Att. Fee — 9/26/1986

U.Z. v. Carteret —

Letter in Lieu of a Reply Brief —

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September 26, 1986

The Honorable Eugene D. Serpentelli
Judge, Superior Court
Ocean County Court House
CN 2191
Toms River, NJ 08754

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| Re: | URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al. Defendants. | Civil No. C 4122-73 (Mount Laurel) |

Dear Judge Serpentelli:

This letter brief is respectfully submitted by way of reply to the Certifications of Jerome Convery, Esq. dated September 16, 1986 and Bertram E. Busch, Esq. dated September 22, 1986, submitted on behalf of Old Bridge and East Brunswick, (the "Townships"), respectively, in opposition to the Civic League's application for attorneys fees and costs. Old Bridge and East Brunswick do not dispute that the Civic League is entitled to counsel fees pursuant to 42 U.S.C. Section 3612. Nor does Old Bridge argue that the Civic League should not be awarded experts' fees for the services of Alan Mallach. Defendant Townships merely contend that they should not be required to pay those fees because their Consent Judgments did not require them to do so.

Defendant Townships' argument is untenable as a matter of law. In New Jersey the burden is on the party losing the underlying litigation to foreclose a claim for attorneys fees under the civil rights statutes, if indeed that is the agreement of the parties, by the inclusion of a stipulation to that effect in the settlement agreement.

## The Consent Judgments

It is respectfully submitted that El Club Del Barrio, Inc. v. United Community Corporations, Inc. 735 F.2 98 (3d Cir. 1984) is controlling here. Plaintiff El Club Del Barrio ("El Club") was the class representative of Hispanic citizens demanding greater participation in the affairs of defendent. The parties entered into a settlement agreement in which El Club , like the Civic League here, was the prevailing party. El Club had attempted to reserve its right to seek counsel fees by the inclusion of a provision to that effect in the agreeement, which it had withdrawn at defendent's insistence. Defendent argued that the resultant silence in the agreement, coupled with plaintiff's conduct during negotiations, amounted to a waiver of attorneys fees. The magistrate found that, "the defendants were misled and reasonably believed that the issue of attorneys' fees had been removed from the case when reference to fees was removed from the form of consent order." Despite this finding, the Court of Appeals held that plaintiffs were not barred from seeking counsel fees, holding in pertinent part:

> It would thus seem that the best rule of law would be one that places the burden on the party losing the underlying litigation. If the parties cannot agree on counsel fees and the losing party wishes to foreclose a suit under section 1988 for attorneys fees, it must insist that a stipulation to that effect be placed in the settlement agreement.[1] Id. at 101.

The matter was remanded "to determine the appropriate award."

Old Bridge and East Brunswick have even less reason than the El Club Del Barrio defendant to have believed that plaintiffs ever intended to waive fees. Bertram Busch, Esq. asserts at paragraph 3 of his Certification that, "At no time was there any discussion about paying legal fees or costs." Nor are there any allegations of any conduct during negotiations which might have given Old Bridge the impression that the Civic League was waiving attorneys' or experts' fees.

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1. Although the instant application concerns fees sought under section 3612, rather than section 1988, the same principles should apply in view of the trend toward the adoption of a relatively uniform set of fee principles. See Larson, Federal Court Awards of Attorney's Fees (New York: Law & Business of HBJ, 1981). As the Court held in Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983): "The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'."

Indeed, under Prandini v. National Tea Co., 557 F. 2d 1015 (3d Cir. 1977) it would have been improper for plaintiffs to press for attorneys fees as a condition of settlement because of the risk of a conflict of interest between attorney and client. As Mr. Busch himself states in paragraph 3, "If in fact the Township had been asked to assume such costs, that may very well have adversely affected the Township's willingness to settle." This would have resulted in precisely the dilemma the Prandini Court sought to avoid. Noting the "increasingly heavy burden upon the courts," and the resultant desirability of settlements, the Court held:

> A reasonable solution, we suggest, is for trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for the attorneys begin. This would eliminate the situation found in this case of having, in practical effect, one fund divided between the attorney and client. Id. at 1021.

Although the U.S. Supreme Court subsequently abandoned the Prandini rationale in Evans v. Jeff D. 54 U.S.L.W. 4359, decided April 21, 1986, Prandini was controlling at the time of the parties' settlements in July 1984 and January, 1986.

Old Bridge

Defendant Old Bridge argues that there is an "implicit" waiver in the Consent Judgment as to attorney and expert fees. This argument is defeated by basic principles of contract construction as well as by the El Club Del Barrio holding. While the Consent Judgment is silent as to attorney and expert fees, it expressly provides that O&Y, Woodhaven and Old Bridge are to pay the Masters' fee and that "in no instance shall the Urban League be liable for any portion of the Master's fee."(Emphasis added; Consent Judgment, p.24.) It is respectfully submitted that if any extrapolation regarding attorneys' and experts' fees is to be made here, as urged by Old Bridge, it follows logically that "in no instance shall the [Civic] League be liable for any portion" of such fees.

Old Bridge further argues that if it is held responsible for Mr. Mallach's fee, it should not be required to pay the same portion as the other municipalities. It is respectfully submitted that the exact amount of Mr. Mallach's fee attributable to Old Bridge would best be determined by the Court following the submission of a supplemental affidavit from Mr. Mallach. While conceding that the Civic League has no responsibility for Carla Lerman's fee, Old Bridge contests the amount for which it is liable. Again, the Civic League respectfully submits that that amount would best be

determined following receipt of appropriate clarification from Ms. Lerman.

East Brunswick

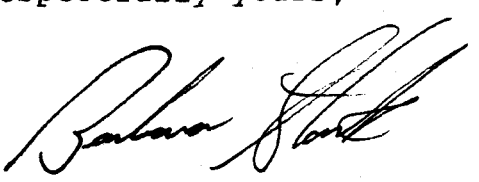
East Brunswick states that "it was the first municipality to settle its case after the remand ". It suggests no reason, however, why this fact should relieve it of its obligations under Section 3612. Among the other benefits it enjoyed by settling before the other municipalities, East Brunswick thereby avoided any claim against it for the legal fees incurred by the Civic League after that date.

There is certainly no justification for forcing the Civic League plaintiffs to absorb the expenses of the years of litigation prior to settlement. As Mr. Busch points out, East Brunswick settled after the remand; that is, after the Civic League had prevailed in the Supreme Court.Moreover, as set forth at greater length in plaintiffs' main brief in Mount Laurel II, the Supreme Court expressly noted "the widespread noncompliance", including that of East Brunswick, with the mandate of Mount Laurel I to provide a realistic opportunity for lower income housing. It is only fair the the Civic League plaintiffs be reimbursed for the costs which East Brunswick forced them to incur to obtain compliance with that mandate.

East Brunswick further contends that it "reserves its rights" to move to reopen the settlement, from which it has derived substantial benefit for more than two years, in response to the instant application. There is no authority in the Consent Judgment, or in the law, for such a motion. Nor does East Brunswick's mere disgruntlement justify spitefully scuttling the settlement. East Brunswick's "reservation of its right to seek counsel fees" is similarly devoid of any legal basis.

Finally, with regard to East Brunswick's assertions regarding Ms. Lerman's fee, the Civic League again respectfully submits that clarification from Ms. Lerman would best resolve this issue.

Respectfully yours,



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