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United States District Court, S.D. New York.

MARISOL A., et al., Plaintiffs,
v.
Rudolph W. GIULIANI, et al., Defendants.

No. 95 Civ. 10533(RJW). | Jan. 25, 1999.

Opinion

MEMORANDUM DECISION AND ORDER

WARD, J.

***1** Nineteen voluntary child care agencies ("Intervenors") who were granted leave to intervene by this Court in a related matter, *Wilder v. Bernstein,* 78 Civ. 957(RJW), now seek to intervene in *Marisol v. Giuliani* pursuant to Federal Rule of Civil Procedure 24(a).[1] For the reasons hereinafter stated, the Intervenors' motion is granted.

[1] While the Intervenors brought this motion under the caption of *Wilder v. Bernstein,* 78 Civ. 957(RJW), the parties, both plaintiffs and City defendants, and the Court understand it to be a motion to intervene in the *Marisol v. Giuliani* action. Therefore, this motion will be treated as such.

BACKGROUND

In order to properly address this motion, the Court must review events that occurred as far back as June 1973. *Wilder v. Sugarman,* 73 Civ. 2644(HRT), was filed in June 1973. The action was brought against various child care agencies, and City and State agencies and officials. Plaintiffs asserted "that the statutory scheme for the provision of child-care services, and the manner in which those services were provided, violated the first, eighth, and fourteenth amendments, and resulted in racial and religious discrimination in the access to these services."*Wilder v. Bernstein,* 499 F.Supp. 980, 986 (S.D.N.Y.1980). A three-judge district court held in 1974 that "the challenged New York laws represent[ed] on their face a fair and reasonable accommodation between the Establishment and Free Exercise Clauses of the Constitution."*Wilder v. Sugarman,* 385 F.Supp. 1013, 1029 (S.D .N.Y.1974).

In March 1978, a new action, *Parker v. Bernstein,* 78 Civ. 957(RJW), was filed which raised similar challenges. This Court, in a June 2, 1978 Order, dismissed *Wilder v. Sugarman,* on the condition that the opinion of the three-judge court would be treated as *stare decisis* in the surviving action. Subsequently, *Parker v. Bernstein* was amended and renamed *Wilder v. Bernstein.SeeWilder v. Bernstein,* 499 F.Supp. at 986–87, n. 4. A class was certified in 1980 and defined as: "all those New York City children who are black, and who are Protestant, of other non-Catholic or non-Jewish faiths, or are of no religion, and are in need of child-care services outside their home."*Wilder v. Bernstein,* 499 F.Supp. at 994.

Before trial was to begin in August 1983, plaintiffs and City defendants entered into settlement negotiations. In April 1984, an initial draft of a Stipulation of Settlement was presented to this Court for approval. At that time, the Court heard objections from nineteen contract child care agencies, the Intervenors, and in June 1984 permitted them to intervene. The Intervenors objected to the initial draft Stipulation of Settlement's focus on discrimination rather than on the best interests of all children in foster care. The Intervenors' concerns were addressed on the record during further settlement negotiations and the Stipulation of Settlement was amended.

On October 8, 1986, the Stipulation of Settlement as amended was approved by this Court ("Stipulation of Settlement").[2]*Wilder v. Bernstein,* 645 F.Supp. 1292 (S.D.N.Y.1986). A final judgment was entered on April 29, 1987 approving the settlement. Subsequently, a number of foster care agencies which also had been dismissed as defendants appealed the judgment. On May 4, 1987, this Court granted a ten-day stay to allow the appellants to seek a further stay from the Court of Appeals. The Court of Appeals granted a partial stay of the final judgment pending appeal on May 21, 1987. In June 1988, the Second Circuit affirmed the judgment. *Wilder v. Bernstein,* 848 F.2d 1338 (2d Cir.1988).

[2] The final provision of the Stipulation of Settlement dismisses the State defendants from the action. Stip. ¶ 84.

***2** The Stipulation in the *Wilder* settlement, among other things, established a panel to monitor activities designated within the Stipulation. The activities of this panel have been continuous and have included such things as monitoring kinship foster care.

Throughout the negotiation of the Stipulation of Settlement and during the continuing enforcement proceedings and court conferences in *Wilder,* the

Intervenors remained involved. They were represented at hearings and presented their position both in written and oral formats. Even in the latest *Wilder* decision where this Court refused to grant City defendants' motion to declare the Stipulation of Settlement terminated and enjoin the parties from enforcing it, the Intervenors filed opposition papers to the motion. *SeeWilder v. Bernstein,* 1998 WL 355413 (S.D.N.Y. July 1, 1998).

While the *Wilder* post-judgment proceeding continued, the related case of *Marisol v. Giuliani* was filed. On December 3, 1995, eleven named plaintiffs brought a class action against City and State of New York officials responsible for administering and monitoring New York City's Child Welfare Administration ("CWA"), now the Administration for Children's Services ("ACS"), claiming that the defendants' actions or inactions deprived plaintiffs of their rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution, under Article XVII of the New York State Constitution, as well as under numerous federal and state statutes. In the Complaint, specific factual allegations regarding these named plaintiffs are identified as well as systemic problems of the class as a whole. In an Opinion dated March 1, 1996, this Court certified the plaintiff class of:

> [a]ll children who are or will be in the custody of the New York City Child Welfare Administration ("CWA"), and those children who, while not in the custody of CWA, are or will be at risk of neglect or abuse and whose status is known or should be known to CWA.

