

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

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APR 08 1998

Judge Marvin E. Aspen
U.S. District Court

DOROTHY GAUTREUX, et al.,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY,

Defendant.

66 C 1459

Hon. Marvin Aspen

PLAINTIFFS' REPLY
TO
CHA'S REPONSE AND MOTION
RESPECTING
PROPOSED ADDITIONAL CLASS REPRESENTATIVES

CHA's Response and Motion pose two questions: (1) Does counsel for the plaintiffs adequately represent the class; and (2) Whether asserted "adverse interests" among class members should (for some unstated reason) preclude naming additional class representatives? (CHA does not question the adequacy of the proposed additional named representatives to serve as representatives of the plaintiff class.) After a brief background statement, we answer these two questions in Parts I and II, respectively.

BACKGROUND

Rejecting CHA's claim that this was an improper class action, the Court in 1967 held that this case could proceed as a class action with a plaintiff class composed of black persons who are tenants in or applicants for public housing

in Chicago. "[T]he Court holds that plaintiffs have standing to maintain this action and that it is a proper class action [citations omitted]." 265 F.Supp. 582, 583 (1967). The Court added:

"What is at issue here is not the quality of the contacts with the CHA of individual tenants or applicants but rather whether the site selection policy of the CHA has been and is being administered without regard to considerations of race. This issue transcends any particular individual's relationship to the system. . ."
(Id.)

Now, after many years, the occasion has arisen to add additional representatives, and plaintiffs have therefore moved to name seven black residents of public housing as additional class representatives. Courts commonly allow the "liberal substitution of representatives . . . in class actions." Van Horn v. Trickey, 840 F.2d 604, 608 (8th Cir. 1988). See also, Doe v. Reivitz, 830 F.2d 1441, 1451 (7th Cir. 1987); Hassine v. Jeffes, 846 F.2d 169, 176 n.3 (3d Cir. 1988).

CHA opposes the motion to add additional named representatives on the grounds that "serious questions arise as to the adequacy of plaintiffs' counsel's representation of the class" (par. 7), and that "[t]here are members of the class whose interests are adverse to the class and should not be represented by any representative of the present class or by the attorneys for the class . . ." (par. 8). We turn to these questions.

I. PLAINTIFFS' COUNSEL'S REPRESENTATION IS ADEQUATE

Respecting counsel's adequacy, CHA offers three points:

- (1) Counsel's asserted lack of communication with present representatives (pars. 3, 5, 7, 19);
- (2) Counsel's asserted antagonism with Horner plaintiffs (par. 12); and
- (3) Counsel's alleged statement that he represents "only future generations" (par. 17).

The first CHA point is completely without merit; the second and third are simply untrue.

Consultation. Generally speaking, inadequacy of representation requires a showing of collusion, bad faith, gross negligence, or the like. See, e.g., United States v. South Bend Community School Corp., 692 F.2d 623, 626, 628 (7th Cir. 1982); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3rd Cir. 1975) ("attorney must be qualified, experienced, and generally able to conduct the proposed litigation").

Making no suggestions of this sort CHA instead relies on an asserted lack of communication between class counsel and present representatives. But in Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982), the court observed: "The fairness and adequacy of counsel's performance cannot be gauged in terms of the representation of the named plaintiffs." Quoting from an earlier Fifth Circuit decision, Parker explained the reason as follows:

"Because the 'client' in a class action consists of numerous unnamed class members as well as the representatives, and because '[t]he class itself often speaks in several voices . . . , it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole' Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1216 (5th Cir. 1978)." (Id.)

The Parker opinion added that the courts have recognized that the duty owed by class counsel is to the entire class and "is not dependent on the special desires of the named plaintiffs." (Id.) Indeed, it has been said that class counsel is under a duty to ignore special interests of class representatives in favor of the overall, general interests of the class as a whole. County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1428, 1435 (E.D.N.Y. 1989).¹

Therefore, even if frequency of consultation were a relevant factor respecting the adequacy of class counsel's representation of the class, it would be consultation with class members, not class representatives. Yet CHA's response and motion make no assertions at all respecting class member consultation.

