UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

WILLIAM THORPE, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	)	Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' RULE 72(B) OBJECTION TO MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

Plaintiffs object to the Magistrate Judge's recommendation in the Report and Recommendation, Dkt. 70 ("R&R"), that the Court dismiss their breach-of-contract claim as barred by the statute of limitations. Dkt. 71 ("Objection"). But the Magistrate Judge correctly concluded that, even if the Virginia Department of Corrections ("VDOC") breached the 1985 Settlement Agreement by adopting the Step-Down Program in 2012, Plaintiffs did not file that claim until after the five-year limitations period had elapsed. The Magistrate Judge also was right to reject Plaintiffs' contention that their claim did not accrue until they were harmed by the breach. For those reasons, and as further demonstrated below, the Court should overrule Plaintiffs' objection and adopt the Magistrate Judge's recommendation to dismiss the breach-of-contract claim.[1]

[1] In rebutting Plaintiffs' objection, Defendants do not waive their arguments, set forth alongside their own objections, that Plaintiffs' breach-of-contract claim should be dismissed on other grounds. *See* Dkt. 72, 73. Although sustaining Defendants' objections would eliminate the need to rule on Plaintiffs' objection, Defendants request that the Court consider and overrule it.

I. The Magistrate Judge was correct to conclude that the alleged breach of the 1985 Settlement Agreement occurred in 2012.

As the Magistrate Judge explained, Plaintiffs' breach-of-contract claim is based on their allegations that the IM pathway within the Step-Down Program is equivalent to the Special Management Unit ("SMU"), and that the SM pathway and Step-Down Program are equivalent to the SMU or Phase Program, which were previously utilized at Mecklenburg Correctional Center. R&R at 70. The breach alleged by Plaintiffs was "the adoption of the Step-Down Program." *Id.*

In light of those allegations, the Magistrate Judge's reasoning and conclusion are unassailable. She rightly noted that, under Virginia law, claims based on breach of a written contract must be brought within five years after the alleged breach. *Id.* at 69 (citing Va. Code Ann. § 8.01-246(2) (2015 & Supp. 2019), § 8.01-230 (2015)). And because VDOC adopted the Step-Down Program in August 2012 (as alleged in the Complaint), the statute of limitations expired in August 2017—well before Plaintiffs brought suit in May 2019.

In their Objection, Plaintiffs do not deny that the alleged original breach occurred in 2012. Nor could they: the Complaint plainly alleges that VDOC breached the 1985 Settlement Agreement by introducing the Step-Down Program "[i]n 2012, after its failed attempt at a second phase program." Compl. ¶¶ 15, 130–33. Instead, Plaintiffs' chief argument is that, notwithstanding the initial breach in 2012, their claims are not time-barred because the Step-Down Program was "re-issued and modified several times after 2012—including as of 2017." Objection at 7. According to Plaintiffs, "[e]ach version of the Step-Down Program articulated different goals or justifications" that "may have altered . . . prisoners' confinement conditions," and therefore ***each version*** of the Program allegedly re-breached the 1985 Settlement Agreement. *Id.*

This argument lacks both factual and legal support.

A. Plaintiffs did not allege multiple breaches.

Plaintiffs' assertion now that VDOC "re-issued or modified" the Step-Down Program in 2017 (and at other unspecified times since 2012) cannot make up for their failure to adequately allege a breach-of-contract claim.[2]

First, the Complaint itself does not allege that the Step-Down Program was reissued in 2017—only that "VDOC ***amended its policies*** to emphasize that the ERT reviews the status of each IM inmate." Compl. ¶ 182 (emphasis added). Thus, even if reissuance of the Step-Down Program could constitute a new breach, Plaintiffs did not allege that is what occurred.

Second, Plaintiffs fail to allege facts showing that those policy amendments themselves breached the settlement agreements. In fact, this allegation appears nowhere in the Complaint; Plaintiffs' breach-of-contract claim is based on the Step-Down Program itself, and does not allege any breach based on the 2017 policy change. Compl. ¶¶ 222–30. Plaintiffs try to remedy this pleading failure by pointing to an argument they made in opposing Defendants' motion to dismiss—that the amendments ***may*** have re-breached the 1985 Settlement Agreement because each "articulated different goals or justifications" and "may have altered the Program's Pathways and standards, and modified prisoners' confinement restrictions." Objection at 7. But that allegation appears nowhere in the Complaint. And even if it did, it would suggest only that the Program was changed, not that it was changed in such a way to constitute a new breach.

Finally, Plaintiffs contend that discovery is needed to determine whether the "2017 Step-Down Program is sufficiently materially different from the Step-Down Program first adopted in

[2] Although Plaintiffs argue the Step-Down Program was modified at other times after 2012, the Complaint does not allege when.

2012." Objection at 7. But, again, Plaintiffs never alleged that the 2017 policy change resulted in a new program.

