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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 18681

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellees,

v.

THE CHICAGO HOUSING AUTHORITY, et al.,

Defendants-Appellants.

On Appeal from the Judgment of the United States District Court for the Northern District of Illinois

REPLY BRIEF FOR THE APPELLANTS

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INTRODUCTION

The brief of plaintiffs suffers from serious debilities and omissions.

Assumptions, speculations, conclusions and arguments are served up by plaintiffs as if they were evidence sustaining plaintiffs' position. References to a self-serving affidavit of lead counsel for plaintiffs (A-18, 19, 20, 21, 22; hereinafter "Counsel's Affidavit") consistently appear throughout plaintiff's brief. Judge Austin, we are told, has heard "evidence," "testimony," and "arguments" of counsel. Yet in nearly all respects this affidavit is nothing more than an argument of trial counsel, reduced to writing and put in affidavit form. It was filed in response to CHA's August 11 motion to vacate (A-10), more than three weeks after the entry of the order appealed from.

By contrast, CHA's position is based upon fact. CHA relies upon documents prepared contemporaneously with the events to which they relate,* the authenticity of which is not challenged; and it relies upon the uncontested facts which are established by those documents. The meaning of these documents and facts is clear: the July 20, 1970 order was entered without notice or hearing.

Plaintiffs' brief does not even attempt to explain several discrepancies that exist between plaintiffs' contentions and the facts established by the documents relied upon by CHA. For example, counsel's July 13, 1970 letter to Judge Austin (A-45, 46, 47), which was written for the express purpose of telling the court what plaintiffs sought, and (according to plaintiffs' brief) after three or four days of "argument" (p. 9), contains no reference whatsoever to a timetable, which plaintiffs now claim was the precise question to be put to Judge Austin (plaintiffs' brief, p. 9).

Those explanations that plaintiffs now submit are little more than afterthoughts. To justify Judge Austin's order,

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* These documents are: correspondence between Mr. Polikoff and Miss Kula (A-22, 24, 26). The Greeley letter (A-12); CHA's chronology of site selection procedures (A-28, 32, 33, 37); Chairman Swibel's memorandum (A-38); CHA's resolution, No. 70-CHA-105 (A-41); Commissioner Wade's July 9 letter to Judge Austin (A-43); and plaintiffs' counsel's July 13 letter and draft order (A-45, 47).

for instance, plaintiffs now for the first time seek to impugn the credibility of CHA chairman Charles Swibel (pp. 14-15). And to justify the claim that CHA had full knowledge that the conferences with Judge Austin were arranged to discuss the imposition of a timetable, plaintiffs now tell us that CHA's counsel was in fact "eager" to discuss a timetable at those conferences (pp. 8-10). Yet plaintiffs' writings prior to July 20 contain not even a hint that Swibel's credibility was either at issue or subject to question, nor any suggestion that plaintiffs believed that CHA was "eager" to discuss timetables with Judge Austin. Even the ubiquitous Counsel's Affidavit does not go so far as to make such outrageous claims.

Furthermore, in addition to the credibility matter and the state of mind of CHA's counsel, plaintiffs now seek to have this court resolve other disputed factual issues on the basis of plaintiffs' assertions alone. For example, although CHA has offered testimony to show that public housing sites have to be disclosed on a metropolitan—rather than citywide—basis (appellants' brief, p. 9; Transcript August 13, p. 4), plaintiffs assert that such a plan "would result in indefinite delay" and that "the record does not show any possibility of reaching . . . agreements" between CHA and suburban housing authorities (plaintiffs' brief, p. 15). Such assertions have no support in the record, are contradicted by witnesses which CHA is prepared to produce, and indeed are contradicted by statements made by plaintiffs' own counsel. Thus, in the companion case against HUD (*Gautreaux* v. *Romney*, No. 66C 1460 (N.D. Ill)), plaintiffs have told the court that "the urban slum problem cannot even be stated accurately without reference to suburbia."*

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* Brief in Support of Plaintiffs' Motion for Summary Judgment, p. 35, filed August 31, 1969.

The unsupported, misleading and frequently untrue claims by plaintiffs create confusion and contradictions which dramatically underscore why matters such as those involved on this appeal should be resolved both upon proper notice and motion, and only after a full hearing.

Structurally, plaintiffs' brief breaks down into three main parts: (1) a statement of purported facts; (2) an attempted justification of the events of June and July as a lawful predicate for the entry of the July 20 order; and (3) the citation of certain facts and cases to support the contention that the order appealed from was a proper exercise of the district court's discretion. In reply, CHA will deal with these parts separately.

