

RULS - AD - 1972 - 60

8/15/1972

- AFFIDAVIT ~~AND~~ + TRIAL BRIEF FOR CIESWICK V. TOWN OF BEDMINSTER

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Attorney for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY
DOCKET NO. L-28061-71 P.W.

Cieswick, et al.,
Plaintiffs

v.

Town of Bedminster,
et al.,

Defendants.

CIVIL ACTION

AFFIDAVIT

STATE OF NEW JERSEY:

ss:

COUNTY OF ESSEX:

LOIS D. THOMPSON, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York admitted pro hac vice by Hon. Paul E. Feiring, J.C.C., to represent plaintiffs in the above-captioned lawsuit.

2. I am familiar with all of the facts and the procedural history of the above-captioned lawsuit as well as with the two related actions, The Allan-Deane Corp. v. Township of Bedminster, L-36896-70 P.W., and The Allan-Deane Corp. v. Township of Bedminster Board of Adjustment, L-32017-71 P.W.

3. Plaintiffs in the above-captioned lawsuit sought unsuccessfully to intervene in The Allan-Deane Corp. v. Township of Bedminster, L-36896-70 P.W. Shortly after their motion to

intervene was denied, plaintiffs filed suit against the Township of Bedminster, its Planning Board and its Board of Adjustment and the Allan-Deane Corp. because Bedminster's zoning laws and land use practices presently exclude them from living there and because Allan-Deane Corp. is seeking to use those zoning laws and practices to build housing which will continue to exclude them.

4. Defendant Allan-Deane Corp. has now moved for summary judgment against plaintiffs in the above-captioned matter.

5. Defendant Allan-Deane Corporation's motion must be denied because, as the accompanying Brief demonstrates, plaintiffs have stated a claim for relief which is amply supported by both case law and legislative enactment so that defendant Allan-Deane Corp. is not entitled to judgment as a matter of law and because there are many factual issues between plaintiffs and defendant Allan-Deane Corp. which must be litigated at trial. Those factual issues will be set forth in this affidavit.

6. In its brief in support of its motion for summary judgment defendant Allan-Deane Corp. claims that its plans for its 467 acres of land in Bedminster are not in "final form".

7. It is plaintiffs' contention that these plans are very detailed and final in form. To wit, defendant Allan-Deane plans to devote its land to the following uses:

92 acres - research and office facilities

6 acres - 120 to 180 unit motel

21 acres - 2 holes of a golf course

6 acres - streets
64 acres - 62 single-family houses on lots of over
one-acre selling for \$90,000
33 acres - 264 townhouses selling for \$35,000 and up
balance - open space / green acres

8. Furthermore, it is plaintiffs' contention that, contrary to the representation made in defendant Allan-Deane Corporation's brief, if defendant Allan-Deane Corporation is successful in either or both of its pending lawsuits it will be permitted to and will develop its land in accordance with its existing plan. Plaintiffs will prove this at trial. Plaintiffs note here that in its complaint in L-36896-70 P.W., defendant Allan-Deane Corp. asks the Court to order that specific parcels of its land be rezoned so that it can develop the office-research complex, townhouses, and houses on one-acre lots which are called for in its plans and that in its complaint in L-32017-71 P.W. defendant Allan-Deane Corp. requests the Court to order the Bedminster Board of Adjustment to grant the variance for which it applied and/or to issue an order permitting it to develop its land "in accordance with (its variance) application." Plaintiffs must be permitted to prove the details of the Allan-Deane Corp. plan and the illegal consequences of Allan-Deane Corporation's plan, if effectuated, before, not after, a court order permitting such development issues. Then, it may be too late.

9. Plaintiffs will show at trial that defendant Allan-Deane Corporation's plans will not and cannot meet the housing needs of the class of low and moderate income, black and Spanish-speaking persons whom they represent.

10. At trial plaintiffs will show that the Allan-Deane Corporation is seeking a court-ordered or municipality-conferred monopoly on multi-family housing in Bedminster and that this monopoly, achieved through State action, violates their constitutional rights.

11. To allow the Court to make the findings recited in paragraph 10, plaintiffs will prove that no multi-family housing now exists in Bedminster, will demonstrate the nature of Bedminster's existing housing stock and of its population, racially, and economically, and will adduce those proofs required to show the Court what type of housing low and moderate income persons can afford. It is essential that such proofs be before the Court for it is only then that the full consequences of Allan-Deane Corporation's proposal can be appreciated.

