IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

UNITED STATES OF AMERICA, by Nicholas deB. Katzenbach, Attorney General of the United States, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 11033
NORTHWEST LOUISIANA RESTAURANT CLUB, et al., Defendants.	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

A. Background

The United States filed this action on April 28, 1965 under Title II, the public accommodations section, of the Civil Rights Act of 1964. The defendants are the Northwest Louisiana Restaurant Club, its officers, its voting members as a class, and the owners of three member restaurants.

Pursuant to Section 206(b) of the Act, 42 U.S.C. 2000a-5(b), a three-judge court has been convened to hear the case upon the request of the Attorney General. On May 21, 1965 plaintiff filed a motion under Rule 34, F.R.C.P., for the production of records and on June 21, 1965 this Court in a per curiam order granted the motion to produce.

On June 18, 1965 the defendants filed a motion to dismiss and an alternative motion for summary judgment to which this brief is a response in opposition. At a hearing in chambers on June 7, 1965 Judge Dawkins indicated that the defendants' motions, at that time not yet filed, would be submitted on briefs for decision by the three-judge panel.

B. The complaint

The complaint alleges that the named individual defendants and the other voting members of the Northwest Louisiana Restaurant Club own or operate restaurants in the Shreveport or Lake Charles areas, and that the restaurants owned by the individual defendants meet the interstate commerce tests of Section 201(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000a(c)[1/] and are therefore subject

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1/ A restaurant is covered under Section 201(c) if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce." Commerce is defined in essence as trade, travel, or transportation among the several States. The reach of Section 201(c) is constitutionally within the power of Congress to regulate interstate commerce. Heart of Atlanta, Inc. v. United States, 379 U.S. 241(1964); Katzenbach v. McClung, 379 U.S. 294(1964).

to the terms of the Act. (Paragraphs 11 and 12.) It is alleged that prior to passage of the Act the defendants served white patrons only, and that several days before the Act became law, the individual defendants and other restaurant owners formed the defendant Northwest Louisiana Restaurant Club for the purpose of avoiding the provisions of the Act. (Paragraphs 13, 15, 22.) It is specifically alleged that each of the restaurants named in the complaint and each of the member restaurants of the Club are establishments open to the public and have not materially changed the nature of their operations by reason of their Club affiliation. (Paragraph 21.)

The Club, as alleged in the complaint, operates so that restaurant owners, as voting members, issue non-voting membership certificates to patrons and prospective patrons. (Paragraph 16.) It is alleged that the policy and practice of the Club and its voting members is to issue membership certificates only to non-Negro patrons. (Paragraph 19.) Moreover, as alleged in the complaint, it is the practice of the defendants to serve white patrons without regard to whether they previously had been issued Club certificates, but to deny service to Negroes upon the stated ground that they do not possess membership cards. (Paragraph 20.)

The complaint further alleges that it is the policy and practice of the defendants to refuse service to Negroes (Paragraph 23) and that at least three of the named defendants have specifically denied service to Negroes who sought such service on their premises. (Paragraph 24.) The complaint alleges that the formation of the Club and its operation by the individual defendants constitutes a pattern or practice of resistance to the requirements of Title II within the meaning of Section 206(a) of the Act. 42 U.S.C. 2000a-5(a).2/ (Paragraph 25.) The complaint asks that the defendants be enjoined from denying service to Negroes and from using the requirement of Club membership as a basis for denying them service, and from giving any further effect in the operations of their restaurants to Club memberships already issued.

2/ Section 206(a) permits the Attorney General to sue to enjoin a "pattern or practice of resistance." Paragraph 25 of the complaint incorrectly alleges a "pattern and practice of resistance." This typographical error should be read in conformity with the language of the Act, and should not be read as an attempt to allege and prove more than what is required by the language of Section 206(a).

C. Defendants' motions

The defendants have moved the Court to dismiss the action for failure to state a claim upon which relief may be granted or in the alternative to grant them summary judgment on the ground that there is no genuine issue as to any material fact. The motion asserts that no pattern or practice of discrimination exists, as shown by their affidavits, that the affidavits show there is no basis for a class action against the defendants as representatives of all Club members, that the Club itself operates no restaurant, and that the individual defendants "are in fact private clubs which do not cater to the public generally." The defendants also ask for a severance on the ground of misjoinder of parties.

