1993 WL 9042
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Steven AUSTIN, et al. Plaintiffs,
v.
PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al. Defendants.

Civ. A. No. 90–7497. | Jan. 7, 1993.

Attorneys and Law Firms

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Opinion

MEMORANDUM

DUBOIS, District Judge.

***1** This is a class action for declaratory and injunctive relief brought under 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343.

Presently before the Court is Plaintiffs' Motion for Leave to File a Fourth Amended Complaint. Plaintiffs seek leave to amend in order to add five medical and mental health care contractors (hereinafter the "medical contractors") as defendants. The medical contractors provide medical and mental health care services to prisoners at several Pennsylvania correctional institutions. Based on the discussion which follows, plaintiffs' motion will be denied.

I. BACKGROUND

Plaintiffs commenced this class action in November 1990 alleging numerous violations of prisoners' constitutional rights at thirteen State Correctional Institutions. The named defendants are Joseph Lehman, Commissioner of the Pennsylvania Department of Corrections, the superintendents of the thirteen correctional institutions, and Robert Casey, Governor of the Commonwealth of Pennsylvania.

In February 1991, plaintiffs amended their complaint as a matter of course before defendants filed a response. Plaintiffs, with leave of court, filed a Second Amended Complaint in September 1991 adding eight inmates as plaintiffs. Plaintiffs' Motion For Leave to File a Third Amended Complaint naming the Superintendent of SCI–Muncy as a defendant was denied by Order dated September 29, 1992.

The medical contractors plaintiffs seek to add as defendants are: (1) Comprehensive Health Care Group, Inc.; (2) Correctional Medical Systems, Inc.; (3) Corrections Physicians Service, Inc.; (4) Prison Health Services; and (5) Pennsylvania Institutional Health Service, Inc. (Pl.'s Mot. To Am.) Such contractors provide health care services at nine of the thirteen correctional institutions named as defendants.[1]

II. APPLICABLE LAW

Federal Rule of Civil Procedure 15(a) states in relevant part: "[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. The purpose of Rule 15(a) is to afford litigants the opportunity to resolve their claims on the merits rather than have the pleadings stage of litigation become a mere exercise in technical proficiency. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); *Reaves v. Sielaff,* 382 F.Supp. 472, 474 (E.D.Pa.1974). As its language suggests, Rule 15(a) is to be liberally construed. The decision to grant or deny leave to amend is committed to the sound discretion of the court. *Gay v. Petsock,* 917 F.2d 768, 772 (3d Cir.1990).

A motion for leave to amend under Rule 15(a) may be denied for the following reasons: (1) undue delay; (2) bad faith or dilatory motive on the part of the moving party; (3) repeated failure to cure deficiencies by amendments previously allowed; (4) prejudice to the non-moving party; (5) futility of amendment; and (6) failure of the amendment to raise a meritorious claim. *Foman,* 371 U.S. at 182, 83 S.Ct. at 230; *Bechtel v. Robinson,* 886 F.2d at 652; *Verhein v. South Bend Lathe, Inc.,* 598 F.2d 1061, 1063 (7th Cir.1979). *See also United Services*

Automobile Ass'n v. Foster, 783 F.Supp. 916 (M.D.Pa.1992).

