RULS - AD - 1973 - 10

?/?/1973

- BRIEF IN SUPPORT OF MOTION TO CERTIFY AS CLASS ACTION (BUCHBAUM)

PGS - 18

RULS - AD - 1973 - 10

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-36896-70 P.W.

LYNN CIESWICK, et al.,

Plaintiffs-Interveners,

v.

THE ALLAN-DEANE CORPORATION,

Plaintiff,

v.

TOWNSHIP OF BEDMINSTER, et al.,

Defendants.

Civil Action

BRIEF IN SUPPORT OF MOTION TO CERTIFY AS CLASS ACTION

PETER A. BUCHSBAUM, ESQ.
45 Academy Street, Room 203
Newark, New Jersey 07102
(201) 642-2084
Attorney for Plaintiffs-Interveners

PROCEDURAL STATEMENT

On June 1, 1972 plaintiffs-interveners instituted suit for a declaratory judgment that the Bedminster zoning ordinance was invalid and for injunctive and other relief. On March 3, 1973, the Supreme Court of New Jersey, upon plaintiff-intervener's petition, consolidated their suit with an earlier one filed by the Allan-Deane Corporation on condition that plaintiffs-interveners be ready for trial within 30 days.

Plaintiffs-interveners plead that their suit is brought on behalf of all other persons of low or moderate income who desire the opportunity to purchase or rent housing in Bedminster. See Complaint, paragraph 15, reproduced at 1a-2a. Plaintiffs now are moving pursuant to R.4:32-2(a) for an order certifying their action as one on behalf of this class.

FACTS

In their affidavits four of the individual plaintiffs verify and supplement the factual allegations in the complaint. Plaintiff Lynn Cieswick, a white mother of two children, is a long-time resident of Somerset County who attends the community college in Branchburg. Her sole income is derived from welfare payments. Plaintiff April Diggs, black, lives in Somerset, New Jersey, with her husband and seven children. While both she and her husband work full time, they earn just over $10,000 per year. Plaintiff Milton Kent, also black, lives in Morristown with his wife and three children. The joint earnings of his wife and him also amount to just over $10,000 per year.

Plaintiff James Rone, a black man, lives in a dilapidated Newark high rise public housing project with his wife and four children. His income as an employee of the City of Newark has been roughly $8,000 for the past year.

All four plaintiffs would like the opportunity to purchase or rent housing in Bedminster. All allege that Bedminster's past and present zoning practices bar the construction of housing which they can afford. Finally, all allege that their situations typify those of numerous other people of low or moderate income, many of them members of racial

minority groups, who live in the general region of Somerset County and who wish the opportunity to purchase housing in an attractive community such as Bedminster. Included in this class of low and moderate income people are not only persons who live outside the defendant Township and would like the chance to move in, but also elderly persons living in the Township who would like to move to smaller, inexpensive homes or apartments there as well as young adults who grew up in Bedminster but who find they cannot afford to live there outside their parents' homes.

ARGUMENT

I. THE PLAINTIFF'S-INTERVENERS SHOULD BE GRANTED AN ORDER PURSUANT TO R. 4:32-2(a) CERTIFYING THEIR ACTION AS A CLASS ACTION.

A. Class Actions are Generally Favored.

Class actions have become an established vehicle for the litigation of claims that zoning ordinances exclude persons of low or moderate income. In both Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 119 N.J. Super. 164, 168 (L. Div. 1972), and Oakwood at Madison v. Tp. of Madison, 117 N.J. Super. 11 (L. Div. 1971) zoning ordinances were struck down at the urging of practically identical

classes of low and moderate income persons. Judge Collins in an unreported decision in Cordier v. Tp. of Randolph, Super. Ct. L. Div. Morris County, Docket No. L-3321-71 P.W., relevant portions of which are attached hereto, discussed the matter in greater detail and also sustained substantially the same class action allegations in a suit challenging municipal zoning. Thus, New Jersey precedents strongly favor certification of the class proposed in this lawsuit. Accord; Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F. 2d 291 (9th Cir. 1970); Norwalk C.O.R.E. v. Norwalk Redevelopment Agency, 395 F. 2d, 920 (2 Cir. 1968).

