

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
COLES COUNTY, ILLINOIS CHANCERY DIVISION

FILED
AUG 26 2011

Vicki Kirlepatrick
Circuit Clerk COLES COUNTY, ILLINOIS

JAMAL SHEHADEH,

Plaintiff,

v.

CONSOLIDATED COMMUNICATIONS
PUBLIC SERVICES, INC.,

Defendant.

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Case No. 11 SC 558

**REPLY MEMORANDUM IN SUPPORT OF CONSOLIDATED
COMMUNICATIONS PUBLIC SERVICES, INC.'S COMBINED 2-619.1
MOTION TO DISMISS**

Plaintiff has essentially abandoned his argument that he has any enforceable rights under the contract between Defendant Consolidated Communications Public Services, Inc. ("Consolidated") and the Department of Central Management Services ("CMS"), acting on behalf of the Illinois Department of Corrections (the "Contract"). He has never alleged to be a party to the Contract, and in neither the Complaint nor his response to Consolidated's motion to dismiss ("Response") does he attempt to show that he is an intended third-party beneficiary to the Contract. Moreover, Plaintiff has failed to plead or even raise any legally cognizable deprivation of his constitutional rights based on either alleged interruptions to his telephone service or his ability to confer with his attorney. Accordingly, Plaintiff does not have standing and cannot state a claim for relief, and the complaint should be dismissed with prejudice pursuant to 735 ILCS §§ 5/2-619(a)(2) and 5/2-615.

- A. PLAINTIFF LACKS STANDING TO STATE A CLAIM AGAINST CONSOLIDATED AND HIS COMPLAINT SHOULD BE DISMISSED PURSUANT TO 735 ILCS § 5/2-619(a)(2).**

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Plaintiff has no standing to sue for an alleged breach of the Contract, and Plaintiff does not argue otherwise. Instead, Plaintiff has all but abandoned any claims arising out of the written contract between Consolidated and CMS and, for the first time, now alleges that he is entitled to relief on the basis of an “implied contract” between Consolidated and Plaintiff. (Resp. at 1) The complaint contains no allegations of any such implied contract. Even if the arguments Plaintiff raises in his Response were evident in the complaint, however, Plaintiff’s claim would still fail. The complaint should therefore be dismissed in its entirety with prejudice.

1. Plaintiff Is Neither a Party Nor an Intended Third-Party Beneficiary to the Contract Between Consolidated and the State.

Because Plaintiff has not responded to Consolidated’s argument that he is neither a party nor an intended third-party beneficiary to the Contract, there is little for Consolidated to reply to with regard to the issue of standing, and Consolidated refers the Court to the arguments already presented in its motion to dismiss. (Motion, at 4-8) In sum, Plaintiff has not pointed to any express provisions in the Contract evidencing the parties’ intention to allow third party inmates to enforce the terms of the Contract. Because the parties’ intention to grant such enforcement rights to third parties does not “affirmatively appear from the contract’s language,” Plaintiff does not have the requisite standing to bring this lawsuit. *Ball Corp. v. Bohlin Bldg. Corp.*, 187 Ill. App.3d 175, 177 (1st Dist. 1989); *see also Hall-Moten v. Smith*, No. 05 C 5510, 2009 WL 1033361, at *8 (N.D. Ill. Apr. 17, 2009); *Ritz v. Lake Cty.*, No. 08 C 5026, 2010 WL 2025392, at *7 (N.D. Ill.).

In fact, the plain language that is contained in the Contract actually indicates that

the parties intended only to be liable to one another. The Contract contains specific provisions setting forth the rights and obligations of Consolidated and CMS, including liabilities that the parties owe *to each other*, and not to third-party inmates. (*See Motion*, at 6-8) Nowhere is there any indication of an intended liability to the inmates, and this is consistent with general contract principles under which “third party beneficiaries of a government contract are assumed to be incidental.” *Bergman v. Water Reclamation Dist. Of Greater Chicago*, 274 Ill. App. 3d 686, 688-89 (1st Dist. 1995). Plaintiff simply does not have standing to sue as a third-party to the contract between Consolidated and CMS, and his claim should be dismissed.

