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United States District Court, S.D. New York.

Walter Francis HANDLIN, David Redmond, Albert May, John J. Clark, Jamie Bulson, and Larry Patterson,[1] Plaintiffs,
v.
James GARVEY, Sheriff of Orange County, Defendant.

No. 91 Civ. 6777 (AGS). | Nov. 20, 1996.

Opinion

OPINION AND ORDER

SCHWARTZ, District Judge:

***1** In this action brought pursuant to 42 U.S.C. § 1983, several former inmates of the Orange County Jail assert that the conditions of their confinement violated their constitutional rights as well as the terms of a consent judgment signed by this Court on October 27, 1978, and later the subject of *Merriweather v. Sherwood,* 518 F.Supp. 355 (S.D.N.Y. 1981) (Weinfeld, J.). Before the Court is defendant's motion to dismiss for failure to prosecute as to all of the plaintiffs except for plaintiff Walter Francis Handlin, who is currently represented by counsel and actively litigating the case. Also before the Court are the applications by three *pro se* plaintiffs for appointment of counsel from the Court's Pro Bono Panel. For the reasons set forth below, defendant's motion is granted in part and denied in part. The applications for appointment of counsel are denied without prejudice to renewal.

BACKGROUND

Plaintiffs commenced this action *pro se* on or about October 8, 1991. At that time, plaintiffs were all prisoners incarcerated at the Orange County Jail (the "Jail"). Their complaint alleges violations of various constitutional rights, including rights protected under the First and Eighth Amendments to the United States Constitution, and of the consent decree entered by former United States District Judge Edward Weinfeld in *Merriweather v. Sherwood,* a class action suit commenced in 1977. Specifically, plaintiffs challenge the sufficiency of the Jail's medical care, dental care, law library, dining facilities, and recreational programs, among other things. Plaintiffs also allege that the Jail denied inmates access to Catholic religious services and a notary public. Plaintiffs seek monetary damages of $1 million each and injunctive relief.

After several pre-trial conferences before former United States District Judge Kenneth Conboy, to whom this matter was previously assigned, the action was transferred to the Court's "Suspense Docket" on May 7, 1992.[2] Judge Conboy's order placing the action on suspense states that it was made "upon the advice of both counsel, pending ongoing settlement negotiations," and that the action is "subject to reinstatement on the calendar of the undersigned upon the filing of an application by a party stating that it is prepared to litigate this cause actively." Settlement negotiations were apparently unsuccessful, and the action was returned to the Court's active docket on March 21, 1995, approximately fourteen months after the case was transferred to the docket of the undersigned.

Plaintiff Walter Handlin has been represented by counsel since October 1995. Since that time, discovery regarding Handlin's claims has proceeded. At the last pre-trial conference on August 6, 1996, defendant's counsel indicated an intention to move for summary judgment as to Handlin's claims when this discovery was completed. In addition, defendant's counsel indicated his intention to make the instant motion, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, to dismiss the complaint as to all plaintiffs other than Handlin for failure to prosecute their claims.

***2** Defendant's counsel has made considerable efforts to determine plaintiffs' current whereabouts and mailed copies of the instant motion to plaintiffs at their last known addresses. Plaintiffs David Redmond, Albert May, and John Clark have filed papers in opposition to defendant's motion in which they indicate their desire to pursue their claims. Plaintiffs Jamie Bulson and Larry Patterson have not responded to defendant's motion.

In a document entitled "Opposition to Defendant's Motion to Dismiss" dated September 12, 1996, plaintiff Redmond states that he is currently incarcerated in South Carolina and thus unable to attend court conferences unless a writ is issued to secure his attendance. Redmond also states that "it is not the plaintiff's fault for the length of time the case was on the Court's Suspense Docket," and that he filed an application for appointment of counsel on or about July 13, 1992, which was denied by Judge Conboy, without prejudice to renew, because the case was then on the suspense docket. Redmond further states that he was never given notice that any further delay in the case will result in dismissal. In a separate document, Redmond has renewed his application for

appointment of counsel.

In an affidavit dated September 12, 1996, plaintiff Clark states that he was under the impression that he was being represented in this action by Mid-Hudson Legal Services, Inc. ("Mid-Hudson"), counsel for the class in *Merriweather v. Sherwood,* because of an order entered February 7, 1994 which referred to Mid-Hudson as "counsel for plaintiffs" in this action. The Court acknowledges that this reference was in error; while Mid-Hudson did appear at several pre-trial conferences in 1992 at Judge Conboy's request, Mid-Hudson promptly wrote the Court, in response to the February 1994 order, that it never considered itself counsel to plaintiffs. Although Mid-Hudson's letter to the Court indicates that copies were sent to plaintiffs, the Court has no assurance that plaintiffs ever received Mid-Hudson's letter. In any event, Clark states in his affidavit that he has been incarcerated for the majority of the time between 1995 and the present and thus unable to attend court conferences. Clark has applied for appointment of counsel and states that he intends to pursue this case in a *pro se* capacity if his application is denied.