On April 23, 1998, at the direction of the Court of Appeals, this Court issued a Memorandum Decision and Order certifying subclasses.

Much discovery was conducted and after several scheduling orders, a firm trial date of July 27, 1998 was established. On the eve of trial, the parties informed the Court that they were engaged in active negotiation discussions. These discussions continued into early December at which time two signed settlement agreements were presented to the Court, one signed by plaintiffs and State officials and the other signed by plaintiffs and City officials. The parties proceeded by giving the appropriate notice and a fairness hearing regarding these settlement agreements is scheduled for January 22, 1999.

This motion made by the Intervenors concerns the settlement agreement signed by plaintiffs and City defendants (*"Marisol* City Settlement Agreement"). Within this agreement, the parties in *Marisol* agree that upon the signing of the agreement, immediate suspension of the following *Wilder*-related activities will occur: "meetings and discussions between and among the City, Plaintiffs' counsel and various other parties; all discovery obligations of any kind; all obligations to provide information and data to Plaintiffs' counsel; and applications to the Court except as provided in this paragraph."*Marisol* City Settlement Agreement, ¶ 33.

***3** The parties also agree that "the following additional activities should be suspended, and agree to jointly seek forthwith by an order to show cause with a proposed temporary restraining order the Court's approval for such suspension: court conferences and all activities of the *Wilder* settlement panel, including any audits or case reviews."*Id.* Further, the parties agree to dismiss *Wilder* and all of its obligations at the time of final approval of the *Marisol* City Settlement Agreement. *Id.* The Court was petitioned to suspend the above-mentioned *Wilder* activities and on December 21, 1998 signed an order suspending certain *Wilder* activities, pending the Court's approval of the *Marisol* settlement agreement and the Court's dismissal of the *Wilder* case upon motion of plaintiffs and City defendants.

The Intervenors, while parties in the *Wilder* action, were not included in any of the negotiations surrounding the *Marisol* City Settlement Agreement. As *Marisol* calls for the dismissal of *Wilder* but continues the obligations of *Wilder,* the Intervenors move pursuant to Rule 24(a) to intervene in the *Marisol* action.[3]They seek to intervene in the following manner with relation to plaintiffs and City defendants, not with regard to State defendants. First, the Intervenors request that the Advisory Panel, established in the *Marisol* City Settlement Agreement, "will provide the Intervenors with a draft of the Initial Report with respect to the *Wilder* Obligations referred to in paragraph 11.b. and will receive and discuss with the Intervenors any comments they wish to make concerning the draft as provided for the parties in paragraph 14" of the *Marisol* City Settlement Agreement. Notice of Motion, ¶ 1. Second, "[t]he Initial Report with respect to the *Wilder* Obligations referred to in paragraph 11.b. will be provided to the Intervenors at the same time it is provided to the parties pursuant to paragraph 15."*Id.* ¶ 2. Third, "[a]ny Periodic Reports referred to in paragraph 19 with respect to the *Wilder* Obligations will be provided to the Intervenors when provided to the parties and the Court."*Id.* ¶ 3. Fourth, "[w]ith respect to any Periodic Report concerning the *Wilder* Obligations under paragraph 23, a draft of such report will be provided to the Intervenors when provided to the parties."*Id.* ¶ 4.

[3] Intervenors' motion to intervene is predicated on the approval of the *Marisol* City Settlement Agreement and the dismissal of *Wilder* by this Court. If this Court does not approve *Marisol* and dismiss *Wilder,* this motion is

> moot. Therefore, the Court writes on the assumption that the *Marisol* City Settlement Agreement is approved and *Wilder* is dismissed.

Additionally, Intervenors request that if plaintiffs move for judicial enforcement of the *Wilder* Obligations pursuant to paragraph 31 of the *Marisol* City Settlement Agreement, Intervenors be served with motion papers and permitted to participate in the enforcement proceedings as a party. *Id.* ¶ 5 .[4]

[4] Intervenors requested additional relief but then withdrew that request in their reply papers. Thus, the Court will not discuss the withdrawn request for relief.

DISCUSSION

Federal Rule of Civil Procedure 24(a)(2) provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[5]

[5] This Court finds that the Intervenors' papers are sufficient to meet the procedural requirements of Federal Rule of Civil Procedure 24(c). As required, the Intervenors state and set forth claims for which they seek intervention. These claims are those which involve the *Wilder* Obligations.

***4** The Second Circuit stated that intervention as of right under Rule 24(a)(2) is granted when the moving party:

> (1) files a timely motion; (2) asserts an interest relating to the property or transaction that is the subject of the action; (3) is so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) has an interest not adequately represented by the other parties.

United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir.1994); *seealsoAmerican Lung Assoc. v. Reilly,* 962 F.2d 258, 261 (2d Cir.1992); *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.,* 922 F.2d 92, 96 (2d Cir.1990).

