1997 WL 770391
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United States District Court, S.D. New York.

James GILES, Plaintiff,
v.
Thomas Coughlin 3D, Commissioner of New York State Correctional Services; Robert Greifinger, M.D., Commissioner and Chief Medical Officer; John P. Keane, Superintendent, Sing Sing Correctional Facility; Charles Greiner, Deputy Superintendent of Security, Sing Sing Correctional Facility; Satish Kapoor, Head Medical Doctor, Sing Sing Correctional Facility, Defendants.

No. 95 CIV. 3033 JFK. | Dec. 11, 1997.

Opinion

MEMORANDUM OPINION and ORDER

KEENAN, District J.

***1** Before the Court is Plaintiff's Fed. R. Civ. Pro. 60(b) motion for reconsideration and modification of this Court's August 1, 1997 Opinion and Order terminating the prospective relief granted in the March 6, 1996 consent decree, in light of the Second Circuit's decision in *Benjamin v. Jacobson,* 124 F.3d 162 (2d Cir. Aug.26, 1997). Defendants cross-move, pursuant to Fed. R. Civ. Pro. 60(b)(5)-(6), for modification of the March 6, 1996 consent decree under equitable principles in light of this Court's August 1, 1997 determination that the consent decree was no longer necessary to correct a current or ongoing violation of a constitutional right. Plaintiff's motion is granted to the extent that the Court stated that because the prospective relief afforded under the March 6, 1996 consent decree was terminated, "Defendants may confine Plaintiff to TB hold pursuant to the May 20, 1996 TB policy." *Giles v. Coughlin,* No. 95 Civ. 3033(JFK), 1997 WL 433437, at *10 (S.D.N.Y. Aug.1, 1997), *reconsideration denied,* 1997 WL 466542 (S.D.N.Y. Aug.13, 1997). Defendants' cross-motion is denied.

A. Plaintiff's 60(b) Motion

On March 1, 1996, the parties entered into a consent decree, approved by the Court on March 6, 1996,[1] under which the parties agreed that "Plaintiff will not be placed in medical keeplock or have his status otherwise changed for the remainder of his sentence due to his refusal to take a PPD (purified protein derivative) test for tuberculosis infection." On April 24, 1997, Defendants made an emergency application to this Court for a modification of the March 6, 1996 consent decree, to allow Plaintiff to be placed in TB hold for his refusal to take a PPD test as part of a contact trace. Upon consideration of the fact that Plaintiff had been exposed to active TB, as well as the testimony of Dr. Lester Wright concerning the public health need to place Plaintiff in TB hold, from the bench the Court modified orally the March 6, 1996 consent decree to allow Plaintiff to be placed in TB hold, if he refused to take a PPD test, "until further order of this Court." Apr. 24, 1997 Tr. at 44. The August 1, 1997 Opinion and Order constituted the "further order of this Court."

In the August 1, 1997 Opinion and Order, this Court found that 18 U.S.C. § 3626(b)(2)-(3) of the Prison Litigation Reform Act ("PLRA") required termination of the prospective relief granted by the March 6, 1996 consent decree because the relief no longer remained necessary to correct a current or continuing violation of a federal right. Upon finding that the prospective relief must be terminated under the PLRA, the Court interpreted this "termination" to mean that Defendants could confine Plaintiff to TB Hold because the consent decree no longer afforded any prospective relief and this Court could no longer prospectively supervise and enforce the decree. In accordance with that interpretation of the meaning of "termination" under the PLRA, the Court stated that the "Defendants may confine Plaintiff to TB hold pursuant to the May 20, 1996 TB policy." *Giles,* 1997 WL 433437, at *10.

