The Catholic Lawyer

Volume 8
Number 1 *Volume 8, Winter 1962, Number 1*

Article 11

July 2016

Recent Decisions: Discrimination in Housing

Discrimination in Housing

In *O'Meara v. Washington State Bd. Against Discrimination,*[1] a recent Washington case, respondent offered for sale the home he had purchased in 1955 with the aid of a private loan insured by the FHA. Petitioner, a negro, attempted to purchase it, leaving a deposit with respondent's wife over her objection. Upon the return of the deposit petitioner lodged a complaint with the Washington State Board Against Discrimination. The Board found, pursuant to a 1957 statute[2] which provided against discrimination in "publicly-assisted" housing, that respondent's home was "publicly-assisted" and that his refusal to sell was motivated by discrimination. The Board then ordered respondent to sell. Upon his refusal to do so, the Board brought an action in Superior Court to enforce its order and a successful defense was made on the ground that the 1957 statute was unconstitutional. On appeal, the Supreme Court of Washington affirmed the ruling of the lower court and held that the statute was a violation of the "equal protection" clause of the federal constitution and the "privileges and immunities" clause of the state constitution.

Attempts to prevent discrimination in the vital area of housing have taken two forms. The first method has been to assail the alleged discrimination as being violative of the fourteenth amendment. The other mode, a more recent one, has been to enact state legislation.

In 1948 the Supreme Court of the United States, in *Shelley v. Kraemer,*[3] held that a racially restrictive covenant was not barred by the Constitution, but that a state court could not enforce such a covenant since the enforcement would violate the individual's right to equal protection of the laws guaranteed by the fourteenth amendment. Earlier, in *Buchanan v. Warley,*[4] the same Court had declared unconstitutional a Louisville ordinance which zoned residential areas on the basis of race. In that case the Court held that the ordinance's restriction on alienation of property violated the seller's right to equal protection. From these decisions, particularly that in *Shelley,* the "state action" theory has developed, namely, that the state, or any political subdivision thereof, cannot act in such a way as to violate an individual's right to equal protection of the laws.[5]

In *Dorsey v. Stuyvesant Town Corp.*[6] the New York Court of Appeals was faced with the problem of discrimination in a low-rent housing project. Pursuant to a state redevelopment law the City of New York consolidated the ownership of a large section of property by eminent domain and sold it to the Stuyvesant Town Corporation, a private company. A twenty-five year tax relief on improvements was also granted the corporation. The plaintiff alleged racial discrimination in the rental of apartments in the governmentally assisted development in violation of the fourteenth amendment. In rejecting the plaintiff's con-

---

[1] — Wash. 2d —, 365 P.2d 1 (1961).
[2] WASH. REV. CODE § 49.60.030 (1957).
[3] 334 U.S. 1 (1948).
[4] 245 U.S. 60 (1917).
[5] It is interesting to note that the "state action" theory, based on the fourteenth amendment, may be used to the advantage of both the purchaser and the seller. Restrictive covenants or zoning laws based on racial discrimination violate the purchaser's freedom to contract and acquire property, and the seller's right to free alienation of his property. See Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).
[6] 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950).

tention the court held that the assistance rendered by the city was not "state action" since it was not "the exertion of governmental power directly to aid in discrimination or other deprivation of right. . . ."[7] A similar situation arose in *Barnes v. City of Gadsden,*[8] where the plaintiff, fearing repetition of the theretofore common discriminatory practice in the state, sought an injunction to compel the city not to allow discrimination in its planned redevelopment program. The project, to be carried out by a plan similar to the Stuyvesant Town development, was to receive federal assistance. The court denied injunctive relief, refusing to impute bad faith to city officials in carrying out the project. By the same reasoning as applied in the *Stuyvesant* case, the court concluded that after the sale of the land to the private developer, any discrimination practiced by the private corporation would not be "state action."

In *Novick v. Levitt & Sons, Inc.*[9] the plaintiffs sought an injunction to prevent the defendant-owner from evicting them from leased premises. It was claimed that Levitt's refusal to renew the lease was based on racial discrimination and, apparently relying on the *Shelley* decision, it was asserted that the defendant could not lawfully evict them. The court, citing *Shelley,* held that the defendant was under no legal obligation to rent and that the plaintiff had failed to state a cause of action.

