UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DISABILITY RIGHTS CONNECTICUT, INC.	:	CIVIL NO. 3:21-CV-00146 (KAD)
V.	:	
CONNECTICUT DEPARTMENT OF CORRECTION	:	APRIL 9, 2021

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY

The defendants hereby file this in reply to Disability Rights Connecticut's ("DRCT") opposition to the defendants' motion to stay.[1] (ECF No. 44). The defendants have established good cause for a stay until resolution of the defendants' pending motion to dismiss and DRCT's exhaustion of its statutory obligation to seek mediation of the issues.

A. The defendants have established good cause for stay.

As detailed in the defendants' motion to stay, "[a] request for a stay of discovery, pursuant to Rule 26(c) is committed to the sound discretion of the court based on a showing of good cause." Metzner v. Quinnipiac Univ., No. 3:20-CV-784 (KAD), 2020 U.S. Dist. LEXIS 233842, *4 (D. Conn. Nov. 12, 2020) (citations omitted). "[I]n determining whether good cause exists for a stay of discovery while a potentially dispositive motion is pending, this Court considers three factors '(1) the strength of the dispositive motion; (2) the breadth of discovery sought; and (3) the prejudice a stay would have on the non-moving party." Id. at *4 (quoting Lithgow v. Edelmann, 247 F.R.D. 61, 62 (D. Conn. 2007)).

[1] With this reply, the defendants submit three exhibits, Exhibits B, C, & D, in addition to citing to Exhibit A, previously submitted with the defendants' motion to stay. Throughout this reply, the defendants also refer to and cite to certain filings and exhibits submitted by DRCT in its opposition as well as the defendants' motion to stay and motion to dismiss.

i. The defendants' motion to dismiss is not futile and raises strong grounds for dismissal, or alternatively, for a stay.

DRCT argues that the defendants' motion to dismiss is futile and cites to portions of its opposition to the motion to dismiss to argue that based on DRCT's calculations, there is less than a 2% chance that the motion is granted. (ECF No. 44, p. 7-8). The defendants, again, submit that their motion is not futile and in fact, raises strong grounds for this Court to dismiss the instant action due to DRCT's failure to exhaust, or at a minimum, stay the proceedings until DRCT has exhausted. The defendants intend on responding in substance to DRCT's arguments in opposition to the motion to dismiss in their reply brief; however, would like to highlight a few points for purposes of this motion.

DRCT's argument that "Defendants do not cite even a single decision in which this Court—or any other court—dismissed a P&A System's claims on either of the two grounds advance in their motion[,]" (ECF No. 44, p. 6), while factually accurate, misses the point of the defendants' argument. Indeed, as the defendants' noted in their motion to dismiss, there is very little case law addressing PAIMI's exhaustion requirement, but the case law out there, in addition to the inclusion of an exhaustion requirement in PAIMI, provides strong support for the defendants' argument. Indeed, the defendants cite several cases that support the proposition that DRCT was required to exhaust under PAIMI prior to initiating suit. See (ECF No. 31-1, p. 14-16). While the courts in Dunn and Armstrong found that the P&A's in those cases had adequately satisfied the PAIMI exhaustion requirement, they clearly support the notion that DRCT was required to exhaust and demonstrate why DRCT has not exhausted in this case. See Prot. & Advocacy for Persons with Disabilities v. Armstrong, 266 F. Supp.2d 303, 313 (D. Conn. 2003) (finding that P&A had satisfied PAIMI exhaustion requirement by "attempt[ing] to

request" the relief sought in the litigation, which defendant "declined to provide"); Dunn v. Dunn, 219 F. Supp.3d 1163, 1174-75 (M.D. Ala. 2016) (finding "the pretrial efforts of P&A to bring its claims to the attention of defendants and seek to resolve them without litigation[,]" which included a letter identifying specific staffing issues and specific inmates not receiving adequate mental health services, as well as a subsequent meeting with the Commissioner to discuss issues, prior to commencing suit, "were sufficient to satisfy § 10807"). Moreover, the Gonzalez decision, while addressing the exhaustion issue on summary judgment, provides further support for the defendants' argument for dismissal, or alternatively a stay, which is exactly what is sought through this motion. See Gonzalez v. Martinez, 756 F. Supp. 1533, 1539 (S.D. Fla. 1991) (finding that "Plaintiffs have presented little evidence that they took adequate measures to resolve this case extra-judicially" prior to filing suit and issuing a stay of "discovery and all further proceedings as to all issues other than exhaustion . . . pending a determination that the matter is ripe for judicial action"). As detailed in the defendants' motion to dismiss, DRCT's prelitigation actions fail to satisfy PAIMI's exhaustion requirement and is therefore grounds for dismissal, or alternatively, a stay. Thus, this factor weighs in favor of a stay.

