

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18681

U.S.C.A. — 7th Circuit

FILED

JAN 19 1971

KENNETH J. CARRICK
Clerk

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

ANSWER TO PETITION FOR REHEARING AND
SUGGESTION FOR EN BANC HEARING

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The error Judge Austin is alleged to have committed consists of entering an injunctive order (part II of the order of July 20, 1970) without giving CHA adequate notice that such an order would be entered and without affording CHA a formal hearing with respect to it. We will show in Part I of this Answer that (A) CHA itself requested the inclusion of part II in the July 20 order (which otherwise would not have

been included) and under established principles should therefore not now be permitted to attack it, and (B) CHA failed to object to part II on the grounds now urged after it made its request for inclusion, and thereby waived such grounds for objection. In Part II of this Answer we will deal with CHA's assertions respecting alleged misapprehensions by this Court.

I. CHA INDUCED THE ALLEGED ERROR
AND WAIVED ANY PROCEDURAL
OBJECTION TO IT

A. CHA Requested Inclusion of Part II in the Order
Appealed from and under Established Principles
Should not Now be Permitted to Attack it.

In all of the briefs and petitions on this appeal these facts have never been controverted:

- (1) Plaintiffs did not ask Judge Austin to order CHA to advise the City Council of its already selected sites - they only asked for an informal expression of views from him that that should be done. (Transcript of Proceedings of 8/13/70, pp. 13-14.)
- (2) At the conference of July 13, 1970, Judge Austin did so state. (A-21, ¶9 of Aff.)
- (3) CHA counsel - not plaintiffs' counsel - then said CHA might desire a written order to that effect. (Id.) Twenty four hours were sought within which to make that decision. (Id.)
- (4) The matter was then continued to July 20 for the purpose of signing an order providing for a written report, and, if and only if desired by CHA, an order providing for advice to the City Council. (Id.)

- (5) Counsel for CHA did thereafter conclude that an order providing for such advice was desired by CHA. (A-21, ¶10 of Aff.)
- (6) Such an order was then prepared and signed by Judge Austin on July 20, 1970. (Id.)

For emphasis we repeat that these facts are not contested or controverted in any way. They are reflected in the opinion of this Court of December 16, 1970. Thus, the Court's opinion says that at the June 26, 1970, conference, "plaintiffs' counsel argued against deferral of site submission, but did not request any formal order to that effect" (p.6), and that the proposed written order submitted to Judge Austin on July 13 by plaintiffs' counsel did not provide "for the establishment of a timetable for site submission." (p.7.)

Thus it is clear, as indeed CHA repeatedly asserts (e.g., CHA Petition, p.2), that plaintiffs proposed only a non-controversial order calling for a report. They also requested Judge Austin to express his view, but informally only, that CHA should submit sites to the City Council. It is agreed, and repeatedly asserted by CHA, that plaintiffs did not ask Judge Austin to enter any order to that effect. It is clear and uncontroverted therefore that the only contested part of the order appealed from was entered only because Judge Austin had expressed his informal view that submission should be made to the City Council and CHA then desired and requested that an order to that effect be entered.

It is perfectly plain that Judge Austin's informally stated view, not embodied in any order and not even reduced to writing, would not have constituted an injunction. In Taylor v. Board of Education, 288 F.2d 600 (2nd Cir. 1961), it was argued that an order to a school board to prepare and submit a desegregation plan, coupled with the trial judge's written opinion that certain proposed construction might aggravate the segregation problem, in effect prohibited the Board from proceeding with its construction plans and therefore constituted an injunction. The Court of Appeals for the Second Circuit held that the order plus the opinion did not constitute an injunction, even though "we fully appreciate why the Board may hesitate to proceed in the light of this [language of the opinion]." (288 F.2d at 603.) The Court said that the written order did not in fact enjoin construction and that it could only conjecture whether the District Court would do so in the future. The Court added that "defendant's apprehension that conduct on his part may ultimately be restrained is not an 'injunction' ..." (Id.)

