2007 WL 473711
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Kadian MCBEAN, et al., Plaintiffs,
v.
CITY OF NEW YORK, et al., Defendants.

No. 02Civ.5426(GEL)(THK). | Feb. 13, 2007.

Opinion

MEMORANDUM OPINION AND ORDER

KATZ, Magistrate J.

***1** In this prisoners' civil rights action, the Intervenor-Plaintiffs, representing a putative class, challenge certain policies and practices of the New York City Department of Correction ("DOC") with respect to strip searches of pretrial detainees who have been arrested on misdemeanor charges and compulsory gynecological examinations of female detainees. Pretrial discovery has been ongoing under this Court's supervision, and it is anticipated that a motion by Plaintiffs for class certification, and a motion by Defendants for summary judgment, will be filed when fact discovery is completed. Presently before the Court is a motion brought by Arthur Wallace, David Sanchez, Julio Phitts, and Chareama Bolds (hereinafter "the Proposed Intervenors"), pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, to intervene as additional plaintiffs. Defendants oppose the motion.

DISCUSSION

Federal Rule of Civil Procedure 24(b) provides, in pertinent part, that intervention is permissible "[u]pon timely application ... (2) when an applicant's claim or defense and the main action have a question of law and fact in common." Fed.R.Civ.P. 24(b). That the motion be timely is a prerequisite for intervention. *See Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.,* 471 F.3d 377, 391 (2d Cir.2006).

> The determination of the timeliness of a motion to intervene is within the discretion of the district court, evaluated against the totality of the circumstances before the court. Circumstances considered in this determination include: (1) how long the applicant had notice of the interest before [he] made the motion to intervene; (2) prejudice to existing parties from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.

D'Amato v. Deutsche Bank, 236 F.3d 78, 84 (2d Cir.2001) (internal citations and quotation marks omitted); *accord Holocaust Victim Assets Litig.,* 225 F.3d 191, 198 (2d Cir.2000). "[T]he length of an applicant's delay ... is among the most important factors to consider in a timeliness decision." *Hnot v. Willis Group Holdings Ltd.,* NO. 01 Civ. 6558(GEL), 2006 WL 3476746, at *2 (S.D.N.Y. Nov. 30, 2006) (internal citation and quotation marks omitted).

There is no apparent dispute that the Proposed Intervenors' claims are essentially identical to the claims raised by the current Plaintiffs. Each of the Proposed Intervenors contends that he/she was subjected to illegal strip searches, without reasonable suspicion, while he/she was in the custody of DOC.[1] (*See* Affirmation of Elizabeth S. Saylor, Esq., dated Dec. 19, 2006, ¶ ¶ 3-5, 11.) Moreover, the Proposed Intervenors are represented by the same counsel as Plaintiffs, so there is no risk of inconsistent or duplicative litigation strategies. Further, as Plaintiffs argue, permitting the Proposed Intervention will assist in developing and resolving the factual and legal disputes in the litigation, including the class certification determination, because the claims of the Proposed Intervenors, which are typical of those of the proposed class, will further elucidate DOC's practices, most particularly its practices in recent months.

***2** Defendants oppose the motion to intervene, arguing, primarily, that it is untimely. They point out that the original intervenor action was filed on April 7, 2005, and thus the litigation has been proceeding for almost two years. There has been very extensive pretrial discovery, and a February 28, 2007 deadline for the completion of fact discovery has been set by the Court. Finally, Defendants observe that none of the Proposed Intervenors has submitted an affidavit or other admissible evidence which indicates when he/she first became aware of the litigation-a critical fact in determining whether there has been undue delay. (*See* Defendants' Opposition to Intervenors' Motion to Add Additional Intervenors ("Defs.' Mem."), at 4.)

The Proposed Intervenors respond that they did not learn that there was an ongoing lawsuit concerning strip searches until November 2006, and they filed their motion to intervene within three weeks of acquiring that knowledge. In fact, two of the Proposed Intervenors filed their motion within just a few days of learning about the lawsuit. (*See* Declaration of Elizabeth S. Saylor, Esq. in Reply to Defendants' Opposition to Motion to Intervene, dated Jan. 12, 2007, ¶¶ 4-5.)[2] Moreover, according to the Proposed Intervenors' counsel, they could not have brought many of their claims at an earlier time, since they were strip searched in October and November of 2006. (*See* Intervenor-Plaintiffs' Reply Memorandum in Support of Motions to Intervene, dated Jan. 12, 2007 ("Pls.' Reply Mem."), at 3-4.) Accepting these contentions as true, the motion was brought expeditiously.[3]