Additionally, DRCT's claim that the defendants' strategy is to avoid the issues in the lawsuit ignores DOC's clear invitation to mediate. (Ex. 13 to Pl. Opp., ECF No. 45-13). DRCT filed suit less than two weeks after DOC indicated that it received DRCT's initial November 23, 2020 letter, demonstrating that DRCT had no interest in addressing the issues through administrative channels. See (ECF No. 31-1, p. 20-22). After filing suit, DRCT filed an Amended Complaint that broadened the scope and issues initially raised in its November 23rd letter, making it impractical for the defendants to provide any

substantive response. While DRCT responded to DOC's offer to engage in mediation, indicating that it would be open to such an administrative process, DRCT failed to provide any further information and rather referenced DOC's failure to provide a substantive response to DRCT's November 23rd letter, a letter which raised issues concerning Northern Correctional Institution ("Northern"), a facility that is soon to be closed, and a letter that did not raise the broadened issues DRCT has now included in the Amended Complaint. (Ex. B, DRCT's April 7, 2021 Letter; Ex. B to Def. Mot. Dis., ECF No. 31-3).

ii. DRCT has not demonstrated that it will be prejudiced by a stay pending resolution of the defendants' motion to dismiss.

To support its position that it will be prejudiced, DRCT argues that "DRCT's allegations, which at this stage must be taken as true, make clear that DRCT's Constituents are being subjected to barbaric mistreatment and suffering horrific psychological and physical injury." (ECF No. 44, p. 9). DRCT further argues that the defendants do not dispute their abuse causes inmates with mental illness harm and gives rise to an inference that they are violating the rights of DRCT's Constituents. (Id. at 9-10).

First and foremost, the defendants certainly do not concede the allegations in the Amended Complaint or that they are "inflicting cruel and unusual punishment on DRCT's Constituents[,]" as DRCT suggests. Moreover, while it is generally true that the Court must accept as true all factual allegations in DRCT's Amended Complaint in the motion to dismiss context,[2] that does not mean that DRCT can rely exclusively on conclusory allegations to establish prejudice, especially in light of the evidence demonstrating lack

[2] "In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." Purugganan v. AFCF Franchising, LLC, No. 3:20-CV-360 (KAD), 2021 U.S. Dist. LEXIS 34284, *3 (D. Conn. Feb. 24, 2021) (citations omitted). However, "where jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014).

thereof. As detailed in the defendants' motion to stay, if the Court were to grant a stay pending resolution of the motion to dismiss, DRCT would not be precluded from protecting or advocating on behalf of its Constituents, nor would DRCT be precluded from attempting to address the issues raised in the instant suit through administrative channels as they should. The defendants have made it quite clear that they are willing to meet with DRCT in attempt to mediate and address the issues. (Ex. 13 to Pl. Opp., ECF No. 45-13).

Moreover, while DRCT alleges that its Constituents are subjected to ongoing barbaric mistreatment, DRCT has refused to identify any such inmate to the defendants who it believes is at imminent risk of harm or should receive immediate attention from mental health staff despite letters from the defendant agency and arguments regarding this deficiency in the defendants' prior briefing. (Id.). This argument is further belied by DRCT's own proposed schedule in this case, which sets deadlines for dispositive motions at the end of 2022, meaning any trial in this matter would not occur until 2023, at the earliest. (ECF No. 32-1, p. 1). Based on DRCT's proposed schedule, none of its claims would reach a resolution on the merits until sometime in 2023, at the earliest, and DRCT fails to articulate how a stay pending resolution of the motion to dismiss would be prejudicial. Critically, DRCT has failed to demonstrate how it would be prejudiced by a delay in the defendants responding to DRCT's document requests and interrogatories, the only written discovery served to date. This factor weighs in favor of a stay.

iii. The defendants would face substantial burdens if a stay is not granted, given the broad and extensive discovery sought in this action.

DRCT's argument that the defendants' "generalized complaints about discovery" do not support a stay and that any concerns about the breadth of discovery can be appropriately addressed through the "ordinary course" misses the point. The defendants

argue they should not be subjected to any discovery, or litigation for that matter, until DRCT has exhausted as required under PAIMI. Whether DRCT's discovery requests and needs are proportional is not the relevant inquiry; rather, the Court must assess the breadth of discovery sought and the burdens on the defendants in responding to such discovery. See Metzner, 2020 U.S. Dist. LEXIS 233842, at *4 ("In assessing the second factor the Court may consider the burden of responding to discovery.") (citations omitted).

