Attorney's Fees - VL v. Carteret 9/30/86

- Township of Piscataway's Memorandum in Opposition to Plaintiff's Motion for Attorney's Fees, Experts' fees and costs
- Brief in Opposition to Motion for Attorney's fees and Costs
- Memorandum Submitted in Opposition to Urban League Plaintiff's Application for Attorneys fees and costs
- Cert. of Frank Santoro
- Cover letter to Roy Epps
- Letter from Old Bridge Attorney adopting memo as the township's own

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S.I. Newhouse Center For Law and Justice
15 Washington Street • Newark • New Jersey 07102-3192 • 201/648-5687

September 30, 1986

Mr. C. Roy Epps, President
Civic League of Greater New Brunswick
47-49 Throop Avenue
New Brunswick, NJ 08901

Re: Urban League, et al. v. Carteret, et al.

Dear Roy:

Enclosed please find copies of answering papers filed on behalf of Old Bridge, South Brunswick, South Plainfield and Piscataway.

Please telephone me with your comments.

Sincerely,

Barbara

encls

cc/John, Eric, Alan, Bob (w/encls)

Pogue

TOWNSHIP OF OLD BRIDGE

MIDDLESEX COUNTY, N.J.

JEROME J. CONVERY
TOWNSHIP ATTORNEY

September 29, 1986

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Courthouse
Toms River, NJ 08754

Re: Urban League vs. Mayor and Council
of Borough of Carteret, et al
C-4122-73
(Township of Old Bridge)

Dear Judge Serpentelli:

I am in receipt of a copy of the Memorandum In Opposition to Motion for Attorneys Fees and Costs submitted on behalf of the Township of Piscataway. To the extent that the Memorandum is applicable to all municipalities in this lawsuit, the Township of Old Bridge relies on said Memorandum.

By copy of this letter I am advising Barbara Stark, Esq. of the fact that the Township of Old Bridge relies upon said Memorandum.

Thank you for your attention to this matter.

Respectfully,

Jerome J. Convery,
Township Attorney

JJC/jd
cc: Barbara Stark, Esq.
cc: Thomas Norman, Esq.

FRANK A. SANTORO, ESQ.
1500 Park Avenue
P.O. Box 272
South Plainfield, New Jersey 07080
(201) 561-7778
Attorney for Defendant, Borough of
South Plainfield

Plaintiffs,	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX/OCEAN COUNTY
URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al	CIVIL NO. C 4122-73 (Mount Laurel)
vs.	
Defendants,	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al	CERTIFICATION OF FRANK A. SANTORO

Frank A. Santoro, of full age, certifies as follows:

1. I am an attorney at law of the State of New Jersey and the Municipal Attorney for the Borough of South Plainfield and have since January 1, 1985 been the Municipal Attorney responsible for the handling of the within-captioned matter on behalf of the Borough of South Plainfield. I am therefore fully familiar with the facts and circumstances of this case.

2. I make this Certification in opposition to the Certifications of Barbara Stark, C. Roy Epps, and their Memorandum

in Support of their application for attorneys fees and costs.

3. In reviewing the plaintiff's application, particularly with regard to attorneys fees, I find that this is the first instance of the plaintiff's application for such attorneys fees being brought before this Court. None of the documents submitted include any Affidavits of Service prepared in the usual manner when attorneys fees are being requested to be awarded by trial court's discretion.

4. With regard to the expert fees of Carla Lerman and Alan Mallach and Rogers, Golden & Halpern, it is submitted that each and all of these experts were either retained by plaintiff or appointed by the Court under the guidelines set forth in Mount Laurel II.

5. The Borough of South Plainfield has expended so far in excess of $200,000.00 in their defense of this matter since the date of the inception of Mount Laurel I up to and including this Certification and Memorandum of Law submitted in opposition to the plaintiff's hereinabove mentioned application.

6. Pursuant to the decision of the Supreme Court of New Jersey in the Hills Development Co. vs. Township of Bernards case, the Borough of South Plainfield's case, along with all other pending Urban League vs. The Mayor and Council of the Borough of Carteret, et al. cases have been transferred to the Council on

Affordable Housing.

7. A Resolution of Participation in the Council on Affordable Housing's proceedings with the transferred case involving the defendant Borough of South Plainfield was adopted on October 21, 1985 and a Letter of Intent to the Council on Affordable Housing has been submitted on or before September 3, 1986; the latter being in accordance with the Council on Affordable Housing's most recently adopted guidelines and criteria.

