

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 Judgment of the United
States District Court for the Northern
District of Illinois

PETITION FOR REHEARING AND SUGGESTION
OF IN BANC HEARING

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Defendants-appellants (CHA), for the reasons set forth below, petition for reconsideration of the opinion of the Court entered on December 16, 1970, and suggest rehearing in banc because of the importance of the questions presented and because of the lack of uniformity on the "hearing" issue with the December 14, 1970 opinion of this Court in Skolnick, et al. v. Mayor and City Council of Chicago (No. 18878).

I.

THE COURT'S MAJORITY OPINION MISAPPREHENDS WHAT CHA DID AGREE TO DO AND WHAT CHA DID NOT AGREE TO DO, OVERLOOKS THE APPLICABLE LAW ON "WAIVER", AND APPROVES A SUMMARY ADJUDICATION OF A MATERIAL DISPUTED FACTUAL ISSUE.

The District Judge accurately described the June 2, June 16, June 26 and July 13 conferences as "pretrial conferences" (Transcript July 13, pp. 31-32) */. And this Court's opinion accurately states that CHA agreed with plaintiffs that these pretrial conferences might be (a) in chambers, (b) off the record and (c) unrestricted as to scope of topic. But CHA submits such agreed ground rules at pretrial conferences in complex litigation are the rule rather than the exception. They provide no basis for either the summary adjudication of contested issues or the waiver of a right to a hearing on contested issues.

1. CHA Never Agreed To Waive Its Right To A Hearing On

*/ For the convenience of the Court, attached as an appendix hereto is a chronology of relevant events.

So Much Of The 1970 Order Amending The 1969 Judgment Order As Imposes A Time Table For The Submission Of Sites To The City Council of Chicago For Its Approval.

The general purpose of the pretrial conferences below was compliance by CHA with the "best efforts" clause of the Judgment Order of July 1, 1969. Such conferences are for the purposes of -

"simplification of issues" and the production of an order which, among other things, will reflect "agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel." Rule 16, F.R.C.P.* /

Thus, at the fourth conference, that of July 13, 1970, counsel for plaintiffs proposed an order requiring CHA to file a report. He believed it "should be non-controversial" (A-47-49). He was right. CHA does not object to so much of the order of July 20 as incorporates the gist of plaintiffs' proposed order, and, in fact, the requisite report was filed on the due date.

As of July 13, 1970, the CHA view on the "timing" issue was known. Since plaintiffs asked only for "specific information concerning what CHA has done and plans to do" (A-46), it is not clear just what plaintiffs' position was on this issue. But it may be assumed that the conferences had resulted by July 13 in the isolation of a disputed fact issue - the "best efforts" issue insofar as it involved submission of sites to the Chicago

* / Appellate Rule 33 says the same thing about a "prehearing conference".

City Council. This Court, we submit, has misapprehended where CHA agreed with the plaintiffs and/or the District Judge and where it was clear there was no agreement. Conferences which illumine a disputed issue are no substitute for the hearing required to resolve it.

2. The Requisites Of A Waiver By CHA Of Its Right To Notice And A Hearing Prior To Modification Of The July 1, 1969 Judgment Order Are Not Satisfied By The Record Before This Court.

In Buffum v. Chase Nat. Bank of City of New York, 192 F.2d 58, (7th Cir. 1951), cert. den. 342 U.S. 944 (1952), the issue before this Court was whether defendant, by qualifying in Illinois for the limited purpose of doing trust business, waived its right not to be sued in Illinois except in connection with its trust business. This Court said (p. 61):

"[Waiver] may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible."

This Court in Buffum concluded that it would not "attribute to [the defendant] an intent to waive anything other than what it did actually waive***". But the majority opinion in this case attributes an intent on the part of the CHA to waive its right to a hearing on modification of the Judgment Order on one issue

because it agreed to a modification as to other matters. Waiver is found as to the disputed time table issue despite the fact that from the moment the District Court on July 13 proposed it, CHA objected and sought to bring in a witness and, after entry of the order of July 20, 1970, imposed it, promptly moved formally for a vacation of that order and again sought a hearing.

3. So Much Of The Ruling Of July 20, 1970, As Imposed A Time Table Amounted To Summary Judgment In The Face Of A Genuine Issue of Material Fact.

