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

Shirley WILDER, et al., Plaintiffs,
v.
Blanche BERNSTEIN, et al., Defendants.

No. 78 Civ. 957(RJW). | July 1, 1998.

Opinion

MEMORANDUM DECISION

WARD, J.

***1** City defendants move for an order declaring that the Stipulation of Settlement, approved and ordered by this Court in a judgment entered on April 29, 1987 and affirmed by the United States Court of Appeals for the Second Circuit in an opinion dated June 8, 1988 is terminated and enjoining all parties to the Stipulation from enforcing it. For the reasons hereinafter stated, the motion is denied.

BACKGROUND

I. HISTORY OF THE STIPULATION

In June 1973, this litigation was commenced as *Wilder v. Sugarman,* 73 Civ. 2644(HRT). The action was brought against various child care agencies, and City and State agencies and officials. Plaintiffs asserted "that the statutory scheme for the provision of child-care services, and the manner in which those services were provided, violated the first, eighth, and fourteenth amendments, and resulted in racial and religious discrimination in the access to these services." *Wilder v. Bernstein,* 499 F.Supp. 980, 986 (S.D.N.Y.1980). A three-judge district court held in 1974 that "the challenged New York laws represent[ed] on their face a fair and reasonable accommodation between the Establishment and Free Exercise Clauses of the Constitution." *Wilder v. Sugarman,* 385 F.Supp. 1013, 1029 (S.D.N.Y.1974).

In March 1978, a new action, *Parker v. Bernstein,* 78 Civ. 957(RJW), was filed which raised similar challenges. This Court, in a June 2, 1978 Order, dismissed *Wilder v. Sugarman,* on the condition that the opinion of the three-judge court would be treated as *stare decisis* in the surviving action. Subsequently, *Parker v. Bernstein* was amended and renamed *Wilder v. Bernstein. See Wilder v. Bernstein,* 499 F.Supp. at 986–87, n. 4. A class was certified in 1980 and defined as: "all those New York City children who are black, and who are Protestant, of other non-Catholic or non-Jewish faiths, or are of no religion, and are in need of child-care services outside their home." *Wilder v. Bernstein,* 499 F.Supp. at 994.

Before trial was to begin in August, 1983, plaintiffs and City defendants entered into settlement negotiations. In April, 1984, an initial draft of the Stipulation was presented to this Court for approval. Nineteen contract child care agencies ("Intervenors") were permitted to intervene in June, 1984. The Intervenors objected to the initial draft Stipulation's focus on discrimination rather than on the best interests of all children in foster care. The Intervenors' concerns were addressed on the record during further settlement negotiations and the Stipulation was amended.

On October 8, 1986, the Stipulation as amended was approved by this Court.[1] *Wilder v. Bernstein,* 645 F.Supp. 1292 (S.D.N.Y.1986). A final judgment was entered on April 29, 1987 approving the settlement. Subsequently, a number of foster care agencies which also had been dismissed as defendants appealed the judgment. On May 4, 1987, this Court granted a ten-day stay to allow the appellants to seek a further stay from the Court of Appeals. The Court of Appeals granted a partial stay of the final judgment pending appeal on May 21, 1987.

***2** In a decision dated June 8, 1988, the Second Circuit affirmed the judgment. *Wilder v. Bernstein,* 848 F.2d 1338, (2d Cir.1988). The Court of Appeals issued its mandate on June 30, 1988 and the mandate was filed in the District Court on July 5, 1988.

II. GENERAL PROVISIONS OF THE STIPULATION

Under the terms of the Stipulation, the City is required to place children in foster care in a non-discriminatory manner, as to race and religion. The children are to be

placed on a "first come, first served basis" in the best available program. Stip. ¶ 19. Further, the children must be evaluated "in accordance with good social work practice, to determine (1) the specific service needs of the child and (2) the level of care, and the specific type of program required by the child." *Id.* at ¶ 48. The Stipulation requires these evaluations to be conducted prior to placement and in the case of pre-evaluation placements no longer than 30 days after placement has occurred. *Id.* at ¶ 38, 48.

To determine the best available program, the Stipulation requires that the City hire a consultant to categorize and rate the quality of foster care programs. *Id.* at ¶¶ 6–17. The Stipulation also has provisions regarding vacancies, *id.* at ¶¶ 53–55, waiting lists, *id.* at ¶¶ 44–47, and therapeutic objections, *id.* at ¶¶ 32–36, to regulate the placement of children. In order to monitor compliance with the terms of the Stipulation, the Stipulation provides for a three-member settlement panel (*"Wilder* Settlement Panel") and support staff. *Id.* at ¶¶ 71–74. By Order filed August 8, 1989, the *Wilder* Settlement Panel was appointed.