8. The Judgment entered in this litigation against the Borough of South Plainfield on May 22, 1984 in the nature of a Summary Judgment was not a final Judgment and the Borough of South Plainfield has never had a final Judgment, as such final Judgment is defined in the Rules governing the Courts of the State of New Jersey, particularly Rule 2:2-3.

9. Defendant Borough of South Plainfield shall further rely upon the Memorandum of Law submitted herewith in opposition to the relief sought by plaintiff.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfuly false, I am subject to punishment.

Frank A Santoro

FRANK A. SANTORO

Date: September 29, 1986

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL.,	:	
Plaintiff,	:	Civil No. C-4122-73
-vs-	:	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL.,	:	
Defendants.	:	

TOWNSHIP OF PISCATAWAY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, EXPERTS' FEES AND COSTS

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant
Township of Piscataway
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On the Brief:

PHILLIP LEWIS PALEY, ESQ.
LIONEL J. FRANK, ESQ.

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TABLE OF CITATIONS AND AUTHORITIES
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OTHER AUTHORITIES

I

THIS COURT LACKS JURISDICTION TO ENTERTAIN THIS APPLICATION FOR ATTORNEYS' FEES AND COSTS

In The Hills Development Co. v. Township of Bernards, ___ N.J. ___ (1986), the New Jersey Supreme Court transferred twelve contested Mount Laurel matters to the Council on Affordable Housing. The clear effect of this transfer was to divest the Superior Court of jurisdiction over all issues presented by the litigation, save one; the only authority remaining in the trial courts was the imposition of conditions to conserve "scarce resources", where it was contended and proved that scarcities existed. All applications were to have been filed within 30 days. (Slip op. pages 86-89.) The Civic League immediately sought the imposition of conditions which it felt had been contemplated by the Supreme Court; interestingly, while the Civic League sought extraordinarily broad relief including extensive new discovery and a widening of existing restraints, it sought no legal fees or costs. Other than for this limited and exclusive purpose, jurisdiction was removed from the trial courts by the Hills decision and has not been reinstated. The instant application clearly does not address the scarcity of resources needed to comply with Mount Laurel and, therefore, is inapt.

A) Notwithstanding the Jurisdiction Issue, Plaintiff Has Not Complied With The Requirements of R. 4:42-9 Regarding its Application for Legal Fees.

R. 4:42-9 governs awards of counsel fees by the Court; it prescribes the procedure required to be followed when applying for legal fees. Specifically, R. 4:42-9(b) requires all applications for allowances of fees to be supported by a detailed affidavit as set forth in the rule. Without such affidavit the Court and opposing counsel have no way to evaluate the amounts sought.[1] Plaintiff's failure to provide such an affidavit clearly renders its motion deficient. Even if this Court had jurisdiction, it should not, under the circumstances, consider plaintiff's motion for an award of legal fees.

Furthermore, plaintiff's motion is untimely. R. 4:42-9(d) provides:

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[1] Similarly, an application for fees rendered on appeal must be made by motion supported by affidavits served and filed within 10 days after the determination of the appeal. R. 2:11-4. And it is clear that applications for allowances of counsel fees and costs may only be made in the court in which the services were rendered or the costs accrued. U.S. Pipe, etc. v. United Steelworkers of America, 37 N.J. 343, 357 (1962); Tooker v. Hartford Accident and Indemnity Co., 136 N.J. Super. 572, 578 (App. Div. 1975). Therefore, the instant application must be limited to fees and costs incurred prior to October 1985, when Piscataway and other municipalities filed appeals in the Appellate Division.

> An allowance of fees made on determination of a matter shall be included in the judgment or order stating the determination.

The judgment as to Piscataway was rendered by the Court on September 17, 1985. The plaintiff did not then seek fees; it may not do so now. The application is inappropriate at this late date; all defendants may rely upon laches and other equitable defenses in opposing the application in its entirety.[2]

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[2] Having said that, Piscataway wishes to object strenuously to the position expressed by Old Bridge and East Brunswick in their responding papers, to the effect that their respective settlements should indemnify them from any contribution to the payment of legal fees and costs. This would produce the inequitable result that parties participating at trial might end up bearing the burden of legal fees for all parties -- those prevailing on the merits, those not prevailing on the merits and those which opted for settlement to cut their costs.

Arguably, since the bulk of fees and costs were incurred in developing a theory applicable to the entire State per the direction of the New Jersey Supreme Court, every one of the 567 municipalities should contribute equally. Alternatively, since the methodology adopted by this Court in AMG v. Warren, ___ N.J. Super. ___ (1986), was binding on municipalities within the growth area, only towns within that area should bear the burden of their "fair share" of such costs.