D. Defendants' affidavits

1. Club officers

The four chief officers of the Club filed a joint affidavit in which they deny that the Club was organized and exists for the purpose of avoiding the Civil Rights Act of 1964. In stating the purpose for the Club's existence they refer to the terms of its Charter and add: "It is the purpose, policy and practice of the Club to issue membership cards to applicants whose character, deportment, personal appearance, and habits are in keeping with the standards of the voting members of the Club." They state

that voting members "do require membership cards to be presented in cases where the particular visitor or customer is not recognized and known to be a non-voting member of the Club. Every effort is made to maintain the status of a private club." They state that as officers they have received no applications for membership from Negroes and they deny they are following a pattern of discrimination. The officers assert that each member restaurant "is free and independent in management and operation, the adoption of policies, service of food and drink, admission of non-voting members, and in every other respect. . . ." They state that they are not representative of the class of voting members of the Club because each restaurant has its own relation to interstate commerce and, impliedly, the restaurants vary in the degree to which they follow Club procedure.

In a separate affidavit defendant Stansell, President of the Club, states that his restaurant is operated as a private club, "membership of which consists almost entirely of neighborhood and local people." Members must have Club cards, but, because he is "personally acquainted with practically every member", he only requires visitors to show their cards before being served. No Negroes have ever sought service at his restaurant or applied for Club membership.

Also in a separate affidavit defendant Smith, Vice-President and a director of the Club, states that no Negroes have sought service or Club membership at his restaurant, the Crosslake Inn. He adds that the restaurant is open "only to persons who meet the membership requirements of the Northwest Louisiana Restaurant Club, and only persons of good character and attractive appearance are admitted into membership." He further states that "white people whose character or conduct is not in keeping with the standards of the Club have been refused admittance."

Defendant Strickland, Secretary of the Club and owner of the Alamo Plaza Chicken Shack in Shreveport, states that she issues membership cards "to persons of good character who were appropriately dressed and who in my opinion would properly behave themselves. . . ." No Negroes have sought service at the restaurant, but one Negro telephoned and said he saw the Club sign on the door and wanted to know whether he and a group of friends would be served if they came to the restaurant that night. She states that she told him: "I did not know that I would have to see him or talk to him." He never came. She denies catering to the general public although a billboard on North Market Street in Shreveport invites the public to her restaurant and makes no mention of the Club requirement. She states that under Club Bylaws she may refuse admittance to persons bearing Club cards if, in her opinion, they are not proper persons to be admitted.

Defendant LoBue, Treasurer of the Club, in his individual affidavit states that his restaurant does not cater to the public generally, that he only admits Club members with cards to his restaurant and that he "has turned away a number of white people who have sought admittance without membership cards." He adds that no Negroes have sought food or service at his restaurant, nor have any asked for membership cards.

2. Ward's Plantation House

Four affidavits regarding Ward's Plantation House, a restaurant in Lake Charles, have been filed in support of the motion for summary judgment. Mr. and Mrs. Ward, the owners and defendants in this action, filed separate affidavits in which they state that their restaurant is open only to "acceptable members of the Northwest Louisiana Restaurant Club", and that during "the time our Club has been in operation we have refused to admit approximately 150 people, all of them white, because they were not members of the Club." Persons must be "of good character and reputation, appropriately dressed, and of good deportment" in order to meet Club standards. Mrs. Ward states that in July 1964 a Negro couple sought service. She told them it was a private club, and they left without applying for membership. She states that she treated them the same way she treats all other persons who appear without membership cards.

Two frequent patrons of Ward's Plantation House in a joint affidavit state that on February 10, 1965 they were both admitted to the restaurant after one of them showed the headwaiter a membership card. The one without a card was admitted as a guest. Three employees of the Wards state in a joint affidavit that they have been instructed "not to admit and not to serve any persons who are not members" of the Club. Moreover, they assert, Ward's "has consistently refused service to white persons who did not have membership cards." They state that since late June 1964, the restaurant has "consistently followed a policy of catering only to persons holding club memberships in the Northwest Louisiana Restaurant Club."

3. El Burrito Grill

Defendant Luis Trujillo, owner of the El Burrito Grill, does not precisely state that his business is operated as a private club but asserts that "membership and admittance to the club is limited to persons of good character, appropriate dress and acceptable deportment and behavior." He states that twice since passage of the Act Negroes sought admittance to the restaurant, but "when affiant asked them if they had a membership card in the Northwest Louisiana Restaurant Club they turned and left without answering."

4. Nanking Restaurant

Defendants Henry Joe and Lee Foo, owners of the Nanking Restaurant in Shreveport, in a joint affidavit state that the restaurant is a private club. In July 1964 an employee turned away three Negroes "who did not have membership cards. He gave them membership application blanks which they filled out, but they never did return and ask for membership cards after making these applications." They do not state that membership is a requirement for service, nor do they state how and under what circumstances membership is obtained.

