

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

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DOROTHY GAUTREAUX, et al.,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY,

Defendant.

JUDGE MARVIN E. ASPEN
UNITED STATES DISTRICT COURT

66 C 1459

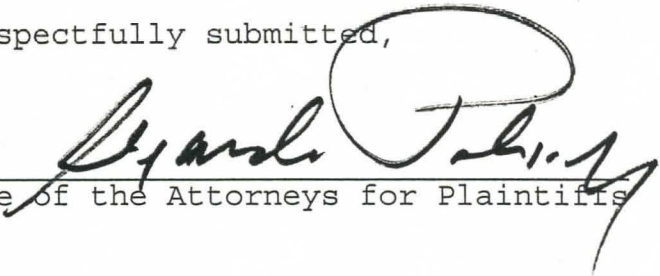
Hon. Marvin Aspen

PLAINTIFFS' MOTION
FOR LEAVE TO FILE
SUR-REPLY

Plaintiffs move the Court for leave to file their Sur-Reply respecting plaintiffs' motion to name additional class representatives.

In support hereof plaintiffs state that CHA cited only two cases (both on the issue of discovery) in its response to plaintiffs' motion, but a dozen cases in its reply. In fairness, therefore, plaintiffs should be permitted to file their sur-reply, attached hereto.

Respectfully submitted,


One of the Attorneys for Plaintiffs

April 14, 1998

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

PLAINTIFFS' SUR-REPLY
RESPECTING
CLASS REPRESENTATIVES

Introduction

In a suit filed over thirty years ago plaintiffs have suggested the death of two of a small total number of class representatives, and have moved to add several additional class representatives, in effect as substitutes for those now deceased. The Court may undoubtedly take judicial notice that remaining representatives have aged.

Under Rule 25 "liberal substitution of representatives" is commonly allowed 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. Jaffes, 846 F2d 169, 176 n.3 (3d Cir. 1988). Indeed, even if plaintiffs were to wait until all class representatives were dead, thus risking theoretical mootness for lack of a representative, the liberal rule would still prevail:

"When mootness of the named plaintiff's claims occurs, intervention by absentee class members is freely allowed in order to substitute them as class representatives." (Newberg on Class Actions, Third Ed., p. 2-110.)

Discussion

Adequacy of Counsel. CHA initially advanced two grounds for opposing substitution. The first was that class counsel may be inadequate for three stated reasons. However, CHA's reply makes no mention at all of two of the three ("Antagonism at Horner" and "Future Generations" - see plaintiffs' reply, p. 5), presumably abandoning these.

As for the third reason, CHA now shifts from frequency of consultation with class representatives to consultation with class members (compare CHA's response, pp. 2-3, 6, with its reply, pp. 3-7), apparently recognizing that counsel's duty is to the class, not the representatives, as we pointed out in our response (pp. 3-4). But CHA's reply still offers no facts or even allegations regarding consultation with class members; it asks only the question, not asked before in over 30 years of litigation, "with whom has plaintiffs' counsel been consulting. . . ." (p. 7.) CHA admits, if only "arguendo," that "unless defendants have information that may seriously undermine a plaintiff's standing . . . they may not engage in a 'fishing expedition' . . ." (CHA reply, p. 4, emphasis added). Yet CHA offers only this one, belated, question.

Of course, asking a question is not the equivalent of supplying information or even of making unsupported allegations. The suggestion that counsel may be inadequate is not in any event a reason for disallowing or postponing substitution. CHA's reply suggests no reason, and cites no authority, why the death of some representatives and the aging of others does not provide an appropriate occasion to substitute live representatives for dead ones (even while an unsupported question is being raised by the defendant respecting how frequently plaintiffs' counsel has consulted with plaintiff class members). Whatever proceedings anyone might wish (upon proper pleadings) to initiate respecting class counsel's adequacy would take time to resolve. Ultimately, if inadequacy were established, the remedy would be to secure adequate counsel. (But CHA has cited not a single case or authority even remotely suggesting that inadequacy of counsel is related to the frequency of counsel's consultation with class members.) Meanwhile the class action would continue, and require representatives.

Adequacy of Class Representatives. CHA's second ground for opposing substitution was that the proposed substitute representatives may themselves be inadequate. But adequacy here, as Judge Austin pointed out long ago, requires nothing more than being black tenants of (or applicants for) CHA housing. That is what plaintiffs' motion says the proposed

substitute representatives are - and CHA's reply does not proffer or allege any information to the contrary.

CHA's reply persists in asserting that there are adverse interests, now termed an "appearance of a conflict" (p. 6), among class members, particularly those who have sued CHA at Cabrini. Ignoring most of what we said on this appearance of conflict matter (plaintiffs' reply, pp. 6-9), CHA persists in the assertion - unfathomable in the face of the Court's three revitalizing orders at Horner, North Kenwood-Oakland and Cabrini-Green - that the judgment order does not authorize building in revitalizing areas! (CHA reply, p. 6.)

