

1-11-89  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - IAS PART 22

EL6

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KENNETH MIXON, RALPH D. HERNANDEZ PAGAN :  
and MICHAEL SNYDER, on their own behalf :  
and ~~on behalf of all~~ other persons :  
similarly situated, and the COALITION :  
FOR THE HOMELESS, :  
:

Plaintiffs, :

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14932/88

- and - :  
:

WAYNE PHILLIPS, on his own behalf and :  
on behalf of all other persons similarly :  
situated, :  
:

Plaintiff-Intervenor, :  
:

- against - :  
:

WILLIAM J. GRINKER, as Commissioner of :  
the New York City Human Resources :  
Administration, and CESAR. A. PERALES, :  
as Commissioner of New York State :  
Department of Social Services, :  
:

Defendants. :  
:

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EDWARD H. LEHNER, J.:

Homelessness is a great tragedy. AIDS is another. No words are sufficient to describe the plight of those facing both afflictions, strewn amidst the gleaming towers of our greatest of cities in this land of plenty. As judges we are taught to suppress our emotions in order to render dispassionate justice, but when studying the papers in a case such as this, all of our emotion wells up inside. This is so, even though a cold record is often said to be no real substitute for the courtroom display of stark reality.

This action was commenced by the Coalition for the Homeless (the "Coalition") and three individuals who allege that they are

homeless and have displayed symptoms of being infected with the Human Immunodeficiency Virus ("HIV"). The relief sought is a judgment determining that the City of New York is required to provide the individual plaintiffs and all others similarly situated "with medically appropriate housing which includes, at a minimum, a private sleeping area and sanitary facilities". Plaintiffs contend that many persons in the large shelters established by the City have infectious diseases, and that placing such persons in the immediate proximity of HIV-infected individuals whose immune systems are impaired endangers the lives of the HIV-ill.

After the institution of the action, housing suitable to the three individual plaintiffs was provided by the City. Thereafter a motion was filed on behalf of Wayne Phillips, a person alleged to be similarly situated to the original plaintiffs, to intervene as a party plaintiff. That application is granted without opposition. It is recognized by all that the issues presented are of significant public importance, and, unfortunately, certain to recur. Thus, the actions of the City with respect to the original named plaintiffs should not moot the action. See: Jones v. Berman, 37 N.Y.2d 42, 57 (1975); Mc Cain v. Koch, 117 A.D.2d 198, 711 (1st Dep't 1986), rev'd on other grounds, 70 N.Y.2d 109 (1987)

Before the court is a motion by Mr. Phillips for a preliminary injunction directing defendants Grinker [the Administrator of the New York City Human Resources Administration (the "City")] and Perales [the Commissioner of the New York State Department of Social Services (the "State")] to immediately

provide him with medically appropriate housing. The City has cross-moved to dismiss pursuant to CPLR 3211(a) 7 and 10, asserting that plaintiffs have failed to state a justiciable claim, and have failed to join necessary parties, to wit, the State Department of Health and the State Division of Substance Abuse Services. The City asserts that "only these State agencies...would have the regulatory authority and resources to create the additional emergency housing that would be required" if the relief requested by plaintiffs were granted, and that "the relief plaintiffs request would require the Court to weigh the wisdom of resource-allocating and priority-setting decisions that have been vested exclusively in the executive branch of government".

With respect to individuals who have been diagnosed as having AIDS under the definition established by the federal Centers for Disease Control ("CDC"), the City has adopted a policy of assisting such persons by providing individual housing units or granting rent subsidies. However, it resists similar efforts on behalf of those whose HIV infections do not meet that criterion, asserting that: "determining how to care for homeless persons with health problems, whether an individual is suffering from mental illness, cerebral palsy, kidney disease, AIDS, or any of a myriad of other health problems" are discretionary decisions "that agencies of the executive branch must make on a daily basis"; that "judicial inquiry into the wisdom of such decisions is wholly improper"; and its "determination to provide non-congregate emergency housing to homeless persons who have been

diagnosed with AIDS is a rational means of allocating scarce resources among the many homeless persons seeking City assistance".