So too here. Judge Austin's order to prepare a report plus his informal and unwritten view as to further delay did not constitute an injunction order on "timetable." This Court could only conjecture what Judge Austin would have done in the future (had CHA not requested a timetable order). CHA's presumed "apprehension" that further delay on its part in advising the

City Council might ultimately be restrained was not an injunction, any more than the school board's "apprehension" in Taylor was an injunction. (And in Taylor the language causing apprehension was written in a formal opinion, not oral and off-the-record.)

Since Judge Austin's informal and unwritten expression of views was not an injunction, and since the request for the injunction which was entered came exclusively from CHA, the familiar principle that a party may not assert as error an action which he induced the tribunal to take dictates that CHA not be permitted to attack the order it requested. The "invited error" doctrine has been employed in a variety of circumstances. See, for example, Sanders v. Buchanan, 407 F.2d 161, 163 (10th Cir. 1969) ("An appellant may not complain on appeal of errors which he himself induced or invited."); Cypert v. Baker, 399 F.2d 927, 930 (10th Cir. 1968) ("We think the case is clearly within the doctrine that a party may not complain on appeal of errors which he induced or invited."); Geehan v. Monahan, 382 F.2d 111, 113 (7th Cir. 1967) ("Neither party to an action can be heard to impugn an order to which that party agreed at the time of its entry."); Garza v. Indiana & Michigan Electric Co., 388 F.2d 623, 627 (6th Cir. 1964) ("One may not complain of rulings which he invited the court to make."); Fort Worth & Denver Railway Co. v. Thompson, 216 F.2d 790, 793-94 (5th Cir. 1954) ("The fourth specification of error ... in our opinion presents no prejudicial error ...

because the course pursued by the Court in respect to it was agreed to if not invited, by the defendant."). And see for still other applications of the invited error doctrine the cases cited in plaintiffs' brief on appeal at pages 7-8.

CHA's argument on this issue is that it would have been "game playing" for it to have disregarded Judge Austin's informally expressed view as to what it should do and "await a formal motion by plaintiffs for amendment or modification of the original judgment order ..." (CHA Reply Brief, p.6.) But the absence of such a formal motion (and the proceedings which would be triggered by it) is exactly what CHA now complains of!

It was CHA's request that induced Judge Austin to include part II in the July 20 order without such a formal motion and following proceedings. Surely, it would be inequitable and contrary to the principle of all the cases referred to above to hold that Judge Austin committed error by not waiting for a formal motion and hearing when CHA itself requested him not to so wait. (For the same reason it is a kind of paradigm of unfairness to charge Judge Austin with violating the doctrine of Lynn v. Smith (CHA Petition, p.4) when CHA's own description shows the judge there acted sua sponte, not at the request of the party who later complained of his action.)

CHA says it "did not induce any error below; it only

quite properly asked that the error be spread on the record." (CHA Reply Brief, p.6.) But the "error" complained of is precisely the absence of a formal motion and the formal hearing which would follow such a motion. CHA did not spread that error on the record. (See section B of this Part I.) It is clear that CHA deliberately chose not "to await a formal motion by plaintiffs," - that it instead requested a written order without so waiting. By such request it induced Judge Austin to do precisely what it now calls error - to enter an injunction without a formal motion and hearing.

The law, as expressed in the cases cited above, does not permit a party to successfully charge the trial judge with error for doing what that party himself so clearly induced the trial judge to do.

B. CHA Waived the Opportunity for a Formal Hearing on the Question of Timing Because it Did Not Request such a Hearing and Did Not Object to the Procedure Followed Below.

Suppose that CHA had not been the party who caused entry of the order now complained of - suppose that plaintiffs rather than CHA had asked for the injunctive order, or that Judge Austin had decided to enter such an order sua sponte. CHA would still be barred from objecting now to the absence of a formal motion and hearing.

