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

Louis MILBURN, Plaintiff,
v.
Thomas A. COUGHLIN III, et al., Defendants.

No. 79 Civ. 5077 (RJW). | May 28, 1993.

Opinion

MEMORANDUM DECISION

ROBERT J. WARD, District Judge.

*1 Andrew Sun, a member of the plaintiff class, moves for a finding of civil contempt, including an adjudication of partial summary judgment on contempt liability under Rule 56, Fed.R.Civ.P. Sun also seeks leave to transfer his claim under 42 U.S.C. § 1983, which is currently pending before the Honorable Sonia Sotomayor in *Sun v. Coughlin*, 91 Civ. 8167(SS) (“the section 1983 claim”) to this Court for trial, along with the hearing on damages for civil contempt in the instant action. Defendants cross-move for an order pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P., dismissing Sun’s contempt claim with prejudice on the ground that it is not properly before this Court and fails to state a claim for relief. For the reasons hereinafter stated, Sun’s motion is denied and defendants’ motion is granted in part and denied in part.

BACKGROUND

Sun is an inmate at Green Haven Correctional Facility (“Green Haven”) and is a member of the plaintiff class. He suffers from massive and confluent venereal warts on his penis and around his anus. Prior to surgery, the warts covered a large area from his groin and penis to his buttocks and into his anal cavity. They bled regularly, interfering with his normal daily activities and rendering it extremely painful for him to evacuate his bowels.

In early 1990, while he was awaiting a surgical consultation, Sun was transferred from Great Meadow Correctional Facility to Green Haven, and his need for surgery was noted in his chart at the time of his arrival. Sun was referred to a specialist, a dermatologist, but was

not seen by the specialist for over six months, during which time he alleges that he continued to suffer pain and bleeding and was frequently unable to work. When he was seen, the dermatologist confirmed the need for surgery and referred Sun to a surgeon.

Finally, in September 1991, nearly seventeen months after his arrival at Green Haven, Sun underwent laser surgery at Vassar Brothers Hospital. During the weeks prior to his surgery, his pain and bleeding required that he be placed in medical confinement.

Sun claims that the medical care he received for his venereal warts prior to surgery was inadequate and caused him unnecessary pain and suffering, anxiety and humiliation. He seeks compensatory and punitive damages as well as attorney’s fees for defendants’ alleged violation of the Court’s orders in this action (“the *Milburn Judgment*”).

According to Sun, defendants violated the Court’s orders by:

delaying Mr. Sun’s referral to a surgeon for more than a year despite the notation of his need for surgery when he arrived at Green Haven, in violation of ¶¶ X–A–3 and X–B of the *Milburn Judgment*, which require that outstanding medical orders of new Green Haven inmates be promptly followed-up;

failing to insure that Mr. Sun receive his appointment with a dermatologist within 75 days, in violation of ¶ VII–B of the *Milburn Judgment*;

failing to insure that Mr. Sun receive his appointment with a surgeon within 45 days, in violation of ¶ VII–A of the *Milburn Judgment*;

*2 failing to prioritize and monitor Mr. Sun’s hospitalization and failing to admit him within 120 days, in violation of ¶ II–B of the Supplement to the *Milburn Judgment*; and

failing on at least two occasions to provide Mr. Sun ordered medications because they were unavailable, in violation of ¶ XVII of the *Milburn Judgment*, which requires that defendants “maintain a system of dispensing medication that results in medication getting to patients in a prompt and secure manner.

Memorandum in Support at 3–4.

DISCUSSION

Sun contends that he is entitled to a finding of civil

Milburn v. Coughlin, Not Reported in F.Supp. (1993)

contempt as a matter of law and requests that the section 1983 claim which he has asserted be heard with the damages aspect of his contempt claim.