***2** The August 1, 1997 Opinion and Order did not continue the Court's April 24, 1997 oral modification of the March 6, 1996 consent decree. Rather, the August 1, 1997 Opinion and Order addressed the original, unmodified March 6, 1996 consent decree and the Court determined that the prospective relief in that original decree must be terminated because it was no longer necessary to correct a current or ongoing violation of a constitutional right. Contrary to Plaintiff's contentions, the Court did not "vacate" the consent decree in the August 1, 1997 Opinion and Order, and the Court never used that term in the Opinion for that very reason.[2]

On August 26, 1997, in *Benjamin v. Jacobson,* the Second Circuit held that a district court's termination of prospective relief granted by a consent decree, pursuant to PLRA § 3626(b), does not allow the parties to ignore the terms of the consent decree and act contrary to those terms. The Second Circuit explained that the termination of prospective relief under § 3626(b) means

> [n]o more and no less than that the non-federal aspects

> of the Consent Decrees are hereafter not to be enforced by the federal courts. The underlying contract, in its time made into a judgment, is left untouched, but federal courts no longer have the jurisdiction to enforce it... It follows that the Consent Decrees remain binding on the parties, although the jurisdiction available to them to enforce these binding agreements has been changed. And the parties are no more free to ignore the agreements they have made than they are to ignore any other agreement as to which no redress in federal court is available.
>
> The plaintiffs, therefore, should be able to get all the relief from state courts including specific performance, that had previously been available to them federally under the Consent Decrees.

Benjamin v. Jacobson, 124 F.3d at 178. To the extent this Court stated that upon termination of the prospective relief "Defendants may confine Plaintiff to TB hold pursuant to the May 20, 1996 TB policy," and essentially ignore the March 6, 1996 consent decree, this Court reverses itself in light of *Benjamin v. Jacobson.*

Accordingly, pursuant to this Court's August 1, 1997 Opinion and Order and the Second Circuit's *Benjamin v. Jacobson* decision, the prospective relief granted by the original, unmodified March 6, 1996 consent decree remains terminated, but the parties are not free to ignore the terms of the consent decree. Termination of prospective relief under the PLRA means that this Court no longer has jurisdiction to prospectively enforce the consent decree. If Defendants violate the terms of the March 6, 1996 consent decree, Plaintiff must seek enforcement of the decree in state court.

B. Defendants' Rule 60(b) Cross–Motion For Modification of the Consent Decree Under Equitable Principles

Defendants cross-move, pursuant to Rule 60(b)(5)-(6), for modification of the March 6, 1996 consent decree on the grounds that equity requires such a modification because the decree is no longer necessary to correct a current or ongoing violation of a constitutional right. Defendants seek a modification of the consent decree to permit the confinement of Plaintiff to TB hold for one year, pursuant to the New York State Department of Correctional Service's ("DOCS") May 20, 1996 TB policy, if he refuses to take a PPD test.

***3** This Rule 60(b) motion is Defendants' second Rule 60(b) motion for modification of the consent decree, but on different grounds. On May 12, 1997, Defendants moved under Rule 60(b)(5) for a modification of the March 6, 1996 consent decree to allow for Plaintiff to be confined to TB hold for one year due to his exposure to active TB and his refusal to take a PPD test as part of a contact trace. That Rule 60(b)(5) motion rested on the ground that James Giles' exposure to active TB constituted a significant change in circumstances that justified modification of the consent decree. Defendants relied on *Rufo v. Inmates of Sullivan County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), in support of their position that the Court should exercise its equitable powers and modify the consent decree due to the alleged change in circumstances. *Rufo* provided that modification of a consent decree under Rule 60(b)(5) may be warranted

> when changed factual conditions make compliance with the decree substantially more onerous ... Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles ... or when enforcement of the decree without modification would be detrimental to the public interest.

Id. at 384.

