Vermont Superior Court
Filed 11/10/22
Washington Unit

STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 22-CV-1341

MATTHEW J. MORGAN,
Plaintiff,

v.

STATE OF VERMONT DEPARTMENT OF CORRECTIONS,
Defendant.

RULING ON DEFENDANT'S MOTION TO DISMISS

In this civil suit for damages, inmate Matthew J. Morgan alleges that correctional officers at the Vermont Department of Corrections ("DOC") were grossly negligent by exposing him and others to inmates from another correctional facility whom the officers knew or should have known were infected with COVID-19.[1] As a result of the officers' alleged negligence and deliberate indifference, Plaintiff claims that he contracted COVID-19 and that he continues to suffer symptoms from his infection, for which he seeks an award of damages.[2]

Presently before the Court is DOC's motion to dismiss Plaintiff's complaint for lack of subject-matter jurisdiction. DOC contends that this Court lacks jurisdiction over Plaintiff's claim because he failed to exhaust his administrative remedies before filing his suit, and/or because DOC is shielded from liability by sovereign immunity. Plaintiff opposes the motion.

In considering a motion to dismiss for lack of subject-matter jurisdiction, the Court accepts all uncontroverted factual allegations of the complaint as true and construes them in the light most favorable to the nonmoving party. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11 (quoting Town of Bridgewater v. Dep't of Taxes, 173 Vt. 509, 510 (2001) (mem.)). The relevant facts are as follows.

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[1] In his original Complaint, Plaintiff named several DOC officers and officials as additional defendants, but the Plaintiff only served process on the State. Therefore, DOC is the only Defendant in this case.

[2] In his original Complaint, Plaintiff also sought an injunction ordering DOC to immediately release him from prison on the grounds that he is not a high-risk offender and DOC cannot be trusted to protect him from another infection. Following the September 20, 2022, hearing on that request, however, DOC released the Plaintiff back into the community, thereby mooting his original request for a court-ordered release from the correctional facility. Therefore, the only claim presently before the Court is Plaintiff's claim against DOC for damages.

Plaintiff's Factual Allegations

At all relevant times, Plaintiff was an inmate at the Northern State Correctional Facility in Newport, Vermont (Complaint, p. 4). On January 28, 2022, DOC transferred several inmates from the Northwest State Correctional Facility in Swanton, Vermont, to the Northern State Correctional Facility in Newport (Id.). At the time DOC did this, the Swanton facility was "on full lockdown due to an outbreak of COVID-19" (Id.). At the time of the transport, the Newport facility "was on 'modified movement,'" which means that the Newport facility had "no active COVID-19 cases within their general population of incarcerated inmates" (Id.).

Although officials at the Swanton facility "had conducted a facility wide COVID-19 testing" if their inmates, "at the time of this transport, the defendants did not have the results of the recently administered COVID-19 tests" (Id.). Nevertheless, "[t]he transfer occurred anyway" (Id., 4-5). The transferred inmates, who were all pending COVID-19 test results, got "placed in the CB-Unit of general population [at Swanton] instead of the EC-Unit, which is specifically designated … for COVID-19 infections, contact tracing and pending COVID-19 testing results" (Id., 5).

One of the inmates from Swanton showed signs of being sick seventy-two hours after his arrival at Newport; that inmate was "placed in EC-Unit on quarantine status" (Id.). "Defendants took no further action after removing this one individual" (Id.). Forty-eight hours later, four more inmates from Swanton showed "vivid signs of being infected with COVID-19" (Id.). Those four offenders were also "moved to the EC-Unit," but "[t]he defendants took no further action after that" (Id.).

