

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DENNIS E. JONES 'EL, MICHA'EL
JOHNSON, DE'ONDRE CONQUEST,
LUIS NIEVES, SCOTT SEAL, ALEX
FIGUEROA, ROBERT SALLIE, CHAD
GOETSCH, EDWARD PISCITELLO,
QUINTIN L'MINGGIO, LORENZO
BALLI, DONALD BROWN, CHRISTOPHER
SCARVER, BENJAMIN BIESE, LASHAWN
LOGAN, JASON PAGLIARINI, and
ANDREW COLLETTE, and
all others similarly situated,

Plaintiffs,

v.

GERALD BERGE and
JON LITSCHER,

Defendants.

ORDER

00-C-421-C

The Court of Appeals for the Seventh Circuit has remanded Evelio Duarte-Vestar's appeal to this court for a ruling on Duarte-Vestar's motion for leave to proceed on appeal in forma pauperis from the settlement agreement recorded on March 8, 2002 in this class action lawsuit. Because the record of this case is in the court of appeals, it is not possible to

tell exactly when Duarte-Vestar put his notice of appeal in the prison mailbox, but the appeal was docketed in this court on April 15, 2002. On April 18, 2002, I wrote to Duarte-Vestar, advising him that because he was a class member represented by counsel in the case, he could not file motions or other papers in the case. I advised him that for this reason, no consideration would be given to his appeal.

Shortly after that, when more class members began filing individual notices of appeal, I accepted the notices for filing and ruled on the requests for leave to proceed in forma pauperis. At the time, the law was that class members lacked standing to appeal unless they were representatives of the class or had succeeded in intervening in the action. See Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998), aff'd by an equally divided court, sub. nom. California Public Employees' Retirement System v. Felzen, 525 U.S. 315 (1999) (only named plaintiffs in a class action have standing to appeal district court's approval of class settlement; class members who are not named representatives must intervene in action if they wish to appeal); see also In the Matter of: Navigant Consulting, Inc., 275 F.3d 616, 617-18 (7th Cir. 2001) ("Because members of a class (other than the named representatives) are not automatically parties, they must intervene and acquire party status if they wish to appeal.")(citing Felzen, 134 F.3d 873)). Therefore, I denied the class members' requests for leave to proceed in forma pauperis on appeal and certified that their appeals were not taken in good faith. See May 2, 2002 order, dkt. # 225; April 29, 2002 order, dkt. #220.

However, the law has changed since these orders were entered.

On June 10, 2002, the Supreme Court decided Devlin v. Scardelletti, 536 U.S. 1 (2002), implicitly overruling Felzen and holding that unnamed class members who have objected to the settlement agreement may appeal a district court's decision to disregard their objections. Thus, Duarte-Vestar has standing to appeal the approval of the settlement agreement so long as he filed objections to the settlement agreement and is appealing only those issues that he raised in his objections.

The record in this case already has been forwarded to the court of appeals. The record includes all of the objections the court received from class members before the settlement was approved. Therefore, before I can decide whether Duarte-Vestar's appeal is taken in good faith, he will have to send this court a copy of the objections to the settlement proposal that he sent to the court during the objection period in this case, together with a statement of the issues he wishes to raise on appeal, as required by Fed. R. App. P. 24(a)(1)(C).

Because there is the possibility that appellant Evelio Duarte-Vestar will persuade this court that his appeal is taken in good faith, he will have to submit a trust fund account statement for the period beginning approximately July 1, 2002, and ending approximately January 1, 2003, so that I can decide whether he is financially eligible to proceed under § 1915 and, if so, what amount he should be assessed as an initial partial payment of the fee

for filing his appeal.

ORDER

IT IS ORDERED that a decision on the motion of Evelio Duarte-Vestar to proceed in forma pauperis on appeal is STAYED until January 17, 2003, so that he may submit (1) a trust fund account statement for the period beginning approximately July 1, 2002 and ending approximately January 1, 2003, (2) a statement of the issues he wishes to raise on appeal and (3) a copy of the objection he submitted in response to the proposed settlement in this case. If, by January 17, 2003, appellant Duarte-Vestar fails to submit the required documents, I will deny his request for leave to proceed in forma pauperis on appeal for his failure to show that he qualifies for indigent status under 28 U.S.C. § 1915.

Entered this 31st day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge