IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J.A., et al.	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 3:07-cv-00394 DPJ-JCS
	)	
BARBOUR, et al.	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MOTION FOR RELIEF FROM ORDER OF DISMISSAL, RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PROSECUTE, AND RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE WHY THE CASE SHOULD NOT BE DISMISSED IN ITS ENTIRETY

Pursuant to Rule 60(b)(1), the Plaintiffs respectfully move the Court for relief from its order dismissing Defendants Donald Armagost and Richard James from this lawsuit for failure to prosecute. (Doc. 57). The Plaintiffs' failure to response to the Defendants' motion to dismiss was the result of a miscommunication between the Plaintiffs' six counsel about who was going to file the response. The Plaintiffs also respond to the Court's order directing them to show cause why this case should not be dismissed in its entirety. In support of this motion and response, Plaintiffs state the following:

1. This case was filed for injunctive relief and monetary damages on behalf of teenage girls living with mental illness who were committed to the Columbia Training School. During their commitments, the girls suffered a host of unconstitutional abuses, including prolonged shackling, a sexual assault, and Defendants' failure to provide appropriate mental

health and rehabilitative services. After the case was filed, the state of Mississippi decided to close the Columbia Training School, rendering moot the Plaintiffs' claims for injunctive relief.

2. Pursuant to a joint motion by the parties in February 2008, the official capacity (injunctive relief) claims were stayed while the issue of Columbia's closure was proceeding in the Mississippi legislature. (Doc. 52). Later, after Columbia actually closed, the Plaintiffs moved to amend their complaint to drop the injunctive relief claims, and the Court granted the motion in September 2008. (Doc. 55). Three claims remained: (1) Count 3 (damages for excessive use of restraints against defendants James and Armagost); (2) Count 4 (damages for failure to provide adequate rehabilitative/mental health treatment and protection from harm against defendants James and Armagost); and (3) Count 5 (damages for sexual assault against defendant Alexander).

3. Perhaps because of the stay, the activity around Columbia's closure, and the later dismissal of the injunctive relief claims, none of the parties moved the Court for a Rule 16 scheduling order or took any action to proceed on the remaining claims in the case.

4. On July 24, 2009, Defendants Armagost and James moved to dismiss claims 3 and 4. (Doc. 56). Because of a serious miscommunication among the Plaintiffs' six co-counsel, Plaintiffs counsel failed to respond to the Defendant's motion, prompting this Court to enter an order several weeks later dismissing the claims with prejudice and ordering the Plaintiffs to show cause why the entire litigation should not be dismissed. (Doc. 57).

5. Plaintiffs' counsel recognize that their failure to respond to the motion was a grievous error and apologize to the Court and to opposing counsel. But this mistake should not bar the Plaintiffs from seeking redress for the abuse they suffered while committed to the Columbia Training School. Plaintiffs' counsel respectfully request that, instead, the Court

impose upon counsel sanctions that would not limit the ability of the named Plaintiffs to pursue their claims. *See Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. 1981) (holding that where a plaintiff refused to comply with three clear directives of the Court, dismissal was improper and that "[t]he proper course would have been to impose such lesser sanctions as costs or fines when appellant initially acted improperly, and then, if these failed to deter the conduct, to impose the greater sanction of dismissal."); Wright & A. Miller, Federal Practice and Procedure: Civil § 2370, at 201 n.86 (1971) ("Many courts have thought it advisable to impose some lesser sanction than dismissal where the fault is with the attorney rather than the client.")

6. The Fifth Circuit has held that "dismissals with prejudice for failure to prosecute are proper only where 1) there is a clear record of delay or contumacious conduct by the plaintiff and 2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution or the record shows that the district court employed lesser sanctions that proved to be futile." *Stearman v. Comm'r of Internal Revenue*, 436 F.3d 533, 535 (5th Cir. 2006). Neither of these factors is present here. First, there is no clear record of delay or contumacious conduct. Plaintiffs' failure to file a timely response to the Defendants' motion resulted from a misunderstanding among co-counsel regarding which attorney was responsible for the filing. This mistake is a serious one, but it does not reflect a willful refusal to abide by the Court's deadlines. Second, lesser sanctions, such as an order to show cause, could have (and would have) prompted diligent prosecution. Less stringent measures may include assessments of fines, costs or damages against the plaintiff or his counsel, and explicit warnings. *See Rogers v. Kroger Co.,* 669 F.2d 317, 322 (5th Cir. Tex. 1982).

