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

James BENJAMIN, et al., Plaintiffs,
v.
Bernard B. KERIK, et al., Defendants.

No. 75 CIV. 3073(HB). | April 14, 1999.

Opinion

Amended Memorandum and Order

BAER, District J.

***1** Plaintiff Juan Romero moves this Court to find Bernard Kerik ("Defendant"). Commissioner of the Department of Correction of the City of New York, in contempt of the consent decree entered in *Benjamin v. Malcolm,* No. 75–3073, slip op. (S.D.N.Y. Mar. 30, 1979). Plaintiff alleges that the visitation rights provision of the decree was violated when he, while incarcerated by the New York City Department of Correction, was prevented from attending his son's wake. For the reasons that follow, Plaintiff's motion is DENIED.

I. BACKGROUND

In 1979, the City of New York signed a consent decree to settle a class action suit which emanated from alleged violations of the constitutional rights of pretrial detainees at Rikers Island. One provision permitted prisoners to visit family members outside of prison during significant family events. Subdivision X provides:

> *Significant Family Events* ... a. Death ... Each detainee shall be permitted to attend the funeral in New York City or the viewing in New York City of deceased parents, parents-in-law, grandparents, brothers, sisters, guardians, and former guardians, children, grandchildren, children-in-law, spouses, including "common-law" spouses, and in the Commissioner's or his designee's discretion, other people with whom the detainee has had significant relationships ... The Commissioner shall consider the detainee's preference between attending the funeral or viewing but reserves the right to make a final decision, provided that the decision shall not be arbitrarily made and shall be based on legitimate security concerns.

There is no dispute as to the facts in the instant case. On Monday, December 9, 1996, Romero—incarcerated at the Vernon C. Bain Center ("VCBC") while awaiting trial—learned of the death of his son, Gerald. The wake was scheduled to be held five days later on December 14. Following the Department's procedures, Romero's wife submitted the child's birth certificate to the Bronx House of Detention, and the certificate was then faxed to VCBC. On December 12, a VCBC counselor attempted to fax the necessary paperwork to the Transportation Division, and to the Operations Division for final approval. These attempts apparently failed, and the paperwork was left with the Control Room Captain with instructions to fax the materials again later that same day. On the morning of December 14, Romero was brought to the intake area to await transportation to the wake. The head of intake operations, Captain Soto, having never received the facsimile, was not aware of any such arrangements. Captain Soto then attempted to secure proper documentation from the plaintiff's wife and the Transportation Division, and in the early evening, the required documents were finally received. He was then told by his superiors, however, that the plaintiff's request was denied because it was not received on time.

II. DISCUSSION

The Department of Correction ("Department") argues that Romero may not bring this contempt action because individual members of the class, suing on their own behalf, may not enforce the *Benjamin* consent decree. In the alternative, the Department contends that even if the Court allows the plaintiff's action to proceed, the Department's actions do not merit a finding of civil contempt.

A. *Enforcement of the Consent Decree*

***2** The defendants argue that Plaintiff, as a member of the *Benjamin* class of plaintiffs, may not sue individually on his own behalf to enforce the consent decrees. I disagree.

Section EE of the Consent Decree reads, in relevant part:

> IT IS FURTHER STIPULATED THAT, in the event that a dispute arises as to whether any party is in compliance with the terms of the partial final judgment incorporating the terms of this stipulation, the parties shall proceed as follows:
>
> Both parties shall make a good faith effort to resolve any differences which may arise between them over

> such terms. Prior to institution of any proceeding before the Court to enforce the provisions of the partial final judgment, plaintiffs' counsel shall notify defendants' counsel for the Department of Correction, and the Deputy Mayor for Criminal Justice, in writing, of any claim by plaintiffs that defendants are in violation of any provision thereof.

(Bliwise Aff. Ex 4 at 50.) If the stipulated procedure fails to resolve the dispute, the "defendants shall be so informed by plaintiffs' counsel and plaintiffs may then have due recourse to the Court." *Id.* The Department argues that these provisions, with the use of the plural and plural possessive to describe the parties to the decree, prohibit enforcement of the decree by an individual class member. An interpretation of the provision that allows individual enforcement, the argument continues, is contrary to the nature of class action for it disregards the existence of the class. This reasoning is not persuasive.