I. PLAINTIFFS' STATEMENT OF THE CASE IS INACCURATE IN MANY RESPECTS

Contrary to what appears in plaintiffs' brief (p. 2), when Judge Austin granted summary judgment in favor of plaintiffs he did not find that CHA had pursued "a deliberate policy to separate the races." Nor did that opinion make any finding concerning "CHA's wrongs of the past." As a result of circumstances beyond CHA's control, there were, to be sure, violations of plaintiffs' constitutional rights, and the July 1, 1969 order directed CHA to take corrective steps. But nowhere was there a finding, or even an implication, that CHA was composed of wrongdoers promulgating policies to violate the constitutional rights of plaintiffs, as plaintiffs' brief suggests. On the contrary, Judge Austin expressly held that CHA was not activated by racial attitudes.

The assertions and opinions in Counsel's Affidavit are persistently cited by plaintiffs to this court as a "record" of what took place before Judge Austin. But plaintiffs'

counsel ignore the fundamental proposition that affidavits, when offered as substitutes for live witnesses, must contain only averments which if spoken in court would be admissible evidence. A court should disregard inadmissible conclusions, opinions, and testimony lacking in foundation.* This rule is particularly applicable when the affidavit's conclusions are offered by counsel as a substitute for evidence.

In plaintiffs' Statement of the Case (p. 4), Counsel's Affidavit is the sole source for the claims, among others, that certain of the conferences before Judge Austin were set to hear "further argument and evidence respecting CHA's proposed deferral of advice to the Chicago City Counsel"; and that the June 26 conference was "continued . . . for the specific purpose of enabling CHA to present whatever additional evidence it wished." CHA vigorously disputes the accuracy of each of these conclusions. None of them would be admissible as presented even if a properly qualified witness were before the court. They are entitled to no consideration here. Moreover, the attempt, via Counsel's Affidavit, to characterize the informal conferences as evidentiary hearings is directly contradicted by the trial judge's contemporaneous description of them as "pretrial conferences"** (Transcript, July 13, pp. 31, 32).

The final two paragraphs of plaintiffs' "Statement of the Case" are written to imply that CHA actually sought the order appealed from. Under the circumstances, this implication is preposterous; it also contradicts Counsel's Affidavit, which states that the order on appeal was entered over the objections of CHA as to substance (A-21).

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* See generally 6 *Moore, Federal Practice* ¶ 56.22[1] (1966).

** See Rule 16, *Fed. R. Civ. Pro.;* "Pre-Trial Procedure, Formulating Issues."

II. PLAINTIFFS' ARGUMENT THAT THE JULY 20, 1970 ORDER WAS ENTERED UPON PROPER NOTICE AND HEARING IS BASELESS

A. CHA did not Invite the Entry of the Order Appealed From

Plaintiffs argue (pp. 6-8) that CHA actually sought and obtained the order from which it now appeals and cite a well-recognized line of cases standing for the common sense, but irrelevant, proposition that one cannot complain about an error which he has induced. We have already dealt with the lack of merit in this claim.

In a footnote (p. 7), plaintiffs suggest that the "correct" procedure would have been for CHA to tell Judge Austin that it did not want a formal order entered, to disregard the oral instructions which the judge would then give, to await a formal motion by plaintiffs for amendment or modification of the original judgment order (or perhaps for a rule to show cause), to oppose such motion, and then to appeal the resulting order! Plaintiffs do not explain the function that such game playing would have served. The uncontestable fact is that CHA opposed any order or instruction that it proceed in accordance with a timetable of the sort ordered by the court. CHA's alleged "inviting" of the controversial part of the order was nothing more than a proper insistence that if the court was to direct CHA to proceed by a timetable, the direction must be embodied in a written order. CHA did not induce any error below; it only quite properly asked that the error be spread on the record.

① admit fact —
② amt to error for court to express its view informally

B. CHA had no Knowledge or Notice that the Conferences Before Judge Austin were for the Purpose of Overriding the Judgment Order

Plaintiffs admit (pp. 6, 7) that in July they were merely seeking an "informal expression of views by Judge Austin" about whether CHA should proceed to the City Council forthwith. This assertion substantiates that CHA did not have notice that the conferences might lead to a directive amending the "best efforts" clause of the judgment order: for plaintiffs concede that they did not know that such was to be the purpose of the conferences!

Plaintiffs' further liberties with the facts relevant to the issues in this appeal are shown by their completely irrelevant claim that "[t]he fact is of course that CHA agreed to attend the conferences with Judge Austin for the very purpose of discussing precisely the question of timetable" (p. 9). Ignoring for the moment the fact that this is nothing but speculation by counsel and contradicted by a letter he wrote on July 13, it is clear that a willingness to discuss a matter is not a willingness to waive the right to a hearing on that matter. Whether on the record or off the record, a pre-trial conference, as the Judge described the informal conference in question, is not a substitute for a hearing or a trial.