2. Plaintiff’s Complaint Contains No Allegations of an “Implied Contract” Pursuant to Which He is Entitled to Relief.

Instead of arguing that he has standing to sue as an intended third-party beneficiary to the Contract, Plaintiff raises an entirely new theory and argues instead that an “implied contract” exists between Plaintiff and Consolidated. (*Resp.* at 1) He further states that he “should be given the opportunity to amend his complaint to clarify this fact.” (*Id.*)

The complaint contains no allegations of any type of “implied contract” that Consolidated may have breached. To the contrary, Plaintiff expressly seeks damages only as a result of Consolidated’s alleged failure “to meet its contractual obligations *as set forth in the Contract for Supplies and/or Services*” between Consolidated and CMS on behalf of the Illinois Department of Corrections. (*Compl.* at 1) (*emphasis added*). Plaintiff acknowledges that “his theory of liability under the contract between [Consolidated] and the State of Illinois may be incorrect,” and instead asks the Court to “draw a reasonable inference” that Consolidated is liable to Plaintiff. (*Resp.* at 1) This is

improper; Plaintiff cannot now abandon the allegations set forth in the complaint in favor of new allegations in an attempt to survive a motion to dismiss, and the Court should disregard Plaintiff's argument regarding any implied contract.

Nonetheless, even if the Court were to find that Plaintiff did allege an implied contract in his complaint, his claim still fails because, once again, Plaintiff would not be a party to such a contract and would lack the requisite standing to sue. Plaintiff's argument regarding an implied contract is based on the fact that he "provided money to persons on [his] list of approved telephone contacts so that [his] collect calls could be pre-paid." (Resp. at 3) Even assuming Plaintiff's allegations about phone interruptions were true, any claim regarding rates paid for telephone service would belong to the person paying the rates. In this case, that would be the recipients of Plaintiff's collect telephone calls, not the Plaintiff. Moreover, because such a claim would be alleging that Consolidated failed to adequately provide telephone services in exchange for agreed-upon rates, that would be a reparations claim and one over which the Illinois Commerce Commission ("ICC"), and not this Court, would have exclusive jurisdiction. *See generally Sheffler v. Commonwealth Edison Co.*, No. 110166, 2011 WL 2410366, at 13 (Ill. June 16, 2011) (affirming dismissal of claims regarding adequacy of service for public utilities because such claims constituted reparations, and determining that the relationship between the utility and the customer was properly governed by a tariff filed with the ICC).

The only contract forming the basis for Plaintiff's allegations in the current complaint is the written contract between Consolidated and CMS. Plaintiff has failed to show that he is either a party or an intended third-party beneficiary to that Contract. Moreover, to the extent Plaintiff now argues that the complaint also alleges an "implied

contract” between Consolidated and Plaintiff – which it does not – Plaintiff would still lack standing to sue under that theory of liability, and the Court would not have jurisdiction over such a claim. The Court should therefore dismiss Plaintiff’s complaint with prejudice.

B. PLAINTIFF FAILS TO PLEAD ANY DEPRIVATION OF RIGHTS RELATED TO HIS TELEPHONE USE AND HIS COMPLAINT SHOULD ALSO BE DISMISSED PURSUANT TO 735 ILCS § 5/2-615.

Plaintiff’s claim should also be dismissed because he has not sufficiently pled a deprivation of his rights. The complaint contains no facts in support of Plaintiff’s argument that he was either unreasonably denied all access to a phone, or that he was ever denied access to his attorney, and should therefore be dismissed for failure to state a claim.

Plaintiff incorrectly argues that it is Consolidated’s contention that he “does not have a right to telephone access.” (Resp. at 4) To the contrary, Consolidated argues that Plaintiff does not have a right to *unlimited* phone access, and this position is consistent with Illinois law. *Murillo v. Page*, 294 Ill. App. 3d 860, 865 (5th Dist. 1998); *Young v. Lane*, No. 86 C. 5929, 1987 WL 10299, at * 3 (N.D. Ill. April 30, 1987) (holding same); *Carter v. O’Sullivan*, 924 F. Supp. 903, 909 (C.D. Ill. 1996) (“Prisons are not required to provide and prisoners cannot expect to receive the services of a good hotel.”) Courts have repeatedly held that an inmate’s rights are not violated when the inmate is denied phone access, either due to a handful of interruptions to service, or even when he is deprived of all telephone access for days at a time. *Hadley v. Peters*, 841 F. Supp. 850, 859 (C.D. Ill. 1994); *Carter*, 924 F. Supp. at 911.

Furthermore, in this case Plaintiff was never deprived *all* access to a telephone.

