

UNITED STATES DISTRICT COURT
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3787

DOROTHY GAUTREAUX, et al.,)

Plaintiffs-Appellees,)

v.)

CHICAGO HOUSING AUTHORITY,)

Defendant-Appellee.)

Appeal from the United
States District Court for the
Northern District of Illinois,
Eastern Division

No. 66 C 1459

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APPEAL OF: Concerned Residents of ABLA,)
Ferrell Freeman, Carolyn Nance, Wandra)
Stimage, Viola Singleton, Vera Smith,)
Latonya Maxwell, Latonya Willett, and)
Loree Brown, on behalf of themselves, and)
Africa Simpson, Kizzie Johnson, and)
Nona Young, on behalf of themselves)
and all others similarly situlated,)

Hon. Marvin E. Aspen,
Judge Presiding

Proposed-Intervenor-Plaintiffs/Appellants,)

v.)

The Chicago Housing Authority (CHA), an)
Illinois Municipal Corporation; Philip Jackson,)
In His Official Capacity as Chief Executive)
Officer of the CHA;)
The United States Department of)
Housing and Urban Development (HUD);)
Andrew Cuomo, In His Official Capacity)
As Secretary of HUD;)
Daniel Levin and The Habitat Company,)
Jointly, as Gautreaux Receiver,)

Proposed-Intervenor-Defendants/Appellees.)

APPELLANTS' RESPONSE TO APPELLEES' JOINT MOTION TO DISMISS APPEAL

INTRODUCTION

The proposed intervenor-plaintiffs (the “appellants” or “ABLA plaintiffs”) are current, former, and prospective residents of the ABLA public housing development, together with a resident group known as the Concerned Residents of ABLA (“CRA”). Since July 1999, the ABLA plaintiffs have been trying to litigate claims against CHA and HUD to challenge the ABLA redevelopment plan and CHA's means of implementing it. The ABLA plaintiffs claim that CHA's redevelopment plan violates fair housing and other federal laws through the massive elimination of public housing units and the perpetuation of racial segregation; the ABLA plaintiffs also claim that the plan is being implemented in violation of federal housing and relocation laws.

The ABLA plaintiffs filed their original complaint in July 1999. See Exhibit A, Appellants’ Exhibits In Support of Response to Appellees’ Joint Motion to Dismiss (“Appellants’ Exhibits.”) The case was assigned to District Court Judge Robert W. Gettleman. Together with the Gautreaux plaintiffs and the Gautreaux Receiver, CHA and HUD successfully petitioned Judge Aspen to dismiss the case. When the ABLA plaintiffs subsequently filed a motion to intervene in Gautreaux, as directed by Judge Aspen in his order of dismissal, the appellees successfully opposed that attempt as well.

Now, having successfully thwarted both the ABLA plaintiffs' original suit and their attempt to intervene in Gautreaux, the appellees argue that the ABLA plaintiffs do not have the right to appeal the denial of their intervention motion.

As demonstrated below, however, the appellees' claim that Judge Aspen's ruling is not final and appealable is specious and should be rejected. Under the controlling case law, an order denying intervention is final and appealable if, as here, a party is rendered unable to pursue its claims, and cannot overcome the order of denial through curative action of its own. United States v. City of Milwaukee, 144 F. 3d 524, 529 (7th Cir. 1998); Rothner v. City of Chicago, 929 F.2d 297, 300 (7th Cir. 1991); Principal Mut. Life Ins. Co. v. Cincinnati TV 64 Ltd. Partnership, 845 F.2d 674, 676 (7th Cir. 1988); see also South Austin Community Council v. SBC

Communications, et al., 191 F.3d 842, 844 (7th Cir. 1999). According to the relevant case law, this Court must deny appellees' motion to dismiss; it must reject appellees' latest effort to consign the ABLA plaintiffs to an indeterminate state of limbo where they can do nothing to vindicate their rights—or even have them heard.

