Attorney's fees

10/12 (1983)

memo re: atty's fees

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To : Urban League Team

From : Rachel Lehr

Re : Attorney's Fees

Date : October 12, 1983

The Complaint filed by the Urban League of Middlesex County on July 24, 1974, in the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. C-4122-73, against 23 municipal defendants, on behalf of low and moderate income persons, both white and non-white, stated plaintiffs' claims for relief based upon:

N.J.S.A. 40 :55 - 32, requiring that a Zoning Ordinance be drawn to encourage the most appropriate use of land throughout the municipality in accordance with a comprehensive plan. [Now §62, with some change in language, such as the elimination of the phrase "throughout the municipality" , suggesting a regional approach.]

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.

Plaintiffs were seeking to enjoin economic and racial discrimination in housing by the 23 municipal defendants. They challanged the zoning and other land use practices of defendants which, by effectively excluding housing that plaintiffs can afford, prevented them from residing in these municipalities in close proximity to a wide range of job opportunities, and deprived their children of equal educational opportunities. The policies and practices of all defendants,

taken together, barred the plaintiffs from securing housing and employment opportunities throughout a major and expanding market area. These policies and practices also adversely affect the housing market in the rest of the county and the region of which defendant municipalities are a part.

Class Action : Plaintiffs brought this suit for injunctive relief as a class action pursuant to Rule 4:32 of the N. J. Court Rules, on behalf of themselves and others similarly situated.

Relief Sought : Defendants permanently enjoined from engaging in exclusionary zoning and land use practices; reasonable steps to correct past discriminatory conduct by implementing a joint plan to facilitate racially and economically integrated housing within the means of plaintiffs and the class they represent. In addition the plaintiffs ask for a judgment **granting named plaintiffs the recovery of all costs, including attorney fees, incurred in maintaining this action.**

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

Judge Furman issued his opinion on May 4, 1976, 142 N.J. Super. 11, holding that the class actions were maintainable under R. 4:32-1(a) and (b) (3). He also announced that no monetary or other specific recovery and **no counsel fee for maintaining class actions was being sought.** I could find nothing in the files stating why counsel fees for maintaining this class action were not sought, but evidently this must be the meaning of the wording of the complaint which asked for "costs, including attorney fees, incurred in maintiaining this action

to be granted to the named plaintiffs.

"At the close of plaintiff's proofs the court dismissed the cause of action for wilful racial discrimination. The impact of low-density zoning is most adverse to blacks and Hispanics, who are disproportionately of low and moderate-income. But no credible evidence of deliberate or systematic exclusion of minorities was before the court. That dismissal must result in the dismissal also of the specific count for violation of Federal Civil Rights Acts, 42 U.S.C.A. §§ 1981, 1982 and 3601 et seq.

"The challenge to the exclusionary aspects of defendants' zoning ordinances remains. All three branches of government have recognized overwhelming needs for low and moderate-income housing in the State as a whole." (142 N.J. Super. at 19)

The dismissal of the discrimination issue is unfortunate because the N. J. Law Against Discrimination, Title V, 105-4 et seq., forbidding discrimination on basis of race, creed, color, national origin, ancestry, age marital status or sex, deals with discrimination in employment, public housing and real property in section 10:5-9.1. Housing built with public funds, or public assistance is defined so broadly as to include every type of subsidy program and "all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof. (10:5-5 m) "Real property" includes real estate, lands, tenements and hereditaments, corpireal, and incorporeal, and leaseholds . . ." And this Act was amended effective February 8, 1980 to award attorney's fees to the prevailing party:

10:5-27.1 Attorneys' Fees

In any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a determination that the charge was brought in bad faith.

In the almost forty years since its enactment in 1945 reading " The opportunity to obtain employment without discrimination because of race, creed, color, national origin or ancestry is recognized as and declared to be a civil right," the Act has undergone regular and consistent expansion of the areas to be protected from discrimination and the bases upon which discrimination is to be prohibited. For example:

1957 - amendment inserted reference to publicly assisted housing accomodation.

1961 - inserted reference to other real property.

1962 - amendment inserted the words "or age"

1970 - amendment substituted "age, marital status or sex" for "or age."

1971 - Blind or partially blind persons with guide dog may not be denied access to public places.

1982 - Same rights extended to deaf persons.