In an affidavit dated September 3, 1996, plaintiff May states that he was never given notice that this action was returned to the active docket of the Court in March 1995, and also states that he was under the impression that Mid-Hudson was "temporary counsel" for plaintiffs. May states that it was never his intention to abandon his claim. Like Clark and Redmond, May has submitted an application for appointment of counsel.

DISCUSSION

Rule 41(b) of the Federal Rules of Civil Procedure states, in pertinent part, as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.... Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision ... operates as an adjudication upon the merits.

***3** Fed. R. Civ. P. 41(b). The Second Circuit has stated that "[i] nvoluntary dismissal for plaintiff's failure to prosecute is a matter committed to the discretion of the trial court by Rule 41(b) ... However, dismissal is a harsh remedy to be utilized only in extreme circumstances." *Colon v. Mack,* 56 F.3d 5, 7 (2d Cir. 1995) (internal quotations and citations omitted).

In deciding motions pursuant to Rule 41(b), courts review five factors: (1) the duration of the plaintiff's failures; (2) whether the plaintiff received notice that further delay would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) a balancing of the need to alleviate court calendar congestion against the plaintiff's due process rights; and (5) the efficacy of lesser sanctions. *E.g., Jackson v. City of New York,* 22 F.3d 71, 74 (2d Cir. 1994).

1. ***Duration of Plaintiffs' Failures***

There are two aspects to this factor: (1) that the failures were those of the plaintiff, and (2) that these failures were of significant duration. *Jackson,* 22 F.3d at 75. Although nearly five years have elapsed since the complaint in this case was filed, blame for this entire period cannot be placed solely at the feet of plaintiffs. Unlike the cases cited by defendant, a significant portion of the delay in this case is attributable to the fact that the case was on the Court's suspense docket by agreement of the parties for nearly three years, from May 1992 to March 1995. Decisions of this Court have recognized that the circumstances under which an action is transferred to the suspense docket -- including the defendant's apparent acquiescence to such delay -- must be considered on a motion to dismiss for failure to prosecute. *See Hanil Bank v. James Martin Supermarkets, Inc.,* No. 88 Civ. 7531, 1996 WL 19000 (S.D.N.Y. Jan. 17, 1996) (denying motion to dismiss for failure to prosecute where case had been on suspense for five years; court noted that "defendants consented to some amount of delay in this case when counsel for all parties requested that the Court place the action on the suspense calendar"); *Velis v. D.H. Blair & Co.,* No. 88 Civ. 8866, 1996 WL 229953 (S.D.N.Y. May 6, 1996) (denying motion where case had been on suspense for five years); *Youngblood v. Citrus Associates of New York Cotton Exchange, Inc,* 99 F.R.D. 570 (S.D.N.Y. 1983) (same; case on suspense for seven years). Here, the transfer to the suspense docket was made upon advice of all parties. Significantly, during the period the case was on the suspense docket, defendant "never requested that the matter be placed back on the Court's active docket." *Hanil Bank,* 1996 WL 19000, at *2. As the Second Circuit has noted, "[T]he failure of a defendant to call the court's attention to a plaintiff's undue delay ... may be considered as a factor in informing the court's discretion." *Finley v. Parvin/Dohrmann Co.,* 520 F.2d 386, 392 (2d Cir. 1975). In sum, defendant's acquiescence to several years of delay weighs against dismissal.

***4** Another mitigating circumstance here is plaintiffs' claim that they were confused about whether Mid-Hudson was serving as their counsel, which was exacerbated by

an order of the Court which erroneously referred to Mid-Hudson as "counsel for plaintiffs." Although it appears that Mid-Hudson attempted to notify plaintiffs in 1994 that they were not plaintiffs' counsel, the Court cannot be sure whether plaintiffs were ever so notified.

In addition, unlike many of the cases cited by defendant, plaintiffs here have not repeatedly violated court orders setting deadlines in the case. *See, e.g., West v. City of New York,* 130 F.R.D. 522, 524-25 (S.D.N.Y. 1990); *Lyell Theatre Corp. v. Loews Corp.,* 682 F.2d 37, 39-40 (2d Cir. 1982). While it is true that plaintiffs, with the exception of Handlin, have done little to move their claims forward since the case was restored to the active docket in March 1995, the three plaintiffs who have responded to defendant's motion have stated that they intend to pursue their claims diligently now that they are fully apprised of the status of the case.

