

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HIGH PLAINS COMMUNITY)
DEVELOPMENT CORP., INC., a)
Nebraska Corporation,)
)
Plaintiff,)

Case No. 4:07CV3149

vs.)

DR. JOANN SCHAEFER, CHIEF)
MEDICAL OFFICER, DIVISION)
OF HEALTH, NEBRASKA)

**DEFENDANT SCHAEFER'S
BRIEF IN SUPPORT OF
MOTION FOR
SUMMARY JUDGMENT**

DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, in her)
Official capacity as administrator)

and)

TERRY HINN & MARILYN)
HINN HAYES, Natural Persons)

And)

HINNS MOBILE HOMES, INC.,)
A Nebraska Corporation)

Defendants.)

Defendant Dr. Joann Schaefer, Chief Medical Officer of the Division of Health of the Nebraska Department of Health and Human Services, hereby submits the following brief for the Court's consideration in support of her Motion for Summary Judgment,.

INTRODUCTION

Plaintiff, High Plains Community Development Corp., Inc., (hereinafter "High Plains"), initially filed a Complaint against defendant The Nebraska Department of

Health and Human Services Regulation and Licensure (hereinafter “Department”) pursuant to the Fair Housing Act, 42 U.S.C.A. § 3601, *et. seq.*, (hereinafter “FHA”), and the Nebraska Fair Housing Act, Neb. Rev. Stat. § 20-301, *et. seq.*, (hereinafter “NFHA”). High Plains alleged that the Department has violated the FHA and the NFHA by issuing annual permits to the owners and operators (hereinafter “Hinns”) of a mobile home park (hereinafter “Hinns Mobile”) located near the intersection of 5th and Maple streets in Chadron, Nebraska (Filing No. 21, ¶1). A Motion to Dismiss filed by the Department (Filing No. 12) and High Plains then amended their complaint (Filing No. 21), substituting as Defendant Dr. Joann Schaefer, Director and Chief Medical Officer of the Division of Health of the Nebraska Department of Health and Human Services, in her official capacity as administrator (hereinafter “Schaefer”). Schaefer then filed an Amended Motion to Dismiss (Filing No.36) which was granted in part and denied in part (Filing No. 44). Schaefer then answered the Amended Complaint (Filing No. 46).

It is alleged that mobile homes within Hinns Mobile provide substandard housing to Native Americans, and that Defendant Schaefer, as head of the Department’s Division of Health has acted with a discriminatory purpose by issuing permits to Hinns for the mobile home park.

Pursuant to the Order for Initial Progression of Case entered by the Court on August 23, 2007, the parties were given leave to conduct limited discovery on the issue of High Plains’ organizational standing to bring its FHA and NFHA claims (Filing No. 20). In this connection, the defendants collectively participated in a Rule 30(b)(6) deposition duces tecum of High Plains on December 10, 2007, limited to the standing issues raised by the parties in their Rule 26(f) report. (Filing No. 52, Ex. 2). In response

to the deposition notice, High Plains produced several documents and a deponent named Rebecca Christian (“Christian”), a Fair Housing Counselor and program coordinator at High Plains. (See Filing No. 52, Ex 1). During the deposition, Christian confirmed that she was the identified individual at High Plains with knowledge respecting each of the topics outlined in the Rule 30(b)(6) deposition duces tecum notice. (Filing No. 52, Ex. 1, 7:10-14).

Based on Christian’s testimony, the documents produced by High Plains, and the affidavits more fully described in the Index of Evidence previously filed herein as Filing No. 52¹, Schaefer has filed a Motion for Summary Judgment because High Plains lacks organizational standing to raise the claims asserted in its Amended Complaint. The evidence adduced by the parties clearly shows that High Plains cannot establish an injury-in-fact sufficient to satisfy applicable standing requirements. In fact, the uncontroverted evidence demonstrates that High Plains cannot demonstrate any palpable injuries that are fairly traceable to Schaefer.

For the reasons discussed herein, Schaefer is entitled to judgment as a matter of law on the issue of whether High Plains has organizational standing to sue and High Plains’ claims against her should be dismissed.