Perhaps now the time has come to add to that list a prohibition against State discrimination against poor in favor of rich in its control of land use. The underlying concepts of fundamental fai rness in the exercise of government

power precludes setting aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. (Mt. Laurel II, 415) The time has come for this sort of discrimination to be covered by The Law Against Discrimination. Although all the additions to this Act since 1945 have come from the legislature, as the Court said in Mt. Laurel II: " . . . powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. (Id., 417) Since the Legislature has not seen fit to ensure that under this Act the constitutional power to zone must be exercised for the general welfare, without discriminating against an economic class, perhaps the court can be convinced to do so. The very word "exclusionary" is tantamount to discrimination and if the Court can be convinced in this way Atorney's fees are statutorily mandated.

Dismissal of the cause of action under §§ 1981, 1982, and 3601 et seq., also deprives plaintiffs of a statutorily mandated award of attorney's fees.

The Fair Housing Act, 42 U.S.C. § 3612 :

Enforcement by private persons:

(c) Injunctive relier and damages; limitations; court costs; attorney fees.

The court may grant . . . court costs and reasonable attorney fees in the casae of a prevailing plaintiff: Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attoraney's fees.

(Apr. 11, 1968. P.L. 90-284, Title VIII, § 812, 82 Stat. 88.)

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.

A motion was made by the plaintiffs on November 11, 1976, applying to the Superior Court, Chancery Division, for an order pursuant to R. 4 :42-8 directing that the 22 remaining Defendants pay to plaintiffs the costs of litigation. (This motion and the accompanying memorandum are Documents 9 and 10 in File 1-1-2 of the pleadings.)

> R. 4 :42-8(a) : **Unless otherwise provided by law, these rules, or court order, costs shall be allowed as of course to the prevailing party.**

The memorandum requesting costs is attached. It is mainly an argument for the inclusion of the cost of plaintiff's expert witness, Allan Mallach. Please note the bottom of page four : **"The bulk of the costs of prosecuting such cases, of course, have been, and will no doubt continue to be donated -- attorney's fees."**

CIVIL PRACTICE RULES

4:42-9 Counsel Fees

(a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except

(1) In a matrimonial action, the court in its discretion may make an allowance .... .

(2) Out of a fund in court. The court in its discretion may . . .

(3) In a probate action . . .

(4) In an action for foreclosure of a mortgage . . .

(5) In an action to foreclose a tax certificate . . .

(6) In an action upon a liability or indemnity policy of insurance, in favor or a successful claimant.

(7) As expressly provided by these rules with respect to any action, whether or not there is a fund in court.

(8) IN ALL CASES WHERE COUNSEL FEES ARE PERMITTED BY STATUTE.

(b) Affidavit of Service .... .

(c) Statement of fees received . . .

(d) Prohibiting Separate Orders for Allowances of Fees. An allowance of fees made on the deatermination of a matter shall be included in the judgment of order stating the determination.

COMMENT

1. . . . There has also been periodic suggestion that the cousel-fee rule be comprehensively revised and that consideration be given to conferring upon the court the discretionary power to award counsel fees in an expanded category of actions and under particularly vaxatious circumstances.

See Grober v. Kahn, 47 N.J. at 155;

Bergen builders, Inc. v. Horizon Developers, Inc., 44 N.J. 435, 438-39(1965) (concurring opinion)

[ ]

Time has not permitted reading these or other cases upon which a common law argument might be based, but that will be done next. This memorandum will mainly deal with statutory provisions and court rules except in a very few instances. Such as:

The most recent case touching upon the subjects is in the advance sheets and was decided July 21, 1983.

State Dept. of Environ. Protection v. Ventron Corp., 94 N.J. 254 (1983) deals with toxic waste buried on property by a former owner, but new owner was sued by EPA, but was successful plaintiff prevailing against former owner who actually violated the law. When request for counsel fee was made court answered:

" . . . the general rule pertaining to counsel fees is that ' sound judicial administration will best be advanced' if litigants bear their own counsel

fees except in those situations designated by R. 4:42. Consistent with this policy, legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, of contract."

(From the few cases read so far, even when court rule or statute provides for prevailing party counsel fees, such an award is almost always left to the discretion of the judge.)

