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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

Randolph DICKERSON, et al., Plaintiffs,

v.

Thomas R. CARPER, Governor of the State of
Delaware, et al., Defendants.

Civ. A. No. 10256. | Submitted: Aug. 11, 1995. |
Decided: Sept. 7, 1995.

Attorneys and Law Firms

Neilson C. Himelein, of Community Legal Aid Society,
Inc., Wilmington; and Elizabeth Alexander, and Mark
Lopez, of National Prison Project of the American Civil
Liberties Union, Washington, D.C., for Plaintiffs.

John K. Welch and Carl C. Danberg, of Department of
Justice, Wilmington, for Defendants.

Opinion

MEMORANDUM OPINION

CHANDLER, Vice Chancellor.

*1 Plaintiffs filed this class action lawsuit against the State of Delaware, its Department of Correction (the “Department”), the Governor and various other state officials on behalf of prisoners incarcerated by the Department. After several years of discovery and negotiations, the parties reached a settlement agreement (the “Agreement”). This Court entered an order approving the Agreement on November 28, 1988. The Agreement covers all four major prisons operated by the Department. It addresses overcrowding, health care services, legal access and environmental conditions at these facilities. The Agreement obligates the defendants to provide information to counsel for plaintiffs for monitoring purposes. The Agreement contemplated implementation of its provisions over three years, ending in 1991.

One year after the approval of the Agreement, the plaintiffs filed a motion to show cause why defendants should not be held in contempt for alleged violations of the Agreement. While the motion was pending, defendants took many actions to assure compliance with

the Agreement. When the Court heard plaintiffs’ motion, it found defendants to be in compliance with the Agreement. *See Dickerson v. Castle*, Del.Ch., C.A. No. 10256, Chandler, V.C. (Oct. 15, 1991). The Court declined to consider whether defendants were in violation of the Agreement prior to taking action to improve conditions at the prisons in response to plaintiffs’ motion. *Id.*

Plaintiffs filed a second motion to show cause which was settled by stipulation (the “Stipulation”). The Court entered an order approving the Stipulation on December 15, 1992. The Stipulation addressed overcrowding problems and tuberculosis control throughout the prison system and legal access at the Women’s Correctional Institute.

The parties are currently before the Court on plaintiffs’ third motion to show cause and defendants’ motion for declaratory relief or relief from judgment pursuant to 10 *Del.C.* Chapter 65 and Chancery Court Rule 60. The Court entered a stipulated order (the “Stipulated Order”) as a temporary resolution of defendants’ motion on February 9, 1995. The Stipulated Order expired on June 1, 1995. The parties agreed to extend its effect until this Court rules on their motions. Plaintiffs contend that defendants have violated that Stipulated Order as well as the Agreement and the Stipulation.

Plaintiffs have styled their enforcement action as a motion to show cause why defendants should not be found in contempt of a court order. Defendants deny that they are in violation of the Agreement or the Stipulation, but they have not questioned plaintiffs’ characterization of a violation of the Agreement as contempt of an order of this Court. Because defendants have never disputed that the Agreement was entered as an order, the Court accepted plaintiffs’ characterization of the Agreement as an order in its 1991 ruling on plaintiffs’ first motion to show cause. *Dickerson, supra*. Yet, the record in this case shows that the Court entered an order approving the Agreement as a fair and reasonable settlement, but that order did not incorporate the Agreement as an order of this Court. *Dickerson v. Castle*, C.A. No. 10256, Jacobs, V.C. (Nov. 28, 1988) (ORDER). The Court also approved the Stipulation as fair and reasonable, but did not incorporate the terms of the Stipulation as an order of this Court. *Dickerson v. Castle*, C.A. No. 10256, Chandler, V.C. (Dec. 2, 1992) (ORDER). A settlement agreement approved by a court but not incorporated into an order is merely an agreement. It may be enforced as a contract, but it cannot be enforced by contempt. *Read v. Wilmington Senior Center*, Del.Super., C.A. No. 91A-06-03, Bifferato, J. (Sept. 6, 1991), *Let.Op.* at 2, *aff’d*, Del.Super., No. 369, 1991 (Dec. 26, 1991) (ORDER). Plaintiffs cannot enforce the Agreement or the

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Stipulation with a motion to show cause.