Perhaps the hottest places in the Mount Laurel hell (with apologies to Dante) should be preserved for those municipalities which, having received an allocation of lower income housing from the Council on Affordable Housing, have done nothing to comply. These municipalities, rather than fighting to obtain justice, seek justice through inertia. They should not be excluded from their fair share of any assigned costs.

B) Plaintiff is Not Entitled to Legal Fees Under The Fair Housing Act.

Plaintiff seeks an award of attorneys' fees under R. 4:42-9(a)(8), alleging that one of the bases for its original complaint was the Fair Housing Act, 42 U.S.C. §3601 et seq. It analogizes to the Awards Act, 42 U.S.C. §1988, which permits the court, in its discretion, to award attorneys' fees in specified civil rights actions, unless special circumstances would render such an award unjust. See, Singer v. State, 95 N.J. 487, 492 (1984); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). The federal courts have permitted an award of attorneys' fees under the Awards Act where plaintiff has obtained substantially all of the relief sought, but not under one of the civil rights statutes prescribed and pleaded. Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

Despite plaintiff's suggestion that this expansive interpretation of 42 U.S.C. §1988 should be applied to fee applications under §3612(c) of the Fair Housing Act, there is no authority for the proposition. Williams v. City of Fairburn, Georgia, 640 F.2d 635 (5th Cir. 1981), cited by plaintiff as such authority, does not stand for that proposition. There fees were sought under §1988 because plaintiff claimed a violation of civil right statutes specifically providing for the recovery of attorneys'

fees. There was no award of fees under the provisions of the Fair Housing Act (§3612(c)).

Attorneys' fees under §3612 can only be awarded to successful plaintiffs proving specific violations. In Shannon v. U.S. Dept. of Housing & Urban Develop., 409 F. Supp. 1189 (E.D. Pa. 1976), plaintiffs' claim for attorneys' fees under §3608 of the Fair Housing Act was denied, the Court stating:

> The problem with the argument is that section [3612] only applies, by its own terms, to suits commenced for violations of sections [3604-06]. These sections are the substantive provisions of Title VIII and they prohibit discrimination in the sale or rental of housing, in the financing of housing, and in the provision of brokerage services for the sale or rental of housing.
>
> * * * *
>
> Thus it is clear that, on its face, section [3612 (c)] does not authorize an award of counsel fees for suits based on section [3608] of the 1968 Act. [Id. at 1191; emphasis added.][3]

Therefore, unless a specific provision of the

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[3] Piscataway did not act in any way in violation of this law. Certainly no proofs addressed to Piscataway's sale, rental, financing, or brokering of housing were presented before this Court. The Court should note, further, that the Fair Housing Act's focus is not directed to municipalities; the definition of "person" found at §3602(d) does not include municipal corporations.

Fair Housing Act authorizes counsel fees and a plaintiff succeeds in asserting and proving a claim under that specific provision, fees may not be awarded.

Furthermore, the admittedly expansive interpretation of §1988 remains much broader than interpretations of §3612 in addressing applications for fee awards. No cases cited by plaintiff are to the contrary, including Singer v. State, supra, and Bung's Bar & Grille, Inc., v. Florence Tp., 206 N.J. Super.432 (Law Div. 1985), which address fee applications under §1988, not the Fair Housing Act.

The Civic League suggests that the holding of the 7th Circuit Court of Appeals in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2nd 1283 (7th Cir., 1977), cert. den., 434 U.S. 1025 (1978) is dispositive in this matter. Arlington Heights involved a lawsuit under the Fair Housing Act seeking to compel an Illinois municipality to rezone property owned by the plaintiff so as to permit the construction of federally financed low cost housing. Arlington Heights described a matrix of circumstances which establishes a violation of the Fair Housing Act, by creating a discriminatory impact without discriminatory intent. See 558 F.2d at 1290. The Court cited four factors as relevant to its inquiry:

1. Whether plaintiff has produced a "strong" showing of discriminatory effect. Here, plaintiff has shown no discriminatory effect with respect to Piscataway or any other municipality. The evidence adduced before this Court during May, 1984, and thereafter, in the fair share phase of this trial, failed to address, let alone demonstrate, discrimination. Piscataway, not the Civic League, sought to introduce evidence regarding racial statistics to overcome an inference of discrimination, to which plaintiff objected! Plaintiff now submits a supplemental memorandum dated September 12, 1986 which purports to evidence racial discrimination. As to Piscataway, the evidence is outdated and inaccurate. For example, nothing beyond a fringe of Camp Kilmer is within Piscataway Township. Camp Kilmer, now housing the United States Job Corps, is in Edison Township. Also, in Exhibit A appended to the initial memorandum, the black population of Piscataway is indicated as 6,162. On page 8 of the supplemental memorandum, the black population is reflected as 5,425. Undoubtedly, subsequent submissions from the Civic League will demonstrate that Piscataway took some nefarious action to dispose of the 700 or so black residents allegedly missing!

