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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable _____

Cause No. 66 C 1460 Date Sept. 1, 1970

Title of Cause Gautreaux v Romney, etc.

Brief Statement of Motion Advisement

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

SEP 2 · 1970

Pursuant to the Court's memo filed this day deft's motion to dismiss is sustd and the complaint is dismissed.

Austin J.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,

Plaintiff,

vs.

GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development of the United States,

Defendant.

NO. 66 C 1460

M E M O R A N D U M

The allegations of this complaint concern the same discriminatory pattern of public housing site selection considered by this court in the companion case and which was found to violate the Fourteenth Amendment to the Constitution. Gautreaux v. Chicago Housing Authority, 269 F. Supp. 907 (1969) and 304 F. Supp. 736 (1969). Proceedings in the instant suit against the Secretary of the Department of Housing and Urban Development were stayed pending resolution of that earlier suit. Ruling on defendant's pending motion to dismiss, plaintiffs' motion to consolidate and for discovery were deferred. The earlier suit having come to judgment, defendant has renewed its motion to dismiss, which is to be treated as a motion for

summary judgment under Rule 12(b), F.R.C.P. The plaintiffs have withdrawn their motions and have filed a motion for summary judgment which seeks to add the Chicago Housing Authority as a party defendant.

The amended complaint seeks a declaratory judgment that the defendant Secretary has "assisted in the carrying on, and . . . continues to assist in the carrying on, of a racially discriminatory public housing system within the City of Chicago" by granting federal financial assistance. ¶¶ 2, 20, Amended Count I. It is requested that defendant be permanently enjoined from further funding. The inappropriateness of that type of relief, however, has been conceded by all parties.

Although not expressly conceded, infirmities exist in Counts III and IV which are identical to those counts in 66 C 1459 wherein the court held that there was a failure to state a claim absent allegations of intentional and deliberate discrimination. Gautreaux v. C.H.A., 265 F. Supp. 582, 584 (1967).[1/] Accordingly, the motion to

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1/ "A public housing program conscientiously administered in accord with the statutory mandate surrounding its inception (Ill. Rev. Stats., Ch. 67-1/2, §§1, 2 et seq.) and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing patterns of racial concentration in housing, however desirable such alterations may be. A showing of affirmative and discriminatory state action is required. * * *"

dismiss Counts III and IV is granted.

The renewed motion to dismiss as to Counts I and II is premised on five grounds: (1) that plaintiffs do not have standing or a capacity to sue this defendant; (2) that plaintiffs have failed to exhaust their administrative remedies; (3) for failure of jurisdiction over the subject matter; (4) for failure to state a claim upon which relief can be granted; and (5) for failure to join an indispensable party, i.e. the Chicago Housing Authority under Rule 19. The last ground is now obviated by plaintiffs request for such joinder and in the light of Powelton v. HUD, 284 F. Supp. 809, 814 (D.C. Pa., 1968); Bro. Locomotive Engrs. v. Denver & R.G.W., 290 F. Supp. 612, 615 (D.C. Colo. 1968); Kletschka v. Driver, 411 F. (2d) 436, 442 (C.A. 2, 1969); and unpublished opinion of my learned colleague Judge Hoffman in Inmates of Cook County v. Tierney, 68 C 504, this court would hold the joinder proper if the complaint withstands the other grounds of defendant's motion. In addition, the court having previously held in the earlier action (265 F. Supp. 582, 583) that said plaintiffs have standing to sue the Chicago Housing Authority also holds that the same considerations must govern in this action and that standing exists in this suit. Data Processing v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397

U.S. 159 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Flast v. Cohen, 392 U.S. 83 (1968).

There remains the troublesome question of jurisdiction and failure to state a claim upon which relief can be granted. Count I of the Amended Complaint invokes the court's jurisdiction under §1331, 28 U.S.C. in that the "rights sought to be secured in this action are rights guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States" and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs. 2/

Defendant contends there is lacking the requisite jurisdictional amount because no single plaintiff has an interest approaching $10,000 in any of the subsidies which the defendant has granted. Plaintiff responds that the amount in controversy is to be gauged by the "pecuniary result to either party which the judgment would directly product" and in any event the rental interest of one of the plaintiffs, Robert M. Fairfax, who has been a tenant

