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Superior Court of Massachusetts,
Norfolk County.

Joanne MINICH[1] et al.[2]
v.
Luis S. SPENCER[3] et al.[4]
No. NOCV201400448.
|
July 2, 2014.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF JOHN DOE'S MOTION FOR PRELIMINARY INJUNCTION

PAUL D. WILSON, Justice.

***1** Plaintiffs in this case are three mentally ill, autistic or intellectually disabled individuals who are or have been confined[5] at Bridgewater State Hospital ("Bridgewater"), a facility operated by the Massachusetts Department of Correction that is accredited as an acute care/crisis stabilization facility for adults. These three named Plaintiffs[6] have not been convicted of any crime, but are or were at Bridgewater because of determinations that no facility of the Massachusetts Department of Public Health could provide the strict security necessary to protect staff, other patients, and these Plaintiffs themselves from harm that Plaintiffs might cause because of their mental health issues. In this lawsuit, Plaintiffs bring claims for violations of their statutory and constitutional rights, alleging that Defendants are employing restraints and seclusion in violation of a Massachusetts statute, are failing to provide them with adequate medical care, and are violating the covenant of good faith and fair dealing in a settlement agreement that resolved earlier litigation of a similar nature two decades ago.

Before me is the motion for a preliminary injunction filed by John Doe, the one Plaintiff who remains at Bridgewater. Doe's preliminary injunction request largely arises from his claim that the Defendants in charge of Bridgewater—Commissioner Spencer, Superintendent Murphy, and Massachusetts Partnership for Correctional Healthcare, LLC—are violating M.G.L.c. 123, § 21 (the "Restraint and Seclusion Statute"). I have reviewed the several briefs, including reply briefs and sur-reply briefs, submitted in support of or opposition to Doe's injunction request, as well as many affidavits submitted by the litigants. I heard oral argument on the injunction request on June 23 and June 30, 2014.

To obtain injunctive relief, Doe must satisfy the test of *Packaging Industries Group, Inc. v. Cheney,* 380 Mass. 609 (1980).

The first *Packaging Industries Group* factor is likelihood of success on the merits. On the basis of the record before me, I find that Doe has established a likelihood of success as to his claim that Defendants are not strictly complying with certain provisions of the Restraint and Seclusion Statute, in at least two regards.

First, I find that Plaintiff Doe has established a likelihood of success on the merits of his claim that the staff members at Bridgewater, serving as agents of Defendants Spencer, Murphy and Massachusetts Partnership for Correctional Healthcare, LLC, have been employing restraint, and specifically seclusion, of Plaintiff Doe in situations that are not limited to cases of "emergency" as defined in the third paragraph of the Restraint and Seclusion Statute. That paragraph allows the use of restraint (which the statute defines as including seclusion as well as mechanical or chemical restraint) "in cases of emergency, such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide." I do not accept Defendants' argument that the legislature's use of the words "such as" in this provision mean that the words that follow are merely examples of "cases of emergency." I interpret this language to require "the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide" before a mentally ill person may be subjected to restraint, including seclusion. A review of the documentation in the files relating to Plaintiff Doe shows a likelihood that he will succeed on his claim that he has been restrained and secluded in situations that do not rise to the level of "emergency" as defined in the Restraint and Seclusion Statute.

***2** Second, I find that Plaintiff Doe has established a likelihood of success on the merits of his claim that, when Plaintiff Doe is in restraint or seclusion, he is not being

personally examined by a physician as frequently as is required by the Restraint and Seclusion Statute. After allowing the use of restraint (including seclusion) only in cases of emergency, the third paragraph of M.G.L.c. 123, § 21 goes on to provide a procedure for the initiation of restraint or seclusion. That provision is quoted in paragraph 2 of this preliminary injunction, below. In essence, it allows the initiation of restraint or seclusion only upon authorization by the superintendent or director of the facility, or, as is apparently the practice at Bridgewater, by a physician designated for this purpose. That physician must be present at the time of the emergency or, if not, must examine the person in restraint or seclusion within two hours. In addition, the seventh paragraph of the Restraint and Seclusion Statute, also quoted in the injunction below in paragraph 3, requires that an order for restraint or seclusion may be renewed after six hours only upon personal examination by a physician.[7] Defendants conceded at the injunction hearing that the practice at Bridgewater is that a person in restraint or seclusion is examined at three-hour intervals, and alternately by a physician and another clinician. I find that Plaintiff Doe has shown a likelihood of success on the merits of his claim that this practice does not comport with the requirements of the law. Plaintiff Doe also alleges that physicians and other clinicians have renewed restraint and seclusion orders by checking a box on a form without conducting a real "personal examination," as required by the seventh paragraph of the Restraint and Seclusion Statute, M.G.L.c. 123, § 21. Based on my review of the records concerning Plaintiff Doe, he may also succeed on the merits as to this claim.

