AF - Plainsboro

c1986

memorandum in opposition to Π's application for attorneys fees and costs

pg 13

AF 000109 D

PIDGEON & PIDGEON, ESQS.
60 North Main Street
Post Office Box 648
Cranbury, New Jersey 08512
(609) 655-0475
Attorneys for Defendant, Township of Plainsboro

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY
CIVIL NUMBER: C4122-73
(Mount Laurel)

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

Plaintiffs,

vs.

MAYOR and COUNCIL OF THE BOROUGH of CARTERET, et al.

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS

Of Counsel and
On the Brief

John R. Pidgeon
Mary Ann Kenny Pidgeon

COUNTERSTATEMENT OF PROCEDURAL HISTORY

The entire procedural history of this litigation between the plaintiff, Urban League of Greater New Brunswick and the defendant, Township of Plainsboro is not relevant to this Motion, however, it should be noted that a Consent Order was entered by the Court on July 30, 1985 setting Plainsboro Township's fair share number through 1990 at 575 units. Because the New Jersey Council on Affordable Housing subsequently fixed Plainsboro's fair share number at 117 units of low and moderate income housing, the parties are presently negotiating a possible modification of the July 30, 1985 Consent Order.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S APPLICATION SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE PROCEDURAL REQUIREMENTS SET FORTH IN R. 4:42-9(b) AND (c)

The plaintiff, Urban League of Greater New Brunswick has filed a Motion against the defendant, Township of Plainsboro and other defendant municipalities for the imposition of attorneys' fees and costs. R. 4:42-9 provides in pertinent part that

> "(b). Affidavit of Service. ...all applications for the allowance of fees shall be supported by an Affidavit stating in detail the nature of the services rendered, ...the responsibility assumed, the results obtained, the amount of time spent by the attorney, any particular novelty or difficulty, the time spent and services rendered by paraprofessionals, other factors pertinent in the evaluation of the services rendered, and the amount of the allowances applied for, and an itemization of disbursements for which reimbursement is sought." R. 4:42-9(b).

In its moving papers, plaintiff states that the amount of the attorneys' fees of the Urban League plaintiffs will "be determined following the submission of an Affidavit of Services." (Notice of Motion at paragraph 1.)

Similarly, in her Certification submitted in support of plaintiff's Notice of Motion, Barbara Stark, attorney for plaintiff, said, "A separate Affidavit of Services with regard to Attorneys' fees shall be submitted following the determination of the instant Motion. Supplemental Affidavits with regard to costs and experts shall also be submitted at that time, if appropriate."

On its face, plaintiff's Notice of Motion and supporting Certifications do not comply with the requirements of R. 4:42-9 and should be dismissed.

POINT II

THE URBAN LEAGUE IS NOT A "PREVAILING PLAINTIFF" AND IS THEREFORE NOT ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C.A. Section 612(c)

Plaintiff, Urban League has filed its Notice of Motion pursuant to 42 U.S.C.A. Section 3612(c) which provides that

> "The Court... may award to the plaintiff... reasonable attorneys' 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 attorneys' fees."

Plaintiff concedes that the Supreme Court in Southern Burlington County N.A.A.C.P v. Mount Laurel Township, ("Mount Laurel II") 92 N.J. 158 (1983) did not "even mention plaintiff's Fair Housing Acts Claims", however, goes on to argue that "there was no need to reach these claims, since the relief sought had already been granted." Plaintiff, is correct when it says that the Supreme Court made no explicit determination as to whether there was a violation of the Federal Fair Housing Act, 42 U.S.C.A. 3601, et seq., however, the Court clearly implied that it was basing its decision only on the New Jersey Constitution and not on the Federal Constitution, the Fair Housing Act or any other federal statue when it said:

> "Plaintiffs allege that the zoning ordinances of these municipalities fail to provide realistic opportunities for low and moderate income housing as required by Mount

> Laurel and were discriminatory against blacks in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution. The latter federal claim was rejected by both courts below and it does not appear that it is being pressed before this Court." Id. at 341.