In Lynn v. Smith, 281 F.2d 501 (3d Cir. 1960), the issue on appeal was whether the district court erred in dismissing the complaint, sua sponte, at the conclusion of a pretrial conference. Reversing, the court said (pp. 506, 507):

"***What the District Court did, in effect, was to grant a summary judgment although neither party had moved for a summary judgment nor had they taken any steps in that direction in accordance with the specific requirements of Rules 12(b) and 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.

"The appellate tribunals in the federal judicial system have frequently pointed out to trial courts that *** summary judgments cannot be granted when there is a genuine issue as to a material fact presented by either of the parties to an action. Bragen v. Hudson News Company, Inc., 3 Cir., 1959, 270 F.2d 265; Alaniz v. United States, 10 Cir., 1958, 257 F.2d 108; Cameron v. Vancouver Plywood Corporation, 9 Cir., 1959, 266 F.2d 535.

"Further, we are compelled to observe that pretrial conferences are not intended, nor have they ever been to serve as a substitute for the regular trial of cases.

"Finally, mention must be made of the fact that in the course of the pretrial conferences the oral statement of an unsworn 'witness' was received***."

* * *

"In our view the receipt of 'oral statements' by 'witnesses' in a pretrial conference opens a Pandora's box not in contemplation by those who so wisely conceived pretrial procedures as a medium of expediting the trial of cases and not as a substitute for the regular trial process."

What happened to the plaintiff in Lynn v. Smith happened to CHA below - despite the existence of a genuine issue of material fact, at the conclusion of a pretrial conference an order of summary judgment was entered without notice or hearing. This violated the principle of due process, the rules for pretrial conferences and summary judgments, and the text of the 1969 Judgment Order.

CHA has claimed, and does claim, that it has lived up to the letter and spirit of the 1969 Judgment Order's "best efforts" clause. But it, like the plaintiffs in Skolnick, et al. v. Mayor and City Council of Chicago, decided by this Court on December 14, 1970 (Case No. 18878), has been denied the opportunity to have its claim "fully litigated".

II.

THE MAJORITY OPINION MISAPPREHENDS DOCUMENTS TO THE PREJUDICE OF CHA.

CHA submits that the majority opinion reflects misapprehension of key documents in the record and each instance has resulted in material prejudice to the cause of CHA.

1. The HUD Letter Of July 9, 1970. The majority (pp. 6, 7), referring to a July 9, 1970, letter from the Regional Administrator of HUD to the Executive Director of CHA about the

status of the HUD approved dwelling units, states:

"The Regional Director expressed concern over possible delay in submitting these sites to the City Council as late as 1971. He indicated that any such delay would be 'quite a serious matter' and noted that the Department's ability to hold the reservation of those sites would be involved if such a delay occurred" (Emphasis added).

The majority thus finds in the record a possibility that a delay of approval by the Chicago City Council to "as late as 1971" (e.g., Jan. or Feb. 1971) would jeopardize the program involving about 1,500 units spread over 263 sites.

What the letter in question actually said about the kind of a delay that might put the whole program at risk is:

"Informally, we have been led to understand that the sites may not be submitted to the City Council until late in 1971" (Emphasis added).

CHA submits that the difference between a possible delay to "as late as 1971" and a possible delay "until late in 1971" is significant: it could be almost twelve months. Moreover, nowhere in any document before this Court on this appeal- including the evidentiary affidavit of the counsel for plaintiffs - is there a basis for the suggestion that the 263 sites might not be submitted to the City Council for approval until "late in 1971". In short, the basic premise of the author of the letter from HUD was false and the majority opinion has overlooked that important point.

Apart from the problem resultant from misapprehension of

its contents, the evidentiary use of such a document as against CHA*/ underscores the difficulty caused CHA by the unusual nature of the proceedings below. The author from HUD stated that his official concern was based upon what unidentified persons at HUD had been "led to understand" - "informally". Because CHA had no opportunity to examine the author of that letter, one can only conjecture and speculate as to who it was that led persons connected with HUD to that understanding, when that understanding was implanted, where, and how.

2. The Wade Letter Of July 9, 1970. The majority (p.6) sums up the letter of July 9 from Richard Wade, a CHA Commissioner, to the District Judge as follows:

"***[Wade] stated his belief that submission of sites to the City Council 'before the upcoming campaigns' would have adverse political consequences, and urged that site submission should be accordingly delayed" (Emphasis added).