Moreover, CHA's assertion that the Cabrini class and the Gautreaux class "make conflicting complaints" (CHA reply, p. 5) flies directly in the face of Judge Coar's statement that what the Cabrini class is seeking is to enforce an agreement that "specifically states that the agreement is '[s]ubject to Federal Court guidelines under Gautreaux' . . ." (Plaintiffs' reply, p. 9.)

Here, too, as with adequacy of counsel, the appearance of conflict may be pursued by persons desiring to do so through appropriate pleadings. It too, if raised, would take time to resolve. Meanwhile this action would continue and require representatives. Again, CHA has suggested no reason, and cited no authority, why the death of some of a small number of representatives does not provide an appropriate occasion to substitute new representatives.

CHA Cases Fail to Support its Adequacy Challenges. We turn to the cases CHA cites in its reply, the first of which is the Seventh Circuit's opinion in the South Bend school desegregation case - which speaks strongly against CHA's position.

South Bend involved intervention under Federal Rule 24, not as here substitution of parties (of which substitution of named representatives is a subset) under Rule 25. The former involves a non-party seeking to enter a lawsuit with party status. The latter seeks no change in parties, but to substitute live persons for dead ones as class representatives.

South Bend dealt with two separate motions to intervene. One was by the NAACP seeking to intervene as a plaintiff. 692 F.2d 623, 626. The other was by an organization of school children's parents (called "Clay" by the Court) who wished to intervene as defendants. Both motions were denied by the district court, whose orders were affirmed on appeal. 692 F.2d at 629.

• The NAACP motion to intervene as a plaintiff was denied on the ground, among others, that it and the Government (the United States as plaintiff, represented by the Justice Department) had a "similar objective, namely, . . . 'system-wide desegregation. . .'", and that the "only disagreement shown was with respect to the 'road map' to be used to achieve that goal." 692 F.2d at 628. This resonates with

CHA's acknowledgment that, "The Gautreaux remedy should remain in place." (Transcript of oral argument of February 10, 1998, p. 36.) Gautreaux too seeks system-wide desegregation; here, too, therefore, it appears that the only disagreement has to do with the road map to that goal. Since the NAACP and the Government had the same "ultimate objective," the Court said, "we presume that the Government adequately represents the NAACP." 692 F.2d at 628.

Clay's motion to intervene as a defendant (seeking, among other things, to preserve neighborhood schools, 692 F.2d at 626), was denied by the district court on the ground, among others, that Clay had not shown that the defendant school board was inadequately representing its interests, and because there was no constitutional or statutory right to attend a neighborhood school. 692 F.2d at 626-27. The Seventh Circuit affirmed on the ground that the Clay students' interests were already represented by the defendant school board, a governmental body charged with responsibility for students' interests, and that adequate representation of the students would be "presumed" absent a "showing of gross negligence or bad faith." 692 F.2d at 627.

The resonance here is that the defendant CHA may well assert views of tenants who have different ideas than those proposed to be embodied in remedial orders sought by the plaintiffs; CHA's recent vigorous advocacy respecting HOPE VI issues shows that it is indeed eager to express views

different from the plaintiffs' on how to achieve the ultimate desegregation goal.¹

In a sequel the Seventh Circuit denied another motion to intervene by another group of mostly black parents on substantially the same grounds. United States v. South Bend Community School Corp., 710 F.2d 394 (7th Cir. 1983). The Court held that the would-be intervenor was not entitled to a hearing to explore its substantive allegations because, "That would have amounted to granting the motion to intervene." 710 F.2d at 396. In the absence of allegations of incompetence, bad faith or collusion, the Court said the representation was presumed to be adequate, a presumption that barred intervention. Id.

"Adequacy of representation and the substantive nature of the would-be intervenor's challenge are analytically distinct. If a parent could intervene in a school desegregation suit as of right merely by stating his concern in constitutional terms, or by denouncing the decree rather than seeking to modify it incrementally, the requirement of adequacy of representation would be a dead letter, and school desegregation suits would become unmanageable." (710 F.2d at Id.)

Here we have no allegations of incompetence, bad faith or collusion (indeed, no allegations at all), and no organized group of tenants (analogous to Clay in South Bend)

¹ "[D]isagreements among class members as to the proper type or scope of relief will not create an impermissible conflict of interest if the class members agree that the defendant is liable . . . Courts have also noted that the position of dissenting class members sometimes will be forcefully asserted by the defendant . . ." (Newberg, supra, pp. 118-123.)

seeking party status. We have only the defendant seeking to delay the naming of additional representatives of the plaintiff class on the virtually abandoned ground that plaintiffs' class counsel may be inadequate, and on the ground that there is an "appearance of conflict" among members of the plaintiff class which, upon inspection, turns out to be no such appearance at all. Moreover, neither CHA reason is logically, or under any authority CHA has cited, a reason to delay naming additional plaintiff class representatives under Rule 25. .