FACTUAL AND PROCEDURAL BACKGROUND

The Chicago Housing Authority ("CHA") began to implement its redevelopment plan for ABLA in August 1995 when CHA began developing a HOPE VI application, subsequently approved by the U. S. Department of Housing and Urban Development ("HUD") in 1996, to fund the redevelopment of a portion of the ABLA development. See Intervenor's Complaint, ¶¶ 56-60, Exhibits in Support of Appellees' Joint Motion to Dismiss Appeal ("Appellees' Exhibits") at Exhibit D. For years, the ABLA plaintiffs, including the CRA, tried to participate in the ABLA redevelopment planning process. Id. at ¶¶ 82-87. At each turn they were rebuffed. This caused increasing concern among many ABLA tenants, as did the results of the planning process (i.e., the contents of the ABLA redevelopment plan), and CHA's means of implementing the plan (i.e., CHA's improper relocation of residents to pave the way for redevelopment). Id. at ¶¶ 57-96.

After numerous unsuccessful attempts to convince CHA to allow them to participate in the planning process, as is their right, the ABLA plaintiffs sued. In July 1999, they filed a 14-count complaint against CHA and HUD, which was assigned to Judge Gettleman. Appellants' Exhibit A. The suit raised claims under the United States Housing Act, the Fair Housing Act, Title VI, the Housing and Community Development Act, the Uniform Relocation Act, and the Housing and Community Development Act. Id. In essence, the ABLA plaintiffs challenged the contents of the ABLA redevelopment plan, the means by which CHA was implementing the plan, and the fact that the ABLA plaintiffs had been shut out of the redevelopment planning process.

CHA, HUD, and the Gautreaux plaintiffs and Receiver ("the Gautreaux parties") immediately filed a motion before Judge Aspen, the Gautreaux judge, asking him to dismiss the ABLA plaintiffs' lawsuit from Judge Gettleman's courtroom and reassign it to his courtroom, to

be litigated as part of the Gautreaux case. The appellees' principal argument was that the ABLA plaintiffs were mounting a collateral attack: they were challenging a plan that had already been approved by Judge Aspen. Specifically, in an order dated June 19, 1998, the Gautreaux parties agreed to, and Judge Aspen signed and entered, a "revitalization order" allowing for the construction or rehabilitation of 1,084 public housing units as part of the ABLA redevelopment plan. The Gautreaux parties argued that the ABLA plaintiffs were seeking to mount a collateral attack on Judge Aspen's order, specifically, the number of public housing units approved by Judge Aspen. See, e.g., Joint Motion of Gautreaux Plaintiffs and Daniel E. Levin and the Habitat Company, Gautreaux Receiver, for Orders Whose Effect Would Be To Dismiss the ABLA Complaint Without Prejudice to the Right of the ABLA Plaintiffs to Seek Leave to Intervene in This Case ("Joint Motion"), at 6, Appellants' Exhibit B; Defendants' Chicago Housing Authority and Philip Jackson Memorandum In Support of [Joint Motion], at 1, Appellants' Exhibit C.

Nowhere in the collateral attack briefing before Judge Aspen did the defendants argue that ABLA redevelopment plan was not final. Indeed, in motions to dismiss the ABLA plaintiffs' complaint filed before Judge Gettleman, CHA and HUD made repeated references to the "the revitalization plan for ABLA" and the "redevelopment plans" for ABLA. CHA Motion to Dismiss, filed October 8, 1999 at 4, 5, 8, 10, and 11 (Attachment A to Appellees' Exhibit I); HUD Motion to Dismiss, filed October 8, 1999 at 4, 11-12 (Attachment B to Appellees' Exhibit I). CHA even argued that that it had obtained court approval to put the ABLA revitalization plan into effect: "If [the ABLA] Plaintiffs' allegations are based on the decrease in the number of public housing units, then Plaintiff has failed to state a claim under Title VI because CHA received court approval to put the proposed ABLA revitalization plan into effect." CHA Motion to Dismiss, Attachment A to Appellees' Exhibit I at 17.

Accepting the Gautreaux parties' representations, Judge Aspen dismissed the ABLA plaintiffs' suit. He stated that, because the ABLA complaint "directly attacks the relief we ordered for the ABLA area pursuant to the Gautreaux decree," the case must be dismissed before

Judge Gettleman, assigned to the Gautreaux court, and then dismissed without prejudice to the ABLA plaintiffs' right to intervene in the Gautreaux case. Id. Judge Aspen stated further that, if the ABLA plaintiffs were to intervene in the Gautreaux case, "all of the ABLA plaintiffs' challenges to the ABLA revitalization plan may be addressed in a single proceeding concerning the redevelopment of the area." Id. He observed that "it would be more expedient to address all of the challenges to the ABLA plan now, rather than in [separate litigation]." Gautreaux Order, November 4, 1999, Appellees' Exhibit C.