With respect to the second factor in assessing timeliness-prejudice to the adversary-Defendants argue that there is now a February 28, 2007 deadline for the completion of pretrial discovery and permitting the intervention would inevitably lead to further burdensome discovery and an inability to meet the deadline. (*See* Defs.' Mem. at 5.) The need to conduct additional discovery, standing alone, does not give rise to such prejudice as to favor Defendants on this factor. The Court appreciates that the pretrial discovery has been prolonged and burdensome to Defendants. Nevertheless, the addition of four Plaintiffs will not substantially add to that burden. The only additional discovery that will be required pertains to the specific experiences of the Proposed Intervenors, and should be quite discrete. Since they are represented by the same counsel as the present Intervenor-Plaintiffs, additional discovery relating to DOC policies and practices, which has placed the greatest burden on Defendants, will not be needed or authorized. Moreover, discovery is ongoing, and the parties are still engaged in efforts to obtain records pertaining to the present Intervenor-Plaintiffs. Thus, the addition of four Intervenor-Plaintiffs is not likely to lead to substantial delay in completing discovery or resolving the claims in the litigation. This case is, therefore, easily distinguishable from other actions in which courts have found that the untimely addition of intervenors would lead to substantial prejudice to the existing parties because, for example, discovery had been completed, a lengthy settlement process had resulted in a settlement that would need to be reconsidered if intervention was permitted, and dispositive motions had been decided prior to the proposed intervention. *See, e.g., D'Amato,* 236 F.3d at 84 ("late intervention would potentially derail the settlement and prejudice the existing parties"); *Holocaust Victims Assets Litig.,* 225 F.3d at 199 ("intervention at this late stage would prejudice the existing parties by destroying their Settlement and sending them back to the drawing board"); *Hnot,* 2006 WL 3476746, at *5 ("The original complaint was filed over five years ago, fact discovery has been complete for over two and [a] half years, and the class has been certified for over a year and a half. The Court has resolved over seven motions, including several summary judgment motions, a motion to amend the complaint, a motion for sanctions, a motion to compel nationwide discovery, and motions to certify and modify the class. Granting [the] motion would effectively require the Court to start from square one....").

***3** As for any prejudice to the Proposed Intervenors if their motion is denied, they argue, and the Court agrees, that, as individuals with limited resources, it would be burdensome, as well as inefficient and a waste of judicial resources, to require them to file a separate, but related case. (*See* Pls.' Reply Mem. at 6.)

Finally, the Proposed Intervenors suggest that permitting the intervention would assist in the development of the record, and may prove to be necessary if the Court determines that subclasses are required, because the Proposed Intervenors, in contrast to the original Intervenor-Plaintiffs, all claim to have been subjected to illegal strip searches in recent months, after Defendants settled the original class claims in this action and claimed to have remedied other challenged practices. (*See* Pls.' Reply Mem. at 6-7.) The Court cannot speculate on future developments in the litigation, but, in the absence of any meaningful prejudice to the present parties, the wiser practice would be to err on the side of inclusiveness, by permitting intervention.

For the above reasons, the Court concludes that the motion to intervene is timely, will not result in any significant prejudice to the present parties, and satisfies the requirements of Federal Rule of Civil Procedure Rule 24(b). Accordingly, Arthur Wallace, David Sanchez, Julio Phitts, and Chareama Bolds's motion to intervene as plaintiffs in this action is granted.

So Ordered.

Footnotes

1 Chareama Bolds, like current Plaintiffs Afifa Hudspeth and Doris Eswards, also contends that she was subjected to a forced gynecological examination while in DOC custody.

2 Apparently, some of the Proposed Intervenors were aware of the earlier class action settlement in this action, but were not aware

that the case had continued with respect to the additional claims of the Intervenor-Plaintiffs. (*See id.* ¶ 6.)

3 As Defendants point out, the assertions about when the Proposed Intervenors learned about the litigation comes from Plaintiffs' counsel, rather than the Proposed Intervenors themselves. The Court attributes this deficiency to the fact that the motion was streamlined-with the general imprimatur of the Court-in order to expedite its filing and resolution. If discovery reveals that the Proposed Intervenors' actual knowledge of the litigation is not what their counsel has represented, appropriate relief can be sought, including revisiting the intervention determination.