SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-00236

James Burke v Nicholas Deml

Opinion and Order on Motion to Dismiss

Defendant has moved to dismiss this action under Vt. R. Civ. P. 12(b)(1) and (6). Plaintiff opposes the motion. Plaintiff is a prisoner in the care and custody of the Vermont Department of Corrections (DOC), of which Defendant is the chief official.[1] He is incarcerated in Mississippi, at the Tallahatchie County Correctional Facility (TCCF). TCCF houses Vermont prisoners through an agreement with DOC. His present complaint asserts that DOC has failed to provide him proper medical care because it has refused to inoculate him with Monkeypox vaccine. Defendant does not contest that Plaintiff properly grieved his request. The Court makes the following determinations.

The Vermont Supreme Court disfavors Rule 12(b)(6) motions to dismiss. "Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiff to relief." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576 (mem.) (quoting *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198)). In

[1] Defendant is named in his official capacity. In substance, the case is against the DOC.

considering a motion to dismiss, the Court "assume[s] that all factual allegations pleaded in the complaint are true, accept[s] as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume[s] that all contravening assertions in defendant's pleadings are false." *Mahoney v. Tara*, LLC, 2011 VT 3, ¶ 7, 189 Vt. 557, 559 (mem.) (internal quotation, brackets, and ellipses omitted).

A complaint must still meet a minimum standard of pleading, however. Vt. R. Civ. P. 8 requires that a complaint's allegations show "the pleader is entitled to relief," and it must provide "fair notice" to defendant of the claim against him, Vt. R. Civ. P. 8, Reporter's Notes. Further, a complaint must contain factual allegations supporting each element of the claims asserted. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 9.

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Vt. R. Civ. P. 12(b)(1), the Court takes "all uncontroverted factual allegations of the complaint … as true and construed in the light most favorable to the nonmoving party." *Jordan v. State Agency of Transp.*, 166 Vt. 509, 511 (1997). In addition, unlike a motion under Rule 12(b)(6), the Court may also consider materials outside the complaint in deciding whether it has jurisdiction. *See Conley v. Crisafulli*, 2010 VT 38, ¶ 3, 188 Vt. 11, 14.

Turning first to the Rule 12(b)(1) motion, Defendant argues that Plaintiff's claim is not cognizable under Vt. R. Civ. 75. Rule 75 allows limited judicial review of governmental administrative decisions, but only "if such review is otherwise available by law." The Vermont Supreme Court has interpreted this provision to

mean that review is allowable if it "is provided by the particular statute establishing an agency," or falls under one of the common law writs, namely: *certiorari*, *mandamus*, or prohibition. *Rheaume v. Pallito*, 2011 VT 72, ¶¶ 9–10, 190 Vt. 245, 250. Here, as there is no statutory right to review, this Court has jurisdiction only if one of those writs is applicable.

Review under a writ of *certiorari* allows judicial examination of decisions taken by public officers that are quasi-judicial in nature. The Department's actions in this instance are not reviewable under *certiorari* because its medical decisions are not made in a quasi-judicial capacity – *i.e.,* through a court-like process.

Nor is review available in this instance under a writ of prohibition. "The function of a writ of prohibition is to prevent the unlawful assumption of jurisdiction by a tribunal contrary to common law or statutory provisions." *In re Mattison*, 120 Vt. 459, 463 (1958). Prohibition is plainly inapplicable here because medical decisions are directly within the Department's grant of statutory authority. *See, e.g.,* 28 V.S.A. § 801; *Ala v. Pallito*, No. 2013-434, 2014 WL 3714892, at *1 (Vt. June 12, 2014) (3-Justice Opinion) (DOC "is vested with authority over the medical care of inmates").

Plaintiff's only possible avenue of review is pursuant to a writ of *mandamus*. *Mandamus* is a remedy wherein the Court "require[s] a public officer to perform a simple and definite ministerial duty imposed by law." *Sagar v. Warren Selectboard*, 170 Vt. 167, 171 (1999). For it to apply, there must some statutory limitation on the Department's discretion. *See Rheaume*, 2011 VT 72, ¶¶ 9–10, 190 Vt. at 250. Here,

Plaintiff argues that Defendant is statutorily required to "provide health care for inmates in accordance with the prevailing medical standards." 28 V.S.A. § 801(a). He contends that law provides the lens through which to evaluate Defendant's duties for purposes of mandamus. The Court agrees.

Section 801(a) requires the Defendant to assure that prisoners are provided with appropriate medical care in accord with "prevailing medical standards." *Id.* While the Court does not take issue with Defendant's point that it is vested with considerable discretion in determining how to provide such care, its assertion that the provision of medical care is "purely discretionary" is overbroad, to say the least. Section 801(c) provides a clear legal and medical standard that can be applied to how the Defendant carries out its discretion. Its exercise of discretion in the provision of medical care must stay at or above that standard. Stated another way, the DOC simply does not have the discretion to provide inadequate medical care to prisoners. A writ of mandamus is available to enforce that plain duty.[2]

Nor can the Court conclude that the present complaint is so deficient as to require dismissal under Rule 12(b)(6). Although Plaintiff does not cite Section 801, he asserts that he has special risks of contracting Monkeypox based both on his individual medical conditions and the circumstances that currently exist in the TCCF. He also alleges that Defendant has violated its duty to provide appropriate

[2] In *Ala v. Pallito*, No. 2013-434, 2014 WL 3714892, by contrast, the plaintiff failed to point to any statutory command that would require the DOC to employ a specific approach to managing the prisoner queues during medication distributions. 2014 WL 3714892, at *1.

medical care to him by not inoculating him. Under the liberal standard of *Bock*, the Court concludes those allegations are sufficient to state a claim for violation of Section 801 and to put Defendant on notice of such a cause of action. 2008 VT 81, ¶ 4, 184 Vt. at 576.

Defendant's overarching point appears to be that medical personnel considered and evaluated Plaintiff's request for Monkeypox vaccine and that should be that. The existence of Section 801 and mandamus belie that view. The Court is evaluating a motion to dismiss, not the merits of the Plaintiff's claim. At this point, the Court is required to assume all facts and inferences in favor of Plaintiff. In that light, Plaintiff is alleging that he has a special need for Monkeypox vaccine, Defendant has denied it to him, and that decision falls below the prevailing level of medical care. No more is needed to proceed past the dismissal stage. Whether that claim can be sustained as a factual matter is beyond the scope of the present filings.

WHEREFORE, Defendant's motion to dismiss is denied.

Electronically signed on Tuesday, May 9, 2023, pursuant to V.R.E.F. 9(d).

Timothy B. Tomasi
Superior Court Judge