

Brad H. v. The City of New York, 2009 WL 2198263 (2009)

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KeyCite Red Flag - Severe Negative Treatment

Reversed by Brad H. v. City of New York, N.Y.A.D. 1 Dept., August 10, 2010

2009 WL 2198263 (N.Y.Sup.), 2009 N.Y. Slip Op. 31561(U) (Trial Order)

Supreme Court, New York.

New York County

BRAD H., et al, Plaintiffs,

v.

THE CITY OF NEW YORK, et al., Defendants.

No. 117882/99.

July 10, 2009.

Motion Seq. No. 19

[This opinion is uncorrected and not selected for official publication.]

Present: Hon. Marilyn Shafer, Justice.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for .....

**PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ... ..

Answering Affidavits - Exhibits .....

Replying Affidavits .....

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accord with the annexed memorandum.

Dated: 7/10/09

MARILYN SHAFER

*J.S.C.*

Plaintiffs Brad H., *et al.* move, by order to show cause, for a preliminary injunction requiring defendants to continue to abide by the terms of the Stipulation of Settlement (Settlement) that the parties entered into on January 8, 2003, and that was approved in an Amended Final Order and Judgment dated April 2, 2003. Defendants cross-move for an order declaring that this action is terminated, pursuant to the terms of the Settlement, staying all monitoring activities

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provided for by the Settlement, and denying plaintiffs any discovery in connection with an Enforcement Motion which, to date, has not been filed.

Briefly, the Settlement provides that defendants will provide certain specified forms of discharge planning for inmates who receive treatment for mental illness while incarcerated in the City jails, and that defendants' provision of those services will be monitored by two agreed-upon Compliance Monitors (Monitors) Independently of the Settlement, defendants are obligated to continue to provide discharge planning, albeit not necessarily in the specific ways set forth in the Settlement. See *Brad H. v City of New York*, 185 Misc 2d 420 (Sup Ct, NY County), *affd for reasons stated*, 276 AD2d 440 (1st Dept 2000).

Paragraph 200 of the Settlement provides that the court shall maintain continuing jurisdiction over this action “for the term of this Agreement.” Plaintiffs brought their motion on May 22, 2009. Defendants contend that the Settlement terminated prior to May 22, 2009, that this action ended at the time that the Settlement terminated, and that the court, therefore, lacks jurisdiction to grant plaintiffs' motion. Defendants fail to explain on what jurisdictional basis this court can grant defendants the declaration that they seek, if, as they contend, this action is over.

Paragraph 193 of the Settlement provides that “[t]he provisions of this Agreement shall terminate at the end of five years after monitoring by the Compliance Monitors begins pursuant to § IV of this Agreement.” The parties agree that, pursuant to a number of stipulations into which they entered while negotiating matters pertaining to defendants' implementation of the Settlement, the termination date of the Settlement was tolled for at least 355 days, from July 25, 2007 until July 13, 2008, a Sunday. Whether that toll was carried forward to the following day, pursuant to General Construction Law § 25 (1), is irrelevant to the disposition of these motions, and defendants' various calculations of time assume a toll of 356 days. Accordingly, as is often the case where a court must determine the end of a limitations period, the decisive question is when the period began, here, when “monitoring by the Compliance Monitors [began] pursuant to § IV of [the Stipulation].”

The first paragraph of § IV of the Stipulation identifies that which the Monitors were to monitor as “the provision of Discharge Planning in City Jails and Defendants' compliance with the terms of this Agreement.” Stipulation, ¶ 108. Defendants argue that such monitoring began on May 6, 2003, the date upon which the Monitors were appointed by order of the court, because from that date on, defendants were obligated to provide the Monitors with access to persons and places relevant to the provision of discharge planning. That argument is untenable, because, plainly, “monitoring by the Compliance Monitors” requires some action on the part of the Monitors. Defendants' fall-back positions are that monitoring began on May 19, 2003, when the Monitors performed an initial review of defendants' draft policies; or on May 22, 2003, when they met with defendants' attorney to discuss defendants' draft policies; or at the latest, on May 28, 2003, when they observed a training session of persons who would subsequently be involved in discharge planning. Using that last date as the date upon which monitoring commenced, and adding the 356-day toll, results in a May 19, 2009 date for the termination of the Settlement, that is, three days before plaintiffs filed their order to show cause. Defendants correctly point out that each of these activities, as well as the access that defendants were required to provide to the Monitors from the time that they were appointed, is required, or authorized, by § IV of the Stipulation. However, defendants' argument, that the five-year period commenced as soon as some action provided for in § IV was performed, is unpersuasive.

As plaintiffs point out, the Settlement defines “Implementation Date” as 60 days after the entry of the final order and judgment in this action, that is, June 3, 2003, by which date, defendants were required to have implemented all aspects of the Settlement, including adoption of all manuals and other documents required to implement the Settlement. Settlement, ¶¶ 105, 107. The Settlement does not require defendants to be in substantial compliance prior to that date. Settlement, ¶ 160. While discharge planning includes the formulating, as well as the implementing, of discharge plans (Settlement, ¶

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1 [cc]), and while the Monitors were to review and comment on drafts of new or revised policies pertaining to discharge planning prior to the Implementation Date, there are no specific requirements as to the formulation of such documents, prior to that date, and there could be no monitoring of substantive compliance, prior to that date. Indeed, the Settlement (¶ 140) required the Monitors to develop performance goals, by which defendants' compliance with the Settlement could first be measured, within the first six months after the Implementation Date. Furthermore, the Monitors' first report, dated September 3, 2003, states that, while the Monitors performed some limited reviews of draft policies commencing on May 19, 2003, "monitoring activities did not commence in earnest until June 25, 2003," and that, even as of the date of the report, the opinions stated therein "are not intended to reflect determinations of substantial compliance or lack thereof."

Moreover, the parties have consistently pegged the termination date of the Settlement to the Implementation Date. For example, the September 15, 2003, contract between the Monitors and the fiscal agent with which the City contracted for the payment of the Monitors' fees and expenses provided for a term commencing on May 6, 2003 and ending on June 2, 2008, five years after the Implementation Date. In a July 11, 2007 e-mail sent in connection with negotiating one of the tolls, counsel for defendants disputed plaintiffs' assertion that the monitoring period was due to end on June 25, 2008, and stated that, as he computed it, the monitoring period was due to end on June 2, 2008: "Monitoring began with the Implementation Date ...." Dantowitz Affirm., Exh. J. For the reasons given above, this court agrees. Adding the 356-day tolling period results in a termination date of May 25, 2009 (2008 was a leap year), or May 26, if the date is deferred because of the observation of Memorial Day on May 25th. Consequently, plaintiffs' order to show cause was timely filed.

Defendants do not dispute plaintiffs' showing that they are likely to prevail on the merits, that they are likely to suffer irreparable harm absent the granting of provisional relief, and that the balance of equities tilts in their favor.

Defendants request that plaintiffs be required to post a substantial bond in the event that a preliminary injunction is issued. Plaintiffs are no less indigent now than they were at the time that this action commenced. Consequently, bond will be set at \$1.00, as it was when the previous preliminary injunction was issued.

Accordingly, it is hereby

ORDERED that the undertaking is fixed in the sum of \$1.00 conditioned that the plaintiffs, if it finally determined that they were not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendants are enjoined and restrained, during the pendency of this action, from failing to comply with the Stipulation of Settlement signed by the parties to this action on January 8, 2003; and it is further

ORDERED that defendants' cross motion is denied; and it is further

DECLARED that this action continues.

Dated: 7/10/09

ENTER:

MARILYN SHAFER

J. S. C.

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