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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,)
)
Plaintiffs)
)
vs.)
)
ROBERT C. WEAVER, Secretary of)
the Department of Housing and)
Urban Development of the)
United States,)
)
Defendant)

NO. 66 C 1460

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United States District Court

BRIEF OF PLAINTIFFS IN OPPOSITION TO THE
MOTION OF DEFENDANT TO DISMISS THE ACTION

Oral Argument Requested

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vs.

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This is a companion case to Gautreaux, et al v.
Chicago Housing Authority, et al., No. 66 C 1459. The com-
plaints in the two cases are substantially identical, the
principle difference being the addition of the allegation in
the complaint here that Federal financial assistance is pro-
vided to the Chicago Housing Authority (the "CHA") in support
of the discriminatory activities complained of. Since the
Court has so recently considered extensive briefs and oral
argument in respect of an essentially identical complaint,
we will not here give a resume of the allegations of the com-
plaint. The Court is respectfully referred to the plaintiffs'
brief, filed on December 15, 1966, in said case No. 66 C 1459,
for such a resume.

The defendant has moved to dismiss the action principally on three grounds:

- (1) lack of standing to sue (def.br.7a-18);
- (2) failure to exhaust administrative remedies (def.br.19-22); and
- (3) lack of an indispensable party (def.br.28-32).

Two additional grounds are asserted (lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted), but in defendant's brief no point other than the alleged lack of standing is argued in support of these grounds (see def.br.23-27). Each of the three arguments will be discussed in the order listed.

I. Plaintiffs Have Standing to Sue

A. Under Counts I and III

Plaintiffs in this case have standing to sue for precisely the same reasons as they do in the companion case. Defendant argues (pp. 7a-12) that plaintiffs lack standing on the basis of the decision of the Seventh Circuit Court of Appeals in Harrison Halsted Community Group, Inc., et al v. Housing and Home Finance Agency, et al, 310 F.2d, 99 (CA 7,1962), and other like decisions. The same argument was rejected by this Court in its order of March 2, 1967 in the companion case. In holding there that the plaintiffs had standing the Court said,

"[P]laintiffs, as present and future users of the [public housing] system, have the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves. Possessing this right and being of the opinion that it is being denied them, plaintiffs may maintain this action to determine whether their opinion is correct, and if it is, to secure an appropriate remedy to insure protection of their right."

That order is thus dispositive of defendant's standing argument with one exception now to be discussed.

Defendant asserts that "the manner of selection of sites for low-rent housing projects. . . is not a function of defendant; it is a function of the CHA. . ." (def.br., p. 7a). Since the defendant does not perform that function, the argument runs, "he cannot be charged with inflicting an injury which results from the performance thereof." (Ibid.) In other words, the defendant is supposed to be a bystander, having no function to perform in site selection and therefore no responsibility for the CHA's discriminatory site selection practices. Therefore, although plaintiffs can sue CHA, they can't sue defendant..

The argument is untenable. It is clear that although the defendant does not make the initial selection of sites, it is centrally involved in every aspect of the operation of the CHA, sets the site selection standards or criteria with which

the CHA must comply, and has and exercises the power to approve or disapprove every site selected by CHA. This is acknowledged in defendant's own briefs, as the following quotations show:

"HUD, under the Annual Contributions Contract, requires certain approvals by it of some of the actions taken by the Housing Authorities. One of these approvals relates to the Chicago Housing Authority's action which is the subject matter of this suit, i.e., site selection." (p. 7)

"Section 103, together with section 102, of Part Two of the Annual Contributions Contract, also recognizes the right of HUD to approve or to disapprove a site selected by the Housing Authority." (p. 7)

"HUD has approved the sites selected by the Chicago Housing Authority for the 1965 projects, referred to in the Complaint in this suit as 'The Five Proposed Projects.' With respect to the sites for the 1966 projects, referred to in the Complaint as the 'Twelve Proposed Projects,' HUD is negotiating with the Chicago Housing Authority the question of approval of these sites." (p.7)

"[T]he following sites included in the 1966 projects have been approved: [listing omitted] Determination as to the remaining sites involved in the 1966 projects has not been made, and no approval has been given by HUD as to those remaining sites which are being held in abeyance." (p.2, First Supplemental Memorandum.)

