Attorney's fees

10/17 (1983)

memo re: attorney's fee
w/ ~~approved~~ amendments

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P.# 4057

AF 000010D

To : Urban League Team

From : Rachel Lehr

Re : Attotney's Fees

Date : October 12, 1983 [added 10/17/83]

On July 24, 1974, plaintiffs, the Urban League of Greater New Brunswick and seven individuals, filed suit on their own behalf and on behalf of all others similarly situated against 23 of the 25 municipalities of Middlesex County, New Jersey. New Brunswick and Perth Amboy, the county's older central cities, in which the lower income and minority population is disproportionately confined, were not named as defendants. Plaintiffs challenged the zoning laws and other land use policies and practices of the defendant municipalities as exclusionary, in violation of the New Jersey Constitution and state and federal laws.[N.J.S.A. 40:55-32, now 40: 55D - 62; Article I, paragraphs 1, 5, and 18, of the New Jersey Constitution; 42 U.S.C. §§ 1981,1982, and 3601 et seq.; Thirteenth and Fourteenth Amendments to the U.S. Constitution.]

On March 21, 1975 Judge Furman certified the action as a class action, with plaintiffs representing low and moderate income persons, both black and white, who are seeking, but are unable to find, adequate or suitable housing within their means in the 23 municipalities.

Trial began on February 3, 1976 and was continued through March 23, 1976. On February 23, 1976, defendant Dunellen was dismissed outright from the suit.

Judge Furman issued his opinion on May 4, 1976. He found that in accordance with the Mt. Laurel decision, plaintiffs had met their burden of establishing that eleven municipalities' zoning ordinances were constitutionally invalid because

of failure to provide for a fair share of the low and moderate income housing needs of the region. In addition, Judge Furman granted dismissals to 11 other municipalities (which he called "substantially built up" 142 N.J. Super. 24), conditioned solely upon their adoption of appropriate amendments to their zoning ordinances.

In this opinion Judge Furman also dismissed plaintiffs' count for violation of Federal Civil Rights Acts, 42 U.S.C.A. §§ 1981,1982, and 3601 et seq. based on his earlier dismissal of a "cause of action for wilful racial discrimination." 142 N.J. Super. at 19.

On May 12, 1976, plaintiffs moved, under the provisions of R. 1:7-4, for an order modifying the May 4, 1976 memorandum opinion. The motion requested, inter alia, that the trial court find "that plaintiffs consented to the dismissals of the eleven substantially built-up municipalities on condition that these municipalities be retained for purposes of any affirmative relief the court might order." Judge Furman denied this motion to amend the findings at a hearing on May 28, 1976. This omission of affirmative relief as to these conditionally dismissed defendants during trial and the denial of this post-trial motion provide a basis for plaintiff's appeal.

On July 9, 1976 Judge Furman signed a judgment, setting out the requirements to be met by each defendant. In both the opinion and the judgment, the trial court retained jurisdiction for purposes of supervising full compliance with the terms and conditions of this judgment. He ordered defendants to enact or adopt zoning ordinance amendments within 90 days of the entry of the judgment. Judge Furman also denied counsel fees to plaintiffs, but allowed plaintiffs to apply for costs by separate motion.

On August 18, 1976, defendants Cranbury, Monroe and Plainsboro filed appeals with the Superior Court, Appellate Division. The next day defendants Sayreville and South Brunswick filed their appeals. Defendants East Brunswick, Piscataway and

South Plainfield filed appeals on August 20, 1976. On August 31, plaintiffs cross-appealed against these eight defendants and appealed against the other 14 defendants remaining in the suit. On October 7, 1976, plaintiffs moved to consolidate the appeals. The court granted that motion on November 24, 1976.

[All of the above is from the Brief For Plainatiffs As Respondents, Cross-Appellants And Appellants, Superior Court of N.J., Appellate Division, Docket No. A-4681-75. September 20, 1979]

Document #22 of our Pleadings File, Folder 1-1 is a pretrial memorandum from before the Chancery Division, Docket No. C-4122-73, which on page 5, item (8) reads:

> Issues or Claims Disposed of or Abandoned
> Plaintiffs have abandoned their claims under ¶18 Article one of the N.J. Constitution. No other issues or claims have been disposed of or relinquished.