In the area of public housing, however, the "state action" prescribed by the fourteenth amendment has been more readily found. Thus, in *Banks v. Housing Authority,*[10] the Housing Authority of San Francisco applied a theory of "neighborhood pattern" in determining eligibility for admission to units of its public low-rent development. Under this plan the Authority considered the number of those unable to obtain decent housing in the neighborhood of the planned project and it considered the proportion of low income families of one race to those of other races so situated. It further regarded the customs and traditions of the neighborhood with regard to public peace and good order. For the development in question the percentage was seventy percent white and thirty percent nonwhite. Plaintiff, a negro, sought mandamus to compel the Authority to certify his eligibility for the development, even though the nonwhite quota had been filled. The court granted his request, stating that an individual's race bears no reasonable relation to his eligibility for low-rent housing. The "neighborhood pattern" plan was held to be based on racial considerations and to effectuate this plan would constitute "state action" in contravention of the fourteenth amendment.

Some states, in an effort to prevent dis-

---

[7] *Id.* at 533-34, 87 N.E.2d at 550. The court further pointed out that the plaintiff's contentions came perilously close to asserting that any state assistance to an organization which discriminates, violates the fourteenth amendment. Such is not reasonable when one considers organizations which discriminate, for example, by admitting only those of one profession. *Id.* at 535, 87 N.E.2d at 551.

[8] 174 F. Supp. 64 (N.D. Ala. 1958), *aff'd,* 268 F.2d 593 (5th Cir.), *cert. denied,* 361 U.S. 915 (1959).

[9] 200 Misc. 694, 108 N.Y.S.2d 615 (Sup. Ct. 1951). Prior to the plaintiff's lease, the defendant-lessor had covenanted in its leases against the use of property by nonwhites; the FHA compelled the removal of these clauses. Defendant renewed leases as a general policy except in instances where the terms were breached. Plaintiff as lessee had permitted negro children to play on the premises. When defendant refused to renew the lease, plaintiff brought this action.

[10] 120 Cal. App. 2d 1, 260 P.2d 668 (1st Dist. 1953), *cert. denied,* 347 U.S. 974 (1954).

crimination in housing in areas other than that covered by the "state action" theory, have enacted legislation in this area. Such legislation ranges from mere codification of the *Shelley* decision[11] to prohibition of discrimination in any class of housing.[12] In other states, however, the legislation provides against discrimination in "publicly-assisted" housing.[13] Under this type of statute, discrimination in privately financed housing is not illegal.

The constitutionality of such a statute was tested in *New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc.*[14] Pelham Hall owned an apartment house which was financed by a mortgage guaranteed by the FHA. Plaintiff filed a complaint with the Commission on the ground that he had been refused an apartment by the defendant because of racial prejudice. At a hearing the Commission found the allegation substantiated and ordered the defendant to stop such activity. Suit was brought by the Commission to enforce its order. The defendant claimed the statute was unconstitutional, because it violated his right to free use of his private property, and also, because it violated the "equal protection" clause since its classification of "publicly-assisted" housing was unreasonable.[15] It was argued on his behalf that there was no reason to distinguish between discrimination in "publicly-assisted" houses and "private" houses and that the law unreasonably singled him out. The court affirmed the Commission's finding. It admitted the defendant's right of private property but also took cognizance of the right of an individual to equality in his public relations. The court viewed the problem as a conflict between the right of private property and the police power of the state in enforcing its public policy against discrimination. The police power must take precedence when it is reasonably exercised, that is, so long as the regulation does not preclude the use of the property for any purpose for which it can be reasonably adopted.[16] On the constitutional question the court indicated that the "equal protection" clause does not preclude a state from resorting to classification for purposes of legislation, and that " 'the prohibition of the . . . [clause] goes no further than . . . [to prevent] the invidious discrimination.' "[17] The court found that the classification there involved was a reasonable step in the legislature's attempt to

[11] IND. ANN. STAT. § 10-901 (Supp. 1961).

[12] COLO. REV. STAT. ANN. § 69-7-5 (Supp. 1960).