*2 A trial court may enforce a settlement agreement if the case is still pending before it. *Confederate Memorial Ass'n v. United Daughters of the Confederacy*, D.C.App., 629 A.2d 37, 39 (1993). Because the parties have expended considerable resources on the motion to show cause, including a two day evidentiary hearing and post-trial briefing, I will treat plaintiffs' motion to show cause as a motion to specifically enforce the Agreement and the Stipulation. I will also consider defendants' motion for a declaratory order that the temporary housing of inmates in shell dormitories in the Multi-Purpose Criminal Justice Facility ("Gander Hill") for two years does not violate the Agreement or Stipulation.

The Court held an evidentiary hearing on the motions on July 25 and 26, 1995. Plaintiffs presented an expert witness, Dr. Robert Powitz, to testify about the problems created by the current conditions in the prisons. Two prisoners testified about the treatment they have received at Gander Hill. Defendants called several prison officials to describe current prison conditions and the implementation of prison programs. Peter M. Ross, the State's budget director, testified concerning the State's plan to spend more than 100 million dollars on expanding and improving the prison system. Stanley W. Taylor, the Bureau Chief of the Bureau of Prisons, described the State's "Master Plan" to expand the prison system to alleviate overcrowding and accommodate anticipated growth of the prison population. After the close of the evidence, the parties submitted simultaneous briefs to the Court. The Court also visited Sussex Correctional Institution on August 28 in order to view the pre-trial building, classrooms and ASDA areas.

Plaintiffs contend that they have demonstrated that defendants have violated the tuberculosis control provisions of the Stipulation, the notice provisions of the Stipulation and the restrictions on overcrowding in the Agreement and the Stipulation. Plaintiffs further assert that defendants have not complied with the February 9, 1995, Stipulated Order which set minimum standards for the temporary dormitories in Gander Hill. Defendants respond that they have attempted to comply with the settlement agreements in good faith. They emphasize the State's long term plan to improve the prison system.

1. *The Shell Dormitories*

The Department is currently housing inmates in temporary shell dormitories at Gander Hill. Defendants have requested a declaratory order permitting them to continue to use the shell dormitories for another two years. Plaintiffs contend that defendants' use of the shell dormitories violates the ban on housing inmates in non-housing areas. Plaintiffs further contend that

defendants have failed to comply with the Stipulated Order concerning the shell dormitories which was entered by the Court on February 9, 1995. The Stipulated Order required the defendants to maintain ten sinks, toilets and showers in each shell dormitory in working order.

*3 Defendants have not breached the Agreement or the Stipulation by operating the shell dormitories as temporary housing areas. The Agreement and the Stipulation prevent defendants from housing inmates in non-housing areas. The Department has effectively redesigned the shell dormitories into temporary housing areas, equipping them with sinks, toilets, showers and beds. Defendants may use the shell dormitories for two years without breaching the Agreement or the Stipulation.

Defendants are also in compliance with the Stipulated Order. The Stipulated Order required Defendants to maintain ten sinks, toilets and showers in each shell dormitory. Defendants have provided those facilities. The toilets and showers have occasionally malfunctioned, but defendants have repaired these problems in a timely manner. The Stipulated Order also required defendants to ensure that inmates assigned to the shell dormitories had the same access to prison services and programs as other inmates. From the evidence presented at the hearing, I find that defendants have kept that promise. Defendants' plan to use the shell dormitories for two years does not violate the Agreement or the Stipulation.

Plaintiffs allege that defendants have violated another aspect of the February 9, 1995, Stipulated Order. Defendants agreed to "[e]nsure that all prisoners eligible for SENTAC Rule # 28 Release are promptly referred to a level 3 placement." Plaintiffs complain that defendants have not been promptly referring eligible prisoners to level 3 placement. Sherese Brewington-Johnson, Warden at Gander Hill, testified that Gander Hill was referring eligible Rule 28 prisoners to a level 3 placement. Warden Johnson explained that the process for administering these referrals was slow and deliberate to ensure that the inmates were truly eligible for level 3 placement.

I find that the defendants complied with the provisions of the Stipulated Order concerning level 3 placement for eligible prisoners. The processing of eligible Rule 28 prisoners at Gander Hill has been reasonably prompt under the circumstances.