Piscataway is proud of the contribution of black citizens to its culture. To suggest that small neighborhoods of several hundred people reflects discrimina-

tion in a community whose current population approximates 50,000 is ludicrous. The fact of the matter is, that the population of black citizens in Piscataway Township is very close to, if not slightly higher than, the national average of black population within the United States. This showing of "discriminatory effect" is not "strong," within the meaning of Arlington Heights.

2. Whether plaintiff has shown some evidence of discriminatory intent. Plaintiff presented no evidence whatsoever to show discriminatory intent. The New Jersey Supreme Court has determined that the municipalities of New Jersey -- not merely the defendants in the instant case -- have failed to modify zoning ordinances to permit a reasonable opportunity for the housing of lower income persons, without regard to race. This is a far cry from a finding that the municipalities intend to exclude racial minorities, especially in circumstances like Piscataway's, when thousands of garden apartments were constructed for the occupancy of lower income persons and are now occupied by lower income persons, but are not considered as an offset to Piscataway's Mount Laurel obligation because of a limiting, artificial methodological construct.

3. Whether plaintiff has analyzed defendant's interest in taking the action complained of. Piscataway, a middle-class, blue-collar community, hardly has an interest

in excluding racial or economic minorities, since racial and economic minorities form substantial components of its population. Piscataway has a strong interest in proper aspects of land use planning and in permitting development within its borders so as to ameliorate the effects of its existing high population density. For example, Piscataway seeks to improve traffic flow throughout the Township; if this desire means housing must be constructed at a lesser density, that may well have to happen. Piscataway seeks to maximize the quality of life for all its citizens: upper, middle, and lower income. Do plaintiffs really contend that concern for these legitimate planning factors did not play a strong role in the creation of the Affordable Housing Council and in the development of rules and regulations established by that Council? The concern of the Legislature of the State of New Jersey with such issues was profound; plaintiff's argument, reduced to an absurdity, means that every town in New Jersey must provide for housing without consideration for traffic, environment, overcrowding, or quality of life.

4. Whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of minority groups, or whether plaintiff seeks only to restrain the defendant from interfering with individual property owners who wish to provide such housing. Obviously, the

second alternative does not apply to this case. Here, plaintiff does not seek to compel the defendant to affirmatively provide housing for members of minority groups, except to the extent that lower income persons represent a minority. Neither plaintiff's pleadings nor proofs address questions of minority group status in any respect whatsoever. It is intellectually dishonest for the plaintiff to suggest that it spent weeks trying a case based upon racial discrimination when not one iota of evidence was presented to justify that position.

The Court may well recall a pleasant drive through Piscataway Township in which one of the authors of this memorandum served as chauffeur. Just prior to lunch, the Court was driven through a section of Piscataway generally identified as "Site 60", also known as the "Park Avenue" area, in which 94% of the residents, according to the data provided by the plaintiff, are black. The Court's expression of the view that that area was attractive and, indeed, almost a model for suburban development is vividly recalled. The Court saw no physical evidence of the discrimination which plaintiff suggests is visible. Plaintiff's point is, simply, wrong. Plaintiff neither pleaded nor proved any racial or other discrimination in Piscataway Township or any other defendant municipality; its claim for legal fees and costs, to the extent based upon a showing of such claim, should be dismissed for lack of proof.

In short, plaintiff has not demonstrated any statutory entitlement to an award of legal fees; plaintiff's application should be denied, in its entirety.

II

ASSUMING, ARGUENDO, THAT THIS COURT HAS JURISDICTION, NO PLAINTIFF IS ENTITLED TO REIMBURSEMENT FOR EXPERT FEES.

New Jersey courts, traditionally, have been reluctant to allow one party to collect experts' fees from the other - particularly without express statutory authority. Housing Authority of Long Branch v. Valentino, 47 N.J. 265 (1966).

In specifically rejecting the argument that one party should have been awarded reimbursement of expert witness fees, the Appellate Division held in Helton v. Prudential Property & Cas. Ins. Co., 205 N.J. Super. 196, 202 (App. Div. 1985): "[a]bsent . . . a statutory provision, we perceive no authority to depart from the general policy that 'each litigant shall bear the expenses of prosecuting and defending his individual interests.' Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 167 (1970) . . ." (Other citations omitted.) Here, as in Helton, there is no statutory provision which would permit the award of expert fees.