In that regard, it should be further noted that the trial court had dismissed plaintiff's claim for a violation of the Federal Civil Rights Acts, 42 U.S.C.A. Sections 1981, 1982 and 3601, et seq., saying that "no credible evidence of deliberate or systematic exclusion of minorities was before the Court." Urban League of Greater New Brunswick vs. Mayor and Council of Carteret, et al., 142 N.J. Super. 11, 19 (Chancery 1976). It is true as plaintiff argues in its brief that the Appellate Division reinstated plaintiff's Federal Fair Housing Act claim (plaintiff's brief at page 5), however, the Appellate Division decided only that "the trial judge erred in requiring proof of discriminatory intent...." Id. at 469. The Appellate Division specifically and emphatically was not "deciding whether the evidence presented actually suffice[d] to prove a violation [of the Federal Fair Housing Act]..." Id. Plaintiff, in its brief, cites no evidence in the record which would have supported its claim for relief under the Federal Fair Housing Act.

The tests for determining whether the Urban League is a "prevailing plaintiff" was enunciated in Singer vs. State, 95 N.J.

487, 495 (1984): "the test... first calls for a factual causal nexus between the plaintiff's litigation and the relief ultimately achieved." It is respectfully submitted in the instant case that there was not a "factual causal relationship" between plaintiff's litigation and the result ultimately achieved. The New Jersey Supreme Court based its decision in Mount Laurel II, supra., on economic and not racial grounds. In its discussion of the procedural and factual setting of the Urban League case, the Court noted that "plaintiffs allege[d] that the zoning ordinances of these municipalites failed to provide realistic opportunities for low and moderate income housing as required by Mount Laurel." Id. at 341. As discussed above, the Court then recognized that "plaintiffs allege[d] that the zoning ordinances of these municipalites... were discriminatory against blacks in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution," but went on to say that "the latter federal claim was rejected by both courts below and it does not appear that it is being pressed before this Court." Id. at 341. Plaintiff alludes to the fact that the Supreme Court did not discuss plaintiff's Fair Housing Act claims, however, it ignores the fact that the dichotomy in the Supreme Court's analysis was between claims on behalf of low and moderate income familities as opposed to claims on behalf of racial minorities. Plaintiff's argument that the Supreme Court did not base its decision on the Federal Fair Housing Act for the sole

reason that "there was no need to reach these claims" does not withstand scrutiny.

It is Plainsboro Township's contention that the Supreme Courtby implication decided adversely to plaintiff on the Fair Housing Act claim and that the rule set forth in Right To Choose vs. Byrne, 91 N.J. 287 (1982) should apply. In that case, the Supreme Court invalidated a state statute restricting state funding to abortions necessary to save the mother's life on the ground that it violated the New Jersey Constitution but not the United States Constitution. The plaintiffs argued that they were the "prevailing party because they [had] prevailed on their state law claim which [arose] from the same facts as the federal claims." Id. at 316. The Supreme Court rejected plaintiffs argument saying that:

> "The flaw in that contention is that Section 1988 permits an award of counsel fees to a party who prevails on a state claim only when the federal claims are adjudicated favorably for that party or not adjudicated at all. (Citations omitted) No counsel fees may be allowed where the federal claims have been decided adversely to the 'prevailing party'." Id.

Since the Supreme Court impliedly decided adversely to plaintiff on its federal claim, the Urban League is not entitled to attorneys' fees in the instant litigation.

In a supplemental brief dated September 12, 1986, plaintiff attempted to prove ex post facto through submission of 1980 census data that there were violations of the Federal Fair Housing Act.

reason that "there was no need to reach these claims" does not withstand scrutiny.

It is Plainsboro Township's contention that the Supreme Courtby implication decided adversely to plaintiff on the Fair Housing Act claim and that the rule set forth in Right To Choose vs. Byrne, 91 N.J. 287 (1982) should apply. In that case, the Supreme Court invalidated a state statute restricting state funding to abortions necessary to save the mother's life on the ground that it violated the New Jersey Constitution but not the United States Constitution. The plaintiffs argued that they were the "prevailing party because they [had] prevailed on their state law claim which [arose] from the same facts as the federal claims." Id. at 316. The Supreme Court rejected plaintiffs argument saying that:

> "The flaw in that contention is that Section 1988 permits an award of counsel fees to a party who prevails on a state claim only when the federal claims are adjudicated favorably for that party or not adjudicated at all. (Citations omitted) No counsel fees may be allowed where the federal claims have been decided adversely to the `prevailing party'." Id.