¹ This duty to the class derives from the realities of class litigation, "[I]ndividual [class] members are represented . . . by counsel to the representative parties. Few members of the class know 'their' counsel or have any special reason to have confidence in them. Those class members must, in the ultimate analysis, depend upon the court's impartiality and judgment." In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 761 (E.D.N.Y. 1984), *aff'd.*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 98 L.Ed.2d 647 (1988).

Antagonism at Horner. As to the asserted "antagonism between the Horner plaintiffs and counsel for the class in this case" (par. 12), on February 25, 1998, counsel for the class was presented with a plaque by the Horner Local Advisory Council (the elected representative body of the Horner residents) which reads as follows:

Appreciation
Award
Presented to
Alex Polikoff

We Extend this Token of
Appreciation with our Heartfelt
Gratitude for your Outstanding
and Dedicated Service so
Unselfishly Given

Presented by
HORNER L.A.C.
1997

(Affidavit of Alexander Polikoff, attached, par. 2.)

Future Generations. Finally, the assertion (par. 17) that class counsel "believes he represents only future generations" (and therefore "there may be no representative plaintiffs") is also untrue (Polikoff Aff., par. 3). Moreover, of the approximately 10,000 families who have so far received Gautreaux relief, over 7,000 current class members have received Section 8 certificates; it can hardly be claimed that counsel has not represented and that his actions have not benefited primarily current class members. See, however, Small v. Sullivan, 820 F. Supp. 1098, 1112 (S.D. Ill. 1992) (when a class action challenges a process or condition that continues to exist, then the class

necessarily includes future as well as past and present applicants).

* * *

Thus, even if valid questions respecting the adequacy of class counsel's representation were a reason to delay naming additional class representatives (which they are not), no such questions are presented by CHA's response and motion.

II. NO "ADVERSE INTERESTS" PRECLUDE ADDING ADDITIONAL CLASS REPRESENTATIVES

CHA asserts that some class members have interests adverse to the class and should not therefore be represented by any representatives of the present class or by their attorneys (par. 8). In fact, there are no "adverse interests" as that phrase is used with respect to class actions.

CHA's contention is predicated upon a mischaracterization of this Court's February 1998 order ("HOPE VI Order") holding that the judgment order in this case applies to HOPE VI replacement housing. Asserting that adversity became an issue when the HOPE VI Order was entered (par. 9), CHA repeatedly mischaracterizes that order as requiring that half of all HOPE VI replacement housing be built in general public housing areas (pars. 9, 10, 11, 15, 16). (E.g., "[U]nder the [judgment order] replacement

housing could only be built on a one-to-one ratio. . ." par. 15.)

In fact, the order permits HOPE VI replacement housing to be built in revitalizing areas as an alternative to the "fifty/fifty" split between general and limited public housing areas to which CHA refers. (See the Court's three recent revitalizing area orders respecting 466 housing units at Horner, up to 241 units in North Kenwood-Oakland, and up to 250 units at Cabrini-Green.) Once the existence of this means for providing HOPE VI replacement housing is acknowledged (as CHA's response and motion omit to do), the ground under CHA's adversity argument is washed away, for it can then no longer be credibly asserted that residents of buildings to be demolished who have "elected to remain in the community" (par. 10) will be frustrated by the "fifty-fifty" provision of the judgment order (pars. 10, 11).²

² CHA does not make an adversity case even apart from its disingenuity in pretending that the revitalization route to replacement housing does not exist. First, fifty-fifty might alone satisfy all tenants' locational wishes. Not only is there no CHA showing to the contrary, but the most formal polling process to date respecting the locational choices of tenants to be displaced by demolition of CHA buildings resulted in the selection by half of those voting of scattered site or Section 8 housing. (Polikoff affidavit, par. 4.)

