PIERCE v. METROPOLITAN PROP. & LIAB. INS. CO.

United States District Court for the Southern District of Ohio, Western Division

November 25, 1983, Filed

Case No. C-3-82-044

Reporter: 1983 U.S. Dist. LEXIS 11368

CHARLES D. PIERCE, et al., Plaintiffs v. METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY, Defendant

Counsel: [*1] Stuart Goldberg, R. J. Stidham, Attorneys at Law, Dayton, Ohio, Counsel for Plaintiffs.

Robert P. Bartlett, Attorney at Law, Dayton, Ohio, Counsel for Defendant.

Judges: Walter H. Rice, United States District Judge.

Opinion by: RICE

Opinion

DECISION AND ENTRY OVERRULING PLAINTIFFS' MOTION TO STRIKE THE DEFENSE OF STATUTE OF LIMITATIONS AND SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS DIRECTED TO FILE AN AMENDED COMPLAINT WITHIN TEN DAYS TIME

On September 20, 1981, Defendant Metropolitan Property and Liability Insurance Company cancelled the homeowners insurance policy which it had issued to the Plaintiffs Charles and Fredda Pierce. As a result of this cancellation, Plaintiffs initiated this action, alleging that Defendant's actions violated Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq*., as well as *42 U.S.C. §§ 1981* and 1982. Plaintiffs seek damages and injunctive relief.

This cause is now before the Court on Plaintiff's motion to strike the affirmative defense of statute of limitations (Doc. #23) from Defendant's amended answer (Doc. #22), and the Defendant's motion for summary judgment (Doc. #25).

I.

Specifically, [*2] Plaintiffs allege, in their amended complaint (Doc. #31), that as husband and wife, they own a house located at 302 Lexington Avenue in the City of Dayton, Ohio. Plaintiffs assert that they are black and that their house is in a predominantly black neighborhood. Plaintiffs allege that their house was a suitable insurance risk, but that the Defendant cancelled their policy. The Plaintiffs contend that the Defendant made this decision on the basis of "marketing practices and underwriting standards which prohibit and/or discourage the writing of homeowners insurance in neighborhoods with predominantly black populations." (Plaintiffs' Amended Complaint, at para. 11). Consequently, Plaintiffs contend, they were denied federal statutory rights.

Defendant admits that it cancelled Plaintiffs' insurance policy, effective on September 20, 1981. Otherwise, Defendant denies Plaintiffs' allegations. Additionally, Defendant has raised a number of affirmative defenses, including the statute of limitations.

II.

Plaintiffs have filed a motion to strike the Defendant's affirmative defense of statute of limitations (Doc. #23), under *Rule 12(f) of the Federal Rules of Civil Procedure*.

The statute [*3] of limitations, which is applicable to some of Plaintiffs' asserted claims under Title VIII is 42 U.S.C. § 3612(a). Section 3612(a) authorizes a private right of action under Title VIII and provides that such an action "shall be commenced within one hundred and eighty days after the alleged discriminatory practice occurred." Since these claims allege discrimination in housing, Plaintiffs' asserted claims arising under *42 U.S.C. §§ 1981* and 1982 and 42 U.S.C. § 3617 are controlled by the statute of limitations contained in Ohio Rev. Code § 4112.051, the most closely analogous state statute of limitations. *Warner v. Perrino,* 585 F.2d 171 (6th Cir. 1978). [1]Section 4112.051 uses language identical to that in § 3612(a) and provides that a civil suit "shall be commenced within one hundred and eighty days after the alleged discriminatory practice occurred."

[*4] Plaintiffs argue that the alleged discriminatory practice, which would trigger the running of the statute of limitations, occurred when the cancellation of their

[1] In *Warner v. Perrino*, the court was faced with housing discrimination claims arising under 42 U.S.C. § 1982 and 3617. However, based upon the same rationale, a housing discrimination claim arising under *42 U.S.C. § 1981* is likewise controlled by the statute of limitations in Ohio Rev. Code § 4112.051. Neither party argues otherwise.

insurance policy became effective on September 20, 1981. Plaintiffs point out that they commenced this action with the filing of their complaint on February 12, 1982, less than one hundred and eighty days after the effective date of the cancellation. Consequently, they conclude, their complaint is not time barred, and the statute of limitations defense is, as a matter of law, legally insufficient.

Plaintiffs argue that the effective date of the cancellation of their policy was what triggered the running of the statute of limitations because the Defendant was engaged in a continuing course of discriminatory conduct. Further, Plaintiffs argue that the last occurrence was the aforementioned effective date. To support their argument, Plaintiffs rely upon *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). In *Havens Realty Corp.,* the Court held that a complaint, asserting that the Defendant engaged in a continuing course of conduct, is not time barred by 42 U.S.C. 3612(a) "when it is filed within 180 days of the last [*5] asserted occurrence of that practice." *Id.* at 381.