C. The Fact that CHA Agreed to a Proceeding in Chambers does not Justify Affirming the July 20 Order

Due to the sensitive nature of the subject matter of this litigation, CHA was perfectly willing to conduct any discussions with Judge Austin in the privacy of his chambers. To claim that by this agreement CHA agreed that the district court could modify the July 20 order without notice or hearing is a non sequitur.

It is also true that CHA did not ask that the discussions proceed before a court reporter. However, CHA did not object to the absence of a court reporter because, as has been set out at great length previously and as the record amply demonstrates, the avowed purpose of the conferences was to present information to Judge Austin and arrange for the providing of information to plaintiffs.

No

D. CHA was not Given an Opportunity to Present any Evidence

Plaintiffs' argument that CHA was given a full opportunity to present all the evidence it wished is supported only by the opinions and conclusions found in Counsel's Affidavit.

CHA did not go into the conferences with Judge Austin expecting to present any "evidence" on any subject, much less on the subject of whether the July 1, 1969 judgment order should be modified. Had CHA been notified that this subject was under inquiry, it would have sought to make a record not only through the testimony of its own representatives and Dr. Greeley, but through that of other experts. When the court on July 13 said it would order CHA to abide by a timetable, and after July 20 when the court did in fact enter such an order, CHA promptly sought the opportunity to make an evidentiary-type presentation to the court.

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E. Nothing in Plaintiffs' Brief Refutes the Arguments Advanced by CHA that the Order Appealed from was Entered without Proper Notice or Hearing

The most glaring deficiency in plaintiffs' brief is that it fails to discuss the one document which shows conclusively the state of the proceedings before Judge Austin on

July 13, 1970, one week before the entry of the order appealed from. That document is Mr. Polikoff's July 13, 1970 letter to Judge Austin, with draft order attached (A-45, 46, 47, 48, 49). If plaintiffs' brief is to be believed, by July 13 many days of hearings (complete with "testimony," "evidence," and "arguments of counsel") had passed on the subject of deferral of submission of housing sites to the Chicago City Council. Yet Mr. Polikoff's July 13 letter dealt only with the "non-controversial" subject of information reporting. It said nothing about modifying the original judgment order in any substantive manner, much less by the imposing of timetables.

Plaintiffs' arguments also ignore the fact that CHA has timely objected in the most vigorous manners to the controversial portion of the July 20, 1970 order. Unlike plaintiffs, with their bootstrap arguments based upon the affidavit-type conclusions of their counsel, CHA has presented to this court uncontrovertible facts showing (1) that the original (July 1, 1969) order required CHA to use its best efforts to accomplish the terms thereof; (2) that that order was only to be modified upon notice and hearing; (3) that the only "notice" given CHA prior to July 13, 1970 was that plaintiffs were seeking to gain information; (4) that on this basis CHA participated in several informal conferences before Judge Austin; (5) that Judge Austin relied upon what was said in these conferences as a basis for issuing the order appealed from; and (6) that CHA took all available steps to object to that order.

Under the circumstances set forth above, it is abundantly clear that the July 20 order must be set aside for the reasons set forth in CHA's principal brief.

III. THE ORDER APPEALED FROM WAS NOT A PROPER EXERCISE OF THE JUDGE'S DISCRETION

Finally, plaintiffs contend that not only was Judge Austin's order a proper exercise of discretion but that had he declined to enter the order such action would have constituted an abuse of discretion. To support this proposition, plaintiffs cite (A) a number of alleged facts which in important particulars are misleading or untrue, and (B) several cases which have no legitimate application to the case now before the court.

A. The Facts Cited by Plaintiffs are Either Inaccurate or Irrelevant

There is no issue on this appeal as to whether Judge Austin, when granting summary judgment in favor of plaintiffs in 1969, found that they had been deprived of their constitutional rights. Plaintiffs rights have been defined, an order has been entered setting forth procedures for vindicating those rights, and CHA has neither appealed from nor contested that order. The only remaining question is how best to achieve the objectives of the July 1, 1969 order; and CHA's complaint about the order appealed from is simply that the district judge did not have a proper basis for substituting his judgment for CHA's.

It is not true, as plaintiffs' brief claims (p. 14), that over a year following the entry of the original judgment order not one proposed site has been "put into the pipeline." The record before this court leaves no doubt that by June 1, 1970 the "pipeline" had, in fact, been filled, leaving at issue, in plaintiff's words (p. 22), only the "narrow question" of "timing". Indeed, plaintiffs' "pipeline" claim ignores what plaintiffs themselves admit at page 14 of their

brief, namely, that CHA has submitted a very substantial number of sites to HUD. The "Chronology of Site Selection Procedures" (A-28, 32, 33) shows the intense activity of CHA both before and after the July 1, 1969 Judgment Order, and there is nothing in the record of these proceedings either controverting or complaining about CHA's best efforts up to and including June 1, 1970. Thus, after extensive effort by CHA, sites have been selected, submittals have been made to HUD, outside authorities have been consulted, meetings have been held with suburban housing districts, and in general CHA has devoted itself fully to the task of carrying out the provisions of the Judgment Order of July 1, 1969.