These zoning precedents have a solid basis in the general judicial partiality toward class actions which was clearly manifested in Lusky v. Capasso Brothers, 118 N.J. Super. 369 (App. Div. 1972):

> The class action rule should be liberally construed, and such an action should be permitted unless there is a clear showing that it is inappropriate or improper.

118 N.J. Super. at 373. Judge Collins clearly applied this presumption in favor of class action to zoning cases when, upon quoting this passage from Lusky, he stated:

> Under the facts as alleged by the named plaintiffs and under the analysis of the Lusky case, it would seem to the court

> that defendants have failed to show why the named plaintiffs should not be permitted to maintain a class action.

Slip Opinion at 8a[1].

If this Court follows the policies and holdings of the precedent it should have no difficulty sustaining the instant plaintiffs' class action allegations.

B. Plaintiffs-Interveners Meet the Specific Requirements of R. 4:32-1(a) and (b).

R. 4:32-1(a) sets forth four pre-requisites for the maintainability of a class action. First, the class must be so numerous that joinder of all members is impracticable. The size of the class alleged in paragraph 15(a) of the complaint--low and moderate income people who are excluded from Bedminster or cannot change residence therein--clearly satisfies this pre-requisite. As the Court said with regard to

---

1. The Supreme Court of New Jersey has also approved an expansive approach to class actions. In two recent cases it has sanctioned approval of class actions for consumer fraud, a subject which traditionally has been excepted from class action adjudication. Olive et al. v. Graceland Sales Corporation, 61 N. J. 182 (1972); Kugler v. Romain, 58 N. J. 522 (1971).

the similar class in Cordier:

> Although there has been no showing as to the exact number of individuals within the the class, it is apparent from the class definition that it would be too numerous to allow joinder of all its members.

Slip Opinion at 7a.

The second and third pre-requisites, the existence of common questions of law or fact and of common claims, also are clearly met. All members of the class defined in paragraph 15 are unable, as a matter of fact, to afford housing in Bedminster; thus the legal right of all to acquire housing there is equally affected by the allegedly exclusionary ordinance and all have similar claims against the defendants.

As to these pre-requisites, Judge Collins' opinion again provides helpful guidance.

> The basic legal issues are to be the same for each member of the class. . . . /A/ll members of the class are similarly concerned and affected by the alleged discriminatory effect of Randolph's zoning ordinance, and named plaintiffs rights under the Constitution of the United States and New Jersey. Common questions of fact relative to the class include "the provisions of the Township zoning ordinance, the effect of that ordinance on available housing in the Township, the economic and racial population of Randolph, the type of housing in Randolph, and the housing needs of the region of which Randolph is a part" . . .

> The claims of the named plaintiffs, that due to the allegedly discriminatory effect of Randolph's zoning ordinance they cannot find housing or are being forced out of housing they currently occupy, would appear to be, if proved, typical of the class which they are attempting to represent.

Slip Opinion at 7a.

Finally, plaintiffs meet the fourth pre-requisite since they "will fairly and adequately protect the interests of the class." R. 4:32-1(a) (4). The named plaintiffs' need for housing is great and they will protect the interest of the class by vigorously prosecuting this lawsuit. Furthermore, both local counsel and New York counsel have had substantial experience in civil rights litigation. New York counsel is exceptionally well versed in the prosecution of exclusionary zoning actionshaving participated in at least a dozen such cases in addition to the Madison and Randolph Township cases previously cited.

Besides meeting the pre-requisites set forth in R. 4:32-1(a), the plaintiffs-interveners satisfy the additional requirements of R. 4:32-1(b). In fact, this action may be maintained as a class action under both R. 4:32-1(b) (2) and (3). Just as plaintiffs' claims are typical of the claims of the class, defendants have acted and have refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole. Quite simply, defendants apply the same zoning code to the named

plaintiffs and their class.

