IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

#LETUSBREATHE COLLECTIVE, et al.,	)	
Plaintiffs,	)	
v.	)	**20 CH 4654**
CITY OF CHICAGO,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Defendant City of Chicago has filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619.1.

I. Background

Plaintiffs #LetUsBreathe Collective ("#LetUsBreathe"), Law Office of the Cook County Public Defender ("Public Defender"), Black Lives Matter Chicago ("BLM Chicago"), Stop Chicago, Umedics, National Lawyers Guild Chicago ("NLG Chicago") and GoodKids MadCity ("GKMC") have filed a Complaint for Mandamus and Injunctive Relief ("Complaint") against Defendant City of Chicago ("the City").

Plaintiffs allege that the City, through the Chicago Police Department ("CPD"), has deprived arrested individuals of their statutory rights under 725 ILCS 5/103-3 and 725 ILCS 5/103-4. Section 103-3 of the Illinois Code of Criminal Procedure ("Criminal Procedure Code") requires the CPD to allow arrestees to communicate with an attorney of their choice and a family member by making a reasonable number of phone calls "within a reasonable time after arrival at the first place of custody." 725 ILCS 5/103-3. Section 103-4 of the Criminal Procedure Code requires the CPD to allow arrestees to consult with a licensed attorney, "alone and in private," at the place of custody, as many times and "for such period each time as is reasonable." 725 ILCS 5/103-4.

Plaintiffs allege that the CPD routinely violates Sections 103-3 and 103-4 by denying arrestees access to counsel and telephones. Plaintiffs further allege that the CPD's violations have increased throughout 2020. Plaintiffs assert that the CPD has used the COVID-19 pandemic and the protests that erupted throughout Chicago in response to the deaths of George Floyd and Breonna Taylor as an excuse to deprive arrestees of their statutory rights under §103-3 and §103-4.

Count I of the Complaint seeks a writ of *mandamus*. Plaintiffs allege that the CPD has a non-discretionary duty under §103-4 to "to ensure access to counsel for arrestees, alone and in

private, at the place of detention, whether by telephone or in person, and within a reasonable time (generally one hour) after the arrestee arrives in custody." (Compl., ¶54). Plaintiffs further allege that the CPD has a non-discretionary duty under §103-3 "to allow arrestees prompt access to a phone after they are brought into custody." (Id.).

Plaintiffs allege that the City "is violating its statutory duty under state law to allow arrestees, including members of the Plaintiff organizations, legal representation within a reasonable time and "alone and in private" at the place of custody by intentionally prohibiting arrestees access to attorneys who are present and available at CPD police stations." (Compl. ¶55). Plaintiffs further allege that the City "is violating its statutory duty under state law to allow arrestees, including members of the Plaintiff organizations, to speak to their counsel within a reasonable time and 'alone and in private' over the telephone where physical representation is not possible." (Id. at ¶56). Plaintiffs further assert that the City "is violating its statutory duty under state law to allow arrestees, including members of the Plaintiff organizations, timely access to a phone at CPD police stations, cutting them off from their families and counsel, and ensuring they are held incommunicado and without protection from police coercion and interrogation." (Id. at ¶57).

Plaintiffs allege that during the protests and continuing after, the City "implemented an informal policy of denying in-person visitation of arrested individuals, including members of the Plaintiff organizations" with their attorneys "when those attorneys were immediately available at police stations to represent arrestees." (Compl. ¶58).

Plaintiffs assert that the City "has further violated its statutory duty under state law to allow representation 'alone and in private' by requiring, as a matter of formal policy, the execution of Form 11.573-A for all people seeking access to counsel in CPD stations via the telephone. That Form contains a mandatory waiver of privacy and forfeiture of constitutional and civil rights as a predicate for stationhouse representation." (Compl. ¶59).

Plaintiffs seek a writ of *mandamus* requiring the City "to comply with its non-discretionary duty to ensure access to counsel and phones at CPD stations, pursuant to 725 ILCS 5/103-3 and 725 ILCS 5/103-4. . . ." (Compl., Prayer for Relief).

Count II of the Complaint asserts a private cause of action for violation of §103-3. Count II alleges that the City has violated Section 103-3 by systematically denying arrestees access to a telephone within one hour of being brought into custody. The relief sought in connection to Count II is unclear.

II. Motion to Dismiss

The City is moving to dismiss the Complaint pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619. "A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint. Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defenses but alleges only defects on the face of the complaint." Id. "All well-pleaded facts and all reasonable inferences from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v.

Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A §2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-pled facts and their reasonable inferences, but raises defects or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers Sys., LLC, 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id.

