IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	1:09-CV-119-CAP
THE STATE OF GEORGIA, et al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Defendants filed a motion to dismiss the United States' Amended Complaint in this case, Doc. No. 53 Ex. A, "because it was filed in breach of the binding and effective Settlement Agreement entered into by the State of Georgia and United States on January 15, 2009," Doc. No. 81.

No valid Agreement exists for the Amended Complaint to breach. Defendants' exhortations belie a lack of a meeting of the minds over material terms in the Agreement, Defendants' failing to abide by this Court's orders to address concerns with the Agreement, and Defendants' complete lack of willingness or ability to comply with the Agreement.

A. There Was No Meeting of the Minds Over Material Terms in the Agreement.

Defendants' statements and actions demonstrate that there never was a meeting of the minds over material terms in the Agreement. Under the discharge planning section of the Agreement, Defendants "shall, consistent with federal law, treat patients in a manner consistent with their clinical needs and legal status and shall, consistent with federal law, actively pursue the clinically indicated discharge of patients when not otherwise legally prohibited from doing so." Agreement, Doc. No. 2, Section III.F (emphasis added). Federal law includes the integration mandate of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131–12134, and the Supreme Court's decision in Olmstead v. L.C., 527 U.S. 581 (1999), interpreting the integration mandate. Furthermore, the United States has steadfastly maintained that "[t]he Agreement requires compliance with Olmstead and the ADA."[1] Doc. No. 12, at 14; see also Doc. No. 72, at 2, 6 ("[T]he Agreement itself contains two pages of provisions enforcing Olmstead. . . . Material terms

[1] Throughout the investigation phase leading up to negotiation of the Agreement, the United States issued findings letters informing Defendants that their discharge planning violated the ADA and Olmstead. See Doc. No. 72, at 4–7.

to that Agreement included measures designed to bring the State into compliance with the ADA and Olmstead . . . .").

Defendants, on the other hand, have expressly denied having any responsibilities under the Agreement with respect to the ADA or Olmstead. See Doc. No. 36, at 17 ("Olmstead is not part of the Settlement Agreement."). Instead, Defendants have claimed that their Voluntary Compliance Agreement ("VCA") with the U.S. Department of Health and Human Services' Office for Civil Rights somehow absolves them of having to comply with the ADA and Olmstead under the Agreement with the Department of Justice, see Doc. No. 71, at 1–2 ("[T]he Settlement Agreement . . . applies only to improving Georgia psychiatric hospitals; the VCA addresses [ADA/]Olmstead issues."); see also Doc. No. 62-2, at 19 n.8 ("[T]he Voluntary Compliance Agreement . . . addresses most, if not all of the amici's (and DOJ's) concerns about community placement, and the Settlement Agreement must be considered in the context of Georgia's other agreement with a federal agency."), despite the VCA's express provision that it did not resolve the ADA concerns of any other federal agency, see VCA, Doc. No. 62-4, at Section IV(F) ("This Agreement does not address or resolve issues . . . under Federal laws

by other Federal agencies, including any action or investigation under Title II of the Americans with Disabilities Act . . . by the United States Department of Justice . . . .").

Defendants characterize the discharge planning provisions of the Settlement Agreement as addressing "[w]hatever it is called—Olmstead or CRIPA," Doc. No. 80, at 2, betraying a fundamental lack of understanding about the Settlement Agreement, governing law, and their responsibilities under each. CRIPA grants the Attorney General standing to enforce the federal constitutional and statutory rights of individuals in state institutions, 42 U.S.C. § 1997a, whereas the ADA and Olmstead are the federal statutory rights addressed by the discharge planning provisions in the Settlement Agreement that the United States has sought to enforce and for which Defendants have repeatedly denied responsibility.

The past year and a half have made clear that, despite the best efforts of the United States, the United States and Defendants never had, and still do not have, a meeting of the minds over the terms of Defendants' ADA and Olmstead responsibilities under the discharge planning provisions of the

Agreement.[2] Georgia contract laws require a "mutual assent of terms." Cohen v. DeKalb County Sch. Dist., No. 1:09-cv-1153-WSD, 2009 WL 4261161, at *4 (N.D. Ga. Nov. 25, 2009). "A valid and binding contract does not exist unless there is a meeting of the minds on all essential terms." Id. at *5. Where, as here, "there was in fact any essential part of the contract upon which the minds of the parties had not met, or upon which there was not an agreement[,] it must follow that a valid and binding contract was not made."[3] Id. at *5 (internal quotation marks omitted).

B. Defendants Have Failed to Address the Court's Concerns with the Agreement.

In addition, Defendants have flouted this Court's order to address identified concerns with the Agreement. The Court's order entering the

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[2] Alternatively, Defendants have repudiated the contract, and a non-repudiating party to a contract is discharged from his or her duties under the contract and may rescind the contract. Stephens v. Trust for Public Land, 479 F. Supp. 2d 1341, 1354 (N.D. Ga. 2007).

