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United States District Court, N.D. Illinois, Eastern Division.

Isaac GREEN, Plaintiff,
v.
Allyn SIELAFF, individually and in his capacity as Director of the Illinois Department of Corrections; Joseph Cannon, individually and in his capacity as the Warden and Chief Administrative Officer of the Illinois State Penitentiary, Joliet Branch; Eugene Buldak; Mary Jurich; Warren W. Wols, Defendants.

No. 71 C 1403. | June 3, 1992.

Opinion

MEMORANDUM OPINION

KOCORAS, District Judge:

***1** This matter comes before the court on petitioner George Peter's motion for leave to intervene as a party plaintiff pursuant to Fed.R.Civ.P. 24 in order to petition the Court for a rule to show cause why Howard Peters III, Director of the Illinois Department of Corrections, should not be held in civil contempt for refusing to comply with Judge McGarr's order dated January 9, 1976. For the reasons set forth below, petitioner's motion to intervene is denied.

BACKGROUND

On January 9, 1976, Judge McGarr of this court entered an injunction which barred Allyn Sielaff, former Director of the Illinois Department of Corrections, as well as his "successors, agents, servants and employees," from enforcing any rule or regulation "which prohibits or restricts the sources from which inmates of Illinois Correctional institutions may receive otherwise admissible publications" and ordered them "henceforth [to] allow and permit inmates to order, solicit, receive as gifts or otherwise obtain publications from friends, relatives ... department stores, magazine distributors, publishers, wholesale or retail establishments, or from any other source of publications or written materials." Since at least November, 1987, the Illinois Department of Corrections has banned receipt of all catalogs, other than for books or periodicals, by inmates at Illinois correctional institutions.

Petitioner George Peter ("Peter") is currently an inmate at Dixon Correctional Center. Peter claims that he has attempted to receive numerous commercial catalogs, but has been unable to receive them because of the institutions' ban. Peter claims that this ban is in violation of this Court's January 9, 1976 order, and he therefore seeks to intervene in this action as of right, pursuant to Fed.R.Civ.P. 24(a)(2) (mandatory intervention), or in the alternative, pursuant to Fed.R.Civ.P. 24(b)(2) (permissive intervention). Peter seeks to intervene so that he can petition the court to issue a rule to show cause why it should not hold Howard Peters, the current Director of the Illinois Department of Corrections, in civil contempt for violating Judge McGarr's order.

DISCUSSION

Fed.R.Civ.P. 24 provides as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:

... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

***2** Fed.R.Civ.P. 24. Because we find that Peter can adequately protect his interests through alternate means, his motion to intervene is denied.

Both Rule 24(a) and Rule 24(b) require timely application in order for intervention. Whether an application to intervene is timely is left to the discretion of the court based on the totality of the circumstances. When considering whether an application is timely, the court should take into account the following factors: 1) the length of time that the applicant knew or should have known of his interest in the case, 2) the prejudice to the

original party caused by the delay, 3) the resulting prejudice to the applicant if the motion is denied, and 4) any other unusual circumstances. *Schultz v. Connery,* 863 F.2d 551, 553 (7th Cir.1988). Considering these factors, we find that Peter's application is untimely, and that allowing him to intervene would result in great prejudice to the Director.

Although the Department of Corrections policy which Peter is challenging was adopted in 1987, this motion to intervene was not filed until March 2, 1992. It is clear that Peter was aware of his interest in challenging the ban on catalogs on June 2, 1988, when he filed a pro se § 1983 action in the United States District Court in the Southern District of Illinois, claiming that the ban on catalogs violated his constitutional rights. After discovery had been taken, and following the magistrate judge's denial of cross-motions for summary judgment, Peter voluntarily dismissed the proceedings in the Southern District of Illinois on January 3, 1991. Now, over a year later, Peter seeks to intervene in this action in order to litigate an issue which he was in the process of litigating before the case was terminated at his request, after the Department of Corrections had spent considerable time and expense in litigating the case. This unnecessary delay caused by the dismissal and subsequent filing of another suit involving the identical legal issues, combined with the prejudice to the defendant in having to defend a second lawsuit, and the seemingly unwarranted wasting of judicial resources, lead us to find that Peter's application to intervene is untimely.[1]

In addition, allowing Peter to intervene in this action would greatly prejudice the Director because it would allow Peter to avoid certain procedural obstacles and would prevent the Director from asserting several defenses which would have been available to him had Peter continued with his § 1983 action. First, Peter is not seeking merely to enforce Judge McGarr's order. Rather, he is seeking relief that goes far beyond what was contemplated in the original action, including a request for money damages against the Director in his individual capacity for allegedly violating the injunction. In addition, Peter is purporting to act as a class representative, even though this case has never been officially certified as a class pursuant to Rule 23 Fed.R.Civ.P. Moreover, it appears that Judge McGarr authorized Ruthanne DeWolfe to act as the attorney for the prisoner "class" in relation to the original lawsuit, yet Peter has not made any showing that his interests are not being adequately represented by her. Finally, if Peter were allowed to intervene to seek relief in the form of a civil contempt action, rather than filing an independent § 1983 action, the Director would be precluded from asserting otherwise-available defenses, such as qualified immunity and lack of personal involvement, and would be deprived of a trial by jury. On the other hand, Peter has not demonstrated that he would be less able to protect his rights in an independent § 1983 action. Weighing all of these factors, the court finds that the equities balance in favor of denying Peter's motion to intervene.

CONCLUSION

***3** For the reasons set forth above, petitioner's motion to intervene is denied.

Footnotes

1 Peter argues that he voluntarily dismissed the case pending in the Southern District of Illinois because it was too difficult for him to travel to the courthouse due to his arthritis and bursitis. However, an examination of Peter's prison records sheds some doubt on this explanation. Peter has frequently been granted permission to travel to participate in 10K and 8K races at prisons around the state. In addition, Peter's medical records indicate that he was injured on July 8, 1991 while playing softball and on February 19, 1992, while refereeing a basketball game.