"In practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." (p.5)

"Upon failure to live up to the requirements of the Federal law or certain provisions of the Annual Contributions Contract (see Part Two, Article V, thereof), the Federal Government reserves the right to demand title or possession of the projects." (p.6)

Finally, defendant's second supplemental brief makes clear that the site selection criteria are established by the defendant's agency.

It borders on the ridiculous to argue that Governmental Agency A, upon which Agency B is "entirely dependent" financially, which establishes site selection criteria, which has among other powers the right to approve or disapprove B's site selections, and which exercises that power and "negotiates" such approval or disapproval, has no function to perform in connection with B's site selections and is therefore not subject to suit if B's site selection practices are racially discriminatory.

The Supreme Court has held in a number of cases involving charges of unconstitutional discrimination that a governmental agency may be sued in connection with such discrimination if it participates in the activities complained of "through any arrangement, management, funds or property." Cooper v. Aaron, 358 U.S. 1, 4 (1958). See also, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In Burton a state agency sought to insulate itself from the discriminatory practices of a restaurant lessee on the ground that it had "not purported to dictate to the restaurant as to how its business should be run." 150 A2d 197, at 198.

But the Supreme Court said,

"The State has so far insinuated itself into a position of interdependence with [the restaurant lessee] that it must be recognized as a joint participant in the challenged activity. . . ." 365 U.S. 715 at 725.

And in Simkins v. Moses H. Cone Memorial Hospital, 323 F2d 959 (CA4, 1963), involving discrimination by hospitals receiving federal funds, the court found that "defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs," (323 F2d 959, at 967) and declared unconstitutional provisions of federal statutes and regulations which were viewed as authorizing discrimination by state institutions. It held that the Negro plaintiffs, doctors and prospective patients suing on behalf of Negroes generally, had standing to contest the constitutionality of the federal statute. 323 F2d 959, at 969-70.

Plainly the defendant's "joint participation" in the CHA's discriminatory practices is governmental action which may be prohibited under the Constitution. Accordingly, for the reasons given in the Court's order of March 2, 1967 in the companion case, plaintiffs have standing to sue.

B. Under Counts II and IV

Counts II and IV are based upon Section 601 of the Civil Rights Act of 1964. We have argued in the companion case that plaintiffs have standing to sue under this section, and the Court's order of March 2, 1967 in that case so holds. But defendant, while conceding that "under some circumstances" that section [601] may "give standing to private persons to seek relief against the local Agency" (def.br.25), argues that no such standing is conferred as against the defendant. The decision in Green Street Association v. Daley, 373 F2d 1 (CA 7, 1967) supports this view. The reasoning in Green Street was that since Sections 602 and 603 of Title VI provide a procedure for Federal officials to follow if they wish to cut off funds to recipients who violate Section 601, the flow of Federal funds may not be cut off in any other manner. 373 F2d, at 8-9.

We believe this conclusion to be erroneous for several reasons:

First, Sections 602 and 603 govern Federal officials who seek to cut off funds from recipients. They have no application to the situation presented here, where Federal officials decline to cut off funds but on the contrary continue to make them available to a discriminatory program.

The Government itself has refuted the argument that the Section 602 and 603 procedures available to Federal officials who seek to cut off funds somehow preclude the possibility of a private right of action under the Act. In the Government's brief in Bossier Parish School Board v. Lemon, 370 F2d 847 (CA5, 1967), the following appears at pages 23-25 and 28:

"Defendants claim that the administrative remedies afforded the United States are the exclusive means of enforcing compliance with the statutory duty imposed by section 601. This position is untenable.

"Section 601 is intended to ensure that no person who participates in or is the beneficiary of any program or activity receiving federal financial assistance will be subject to discrimination on the ground of race, color or national origin. Plaintiffs, who attend schools receiving federal financial assistance, are persons whom this statute is designed to protect. While the statute does not expressly afford plaintiffs a remedy for violation of its prohibition, they are not thereby precluded from obtaining appropriate relief. On the contrary, under such circumstances the Supreme Court in Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916) declared:

" 'A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., Tit. Action upon Statute (F), in these words: "So, in every case, where a statute enacts, or

prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." ' "

