

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The Inclusive Communities Project, Inc., *
Plaintiff, *
v. *
*
The Texas Department of *
Housing and Community Affairs, and *
Michael Gerber, *
Leslie Bingham-Escareño, *
Tomas Cardenas, *
C. Kent Conine, *
Dionicio Vidal (Sonny) Flores, *
Juan Sanchez Muñoz, and *
Gloria L. Ray in their official capacities, *
Defendants. *

Civil Action No. 3:08-CV-0546-D

PRETRIAL ORDER

LR 16.4.a. a summary of the claims and defenses of each party.

ICP's summary of its claims.

ICP alleges that TDHCA has disproportionately approved tax credits for low-income housing in minority neighborhoods and has denied applications for non-elderly low-income housing in predominately Caucasian neighborhoods; that 92% percent of all LIHTC units in the city of Dallas are in census tracts where more than one-half of the population is minority; that TDHCA has discretion in determining which proposed projects receive tax credits, and that TDHCA improperly takes race into account (both of the neighborhood and of potential residents), perpetuating racial segregation in Dallas housing; that defendants made housing and financial assistance for housing construction unavailable because of race, in violation of the Fair Housing Act; and that defendants used race as a factor in their allocation of tax credits, in

violation of the Fourteenth Amendment, actionable under § 1983, and § 1982, which requires that defendants give all United States citizens the same right to lease property as Caucasian citizens.

ICP requests broad equitable relief. ICP recognizes that in the event TDHCA is found liable, the defendants should be given the opportunity to propose a remedial plan for consideration.

ICP objects to defendants' attempt in its summary of defenses to reurge the 11th Amendment immunity issue that defendants have withdrawn from consideration. ICP suggests that the Court decide the issue on the briefing and Appendix previously submitted by the parties.

Defendants' summary of defenses.

The Texas Department of Housing and Community Affairs ("TDHCA") and several of its current or former board members and its Executive Director, each sued only in their official capacities (the "Individual Defendants") (TDHCA and the Individual Defendants, may sometimes hereinafter be collectively referred to as the "Defendants"), contend as follows:

The Defendants have not discriminated on the basis of the race either of the likely tenant population nor that of the surrounding community in their allocation of credits under the Low Income Housing Tax Credit ("LIHTC") program established under Section 42 of the Internal Revenue Code, 26 U.S.C. § 42. Plaintiff ICP has not proved, nor will it be able to prove at trial, that Defendants, in their administration of the LIHTC program have violated either §§ 3604(a) or 3605(a) of the Fair Housing Act, 42 U.S.C. §§ 3604(a), 3605(a). Nor has ICP proved, nor will it be able to prove at trial, that Defendants have violated the Fourteenth Amendment of the United States Constitution, actionable under 42 U.S.C. § 1983, or the requirements of 42 U.S.C. § 1982.

Section 42 of the Internal Revenue Code directs each state's housing credit agency (in this case for the State of the Texas, the TDHCA) to establish a Qualified Allocation Plan (a "QAP") for the allocation of LIHTC credits which, among other matters, must -

- (i) set[] forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,
- (ii) give[] preference in allocating housing credit dollar amounts among selected projects to-
 - (I) projects serving the lowest income tenants,
 - (II) projects obligated to serve qualified tenants for the longest periods, and
 - (III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan.

26 U.S.C. §42(m)(1)(B). In Texas the Legislature has authorized and directed the TDHCA to propose on an annual basis a QAP, after an opportunity for public review and comment, for approval by the Governor. That authority has been set forth in the provisions of the Texas Government Code (the "Code"), has been amended from time to time since the inception of the LIHTC program in 1986, and is currently found in the provisions of Subchapter DD of Chapter 2506 of the Code.

Plaintiff, Inclusive Communities Project, Inc. ("ICP"), does not challenge either TDHCA's QAPs or the state and federal legislative choices reflected in those plans. Further, ICP has expressly stated that it does not base its complaints upon the provisions of 42 U.S.C. § 3608(d) which generally obligate federal agencies in their housing programs to affirmatively

further fair housing goals.

Considering these two important clarifications by ICP in its briefing before this Court, ICP is left with its claim that the TDHCA has the discretion to allocate, and in the exercise of its discretion, is legally required to allocate more LIHTC credits to units or projects in predominately white areas, and in particular, in predominately white areas in the Dallas metropolitan area in which ICP operates. Contrary to ICP's assertions, however, TDHCA does not have unlimited discretion in the making of its LIHTC allocations. First, by the nature of the program, the Defendants do not select the location of nor directly make available any housing to the populations for whom the housing is developed. Each of those functions or activities are in the hands of private developers, and are also subject to a variety of local governmental restrictions or involvement, such as zoning or land use regulations. Second, the decisions on which projects will be allocated LIHTC credits are currently made, and have been since at least 2001, under an objective point system set forth in each year's QAP, but subject to various provisions of the Code setting for factors which must be given priority and following under applicable opinions of the Texas Attorney General. Moreover, the current version of the statutes governing TDHCA's decisions date back to 2001, following a period in which ostensibly greater discretion led to allegations of corruption and actual convictions for criminal misconduct. The current legislative policy favors governmental interests of accountability, transparency and predictability in the application of the policies of both the Federal and State legislation governing the LIHTC program.