III. KINSHIP CARE DECISION

On July 14, 1993, plaintiffs filed a Motion for Contempt and Enforcement against City defendants, citing alleged noncompliance with provisions of the Stipulation involving child evaluations, placement of foster children, and lack of access to necessary monitoring information. Included in the alleged violations of placement of foster children were allegations regarding children placed with foster parents to whom they were related ("kinship foster children"). As a defense to the issue of kinship foster children, City defendants contended that the Stipulation did not cover the approximately 14,000 children in kinship foster care (out of approximately 50,000 children in foster care) and, therefore, the Stipulation's requirements were not applicable to those children.

This Court disagreed with the City's interpretation of the Stipulation and ruled that the Stipulation applied to kinship foster children and that these children are protected by the Stipulation. *Wilder v. Bernstein,* 153 F.R.D. 524 (S.D.N.Y.1994). The Court stated that the City had

> presented no rationale to explain why it should be able to exclude certain foster children from the protections of *Wilder* merely by creating a new program that was not in existence when the stipulation was finalized. Nor could they. Such a result would violate the wording and spirit of the consent decree whose provisions were drafted with flexible terms designed to adapt to an ever changing system.

***3** *Id.* at 532 (footnote omitted).

City defendants appealed this ruling to the Court of Appeals. On February 23, 1995, the Second Circuit dismissed the appeal, stating that this Court had interpreted rather than modified the Stipulation and that it had no jurisdiction to hear the appeal. *Wilder v. Bernstein,* 49 F.3d 69 (2d Cir.1995). In ruling, the Court of Appeals stated that "[i]t is Judge Ward ... who is ultimately responsible for overseeing and interpreting the Decree, and ... there is no reason to anticipate that Judge Ward will now act against the best interest of the children...." *Id.* at 74.

IV. DURATION PROVISIONS OF THE STIPULATION

The Stipulation includes provisions concerning its duration. Stip. ¶¶ 79–81. These paragraphs were included in the original Stipulation, and paragraphs 79 and 80 were amended on October 6, 1989 and again on June 22, 1990. For the purpose of this motion, the relevant termination provisions are as follows:

> 80.... In no event, however, will this Stipulation remain in effect more than three years after the full implementation of the classification system described in section I, or nine years and six months from the date this Stipulation went into effect and all stays were lifted, whichever is sooner, except as provided in the paragraph below.
>
> 81. Within 60 days from the time this Stipulation would otherwise terminate, plaintiffs may petition the court for relief from such termination upon their showing that defendants are not in substantial compliance with the terms of this Stipulation (including having fully implemented a classification system or its alternative) and that there is need for continuation of the Stipulation.

On March 3, 1998, Acting Corporation Counsel Jeffrey D. Friedlander, citing paragraphs 80 and 81 of the Stipulation, informed the Court that the Stipulation had expired on or before December 29, 1997. Mr. Friedlander explained the City's understanding of the termination as follows:

> The Second Circuit issued its decision approving the *Wilder* Stipulation on June 8, 1988. The mandate order from the Second Circuit was required to be filed within 21 days of the Second Circuit's decision, i.e. June 29, 1988. Thus, the Stipulation became effective, at the latest, on June 29, 1988. Under the terms of the Stipulation set forth in the modified paragraph 80, the Stipulation does not 'remain in effect more than ... nine years and six months from the date the Stipulation went into effect and all the stays were lifted.' Accordingly, the Stipulation terminated on or before December 29, 1997.

Upon subsequent review of the history of this case, the City contended that the Stipulation expired on December 30, 1997. The City, therefore, seeks an order declaring that the Stipulation has terminated and enjoining the parties from enforcing the terms of the Stipulation after December 30, 1997.

DISCUSSION

It is well recognized that the district court entering a consent decree is the court "to determine the meaning of its own order." *Home Port Rentals v. Ruben,* 957 F.2d 126, 131 (4th Cir.), *cert. denied,* 506 U.S. 821 (1992). The Second Circuit, in an appeal of an interpretation of another order of this Court stated: "[w]e see no basis for substituting our judgment for that of the district court judge in interpreting his own order." *S.E.C. v. Sloan,* 535 F.2d 679, 681 (2d Cir.1976). Further, the Second Circuit, in this very case, held that "[i]t is Judge Ward ... who is ultimately responsible for overseeing and interpreting the Decree." *Wilder v. Bernstein,* 49 F.3d at 74. Therefore, it is clear that this Court is left with the task of interpreting its own order.