This Court's opinion of December 16 holds that CHA "waived the opportunity for a formal hearing on the question

of timing ..." (p.10) In that connection the Court's opinion correctly notes that CHA "never registered or made known any objection as to the manner in which the five conferences were being conducted." (Id.)

These factual statements by the Court also reflect uncontested facts. CHA tries to avoid the legal conclusion which flows from them by arguing that, although the issue of "timing" had been discussed earlier, the possibility of the entry of an order on that subject arose "suddenly" on July 13 and CHA had no prior notice or opportunity to be heard formally as to such an order. (CHA initial brief, p.17.)

We think the facts discussed at pages 10-11. of the Court's opinion are a full and complete answer to these contentions. But let us nonetheless assume the CHA assertions to be true. It remains the case, then, on CHA's own version of the events, that the entry of an order on the issue of timing was raised and was discussed at two of the five conferences, those held on July 13 and July 20. It remains the case also that CHA did not at either of those conferences, after it knew (because it itself had made the suggestion) that an order on timing might be entered, "register or make known any objection" as to notice, hearing, or any other matter. In other words, CHA did not, on either July 13 or July 20 (let alone earlier) request a formal motion or notice or hearing or make any other procedural request or objection.

Even on CHA's version of the facts, then, CHA had not one but two separate opportunities to make the procedural arguments it first made almost a month later. It could have said to Judge Austin: "Before an injunction order is entered on the issue of timing we want a formal motion and hearing." On neither July 13 nor July 20 did it say anything of the sort.*

Under these circumstances it is clear that CHA has

*Moreover, CHA's Petition misstates the facts as to what it did say. First, the CHA Petition says the District Court proposed the timetable order. (p.4.) The fact is that it was CHA, not Judge Austin, who proposed the order. (See the text discussion in I.A. hereof.) Second, the CHA petition says that "from the moment the District Court [proposed the timetable order] CHA objected and sought to bring a witness." (Id.) The fact is that CHA sought to have another witness brought in at the outset of the July 13 conference, before Judge Austin informally expressed his views on timetable (A-20-21); and, far from objecting "from the moment" Judge Austin so expressed himself, CHA's response was that it might prefer a formal injunctive order to a non-enforceable, informal off-the-record expression of views. It adhered to this view on July 20, sought and obtained a different date for inclusion in the order (Transcript of August 13, p.15), and never once, on July 13 or July 20, raised a hint of the procedural objections it later made. Third, the CHA Petition says after entry of the order of July 20 CHA "promptly moved formally for a vacation of that order and again sought a hearing." (p.4, emphasis supplied.) CHA's motion to vacate was filed on August 11, over three weeks after July 20 and a month after July 13. Query as to "promptly." Of greater importance, "formally" and "again" suggest CHA had previously moved informally for a hearing on the timetable part of the order. But, as we have seen, there never was any such motion or request, formal or informal, until the afterthought motion of August 11. All the witnesses had been heard or tendered before Judge Austin informally expressed his views on timetable. CHA never thereafter (until its afterthought motion a month later) said it wanted a formal motion and hearing on that issue. CHA's rendition (on page 4 of its Petition for Rehearing) of what are uncontroverted facts is a distortion.

waived the right to make procedural objections to the July 20 order. The waiver doctrine, like the invited error doctrine, has been applied in a number of comparable situations. For example, in Schy v. Susquehanna Corporation, 419 F.2d 1112 (7th Cir. 1970), this Court held that a procedural objection was waived by failure to make it in timely fashion:

"The plaintiff next complains that the District Court erroneously considered affidavits and exhibits filed on the day of the hearing ... The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal." (419 F.2d at 1116.)