By his own admission, at all times complained of at least two phones were working and available to him. (Compl. at 3-4, ¶¶ 12 and 20) Despite Plaintiff's reference to an "inability" to make phone calls (Resp. at 4), the factual allegations contained in the complaint indicate that at most he was inconvenienced, but at no time was he denied all access to a telephone. Moreover, as Illinois courts have repeatedly held, even if he *had* been denied complete access to a phone for some period of time, that would not be sufficient, standing alone, to allege a deprivation of Plaintiff's constitutional rights. *Hadley v. Peters*, 841 F. Supp. 850, 859 (C.D. Ill. 1994); *Carter*, 924 F. Supp. at 911

Additionally, Plaintiff's rights have not been violated with regard to his ability to communicate with his attorney. Plaintiff is not complaining that he was denied access to his attorney, but rather that Consolidated "knowingly and intentionally records attorney telephone calls." (Resp. at 4) There are several problems with this argument. First, there is no indication anywhere in the complaint or in the grievance report attached to the complaint that Plaintiff called his attorney and that such calls were actually recorded. Second, it is not improper for prison officials to record calls between inmates and their attorneys. Prison officials may tape a prisoner's telephone conversations with his attorney as long as the recording does not "substantially affect the prisoner's right to confer with counsel." *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) Even if Plaintiff alleged sufficient facts showing his calls with counsel had been recorded – which he has not – that would not be sufficient to state a claim, because Plaintiff has not alleged that he was unable to meet with his attorney, to talk to his attorney by phone, or to exchange written correspondence with his attorney.

Moreover, courts throughout the country have repeatedly rejected challenges to

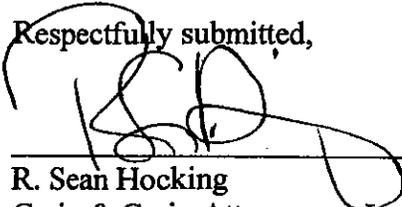
various correctional-facility telephone systems with security features virtually identical to the phone system at issue here, such as call-blocking, monitoring, and recording. Prison officials have determined that such security measures are an efficient way to provide access to telephones, yet prevent inmates from engaging in telephone fraud; contacting and harassing judges, witnesses and victims; participating in criminal activity over the phone; and creating dangers to public safety. *See, e.g., Murillo v. Page*, 294 Ill. App. 3d 860, 865 (5th Dist. 1998) (an inmate's phone use is subject to limitations "because of the legitimate security interests of a penal institution"); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (telephone restriction did not violate inmate's constitutional rights because it was reasonably related to legitimate penological objectives); *Arney v. Simmons*, 26 F.Supp.2d 1288, 1293-94 (D. Kan. 1998); *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir.), *cert. denied*, 493 U.S. 895 (1989); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (inmate's right to use telephone is subject to rational limitations in light of the prison's legitimate security interests).

Plaintiff has not pled sufficient facts showing that his rights were deprived with regard to his telephone use. His allegations that his due process and equal protection rights have somehow been violated are unfounded, and the complaint should therefore be dismissed with prejudice.

For all of the foregoing reasons, as well as those contained in Consolidated's Combined 2-619.1 Motion to Dismiss, Plaintiff's Complaint for Damages Resulting from a Breach of Contract Should be dismissed with prejudice.

Dated: August 26, 2011

Respectfully submitted,



R. Sean Hocking
Craig & Craig Attorneys at Law
1807 Broadway Avenue
P.O. Box 689
Mattoon, IL 61938
Telephone: (217) 234-6481

Charles H.R. Peters
Lisa M. Natter
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
Telephone: (312) 258-5500
Fax: (312) 258-5600
Firm ID No. 90219

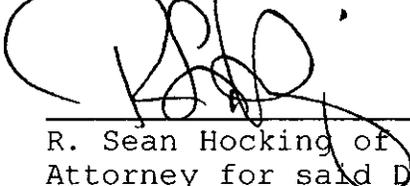
*Attorneys For Defendant Consolidated
Communications Public Services, Inc.*

CERTIFICATE OF SERVICE

It is hereby certified that the original of the foregoing document was sent to the Circuit Clerk and a true and accurate copy of the foregoing document was sent in envelopes securely sealed, legibly addressed and sent via Express Mail Next Day Delivery with the proper postage affixed thereto and deposited in the United States Mail at the United States Post Office in Charleston, Illinois to:

Mr. Jamal Shehadeh
Inmate No. S10300
Logan County Correctional Center
PO Box 1000
Lincoln, Illinois 62656

DATED this 26th day of August, 2011.



R. Sean Hocking of Craig & Craig
Attorney for said Defendant