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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DOROTHY GAUTREAUX, ODELL JONES,)
DOREATHA R. CRENCRAW, EVA RODGERS,)
JAMES RODGERS, ROBERT M. FAIRFAX)
and JIMMIE JONES,)

Plaintiffs,)

vs.)

THE CHICAGO HOUSING AUTHORITY, a)
Corporation, and ALVIN E. ROSE,)
Executive Director,)

Defendants.)

CASE NO. 66 C 1459

RECEIVED

APR 5 1968

ELBERT A. WAGNER, JR., CLERK

UNITED STATES DISTRICT COURT

REPLY BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO AMEND THE COMPLAINT

Defendants' brief in opposition is a "low blow". It says the complaint is sought to be amended "because the attorneys have had an afterthought" (p.6.), although the "afterthought" was that of defendants' own attorneys. It implies that the motion to amend is too late because the complaint has been on file more than 1 1/2 years (p.1.), although defendants' own conduct made an earlier amendment unnecessary. And it asserts that defendants will be "prejudiced" by the granting of the motion because they will have to conduct some additional discovery (p.5.), although they participated in plaintiffs' discovery on discriminatory tenant assignment practices for almost six months and could - and should - have conducted their

own discovery during that time.

In any event, as we will show, defendants will not in fact be prejudiced by the amendment, which is the only valid reason under the cases for denying leave to amend.

I. The "Afterthought" was Defendants.

The complaint charges the defendant Chicago Housing Authority ("CHA") with keeping Negroes out of white neighborhoods. It charges that this was done by locating housing projects almost exclusively in Negro neighborhoods. When the complaint was filed plaintiffs' counsel did not know (affidavit in support of original brief, ¶3) that another way this was done was by keeping Negroes out of the few projects which had long ago been located in white neighborhoods. Counsel uncovered facts on this subject only during discovery, while preparing to oppose CHA's motion to strike the complaint (ibid.).

In light of this Court's ruling of March 2, 1967, that plaintiffs must prove "that defendants were prompted in their selection of sites at least in part by a desire to maintain concentration of Negroes in particular areas or to prevent them from living in other areas," it was plain that proof of defendants' desire to prevent Negroes from living in the few old projects in

white neighborhoods would be impressive evidence that the location of practically all the newer projects in Negro neighborhoods was not just an accident. Accordingly, plaintiffs set out to gather such proof. Each of the following requests for documents, and the interrogation of Mr. Humphrey, included the subject of discriminatory tenant assignment (affidavit attached to this brief, ¶2).

1. Documents requested of CHA on May 24, 1967; supplied on June 20, 1967.
2. Documents requested of CHA on July 5, 1967; supplied on July 27, 1967.
3. Documents requested of CHA on September 26, 1967; supplied on October 10, 1967.
4. Deposition of Mr. C.E. Humphrey, then Deputy Executive Director of CHA, taken on July 10, 1967.

(Plaintiffs devoted considerable time to searching for documents on this subject in order to be able to make the above requests, and paid CHA charges for copies of the documents furnished.) Thus, it could not have been clearer, as shown by CHA's own participation in discovery, that the issue of discriminatory tenant assignment was "in" the case.

In normal course, plaintiffs would have been entitled to amend the pleadings at the conclusion of discovery or, under Federal Rule 15(b), to conform to their proof at trial. However, the

situation changed suddenly on November 13, 1967. On that date CHA for the first time took the position that it would not permit discovery on the subject of tenant assignment. This occurred during the deposition of a CHA employee who was instructed not to answer a question on that subject. Counsel for CHA said,

"I have changed my view, and I am affording you the opportunity to raise this with the Judge if you so desire." (Attached affidavit, ¶3.)

Clearly, therefore, the change of view - the afterthought - was that of CHA, not the plaintiffs.

II. There has Been no Delay Since CHA's Change of Position.

On November 29, 1967 (two weeks after CHA's change of position), at the suggestion of CHA, the deposition then being taken of Mr. Swibel, Chairman of the CHA, and all other scheduled depositions, were adjourned by agreement of the parties for the purpose of conducting settlement discussions. Such discussions continued until February 8, 1968, when they were terminated. (Attached affidavit, ¶4.) The motion for leave to amend the complaint was filed on March 4, 1968.