As DRCT concedes, this action "challenges DOC's systematic prolonged isolation and in-cell shackling of *all* incarcerated people with mental illness who are in DOC's custody and are currently in [Isolative Statuses] . . . or at risk of transfer into Isolative Statuses[,]" (Ex. B, p. 2). and by its very nature, this type of action will require substantial and expansive discovery. Even assuming that DRCT's discovery requests are proportional, which the defendants do not concede, it does not mean that the discovery sought is not expansive or that responding to such discovery would not be burdensome. If DRCT's view of this factor were accepted, then the Court's consideration of this factor would be superfluous as according to DRCT, the breadth and burdens of responding to discovery could always be addressed through the "ordinary course" of discovery.

Additionally, DRCT cannot credibly argue that the breadth of discovery in this case is not expansive, nor can DRCT credibly argue that the burdens on the defendants in responding to discovery would not be substantial. Again, the very nature of DRCT's suit necessitates substantial and expansive discovery. This is made clear not only in DRCT's proposed Rule 26(f) schedule, which states DRCT "will require significant discovery" and "anticipates requiring substantial discovery[,]" (ECF No. 32, p. 7), and lists the anticipated discovery topics and needs, but also by the discovery already sought by DRCT.

DRCT's initial discovery requests include ninety (90) separate requests for production of documents and seventeen (17) separate interrogatories directed at each defendant on a broad array of topics, including, but not limited to, seeking documents dating back ten years,[3] seeking documents and information concerning the soon to be closed Northern,[4] as well as seeking a broad array of records and information concerning any and all inmates with a classification of MH2+ and who at anytime since February 4, 2016 has been on an Isolative Status for any period of time.[5] Indeed, these requests alone highlight the burdensome nature of responding to DRCT's discovery, discovery which the defendants should not subjected to until DRCT exhausts. These requests seek all medical records, custody records, classification records, incident reports, disciplinary reports, and all video/audio/photographic recordings of an entire subset of inmates, which would require the defendants to not only divert substantial time and resources searching records to identify all inmates with a MH2+ who have been placed on an Isolative Status, for even a day, since February 4, 2016, but also requires the defendants to expend time and resources to search, review, and produce all records related to these inmates.

Likewise, the interrogatories require the defendants to not only expend time and resources searching records to identify all inmates meeting the specific criteria requested, but also expend time and resources reviewing the specific records of each inmate identified in order to "separately describe" information concerning these inmates.[6]

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[3] See e.g., (Ex. A to Def. Mot. Stay, ECF No. 33-1, Request Nos. 12-18, 23, 40).

[4] See e.g., (Ex. A to Def. Mot. Stay, ECF No. 33-1, Request Nos. 4-7, 11).

[5] See e.g., (Ex. A to Def. Mot. Stay, ECF No. 33-1, Request Nos. 22, 25-29, 31-35, 41-49, 51-55, 59-61, 63-64, 69-72); (Ex. A to Def. Mot. Stay, ECF No. 33-1, Interrog. Nos. 4, 7, 11-12, 15, 17).

[6] See e.g., (Ex. A to Def. Mot. Stay, ECF No. 33-1, Interrog. No. 4) ("Describe the mental and medical history of each Isolated MH2+ Prisoner by, *separately for each such Prisoner*, identify each mental or

Responding to these discovery requests alone places a substantial burden on the defendants, who maintain they should not be subject to litigation, let alone expansive and burdensome discovery, until DRCT exhausts. Given the broad nature of DRCT's lawsuit, the expansive discovery topics identified by DRCT, and the clear and substantial burdens on the defendants in responding to the discovery already served, this factor clearly weighs in favor of a stay. See Valenti v. Group Health Inc., No. 20 Civ. 9526 (JPC), 2021 U.S. Dist. LEXIS 42772, *4 (S.D.N.Y. Mar. 8, 2021) ("The burden on Defendants of responding to discovery also weighs in favor of a stay. Plaintiffs have brought broad conspiracy claims. As Plaintiff's pre-litigation demand letter—cited by Defendants in their letter-motion—makes clear, Plaintiffs are seeking wide-ranging, expansive discovery.").