III. DISCUSSION

***2** Plaintiffs' impetus for seeking leave to add the medical contractors as defendants stems from a colloquy which occurred during the hearing on Plaintiffs' Motion for Preliminary Injunction on September 9, 1992. At the hearing, Plaintiffs' Exhibit Number 4, an affidavit of Dr. Leo Hartz dated July 28, 1992, was offered into evidence by plaintiffs to prove the existence of three active cases of tuberculosis at SCI–Muncy in 1992.[2] (Hearing Transcript, Sept. 9, 1992, at pp 88–103) At the time, Dr. Hartz was employed by the medical contractor which provided medical services at SCI–Muncy. Plaintiffs argued that the affidavit was admissible either under Rule 801(d)(2)(D) as the statement of an agent, or under Rule 801(d)(2)(B) as an adoptive admission.[3] (Hearing Transcript, Sept. 9, 1992, at pp 88–90) Defendants objected to the admission of the affidavit on the ground that it was hearsay. (Hearing Transcript, Sept. 9, 1992, at pp 88–89) In response, the Court stated, without ruling on the issue, that it was in general agreement with defendants' position that the medical contractors are not agents for purposes of Rule 801(d)(2)(D) and that parties such as defendants do not automatically adopt as admissions under Rule 801(d)(2)(B) the statements of such medical contractors. (Hearing Transcript, Sept. 9, 1992, at pp 100–101)

After an extensive discussion between the Court and counsel for both parties, defendants stipulated to the number of active cases of tuberculosis referred to in the Hartz Affidavit. (Hearing Transcript, Sept. 9, 1992, at pp 94) In view of the stipulation, there was no need to admit the Hartz Affidavit into evidence and the Court did not rule on the admissibility of statements made by Dr. Hartz or any other employees of the medical contractors. (Hearing Transcript, Sept. 9, 1992, at pp 95–97)

A. Plaintiffs' Motion For Leave To Amend Is Not Asserted For A Proper Purpose.

In response to the dialogue summarized above, plaintiffs filed their motion for leave to amend in order to prevent defendants from gaining what plaintiffs' perceive to be an evidentiary advantage at trial. (Pl.'s Brief Supp. Mot. to Amend at 2) Plaintiffs argue that admission of statements by medical contractors' staff into evidence is necessary in order to prove deliberate indifference on the part of DOC officials. *See Wilson v. Seiter,* 111 S.Ct. 2321, 2324 (1991); *Estelle v. Gamble,* 429 U.S. 97 (1976). Plaintiffs state in their supporting brief that "failure to allow plaintiffs to add the medical contractors as defendants may cast doubt on the ability of plaintiffs to gain admission for documents generated by the contractors reflecting a failure to have sufficient staff, equipment or services to provide adequate medical care." (Pl.'s Brief Supp. Mot. to Amend at 3)

Plaintiffs' motion and supporting brief are aimed at curing a potential evidentiary problem at trial rather than asserting meritorious claims for relief against the contractors. Under those circumstances, leave to amend would not be appropriate. *Verhein,* 598 F.2d at 1063; *Foster,* 783 F.Supp. 916. The Court would not order joinder of the medical contractors as defendants solely as a remedy for plaintiffs' evidentiary concerns.

***3** Plaintiffs state in their Reply Brief that they "are indeed claiming that the [medical] contractors have violated the constitutional rights of the plaintiff class." (Pl.'s Rep. Brief at 1) Although plaintiffs' assertion regarding constitutional claims appears to be akin to a "second thought" when considered in juxtaposition to the colloquy which occurred at the preliminary injunction hearing, and the absence of any mention of such claims in the motion itself or the initial supporting brief, and plaintiffs repeated emphasis on curing potential evidentiary problems in all of their moving papers, the Court will nevertheless address this argument.

First, plaintiffs' seek only declaratory and injunctive relief; no damages are claimed. As plaintiffs correctly point out in their supporting brief, regardless of a state's arrangements with medical contractors, the state remains responsible under the Constitution for providing adequate medical care to inmates confined at correctional facilities. (Pl.'s Brief Supp.Mot. to Amend at 2); *West v. Atkins, supra.* The Commonwealth of Pennsylvania has vested responsibility for prison operations, including medical and mental health care, in the Commissioner of the Department of Corrections and the superintendents of the individual corrections facilities. Therefore, in the event plaintiffs prevail at trial on their Eighth Amendment claim for inadequate medical care against the prison officials who are named as defendants, those officials will be obligated to ensure that the medical contractors are in compliance with any declaratory or injunctive relief granted by the Court.

