1997 WL 711360
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Pauline DAVIS, et al., 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.

Nos. 90 Civ. 628(RWS), 92 Civ. 4873(RWS). | Nov. 13, 1997. | As Amended November 20, 1997

Attorneys and Law Firms

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Opinion

OPINION

SWEET, J.

***1** Defendants, The New York City Housing Authority ("NYCHA"), have moved for reconsideration and reargument of that portion of the Court's July 17, 1997 decision that preliminarily enjoined NYCHA from amending its Tenant Selection and Assignment Plan (the "TSAP") to implement a working-family preference ("WFP") as proposed. Defendants seek either (1) an order vacating the preliminary injunction; or (2) an order vacating the injunction as it applies to all developments, except those 11 at which Plaintiffs claim the WFP would perpetuate segregation. Furthermore, NYCHA and Plaintiffs have submitted an Order for Settlement and a Counter–Proposed Order, pursuant the Court's Opinion. For the reasons set forth below, the motion to reconsider is denied. The preliminary injunction is modified to the extent that (1) NYCHA may implement the working-family preference as proposed in any project where white families do not constitute more than 30 percent of the families at the project; and (2) NYCHA may extend limited project choice to families requiring three or four-bedroom apartments. NYCHA is granted leave to move to modify the preliminary injunction consistently with this opinion and upon any further showing of good cause.

The Parties

NYCHA is the largest public housing agency in the United States, operating more than 320 projects, comprising approximately 180,000 apartments which house nearly 500,000 people. NYCHA operates these projects pursuant to an Annual Contributions Contract and other agreements with the Department of Housing and Urban Development ("HUD"), New York State and New York City. To be eligible for admission to public housing, families must be "low-income," defined by the United States Housing Act of 1937 as receiving household income less than 80 percent of the median income for the area. *See* 42 U.S.C. §§ 1437a(a)(1) & (b)(2).

The Davis plaintiffs are Latino and African–American individuals residing in or eligible for NYCHA housing (the "Plaintiffs").

Prior Proceedings

The facts and prior proceedings in this litigation are described in the prior opinions of this Court, familiarity with which is assumed. *See Davis v. New York City Hous. Auth.,* Nos. 90 Civ. 628, 92 Civ. 486, 31997 WL 407250 (S.D.N.Y. July 18, 1997) (hereinafter *Davis IV*); *Davis v. New York City Hous. Auth.,* 940 F.Supp. 80 (S.D.N.Y.1996) (hereinafter *Davis III*); *Davis v. New York City Hous. Auth.,* 839 F.Supp. 215 (S.D.N.Y.1993) (hereinafter *Davis II*); *Davis v. New York City Hous. Auth.,* No. 90 Civ. 0628, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) (hereinafter *Davis I*).

On May 31, 1990, the Plaintiffs filed a class action complaint against NYCHA, styled *Davis v. New York City Housing Authority,* 90 Civ. 628, alleging discrimination on the basis of race, color, and national origin in the selection and assignment of public housing tenants in

violation of the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 (the "Fair Housing Act"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981, 1982, 1983. The United States later initiated a parallel action, *United States v. New York City Housing Authority,* 92 Civ. 4873, also alleging that NYCHA's policies and practices of selecting tenants for projects violated the Fair Housing Act.

***2** On July 1, 1992, a Consent Decree was signed by the United States, the Plaintiffs and NYCHA. The Consent Decree consolidated the Government's and Plaintiffs' complaints, certified a plaintiff class of African–American and Hispanic applicants and tenants, and provided certain relief to the class, including the implementation of the TSAP, which NYCHA now proposes to modify. Pursuant to Fed.R.Civ.P. 23(e), a fairness hearing was held on November 6, 1992. Additional written statements were received by the Court through November 11, 1992. A summary order approving the Consent Decree was entered on November 17, 1992, followed by a written opinion and order of the Court dated December 30, 1992. *See Davis I.*

By opinion dated December 2, 1993, the Consent Decree was clarified, and NYCHA was enjoined from using "duplicate requests" in filling larger apartments at one of the NYCHA's projects. *See Davis II.* By order dated September 30, 1996, this Court granted Plaintiffs' motion for an extension of time to file objections to the proposed modifications to the TSAP that are the subject of this motion. *See Davis III.*

Plaintiffs filed a motion to preliminarily enjoin NYCHA from implementing two proposed changes to the TSAP on November 15, 1996. Oral argument was heard on April 2, 1997. Submissions were received through April 17, 1997, at which time the matter was deemed fully submitted. The Court, in an opinion dated July 18, 1997, granted the Plaintiffs' motion "to the extent that NYCHA will be enjoined from implementing a 'Working Family Preference' as proposed" but denied Davis' request to enjoin NYCHA from expanding " 'Project Choice' to permit larger families to specify the project in which they wish to live." *Davis IV* at *1.