A. *Count I (§2-615)*

The City contends that Count I fails to state a claim for a writ of *mandamus* as a matter of law. "*Mandamus* is an extraordinary remedy to enforce, as a matter of right, 'the performance of official duties by a public officer where no exercise of discretion on his part is involved.'" Noyola v. Bd. of Ed., 179 Ill. 2d 121, 133 (1997). "The extraordinary remedy of *mandamus* 'is not appropriate to regulate a course of official conduct or enforce the performance of official duties generally.'" Ryan v. City of Chicago, 2019 IL App (1st) 181777, ¶12.

To allege a claim for *mandamus*, a plaintiff must plead facts showing "(1) a clear, affirmative right to relief; (2) a clear duty of the public officer to act; and (3) clear authority in the public officer to comply." Bremen Comm. High Sch. Dist. No. 228 v. Cook Cty. Comm'n on Human Rights, 2012 IL App (1st) 112177, ¶ 14.

1. Whether Section 103-3 Requires the CPD to Allow an Arrestee to Communicate With an Attorney and Family Member Within One Hour of Arriving at the Place of Custody

Count I of the Complaint seeks a writ of *mandamus* based upon violations of both §103-3 and §103-4 of the Criminal Procedure Code. Initially, the court notes that the Complaint conflates the requirements of §103-3 and §103-4. The court further notes that both the City and Plaintiffs conflate the requirements of these sections in making their arguments. Section 103-3 and §103-4 are separate statutes with different requirements and will be considered separately by this court.

Section 103-3 of the Criminal Procedure Code provides that:

(a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted *within a reasonable time* after arrival at the first place of custody.

(b) In the event the accused is transferred to a new place of custody his right to communicate with an attorney and a member of his family is renewed.

725 ILCS 5/103-3 (emphasis added).

Section 720.20 of the Illinois Administrative Code ("Administrative Code"), which follows §103-3 provides, in relevant part, that:

> (b) Right to Communicate with Attorney and Family - Transfers
>
> > (1) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted *within a reasonable time (generally within the first hour)* after arrival at the first place of custody.
> >
> > (2) In the event the accused is transferred to a new place of custody, his or her right to communicate with an attorney and a member of his or her family is renewed.
>
> (c) Right to Consult with an Attorney
>
> > (1) Any person committed, imprisoned or restrained of his or her liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable.

20 Ill. Adm. Code §720.20 (emphasis added).

Plaintiffs allege that §103-3, when read together §720.20 of the Administrative Code, requires that arrestees be allowed to communicate with an attorney or family member within one hour of arriving at a place of custody. The City contends that §103-3 does not require that arrestees be allowed to communicate with an attorney or family member within one hour, but within a reasonable time. The City argues that because what constitutes a reasonable time involves an exercise of discretion, *mandamus* is not available.

"[T]he primary objective . . . in construing the meaning of a statute is to ascertain and give effect to the intention of the legislature." In re Detention of Lieberman, 201 Ill. 2d 300, 307 (2002). "All other rules of statutory construction are subordinate to this cardinal principle. Id. "When the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction." Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255 (2004).

"It is a cardinal rule of statutory construction that [a court] cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." People ex rel. Birkett v. Dockery, 235 Ill. 2d 73, 81 (2009).

The language of §103-3 plainly and unambiguously requires that arrestees be allowed to communicate with an attorney and family member "within a reasonable time" after arrival at the first place of custody. 725 ILCS 5/103-3. Section 720.20 of the Illinois Administrative Code provides that "within a reasonable time" is "generally within the first hour." Ill. Adm. Code §720.20.

Neither §103-3 or §720.20 mandate that arrestees be allowed to communicate with an attorney and family member within one hour of arriving of the first place of custody as asserted by Plaintiffs. Rather, arrestees must be allowed such communication "within a reasonable time." To accept Plaintiffs' position that arrestees are entitled to such communication within one hour as a matter of law would require this court to rewrite Section 103-3. This court cannot do so. Dockery, 235 Ill. 2d at 81.

Section 103-3 and §720.20 require only that arrestees be allowed to communicate with a lawyer and family member "within a reasonable time." While §720.20 states that "within a reasonable time" is "generally within the first hour," what constitutes "within a reasonable time" necessarily involves an exercise of discretion.[1] This court cannot issue a writ of *mandamus* instructing the City how to exercise this discretion. Pate v. Wiseman, 2019 IL (1st) 190449, ¶25.

The court notes that while §103-3 does not require that communication be allowed within any specific time period, Section 103-3 does require that such communication be allowed. If Plaintiffs were alleging that the CPD routinely denied any such communication, they might have a viable claim for a writ of *mandamus*. However, the Complaint does not clearly allege this. Rather, the Complaint appears to be focused upon the delay in allowing such communication and conflates the requirements of §103-3 and §104-3.

