

1989 WL 82421

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

Mary DEAN, et al., Plaintiffs,
v.
Thomas A. COUGHLIN III, et al., Defendants.

No. 84 CIV. 1528 (SWK). | July 12, 1989.

Opinion

MEMORANDUM OPINION AND ORDER

KRAM, District Judge.

*1 This action involves a motion to enforce this Court's final judgement by consent granting injunctive relief to remedy the inadequacy of dental care services provided at Bedford Hills Correctional Facility (hereinafter "Bedford Hills"). The provision of such services were in violation of prisoners' rights under the United States Constitution. The injunction provided, in relevant part, for better access to dental care and follow-up treatment, an adequate dental staff, thorough records of each patient's treatment, adequate supervision and maintenance of records showing compliance with the injunction, reports showing such compliance, quality assurance control, and inspections by experts and counsel provided by the plaintiff class. Such inspections could be carried out once every ninety days for three years after the injunction and included "all dental areas of Bedford Hills" and all records and documents maintained by the dental clinic. *See* Stipulation; Final Judgment by Consent on Injunctive Claims. Finally, ¶ IV-H of the Stipulation provides that "[P]laintiffs shall not seek or obtain any order, judgment or decree enforcing or extending this Stipulation except upon motion and a finding by the court of non-compliance with the terms thereof as set forth in ¶ IV-F-1. *See* Stipulation at ¶ IV-H.

Background

Prior to the litigation, plaintiff's expert, Dr. William Byland, had investigated the adequacy of the dental care at Bedford Hills, by looking at records, examining patients, observing dental areas, and studying various procedures. The evidence he uncovered was used at the trial for the injunction, where Dr. Byland was confirmed by the Court as an expert. Subsequently, Dr. Byland

accompanied plaintiffs' counsel on visits to Bedford Hills to confirm compliance with the order. Aside from examining the dental areas and records, Dr. Byland also received permission from the dental staff at the prison to examine patients, and he proceeded to do so. During one investigation, Dr. Byland, without specific permission, put a temporary filling in a patient's cavity. According to plaintiffs, however, two of Bedford Hills' dentists knew about the filling and, in fact, defendants' attorney was present when Dr. Byland took the action.

Dr. Byland's background is impressive.¹ He has served as the chief dentist at the Missouri State Penitentiary and the dental director of Michigan's correction system, and he is now the director of Health Services for the Executive Health Group of the National Health Services. He has served in advisory and consulting positions for correction systems in Maryland, New Mexico, Tennessee, Washington and Wisconsin. He regularly speaks at seminars and workshops and holds conferences concerning the topic of correctional health care.

In 1988 plaintiffs' counsel and Dr. Byland began inspecting Albion prison (hereinafter "Albion") for deficiencies similar to those at Bedford Hills. During a tour scheduled for September 1, 1988, one of the attorneys general for defendants in the Albion case told plaintiffs' counsel that Dr. Byland had no license to practice dentistry in New York.² One of the Bedford Hills dentists discovered this fact in late August and reported it to the Albion Attorney General. According to plaintiffs, the Albion Attorney General's mention of the case included a threat to Dr. Byland of criminal prosecution for his illegal treatment. The attorney general noted that Dr. Byland had engaged in the practice of dentistry by looking into a patient's mouth and rendering an opinion. Both sides apparently disagreed as to Dr. Byland's authority to examine patients. Defendants claim that they never threatened to prosecute Dr. Byland and that, in fact, they had no authority to do so. Although plaintiffs claim that they asked the attorneys general for an assurance that Dr. Byland would not be prosecuted, and defendants refused, defendants assert that they had no authority to grant such immunity. Asserting that he felt intimidated, Dr. Byland called off the search.

*2 Three days before Dr. Byland's next scheduled tour of Bedford Hills, plaintiffs' attorneys called the attorney general in charge of the Bedford Hills case, Frederic L. Lieberman, and asked him his position on Dr. Byland's investigation of Bedford Hills. Lieberman said he would take a position consistent with that taken by the attorneys general in the Albion case. Lieberman also said that it might also be illegal for Dr. Byland to look at the charts of individual patients and render a diagnosis. Dr. Byland again refused to inspect the prison dentistry facilities.

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Plaintiffs instituted an action in *Jenkins v. Coughlin*, No. 88 Civ. 0782T (W.D.N.Y.), asking the court for a protective order to prevent the state from prosecuting Dr. Byland for illegal practice. The purpose of the action was to allow Dr. Byland to continue his investigation of Albion's dental care. The court refused to grant the order, stating that the possibility of criminal prosecution of Dr. Byland was too far-fetched to necessitate such an order. The court stated, however, that should the state take any action towards a criminal prosecution, the plaintiffs may reapply for the protective order.