12. Defendant Allan Deane Corporation's motion for summary judgment must be denied so that the factual issues between plaintiffs and defendant Allan-Deane Corporation may be fully litigated at trial.

13. Defendant Allan-Deane's motion for summary judgment should also be denied so that the Court may have the benefit of full briefs on the legal issues. Plaintiffs note that defendant Allan-Deane cites only one case in its brief and that that case simply deals with principles of law governing summary judgment. Plaintiffs further note that defendant Allan-Deane Corporation's motion was served precisely within the eight-day period permitted

for motions and so, although they have sustained their burden on such a motion, they have had only the minimum amount of time to prepare their papers on this important motion for summary judgment.

Lois D. Thompson
Lois D. Thompson

Sworn to and subscribed before me
this 15th day of August, 1972.

Ruth J. Williams
NOTARY PUBLIC OF NEW JERSEY.
My Commission Expires May 4, 1976

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs have brought a class action for (1) a declaratory judgment that Bedminster Township's exclusionary zoning is in violation of the Constitutions and certain statutes of the United States and the State of New Jersey; (2) an injunction prohibiting the Township from enforcing such exclusionary zoning, requiring it to enact inclusionary zoning laws and an inclusionary master plan, and requiring it to adopt and implement an affirmative-action program to rectify past discrimination; and (c) an injunction requiring the Allan-Deane Corp., as part of its intended housing development project, "Wardley Woods", to construct a significant amount of low and moderate income housing.

This action is but one in a recent series of challenges to zoning in Bedminster Township. Last year, the Allan-Deane Corp. sued the Township and its Planning Board, challenging the zoning of its land for single family houses on lots of five acres, Docket No. L-36896-70 P.W. Plaintiffs in the instant action tried unsuccessfully to intervene in that suit before filing their own complaint. Since then they have tried, again unsuccessfully, to have the two suits consolidated. The denials of the motions to intervene and to consolidate are now on appeal.

Plaintiffs in the instant action are six black and white low and moderate income persons prevented by Bedminster's housing and land use laws, policies and practices from finding decent housing opportunities in the Township at prices which they can afford. Plaintiffs sue on behalf of a class of similarly situated

persons.

As the complaint alleges, Bedminster is a virtually all-white (1.5% black) upper income community of expensive homes priced well beyond what persons of low and moderate income, a disproportionate number of whom are black and Spanish-speaking, can afford. Housing costs in the Township are maintained at a deliberately high level by the Township's zoning laws, practices and policies (e.g. zoning of land for minimum lot sizes of five acres; prohibition of multi-family dwellings; requirement of excessive minimum interior floor sizes for single family residences) which constrict the supply of land and drive up the cost of housing beyond the reach of plaintiffs and the class they represent.

Defendant Allan-Deane Corp. seeks a modification in those zoning laws which will enable it to construct the type of housing it wishes to market but which will still be considerably beyond what plaintiffs and their class can afford. Defendant Allan-Deane Corp. is seeking to have those zoning laws changed to serve its purposes while claiming, falsely, that such a change will benefit blacks, and other moderate income persons. Plaintiffs sue defendant Allan-Deane Corp. to insure that the Corporation will in fact build housing which meets their needs if the zoning of the Corporation's land is changed. Plaintiffs sue defendant Allan-Deane Corp. to secure their rights under federal and state law to guarantee that Allan-Deane Corp. will not discriminate against them in the development of its housing, which housing can only be

built as a result of state action, be it exercised via the courts or the Township government.

The Allan-Deane Corp. has just instituted a new lawsuit' challenging zoning in Bedminster, this time naming the Board of Adjustment as a defendant, because the Board denied the Allan-Deane Corporation's application for a variance to build "Wardley Woods", Docket No. L-32017-71 P.W.

In the instant suit answers have been filed, the defendant Township has served plaintiffs with interrogatories, plaintiffs have served defendant Allan-Deane with interrogatories, and plaintiffs have both noticed depositions of certain Township officials and employees and requested that certain Township records be produced. Defendant Allan-Deane Corp. now moves for summary judgment.

