

**IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DON LIPPERT,)	
)	
Plaintiff,)	Case No. 10-cv-4603
v.)	
)	The Honorable Ruben Castillo
SALVADOR GODINEZ, et al.,)	
)	
Defendants.)	

**DEFENDANT WEXFORD HEALTH SOURCES, INC.'S
MOTION TO DISMISS**

Defendant, WEXFORD HEALTH SOURCES, INC., by its attorneys, Charysh & Schroeder, Ltd., pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for its motion to dismiss the plaintiff’s second amended complaint, states as follows:

1. In his second amended complaint, the plaintiff alleges civil rights and state law claims against defendant Wexford Health Sources, Inc. (“Wexford”). In Count I, the plaintiff raises a 42 U.S.C. §1983 civil rights claim, arguing Wexford had a cost-cutting policy and failed to provide inmates with medically-prescribed diets. (Complaint, ¶ 91). In Count II, the plaintiff claims Wexford also had a cost-cutting policy that denied the plaintiff adequate medical care in violation of §1983. (Complaint, ¶¶ 101-102). In Count III, the plaintiff raises a state-law claim, arguing Wexford violated the Illinois Consumer Fraud and Deceptive Business Practices Act by misrepresenting the quality of the medical services it provides to inmates. (Complaint, ¶¶ 111-112). In Count IV, the plaintiff raises a state law breach of contract claim, alleging Wexford breached its contract for services with the Illinois Department of Corrections by failing to provide adequate medical care to inmates. (Complaint, ¶¶ 117-120).

2. The plaintiff's complaint against Wexford fails on all counts. Just as argued in Dr. Ghosh's motion to dismiss, the plaintiff has not and cannot establish that Wexford had any control over the diets or types of food served to inmates at Stateville. Further, the plaintiff admits that Dr. Ghosh, the Medical Director at Stateville and an employee of Wexford, advised him on a proper diabetic diet. Therefore, Count I, for failure to provide a medically-prescribed diet, must be dismissed.

3. The plaintiff also has not properly pleaded that Wexford had a policy denying medical care to support his deliberate indifference claim in Count II. As detailed in Dr. Zhang's motion to dismiss, the plaintiff pleads only one instance where he was allegedly denied medical care – the denial of a second insulin shot on May 1, 2010. The plaintiff admits the insulin shot was ordered by Dr. Zhang, an employee of Wexford. Therefore, he has not alleged any facts showing an unconstitutional policy on the part of Wexford.

4. A corporate entity acting under color of state law violates an inmate's constitutional rights, “if it maintains a policy that sanctions the maintenance of prison conditions that infringe upon the constitutional rights of the prisoners.” *Estate of Novack ex rel. v. County of Wood*, 226 F.3d 525, 530 (7th Cir. 2000). “This liability is not founded on a theory of vicarious liability or *respondeat superior* that holds a municipality [or corporate entity] responsible for the misdeeds of its employees. Rather, a municipal policy or practice must be the ‘direct cause’ or ‘moving force’ behind the constitutional violation.” *Id.*

5. In other words, it is when the execution of a specific corporate policy or custom inflicts the injury, that the corporation acting under color of state law, as an

entity, is responsible under §1983. In the case at bar, plaintiff has not identified, or even alleged, that a specific policy or practice of Wexford was the direct cause or moving force behind the alleged violation. To the contrary, the plaintiff alleges he was denied certain foods appropriate for a diabetic at Stateville and denied a second insulin shot on one occasion on May 1, 2010. The plaintiff's conclusory, threadbare and self-serving allegation that Wexford had a "cost-cutting" policy, with no factual allegations to support that conclusion, is insufficient to state a cause of action against Wexford. Accordingly, Count II of the plaintiff's complaint should also be dismissed.

6. Because the plaintiff has not properly alleged a §1983 claim against Wexford, this court should not accept supplemental jurisdiction over his state law claims in Count III and IV. Alternatively, the plaintiff has not properly stated a claim against Wexford in those counts.

7. In order to state a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, a plaintiff must plead facts showing a deceptive practice by Wexford and that Wexford intended the plaintiff to rely on the deception. 815 ILCS 505/1, *et seq.* The plaintiff has not a cannot plead such facts here. Further, Illinois courts have found that medical care is not a "trade or commerce" so as to fall under the ambit of the Consumer Fraud and Deceptive Business Practices Act. *Tkacz v. Weiner*, 368 Ill.App.3d 610, 858 N.E.2d 514 (1st Dist. 2006). Accordingly, if this Court retains jurisdiction over Count III, it should be dismissed.

8. Similarly, the plaintiff cannot establish a state law breach of contract claim, because he cannot allege the existence of a contract with Wexford and cannot establish he was a third-party beneficiary of a contract. Count IV is based on the incorrect assumption the plaintiff is a third party beneficiary under the contract between Wexford and the IDOC. The plaintiff

does not make any factual allegations or references to the contract which support this conclusory statement.

9. Illinois law holds a strong presumption against creating contractual rights in third parties. This presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party. *Bates & Rogers Construction Corp. v. Greeley & Hansen*, 109 Ill.2d 225, 486 N.E.2d 902 (1985).

10. Illinois recognizes two types of third-party beneficiaries, intended and incidental. An intended beneficiary is intended by the parties to the contract to receive a benefit for the performance of the agreement and has rights and may sue under the contract. An incidental beneficiary has no rights and may not sue to enforce them. *MBD Enterprises, Inc. v. American Nat. Bank of Chicago*, 275 Ill.App.3d 164, 655 N.E.2d 1061 (1st Dist. 1995).

11. The plaintiff does not rely on any language in the contract which expressly indicates a benefit to him. An intended beneficiary is intended by the two parties to a contract to receive a benefit from the performance of the agreement. *Sharon Farrell, Wendell Lawson, Joseph McCullough, Marsha*, 52 Ill.Ct.Cl. 275 (2000).

12. A 'benefit' has been defined as something desirous or advantageous that a person receives which they had no previous right to. (*see Hamilton Bancshares, Inc. v. Leroy*, 131 Ill.App.3d 907, 476 N.E.2d 788 (4th Dist. 1985)). Here, the plaintiff did not receive any 'benefit' from the contract between the IDOC and Wexford. All he was to receive was that which he already had a constitutional right to – medical care. As such, he was not a third party beneficiary.

13. As Judge Holderman held in a similar situation, “[w]ithout any specific evidence that the Illinois Department of Corrections and Wexford entered into their contract with the intention of benefiting inmates like [the plaintiff], the court cannot find circumstantially that [the plaintiff] is a third-party beneficiary entitled to enforce the contract.” *Hall-Moten v. Smith*, 2009 WL 1033361 (N.D.Ill., April 17, 2009).

14. As the plaintiff has not alleged, nor even alluded to, any facts or contractual language which supports his conclusory statement that he is a third party beneficiary to the contract between IDOC and Wexford, Count IV of the plaintiff’s complaint must be dismissed.

WHEREFORE, defendant, WEXFORD HEALTH SOURCES, INC., respectfully requests that this Honorable Court enter an order dismissing the plaintiff’s second amended complaint against it with prejudice, and for such other and further relief as this Court deems just.

Respectfully submitted,

CHARYSH & SCHROEDER, LTD.

/s/ John J. Beribak

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served a copy of the foregoing documents on all attorneys of record via electronic notification to EFC participants, and by U.S. Mail to non-EFC participants at their respective addresses by depositing copies of same with proper postage prepaid in the U.S. Mail at 33 North Dearborn Street, Chicago, Illinois, on January 9, 2012.

s/ John J. Beribak