NYCHA filed the instant motion on August 4, 1997. Plaintiffs filed opposition papers on August 15, 1997, and NYCHA filed a reply on August 25, 1997. Supplementary materials were received through September 24, 1997.

In accordance with the Court's instructions in *Davis IV,* NYCHA filed a Proposed Order and supporting documentation on October 16, 1997. Plaintiffs filed a Counter–Proposed Order on October 30, 1997 along with a Memorandum of Law in Opposition to Defendant's Proposed Order and in Support of Plaintiffs' Proposed Order and an affidavit from Plaintiffs' expert. On November 5, 1997, NYCHA submitted a letter to oppose Plaintiffs' proposed order, at which time the motion and proposed orders were deemed fully submitted.

Discussion

I. ***Standard For Reconsideration***

Local Rule 6.3 provides in pertinent part, "there shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." *See* SDNY R. 6.3. Thus, to be entitled to reargument, a party must demonstrate that the Court overlooked controlling decisions or factual matters put before it on the underlying motion. *See Domenech v. City of New York,* 927 F.Supp. 106, 108 (S.D.N.Y.1996); *Violette v. Armonk Assocs., L.P.,* 823 F.Supp. 224, 226 (S.D.N.Y.1993); *Fulani v. Brady,* 149 F.R.D. 501, 503 (S.D.N.Y.1993), *aff'd,* 35 F.3d 49 (2d Cir.1994). Therefore, a party in its motion for reargument "may not advance new facts, issues or arguments not previously presented to the court." *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc. .,* No. 86 Civ. 6447, 1989 WL 162315, at *3 (S.D.N.Y. August 4, 1989), *rev'd on other grounds,* 967 F.2d 742 (2d Cir.1992).

***3** Local Rule 6.3 is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court. *See Caleb & Co. v. E.I. Du Pont De Nemours & Co.,* 624 F.Supp. 747, 748 (S.D.N.Y.1985). In deciding a Local Rule 6.3 motion, the Court must not allow a party to use the motion to reargue as a substitute for appealing from a final judgment. *See Morser v. AT & T Info. Sys.,* 715 F.Supp. 516, 517 (S.D.N.Y.1989); *Korwek v. Hunt,* 649 F.Supp. 1547, 1548 (S.D.N.Y.1986), *aff'd,* 827 F.2d 874 (2d Cir.1987).

II. ***There Is No Basis To Reconsider Whether The WFP Would Perpetuate Past Discrimination***

According to NYCHA, the Court overlooked factual matters which were material to the Court's decision. Specifically, NYCHA disputes the conclusion that "the plaintiffs have adequately demonstrated a likelihood of success in proving a prima facie case that the Working Family Preference would perpetuate past segregation in predominantly white projects." *Davis IV* at *14. The Court reached this conclusion upon crediting the

Plaintiffs' expert testimony that, "assuming [ ] existing turnover and move-in rates persist and that for each vacancy set aside for claimants under the Davis decree, a family of color would replace a white family, implementation of the Working Family Preference would effectively 'freeze' the desegregation process at the racially identifiable projects, in violation of Title VIII." *Id.* at *12. The Court accepted the expert's conclusion that the WFP will "more than double white admission rates" and that "many of these additional white families will be concentrated in predominantly white developments." *Id.*

In essence, NYCHA first argues that the analysis was flawed and, according to NYCHA's new analysis, the statistics show that past segregation would not be perpetuated, but rather in some instances would be reversed by the WFP. As Plaintiffs point out, NYCHA had the opportunity to present its own expert analysis to rebut Plaintiffs' argument. The Court addressed NYCHA's rebuttal point by point.[1] It is not appropriate, as NYCHA attempts to do here, to advance new argument regarding the effect of the WFP on perpetuating segregation on a motion to reconsider. *See Scheiner v. Wallace,* 955 F.Supp. 232, 237 (S.D.N.Y.1997) ("[A] party in its motion for reargument 'may not advance new facts, issues or arguments not previously presented to the court.' " (quoting *Litton,* 1989 WL 162315, at *3)).

1 The Court rejected the four principal arguments advanced by NYCHA, which were that (1) "the effects of past discrimination have been 'attenuated' by the passage of time," *id.* at *12; (2) "because the cause of the past segregation was racial steering practices, not tenant selection practices, the fact that proposed tenant selection practices would perpetuate or prolong existing segregation is irrelevant," *id.* at *13; (3) "the fact that the proposed WFP will actually align the racial composition of new admissions with that of the applicant pool somehow prevents a finding of perpetuation of past segregation," *id.;* and (4) "only a small number of projects continue to be disproportionately white, while the majority of tenants are minority and the bulk of the projects are racially integrated, vitiates any claim of segregation," *id.* at *14.