Despite the Court's opinion on the partial summary judgment motions to the contrary, Defendants continue to contest that ICP has met its prima facie burdens under the causes of

action asserted. The statistics, when critically viewed under appropriate statistical analysis do not establish a disparate impact nor a discriminatory intent and do not support ICP's claims under the Fair Housing Act, the Fourteenth Amendment or 42 U.S.C. § 1982. In this regard, Defendants reassert their challenges to ICP's experts under *Daubert*, which this Court did not resolve in ruling upon the partial summary judgment motions.

Defendants contend that the proof at trial will establish, among other matters, that over 130 LIHTC projects have been approved and are currently in service in Walker Target Area Tracts. Walker Target Area Tracts are the census tracts in which ICP is mandated by the various settlements in the Walker Litigation to attempt to place its clients. Those tracts are deemed by the applicable orders in the Walker Litigation to be predominately white for the remedial purposes of that litigation. Moreover, and in contrast, ICP has alleged that only 27 projects in that same area [and no projects were specifically identified as impermissibly denied in any other region] were denied for racial reasons, and that, indeed, only 7 of those were denied in the period following the 2001 amendments to the State Legislation, with none allegedly denied since 2006. Defendants will also show that each QAP makes changes and that as either the Federal or State legislation has been amended, especially in recent years, the QAPs, and hence the point scoring provisions for the application for LIHTC credits, have increasingly favored developments in what ICP contends are high opportunity areas and have attempted to curtail further development of LIHTC projects in areas of high concentration.

With respect to ICP's claim under the FHA, the evidence will show that, because the demand for LIHTCs so greatly exceeds the supply, the TDHCA does not make housing unavailable by denying an application for LIHTCs. Instead, the evidence will show, the TDHCA

makes available the greatest amount of housing it can by awarding the greatest number of LIHTCs that TDHCA is authorized to award in each year. ICP's chief complaint is actually that the TDHCA does not make housing available in the locations ICP and its clients prefer. The evidence will show that the TDHCA makes housing available without any consideration of the race of ICP's clients or any other person who utilizes government-sponsored programs. Wherever LIHTC supported housing developments are located, people of any race are welcome to reside in such developments. Accordingly, the TDHCA does not make housing unavailable, be it based on race or otherwise.

Assuming for the sake of argument that ICP will satisfy its prima facie burden, ICP will not be able to sustain its claims because no discriminatory impact or intent has been proved, and in any event, the Defendants' actions have met compelling governmental interests and were implemented without pretext.

Additionally, Defendants contend that the applicable 2 year statutes of limitation bar any claims for liability for allocation decisions made more than 2 years before the filing of this suit. Thus, any conduct prior to that 2 year period cannot be used as a basis for the mandatory, injunctive relief sought by ICP.

Finally, TDHCA is immune from suit under the 11th Amendment to the United States Constitution.

LR 16.4.b. a statement of stipulated facts.

None.

LR 16.4.c. a list of contested issues of fact.

ICP's list of contested issues of fact.

The only contested issues of fact for trial are:

Whether the circumstantial evidence of discriminatory intent establishes by a preponderance of the evidence that race was a determinative reason for the housing decisions by TDHCA that resulted in the present racially segregated pattern of the location of LIHTC units.

Whether the defendants' proffered reason or reasons for the racially segregated pattern of the location of LIHTC units are pretextual.

Whether, if the defendants assert a compelling governmental interest as a defense, the defendants' evidence establishes the facts necessary to support the elements of that defense: (1) whether TDHCA's actions in fact further the governmental interest asserted; (2) whether the public interest served by TDHCA's actions is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and (3) whether less drastic means are available whereby the stated governmental interest may be attained. This issue also involves a determination of law.

ICP objects to the defendants' attempt to make the fact issues determined as a matter of law in the summary judgment proceedings contested issues of fact.

ICP objects to the defendants attempt to raise a new defense, statute of limitations, as a contested issue of fact.

Defendants' list of contested issues of fact.

1. Whether the statistical proof and other evidence relied upon by the Court in its September 28, 2010 Memorandum Opinion finding that ICP had met its prima facie burdens under the causes of action asserted were accurate and support that determination?

2. Whether Defendants otherwise made unavailable or denied a dwelling to any

person because of race as prohibited by 42 U.S.C. § 3604(a)?

3. Whether Defendants discriminated against any person in making available a real-estate related transaction because of race as prohibited by 42 U.S.C. §3605(a)?