II. The Defendants' Motion for Summary Judgment Should Be Denied 3/

A. Defendants' affidavits are consistent with the complaint, and state no facts entitling them to judgment

To obtain summary judgment, the defendants must show "that there is no genuine issue as to any material fact." (Rule 56(c), F.R.C.P.) The effect of their affidavits achieves the opposite; they show that as to all material facts genuine issues do indeed exist. We do not at this point rely on the truth of our allegations to defeat defendants' motion. We simply show that the defendants state no specific facts which even begin to challenge the factual allegations in the complaint.

3/ The defendants call their pleading a motion to dismiss and alternative motion for summary judgment. Their stated grounds for the motion are exclusively factual - i.e., no pattern or practice of discrimination exists, and the defendants "are in fact private clubs." We treat their pleading simply as a motion for summary judgment.

The defendants' supporting affidavits are conclusionary, expressed in terms of legal argument. Each of the affiants states or implies that he operates a "private club." None of them, however, state precisely how they operate their clubs. We do not learn who has been admitted, when they were admitted, and who has been turned away, except for Negroes. Except to trace general language from the Club charter, the defendants do not tell us what standards are used in determining membership.

The affidavits are significant more for what they fail to say than for what they assert. The complaint alleges that it is the practice of voting members "to issue non-voting membership certificates only to non-Negro patrons." (Paragraph 19.) This is not denied in any of the affidavits; the affiants admit that each time Negroes sought service, they were rejected for lack of Club membership. We are not told what is said to white patrons who have not yet been issued membership cards. We are not told how quickly or automatically whites receive membership cards. Thus the allegation of the complaint that it is the practice of the defendants "to serve white persons who seek service at the restaurants owned and operated by voting members without regard to whether white persons have previously been issued certificates as non-voting members. . . ."[4] is not met.

[4] Paragraph 20 of the complaint.

The complaint alleges that prior to passage of the Act the defendants served white patrons only, and that affiliation with the Club has not changed the character of their trade and the nature of their solicitation to the general public. (Paragraphs 13 and 21.) None of this is in any way denied or shown to be untrue by the affiants. The one reference to a specific form of advertising (a billboard) admits that the advertisement makes no reference to a limitation on service turning on Club membership. (Affidavit of Mrs. J. C. Strickland.) The others assert they do not cater to the public generally, but this conclusion is offerred without specific factual support. We are not told what signs or advertisements the defendants use to announce their places of business; we are not told what notices, other than one decal on the door of Ward's Plantation House, are posted showing that the restaurants are private clubs; we are not told what changes in physical format or operating policy occurred after affiliation with the Club; and it is surely not denied that the restaurants were and remain business enterprises operated for profit.

The defendants state that they operate private clubs but in support of this conclusion they reveal nothing about their operation. The Wards, Murrell Stansell, and John LoBue do state that their practice is to serve only persons possessing membership cards, but, as noted previously, they do not say how, when, or to whom Club cards are issued.

The other affiants, and this includes two of the three who admit having denied service to Negroes, fail to state that club membership is a requirement for service. Instead they simply say they operate private clubs and that they have issued membership cards to persons thought qualified. And most significantly, none of the affiants state that whatever the Club requirements, Negroes are not barred on account of race. None state they are willing to issue memberships to and serve otherwise qualified Negroes.

There are two techniques available to the defendants to use the Club requirement to deny service to Negroes but not to whites. They may automatically issue Club cards to whites and deny service to Negroes who are not issued cards, or they may simply serve whites and require Club membership only of Negroes. No affiant states facts which show that he does not employ one or the other of these schemes, even accepting the truth of the affidavits. Moreover, since the owners of the Nanking and El Burrito restaurants admit denying service to Negroes who did not have membership cards, but do not state they require membership cards of whites, their affidavits by implication admit the essential allegations of the complaint.

The defendants' moving papers in no way reveal what restaurants are affiliated with the Club. There are no facts showing which members, apart from the named defendants, have had occasion to serve or reject Negro customers.

Thus the allegations in the complaint regarding discriminatory practices common to all Club members are not challenged in the defendants' moving papers. The record is still silent, except for the allegations in the complaint, regarding the identity and practices of other affiliated restaurants. This Court surely cannot conclude this case without those facts before it.

The essential issue as framed by the defendants is whether they are operating private clubs and not places of public accommodation. If they are, the experience of Negroes is irrelevant. If they are not operating private clubs, the experience of Negroes as described in the defendants' affidavits substantially proves a pattern or practice of resistance in violation of the Act. The three restaurants that admit refusing service to Negroes have not shown that whites receive the same treatment accorded the Negroes. Common sense dictates that their establishments could not operate even as clubs if all patrons were treated as were the Negroes. Thus with respect to their actual operation as clubs rather than public business, the affiants are uninformative, but with respect to their treatment of Negroes, they substantially show a pattern of discrimination.