***4** When interpreting consent decrees, a court applies the principles of contract law. "Consent decrees are a hybrid in the sense that they are at once both contracts and orders.... [T]hey are construed largely as contracts, but are enforced as orders." *Berger v. Heckler,* 771 F.2d 1556, 1567–68 (2d Cir.1985) (citing *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 236, 95 S.Ct. 926, 43 L.Ed.2d 148 n .10 (1975); *Schurr v. Austin Galleries,* 719 F.2d 571, 574 (2d Cir.1983); *United States v. American Cyanamid Co.,* 719 F.2d 558, 563–64 (2d Cir.1983), *cert. denied,* 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984)); *see also EEOC v. Local 580,* 925 F.2d 588, 592–93 (2d Cir.1991).[2]

As with contract interpretation, great weight is given to the "explicit language of the decree." *Berger v. Heckler,* 771 F.2d at 1568. In the instance of consent decrees, interpreting the plain language of the order is of special importance as:

> It is recognized that a consent decree represents a compromise between parties who have waived their right to litigation and, in the interest of avoiding the risk and expense of suit, have 'give[n] up something they might have won had they proceeded with the litigation.... For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'

Id. at 1568 (quoting *United States v. Armour & Co.,* 402 U.S. 673, 681–82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971)). Additionally, a consent decree, as a contract, should be interpreted in such a way as to "ascribe[ ] meaning, if possible, to all of its terms." *See United States Naval Institute v. Charter Communications, Inc.,* 875 F.2d 1044, 1049–50 (2d Cir.1989) (citations omitted).

In this case, there are two relevant paragraphs of the Stipulation that the Court must interpret to determine if the Stipulation is still in effect. First, the Court must identify the termination date of the Stipulation as outlined in the above quoted portion of Paragraph 80. *See supra* p. 6. Then, the Court must determine when plaintiffs had to seek relief from termination. *See id.;* Stip. ¶ 81. After interpreting the meaning of these paragraphs, the Court must decide if actions were taken, consistent with the Stipulation, that would result in the Stipulation remaining in effect.

Paragraph 80 of the Stipulation states that the termination date is "nine years and six months from the date this Stipulation went into effect and all stays were lifted ... except as provided in the paragraph below." Stip. ¶ 80. In ascribing meaning to all of the terms of the Stipulation, as is consistent with contract interpretation, the Court finds

that the nine years and six months period commenced on the date that both conditions were met: (1) the Stipulation went into effect *and* (2) all stays were lifted.

On May 4, 1987, the Court denied a motion for a stay pending appeal to the Second Circuit but did grant a ten-day stay to permit an application to the Second Circuit. The Court of Appeals on May 19, 1987 granted a partial stay of the final judgment pending appeal. On June 8, 1988, the Second Circuit affirmed this Court and issued its mandate on June 30, 1988. Therefore, this Court finds that "all stays were lifted" as of June 30, 1988.

***5** In interpreting the meaning of the condition as to when "this Stipulation went into effect," the Court finds that the Stipulation went into effect after the Second Circuit's mandate was filed in the District Court on July 5, 1988. While this date may not seem apparent from the face of the Consent Decree, this Court interprets its own order in this manner.[3] As such, the termination date referenced in Paragraph 80 is January 5, 1998, nine years and six months from July 5, 1988.

Next, the Court turns to Paragraph 81 to determine if plaintiffs have petitioned the Court in a timely manner for relief from termination of the Stipulation. Paragraph 81 details three conditions that must be met: (1) plaintiffs must petition the Court for relief "[w]ithin 60 days from the time this Stipulation would otherwise terminate;" (2) plaintiffs must show in their petition to the Court that "defendants are not in substantial compliance with the terms of this Stipulation (including having fully implemented a classification system or its alternative);" and (3) plaintiffs must demonstrate that "there is need for continuation of the Stipulation ."

Plaintiffs did petition the Court "[w]ithin 60 days from the time this Stipulation would otherwise terminate." Webster's Dictionary defines "within" as "in the inner part of; inside" or "inside the limits of" and "from" as "beginning at" or "starting with." Webster's New World Dictionary (2d College ed.1972). Accordingly, the plain meaning of the language of the Stipulation is that plaintiffs were required to petition the Court inside a period of 60 days starting with the day the Stipulation would otherwise terminate. By petitioning the Court by letter on March 5, 1998, plaintiffs requested relief from the Court within 60 days from January 5, 1998.

Plaintiffs, in their petition to the Court on March 5, 1998, demonstrated to the Court that defendants were not in substantial compliance with the Stipulation, and at no time do defendants seriously contend that they are in substantial compliance. Through their petition to extend the Stipulation, plaintiffs set forth many examples of City defendants' failure to comply with large areas of the Stipulation. For instance, the classification system, which is specifically mentioned in Paragraph 80 of the Stipulation, is still not in operation and children are still not being evaluated within the 30 days designated by the Stipulation.[4]

Additionally, the City is still failing to afford kinship foster children appropriate protections. During the first seven years of the Stipulation, the City did not afford these children any of the protections which this Stipulation was designed to provide. It was not until after the Second Circuit directed the City that kinship foster care children were covered by the Stipulation, and after this Court entered an Order on December 28, 1995 (the "Kinship Order"), that children in kinship foster care were afforded the benefits of the Stipulation. The Kinship Order further provides that the *Wilder* Settlement Panel shall monitor, by case review, City defendants' progress with respect to implementing the requirements of the Kinship Order and the Stipulation.