STATEMENT OF FACTS

As the factual basis for the Motion for Summary Judgment, Schaefer relies on the admissions contained in Christian’s deposition, the admissions contained in the parties’ pleadings, and the documents produced by High Plains, as more fully described in the

¹ Rather than make a duplicate filing of evidence in a new index of evidence, Defendant Schaefer will refer to evidence already before the Court in Filing No. 52

Index of Evidence previously filed herein as Filing No. 52. Pursuant to NELR 56.1(a), the material facts about which there is no genuine dispute are set forth below.

1. At all relevant times High Plains has been a non-profit, fair housing corporation in the Nebraska Panhandle Region. (Filing no. 1., ¶ 12).
2. High Plains is funded by the United States Department of Housing and Urban Development and the Nebraska Department of Economic Development with a mission of outreach and education about fair housing. (Filing No. 52, Ex. 1, 28:1-3; 160:16-161:3).
3. High Plains receives funding to engage in fair housing counseling education, including both public awareness and direct educational interaction with landlords and tenants. High Plains also takes complaints from individuals about fair housing issues and assists those individuals with processing their complaints with other state and federal agencies. (Filing No. 52, Ex. 1, 161:7-22).
4. At all relevant times, the Department has been an administrative agency of the State of Nebraska. One of the tasks of the Department is to issue licenses to mobile home parks operated in the State of Nebraska. (Filing no. 1, ¶ 13).
5. The Department has the authority to deny, refuse to renew, suspend, or revoke a license to operate a mobile home park if the mobile home park fails to comply with certain published standards. Neb. Rev. Stat. § 71-4631 (Filing no. 1, ¶ 14). The Department has no jurisdiction relating to the condition of the mobile homes that may be situated on the premises of a

mobile home park under the applicable statutory framework. Neb. Rev. Stat. §§71-4621 to 71-4635 (Reissue 2003).

6. Hinns Mobile Homes is a Nebraska corporation, organized and operated under the laws of Nebraska. (Filing No. 52, Ex. 5, ¶3).
7. Hinns Mobile Homes owns the real estate upon which Hinn's Mobile Home Park #2 is located. Hinns Mobile Home Park #2 is located near the intersection of 5th and Maple streets in Chadron, Nebraska. It is the mobile home park that is referenced in High Plains' Amended Complaint. (Filing No. 21, ¶¶ 16, 20; filing No. 52, Ex. 5, ¶ 3).
8. The Department, pursuant to Neb. Rev. Stat. § 71-4631, issued an operating permit to Hinns in March 2002 allowing these defendants to operate a mobile home park in Chadron, NE, and has continuously renewed this permit annually since that time. (Filing no. 1., ¶ 15).
9. The Department issued Mobile Home Park Inspection Reports dated September 19, 1995, June 1, 1995, July 24, 1996, April 24, 1996 June 12, 2002, June 19, 2002, July 2, 2003, August 5, 2003, November 14, 2003, April 13, 2004, April 14, 2004, June 16, 2005, November 8, 2005, and April 11, 2006 related to the Hinn's mobile home park in Chadron, Nebraska. These reports indicated various violations of regulatory codes set out by the Department none of which rose to the level of creating imminent peril or danger to anyone residing on the premises. (Filing no. 1., ¶ 21).

10. The Department sent defendants Hinn a series of letters between October 4, 1995 and April 20, 2006, notifying the Hinn's of violations of the regulatory code and requesting corrective action. (Filing no. 1., ¶ 22).
11. The only real estate related to the allegations of discrimination in the Amended Complaint is the mobile home park located near 5th and Maple streets in Chadron, Nebraska. In addition, the alleged discriminatory conduct asserted in the Amended Complaint relates only to a purported tenant named Leslie Lane (hereinafter "Lane"). (Filing No. 52, Ex. 1, 54:8-17, 55:1-22; 68:11-17; 105:9-106:4).
12. High Plains has had an extensive relationship with Lane on a variety of housing issues. Christian's Case Detail Report for Lane indicates that since September 14, 2006, High Plains has assisted Lane in a multitude of tenancy issues wholly unrelated to the defendants or the allegations in this case, including: (1) evictions for non-payment of rent; (2) allegations of illegal drug use on rented premises; (3) allegations of illegal drug sales on rented premises; (4) disruptive partying on rented premises; (5) frequent disruptive intoxication on rented premises; (6) frequent police calls to premises she has rented, and (7) excessive damage to premises she has rented. (Filing No. 52, Ex. 3).
13. High Plains fields complaints about housing and possible housing discrimination, but the organization does not do any investigation into the complaints and does not make a final determination as to whether any

