AUSTEN NWANZE, et al., Plaintiffs, -against- PHILIP MORRIS COMPANIES, INC., et al., Defendants.

97 Civ. 7344 (LBS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 21955

August 24, 1998, Decided; May 10, 1999, Nunc Pro Tunc
May 10, 1999, Filed

DISPOSITION: [*1] Defendants' Motion to Dismiss as "moot" in light of this Memorandum and Order endorsed; Plaintiffs' Motion to File a Second Amended Complaint granted; Plaintiffs' Motion for Class Certification denied without prejudice; and held in abeyance the Plaintiffs' Motion to Appoint Counsel pending resolution of the venue question.

COUNSEL: AUSTEN NWANZE, plaintiff, Pro se, Bradford, PA.

DALE BROWN, plaintiff, Pro se, Coleman, FL.

DOUG NYHUIS, plaintiff, Pro se, Bradford, PA.

JAY LOCKE, plaintiff, Pro se, Bradford, PA.

WILLIAM GRAY, plaintiff, Pro se, Bradford, PA.

DARRELL MORELOCK, plaintiff, Pro se, Bradford, PA.

THOMAS KIELAR, plaintiff, Pro se, Bradford, PA.

MALIK WARD, plaintiff, Pro se, Bradford, PA.

RICARDO TORREZ, plaintiff, Pro se, Bradford, PA.

MARVIN LOVEJOY, plaintiff, Pro se, Bradford, PA.

RAYMOND WILLIAMS, plaintiff, Pro se, Bradford, PA.

CLIFFORD JONES, plaintiff, Pro se, Bradford, PA.

DARRYL BAKER, plaintiff, Pro se, Bradford, PA.

JAMES JONES, plaintiff, Pro se, Bradford, PA.

LUIS SANTIAGO, plaintiff, Pro se, Bradford, PA.

DAVID YI, plaintiff, Pro se, Elkton, OH.

For DERRICK LIPSEY, plaintiff: Derrick [*2] Lipsey, USP Allenwood, White Deer, PA.

For SHAWN STEELE, plaintiff: Shawn Steele, Philadelphia, PA.

JOSE SANTIAGO, plaintiff, Pro se, White Deer, PA.

JOHN PINER, plaintiff, Pro se, Milan, MI.

DENNIS J. GUERRERO, plaintiff, Pro se, White Deer, PA.

WILLIAM CARTEGENA, plaintiff, Pro se, Lexington, KY.

JUDGES: Leonard B. Sand, U.S.D.J.

OPINION BY: Leonard B. Sand

OPINION

MEMORANDUM & ORDER

SAND, District Judge.

The Plaintiffs, appearing *pro se*, are non-smoking inmates at the Federal Correctional Institution at McKean in McKean County, Pennsylvania. They filed suit against the Defendants, several major tobacco companies, for damages arising from the Plaintiffs' alleged exposure to involuntary secondary cigarette smoke generated by other inmates' use of tobacco products manufactured and marketed by the Defendants. *See Nwanze v. Philip Morris Co.*, No. 97 Civ. 7344, 1998 WL 199285, at *1-2 (S.D.N.Y. Apr. 7, 1998). Presently pending before the Court are four motions: (1) the Defendants' Mo-

tion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction; (2) the Plaintiffs' Motion to File a Second Amended Complaint; (3) the [*3] Plaintiffs' Motion for Class Certification; and (4) the Plaintiffs' Motion to Appoint Counsel. We examine each motion below.

As regards this Court's subject matter jurisdiction, the Defendants advance two principal arguments. First, they contend that the Plaintiffs have failed to plead properly diversity of citizenship, since "nowhere in the 96-page Amended Complaint do any of 171 Plaintiffs allege their pre-incarceration domicile, which is the domicile that must be considered when engaging in the diversity-of-citizenship analysis for inmates of correctional institutions." (Def.'s Mem. at 2.) Second, the Defendants argue that:

> To the extent Plaintiffs' Complaint could be read as resting on constitutional grounds, and therefore seeking to invoke the Court's federal question jurisdiction under *28 U.S.C. § 1331*, such a claim would be wholly frivolous. It is axiomatic that to find a violation of the Constitution the Defendants must have engaged in state action. Tobacco manufacturers are private citizens, not state actors. Moreover, it is the federal prison system, not tobacco manufacturers, which is responsible for designating smoking and non-smoking [*4] areas in the federal prison system.

Id. at 5 n.2 (citations omitted).

In their Opposition Memorandum, the Plaintiffs disavow any attempt to assert diversity jurisdiction. (Pls.' Mem. at 1-2.) Accordingly, the only issue is whether federal question jurisdiction exists. The Plaintiffs argue that it does because the Amended Complaint referred to "other unknown conspirators," one of which, the Plaintiffs now inform the Court, is "the federal prison system." (*Id.* at 3.) The Defendants respond that since the Plaintiffs' Amended Complaint "states exclusively state law claims," even if the Amended Complaint "could be read as including a federal official as a *non-defendant* co-conspirator, that fact alone would not create federal subject matter jurisdiction." (Def.'s Reply Mem. at 1 (emphasis added).)

Resolving the foregoing issue presents a difficult task. *See, e.g., Sylvane v. Whelan, 506 F. Supp. 1355, 1358 (E.D.N.Y. 1981)* (noting complexity of determining jurisdiction in analogous action, especially since "mere fact" that suit may involve federal officials does not automatically vest federal court with jurisdiction). It is, however, not a task that [*5] the Court need undertake now. The principal reason is that the Plaintiffs have proposed the filing of a Second Amended Complaint, which document may eliminate some of the uncertainty facing the Court in analyzing the First Amended Complaint.

In the proposed Second Amended Complaint, for instance, the Plaintiffs explicitly name Kathleen Hawk, the Director of the Bureau of Prisons ("BOP"), as a Defendant. Moreover, the core allegation made therein is that the BOP, acting under color of law, conspired with the co-defendant tobacco manufacturers to violate the Plaintiffs' *Eighth Amendment* rights. (Second Amended Compl. at 56.) The Plaintiffs thus assert primary jurisdiction under *28 U.S.C. § 1331*, and supplemental jurisdiction over the state claims pursuant to *28 U.S.C. § 1367*. (*Id.* at 57.)

The Court grants the Plaintiffs permission to file their proposed Second Amended Complaint. Two primary factors motivate this decision. First, we are at an early stage of the proceedings, and thus liberal amendment of the Complaint is not inappropriate. [*6] *Fed. R. Civ. P. 15(a)*. And second, the Plaintiffs are appearing *pro se*, and thus the Court has a heightened obligation to ensure that the litigation proceeds in an equitable fashion. *See, e.g., Moore v. Agency for Int'l Dev., 301 U.S. App. D.C. 327, 994 F.2d 874, 877 (D.C. Cir. 1993)* (finding that district court should have permitted *pro se* plaintiff to amend complaint to satisfy heightened pleading standard of *Bivens* actions, absent showing that any defendant would be prejudiced or that amendment would be futile); *Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 621-22 (5th Cir. 1992)*. Accordingly, we will endorse as "granted" the Plaintiffs' Notice of Motion to File a Second Amended Complaint, and upon submission of the appropriate paperwork by the Plaintiffs, we hereby direct the Marshall's Office to serve the Second Amended Complaint on the eighteen Defendants identified therein. [1]

> 1 The Defendants, of course, are entitled to move again pursuant to *Fed. R. Civ. P. 12(b)(1)* should they conclude that the Second Amended Complaint fails to remedy the jurisdictional defects purportedly found in the First Amended Complaint.

