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

John KELSEY and Timothy Wright, Plaintiffs,
v.
COUNTY OF SCHOHARIE; John S. Bates, Jr,;
and Jim Hazzard, Defendants.

No. 04-CV-299. | Aug. 5, 2005.

Attorneys and Law Firms

Beranbaum, Menken, Ben-Asher & Bierman, New York, New York, for Plaintiffs, Bruce E. Menken, Jason, J. Rozger, of counsel.

Elmer Robert Keach, Amsterdam, New York, for Plaintiffs.

Girvin & Ferlazzo, P.C., Albany, New York, for Defendants, Gregg T. Johnson, Jacinda H. Conboy, of counsel.

Opinion

MEMORANDUM-DECISION AND ORDER

HOMER, Magistrate J.

***1** Presently pending is the motion of defendants County of Schoharie, John S. Bates, Jr., and Jim Hazzard (collectively referred to herein as the "County") for leave to file an amended answer. Docket No. 37. Plaintiffs oppose the motion. Docket No. 38. For the reasons which follow, the County's motion is denied.

I. Background

The two named plaintiffs commenced this action against the County on behalf of a proposed class of individuals alleging that their rights under the Fourth Amendment were violated when the County improperly strip searched them following their arrests for misdemeanor offenses. The County answered and a scheduling order was entered pursuant to Fed.R.Civ.P. 16 requiring that pleadings be amended by November 1, 2004 and discovery be completed by July 1, 2005. Docket Nos. 4, 12, 33.

II. Discussion

On June 1, 2005, the County moved for leave to file and serve an amended answer to add an affirmative defense under the Prison Litigation Reform Act of 1995 (PLRA), Pub.L. No. 104-134, -803(d), 110 Stat. 1321-66, -71 (1996). Under the PLRA provision in 42 U.S.C. § 1997e(e), "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." The County now seeks to add the affirmative defense that plaintiffs are limited to nominal damages by § 1997e(e) because they cannot prove any physical injury.

Fed.R.Civ.P. 15(a) requires that on a motion for leave to amend a pleading, leave be "freely given when justice so requires." This " 'facilitate[s] a decision on the merits" ' and identifies the material issues of the case. *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 320 (1988) (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)). Courts have broad discretion to grant a party leave to amend its pleadings, *Local 802, Associated Musicians of Greater N.Y. v. Parker Meridien Hotel,* 145 F.3d 85, 89 (2d Cir.1998). Amending a pleading is futile where the proposed amendment does not cure the deficiencies in the original pleading, *Acito v. Imcera Group, Inc.,* 47 F.3d 47, 55 (2d Cir.1995), or would not survive a motion to dismiss. *Ricciuti v. N.Y.C. Transit Auth.,* 941 F.2d 119, 123 (2d Cir.1991). Therefore, to determine whether the proposed amendment is futile, a court must apply "the same analysis as that applied on a motion to dismiss" under Fed.R.Civ.P. 12(b)(6). *Stetz v. Reeher Enterprises, Inc.,* 70 F.Supp.2d 119, 121 (N.D.N.Y.1999) (McAvoy, C.J.). Accordingly, the facts alleged by the County here are treated as true and are viewed in the light most favorable to the County. *See id.*

The issue presented here is whether § 1997e(e) applies where plaintiffs were no longer incarcerated when the action was commenced. The plain language of § 1997e(e), the declared purpose of the PLRA, and case law support the conclusion that the limitation of § 1997e(e) is inapplicable where a plaintiff is no longer incarcerated. The plain language of § 1997e(e) limits its applicability to "a prisoner confined in a jail, prison, or other correctional facility." That language clearly limits the provision to individuals who are incarcerated when an action is commenced. There is no dispute here that the named plaintiffs and potential class members were not incarcerated when the action was commenced.

***2** This interpretation of that language is supported by the purpose of the PLRA, which was "to curtail what

Congress perceived to be inmate abuses of the judicial process." *Ortiz v. McBride,* 380 F .3d 649, 658 (2d Cir.2004); *see also Greig v. Goord,* 169 F.3d 165, 167 (2d Cir.1999) (finding that the Congressional concern motivating the enactment of the PLRA was that lawsuits had become a "recreational activity for long-term residents of our prisons" and presented "a means of gaining a short sabbatical in the nearest Federal courthouse"). Thus, where, as here, the plaintiffs are not inmates when an action is commenced, the purposes of the PLRA would not be served by application of the statute.

Although the Second Circuit has yet to address the issue, it appears that the two courts of appeals which have considered the issue have drawn the same conclusion. *See Harris v. Garner,* 216 F.3d 970, 976-80 (11th Cir.2000) (en banc) ("Because section 1997e(e) applies only to claims filed while an inmate is confined, it does not prevent a former prisoner from filing after release a monetary damages claim for mental and emotional injury suffered while confined, without a prior showing of physical injury."); *Kerr v. Puckett,* 138 F.3d 321, 322-23 (7th Cir.1998) (holding that "by waiting until his release from prison Kerr avoided § 1997e(e).").