complaint relates to discriminatory conduct. (Filing No. 52, Ex. 1, 37:6-38:7; 39:18-40:2).

14. High Plains has never refrained from referring a tenant complaint to another agency irrespective of whether staff believes the veracity of the tenant's story. (Filing No. 52, Ex. 1, 39:2-10; 98:24-99:23).
15. High Plains claims that it devoted "too much" time to Lame's case and that its reputation has been damaged as a result. (Filing No. 52, Ex. 1, 112:18-113:15).
16. High Plains is unable to identify any specific damage to its reputation caused by conduct alleged in the Amended Complaint, (filing no. 52, Ex. 1, 169:13-170:8), and, with respect to its claims about the amount of time spent with Lame, High Plains does not have any specific criteria it uses to determine whether or not a particular case has required "too much" time. (Filing No. 52, Ex. 1, 113:20-114:13).
17. High Plains produced a document entitled "Fair Housing Organization Damages Worksheet," indicating that it has expended \$4,862.20 in staff time and resources on Lame's complaint. (Filing No. 52, Ex. 4). However, High Plains cannot carve out the specific amounts of time or funds attributable to the alleged conduct in the Amended Complaint. (Filing No. 52, Ex. 1, 119:13-127:13). Much of the time she spent with Lame related to other issues she was dealing with that had nothing to do with the named defendants or their alleged discriminatory conduct (Id.).

18. High Plains does not investigate tenant complaints that it receives. (Filing No. 52, Ex. 1, 39:18-40:2).
19. When asked to specifically quantify the amount of resources High Plains spent or used to combat the discriminatory conduct alleged in the Amended Complaint, Christian responded, “I can’t.” (Filing No. 52, Ex. 1, 170:25-171:5).
20. High Plains’ injuries are speculative, conjectural, and do not establish the drain on High Plains’ resources required to prove a palpable injury-in-fact traceable to Schaefer.

ARGUMENT

The sole issue before the Court at this stage of the proceeding is whether the evidence submitted establishes organizational standing on the part of High Plains to assert the claims set forth in its Amended Complaint. Schaefer contends that there are no genuine issues of material fact which bear on essential elements necessary to prove High Plains organizational standing and the requisite injury-in-fact.

Under the Federal Rules of Civil Procedure, summary judgment should be granted when, viewing the facts and inferences in the light most favorable to the nonmoving party, “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Harder v. ACandS*, 179 F.3d 609, 612 (8th Cir. 1999). The court must look into substantive law to determine whether an element is essential to a case, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of

summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Here, Schaefer has the initial responsibility to show the Court the basis for her motion and identify those portions of “the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any,” which she believes shows the absence of a genuine issue of material fact. *Tenbarge v. Ames Taping Tool Sys., Inc.*, 128 F.3d 565, 657 (8th Cir. 1997).

The burden then shifts to High Plains to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). It may not rest upon the mere allegations or denials of its pleadings, but rather, must set forth specific facts by affidavits or other proper evidence, showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Ghane v. West*, 148 F.3d 979, 981 (8th Cir. 1998).

The elements of standing are not “mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2136, 119 L.Ed.2d 351 (1992). Thus, in order to defeat a motion for summary judgment based on the issue of standing, High Plains is required to submit “affidavits or other evidence showing through specific facts . . . that . . . it [was] ‘directly’ affected.” *Id.*, at 562. In this case, it is clear that High Plains cannot carry this burden because the evidence before the Court establishes that High Plains can produce nothing of substance to support the allegations it has set forth in

its Amended Complaint. As a result, Schaefer is entitled to judgment as a matter of law on the issue of High Plains standing to assert its discrimination claims.

