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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

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

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
17 Academy Street
Newark, New Jersey 07102
(201) 623-3600

On the Brief:

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

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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