Aware of this deficiency, plaintiff suggests that such fees are includable under N.J.S. §22A:2-8, which permits the recovery of taxed costs. As is clear from U.S. Pipe, etc. v. United States Steelworkers of America, 37 N.J. 343, 355-356 (1962), however, N.J.S. §22A:2-8 specifically

delineates those costs which may be taxed -- subject always to the discretion of the Court in the particular case. Id.

In Helton the Court held that N.J.S.A. 22A:2-8 referred to "fees and mileage rates" and specifically rejected the inclusion of expert witness fees within "allowable" costs:

> "... expert witness fees do not fall within the ambit of any of the applicable court rules or statutes." [Helton at 202.][4]

Despite this clear authority disallowing expert witness fees, plaintiff unabashedly suggests that "equity" compels such allowance. Specifically, plaintiff asserts that the municipalities' ordinances produced the litigation and the resistance of the defendants to the litigation resulted in a greater expenditure of expert time "than should have been necessary." Plaintiff also contends that "because their primary objective . . . has been the advance-

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[4] Although the Court acknowledged that in Bung's Bar & Grille, Inc. et al v. Florence Tp. Council, supra, expert fees were held to be recoverable under 42 U.S.C. §1988 (the Awards Act), that statute is not applicable here, as conceded by plaintiffs in their August 14, 1986 brief at page 8, footnote 4. As previously discussed in Point I, are not entitled to counsel fees under §3612(c) of the Fair Housing Act.

ment of the public interests[.][5], the municipalities should pay the Court expert's fees, without contribution from the Civic League.

First, as to the contention that the Court-appointed expert expended more time than plaintiffs' anticipated, that contention may be correct. Obviously, the complexity of the issues and the insufficiency of plaintiffs' original proofs required close and detailed attention. Urban League of Greater New Brunswick, et al v. The Mayor and Council of The Borough of Carteret, et al, 170 N.J. Super. 461, 476-477 (App. Div. 1979). Perhaps just as significant is the fact that plaintiffs' estimates of everything in this litigation have been woefully far from

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5 This Court has been judicious in avoiding the merits of the argument that any party is the sole representative of the "public interest"; if memory serves, this Court has itself stated that no party has a monopoly on the "public interest". It is therefore submitted that plaintiff's reliance upon Huber v. Zoning Board of Adjustment of Howell Tp., 124 N.J. Super. 26 (Law Div. 1973), for the proposition that it represented the public interest and should be reimbursed for Ms. Lerman's and Mr. Mallach's fees, is inappropriate. Similarly, plaintiff's reliance upon Finch, Pruyn & Co., Inc. v. Martinelli, 108 N.J. Super. 156 (Ch. Div. 1969), is inapplicable. Rather than "reprehensible" conduct, the municipalities' vigorous defense of the constitutionality of the Fair Housing Act deserves commendation.

the mark all along.

Second, as the Court is fully aware, the municipalities herein and in other Mount Laurel litigation defended against plaintiffs' positions primarily because of concern for the adverse effect on the general welfare resulting from court-mandated increments to population in large numbers. Because of the municipalities' defense, the Legislature enacted the Fair Housing Act, which produced more realistic goals based on broader guidelines and criteria than previously employed. The Act applies to many more municipalities than did the consensus methodology; one would think that this result would be applauded by plaintiffs. The constitutionality of the Fair Housing Act was upheld by our Supreme Court in The Hills Development Co. v. Township of Bernards, _____ N.J. ____ (1986). It is respectfully contended that the municipalities were the representatives of, and advanced, the public interest, rather than those plaintiffs who argued against the legitimacy of the Act on several significant grounds (all rejected).

The conclusion is clear; plaintiffs show no greater entitlement to a contribution towards their experts' fees than do defendants - especially where plaintiff's experts have been shown to have been consistently wrong in approach over the years! If, for example, plaintiffs' expert had accepted Piscataway's experts' conclusions,

Piscataway's case could have been resolved in May, 1984. Mr. Nebenzahl's testimony reflected his view that Piscataway's fair share number should be between 900 and 1100 - exactly the range determined by the Council on Affordable Housing.

Equity compels each party to this extended litigation to bear its own costs.[6] There is no legal basis for imposing any "taxed costs" in these proceedings for expert witness fees or otherwise; plaintiff's motion should be rejected.

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[6] It deserves mention that funds of a municipal defendant are derived from general tax revenues paid by the public.

CONCLUSION

For the foregoing reasons, plaintiff's motion for attorneys' fees, experts' fees and costs should be denied.

