AMG - Haueis v. Far Hills 10/9/86

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letter opinion addressing Δ's motion to transfer case to COAH or for a reduction in the fair share number by Judge Serpentelli

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Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI
ASSIGNMENT JUDGE

OCEAN COUNTY COURT HOUSE
C.N. 2191
TOMS RIVER, N.J. 08754

October 9, 1986

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LETTER-OPINION

Re: Haueis & Ochs v. Borough of Far Hills, et als.

Gentlemen:

This letter opinion shall address defendant's motion to transfer this case to the Council on Affordable Housing or, alternatively, for a reduction in the fair share number. Plaintiff has cross moved for enforcement of the compliance order and for an order compelling the Planning Board to schedule public hearings on its site plan application. This latter issue has apparently been resolved to plaintiff's satisfaction so long as defendant provides for the final vote on site plan approval by the December 1, 1986 meeting. Additionally, plaintiff requested in its September 15, 1986 letter to the court that the Master, George Raymond, be instructed to help move along the sewer treatment plant expansion application so as to keep delays at a minimum.

Herbert A. Vogel, Esq. October 9, 1986

J. Albert Mastro, Esq. Haueis,et al. v. Far Hills

The court heard the initial motion on August 1, 1986 and withheld decision pending the parties further briefing of the issue of finality of the October 4, 1985 compliance order and possible additional oral argument. I find no additional argument necessary. I hereby incorporate in this opinion the preliminary findings of the court made on August 1.

Defendant Far Hills argues the October 4, 1985 order, captioned "Order of Compliance Subject to Conditions" is not a final order because of the inclusion of conditions. Absent a final order, defendant claims it is entitled to be transferred to the Council on Affordable Housing. Defendant points to, among other things, paragraph 10 of the October 4th order which did not grant "final" repose but continued the "interim" repose granted by order dated December 31, 1984 entitled "Interim Order of Settlement". Defendant claims this "interim" repose is not the same "quality" as "final" repose.

Far Hills stresses condition #9, concerning the sewerage treatment plant expansion in cooperation with Bedminster Township (which expansion was considered critical to the compliance order), renders the order not final because Bedminster was not a named party to the litigation. To be a final order, appealable as of right, case law provides that it must be final to all

parties and all issues. Defendant is apparently arguing that the fact that sewer expansion was considered a "critical" issue and Bedminster's cooperation was essential to the resolution of that issue, since Bedminster was not a named party, the "critical" sewerage issue can not be said to have been resolved.

Defendant also argues that at the October 4, 1985 compliance hearing the court recognized further action may be needed relative to either the Township of Bedminster or the state Department of Environmental Protection. Defendant believes such anticipated court intervention makes the order interlocutory in nature.

Defendant uses Section 28 of the Fair Housing Act regarding the builder's remedy moratorium to further support its position. Section 28 provides that a court may not grant a builder's remedy in any case before it until a January 1, 1986, the time by which municipalities must file a housing element with the Council on Affordable Housing. The Act provides that if a final judgment granting a builder's remedy has already been granted, the moratorium does not apply. Final judgment is defined in Section 28 as a judgment subject to an appeal as of right for which all right to appeal is

exhausted. Defendant implies it did not believe it had a right to appeal the October 4, 1985 compliance order because it was not sure whether all issues were completely adjudicated.

Conversely, plaintiff argues that the compliance order is final. Plaintiff emphasizes that the compliance hearing was held at the defendants' request. Further, the court questioned Mr. Mastro, attorney for the Borough, about the voluntariness of the proceeding in light of the newly enacted Fair Housing Act. Specifically the court stated in part:

> I want to commend the municipality for having voluntarily resolved the issue. I should have, at the opening of this proceeding, as I have been doing since the adoption of the legislation, in essence, read the municipality its rights, but I know Mr. Mastro is entirely aware of its rights, and we proceed today at the request of the township.
>
> Mr. Mastro that's correct, I take it.....

Mr. Mastro (in part)...The compliance hearing was at our request.

The court further noted it was very sensitive to the fact that there was legislation and it was sensitive to the rights created thereunder.

Plaintiff compares the Far Hills matter to those cases which the Supreme Court referred to as having reached final settlement in its decision in Hills Development Co. v. Bernards Tp., 103 N.J. Super. 1 (Law Div.1986),

including Allan Deane v. Bedminster, 205 N. J. Super 87, (Law Div. 1985), which was settled in this court. Plaintiff emphasizes the fact that the majority of the compliance orders contained numerous conditions to be fulfilled subsequent to the compliance hearings which plaintiff argues is typical in Mount Laurel litigation. Lastly, plaintiff states all of the conditions are or can be fulfilled.