"Thus, in Fitzgerald v. Pan American World Airways, 229 F2d 499 (CA 2, 1956), plaintiff sued Pan American for civil damages alleging that defendants had discriminated against her because of race in the operation of its airlines. She predicated her claim on 49 U.S.C. 484(b), (now 49 U.S.C. 1374(b)), which as interpreted by the court, prohibited the conduct of which she complained. There was, however, no civil remedy provided by the Act to redress her grievance - only a provision making a violation of section 484(b) a crime. 49 U.S.C. 622(a), (now 49 U.S.C. 1492(a)). A complaint procedure authorized any person to notify the Civil Aeronautics Board of any violation 49 U.S.C. 642(a), (as amended 49 U.S.C. 1482(a)). The Board had the power to investigate the claim and, upon finding a violation, issue an appropriate order to compel compliance. 49 U.S.C. 642(b)(c) (amended 49 U.S.C. 1482(b)(c)). Fully cognizant of this procedure, the court held that a violation of 49 U.S.C. 484(b) created 'an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation.' 229 F2d at 501.

* * *

"So here, the benefits accorded and the rights conferred on these plaintiffs under section 601 would be empty and illusory if the courts do not compel the performance of defendants' statutory obligation. Redress of plaintiffs' grievance cannot depend upon whether the

Government elects to invoke the sanctions available under section 602. ... The Congressional policy expressed in section 601, moreover, will be furthered by allowing parties to bring actions to secure rights under that section." (emphasis supplied)

Although Lemon was a suit against local, not federal defendants, the argument made in the Government's brief does not turn on that fact. It is persuasive whoever the defendant may be.

Second, the Fifth Circuit in Bossier Parish School Board v. Lemon, 370 F2d 847 (CA5, 1967), considered and rejected the argument that Section 602's administrative remedies were the only means by which Section 601 could be enforced. The holding of Lemon is that,

"In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts."
370 F2d, at 852.

As the Seventh Circuit correctly states, Section 602 establishes "the procedure to be followed by federal officials." 373 F2d, at 8-9. Section 602 does not purport to establish a procedure through which individuals - such as the plaintiffs here - can vindicate their Section 601 rights. Accordingly,

violations of Section 601 are cognizable by the courts whether the violators are federal or local officials.

Third, there is no basis in the language of Title VI of the Civil Rights Act of 1964 to support the view that Section 601 gives persons subjected to discrimination standing to sue under that Act the local officials involved but not the federal officials who decline to cut off the flow of funds which makes that discrimination possible. Such a distinction seems illogical. Federal funds can be stopped, with equal effectiveness, by blocking their receipt and use (by local officials) or by prohibiting their disbursement (by federal officials). In either case the flow of money will cease.

Finally, the statement that the administrative procedures of Sections 602 and 603 would be bypassed by allowing a private right of action against federal officials misses the point. Congress has traditionally been hesitant to entrust unfettered discretion to the "nameless, faceless bureaucrat" in Washington. Where the power to cut off funds to the enormous number of programs now receiving Federal

financial assistance is given to a federal agency, it is understandable that the exercise of such a power by the agency should only be in accordance with carefully defined procedures. But in this lawsuit, no federal agency is cutting off any funds. The decision to be made will be that of this Court, not of any agency. And this Court's decision will be rendered only after the full hearing and other procedural safeguards that characterize Federal court proceedings. Meanwhile, if the defendant's agency should conclude that the discriminatory site selection described in the complaint is a violation of the Civil Rights Act, the agency may proceed under the administrative provisions of Section 602.

We respectfully submit that the Green Street decision is erroneous on the standing issue for the reasons given above.

II. Plaintiffs' Actions Under the 1964 Civil Rights Act Are Not Barred by the Doctrine Requiring Exhaustion of Administrative Remedies.

Next defendant argues that plaintiffs have failed to exhaust administrative remedies available to them under the

regulations promulgated to effectuate Title VI of the Civil Rights Act of 1964 (def.br., pp.19-22). The argument, of course, applies only to Counts II and IV of the Complaint, and it is defective for two separate reasons: (1) there is no administrative remedy available to plaintiff under the 1964 Civil Rights Act, and (2) even if there were, it would have been futile to attempt to secure relief under it.

The "administrative remedy" is not really an administrative remedy at all. The supposed remedy consists of a regulation which says that a person may file a "written complaint." (The regulation is quoted at page 19 of defendant's brief.) There is no provision for a hearing, none for the taking of evidence, none requiring defendant to take any action at all based upon the "complaint." The argument appears to be that if a Governmental Agency issues a regulation authorizing a citizen to write it a letter of complaint, it has thereby created an administrative remedy. The short answer is that citizens do not need governmental agencies to authorize them to write letters, and such purported authorization is not an "administrative remedy."

