UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al., Plaintiffs	)	
vs.	)	No. 66 C 1460
ROBERT C. WEAVER, Secretary of the Department of Housing and Urban Development of the United States, Defendant	)	

MOTION FOR LEAVE TO SUBMIT MEMORANDUM IN SUPPORT OF (A) PLAINTIFFS' REQUEST TO TAKE A DEPOSITION AND (B) PLAINTIFFS' REQUEST FOR ORAL ARGUMENT

Now come plaintiffs, by their attorneys, and move the court for leave to submit a brief memorandum (attached hereto) in support of (A) plaintiffs' request to take a deposition in connection with defendant's motion to dismiss the complaint and (B) plaintiffs' request for oral argument in connection with such pending motion to dismiss.

ALEXANDER POLIKOFF, one of
the attorneys for plaintiffs
231 South La Salle Street
Chicago, Illinois 60604
CE 6-4500

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MEMORANDUM IN SUPPORT OF (A) PLAINTIFFS' REQUEST TO TAKE A DEPOSITION AND (B) PLAINTIFFS' REQUEST FOR ORAL ARGUMENT

A. Request to Take Deposition.

One ground of defendant's motion to dismiss the complaint is the alleged failure to exhaust a supposed administrative remedy. The familiar rule is that no such exhaustion is required if a showing is made that the effort would be futile. The affidavit and exhibits filed in support of plaintiffs' answering brief make such a showing. They demonstrate that in 1965 a letter of complaint was filed (the filing of such a letter is the supposed administrative remedy) with respect to some of the very sites at issue

here, and upon grounds identical to those alleged in the complaint in this cause, and that defendant rejected the letter of complaint for reasons of general applicability.

Defendant's latest affidavit filed in support of the reply brief seeks to counter this showing by asserting that notwithstanding the rejection of the 1965 letter of complaint, defendant has considered the 1966 sites "being aware of the 1965 complaint" (paragraph 7 of the affidavit of Mr. Servaites). The same affidavit also asserts that"after conferences and discussions" the Chicago Housing Authority "withdrew" certain sites from consideration and that other sites were approved by the defendant (Ibid, paragraphs 7 and 9). The affidavit also gives what are apparently supposed to be reasons justifying such approval and states that the approved projects "have been considered as a group," whatever that may mean (Ibid, paragraph 9). The intended thrust of the affidavit is patently to show that it would not have been futile to complain about the 1966 sites, notwithstanding defendant's rejection of the 1965 letter of complaint.

The affidavit creates these three issues:

(a) Were some of the 1966 sites rejected by the defendant or withdrawn voluntarily by CHA?

(b) If the sites were rejected by the defendant, was it because of the considerations advanced in the complaint in this cause or because of other, unrelated considerations?

(c) Are the reasons given in paragraph 9 of the Servaites affidavit for defendant's approval of some of the 1966 sites sufficient to justify approval in light of the considerations advanced in the complaint, or do such approvals further support plaintiffs' position that it would have been futile to complain to the defendant?

Plaintiffs are clearly entitled to explore these questions by means of a deposition and to have the Court consider such deposition before it rules on the pending motion. Federal Rule 12(b) provides that if,

on a motion such as defendant's,

> "..matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56,..." (emphasis supplied.)

When Rule 12(b) was amended in 1946, the Advisory Committee notes on the amendment included the following statement:

> "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs...." 2A Moore's Federal Practice, p. 2213, emphasis supplied.

The procedure provided by Rules 12(b)(6) and 56 has been specifically approved and adopted by the Court of Appeals for the 7th Circuit in Huke v. Ancilla Domini Sisters, 267 F.2d 96, 97 (C.A. 7, 1959). Indeed, the courts have observed that one who resists summary judgment cannot proceed on suspicion alone without discovery but that he "must

utilize discovery" if he does not wish to be bound by his opponent's affidavits. Robin Constr. Co. v. U.S., 345 F.2d 610, 614 (C.A. 3, 1965); discussed at 6 Moore's Federal Practice, p. 2879.

It would be unfair for the Court to resolve the issue of futility on the basis of the conclusory and ambiguous affidavit which the defendant has submitted on this issue without having given plaintiffs an opportunity to discover the relevant facts which underlie the affidavit.

B. Request for Oral Argument.

(1) On the issue of standing.

A brief oral argument on the issue of standing under the 5th Amendment to the Constitution is appropriate because the briefs have not joined issue on this question but proceed on different theories. Defendant argues as if this were a suit based on alleged violations of the Federal Housing Act like Harrison-Halsted Community Group v. Home Financing Agency, 310 F.2d 99 (C.A. 7, 1962). Plaintiffs'

position is that this is not an action like Harrison-Halsted for violation of any provisions of the Housing Act (which is not even mentioned in the complaint), but an action based on the violation of their individual rights under the Fifth Amendment to the United States Constitution not to be discriminated against on racial grounds. In this respect the case is procedurally identical to Bolling v. Sharpe, 347 U.S. 497 (1955), in which it was held that plaintiffs had standing to sue directly an agency of the federal government which was alleged to be discriminating on racial grounds in the operation of a school system. The principle is that "'the action of an officer of the sovereign. . .can be regarded as so'illegal' as to permit a suit for specific relief against the officer. . .if the powers, or their exercise in the particular case, are constitutionally void.'" Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 140 (1951), holding that the plaintiff had standing to sue directly an officer of the

federal government whose actions were alleged to violate the plaintiff's Fifth Amendment rights.

(2) On the issue of administrative remedies.

Issue has now been joined by the parties on the factual question of whether it would have been futile to attempt to employ the alleged administrative remedy with respect to the 1966 sites. Since plaintiffs are entitled to develop the facts in this regard before a ruling on the defendant's motion (see Section A above), a brief oral argument will be appropriate following the development of such facts not now before the Court.

* * * *

For the reasons herein given plaintiffs respectfully urge that they be permitted to take the deposition they have requested and that thereafter they be given an opportunity to address the Court briefly prior to the Court's decision on the pending motion.

Respectfully submitted,

ALEXANDER POLIKOFF, one of
the attorneys for plaintiffs
231 South La Salle Street
Chicago, Illinois 60604
CE 6-4500

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Defendant

Original to Judge Austin's Minute Clerk at 11:35 AM, 6-20-67.

NOTICE

TO: Edward V. Hanrahan
United States Attorney
Room 1500, U.S. Courthouse
Chicago, Illinois 60604

PLEASE TAKE NOTICE that on Wednesday, June 21, 1967, at the opening of court or as soon thereafter as counsel may be heard, I will appear before Judge Richard B. Austin in the courtroom usually occupied by him in the United States Courthouse, 219 S. Dearborn Street, Chicago, Illinois, or before such other judge who may be sitting in his place and stead, and then and there move the court for leave to submit a Memorandum, a copy of which is attached hereto.

ALEXANDER POLIKOFF, one of the attorneys for plaintiffs

RECEIVED a copy of the above Notice and Memorandum attached this 20th day of June, 1967.

Assistant United States Attorney