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United States District Court, S.D. New York.

Pauline DAVIS, Cynthia Williams, Cornelia Simmons, and Kim Rivera, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
The NEW YORK CITY HOUSING AUTHORITY, Defendant.
UNITED STATES of America, Plaintiff,
v.
The NEW YORK CITY HOUSING AUTHORITY, Defendant.

No. 90 CIV. 0628 (PNL), 92 CIV. 4873 (PNL). | Dec. 31, 1992.

Opinion

OPINION AND ORDER

LEVAL, District Judge.

***1** On July 1, 1992, the parties to these actions filed a proposed consent decree resolving all claims of the plaintiffs and the proposed plaintiff-class. This court directed the Housing Authority to give notice of the proposed settlement to the plaintiff-class and, because the interests of non-parties might be affected by the decree, *see In re Masters Mates & Pilots Pension Plan,* 957 F.2d 1020, 1026 (2d Cir.1992), to other interested persons as well. Notices were posted in all residential public housing buildings, published in three newspapers, and mailed to over 200 hundred entities and organizations.

Pursuant to Fed.R.Civ.P. 23(e), a hearing on the fairness, reasonableness, and adequacy of the proposed settlement was scheduled for November 6, 1992. Sixty-four written comments were received prior to the hearing,[1] 58 of which supported the proposed settlement or sought to file claims for relief under it. On October 30, 1992, plaintiffs and the defendant submitted papers responding to the written comments and supporting the fairness and adequacy of the proposed decree.

At the Rule 23(e) hearing on November 6, all persons in attendance who wished to speak were permitted to do so, whether or not they had submitted written comments prior to the hearing. The court heard oral objections from two Staten Island City Council members and counsel for one of them, and statements in support of the settlement from numerous class members, and one fair housing organization. The court permitted all interested persons to supplement their objections with additional written statements on or before November 11, 1992. Three such statements were received.

The "central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate." *Weinberger v. Kendrick,* 698 F.2d at 73. The "primary concern" entails a comparison of the terms of the compromise with the likely rewards of litigation. *Id.* Attention must also be paid "to the negotiating process by which the settlement was reached," including whether the agreement is the result of arm's-length negotiations, and whether plaintiffs' counsel possessed the requisite experience and ability and engaged in discovery necessary to effective representation of the class' interests. *Id.* at 74. The interests of non-parties must likewise be considered. *In re Masters Mates & Pilots Pension Plan,* 957 F.2d at 1026.

Although "to avoid a trial it is not necessary to conduct one," *see Weinberger,* 698 F.2d at 74, "findings and conclusions should be made with respect to every controverted settlement in order to permit intelligent review." *Plummer v. Chemical Bank,* 668 F.2d 654, 659 (2d Cir.1992). Among the factors for consideration are (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; the risks of establishing (4) liability and (5) damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnel Corp.,* 495 F.2d 448, 463 (2d Cir.1974); *see also Weinberger,* 698 F.2d at 73–74.

***2** After reviewing the proposed settlement in light of these standards, including all declarations and statements in support of and in opposition to it, documentary and statistical evidence, and all matters presented at the hearing, the court approved the decree by order entered on November 16, 1992. The court now makes the following findings of fact and conclusions of law.

Plaintiffs' evidence supports their allegations that during

specified periods of time the Housing Authority selected and assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics. These methods included (1) the intermittent use of codes denoting housing projects to which only white families could be assigned; (2) the use of zip code and other geographic restrictions on admission to projects; (3) the use of racial goals or targets when new projects were "rented up" and on an ongoing basis thereafter; and (4) the assignment of families to projects where vacancies were not expected to arise. The evidence submitted by plaintiffs also supports their allegations that one or more of these practices continued during the period addressed in the Consent Decree (1983 through 1990, and on Staten Island through May 1991).

The court is satisfied that the decree will afford redress for these practices for a substantial portion of the plaintiff-class. Under the decree, the Housing Authority will provide priority placement at 31 public housing projects ("Affected Developments") for 1,990 families adversely affected by discrimination since 1985, together with moving expenses and utility reconnection costs for those class members who changed addresses since their eligibility interview; these expenses and costs will be paid directly to the providers on behalf of the class members. The 1,990 figure represents a reasonable estimate of the number of families who were adversely affected since 1985 based on statistical analyses of the relevant applicant pools. The potential value of moving expense benefits and utility reconnection costs paid on behalf of class members is estimated at roughly $1.1 million.