However, Plaintiffs' reliance on *Havens Realty Corp.* is misplaced. Even assuming that Defendant was engaged in a continuing pattern or practice of conduct, the last occurrence of this practice was not the effective date of the cancellation of the policy. Rather, the last occurrence, as Defendant argues, was when Defendant informed Plaintiffs that the policy would be cancelled. This conclusion is compelled by *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Chardon v. Fernandez,* 454 U.S. 6 (1981) (per curiam).

In *Ricks,* the Plaintiff Ricks brought an action under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, and *42 U.S.C. § 1981*, alleging that the Defendant had denied him tenure on the basis of his national origin. The Defendant, therein, had given Ricks a one-year terminal contract upon informing him that he would not be granted tenure. The Court ruled that the applicable statute of limitations began to run when Ricks was informed that he would not be granted tenure rather than when his employment with the Defendant terminated at the expiration of Ricks' one-year terminal [*6] contract. In reaching this conclusion, the Court specifically rejected Ricks' contention that the final year he worked for the Defendant constituted a continuing violation of his rights. Similarly, in *Chardon v. Fernandez, supra,* the Court held that the statute of limitations began to run when the Plaintiffs therein were notified that their employment would be terminated rather than when their employment actually ceased. [2]

Under *Ricks* and *Chardon,*[3] it is the act of informing someone that an action will be taken, rather than the day upon which the action becomes effective, that is the occurrence which triggers the running of the statute of limitations in a civil rights action. *Havens Realty Corp.* did not vary such a rule. Therein, the Court merely held, as stated above, that when numerous such occurrences arise out of a pattern or practice, the complaint is timely as long as it is [*7] filed within one hundred and eighty days of the last occurrence. *Havens Realty Corp.* did not suggest that informing one that he would be deprived of a right and the subsequent effective date of that deprivation constitute a continuing violation so that a complaint filed within one hundred and eighty days after the effective date of the deprivation is timely filed.

Applying these standards to the present case, the Court concludes that the statutes of limitations in this case began to run when the Plaintiffs were informed that their insurance policy would be cancelled, not when the cancellation became effective. The notification of cancellation and the effective date of the cancellation did not constitute a continuing violation so that the Plaintiffs' complaint was timely if filed within one hundred and eighty days after the September 20, 1981, effective date of the cancellation of the [*8] insurance. Accordingly, Plaintiffs' motion to strike is overruled. Plaintiff's complaint is not time barred if filed within one hundred and eighty days of notification of cancellation. In their amended complaint, Plaintiffs allege that they received notification of cancellation on or about August 28, 1981. Their complaint was filed less than one hundred and eighty days later. Defendant denies that they received notification on that date, contending that notification was, in fact, received earlier. If Plaintiffs are correct, their complaint was timely filed. If, on the other hand, notification was received on the date as contended by the Defendant, the complaint was not timely filed. Therefore, a question of fact -- when were Plaintiffs notified -- remains.

III.

Defendant has filed a motion for summary judgment (Doc. #25). In its motion Defendant presents separate arguments against Plaintiffs' claims under 42 U.S.C. § 3601 *et seq.* and *42 U.S.C. §§ 1981* and 1982. These will be discussed separately.

A.

Defendant presents three arguments why summary judgment should be entered in its favor on Plaintiffs' claim under 42 U.S.C. § 3601 *et seq.*

[2] In *Chardon,* the Plaintiffs alleged that their employment was terminated in violation of *42 U.S.C. § 1983*.

[3] The rule in *Ricks* and *Chardon* is one of federal law regardless of whether applicable statute is federal or state.

First, Defendant argues that Plaintiffs' [*9] claim does not come within the purview of 42 U.S.C. § 3604. Section 3604 makes it unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

Defendant argues that § 3604 is violated only when either an alleged discriminatory act is connected to the sale or the rental of a dwelling, or the dwelling is otherwise made unavailable by the alleged discriminatory act. Since the Plaintiffs owned their house for a number of years prior to the cancellation of the insurance policy, Defendant argues, said cancellation was not connected to the sale or rental of the Plaintiffs' house, nor did it make their house otherwise unavailable. Therefore, Defendant concludes, § 3604 was not violated here. In making this argument, the Defendant seeks to have the Court [*10] distinguish *Dunn v. Midwestern Indemnity,* 472 F. Supp. 1106 (S.D. Ohio 1979).

The Court does not find *Dunn* to be distinguishable. First, *Dunn* is factually indistinguishable from this case. As Judge Rubin stated in *Dunn:*

The facts which generated this dispute as gleaned from plaintiffs' complaint may be briefly stated. Plaintiffs are black homeowners residing in a predominantly black neighborhood. In 1955, they purchased homeowner's insurance from defendant Midwestern through defendant Borchers Insurance Company (Borchers). Coverage was maintained until December 9, 1977, when Midwestern notified plaintiffs that their policy would not be renewed.