ARGUMENT

DEFENDANT ALLAN-DEANE CORPORATION'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Defendant Allan-Deane Corporation's motion should be denied because defendant Allan-Deane Corp. is not entitled to judgment as a matter of law and because there are issues of fact between plaintiffs and defendant Allan-Deane Corp. which must be litigated.

Plaintiffs do not quarrel with defendant Allan-Deane Corporation's discussion of the criteria guiding judicial determination of a motion for summary judgment although they would call the Court's attention to that aspect of the opinion in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N. J. 67, 74 (1954), in which the New Jersey Supreme Court held that summary judgment is to be granted only if a search of the record "clearly shows" no genuine issue of material fact. (Emphasis added). Plaintiffs believe there are many such issues. Plaintiffs also note that courts are generally loathe to deny parties the opportunity to present their case to the trier of fact.

A. There Are Many Issues of Fact to be Litigated.

The accompanying Affidavit of Lois D. Thompson deals with the factual issues between plaintiffs and defendant Allan-Deane Corp. which must be litigated at a trial on the merits.

Basically, it is plaintiffs' position that a special situation exists in a community like Bedminster which, as a result of its zoning, is characterized by expensive houses on large lots and a total absence of multi-family housing. It is therefore necessary at the outset to prove the nature of Bedminster's character.

It is plaintiffs' position, discussed further, infra, that when a developer like Allan-Deane Corp. comes into a community like Bedminster and seeks a zoning change to construct a large new development (the number of housing units Allan-Deane Corp. intends to construct equals more than one-third the number of units now existing in Bedminster), it is, in effect, seeking a monopoly, and the zoning change which permits that monopoly must serve the general welfare: it must meet the regional housing needs of low and moderate income persons; it must provide housing opportunities for those denied them. Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super 11, 283 A. 2d 353 (1971). It is therefore necessary for plaintiffs to prove the contents of defendant Allan-Deane Corporation's plan, to prove that the planned housing will not meet the needs of low and moderate income persons, and to prove that there is a regional and/or local need for housing for persons of low and moderate income. All of this must wait for the necessary evidence to be produced at trial.

B. Plaintiffs Have Stated A Claim For Relief and Are Relying on a Well-Recognized Legal Theory For Which There Is Abundant Precedent.

In its brief, defendant Allan-Deane Corp. mis-states

plaintiffs' position. Plaintiffs are not suing to "compel a private property owner to develop land in accordance with a plan (they) feel is ... appropriate...." Plaintiffs are suing not over the "appropriateness" of a plan but because defendant Allan-Deane Corp. is discriminating against them and is seeking to do so through the intervention of the state. However, before dealing at length with this issue it is necessary, first, to dispose of an argument advanced by defendant Allan-Deane Corp. which clouds the main issue.

Defendant Allan-Deane Corp. argues both in its brief in support of its motion for summary judgment and in its answer to plaintiffs' complaint that plaintiffs are seeking to deny it its right to its property in violation of the due process clauses of the state and federal constitutions. What defendant Allan-Deane Corp. fails to recognize is that for the general welfare and to protect the constitutional rights of those who have been discriminated against, the law constantly regulates an individual or corporation's right to use its property.

Such regulation is, of course, the essence of zoning. As long ago as 1926, the United States Supreme Court in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), upheld comprehensive zoning. The Court held that a zoning ordinance which limited what a landowner could do with his "private property" was valid and did not deprive that owner of his property without due process of law - even though that landowner could no longer do what he had wanted to do with his own land. Article IV, Section

- 1 -

VI, paragraph 2 of the New Jersey Constitution of 1947, of course, permits local governments to regulate the use of privately held land in New Jersey.

The constitutionality of laws requiring a privately owned lunchroom to serve all persons regardless of race (42 U.S.C. § 2000a(a)) and the owner of a privately owned house to sell to anyone regardless of race (42 U.S.C. § 3604; N.J.S.A. 10:5-12(g); Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514 (1960)) have long been recognized. Yet, at one time it was claimed that such laws interfered with the right to private property.

What defendant Allan-Deane Corp. ignores in making its argument that its right to its private property is being interfered with is that in the instant case we are no longer dealing with private property viewed in isolation, if, indeed, it was ever possible to view the Allan-Deane Corporation's land in that way.