Under the decree, the United States Department of Housing and Urban Development ("HUD") will also provide contract authority for 200 Section 8 housing vouchers for use in the private housing market by families who were adversely affected by discrimination in 1983 or 1984. Any unused vouchers could be claimed by class members from subsequent years. In consideration of this contribution by HUD, the plaintiff-class releases HUD from claims that relate to or arise out of HUD's relationship to the tenant selection practices of the Housing Authority during the relevant period. If the 200 Consent Decree vouchers remain under contract for an average of 15 years, their estimated value to the class would be roughly $24 million. The plaintiffs calculate that the 200 figure, while lower than the number of potential class members during 1983 and 1984, represents a reasonable estimate of the number of class members from that time period who are likely to be identified and located, found eligible, desirous of participating in relief, and not otherwise eligible as post–1984 class members.

***3** A new Tenant Selection and Assignment Plan ("TSAP") will prohibit the past practices challenged in the complaints and provide for enhanced information to all housing applicants. This information will include a new "project information book" containing information on the location of housing projects and, for each project, the nearest transportation, schools, hospitals, public services such as child care, and accessibility of apartments for the mobility impaired. Data from the project information book would be posted on maps in the Housing Authority Applications Department. Lists depicting the locations of all projects where vacancies are expected to arise, and describing the location of each project, would be publicly available and could be taken home by applicants for review. These changes will permit public housing applicants to make more informed housing choices. Black or Hispanic families who may be unaware of housing opportunities in neighborhoods unfamiliar to them, and who may, through lack of knowledge, have failed to request assignment to some housing projects, would especially benefit.

In light of the value of these benefits to the plaintiff-class and the potential risks and delays associated with litigation, I am convinced that the compromises made on behalf of the plaintiff-class members were reasonable. Those compromises consist primarily of the waiver of payment of monetary damages, except for monetary damages to the named plaintiffs and moving expenses and utility reconnection costs paid on behalf of unnamed class members; partial relief for the 1983–1984 time period; and the exclusion of relief at a number of largely non-white housing projects in East Harlem. The waiver of additional monetary damages, over and above moving expenses and utility reconnection costs paid on behalf of unnamed class members, was reasonable in light of the value of other remedial relief to class members. Partial relief for the 1983–1984 time period, and excluding a small number of additional housing projects in East Harlem, was justified in light of the litigation risks and potential delays associated with these claims. The payment of monetary awards to the named plaintiffs was reasonable in light of the costs and burdens associated with their participation in the litigation. *Cf. Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 24 (2d Cir.1987) (upholding modest awards to name plaintiffs).

The remaining factors also support approval of the settlement. The settlement was the result of intense and protracted arm's-length negotiation. Submissions in support of the settlement demonstrate the requisite discovery and experience of counsel necessary for effective representation of the class.

Although some objectors have asserted that the settlement could affect the interests of non-class members, particularly some families currently on the waiting lists of Affected Developments, any effect that it might have is both consonant with the Fair Housing Act and equitable to non-class members. The settlement will reserve one out of every four vacancies at Affected Developments for non-class members. This compromise between the interests of class members and non-class members is a reasonable one. The power of the court to order relief for victims of discrimination is broad: the Act authorizes the court to issue "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." 42 U.S.C. § 3613(c)(1). Moreover, there is legal support for affording all class members remedial relief by giving them priority placement ahead of non-victims of discrimination. *See Franks v. Bowman Transportation Co.,* 424 U.S. 747, 774–76 (1976); *see also Jones v. Amalgamated Warbasse Houses, Inc.,* 97 F.R.D. 355, 361 (E.D.N.Y.1982) ("Outsiders are not being forced to forfeit their status as members of the list; rather, they merely may have to wait somewhat longer for an apartment. This potential delay is not legally significant and therefore does not provide a basis for disapproving the settlement.") (citing *Franks*). In addition, most families on current waiting lists at the Affected Developments had later interviews than the large majority of class members, and thus would have been housed after such class members. Priority placement for class members therefore helps to restore the *status quo.* Further, most families on current waiting lists will be housed prior to class members in any event because of inevitable delays associated with implementation of the decree. Finally, some non-class members on waiting lists of Affected Developments enjoy such status because of the practices challenged in these cases. I am therefore satisfied that the settlement does not illegally discriminate against individuals currently on waiting lists for public housing.