Since the Supreme Court impliedly decided adversely to plaintiff on its federal claim, the Urban League is not entitled to attorneys' fees in the instant litigation.

In a supplemental brief dated September 12, 1986, plaintiff attempted to prove ex post facto through submission of 1980 census data that there were violations of the Federal Fair Housing Act.

adverse impact on one racial group that another....'" (Plaintiff's supplemental brief dated September 12, 1986 at page 8.) Plaintiff conveniently ignored the fact that 3% of Plainsboro's population was Asian and 2% was of Spanish origin. Morever, plaintiff cited no authority in support of its use of the "eleven county AMG region" as opposed to the four county Affordable Housing Council region ofwhich Plainsboro is a part. The Federal Fair Housing Act prohibits discrimination on the basis of "race, color, religion, sex or national origin". See e.g. 42 U.S.C.A. Section 3604. Nowhere does the Federal Act limit its application to "blacks". It is therefore, respectfully submitted by Plainsboro Township that plaintiff's submission of data showing that Plainsboro's minority population consisting of blacks, Asians and persons of Spanish origin in 1980 amounted to approximately 11% of the total population not only does not prove a violation of the Federal Fair Housing Act but rather tends to show on its face that there was no violation.

POINT III

ASSUMING ARGUENDO THAT PLAINTIFF IS ENTITLED TO FEES FOR ATTORNEYS' SERVICES ATTRIBUTABLE TO ITS FEDERAL CLAIM, THERE MUST BE AN APPORTIONMENT MADE IN RESPECT TO LEGAL SERVICES INVOLVED IN THAT CLAIM AND THOSE ON THE STATE CONSTITUTIONAL ISSUES

It is the defendant, Plainsboro Township's position that plaintiff is not entitled to attorneys' fees in this matter, however, if the Court finds that plaintiff is entitled to attorneys' fees, there must be an apportionment between services rendered in connection with the federal claim and services rendered in connection with the state constitutional claim. In Carmel vs. Hillsdale, 178 N.J. Super. 185 (App. Div. 1981), the plaintiff successfully challenged an anti-pornography ordinance on both state and federal grounds. The Appellate Division held that inasmuch as the trial judge expressly relied on 42 U.S.C.A. Section 1983 as well as the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1, et seq., plaintiff was entitled to attorneys' fees on the federal claim but noted that:

> "Where a party prevails on both state and fee-qualifying federal issues, an apportionment may be made in respect of the legal services involved in each and an award allowed pursuant to 42 U.S.C.A. Section 1983 for the services attributable to the federal issue." Id. at 190.

Similarly in Right to Choose vs. Byrne, 173 N.J. Super. 66 (Ch. Div. 1980), the Court awarded attorneys' fees to the prevailing plaintiff but said that:

> "A plaintiff's attorneys' fees under Section 198H should be limited and apportioned to time expended on the prevailing issue or issues without allowance for time expanded on any issue determined adversely to plaintiff. citing Nadeau vs. Helgemoe, 581 F. 2d, 275, 279 (1 Cir. 1978)."

The Supreme Court's later reversal in Right to Choose vs. Byrne, 91 N.J. 287, supra., did not invalidate the trial court's upholdings as to apportionment.

It is therefore clear that if this Court finds the plaintiff is entitled to attorneys' fees on its federal claim that there must be an apportionment between legal services rendered in connection with that claim and those rendered in connection with the State Constitutional claim. Since plaintiff has not even submitted an Affidavit of Services (see Point I of this brief), the Court has no facts on which to base the required apportionment.

CONCLUSION

For the reasons aforesaid, plaintiff's Motion for attorneys' fees and costs should be denied.

Respectfully submitted,

PIDGEON & PIDGEON, ESQS.
Attorneys for Defendant,
Township of Plainsboro

BY: John R. Pidgeon