

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

MARTIN GALLEGOS,

Plaintiff,

vs.

No. CIV 16-0127 JB/WPL

BERNALILLO COUNTY BOARD OF
COMMISSIONERS; BERNALILLO COUNTY
DETENTION CENTER; NEW MEXICO
DEPARTMENT OF CORRECTIONS, and
JOHN DOES 1 through 5,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on: (i) Defendant New Mexico Department of Corrections' Motion for Summary Judgment and Memorandum Brief in Support Thereof, filed April 7, 2017 (Doc. 67)("MSJ"); and (ii) the Plaintiff's Motion to File a Second Amended Complaint, filed February 17, 2017 (Doc. 58)("Motion to Amend"). The Court held a hearing on June 2, 2017. The primary issues are: (i) whether Defendant New Mexico Department of Corrections is entitled to summary judgment, because the New Mexico Corrections Department enjoys sovereign immunity from Plaintiff Martin Gallegos' suit, including Gallegos' state tort claim and his 42 U.S.C. § 1983 claim that the New Mexico Corrections Department inflicted cruel and unusual punishment on him in violation of the Eighth Amendment to the Constitution of the United States of America by receiving him into custody such that Gallegos was without methadone; (ii) whether the New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 to -30 ("NMTCA"), waives the New Mexico Corrections Department's Eleventh Amendment immunity from Gallegos' state tort claims for receiving him into custody such that Gallegos was without methadone; (iii) whether § 41-4-6(A)'s waiver provision does not apply, because the

New Mexico Corrections Department failed to implement a safety policy regarding the provision of methadone necessary to protect those who use the building that housed Gallegos; (iv) whether § 41-4-6(A)'s waiver provision does not apply, because Gallegos' state tort claim is predicated on a single, discrete administrative act affecting only himself; (v) whether Gallegos' proposed amendment to add Mr. James Brewster, the New Mexico Corrections Department's General Counsel, is futile, because Mr. Brewster is immune from Gallegos' claims to the extent that they are based on Brewster's enforcement of facially-valid court orders; and (vi) whether the Court should deny Gallegos' proposed amendment to add Mr. Brewster as a defendant as futile, because Mr. Brewster was neither negligent nor deliberately indifferent to Gallegos' withdrawal symptoms.

The Court concludes that: (i) the New Mexico Corrections Department is entitled to summary judgment on Gallegos' claims, because the New Mexico Corrections Department enjoys sovereign immunity from Gallegos' suit; (ii) the NMTCA does not waive the New Mexico Corrections Department's Eleventh Amendment immunity from Gallegos' state tort claim; (iii) even if the NMTCA waives the New Mexico Corrections Department's Eleventh Amendment immunity from Gallegos' state tort claim, § 41-4-6(A)'s waiver provision does not apply, because Gallegos has not sufficiently demonstrated that the New Mexico Corrections Department failed to implement a safety policy necessary to protect those who use the building that housed him; (iv) even if the NMTCA waives the New Mexico Corrections Department's Eleventh Amendment immunity to Gallegos' state tort claims, § 41-4-6(A)'s waiver provision does not apply, because § 41-4-6(A) does not waive the New Mexico Corrections Department's immunity from Gallegos' state tort claim to the extent that Gallegos' state tort claim is predicated on a single, discrete administrative act affecting only himself; (v) Gallegos' proposed

amendment to add Mr. Brewster as a defendant is futile, because Mr. Brewster is immune from Gallegos' claims to the extent that Gallegos' claims are based on Mr. Brewster's enforcement of facially valid court orders; and (vi) Gallegos' proposed amendment to add Mr. Brewster as a defendant is futile, because Mr. Brewster was neither negligent nor deliberately indifferent to Gallegos' withdrawal symptoms. Accordingly, the Court grants the MSJ and denies in part the Motion to Amend to the extent that Gallegos proposes to add Mr. Brewster as a defendant.

FACTUAL BACKGROUND

The Court draws the factual background from the parties' assertions of undisputed material fact in their summary judgment motion papers. See MSJ ¶¶ 1-12, at 2-4; Plaintiff's Response to Defendant New Mexico Department of Corrections Motion for Summary Judgment ¶¶ 13-26, at 1-4, filed April 24, 2017 (Doc. 68)("Response"); Reply to Plaintiff's Response to Defendant New Mexico Department of Corrections' Motion for Summary Judgment and Memorandum Brief in Support Thereof ¶¶ 13-26, at 1-4, filed May 8, 2017 (Doc. 69)("Reply").

1. Gallegos' Remand to the Metropolitan Detention Center and Subsequent Transfer to the New Mexico Corrections Department.