***4** Several persons, including three members of the New York City Council from Staten Island (the "objectors"), oppose this settlement. The court has considered their contentions, both written and oral, and finds their objections to be without merit.

One objector contends that the incorporation in the settlement of a new TSAP usurps a legislative function of the New York City Council, and that Council members should have been invited to participate in the negotiating process. This is not correct. The Housing Authority is an independent public corporation created by New York State Law, and neither the New York Public Housing Law, *see* N.Y. Pub. Hous. Law § 401 *et seq.,* nor any other provision of law requires the Housing Authority to consult the New York City Council or to obtain its approval before adopting a TSAP. In any case, the objectors have been afforded an opportunity to comment on the proposed settlement, and the court has carefully considered their views and the views of those for whom they speak, including persons who are currently on the waiting list for public housing.

Two objectors raise various objections to the parties use of statistics in negotiating the number of vacancies to be allocated to class members at the Affected Developments on Staten Island. The objectors assert that statistics concerning Staten Island demonstrate an absence of discrimination at the projects in that borough. Evidence presented by the plaintiffs, however, shows discrimination there. The plaintiffs presented direct evidence of discrimination on Staten Island, such as improper practices at the special Staten Island Applications Office and the failure to report expected vacancies at the largely white Staten Island projects. This direct evidence is corroborated by statistics adduced by the plaintiffs. While only 15.4% of the total population of Staten Island is Black or Hispanic, the percentage of Blacks to Hispanics among non-elderly applicants who seek to live in public housing on Staten Island exceeds 70%. Move-in data at the 11 Housing Authority projects on Staten Island demonstrates that, at the five projects where racial occupancy controls were not imposed, approximately 85% of the families that moved in between 1985 and 1990 were Black or Hispanic. In contrast, at the six projects where the plaintiffs contend whites received admission preferences, white families constituted almost 70% of the move-ins during that period. Because the rate of Black and Hispanic applicants moving to Staten Island far exceeds their proportion in the residential population of Staten Island in general, it was appropriate for the parties to take this into account in conducting their statistical analysis. I am satisfied that the statistical calculations in connection with Staten Island were reasonable.

Two objectors complain that the remedial relief will damage the socio-economic balance of the Affected Developments by requiring the assignment of homeless families to these projects. However, there is no evidence that the socio-economic mix of the class members will differ in any way from the population already in public housing or on waiting lists for public housing. In addition, one in four slots will go to those on the waiting list during the administration of the remedial relief.

***5** One objector points out that the settlement does not require that class members prove that they applied to live in one of the Affected Developments. However, the settlement does require that the class members establish that they requested or would have requested housing at one of the Affected Developments. This standard is reasonable in light of the showing that the Housing Authority failed to advise Blacks and Hispanics of anticipated vacancies at a number of the Affected Developments and engaged in other discriminatory practices. Moreover, the settlement contains significant procedural requirements that class members must meet in order to qualify for an apartment.

Finally, an objection filed on behalf of the Hasidic community in Brooklyn asserts that various provisions of the Tenant Selection and Assignment Plan will have a disparate impact on that community. However, the challenged provisions of the TSAP, concerning various conditions on project choice for smaller and larger apartments, appear to be reasonable and justified by considerations facing the Housing Authority. In addition, the objector points to no constitutional, statutory, or other right violated by these provisions of the TSAP.

A number of the objectors' contentions may be rejected summarily: (1) There is no evidence that the notice to potential class members under the Consent Decree will encourage false claims; (2) there is no evidence that the parties will be unable to identify class members with reasonable precision given the evidentiary standards set forth in the Consent Decree; (3) contrary to the objectors' assertions, the Consent Decree does not dispense with the Housing Authority's eligibility requirements; (4) the moving expenses that will be paid under the Consent Decree are not a "windfall" to class members, but rather are a reasonable means of paying for the additional expenses class members would incur in receiving relief under the Consent Decree. (And, these expenses will be paid directly to the moving and utility companies, not to the class members.)

The court has considered all the other oral and written objections submitted to it, and has concluded, for reasons set forth in the parties' submissions and at oral argument, that the objections lack merit. The settlement is hereby approved.

SO ORDERED.

[1] Although one comment arrived approximately 30 days after the final date for receipt of written statements, the court accepts it as a late-filed comment. *See Weinberger v. Kendrick,* 698 F.2d 61, 69 n. 10 (2d Cir.1982) (Friendly, J.), *cert. denied,* 464 U.S. 818 (1983).