But the effort to employ the "remedy" would have been futile in any event. The complaint seeks relief respecting

sites selected by the CHA in 1965 and 1966. Some of the 1965 sites were the subject of a letter of complaint to the defendant. (See Exhibit A to the affidavit accompanying this brief.) The complaint was parried by a seven-page letter over the signature of the same administrator who has signed the affidavits filed in support of defendant's motion. (See Exhibit B to the affidavit accompanying this brief.) The response was not based on a specific factual determination respecting each site complained of but upon general statements of policy and history applicable to the site selection policies of the CHA in general. Without denying that selection of the sites in question would perpetuate patterns of segregation, the response stated defendant would not overrule CHA's site selection for the reason, among others "that sites other than in the south or west side, if proposed for regular family housing, invariably encounter sufficient opposition in the [City] Council to preclude Council approval." (Exhibit B, p.6)

The familiar rule is that when an administrative agency's announced views or policies are such that a plaintiff's application for the relief he seeks would almost

certainly be rejected, the courts will not require the plaintiff to make the futile gesture as a prerequisite to granting judicial relief. See, for example, School Board of City of Charlottesville, Va. v. Allen, 240 F2d 59, at 63-64 (CA 4, 1956), and Koepke v. Fontecchio, 177 F2d 125, at 128 (CA 9, 1949), both holding that where pursuit of the administrative remedy would have been futile, the courts would not require the vain effort of seeking administrative relief. Defendant's rejection of the letter of complaint which it did receive clearly brings this case within that rule.

Accordingly, for each of the two reasons given above, defendant's motion, so far as based on the administrative remedies doctrine, must be denied.

III. The Granting of Plaintiffs' Motion to Consolidate Will Obviate the Objection that the CHA is an Indispensable Party to This Action.

This case is a companion to Gautraux, et al v. Chicago Housing Authority, et al, No. 66 C 1459. Both cases were filed on the same day by the same plaintiffs. The cases were assigned as "related cases" to the same

Judge. The complaints are identical with the exception that the complaint in this case contains allegations respecting the employment of federal funds which are not made in No. 66 C 1459.

Under these circumstances, it would plainly be appropriate to consolidate the two cases for purposes of discovery and trial. Plaintiffs have so moved. The granting of this motion will obviate the objection that an order in this case might "drastically affect the right of the Chicago Housing Authority" (def.br. 29), and that therefore the Court should not proceed without having the CHA before it.

CONCLUSION

It is respectfully submitted that defendant's motion should be denied and that this case and case No. 66 C 1459 should be consolidated for purposes of discovery and trial.

Respectfully submitted,

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Received a copy of the above Brief of
Plaintiffs together with the Counteraffidavits
referred to therein this 9th day of May, 1967.

Attorney for Defendants.

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

ALEXANDER POLIKOFF, being first duly sworn, on oath deposes and says that on the 9th day of May, 1967, he placed a copy of the foregoing Brief of Plaintiffs, together with the Counteraffidavit and Exhibits therein referred to, in an envelope addressed to Edward V. Hanrahan, United States Attorney, 219 South Dearborn Street, Chicago, Illinois, and deposited the same, duly stamped, in a United States mail chute, at Chicago, Illinois, before 4:30 P.M.

Subscribed and sworn to before me
this 9th day of May, 1967.

Notary Public.

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vs.)

NO. 66 C 1460

ROBERT C. WEAVER, Secretary of the
Department of Housing and Urban
Development of the United States,
Defendant)

A F F I D A V I T

LOUIS KREINBERG, being duly sworn, on oath says:

1. I am the Research Director of the West Side Federation, 3411 West Douglas Boulevard, Chicago, Illinois, and have supervisory responsibility over its books and records.

2. Attached hereto as Exhibits A and B, respectively, are true and correct copies of the following:

Exhibit A - letter of the West Side Federation, dated August 26, 1965, to Mr. Robert Weaver; and

Exhibit B - letter dated October 14, 1965, to the West Side Federation from Marie C. McGuire, Commissioner, Public Housing Administration.

FURTHER AFFIANT SAYETH NOT.

SUBSCRIBED AND SWORN to
before me this 8th day
of May, 1967.

Rose Salata
Notary Public

Louis Kreinberg