1987 WL 8948
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United States District Court, W.D. New York.

Akil AL–JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Mario Santos, Mother and Legal Representative of Santiago Santos, deceased; Jomo Sekou Omowali, a/k/a Eric Thompson; Vernon LaFranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Charles "Flip Crowley; William A. Maynard, Jr.; Calvin Hudson; Kimanthi-Mpingo, a/k/a Edward Dingle; and Ken-Du, a/k/a Willie Stokes, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
The ESTATE OF Nelson A. ROCKEFELLER; Russell A. Oswald; Walter Dunbar; John C. Baker; A.C. O'Hara; John Monahan; John C. Miller; Leon Vincent; Karl Pfeil; Robert F. Fischer; Wim Van Eekeren; Vincent Mancusi; John Does Nos. 1–100, Defendants.

No. CIV–75–132E.
|
April 3, 1987.

Attorneys and Law Firms

Elizabeth M. Fink, Brooklyn, N.Y., Susan E. Carpenter, Sunyab, John Lord O'Brian Hall, Buffalo, N.Y., Dennis Cunningham, Michael E. Deutsch, Peoples' Law Office, Chicago, Ill., James I. Meyerson, New York City, Joseph J. Heath, Syracuse, N.Y., Martin Stolar, Stolar, Alterman & Gulielmetti, P.C., NEw York City, Elizabeth A. Gaynes, Hastings-on-Hudson, N.Y., Herbert X. Blyden, Buffalo, N.Y., Jerome Rosenberg, Napanoch, N.Y., for plaintiffs.

William E. Jackson, Milbank, Tweed, Hadley & McCloy, New York City, for Estate of Rockefeller.

Michael A. Gurda, Gurda, Gurda & Katz, Middletown, N.Y., for Monahan.

John R. Stewart, Latham, N.Y., for Monahan (trial counsel).

Richard Moot, Moot & Sprague, Buffalo, N.Y., for Mancusi.

Irving C. Maghran, Jr., Maghran, McCarthy & Flynn, Buffalo, N.Y., George C. Mantzoros, Assistant Attorney General, New York City, for Pfeil.

John H. Stenger, Jaeckle, Fleischmann & Mugel, Buffalo, N.Y., Donald P. Berens, Jr., Assistant Attorney General, Albany, N.Y., for Oswald.

MEMORANDUM and ORDER

ELFVIN, District Judge.

***1** A number of motions are presently pending in this civil rights action springing from the September 1971 quelling of an uprising at the Attica (N.Y.) Correctional Facility. The Estate of Nelson Rockefeller ("the Estate") has moved to decertify the plaintiff class, to compel the plaintiffs to respond to its discovery requests and for a scheduling order. Defendant Mancusi has moved for a partial dismissal of the Amended Complaint or, alternatively, for decertification of the plaintiff class as to those causes of action against him designated "Reprisals" and "Bad Faith Prosecutions." The plaintiffs seek a protective order in connection with the Estate's discoverv requests and also seek a scheduling order. The Attorney General of the State of New York has moved for a protective order.

In a Memorandum and Order filed October 31, 1979 this Court granted the plaintiffs' motion for class action certification as to the first eight causes of action alleged in the Amended Complaint.[1] The class, approved under Fed.R.Civ.P. rule 23(b)(3), consists of all persons who were on September 13, 1971 inmates of the facility and who then were present in "D-yard." A subsequent finding that the plaintiffs' then counsel had failed to represent the plaintiffs adequately resulted in the October 27, 1980 revocation of the certification. This Court June 24, 1985 granted the plaintiff's motion for recertification of the class, as initially certified.

The Estate has moved to decertify the class again because the plaintiffs have failed to take steps to identify the individual class members and to direct to the class members the notice required under Fed.R.Civ.P. rule 23(c)(2). The plaintiffs have responded by indicating that it is for a court to decide the proper circumstances for the giving of such notice and to issue an order specifying the form and scope of the notice. Subsequent to the hearing of the Estate's motion to decertify, the plaintiffs submitted a proposed class notice. The Estate replied by indicating that the issue of the proposed notice had not been properly brought before this Court and by detailing what it believed to be the deficiencies of the proposed notice. Other defendants have not responded.

The plaintiffs' failure to send the notice required under rule 23(c)(2) is found not to have prejudiced any defendant. In addition, notification at this stage in the litigation will not serve to prejudice any rights of any member of the plaintiff class. Decertification is not appropriate.

This Court agrees that the plaintiffs have not properly brought forward the issue of the class notice. Suggestions and comments of counsel would be helpful in determining an appropriate notice and the appropriate means for its promulgation. The plaintiffs shall have twenty days from the filing of this Memorandum and Order in which to move for this Court's approval of a proposed class notice.

