

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANE DOE I, et al., : 93 Civ. 878 (PKL)
: :
: CORRECTED
Plaintiffs, : PLAINTIFFS' MEMORANDUM
: ON THE INCLUSION OF THE
: CLAIMS OF DECEASED AND
: DISAPPEARED RELATIVES
: :
: OF JANE DOE VII,
- against - : JANE DOE X,
: JANE DOE XI, JANE DOE XII,
: JOHN DOE IV, JOHN DOE VI,
RADOVAN KARADZIC, : JOHN DOE VII, AND
: JOHN DOE VIII
: :
Defendant. :
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I. INTRODUCTION

Plaintiffs have asserted that Mirzeta Hirkic (Jane Doe IV), Hava Jukic (Jane Doe V), Halida Mesic (Jane Doe VI), Jane Doe VII, Jane Doe X, Alma Vilogorac (Jane Doe XI), Jane Doe XII, John Doe IV, John Doe VI, John Doe VII, and John Doe VIII are suing on behalf of deceased and disappeared relatives.¹ Defendant had notice of the claims on behalf of all deceased or disappeared relatives, including those of Jane Does VII, X, XI, and XII, and John Does IV, VI, VII and VIII. These claims were specifically identified in the proposed jury instructions and jury verdict form served on the defendant on August 28, 2000 and the amended proposed jury verdict form served on the defendant on September 20, 2000.² In addition,

¹The claims of certain plaintiffs are not open to question, for the Amended Complaint clearly stated that the plaintiffs are suing on behalf of their deceased husbands: Mirzeta Hirkic (Jane Doe IV); Consolidated Complaint at 9 (“on behalf of her deceased husband”); Hava Jukic (Jane Doe V), Consolidated Complaint at 10 (“on behalf of her deceased husband”); Halida Mesic (Jane Doe VI), Consolidated Complaint, at 11 (“on behalf of her deceased husband”); Jane Doe VII, Consolidated Complaint at 12 (“on behalf of her deceased husband”).

²The claim that John Doe VII was suing on behalf of his infant son was specifically included in the proposed jury instructions served on defendant on August 28, 2000. Although a separate

evidence presented at trial supports an award of damages to plaintiffs' disappeared or deceased relatives. Notice had also been provided in the initial pleadings. Where the opposing party is on notice of the claims and the evidence presented justifies an amendment to the pleadings, it is proper for the Court to amend the pleadings on its own initiative, even at this stage of the proceedings.

II. ARGUMENT

A. Plaintiffs Have Provided Notice to the Defendant about the Claims on Behalf of Their Deceased and Disappeared Relatives

Defendant Karadzic was specifically on notice of plaintiffs' claims on behalf of the deceased and disappeared relatives of Jane Doe VII, Jane Doe X, Jane Doe XI, Jane Doe XII, John Doe IV, John Doe VI, John Doe VII, and John Doe VIII because these claims were specifically identified in the proposed adaptations to jury instructions and the proposed jury verdict forms filed and served on defendant on August 28, 2000, and the amended proposed jury verdict forms filed and served on September 20, 2000. A copy of the certificates of service and cover letters are attached as Exhibits A, B, and C. Because defendant had notice that the claims by plaintiffs on behalf of their missing or dead relatives would be tried and because evidence was presented at trial without objection, defendants are not prejudiced.

In their Amended Complaint and Plaintiffs-Intervenors Complaint (combined as "Consolidated Complaint"), plaintiffs asserted claims for the summary execution and disappearance of plaintiffs' relatives. See Consolidated Complaint, 14 (Jane Doe X's father and brother), 15 (two brothers of Jane Doe XI), 16 (Jane Doe XII's husband), 21 (John Doe IV's son), 23 (father and two brothers of John Doe VI), 24 (John Doe VII's infant son), 25 (two

claim delineating that John Doe VII was suing on behalf of his son was inadvertently omitted from the verdict forms, the verdict forms made reference to the "killing of his son."

brothers of John Doe VIII), 100 (summary execution allegation), 50 (brother of Jane Doe VII), and 104, 105, 107 (disappearance allegation).³

B. Should the Court Determine That Plaintiffs Have Not Adequately Pled Claims for Their Deceased or Disappeared Relatives, the Court Could Amend the Pleadings to Conform to the Evidence Presented at Trial.

Should the court decide that plaintiffs Jane Does X, XI and XII and John Does IV, VI, VII, and VIII have not adequately pled the claims of their deceased or disappeared relatives, it may, of its own initiative, amend the pleadings to conform to the evidence presented by plaintiffs.

The Court should amend the pleadings to conform to the evidence produced at trial. Rule 15(b) requires no motion or formal amendment of the pleadings. Jund v. Hempstead, 941 F.2d 1271, 1287 (2d Cir. 1991); New York State Electric & Gas Corporation v. Secretary of Labor, 88 F.3d 98, 105 (2d Cir. 1996). Cf. Howell v. Cataldi, 464 F.2d 272, 275 (3d Cir. 1972) (under Rule 15(b), court "look[s] beyond the pleadings").