[3] Defendants recently attempted to distinguish Cohen by arguing that, unlike this case, Cohen "involved a confidentiality provision to a verbal settlement agreement that was excluded from the written version." Doc. No. 80, at 4. This is a distinction without a difference. The provisions of Cohen cited by the United States are general statements of Georgia contract law that the court in Cohen then applied to the facts of that case. See Cohen, 2009 WL 4261161, at *4–5.

Agreement was, and remains, temporary. See Order, Doc. No. 9 ("[T]he court hereby ADOPTS the proposed settlement agreement as the temporary order of the court so that the parties can proceed with implementation and enforcement of its terms pending final approval." (emphases added) (internal citation omitted)); Order, Doc. No. 34 ("The order that temporarily adopted the proposed settlement agreement is in full force and effect." (emphasis added) (internal citation omitted)). The Court made the dismissal temporary so that the Parties could address concerns that amici curiae had raised regarding the Settlement Agreement and ordered the Parties to do so. See Order, Doc. No. 16 ("[T]he court DIRECTS all of the interested parties to meet no later than June 5, 2009, in order to discuss the various issues of concern and attempt to reach a resolution amongst themselves."); see also Order, Doc. No. 24 ("[W]hen the court directed the parties to file a joint status report, it intended for the term 'parties' to mean all interested parties."). Contrary to the order of this Court, Defendants have failed to address those concerns and, instead, have flagrantly ignored them.

Initially, in response to those concerns, Defendants agreed to develop an implementation plan for the Settlement Agreement and to utilize a needs

assessment of community-based services as part of its discharge planning responsibilities under Section III.F of the Agreement. See Doc. No. 26, at 3, 7. However, when Defendants' efforts proved inadequate, see Doc. No. 30, at 2, Defendants flatly denied ever having had any responsibility to develop an implementation plan or address community services with regard to the Settlement Agreement, see Doc. No. 36, at 8, 17. Those concerns remain unaddressed, see Doc. No. 60, at 4, which led in part to the United States filing a Motion for Immediate Relief, an Amended Complaint in this case, and the Complaint in the related case of United States v. Georgia, No. 1:10-cv-249-CAP (N.D. Ga.).[4] See, e.g., Doc. No. 55-1, at 4–8.

C. Defendants Are Unwilling and Unable to Comply with the Agreement.

Moreover, Defendants have demonstrated their complete lack of willingness or ability to comply with the Settlement Agreement. The implementation plan filed with the Court on January 15, 2010, indicated that the State had not even begun to implement any provision of the Agreement until October 19, 2009, and that many provisions of the Agreement still had

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[4] The United States filed a motion to consolidate the two cases, see Doc. No. 54, which remains pending, and which Defendants do not oppose, see Doc. No. 69.

not been acted upon in any way, despite the Agreement requiring the State to begin implementing the entire Agreement immediately. Doc. Nos. 49 & 50; Agreement, Doc. No. 2, at Section IV.A. The plan also revealed that the State does not intend to achieve full implementation regarding at least seven of the provisions of the Agreement until December 31, 2013, nearly one year after the Agreement requires the State to be in substantial compliance with all of its provisions. Doc. Nos. 49 & 50; Agreement, Doc. No. 2, at Section IV.E. Moreover, an Audit completed by the State and submitted to the United States on January 15, 2010, indicated that, in breach of the Settlement Agreement, the State had failed to achieve substantial compliance in the four priority areas of the Agreement. Doc. No. 72-1, at 1–18. Thus, since the Agreement's inception, Defendants have been in violation of it.

Indeed, at this very moment, Defendants ignore their fundamental responsibilities under the Agreement to provide the United States with current information about conditions in the State Hospitals. Although the Agreement requires Defendants to "notify the United States promptly upon the death of any patient and other sentinel events," Doc. No. 2, at Section IV.H, Defendants have failed to provide any notice since January 19,

2010. In addition, more than a year ago, Defendants promised this Court that they would make "[a]ll reports regarding implementation of the Agreement . . . publicly available on the State's website" within 30 days of completion. Doc. No. 26, at 8–9. The United States does not believe that Defendants have made any of its compliance reports publicly available on the State's website.

Instead, rather than work with the United States and the amici curiae to fix Georgia's broken mental health system, which the Court ordered Defendants to do, Defendants have fought the agreed-upon resolution to the amici's expressed concerns, fought their own ADA and Olmstead responsibilities under the Settlement Agreement, and even fought the statutorily-mandated access of Georgia's Protection & Advocacy System in the State Hospitals in their efforts to protect vulnerable individuals in the Hospitals from abuse and neglect. See Ga. Advocacy Office, Inc. v. Shelp, No. 1:09-cv-2880-CAP (N.D. Ga.). Tragically, all the while, preventable deaths, suicides, assaults, and grievous harm have continued to occur with alarming frequency in the hospitals, and Defendants have continued to fail to

serve individuals confined in the hospitals in the most integrated setting appropriate to their needs.