The second *Packaging Industries Group* requirement for an injunction concerns whether Doe will suffer irreparable harm in the absence of an injunction. I find that he will, because, in the absence of an injunction, Defendants may restrain and seclude him in ways not permitted by the Restraint and Seclusion Statute, and such violations to his person could not be remedied retroactively. *O'Sullivan v. Secretary of Human Services,* 402 Mass. 190, 197–98 (1988).

Next, *Packaging Industries Group* requires me to balance Doe's chance of success on the merits and the risk that he will suffer irreparable harm against any similar risk of irreparable harm to the Defendants. Defendants maintain that they are in full compliance with the Restraint and Seclusion Statute. If that is so, then Defendants will suffer no harm from the issuance of an injunction requiring them to comply with that statute. I have found, however, that Doe has established a likelihood of success on the merits of his claim that Defendants are not strictly complying with that statute, and so the effect of an injunction may be to prevent Defendants from restraining and secluding Doe as often as they have been, or for as long as they have been. It is possible, therefore, that an injunction will increase the burden on Defendants as they deal with the behavior of a patient who is difficult to control, although through no conscious fault of his own. To the extent that this qualifies as harm to Defendants, the legislature placed that burden on Defendants when it enacted the Restraint and Seclusion Statute, which the preliminary injunction below simply requires them to follow. Thus the balance of harms weighs in favor of the issuance of a preliminary injunction.

***3** The final factor that must be considered when a party seeks to enjoin governmental action is how the relief sought will affect the public interest. *Tri–Nel Mgmt., Inc. v. Board of Health of Barnstable,* 433 Mass. 217, 219 (2001). Defendants argue that an injunction would harm the public interest because it would essentially second-guess clinical decisions made by the doctors who treat Doe, which might make them more reluctant to employ restraints and seclusion in the future, thereby endangering themselves, other patients, and Doe himself. But in the Restraint and Seclusion Statute, the legislature has enacted specific and detailed rules about when restraint and seclusion may be employed, for how long, and under what conditions. Presumably the legislature considered the public interest when it laid down those rules.

Order

On the basis of these findings, I issue the following *Preliminary Injunction:*

1. Defendants Spencer, Murphy, and Massachusetts Partnership for Correctional Healthcare, LLC and their agents and employees and those persons in active concert or participation with them are enjoined from restraining or secluding Plaintiff Doe, as the term "restraint" is defined in M.G.L.c. 123, § 1 (a definition that includes seclusion, as well as mechanical or chemical restraint), in circumstances other than those set forth in the third paragraph of the Restraint and Seclusion Statute, M.G.L.c. 123, § 21, which provides, "Restraint of a

mentally ill patient may only be used in cases of emergency, such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide."

2. Defendants Spencer, Murphy, and Massachusetts Partnership for Correctional Healthcare, LLC and their agents and employees and those persons in active concert or participation with them are enjoined from failing to comply with the procedures set forth in the third paragraph of the Restraint and Seclusion Statute, M.G.L.c. 123, § 21, which are: "that written authorization for such restraint is given by the superintendent or director of the facility, or by a physician designated by him for this purpose who is present at the time of the emergency or if the superintendent or director or designated physician is not present at the time of the emergency, non-chemical means of restraint [including seclusion] may be used for a period of one hour provided that within one hour the person in restraint shall be examined by the superintendent, director or designated physician. Provided further, that if said examination has not occurred within one hour, the patient may be restrained for up to an additional one hour until such examination is conducted, and the superintendent, director, or designated physician shall attach to the restraint form a written report as to why the examination was not completed by the end of the first hour of restraint."