Thus, most of the time between the CHA's change of position and the filing of the motion to amend was taken up with settlement

discussions. Following the termination of settlement discussions plaintiffs moved promptly (within 3 1/2 weeks) to amend the complaint.

Moreover, delay (even if there were any) would not be a ground for denial of the motion.

"No case in this circuit has been found which holds that delay in itself warrants refusal of leave to amend." A.L.B. Theatre Corporation v. Lowe's Incorporated, 21 F.R.D. 584, 586 (D.C. N.D., Ill., 1951).

III. There is No Prejudice.

The cases in this circuit (see our original brief - defendants cite mostly cases from other circuits*) make it clear that the only ground for denying leave to amend is prejudice. The only "prejudice" which is referred to in the answering brief is defendants' assertion that they will have to conduct some additional discovery, for which there is ample time before trial.

* Defendants have cited five cases for the proposition that "amendment should not be allowed when its proponent has not been reasonably diligent and the rights of the opposing party will be unduly prejudiced or the trial of the issues unduly delayed" (p.4). Three of these cases - Rupe, Woldow and Hirshhorn - allowed amendment. A fourth - Eisenmann - while finding undue delay, held that the amendment did not state a claim on which relief could be granted. The fifth - Klee - found that an amendment raising the issue of the federal court's lack of jurisdiction would unduly prejudice the other party, since the statute of limitations for bringing the action in the state court would expire in 4 days. This was real prejudice; defendants here can make no such showing.

This is not "prejudice" in the sense in which that term is used in relation to amendments to pleadings.

"The fact that defendant may be put to more discovery proceedings or that plaintiff's amendment may embrace new facts, or even entirely new and independent cause of action, is no objection." International Ship Supply Co., Ltd. v. American Tobacco Co., 11 F.R.Serv. 2d., 15a.21, Case 2 (D.C.E.D. Pa., 1967).

"The fact that the defendants might have to undertake some discovery proceedings and have time within which to answer is not sufficient reason for denial of the motion." Cunningham v. Jaffe, 37 F.R.D., 431, 435 (D.C.W.D. S.Car., 1965).

In Fli-Fab, Inc. v. United States, 16 F.R.D. 553 (D.C. Rh.Is., 1954), the court said:

"Plaintiff contends vigorously that the defendants have been guilty of inexcusable delay in making the allegations they now seek to plead and that to permit the amendment would substantially enlarge and change the nature of the trial of this case in such a manner that would seriously prejudice their rights ...

"A cursory reading of the complaint is sufficient to show that the factual matters involved herein are numerous, complex and probably difficult of ascertainment. From their very nature they are peculiarly within the knowledge of the plaintiff. It is not unreasonable to assume that the proper investigation thereof required a long period of time. Under the circumstances I cannot find that the defendants have been guilty of inexcusable delay as claimed by the plaintiff. Delay, inexcusable or excusable, is not alone sufficient to warrant denial of leave to amend. There must also

be a showing that as a result thereof the rights of the plaintiff would be prejudiced if the amendment were allowed.

"While it is true that the allowance of the proposed amendment will present a question which may require additional preparation for trial by both the plaintiff and defendants, this is clearly no ground for denial of the motion of the defendants. The issues sought to be raised have been known to the plaintiff since September, 1952 ...

"There is no showing in the affidavit filed in support of plaintiff's objection to the motion that the delay of the defendants in requesting leave to amend would prejudice the plaintiff in presenting evidence to support the deductibility of said alleged losses. There is no indication that the officers of the plaintiff who are familiar with the sale of the plant and other assets and the transfer of the note are not available as witnesses. No claim is made that any pertinent records relating thereto are missing or incapable of production ...

"It is my considered judgment that the plaintiff will not be prejudiced by the allowance of leave to amend and that justice in the present case will be furthered if said leave is granted."
(16 F.R.D., at 556-57.)

