

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3787

DOROTHY GAUTREAUX, et al.)

Plaintiffs,)

v.)

CHICAGO HOUSING AUTHORITY,
a corporation, and TERRY PETERSON
Executive Director, in his official
capacity.)

Defendants.)

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

) No. 66 C 1459

) Chief Judge Marvin E. Aspen
)
)

U.S.C.A.—7th Circuit
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GINO J. AGNELLO
CLERK

APPELLEES' JOINT REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

Appellees, The Chicago Housing Authority ("CHA"), the Plaintiffs, the United States Department of Housing and Urban Development ("HUD"), and Daniel E. Levin and The Habitat Co., Inc., the Court-appointed Receiver for the Chicago Housing Authority in the District Court ("Receiver"), jointly submit this reply pursuant to Fed. R. App. P. 27(a)(4) to the Appellants' Response to Appellees' Joint Motion to Dismiss Appeal ("Response") filed by the appellants, Concerned Residents of ABLA, et al ("CRA").

As shown in the Joint Motion to Dismiss, the principles articulated in United States v. City of Milwaukee, 144 F.3d 524 (7th Cir. 1998), and Peters v. Welsh Dev. Agency, 920 F.2d 438 (7th Cir. 1990), require dismissal for lack of appellate jurisdiction. CRA's attempts to distinguish those cases are unpersuasive.

CRA argues that the dismissals in both Milwaukee and Peters were based upon "minor procedural impediments" that could "easily" be cured, and that ability to return to Court was, therefore,

wholly within the control of the dismissed party. Response at 7. Though that may have been true in Milwaukee, it was clearly not the case in Peters. The Peters dismissal order had two conditions, one, that “British criminal charges [against Peters] are resolved,” and two, that he convinces the district court that “he is prepared to diligently conduct and respond to discovery.” Peters, 920 F.2d at 439. Though this Court noted that Peters might be able to satisfy the first condition through his offer to waive his Fifth Amendment privilege, the condition as stated in the dismissal order was not “easily curable.” And the second condition was plainly subject to the discretion of the district court.

In any event, neither Milwaukee nor Peters stands for the proposition advanced by CRA, i.e., that a dismissal without prejudice is unappealable only if the reason for the dismissal is a procedural impediment easily curable by unilateral action of the dismissed party. CRA cites no case so stating, and none exists to our knowledge. Rather, the test of appealability focuses on finality, and asks whether the district court contemplates further proceedings, as Peters and the cases cited by CRA indicate. “A dismissal of a case is not final and appealable when the district court contemplates further proceedings.” Peters, 920 F.2d at 440, quoting Rosser v. Chrysler Corp., 864 F.2d 1299, 1304 (7th Cir. 1988). See also, e.g., Ordower v. Feldman, 826 F.2d 1569, 1572 (7th Cir. 1987). Here, Chief Judge Aspen’s order plainly contemplated further proceedings: The denial of intervention was “without prejudice to the CRA’s right to bring another motion to intervene in this court after the completion of the development plan.” Minute Order of September 25, 2000 (Ex.A to Motion to Dismiss). He also stated that “once a development plan is finalized, we expect to hold a hearing on the merits of the plan At that time, if the CRA believes the final plan is in violation of the law, it may renew its motion to intervene.” Id.

By trying to distinguish Milwaukee on its facts, CRA tiptoes away from the controlling legal standard applied by this Court:

[I]n order to be immediately appealable, an order denying a motion to intervene must be *truly final* with respect to the proposed intervenor – that is, the order *must rule definitively* on the party’s participation in the litigation before the district court.

City of Milwaukee, 144 F.3d at 528. The denial of intervention here was not “truly final,” as it did not rule at all, let alone definitively, on CRA’s intervention petition. The Court declined to rule on the merits of CRA’s intervention petition denial because the CRA was challenging a redevelopment plan that did not yet exist. Chief Judge Aspen directed the CRA to return to Court when the plan, and a resulting “case or controversy,” actually exists. That is, the Court below contemplates deciding the intervention issue at that later time if CRA is unhappy with the actual plan. Indeed, Chief Judge Aspen wrote that he intends to hold a hearing concerning the merits of the plan after it is created and CRA may “renew its motion to intervene” at that time. Since the order below did not “resolve definitively whether [CRA] ought to be allowed to intervene,” Milwaukee, 144 F.3d at 529, the order is not “truly final” with respect to intervention.