On February 4, 2022, the Newport facility was "[f]inally … placed on full facility lockdown" (Id.). Two days later, on February 6, 2022, Plaintiff had an intense fever, a runny nose, an intense sore throat and tiredness" (Id.). Plaintiff had "no doubt" that he "had been infected with COVID-19" (Id.). On February 8, 2022, DOC began testing the entire CB-Unit for COVID-19; Plaintiff received a COVID test that same day (Id.). On February 9, 2022, DOC confirmed that the Plaintiff and two of his three cellmates had contracted COVID-19 (Id., p. 6). Eventually, 38 inmates in Newport were infected with COVID-19, an outbreak that Plaintiff alleges "was preventable" and "would have been avoided" if DOC had followed its August 18, 2021, "Medical Isolation/Quarantine" protocol (Id., p. 7). On February 10, 2022, DOC began quarantining infected inmates at Newport (Id., p. 8).

Plaintiff alleges that DOC should have quarantined the inmates from Swanton, and awaited the results of their COVID tests, before allowing them to mix with the inmates in Newport, as called for in DOC's "Medical Isolation/Quarantine" protocol. That protocol provides:

> This memo serves as notification you are being placed on **Medical Isolation/Quarantine** due to your exposure to or infection with the COVID-19 virus….
>
> As you may be aware, citizens who have been exposed to, or infected with, the virus are being medically isolated or quarantined for public health. The

> VTDOC has the same obligation to contain the spread of COVID-19 within Vermont's correctional facilities. The health and safety of those in our custody and of our staff are of paramount concern.
> This is a medical decision made solely as a public health measure. Restrictions in place will be determined by medical guidance to reduce the risk of passing this infection to others. A physician will consider your individual medical condition to determine the duration of this status.
>
> Facility Management will review your status with medical each day.
>
> For the benefit of the health of those around you, your full cooperation with any restrictions in place is expected and appreciated. Your adherence to medical advice throughout this time is strongly encouraged to best serve your own health. Please continue to address any concerns or requests with your assigned Caseworker.

(Complaint, Exhibit B).

Plaintiff Did Not Fail to Exhaust any Available Administrative Remedy

DOC contends that this Court lacks subject-matter jurisdiction over the Plaintiff's complaint because the Plaintiff failed to exhaust his administrative remedies before filing his complaint with this Court. More specifically, DOC contends that the Plaintiff failed to exhaust his administrative remedies because he failed to comply with the grievance procedure set forth in DOC Directive #320.01. Under that Directive, an inmate who is dissatisfied with a DOC action or decision must file a grievance, and, if he or she is unhappy with the decision on the grievance, he or she must appeal the decision first to the corrections executive and then, if still dissatisfied, to the commissioner of corrections. In addition, under the Directive, the corrections executive and commissioner have twenty days to respond to the appeal.

Here, the Plaintiff did file a grievance, he appealed the adverse decision to the corrections executive, and on April 9, 2022, he appealed to the commissioner, but he did not wait 20 days before filing his suit with this Court. On April 18, 2022, nine days after filing his appeal with the commissioner, Plaintiff filed his complaint with this Court, even though the commissioner had not yet decided his appeal. On April 29, 2022, Commissioner Nicholas Deml issued his decision denying Plaintiff's appeal.

"A trial court lacks subject matter jurisdiction to hear a case if a party fails to exhaust administrative remedies." Pratt v. Pallito, 2017 VT 22, ¶ 15, 204 Vt. 313.

> This [C]ourt has consistently held, as a long-settled rule of judicial administration, that when administrative remedies are established by statute or regulation, a party must pursue, or exhaust, all such remedies before turning to the courts for relief…. The rule serves the dual purposes of protecting the authority of the administrative agency and promoting judicial efficiency…. To allow complainants to bypass their administrative remedies deprives the parties and the courts [of] the benefit of the administrative agency's experience and expertise, and denies the agency the opportunity to