Second, plaintiffs appear to misconstrue Rule 801(d)(2)(B). Joinder of the medical contractors as defendants is not necessary to have statements by medical contractors' staff admitted into evidence as adoptive admissions by defendants. What is required for admission under Rule 801(d)(2)(B), regardless of whether the statements were made by a party or a non-party, is conduct or words by which defendants manifest their adoption of or belief in the truth of the statement or statements.[4] Fed.R.Evid. 801(d)(2)(B); *United States v. Ordonez,* 737 F.2d 793, 800–801 (9th Cir.1984). Such a determination must be made on a case by case basis.

Third, for a statement to be admissible under Rule 801(d)(2(D), the party seeking admission must make a three-part showing: (1) "[t]he party must establish the existence of the [agency] relationship independent of the declarant's statement offered as evidence;" (2) "[t]he statement must be made during the existence of the declarant's agency;" and (3) [t]he statement must concern a matter within the scope of [the agency relationship]." *Boren v. Sable,* 887 F.2d 1032, 1038 (10th Cir.1989). Common law principles of agency are used in applying Rule 801(d)(2)(D).[5] *Id.*

The joinder of the medical contractors would add nothing to plaintiffs' agency argument. Assuming *arguendo* the medical contractors were defendants, plaintiffs would presumably be able to establish an agency relationship between the medical contractors and their employees. At best for plaintiffs under those circumstances, the statements of employees of the medical contractors would be treated as admissions against the medical contractors, but not the other defendants. In order for the statements of employees of medical contractors to constitute admissions against defendants other than the medical contractors, plaintiffs would have to establish an agency relationship with such defendants. Plaintiffs can attempt to do so whether or not the medical contractors are named as defendants. The addition of the medical contractors as defendants would not affect their burden of proof on that issue.

***4** As a final note in this section, the Federal Rules of Civil Procedure provide plaintiffs with a mechanism for introducing written statements of employees of medical contractors into evidence apart from Rules 801(d)(2)(B) and (D). Plaintiffs may direct requests for production of documents to the non-party medical contractors pursuant to Federal Rule of Civil Procedure 34(c). After the documents are obtained, plaintiffs may proceed by requests for admission directed to defendants pursuant to Federal Rule of Civil Procedure 36.

B. ***Undue Delay***
Plaintiffs waited more than two years before seeking to add the medical contractors as defendants and have not presented a satisfactory explanation for such delay. From the early stages of this action, plaintiffs were aware that medical and mental health care at many state correctional institutions was provided by the medical contractors. Although delay alone is generally an insufficient ground for denying leave to amend, delay combined with additional factors is sufficient to justify such denial. *Quaker State Oil Refining Corp. v. Garrity Oil Co.,* 884 F.2d 1510, 1517 (1st Cir.1989). Accordingly, the Court concludes that plaintiffs' delay in seeking leave to name the medical contractors as defendants, combined with other factors discussed *infra* and *supra,* justifies denial of the motion.

Plaintiffs state in their supporting brief that "[a]dding the new defendants will not delay trial because plaintiffs will not seek from the contract defendants any new discovery not previously identified." (Pl.'s Brief Supp. Mot. to Amend at 5) Although plaintiffs may not request additional discovery from the medical contractors, plaintiffs overlook the medical contractors' right to conduct discovery in the event they are added as defendants, and understate the delay which undoubtedly will result from the additional discovery required by the medical contractors. Moreover, the alleged presence of counsel for the medical contractors at all inspections of medical and health care facilities by plaintiffs' medical experts, a fact disputed by defendants, does not affect the right of the medical contractors to proceed with additional discovery.[6]

C. ***Bad Faith or Dilatory Motive***
Defendants argue in their supporting brief that plaintiffs' motion is not brought in good faith and suggest that the Court levy sanctions against plaintiffs pursuant to Rule 11 or under the Court's inherent power. The Court disagrees and will not impose sanctions. There is no evidence from which the Court can conclude that plaintiffs' motion for leave to amend was filed in bad faith.