As discussed in the United States' Motion for Immediate Relief, individuals in the hospitals suffer grave harm that is frequent, recurrent, and preventable. They continue to die with alarming frequency; for example, in April 2009, a patient was killed by another patient, despite that patient being suspected of two separate homicides prior to his admission, including killing his jail cell mate immediately before his transfer to the hospital. Doc. No. 55-1, at 27. Patients continue to kill, and attempt to kill, themselves with alarming frequency; in January 2010, a patient committed suicide by strangling herself with a shoestring within 24 hours of being transferred to an alternative unit on campus grounds, despite having expressed suicidal thoughts, paranoia, and significant anxiety regarding her transfer. Id. at 28. And physical and sexual assaults continue to occur with alarming frequency in the State Hospitals; in August 2009, a patient reported being raped by a peer on his living unit, and the State concluded that the allegation was unsubstantiated because of a lack of physical evidence before receiving the rape kit results, which came back positive; in October 2009, a State employee

pulled a patient out of his chair, walked him down the hallway, pulled him into his room, shut the door, and beat him. Id. at 30.

Defendants claim that they "have . . . undertaken significant and meaningful measures to ensure the health and safety of patients" and that "the safety and well-being of patients have substantially improved." Doc. No. 71 at 20. The facts are to the contrary. In the months since the United States filed its Motion for Immediate Relief, while the United States attempted to negotiate a positive resolution with Defendants, grievous harm has continued unabated. The State Hospitals remain dangerous institutions for the patients confined therein. For example, the United States has received allegations that:

In February 2010:

- A 73-year-old patient who could have been served in the community instead was boiled to near death in a hospital. The woman was scalded by hot water while being bathed by a State employee who was responsible for seven other women at the time, including one patient on line-of-sight observation. The State had had longstanding knowledge of problems with the water temperature in the showers. The burns resulted in 40% of the woman's skin sloughing off, including along her feet, legs, buttocks, and genital area;

- A patient was raped by another patient;

- A staff member paid a patient with food to "handle the situation" if other patients did not listen to the staff member;

- Staff members used a prone restraint to subdue a patient; prone restraints are highly dangerous and are supposedly prohibited in the State Hospitals; and

- A staff member sat on a patient and punched her in the face out of retaliation for an earlier act of aggression.

In March 2010:

- A patient died after requiring emergency treatment for acute vomiting due to a bowel obstruction; this death is particularly alarming because it mirrors the deaths that led the United States to open up its investigation more than three years ago;

- A staff member beat up and laughed at a patient;

- A patient required emergency room treatment after ingesting screws, bolts, and other inedible objects; and

- A staff member got into a fight with a patient that was "escalated and chaotic" and required the intervention of multiple staff members.

In April 2010:

- A staff member punched a patient in the face;

- Two staff members threatened a patient, telling him that, "if you hit somebody tonight, we gonna [expletive] you up," before hitting him in the mouth and putting him in a headlock;

- A staff member taunted a patient and then grabbed him around the neck;

- Three staff members punched a patient in the face and kicked him;

- A staff member found a patient had not been given a bath, shave, or a change of clothes in several days;

- A patient who was supposed to be on close observation was left alone and drank a cup of paint;

- A staff member had sex with a patient while on duty;

- A patient, who alleged that a staff member had pulled her hair and slapped her in the face, was found with several bruises to several areas of her body, "too numerous to count." The next day, the same patient was found with a large purplish bruise in her pubic area and a fractured thumb; and

- A patient, who was placed in seclusion, kicked and hit the door of the seclusion room, causing the door to jam; the United States has warned the State about the danger of seclusion doors becoming jammed on multiple prior occasions.

In May 2010:

- A patient almost died from an adverse drug reaction, despite the patient having informed his State Hospital treatment team that he did not want to take the drug because he almost died during his last hospitalization while on that drug;

- Two staff members physically abused a patient; and

- A patient exhibited aggressive behaviors and eloped multiple times from the facility. One elopement involved an altercation with the police in the middle of the road, during which the patient asked the officers to shoot him.

In short, Defendants have failed to abide by this Court's orders to address concerns with the Agreement, have failed to come to a meeting of the

minds with the United States over material terms in the Agreement, and have demonstrated their complete lack of willingness or ability to comply with the Agreement. No valid Agreement exists to bar the Amended Complaint.

Conclusion

For the foregoing reasons, the United States respectfully requests that the Court deny Defendants' Motion to Dismiss, Doc. No. 81.

Respectfully submitted, this 15th day of July, 2010.

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Century Schoolbook, 13-point font in compliance with Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2010, I electronically filed the foregoing UNITED STATES' RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT with the Clerk of Court using the CM/ECF system which automatically serves notification of such filing to all counsel of record.

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