IP 00-1974-C M/L Brademas v. IN Housing Finance
Judge Larry J. McKinney Signed on 3/27/03

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRADEMAS, THOMAS GENERAL PARTNER AND MANAGING MEMBER, PIN OAK COMMUNITY PARTNERSHIP, WESTERN MANOR COMMUNITY PARTNERSHIP, CORBY HOMES COMMUNITY PARTNERSHIP, WEST PLAINS APARTMENTS LLC, CROSSROAD APARTMENTS LLC, JOHNSON STREET APARTMENTS LLC, HILLCREST APARTMENTS LLC, HUNTINGTON ROAD APARTMENTS PARTNERSHIP,	)	CAUSE NO. IP00-1974-C-D/F
Plaintiffs,	)	
vs.	)	
KERNAN, JOSEPH IN HIS CAPACITY AS CHAIRMAN OF THE INDIANA HOUSING FINANCE AUTHORITY IS NOW SUBSTITUTED FOR IHFA (SEE ORDER #6), INDIANA HOUSING FINANCE AUTHORITY,	)	
Defendants.	)	

π Thomas Brademas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THOMAS BRADEMAS, *et al.*,	)	
Plaintiffs,	)	
	)	
vs.	)	IP 00-1974-C-M/L
	)	
INDIANA HOUSING FINANCE	)	
AUTHORITY,	)	
Defendant.	)	

ORDER ON PARTIAL MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on plaintiffs', Thomas Brademas Sr., Pin Oak Manor Community Partnership, Western Manor Community Partnership, Corby Homes Community Partnership, West Plains Apartments, L.L.C., Crossroads Apartments, L.L.C., Johnson Street Apartments, L.L.C., Hillcrest Apartments, L.L.C., and Huntington Roads Apartments Partnership (collectively "Brademas"), Partial Motion for Summary Judgment in this suit against defendant, Indiana Housing Finance Authority ("IHFA"). Brademas' suit arises under 42 U.S.C. § 1983. The parties have fully briefed their arguments, and the motion is now ripe for ruling.

I. FACTUAL BACKGROUND

A. LOW-INCOME HOUSING TAX CREDIT PROGRAM

The federal Low-Income Housing Tax Credit program ("LIHTC" program) was created by the 1986 Tax Reform Act. Pl.'s Ex. 1; see 26 U.S.C. § 42 (the "Code"). By allocating federal tax credits to developers of affordable rental housing and thereby reducing federal tax liability, the LIHTC program

provides significant incentives for private construction of and investment in housing for the nation's low to moderate income population. Id. Under the LIHTC program, each state is allocated an annual amount of federal tax credits based on the state's population. Id. Though the LIHTC program is a federal program, it is administered by the individual states. Id. The IHFA is Indiana's official "housing credit agency," and, as such, is responsible for the administration and allocation of Indiana's tax credits from the LIHTC program. Id.; 26 U.S.C. § 42(m).

Under Section 42(m) of the Code, the IHFA is responsible for developing and implementing a "qualified allocation plan" ("QAP") that sets forth selection criteria to be used to determine housing priorities that guide allocation of Indiana's tax credits. 26 U.S.C. § 42(m). The Code sets forth certain selection criteria which must be used in the QAP. Id. Section 42(m) also requires that the QAP:

> provide[] a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of this section and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.

26 U.S.C. § 42(m)(1)(B)(iii). Additionally, IHFA is required to make a number of certifications to the Internal Revenue Service ("IRS") about the low-income buildings receiving the tax credits, and provide the IRS with information about the tenants who live in the buildings. 26 U.S.C. § 42(l). IHFA must submit this documentation on an annual basis. Id.

IHFA's 1997 QAP requires recipients of the federal tax credits to fully comply with IHFA's compliance monitoring procedures, and all other procedures and requirements of the QAP and the Code. 1997 LIHTC QAP for Indiana, Appendix A at E.4. If the IHFA finds any material failure in this regard, it "may withhold or reduce, in whole or in part, Credits for which application is made, irrespective of

whether the withheld or reduced Credits relate to the project to which the noncompliance relates. . ." Id.