Id. at 1107. Hence, *Dunn,* like the present case, did not involve the sale or rental of a house, and the Plaintiffs in each owned their houses for a number of years prior to the cancellation of their insurance.

Secondly, Defendant's argument reads the rationale of *Dunn* too narrowly. In *Dunn,* the court reasoned that the availability of insurance is a necessary precondition to obtaining financing which is a necessary predicate to securing housing. *Id.* at 1109. *See also, Laufman v. Oakley Bldg. &* [*11] *Loan Co.,* 408 F. Supp. 489 (S.D. Ohio 1976). Similarly though, as herein, while insurance redlining does not prevent the sale or rental of housing, it may nevertheless make housing available. This is because many mortgage agreements require that property insurance be maintained throughout the course of the mortgage. [4] Therefore, the continued availability of insurance may be required for the maintenance of financing which is a prerequisite for continued availability of housing. Therefore, here there is a sufficient nexus between the asserted redlining and the availability of housing to come within the purview of § 3604.

Thirdly, Defendant's reading of § 3604 would not rob *Dunn* of all vitality. An insurance company could avoid liability for redlining [*12] by making insurance available when housing is sold or rented, and then cancelling the insurance shortly thereafter. This Court will not so weaken *Dunn.*

Therefore, the Court concludes that Plaintiffs have stated a cause of action under § 3604.

Defendant also argues that Plaintiffs do not have a claim under 42 U.S.C. § 3605. Section 3605 provides:

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise *whose business consists in whole or in part in the making of commercial real estate loans* to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective [*13] owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

(emphasis added).

In *Dunn,* the court held that § 3605 applies only to insurance companies "engaged 'in the making of

[4] Herein, the Plaintiffs assert that their house is subject to a mortgage which obligates them to maintain insurance upon the house. *See,* Affidavit of Plaintiffs attached to Plaintiffs' Memorandum Contra Defendant's Motion for Summary Judgment (Doc. #32).

commercial real estate loans.'" 472 F. Supp. at 1110. The affidavit of Richard J. Schinler (Doc. #26) states that Defendant is not engaged in making commercial real estate loans. Accordingly, the Court concludes that the Plaintiffs do not have a claim under § 3605. [5]

Defendant's third basis for summary judgment on Plaintiffs' claims arising under 42 U.S.C. § 3601 *et seq.* is that they are barred by the applicable statute of limitations, 42 U.S.C. § 3612(a). [6] This branch of Defendant's motion is based upon an allegation in Plaintiffs' complaint [*14] that they were notified of the pending cancellation of their insurance policy on August 8, 1981. The complaint was filed more than one hundred and eighty days afterwards. Therefore, Defendant argues, the complaint is time barred by § 3612(a).

As discussed above, the Court agrees with Defendant's position that the statute of limitations began to run when the Plaintiffs were informed that their insurance would be cancelled. However, the Plaintiffs' amended complaint (Doc. #31) alleges that they were informed that their insurance policy would be cancelled on August 28, 1981. The complaint was filed less than one hundred and eighty days later. Accordingly, this branch of Defendant's motion is overruled.

In summation, Defendant's motion for summary judgment, as it relates to Plaintiffs' claims arising under 42 U.S.C. 3601 *et seq.*, is sustained to the extent that Plaintiffs [*15] do not have a claim under 42 U.S.C. § 3605. In all other respects, this branch of Defendant's motion is overruled. [7]

B.

Regarding Plaintiffs' claims under *42 U.S.C. §§ 1981* and 1982, Defendant argues that it is liable under those sections only if it intentionally discriminated against Plaintiffs. Defendant contends that because of this, it is entitled to summary judgment for alternative reasons. First, Defendant argues that it is entitled to summary judgment because Plaintiffs did not allege in their complaint that Defendant intentionally discriminated against them. Alternatively, Defendant asserts that even if that omission is not fatal, whether Defendant was engaged in intentional discrimination [*16] is not a genuine issue of a material fact in this case.

At the outset, the Court agrees with Defendant that intent to discriminate is a necessary element under *§§ 1981* and 1982. In *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982), the Court held that *§ 1981* forbids only purposeful discrimination. The Court did not discuss whether there is such a requirement in actions arising under § 1982. However, the Court once again noted that *§§ 1981* and 1982 were companion enactments and that the two sanctions evolved together. *Id.* at 383-84. *See also, Jones v. Alfred H. Meyer Co.,* 392 U.S. 409, 422-37 (1968). Based on the common genesis and evolution of *§§ 1981* and 1982, this Court concludes that § 1982 also reaches only purposeful discrimination. *Accord, Memphis v. Greene,* 451 U.S. 100, 129-35 (1981) (White, J., concurring in the judgment). *But see, Greene v. Memphis,* 610 F.2d 395, 404 n.13 (6th Cir. 1979), *rev'd on other grounds,*451 U.S. 100 (1981) ("We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982.")