The Second Circuit's ruling in Ostano Commerzanstalt v. Telewide Systems, Inc., 880 F.2d 642, 646 (2d Cir. 1989), is directly on point. Therein, the Court held that the addition of one of plaintiff's sublicensees as a plaintiff after the close of trial on damages was proper because the defendants were not prejudiced and the addition of sublicensee conformed to evidence. As the Court noted: "Rule of Civil Procedure 15(b) permits the amendment of the pleadings to

³The allegations stated by plaintiffs meet the requirements for pleading claims on behalf of their deceased relatives. Fed. R. Civ. P. 8(a). All that is necessary is that the claim for relief be stated with brevity, conciseness and clarity. Bowles v. Cabot, 153 F.2d 258 (2d Cir. 1946), Gins v. Mauser Plumbing Supply Co., 148 F.2d 974 (2d Cir. 1945); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1215. As the Supreme Court has stated, "The purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 78 S.Ct. 99, 103, 355 U.S. 41, 48. Plaintiffs' allegations make clear that the plaintiffs' relatives have been disappeared and/or killed by the forces of the defendant, and thus provided defendant with notice as to the claims against him.

conform to the evidence. Rule 21 authorizes the district court to order the addition of a party at any time 'on such terms as are just.'" Id. at 646.

In reviewing the decision of the district court to permit the inclusion of the plaintiff's subliscences as a plaintiff, the Court looked to the decision written by Judge Charles Clark in SEC v. Rapp, 304 F.2d 786, 790 (2d Cir.1962)⁴ that Rule 15(b) is "mandatory, not merely permissive," in requiring that issues that are tried, though not raised in the pleadings, be treated as if they were raised in the pleadings." The Court went on to quote at length from that opinion:

Indeed, formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings.

* * *

The well-known objective of the rule that cases should be decided on resolution of the actual dispute between the parties, rather than on the paper pleadings filed at the inception of suit." 880 F.2d at 626, quoting 304 F.2d at 790.

Because the proposed verdict forms and jury instructions clearly noted that plaintiffs were making claims on behalf of their deceased or disappeared relatives and the defendant did not subsequently object, defendant is not unfairly prejudiced by the awards of damages to them.

The fact that plaintiffs did not seek to amend prior to the time they rested is also not determinative. In Hogan v. Wal Mart Stores, Inc., 167 F.3d 781, 783-84 (2d Cir. 1999), plaintiffs sought leave to amend after the trial had concluded and the jury had rendered its verdict. The Court reasoned that, under Rule 15(c), the amendment related back to the time of the initial pleading. In Hogan, the defendant had notice of the new claims because relevant evidence was presented at trial. Here, while the defendant's voluntary decision not to defend deprived him of notice of specific testimony, he was made aware of the claims on behalf of

⁴The Court noted that Judge Charles Clark served as Reporter to the Advisory Committee on Civil Procedure of the Supreme Court from 1935 to 1956 and was called the "father" of the Federal Rules by Judge Harold Medina. See M. Schick, Learned Hand's Court 30-31 & n. 81 (1970). Id.

deceased and disappeared relatives by virtue of the proposed jury instructions and verdict forms. Because the claims were then presented to him, defendant cannot now claim lack of notice.

III. CONCLUSION

Plaintiffs have provided defendant with notice of the claims of the deceased and disappeared relatives of all plaintiffs, including those of Jane Doe VII, Jane Doe X, Jane Doe XI, Jane Doe XII, John Doe IV, John Doe VI, John Doe VII, and John Doe VIII. Should this Court decide that it is necessary, plaintiffs respectfully request that the Court, on its own initiative, amend the pleadings to conform to the jury verdict form, and reflect that the following plaintiffs are suing on behalf of their deceased and disappeared relatives:

- Mirzeta Hirkic (Jane Doe IV) (suing on behalf of her deceased husband);
- Hava Jukic (Jane Doe V) (suing on behalf of her deceased husband);
- Halida Mesic (Jane Doe VI) (suing on behalf of her deceased husband);
- Jane Doe VII (suing on behalf of her deceased husband and her deceased brother);
- Jane Doe X (suing on behalf of her deceased father and her deceased brother),
- Alma Vilgorac (Jane Doe XI) (suing on behalf of her deceased older brother and her deceased twin brother);
- Jane Doe XII (suing on behalf of her deceased husband);
- John Doe IV (suing on behalf of his deceased son);
- John Doe VI (suing on behalf of his deceased father and his deceased Brother No. 1 and his deceased Brother No. 2);
- John Doe VII (suing on behalf of his deceased son); and
- John Doe VIII (suing on behalf of his deceased Brother No. 1 and his deceased Brother No. 2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that this day of 2000, I caused to be sent copies of the foregoing Corrected Plaintiffs' Memorandum on the Inclusion of Claims of Deceased and Disappeared Relatives of Jane Does VII, X, XI, XII and John Does IV, VI and VII, and a Proposed Order to the following by first class mail (at their request):

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