> cure its own errors…. Hence, we generally will not interfere with an agency's decisions regarding issues within its legislatively permitted jurisdiction unless and until all administrative remedies have been invoked…. Indeed, exhaustion of administrative remedies is a presumed requirement, and the burden is on the party seeking to bypass the administrative process to show that it fits within an exception to this general rule.
>
> … [C]ompliance with the DOC's administrative-grievance procedures requires more than submission of each form in the appropriate sequence; rather, it necessitates filing the required forms and then waiting for either an agency response or the expiration of the time allotted for the same by rule. The well-settled purposes underlying the common-law exhaustion requirement are not served by rote submission of documents, rapidly followed by an appeal before ethe agency has occasion to respond. Rather, in order for the review process – and, ipso facto, the common-law exhaustion requirement – to have meaning, the agency must be afforded the opportunity to cure its own errors and to weigh in on the issues at stake, giving courts the benefit of the agency's expertise…. Therefore, in order to bypass the exhaustion requirement, Mullinnex bore the burden of showing that his circumstances fit[] within an exception to this general rule….

Mullinnex v. Menard, 2020 VT 33, ¶¶ 14, 15, 212 Vt. 432 (citations and internal quotation marks omitted).

DOC contends that Mullinnex requires this Court to dismiss the Plaintiff's Complaint in this case because that was the outcome in Mullinnex and Mullinnex "is on all fours" with this case (Motion to Dismiss, p. 3). The plaintiff in Mullinnex was an inmate who challenged the sufficiency of the medical care he received while held in a DOC facility. Before filing suit in court, the plaintiff in Mullinnex filed a grievance, he then appealed the denial of his grievance to the corrections executive, and he then appealed to the corrections executive's decision to the commissioner. However, like the plaintiff in this case, the plaintiff in Mullinnex filed suit without receiving a decision from the commissioner and without giving the commissioner the 20 days allowed under DOC's Directive. The Supreme Court concluded that, by so shortcutting the process, the plaintiff in Mullinnex had failed to exhaust his administrative remedies and that the trial court should have dismissed his suit for lack of subject-matter jurisdiction. Id., ¶ 18.

Although there are factual similarities between Mullinnex and this case, there are also important differences, and those differences require a different outcome. As noted earlier, the plaintiff in Mullinnex sought to challenge the sufficiency of the medical care he was receiving at his correctional facility; that is a subject which DOC has clear statutory authority to address. *See* 28 V.S.A. § 801(a) ("The Department shall provide health care for inmates in accordance with the prevailing medical standards."). In the case at bar, however, the Plaintiff is asserting a tort claim against the State for money damages. DOC has no statutory or regulatory authority to address such a claim. To the contrary, such claims are governed by the Vermont Tort Claims Against the State Act, under which the Superior Courts have "exclusive jurisdiction." 12 V.S.A. § 5601(a) ("The Superior Courts of the State shall have exclusive jurisdiction of any actions brought hereunder."). No statute or regulation required the Plaintiff to submit a grievance to DOC before filing his tort suit

with the court, and no statute or regulation empowered DOC or its commissioner to grant or withhold the relief that the Plaintiff seeks in this action.[3] In short, there was no administrative remedy available to the Plaintiff for him to exhaust. See 4 Admin. L. & Prac. § 12:21 (3d ed.) (noting that an agency's lack of "authority to issue the particular form of relief requested" weighs in favor of excusing exhaustion requirement). Therefore, Plaintiff's failure to complete DOC's grievance process does not divest this court of jurisdiction over this suit.

There is a second important distinction between Mullinnex and this case. In Mullinnex the commissioner never responded to the inmate's grievance appeal. Thus, in Mullinnex the agency was deprived of an opportunity to cure its own errors, and the court was deprived of the benefit of the commissioner's experience and expertise, because of the plaintiff's failure to complete the grievance process in that case. Here, however, Commissioner Deml did respond to Plaintiff's grievance appeal, despite the Plaintiff's decision to file suit before the Commissioner's 20-day decision period had elapsed. Thus, in this case the Commissioner was not deprived of an opportunity to cure the agency's errors, nor is this court deprived of the benefit of the Commissioner's experience and expertise. The goals of the exhaustion requirement have been met in this case, despite Plaintiff's failure to wait 20 days before filing suit.

Moreover, requiring the Plaintiff to start the grievance process all over again would be pointless, since the Commissioner has already denied his grievance. Thus, if DOC's grievance process were deemed to have been an administrative remedy available to the Plaintiff in this case, the Plaintiff exhausted it. For all the foregoing reasons, the court concludes that it has subject-matter jurisdiction over this case.

Sovereign Immunity Bars Plaintiff's Tort Suit Against the State

The doctrine of sovereign immunity protects states from being sued for damages without their consent. Ingerson v. Pallito, 2019 VT 40, ¶ 11, 210 Vt. 341 ("It has long been established that '[l]awsuits against the State are barred unless the State waives its sovereign immunity.'" (citation omitted). In 1961, the Vermont Legislature enacted the Vermont Tort Claims Against the State Act, which provides for a limited waiver of sovereign immunity under certain circumstances. The Act provides as follows:

> The State of Vermont shall be liable for injury to persons … caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner, and to the same extent as a private person would be liable to the claimant….

12 V.S.A. § 5601(a). The State's maximum liability under the Act is "$500,000.00 to any one person…." Id., §5601(b). Under the Act certain kinds of claims are excluded from the waiver of sovereign immunity. The list of excluded claims includes the following two:

[3] Though a broad statutory exhaustion requirement can be interpreted to apply even where the agency has no power to award the relief sought, see generally, e.g., *Booth v. Churner*, 532 U.S. 731 (2001), there is no such statutory requirement in this case.

This section shall not apply to:

> (1) Any claim … based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion involved is abused….
>
> (3) Any claim for damages caused by the impositions of a quarantine by the State.

Id., §5601(e).

DOC contends that Plaintiff's Complaint must be dismissed for any or all of the following reasons: (1) because Plaintiff's claim has no private analog; and/or (2) because Plaintiff's claim is based upon performance of discretionary functions; and/or (3) because Plaintiff's claim is based on the imposition of a quarantine. The court will address the private analog issue first.

Under the Act, the State has waived sovereign immunity "only to the extent a plaintiff's cause of action is comparable to a recognized cause of action against a private person." Sabia v. State, 164 Vt. 293, 298 (1995). Thus, the threshold issue is whether Plaintiff's factual allegations "satisfy the necessary elements of a cause of action against the State comparable to one that may be maintained against a private person." Denis Bail Bonds, Inc. v. State, 159 Vt. 481, 486 (1993). Tethering the State's waiver to common law "serves to prevent the government's waiver of sovereign immunity from encompassing purely 'governmental functions.'" Id., 159 Vt. at 485-86. For the following reasons, the court concludes that Plaintiff's tort claim against the State satisfies the private analog requirement because his negligence claim is comparable to recognized causes of action against private persons.

DOC has a statutory duty to protect persons incarcerated in its correctional facilities from contracting COVID-19. This duty arises from 28 V.S.A. § 601(3), which requires DOC "to take proper measures to protect the safety of the inmates," and 28 V.S.A. § 801(a), which requires DOC to "provide health care for inmates in accordance with the prevailing medical standards." Private parties such as nursing homes can be held liable in tort for negligently failing to protect their residents from contracting COVID-19 in their facilities. Indeed, DOC seems to acknowledge this in its August 18, 2021, Medical Isolation/Quarantine protocol, when it states that "citizens who have been exposed to, or infected with, the virus are being medically isolated or quarantined for public health" and "VTDOC has the same obligation to contain the spread of COVID-19 within Vermont's correctional facilities."

DOC argues that the private analog requirement is not met in this case because "[p]rivate citizens do not operate correctional facilities, they do not transfer correctional facility residents between facilities, and they do not maintain quarantine procedures at correctional facilities" (Opposition, p. 7). This is an overly narrow reading of the Plaintiff's claim in this case. "The purpose of the private-analog provision is not to bar, without exception, suits claiming injuries based on the breach of duties performed by government employees performing government services, but rather to place constraints on how creative courts can be in finding duties where none had previously existed." Sabia, 164 Vt. at 302.