Defendants argue that Sun's claim for contempt should be dismissed because he is not entitled to damages for the alleged contempt of the *Milburn* judgment. Defendants also assert that Sun's contempt claim should be dismissed as barred by principles of fact and issue preclusion. In addition, defendants contend that Sun's claim for contempt should be dismissed since such claims may be brought, if at all, only by class counsel after efforts at informal dispute resolution with defendants' counsel have failed. Defendants also argue that if Sun's contempt claim is not dismissed, his motion for partial summary judgment must be denied as there are material issues of fact concerning defendants' compliance with the *Milburn* judgment. Finally, defendants urge that the question of consolidation with the section 1983 claim be reserved until later.

Sun is Entitled to Seek Damages Resulting from the Alleged Contempt of the Milburn Judgment

Once a plaintiff has shown harm because of a violation of the terms of an injunction, he is entitled to seek an award of compensatory damages. *Canterbury Belts Ltd. v. Lane Walker Rudin, Ltd.*, 869 F.2d 34, 39 (2d Cir.1989); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979). The Second Circuit has repeatedly upheld the availability of compensatory damages to individual class members who establish that prison officials have violated the terms of class consent decrees and judgments. *See, e.g., Badgley v. Santacroce*, 800 F.2d 33, 39 (2d Cir.1986) (in jail overcrowding case, each inmate admitted in violation of consent decree to receive compensatory damages); *Powell v. Ward*, 487 F.Supp. 917, 936 (S.D.N.Y.1980) (where rights set by court order at prison disciplinary proceedings were violated "plaintiffs who have suffered harm because of a violation of a decree are to be awarded damages to the extent they are established") *aff'd as modified*, 643 F.2d 924 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981).

As a member of the plaintiff class who claims damages resulting from alleged violations of the *Milburn* judgment, Sun has standing to seek compensatory damages by way of a contempt motion.

Sun's Claim is not Barred by Principles of Fact and Issue Preclusion

*3 Defendants argue that Sun should be barred on the ground of *res judicata* from seeking compensatory contempt as a result of the settlement of the 1989 class motion for contempt, modification and appointment of a master ("the 1989 class motion").¹ This argument fails for several reasons. First, the settlement clearly states that the motion was withdrawn without prejudice, thereby negating any preclusion argument. Second, the motion did not seek compensatory contempt for individual class members, and at no point did the class attempt to litigate such claims. Finally, the settlement which resulted in the withdrawal of the motion made no mention of resolving individual claims for compensatory damages, and therefore, no class member could have been put on notice that a failure to object to this classwide settlement of the motion for injunctive relief would act as a bar to such individual relief.

Defendants assert that the language in the 1991 Stipulation for Entry of Modified Final Judgment by Consent that the 1989 class motion "will be withdrawn *without prejudice*" means that class counsel could "renew their class-wide *Milburn I* litigation," Defendants' Memorandum at 32, n. 8. At the same time, defendants assert this language does not preclude a *res judicata* finding on a motion, such as that presently before the Court, for absent class members' claims that were not even raised by the 1989 class motion. Defendants cite no authority for this argument.

Withdrawing a motion without prejudice means that the parties have the right to relitigate the issues raised by the motion. In order for parties to be precluded from relitigating issues there must be a "judgment on the merits." *Moore's Federal Practice*, § 0.409[1.-2] at 306 (1992). The 1989 class motion was withdrawn and there was no disposition of plaintiffs' motion for contempt, either by the Court or the parties to the settlement. Consequently, the withdrawal had no *res judicata* effect.

Even if the motion was not withdrawn without prejudice, plaintiff Sun's claims would survive because they were not litigated by the 1989 class motion. In that motion, plaintiffs sought a finding of contempt and an assessment of fines to coerce defendants to comply with the terms of the *Milburn* judgment. The plaintiff class did not seek compensatory relief for individual class members. *Res judicata* will be found in class actions only for those issues that are part of the common questions actually litigated or expected to be litigated. *See Newberg on Class Action*, 3rd Edition, § 16.22 and cases cited therein; *Moore's Federal Practice*, § 23.60 at 446-47.