On November 6, 2014, the Honorable Michael Martinez, District Court Judge Pro Tem for the Second Judicial District Court, County of Bernalillo, State of New Mexico, remanded Gallegos to the Metropolitan Detention Center ("MDC") in Albuquerque, New Mexico. See MSJ ¶ 1, at 2 (asserting this fact); Response at 1 (admitting this fact). See also Order Remanding Defendant to Metropolitan Detention Center (MDC) ¶ 3A, at 1 (filed in state court on November 6, 2014), filed in federal court on April 7, 2017 (Doc. 67-1)("Remand Order").¹ The Remand

¹In the Response, Gallegos asserts that he "was remanded to Metropolitan Detention Center ('MDC') according to a 'Titration Order,'" which Gallegos alleges was "scanned to MDC." Response ¶ 14, at 1-2 (internal quotation marks omitted). Gallegos asserts that the remand order stated: (i) that Gallegos "shall be remanded to the Metropolitan Detention Center";

Order states that Gallegos shall remain in the MDC's custody "until his level of methadone^[2] treatment has reached a point where he will not incur life-endangering withdrawal symptoms upon transfer" to the New Mexico Corrections Department. MSJ ¶ 1, at 2 (asserting this fact). See Response at 1 (admitting this fact); Remand Order ¶ 3.C, at 1-2. Gallegos asserts that "[i]t is clear that the Titration^[3] orders such as these were used frequently, by the District Court, for people who were on methadone." Response ¶ 21, at 3 (citing Deposition of Douglas Wilber at 32:18-33:1; id. at 33:10-25 (taken February 9, 2017)(Lawless, Wilber), filed April 7, 2016 (Doc. 68-1)("Wilber Depo.")). See Reply ¶ 21, at 3 (not disputing the factual allegation).⁴ The court

(ii) that Gallegos "shall be enrolled and participate in the Methadone Program at the Metropolitan Detention Center (MDC) in order to decrease his levels of dependency"; and (iii) that Gallegos "shall remain in custody of the Metropolitan Detention Center (MDC) until his level of methadone treatment has reached a point where [Gallegos] will not incur life-endangering withdrawal symptoms upon transfer to the Department of Corrections, where he is to serve the remainder of his sentence." Response ¶ 14, at 2 (emphasis in original). See Remand Order ¶ 3, at 1. In reply to these allegations, the Department of Corrections "admits that there was an Order Remanding Defendant to Metropolitan Detention Center . . ." Reply ¶ 14, at 1. See Remand Order ¶ 3, at 1. Thus, the parties do not dispute that there is a Remand Order remanding Gallegos to MDC.

²Methadone, sold under the brand name Dolophine, among others, is an opioid used to treat pain and/or as maintenance therapy or to help with tapering in people with opioid dependence. Detoxification using methadone can either be done relatively rapidly in less than a month or gradually over as long as six months. While a single dose has a rapid effect, maximum effect can take five days of use. The effects last about six hours after a single dose and a day and a half after long-term use in people with normal liver function. Methadone is almost always taken by mouth and rarely by injection into a muscle or vein.

"Methadone," Wikipedia, <https://en.wikipedia.org/wiki/Methadone> (last viewed, June 21, 2017).

³A titration is the "continual adjustment of a dose based on patient response. Dosages are adjusted until the desired effect is achieved." titration dose, Medical Dictionary for the Health Professions and Nursing (2012), <http://medical-dictionary.thefreedictionary.com/titration+dose> (last viewed June 22, 2017).

⁴Although the New Mexico Corrections Department does not specifically dispute the factual allegation that the state court frequently enters titration orders, the New Mexico

filed the Remand Order on November 6, 2014. See Remand Order at 1.⁵ The Remand Order states that it was to remain in effect for six weeks at maximum. See MSJ ¶ 1, at 2 (asserting this fact); Response at 1 (admitting this fact). See also Remand Order at ¶ 4, at 2.

Corrections Department “denies that Mr. Wilber’s deposition testimony provides support for the statement.” Reply ¶ 21, at 3. Mr. Wilber’s deposition testimony provides:

Q. Titration orders, you mentioned that you’ve been involved in some.

A. Yes.

Q. What about -- but you also mentioned that probation violation sees a lot of these. Is that a fair statement?

A. Yeah. In our -- in the probation violation courtroom, they are entered on what I would say is a pretty regular basis.

Q. And do they all occur the same way? In other words, the judge enters an order sending somebody to the Department of Corrections and then enters an order saying don’t sent them until this titration order is completed? . . . As far as you can recall.

A. I would say that yes, in general, in my experience, that’s how it works. That’s kind of the only reason for a titration order generally, because of that specific situation, what we call a titration order, I don’t know if it’s really a common term. It’s how we refer to them in our office. And so it’s almost a probation-specific term, but yes.

Q. So they go in the same day -- here’s the sentence to DOC -- and then hold it for a while because there is a titration order to get them to reduce methadone dependency, is that fair?

A. I would say that’s normally how it works. I think sometimes the titration order might get entered later if the issue isn’t discovered until maybe the day after the sentencing. But usually it’s the intent to have them entered together.

Wilber Depo. 32:18-33:25 (Lawless, Wilber). Accordingly, the Court deems the fact that the state court frequently enters titration orders as undisputed. See D.N.M.L.R.-Civ. 56.1(b)(“All material facts set forth in the Response will be deemed undisputed unless specifically controverted.”).

⁵See Fed. R. Civ. P. 56(c)(3)(“The court need consider only the cited materials, but it may consider other materials in the record.”).

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