Defendant Allan-Deane Corp. has requested Bedminster Township, its Planning Board, and its Board of Adjustment, all instrumentalities of the state, delegated the exercise of a state function, to rezone its land. Defendant Allan-Deane Corp. has requested a state court to order its land rezoned. It is clear that defendant Allan-Deane Corp. cannot use an instrumentality of the state to effect a discriminatory result. Shelley v. Kraemer, 334 U.S. 1 (1948); Burton v. Wilmington Parking Auth., 365 U.S.

715 (1961); and Levitt & Sons., Inc. v. Division Against Discrimination, supra, 31 N.J. 514, 528-529:

"The very fact that there are houses with which to discriminate in the development in question is primarily attributable to public assistance."

And the result Allan-Deane Corp. will achieve if its plan is effectuated will be discriminatory. It will discriminate against the poor. It will discriminate against persons on the basis of their race.

Numerous courts have recognized that it is a violation of the Fourteenth Amendment to treat the poor in a discriminatory manner simply because they are poor. See Boddie v. Conn., 401 U.S. 371 (1971); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Douglas v. California, 373 U.S. 353 (1963); Edwards v. California, 314 U.S. 160 (1941). The New Jersey Courts have specifically noted that zoning ordinances and land use practices illegally discriminate against the poor. See, Oakwood at Madison v. Township of Madison, supra, 117 N.J. Super. 11, 283 A.2d 353 (1971); Southern Burlington Co. NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 290 A.2d 465 (1972) and Rutgers, The State University v. Piluso, _____ N.J. _____, 286 A.2d 697 (1972).

Defendant Allan-Deane Corporation's housing will also discriminate against those who are black and Spanish-speaking because persons who are black and Spanish-speaking are disproportionately of low income and therefore will be disproportionately excluded from defendant Allan-Deane Corporation's housing.

The proposition that practices and actions which disproportionately affect black and Spanish-speaking persons unconstitutionally discriminate against them has been relied on so frequently by the courts that the issue is no longer open to question. For example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the United States Supreme Court held that while white job applicants might also lack a high school diploma and thus be refused employment, the requirement that a job applicant have such a diploma was constitutionally defective because so many fewer blacks than whites had completed high school in the state in question.

In writing about the right to employment in Griggs, Mr. Chief Justice Burger said something which applies equally well to the right to shelter:

"What is required...is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 430.

See Hicks v. Crown Zellerbach Co., 319 F. Supp. 314 (1970) and Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (N.D. Cal. 1970). The most recent cases applying the principle that disparate racial effect is discriminatory effect are Carmical v. Craven, 40 U.S.L.W. 2306 (9th Cir., Nov. 4, 1971), and Castro v. Beecher, 40 U.S.L.W. 2752 (1st Cir., April 26, 1972).

It is important to note that all of the above-cited cases turn on a finding of discriminatory effect rather than a finding of intent to discriminate. See, e.g., Griggs, 401 U.S. at 432.

State action is present where defendant Allan-Deane Corp. is concerned in still another respect, in addition to those discussed above. Defendant Allan-Deane, in seeking to have some of its land rezoned for multi-family or townhouse development is seeking what is, in effect, a monopoly on such housing in Bedminster since no other such housing exists in the Township. Courts have recognized that state action may be found in an effective grant of monopoly power through zoning practices. See Lavoie v. Bigwood, 457 F. 2d 7 (1st Cir. 1972); Accion Hispana, Inc. v. Town of New Canaan, Civil No. B-312 (Conn. D. C. 1972).

Plaintiffs have discussed state action at length because state action is so intertwined in defendant Allan-Deane Corporation's activities but it is, of course, true that state action is not required in order to make out a claim for relief. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the United States Supreme Court held that 42 U.S.C. § 1982, one of the statutes on which plaintiffs herein rely, outlawed private acts of discrimination in the sale, lease, etc. of real property. The Court held that no state action was required to make out a cause of action.

In the very year that Jones was decided a Federal District Court ruled that "governmental sanction or participation is not a necessary factor" in order to make out a claim for relief under 42 U.S.C. § 1981, under which plaintiffs herein also sue. Dobbins v. Local 212, Intern. Broth. of Elec. Workers, 292 F. Supp. 413 (D. Ohio 1968). So many courts agree with the Dobbins court that "private" racial discrimination is covered by Section 1981 that the issue would no longer seem to be in doubt. See Waters v.