The affidavit of Stanley Brezenoff, First Deputy Mayor, shows that, the City is now providing emergency shelter to an average of 27,000 persons every night of the year; that HIV-related expenditures of all City agencies have increased from \$137 million in fiscal year 1987 to \$335 million in the current year; the number of HIV-ill patients treated at City hospitals has increased from 137 per day in May 1985 to 500 per day this past July (13% of the inpatient census of the City hospitals); the City spending on AIDS-related housing services has quadrupled from \$2.9 million in fiscal year 1987 to \$11.9 million this year; the City is providing rental subsidies to 900 persons with AIDS and provides housing assistance to 350 people with AIDS through a combination of rooms at Bailey House (a 44 bed residence on West Street operated by the AIDS Resource Center under a contract with HRA), scatter site apartments, and single room occupancy hotels. Mr. Brezenoff concludes that if the requested relief is granted, it "could be accomplished only by taking accommodations from other groups, such as the homeless families now sheltered in the commercial hotels and congregate shelters that the City is committed to emptying, or by reducing funding in other areas".

In his affidavit of November 16, 1988, Administrator Grinker refers to certain governmental studies that have "concluded that some of the most severe cases of HIV related illness...are no less medically serious" than CDC defined AIDS, and have "recommended that victims of such severe HIV related

illness should be eligible for the same special medical and social services as are currently available to persons with an official AIDS diagnosis". The Administrator concludes that in "light of these recommendations..., HRA has recently commenced a review of the eligibility criteria for a wide variety of AIDS related services now offered by HRA". However, he has not stated when his agency can be expected to announce a decision as to whether a policy change will be made.

The City does not dispute that the State Commissioner of Social Services could by regulation or administrative directive require the City and all other social service districts to provide non-congregate housing to all symptomatic HIV-infected homeless persons, but contends that the State has not done so, with which position the State agrees.

The papers show that Phillips has been diagnosed with symptomatic AIDS Related Complex, an advanced stage of HIV-infection where his immune system is seriously impaired. Although his illness would not be deemed AIDS under the CDC definition, plaintiffs have submitted medical evidence indicating that with regard to need for medically appropriate housing, there is no reason for a distinction between CDC defined AIDS and other HIV related illnesses, and that many persons die of HIV related illnesses without ever meeting the criteria for CDC defined AIDS.

Plaintiffs have clearly indicated that they do not seek to prevent HIV-infected persons from choosing to live in shelters, and thus are not seeking to require testing so as to exclude such persons from congregate facilities, stating that "rather than

seeking to deny freedom of choice...,plaintiffs are seeking to expand the freedom of homeless HIV-infected persons to choose housing which is medically appropriate and safe".

The obligation of the City to provide shelter to the homeless emanates from the consent decree ~~dated~~ August 26, 1981 in the case of Callahan v. Carey (N.Y. Co. Index No. 42582/79), in which the City agreed to provide emergency shelter to homeless men. In Eldredge v. Koch, 98 A.D.2d 675 (1st Dep't 1983), the obligation was extended to women, the court ruling that "homeless women are constitutionally entitled to treatment equal to that accorded to homeless men", and finally in Mc Cain v. Koch, supra, the right to emergency housing for families was recognized. Thus, it can be seen that the current provisions for housing the homeless resulted not from initiatives of the executive or legislature, but rather was the result of litigation.

The standard criteria for granting a preliminary injunction are "1) the likelihood of success on the merits; 2) irreparable injury absent granting the preliminary injunction; and 3) a balancing of the equities". W.T. Grant Company v. Srogi , 52 N.Y.2d 496, 517 (1981)

In Mc Cain v. Koch, supra, the Court of Appeals said that (p. 116) "in a proper case (the) Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies", and (p. 118) that once government undertook to provide housing, the court had the power "to make that shelter minimally habitable".

