6th day of July, 2023, for the reasons more fully set forth above, judgment in ejectment is entered in favor of Plaintiff and against the Defendant, for possession of 2500 Federal Avenue, Apt. 329, Williamsport, Pennsylvania, 17701, and costs of suit. The Court notes that the Complaint contains no demand for rent or other money damages.

By The Court,

Hon. William P. Carlucci, Judge

cc: Court Administrator
Andrea Pulizzi, Esquire
Christian A. Lovecchio, Esquire