

1990 WL 94898

Only the Westlaw citation is currently available.
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, Maria Santos, Mother and Legal Representative of Santiago Santos, deceased, Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased, Jomo Joka Omowale, 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 Maynard, Jr., Calvin Hudson, Kimanthi Mpingo, a/k/a Edward Dingle, Kendu Haiku, a/k/a Willie Stokes, Ooji Kwesi Sekou, a/k/a Chris Reed, Phillip "Wald" Shields, Jerome Rosenberg, Alphonso Ross, Frank Lott, Gary Richard Haynes, Raymond Sumpter, Omar Sekou Toure a/k/a Otis McGaughey, Dacajeweiah, a/k/a John Hill, and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

Nelson A. ROCKEFELLER, Russell G. Oswald, T. Norman Hurd, Walter Dunbar, Wim Van Eekeren, John C. Miller, John Monahan, John C. Baker, A.C. O'hara, Vincent Mancusi, Leon Vincent, Karl Pfeil, Robert F. Fischer, Dalton Carney, Henry Williams, J.C. Moochler, A.T. Malovich, Robert P. Quick, W.L. Schurter, K.E. Gellert, G.K. Elbet, T.N. Kruk, W.K. Dillon, M.K. Halloran, K.S. Crouse, R.J. Dwyer, P.P. Zelinski, G.R. Toray, J.B. Connell, B. Muthig, D.O. Parr, J.J. Patterson, J.W. McCarthy, D.O. Ellis, E.M. Byre, and John Does
Nos. 1-100, Defendants.

No. CIV-75-132E.

June 15, 1990.

Attorneys and Law Firms

Elizabeth Fink, Brooklyn, N.Y., Michael E. Deutsch, Chicago, Ill. for plaintiff.

John Stengu, Buffalo, N.Y., Joshua Effron, Delmar, N.Y., Richard Moot, Irving Maghran, Jr., Buffalo, N.Y., for defendant.

MEMORANDUM and ORDER

ELFVIN, Senior District Judge.

*1 *Sub judice* in this civil rights class action suit¹ is the plaintiffs' motion for substitution of parties under Fed.R.Civ.P. rule 25(a)(1).

Defendant John Monahan died April 21, 1987 in Goshen, N.Y. His attorney filed affirmations of his death with this Court and served these on the parties hereto in May 1987. *See* Affirmation of John R. Stewart, Esq. (filed May 4, 1987); Affirmation of Stewart (filed May 12, 1987) and Exhibit A thereto (copy of death certificate). The plaintiffs thereafter moved to substitute Monahan's estate in his stead. *See* Notice of Motion, filed August 13, 1987. Monahan's attorney opposed the motion, asserting that the motion was untimely and also that Monahan had died interstate and without any assets, rendering substitution an impossibility. *See* Affirmation of Stewart (dated September 23, 1987), ¶¶ 7-8. The plaintiffs thereafter indicated that they would petition for letters of administration in the Orange County (N.Y.) Surrogate's Court so as to establish a nominal administrator for purposes of this litigation. *See* Affirmation of Michael E. Deutsch, Esq. (dated November 20, 1987), ¶ 13. The plaintiffs' motion was not argued or taken under advisement, however, until March 13, 1990 (along with a motion by Monahan's counsel to have him dismissed from the suit), at which time there impliedly continued to be no administrator of an estate for Monahan.

Under Fed.R.Civ.P. rule 25(a)(1), as amended, a motion to substitute because of the death of a party must be made "not later than 90 days after the death is suggested upon the record by service of a statement of the fact of death."²

But the ninety-day limitation is not implicated unless the statement of death identifies the successors or representatives of the estate “when such information was readily available to the person making the statement.” *Al-Jundi v. Rockefeller*, 88 F.R.D. 244, 247 (W.D.N.Y. 1980). “[O]therwise an opposing party could be put to an unfair burden of locating and serving the representatives before the ninety-period expired.” *Ibid.* Here, the plaintiffs had not been informed that there were no successors or representatives until after having filed their motion. *See Deutsch Affirmation, supra*, ¶¶ 4-8. Their ignorance in this regard operated to impose an unfair burden upon them of ascertaining the absence of successors or representatives within ninety days of being served with the statement of death. Conversely, Monahan’s counsel was in a position vis-a-vis his former client to readily obtain this information, if not in early May of 1987 at least shortly thereafter. Hence, this Court construes the motion to be timely. *See Al-Jundi v. Rockefeller, supra*, at 247 (noting the “remedial flexibility” of the ninety-day limitation period so as to avoid harsh and unfair results).

New York law expressly permits “[a]ny person interested in the estate of an intestate” to present a petition praying for the appointment of an administrator. *See New York’s Surrogate’s Court Procedure Act*, § 1002(1). Of course, whether letters of administration will be granted is an entirely separate affair and one which might conceivably be impacted by the absence of assets to be administered. *See In re Estate of Perno*, 30 A.D.2d 37, 294 N.Y.S.2d 853, 854 (4th Dept. 1968) (surrogate’s court lacked jurisdiction to issue letters of administration where “the appointment of an administrator would have been a useless and unnecessary act”). But such question is—or was—for the state court, not this one.

*2 The above-referenced Paragraph 13 of Mr. Deutsch’s Affirmation speaks as follows:

“Finally, since none of Mr. Monahan’s next of kin intend to set up an estate on his behalf, plaintiffs will petition for letters of administration in the Orange County Surrogate Court. This will allow a nominal estate to be established as an entity to be sued.”

Elizabeth M. Fink, Esq., in her February 23, 1990 Affirmation, recognized again that

“it is entirely proper for one of the plaintiffs to set up an estate in the name of John Monahan, to provide for an

entity to allow for the continuation of the claims against defendant Monahan. Plaintiff Frank Big Black Smith is now completing the proper procedures to obtain letters of administration * * *. A final delay in this procedure has only been occasioned by the recent death of Rose Monahan * * * and the need to correctly verify the next of kin.

“In any circumstance, Plaintiff Frank Smith will have the process completed before the date set for oral argument on this motion.”

Attached to Ms. Fink’s Affirmation as Exhibit C is a group of uncertified and unconformed documents purporting to comprise (a) Mr. Smith’s Petition to the Surrogate’s Court, County of Orange, for Letters of Administration to issue to John S. Keller, Orange County Commissioner of Finance, or another with the authority of such representative being limited to the creation of an estate to receive funds and process in this action, (b) a Combined Verification, Oath and Designation (For Use When Petitioner Is To be Appointed Administrator) which is not completed except to show Ms. Fink as the attorney and (c) a Citation to Denise Cohen (said to be Mr. Monahan’s daughter) and Mr. Keller which is uncompleted except to show the year 1990, the court to be the Surrogate’s Court estate to be that of John W. Monahan, the petitioner to be Mr. Smith, the petitioner’s attorney to be Ms. Fink and the proposed representative of the estate to be Mr. Keller or another.

Inasmuch as this Court deems it immensely pertinent to the disposition of the plaintiffs’ motion to substitute to have detailed and probative information as to the existence *vel non* of a representative of Mr. Monahan’s estate, it is hereby

ORDERED that the plaintiffs shall supply such information under affidavit not later than July 2, 1990 and that, failing such submission, their motion to substitute the estate of John W. Monahan in the place of John Monahan as a defendant in this action shall be denied and the motion to dismiss the Complaint as to him shall be granted.

All Citations

Not Reported in F.Supp., 1990 WL 94898

Footnotes

¹ Familiarity with the procedural and factual background of this case is presumed. For a detailed discussion see *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir.1989).

² Rule 25(a)(1) provides in its entirety:

“If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.”