This statement misapprehends Wade's letter. The only adverse consequences suggested by Wade in his letter if sites were submitted before "the upcoming campaigns" were consequences adverse to the goal of more public housing. Wade said (A-44):

"*** it [is] my judgment that submission of the sites at the present time would make public housing the central issue of upcoming campaigns and it [is] my fear that the ultimate results would be that less housing would be built. There is abundant historical evidence that resistance to public housing in white areas has been used by political candidates for partisan political purposes. It would be

*/ It was put into the record as an exhibit to the affidavit of plaintiffs' counsel's affidavit on August 13, 1970 (A-20,21).

unfortunate if your historic decision got embroiled in a political contest where there was not adequate defense of either public housing or your decision.

"*** I would not like to see this great opportunity for integrated housing jeopardized by temporary political considerations" (Emphasis added).

The majority's misapprehension of what Wade said undoubtedly contributed to the Court's conclusion (p. 12) that "political considerations" were a basis for CHA's arguments in favor of delaying submission of the sites. As the Wade letter clearly states, CHA's position was not based upon "political considerations" (whether this or that candidate would be aided or hurt by the submission of sites during a political campaign); but rather upon the fact that CHA must take into account that each proposed site must be approved by Chicago aldermen: if they vote "No" on a proposed site there will be no public housing on that site. If one's interest is in the construction of more public housing in Chicago, it seems obvious that aldermen should vote at a time most opportune for a "Yes" vote. All Professor Wade suggested was that campaign time was not such an opportune time.

The majority states (p. 12):

"*** community hostility is no reason to delay enforcement of proven constitutional rights. Coppedge v. Franklin Board of Education, 293 F. Supp. 356 (E.D.N.C. 1968), aff'd 404 F.2d 1177 (4 Cir., 1968); McNeese v. Board of Education, 373 U.S. 668(1963); Holmes v. New York City Housing Authority, 398 F.2d 262 (2 Cir., 1968)."

The defendants in each of those cases had the power - however hostile the community - to grant the plaintiffs relief: each school board defendant had the power to desegregate the schools in its district and the housing authority defendant had the power to abolish discriminatory practices in the rental of units it controlled. But CHA does not have the power to build public housing in the City of Chicago or elsewhere without approval of the local government. What CHA builds it will build in accordance with the 1969 Judgment Order. But without local government approval it can build nothing.

Finally, it must be remembered that Professor Wade is just one Commissioner of the CHA who presented one Commissioner's opinion supplementing the official position of the Commission. The official position of the CHA (A-38-43) is that the problem of public housing must be solved, as is contemplated in the July 1, 1969, Judgment Order, on a metropolitan basis.

3. The Polikoff Letter of July 13, 1970. The last of the four pretrial conferences on July 13, 1970, opened with the submission of a letter and form of proposed order from counsel for plaintiffs to the District Judge and to the General Counsel of CHA. The majority (p.7) says that the "letter objected to CHA's failure to submit any sites to the City Council since the entry of the July 1, 1969 order: and that the accompanying "proposed order did not formally move for the establishment of

a time table for site submission" (emphasis added).

CHA submits that the letter did not constitute an objection to the failure, thus far, to submit sites to the City Council: that unquestioned fact simply was a basis for plaintiffs' request, as the majority opinion accurately notes (p.7), "for the preparation of a comprehensive report containing a full disclosure of all of defendants' efforts to comply with the 'best efforts' clause". */

The majority's reference to the fact that plaintiffs on July 13, 1970, did not "formally move" for the establishment of a time table for site submission implies, we submit, that there had been an "informal motion" to that effect. The text of the letter and the proposed order rebut that implication. Omitting the paragraphs referring to "background" and those setting forth what information plaintiffs wanted, plaintiffs' July 13 letter reads as follows:

"Against this background, let me set out the following facts:

1. Since the entry of the decree CHA has not submitted one site for new low-income family housing to the City Council for approval - and, of course, therefore, has not begun the construction of one new dwelling unit for low-income families" (A-45).

"Unless the best efforts provision of the decree is to be rendered meaningless, we need specific information concerning what CHA has done and plans to do. Perhaps everything is being done that can be done, but we cannot

*/ Such a report was filed on August 14, 1970.

know this if we do not have the information. If more should be done than is being done, we cannot make intelligent recommendations to the Court without knowledge.

"Therefore, pursuant to the 'best efforts' provision of the decree, we ask that CHA be directed to cooperate with us in preparing a factual report for the Court. Attached is a form of such an order. We do not necessarily ask, however, that such an order be entered; we believe that an informal request from you to CHA should suffice.

