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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 18681

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellees

vs.

THE CHICAGO HOUSING AUTHORITY, et al.,

Defendants-Appellants

On appeal from the Order of July 20, 1970 of the United States District Court of Illinois.

Honorable Richard B. Austin, Judge Presiding.

MEMORANDUM OF DEFENDANTS-APPELLANTS IN
OPPOSITION TO THE "MOTION TO RECONSIDER
AND VACATE GRANTING OF STAY" OF PLAINTIFFS-APPELLEES

Defendants were served late in the afternoon of August 20, 1970 with the above motion of defendants. Attached hereto is a memorandum previously served upon defendants but not filed with the Court because the stay pending appeal was granted just before counsel for defendants arrived at the Court House with the memorandum. We submit it now, however, in support of the order granting a stay and in opposition to the recent motion of plaintiffs to vacate the stay. In further support of defendants' position we note that plaintiffs' memorandum, at page 14, charges that the defendants' motion in the District Court was "untimely under the

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MEMORANDUM IN SUPPORT OF DEFENDANTS
MOTION FOR A STAY PENDING APPEAL

Defendants take the liberty of filing this brief memorandum in support of the motion pending before this Court for a stay pending appeal because of the most serious nature of the issues presented. It is defendants' contention that if a stay pending disposition of their appeal is not granted, they will have been denied the right to an effective appeal from the order of the District Court of July 20. The Chicago Housing Authority will have been both denied a hearing and an appeal from that denial. A grave issue - how best to provide public housing for the poor -

is involved. But the subject matter of defendants' appeal will have disappeared if their motion for a stay is denied. Moreover the injury to defendants will clearly be irreparable if the stay is not granted: in addition to loss of the right to an appeal, the injury that threatens is nothing less than, among other things, a collapse of the public housing effort in the City of Chicago.

The key documents before this Court on this motion for a stay pending appeal are the July 1, 1969 Judgment Order (Exhibit A), the Order of July 20, 1970 (Exhibit B), Defendants' Motion to Vacate the Order of July 20, 1970 and the attachment to it (Exhibit C), and the Answer of Plaintiffs to the Motions of Defendants and the documents attached thereto (Exhibit F) and the August 14 Notice of Appeal (Exhibit H). The opinion of Judge Austin which led to the Judgment Order of July 1, 1969 is reported in 296 F. Supp. at p. 907.

The pending appeal is not an attempted appeal from the July 1, 1969 Judgment Order. The pending appeal relates only to Judge Austin's order of July 20 and, in particular, to the provisions requiring defendants to refer to the Chicago Plan Commission on August 20 - tomorrow, and 30 days later to the Chicago City Council the sites proposed for public housing within the City of Chicago.

STATEMENT OF FACTS

The conferences in chambers which preceded the order of July 20, 1970 were "off the record". Although representations were

made by some of the interested parties and by counsel, and various papers supplied to the District Court, no testimony was taken from any one. It is also undisputed that the General Counsel for the CHA sought to call as a witness an outside expert, Dr. Andrew M. Greeley, to testify on behalf of the CHA and was turned down, and that CHA objected to the order of July 20, 1970. The various papers presented to the District Court were first filed of record in connection with the defendants' motion to vacate the order of July 20, 1970*.

The informal discussions with the District Court prior to the July 20 order involved the general subject of whether CHA's activities constituted its "best efforts" to comply with the directives of the 1969 decree that the CHA must:

"***administer its public housing system in every respect***to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures.

* * * *

"[and] use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and take all steps necessary to that end, including making applications for federal funds and carry out all necessary planning and development" (Par. VIII, Ex. A, p. 9)

* All of the papers referred to are attached to the plaintiffs' Answer to the Motion to Vacate (Ex. F) except the letter from Dr. Greeley which is attached to Defendants' Motion (Ex. C).

The current policy of the CHA and the reasons for it were set forth in papers presented to the District Court. Thus, a copy of a June 25, 1970 resolution of CHA stated that:

"***the Commissioners of the Chicago Housing Authority having considered the many and complex sociological and economic factors involved in the siting of low-rent public housing have concluded as a matter of policy that the interests of the community and the public housing program will best be served by developing sites simultaneously in the city and suburban areas; that the difficulties involved in housing the underprivileged are the problems of the Metropolitan Area and must be solved on a metropolitan area basis".