This court cannot issue a writ of *mandamus* requiring the City to allow arrestees to communicate with an attorney and family member within one hour of arriving at the first place of custody, or within any other specific period of time, because the City has no non-discretionary duty to do so under §103-3. To the extent that Count I seeks such *mandamus* relief, it is dismissed with prejudice pursuant to §2-615.

3. Whether the Complaint Alleges Violations of Section 103-4 Which Can Be Addressed by a Writ of *Mandamus*

Section 103-4 of the Criminal Procedure Code provides, in relevant part, that:

> Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, *alone and in private at the place of custody*, as many times and for such period each time as is reasonable. * * *

[1] The court notes that while §720.20 does not require that communication be allowed within one hour as asserted by Plaintiffs, any such requirement would be contrary to §103-3 and would render §720.20 invalid. See, e.g., People v. Bair, 379 Ill. App. 3d 51, 59 (1st Dist. 2008).

725 ILCS 5/103-4 (emphasis added).

Under the plain and unambiguous language of §103-4, any arrestee who so desires must be allowed to consult with an attorney "alone and in private at the place of custody" as many times, and for such a period of time, as is reasonable. The only exception is in cases of imminent danger of escape. While §103-4 affords discretion as to the number of consults and the length of time of each consult, it does not afford *any* discretion as to the right of an arrestee to consult with an attorney "alone and in private at the place of custody" except in cases where there is an imminent danger of escape.

The Complaint clearly alleges facts supporting Plaintiffs' contention that the CPD is not allowing arrestees to consult with an attorney "alone and in private at the place of custody." The City argues that public defenders have refused to meet in person with arrestees due to the COVID-19 risk and asserts that the CPD does not have the ability to provide privacy for consultation with counsel by telephone. Section 103-4, however, provides an exception only in cases of imminent danger of escape.

The Complaint alleges that the CPD has required arrestees to sign a waiver prior to consulting with counsel by phone acknowledging that the CPD cannot guarantee the privacy of the call. Section 103-4 is clear, however, that arrestees "***shall*** . . . be allowed" to consult with an attorney "alone and in private." 725 ILCS 5/103-4. As written, Section 103-4 does not afford *any* discretion on this matter. An arrestee must be allowed to consult with an attorney "alone and in private." Id. Section 103-4 does not contain any exceptions for pandemics or any other exception that is applicable to the facts alleged in the Complaint.

The City suggests that because the public defenders have declined to meet with arrestees in person, the City is absolved from any responsibility to comply with §103-4. Section 103-4, however, does not contain any language allowing the City to deprive arrestees of their right to consult with counsel alone and in private based upon the actions of the public defenders or upon any agreement with the public defenders. The right at issue belongs to the arrestees, not the public defenders.

Count I does allege sufficient facts to withstand dismissal as to the allegations regarding §103-4.

B. *Count II (§2-615)*

Count II asserts a private cause of action for violation of §103-3 of the Criminal Procedure Code. Plaintiffs contend that they inadvertently failed to also assert a private cause of action for violation of §103-4 and will seek leave to do so. The City contends that Plaintiffs cannot establish a private cause of action as to either §103-3 or §103-4. In the interest of judicial economy, this court will consider whether Plaintiffs can assert a private cause of action under either section.

Sections 103-3 and §103-4 contain no express language granting a private cause of action. Therefore, this court must consider whether such a cause of action can be inferred. Moore v. Lumpkin, 258 Ill. App. 3d 980, 989 (1st Dist. 1994), A private cause of action may be inferred where the plaintiffs allege facts establishing that: (1) they are members of the class for whose benefit the statute was enacted; (2) a private cause of action is consistent with the underlying purpose of the statute; (3) their injury is one the statute was designed to prevent; and (4) a private cause of action is necessary to provide an adequate remedy for violation of the statute. McCarthy v. Kunicki, 355 Ill. App. 3d 957, 967 (1st Dist. 2005)

Sections 103-3 and 103-4 were clearly enacted to protect the rights of arrestees. Plaintiffs concede that the Public Defender and NLG are not arrestees and, therefore, are not members of the class for whose benefit these statutes were enacted. However, they contend that the remaining organizational Plaintiffs are intended beneficiaries of the statutes because they represent the interests of arrestees.

The court agrees that to the extent the organizational Plaintiffs are representing the interests of their members, they are intended beneficiaries of §103-3 and §103-4. However, the Complaint is clear that the organizational Plaintiffs are also bringing the Complaint on their own behalf. (Compl. ¶15). The organizational Plaintiffs allege that they have been injured by being forced to divert funds from their missions. (Compl. ¶¶15-20). The organizational Plaintiffs themselves are not intended beneficiaries of §103-3 or §103-4 and their alleged injury is not one the statutes were intended to prevent.