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2/ §1331. Federal Question; amount in controversy; costs. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

in CHA housing since 1945 would to date equal the sum of $15,000 even if it averaged $50 per month. (Reponse Brf. to Reply, p. 2 fn) Neither approach is sound. The rule governing dismissal for want of jurisdictional amount is that, unless the law gives a different rule, the sum claimed by the plaintiff in good faith at the time of filing controls. 1 Moore Fed. Prac. ¶0.91, pp. 825-828. Cf. Giancana v. Johnson, 335 F. (2d) 366 (C.A. 7, 1964), cert. den. 379 U.S. 1001. A monetary value is difficult to assess in cases where violation of fundamental constitutional rights is alleged, and it does not appear in this instance that the allegation is not made in good faith. Further, aggregation in class actions is permitted where "one or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest". Snyder v. Harris, 394 U.S. 332, 335 (1969); Brown v. Trousdale, 138 U.S. 389 (1891). Where "the action is based on a public right, not on personal claims, the amount in controversy is the aggregated claim of the class, that is, the public's claim". 3A Moore Fed. Prac. ¶23.13, p. 3482; cf. Potrero Hill Community Action v. Housing Authority of City and County of San Francisco, 410 F. (2d) 974, 977, (C.A. 9, 1969).

From the argument that plaintiffs have standing to sue under the Fifth Amendment, plaintiff asserts that it is beyond dispute that an aggrieved citizen may sue a federal official for violation of his rights thereunder. In citing Bolling v. Sharpe, 347 U.S. 497 (1953) the plaintiff finds support for the application of the Fifth Amendment due process clause to that of the equal protection clause of the Fourteenth Amendment. The Supreme Court of the United States in that case dealt with the validity of segregation in the public schools of the District of Columbia. In holding that the District, being a body politic apart from the States, and thus not under the inhibition of the Fourteenth Amendment equal protection clause, the Supreme Court applied the Fifth Amendment due process clause because (p. 500)

> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. * * *"

In making that application, the Court said: (p. 498)

> "We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable to the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts

> of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of laws' is a more explicit safeguard of prohibited unfairness than "due process of law' and therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized discrimination may be so unjustifiable as to be violative of due process. * * *"

Thus because of the unique status of the District of Columbia the Fifth Amendment was directly applied to implement desegregation of the public school in that district.

This is not to say that the Fifth Amendment does not apply as a restraint against federal officials, but its application has been confined to their actions as exercised under statutory authority apart from the Amendment alone, and except as such authority was exercised in violation thereof or under the common law. This is borne out by the plaintiffs cited cases of Schneider v. Rusk, 377 U.S. 163 (1963) wherein the Supreme Court of the United States held unconstitutional a section of the Immigration and Naturalization Act which resulted in loss of American citizenship acquired through naturalization by continuous residence for three years in the country of origin whereas an American born citizen did not suffer the same consequence. In Kent v. Dulles, 357 U.S. 116 (1958) a passport was denied under a regulation precluding granting the same to members

of the Communist party. The Court concluded that no statute delegated to the Secretary the kind of authority he exercised in promulgating the regulation and that he acted beyond his authority. In Flast v. Cohen, 392 U.S. 83 (1969) the expenditure of tax monies to finance instruction and instructional materials in religious schools was alleged to be in excess of the Secretary's authority under the Elementary and Secondary Education Act of 1965 and also that if such action was within the Act, then the Act was to that extent unconstitutional and void.

These cases found their premise for jurisdiction in unauthorized or undelegated exercises of power under existent Congressional statutes. With the exception of Bolling v. Sharpe, supra, they come within the exceptions to the right to sue the sovereign and find their premise not in the Fifth Amendment alone or any other Constitutional amendment, but in the circumscribed exercise of delegated authority under legislative enactments. From the passage of the Civil Rights Act, it also appears that Congress recognized that the Constitution in itself is not the source for authorizing a cause of action. No statutory premise is here alleged in Count I. Plaintiff stresses heavily that liability is on the basis of "joint participation" with the Chicago Housing Authority in perpetuating

a racially discriminatory public housing pattern, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1960).

The court holds that the Fifth Amendment in the circumstances here alleged by this suit does not authorize suit against the defendant Secretary and the general federal question jurisdiction section does not confer authority for such suit. Therefore, Count I fails to state a claim over which this court has power to exercise jurisdiction or to grant relief and the same is dismissed.

Count II is premised on §1331 and §1343(4),[3/] 28 U.S.C. in that the "rights sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to-wit, Title 42 U.S.C. §2000d[4/] [Section 601, Title VI of the Civil Rights Act of 1964] and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs."

3/ "§1343(4). Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4/ §2000d, 42 USC. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Under §2000d-1, 42 U.S.C., the Secretary was authorized to promulgate rules and regulations to effectuate such non-disciminatory action in any fed rally funded program. Compliance therewith

> "may be effected (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, * * * or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. * * *"

In meeting the government's contention that there exist genuine issues of material fact which preclude entry of summary judgment, plaintiff states that its motion for summary judgment admits that defendant made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods" and therefore no dispute exists as to any material fact. The only issue remaining is whether despite these salutary efforts on the part of defendant, did the continued approval and funding of a discriminatory housing program make the defendant a joint participant in the violations which CHA has been found to have committed; or, should the defendant in order to absolve itself

of any of the illegal aura permeating CHA action have terminated federal financial assistance or followed another method as authorized under the Civil Rights Act §2000d-' in lieu of continued funding and approval.