As the Vermont Supreme Court noted in Herbert v. State, 165 Vt. 557, 558 (1996) (mem.), [e]ven if incarceration is a 'uniquely governmental' function, a number of private persons and institutions are charged with the care of persons in their custody." In Herbert the Court held that a wrongful death suit against DOC for failing to prevent the suicide of an inmate was not barred by sovereign immunity because there was a private analog for such a suit. The same is true here.

DOC contends in the alternative that Plaintiff's Complaint must be dismissed because Plaintiff's claim is based on the imposition of a quarantine. As noted earlier, the Tort Claims Against the State Act excludes from the State's waiver of sovereign immunity "[a]ny claim for damages caused by the impositions of a quarantine by the State." 12 V.S.A. § 5601(e)(3). A federal court recently explained the purpose of a similar exclusion in the Federal Torts Claims Act as follows: "The very nature of quarantines is that they may increase the risk to some in order to protect many. By retaining its sovereign immunity, the government has permitted itself to exercise its discretion in this sensitive area free from fear of litigation." Cascabel Cattle Company, LLC v. United States, 955 F3d. 445, 452 (5th Cir. 2020). Thus, if Plaintiff's claim were based upon the State's "impositions of a quarantine," then it would be barred by sovereign immunity. However, Plaintiff's claim is not based upon any imposition of a quarantine; to the contrary, it is based upon the State's alleged *failure* to quarantine the inmates whom DOC transferred from Swanton to Newport pending the outcome of their COVID-19 tests. Therefore, this exclusion does not apply to Plaintiff's claim.

DOC's final contention is that Plaintiff's Complaint must be dismissed because it is based upon the State's performance of discretionary functions. As noted earlier, the Act excludes from the State's waiver "[a]ny claim … based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion involved is abused…." 12 V.S.A. § 5601(e)(1). The Vermont Supreme Court has set forth the following two-part test for determining whether a plaintiff's claim is barred by the discretionary function exclusion:

> The first prong requires us to determine whether the challenged act or omission involves an element of judgment or choice…. If a statute or regulation or policy specifically prescribes a course of action for an employee to follow, then the discretion requirement is not met…. We have explained that acts furthering policy decisions fall within the discretionary function exception only if there is a range of discretion to exercise in deciding how to carry out that decision…. While the discretionary function exception shields the State from liability for administrative and policymaking decisions, it will not excuse the State from liability for failure to act when required or for failure to use reasonable care when executing ministerial tasks in furtherance of a discretionary undertaking….
>
> If the act is discretionary in nature, the second prong of the test requires the court to determine whether that judgment involved considerations of public policy which the discretionary function exception was designed to protect. The purpose of the discretionary function exception is to assure that the courts do not invade the province of coordinate branches of government by passing judgment on legislative or administrative policy decisions through

> tort law…. It is presumed that when a government agent is authorized to exercise discretion, their acts are grounded in policy when exercising that discretion…. If the State's action involves negligence unrelated to policy objectives, then the second prong of the discretionary exception test is not satisfied…. While the State must act with due care with regard to ministerial acts implementing policy decisions, the discretionary function exception shields discretionary acts that further a protected policy decision when there is a range of discretion to exercise in deciding how to carry out the activity…. The exception applies to such acts whether or not the discretion involved is abused….

Stocker v. State, 2021 VT 71, ¶¶ 24, 25, -- Vt. – (citations and internal quotation marks omitted) (holding that DCF's alleged violation of its statutory obligation to make a prompt determination regarding the validity of reports of child abuse and neglect did not fall within the "discretionary function" exception, whereas DCF's determination of whether to assess or investigate a report of alleged child abuse or neglect did come within the exception).