AMENDMENTS TO RULES

R. 4: 46 -6. Attorneys Fees

In an action tried to conclusion in which the prevailing party had made a pretrial motion for summary judgment or partial summary judgment that was denied, the court may, on motion, award counsel fees to the prevailing party if it finds that the denial of the motion was based on a factual contention raised in bad faith by the party opposing the motion with knowledge that it was a palpable sham or predicated on facts known or which should have been known by him to be false. The motion shall be made to the trial court and shall be decided on the basis of the record made in the summary judgment motion and the trial of the cause. The award of counsel fees shall be limited to those legal services rendered on the motion for summary judgment and for such subsequent services as were compelled by its denial.

Note: Adopted July 22, 1983 to be effective September 12, 1983.

Since the policy behind this new rule must be to avoid the waste of time and expense of the court and innocent parties resulting from the bad faith of a party to an action and the knowledge that his action is a sham, by having this party pay the added unnecessary expense that would have been avoided had he acted in good faith, couldn't an analogy be made here to Urban League? An argument can be made for the same underlying principle. If the defendants in Mt. Laurel I had abided by that decision and complied with the zoning ordinance amendments they were to have accomplished within 90 days, almost ten years of further litigation would have been unnecessary. Instead most efforts constituted a sham, alluded to often throughout the opinion by the court in Mt. Laurel II.

For example: After eight years the amended ordinance is still " little more than a smoke screen that attempts to hide the Township's persistent intention to exclude housing for the poor . . . Our trust was ill placed." (460) The court continued, explaining that Mt. Laurel's ordinance was still "facially invalid," as demonstrated by "provisions [that] are woefully inadequate or are simply a smoke screen that diffuses the underlying exclusionary intent or effect."(465) The court also talks of lack of good faith and/or interminable delay. (466)

" We have simpli ied the scope of litigation; the Mt. Laurel obligation is to provide a realistic opportunity for housing--not litigation." (490)

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-MIDDLESEX COUNTY
DOCKET NO. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action

MEMORANDUM

The memorandum opinion in this case was issued on May 4, 1976 and on July 9, 1976, the Court entered the Judgment. In that Judgment, the Court held open the matter of costs, granting permission to plaintiffs to raise the issue by separate motion. This memorandum is in support of a motion requesting that the Court award cost to the plaintiffs.

Nov 9? 1976

R. 4:42-8(a) states that "(u)nless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party." In order to determine which costs are allowed we must look to N.J.S.A. 22A:2-8. This statute states:

> A party to whom costs are awarded or allowed by law or otherwise in any action, motion or other proceeding, in the Law Division or Chancery Division of the Superior Court is entitled to include in his bill of costs his necessary disbursements, as follows:
>
> The legal fees of witnesses, including mileage for each attendance, masters, commissioners and other officers;
>
> The costs of taking depositions when taxable, by order of the court;
>
> The legal fees for publication where publication is required;
>
> The legal fees paid for a certified copy of a deposition or other paper or document, or map, recorded or filed in any public office, necessarily used or obtained for use in the trial of an issue of law, or upon appeal, or otherwise;
>
> Sheriff's fees for service of process or other mandate or proceeding;
>
> All filing and docketing fees and charges paid to the clerk of the court;
>
> Such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law, or rule of court.

Plaintiffs here seek to have taxed as costs to which they are statutorily entitled, fees paid for copies of public documents, sheriff's fees, and filing fees; and have taxed

as "other reasonable and necessary expenses" the fees of expert witnesses and the cost of reproducing exhibits for distribution to defendants at trial. All costs are included and sworn to on the affidavit attached to the motion.

Because some of the costs for public documents, sheriff's fees, and initial filing are allowed as of right by statute, they will not be further discussed.

The costs plaintiffs are requesting by Court order as "reasonable and necessary expenses" fall into two categories. First, are the expenses incurred during and before the trial for copies of plaintiffs' exhibits for each of the 22 defendants.[1/] During the course of the trial the Court indicated to counsel that this specific cost item could be

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1/ Because the plaintiffs failed to prove that Dunellen has engaged in any exclusionary practices, we do not seek to tax any costs against that municipality. Costs are sought, however, against the 11 defendants which were "conditionally dismissed" because of the finding of liability implicit in those dismissals. To obtain costs under Rule 4:42-8(a), the movant must be a "prevailing party". In our judgment, the word "prevailing includes a party who succeeds in securing relief even though it may not be embodied in a final judgment entered by the court, after trial, entailing the ways in which the defendants' conduct violates the law. See Aspira of New York, Inc. v. Bd. of Ed., 65 F.R.D. 541 (S.D.N.Y. 1965); Parker v. Matthews, F. Supp. (D.D.C. 1976). These defendants should not be able to avoid a taxation for costs merely by agreeing to revise their ordinances prior to the entry of a final decree. This is particularly true in this case since the agreements by the 11 municipalities did not occur until the end of the trial after the plaintiffs had expended large sums of money to pay the costs of litigation. They should be equally liable for costs as the other 11 municipalities.

reimbursed upon motion.