Plaintiff seeks to ground his claim for injunction to terminate funding on the theory of joint participation as found to exist in Burton v. Wilmington Parking Authy., supra. Burton had been refused service by a restaurant operator who leased premises from an agency of the State of Delaware. The building in which the restaurant was located was on public land, was built with public funds for public purposes, and was owned and operated by an agency of the State. The court held that when a State leases property, the proscription of the Fourteenth Amendment must be complied with by the lessee, stating (p. 725):

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. * * * By its inaction the Authority and through it the State has not only made itself a party to the refusal but elicited to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle (leased restaurant) that it must be recognized as a joint participant in the challenged activity which on that account cannot be considered to have been purely private as to fall

without the scope of the Fourteenth Amendment." It is of importance to note that joint participation was applied where a private party violated constitutional rights and wherein the government by virtue of its identity with such private party had been held to be a party to such private act; i.e., such private party stands in the shoes of the public entity. Simkins v. Cone Memorial Hosp., 323 F. (2d) 959 (C.A. 4, 1963); Colnon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (D.C.N.Y., 1968). Thus, evidentiary hearings were held in Burton to "sift" facts as to whether private discriminatory conduct was imbued with governmental participation and to determine whether such private being became an instrumentality of the government. The CHA is a public body performing a governmental and public function and we are thus not concerned with the "sifting" process to determine whether the acts of any private party were the acts of CHA or those of the federal government. But, plaintiff urges that CHA was found responsible in the earlier action although the acts fostering the illegal conduct were those of the City Council and that the measure of this defendant's liability must be the same. However, the responsibility of CHA was based on the theory of agency. Thus in Cooper v. Aaron, 358 U.S. 1 (1958) where the good faith attempts of the school district in

desegregating was being frustrated by other state officials, the Court said:

> ". . . it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of respondents when vindication of those rights was rendered difficult or impossible by the actions of other state officials . . ." pp. 15-16.

They were held to be agents of the State even though the acts of the Governor and the Legislature made impossible the implementation of the desegregation of the public schools. Indeed, in the companion case CHA could not act without the City Council in the performance of its governmental function.

The court is asked to extend the joint participation principle of Burton to the approval and funding, with attendant supervision, of the Department of Housing and Urban Development, an executive department of the federal government. In effect, under the Burton analogy, that the acts of the Chicago Housing Authority and the Chicago City Council were the acts of the federal government; that in the performance of their governmental functions they became the instrumentalities of the federal government and thus their acts became the acts of the federal government. To state such a propposition is to

reveal its inapplicability. Except as the separate acts of each are the result of concerted action to commit the tort of discrimination, joint participation cannot be extended to separate and distinct political entities and sovereignties each of whom are autonomous in their governmental functions. No such activity on the part of separate governmental entities can be equated to the Burton application. It is an ever-recurring fact that federal governmental financing is granted with greater frequency where needed to improve the condition of citizens of states, counties and cities, without thereby making the federal government a partner in the end result. Funding and approval have not so reached into the operations of CHA so as to make its functions federal governmental functions. If this were so, every federal funding, accompanied by supervision, would per se become a federal function and subsequent use become federal action. Even Hicks v. Weaver, 302 F. Supp. 619, (D.C. La. (1969) does not so hold.

The court is confronted, however, with a defendant who made efforts to correct the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take.

Justification for such action was made because

> ". . . faced with the tough dilemma of accepting some other sites proposed by the authority that were believed to be lawful but not optimal, or rejecting those sites and depriving potential housing tenants of improved shelter, HUD chose the former alternative."

In this court's view, the essence of defendant's wrong, if any, is not continued funding and approval but a purported dereliction of a stated statutory duty under §2000d-1, i.e., HUD could have terminated funding or have used other means to insure compliance. Cf. United States v. Frazier, 297 F. Supp. 319 (D.C. Ala., 1968). The fact that the Secretary did not pursue either of those steps does not result in making him a joint participant with CHA.

While the suit is not couched in the remedy to enjoin an official act on the ground that it was not within the authority conferred upon the defendant, or that it was an improper exercise of such authority, or that Congress lacked power to confer the authority, it is in reality such an action and the only action which plaintiff can bring against this defendant. The court believes that plaintiffs have misconceived the remedial claim which should be taken and Count II of the amended complaint is dismissed for failure to state a claim upon which relief can be granted.