3. Defendants Spencer, Murphy, and Massachusetts Partnership for Correctional Healthcare, LLC and their agents and employees and those persons in active concert or participation with them are enjoined from restraining Plaintiff Doe for more than six hours unless the order for restraint is renewed upon personal examination by a physician, as required by the seventh paragraph of the Restraint and Seclusion Statute, M.G.L.c. 123, § 21. As further required by that paragraph, the reasons for the original use of the restraint, the reasons for its continuation after each renewal, and the reasons for its cessation shall be noted upon the restraining form by the authorized physician.

***4** 4. Defendants Spencer, Murphy, and Massachusetts Partnership for Correctional Healthcare, LLC and their agents and employees and those persons in active concert or participation with them are enjoined from keeping Plaintiff Doe in restraint, including seclusion, when the emergency that justifies the use of restraint or seclusion no longer exists.[8]

This preliminary injunction will remain in effect until further order of this court.

All Citations

Not Reported in N.E.3d, 2014 WL 3816980

Footnotes

1 In her capacity as Guardian of Peter Minich.

2 Vilma and Daniela Zomosa, as next friends of Filipi Zomosa, Jeff and Judy Doe, in their capacity as Guardians of John Doe, and on behalf of all others similarly situated.

3 In his capacity as Commissioner of the Massachusetts Department of Correction.

4 Robert Murphy in his capacity as Superintendent of Bridgewater, Marcia Fowler in her capacity as Commissioner of the Massachusetts Department of Mental Health, Massachusetts Partnership for Correctional Healthcare, LLC, and the Commonwealth of Massachusetts.

5 Since the initiation of this lawsuit, Plaintiffs Peter Minich and Filipi Zomosa have been transferred to another facility operated by the Massachusetts Department of Mental Health.

6 Plaintiffs' amended complaint seeks to pursue claims on behalf of a class of approximately 175 similarly situated persons at Bridgewater, but no class has been certified at this early stage of this lawsuit.

7 Regulations of the Department of Mental Health are even stricter, requiring that, after the first two-hour period, the restraint or seclusion order may be renewed only if an authorized physician examines the patient and determines that continued restraint or

seclusion is necessary to prevent the continuation or renewal of an emergency condition. That renewal, in turn, is only valid for another two hours, after which another physician examination is required. See 104 CMR 27.12(5)(f)(2). Plaintiffs contend that this regulation applies to Bridgewater. Defendants have not argued to the contrary-although, because Plaintiffs made this argument for the first time on the final day of the injunction hearing, Defendants have not had a fair chance to challenge that assertion. Whether or not this regulation directly applies to Bridgewater, Bridgewater's failure to follow the procedures enforced at other mental health facilities by Department of Mental Health, which has expertise in the matter and whose Director is a Defendant here, only adds to Doe's likelihood of success on the merits on this issue.

8 At this time, I decline to order Defendant Spencer, the Commissioner of the Department of Correction, to review and sign copies of all restraint forms relating to Plaintiff Doe within 30 days, as required by the twelfth paragraph of M.G.L.c. 123, § 21, because last week the Department of Correction amended its Seclusion and Restraint Procedure to track the language of the Restraint and Seclusion Statute, and counsel for Defendant Spencer represents that this Defendant is now complying with this aspect of the statute. At this time, I also decline to order Defendant Murphy, the Superintendent of Bridgewater, to authorize each instance of the maintenance of Plaintiff Doe in restraint or seclusion for more than eight hours in any 24–hour period, as required by the ninth paragraph of M.G.L.c 123, § 21, because Defendant Murphy has stated under oath that he participates in daily meetings to discuss the clinical status of each patient in seclusion or restraint. Finally, I also decline to grant a preliminary injunction concerning Defendants' alleged failure to provide Plaintiff Doe with constitutionally adequate medical treatment, because this is a complex issue that would best be considered on a fully developed factual record, as was present in each of the cases cited by Plaintiff Doe in support of this particular request for injunctive relief-including, in one case, a record developed at a 123–day bench trial See *Messier v. Southbury Training Sch.,* 562 F.Sup. A.2d 294, 298 (D.Conn.2008).