See also, Brotherhood of Railroad Trainmen v. Chicago M.St.P. & P.R. Co., 380 F.2d 605, 608 (D.C. Cir., 1967) ("Procedural objections to the action of an administrative agency or trial court must be timely made to give the tribunal an opportunity to correct the error ..."); Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 716 (4th Cir. 1966) ("No request was made by appellants at any time to be allowed to offer oral testimony. For this reason, they cannot now complain of the procedure adopted by the lower court for deciding the factual issues ..."); Livergood v. S. J. Grove & Sons Company, 361 F.2d 269, 273 (3rd Cir. 1966) ("Defendant may not seriously object to the fact that Billotte was questioned out of the hearing of the jury ... The record reflects that it consented to that

arrangement either expressly or by failing to object seasonably."); Murphy v. Kodz, 351 F.2d 163, 168 (9th Cir. 1965) ("Failure of the appellants to bring to the attention of the court considerations requiring an exercise of discretion estops them from asserting that privilege after decision on the merits."); Hoosier Home Improvement Co. v. United States, 350 F.2d 640, 644 (7th Cir. 1965) ("The procedure was agreed^{to}/by Hoosier and no objection was made to it in argument to the district court on the motion for directed verdict. We do not think the issue is properly raised here.").

In Canvas Fabricators v. William E. Hooper & Sons, 199 F.2d 485 (7th Cir. 1952), this Court assumed, without deciding, that the procedural objection was sound but still held that a failure to make it timely constituted a waiver:

"The procedural question raised by plaintiff is that the burden was upon the defendant to sustain its attack upon the Court's jurisdiction and that the Court erred in not hearing oral testimony on the issue thus raised ... We know of no rule or statute which prescribes the course which a hearing shall take upon an issue such as is here presented. We may assume, without deciding, that plaintiff upon a proper request would have been entitled to offer oral testimony, but, even so, plaintiff cannot now complain because no such request was made. So far as the record discloses, both sides were agreeable to a submission of the facts as they did, that is, in the form of affidavits. It is now too late to complain that

the Court should have ascertained the facts in some other manner."
(199 F.2d at 488.)

Another case in which the procedural objection was assumed to be sound but was waived because made too late is Baker v. Sherwood Construction Co., 409 F.2d 194 (10th Cir. 1969). There no proper and timely objection had been made to the trial court's failure to poll the jury. Holding that the objection was waived under Federal Rule 46, the Court quoted one of its own earlier opinions:

"Rule 46 contemplates that a dissatisfied party make known to the trial court the action desired on his objection. The purpose for this rule is obviously to allow the trial court to reconsider his rulings so that the trial court may correct its own possible errors ..."
(409 F.2d at 195.)

Rule 46, of course, requires "that a party, at the time the ruling or order of the court is made ... [make] known to the court ... his objection to the action of the court and his grounds therefor ..." Another statement of the reason for the rule is quoted in Bucy v. Nevada Const. Co., 125 F.2d 213, 218 (9th Cir. 1942):

"[I]t is necessary that a man should not spring a trap on the court ..., so the rule requires him to disclose the grounds of his objections fully to the court."

So too here. This Court may assume that had CHA said on July 13, or on July 20, or perhaps even by a motion under Rule 59 within the ten-day period provided by such Rule,

that it had changed its mind as to the desirability of an injunction order and did not wish such an order entered without a formal motion and hearing, Judge Austin would have given CHA the hearing it requested. But CHA made no such request on July 13, or on July 20, or even within the time provided by Rule 59. (In such a context it is almost effrontery to refer to this Court's opinion in the Skolnick case where a request for a formal hearing was vigorously and timely made.) For this separate reason (quite apart, that is, from the invited error doctrine) CHA must be held to have waived the procedural objections it now makes to this Court.

CHA's single citation on this point highlights the bankruptcy of CHA's contrary view. In Buffum (CHA Petition, p.3), a New York bank, doing a trust business in Illinois, had consented to be sued in Illinois "in connection with the acceptance and execution of trusts and receipts of deposits and trust funds in Illinois." (192 F.2d at 59.) This Court properly held that such a consent did not extend to "a transaction which on its face does not purport to grow out of such trust business." (192 F.2d at 61.) (The result would have been otherwise had the bank engaged in a full service business in Illinois. See Frankford Supply Co. v. Matteo, 305 F.Supp. 794 (E.D. Pa. 1969).)