We point out, in passing, that in this portion of plaintiffs' argument their attorneys adopt the role not only of witnesses but of experts on public relations and urban affairs. Thus, plaintiffs state that "strong public statements" can handle the problem of the white emigration to the suburbs; that CHA's suburban policy will result in indefinite delay; and that "identical considerations" exist in the suburbs as in Chicago (plaintiffs' brief, pp. 15-16). As has been true in countless other circumstances concerning this appeal, no facts in the record support these assertions by plaintiffs.* Such assertions underscore the need for the conflicting contentions of the parties to be put to the test in the usual manner.

B. The Cases Cited by Plaintiffs have no Legitimate Bearing on the Facts Now Before the Court

Plaintiffs' claim (p. 17) that the *Prince Edward County School* case is dispositive of CHA's contentions that the

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* A somewhat similar example of what is best described as cheek appears at page 23 of appellees' brief, where plaintiffs point out that "current newspaper stores show" that CHA's system is one of the "Cancers" of Chicago.

district court abused its discretion. There, to avoid integration, a school board in 1959 had closed completely all public schools in the county, thereby denying most (if not all) of the negro children in the county (as well as some of the poor white children) any education at all. By the time the case got to the Supreme Court, in 1964, the schools had been closed for five years. Thus, before the Supreme Court upheld the extreme remedy there set forth, there had been an obvious and deliberate flouting of the law by the local officials. It is grotesque to apply such facts to this case, where CHA has worked diligently to achieve the objectives of the July 1, 1969 judgment order.

Moreover, CHA does not contend, as plaintiffs imply it contends, that the district court lacked jurisdiction to enter either the July 1, 1969 order or orders amending it. What CHA does contend is, first, that it had no hearing on the question of whether the July 20, 1970 order should have been entered and, second, that that order constituted an abuse of discretion.

In *Coppedge* v. *Franklin Board of Education* (plaintiffs' brief, p. 19) the court of appeals noted that 13 years "had passed since the Supreme Court's decision in *Brown* v. *Board of Education*." Accordingly, the *Coppedge* case is an indication of what the courts have the power to do in the case of extreme delay. Similarly, in *United States* v. *Bertie County Board of Education* (plaintiffs' brief, p. 20), the district court held that desegregation had been postponed for an extremely long period of time.

Plaintiffs' reliance upon *Cooper* v. *Aaron* (plaintiffs' brief, pp. 20-21) seems ludicrous. In *Cooper,* the Supreme Court was confronted with a deliberate and obvious challenge to the power of the federal courts by governmental

officials of the State of Arkansas. With the governor ordering the Arkansas National Guard to resist negro efforts to enter white schools, it is hardly surprising that the United States Supreme Court considered state sponsored public hostility as irrelevant to the issues before it. The CHA is not backing-off because of community hostility from what it has the power to accomplish—it seeks only the right to exercise reasonable discretion in using its best efforts in pursuit of a goal that can only be accomplished with the cooperation of other municipal corporations.

Conspicuously absent from appellees' brief is a discussion of Judge Austin's opinion in *Gautreaux* v. *Romney,* the companion to the present case and discussed at pages 29-31 of CHA's principal brief. Plaintiffs have not and cannot explain the legal and philosophical discrepancies which exist between these two companion cases: one, the present case, where administrative judgment was supplanted, and the other adopting nearly a judicial "hands off" policy in the area of public housing. It is likely that plaintiffs' silence is prompted by their view that Judge Austin was wrong in not granting, as plaintiffs argued, summary judgment *against* HUD instead of in *favor* of HUD. At the very least, however, one would have reasonably expected the result in that companion case to have cooled plaintiffs' rhetoric suggesting that CHA's prompt compliance with the order of July 20 would have been a great leap forward in righting the wrongs done to the plaintiff class. After all, the plaintiffs argued to Judge Austin in the HUD case that "full relief for the plaintiffs requires an order against HUD".*

* "Brief for Support of Plaintiffs' Motion For Summary Judgment", pp. 35, 36, filed October 31, 1969 in the District Court in the companion case.

CONCLUSION

This appeal is being taken because the district court modified its original judgment order without proper notice or hearing given to CHA and because the order as modified constituted an abuse of discretion. We submit that plaintiffs' arguments further dramatize the error below and that this Court should vacate the district court's order of July 20, 1970.

In their concluding paragraph, plaintiffs suggest that pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure this court should order that its mandate issue immediately and not be stayed. In view of the fact that CHA fully expects to prevail on this appeal, it makes no comment at this time concerning plaintiffs' suggestion, other than to note that this is not the proper time for such a suggestion to be made.

Respectfully submitted,

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