Respectfully submitted,

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant,
Township of Piscataway

By: _____
Phillip Lewis Paley

DATED: September 25, 1986

BENEDICT AND ALTMAN
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New Brunswick, NJ 08901
(201) 745-9000
Attorneys for Defendant Township of South Brunswick

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

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

vs. Civil Action

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

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR ATTORNEYS'FEES AND COSTS

On the Brief:

Joseph J. Benedict, Esq.

LEGAL ARGUMENT

AWARD OF ATTORNEYS FEES AND COSTS TO PLAINTIFFS IS INAPPROPRIATE

Plaintiffs make their claim for attorneys' fees under 42 U.S.C.A. §3612(c), which provides:

> (c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees. (Emphasis supplied).

It should be noted from the outset that this provision is significantly different from most federal statutory provisions for attorneys' fees in two respects: (1) The award is limited to prevailing plaintiffs as opposed to prevailing parties generally, and (2) the statute places "need" restrictions on the plaintiff. (On both points, Cf. 42 U.S.C.A. §§ 1988, 2000a-3(b), 2000e-5(k) and 19731(e)). By comparison to other federal statutes, there-

LEGAL ARGUMENT

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It should be noted from the outset that this provision is significantly different from most federal statutory provisions for attorneys' fees in two respects: (1) The award is limited to prevailing plaintiffs as opposed to prevailing parties generally, and (2) the statute places "need" restrictions on the plaintiff. (On both points, Cf. 42 U.S.C.A. §§ 1988, 2000a-3(b), 2000e-5(k) and 19731(e)). By comparison to other federal statutes, therefore, the Fair Housing Act (42 U.S.C.A. 3601, et seq.) severely limits the circumstances under which a plaintiff may recover attorneys' fees. Defendant Township of South Brunswick contends that the higher standard imposed for an award of attorneys' fees under the Act indicates an intention on the part of Congress that such an award only be made in the clearest of contexts, i.e., when a plaintiff in fact prevails on a claim under the Act.

The present litigation is not such a clear case. Plaintiffs' action, although alleging violations of various federal statutes, including the Fair Housing Act, has never in fact

litigated these issues. Nor has a consideration of such issues ever influenced the course or outcome of the litigation. Indeed, only months after Plaintiffs instituted the present action did our Supreme Court announce its holding in So. Burlington County NAACP v. Mt. Laurel Township, 67 N.J. 151 (1975) (Mt. Laurel I). It was this decision, under the New Jersey Constitution, which has determined the course and focus of the litigation. And it was the Legislature's enacting of the New Jersey Fair Housing Act which has determined the ultimate resolution of this case. The only relevance, therefore, of Plaintiffs' federal claim is its appearance in Plaintiffs' complaint. It is difficult to believe that Congress intended to award attorneys' fees to a plaintiff on the basis of a federal claim where that claim has played no part in obtaining the relief sought.

This conclusion is consistent with the analysis of the Court in Singer v. State, 95 N.J. 487 (1984). The Court therein stated that the first requirement for an award of fees under 42 U.S.C.A. §1988 was "a factual nexus between plaintiff's litigation and the relief ultimately achieved". Id. at 495. In the present case there is no such nexus. The relief ultimately achieved in the present case will be the direct result of the application to the Defendants of the New Jersey Fair Housing Act. It is relief which would have been given even if Plaintiffs' had never initiated the present litigation.

Under circumstances where the relief sought becomes an inevitable result of factors external to the litigation, an award of attorneys fees is clearly improper. Such circumstances make

the litigation moot - a determination which this Court has already made in approving the transfer of Defendant South Brunswick's case to the Council on Affordable Housing.

In this respect then the present case is not substantially different from those cases where a plaintiff's federal claim has not been prosecuted or has been determined to be moot. Thus regarding a claim for attorneys' fees under 42 U.S.C.A. §1988 in Mesolella v. Providence, 578 F.Supp. 387 (D.C.R.I. 1984), the attorneys' fees were denied where a separate federal civil rights action was instituted while a state claim on the same facts was pending and where the federal action lay dormant and was ultimately withdrawn upon plaintiff's victory on the state claim. And in Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979), cert. den. 445 U.S. 928 (1980), an award of fees under 42 U.S.C.A. §1973l(e) was denied due to the mootness of plaintiff's underlying claim. See also, Ward v. Dearman, 626 F.2d 489 (5th Cir. 1980) and Davis v. Ennis, 520 F.Supp. 262 (N.D.Tex. 1981).

Given that Plaintiffs' federal claim has in no way shaped or contributed to the present litigation or its result, it seems vain to engage in a discussion of whether or not, if the claim had been litigated, Plaintiffs would have prevailed. Plaintiffs have argued extensively that this claim was substantial and meritorious. However, after more than ten years of litigation, during most of which the merits of the claim have never been directly in issue, any such discussion can be at best speculative.