B. Plaintiffs' argument lacks support in case law.

Plaintiffs cite only a few cases in support of their argument that the limitations did not begin to run until they were harmed—and those they do cite stand only for the unremarkable proposition that each breach in a series "inflicts a new injury and gives rise to a new and separate cause of action." *Am. Physical Therapy Ass'n v. Fed'n of State Bds. of Physical Therapy*, 271 Va. 481, 484 (2006). *See also Adams v. Alliant Techsystems, Inc.*, 201 F. Supp. 2d 700 (W.D. Va. 2002). That principle does not apply here, however, where a single alleged breach occurred more than five years before Plaintiffs filed suit.

As explained above, Plaintiffs allege that the implementation of the Step-Down Program in 2012 breached the provisions in the 1985 Settlement Agreement that VDOC "does not intend to ***reinstate*** any similar program in the future" and that "[t]he Special Management Unit has been and ***will remain*** abolished." Compl. ¶¶ 10–11 (emphasis added). These conditions are very different from those at issue in Plaintiffs' cases.

For example, in *Adams*, this Court concluded that the statute of limitations for personal-injury claims began to run anew each time the plaintiffs were injured by excessive noise levels. The Court found important that "a person's hearing deteriorates with each exposure to impermissible levels of noise." 201 F. Supp. 2d at 711. Similarly, in *American Physical Therapy Association*, a physical therapy trade association had agreed that it "shall establish prices for [a certain] Examination that are generally consistent . . . with prior levels and which are not unduly burdensome to candidates." 271 Va. at 483. The Supreme Court of Virginia found a new breach every time the association imposed a new exam fee, reasoning that the contract had imposed a duty

on the association to ensure that ***each*** new fee was consistent and not unduly burdensome. *Id.* at 485. As the U.S. District Court for the Eastern District of Virginia characterized *American Physical Therapy Association*, the contract there "clearly envisioned that the defendant would on more than one occasion establish different prices for the Examination." *Hunter v. Custom Bus. Graphics*, 635 F. Supp. 2d 420, 432 (E.D. Va. 2009).

No similar provision, or repeated breach, is at issue here. Rather, this case instead resembles *Fluor Federal Solutions, LLC v. PAE Applied Technologies, LLC*, 728 F. App'x 200 (4th Cir. 2018), which the Magistrate Judge cites. There, a subcontractor alleged that the contractor breached a contract by imposing a continuous cap on the rate of the subcontractor's costs. Applying Virginia law, the Fourth Circuit held that, for limitations purposes, the subcontractor asserted a single breach of contract dating from the time the cap was first imposed, rather than multiple breaches corresponding to each of the times the subcontractor's costs were capped. *Id.* at 203. "Fluor's entire harm flowed directly from PAE's initial decision to cap G & A costs. That Fluor's alleged damages increased over the course of the contract does not alter the fact that the breach was single and continuous." *Id.*

Similarly, in *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543 (1989), the Supreme Court of Virginia rejected the contention that the statute of limitations began to run anew each day that a landlord failed to enforce a lease provision pertaining to uniform hours of operation for all tenants. *Id.* at 549. "The subsequent failures to enforce the business hours provision did not constitute ***new*** individual breaches because it was the initial wrongful conduct—failure to enforce business hours—that produced the plaintiff's harm." *Fluor Fed. Sols.*, 728 F. App'x at 202–03 (characterizing *Westminster Investing Corp.*). *See also Harvey v. Merrill Lynch Life Ins. Co.*, No. 3:11-cv-73, 2012 WL 1155711, at *7 (W.D. Va. Apr. 5, 2012) ("[O]nly one

breach occurred in this case. Each monthly failure to make an installment payment did not constitute a new breach. Instead, each successive failure to make an installment payment . . . was merely a continuation of the breach that occurred when Transamerica purported to cancel the Contract"); *Hunter*, 635 F. Supp. 2d at 433 (employer's termination of monthly automobile allowance and reduction of commission rate was the relevant breach; "each subsequent failure to pay did not constitute a new breach, but merely a continuation of the original breach").

Unlike the situations in the cases cited by Plaintiffs, the 1985 Settlement Agreement allegedly imposed a continuing duty to refrain from reinstating a similar program and that the SMU remain abolished. If VDOC breached the agreement, it did so when it implemented the Step-Down Program in 2012, not every day the Program has remained in operation.

II. The Magistrate Judge properly rejected Plaintiffs' argument that the statute of limitations did not begin to run until they were affected by the breach.

Contrary to Plaintiffs' contention, the Magistrate Judge did not ignore their argument that their breach-of-contract claim did not accrue until they were harmed by the breach. *See generally* Objection at 8–10. She specifically noted that argument before rejecting it: "The plaintiffs argue that their breach of contract claim did not accrue, and, therefore, that the statute of limitations did not begin to run on this claim, until they were affected by the breach." R&R at 70. The Magistrate Judge disagreed with Plaintiffs because, as she correctly explained, under Virginia law "'the running of the statute of limitations is not postponed by the fact that the . . . damages do not occur until a later date.'" *Id.* (quoting *Fluor Fed. Sols.*, 728 F. App'x at 203).