Second, plaintiffs are requesting reimbursement for the expenses or fees paid to expert witnesses who testified on behalf of plaintiffs. It is axiomatic in New Jersey that what costs are allowed is determined either by court rule or found under statutory authority. The allowance of certain costs such as expert witness fees is ordinarily discretionary with the court in a particular case. See U.S. Pipe and Foundry Co. v. United Steelworkers of America, AFL-CIO, Local No. 2026, 37 N.J. 343 (1962). See also, NJSA 2A:15-59. Plaintiffs urge that the "such other reasonable and necessary expenses" clause found at the end of NJSA 22A:2-8 (as quoted in full above) provides ample authority for the Court to award as a cost item against each defendant a proportionate share of the expenses or fees of expert witnesses.

In comparable cases, the New Jersey courts have allowed expert witness fees as part of the costs to the prevailing party. For example, in an action for damages for the cost of removing an encroaching retaining wall, plaintiff paid a fee for the appearance in court of a surveyor to prove his survey. Plaintiff asked for and received the fee as a cost item at the trial level, which was affirmed by the Appellate Division. Barber v. Bochinsky, 43 N.J. Super 186 (App. Div. 1956). In Barber, the surveyor's report was an essential ingredient in the plaintiff's case and thus the cost was allowed.

This is exactly the situation faced in the instant case. Plaintiffs are requesting reimbursement of the costs for expert witnesses because the services rendered by the experts constituted the very heart of plaintiffs' case. This is especially true in the case of Mr. Mallach. As the Court can appreciate, access to the courts by low and moderate income persons to vindicate constitutional rights, such as those involved in the instant case, will depend largely on the ability of public interest groups to provide the needed support and legal assistance. In cases such as this one, where the extensive expert testimony is required, the costs are necessarily heavy. Unless some of these costs can be recovered, it will be extremely difficult for these public interest groups to continue undiminshed their efforts to assist low and moderate income persons in securing relief for violations of their constitutional rights.

Qualified experts, particularly in the complicated area of planning and land use, are seldom able -- and indeed they should not be required to -- donate their professional services free of charge. By the same token, public interest groups do not have the financial resources to absorb indefinitely the full measure of these litigation costs. The bulk of the costs of prosecuting such cases, of course, have been, and will not doubt continue to be donated - attorneys fees, travel expenses, the time and effort of the plaintiffs.

But requiring that prevailing low and moderate income plaintiffs also must bear the full cost of securing expert witnesses will necessarily impose an unsupportable burden on the limited resources of these plaintiffs and the public interest groups that assist them.

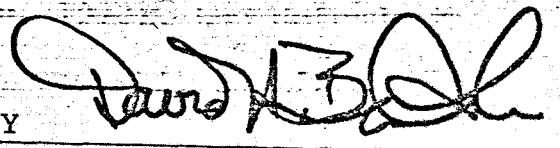
In determining whether certain "discretionary" costs should be allowed, the courts in this state have taken into account the extent to which the public interest is advanced. In Huber v. Zoning Board of Adjustments, Howell Township, 124 N.J. Super 26 (Law Div. 1973), the defendant Board had granted a variance and the Township Committee had granted a special permit for enlargement of a gas station. Plaintiff challenged these actions successfully, and moved to recover the cost of the transcript of the proceedings before the Board of Adjustment. The Court approved such a recovery emphasizing that plaintiff was an "interested citizen" whose suit would redound to the benefit of all citizens in the Township.

> It is important that citizens should feel able to bring such actions when they believe that their representatives are not carrying out their duties correctly or effectively and should not be discouraged from doing so by the possibility of large costs. Id., at 29.

That holding in Huber is fully applicable to the request for expert witness fees made in this case.

Plaintiffs stress that the defendants in this case have been found to have violated plaintiffs' basic constitutional rights. Plaintiffs ask only that they be required to bear a part of the considerable expense that has been involved in securing the rights of citizens who would not otherwise be able to have their day in Court.

Respectfully submitted,

BY 

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Dated: 11-9-76