Accordingly, the ABLA plaintiffs filed a motion to intervene in Gautreaux, attaching an Intervenor's Complaint virtually identical to their original complaint. Appellees' Exhibit D. The Intervenor's Complaint contains the same 14 counts attacking the legality of the ABLA revitalization plan, and the planning and implementation thereof. The Intervenor's Complaint adds two new defendants (The Habitat Company and Daniel E. Levin, acting jointly as the Gautreaux Receiver), and it alleges violations of the Fair Housing Act and Title VI of the Civil Rights Act of 1964 against them. Id. at Counts I-VI. The Intervenor's Complaint also redefines the ABLA plaintiff class to include the 1,000 or more ABLA leaseholders displaced from ABLA. Id. at ¶ 25. In all other respects, the complaint is identical to the one filed before Judge Gettleman.

Seven months after the motion to intervene was fully briefed, Judge Aspen still had not ruled. The ABLA plaintiffs therefore filed a request for ruling under Local Rule 78.5 of the United States District Court for the Northern District of Illinois. ABLA Plaintiffs' Request for Ruling on Motion to Intervene, filed September 20, 2000, Appellants' Exhibit D. Included with the motion were CHA's draft FY 2000 Vacancy Consolidation and Building Closure Plan and the affidavits of three ABLA residents. The draft consolidation and building closure plan stated CHA's preliminary intent to close the northern (Jane Addams) portion of ABLA before winter and to relocate all Jane Addams residents to ABLA buildings south of Roosevelt Road. The three affidavits demonstrated that CHA was providing ABLA residents only two or three days' notice of permanent relocation, was failing to

provide residents their choice of permanent replacement housing, and was failing to provide residents with the many relocation rights required by the Uniform Relocation Act. Id.

On September 25, 2000, Judge Aspen issued a ruling denying the ABLA plaintiffs' motion to intervene. According to the court, the ABLA plan—concrete enough in November 1999 to make plaintiffs' challenge to it a collateral attack—was now merely a “sample development plan” about which the parties were “unsure” as to implementation. The court stated, “[w]e cannot consider whether the sample plan will actually be implemented,” and so the ABLA plaintiffs' complaint, “which alleges that the plan is illegal, is not ripe for adjudication.” Rather, once a final plan is developed—a process that will take many months, or more likely, years¹--the ABLA plaintiffs will be permitted to “bring another motion to intervene in this court after the completion of the development plan.”

The court made no mention whatsoever of the ABLA plaintiffs' housing choice claims brought under the United States Housing Act or relocation claims brought under the Uniform Relocation Act and Housing and Community Development Act. These claims were based on actions that have already occurred and continue to occur. Rather, the court denied the motion to intervene on the sole ground that any challenge to the ABLA redevelopment plan itself was premature.

The ABLA plaintiffs filed a timely appeal on October 24, 2000. The Gautreaux parties have filed a motion to dismiss the appeal on the ground that the district court's order was not “truly final with respect to the proposed intervenor,” under United States v. City of Milwaukee, 144 F.3d 524 (7th Cir. 1998), in that the order did not “rule definitively on the party's participation in the litigation before the district court.” Appellees' Joint Motion to Dismiss Appeal at 2.

¹ According to the court, the process for creating a “final plan” includes “selecting a development manager, having a working group which includes the Receiver and Gautreaux plaintiffs consider and approve the plan, and incorporating the plan into a final proposal submitted to HUD for approval.” Gautreaux Order, September 25, 2000, Appellees' Exhibit A.

ARGUMENT

Denial of the ABLA Plaintiffs' Motion to Intervene is Final and Appealable Because the ABLA Plaintiffs Cannot Pursue Their Claims By Curing A Procedural Defect.

Appellees argue that because the district court denied the ABLA plaintiffs' motion to intervene "without prejudice," the order is not final and appealable. It is true that, in many instances, an order of dismissal without prejudice is not final and appealable. This was the case in United States of America v. City of Milwaukee, 144 F.3d 524, 527 (7th Cir. 1998), and Peters v. Welsh Development Agency, 920 F.2d 439 (7th Cir. 1990), the only two cases upon which appellees rely. Yet, in both of these cases, this Court dismissed the appeals based on minor procedural impediments—impediments that the aggrieved parties could themselves easily cure. As such, those cases are completely dissimilar to this one, in which the ABLA plaintiffs have absolutely no control over the timing of the events which will, according to the district court, make the ABLA plaintiffs' claims ripe for adjudication. Under such circumstances, the case law is clear: the order of denial or dismissal is final and appealable.