In the August 1, 1997 Opinion and Order denying Defendants' Rule 60(b)(5) motion, the Court found that there was no substantial change in circumstances to justify modification of the decree because at the time Defendants entered into the consent decree they were very much aware of the high risk of exposure to active TB within the general prison population and the likelihood that Plaintiff would be exposed to active TB. In light of the well-known TB problem in state prisons, as well as the fact that the consent decree did not prohibit alternative means to monitor Plaintiff for signs of active TB through regular x-rays and physical examinations, the Court determined that the consent decree expressly covered the possibility, if not probability, that Plaintiff would be exposed to active TB during his confinement. *See Giles,* 1997 WL 433437, at *4–5. The Court found that equity did not require modification of the consent order because the allegedly significant change in circumstances was nothing other than a well-known risk coming to pass and the consent decree did not prohibit alternative means to monitor Plaintiff in case of exposure. Compliance with the decree was not substantially onerous and Defendants did not satisfy their heavy burden in demonstrating that they agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)(5).

Defendants now move again under Rule 60(b) for modification of the consent decree. Instead of relying on *Rufo,* however, Defendants rely primarily on *Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237, 111

S.Ct. 630, 112 L.Ed.2d 715 (1991), in support of this Rule 60(b) motion. Under *Dowell,* which the Supreme Court decided a year before *Rufo* and addressed a consent decree imposing a school desegregation plan, the Supreme Court found that modification or vacatur of the school desegregation consent decree was appropriate where (1) the unlawful conduct has ceased, (2) the defendant complied in good faith with the consent decree for a reasonable amount of time after it was entered, and (3) the "vestiges" of the past unlawful conduct have been eliminated to the "extent practicable," and therefore the purpose of the decree has been satisfied. *Dowell,* 498 U.S. 249–50; *see Freeman v. Pitts,* 503 U.S. 467, 491–92, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992); *Inmates of the Suffolk County Jail v. Rufo,* 12 F.3d 286, 292 (1st Cir.1993). Pointing to the August 1, 1997 Opinion and Order in which this Court terminated the consent decree's prospective relief because "[t]o the extent that Plaintiff is no longer subject to the previous medical keeplock policy, and the conditions of confinement under the May 20, 1996 TB hold policy do not constitute an Eighth Amendment violation, the prospective relief granted by the March 1, 1996 decree does not remain necessary to correct a current or continuing violation of a federal right," *Giles,* 1997 WL 433437, at *9, Defendants contend that the *Dowell* criteria have been met and that equity demands modification of the decree.

***4** This Court seriously questions whether the *Dowell* standard for modification of consent decrees is applicable to the instant application. First, the *Dowell* Court addressed a consent decree aimed at institutional reform. The consent decree in this case provides very narrow relief to a single individual and the decree does not call for supervision over the operation of an entire institution. As the Second Circuit observed,

> If a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard [as outlined in *Dowell* and *Rufo*] in determining when modification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objective.

Patterson v. Newspaper & Mail Deliverers' Union of New York & Vicinity, 13 F.3d 33, 38 (2d Cir.1993), *cert. denied,* 513 U.S. 809, 115 S.Ct. 58, 130 L.Ed.2d 16 (1994). This consent decree is not directed toward institutional reform and does not provide for broad reform or pervasive changes in longstanding practices. Further, by providing for a particular type of narrow relief to one Plaintiff, this decree does not seek to vindicate significant rights of a public nature. Second, the *Dowell* consent decree called for open-ended court supervision of school desegregation until the goals of the decree were achieved. In this case, the consent decree's specific duration is for the remainder of Plaintiff Giles' sentence.[3] This consent decree will not operate in perpetuity.

Neverthelees, assuming that the *Dowell* standard does apply, the Court finds that the *Dowell* criteria for modification have not been met. *Dowell* requires good faith compliance with the consent decree for a reasonable amount of time after entering into the decree. By entering into the March 6, 1996 consent decree, Defendants accepted the burden of having to use alternative measures to monitor Plaintiff for TB for the remainder of his sentence. Indeed, about two weeks prior to entering into the decree Defendants' counsel made clear to the Court that DOCS intended to monitor Plaintiff in the general population through chest x-rays and sputum tests rather than through a PPD test. *See* Defs.' Mem. in Opp., Ex. 3 at 8. Yet, just over a year after entering into the consent decree, Defendants moved for relief from the burden of having to use alternative means to monitor Plaintiff in the general population because he was exposed to active TB and they wanted him to take a PPD test as part of a contact trace. As the Court stated in the August 1, 1997 Opinion and Order,