The plaintiffs and the Estate have both moved for an order setting time limits for discovery. The plaintiffs, seeking to push this action on to trial, propose that depositions be limited to fifteen per side, that a four-month period be provided for the parties to make and settle requests for admissions and that an additional four months be provided to settle the contents of a final pretrial order. November 13, 1985 affidavit of Elizabeth M. Fink, Esq., ¶15. The Estate proposes that the scheduling order provide that all depositions of class members be completed within one year and that all discoverv be completed within eighteen months after the date that notice is provided to the class members.

***2** The knowledge of the individual plaintiffs in this action will affect not only the determination of any damages, but also will affect the decision whether the defendants, or particular defendants, may be held liable for their actions or inactions. Further discoverv, including the possibility of numerous depositions, concerning individual plaintiffs' relevant knowledge and experience may be appropriate. This Court, therefore, will not arbitrarily limit the number of depositions each side may conduct. However, some time limit for discovery which may have the concomitant effect of limiting the number of depositions is entirely appropriate. While the defendants' asserted need to depose each of the approximately 1200 class members is excessive in light of the nature of this litigation, a reasonable time should be provided for the parties to determine from whom further discovery should be sought and to obtain such. Any time limit, of course, must be somewhat arbitrary. Given the nature of the Amended Complaint, the number of parties in this action and the great amount of time the parties have spent reviewing documents, this Court directs that all discovery, including all depositions, shall be completed within seven months of the return date for the filing of notices by individual plaintiffs opting out of the case and that all motions to compel discoverv shall be filed prior to termination of that seven-month period. The parties shall have ninety days thereafter in which to serve requests for admissions. All motions to dismiss and/or for summary judgment shall be filed no later than the end of this ninety-day period.

The Estate has moved to compel the plaintiffs to answer its interrogatories and to respond to its requests for documents. Although the answers have yet to be filed, it is this Court's understanding that the plaintiffs have answered. February 26, 1986 Reply Affidavit of Kelley A. Cornish, Esq. ¶ 11. As Cornish indicates, if the defendants are not satisfied with the answers, they must raise their objections in a separate motion to compel.

Mancusi has moved to dismiss the causes of action designated "Reprisals" and "Bad Faith Prosecutions" or, in the alternative, to decertify those causes of action.[2] The motion rests upon the claim that collateral estoppel bars such causes as they apply to Mancusi. He also claims that requiring him to defend against the charges of reprisals constitutes a denial of due process.

Mancusi has cited a number of cases in support of his contention that the plaintiffs are collaterally estopped. The decision in Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), reversed this Court's dismissal of a complaint and directed it to impose an injunction preliminarily enjoining brutalizing conduct by state personnel at the facility. That decision did not resolve the issues there presented and cannot serve as a basis for collateral estoppel in this case. Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973), concerned the alleged failure of state and federal authorities to investigate and prosecute persons who were claimed to have mistreated the plaintiffs. The appellate court found that such injunctive relief should not be granted. The issues resolved in that case are not those raised here. Nieves v. Oswald, 498 F.2d 802 (2d Cir. 1974), addressed the issue of the procedural due process required in interrogating inmates subsequent to the uprisings. That case is not read as having resolved any issue now raised. These cases, therefore, fail to provide grounds for applying the doctrine of collateral estoppel.

***3** In United States ex rel. Walker v. Mancusi, 467 F.2d 51 (2d Cir. 1972), the named plaintiffs, representing a class of prisoners who had been segregated from the general inmate population in the Attica facility and incarcerated in a special housing unit known as "A Block, 6 Company," claimed that the segregation had violated their Eighth Amendment and Fourteenth Amendment rights. It was determined that the segregation had not constituted cruel and unusual punishment and had not violated the plaintiffs' equal protection or due process rights. Id. at 53. The plaintiffs in this action claim that segregation and punitive segregations violated their rights under those amendments. Amended Complaint ¶¶ 60(f), 61(d). To the extent that the plaintiffs' claims arise out of detentions in the "A Block, 6 Company" and that those claims duplicate those already adjudicated in United States ex rel. Walker v. Mancusi, supra, the claims are barred by collateral estoppel. However, this Court lacks sufficiently detailed information upon which to determine whether the segregation here complained of is the same as that in United States ex rel. Walker v. Mancusi. If collateral estoppel in fact applies, only discrete portions of the instant plaintiffs' Amended Complaint will be barred. The collateral estoppel issues raised by no means will result in the dismissal of the entire causes of action for reprisals.