Plaintiffs try to escape this well-established principle of Virginia law by rehashing an argument they previously made, *see* Dkt. 23 at 18—that their breach-of-contract claim accrued for each prisoner at the time of his placement in the Step-Down Program, *see* Objection at 8–10. But that argument ignores how the accrual of breach-of-contract claims is treated under Virginia Code

§ 8.01-230. As the Supreme Court of Virginia has explained (in a case cited by Plaintiffs, *see* Objection at 10), while a plaintiff's right of action and the cause of action may not accrue at the same time in other categories of cases, "accrual for breach of contract, as Code § 8.01-230 plainly states, turns ***entirely*** on the breach." *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 158 (2018) (emphasis added). "[A] right of action for a breach of contract could . . . be barred by the statute of limitations without regard to whether compensatory damages ever occur." *Id.* at 158. Thus, as the Magistrate Judge correctly determined, the statute of limitations for any claim stemming from VDOC's alleged breach of the 1985 Settlement Agreement runs from 2012, when Plaintiffs allege the Step-Down Program was first implemented.

That conclusion is unchanged by the fact that Plaintiffs' injuries were unknown at the time. As the Supreme Court of Virginia explained in *Kerns*, the claim accrues "when the breach of contract occurs," regardless of whether actual or substantial damages occur or are discovered at a later date. *Id.* at 159. This is because "[a]ny amount of damages, 'however slight,' triggers the accrual of the cause of action," and a claim for nominal damages occurs at the moment the contract is breached, even if the full extent of damages are unknown. *Id.* While this accrual "rule may produce inequities by triggering a statute of limitations when the injury or damage is unknown[,] . . . it is the role of the General Assembly, not the courts, to change [such] rule of law." *Id.* at 162. And the General Assembly has not done so.

In a variation on their argument, Plaintiffs contend that, while Plaintiffs collectively "may have had a *right* of action" in 2012, each individual Plaintiff's "*cause* of action" did not accrue until he himself was placed in the Step-Down Program. Objection at 10 (emphasis in original). That argument suffers from two fatal flaws. First, it relies on the same faulty premise that a breach-of-contract claim accrues when the resulting damage is discovered, not when the breach occurs.

Second, it conflates the putative class's broadside challenge to the Step-Down Program with individual Plaintiffs' claims concerning their placement in the Step-Down Program. According to Plaintiffs, their suit "mounts a predominantly facial challenge to VDOC policies that apply to multiple prisons." Class Plfs.' Statement of Position in Supp. of Venue & Opposing Discretionary Transfer at 1, Dkt. 31. Their breach-of-contract claim is consistent with the collective nature of their suit; that claim accrued in 2012 when VDOC adopted the Step-Down Program (the only program Plaintiffs allege violated the 1985 Settlement Agreement), and the limitations period elapsed five years later. Any attempt to now assert individual breach-of-contract claims about the application of the Step-Down Program is not supported by Plaintiffs' framing of their Complaint on behalf of a putative class or the allegations it contains, which challenge only the Step-Down Program. Compl. ¶¶ 222–30.[3]

CONCLUSION

The Court should overrule Plaintiffs' objection and grant Defendants' motions to dismiss in full.

October 2, 2020

Respectfully submitted,

/s/ *Maya M. Eckstein*

[3] Plaintiffs assert that "Defendants never disputed that any prisoner subject to the Step-Down Program had standing to allege breach of contract." Objection at 8–9. Not so. As they have previously explained, Defendants have not conceded that Plaintiffs have standing; they have simply acknowledged that the Complaint alleges Plaintiffs Thorpe and McNabb were within the class covered by the 1985 Settlement Agreement and, thus, it alleges facts sufficient to overcome a Rule 12 motion on standing grounds as to those Plaintiffs. Dkt. 25 at 8–9. In any event, the Court need not reach that issue because Plaintiffs' claims fail for the numerous reasons stated in Defendants' briefs and in their objections to the Report and Recommendation.

Mark R. Herring
Attorney General of Virginia

Margaret Hoehl O'Shea (VSB #66611)
Assistant Attorney General,
Criminal Justice & Public Safety Division

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
Ph: (804) 786-2206 – Telephone
Fax: (804) 786-4239 – Facsimile
moshea@oag.state.va.us

Maya M. Eckstein (VSB #41413)
Trevor S. Cox (VSB #78396)
HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@HuntonAK.com
tcox@HuntonAK.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

By: */s/ Maya M. Eckstein*

Maya M. Eckstein (VSB # 41413)
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
meckstein@HuntonAK.com

Counsel for Defendants