[and] * * * *

"It is hereby declared to be the policy of this Board that the current federal allocation of low-rent family public housing units be utilized for the simultaneous location of such units in suburban communities of the Chicago metropolitan areas as well as in the City proper, all in accordance with the limitations provided in Judge Austin's order of July 1, 1969;

The Commissioners do hereby authorize the expenditure of preliminary planning funds to continue the search for suburban sites and staff is instructed to proceed not only with negotiations with other housing authorities but with the identification of specific sites in the metropolitan area beyond Chicago's City limits."

The Chairman of defendant CHA, in a paper dated June 26, 1970, informed the Court that the CHA was funding "an immediate search for feasible locations in surrounding communities and that as soon as sufficient sites outside the city had been located, both

Chicago and suburban sites would be submitted to the respective governing bodies for their approval", volunteered to submit to the District Court reports of progress in negotiations with suburban city and housing authorities on "any time-basis deemed desirable", and stated that the "object of the order of July 1, 1969 is one with which Chicago Housing Authority is in complete accord".

A letter to Judge Austin from one of the CHA Commissioners, Professor Wade of the University of Chicago History Department, recorded his earlier remarks to the Court at one of the conferences. He said it was his "judgment that submission of the sites at the present time would make public housing the central issue of upcoming campaigns and it was my fear that the ultimate result would be that less housing would be built". He stated his position was not dictated by any reservations about the Judgment Order of July 1, 1969 or the ultimate submission of sites to the City Council.

The CHA offered as a witness, Dr. Andrew M. Greeley who, according to a statement from him attached to the motion to vacate, would, if permitted to testify, state his opinion as follows: "I heartily endorse and am in complete agreement with the policy and program conceived by the CHA Board of Commissioners that the most effective way to carry out the federal order requiring it to build integrated housing is to develop sites simultaneously in the city and the suburbs" (Exhibit A to Motion to Vacate, p.3). The witness

expressed in the same document (p. 1) his "conviction that the choice is not between metropolitan public housing or public housing in Chicago only, but rather one between metropolitan public housing or no public housing". Dr. Greeley was not permitted to testify and his proffered testimony was later described by the Trial Judge as having the value of the "twenty-third character witness in a criminal trial" (Transcript, August 13, p.4).

The opinion of Dr. Greeley as to the dangers if the public housing issue is not treated as a metropolitan problem was shared by the Chairman of the CHA. His June 26 memorandum to the Court also stated that proceeding now, just in Chicago, as the Court ordered on July 20, threatened:

- "1. complete stoppage of the urgently needed public housing program;
2. racial tension in the city to the point of strife;
3. acceleration of an already alarming flight to the suburbs by middle-class white families;
4. vigorous protests from the Black community for failure to make housing available to them outside the city."

Plaintiffs offered nothing in opposition to the papers and views submitted by defendants at these conferences except that various letters from one of plaintiffs' trial counsel were submitted, and

one letter from an official of the Department of Housing and Urban Development; the later affidavit of Mr. Polikoff in opposition to the motion to vacate recites that at the June 26, 1970 meeting "counsel for plaintiffs made a statement as to the impracticality of further deferral of advice to the City Council of sites appropriate for Dwelling Units" (p.4). At the July 13, 1970 conference, however, plaintiffs suggested a form of order that said nothing about a deadline for submission to the Plan Commission and City Council of Chicago. It was at this session that the Trial Judge announced his intention to impose deadlines. The discussions thereafter were as to the form of the order (Polikoff Affidavit p.5).

On August 18, 1970, the District Court (Exhibit J) denied defendants' motion for a stay pending appeal and defendants promptly filed their motion for a stay in this Court.

ARGUMENT

A. Defendants Are Entitled To A Stay Pending Appeal. A Denial Of A Stay Is Tantamount To A Denial Of The Right Of Appeal.

The subject matter of this appeal is whether the "best efforts" provision of the order of July 1, 1969 requires defendants to proceed forthwith to present public housing sites to the Chicago authorities or whether, as is the CHA policy, and for the reasons explained to the Court below, presentation of those sites should be

deferred until metropolitan sites can be developed. The objective of this motion is to preserve defendants' right of review of this important matter. If there is no stay and defendants comply with the order of July 20, 1970, there is , as was shown above, a clear threat of irreparable damage to the cause of public housing. The particular order appealed from must be stayed if defendants' right to appeal is to be effective.

Clearly, even if the slender record before this Court was barren of the nontestimonial views of counsel, the parties and third parties as to the consequences of complying with the order of July 20, the order must be stayed. This is an appeal from an order requiring CHA to do certain acts on August 20 and September 20, 1970. If the order is not stayed, the acts will have to be performed and the appeal from the requirement that they be performed will be not only moot but useless. If the acts are not performed, contempt of court looms. This is the sort of situation where a stay should be granted. See Vacuum Oil Co. v. Grabler Mfg. Co. 53 F2d 975, 976 (C.A. 6, 1931).