2. ***Notice that Further Delays Will Result in Dismissal***
Plaintiffs in this case were never given prior notice that further delay would result in dismissal of their claims. Accordingly, this factor weighs against dismissal.

3. ***Prejudice from Further Delay***
Defendant argues that the five-year delay since the complaint was filed has resulted in prejudice, contending that the "passage of time will make it difficult to defend this case, because of potential difficulty in locating witnesses, and the dulling of memories through time." Defendant's Memorandum of Law at 5. Given the circumstances of the case, however, defendant's arguments are misplaced. As discussed above, the delay is largely attributable to the fact that the case was transferred to the Court's suspense docket, with the consent of defendant's counsel. Moreover, this action will proceed whether or not defendant's motion is granted, because plaintiff Handlin is not subject to dismissal for failure to prosecute. As there appears to be significant overlap in Handlin's claims and those of the other plaintiffs, the added burden of defending against the claims of additional plaintiffs will be minimal.

4. ***Balancing the Need to Alleviate Congestion Against the Plaintiffs' Right to Due Process***
This case, unlike many of the cases cited by defendant, "did not consume this court's resources during the period of delay because it was on the suspense docket." *Velis,* 1996 WL 229953, at *3. In light of the policy favoring resolution on the merits, this factor weighs against dismissal. *Id.*

5. ***Efficacy of Lesser Sanctions***
No lesser sanctions have been imposed prior to defendant's motion, so it cannot be concluded that such sanctions would be ineffective. In any event, defendant does not suggest an appropriate lesser sanction.

Taking into account all five factors, the harsh remedy of dismissal is not warranted at this time as to plaintiffs Redmond, May, and Clark, who have responded to defendant's motion and indicated their intention to prosecute their claims. These plaintiffs should, however, bear in mind that their record of prosecution since the case was returned to the Court's active docket is poor, and that failure to comply with discovery demands or other conduct causing further delay may result in sanctions, including dismissal.

***5** As to the two plaintiffs who have not responded to defendant's motion -- Bulson and Patterson -- dismissal for failure to prosecute is appropriate. Their failure to respond to defendant's motion may be attributed either to their disinterest in pursuing their claims or their failure to apprise defendants and the Court of their current addresses, an obligation that rests with all *pro se* plaintiffs. *Cf. Lukensow v. Harley Cars of New York,* 124 F.R.D. 64, 66 (S.D.N.Y. 1989) ("as this Court has no current address for plaintiffs, any attempt to further warn plaintiffs of their responsibilities and the consequences of their continued failure to prosecute this action would be futile").

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss for failure to prosecute is granted in part and denied in part. The claims of plaintiffs Bulson and Patterson are dismissed for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The claims of plaintiffs Redmond, Clark, and May are not dismissed. To ensure that there are no further delays, plaintiffs Redmond, Clark, and May are directed to promptly notify the Court's Pro Se Office and defendant's counsel of any address changes.

The Court sets the following schedule for further proceedings in this matter:

1. All discovery shall be completed by February 28, 1997.

2. Any party wishing to file a dispositive motion shall notify the Court in writing of its intentions and the basis for its motion on or before March 14, 1997. The Court will either schedule a conference to discuss the proposed motion or set an appropriate briefing schedule.

The motions for appointment of counsel are denied without prejudice to renewal.

SO ORDERED.

Footnotes

1 Many of the papers filed in this action list a "Charles Scott" as plaintiff. However, Scott's name is crossed out wherever it appears in the complaint filed with the Court, although his name does appear in a motion for a temporary restraining order filed with the Court in October 1991. Since then, the Court has received no correspondence indicating that Scott considers himself to be a plaintiff in this action. In any event, defendant has determined that Charles Scott is an inmate at the Eastern Correctional Facility in Naponoch, New York, and recently served him with copies of its motion to dismiss for failure to prosecute. Scott has not responded to defendant's motion. Given this record, the Court will not consider Scott to be a plaintiff in this action. Even if Scott were listed in the complaint, however, dismissal of his claims would be appropriate for the reasons applicable to plaintiffs Bulson and Patterson, discussed *infra.*

2 Rule 20 of the Southern District's Rules for the Division of Business Among District Judges states, in pertinent part, as follows: "A civil case which, for reasons beyond the control of the court, can neither be tried nor otherwise terminated shall be transferred to the suspense docket."