

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL,	:	
	:	
Plaintiff	:	Civil Action No. 16-cv-2000
	:	
v.	:	Judge Robert D. Mariani
	:	
JOHN WETZEL, <i>et al.</i> ,	:	
	:	
Defendants	:	Filed Via Electronic Case File
	:	Jury Trial Demanded

BRIEF IN OPPOSITION TO MOTION FOR CONTEMPT

Relevant Factual and Procedural History

The Plaintiff is Mumia Abu-Jamal, an inmate incarcerated by the Commonwealth of Pennsylvania at the State Correctional Institution at Mahanoy. The Department of Corrections Defendants (hereafter, “Department Defendants”) who are identified are: (a) John Wetzel, Secretary of the Department; (b) Paul Noel, M.D., Chief for Clinical Services for the Department’s Bureau of Health Care Services (BHCS), who also sits on the Hepatitis C Treatment Committee; (c) the Assistant Medical Director for the BHCS, who also sits on the Hepatitis C Treatment Committee; (d) the BHCS Infection Control Coordinator, who also sits on the Hepatitis C Treatment Committee; and (e) Joseph Silva, the Director of the BHCS. *See Doc. 1 (Complaint).*

This action, filed pursuant to 42 U.S.C. § 1983, seeks an injunction against the Defendants in their official capacities to immediately provide Plaintiff with the Federal Drug Administration (FDA) approved Hepatitis C directing-acting antiviral medications. *See Complaint*, ¶ 13. In 2012, Plaintiff tested positive for the Hepatitis C antibody. *Id.*, ¶ 46. Hepatitis C bloodwork performed on Plaintiff in late July 2015 revealed a viral load, indicating that Plaintiff has active Hepatitis C and that the disease is chronic.

The Department's Hepatitis C protocol will provide the anti-viral drugs only to those inmates with decompensated cirrhosis. *Id.*, ¶ 33. The protocol further delegates to the Hepatitis C Treatment Committee the authority to make recommendations as to which inmates would receive Hepatitis C anti-viral treatment. *Id.*, ¶ 37. In accordance with the Department's Hepatitis C protocol, the Committee had determined that Plaintiff would not receive the anti-viral medication. *Id.*, ¶¶ 103-104.

Accordingly, concomitant with the Complaint, Plaintiff had filed a motion for a preliminary injunction to order the Defendants "to immediately treat Plaintiff's active Hepatitis C infection with the latest acting anti-viral drugs that are the established standard of care." *See Docs. 7 and 8.*

On January 3, 2017, the Court issued an Order: (1) enjoining the Defendants from enforcing the Department's Hepatitis C Protocol as it pertains to Plaintiff; (2)

directing the Defendants to arrange for Plaintiff to be examined by a supervising physician experienced in the treatment of Hepatitis C within 14 days; and (3) directing the Defendants to treat Plaintiff with DAA medications within 7 days thereafter unless the Supervising Physician determines those medications to be medically contraindicated.

Pursuant to Federal Rule of Civil Procedure 52(b) and 60, the Department Defendants filed a motion to request that this Court: (1) amend the findings of fact and conclusions of law underlying the Court's January 3, 2017 Order; and (2) deny Plaintiff's motion for preliminary injunction. *See Doc. 29.* Concurrently, the Department Defendants also filed a motion to stay the preliminary injunction. *See Doc. 30.*

Additionally, due to the time constraints associated with complying with the Court's January 3, 2017 preliminary injunction, the Defendants filed a Notice of Appeal to the Third Circuit Court of Appeals. *See Doc. 31.* The Third Circuit appeal at 17-1125 is stayed pending disposition of the post-decision motions before this Court.

On February 7, 2017, Plaintiff filed a motion for contempt on the basis that the Defendants have not complied with the Court's January 3, 2017 Order. *See Doc. 53.*

On February 10, 2017, a Joint Motion to Stay the Preliminary Injunction Order Pending Appeal Pursuant to F.R.A.P. 8(a) was filed by the Defendants with the Third Circuit Court of Appeals at 17-1125.

This brief is filed in opposition to Plaintiff's motion for civil contempt (*Doc. 53*).

Argument

The Department Defendants submit that the January 3, 2017 Order entered by this Court is not ripe for enforcement, given the pendency of the motions to stay its enforcement that have been filed with this Court, as well as with the Third Circuit Court of Appeals.

A district court has the power to preserve the status quo pending appeal in an injunction case, by 'suspend[ing], modify[ing], restor [ing], or grant[ing] an injunction during the pendency of the appeal.' Fed.R.Civ.P. 62(c). If the order appealed from has granted an injunction, then the Rule 62(c) injunction constitutes a second injunction, which dissolves when the appellate court rules on the underlying injunction. *See Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 235 (9th Cir.1975). But the court exercises that power pursuant to Rule 62(c), which authorizes, but does not require, the posting of a bond "for the security of the rights of the adverse party." *See generally 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2905. It follows that if a district court declines to preserve the status quo by entering a Rule 62(c) injunction, then a stay pending appeal relieves the party enjoined by the underlying order from conforming its conduct to the terms of the district court's injunctive decree. See [Moore's Federal Practice], supra, ¶ 208.03.*

Stone v. City and County of San Francisco, 145 F.R.D. 553, 560 (N.D. Cal. Jan. 19, 1993) (emphasis added).

The Defendants timely filed a motion seeking a stay of the January 3, 2017 Order before this Court pursuant to Federal Rules of Civil Procedure 62(b) and (c) and fully briefed the factors for judicial consideration in determining whether a stay is merited, namely, (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *In re Revel AC, Inc.*, 802 F.3d 558 (3d Cir. 2015).¹ Because the requested relief was not forthcoming from this Court, the Defendants then sought relief from the Third Circuit, pursuant to Federal Rule of Appellate Procedure 8(a), requesting that the appellate court consider acting under Federal Rule of Civil Procedure 62(g). Both provisions of Rule 62 necessarily invoke judicial discretion, such that the stay is granted where the balance of equities favors this result. To seek enforcement of the underlying injunctive order while these motions remain pending is premature. It would eviscerate the provisions of Federal Rules of Civil Procedure 62(c) and 62(g)

¹ *See also Stone*, 145 F.R.D. at 562 (“As a final matter, the Court must address plaintiffs’ argument that unless contempt fines accrue while a stay is in effect, a defendant has no incentive to comply with the underlying contempt order during the pendency of the appellate process. Plaintiffs accurately state the logical corollary of the Court’s finding that a stay pending appeal deprives a coercive contempt order of its intended effect. That consequence must be assumed, however, to play a part in the balancing process in which a court engages whenever it is asked to stay an order pending appeal. The latter two factors account adequately for plaintiffs’ concerns.”) (citations omitted).

to allow for enforcement proceedings to commence and civil contempt sanctions to issue, despite the pendency of requests that the underlying injunction order be stayed and the *status quo* be maintained until post-decision motions have been decided or the appeal has been adjudicated. *See generally 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil §§ 2904, 2905. See also Fed.R.Civ.P. 1* (Rules of Civil Procedure must be construed to secure the just, speedy, and inexpensive determination of every action and proceeding).

Conclusion

In consideration of the foregoing, the Department Defendants respectfully request that this Court deny the Plaintiff's motion for contempt.

Respectfully submitted,

Office of General Counsel

Dated: February 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served on the parties counsel in this matter via ECF.

By: /s/ Maria G. Macus
Maria G. Macus
Office of Chief Counsel
PA Department of Corrections

Dated: February 21, 2017