Similarly, NYCHA's argument that, even accepting Plaintiffs' analysis, the differential between the number of white families moving into the disproportionately white projects under the present TSAP and the proposed plan is essentially *de minimis* is a new argument not properly addressed on a motion for reconsideration. The Court found that the WFP would "more than double white admission rates." *Id.* at *12. Indisputably this is a step backwards, however small, in desegregating the projects at issue. In light of the Court's conclusion that "NYCHA has not sustained its burden of demonstrating that there is no less discriminatory means of advancing the same interests" as those intended to be achieved by the WFP program, even a small step in the wrong direction is impermissible. *Id.* at *14.

III. *The Preliminary Injunction Will Be Modified*[2]

2 NYCHA moved for reconsideration of the preliminary injunction. NYCHA's argument, that by applying the preliminary injunction to projects that were not disproportionately white the injunction was overbroad, is moot in light of the modification to the preliminary injunction herein.

***4** Pursuant to the Court's direction in *Davis IV* to settle an order on notice, NYCHA and the Plaintiffs submitted a Proposed Order and a Counter–Proposed Order (together, the "Proposed Orders"). In the Proposed Orders and the letters submitted therewith, both parties agree that the WFP considered in *Davis IV* will not perpetuate past discrimination at any of the NYCHA projects other than the 21 projects where greater than 30% of the apartments are rented to whites (the "Disproportionate Projects"). Both parties further agree that NYCHA may extend limited project choice to families requiring three or four-bedroom apartments. They disagree, however, on the appropriate modification to the WFP that is necessary to avoid perpetuating past discrimination in the Disproportionate Projects.

NYCHA proposes to modify the WFP to eliminate two categories of preference codes (L3 and F3) for the Disproportionate Projects. Under the WFP up to half of all vacancies would be reserved for so-called "local Preference" holders (categories L1, L2, and L3). Priority L1 would correspond to families with the highest incomes (Tier III families) and priority L3 would correspond to families with the lowest incomes (Tier I families). According to NYCHA, since the L3 population is disproportionately white, the elimination of L3 designated families from the WFP addresses the Plaintiffs' concern that the WFP would perpetuate past discrimination.

Plaintiffs contend, however, that elimination of the L3 and F3 categories will have no effect on the admissions of white families as compared with the unmodified WFP, since eliminating L3–designated applicants is largely irrelevant to the overall effect of the WFP because the L1 and L2 categories, having higher priorities, would obtain most of the apartments. Furthermore, Plaintiffs contend that the L1 and L2 categories are also disproportionately

white as compared with the percent of white families who presently obtain apartments, and accordingly the effect would still be a net increase in the number of white families as compared to the present TSAP, and would not, therefore, cure the discriminatory defect found in *Davis IV.* Although NYCHA attacks Plaintiffs' expert's statistics, it has not provided any rebuttal statistical analysis.

The Plaintiffs counter-propose that all applicants with local preference codes should be barred from apartments in the Disproportionate Projects. In this way, the purportedly over-represented white applicants in these preference code categories would not adversely influence the unmodified TSAP currently in effect. NYCHA notes that virtually all working families will be assigned to one of these local preference codes, and that therefore no working families would move into the Disproportionate Projects.

NYCHA asserts that this result would be bad policy and a violation of Federal law, pointing to the United States Housing Act, 42 U.S.C. § 1437d(c)(4)(A)(iv), which requires NYCHA "to ensure that, to the maximum extent feasible, the projects of an agency will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems." In addition, NYCHA notes that the implementing regulations require NYCHA to "attain, to the maximum extent feasible, a tenant body in each project that is composed of families with a broad range of incomes and to avoid concentrations of the most economically deprived families with serious social problems." 24 C.F.R. § 960.204(a)(2)(i). However, NYCHA has not presented any statistical analysis to establish that the WFP is necessary to attain a tenant body with a broad range of incomes in the Disproportionate Projects.

***5** On the present record, the modification to the WFP proposed by NYCHA appears to adversely affect the ratios at the Disproportionate Projects in terms of the purposes of the Consent Decree. However, since both parties agree that the WFP should go forward for the non-Disproportionate Projects, the preliminary injunction is modified to the extent that:

1. NYCHA may implement the working-family preference as proposed in any project where white families do not constitute more than 30 percent of the families at the project; and

2. NYCHA may extend limited project choice to families requiring three or four-bedroom apartments.

Furthermore, NYCHA is granted leave to move to modify the preliminary injunction consistently with this Opinion and upon any further showing of good cause.

Conclusion

For the reasons set forth above, NYCHA's motion for reconsideration and reargument is denied. The preliminary injunction is modified as set forth above.

It is so ordered.