With this in mind, the Court will address Defendant's second [*17] proposition first. If there is not a question of fact regarding Defendant's intent to discriminate, then Plaintiffs' failure to allege such intent in their complaint becomes moot. For purposes of deciding this question, the Court will assume that the Plaintiffs have made such an allegation.

It is Defendant's position that the affidavits of Gilda A. David and Thomas C. Gast demonstrate that discrimination is not a question of fact in this case. The affidavit of Gilda David recites that she was Defendant's employee who initially decided that Plaintiffs' application for insurance was unacceptable. Further, David recites that she reached that decision based on a significant difference between the market value of the Plaintiffs' house and its replacement cost, the condition of the house and its surroundings. David states that her decision was not based on the Plaintiffs' race, nor did she know what their race was. She concludes that her decision was reviewed only by Gast, who concurred in it. The affidavit of Gast makes the same recitations as those contained in David's affidavit.

The Court does not agree with Defendant that these affidavits demonstrate the non-existence of a fact question [*18] regarding intent. As the Plaintiffs argue, these affidavits are highly self-serving. Further, there is sufficient circumstantial evidence before the Court to

[5] Plaintiffs do not argue otherwise.

[6] 42 U.S.C. § 3612(a) imposes a one hundred and eighty day statute of limitations upon private rights of action that are authorized by it.

[7] In response to this branch of Defendant's motion for summary judgment, Plaintiffs have argued that they also have a claim under 42 U.S.C. § 3617. As the Defendant in its motion for summary judgment did not argue to the contrary, it would be inappropriate for the Court to express an opinion on Plaintiffs' contention.

question the credibility of these affidavits. Gast and David say in their affidavits that they based their decisions, in part, on an inspection report. [8] This report stated, in part, that the Plaintiffs' house was located in an area where there were a number of vacant or run-down houses, that the area of Plaintiffs' residence was located in a center city with a high frequency of reports of crime and vice. Based upon these facts, one could infer that Plaintiffs' house was located in a predominantly minority area and that the Plaintiffs are minorities. Hence, statements by David and Gast that they were unaware of Plaintiffs' race is called into question. Also, David and Gast state in their affidavits that their decisions were based, in part, on the surroundings of the Plaintiffs' house as depicted in the above-discussed inspection report. One of the "surroundings" which can be inferred from that report is that Plaintiffs are minorities living in a predominantly black neighborhood.

[*19] This conclusion is bolstered by the nature of the factual issue involved. Questions involving intent or motive are not suited for summary judgment. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962); *Smith v. Hudson,* 600 F.2d 60 (6th Cir. 1979). In *Charbonnages DeFrance v. Smith,* 579 F.2d 406, 414 (4th Cir. 1979), the court explained this proposition:

This reflects a general perception that whether as a matter of fact any particular state of mind exists can seldom be considered to be beyond reasonable dispute because this depends entirely upon the conflicting inferences to be drawn from evidence so likely to be circumstantial or, if direct, self-serving. *See, e.g., Croley v. Matson Navigation Co.,* 434 F.2d 73, 75 (5th Cir. 1970) (importance of "demeanor" evidence); *Empire Electronics Co. v. United States,* 311 F.2d 175, 179-80 (2d Cir. 1962) (reliance on circumstantial evidence).

Turning to Defendant's contention that it is entitled to a summary judgment because Plaintiffs failed to allege, in their complaint, that they are victims of Defendant's intentional discrimination, the Court agrees with Defendant that such an allegation is necessary [*20] since intent is an element of Plaintiffs' case. However, the Court will provisionally overrule this branch of Defendant's motion on the express condition that Plaintiffs file an amended complaint, including such an allegation, within ten days of the entry of this decision.

III.

In conclusion, the Court overrules Plaintiffs' motion to strike the defense of statute of limitations. The Court sustains that part of Defendant's motion for summary judgment relating to Plaintiffs' claims arising under 42 U.S.C. § 3605. That portion of Defendant's motion for summary judgment, as it relates to other claims arising under 42 U.S.C. § 3601 *et seq.* is overruled. The Court provisionally overrules that part of Defendant's motion for summary judgment relating to Plaintiffs' claims arising under *42 U.S.C. §§ 1981* and 1982 on the condition that Plaintiffs file the previously mentioned amended complaint.

[8] In the affidavits, it is said that this report is attached and made an exhibit. It is not. However, Defendant, in its Answers to Plaintiffs' First Interrogatories (Doc. #18), refers to the contents of this report. It is from these answers that the Court has been able to glean an insight into the contents of the aforementioned report.