Moreover, CHA is wrong in saying such tenants "have the right under HOPE VI to choose where they want to live . . ." (par. 10). In fact, HOPE VI only prescribes that "to the maximum extent practicable" residents should be allowed to choose where they wish to live. 42 U.S.C. 14371(d)(2)(B).

Moreover, disagreements regarding a proposed means of achieving desegregation are insufficient to defeat the adequacy of representation requirement in a class action.

"[D]iversity of opinion within a class does not defeat class certification. See Lanner v. Wimmer, 662 F.2d 1349, 1357 (10th Cir. 1981) ("The fact that the class may have included persons who support the [challenged] program does not offend the principles set down in Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). It is not 'fatal if some members of the class might prefer not to have their [constitutional] rights remedied.'" (quoting United States Fidelity & Guaranty Corp. v. Lord, 585 F.2d 860, 873 (8th Cir. 1978)); Wilder v. Bernstein, 499 F.Supp. 980, 993 (S.D.N.Y. 1980) ("The fact that some members of the class may be satisfied with the existing system and may prefer to leave the violation of their rights unremedied is simply not dispositive of a determination under Rule 23(a).") Waters v. Barry, 711 F.Supp. 1125, 1131-32 (D.D.C. 1989).

CHA also asserts that some class members are members of "competing classes" (par. 12), referring specifically to Horner (id.) and Cabrini-Green (par. 13), at each of which, as CHA notes, litigation against CHA is pending in another court. Without citation of authority or articulation of its reasoning CHA then concludes that class counsel and the proposed additional class representatives cannot adequately represent class members "who are members of more recently certified classes in other litigations. . ." (par. 14).

Not so. This Court has already entered orders with respect to both Horner and Cabrini-Green which illustrate how these other cases can "fit" with this one. At Horner orders have been entered with the concurrence of the Horner plaintiffs (see, e.g., orders of March 9 and August 14,

1995), and counsel for the Cabrini plaintiffs was notified and had no objection to entry of this Court's Cabrini order. (Polikoff Aff. par. 5.) In addition, as to Cabrini - apart from CHA's own argument, inconsistent with its position here, that

"the black residents of Cabrini-Green are 'already well-represented by their class counsel in Gautreaux . . .'" - Judge Coar has observed:

"[T]he agreement that plaintiff seeks to have enforced specifically states that the agreement is '[s]ubject to Federal Court guidelines under Gautreaux' . . . Any relief that this court directs must necessarily take this position into account." (Cabrini-Green Local Advisory Council v. CHA, No. 96C6949, Memorandum Opinion and Order, January 21, 1997, pp. 27, 29.)

There is no "competing classes" problem (whatever CHA means by that phrase) standing in the way of allowing the naming of additional class representatives here.

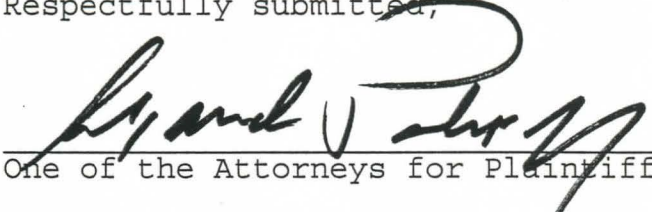
Finally, CHA's request for discovery should be denied. As Judge Austin has ruled, black persons who are "either tenants in or applicants for public housing" meet the only requirements for representational status here; "the quality of the contacts with the CHA of individual tenants or applicants . . ." are not in issue. 265 F.Supp. at 583. See, Newburg on Class Actions, 3rd (1991), Ch. 7, pp. 29-30 (unless defendants have information that may seriously undermine a plaintiff's standing or create a conflict of interest, they may not engage in a "fishing expedition" to turn up such facts).

CHA cites no cases permitting discovery relating to the proposed naming of additional class representatives during the remedial phase of a certified class action. It does not even question the representational qualifications of the proposed additional representatives. Its "adverse interests" and "competing classes" arguments (the former predicated on a mischaracterization of the Court's HOPE VI Order, the latter - to the extent it is understandable - not fact-based) fail utterly to make a case for the expenditure of time and money on a discovery sideshow.