Here too, the factual matters involved are numerous, proper investigation has taken time (plaintiffs not having been aware of the facts when the complaint was filed), the facts are peculiarly within the knowledge of CHA, the issue has been known to CHA since at least December 15, 1966 (when an affidavit on the subject was filed), and there is no indication that any of the officers of

CHA who are familiar with the facts are not available or that any records are missing. These holdings are especially applicable here since (as we have shown above) the amendment does not really "embrace new facts." The issue of discriminatory tenant assignment has been "in" the case for a very long time, defendants have participated in plaintiffs' discovery on that subject, and defendants have only themselves to blame for not having engaged in discovery on the subject before now.

In addition (although for reasons already given the fact is irrelevant), defendants have overstated the amount of additional discovery which will be required. Defendants have completed only four depositions; three of those deponents will not testify on the subject of tenant assignment, and plaintiffs will so stipulate. The only other witnesses (apart from CHA's own officers) plaintiffs presently expect to testify on this subject are two former employees of CHA. One has already filed an affidavit in this case and defendants have long been aware of the substance of her proposed testimony; and CHA has already indicated that it may take the deposition of the other in any event, quite apart from the motion to amend (attached affidavit ¶5).

Thus, there is no factual basis for an argument of prejudice.* The entire subject of tenant assignment is preeminently a matter of CHA's own policies and procedures as to which little discovery by CHA should be needed. The parties have previously agreed that any further depositions desired by either side are to be taken between April 9 and May 20, 1968. Surely there is ample time during this period of almost a month and a half for CHA to conduct any additional discovery it may wish.

CONCLUSION

In Foman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court said:

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice

* Defendants have not supported their claim of prejudice with an affidavit or otherwise. In County Theatre Co. v. Paramount Film Distributing Corp., 166 F.Supp. 221, 224 (D.C. E.D. Pa., 1958), the court said:

"Even though plaintiff has not been diligent in waiting 17 months to move for this amendment, this defendant (Fox-Delaware) has not shown that this delay has resulted in any prejudice or harm to it. If it can make such a showing, Fox-Delaware may apply for a continuance of the scheduled trial date."

(2d ed. 1948), §§ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

The cases in this circuit make it clear that amendments to pleadings are to be permitted unless prejudice would result. In this case, as we have shown, a claim of prejudice can hardly be made with a straight face. The facts were not known when the complaint was filed; discovery ensued, during which the facts were uncovered; there was then a jointly agreed upon "moratorium" for settlement discussions; and the motion to amend was filed promptly after such discussions ended and four months before the

scheduled trial date. It is inconceivable that any case could be found which denied leave to amend on facts such as these.

Respectfully submitted,

Alexander Polikoff

One of the attorneys for the plaintiffs
231 South LaSalle Street
Chicago, Illinois 60604
Central 6-4500

PROOF OF SERVICE

RECEIVED a copy of the foregoing Reply Brief in Support of Plaintiffs' Motion for Leave to Amend the Complaint and supporting Affidavit this _____ day of April, 1968.

Attorney for Defendants

UNITED STATES DISTRICT COURT
FOR THE
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Defendants.)

AFFIDAVIT

ALEXANDER POLIKOFF, being duly sworn upon oath, deposes
and says that:

1. He is one of the attorneys for the plaintiffs in
this case.

2. From documents supplied by CHA, and through depositions
taken in the discovery process and other investigation, all
subsequent to the filing of the complaint, he has found evidence
that CHA did prevent Negroes from living in existing housing
projects in white neighborhoods.

3. On November 13, 1967, during the deposition of Calvin
Hall, a CHA employee, CHA counsel for the first time instructed
a deponent not to answer questions on the subject of tenant

assignment and said, "I have changed my view, and I am affording you the opportunity to raise this with the Judge if you so desire."

4. On November 29, 1967, at the suggestion of CHA, the deposition then being taken of Mr. Swibel and all other scheduled depositions were adjourned by agreement of the parties for the purpose of conducting settlement discussions. Such discussions continued until February 8, 1968, when they were terminated.

5. Plaintiffs' witnesses on the subject of discriminatory tenant assignment, other than CHA officers, are expected to be Kale Williams, Tamaara Tabb and Edward Holmgren. Tamaara Tabb has filed an affidavit in the cause on such subject, and counsel for CHA has previously indicated that CHA may take the deposition of Edward Holmgren.

Alexander Polikoff

Subscribed and sworn to
before me this _____
day of April, 1968.

Notary Public