The string cite of cases in Response at 9-10 does not help CRA, because in each one the dismissed party’s case had no future in federal court. That is not the situation here, as the order denying intervention makes clear. South Austin Coalition Community Council v. SBC Communications Inc., 191 F.3d 842 (7th Cir. 1999), cited in Response at 8-9, where this Court affirmed the district court’s dismissal of a “gun-jumping suit,” 191 F.3d at 845, does not support the exercise of jurisdiction here. The procedural posture regarding finality was different in that case. The dismissal order in South Austin terminated an entire lawsuit. “[T]here was nothing tentative about the district court’s dismissal” in that case, and the case had “come to a close in the district court.” 191 F.3d at 844. The district court there did not, as it did here, indicate it was going to hold future hearings upon ripening of the claim. In contrast, this case continues unterminated, and the district court contem-

plates holding a hearing on the plan and deciding the intervention motion when the redevelopment plan is created. The denial of intervention is therefore not final under 28 U.S.C. §1291.^{1/}

The CRA is neither “stuck in an unbearable Catch-22” nor “cast into limbo.” Response at 9. No such melodrama has occurred. All that has happened is that CRA tried to challenge a plan that does not yet exist. Chief Judge Aspen told CRA it had jumped the gun, that it needs to wait until the plan is created, and then return to Court if it doesn’t like the plan. When the plan is actually drawn up, a hearing will be held and the merits of CRA’s intervention petition will be decided, as the court below stated.^{2/}

For the foregoing reasons and for the reasons stated in the Joint Motion to Dismiss, the appellees respectfully ask the Court to dismiss this appeal for lack of jurisdiction.

^{1/} Even if South Austin supported jurisdiction (and it does not), its holding on the merits of the ripeness issue would support a quick affirmance of Chief Judge Aspen’s order. The merger at issue in that case was subject to regulatory approvals, and the terms and conditions of the merger were not yet in place. In those circumstances, the case was unripe. This Court held that it would be “a waste of everyone’s time to proceed,” and “an expensive challenge to a moving target is worse than pointless.” South Austin, 191 F.3d at 845. Here, the CRA challenges a plan that does not yet exist, and it surely would be a waste of time and worse than pointless to proceed at this time, as Chief Judge Aspen ruled.

^{2/} CRA mentions its relocation claims in its factual summary, but does not explain why they bear on the jurisdictional issue. These claims were also premature. CRA claims that CHA has a “draft” consolidation and building closure plan with a “preliminary intent” to close the Jane Addams portion of ABLA before winter and move all of the Addams residents south of Roosevelt Road. Response at 5. This “draft plan” and the affidavits the ABLA plaintiffs refer to were not included in their complaint and are therefore not properly considered on appeal. In any event, the “plan” the ABLA plaintiffs have seized upon was only a preliminary draft, as CRA concedes, and CHA never put it into effect. CHA informed Judge Aspen of this, see Ex.A hereto, and have told the ABLA plaintiffs this repeatedly, in writing and at meetings to discuss relocation. Nonetheless, the ABLA plaintiffs insist on trying to litigate a relocation “plan” that does not exist.

Date: November 29, 2000

Respectfully submitted:

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Hon. Marvin Aspen
United States District Court
219 S. Dearborn St.
Chicago, Illinois

Hand-Delivered

Re: Gautreaux

Dear Judge Aspen:

We represent the CHA in Gautreaux. Yesterday, we received the ABLA Plaintiffs' Request for Ruling on Motion to Intervene. We have no objection to a prompt ruling and we learned this morning that you will not be calling the ABLA Plaintiffs' motion, as a ruling will be issued soon.

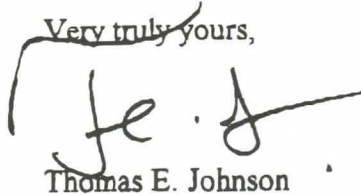
We object, however, to the affidavits and exhibits attached to the ABLA Plaintiffs' Request for Ruling and believe it would be improper for the Court to consider them, unless CHA has been afforded an opportunity to respond to this evidentiary material. The material attached to the Request for Ruling is grossly inaccurate. I will give you just a few examples. First, the water is not being shut off at 1433 W. 13th Street. On September 12, 2000, the CHA received numerous notices of shut off, affecting many of its buildings. CHA immediately met with the Department of Water and the problem turned out to be in the formatting of the computer discs that the Department of Water sends to CHA with all of the information pertaining to water charges. Once the Water Department resolved this problem, CHA sent a full payment for all of the invoices due on September 15th. Second, there are no plans to close the Addams Homes for the winter of 2000. The plaintiffs have attached an early draft of CHA's Vacancy Consolidation and Building Closure Plan, circulated to CHA staff and resident leaders in order to facilitate discussion about difficult choices that must be made. The plan has since been modified many times and no longer includes a plan to close the Addams Homes. The CHA board has not yet, however, finalized or approved any Vacancy Consolidation and Building Closure Plan. The relatively few relocations from Addams have been to brand new units. Each resident moved has signed an agreement to accept the new apartment and waive the relocation notice requirement. These moves are being done pursuant to an agreement with the duly-elected Local Advisory Council and with their full

EXHIBIT A

cooperation.

There are many inaccuracies and omissions in the individual affidavits filed. They present a false and inaccurate picture. It would be most unfair for the Court to consider this material and therefore we urge the Court to strike it.

Very truly yours,

A handwritten signature in dark ink, appearing to be 'T.E. Johnson', written over a horizontal line.

Thomas E. Johnson

TJ:yt

cc: William Wilen
Clyde Murphy
Harold Hirshman
Edward Feldman
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on November 29, 2000 he served copies of *Appellees' Joint Reply in Support of Motion to Dismiss Appeal* on the parties listed below by causing true and correct copies of the same to be delivered by messenger delivered to the following parties:

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Dated: November 29, 2000



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