Many of the other CHA-cited cases involve initial certification of a class, for example, Oppenheimer and Folding Cartons (CHA reply, p. 2). However,

"Rationales for encouraging a substitute class representative or permitting the named plaintiff to continue in a representative capacity become more forceful after a class is certified."
(Newberg, supra, p. 2-121.)

CHA's cases also involve situations in which the court was presented with factual information sufficient to prompt inquiry, e.g., Folding Cartons Inc. v. American Can Co., 79 F.R.D. 698, 700 (N.D. Ill. 1978) (information presented indicating representative had been previously found guilty of fraud); In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir. 1979) (information presented regarding unfairness of settlement negotiations).

On the issue of discovery the following is particularly relevant:

"[C]ourts are sharply curtailing inquiries into and attacks on the personal circumstances of plaintiffs who seek to represent a class. Precedents have now settled the law in many areas of common challenges made to the plaintiff's adequacy. There is also the very real potential for such discovery to be harassing and oppressive. . . . The time and expense that must be directed to resolving challenges which have little probability of being upheld in most cases can easily become grossly disproportionate . . . to the contemplated adjudication of the underlying merits. Finally, the 1980 amendments to the Federal Rules of Civil Procedure, calling for . . . sharp curtailment and control of discovery not pertaining directly to the merits of the issues in litigation, should reinforce this judicial direction to curb any potential dilatory or abusive tactics that are possible with such challenges." (Newberg, supra, pp. 3-159, 160.)

And in the Oppenheimer case CHA cites, the Court said:

"[D]iscovery, like all matters of procedure, has ultimate, and necessary boundaries [citation omitted] . . . [A] court is not required to blind itself to the purpose for which a party seeks information . . . [D]iscovery should be denied when a party's aim is to delay . . . embarrass or harass" 437 U.S. 340, 351, 352.

Here, there is no indication that CHA has even made inquiry of counsel - a logical first step if information rather than obstruction is desired - respecting the questions CHA would like to ask, e.g., how frequently has counsel consulted with class members. Certainly there must be some showing (respecting even legitimate questions) that CHA has sought the information it professes to want before the machinery of discovery is trundled out.

Conclusion

During the course of an extended class action, now well beyond the certification stage, persons may nonetheless, pursuant to appropriate pleadings, raise issues of the adequacy of counsel or representatives. To do so, especially to warrant discovery in that connection, requires the making of allegations or the presentation of information that justifies spending the time of the Court and the parties on the matter. That has not been done here (where information - even unsupported allegations - respecting the inadequacy of counsel or of the proposed additional representatives are entirely lacking).

Moreover, the occasion chosen by CHA to attempt to suggest such issues, the substitution of live for dead representatives, is a singularly inappropriate one, for there is no logical connection between the issues CHA would raise and the substitution of new representatives for deceased ones; allowing the substitution would in no way preclude the legitimate raising of adequacy issues in the future, by the Court (to satisfy itself that plaintiffs'

claim is being adequately represented), or by the parties or would-be intervenors.

Respectfully submitted,



One of the Attorneys for Plaintiffs

April 14, 1998

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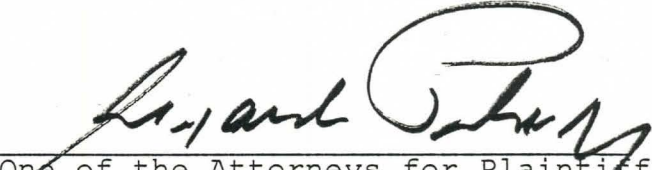
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	)	
v.	)	66 C 1459
	)	
CHICAGO HOUSING AUTHORITY,	)	Hon. Marvin E. Aspen
	)	
Defendant.	)	

N O T I C E

To: Attached Service List

PLEASE TAKE NOTICE that on Friday, April 17, 1998, at 9:30 a.m., we will appear before the Honorable Marvin E. Aspen, Chief Judge of the United States District Court in the courtroom usually occupied by him at 219 South Dearborn Street, Chicago, Illinois, and then and there present Plaintiffs' Motion for Leave to File Sur-Reply, a copy of which is attached hereto.



One of the Attorneys for Plaintiffs

April 14, 1998

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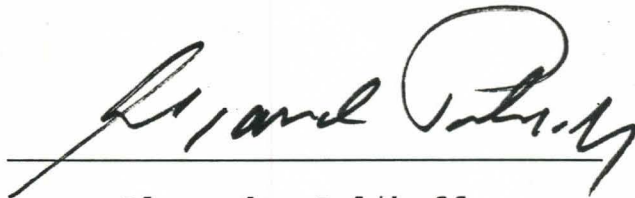
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CERTIFICATE OF SERVICE

Alexander Polikoff, an attorney, hereby certifies that on April 14, 1998, I caused copies of the foregoing Motion for Leave to File Sur-Reply and attached Plaintiffs' Sur-Reply Respecting Class Representatives to be served on the persons shown on the attached service list.

A handwritten signature in black ink, appearing to read "A. Polikoff", written over a horizontal line.

Alexander Polikoff