1995 WL 353159
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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; 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.
Kurt G. OSWALD, as Administrator of the Estate of Russell G. Oswald; John S. Keller, as the Administrator of the Estate of John Monahan; Vincent Mancusi; and Karl Pfeil, Defendants.

75–CV–0132E(M).
|
June 06, 1995.

Attorneys and Law Firms

Elizabeth M. Fink, Brooklyn, NY, Michael E. Deutsch, Chicago, IL, Joseph Heath, Jamesville, NY, Dennis Cunningham, San Francisco, CA, Daniel Meyers, New York City, for plaintiffs.

John H. Stenger, Buffalo, NY, for Oswald.

Joshua J. Effron, Delmar, NY, for Keller.

Richard E. Moot, Buffalo, NY, for Mancusi.

Irving C. Maghran, Buffalo, NY, for Pfeil.

MEMORANDUM and ORDER

ELFVIN, District Judge.

***1** Before this Court is the Plaintiffs' motion, pursuant to FRCvP[1] 15(b), for permission to amend the Complaint to conform to the proof claimed by them to have been adduced at the earlier trial of this matter by adding Eighth Amendment causes of action against defendant Mancusi for his alleged failure to provide medical care to the plaintiffs and against defendant Estate of Monahan ("Monahan") for the reprisals the plaintiffs allegedly suffered after the defendants had retaken control of the Attica Correctional Facility ("the Facility"). The motion will be denied in part.

Rule 15(b) states in pertinent part that

> "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment * * *."

The United States Court of Appeals for the Second Circuit has put the following gloss on such rule:

> "[I]f the motion is made after trial, and the issues have been tried with the express or implied consent of the

> parties, the motion must be granted; * * * if the motion is made after trial, and the issues have not been tried with the express or implied consent of the parties, the motion may be granted if the party against whom the amendment is offered will not be prejudiced by the amendment and should be granted in the absence of such prejudice if the interests of justice so require." *Hillburn By Hillburn v. Maher,* 795 F.2d 252, 264 (2d Cir.1986).

Thus, a two-part analysis is required. If the issues were tried with such consent of the plaintiffs *and* Mancusi and Monahan, respectively, the plaintiffs are entitled to amend the Complaint as a matter of right; if not, this Court still has discretion to allow the amendment if it finds that the respective defendant would not thereby be prejudiced.

The plaintiffs first argue that both issues were tried. Concerning the failure-to-provide-medical-care amendment against Mancusi, they point principally to witness Dr. Worthington Schenck's testimony that Mancusi—who himself had testified that he had been aware of the carnage inherent in and resulting from the retaking of that part of the Facility that had been held for four days by the plaintiffs and of the Facility's inability to cope with it—had called him, 45 minutes after the retaking, seeking medical assistance but had failed to apprise Schenck of the magnitude of the medical crisis, resulting in Schenck's arriving at the Facility woefully undermanned and undersupplied and thereby exacerbating the suffering and injuries of some of the plaintiffs. While this and other evidence adduced *may* be sufficient, as the plaintiffs argue, to establish of *prima facie* claim against Mancusi for failure to provide medical care, it does not establish that this claim was tried with or without Mancusi's consent. To the contrary, that a special verdicts form was submitted to the jury and that it nowhere included or implied such claim definitively establishes that it was not tried. Plaintiffs' counsel had ample opportunity to argue about the contents of and any omissions from the special verdicts form before it was submitted to the jury yet never suggested that a medical claim against Mancusi should be added and be considered by the jury. The plaintiffs tacitly admit that the Schenck testimony was not adduced to establish a medical-deprivation claim against Mancusi but rather was offered to establish others of their claims. Consequently a valid basis for a mandatory Rule 15(b) amendment has not been shown. *See Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078, 1086 (2d Cir.1977) ("The purpose of Rule 15(b) is to allow the pleadings to conform to the issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record.")

***2** For similar reasons, the plaintiffs have not established that the amendment's claims against Monahan were tried.

The issue remains then whether the proposed amendments would unduly prejudice either or both of the defendants. As to Mancusi, this Court opines that an amendment at this juncture would so prejudice him and thus it will not exercise its discretion to allow such. Beyond the fact that the evidence is close to minimal as to his liability, the plaintiffs' inordinate delay in bringing the motion and the concomitant temporal difficulties Mancusi would have in marshalling his defense to this claim militate against allowing the amendment. Similar concerns incline this Court toward disallowing the amendment as to Monahan. However, because this proposed claim has a slightly more tenable evidentiary basis, the motion to amend will be denied without prejudice to the plaintiffs' renewing it prior to or during the trial re reprisals should they be able to adduce proof sufficient to support a claim against Monahan for reprisals allegedly committed not only by the State Police but by such officers under his supervision and control after the retaking of the Facility.

Accordingly, it is hereby *ORDERED* that the plaintiffs' motions to so amend the Complaint are denied.

All Citations

Not Reported in F.Supp., 1995 WL 353159

Footnotes

[1] Federal Rules of Civil Procedure.

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