Moreover, it seems obvious that no interest of plaintiffs is threatened or prejudiced by a stay pending appeal. The issue on appeal is not one involving constitutional rights but rather one of judgment as to how best in the coming months may the constitutional rights of plaintiffs find some practical fulfillment in increasing the supply of public housing units. Nor is there here, as in some school desegregation cases, "a pattern of delay" in an effort to

defeat constitutional rights (See Taylor v. Board of Ed. 195 F. Supp 231, 238, 240 (S.D. N.Y.). Here defendants did not appeal from the Judgment Order of July 1, 1969 and the law of this case is that defendants are not "racists". See Gautreaux v. CHA 296 F Supp 907, 914 (1969). Delay in achieving the purposes of the July 1969 Judgment Order is threatened by the summary adjudication of important contested issues which occasion appeals such as this.

The valuable right of defendants to an effective appeal would not only be prejudiced but destroyed by a refusal to grant a stay and it is clear that a stay should be granted pending appeal. See Shinholt v. Angle 90 Fed.2d 297, 298 (C.A. 5 1937).

B. The Issue Summarily Adjudicated Below Without A Hearing Could Not Withstand Judicial Review. Without A Stay Pending Appeal, There Can Be No Effective Review.

Although the attorneys for the parties variously characterize the events which preceded the order of July 20, 1970 it is undisputed that: (1) The issue below was whether defendants were exercising their "best efforts"; (2) Defendants told the District Court in various conferences that they were exercising their "best efforts" and the District Court obviously ultimately disagreed; (3) Defendants sought to introduce the testimony of Dr. Greeley and were denied the right to do so (Polikoff Affidavit, p.4); (4) The order of July 20, 1970 was entered over the objection of defendants (Polikoff Affidavit, p.5).

It should not be disputed that such summary adjudication of genuine issues of material fact should be decided only after a

hearing. This is true even if the statements, letters, etc. received by the District Court in chambers are considered as "affidavits". This is particularly true where the disputed issue has to do with opinions and judgments as to such a matter as the "best efforts" of the CHA. As this Court said in Duane v. Altenberg 297 F.2d 515, 518 (C.A. 7 1962):

"Such affidavits [related to factors such as motivation and valuations] do not qualify as a basis for summary judgment. They are not competent for the purpose of negating the existence of a genuine issue of material fact where matters of motive or opinions on value are involved. Fogelson v. American Woolen Co., 2 Cir., 170 F.2d 660; Cf. Subin v. Goldsmith, 2 Cir., 224 F.2d 753; Colby v. Klune, 2 Cir. 178 F.2d 872. A proceeding on summary judgment is in the nature of an inquiry to determine whether or not a genuine issue of fact exists. It is not for the purpose of determining such an issue. Caylor v. Virden, 8 Cir., 217 F.2d 739. It does not permit of trial by affidavit. Campana Corporation v. Harrison, 7 Cir., 135 F.2d 334."

In Alabama Great Southern Railroad Company v. Louisville and Nashville Railroad Company 224 Fed.2d 1, 3 (C.A. 5 1955) the Court made it clear that where such issues as "best efforts" are involved they should not be resolved summarily:

"where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, ***examination and cross-examination were necessary instruments in obtaining the truth***".

In this very case the District Judge held, in an earlier proceeding, that:

"Summary judgment is rarely, if ever, appropriate where, as here, motive and intent are important

to a resolution of the issues and never where, as here, serious questions of fact remain unresolved, as, for example, the racial composition of the neighborhoods involved" *Gautreaux v. CHA* 265 F. Supp. 582, 584 (emphasis added).

Surely, if questions such as the racial composition of neighborhoods involved are never matters for summary adjudication, neither should the even more complicated matter of whether defendants have used their "best efforts" toward achieving the agreed upon goals set forth in the Judgment Order of July 1, 1969.

The applicable principle, in a different context, also was well stated in *Sims v. Greene* 161 Fed. 2d 87, 88 (C.A. 3, 1947):

"[Conflicting allegations] must be resolved by oral testimony since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties. If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another" (emphasis added).