A. Applicable Article III standing principles require the establishment of a distinct, palpable injury in fact to High Plains to establish organizational standing.

Article III of the Constitution limits the judicial power of the United States to the resolution of “Cases” and “Controversies,” and “ ‘Article III standing ... enforces the Constitution's case-or-controversy requirement.’ ” *Hein v. Freedom From Religion Foundation, Inc.* 127 S.Ct. 2553 (2007) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. ----, ----, 126 S.Ct. 1854, 1861, 164 L.Ed.2d 589 (2006) (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004))). “ ‘No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.’ ” *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). The “core component” of the requirement that a litigant have standing to invoke the authority of a federal court “is an essential and unchanging part of the case-or-controversy requirement of Article III.” *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854 (2006) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The requisite elements of this “core component derived directly from the Constitution” are familiar: “A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.” *Cuno*, 126 S.Ct. at 1861.

In addition to Article III standing, this Court must consider judicially imposed prudential limits on standing. *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 871, (8th Cir. 2003) (citing *Bennet v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). By imposing prudential limits on standing, “the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to litigants best suited to assert a particular claim.” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979). Thus, a plaintiff may have Article III standing but the claim may run afoul of prudential standing limits because its effects are indistinct from those felt by persons generally, thus depriving the plaintiff of a unique stake in the controversy. *Oti Kaga*, 342 F.3d at 880. A plaintiff may also run afoul of prudential standing limits because the claim rests on the legal rights of third parties, *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), or the interest, though real, may not fall within the zone of interests protected by the statutory provision invoked. *Bennet*, 520 U.S. at 162, 117 S.Ct. 1154.

While it is true that “Congress intended standing under [the Fair Housing Act] to extend to the full limits of Article III,” *Gladstone*, 441 U.S. at 103, 99 S.Ct. 1601, it has also been held that “[n]ot just any non-class class member who protests what he perceives to be a discriminatory housing policy is an ‘aggrieved person’ with standing to sue under the Fair Housing Act.” *Wasserman v. Three Seasons Ass’n No. 1, Inc.*, 998 F.Supp. 1445 (S.D.Fla., 1998). It is also true that “in deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show—depending on the stage of the proceeding—that it has devoted additional

resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement.” *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78 (3rd Cir. 1998). However, “in order to establish standing, an organization must point to a “concrete a demonstrable injury to [its] activities.” *Id.* at 79 (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C.Cir. 1990)). Further,

something more than . . . naked allegations [are] required at the summary judgment stage. “Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation.”

Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71, 76 (3rd Cir. 1998) (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136). The evidence before the court clearly establishes that High Plains cannot carry this burden.

B. Summary judgment is appropriate because High Plains cannot prove the essential elements of organizational standing as to its discrimination claim.

Numerous courts in the post-*Haven* era have rejected organizational claims where an organizational plaintiff did not establish the same degree of injury as required by Article III.

For instance, the Third Circuit has described two circumstances in which an “organization . . . may have standing to bring a suit.” *Pennsylvania Prison Soc. V. Cortes*, 508 F.3d 156, 162 (3rd Cir. 2007). “First, an organization may be granted ‘standing in its own right to seek judicial relief from injury *to itself* and to vindicate whatever rights and immunities the [organization or] association itself may enjoy.’ ” *Id.* at 163 (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975))

(emphasis added)). Second, an organization “may assert claims on behalf of its members, but only where the record shows that the organization’s *individual members themselves have standing to bring those claims.*” *Id.*; see *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 70 (3d Cir.1990).”

And while it is true that a housing organization had standing where its staff “stopped everything else” and devoted all attention to the litigation in question and diverted resources to counter the defendant’s conduct (*Alexander v. Riga*, 208 F.3d 419, 427 n. 4 (3rd Cir. 2000)), that is clearly not the case here; High Plains cannot show that it “stopped everything else” and devoted all its attention to Lane and Hinns, nor can High Plains show that it has suffered an injury to itself or its members. Further, there is no showing whatsoever that High Plains devoted any significant time or resources in any dealings with Schaefer or her agency.