As is obvious from the above discussion, the questions of law and fact common to the members of the class which will be determined in this litigation predominate over any questions affecting only individual members. In fact, there are no individual questions. A class action is clearly the only available method for the fair and efficient adjudication of this controversy. Individual members of the injured class do not have the financial resources to bring separate actions, so their claims and interests may be brought before the court only in an action such as this. These views were concurred in by Judge Collins for he held, with regard to R. 4:32-1(b):

> Here the named plaintiffs have again complied with the requirements of the rule, as under R. 4:32-1(b) (2) they allege that defendants have applied the same zoning code with the same discriminatory effect as to all members of the class.

Slip opinion at 7a-8a.

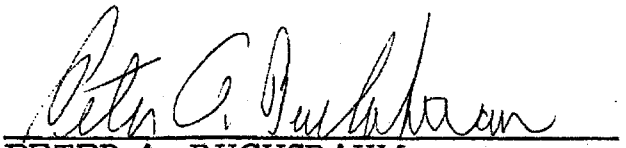
See Pressler, Current N. J. Court Rules, Advisory Committee's Notes to Federal Rule on Class Actions at 982-983.

Thus, both precedent and the words of R. 4:32 amply support plaintiff-interveners contention that they meet the requirements for an order certifying their action as a class action.

CONCLUSION

For the above reasons, this suit should be certified as a class action.

Respectfully submitted,



PETER A. BUCHSBAUM
Attorney for Plaintiffs-Interveners

Appendix

IV. THE PLAINTIFF CLASS

15(a). This is a class action under Rule 4:32 of the New Jersey Court Rules, plaintiffs [illegible] on behalf of themselves and all others similarly situated. The class is defined as, and comprised of, black, Spanish-speaking and other low and moderate-income people who are either excluded from living in Bedminster or live there but are denied the opportunity to move therein because of the Township's exclusionary zoning which prevents the development of low and moderate-income housing. (As noted in paragraph 1 hereof, such class is sometimes referred to herein as the "excluded class".)

15(b). Many sub-classes also comprise [illegible], e.g., persons who work in or for the Township but cannot live there; persons, many of them blue-collar workers, who work in the region and presently live in indecent, inadequate housing; persons who now live outside of Bedminster, many of them in indecent and inadequate housing, and simply want the opportunity to move to good housing in that community; elderly persons, many of them now on fixed incomes, who can no longer afford to live in the Township; and young married couples and other young adults who, having grown up in Bedminster, find they cannot afford to live there outside of their parental homes.

15(c). Furthermore: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of plaintiffs are typical of the claims of the class; (4) plaintiffs will fairly and adequately protect the interests of the class; (5) defendants have acted and have refused to act

grounds generally applicable to the class, thereby making [illegible] appropriate final declaratory and injunctive relief with respect to the class as a whole; and (6) the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for a fair and efficient adjudication of the controversy.

15(d). Except where otherwise indicated, the term "plaintiffs" as used hereinafter shall refer to the class of persons represented by the named plaintiffs as well as to the named plaintiffs themselves.

V. THE DEFENDANTS

16. Defendant the Township of Bedminster, New Jersey is a municipality incorporated under the laws of the State of New Jersey. It consists of a population residing in housing constructed and on land zoned in accordance with the zoning law and Master Plan of that community.

17. Bedminster and the Bedminster Township Committee and Planning Board are sued in their own capacities and as representative of their officials, employees and agents.

18. Upon information and belief, defendants Township, Committee and Planning Board are involved, as hereinafter described, in the making, executing and/or administering of the Township's exclusionary zoning. Such involvement is responsible for or directly contributes to the discrimination against and exclusion of plaintiffs in violation of the constitutional and statutory provisions cited herein.

