U.L. v. Carteret – general 11-17-1976

TS Supplemental Memo In Opposition To Motions of Defs to Dismiss Appeal

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-33-76

Plaintiffs-Appellants

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

v.

Defendants-Respondents

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Civil Action

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTIONS OF FIVE DEFENDANTS TO DISMISS THE APPEAL

On September 23, 1976, the plaintiffs filed a memorandum in opposition to the motions of two defendants (Helmetta and Milltown) to dismiss the appeal. These defendants based their motions on the asserted ground that the plaintiffs had "consented" to the disposition of the case against them, the so-called "conditional dismissals" discussed by the court in its opinion of May 12, 1976. In our memorandum of September 23, we pointed out that our consent extended only to the kind

and scope of revisions to be made in defendants' zoning ordinances. Plaintiffs did not consent to exempting these defendants from other relief that might be afforded.

Since September 23, three other defendants (Highland Park, Middlesex and Woodbridge) have filed similar motions to dismiss the appeal based essentially on the same ground. In addition, defendants Middlesex and Woodbridge contend that the Judgment of July 9, from which the plaintiffs appeal, is not a "final judgment" and thus not appealable under Rule 2:2-3(a). Finally, defendant Woodbridge argues that the plaintiffs have not filed their notice of appeal within the 45 days allowed by that rule. In light of these additional motions and arguments, and in accordance with the letters of November 1 and 12, 1976, from the Clerk of this Court, the plaintiffs submit this supplemental memorandum and transcripts.

1. The Scope of the Settlements.

The five defendants, which are moving to dismiss the appeal, contend that the plaintiffs agreed to the lower court's disposition of the cases against them and thus are precluded from appealing that part of the Judgment. The defendants misconceive the scope of that agreement. During the course of the trial, when it became clear that these defendants had engaged in zoning practices which violate the Constitution, as announced in the Mt. Laurel case,[1/]

1/ Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975).

the Court directed them to revise their zoning ordinances to bring them into compliance with the law.[2/] The Court urged the parties to agree on the precise nature of the revisions, after the court had indicated its views on which features were offensive. In such instances, at the direction of the court, the plaintiffs and the defendants discussed the zoning provisions to be altered or repealed. In some instances, when points remained in dispute, the court resolved the conflict.

During the trial, however, the plaintiffs repeatedly emphasized that their agreement to the zoning revisions was not to be interpreted as precluding a request for additional "affirmative" relief at the conclusion of the trial. The following exchange involving Middlesex, one of the movants here, is typical. Mr. Johnson, counsel for Middlesex had just completed summarizing what could be done to modify the zoning ordinance:

> THE COURT: Is there anything you wish to add, Mr. Searing?
>
> MR. SEARING: No, Your Honor, that statement by Mr. Johnson is correct. We would only add that as with other conditional dismissals, should

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2/ For example, at the conclusion of plaintiffs' testimony concerning defendant Highland Park, the court denied Highland Park's Motion to Dismiss, but indicated that if the zoning ordinance provisions against which plaintiffs had made a prima facie case were removed by the municipality during the course of the trial, a motion to dismiss Highland Park would be favorably considered. See Highland Park Tr. 304-305 (Feb. 24, 1976). The transcript shows that the initiative for this action came from the court, and plaintiffs' consent was not requested. Indeed, the plaintiffs' request for affirmative relief, in addition to revision of the zoning ordinances, was clear from the time the complaint was filed on July 24, 1974. See attached Complaint, p. 17, para 2, Sec. V. Prayer for Relief.

this come to pass, we reserve plaintiffs' right to retain the municipality in the case for purposes of participating in any affirmative relief that may be ordered.

THE COURT: All right, that will be granted. Thank you.

MR. JOHNSON: Thank you, Judge.

Middlesex T. 690

The transcript of the entire exchange with Middlesex T. 684 (March 9, 1976) is attached. The first exchange concerning Woodbridge's motion to dismiss is at Woodbridge T. 33 (March 2, 1975) attached. The eventual agreement was attached to Woodbridge's motion papers. Both clearly state the plaintiffs' reservation regarding further participation by Woodbridge in affirmative relief. The transcript of the court's exchange concerning defendant Helmetta's motion to dismiss is at Helmetta, T. 260 (March 3, 1976). The transcript of the exchange with defendant Milltown is not yet available.[3/]

That plaintiffs considered the "conditional dismissals" to remain open as to participation by the more developed communities (including the five movants here) in relief above and beyond changes

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3/ Plaintiffs have attached transcripts of the exchange concerning motions to dismiss with Carteret, T. 56, Jamesburg, T. 96 and South River, T. 489. Although they are not movants here, there is no question that should the appeal be dismissed on the basis of these "agreements" the remaining defendants will move based on the same grounds. Additionally, each reflects the continuing exception that defendants be retained for participation in affirmative relief over and above rezoning.

in the zoning ordinance was reaffirmed during an exchange between the Court, defendant Metuchen and plaintiffs on March 17, 1976, one week before the end of the trial. Plaintiffs made clear that "throughout the plaintiffs have not been content with relief limited to changes in the zoning laws." T. 105-107. Plaintiffs indicated their readiness to present testimony "that municipalities that are fairly well developed still have a very significant role, rehabilitation of existing substandard units, and otherwise."

