1978

Appellant's Reply Brief

Lewis Steel '63

Eisner Levy Steel & Bellman, P.C.

National Association for the Advancement of Colored People

78-6001

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BROOKHAVEN HOUSING COALITION, BROOKHAVEN BRANCH N.A.A.C.P., SMITHHAVEN MINISTRIES,

Plaintiffs,

ROSEMARY TARRY, GLORIA YOUNG, CAROLYN JOHNSON, DORIS ACREE, VICKIE JORDAN, LUCILLE MIDDLETON, and NORA RUSH,

Plaintiffs-Appellants,

against

JOEL SOLOMON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; GERALD TURETSKY, REGIONAL ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE; PHILIP E. COATES, REGIONAL COMMISSIONER, NORTH ATLANTIC REGION, INTERNAL REVENUE SERVICE; TOWN OF BROOKHAVEN, NEW YORK; BROOKHAVEN TOWN BOARD; JOHN RANDOLPH, BROOKHAVEN TOWN SUPERVISOR; CHARLES W. BARRAUD; BROOKHAVEN TOWN PLANNING BOARD; JOHN LUCHSINGER, CHAIRMAN, BROOKHAVEN TOWN PLANNING BOARD,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

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THE JURISDICTIONAL AND PROCEDURAL ARGUMENTS RAISED BY THE FEDERAL APPELLEES HAVE NO MERIT.

The federal appellees have presented a litany of jurisdictional and procedural issues which they claim bar the instant action against them. Several of these issues warrant response. They are: the district court lacked jurisdiction to hear the breach of contract claim as against the federal appellees; the appellants lacked standing to maintain this action against the federal appellees, and the appellants failed to exhaust administrative remedies.

1. The federal appellees assert that the district court lacked jurisdiction to consider the claim that GSA breached its duty to compel Brookhaven to follow through on and fulfill the commitments made in the September 4, 1970 letter to GSA. In presenting this argument, these appellees seek to frame this case as a simple contract matter, ignoring the historical background leading to the agreement between GSA and Brookhaven. The federal appellees would have this Court overlook the fact that GSA secured the Brookhaven commitment as a direct result of its enforcement efforts and activities under Executive Order 11512 and the affirmative action requirement of the Federal Fair Housing Act, 42 U.S.C. 3608 (A. 87-89).

Originally, this litigation did not focus on the September 4, 1970 agreement. When the case was filed, the complaint charged

GSA with violations of Executive Order 11512 and the Federal Fair Housing Law. The appellants alleged that GSA had not made adequate inquiry into the availability of low cost housing opportunities near to the proposed IRS Center in Holtsville. Subsequently, the Town of Brookhaven was added as a party defendant and the complaint was amended to include the allegations that the Town breached a contractual agreement with GSA to develop programs responsive to the housing needs of lower income IRS workers at the Center. The amended complaint also alleged that the federal appellees failed to enforce the September 4 agreement (Appellants' Brief, pp. 2-5).

In both the original and amended complaints, jurisdiction was asserted under 28 U.S.C. 1331, 1343(3)(4), and 1361, and the Administrative Procedure Act, 5 U.S.C. 701-706 to review GSA's compliance with the Executive Order and Fair Housing Law (A. 3). There is no question that the district court had jurisdiction to rule on the allegations against GSA, as federal jurisdiction is routinely found to test civil rights compliance by federal agencies and departments. Jurisdiction in such cases is premised on the same jurisdictional provisions invoked here. See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920(2d Cir. 1968); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

Since Brookhaven's commitment grew out of and was an integral part of GSA's exercise of its civil rights responsibilities, the federal appellees' jurisdiction argument against enforcement of the Brookhaven contract has no merit. Given that jurisdiction existed to hear the broader civil rights issues, then certainly the court also had jurisdiction under 28 U.S.C. 1331 and 1343 to review simultaneously GSA's alleged failure to require compliance with its contractual commitments.