In support of its claimed injury in this case, High Plains (through Christian’s testimony) asserts only that it devoted “too much” time to Lane’s case and that its reputation had been damaged as a result. (Filing No. 52, Ex. 1, 112:18-113:15). Nevertheless, Christian was unable to identify any specific damage to High Plains’ reputation caused by conduct alleged in the Amended Complaint (Filing No. 52, Ex. 1, 169:13-170:8), and with respect to its claims about the amount of time spent with Lane, Christian admitted that High Plains does not have any specific criteria it uses to determine whether or not a particular case has required “too much” time. (Filing No. 52, Ex. 1, 113:20-114:13). Further, Christian could not specify how Lane’s case in any way

impacted or detracted her from her other day-to-day functions. (Filing No. 52, Ex. 1, 117:14-18). Nor could Christian identify any particular tasks she performed for Lame that were not akin to those she routinely performed for other tenants. (Filing No. 52, Ex. 1, 114:25-116:4).

High Plains was able to produce a document entitled “Fair Housing Organization Damages Worksheet,” ostensibly indicating that it had devoted \$4,862.20 in staff time and resources to Lame’s complaint (Filing No. 52, Ex. 4), but Christian could not specifically identify the amounts of time or funds attributable to the alleged conduct in the Amended Complaint. (Filing No. 52, Ex. 1, 119:13-127:13).

Indeed, Christian acknowledged that much of the time she spent with Lame related to other issues she was dealing with that had nothing to do with the alleged conduct in the Amended Complaint. This is confirmed in the “Case Detail Report” that High Plains provided for Lame. (Filing No. 52, Ex. 3). This report establishes that, since September 6, 2006, the High Plains has had an ongoing relationship w/ Lame concerning a multitude of tenancy issues totally unrelated to the allegations in this case, including: (1) evictions for non-payment of rent; (2) allegations of illegal drug use on rented premises; (3) allegations of illegal drug sales on rented premises; (4) disruptive partying on rented premises; (5) frequent disruptive intoxication on rented premises; (6) frequent police calls to premises she has rented, and (7) excessive damage to premises she has rented. (Filing No. 52, Ex. 3).

Finally, Christian cannot identify any specific projects or work that had to be put on hold while working on Lame’s case. (Filing No. 52, Ex. 1, 132:9-133:15).

Absent “specific facts establishing distinct and palpable injuries *fairly traceable*” to the Defendant, High Plains “cannot satisfy its burden at the summary judgment stage to establish the injury in fact requirement for standing.” *Arkansas ACORN Fair Housing, Inc. v. Greystone Development, Ltd. Co.*, 160 F.3d 433, 435 (8th Cir. 1998). Based on the evidence before the Court, much, if not all, of the time High Plains spent dealing with Lame did not involve or concern Schaefer or Hays or Hinn’s Mobile Homes. Further, High Plains cannot identify any projects or work that went undone because of any time spent working on Lame’s case.

As such, High Plains’ figures are clearly speculative, conjectural, and do not establish the drain on High Plains’ resources required to prove a palpable injury-in-fact traceable to Schaefer or the other defendants. Because High Plains cannot specifically quantify the amount of resources it claims to have spent or used to combat any alleged discriminatory conduct in its Amended Complaint, it cannot establish organizational standing in this case, and Schaefer and the other defendants are entitled to judgment as a matter of law.

CONCLUSION

For the above and forgoing reasons, the Court should enter summary judgment in favor of Defendant Dr. Joann Schaefer, Chief Medical Officer of the Division of Health of the Nebraska Department of Health and Human Services, in her official capacity as administrator, and dismiss High Plains Community Development Corp., Inc.’s Amended Complaint at Plaintiff’s costs..

Dated this 14th Day of February, 2008.

DR. JOANN SCHAEFER
Defendant.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2008, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which sent notification to the following: Steven M. Virgil, Andrew D. Strotman, Stanton Beeder, Randall Goyette, Jarrod S. Boitnott.

/s/Michael J. Rumbaugh
Assistant Attorney General