Indeed, policy questions about the "wisdom, need, and effectiveness of a particular project" such as the timing of presenting the sites to the CHA probably do not, absent some showing of bad faith, belong in the courts. As the Supreme Court said, admittedly in a different context, in *Oklahoma v. Atkinson Co.* 313 U.S. 508, 527 (1941):

"Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. For us to inquire whether this reservoir will effect a substantial reduction in the lower Mississippi floods would be to exercise

a legislative judgment bases on a complexity of engineering data. It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character."

Certainly there is nothing either before the District Court or before this Court suggesting that the court below was in a better position than defendant CHA to make a judgment based upon all of the relevant complicated factors as how to maximize the chances of success in achieving the goals both of the District Court and of defendant CHA in building the maximum number of public housing units for low income families and to do so on a basis that tends to disestablish segregated patterns. This is particularly true in a case where the District Court earlier expressly found that it was "undoubtedly true" that "CHA officials never entertained racial attitudes and that 'the racial character of the neighborhoods has never been a factor in CHA's selection of a suitable site'" Gautreaux v. CHA 296 F.Supp. 907, 914 (1969).

The dubiousness of the order from which defendants have appealed is thus obvious. As we pointed out above, if there is no stay pending this appeal, defendants face either contempt charges or, upon compliance by making public the Chicago sites prior to development of suburban sites, irreparable injury to the goal of more

public housing. Contempt proceedings in this case are a distinct possibility as the Judge stated on August 13, 1970 that if the defendants did not comply with the "report" requirement of the Order of July 20 by August 14:

"After the 15th of August there may be an application for a rule to show cause" (Transcript August 13, 1970 p. 8, 9).

As unreliable and unjudicial as the various pieces of paper attached to the Motion to Vacate and the plaintiffs' response may be, the only assertions supportive of the July 20 order are the representations of plaintiffs' counsel. It is plainly wrong that the opinion of the entire Chicago Housing Authority, the separate views of its Chairman, and the supporting expert opinions of another member and an outside expert should be discarded without a hearing merely because counsel for plaintiffs have made representations "as to the impracticality and undesirability of further deferral of advice to the City Council of sites appropriate for Dwelling Units" (Polikoff Affidavit, p.4). This wrong would be compounded if defendants are not given a chance to set it right by means of this appeal. Without a stay there is no such chance.

Finally, it is clear -- even from the "record" at hand -- that there is no basis for a claim that CHA waived its right to a hearing below. The Polikoff affidavit and his letter of July 13, 1970 attached to it show unmistakably:

(1) The order plaintiffs sought on July 13, 1970 said nothing about deadlines for going to the Chicago Plan

Commission or to the City Council. Plaintiffs' letter put CHA on notice only that plaintiffs were seeking that the District Court "pursuant to the 'best efforts' provision of the decree *** [direct] CHA *** to cooperate with us in preparing a factual report to the Court" and said the matter "should be non-controversial";

(2) During the discussion that followed the presentation of plaintiffs' letter notice of July 13, CHA asked for an opportunity to present the testimony of Dr. Greeley, was turned down, and the District Judge directed that the CHA should defer no longer the advice to the Plan Commission and City Council of the Chicago sites;

(3) An order embodying the Court's July 13 verbal directives was prepared by plaintiffs' counsel and, over objection of defendants, entered on July 20, 1970 (Polikoff Affidavit pp. 4, 5 and letter of July 13, 1970 attached).

Thus, even the affidavit of counsel for plaintiffs affirmatively shows that CHA had no notice of the controversial portion of the order decided upon on July 13, 1970. In fact, all it had notice of was plaintiffs' desire for a directive pertaining to the "non-controversial matter of filing a report with the Court^{*/}". And, CHA's explicit request for an opportunity to produce testimony

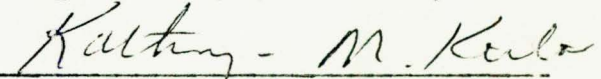
^{*/} The report in question was filed with the District Court on August 14, the date due. Pursuant to an agreed order it was filed under seal.

in support of its position was summarily denied. Moreover, the record, such as it is, shows that defendants moved promptly to give the District Court an opportunity to reconsider and correct its erroneous procedure.

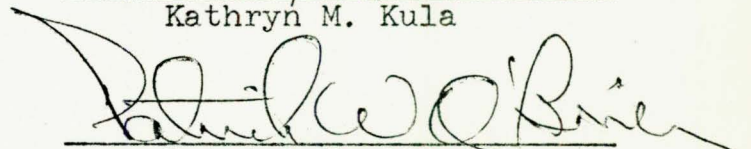
CONCLUSION

For all of the foregoing reasons defendants' motion for a stay pending appeal should be granted.

Respectfully submitted,



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