> THE COURT: I didn't mean to foreclose you from that, Mr. Sloane. To that extent the case will survive against the Borough of Metuchen. T. 107-116.

A few moments later the Court stated:

> THE COURT: So what it comes down to is the surviving issue, has the Court the authority to order the Borough of Metuchen to comply with any Federal-State program for subsidies, for funds, for rehabilitation, to [prevent] deteriorated, dilapidated, otherwise substandard housing, and that issue, as I said, is surviving. T. 108-112

Although this particular colloquy took place regarding defendant Metuchen, there is no question that it applies equally to the other 10 "conditionally dismissed" defendants, including the five movants here. The entire exchange is attached, see T. 104 thru 119 (March 17, 1976).

The limited nature of the plaintiffs' consent is reflected also in the May 4, 1976 Opinion of the trial court. On page 11 of that Opinion, Judge Furman, in discussing the disposition of the cases against 11 of the defendants (including the five movants here), stated that they "were granted dismissals conditional upon adoption of amendments to their zoning ordinances which are agreed to by their respective attorneys, accepted by plaintiffs and approved by the Court". That observation by the court must be read as meaning only that the plaintiffs agreed to the specific zoning changes to be made. It can not be read in view of plaintiffs' consistent reservation, of which all defendants were aware, to indicate that zoning revisions are the only relief sought by the plaintiffs.

In that same May 4, Opinion, however, the court refused to order these five defendants to do anything more than revise their zoning ordinances. Because of this deficiency in the contemplated relief, the plaintiffs, on May 12, moved to modify the Opinion to reflect their reiterated request that affirmative relief be ordered. These motion papers are attached to this memorandum. The trial judge denied the plaintiffs' motions because it believed such affirmative relief was not needed. The judge did not deny the motions because he believed the plaintiffs' agreement on the zoning changes precluded any further relief. An examination of the transcript of the May 28 hearing on the plaintiffs' motions is instructive:

> COURT: Yes. I should also rule on the motion to amend the findings. There was no affirmative relief ordered as to the eleven conditionally-

> dismissed municipalities, nor is there any order as to Woodbridge and so forth where there is significant vacant acreage. This is because of the determination by the Court that with the amendments which were agreed to by counsel for the respective municipalities, the zoning would be valid and would not be invalidly exclusionary and it would provide a significant contribution toward the low and moderate income housing needs of the county or the region.

At the same hearing, the court stated explicitly that the conditional dismissals resulted from the court's ruling, not from the agreement of the plaintiffs. At this second point in the transcript, the Court indicated its willingness to allow additional argument for strengthening the judgments against the defendants "when the proposed forms of order are submitted by the respective judicially dismissed municipalities Tr. at 22. (emphasis added). Again the judge makes no reference to any consent by or agreement of the plaintiffs to the scope of the order against these "conditionally dismissed" defendants. The entire record of this May 28, 1976 hearing is attached to this memorandum.

When the entire record is examined, it becomes very clear that the plaintiffs agreed only to the nature of the zoning changes to be made by the municipalities subject to the court-imposed "conditional dismissals". Plaintiffs never agreed that further relief would not be sought against these defendants. Indeed the record, as noted above, reflects at several points the plaintiffs' stated intention to request additional relief in the nature of affirmative action to remedy the past exclusion of low and moderate income housing. It has never been plaintiffs' view that modifying zoning ordinances alone is an adequate remedy for a Mt. Laurel type violation.[4/]

2. "Final" Judgment Questions.

Movants Woodbridge and Middlesex raise the additional point that the Judgment of July 9 is not a "final judgment" from which an appeal may now be taken. All parties agree, as they must, that appeals under Rule 2:2-3(a) be only from "final judgments". It is the long-standing rule in this jurisdiction that appeals cannot be taken "until after final judgment or final disposition of the case, not only as to all issues but as to all parties." Petersen v. Fulyarano, 6 N.J. 447, 453 (1951). Thus, in Frantyen

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4/ In view of the showing here that the defendants had full notice from the date the complaint was filed through the end of the trial, no weight should be given whatever to their claim that somehow they would be prejudiced by the prosecution of this appeal. If they failed to offer evidence by way of defense, that was a conscious decision to forego a right the judge offered up until the end of the trial.

v. Howard, 132 N.J. Super. 226, 227 (App. Div. 1975), the Appellate Division dismissed an appeal in a "c" variance case because the trial court had not yet decided "an important issue regarding the constitutionality of a relevant ordinance." Finality is not achieved until all such issues as to all parties are resolved.