Because many of the amici and plaintiffs themselves have through their briefs emphasized the importance and necessity of this defendant's supervision through a precisely formulated decree, the court feels their plea must be dealt with at this time even though nothing remains of the action upon which to premise that relief. Therefore, even if the action were alleged to be in derogation of defendant's statutory duty and power, and even if the court were to find that such duty and power were exercised in violation of plaintiffs' rights, the effect of the remedy sought as disclosed by plaintiffs and amici will be considered.

Where an agent or officer of the government purporting to act on its behalf have been held to be liable for his conduct which caused injury to another, the ground of liability must be found either in that he exceeded his authority or that it was not validly conferred. The action is therefore a personal action against the officer and not an action against the United States and an injunction against that officer is not against the sovereign for the sovereign cannot be enjoined.

The critical consideration is not the identity of the parties, however, but rather the result of the judgment or decree which might be entered. Minn. v. Hitchcock, 185 U.S.

373, 387 (1902). The perimeter of such remedy has been set forth in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"

Plaintiffs and amici contend that if HUD can feasibly contribute to a prompter remedy than that contained in the decree heretofore entered against CHA which would accelerate desegregation of public housing in Chicago and create more new low income housing not only in the central city but in the General Public Housing area encompassing the remainder of Cook County [304 F. Supp. 736, 737], then they are entitled to an order calling for such efforts. Thus, the remedy should be framed with respect to that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago Housing Market area; that the order "will fashion the means of dealing with a major societal problem" which problem is that of increasing segregation of the races in the Chicago Metropolitan housing area and the serious lack of low income housing. Reference is made to major governmental study commissions which have reported on evidence that the problem is not confined to the central

city but that much of that problem is engendered through existence of a circle of surrounding white suburbs.

Buttressed by these scholarly reports, the plaintiffs appeal to this court is found in the language of the Supreme Court of the United States in Louisiana v. United States, 380 U.S. 145, 154 (1964):

> "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

However, even that case does not give free license to the court to determine and encompass issues not existent in the complaint before it. [See Fn. 17, p. 154].

It appears clear to this court that the relief so earnestly desired by plaintiffs and amici would entail a decree operative against the defendant in his official capacity and not otherwise. The relief sought would not be effected by merely ordering the cessation of conduct. Cf. Hicks v. Weaver, supra. The defendant Secretary could satisfy the suggested methods of implementation to be contained in this decree only by acting in his capacity as Secretary of the Department of Housing and Urban Development in discharging the myriad functions and programs entrusted to him by Congress.

This court does not have jurisdiction to direct

and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention.

Although the preceding consideration is not required in the light of the disposition made of the pending motions, the egregious problem involved and adjudged in the companion case, and the earnest and dedicated efforts of counsel for plaintiffs and amici to seek implementation of corrective efforts already in effect, impels this court to explore the putative limits of its powers and in so doing finds them effectively circumscribed.

An order has this day been entered sustaining the defendant's motion to dismiss and dismissing the complaint.

Judge, United States District Court

Dated: September 1, 1970.

Messrs. Alexander Polikoff, Charles R. Markels, Bernard Weisberg, Milton I. Shadur and Merrill A. Freed, for Plaintiffs [109 North Dearborn];

Calvin P. Sawyier, Esq. for The Metropolitan Housing and Planning Council of Chicago, as amicus curiae, [53 West Jackson];

Messrs, Richard F. Babcock, Chas. A. Bane, Hammond E. Chaffetz, Allison S. Davis, James L. Harris and Edwin A. Rothschild for Lawyers' Committee for Civil Rights Under Law (National and Chicago Offices); The Urban Coalition; NAACP Legal Defense and Education Fund, Inc.; National Committee Against Discrimination in Housing, Inc., all as amici curiae [53 W. Jackson, 69604)

Robert L. Stern, Esq. for Urban Law Institute of George Washington Institute of George Washington University and Citizens Advocate Center as amici curiae [231 S. LaSalle St., 60603]

Messrs. Edward H. Hickey and Ellis A. Ballard for Urban Affairs Committee of the Chicago Bar Association as amici curiae (29 S. LaSalle St., 60603]

F. Willis Caruso, Esq. for Leadership Council for Metropolitan Open Communities amicus curiae [155 North Wacker Drive, 60606]

Stuart Bernstein, Esq. for The League of Women Voters of Illinois as amicus curiae [231 S. LaSalle St., 60604];

Hon. Thomas A. Foran, United States District Attorney, Chicago, for Defendant.

A TRUE COPY ATTEST
ELBERT A. WAGNER, JR., CLERK
BY:

Mary Ellen Noyes

DEPUTY CLERK, U.S. DISTRICT COURT
NORTHERN DISIRICT OF ILLINOIS
DATE: SEP 3 1970