2. *The Booking and Receiving Area at Gander Hill*

Plaintiffs allege that overcrowded conditions in the Booking and Receiving Area at Gander Hill violate the Agreement and the Stipulation. Plaintiffs' expert, Dr. Powitz, visited Gander Hill in April and found severely overcrowded conditions. Since Dr. Powitz's visit, Gander Hill has opened the third shell dormitory. Warden

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Johnson testified that seventy five percent of the prisoners held in Booking and Receiving were relocated to the new shell dormitory. At the time of the hearing, Booking and Receiving held 39 prisoners, although all but 18 of them were in court at that time.

Plaintiffs failed to carry their burden of showing that current conditions in Booking and Receiving do not comply with the settlement agreements. Defendants breached the Agreement in April, but have since improved the situation by opening another temporary dormitory. The completion of the new temporary dormitory makes a reoccurrence of the conditions that existed in April unlikely. The evidence concerning current conditions in Booking and Receiving was scant. Plaintiffs have failed to demonstrate that defendants are not in compliance with the provisions of the Agreement and the Stipulation regarding overcrowding at Gander Hill.

3. Tuberculosis Control

*4 In the Stipulation, defendants agreed to develop a tuberculosis control program throughout the prison system. Plaintiffs allege that defendants have not implemented the program they promised to undertake. Plaintiffs complain that defendants are not: testing all newly admitted inmates; investigating all cases of conversion, *i.e.*, persons who test positive after previously testing negative; providing appropriate prophylaxis for inmates who test positive but have no active disease. Defendants respond that their tuberculosis control program is effective. They note that no inmate has entered the prison system testing negative for tuberculosis and, thereafter, developed the disease.

Defendants are complying with most of the tuberculosis control provisions of the Stipulation. Contrary to plaintiffs' allegations, defendants are testing all newly arriving inmates for tuberculosis. The Department's record of controlling tuberculosis throughout the prison system has been excellent. Yet, the effectiveness of the Department's tuberculosis control is not the issue before the Court. Defendants agreed to take specific tuberculosis control measures.

Plaintiffs have demonstrated that defendants have failed to implement two of the tuberculosis control provisions of the Stipulation. Defendants agreed to develop a system for the thorough investigation of cases of conversions. The evidence presented at the hearing shows that defendants have not developed a system to investigate conversions. Defendants shall develop the system they agreed to implement. Defendants also agreed to provide appropriate prophylaxis for inmates with positive test results but no active disease. Defendants' witness, Carol Marvel, a registered nurse employed by Correctional Medical Systems ("C.M.S."), testified that C.M.S.

protocol mandates consideration of INH therapy for inmates who test positive. The medical records presented at the hearing do not indicate whether INH therapy was considered. INH therapy was not administered for any of the patients whose records were presented to the Court. The evidence indicates that defendants are not following their own protocol concerning INH therapy. Defendants shall follow their own protocol and have medical providers consider whether INH therapy is appropriate for persons who have positive test results. Defendants must implement the tuberculosis control system that they promised to develop.

4. Overcrowding at SCI

Plaintiffs allege that the overcrowded conditions at Sussex Correctional Institution ("SCI") violate the Agreement and the Stipulation. In the Stipulation, defendants agreed to a ban on the use of non-housing areas for housing inmates. Plaintiffs contend that defendants are violating that ban by housing inmates in the dining hall and classrooms that were not designed as dormitories. Plaintiffs also complain that defendants have violated the settlement agreements by housing pre-trial detainees in ASDA, the Administrative Segregation Detention Area; and double bunking the pre-trial receiving area. Defendants do not respond to plaintiffs' specific allegations, but emphasize the State's long term plan to expand and improve the prison system.

*5 In the Stipulation, defendants agreed to "not house any prisoner in any area not designed for housing...." Defendants have broken that promise by using the dining hall and two classrooms as temporary dormitories. Unlike the shell dormitories at Gander Hill, these non-housing areas have not been effectively redesigned to serve as temporary dormitories. I find that defendants have tried to comply with the agreements in good faith, but that does not excuse them from honoring their obligations under the settlement agreements. Defendants shall not use the classrooms or dining hall at SCI for housing inmates.