D. ***Repeated Failure to Cure Deficiencies By Previous Amendments***
Plaintiffs have amended their complaint on previous occasions, but have not, until now, sought to add the medical contractors as party defendants. Plaintiffs have not offered a satisfactory explanation for failing to add the medical contractors at an earlier point in the litigation.

E. ***Prejudice to the Non-moving Party***
***5** Defendants argue that undue delay will result and additional expense will be incurred which will prejudice defendants in the event leave to amend is granted. The Court agrees.

A great deal of time, effort and expense has been expended on discovery including depositions, interrogatories, requests for documents and extensive tours of prison medical and mental health care facilities. Discovery in the case has almost reached completion. Granting plaintiffs leave to amend would require additional document production, tours of medical and mental health care facilities, depositions and interrogatories, not to mention the additional discovery disputes and motions the Court would be required to

resolve, all of which would delay the trial. Such delay, and the additional expense that would be incurred by the defendants and the medical contractors, is not warranted under the circumstances.

F. ***Futility of Amendment***

Defendants argue that adding the medical contractors as defendants would be futile and the Court agrees. As noted above, plaintiffs seek only declaratory and injunctive relief. For reasons stated in Subsection A of this Memorandum, naming the contractors as defendants would not change the scope, extent, applicability or enforceability of any such declaratory or injunctive relief that might be awarded.

An appropriate order will follow

ORDER

AND NOW, to wit, this 7th day of January, 1993, upon consideration of Plaintiffs' Motion For Leave To Amend Complaint and Add Parties (Document No. 112), Defendants' Brief In Opposition (Document No. 115), and Plaintiffs' Reply Brief (Document No. 116), IT IS ORDERED that Plaintiffs' Motion is DENIED.

In view of the denial of Plaintiffs' Motion for Leave to Amend Complaint to Add Parties, IT IS FURTHER ORDERED that Defendants' Motion to Correct Factual Record With Respect to Plaintiffs' Motion for Leave to Amend Complaint (Document No. 117) is DENIED AS MOOT.

Footnotes

1 The correctional institutions served by the contractors are SCI–Greensburg, SCI–Cresson, SCI–Frackville, SCI–Graterford, SCI–Retreat, SCI–Dallas, SCI–Smithfield, SCI–Camp Hill, and SCI–Waymart.

2 SCI–Muncy, although not one of the thirteen institutions involved in this action, was covered by this Court's Order of September 29, 1992, granting plaintiffs' Motion for Preliminary Injunction.

3 Federal Rule of Evidence 801(d) states in relevant part: "A statement is not hearsay if—(2) The statement is offered against a party and is ... (B) a statement of which the party has manifested an adoption or belief in its truth, or ... (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.... Fed.R.Evid. 801(d)(2)(B) & (D).

4 Plaintiffs may also use statements by medical contractors' staff when not offered to prove the truth of the matter asserted. Fed.R.Evid. 801(c).

5 Under Pennsylvania law, "[t]he basic elements of agency are the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." *Scott v. Purcell,* 490 Pa. 109, 415 A.2d 56, 60 (1980) (citing Restatement (Second) of Agency § 1, Comment b (1958)). A pivotal factor in determining whether the medical contractors are agents or independent contractors is the degree of control defendants exercise over the means by which the medical contractor's contractually defined duties are accomplished. *Massachusetts Mutual Life Ins. Co. v. Central Penn National Bank,* 372 F.Supp. 1027, 1041 (E.D.Pa.1974), *aff'd,* 510 F.2d 970 (3d Cir.1975).

6 Defendants filed a Motion to Correct Factual Record With Respect To Plaintiffs' Motion For Leave To Amend Complaint regarding the presence of counsel for the medical contractors during inspection tours of medical facilities at correctional institutions. In view of the Court's conclusion on this issue, defendants' Motion to Correct will be denied as moot.