

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RALPH VALVANO, et al.,	:	
Plaintiffs,	:	70-C-1390
- against -	:	
GEORGE F. McGRATH, et al.,	:	October 21, 1971
Defendants.	:	

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Appearances:

MILTON ADLER, ESQ.
The Legal Aid Society
Attorney for Plaintiffs

By: WILLIAM E. HELLERSTEIN, ESQ.
WILLIAM A. NELSON, ESQ.
JOEL BERGER, ESQ.
RICHARD LEVI, ESQ.
BARBARA SHAPIRO, ESQ.
of Counsel

HON. J. LEE RANKIN
Corporation Counsel, City of New York
Attorney for Defendants

By: LEONARD BERNIKOW, ESQ.
Assistant Corporation Counsel
and
GEORGE ROBERTS, ESQ.
Director of Legal Affairs
Department of Correction
of Counsel

J U D D, J.

MEMORANDUM AND ORDER
EXCLUDING INDIVIDUALS FROM CLASS

One of the latest motions in this civil rights action requires an attempt to pierce the murky language of Rule 23 of Federal Rules of Civil Procedure concerning class actions.

The question arises on plaintiffs' motion to exclude fifteen named individuals from membership in the class of inmates and former inmates at Queens House of Detention for Men (QHD) on behalf of whom the plaintiffs are suing. The purpose of exclusion from the class is

... to put beyond question the right of these persons to bring individual actions for monetary damages arising out of the abuses alleged in the lawsuit.

The City defendants oppose the motion on the ground that the action was treated as a class action under Rule 23(b)(2) and that members of the class have no privilege to opt out in an action under 23(b)(1) or 23(b)(2), citing 38 Moore's Federal Practice (1970), § 23.60, p. 23-1202, and Van Gemert v. Boeing Co., 259 F.Supp. 125, 130 (S.D.N.Y. 1966).

The applicable provisions of Rule 23(b) read

as follows:

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

....

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

....

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

....

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

The Van Gemert case is different from this one.

It involved a number of separate actions by holders of debentures, who had failed to respond to a published notice of the expiration of conversion rights. Since the notice of redemption date was directed to all de-

venture holders, there was a minimum of difference between potential members of the class. In another class action maintained under (b)(1) and (b)(2) of Rule 23, plaintiff was permitted to exclude certain parties. Research Corp. v. Pfister Associated Growers, Inc., 301 F.Supp. 497 (N.D.Ill. 1969). That was an action to determine the validity and infringement of a patent, where there were differences shown between potential defendants.

The same effect as exclusion of members requesting not to be represented by plaintiffs could perhaps be obtained in the pending action by creating sub-classes pursuant to Rule 23(c)(4).

The application of Rule 23 should not turn on grammatical analysis of its language without regard to rational consideration of the facts in the particular case.

This court's Memorandum on Class Action Determination dated January 15, 1971, assumed that individual inmates could opt out. The action seeks injunctive relief to prevent the use of improper force by Correction Officers against inmates of QHD and to prevent other alleged misconduct of the defendants and

Correction Officers. As was pointed out in the Memorandum just mentioned,

This case does not involve claims for damages, in which individual differences might be significant, but injunctive relief to correct conditions affecting all inmates in the institution.

The Memorandum further stated:

The court therefore determines that the action may be maintained as a class action under F.R.Civ.P. 23(b)(2), in that any final injunctive relief or corresponding declaratory relief will be appropriate "with respect to the class as a whole."

One of the objections of the City defendants to the maintenance of the case as a class action was that not all inmates in QHD support the position of the plaintiffs. The court stated in the Memorandum on Class Action Determination:

There is no opportunity to determine how many members of the class support the action until notice is given pursuant to Rule 23. Even after notice, numerical tallies will not be decisive. All members of the class will receive the benefit of any relief that is granted. On the other hand, denial of relief will not worsen the position of any inmate who wishes not to be represented in the action. (Emphasis added).

The practical reason for the City defendants'

opposition to the present motion appears to be the hope that they can make use as res judicata of findings heretofore made by a Special Master that testimony of witnesses for the plaintiffs was false and that testimony of witnesses for the defendants was true. Cross-motions to confirm and reject the Special Master's Report are awaiting decision.

Granting of injunctive relief in this action depends on the showing of a pattern of violence that would require court action to prevent repetition. Success in individual damage actions will depend only on a showing that a particular inmate was mistreated on a particular date. Moreover, injunctive relief would benefit present and future inmates of QHD, while any claim for monetary damages will probably not be determined until after the individual plaintiffs have been discharged or transferred from the institution.

It would be unfair and unequitable, if not irrational, to forbid class members from opting out if a denial of that right might in any way prejudice their individual claims for damages.

It is ORDERED that plaintiffs' motion be granted and that:

Joseph Kane, Raymond Minori, Edgar
Andre, Jon Durros, James Evans,
Simon Johnson, Richard Flowers,
Jerome Holloway, Walter Barney,
James D'Angelo, Kevin James Goode,
Matthew Berry, C. James Lombardi,
James Maxwell, and William Lassiter

be excluded ab initio from membership in the class on
behalf of whom plaintiffs are suing.

GERRIN G. JUDD

U. S. D. J.