The overcrowding at SCI has forced defendants to place pre-trial detainees in ASDA, the Administrative Segregation Detention Area. Plaintiffs assert that housing pre-trial detainees in ASDA violates the settlement agreements. SCI's use of ASDA to hold the overflow population from the Pre-Trial Building does not violate the settlement agreements. ASDA is an area designed for housing-it was once the receiving area for SCI. SCI may use ASDA to house the overflow from the Pre-Trial Building.

SCI has installed double bunks in the Pre-Trial Building and ASDA as another method of accommodating the large population of pre-trial detainees. Plaintiffs argue that SCI's use of double beds violates the Agreement. In the

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Agreement, defendants promised to “install single beds (not double-bunked) in the receiving area so that inmates will not be sleeping on mattresses on the receiving area floor.” When the parties entered into the Agreement in 1988, the “receiving area” was not the Pre-Trial Building, it was ASDA. Because SCI is still using ASDA 2 and ASDA 3 as a “receiving area,” the restriction on double bunking applies to ASDA 2 and ASDA 3. SCI cannot use double bunked beds in ASDA 2 and ASDA 3. By its terms, the restriction on double bunking does not apply to the Pre-Trial building.¹ It is not the “receiving area” referred to in the Agreement. Defendants use of double bunks in the Pre-Trial building does not violate the Agreement.

¹ The changing conditions at SCI highlights a problem with the Agreement. The Agreement is seven years old and its applicability to current conditions in the prison system has begun to become dated. The parties anticipated that the Agreement would cover a three year period, ending in 1991.

5. Notification

Defendants agreed in the Stipulation to notify plaintiffs of any violations of the settlement agreements. Defendants have housed inmates in non-housing areas of SCI in violation of the Stipulation, but never notified plaintiffs’ counsel of this violation. Defendants shall comply with the notification requirements of the Stipulation.

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Attached to this Memorandum Opinion is an Order that directs defendants to (1) stop housing prisoners in the dining hall and classrooms at SCI, (2) notify counsel for plaintiffs of any future housing of prisoners in the classrooms or dining area at Sussex Correctional Institution and (3) comply with two of the tuberculosis control provisions of the 1992 Stipulation. The attached Order merely requires defendants to do that which they have promised to do. This Court will enforce the attached Order by contempt. The remainder of the 1988 Agreement and the 1992 Stipulation cannot be enforced by contempt.

*6 The Agreement and Stipulation themselves are not orders of this Court. They are contractual arrangements that may be enforced through a contract action. I considered plaintiffs’ motion to enforce the settlement agreements because this lawsuit is still pending before me, but any future motions to enforce the settlement agreements themselves will not be heard as part of this litigation. As the Court noted in its 1991 Opinion in this

case, “at some point, ..., even institutional reform litigation must come to an end.” *Dickerson*, (Oct. 15, 1991), *supra*, n. 5. For this case, that time has come. The parties contemplated dismissing this lawsuit in 1991. The Agreement states that this “pending litigation will be dismissed with prejudice at the end of three years from the effective date of the agreement (and remain inactive during the interim) if the defendants comply with the [terms of the settlement].” The Agreement is almost seven years old, but the parties have not dismissed this lawsuit. Allowing this lawsuit to continue means that it will have no end, the parties will forever enter into “stipulated agreements” concerning the operation and maintenance of the Delaware prison system. But an agreement of the parties cannot and should not confer perpetual jurisdiction on this Court to oversee the parties’ contractual arrangement. I will not permit the parties to leave an open ended lawsuit on my docket. This lawsuit is dismissed. Any future efforts to enforce the 1988 Agreement or the 1992 Stipulation must be brought as a separate contract action.

An Order has been entered consistent with this Memorandum Opinion.

ORDER

For the reasons set forth in the attached Memorandum Opinion entered in this case on this date, it is

ORDERED:

- (1) defendants may use the shell dormitories at Gander Hill as temporary dormitories for a period of two years;
- (2) defendants shall develop a tuberculosis control system that investigates all cases of conversion and that has medical providers consider whether an inmate who has a positive PPD test result should receive INH therapy;
- (3) defendants shall no longer house inmates in the classrooms and dining area at SCI;
- (4) defendants shall notify counsel for plaintiffs of any future housing of prisoners in the classrooms or dining area at SCI;
- (5) this action is dismissed, with each party to bear its own costs.