***6** In accordance with the directive from this Court in the Kinship Order, the *Wilder* Settlement Panel, on March 23, 1998, released its study, *Kinship Foster Care: Study of Cases Entering Kinship Care or Transferring Case Supervision from July to December 1996* ("Kinship Foster Care Study"). This study sets forth a failure by City defendants to comply with the Kinship Order and with the Stipulation regarding children in kinship foster care. The Panel noted that "an overwhelming majority of the children are being placed into kinship foster homes without regard to their safety and wellbeing." *Wilder* Settlement Panel letter to Honorable Judge Robert J. Ward of March 23, 1998, at 1 (accompanying Kinship Foster Care Study). Regarding home studies prior to placements, the Panel found that "[t]hree-fourths (76%) of the children were placed into the home prior to the completion of an expedited home study ["EHS"], so the requirement of completing an EHS prior to the child's placement in the home was met in only one-quarter (24%) of the cases." Kinship Foster Care Study at 17. In violation of state regulations, "89% of the birth parents, 58% of the children, and 56 % of the foster parents had no contact with their case planner during the first month of the child's placement into kinship foster care." *Id.* at 34. Further, "[d]espite the requirement that kinship foster parents complete foster parent training within 120 days of the child's initial placement date, less than one-fifth of the

kinship parents appear to have had any foster parent training 5 months or more after the child's placement." *Id.* at 22. The foregoing are a sample of the findings of noncompliance made by the *Wilder* Settlement Panel in regard to kinship foster care.

Moreover, as the Court closely oversees the Consent Decree through both meetings with the parties and reports from the *Wilder* Settlement Panel, it is evident to the Court that the City has never, since the Stipulation went into effect on July 5, 1988, been close to substantially complying with the Stipulation. Accordingly, the need for continuation of the Stipulation is obvious. While the Court has no intention of continuing the Stipulation indefinitely, it is clear that an extension is required in order to compel the City to comply with the essential elements of the Stipulation.

CONCLUSION

City defendants' motion for an order declaring that the Consent Decree terminated on December 30, 1997 is denied. The next *Wilder* conference shall be held on July 22, 1998 at 10:30 a.m. at which time the parties and the Panel are to report concerning compliance with the Stipulation and setting a termination date for the Stipulation.

It is so ordered.

Footnotes

1 The final provision of the Stipulation dismisses the State defendants from the action. Stip. ¶ 84.

2 The Second Circuit has noted that "though 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." *EEOC v. Local 580,* 925 F.2d at 593. This Court, however, is not even flexing its muscles at this juncture; it is simply interpreting the language of its own Consent Decree.

3 As is noted above, a district court is generally left to interpret the meaning of its own order. In a similar situation, the Fourth Circuit deferred to the interpretation of an order as rendered by the district court responsible for issuing the order. *Home Port Rentals, Inc. v. Ruben,* 957 F.2d 126 (4th Cir.), *cert. denied,* 506 U.S. 821 (1992). In that case, a reinstitution of the suit was to occur "no later than 180 days from the date of this Order." *Id.* at 131. A dispute arose over what constituted "the date of this Order." *Id.* The district court found that "the relevant date for computation of time is the date the order was filed in the Clerk of Court's Office...." *Id.* (citation omitted). The appellants argued, however, that "the date of this Order" was the date the court signed the order. The Fourth Circuit found that "[i]t is not clear from the face of the consent order which date the court considered to be the date of the order. It is peculiarly within the province of the district court, however, to determine the meaning of its own order ... [and that] [w]hile it is certainly not unreasonable to assume that the date of the order is the date on which the order was signed, as appellants argue, ... we cannot say that the district court abused its discretion in interpreting its order in the manner that it did." *Id.* Similarly, this Court finds that the date the "Stipulation went into effect" is the date of the filing of the mandate with the Clerk of the United States District Court for the Southern District of New York.

4 As the City's noncompliance with the Stipulation is extensive, the Court does not find the need to enumerate all of the provisions with which the City fails to comply. Plaintiffs do provide detailed descriptions of the City's noncompliance in their "Revised Memorandum of Law in Opposition to Defendants' Motion for an Order Declaring that the Stipulation has Terminated, and Enjoining the Parties from Enforcing the Terms of the Stipulation," and the Court finds that this is clear evidence of substantial noncompliance. *See* Pl. Mem. In Opp. at 6–13.