Buffum did say that relinquishment of a right or privilege "may be implied as a necessary consequence of the

waiver's conduct inconsistent with an assertion of retention of the right." (192 F.2d at 61.) This applies precisely to CHA's conduct on July 13 and July 20. On each of those days CHA participated in conferences, knowing that (upon its own request) a formal, written, injunctive order on timing was under consideration, without registering or making known any objection to the entry of such an order on the ground of the manner in which those conferences were being conducted. CHA's assent to that manner must be implied as a necessary consequence of CHA's failure to register or make known any such objection, or to request any formal notice, motion or hearing before inclusion of part II in the July 20 order, quite apart from its affirmative action of requesting the written order and choosing not "to await a formal motion by plaintiffs ..."

Surely CHA was not entitled to keep Judge Austin and plaintiffs in total ignorance of the fact that it had procedural objections which it would not raise for the first time until a month later. Surely it could not participate in the July 13 conference, and in the July 20 conference, at both of which a formal written injunction order was discussed, remain silent about its no-notice and no-hearing complaints, keep locked up in its corporate bosom its secret desires for a formal motion and hearing, allow the order to be signed by an unsuspecting Judge Austin, and then tell him and plaintiffs for the first time a month later that it had procedural objections

and had wanted a formal motion and hearing all along.

* * *

The short of the matter is that CHA requested Judge Austin to enter the order appealed from and did not tell him that it objected to the procedure which preceded its entry; but for CHA's request there would have been no part II to the July 20 order. And the short of the matter is that, had CHA objected on either July 13 or July 20 to the inclusion of part II in the July 20 order without a formal motion and hearing, had CHA on either of those days disclosed its secret desires for formality, common sense tells us that Judge Austin would not then have entered an order he was entering in the first place only because CHA wanted it. (CHA chose not "to await a formal motion ...")

We think that, for the reasons summarized at pages 10 and 11 of the Court's opinion, no error was committed and that CHA did in fact have adequate notice and did in fact have an adequate hearing. But quite apart from that consideration, it would sanction two kinds of game-playing with the judicial process to permit CHA to ask Judge Austin for an order, keep him uninformed of its secret procedural objections to the proceedings leading to its entry, and then pounce upon the order three weeks after it was entered.

II. THE COURT HAS NOT MISAPPREHENDED DOCUMENTS

The alleged misapprehensions are a tissue of dexterously woven but distorted innuendoes. The most objectionable is the deliberate and unsupported implication that counsel for plaintiffs and Judge Austin both misstated a key fact - that the Chairman of CHA said CHA intended to wait until after the mayoralty election. (Petition, pp.12-15.) Although CHA professes not to attack counsel's "credibility, reliability or memory" it does just that. The statement of what the CHA Chairman said was contained in a sworn affidavit. Independently, Judge Austin recalled the same statement - his recollection of what the CHA Chairman said was his own, not acceptance of counsel's affidavit. (Tr. p.18, quoted at p.18 of CHA's Petition.) No counteraffidavit has ever been filed. No argument raising any question as to the truthfulness or accuracy of counsel's sworn statement or Judge Austin's assertion has ever before been made - not before Judge Austin or before this Court - though there was ample opportunity to do so in both places. In any event, Judge Austin needed no affidavit to know what the CHA Chairman said in his presence. It borders on the unprofessional for such an unsupported innuendo now to be inserted in a petition for Rehearing.

Another alleged misapprehension is said to be an "implication" in this Court's opinion that plaintiffs had

made an "informal motion" for an order on timing. (Petition p.10.) We think there is no such implication in the Court's opinion (see the quotations from the opinion in Part I hereof). We think the Court has rightly understood that CHA requested the formal, written injunctive order and that plaintiffs never asked for more than an informal expression of views from Judge Austin.