In addition, because it is alleged that the federal appellees did not carry out their responsibilities under the Executive Order and the Fair Housing Law when they failed to compel Brookhaven to abide by the terms of its agreement, jurisdiction is appropriately premised on 28 U.S.C. 1361 and 5 U.S.C. §702. See, Shannon v. HUD, supra.

2. With respect to the standing issue, the appellants seek to enforce the terms of a specific contract which would provide lower cost housing programs for their benefit and other lower income IRS workers at the Center. In the event the appellants prevail, relief would involve a directive that Brookhaven follow through with its agreement to provide whatever housing programs are necessary to meet the appellants' needs. Brookhaven clearly has control over residential development in the vicinity of the IRS facility through its authority over land use and housing planning, zoning, and applications for state and federal housing subsidies. Brookhaven certainly is in a position to comply with

the terms of its agreement with GSA. In fact, the court below specifically found that Brookhaven did not utilize available programs to remedy the lack of housing for IRS employees and noted the existence of possible remedial actions which could be undertaken (A. 119-122).

The specificity of purpose set forth in the Brookhaven agreement and the clear benefit the appellants would derive from the relief sought, distinguishes this matter from Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976) (en banc), a case upon which the federal appellees place principal reliance. In Evans, suit was brought to halt funding by two federal agencies to New Castle, New York, on the grounds that that Town maintained discriminatory and exclusionary housing policies. The Evans plaintiffs were not, however, residents of New Castle and this Court held they lacked standing in that it was speculative whether they would benefit from an injunction halting the federal monies. Here appellants will benefit by enforcement of Brookhaven's contractual commitment and Evans simply is not in point.

Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974) also does not affect appellants' standing. In Acevedo, lower income residents of Nassau County sued the County and GSA with respect to the development activities at Mitchell Field in Nassau County. The claim against GSA involved its determination to locate a federal office building at Mitchell Field notwithstanding the absence of an adequate supply of low cost housing. This

Court held that the plaintiffs lacked standing to challenge GSA's determination with respect to the office building as none of them were employees of the federal government or expected to be employees. Therefore, the Acevedo plaintiffs were not individually harmed by the alleged violation of federal policy. 500 F.2d at 1082-83.

Judge Judd correctly held that the Evans and Acevedo rulings were not applicable because the plaintiffs here were employees of the IRS Center and the specific intended beneficiaries of the Brookhaven-GSA housing agreement (A. 234). Judge Pratt concurred in this view (A. 64).

In seeking to enforce the terms of the Brookhaven housing commitment, the appellants come within the standards set for determining standing set out in Village of Arlington Heights v. Metropolitan Housing Development Corp., U.S. , 97 S.Ct. 555, 562-3 (1977). There the individual plaintiff asserted that he would qualify for residency in a lower cost housing project to be built if the Metropolitan Housing Development Corp. could secure a multi-family rezoning. Standing was upheld despite the fact there was no assurance that should zoning be granted the development would in fact go forward. All that was required was a "substantial probability" that the plaintiff would benefit in the event the court granted relief. In the instant case, the individual appellants are the specific and precise beneficiaries of the contract they seek to enforce. As the court below pointed out,

if Brookhaven is required to live up to its commitment, constructive steps can be taken responsive to appellants' housing needs (A. 120).

3. Appellees' claim that there was a failure to exhaust administrative remedies is being raised for the first time in this Court. Neither the answer nor amended answer raise this issued, nor was it litigated below. In any event, the record is replete with references to the fact that the appellants, their counsel and Suffolk civil rights groups continually pressed GSA to compel Brookhaven to live up to the agreement it reached with respect to providing low cost housing for the IRS workers. See, Trial Transcript, pp. 104-119a, 122-130.

CONCLUSION

For the above stated reasons the procedural and jurisdictional defenses raised by the federal appellees must be rejected.

Respectfully submitted,

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