This is an action brought by Henry Cordier (hereinafter referred to as Cordier) and David Herbert, Frank Kidd, Ellen Lawton, Larson, James Rone, Robert Saunders, Rosemarie Saunders and Trench (hereinafter referred to as named plaintiffs), for relief, a declaratory judgment and in lieu of prerogative writs, ing on various statutory and constitutional grounds of Randolph Township, Morris County. Defendants have the complaint alleging that there:

1. Has been a failure to state a claim upon which relief can be granted;

2. Has been a failure to join a party without whom the action cannot proceed;

3. Has been a failure to comply with the requirements of R. 4:32-1 and

4. To dismiss the class action under R. 4:32-2.

In the alternative, defendants ask for a more definite statement and an extension of 60 days to answer the complaint. Plaintiffs have moved for an order permitting Lois D. Thompson, Esq., an attorney at law of the State of New York, to appear pro hac vice pursuant to R. 1:21-2.

The defendants argue that under R. 4:6-2(e), which, in conjunction with R. 1:4-2, plaintiffs have failed to state a cause of action upon which relief can be granted. In considering a motion to dismiss for failure to state a claim upon which relief can be granted, "the court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim * * *." De Grisantis v. Holy Sepulchre Memorial Park, 43 N.J. Super. 244 (App. Div. 1957) at p. 252. See also Jersey City v. Hague, 18 N.J. 584 (1955) at p. 595; Printing Co. v. Thatcher, 27 N.J. Super. 404 (App. Div., 1953) at p. 408; Camden v. Miller, 5 N.J. Super. 451 (Ch. Div., 1949). While "the [illegible] must not be permitted to fall to the incomprehensible, it is [illegible] true that today we are much less technical in our approach toward pleading than we were prior to 1948." Cafone v. Nesto Construction Co., 31 N.J. Super 200 (Law Div. 1955) at p. 205, and cases cited therein.

Plaintiff's complaint is lengthy and raises many and varied issues and claims. However, it is clear that it sets forth "at least the gist" of several substantive grounds of relief. 18 N.J. at p. 19. Furthermore, "in dealing with the legal sufficiency of the complaint, the plaintiff is entitled to a liberal interpretation of its contents and to the benefits of all of its allegations and the most favorable inferences which may reasonably be drawn from them [citations omitted]." Rappaport, etc. v. Nichols et al., 31 N.J. 188 (1959) at pp. 193-194. See also Schierstad v. Brigantine, 29 N.J. 220 (1959); P. & A. Construction, Inc., v. Hackensack Water Co., 115 N.J. Super 550 (App. Div. 1971), "Plaintiffs are entitled to the benefit of every favorable inference of fact. Independent Dairy Workers Union of Hightstown v. Milk Drivers and Dairy Employees Local No. 680, 23 N.J. 85 (1956)." De Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super 244 (App. Div. 1957) at p. 252, and the allegations as to the effects upon the constitutional and statutory rights of the various plaintiffs of the ordinances here attacked, if proved, would warrant the granting of relief by this court. Southern Burlington County NAACP et al. v. Township of Mt. Laurel et al., 119 N.J. Super. 164 (Law Div. 1972); J.D. Construction Corp. v. Bd. of Adjustment of Freehold Township, 119 N.J. Super 140 (Law Div. 1972); Oakwood at Madison v. Twp. of Madison, 117 N.J. Super 11 (Law Div. 1971); Schere v. Township of Freehold, 119 N.J. Super 433 (App. Div., 1972).

Defendants further contend that, at least as to Cordier, he is barred by collateral estoppel and res judicata from challenging the ordinances in question. See Hantman v. Township of Randolph, 58 N.J. Super. 127 (App. Div. 1959), cert. den. 31 N.J. 550 (1960); Brundage v. Township of Randolph, 54 N.J. Super 384 (App. Div. 1959), aff'd. 30 N.J. 555 (1959).