In the present appeal, the Judgment of July 9 is "final" within the meaning of the rule and the relevant precedents. The issues have been determined and the trial court has entered an Opinion and Judgment deciding them as to each party, one way or the other. It is true that the Judgment has not been fully implemented. The defendants still need to undertake a number of steps before they will be in full compliance with the Judgment. But implementation of a judicial decree or even the possible need for amendments or further orders have never been the test of finality for appeal purposes.

This is particularly true in actions orginating in the Chancery Division. Over 20 years ago, the New Jersey Supreme Court restated the settled definition of finality:

> And the judgment or decree of a court of equitable or probate jurisdiction is not the less final in its nature because "some future orders of the court may possibly become necessary to carry such final decree into effect." Stovall v. Banks, 10 Wall. 583, 19L. Ed. 1036 (1871).

In re Caruso, 18 N.J. 26, 32 (1955).

Woodbridge and Middlesex ignore the teaching of In re Caruso when they argue against the finality of the

July 9 decree because they have not yet complied with it, or because the trial court has not yet entered an order of dismissal, which is the last step in the compliance process.

Following In re Caruso, supra, the Appellate Division has, on at least two occasions, rejected similar contentions which Middlesex and Woodbridge now advance. In Rothman v. Harmyl Inn, Inc., 61 N.J. Super 76 (App. Div. 1960), the plaintiff stockholder successfully sued a corporation for misuse of assets and obtained an order appointing a receiver to manage the affairs of the company. After the corporation noticed an appeal, the plaintiff moved to dismiss it for lack of a final judgment on the grounds that the receiver had not yet taken any action regarding the company assets. The Appellate Division rejected that argument:

> A judgment which grants the injunction and appoints a receiver is no less final because some future order may possibly be necessary to carry the judgment into effect. Id. at 80-81.

Similarly, in Le Compte v. State, 128 N.J. Super 552 (App. Div.), certif. denied, 66 N.J. 321 (1974), this Court allowed an appeal against a claim of non-finality in an action to review a decision of the Commissioner of Environmental Protection.[5/] In that case, the Commissioner had fixed the sum to be paid by the petitioner to purchase certain reparian lands. On appeal, the state respondents argued no finality because the determination of the Commissioner was subject to

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5/ In defining finality, the Supreme Court has made no distinction between final decisions of administrative agencies and final judgments of courts. See Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 410 (1956).

review by the Governor. Thus the suggestion here that this appeal is not final because local legislative bodies (and ultimately the trial court) must first act should be no more compelling than it was in Le Compte where the Governor's approval was required for implementation of the initial decision. See also State Board of Medical Examiners v. Weiner, 67 N.J. Super. 199 (App. Div. 1961).

3. Timeliness

The defendant Woodbridge also contends that the plaintiffs' appeal, filed August 31, 1976 is not timely. Although the point is made in paragraph 2 of the affidavit of Barry H. Shapiro, counsel for Woodbridge, there is no elaboration in the Brief and Appendix which accompany that motion and affidavit. In the absence of supporting argument and authority, this Court should summarily reject the contention of untimeliness.

Furthermore, it should be noted that Rule 2:4-2(a) expressly authorizes the appeal taken in this case against Woodbridge. That rule reads as follows:

> Cross appeals from final judgments, orders, administrative decisions or actions and cross appeals from orders as to which leave to appeal has been granted may be taken by serving and filing a notice of cross appeal within 15 days after the service of the notice of appeal A respondent on appeal may appeal against a non-appealing party by serving and filing a notice of appeal within the time fixed for cross appeals.

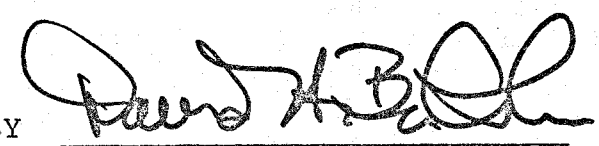
The last sentence of insertion (a) specifically sanctions the procedure followed in this case. See generally Comment after Rule 2:4-2. After the expiration of the initial 45 day

period, but before the 15th day thereafter, the plaintiffs, who were then respondents by virtue of earlier appeals, filed their cross-appeals against the original appellants and noticed appeals against the remaining defendants, including Woodbridge. Consequently, the plaintiffs' notice of appeal against Woodbridge, filed on August 31, 1976, is clearly within the time allowed by Rule 2:4-2(a).

Conclusion

In view of the reasons set out above, the motions of defendants Helmetta, Highland Park, Middlesex, Milltown, and Woodbridge to dismiss the appeal should be denied.

Respectfully submitted,

BY 

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Filed: November 17, 1976

CERTIFICATE OF SERVICE

I certify that service of this supplementary memorandum with transcripts was made by hand-delivering the original and one copy to the Clerk, Appellate Division, Superior Court of New Jersey; mailing a copy to the Court at the addresses below:

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