CONCLUSION

CHA has advanced no persuasive reason for questioning either the adequacy of the representation being provided by class counsel, or the appropriateness of adding additional class representatives. Plaintiffs' motion to name additional class representatives should therefore be granted.

Respectfully submitted,



One of the Attorneys for Plaintiffs

April 8, 1998

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

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	66 C 1459
	)	
CHICAGO HOUSING AUTHORITY,	)	Hon. Marvin Aspen
	)	
Defendant.	)	

AFFIDAVIT OF ALEXANDER POLIKOFF

Alexander Polikoff, being sworn, says:

1. I am lead counsel for the plaintiff class in this case.

2. On February 25, 1998, at a meeting of the Horner Local Advisory Council, I was presented with a plaque which reads as follows:

Appreciation
Award
Presented to
Alex Polikoff

We Extend this Token of
Appreciation with our Heartfelt
Gratitude for your Outstanding
and Dedicated Service so
Unselfishly Given

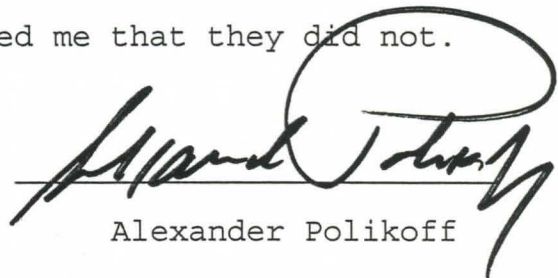
Presented by
HORNER L.A.C.
1997

3. In a meeting with Joseph Shuldiner I stated that the interests of future generations were involved in the remedial activities in the Gautreaux case. I did not then

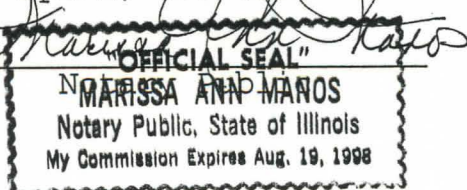
say, nor have I at any other time said, I represent only future generations.

4. In connection with implementing court orders relating to the Henry Horner public housing development, a formal process was arranged jointly by all parties to the Horner litigation to enable Horner residents to express their preferences respecting replacement housing. A substantial majority of Horner residents participated in the process. Approximately half expressed preferences for either Section 8 or scattered site replacement housing.

5. Before filing the proposed agreed order respecting the designation of an area adjacent to the Cabrini-Green public housing development as "revitalizing," entered by this Court on November 6, 1997, I submitted a copy of the proposed order to Richard M. Wheelock, known to me to be the attorney for the plaintiffs in Cabrini-Green Local Advisory Council v. CHA, No. 96C6949. I asked Mr. Wheelock to review the proposed order and advise me whether the plaintiffs in Cabrini-Green objected to entry of the order. Mr. Wheelock thereafter telephoned me and advised me that they did not.


Alexander Polikoff

Subscribed and Sworn to
before me this 8th day
of April, 1998.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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Judge Marvin E. Aspen
U.S. District Court

DOROTHY GAUTREAUX, et al.,

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Defendant.

66 C 1459

Hon. Marvin E. Aspen

NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that on Wednesday, April 8, 1998, we filed in the United States District Court for the Northern District of Illinois, Eastern Division, Plaintiffs' Reply to CHA's Response and Motion Respecting Proposed Additional Class Representatives, a copy of which is attached hereto and served upon you.

One of the Attorneys for Plaintiffs

April 8, 1998

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CERTIFICATE OF SERVICE

I, Alexander Polikoff, an attorney, certify that on April 8, 1998, I caused copies of the foregoing Notice of Filing and Plaintiffs' Reply referred to therein to be served on the persons shown on the attached service list.


Alexander Polikoff