In the Appellate decision, Urban League v. Carteret, 170 N.J. Super at 468:

" On the cross-appeal the individual plaintiffs assert that the trial judge erred in denying them standing to argue violations of the 13th and 14th Amendments of the United States Constitution and violations of the Civil Rights Act of 1968, also known as the Fair Housing Act. 42 U.S.C.A. §3601 et seq." The Appellate Court agreed with the plaintiffs that this was indeed in error. "The rights asserted by the individual plaintiffs could only have arisen under 42 U.S.C.A. § 3612(a) and by the language of that statute, are enforceable " in appropriate State or local courts of general jurisdiction."

" Plaintiffs further claim that the trial judge erred in dismissing the corporate plaintiff's complaint for racial discrimination under the foregoing federal statute. The reason given was that "no credible evidence of deliberate or systematic exclusion of minorities was before the court.' . . . Without deciding whether the eveidence presented actually suffices to prove a violation, we conclude that the trial judge

erred in requiring proof of a discriminatory intent since this ruling is in conflict with controlling authorities. It is settled that in the interpretation of federal statutes courts of this state are abound by decisions of the federal courts."

In Metropolitan, etc. v. Arlington Heights, 558 F.2d 1283 (7 Cir. 1977) the Court held that

> at least under some circumstances a violation of Section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent.[At 1290]

"The court then directed that in determing whether the particular circumstances of each case merit relief the following four critical factors be considered:

> (1) how strong is plaintiff's showing of discriminatory effect;
> (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washingto v. Davis,426 U.S. 299 (1976)
> (3) what is the defendant's interest in taking the action complained of; and
> (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. [At 1290]

The Court here in the Appellate opinion, did not decide any substantive issue for the plaintiffs on §3601, only found the trial judge in error on the procedural issue of The Fair Housing Act--standing, because the very next sentance of the opinion is"Weturn to thesubstantive issues of the appeal."(170 N.J. SUPER. at 470) Except for one small footnote at the very end of the Plaintiff's Petition for Rehearing , September 20, 1979, this cause of action seems never to be mentioned again. However, we do not seem to have the brief for the Supreme Court appeal.

Plaintiffs Petition For Rehearing, page 15:

(All fifteen pages of the petition deal only with the dismissal by the Appellate Court for what it considered to be the use of the wrong definition of "region." The only lines on any other subject are these in the note at the very end:)

"In addition, failure to prove a region should not prevent a remand to the trial court to determine whether or not the exclusionary ordinances violate the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 et seq., in light of this Court's holding that Judge Furman used the wrong legal standard in assessing plaintiffs' claims under the ACt."

October 18, 1983

After triple checking to make sure we do not have Supreme Court appellate brief, I called Janet LaBella. She will talk to Bruce Gelon about sending it as soon as possible.

On the Mt. Laurel II opinion Judge Wilentz wrote:

> Plaintiffs alleged that the zoning ordinances of these municipalities failed to provide realistic opportunities for low and moderate income housing as required by Mount Laurel and were discriminatory against blacks in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution. The latter federal claim was rejected by both courts below and it does not appear that it is being pressed before this Court.

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73 All parties were given an opportunity to be heard on the claims before they were denied. We are in accord with the trial court's denial of these claims for substantially the reasons set forth in the trial court opinion. 142 N.J. Super. at 18. See also our discussion of the standing issue in Mahwah, supra at (slip op. at 222-25).

(slip op. at 230-231)

The Appellate Division reversed the trial court's order completely and dismissed the plaintiffs' claims.[77]

> We believe that the Appellate Division erred, both in its interpretation of the lower court's opinion and in its failure to remand the case to that court for further proceedings.

(Id. at 241)

> The judgment of the Appellate Division is reversed, and the matter is remanded for proceedings consistent with this opinion.

(Id. at 246)