Contrary to the Department's assertion, the above cited provision of the consent decree simply instructs the parties to attempt to reach an agreement without judicial involvement. The consent decree merely suggests an alternative method of dispute resolution and does not prohibit a class member from bringing a suit in court. The Department's reading of the consent decree is unduly narrow and, in my view, must be rejected in favor of a more reasonable interpretation. *See U.S. v. Local 359, United Seafood Workers,* 55 F.3d 64, 69 (2d Cir.1995) ("[A] consent decree is an order of the court and thus, by its very nature, vests the court with equitable discretion to enforce the obligations imposed on the parties.") (citation omitted); *see also E.E.O.C. v. Local 580, International Association of Bridge, Structural and Ornamental Ironworkers,* 925 F.2d 588, 593 (2d Cir.1991) ("[T]hough a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad.").

Moreover, an argument similar to the Department's was addressed in *E.E.O.C. v. Local 40, International Association of Bridge, Structural and Ornamental Ironworkers,* 885 F.Supp. 488 (S.D.N.Y.1994), *rev'd on other grounds,* 76 F.3d 76 (2d Cir.1996). In *Local 40,* plaintiffs brought contempt proceedings against the union for its failure to comply with a previous court order. The order contained a paragraph similar to the *Benjamin* consent decree, and reads in relevant part:

> ***3** In the event that at any time during the duration of the Order any party believes that Defendant Local 40 is in violation of the terms of the Order, E.E.O.C. shall notify Defendant in writing of the alleged violation, and if the parties are unable to resolve the dispute within sixty (60) days after such notice, the E.E.O.C. may move the court to resolve the dispute.

Id. at 494. Local 40 argued that under this provision only the E.E.O.C. could enforce the order, and not a class member. The court disagreed and concluded that the paragraph

> merely states that if the E.E.O.C. is unable to resolve the dispute it "may" move the court to provide relief. [The paragraph] *does not state that other parties may not seek relief from the court, and thus it does not purport to prescribe the sole manner in which the decree may be enforced* .... [T]he Second Circuit ruled that use of the word "may" showed while the provision provided one means to resolve disputes, it was not the only means.

Id. at 495 (emphasis added) (citations omitted). In the case at bar, it cannot be said that the language in the *Benjamin* consent decree dictates the sole manner in which the decree may be enforced.

Along these lines, I find persuasive Judge Ward's holding in *Milburn v. Coughlin III,* 1993 WL 190279 (S.D.N.Y. May 28, 1993). The court in *Milburn* explicitly rejected the defendant's contention that the individual plaintiff's claim for contempt should be dismissed as such claims could only be brought by class counsel. *Id.* at *2. The court instead held: "As a member of the plaintiff class who claims damages resulting from alleged violations of the Milburn judgment, [the individual plaintiff] has standing to seek compensatory damages by way of a contempt motion." *Id.*

Having found that the plaintiff may proceed with his claim,[1] I now address the merits of his allegation of contempt.

B. *Standard for Civil Contempt*

This court has inherent and statutory power to enforce its decrees and punish violators for contempt. *Roadway Express, Inc. v.. Piper,* 447 U.S. 752, 764–765 (1980). Civil contempt is a "sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party." *New York State National Organization for Women v. Terry,* 886 F.2d 1339, 1351 (2d Cir.1989). "The failure to meet the strict requirements of an order does not necessarily subject a

party to a holding of contempt." *Dunn v. N.Y. State Department of Labor,* 47 F.3d 485, 490 (2d Cir.1995). Indeed, a party may only be held in contempt for its failure to comply with a court order if (1) the order is clear and unambiguous, (2) proof of noncompliance is clear and convincing, and (3) the defendants have not been "reasonably diligent and energetic in attempting to accomplish what was ordered." *Powell v.. Ward,* 643 F.2d 924, 931 (2d Cir.1981). Additionally, a contempt order should be entered only when the moving party proves these three elements by clear and convincing evidence. *See King v. Allied Vision, Ltd.,* 65 F.3d 1051, 1058 (2d Cir.1995); *Schmitz v. St. Regis Paper Co.,* 758 F.Supp. 922, 925 (S.D.N.Y.1991)("The standard for contempt is rigorous and mandates that the plaintiff prove [contempt] by clear and convincing evidence ....").

***4** An analysis of the three above elements leads me to conclude that a holding of contempt is not warranted. While in the case at bar the satisfaction of the first two elements is beyond dispute, it cannot be said that the defendants have not been "reasonably diligent and energetic in attempting to accomplish what was ordered." To answer this inquiry, the courts "examine the defendant's actions and consider whether they are based on a good faith and reasonable interpretation of the court order." *Schmitz v. St. Regis Paper Co .,* 785 F.Supp. at 927; *accord Aspira of New York, Inc. v. Board of Education of the City of New York,* 423 F.Supp. 647, 654 (S.D.N.Y.1976) ("It is a sufficient defense ... if a defendant ... has in good faith employed the utmost diligence in discharging his ... responsibilities.") (internal quotations and citation omitted); *see also King v. Allied Vision Ltd.,* 65 F .3d at 1060 ("Without a showing of bad faith, there is no basis in the decree upon which the district court could find [the defendant] in contempt ....")