Indeed, it is well established that a party whose motion to intervene has been denied may take an immediate appeal, since the order of denial is final to the would-be intervenor. City Of Milwaukee, 144 F.3d at 528. See also Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 524 (1947); B.H. v. Murphy, 984 F.2d 196, 199 (7th Cir. 1993). This rule of finality is based on the fact that the proposed intervenor, having been denied the status of a party, will never be able to appeal in the underlying action unless the order denying intervention is first reversed. See B.H., 984 F.2d at 199.

Appellees claim that this rule does not hold where the dismissal, as here, is "without prejudice." But neither the United States Supreme Court nor the Seventh Circuit have accorded "talismanic importance" to the fact that a complaint or motion to intervene is dismissed "without prejudice." See City of Milwaukee, 144 F.3d at 529 n.7. A dismissal without prejudice is a final, appealable order where, as here, "the action could not be saved by any amendment to the

complaint which the plaintiff could reasonably be expected to make.” Brotherhood of R.R. Trainmen, 331 U.S. at 529 n.7; Rothner v. City of Chicago, 929 F.2d 297, 299 (7th Cir. 1991).

To that end, only last year, in a case strikingly similar to the one at bar, this Court determined that a dismissal for lack of ripeness was a final and appealable order—even though the dismissal was “without prejudice.” In South Austin Community Council v. SBC Communications et al., 191 F.3d 842 (7th Cir. 1999), a group of telephone customers sought to enjoin the merger of two telephone companies, alleging that the merger would violate antitrust laws. The district court dismissed the suit as premature, concluding that the dispute would not be ripe for adjudication until all required state and federal approvals had been obtained. Id. The court reasoned that the agencies might insist on changes that would substantially alter the merger’s competitive effects, thus changing or mooted some of plaintiffs’ claims. Id. The court dismissed the case for “want of jurisdiction,” expressly without prejudice to plaintiffs’ right to refile after the final shape of the merger was known. Id. at 844.

The telephone companies challenged plaintiffs’ appeal, arguing that there was no final order since the district judge contemplated further proceedings after regulatory approval occurred. Id. This Court rejected the telephone companies’ arguments, finding that “there was nothing tentative about the district court’s dismissal....This case has come to a close in the district court, without prejudice in the same sense that *every* jurisdictional dismissal is without prejudice to litigation of the merits in some other court or at some other time.” Id. (emphasis in original). This Court concluded, “the step the district judge took, an absolute dismissal, is a final decision, and so we turn to the merits.” Id. In South Austin, this Court properly looked beyond the designation of dismissal “without prejudice” and determined that, in fact, the dismissal was “final”: the potential opportunity to litigate claims at some indeterminate point in the future does not strip a dismissal of its finality. Id.

South Austin controls the instant case. Here, the district court denied the ABLA plaintiffs’ motion to intervene, determining that the claims were not ripe for adjudication until after governmental approvals were obtained—in the case at bar, until a final “plan” for ABLA is

submitted and approved by HUD. Gautreaux Order, September 25, 2000, Appellees' Exhibit A. The court's order was without prejudice, as in South Austin, leaving open the possibility that litigation of the merits could occur at some indeterminate point in the future. Id. But, as in South Austin, the ABLA plaintiffs' case has effectively "come to a close" as a result of the district court's decision and, thus, immediate appeal is warranted.

If this were not so, the ABLA intervenors would be stuck in an unbearable Catch-22. They cannot correct some minor procedural defects and refile their case before Judge Aspen. They cannot file a new case, as it would undoubtedly be considered a "collateral attack" on Gautreaux, as was the ABLA plaintiffs' original complaint. Id. Nor, according to appellees, can the ABLA plaintiffs appeal the denial of their motion to intervene in Gautreaux. Instead, they must wait on the sidelines until some indeterminate point, months or years in the future, when a "Revitalization Plan" is submitted and approved—actions over which the appellees (HUD, CHA and the Gautreaux plaintiffs and Receiver) have complete control. Accepting appellees' arguments would mean "cast[ing] the case into limbo, from which the loser has no escape." See Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994).