Each affiant makes a cursory attempt to establish that his restaurant is not covered under the interstate commerce tests contained in Section 201(c) of the Act.

They seek to accomplish this by asserting the conclusion, in statutory language, that they do not offer to serve interstate travelers, or that much of their food is purchased locally. There of course exists a genuine controversy as to these facts. Whether the restaurants offer to serve interstate travelers turns on their proximity to major arteries, the nature of their signs on their premises, the kind and volume of their advertising, and their procedures for winnowing interstate travelers from other patrons. None of these facts are contained in the affidavits. Whether a substantial portion of the food sold at a restaurant has moved in commerce turns on the percentage of the volume of food served which originated from other states. The affiants do not tell us what their total purchases are, or the ultimate source of the purchases. On the whole question of statutory coverage, they have offered no facts at all which would prove or disprove their contention.

B. The defendants have not met their burden of proof under Rule 56

The burden on the party moving for summary judgment is to show that no factual issues exist. Rule 56(c), F.R.C.P. In ruling on a motion for summary judgment the court's function is to determine whether a genuine issue as to any material fact exists; the court is not to resolve any existing issues. 6 Moore, Federal Practice 2101 (2nd.ed.,1953).

The defendants are asking this Court to do precisely what the Fifth Circuit in National Screen Service Corp. v. Poster Exchange, Inc., 305 F. 2d 647 (C.A. 5, 1962) said it must not do:

> "Summary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is. . . .It is no part of the duty of the Court to decide factual issues, but only to determine whether there are factual issues to be tried." 305 F. 2d at 651.

The point was reiterated in United States v. Morgan, 321 F. 2d 781, 787 (C.A. 5, 1963), where the Court held that a party is not entitled to summary judgment "unless his moving papers make it quite clear what the truth is, remembering that the burden of demonstrating clearly that there is no genuine issue of fact is upon him as a movant, and remembering further that any doubt as to the existence of such issue is to be resolved against him." See also R. J. Reynolds Tobacco Co. v. Hudson, 314 F. 2d. 776, 788 (C.A. 5, 1963); Sheets v. Burman, 322 F. 2d 277, 278 (C.A. 5, 1963); Gray Tool Co. v. Humble Oil & Refining Co., 186 F. 2d 365 (C.A. 5, 1951).

The Fifth Circuit has held that the affidavits of the moving party alone can show that there is indeed a genuine issue of fact. The controversy "may arise from the face of the moving papers showing that certain 'facts' are variable or uncertain or indefinite or that from established or uncontradicted physical or similar facts different

inferences may be drawn." Braniff v. Jackson Ave. - Gretna Ferry, Inc., 280 F. 2d 523, 526 (C.A. 5, 1960). The defendants' affidavits show that genuine issues of material fact do exist. They raise more factual questions than they answer. Clearly this is not a case for summary judgment.

The 1963 amendment to Rule 56(e) requiring that a party opposing a properly supported motion for summary judgment must in turn support his allegations with affidavits[5] cannot operate to make sufficient a motion by its own terms insufficient. Thus Professor Moore states that in spite of the amendment "the burden remains on the party moving for summary judgment of clearly establishing the lack of any triable issue of fact. . . .Where the movant has not sustained this burden, summary judgment is not warranted, even if the non-moving party has not offered responsive affidavits and other materials." 6 Moore, Federal Practice §56.22 (1953, Supp. 1963).[6] Thus the Fifth Circuit stated the general rule even after Rule 56(e) was amended

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5/ The amendment added the following to Rule 56(e):

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

6/ See also Advisory Committee's Note on Rule 56 (as amended), Report of the Judicial Conference of the United States, 31 F.R.D. 623, 648 (1962).

as follows:

> "Summary judgment can be granted only if there is no genuine dispute as to any material fact. This requirement is to be strictly construed so as to insure that factual issues will not be determined without the benefit of the truth-seeking procedures of a trial." Jackson Tool & Die, Inc. v. Smith, 339 F. 2d 88 (C.A. 5, 1964).