In this case, plaintiffs ask for similar relief. They seek an assurance that defendants will not prosecute Dr. Byland for any future investigations into Bedford Hills, nor for any past unlicensed activity in which he engaged. Plaintiffs claim that by holding the threat of criminal prosecution over Dr. Byland, defendants have effectively intimidated him from further carrying out the investigation provision in the original injunctive order. Furthermore, plaintiffs assert, Dr. Byland remains chilled from testifying should he find something amiss at Bedford Hills, since the state can, at any time, prosecute him for unlicensed activity. Plaintiffs contend that the original injunction justifies such a protective order. Finally, plaintiffs claim that defendants' alleged threat to Dr. Byland constitutes a conspiracy to intimidate a federal witness, in violation of 42 U.S.C. § 1985(2),³ and that defendants violated the Code of Professional Responsibility by making the threat. In the conspiracy charge plaintiffs note that the attorneys general for each case spoke with each other and planned their course of action, which was to intimidate Dr. Byland. Plaintiffs ask also for an extension in the three-year period to make up for the time lost when Dr. Byland would not investigate, for attorneys fees, and for Dr. Byland's airfare.

Defendants apparently believed initially that Dr. Byland's illegal activities consisted of examining patients and patients' charts and then rendering opinions. Defendants now assert that their only concern lies in the tooth-filling activity in which Dr. Byland engaged. They claim that they never threatened Dr. Byland and that, in fact, they acted responsibly by telling him of their discovery. They dispute plaintiffs' conspiracy charge, stating that the Albion attorney general had no connection with the present action, other than the mere communication before the original notice to plaintiffs' attorneys about Dr. Byland. Thus, defendants assert, no conspiracy exists.

Discussion

*3 Defendants do not claim that Dr. Byland cannot examine patients' charts or even the patients themselves.

As far as defendants are concerned, the only activity which appears not to constitute work "normally undertaken by an expert in the course of providing his expert opinion" is actual treatment of the patient. See Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Enforce the Final Judgment at 5. The only instance in which Dr. Byland exceeded his authority, according to defendants, thus occurred when he temporarily filled the patient's cavity.

The Court accepts defendants' representations and thus finds it unnecessary to issue an enforcement order. It appears that so long as Dr. Byland refrains from exceeding his authority as an expert unlicensed in New York, he will be in no danger of prosecution. Only the instance in which he filled a patient's tooth might concern Dr. Byland. As Judge Telesca noted in *Jenkins*, however, "the likelihood of such prosecution [is] too far-fetched to justify a protective order." *Jenkins v. Coughlin*, No. 88-0782T, slip op. at 4 (W.D.N.Y. January 24, 1989). Should the Attorney General's Office attempt to prosecute Dr. Byland, plaintiffs may apply for another order.

Furthermore, there are other options open to plaintiffs and Dr. Byland. Dr. Byland may avail himself of New York Education Law § 6610 (5), in which he is authorized to act as a consultant to a New York-licensed practitioner. Plaintiff may also find another expert.⁴ Again, Dr. Byland may confine his investigations to those which comport with his authority.

The Court also rejects plaintiffs' claims of conspiracy and violation of the Code of Professional Responsibility. There is presently insufficient evidence to prove such charges, as defendants dispute plaintiffs' allegations that defendants threatened Dr. Byland and actually planned to intimidate him. Furthermore, plaintiffs have failed to mention any remedy which might result from a finding that defendants' counsel breached the Code of Professional Responsibility. Any such conspiracy or breach would have been perpetrated by the attorneys general, rather than by the parties named in the action.

Conclusion

Plaintiff's motion to enforce the final judgment is therefore denied.

SO ORDERED.

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Footnotes

- ¹ Dr. Byland is also affiliated with the National commission on correctional Health Care, the American Correctional Health Services Association, the American Correctional Association, and Correctional Medical systems, Inc., where he was the National Dental Director.
- ² The relevant sections of the New York Education Law read:
Anyone not authorized to practice under this title who practices or offers to practice ... in any profession in which a license is a prerequisite to the practice of the acts ... shall be guilty of a class E felony.
New York Education Law § 6512(1) (McKinney 1989).
The attorney general shall prosecute such alleged offenses in the name of the state ...
Sub-article 4, § 6514(2).
The practice of the profession of dentistry is defined as diagnosing, treating, operating, or prescribing for any disease, pain, injury, deficiency, deformity, or physical condition of the human mouth ... The practice of dentistry may include performing physical evaluations in conjunction with the provision of dental treatment.
New York Education Law § 6601.
Only a person licensed or otherwise authorized to practice under this article shall practice dentistry or use the title 'dentist'.
New York Education Law § 6602.
- ³ An injured party may have a cause of action for damages “[i]f two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully ...” 42 U.S.C. § 1985 (2).
- ⁴ The Court nevertheless recognizes the value of Dr. Byland to plaintiffs. Aside from his outstanding record, Dr. Byland has been involved in attempts to improve the dental services of Bedford Hills since before the beginning of this litigation.