[13] See, *e.g.*, CAL. HEALTH & SAFETY CODE § 33071 (Supp. 1961); N. J. REV. STAT. § 18:25-5(k) (Supp. 1961); N. Y. EXECUTIVE LAW § 292(e)(1).

[14] 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958). The New York constitution provides: "No person shall . . . be subject to any discrimination in his civil rights by any other person or any firm, corporation, or institution, or by the State or any agency or subdivision of the State." N. Y. CONST. art. I, § 11. The court in the *Stuyvesant Town* case, when faced with racial discrimination in housing, found that this constitutional provision was not applicable. The court reasoned that civil rights meant those rights elsewhere enumerated in the constitution or statutes. There was nowhere enumerated a right not to be discriminated against in housing. In 1955 the state legislature enacted Section 298 of the N. Y. EXECUTIVE LAW (see also N. Y. CIV. RIGHTS LAW art. 2-A) creating such a right. The court in the *Pelham Hall* case, therefore, had a constitutional mandate in support of its opinion.

[15] It is interesting to note that the defendant (the party discriminating) attacked the statute on the basis of the "equal protection" clause. This is the same clause used by those discriminated against to enforce their rights.

[16] New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc., 10 Misc. 2d 334, 341, 170 N.Y.S.2d 750, 757 (Sup. Ct. 1958).

[17] *Id.* at 343, 170 N.Y.S.2d at 759, quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

abolish discrimination in housing.

> In passing upon the validity of legislation claimed to offend against the equal protection clause because operating solely with respect to particular classes of persons or property, the test is whether or not the classification rests upon some reasonable basis bearing in mind the subject matter and the object of the legislation.[18]

The constitutionality of a similar statute in New Jersey was attacked on the same grounds in *Levitt & Sons, Inc. v. Division Against Discrimination*.[19] The court upheld the statute on reasoning analagous to that used in *Pelham Hall*.

In the *O'Meara* case, where the Washington statute prohibited discrimination in "publicly-assisted" housing,[20] the defendant contended that the statute was unconstitutional because the classification of "publicly-assisted" housing violated the "equal protection" clause.[21] Justice Foster adopted the opinion of the court below, which, after taking note of the *Pelham Hall* and *Levitt* decisions, proceeded to apply the test set forth by Mr. Justice Holmes in *Patsone v. Pennsylvania*.[22] Mr. Justice Holmes writing for that Court said: "[A] State may classify with reference to the evil to be prevented, and . . . if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out."[23]

Applying this test the lower court opinion adopted by the majority declared that there was no reason to suppose that persons with FHA mortgages are any more likely to discriminate than those who have conventional mortgages. The statute thereby gives a privilege or immunity to those who, in dealing with similar parcels of real estate, do not have "publicly-assisted" financing. The Court then concluded that "the classification is arbitrary and capricious and bears no reasonable relation to the evil which is sought to be eliminated,"[24] and held that it violated the fourteenth amendment.

Justice Mallery in his concurring opinion cited five reasons why the statute violated the Washington constitution. First, the Washington constitution provides against private property being taken for private use. While the statute classifies the property as "publicly-assisted," he pointed out that it is in fact the private property of O'Meara being taken for the private use of Jones. Second, the state constitution grants original jurisdiction to the superior court in all cases involving the title or possession of real property. The statute, in effect, violates this provision because it gives the State Board Against Discrimination the power to order a party to sell his property. Third, the constitution provides that no property be taken except by due process of law. The statute provides that the State Board which investigates and prosecutes complaints is also to hear the case. Justice Mallery indicated that since the tribunal is not independent and impartial, the elementary requirements of due process are not met. Fourth, the State Board is empowered to make suitable rules and regulations and to set policy, to investigate and prosecute complaints, and to hear and dispose of the case. This combination

[18] *Id.* at 343, 170 N.Y.S.2d at 759.
[19] 56 N. J. Super. 542, 153 A.2d 700 (App. Div. 1959), *aff'd*, 31 N. J. 514, 158 A.2d 177 (1960).
[20] WASH. REV. CODE § 49.60.030 (1957).
[21] See note 15 *supra*.
[22] 232 U.S. 138 (1914).
[23] *Id.* at 144.
[24] O'Meara v. Washington State Bd. Against Discrimination, — Wash. 2d —, — 365 P.2d 1, 5 (1961).