4. Whether Defendants allocations of LIHTC credits has either adversely affected a particular minority group or harmed the community generally by the perpetuation of segregation?

5. In the event the Court determines any of issues 1, 2 or 3 in favor of Plaintiff, ICP, whether Defendants acted under a compelling governmental interest?

6. Whether Defendants have

a. violated any rights of ICP which are secured by the Constitution or laws of the United States; and

b. demonstrated that any such deprivation of rights was committed by Defendants acting under color of state law, as prohibited by 42 U.S.C. § 1982 and the Fourteenth Amendment to the United States Constitution and actionable under 42 U.S.C. § 1983?

7. Whether in connection with the issues set forth in item 4, above, Defendants acted with discriminatory intent?

8. In the event the Court determines any of issues 5 or 6 in favor Plaintiff, ICP, then whether Defendants' explanations regarding the reasons for such actions were pretextual?

9. In the event the Court determines any of issues 1 through 7 in favor of Plaintiff, ICP, then whether any such actions giving rise to those findings occurred on or after March 28, 2006 [2 years before the filing date]?

LR 16.4.d. a list of contested issues of law.

ICP's list of contested issues of law.

Whether facts established by the evidence show a violation of the Fair Housing Act, 42 U.S.C. § 3604(a) and § 3605, a violation of the Fourteenth Amendment, actionable under 42 U.S.C. § 1983, and a violation of 42 U.S.C. § 1982.

Defendants' list of contested issues of law.

1. Whether Defendants have rebutted the prima facie finding by this Court in its September 28, 2010 Order (see Order at fn. 15)?
2. Whether, if Plaintiff has met its prima facie burdens, Defendants have established a compelling governmental interest for the actions they have taken?
3. Whether, if Plaintiff has met its prima facie burdens, Plaintiff has proven that Defendants' explanations for the actions they have taken were pretextual?
4. Whether Plaintiff has proven that Defendants have taken race into account in the decisions to allocate LIHTC credits in violation of Sections 3604(a) and 3605(a) of the Fair Housing Act or the Fourteenth Amendment to the United States Constitution, as made actionable by 42 U.S.C. § 1983, or under 42 U.S.C. § 1982?
5. Even if Plaintiff has established a prima facie case of discrimination and offered evidence that Defendants' justification is false, whether this Court, as a rational fact finder can conclude from the evidence adduced at trial that Defendants' actions were discriminatory (see September 28, 2010 Order at 33).?
6. Whether Plaintiff's causes of action, or parts of them, are barred by the two year states of limitation imposed by 42 U.S.C. § 3613(a) and applicable two year statute of limitations

under Texas law as applied to Plaintiff's claims under the Fourteenth Amendment to the United States Constitution, as made actionable by 42 U.S.C. § 1983, or under 42 U.S.C. § 1982 (as raised in Defendants' Answer)?

7. Whether TDHCA is immune from suit under the 11th Amendment to the United States Constitution?

8. Whether the remedy proposed by Plaintiff for Defendants alleged violations is sufficiently and narrowly tailored to meet the alleged violations?

9. Whether the remedy proposed by Plaintiff for Defendants' alleged violations is an impermissible and unconstitutional race conscious remedy?

10. Defendants contend that they only withdrew the immunity defense in connection with their summary judgment motion and that the applicable statutes of limitations were pled in Defendants' Answer.

LR 16.4.e. an estimate of length of trial.

ICP's estimate of length of trial

ICP estimates that the testimony of its witnesses including expert witnesses can be completed in two days. Additional time could be necessary depending on the objections to ICP's evidence that require testimony to resolve.

Defendants' estimate of length of trial.

Defendants believe that their case can be presented in two to two and one-half days, inclusive of anticipated cross examination of Defendants' witnesses by Plaintiff.

LR 16.4.f. a list of additional matters that might aid in the disposition of the case.

ICP's statement of additional matters that might aid in the disposition of the case.

Some of ICP's exhibits are summary exhibits that involve TDHCA or other government data including U.S. Census information. ICP is willing to meet with defendants' counsel and provide the predicate testimony that would be used for these exhibits and answer predicate related questions concerning these exhibits. This could expedite the consideration of the admissibility of the exhibits.

Defendant's statement of additional matters that might aid in the disposition of the case.

Defendants acknowledge Plaintiff's offer regarding interviews of its witnesses on matters predicate to the admissibility of certain documents. Defendants will make a similar offer to Plaintiff should it so desire.

Defendants believe the parties can fruitfully discuss further the possibility of stipulations as to both facts and certain documents to avoid duplication.

Defendants also believe that an early pretrial conference may be useful in resolving any issues as to the order of proof given the Court's findings in its September 28, 2010 Order.

Defendants also seek a ruling on their renewed *Daubert* motion to be filed today.

SO ORDERED.

August 25, 2011.


SIDNEY A. FITZWATER
CHIEF JUDGE

Respectfully Submitted,

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