B. MADISON APARTMENTS

Madison Apartments is a semi-independent living initiative for persons who are chronically mentally ill and under the care of the Madison Center, a mental health care facility serving South Bend, Indiana, and surrounding areas. Comp. at 5. Brademas was the General Partner or Managing Member of Madison Apartments, and of all the entities that are plaintiffs in this action. Comp. at 4. In 1987, Brademas submitted an application to the IHFA for an allocation of low-income tax credits for Madison Apartments. Comp. at 5. The IHFA approved the application. Id.

On July 6, 1987, Brademas, the Madison Center, and the Indiana State Housing Board ("ISHB") entered into a Memorandum of Understanding ("MOU") pertaining to the operation of Madison Apartments. Pl.'s Stmt. of Facts ¶ 14; Pl.'s Ex. 6. Under the MOU, ISHB had the following responsibilities:

> a. Determine the economic eligibility of chronically mentally ill persons specifically for Section 8 assistance.
> b. Verify family income and ascertain the extent to which rent subsidy may be required.
> c. Determine whether any proposed housing unit meets Section 8 requirements.
> d. Make housing assistance payments on behalf of chronically mentally ill persons referred by the Center for such Section 8 housing subsidy assistance . . .

Pl.'s Ex. 6. In return, Brademas (the Madison Center) promised to:

> a. Make all disability eligibility determinations, except economic, of persons [tenants] who are chronically mentally ill . . .
> b. Provide ISHB with a written referral for the persons who are in need of housing.
> c. Provide case management and supervision as may be required to reasonably fulfill the

tenant's responsibilities under a Section 8 lease agreement . . .

Id. The duties of ISHB were subsequently assumed by Indiana Family & Social Services Administration ("IFSSA"). Pl.'s Stmt. of Facts ¶ 19. On March 1, 1992, IFSSA contracted with the Housing Assistance Office, Inc. ("HAO"), of South Bend, Indiana, to assume the duties of IFSSA. Id. ¶¶20-21. The duties of ISHB (and subsequently IFSSA and HAO) included performing all annual recertifications as to tenants' eligibility pursuant to Section 8 guidelines. Id. ¶ 18.

On December 11, 1996, IHFA sent a letter to Brademas to inform him that it would be inspecting and auditing Madison Apartments for continuing compliance with the LIHTC program. Def.'s Ex. 11. The audit would cover any tenants who lived in Madison Apartments during 1995. Id. The letter requested documentation for specific apartment units in Madison Apartments, and gave Brademas ten days to send IHFA the information. Id. The letter provided in relevant part:

> The file must be the complete original file from application forward with all supporting documents. This contact will require the annual Income Certification, the documentation the project owner has received to support that certification and any other information used to qualify the tenant for the LIHTC program.

Id. IHFA also advised Brademas that he would be given a "cure" period beyond the ten days to address any unanswered questions or missing information. Id.

On December 27, 1996, IHFA sent a letter to Center Management Corporation[1] to inform him that the audit revealed that tenant files were not in compliance with § 42 of the Code. The compliance issues centered on the following inadequacies:

* Tenant Certification figures do not agree with those reported to the IHFA on the Owner

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[1]Brademas is the President of Center Management Corporation.

Certification Part B or no total to see where figure was from.
* Tenants missing from Owner Certification of Compliance reports submitted to IHFA Part B for the monitoring year.
* No Tenant Certifications of income (50059 or 50058) in files. Just Section 8 contract.

Def.'s Ex. 12. IHFA gave Brademas until January 10, 1997, to address these inadequacies, and set February 13, 1997, as a final audit review at the IHFA office. Id. IHFA also notified Brademas that if a work out plan was submitted, Brademas would have until April 15, 1997, pursuant to the Code's ninety day "cure" period, to submit the missing documentation. Id. At the end of that period, § 42 regulations required IHFA to file a Form 8823, LIHTC Agencies Report to the IRS and indicate whether the noncompliance had been corrected. Id.