[*7] Turning to the Amended Motion for Class Certification, we deny the Plaintiffs' application to certify a class of non-smoking federal inmates. Such denial, however, is without prejudice to the Plaintiffs' right to seek such certification in the future. Apart from obvious concerns about whether different conditions of imprisonment and ETS levels at different federal institutions around the country would eviscerate the traditional efficiency gains associated with the class action vehicle, the main reason we deny certification is that, at the present

moment, the Plaintiffs lack counsel. Given the established rule forbidding *pro se* plaintiffs from conducting class action litigation, *McShane v. United States, 366 F.2d 286, 288 (9th Cir. 1966)*; *McLeod v. Crosson, 1989 U.S. Dist. LEXIS 2796*, No. 89 Civ. 1952, 1989 WL 28416, at *1 (S.D.N.Y. Mar. 21, 1989) (mem.), the Court has no option but to resolve this issue against the Plaintiffs. [2]

> 2 The Court notes, moreover, that since this action was filed, we have received numerous individual requests to join the class from other federal inmates not named in the caption of the current Complaint. Because the Plaintiffs' request for class certification is denied, these individual requests are moot.

[*8] The Court recognizes, of course, that appointing counsel could alter the underlying factual predicate for the certification decision. Making such a determination, however, is premature at this point. We believe that the Court ultimately responsible for conducting this litigation should also be the Court determining whether to appoint counsel, and as yet, we are not convinced that we are the appropriate Court. If one thing is clear, it is that ETS litigation involves largely fact-specific determinations. *See, e.g., Helling v. McKinney, 509 U.S. 25, 36, 125 L. Ed. 2d 22, 113 S. Ct. 2475 (1993)*; *Warren v. Keane, 937 F. Supp. 301, 306-07 (S.D.N.Y. 1996)*. From our current perspective, it appears that a substantial part of the events or omissions allegedly giving rise to the Complaint occurred in McKean County, which is located in the Western District of Pennsylvania. *See 28 U.S.C. § 118*. The question of venue, then, should be resolved at the outset so as to minimize logistical inconveniences.

Although a motion by one of the parties [*9] is ordinarily required for transfer, the district court may consider the possibility of transfer *sua sponte. See, e.g., Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986)*; *Clisham Mgmt., Inc. v. American Steel Bldg. Co., 792 F. Supp. 150, 157 (D. Conn. 1992)*. The relevant statute reads:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a). The court must, however, grant the parties an opportunity to be heard prior to transferring the action *sua sponte. Mobil Corp. v. SEC, 550 F. Supp. 67, 69 (S.D.N.Y. 1982)*; *Clisham, 792 F. Supp. at 157*.

Accordingly, the Court invites the parties to submit memoranda on the venue issue no later than 45 days after proof of service of the Second Amended Complaint. The parties will also have 15 days after the initial 45-day period to submit reply memoranda. The Court will hold the motion for appointment [*10] of counsel in abeyance until it rules on its own motion for transfer of venue. *See, e.g., Magic Toyota, Inc. v. Southeast Toyota Distrib., Inc., 784 F. Supp. 306, 321 (D.S.C. 1992)*. This resolution also has the virtue of avoiding the unwelcome possibility that, should the appointment of counsel be found appropriate in this litigation, the Western District of Pennsylvania might have to replicate our efforts to appoint counsel should New York counsel prove unwilling to pursue this litigation in that district.

In summary, then, the Court hereby: (1) endorses the Defendants' Motion to Dismiss as "moot" in light of this Memorandum and Order; (2) grants the Plaintiffs' Motion to File a Second Amended Complaint; (3) orders the Marshall's Office, upon submission of the appropriate paperwork by the Plaintiffs, to serve the Second Amended Complaint on the Defendants named therein; (4) denies without prejudice the Plaintiffs' Motion for Class Certification; and (5) holds in abeyance the Plaintiffs' Motion to Appoint Counsel pending resolution of the venue question.

SO ORDERED.

Dated: New York, NY

August 24, 1998

Leonard B. Sand

U.S.D.J.

5/10/99 Nunc Pro Tunc to 8/24/98