C. This is a proper class action

The defendants object to the class action aspect of this Proceeding, and assert that objection in support of their motion for summary judgment. The argument more properly goes to the scope of the relief ultimately granted, and is not a proper ground for the granting of summary judgment. Moreover, the voting members of the Club are properly sued as a class because their membership in the Club raises common questions of fact and law. Whatever the facts may be concerning the treatment of Negroes by individual restaurants, membership in the Club and intent to circumvent the provisions of Title II of the Civil Rights Act of 1964 are facts common to all members of the class sued. From these common facts arises a common question of law: does the restaurants' membership in the Club constitute a pattern and practice of resistance to the full enjoyment by Negroes of any of the rights secured by Title II of the Act?

Certain differences between various members of the class are not important so long as there is a question of law or fact that is common to all.[7] The cases cited by the defendants deal with the impropriety of a class action when the factual differences between the members of a class make it impossible to apply a common rule of law to all of them.

In a class action there may well be differences as well as similarities between the various members of the class; however, the differences do not affect the propriety of the class action if the similarities are the basis of the suit. It is the presence of similarities rather than the absence of differences upon which the decision that a class action is proper should be made. The defendants here created the class by organizing and operating the Club; to the extent that individual restaurants differ in their operation from the general run of Club members, the defendants are free to offer that evidence at trial.

D. "Pattern or Practice" and Proper Joinder

The defendants' arguments that no pattern or practice of resistance has been alleged and that the defendants have been improperly joined are set out as separate issues in the defendants' brief but should be considered together.

7/ State Wholesale Grocers v. Great Atlantic & Pacific Tea Company, 24 FRD 510, 511-512 (ND Ill. 1959); 3 Moore, Federal Practice 3442 (2nd. ed.).

Section 206(a) expressly authorizes the Attorney General to bring suit against a group of persons who have engaged in a "pattern or practice of resistance to the full enjoyment of any of the rights"secured by Title II. The legislative history of the section shows the relationship between the concept of "pattern or practice" and the joinder of defendants; Senator Humphrey, in the same statement quoted in part by the defendants on pages 5 and 6 of their brief, explained that an action involving a "pattern or practice" under this section does not depend on "whether the companies acted in concert or in a conspiracy." 110 Cong. Rec. 14270 (1964). Senator Humphrey went on to say that "the bill would authorize the Attorney General to join all or some of several defendants in the same action." Ibid.[8] Thus it is the existence of a pattern or practice that allows these defendants to be joined in the same action.

Although it is the defendants' contention that the refusal by three different establishments to sell food to Negroes does not constitute a "pattern or practice" of resistance, it is precisely this situation that Senator Humphrey refers to in the paragraph of his remarks immediately following the part quoted on page 6 of the defendants' brief: "There would be a pattern or practice if, for

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8 / See Flying Tiger Line, Inc. v. Atchison, Topeka & Santa Fe Railway, 75 F. Supp. 188, 190 (S.D. Cal. 1947) which states that statutory authorization of joinder is sufficient even if defendants were not properly joined under Rule 20(a).

example, a number of companies or persons in the same industry or line of business discriminated. . . ." In addition, the complaint in this action alleges that the formation and existence of the club itself contributes to the "pattern or practice." It is their membership in the club that amounts to participation in the "pattern or practice" of resistance by those establishments that have never had a Negro ask for service. The affidavit of defendant Strickland, who never has had a Negro seek service on the premises, illustrates how the mere existence of the Club serves as a discriminatory deterrent to Negroes, who know better than to attempt to run the gauntlet of the owner's scrutiny of their "character", "general deportment", and other such "qualifications."

In considering whether this case presents a pattern or practice of resistance, it should be noted that Congress had no intention of allowing sham "clubs" to circumvent the provisions of the Act. While discussing the meaning of the phrase "private club", Senator Humphrey stated:

> "If a club were established as a way of by-passing or avoiding the effect of the law, and it was not really a club . . . and there are clubs like that in existence, where anyone can step up and pay $2 and in that way become a member, with the $2 being used as a kind of cover charge, that kind of club would come under the language of the bill." 110 Cong. Rec. 6008 (1964).

The defendants here, so far as their affidavits show, don't even burden their "members" with the cover charge requirement, and their own affidavits strongly suggest, if they don't actually prove, that they are operating in the manner alleged in the complaint.

III. Conclusion

The defendants having failed to show the absence of any material issue of fact, their motion for summary judgment should be denied.

Respectfully submitted,

D. ROBERT OWEN
LOUIS M. KAUDER
ALEXANDER C. ROSS
Attorneys
Department of Justice

CERTIFICATE OF SERVICE

I, LOUIS M. KAUDER, hereby certify that on July 1, 1965 I served the foregoing brief on the defendants in this case by mailing copies, air mail postage prepaid, to W. Scott Wilkinson, P. O. Box 1707, Shreveport, Louisiana.

LOUIS M. KAUDER