Neither Brademas nor anyone from his company attended the February 13, 1997, final audit review at the IHFA office. Def.'s Exs. 13, 15. On February 17, 1997, IHFA sent a letter to Brademas, informing him that his request for a four percent (4%) tax credit (through the LIHTC program) for the Pin Manor Community Partnership ("Pin Manor"), the Western Manor Community Partnership ("Western Manor"), and the Corby Homes Community Partnership ("Corby Homes") had been denied. Def.'s Ex. 1. The letter provided, in relevant part:

> According to the State of Indiana's Qualified Low Income Housing Tax Credit Allocation Plan, "every owner of a low income housing project which has received an allocation of Credits by the [IHFA] since the inception of the Credit program (January 1, 1987) must cooperate and comply with the [IHFA's] compliance monitoring procedures. . . If, in the sole discretion of the Authority, an applicant has materially failed to comply with the procedures and requirements of the Authority, the Code or any other governmental program. . . I) the Authority may withhold or reduce, in whole or in part Credits for which application is made, irrespective of whether the withheld or reduced Credits relate to the project in which the noncompliance relates; ii) in addition, if the Applicant's noncompliance is chronic and/or egregious in nature, the Authority may refuse to accept for filing and/or otherwise refuse to consider all or any part of the Applicant's pending or future applications for Credits until such time as the Authority decides otherwise."

Def.'s Ex. 1. In other words, if the IHFA finds that an applicant is out of compliance with regard to one housing development, it may deny the applicant tax credits with regard to other housing developments that are in compliance with the Code and the IHFA requirements. In this letter, the IHFA denied the tax credit application for Pin Manor, Western Manor, and Corby Homes because of non-compliance findings with regard to Madison Apartments. Brademas Aff. ¶ 25.

The IHFA honored Brademas' subsequent request for a March 6, 1997, audit, and:

> The audit resulted in a two day audit due to the lack of information. The audit was completed on March 7 with Mr. Tom Brademas, Jr. receiving copies of the results. A date of March 17, 1997, was offered to revisit the files but declined by Mr. Tom Brademas, Jr. Mr. Brademas, Jr. is requesting that he instead review the matter with Ira Peppercorn and Lante Earnst. Mr. Brademas, Jr. as the agent for the owner will be contacting [IHFA] on or before the March 17, 1997 date with any information to close the audit.

Def.'s Ex. 15.

On March 26, 1997, IHFA sent another letter to Brademas in reference to the audit of Madison Apartments. Def.'s Ex. 14. IHFA already had given Brademas the § 42 ninety day "cure" period to submit documents missing from the Madison Apartments file, and that period would expire on April 15, 1997. The March 26 letter extended that "cure" period by two weeks, setting May 2, 1997, as the date for the extension audit. Def.'s Ex. 14.

On June 17, 1997, the IHFA notified Brademas that it had filed a noncompliance form with the IRS:

> Regretfully the Indiana Housing Finance Authority must inform you that the enclosed Low-Income Housing Credit Agency's Report of Noncompliance IRS Form 8823 has been sent to the Internal Revenue Service due to the possible issues of noncompliance with the Low-Income Housing Tax Credit requirements of the Internal Revenue Code section 42.

Pl.'s Ex. 12. The enclosed IRS Form 8823 described the noncompliance this way: "Inadequate documentation. . . Owner has declined to bring one unit into compliance. Set Aside was not met in a timely manner." Pl.'s Ex. 12, IRS Form 8823.