Thus the issue is whether the October 4, 1985 compliance order subject to conditions constitutes a final order which would preclude defendant from receiving a transfer to the Council on Affordable Housing.

Defendant claims its case is very similar to the cases decided in Hills, especially to the Hills v. Bernards litigation because of the interim order of settlement which exists in both cases. Defendant notes the only difference is that a compliance hearing was held in Far Hills but not in Bernards or any of the other cases. The fact that a compliance hearing was held is of significance. The hearing concluded the litigation. The Supreme Court in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Tp., 92, N.J. 158,290 (1983) (Mount Laurel II), described the "remedial state of Mount Laurel litigation and stated that the litigation is concluded with a judgment of compliance or non-compliance...." Defendant received an order of compliance. The litigation was therefore no longer "pending" to be

transferred to the Council on Affordable Housing pursuant to Section 16a. All of the critical issues had been resolved. The conditions contained in the order memorialize the resolution and set forth the continuing obligations of the parties pursuant to the settlement.

Mount Laurel litigation would never be resolved if final orders could not be subject to conditions because of the very nature of the remedies granted - phasing, rehabilitation, development of sale and resale mechanisms are devices which are implemented over time. The court, in effect, retains jurisdiction to make sure the conditions are fulfilled. The court does not "police" its order - but relies on the parties to come before it - generally on a motion to enforce litigants rights in the event an order is not being fulfilled.

The fact that the order does not say "final" judgment exalts form over substance. Defendants claim that its repose was not of the same quality as "final repose" - is faulty. Defendant has clearly received the benefit of Mount Laurel repose to the fullest extent. It should be remembered that the compliance hearing was contested by a potential plaintiff. Timber Properties, wanted to be a part of the litigation but the court denied the request because of the repose previously granted. Furthermore, once all of the

conditions are met, if defendant wishes to submit a formal order of repose pursuant to Paragraph 10 - defendants' repose period would undoubtedly relate back to the October 4, 1985 order. Thus, in any event, the repose granted expires on October 4, 1991. Clearly that was what all parties and the court intended. If the "quality" of final repose was somewhat different from the repose defendant has benefited from thus far, it would be entitled to repose from the date of any order subsequently submitted pursuant to paragraph 10 of the October 4, 1985 order.

The sewerage issue is clearly a red herring. If in fact Bedminster is no longer willing to cooperate voluntarily in the sewerage expansion as it represented to this court on October 4, 1985, then either plaintiff or defendant can bring Bedminster into court in a separate action. This would in no way affect the validity or the finality of the order between the parties.

Defendant argues in its reply brief that plaintiffs would have the right to seek a modification of defendants fair share obligation if by chance there was significant commercial growth in Far Hills. Whether or not this is true in light of the Fair Housing Act is questionable. Undoubtedly any party

to an order may seek modification - even vacation pursuant to R. 4:50. The right to do so does not mean modification will be granted nor does it destroy the finality of the order of October 4, 1985.

Finally, defendant seeks, in the alternative, a reduction of the fair share number. Defendant is not entitled to any reduction in the number both because it did not reserve the right to do so and because there is simply no other justification to be found. It entered into this agreement a full three months after the enactment of the Fair Housing Act. Defendant indicated on the record it was aware of its rights pursuant to the Fair Housing Act and sought to proceed with the compliance hearing without any reservation of rights. To allow defendant to reduce its number would undermine all other cases which had reached final settlements.

The bottom line of defendant's motion is a disturbing signal which, if reflective of general attitudes among our municipalities, bodes ill for those settlements already solemnly reached and for cases now pending. It bespeaks an attitude to avoid at all costs any obligation not set in concrete. It draws into question the moral commitment to do what all concede should be done - provide at least some affordable housing, recognizing we will not provide all that is needed. Matters of conscience do not necessarily dictate legal results. However, nothing short of raw expediency,

opportunism and obstructionism require that conscience be abandoned in an effort to misuse the law.

This court cannot permit itself to be part of that effort unless the decision in Hills mandates the result. I find nothing in Hills to indicate that a final judgment subject only to compliance conditions should be disturbed. Quite to the contrary, I find that is where the Supreme Court drew the line between transfer and finality. As a result that is where I draw the line subject to further clarification by our appellate courts.

The defendants motions are denied. The plaintiff's motion shall be deemed moot without prejudice.

Very truly yours,

Eugene D. Serpentelli,
A. J. S. C.

EDS:RDH
cc: George Raymond