"I am sorry I have not been able to prepare and deliver this letter earlier. However, it really does nothing more than reduce in writing the oral request we made at our last meeting in your chambers. Moreover, it should be non-controversial. Accordingly, I hope it will be possible to act upon our request promptly, if not this morning then shortly thereafter" (A-46-47, emphasis added).

Thus the document submitted by plaintiffs on the very day that the Judge decided to impose a time table shows that plaintiffs were not suggesting, formally or informally, the imposition of a time table, they were - in fact - candidly admitting that so far as they knew after three pretrial conferences: "Perhaps everything is being done that can be done***" (A-46).

The minority opinion (p.13) takes note of the assertion of counsel for plaintiffs - in argument on August 13, 1970 (Tr. p.13):

"*** we did make an oral motion in the presence of counsel for CHA that the Court express its view that it was high time CHA got down to brass tacks and submitted the already approved sites to the City Council***"

However, the only support in the record for this August 13 argument of counsel for plaintiffs is found in his volunteered testimonial affidavit in which he says that at the June 26, 1970, pretrial conference:

"Counsel for plaintiffs made a statement as to the impracticability and undesirability of further deferral of advice to the City Council of sites appropriate for Dwelling Units" (A-20).

Thus, it appears that, whatever the views of plaintiffs on June 26, 1970, by July 13, 1970, (after considering the CHA resolution and the statement of its Chairman submitted on June 26, 1970, and the July 9, 1970 letter of Wade), so far as plaintiffs knew: "Perhaps everything is being done that can be done***" (A-46). As of July 13, 1970, therefore, the record shows that CHA had every reason to believe that plaintiffs were as willing to defer submission of the sites to the City Council as CHA was willing to provide plaintiffs with the information they desired.

4. The Polikoff Affidavit Of August 12, 1970. Below, plaintiffs' counsel filed an affidavit in opposition to the August 12 motion of CHA to vacate the July 20 order and to set the contested matters involved for a hearing. This was relied on by the District Judge (Tr. Aug. 13, p.17) and misapprehended by this Court (p.4) to the prejudice of CHA. Among other things, plaintiffs' counsel, as affiant, said:

"The first of such conferences [June 2, 1970] was held following the advice to counsel for plaintiffs from the Chairman of CHA to the effect that CHA did not intend to advise the Chicago City Council of sites appropriate for dwelling units*** prior to the Chicago mayoralty election scheduled to be held in April 1971" (A-18, emphasis added).

This August assertion as to what the Chairman of the CHA supposedly

said some time in May, 1970, is not hinted at in any of the documents written by the affiant prior to the date of the affidavit. See Polikoff letters of May 18, May 20 and July 13, 1970 (A 22-25, A 45). Also, the August 12 assertion by plaintiffs' counsel as to what was supposedly said to him by the CHA Chairman sometime prior to the first conference, is contradicted by what plaintiffs' counsel wrote on July 13, the date of the fourth conference:

"Perhaps everything is being done that can be done*** (A-46).

If plaintiffs were convinced that CHA, come what may, was resolved upon a delay until after the April 1971 mayoralty election they had no basis for such a temperate statement - plaintiffs should have initiated contempt proceedings.

At the August 13, 1970 argument before the District Judge, CHA objected both to the above and other evidentiary portions of the Polikoff affidavit (Tr. pp. 7, 24, 25). But the Trial Judge left no doubt that he accepted as true the "evidence" of plaintiffs' counsel during the following colloquy:

"The Court: Well, it was suggested by the Chairman that a better time politically would be after the 15th of April, 1971.

"Mr. Polikoff: I think that is correct, your Honor.

"The Court: And I think that is disclosed in your affidavit" (Tr. p.18, See also Tr. p. 17).

CHA Counsel stated then that such reliance upon an affidavit of

an adversary attorney was "outrageous" (Tr. p.24) and that is still the view of CHA. By this position CHA does not attack the affiant's credibility, reliability or memory. If the testimony contained in the Polikoff affidavit of August had been introduced and tested in the usual fashion, a fuller version of the alleged May conversation would have been before the district court and this Court; had this been the case, most of the contradictions that bristle in this record between what plaintiffs' documents contemporaneous with events reflect and what plaintiffs later argued probably would have vanished.