The IHFA explained this decision in a November 30, 1997, letter to Patrick Bauer of the Indiana House of Representatives:

> Upon our staff's review, many, if not all, of the Madison Apartments files were out of compliance on the initial review and had been for a considerable period of time indicating that the property had not been managed pursuant to the Code. Further, through constant hard work by both our staff and Mr. Brademas and his staff, many files were brought to compliance pursuant to Section 42 Code (mainly by retrieving old documents). However, there remained at least 15 files on this property (since it was developed in 1988) which were out of compliance at the time of the final compliance audit on May 30, 1997. Additionally, it was uncertain if indeed all of the units on that date were occupied by residents who were within the income guidelines.
>
> We at the Authority appreciate very much Mr. Brademas' hard work in bringing the Madison Apartments closer to compliance, and he has admitted to learning a great deal in the process. However, the fact is that the Madison Apartments were not in compliance at the time of the application for new Tax Credits on the "refinanced developments" [Pin Manor, Western Manor and Corby Homes]. Thus the Tax Credits were not allocated to the "refinanced developments."

Def.'s Ex. 18. The letter concluded: "We have informed Mr. Brademas on several occasions that if he maintains a good track record going forward through the beginning of next year, we see no reason why we could not entertain a new application for Tax Credits in 1998 on other developments . . . Rest assured, this issue has been reviewed very throughly by several offices and their counsel and the decision of last Spring still stands." Id.

At some point after the February 17, 1997, denial of tax credits and the June 17, 1997, report of noncompliance to the IRS, Brademas requested a file review of apartment #102 of the Madison

Apartments. Ex. A to Supp. Aff. of Brademas. According to Brademas, apartment #102 was the unit that IHFA referred to as out of compliance in the IRS 8823 form. On October 29, 1998, IHFA sent Brademas a letter about the requested file review, and let him know that the review would be delayed due to staff turnover. Ex. A. The letter provided: "[W]e estimate that a response from IHFA, as it relates to apartment #102, to the owner will occur by November 25, 1998. We apologize for the time delay in responding to your request." Id. As late as January 7, 1999, IHFA still had not contacted Brademas about the requested file review. Ex. B to Supp. Aff. of Brademas.

C. TAX EXEMPT BOND FINANCING

Tax-exempt bonds are another government incentive for investment in low-income housing. 26 U.S.C. § 103(a). Brademas received an allocation of tax exempt bonds to permit the acquisition and rehabilitation of Corby Homes, Western Manor, and Pin Manor around January 22, 1997. Pl.'s Stmt. of Facts ¶ 36. On or around January 15, 1998, Brademas received an allocation of bonding authority for West Plains Apartments (located in Goshen, Indiana), Crossroads Apartments (Nappanee, Indiana), Johnson Street Apartments (Elkhart, Indiana), and Hillcrest Apartments (Plymouth, Indiana). Id. ¶¶ 39-40. The lending institutions that agreed to purchase the bonds for Pin Manor, Western Manor, and Corby Homes conditioned their participation on Brademas' receipt of § 42 tax credits for the housing developments by December 31, 1997. Pl.'s Ex. 38.

D. BOND FINANCING WITHDRAWN

On or about May 24, 1999, counsel for the purchaser of the bonds ("lender") for Pin Manor,

Western Manor, and Corby Homes sent a letter to plaintiffs setting forth the failure to obtain a favorable determination letter from IHFA on eligibility of the projects for low income housing tax credits as a reason to withdraw from financial participation. Pl.'s Stmt. of Facts ¶ 52. The letter summarized the borrowers' (Brademas') "deficiencies" in satisfying their obligations under its Credit Agreement with the lender:

> Construction and rehabilitation not completed by March 1, 1999 . . .
> Failure to pay Letter of Credit monthly fees to the Bank . . .
> Failure to fund replacement reserves. . .
> *Failure to obtain Section 42 tax credits by 12/31/97 . . .*
> [A]ssuming or incurring [more] indebtedness. . .
> Failure to provide insured draw endorsements to the Title Company. . .
> Failure to provide timely financial reports. . .
> Failure to provide written notice of events of default or adverse changes . . .
> Failure to provide survey. . .

Pl.'s Ex. 38 (emphasis added).