Mancusi has not directed this Court's attention to any determination which would collaterally estop the plaintiffs from pursuing their cause of action based on his claimed bad faith prosecutions. This Court, in its October 30, 1979 Memorandum and Order, narrowed the scope of the Amended Complaint's allegation of bad faith prosecutions but found that the plaintiffs had stated a cause of action against Mancusi. Dismissal at this time is not appropriate. In addition, Mancusi's due process arguments are also not found to provide a basis for dismissal of this action as it applies to him.

Finally, Mancusi argues that the class certified for the causes of action for reprisals should be decertified because paragraphs 61 through 64 of the Amended Complaint state that they apply only to certain members of the class. This Court noted in its October 31, 1979 Memorandum and Order that "[i]f, at a later point in the lawsuit, it becomes apparent that fewer than all the class members were subject to reprisals, a subclass can be defined.[3] Nothing has changed since that decision. No basis is found at this time to certify a subclass and no basis is provided to justify the requested decertification.

The Attorney General of the State of New York has moved for a protective order permitting the State to withhold certain documents from discovery. The issues raised were discussed in this Court's Memorandum and Order dated June 24, 1985. Since the issuance of that decision the State has labelled and cataloged the material which it claims is privileged and has detailed the privileges it asserts apply to each document. The seventy-eight items for which an attorney's work-product privilege had originally been claimed have been destroyed, apparently inadvertently. The motion as to these items, if not entirely mooted, is denied without prejudice to its reassertion upon the possible reconstruction of those documents. As to items of grand jury testimony and records and volumes II and III of the Meyer Report and McKay Commission records, this Court finds no reason to change the determinations made in its June 1985 Memorandum. and Order. These items remain protected from discovery until such time as a party satisfies the concerns addressed in that decision and complies with its requirements as to these items.

***4** The issue has been raised that the State has waived any privilege by having disclosed to the plaintiffs items now claimed as privileged. See Third Declaration of Richard E. Moot, Esq. in Support of Motion by Defendant Vincent R. Mancusi for an Extension of Time in Which to Examine Attica Documents, ¶¶ 5, 6. A troublesome problem exists whether the person who mav have revealed certain privileged items to the plaintiffs had the power under the State's law to waive any privilege absent an order issued bv a court of the State. However, that issue need not be addressed here. Edward J. Perry, Jr., Esq., avers that, while it is possible and even probable that the plaintiffs' attorney glanced at or examined some of the items now claimed to be privileged, he remembers no specific document reviewed by the plaintiff's attorney which the State now clai——Is is privileged. It must be remembered that the plaintiffs' attorney apparently reviewed tens of thousands of documents. Under these circumstances and unless the items for which a privilege has been claimed had been in some manner particularly marked or noted by the plaintiffs' attorney, no practicable way exists to determine the documents which were reviewed and as to which a privilege is now asserted. This Court is not prepared to order opened all files for which a privilege is claimed simply based upon the claim that the plaintiff may have glanced at or reviewed some unidentified items.

Accordingly, it is hereby ORDERED (a) that the Estate's motion to decertify the class is denied (as always, without prejudice), (b) that the motions for a scheduling order are granted as noted above in the final three sentences of the seventh paragraph hereof, (c) that the Estate's motion to compel the plaintiffs to answer its interrogatories is denied as moot (the plaintiffs, however, are directed to file their answers with the Clerk of this Court), (d) that the Estate's motion for fees is denied, (e) that the plaintiffs' motion for a protective order is denied, (f) that Mancusi's motion to dismiss or to decertifv the class is denied, (g) that New York's motion for a protective order is denied without prejudice and (h) that the plaintiffs shall have twenty days from the filing of this Memorandum and Order to move for this Court's approval of a proposed class notice.

It is further hereby ORDERED that, in the interest of expediting discovery, this action is referred to the Honorable Edmund F. Maxwell, United States Magistrate for the Western District of New York, who, as authorized by rules 16 and 35 of the Local Rules of Practice of this Court, shall schedule and oversee conferences with the attorneys for the parties for the purposes set out in Fed.R.Civ.P. rule 16 and shall hear and determine all non-dispositive pretrial motions as authorized by 28 U.S.C. § 636(b)(1)(A).

ALL PAPERS ARE STILL TO BE FILED IN THE CLERK's OFFTCE.

All Citations

Not Reported in F.Supp., 1987 WL 8948

Footnotes

1 The plaintiffs denominated their amended pleading as their complaint. The Amended Complaint was filed September 11, 1975 and it will be referred to herein as the Amended Complaint.

2 The causes of action for "Bad Faith Prosecutions" have not been certified as class actions. Memorandum and Order dated October 30, 1979 and filed October 31st, p. 45; Memorandum and Order dated June 24, 1985 and filed June 25th, p. 13.

3 It should be noted that Paragraph 60 of the Amended Complaint, which also relates to reprisals, does not indicate that the actions complained of therein affected only certain plaintiffs.

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