With two exceptions discussed below, district courts have held the same. *See, e.g., Smith v. Franklin County,* 227 F.Supp.2d 667, 676 (E.D.Ky.2002) (holding that plaintiff who had been released from the county jail before commencing an action concerning the conditions of her incarceration was not bound by the limitations of the PLRA); *Doan v. Watson,* 168 F.Supp.2d 932, 935 (S.D.Ind.2001) (holding that where former inmates filed suit to recover damages based on strip searches conducted by defendants, "[b]ecause Plaintiffs filed their claims following their detention, the PLRA does not require them to produce evidence of physical injury to pursue their claims."); *Lee v. State of New York Dep't of Correctional Servs.,* No. 97 Civ. 7112(DAB), 1999 WL 673339, at *4 & n. 7 (S.D.N.Y. Aug. 30, 1999) ("Moreover, at the time that this suit was filed, Plaintiff's son was no longer even incarcerated, thereby removing him even further from the definition of 'prisoner' under the PLRA.").

Defendants rely on *Cox v. Malone,* 199 F.Supp.2d 135 (S.D.N.Y.2002), *aff'd,* 56 Fed.Appx. 43 (2d Cir.2003). There, a former state prisoner sued state officials alleging the excessive use of force during a search in violation of 42 U.S.C. § 1983. Defendants moved for summary judgment on the ground, *inter alia,* that the physical injury alleged by plaintiff was *de minimis* and, therefore, failed to satisfy the physical injury requirement of § 1997e(e). The district court granted the motion, holding that § 1997e(e) applied to plaintiff even though he had been released from custody before commencing the action. The court reasoned that

> ***3** Section 1997e(e) ... is a substantive limitation on the type of actions that can be brought by prisoners. Its purpose is to weed out frivolous claims where only emotional injuries are alleged. This purpose is accomplished whether section 1997e(e) is applied to suits brought by inmates incarcerated at the time of filing or by former inmates incarcerated at the time of the alleged injury but subsequently released. The fortuity of release on parole does not affect the kind of damages that must be alleged in order to survive the gate-keeping function of section 1997e(e). Because plaintiff's suit alleges only emotional injuries, it is barred by the PLRA irrespective of his status as a parolee at the time of filing.

Id. at 140. The Second Circuit affirmed the district court's holding in an unpublished opinion "for substantially the reasons stated in the district court's thorough and well-reasoned opinion." 56 Fed.Appx. 43; *see also Lipton v. County of Orange,* 315 F.Supp.2d 434, 456 & n. 29 (S.D.N.Y.2004) (following *Cox*).

Cox does not address the contrary authority discussed above and its rationale appears founded on an analysis not supported by the plain language of § 1997e(e) upon which other courts have relied. *Cox* correctly notes that limiting § 1997e(e) to those incarcerated at the time an action is commenced leaves to the "fortuity" of a prisoner's release date whether he or she will fall under or escape § 1997e(e)'s limitations. However, if Congress intended § 1997e(e) to apply to prisoners released from custody when an action is commenced, statutory language to accomplish this end was available. The language chosen by Congress in § 1997e(e) plainly limited its applicability to prisoners incarcerated at the time an action is commenced, was consistent with the purposes of the PLRA, and such Congressional determination and intent are not unreasonable.

The *Cox* decision, of course, does not constitute binding precedent for this Court. Were it simply a matter of analyzing the *Cox* decision in light of the *Kerr* line of cases addressing the scope of § 1997e(e), the *Kerr* line of cases holding that the plain meaning of the language in § 1997e(e) limits its applicability to prisoners incarcerated at the time an action is commenced is most persuasive. The Second Circuit's affirmance described that decision as "thorough and well-reasoned." That affirmance, however, was unpublished and by Second Circuit rule,

may not be cited as authority outside the *Cox* litigation. *See* 2d Cir. R. 0.23. Thus, the question becomes whether the Second Circuit's unpublished affirmance of *Cox* should lead a court in these circumstances to follow *Cox.*

For at least two reasons, it does not. First, Second Circuit Rule 0.23, restated on the *Cox* affirmance, explicitly limits the precedential value of the affirmance to the *Cox* case itself and bars its use in this and other cases. That rule should be followed unless and until the Second Circuit directs otherwise. Second, neither *Cox* nor the Second Circuit have directly considered or addressed the *Kerr* line of cases and their compelling rationale. Accordingly, for the reasons discussed above, the rationale of the *Kerr* line of cases is adopted. Because plaintiffs were not incarcerated at the time this action was commenced, § 1997e(e) is inapplicable and the defense which the County seeks to add in its proposed amended answer would be futile. Therefore, the County's motion to file and serve an amended answer is denied.[1]

III. Conclusion

***4** For the reasons stated above, it is hereby

ORDERED that the County's motion to file and serve an amended answer (Docket No. 37) is DENIED.

IT IS SO ORDERED.

Footnotes

1 Plaintiffs also oppose the County's motion on the ground that it is untimely. However, substantially for the reasons set forth in the County's Memorandum of Law (Docket No. 37) at pages 2-6, that contention, must be rejected.