II. SUMMARY JUDGMENT STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not

simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the Court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which she relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *See Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chi. Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, the Court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to [its] case, one on which [it] would

bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

III. DISCUSSION

STATUTE OF LIMITATIONS

§1983 claims are considered personal injury claims and, accordingly, are subject to the personal injury statute of limitations in the state where the alleged injury occurred. *See Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992), (*citing Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed. 254 (1985)). Because the alleged injury in this case took place in Indiana, Indiana's two-year statute of limitations applies in this action. I.C. 34-1-2-2(1). "The Indiana statute of limitations for personal injury requires a suit to be filed within two years of the accrual of the cause of action. Federal law determines when a claim accrues. A § 1983 claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Hondo, Inc. v. Sterling,* 21 F.3d 775, 778 (7th Cir. 1994) (citations omitted).

Determining the accrual date of a § 1983 claim requires two steps. First, the Court must identify the injury. Second, the Court must determine the date when the plaintiffs could have sued for that injury and that date should coincide with the date the plaintiffs "know or should have known" that their rights were violated. *See Kelly v. City of Chi.*, 4 F.3d 509, 511 (7th Cir. 1993). Because the complaint was filed on June 12, 2000, and because the claim is subject to a two-year statute of limitations, Brademas' § 1983 action is time-barred unless the cause of action accrued on or after June 12, 1998.

The injury about which Brademas complains is a deprivation of a property right – in this case a denial of low-income housing tax credits – without due process.[2] The denial was based on a lack of compliance with IHFA monitoring requirements, and the IHFA subsequently reported the lack of compliance to the IRS. Although Brademas does not explicitly avow that the tax credit denial is the injury in his statute of limitations arguments, his arguments on the substance of the motion illustrate that the tax credit denial is the injury on which he bases his complaint. For example, when arguing procedural due process, Brademas maintains that he "had a protected property interest for due process purposes in the statutory enforceable rights to realize low-income housing tax credits." Pl.'s Brief in Support at 2. Later, Brademas asserts that IHFA's action in notifying the IRS of the lack of compliance at Madison Apartments "was arbitrary and unfair, and without any reasonable basis in fact." *Id*. at 7. The substantive due process and equal protection arguments also center around the Madison Apartments audit, the tax credit denial, and the subsequent reporting to the IRS. *See id*. at 10-13.

The Court now must determine when Brademas could have sued for the tax credit denial. The tax credit denial letter was dated February 17, 1997, and the IHFA notified the IRS of Brademas' lack of compliance on June 17, 1997. If either of these dates is the accrual date, Brademas' claim is untimely. Brademas makes three arguments to avoid the statute of limitations bar: (1) no final determination on the tax credits was made until January 1999 because Brademas requested a file review about Madison Apartments, and the IHFA did not complete the review until some time in 1999; (2) the accrual date was in June 1999 when the bond purchasers backed out due to his failure to obtain a favorable determination

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[2]Due to the Court's resolution of the statute of limitations defense, it need not decide whether the federal tax credit is a property right protected by the Constitution.

regarding the tax credits; and (3) the statute of limitations should be tolled due to either equitable estoppel or equitable tolling. Each argument will be addressed in turn.

1. The Finality of the 1997 Tax Credit Denial

Brademas first argues that no final determination was made on the tax credits until sometime in 1999 because he asked for a file review on apartment #102, and IHFA delayed in responding to his requests for a file review.[3] According to Brademas, his claim was not ripe prior to the file review in 1999. IHFA, on the other hand, contends that the statute of limitations began to accrue on February 17, 1997, when Brademas was notified that his application for the tax credits was denied. Thus, the Court must determine when the tax credit denial became final.