Finally, all of this must also be considered in light of the current state of affairs concerning the closure of Northern and recent developments in the Connecticut General Assembly regarding the issues raised in the instant action. Specifically, it is quite clear that the issues raised in DRCT's November 23rd letter, and in DRCT's original Complaint, related to Northern specifically, and the conditions DRCT wished to change were the product of long-standing administrative practices at that facility. See (ECF No. 31-1, p. 5-6 n. 7, p. 27 n. 17). While DRCT has now attempted to extend its claims to unnamed facilities again without first exhausting its remedies, DRCT still seeks discovery concerning Northern. See e.g., (Ex. A to Def. Mot. Stay, ECF No. 33-1, Request Nos. 12-18, 23, 40; Ex. A to Def. Mot. Stay, ECF No. 33-1, p. 37-39). As DRCT is well-aware, Northern is closing by July 1, 2021 and any inmates housed there have been, or soon will

medical evaluation or assessment and for each such evaluation or assessment stating the date, identifying the persons who administered the evaluation or assessment, describing the result of the evaluation or assessment, and identifying all documents concerning the evaluation or assessment.") (emphasis added); (Id., Interrog. Nos. 7, 11-12, 15, 17).

be, transitioned to a different facility.[7] It is not a productive use of the parties' resources to litigate issues or conduct discovery concerning a facility that is closing. Again, this suit only seeks prospective relief and based on DRCT's proposed schedule, no decision on the merits will be reached in this case until 2023, at the earliest, at which time Northern will have long been closed.

Additionally, the issues raised by DRCT in this action are currently the subject of robust debate in the Connecticut General Assembly, which is currently considering Senate Bill ("SB") 1059, also known as the PROTECT Act.[8] Indeed, just yesterday, April 8, 2021, SB 1059 was reported favorably out of the Judiciary Committee and was filed today, April 9, 2021, with the Legislative Commissioners' Office.[9] SB 1059 addresses the issues raised by DRCT in this action, including the alleged use of in-cell restraints on DRCT's Constituents, the alleged prolonged isolation of DRCT's Constituents, and creating and implementing mechanisms to screen out persons with mental illness from being subjected to such conditions. See (ECF No. 24, ¶¶ 159, 163-223). SB 1059 specifically contains provisions regarding the amount of time an inmate can spend in "isolated confinement",[10] and requires that, absent particular exceptions, "[e]ach incarcerated person shall have the opportunity to be outside of his or her cell for at least

[7] According to publicly available data, as of March 31, 2021, there were only 40 sentenced inmates held at Northern. See https://data.ct.gov/Public-Safety/Correctional-Facility-Daily-Population-Count-With-/fdya-crf4/data (last accessed April 9, 2021).

[8] A copy of SB 1059 is attached as Exhibit C. It can also be accessed at https://www.cga.ct.gov/2021/TOB/S/PDF/2021SB-01059-R00-SB.PDF (last accessed April 9, 2021). The page numbers cited in Exhibit C refer to the actual page numbers on the document, not the page numbers generated by PACER.

[9] Information concerning SB 1059 can be found on the Connecticut General Assembly's website at https://www.cga.ct.gov/jud/ (last accessed April 9, 2021).

[10] "Isolated confinement" is defined as "confinement of an incarcerated person in a cell, alone or with others, for more than sixteen hours per day." (Ex. C, p. 9, ¶ (a)(8)).

eight hours each day . . .” (Id. at 14, ¶ (b)(1)). SB 1059 includes provisions concerning who can place inmates on such a status as well as screening mechanisms to be used prior to placing any inmate in “isolated confinement” including a physical examination by a physician and a mental health evaluation by a therapist “to determine whether such person is a member of a vulnerable population . . . .” (Id. at 14, ¶¶ (b)(2)-(5)). Furthermore, SB 1059 contains provisions concerning the use of physical restraints on inmates,[11] such as in-cell restraints, including limitations on the use of such restraints, who is authorized to order such restraints, as well as screening mechanisms to be used prior to placing any inmate in such restraints. (Id. at 15-18, ¶¶ (c)(1)-(d)(4)).

SB 1059 clearly addresses the issues raised by DRCT in this lawsuit and in fact, the ACLU of Connecticut and the Lowenstein International Human Rights Clinic at Yale Law School, organizations whose attorneys have appeared in this action, have been active in the debates concerning SB 1059 and have voiced their strong support for it. (Ex. D). In short, in addition to the relevant factors weighing in favor of a stay, there is further good cause for a stay to let these state government processes play out, including letting the elected representatives of Connecticut debate and address these issues, which may substantially moot the prospective relief claims advanced by DRCT in this action.

WHEREFORE, the Court should grant the defendants’ motion to stay and should stay discovery until a resolution on the defendants’ motion to dismiss and/or DRCT’s exhaustion of its statutory mediation obligations.

[11] “Physical Restraint” is defined as “any mechanical device used to control the movement of an incarcerated person’s body or limbs, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, a black box, leg irons, belly chains, a security chain or a convex shield . . . .” (Ex. C, p. 11, ¶ (a)(16)).

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CERTIFICATION

I hereby certify that on April 9, 2021, a copy of the foregoing was filed electronically. Notice of this filing was sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's System.

/s/
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