Defendant South Brunswick would also note that the very

legislation which has terminated this litigation makes no provision for an award of attorneys' fees and that traditionally our courts have sanctioned such awards only in exceptional cases. R.4:42-9.

Even if the Court determines that §3612(c) applies in this case, the statute clearly indicates such an award is not mandatory. The applicable language is "may award" and at least one Court has held that this language places the decision within the discretion of the Court. Marr v. Rife, 503 F.2d 735 (6th Cir. 1974), later app. 545 F.2d 554 (6th Cir. 1976). Therefore, even if the Court determines that such an award is permissible, the award need not be made. Defendant South Brunswick would argue that where, as here, a federal claim has not, for all intents and purposes, been pursued, such an award is improper and does not serve to further the goals of the legislation under which it is claimed.

As to costs, also, the matter is submitted to the court's discretion. However, an award should not be made if it would work injustice or oppression. Looman Realty v. Broad Street National Bank of Trenton, 74 N.J. Super. 71, 85 (App. Div. 1962).[1] In the present case such an award of either attorneys' fees or costs would be oppressive given the existing financial burdens which will be placed upon the Defendant in meeting its fair share requirements and the burden it has already carried in providing

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1. The Court noted, parenthetically, that this standard also applied to counsel fees.

for its own representation.

Finally, the exercise of the Court's discretion should be influenced by the fact that the Township, having not been forewarned of this application, as well as having no way to anticipate the amount claimed, has not budgeted any funds for this purpose.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Plaintiffs' motion for attorneys' fees and costs should be denied.

Respectfully submitted,

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Plaintiffs,	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX/OCEAN COUNTY
URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al	CIVIL NO. C 4122-73 (Mount Laurel)
vs.	
Defendants,	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al	

MEMORANDUM SUBMITTED IN OPPOSITION TO URBAN LEAGUE PLAINTIFF'S APPLICATION FOR ATTORNEYS FEES AND COSTS

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Introduction

This Memorandum is respectfully submitted on behalf of the defendant Municipality Borough of South Plainfield in opposition to the Urban League plaintiff's application for attorneys fees and costs in connection with the within-captioned matter. This defendant in reply to the numerous authorities cited by plaintiff Urban League in support of their application for attorneys fees and costs shall rely upon three major issues, being;

1. That if counsel fees and costs are to be awarded at all, then all municipalities in the growth area should pay their pro rata share of Urban League plaintiff's expenses from the Mount Laurel II remand period up to but not including the Appellate Division and Supreme Court's handling of the matter which resulted in the Hills Development Co. vs. Bernards Township case.

2. That this Court as a trial court now lacks any jurisdiction under the Hills Development Co. vs. Bernards Township case to entertain Urban League plaintiff's application for attorneys fees and costs.

3. That the Urban League plaintiffs should be denied relief in any regard under the Doctrine of Laches.

ARGUMENT

I. IF COUNSEL FEES AND COSTS ARE TO BE AWARDED AT ALL, THEN ALL MUNICIPALITIES IN THE STATE OF NEW JERSEY IN THE GROWTH AREA SHOULD PAY THE PRO RATA SHARE OF ALL EXPENSES OF THE URBAN LEAGUE PLAINTIFFS FOR THE MOUNT LAUREL II REMAND PERIOD.

Plaintiffs recite a plethora of authority under Title 42 of the United States Code and various and sundry State Court decisions which hold to the proposition that court costs and counsel fees are allowable at the discretion of the Court for a prevailing party in litigation which involves the enforcement of some constitutionally guaranteed right or privilege.

Indeed, in ruling in favor of the Urban League (as cited by Urban League plaintiffs in their Brief) the Supreme Court may have considered, "The same nucleus of operative facts as that underlying the Urban League Fair Housing Act claims."

What has not been mentioned in the Urban League plaintiff's Brief or in their Certifications is the reality that but for the defendant municipalities such as this defendant, the Borough of South Plainfield who in earnestly, honestly and steadfastly defending their rights to oppose local zoning by judicial fiat, the Fair Housing Act would never have become a reality. As a matter of fact, the defendant municipalities' resistance after Mount Laurel I was the direct cause of the Supreme Court's handling of the zoning matters in Mount Laurel II. It is legend that subsequent to the issuance of the Mount Laurel II decision, the three trial court judges were appointed by the

Supreme Court.