Providing a symptomatic HIV-infected person a bed that may be as close as three feet from one occupied by a person with

tuberculosis or some other infectious disease would not seem to be providing a habitable shelter, as habitability includes the concept of being substantially free of potentially significant health threats. See: Barnes v. Koch, 136 Misc.2d 96, 99 (Sup. Ct., N.Y. Co. 1987)

Thus, since the court finds that to joinder is a justiciable issue has been raised as to whether the shelter the City now provides to Mr. Phillips and to others similarly situated satisfies minimum standards of habitability, and since the City may be required to act without the joinder of the two additional State agencies referred to above, its motion to dismiss is denied. The City may, however, if it so chooses, join said agencies as third-party defendants.

Since providing Phillips shelter in a barracks type setting may well involve irreparable danger to his health, and since he stands a likelihood of success in establishing that a person in his condition is entitled to be provided with shelter that is more private, the court finds that Phillips has satisfied the prerequisites for the issuance of a preliminary injunction, and thus hereby directs that, pending the trial of this action, he be provided shelter by the City in a facility where he will not be in close proximity to those who may have infectious diseases.

Whether the minimum housing that the City must provide calls for a private sleeping area as demanded by plaintiffs is an issue that cannot be determined at this time, but must await the trial, as is the question as to how advanced the infection must be to entitle a homeless person to housing in a non-congregate

facility.

Although it well may be that this action will have to be tried to determine the rights of the parties, it is hoped that this will be unnecessary and that no matter how difficult the solution, government will act without being further prodded by the courts. As Governor Cuomo said in his recent State of the State message (New York Times, January 5, 1989, p. B4).

"Unless we continue to work toward the day when every person in this state has a place to call home and a bed to sleep in, we will have to admit to ourselves, to our children, to everyone, that we are prepared to accept failure as a society".

The Coalition asserts that it has standing because a substantial portion of its resources are used to aid homeless persons. A similar claim was made by it in *Grant v. Cuomo*, 130 A.D.2d 154 (1st Dep't 1987), *aff'd* \_\_\_\_\_ N.Y.2d \_\_\_\_\_, NYLJ Dec 23, 1988, in an action where it sought an injunction against the City to require it to comply with the statutory mandate that reports of child abuse be investigated within 24 hours. There the court observed that the pecuniary affect upon the Coalition was, as it is here, "presented in general terms only". However, the court found standing stating that (p. 159):

"...we cannot ignore the obvious fact that if organizations of this kind are denied standing, the practical effect would be to exempt from judicial review the failure of defendants, here conceded, to comply with their statutory obligations. Manifestly, the abused children are not themselves able to seek a judicial remedy, nor is it likely that parents or caretakers, the objects of the claims of abuse or maltreatment, would undertake to secure a remedy".

The situation here is entirely different as the plaintiffs



are adults for whom the Coalition may provide legal representation. Thus, although the Coalition technically lacks standing to be a party plaintiff, and the Clerk may enter judgment dismissing its complaint (without costs or disbursements), the persons it seeks to assist would not appear to be in any way prejudiced by such dismissal.

The application for class certification is denied as unnecessary as there is nothing to indicate that the governmental defendants will not comply with any eventual determination as to the rights of HIV-infected persons, and hence members of the proposed class will be protected under the principles of stare decisis. See: *Bey v. Hentel*, 36 N.Y.2d 747 (1975); *Mc Cain v. Koch*, supra; *Grant v. Cuomo*, supra; *Williams v. Blum*, 93 A.D.2d 755 (1st Dep't 1983)

Further, it would appear that the problems of all HIV-infected persons may not be similar. Counsel may wish to consider adding additional plaintiffs if they believe that the eventual judgment may call for different determinations depending on the status of the illness.

In summary: the motion by Phillips to intervene is granted; plaintiffs' motion for a preliminary injunction is granted to the extent indicated; its request for class certification is denied; the City's motion to dismiss is denied except to the extent it seeks the dismissal of the complaint of the Coalition, which is granted. This decision constitutes the order of the court.

Dated: January 11, 1989

  
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J.S.C.