An excellent discussion of the principles of res judicata and collateral estoppel may be found in Public Service Electric & Gas Co. v. Waldroup, 38 N.J. Super 419 (App. Div. 1955). There the court stated that:

> It is a fundamental rule that facts and questions in issue in an action and there admitted or judicially determined are conclusively settled by a judgment therein, and such facts or questions become res judicata in all subsequent litigation between

the same parties and their privies. [Citations omitted; emphasis added.] This is known as the doctrine of collateral estoppel or estoppel by judgment and is to be distinguished from the doctrine of res judicata, which is that in any action on a cause previously litigated by the same parties or their privies, a general judgment in the prior action is considered a finding against the party affected on all grounds that were or could have been raised therein. [Emphasis added].

38 N.J. Super. at pp. 425-426

Without deciding as to the requirement of privity (see emphasis above), it appears to this court that the plaintiff Cordier raises at least one claim for relief which has not been previously litigated, namely that he has been subjected to injury by governmental action on the basis of the prospective race and economic class of his tenants and would-be tenants by being denied the opportunity to rent his housing units to members of the excluded class." See Barrows v. Jackson, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969); Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

As to the plaintiffs other than Cordier there appears to be no indication in any prior actions pointed to by defendants of the litigation concerning the rights of members of the class which they represent under the cited provisions of the State and Federal constitutions and statutes enacted pursuant thereto.

Defendants argue the complaint should be dismissed under R. 4:28-1, R. 4:32-1 and R. 4:6-2(f) for failure to join a party without whom the action cannot proceed. Preliminarily it is to be noted that plaintiff Cordier is bringing suit individually and not as a member of a class. This was apparent and specifically indicated in the plaintiffs' complaint. It is reasonable for an individual plaintiff such as Cordier, whose apparent cause of action arose from the same or similar circumstances, to join his suit with that of a class. See Oakwood at Madison v. Madison Township, 117 N.J. Super 11 (Law Div. 1971).

The named plaintiffs have defined the class they represent as being one of "low and moderate income people who are either excluded

from living in Randolph or live there but are denied the opportunity to continue living there because of the Township's exclusionary zoning. In argument on these motions plaintiffs indicated that by moderate income they meant an annual family income of less than $15,000 a year.

Defendants contend that the named plaintiffs do not have among their number certain types of individuals representative of the classes within the above described class. They also argue that the named plaintiffs have failed to comply with the other requirements of R. 4:32-1. They argue that therefore the complaint should be dismissed. These arguments seem to be directed primarily at the requirement under R. 4:32-1(a)(4) that the "representative parties will fairly and adequately protect the interests of the class." In short, they contend that the named plaintiffs are not representative of the class on whose behalf the suit is brought. It is this court's opinion that the named plaintiffs are representative of the class described in their complaint. The mere fact that it may be possible to further sub-divide this class into sub-classes with certain distinguishing characteristics, and that there are no named plaintiffs who have all the characteristics of any one of these sub-classes does not result in a conclusion that some member of that sub-class must be joined before the action can proceed. Barring some special and distinct interest which would require the joining of such a plaintiff and a showing that the prosecution of the suit by members of the greater class will not properly protect the interests of those who are members of the lesser group, there is no reason to consider even a narrowing of the class action by excluding such sub-classes, let alone a dismissal of the entire suit. It appears to this court that the named plaintiffs have "the necessary interest and desire to prosecute or defend on its [the class's] behalf." Behrman v. Egan et al, 9 N.J. Super. 471 (App. Div. 1950). It should be noted that this finding will not preclude the court from future application of R. 4:32-2(d) should it be deemed appropriate.

Defendants contend that the named plaintiffs have failed to comply with the requirements as to class actions under R. 4:32-1 and have moved pursuant to R. 4:32-2(a) to dismiss the class action.

In Lusky et al. v. Capasso Brothers, 118 N.J. Super. 369 (App. Div. 1972), the court dealt with the criteria for permitting the maintenance of a class action under R. 4:32-1.

First, the class must be so numerous that joinder of all members is impracticable. Although there has been no showing as to the exact number of individuals within the class, it is apparent from the class definition that it would be too numerous to allow joinder of all its members.