Wisc. Steel Workers of Intern. Harvester Co., 427 F. 2d 476 (7th Cir. 1970) ("We hold that a right to sue under section 1981 for 'private' racial discrimination in employment existed prior to 1964," at 481); Sanders v. Dobbs Houses, Inc., 431 F. 2d 1097 (5th Cir. 1970) ("Section 1981 created a right of action against private discrimination," at 1099); Young v. I.T.T., 438 F.2d 757 (3d Cir. 1971).

Just last term, in Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court gave its approval to those cases holding that various provisions of the 1866 Civil Rights Act reach private discrimination, and extended that reading to still another of those provisions, codified as 42 U.S.C. 1985 (3).

Plaintiffs reiterate their argument, made supra, that zoning must serve the general welfare and, particularly, that it must meet regional housing needs. If defendant Allan-Deane Corporation's land is to be rezoned it should be rezoned so as to enable the development of housing for all economic classes of the population and for all racial groups. At least one jurisdiction has recognized that to serve the general welfare, housing developments must include housing for everyone. The Fairfax County, Virginia zoning ordinance requires that 15% of all units in planned development housing (the equivalent of New Jersey's planned unit development), garden apartments, townhouses, and six story apartment houses be set aside for persons of low and moderate income. A similar requirement exists in Eugene, Oregon.

Defendant Allan-Deane Corporation's argument that plaintiffs must wait until there is municipal approval of its plan makes no sense. The fact of the matter is that there may never be municipal approval of its plan. Defendant Allan-Deane Corp. is presently pursuing two legal actions in which it is seeking to circumvent the need for municipal action and to obtain a court order permitting it to develop its land as it desires. If it obtains such a court order plaintiffs will be hard pressed to challenge it. As noted, supra, it was for that reason that plaintiffs sought to intervene in defendant Allan-Deane Corporation's initial action against Bedminster. It is for that reason that plaintiffs are now suing for declaratory judgment and injunctive relief. They seek a declaration that the plan defendant Allan-Deane Corp. wants the Court to order into existence is discriminatory and an injunction compelling defendant Allan-Deane to develop housing which will promote the general welfare and serve the housing needs of plaintiffs and those others of New Jersey's citizens who are presently ill-housed.

CONCLUSION

Defendant Allan-Deane Corporation's motion for summary judgment must be denied because numerous genuine issues of fact must be litigated and because defendant Allan-Deane Corp. is not entitled to judgment as a matter of law.

Respectfully submitted,

Lois D. Thompson

Lois D. Thompson
for Peter Buchsbaum
Attorneys for Plaintiffs

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FILED

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SOMERSET COUNTY
L. R. OLSON, CLERK

S-9153

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-28061-71 P.W.

8/18

X

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Defendants.

CIVIL ACTION
AFFIDAVIT OF SERVICE

Ent'd ✓ I. C. D.
Recorded Bk. Page

STATE OF NEW JERSEY:

SS:

COUNTY OF ESSEX:

LOIS D. THOMPSON, being duly sworn, deposes and says:

Copies of the within Brief and Affidavit have been filed with the Clerk of the County of Somerset at Somerset County Court House, Somerville, N. J.

The originals of the within Brief and Affidavit have been filed with the Clerk of the Superior Court in Trenton, N. J.

Copies of the within Brief and Affidavit have been served by mail, sealed in pre-paid wrappers, deposited at the U.S. Post Office, East Orange, N. J., upon:

Hon. B. Thomas Leahy, J.C.C./TA
Somerset County Court House
Somerville, N. J.

William W. Lanigan, Esq.
59 So. Finley Ave.
Basking Ridge, N. J.

Edward Bowlby, Esq.
17 East High Street
Somerville, N. J.

Nicholas Conover English, Esq.
McCarter & English
550 Broad Street
Newark, N. J.

Dated: August 15, 1972

Lois D. Thompson

Lois D. Thompson

Sworn to and subscribed
before me this 15th
day of August, 1972.

Kath. Williams

NOTARY PUBLIC OF NEW JERSEY.
My Commission Expires May 4, 1976

copy

Peter Buchsbaum, Esq.
New Jersey Civil Liberties Union
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Attorney for Plaintiffs

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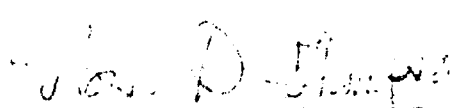
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