The Court finds that the Intervenors did request intervention in a timely manner. "Timeliness defies precise definition, although it certainly is not confined strictly to chronology. Among the circumstances generally considered are: (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting 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."*Pitney Bowes, Inc.,* 25 F.3d at 70.

The Intervenors received notice of their interest in the *Marisol* action in December 1998. It was at this time that the Intervenors were informed that the *Marisol* City Settlement Agreement called for the dismissal of *Wilder.*The Intervenors were not included in the *Marisol* settlement negotiations, nor were they informed of their impact on *Wilder* until after the *Marisol* City Settlement Agreement was reached. This Court recognizes the great confidentiality that surrounded the negotiations and finds that the Intervenors were not lacking in diligence. To the contrary, the Intervenors have moved in a most prompt manner. Notice of the proposed settlement in *Marisol* and dismissal of *Wilder* was given in December 1998 and comments were to be submitted by January 15, 1999. The Intervenors moved well within this period to have their interests heard.

Further, the timing of the intervention does not prejudice the original litigating parties. First, as the Intervenors are timely, any inconvenience to the parties is a matter of course that must be accepted. Second, it should have been foreseen by the parties in *Marisol* that the remaining parties in *Wilder* would seek to assert their rights in the remaining litigation. Finally, the Court finds that prejudice to the Intervenors would exist if the motion was denied. Assuming approval of the *Marisol* settlement and the dismissal of *Wilder,* denial of this motion would end the enforcement of Intervenors' interests in *Wilder* related issues.

The Court finds that the Intervenors have an ongoing interest relating to the transaction that is the subject of the action. For example, one of the five areas that the *Marisol* Advisory Panel is instructed to examine is "[p]lacement and evaluation issues arising out of an agreed-upon set of existing legal obligations in *Wilder* set forth in paragraph

30.b, below ("*Wilder* Obligations")."*Marisol* City Settlement Agreement ¶ 11.b. Therefore, the interests that this Court found the Intervenors to have in the *Wilder* action continue to be present in the *Marisol* case.

***5** Without the ability to intervene, the Court would be denying the Intervenors the right to protect their interests. As *Marisol* calls for the dismissal of *Wilder* and the furtherance of *Wilder* objectives in a new manner, the Intervenors should be permitted to enforce the *Wilder* Obligations through this new medium.

Finally, this Court does not believe that the other parties adequately represent the interests of the Intervenors. As was noted in the *Wilder* litigation, the Intervenors' "contributions ... were essential to the creation of the final Stipulation."*Wilder v. Bernstein,* 725 F.Supp. 1324, 1350 (S.D.N.Y.1986), *aff'd,*944 F.2d 1028 (2d Cir.1991). Further, the Court finds that the interests the Intervenors had that afforded them party status in *Wilder* apply to the *Wilder* Obligations carried forth in *Marisol.*As "[t]he Court benefitted immeasurably from the [I]ntervenors' initial insights into the operation of the child care system from the voluntary agency's perspective," the Court is sure that the *Marisol* Advisory Panel will likewise benefit from the insights of the Intervenors. *Seeid.* at 1350.

On the condition that the *Marisol* City Settlement Agreement is approved and *Wilder* is dismissed by this Court, the Court grants the Intervenors intervention in *Marisol* with regard to City defendants and the *Wilder* Obligations. It also grants the Intervenors' requests to receive the draft of the Initial Report with respect to the *Wilder* Obligations referred to in paragraph 11.b. of the *Marisol* City Settlement Agreement from the Advisory Panel and for the Advisory Panel to then receive and discuss with the Intervenors any comments the Intervenors have regarding the draft, as provided for the parties in paragraph 14. Additionally, the Initial Report with respect to the *Wilder* Obligations referred to in paragraph 11.b. will be provided to the Intervenors when provided to the other parties, and any Periodic Reports referred to in paragraph 19 with respect to the *Wilder* Obligations will be provided to the Intervenors when provided to the other parties.

The Court finds the Intervenors' request to be permitted to participate in enforcement proceedings with plaintiffs to be moot. First, no such proceedings are currently under way. Second, as the Intervenors are granted party status with regard to the *Wilder* Obligations in *Marisol,* they may proceed as a party under the agreement and enforce any requirements concerning the *Wilder* Obligations, specifically those set forth in paragraph 31 of the *Marisol* City Settlement Agreement.

As a final matter, the City raises the concern of attorneys' fees for the Intervenors. City defendants claim that the Intervenors agreed to waive attorneys' fees in connection with *Wilder,* and that this should continue in the *Marisol* matter. This Court disagrees. Assuming that *Wilder* is dismissed by this Court, any such orders or agreements in *Wilder* no longer bind the Court. Therefore, any application for attorneys' fees would be examined in *Marisol,* and the Court reserves decision on such applications until they are made.

CONCLUSION

***6** This Court grants Intervenors' motion to intervene and the additional relief stated above, conditioned on this Court's approval of the *Marisol* City Settlement Agreement and dismissal of *Wilder v. Bernstein,* 78 Civ. 957(RJW).

It is so ordered.