1988 WL 128567
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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.
|
Nov. 30, 1988.

Attorneys and Law Firms

Michael E. Deutsch, Chicago, Ill., Elizabeth Fink, Brooklyn, N.Y., Dennis Cunningham, San Francisco, Cal., for plaintiff.

William E. Jackson, Millibank Tweed, Hadley & McClay, New York City, Estate of Rockefeller.

MEMORANDUM and ORDER

ELFVIN, District Judge.

***1** This Court on September 24, 1988 granted summary judgment of dismissal to defendant The Estate of Nelson A. Rockefeller ("the Estate"). The plaintiffs and the Estate seek entry of a final judgment pursuant to Fed.R.Civ.P. rule 54(b) as to the Estate so that the correctness *vel non* of such ruling may be evaluated at this point by the United States Court of Appeals for the Second Circuit, the plaintiffs wishing to have the Order reversed so that the Estate will remain as a party defendant and the Estate wishing to have the dismissal finalized so that the administration of the Estate can proceed and be wound up. Alternatively, the plaintiffs ask for a certification of the Order pursuant to 28 U.S.C. § 1292(b). The Estate does not join in such request.

Oral argument of these motions was had via a telephone conference November 16, 1988, with Michael E. Deutsch, Esq., in Chicago, representing the plaintiff class, and William E. Jackson, Esq., in New York, representing the Estate. Present in the courtroom were Linda G. Casciotti, Esq. (representing defendant Oswald), Irving Maghran, Esq. (representing defendant Pfeil) and Clarence Torrey, a purported member of the plaintiff class.

The plaintiffs seek certification pursuant to section 1292(b) on the grounds that this litigation is complex and of great public interest and that the issue of the late Governor's supervisory liability is one of first impression. In order for a district court to certify an order for appeal to the appropriate court of appeals it must, in accordance with the section, "be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." This Court's Order granting summary judgment to the Estate did not involve any controlling question of law; rather it held that there was no material issue of fact to be decided and, as such, applied the law to the factual scenario. The applicable law does not, however, lend itself to a "substantial ground for difference of opinion" and, therefore, the plaintiffs' motion for certification must be denied.

Pursuant to rule 54(b) this Court can expressly direct entry of a final judgment in the instant context of claims against multiple parties and a disposition of all of such claims as against this single party—*viz.,* the Estate—only

if it is determined that there is no just reason for delay. A determination of the correctness *vel non* of this Court's Order would work no delay in the ongoing remainder of the litigation. Despite the passage of many years there still remain depositions to be taken by the remaining defendants of individual plaintiffs and the earlier-declared availability of a 90–day period following such for any post-discovery motions. Such contemplates that the trial could not begin prior to the Fall of 1989 and that, once commenced, it would consume some three months. If a final appealable judgment were not entered now and if, on appeal from the judgment involving all remaining defendants, the decision as to the Estate were declared incorrect, a complete new trial would have to be held with only the Estate as the defendant. This by itself is a staunch reason not to delay an appellate weighing of this Court's Order. Similarly the administration of the late Governor's Estate has been ongoing for some nine years and, in all fairness to its beneficiaries, ought to be able to be concluded.

***2** While this Court is not in any doubt as to the correctness of its ruling, the United States Court of Appeals for the Second Circuit may well have a differing viewpoint and conclusion. Also, while this Court is reluctant to add to the burdens of such appellate court in acquainting itself with the factual milieu now and ruling re the Estate and later having to re-acquaint itself therewith and ruling relative to the judgment vis-a-vis the other defendants, it appears that there should be an appellate decision at this point.

This Court therefore finds that there is no just reason to delay the entry of a final judgment of dismissal of all and any claims of any and all plaintiffs against the Estate. Such judgment is hereby ORDERED to be entered forthwith.

All Citations

Not Reported in F.Supp., 1988 WL 128567