The following are the relevant facts on the issue. In 1996, consistent with its compliance responsibilities regarding the LIHTC program, the IHFA notified Brademas that it would be auditing Madison Apartments for continuing compliance with the federal program. After reviewing the files submitted by Brademas, the IHFA informed him that there were a number of inadequacies with regard to the tenant files. Both Brademas and IHFA worked to bring the documentation into compliance with LIHTC requirements, and a February 13, 1997, final review audit was set at the IHFA office. Neither Brademas nor a representative attended the final audit review, and the IHFA notified him by letter on February 17, 1997, that his application for tax credits for Pin Manor, Western Manor, and Corby Homes

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[3]Brademas also focuses on the contract that he had with ISHB, and maintains that it was ISHB's responsibility to provide the financial information about the tenants. However, this is a substantive argument that does not affect the statute of limitations issue.

had been denied due to noncompliance with LIHTC requirements.

However, that determination was not final. Consistent with § 42 of the Code, the IHFA granted Brademas a ninety-day cure period to bring the files into compliance. That deadline would expire on April 15, 1997. The IHFA subsequently granted Brademas' request to extend that deadline to May 2, 1997. Despite the cure period and two-week extension, Brademas did not bring all of his files into compliance, and the IHFA sent a noncompliance form to the IRS on June 17, 1997.

At the latest, Brademas knew or should have known he had been injured by June 17, 1997, when the IHFA notified him that it had filed a noncompliance form with the IRS. That was more than three years before Brademas filed this suit. Brademas tries to avoid the consequences of this date by offering evidence of his request for a file review on apartment #102. Apartment #102 apparently was the unit that the IHFA referred to in the noncompliance form it filed with the IRS on June 17. However, Brademas has not offered any evidence that establishes that the file review request took away from the finality of the decision in 1997. Nor has Brademas offered evidence that the file review request was a type of administrative or appeal process that allowed applicants to appeal the IHFA's denial of tax credits. Brademas' request for a file review is akin to request to reconsider and nothing more. Such a request does not toll the statute of limitations. Nor should it since it relies only on the good will of the IHFA rather than any statutory right.

Instead of bringing suit in state or federal court for the tax credit denial in 1997, Brademas decided to pursue other avenues to achieve his goal of a favorable review. However, Brademas' attempts to have the determination overturned through the political process did nothing to alter the finality of the earlier agency decision. If anything, Brademas' appeals through the political process illustrate that he thought he

had been damaged in 1997. In a November 30, 1997, letter to Representative Bauer, the IHFA explained that "many, if not all, of the Madison Apartments files were out of compliance on the initial review and had been for a considerable period of time. . . there remained at least 15 files on this property (since it was developed in 1988) which were out of compliance at the time of the final compliance audit on May 30, 1997." Def.'s Ex. 18. Moreover, on the finality issue, the letter continued:

> We at the Authority appreciate very much Mr. Brademas' hard work in bringing the Madison Apartments closer to compliance, and he has admitted to learning a great deal in the process. However, *the fact is that the Madison Apartments were not in compliance at the time of the application for new Tax Credits on the "refinanced developments" [Pin Manor, Western Manor and Corby Homes]. Thus the Tax Credits were not allocated to the "refinanced developments."*
>
> We have informed Mr. Brademas on several occasions that if he maintains a good track record going forward through the beginning of next year, we see no reason why we could not entertain a new application for Tax Credits in 1998 on other developments. . . Rest assured, *this issue has been reviewed very thoroughly by several offices and their counsel and the decision of last Spring still stands*.

Id. (emphasis added). Nothing in the letter to Representative Bauer, or in other IHFA correspondence about the Brademas 1997 tax credit denial, indicates that the determination was not final. Accordingly, the Court finds that the IHFA made a final decision in 1997, and Brademas could have sued at that time.

2. Loss of Bond Financing

Brademas also argues that his cause of action did not accrue until June 1999 when the financing for the tax exempt bonds was withdrawn due to Brademas' failure to obtain LIHTC tax credits for Pin Manor, Western Manor, and Corby Homes. According to Brademas, the injury from the 1997 tax credit denial did not become ascertainable until it resulted in the loss of bond financing. This position is not

tenable.