Here, the statutory duties imposed upon DOC by 28 V.S.A. § 601(3) ("to take proper measures to protect the safety of inmates") and 28 V.S.A. § 801(a) ("to "provide healthcare for inmates in accordance with the prevailing medical standards") are highly discretionary in nature. These statutes do not specifically prescribe a course for DOC to follow in protecting the safety of its inmates other than to follow "prevailing medical standards" in providing them with healthcare. Decisions regarding the safety of inmates necessarily involve judgment and choice; there is a range of discretion for DOC to exercise in deciding how to carry out these statutory duties.

The Plaintiff challenges DOC's decision to transport several inmates from Swanton, which was in lockdown due to an outbreak of COVID-19, to Newport, which had no known cases of COVID-19, without quarantining the inmates and separating them from the Newport inmates until their COVID test results were known. However, there is no allegation that any of the Swanton inmates showed symptoms of having COVID-19 at the time DOC decided to transfer them to Newport; indeed, the Complaint expressly alleges that the first symptoms did not appear until after the inmates had arrived in Newport. There is also no allegation in the Complaint that any of the Swanton inmates were known to have been exposed to anyone infected with COVID-19 at the time DOC decided to transfer them to Newport; the mere fact that they had been incarcerated in Swanton is not evidence that any of them had been exposed to an infected inmate or staff person there. Thus, the decision to remove non-symptomatic inmates from a facility in COVID lockdown, and to send them to a safer facility where there was no COVID, without awaiting the results of their COVID-19 tests, was within the scope of the discretion granted to DOC by the applicable statutes. For this court to pass judgment on DOC's administrative policy decision would invade the province of the executive branch to carry out its public policy duties. The court concludes, therefore, that Plaintiff's claim falls within the discretionary function exception of the Tort Claims Against the State Act.

The court's conclusion is supported by Ingerson. In that case the plaintiff sued DOC for negligence in investigating allegations that he was being sexually exploited by a DOC employee while he was an inmate at a DOC correctional facility. The trial court granted summary judgment in favor of DOC, holding that plaintiff's claim was barred by the

discretionary function exception, and the Supreme Court affirmed. The Court noted that "[t]here is no dispute that DOC is obligated to protect inmates committed to its care from sexual exploitation." Id., 2019 VT 40, ¶ 22. Nevertheless, the Court held that the discretionary function exception applied because "at the time of the events at issue, the statues, regulations, and policies in place required DOC to investigate reports of sexual misconduct and sanction officers who engaged in sexual misconduct, but they did not mandate that DOC conduct the investigation in a particular manner or separate alleged perpetrators from alleged targets during investigation." Id., ¶23.

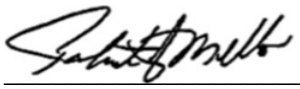
Similarly, in Earle v. State, 2006 VT 92, 180 Vt. 284, the plaintiff claimed that the defendant, the Vermont Department of Social and Rehabilitation Services ("SRS"), was negligent in both placing and failing to remove or control a foster child in plaintiff grandparents' house, and, as a result, the foster child sexually abused him. In affirming the trial court's award of summary judgment in favor of SRS based on the discretionary function exception, the Supreme Court said the following:

> The placement of difficult-to-manage juveniles with foster families necessarily involves some risk for the foster family and those close to it. As the superior court noted, plaintiff's response is to rely on competing professional analyses of what the SRS workers should have done in these circumstances, rather than on ministerial requirements; this response highlights the inherently judgmental aspects in abuse report responses…. [T]he response of the SRS workers to the report of sexual abuse of plaintiff involved an "element of judgment"…..

Id., ¶ 25.

For the foregoing reasons, the court concludes that Plaintiff's claim in this case is barred by the doctrine of sovereign immunity. Therefore, Plaintiff's Complaint must be, and hereby is *dismissed with prejudice.*

SO ORDERED this 10th day of November, 2022.



Robert A. Mello
Superior Judge