This Court in particular, was charged with the obligation and duty of developing "the consensus methodology" as a way of determining the fair share obligation of all municipalities in the growth regions of the State of New Jersey. In fact, the Supreme Court in Mount Laurel II at page 199, recognized that the general welfare for which the trial courts were required to impose upon municipalities, fair share zoning ordinances, intimated that "the general welfare in the case of housing needs included not only low and moderate income persons residing outside of the municipality but (also those) within the region that contributes to the housing demand within that municipality." (Emphasis added)

Equity would therefore demand that an allocation of any of Urban League plaintiff's expenses, be they expert fees or attorneys fees, be allocated on a pro rata basis for all the municipalities in the growth area and not just those few municipalities which chose to continue to be the motivating force for the finalization of the constitutional process which began with Mount Laurel I and which finally (and hopefully) concluded with the adoption of the Fair Housing Act and the Supreme Court's decision in the Hills Development Co. vs. Bernards Township case.

II. THIS COURT LACKS SPECIFIC JURISDICTION UNDER THE HOLDING OF THE HILLS DEVELOPMENT CO. VS. BERNARDS TOWNSHIP CASE TO HEAR URBAN LEAGUE PLAINTIFF'S APPLICATION FOR COSTS AND LEGAL FEES.

On February 20, 1986, the Supreme Court of New Jersey, in a unanimous decision decided the Hills Development Co. vs. Bernards case. In such case the within-captioned matter, along with all other pending Urban League plaintiff cases involving other defendant municipalities, was transferred to the Council on Affordable Housing in accordance with the provisions of the Fair Housing Act. In such decision, the Supreme Court remanded each of the particular cases back to the trial court for the sole purpose of imposing conditions on transfer seen to be necessary by the trial court to preserve "scarce resources". It is eminently clear that this trial court has and had only that limited jurisdiction and for only such purposes as above recited. This Court under an Order dated May 21, 1986 has already exercised its limited jurisdiction; it has imposed the conditions on transfer and has in fact forwarded the case, involving this defendant municipality to proceed to the Council on Affordable Housing forthwith as it was required to do by the Supreme Court.

On or before September 3, 1986 the defendant municipality, Borough of South Plainfield, filed a Letter of Intent with the Council on Affordable Housing indicating its intention to participate in the proceedings of the Council in developing its fair share housing plan.

Accordingly, this Court does not have the jurisdiction to entertain any of the Urban League plaintiff's applications for

counsel fees or costs as to this defendant, at least.

III. URBAN LEAGUE PLAINTIFFS ARE NOT ENTITLED TO COUNSEL FEES AND COSTS UNDER THE DOCTRINE OF LACHES SINCE THEIR APPLICATION FOR SAME IS BEING MADE AT SUCH A TERMINAL POINT IN THE LITIGATION.

The Doctrine of Laches, an affirmative defense, has long been cited in litigation matters where a party's failure to do something which should have been done or to claim or enforce a right at the proper time has caused a prejudice or disadvantage to the adverse party.

It is clear that a party urging the application of laches must show that the adversary, without explanation or excuse, delayed in asserting a claim, that the delay was unreasonable and that it visited prejudice upon the party asserting the delay. Allstate Insurance Co. vs. Howard Savings Institution, 127 N.J. Super. 479, 317A 2nd 770.

In the instant case, other than a general recital in the initial Complaint, Urban League plaintiffs have failed to bring a timely application for an awarding of counsel fees and costs of this action. The case, particularly in reference to this defendant municipality, has been transferred and is now within the jurisdiction of the Council on Affordable Housing. As a result of this, defendants and in particular, this defendant, is asked to respond to an eleventh-hour application for costs and counsel fees at a time when all of the defendant municipality's activities are now being concentrated on the development of a rough draft and final draft of its Fair Share Plan and Housing Ordinance for submission to the Council on Affordable Housing. It is being

asked to defend against such an application in reference to counsel fees and is being left in total darkness as to which attorneys are to be awarded, by whom they were employed, what their hourly rates will be, what the total assessment for this defendant will be which this Court is being asked to determine. Obviously, this defendant municipality, along with other defendant municipalities, are severely prejudiced because the Urban League plaintiffs are asking this Court to rule in their favor for counsel fees as yet undetermined and in essence to give them a "blank check". How can this defendant municipality and others determine whether or not the counsel fees to be awarded are reasonable or whether or not the Court has employed one of the methods for determining such counsel fees as recited in some of the cases set forth in the Urban League plaintiffs Memoranda, or whether the Court in assessing costs and counsel fees for Urban League plaintiffs will utilize its own method.

CONCLUSION

For all of the above-stated reasons, this defendant respectfully requests that the Urban League plaintiff's application for counsel fees and costs be denied.

Frank A Santoro

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Attorney for Defendant Borough of South Plainfield