Case law from the Supreme Court and the Seventh Circuit distinguishes between the date of the injury and the date that the consequences of that injury are felt; the accrual date is the former.[4] *See e.g., Del. State Coll. v. Ricks*, 449 U.S. 250, 258-59, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). *See also Cada*, 920 F.2d at 449-451. In *Ricks,* the plaintiff was denied tenure for allegedly discriminatory reasons, but his employment contract did not expire until a year later. *See Ricks*, 449 U.S. at 257-58. The action was time-barred if the date of the tenure denial was the accrual date, but timely if the statute of limitations did not start until the plaintiff's last day of work. *Id*. The Court concluded that the plaintiff's claim was time-barred, and later described its holding this way: "[i]n *Ricks*, we held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act became painful." *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981).

The Seventh Circuit relied on *Ricks* to reach a similar result in *Cada*. *See Cada*, 920 F.2d at 449-50. In *Cada*, the plaintiff met with his supervisor at a May 5 meeting, and was told that his position would be terminated. *See id*. at 448. The plaintiff did not believe that the supervisor at the May 5 meeting had the authority to fire him, and met with another supervisor on May 22, when he was told that the termination decision was made and effective on May 5 and nothing could be done to change it. *See id*. The action was timely if the accrual date was May 22, but barred if the statute of limitations began to run on May 5. *See id*. After finding that the supervisor at the May 5 meeting had authority to fire the plaintiff, the Seventh

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[4]Of course, the accrual date may be later if the plaintiff does not discover he is injured until after the date of the injury. *See, e.g., Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 450-51 (7th Cir. 1990) (explaining the discovery rule). However, the discovery rule is not at issue in this case because the IHFA made *and communicated* its decisions to Brademas in 1997.

Circuit concluded that May 5 was the accrual date: "[t]he May 5 meeting was the equivalent of the tenure vote in *Ricks*." *Id*. at 450. The Seventh Circuit explained *Ricks* in this way: "The point was that the denial of tenure was an adverse personnel action forbidden if done for discriminatory reasons; it was irrelevant that the full consequences of the action were not felt till later, when Ricks, unprotected by tenure, was let go upon the expiration of his employment contract." *Id*. at 449.

Like the plaintiffs in *Ricks* and *Cada*, Brademas maintains that the statute of limitations did not begin to accrue until he felt the consequences of the injury. The 1997 denial of tax credits was the injury, and one of the consequences of that injury was that the bond purchasers withdrew their financial backing around June 1999. Brademas emphasizes that, "IHFA makes no argument that the injury suffered by Plaintiffs was not fairly traceable to its actions [in denying the tax credits in 1997]." Pl.'s Reply at 7. This is beside the point – as stated earlier, the fact that a consequence is traceable to an earlier injury does not alter the date of accrual. Regardless of whether or not the withdrawal of the bond purchasers made the tax credit denial more painful, "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts become most painful." *Ricks*, 449 U.S. at 258 (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979)). *See also Kelly v. City of Chi.*, 4 F.3d 509, 512 (7th Cir. 1993) (holding that § 1983 action based on revocation of a liquor license accrued on the date that notice of revocation was given, and not on the actual closing date of the bar). Accordingly, the Court rejects Brademas' argument that the statute of limitations did not begin to run until June 1999.[5]

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[5] The IHFA's refusal to overturn the 1997 decision is not a continuing violation. "[T]he refusal to undo a violation is not a 'fresh act' of discrimination . . ., but instead is a persisting effect of past discrimination that does not affect the running of the statute of limitations." *Pitts v. City of Kankakee, Ill.* 267 F.3d 592, 597 (7th Cir. 2001) (*citing Sharp v. United Airlines, Inc.*, 236 F.3d 368, 373 (7th

3. <u>Equitable Estoppel and Equitable Tolling</u>

Brademas also invokes the equitable estoppel and equitable tolling doctrines. "Tolling doctrines stop the statute of limitations from running even if the accrual date has passed." *Cada*, 920 F.2d at 450. Equitable estoppel "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Id*. at 450-51. Equitable estoppel is sometimes called fraudulent concealment. *Id*. at 451. "Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant – above and beyond the wrongdoing upon which the plaintiff's claim is founded – to prevent the plaintiff from suing in time."