7. Plaintiffs' counsel do not minimize their error in failing to respond in a timely fashion to the Defendant's motion to dismiss and in failing to ensure the diligent prosecution of

this case. But the Court's dismissal of this case with prejudice could be considered a sanction that is disproportionately harsh. "The ultimate sanction for the litigant is dismissal of his case with prejudice. This most extreme penalty should be imposed only after full consideration of the likely effectiveness of less-stringent measures." *Hornbuckle v. Arco Oil & Gas Co.,* 732 F.2d 1233, 1237 (5th Cir. Tex. 1984). Absent a clear record of delay that resulted from intentional conduct or a willful disregard of court directives, courts generally look with disfavor on dismissals with prejudice for lack of prosecution. *Link v. Wabash Railroad*, 370 U.S. 626 (1962) (finding, in litigation that lasted over six years, that Plaintiff deliberately proceeded in "dilatory fashion" when he missed numerous deadlines and failed to appear at a pre-trial conference); *McGowan v. Faulkner Concrete Pipe Co.,* 659 F.2d 554 (5th Cir. 1981) (reversing dismissal of employment discrimination action and finding there was no clear record of delay and that lesser sanctions should have been imposed when, in litigation that was pending for about two years, the plaintiff took no depositions, engaged in no discovery, exchanged no exhibits, filed a pretrial order six days late, proposed findings of fact and conclusions of law 43 days late, and failed to reimburse defendant for discovery costs); *Burden v. Yates***,** 644 F.2d 503, 504 (5th Cir. 1981) (reversing a dismissal that had the effect of a dismissal with prejudice when, on three separate occasions, the plaintiff failed to obey the clear directive of the court; plaintiff's "failure to comply with the court order was more a matter of negligence than purposeful delay or contumaciousness") Counsels' conduct here—missing one deadline as a result of a miscommunication—simply does not create a record of intentional delay.

8. In addition to requiring a clear record of intentional delay and a consideration of lesser sanctions, the Fifth Circuit generally requires at least one of three aggravating factors before a court may dismiss with prejudice for failure to prosecute: 1) plaintiff culpability, 2)

prejudice to defendant, and 3) intentional conduct by plaintiff or counsel. *See Kroger,* 669 F.2d 317 at 322. None of these factors can be found here. The named Plaintiffs bear no responsibility for Counsels' failure to respond to the Defendants' motion in a timely fashion or to move this case forward. Nor will the Defendants suffer prejudice from reinstating this case. "It remains the policy of the law to favor the decision of cases on their merits. This must be weighed against any presumed prejudice to the defendant and the court may decide to excuse plaintiff's lack of diligence in the absence of any actual prejudice to the defendant." 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2370, at 216-17 (1971). Finally, as explained above, the Plaintiffs' counsel did not intentionally ignore the deadlines set by this Court.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Honorable Court (1) reconsider its Order dismissing Claims 3 and 4 and reinstate those Claims; and (2) enter a Rule 16 scheduling order on the three remaining claims in this case. In the alternative, the Plaintiffs request a hearing or telephone conference during which they will show cause as to why the dismissed claims should be reinstated and why the entire case should proceed.

Respectfully submitted,

/s/Sheila A. Bedi, Miss. Bar. No. 101652
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PROPOSED ORDER

BEFORE THIS COURT is Plaintiffs' Motion for Relief from Order of Dismissal, Response to Defendants Motion to Dismiss, and Response to the Court's Order to Show Cause. Having fully considered the matter, this Court finds that the motion is well-taken and should be GRANTED.

Accordingly, the claims pending against Defendant Armagost and James are reinstated. The Parties are further ordered to submit a proposed joint scheduling order to the Court within fourteen days.

SO ORDERED, this the _____ day of _____, 2009

_____
United States District Judge

Certificate of Service

I hereby certify that on August 18, 2009, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by email to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Sheila A. Bedi