Applying this standard to the facts before me, the Department has made a good faith effort—both on a systemic level and in the instant case—at complying with the requirements of the *Benjamin* consent decree. The Department has instituted procedures to be followed when inmates submit requests pursuant to the "Significant Family Events" provision. (*See* Schaal Decl. Ex. 1.) Additionally, I find significant the Department's relative success at complying with the consent decree, as described by the conclusions contained in the Office of Compliance Consultants' ("OCC") 44th Progress Report.[2] (Schaal Decl. Ex. 2.) The draft report, dated March 16, 1998, concludes on this issue that the Department was in compliance with the consent decree and the Department "generally permitted [detainees] to attend funerals and viewings and [to] visit seriously ill family members in accordance with the consent decree." (Schaal Decl. Ex. 2 at 58.) Of the 345 inmates who requested to attend significant family events, forty-four percent were approved, and "[a]s far as [OCC] was able to determine ... facility denials were based on consistent and objective criteria." *Id.* The plaintiff sets out evidence of other errors in this area, but there have apparently been only four such instances during the seven-year period from 1991 to 1998. While most unfortunate, they fail to defeat the reasonable diligence standard.

On the other hand, the OCC report regarding this particular claim seems at first blush particularly damning, stating: "Due to the Department's malfeasance, Mr. Romero was denied access to his son's wake in violation of the consent decree[,]" and that "the Department does not appear to have had legitimate reasons for denying Mr. Romero access to his son's wake." (Bliwise Aff. Ex. 9 at 3–4.) Upon further review however, the specific Departmental actors involved apparently acted in good faith and the Department simply failed to properly process and/or communicate the plaintiff's request in time. When the family's funeral arrangements were conveyed to the counseling unit at VCBC on December 12, 1996, the counselor assigned to the unit promptly completed all the necessary paperwork and then attempted to fax it to the Operations and Transportation Divisions. *Id.* at 2. Although the fax was not successfully transmitted at that time, the counselor left verbal and written instructions with the Control Room Captain to fax the paperwork again later that same day. *Id.*[3] Further, upon realizing the error on December 14, the day the plaintiff was to attend the wake, Captain Soto continued to work up to the last minute and beyond to obtain clearance for the plaintiff to leave VCBC and attend the ceremony. *Id.* at 2–3. He requested that Mr. Romero call his wife from the intake area and ask her to bring the necessary papers to VCBC; indeed, it was only after she had come with the wrong birth certificate and returned to the funeral parlor to obtain the right one that time ran out and it was too late for the required processing. However reprehensible, shocking, and painful the end result of these errors may have been, they are insufficient to prove that the defendant—in technical noncompliance with the consent decree by not allowing Mr. Romero to attend his son's wake—should be held in contempt.[4]

III. CONCLUSION

***5** For the reasons discussed above, the plaintiff's motion is DENIED.

SO ORDERED.

Footnotes

1 My finding rests on grounds independent of the Second Circuit's decision in *Samuels v. Department of Correction,* No. 82–2227, slip op. (Second Cir. Jan. 12, 1983). I suspect, however, that since *Samuels* was based on the same consent decree at issue here, the instant case is a related one for purposes of Section 0.23 of the Second Circuit Rules, and the case could be properly cited to support the notion that individual class members have standing to sue to enforce the consent decree.

2 The OCC, created in 1982, is a third-party administrative agency that monitors the City's compliance with all aspects of the consent decree.

3 The Report notes that the fax confirmation sheet indicates the paperwork was received by the Operations Division at 7:09 p.m. on December 12. There apparently is no corresponding confirmation sheet, however, to verify receipt of the paperwork by the Transportation Division. *Id.* at 2.

4 My decision on the merits of Mr. Romero's motion ignores the fact that his claim likely fails on other grounds. Indeed, the Prison Litigation Reform Act of 1996 ("PLRA") may operate to bar the plaintiff's motion. 42 U.S.C. § 1997e(e). Although I decline to rule on this issue, I find persuasive the reasoning employed by the Second Circuit in *Vuitton v. Carousel Handbags,* 592 F.2d 126, 130 (2d Cir.1979). There the court noted that a compensatory fine for civil contempt is similar to a tort judgment for damages in that the purpose of both "is to restore the parties to the position they would have held" had they not been harmed by the defendant's conduct." *Id.* at 130. Given that the statute precludes a federal "action" brought by a prisoner that seeks compensatory damages based only on mental or emotional injury, the PLRA's reach may also extend to motions for contempt such as this.