Accordingly, class members are not precluded from individual actions for damages even though they are members of a class seeking injunctive and declaratory relief. *See, e.g., Fortner v. Thomas*, 983 F.2d 1024, 1031-32 (11th Cir.1993); *Herron v. Beck*, 693 F.2d 125,

Milburn v. Coughlin, Not Reported in F.Supp. (1993)

127 (11th Cir.1982); *Bogard v. Cook*, 586 F.2d 399, 408–09 (5th Cir.1978); *Jones–Bey v. Caso*, 535 F.2d 1360, 1361–62 (2d Cir.1976).

*4 The particular issues raised concerning the care of Sun and the specific allegations of defendants’ noncompliance with the *Milburn I* judgment were never adjudicated. Therefore, Sun’s claim is not barred on *res judicata* grounds.

Class Counsel Need Not Represent A Member of the Plaintiff Class Seeking Compensatory Damages

As a matter of law, there is no requirement that class counsel represent all class members seeking contempt damages. Although defendants cite several cases holding that claims for further *injunctive* relief must be referred to the *court* having jurisdiction over the injunction, that proposition is not at issue in this proceeding. Nor does it support, even by analogy, defendants’ argument. Several of the cases cited rely on the need to avoid conflicting or inconsistent orders and directions in an ongoing proceeding. *Carver v. Knox County, Tenn.*, 887 F.2d 1287 (6th Cir.1989), *cert. denied*, 110 S.Ct. 1949 (1990); *Groseclose v. Dutton*, 829 F.2d 581, 584 (6th Cir.1987); *Goff v. Menke*, 672 F.2d 702, 705 (8th Cir.1982). Where, as in the instant case, individual damages, rather than further orders are sought, that danger is not present and non-class counsel can properly present the individual class member’s case.

Finding of Contempt

A Court’s inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of non-compliance is clear and convincing and (3) the party has not diligently attempted in a reasonable manner to comply. *See New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir.1989), *cert. denied*. 495 U.S. 947 (1990).

Although the *Milburn* judgment is clear and unambiguous, and the proof of non-compliance is clear and convincing, a factual dispute remains concerning whether the defendants have diligently attempted in a reasonable manner to comply. Accordingly, Sun’s application for a finding of contempt as a matter of law

must be denied pending a hearing concerning whether the defendants have diligently attempted in a reasonable manner to comply with the *Milburn* judgment.

Punitive Damages Are Not Available

Plaintiff’s *Milburn* claim is, at best, a claim for civil contempt. *See* Complaint ¶ 1. Punitive damages are not an appropriate sanction for civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947); *New York State National Organization for Women v. Terry*, 886 F.2d at 1353; *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 31 (2d Cir.1981). *See also Babe–Tenda Corp. v. Scharco Manufacturing Co.*, 156 F.Supp. 582, 587 (S.D.N.Y.1957).

Consolidation with the Section 1983 Action

Inasmuch as Sun’s claim for compensatory damages for contempt will be determined by the Court and his section 1983 claim will be determined by a jury and the defense of qualified immunity is not available on the contempt motion but is available on the section 1983 claim and punitive damages are only available on the section 1983 claim, the Court has determined not to consolidate the two hearings.

*5 Sun is directed to advise the Court within ten days of the date of this decision whether he elects to proceed first with the contempt hearing or with the section 1983 claim.

In the event Sun elects to proceed first with the contempt hearing, this Court will fix a hearing date. If Sun elects to proceed first with the section 1983 claim, this Court will stay the contempt hearing pending disposition of the section 1983 claim by the Honorable Sonia Sotomayor.

CONCLUSION

For the foregoing reasons, Sun’s motion is denied and defendants’ motion is granted in part and denied in part.

It is so ordered.

Footnotes

Milburn v. Coughlin, Not Reported in F.Supp. (1993)

¹ As part of the settlement agreement, the 1989 class motion was withdrawn.