The majority of this Court, misapprehending the nature of the affidavit in question, states:

"Plaintiffs were informed that defendants wished to delay submission of sites and that allegedly, defendants 'did not intend to advise the City Council of sites appropriate for dwelling units...prior to the Chicago mayoralty election scheduled to be held in April, 1971'". (p.4)

Thus, over CHA's objection and without any opportunity for CHA to cross-examine the affiant or to produce testimony to the contrary, both the majority of this Court and the district court have given credence to an untested and prejudicial testimonial statement from the attorney for a party litigant. CHA submits that such reliance upon such a document constitutes a clear denial of due process to CHA.

CHA, therefore, submits that this Court has misapprehended important documents and that CHA has been seriously prejudiced thereby. Each of these matters, we submit, is sufficient to

provide an independent basis for this petition for rehearing and that the matter be considered in banc.

CONCLUSION

In conclusion, a word about "delay". If the contested issue had been heard, say in late August, any appeal from the result, if expedited as this one was, could have been decided long before December 16: There would have been a regular record and the findings of fact would have been governed by Rule 52(a). The irregular procedure below, commencing on July 13, 1970, when the Trial Judge announced his determination to impose a time table, has produced confusion and a divided Court. Of course, during the flurry of procedural motions attendant to CHA's appeal (See Appendix), CHA has remained bound by all of the provisions of the 1969 Judgment Order, including the "best efforts" clause, so there has been no pause in the effectiveness of the basic decree.

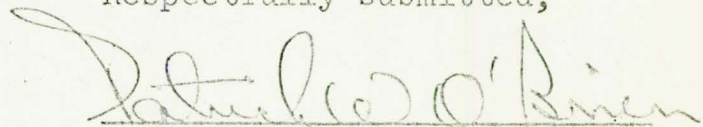
For all of the above reasons, CHA submits that its petition for rehearing and its suggestion of an in banc rehearing should be granted.

Of Counsel:

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General Counsel, CHA

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Respectfully submitted,


Patrick W. O'Brien


Watson B. Tucker

Attorneys For Defendants-Appellants

A P P E N D I X

<u>DATE</u>	<u>DESCRIPTION</u>
June 2, 1970) June 16, 1970) June 26, 1970)	Pretrial conferences in Judge Austin's chambers.
July 13, 1970	Pretrial conference in Judge Austin's chambers, service of Polikoff letter (A-45-49), announcement by Judge of intention to amend the order of July 19, 1969 by imposing a time table for submission of sites to stay counsel.
July 20, 1970	Entry of order from which this appeal is taken.
August 10, 1970	Filing of the appearance of Patrick W. O'Brien and Watson B. Tucker as additional attorneys for CHA.
August 11, 1970	Filing and service of three motions on behalf of CHA: 1. Motion to vacate the order of July 20, 1970 and to set the matters referred to in said order for hearing. 2. Motion to extend the time periods set forth in the order of July 20 until disposition of CHA's motion to vacate, etc. 3. Motion to extend time for the filing of an appeal from the order of July 20 until disposition of CHA's motion to vacate, etc.
August 13, 1970	Argument of counsel and entry of order denying each of CHA's August 11 motions.

August 14, 1970	Pursuant to an agreed order the filing by CHA in the District Court - under seal until further order of Court - the report called for by paragraphs A and B of Part I of the order of July 20, 1970.
August 14, 1970	Filing of the notice of appeal.
August 18, 1970	CHA's motion in the District Court for a stay pending appeal and an entry of an order denying same.
August 18, 1970	CHA's motion in this Court for a stay pending appeal.
August 19, 1970	Order of this Court granting a stay pending an appeal, ordering that the appeal be expedited and setting the schedule for briefs and oral argument.
August 20, 1970	Motion of Plaintiffs To Reconsider and Vacate Granting of Stay.
August 21, 1970	Order of this Court denying Plaintiffs motion to reconsider and vacate granting of a stay pending appeal.
September 9, 1970	Filing of brief and appendix of CHA.
September 23, 1970	Filing of the brief of Plaintiffs.
September 30, 1970	Filing of the reply brief of CHA.
October 6, 1970	Oral argument.
December 16, 1970	Opinion of this Court.
December 17, 1970 (A.M.)	Plaintiffs' Motion For Immediate Issuance of Mandate, Etc.
December 17, 1970 (P.M.)	Memorandum of CHA In Opposition To Motion of Plaintiffs For Immediate Issuance Of Mandate, Etc.
December 18, 1970	Order of this Court denying Plaintiffs' Motion For Immediate Issuance Of Mandate, Etc.
December 30, 1970	Filing of this Petition for Rehearing.