For this reason, there is a veritable raft of additional case law from this and other circuits supporting the principle that "uncurable" dismissals without prejudice are final and appealable. See Bragg v. Reed, 592 F.2d 1136, 1138 (10th Cir. 1979) ("If it is clear the plaintiff may not start over again with a properly drawn complaint, because of statute of limitations problems or otherwise, the action is treated as final and the order is appealable"); Cook v. Weber, 698 F.2d 907, 910 (7th Cir. 1983) (dismissal "without prejudice" to filing of suit in state court was final and appealable order since it effectively ended litigation in federal court); Ordower v. Feldman, 826 F.2d 1569, (7th Cir. 1987) (dismissal "without prejudice" for untimely service of process was final and appealable); Farrand v. Lutheran Brotherhood, 993 F.2d 1253, 1254 (7th Cir. 1993) (dismissal "without prejudice" was final and appealable); Marshall v. Sawyer, 301 F.2d 639, 643 (9th Cir. 1962) (dismissal based on abstention was final and appealable since there was "no way in which plaintiff could, by amending his complaint, avoid dismissal"). Cf. Otis v. City of

Chicago, 29 F.3d 1159, 1167-68 (7th Cir. 1994) (dismissal with leave to reinstate based on plaintiff's failure to comply with discovery became final and appealable once time for compliance passed).

In contrast, the appellees rely exclusively on two inapposite cases. These cases purportedly stand for the proposition that a dismissal "without prejudice" is not a final and appealable order. But in both cases relied on by appellees, it was wholly within the control of the plaintiff or putative intervenor to remedy the grounds for the dismissal.

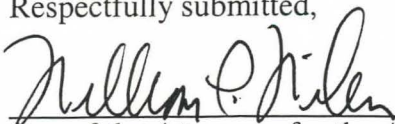
In United States of America v. City of Milwaukee, 144 F.3d 524, 527 (7th Cir. 1998), the district court denied intervention because the motion did not conform to the procedural requirements of Federal Rule of Civil Procedure 24(c); specifically, the proposed intervenor had failed to attach a pleading to his motion. Id. Therefore, the proposed intervenor could have easily remedied the defect and quickly refiled his complaint. Similarly, in Peters v. Welsh Development Agency, 920 F.2d 439, also relied on by appellees, the district court entered a dismissal without prejudice due to the plaintiff's failure to submit himself to discovery. Again, it was wholly within the plaintiff's control when and if the case would be reinstated: although the Court made mention of a second condition to reinstatement—that a criminal case pending in Britain be resolved—the Court itself noted that this condition would be mooted by Peters' unilateral action in agreeing to waive his Fifth Amendment rights. Id. at 439-440. The fact that Peters could satisfy the district court's requirements and have his case reinstated made his appeal "unnecessary." Id.; see also Furnace v. Board of Trustees of Southern Illinois University, 218 F.3d 666, 670 (7th Cir. 2000) (dismissal of complaint not final, appealable order where nothing in record suggested that plaintiff could not save complaint through amendment).

Here, unlike the cases cited by appellees, the district court entered a dismissal order finding that the ABLA plaintiffs' claims were not ripe for review. Gautreaux Order, September 25, 2000, Appellees' Exhibit A. Unlike City of Milwaukee and Peters, there is nothing the ABLA plaintiffs can do to "save" their case by amending their complaint and have it reinstated. See City of Milwaukee, 144 F.3d at 529 n.7. Appellees' own case recognizes the well-settled

rule, discussed above, that a dismissal without prejudice is final and appealable where, as in the instant case, it is beyond the plaintiff's capability to save the case through some amendment to the complaint. Id.

This Court should accordingly deny the appellees' motion to dismiss this appeal and finally allow the merits of this case to be heard.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on November 22, 2000 he served copies of the *Appellants' Response to Appellees' Joint Motion To Dismiss Appeal* on the parties listed below by causing true and correct copies of the same to be delivered by messenger to the following parties:

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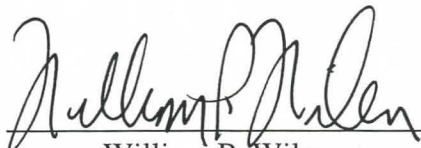
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