Second, there must be questions of law and fact common to the class, "even though some variances exist." 118 N.J. Super at p. 372. The "basic legal issue(s)" is (are) to be the same for each member of the class. The named plaintiffs appear again to have met this requirement as all members of the class are similarly concerned and affected by the alleged discriminatory effect of Randolph's zoning ordinances, and named plaintiffs' rights under the Constitutions of the United States and New Jersey. Common questions of fact relative to the class include "the provisions of the township zoning ordinance, the effect of that ordinance on the available housing in the Township, the economic and racial population of Randolph, the type of housing in Randolph, and the housing needs of the region of which Randolph is a part."

A third requirement is that the claims of the representative parties must be typical of the class. The claims of the named plaintiffs, that due to the allegedly discriminatory effect of Randolph's zoning ordinance they cannot find housing or are being forced out of housing they currently occupy, would appear to be, if proved, typical of the class which they are attempting to represent.

Fourth, there is a requirement that "the representative parties will fairly and adequately protect the interests of the class." 118 N.J. Super. at p. 372. Given the named plaintiffs representations as to their great need for housing, and having been satisfied as to the competency of their counsel, the court feels this criteria, too, has been satisfied.

"In addition to the prerequisites of R. 4:32-1(a) [above] . . . a class action is maintainable only if one of the additional requirements of R. 4:32-1(b) is met." 118 N.J. Super. at p. 372. Here the named plaintiffs again have complied with the requirements of the rule, as

under R. 4:32-1(b) (2) they allege that defendants have applied the same zoning code with the same discriminatory effect as to all members of the class.

Under the facts as alleged by the named plaintiffs, and under the analysis of the Lusky case, it would seem to the court that defendants have failed to show why the named plaintiffs should not be permitted to maintain a class action. "The class action rule should be liberally construed, and such an action should be permitted unless there is a clear showing that it is inappropriate or improper." Lusky et al. v. Capasso Brothers, 118 N.J. Super 369 (App. Div. 1972) at p. 373. See also Crescent Park Tenants Assoc. v. Realty Equity Corp., 58 N.J. 98, [illegible] Kugler v. Romain, 58 N.J. 522 (1971).

The court denies all of defendants' motions to dismiss the complaint and class action. However, the court feels that it is incumbent upon it under R. 1:4-2, R. 4:5-7, R. 4:32-3(a) and R. 4:6-4, in order to facilitate the clear presentation of this litigation, to order plaintiffs to amend the complaint and to separate in individual counts their averments as to:

1. A general statement of the facts;

2. Alleged violations of their rights, privileges, and immunities under the 1st, 13th and 14th Amendments to the United States Constitution and statutes enacted pursuant thereto;

3. Alleged violations of their rights, privileges and immunities under the Constitution of the State of New Jersey and statutes enacted pursuant thereto;

4. Allegations as to plaintiff, Henry Cordier, insofar as he is not a member or representative of the class defined by plaintiffs for purposes of bringing suit under R. 4:32-1, 2, 3 and 4;

5. Such other counts as plaintiffs shall deem suitable to present in order to assure that the pleadings will be complete yet "simple, concise, and direct".

It is further ordered that the complaint, and all other pleadings and papers relative to this matter whatsoever, shall be amended to name as parties defendant in lieu of the Township Committee of the Township of Randolph, the Township Council of the Township of Randolph,

Plaintiffs will be permitted 20 days from the date of this order to file their amended complaint. Defendants shall have 20 days from the date of the filing of the amended complaint to file their answer.

Plaintiffs' motions pursuant to R. 1:21-2, to permit Lois D. Thompson, an attorney of the State of New York, pro hac vice to represent the plaintiffs in this case is granted.

Pursuant to R. 4:32-2(a) it is ordered that plaintiffs may proceed with this action as a class action under R. 4:32-1, 2, 3 and 4, subject to future alteration or amendment pursuant to R. 4:32-2(b) and R. 4:32-3.

An order consented to as to form or on notice shall be submitted by plaintiffs with provisions as to notice pursuant to R. 4:32-2(b) within 10 days of the date of this order.