Equitable estoppel is not applicable in this case. The IHFA never promised Brademas not to plead the statute of limitations. Moreover, the IHFA did not engage in any wrongful, affirmative conduct as it related to Brademas. *See Smith v. City of Chi. Heights*, 951 F.2d 834, 841 (7th Cir. 1992) ("In essence, equitable estoppel focuses on whether the defendant acted *affirmatively* to stop or delay the plaintiff from bringing suit within the limitations period."). It was Brademas who requested a file review for unit #102 in Madison Apartments, and though the IHFA delayed in performing the review, this is not the

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Cir.2001). Nor has Brademas offered evidence that the 1997 tax credit denial's character as a violation did not become clear until it was repeated. *See Dasgupta v. Univ. of Wis. Bd. of Regents*, 121 F.3d 1138, 1139 (7th Cir. 1997) ("A continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period.").

type of deceptive conduct that justifies equitable estoppel. Rather than being deceptive, the IHFA corresponded with Brademas about the file review, and alerted him that there would be delays. Ex. A to Supp. Aff. of Brademas. There were no assurances of result made, or any promises that would induce Brademas not to pursue legal remedies. In short, Brademas has not offered any evidence that suggests that the IHFA took steps to prevent him from suing in time. The IHFA's acceptance of his request for a file review does not then under these circumstances toll the statute of limitations. Accordingly, the Court concludes that equitable estoppel does not save Brademas' claim.

The Seventh Circuit, in conformity with many other appellate courts, has recently held that the state, rather than the federal, doctrine of equitable tolling governs "borrowing" cases like this one. *See Shropshear v. Corp. Counsel of the City of Chi.*, 275 F.3d 593, 596 (7th Cir. 2001) (collecting cases).[6] Federal courts in § 1983 actions "borrow" the state's personal injury statute of limitations, and consequently rely exclusively on state equitable tolling principles because of the "reciprocal relation between the length of the limitations period and the grounds for tolling (extending) it." *Id.* (citations omitted). "A state might decide to set a short period but allow generous tolling, or a long period in lieu of generous tolling. If the federal courts used the short period in conjunction with a tolling doctrine less generous than that of the state that had set the period, or the long period in conjunction with a tolling doctrine more generous than that of the state, it would be creating an irrational hybrid." *Id.* Thus, we look to Indiana law to determine whether the statute of limitations was tolled.

As noted by the Seventh Circuit in *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993), *aff'd*,

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[6]The Seventh Circuit's holding in *Shropshear* was limited to equitable tolling. Equitable estoppel was not at issue in the case.

512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), Indiana does not recognize equitable tolling as it is defined under federal law. *See also Cada*, 920 F.2d at 450-52 (explaining the federal doctrine). *Torres v. Parkview Foods*, 468 N.E.2d 580, 582 (Ind.App. 1984), the leading Indiana case on equitable tolling, "holds that if a plaintiff in good faith files a diversity suit in federal district court but the suit is later held to be outside of diversity jurisdiction and is therefore dismissed without an adjudication on the merits, the statute of limitations for refiling in state court is tolled." *Heck*, 997 F.2d at 357-58. That is the only form of equitable tolling recognized in Indiana, and it has no application to the facts of this suit. Thus, the Court concludes that Indiana's equitable tolling doctrine does not save Brademas' claim.

IV. CONCLUSION

For the reasons discussed herein, the Court finds that Brademas' claim accrued in 1997. Brademas did not file this action until June 2000. Because this § 1983 claim is subject to Indiana's two-year statute of limitations, the June 2000 filing was too late and Brademas' claim is time-barred. Accordingly, the Court **DENIES** Brademas' Motion for Summary Judgment, and enters judgment in favor of the IHFA.

IT IS SO ORDERED this _____ day of March, 2003.

____
LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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