The alleged misapprehension of the Wade letter (Petition pp. 7-9) hardly needs comment. Wade was fearful that the public housing issue might be used "by political candidates for partisan political purposes." (A-44.) The Court's statement, which CHA considers a misapprehension of the letter, is that Wade believed submission of sites before the political campaigns "would have adverse political consequences ..." (p.6.) We can see no misapprehension. (CHA's effort to distinguish the cases cited by the Court (Petition p.9) is a transparent attempt to resuscitate the discredited community hostility reason for delaying desegregation. CHA has so far only been ordered to do what it alone has power to do - submit sites.)

The final "misapprehension" is that the Court's opinion referred to HUD's concern that sites might be submitted to the City Council as late as 1971 instead of late in 1971. (CHA Petition pp. 5-7.) Again there is no misapprehension - only CHA semanticism. When read in the context of the whole

letter, it is perfectly clear that HUD was expressing a concern about a delay until as late in 1971 as the mayoralty elections. The letter states that HUD had been informed in 1969, and again in early 1970, that the 1500 units "would be developed immediately." It also says, "we have waited expectantly for the Authority to have the sites approved by the City Council" The letter was written 6 months before the end of 1970. From the perspective of that date, a further delay until after the April mayoralty election would be an additional delay of 10 more months. HUD was expressing concern about any more delay, whether until the beginning of 1971 or well into the year. CHA's assertion of a "misapprehension" on this score is merely a further illustration of the emptiness of its arguments.

CONCLUSION

Suppose CHA had never requested that part II be included in the otherwise non-controversial and unappealed from July 20 order. It is clear that that part would not have been included in the order and there would have been no ground for alleging error. But CHA did make such a request, knowing that, as to timetable, there had been no motion by plaintiffs for an order, no witnesses sworn, no transcript of testimony on that subject, and that one of CHA's proffered witnesses had been rejected. Knowing all this, nonetheless

CHA asked that a formal order be entered and then participated in two conferences leading to the entry of the order it had requested without objection on any procedural ground - notice, motion, hearing, or any other. Knowing the procedural situation, and raising no whisper of the procedural objections it made much later, CHA urged Judge Austin to go further than plaintiffs had asked him to go and further than he himself had gone. Then, having thus lured the Judge into taking a step he had not been asked by plaintiffs to take and would not otherwise have taken, having done so with full knowledge of the procedural situation, and not having even hinted at its later position that a formal motion and hearing must precede entry of the order it had requested, CHA charged weeks later that it was error to have complied with its request and that one reason for the error was the procedural situation it was perfectly aware of and remained silent about at the time it made its request.

Does not elementary fairness to Judge Austin suggest that CHA should have said, "We want you to enter an order but we warn you that we shall then appeal on the ground you have no right to do so without a formal motion by plaintiffs and a formal hearing on that motion?"

The absurdity of making such a statement precisely mirrors the gross unfairness of CHA's present posture (an unfairness which is compounded by the fact that in pressing its

afterthought procedural claims CHA is accomplishing the precise passage of time its Chairman sought on grounds this and other courts have rejected as invalid). We trust this Court will not sanction that unfairness, to Judge Austin and the judicial process, let alone to plaintiffs.

Respectfully submitted,

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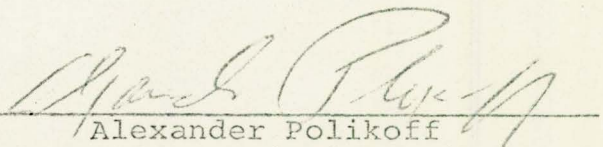
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January 19, 1971

CERTIFICATE OF SERVICE

Alexander Polikoff certifies that on January 19, 1971, he mailed a copy of the foregoing Answer to Petition for Rehearing to the attorneys for Defendants-Appellants.

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Dated: January 19, 1971