> The risk of exposure to active TB is a part of prison life, and the parties were aware of those risks when they entered into the March 1, 1996 consent decree. What Defendants assert to be changed circumstances are no more than a well-known risk at the time of the stipulation coming to pass. At the time they agreed to the consent decree, the fact that Plaintiff might be exposed to active TB during the remaining term of his confinement was foreseeable and anticipated.
>
> ***5** ... The decree contemplates that Plaintiff would not be placed in isolation for his PPD test refusal even if he was exposed to active TB. The stipulation covers this scenario and allows for regular x-rays, physical examinations, and monitoring of the Plaintiff for signs of active TB.

Giles, 1997 WL 433437, at *5. In light of the short time that has passed since the decree was entered, the fact that by entering into the decree Defendants accepted the burden of having to use other available means to monitor Plaintiff for TB in the general population "for the remainder of his sentence", as well as the fact that Defendants created the situation in which Plaintiff was exposed to active TB, the Court concludes—as it did in the August 1, 1997 Opinion and Order—that Defendants have not shown good faith compliance with the decree for

a reasonable amount of time and therefore modification is not warranted at this time. Defendants agreed to provide the prospective relief at issue "for the remainder of [Plaintiff's] sentence" without objection knowing full well of the risks and burdens involved. *See Rufo,* 502 U.S. at 389 ("We have no doubt that, to 'save themselves the time, expense, and inevitable risk of litigation' .... petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement."); *Alexander v. Britt,* 89 F.3d 194, 200 (4th Cir.1996) ("in a consent decree, defendants may agree, within limits, to do more than a judicially imposed injunction could have required"). Defendants can make due with the information they have already obtained from the contact trace and continue to use alternative means to monitor Plaintiff in the general population for signs of active TB.

Defendants appeal to this Court's equitable powers under Rule 60(b) and, under the facts of this case at this time, the Court declines to exercise its equitable powers. The parties carefully negotiated this consent decree to compensate Plaintiff for the four years in which he was subjected to unconstitutional conditions of confinement. Defendants have not made a showing that they should be released from the terms of this consent decree, which they entered into only twenty-one months ago. Defendants knowingly accepted the burden of having to use alternative means to monitor James Giles for TB throughout the remainder of his sentence and, under the present circumstances, the Court declines to release Defendants from that obligation. Compliance with the consent decree is not so burdensome as to necessitate modification or vacatur of the consent decree under Rule 60(b). Accordingly, the Court denies Defendants' motion for modification of the March 6, 1996 consent decree under Rule 60(b)(5)-(6).

***6** SO ORDERED.

Footnotes

1 In the August 1, 1997 Opinion and Order and August 13, 1997 Memorandum Opinion and Order, the Court referred to the consent decree as the March 1, 1996 decree as opposed to the March 6, 1996 consent decree.

2 Plaintiff's counsel makes the argument that this Court "vacated" the consent decree because in the August 1, 1997 Opinion and Order, and in the August 13, 1997 order denying Plaintiff's motion for reconsideration, the Court relied upon Judge Baer's decision in *Benjamin v. Jacobson,* 935 F.Supp. 332 (S.D.N.Y.1996), in which Judge Baer found that consent decrees were to be "vacated" under the PLRA. This Court cited to *Benjamin v. Jacobson* only for the proposition that the PLRA's termination of prospective relief provisions apply retroactively, are constitutional and do not violate the separation of powers doctrine.

3 Plaintiff is serving a sentence of fifteen years to life and he has been incarcerated since 1984. *See* Defs.' Mem. in Opp., Ex. 3 at 9.