Furthermore, even assuming that §103-3 and §103-4 were enacted to benefit Plaintiffs and Plaintiffs have sustained an injury these statutes were intended to prevent, there is no basis to infer a private cause of action based on Plaintiffs' representation of arrestees because a private cause of action is not necessary to provide an adequate remedy for violation of §103-3 or §103-4. See, Abbasi ex rel. Abbasi v. Paraskevoulakos, 187 Ill. 2d 386, 393 (1999).

Section 103-8 of the Criminal Procedure Code provides that:

> Any peace officer who intentionally prevents the exercise by an accused of any right conferred by this Article or who intentionally fails to perform any act required of him by this Article shall be guilty of official misconduct and may be punished in accordance with Section 33-3 of the Criminal Code of 2012 [720 ILCS 5/33-3].

725 ILCS 5/103-8. Therefore, the Criminal Procedure Code itself provides a remedy for violation of §103-3 and §103-4.

Substantial violations of §103-3 and §103-4 can also be remedied through a federal §1983 civil rights action. Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1349 (7th Cir. 1985)(acknowledging that because the 14th Amendment to the U.S. Constitution protects "the right to call and consult with an attorney," violation of a state statute protecting such a right would give rise to a §1983 claim). Additionally, a violation of §103-3 or §103-4 resulting in a denial of counsel may lead to the suppression of evidence obtained in violation of that right.

E.g., People v. Sanchez, 2018 IL App (1st) 143899, ¶75; People v. Barton, 122 Ill. App. 3d 1079, 1084 (5th Dist. 1984).

Plaintiffs argue that the Criminal Procedure Code does not provide an adequate remedy for violations of §103-3 or §103-4, but the cases cited by Plaintiffs are distinguishable. People v. Martin, 121 Ill. App. 3d 196 (2d Dist. 1984)(finding that while an isolated violation of §103-3 would not require suppression without some wrongfully obtained evidence, a similar violation could lead to suppression where there was an infringement on the substantive right to counsel, a resulting incriminating statement, or abuse of police procedures); People v. Williams, 2017 IL App (1st) 142733 (finding that voluntary statement made by plaintiff was admissible despite denial of telephone call because plaintiff never disclosed the purpose of the call which was not to contact an attorney, but to check on his newborn son). These cases do not stand for the proposition that there is no remedy for a violation of §103-3 or §103-4.

Count II is dismissed with prejudice because there is no basis for inferring the existence of a private cause of action for violation of either §103-3 or §103-4.

C. *Section 2-619(a)(3)*

The City also contends that the Complaint should be dismissed because there is other pending litigation which is duplicative of this litigation. The State of Illinois filed suit against the City of Chicago in the United States District Court for the Northern District of Illinois, Case No. 17 cv 6260 ("federal litigation"). On January 31, 2019, a Consent Decree was entered in the federal litigation. Under the Consent Decree, the district court retained jurisdiction to monitor compliance with the Consent Decree and to modify the Consent Decree as agreed upon by the parties. The Consent Decree provides that it resolves all the claims asserted by the State of Illinois and constitutes a complete settlement of all claims against the City.

Under section 2-619(a)(3), a defendant may move to dismiss a cause of action on the grounds that another case is pending involving the same cause between the same parties. Doutt v. Ford Motor Co., 276 Ill. App. 3d 785 (1st Dist. 1995). Efficient and orderly administration of justice and the avoidance of duplicative actions are the primary considerations in deciding whether to grant a section 2-619(a)(3) motion involving pending intrastate actions. Energy Cooperative v. Northern Illinois Gas Co., 93 Ill. App. 3d 884 (3d Dist. 1981).

"A court should consider the following factors in deciding whether to dismiss an action pursuant to section 2-619(a)(3): '(1) comity; (2) the prevention of multiplicity, vexation and harassment; (3) the likelihood of obtaining complete relief in a foreign jurisdiction; and (4) the res judicata effect of a foreign judgment in the local forum.'" Kapoor v. Fujisawa Pharmaceutical Co., 298 Ill. App. 3d 780, 785 (1st Dist. 1998). All four factors, however, do not necessarily apply to every case. Id. 789. In addition to considering the above factors which are relevant, the trial court should also weigh the prejudice to the non-movant against the policy of avoiding duplicative litigation. Id. at 785-86.

The threshold issue here is whether the Consent Decree constitutes other pending litigation. The court agrees with Plaintiffs that it does not.

A consent decree operates as both a contract between the parties and a judgment of the court. Local No. No. 93, Intern. Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 519 (1986). The parties' agreement is the source of authority that allows the court to enter judgment on the consent decree. Id. at 522. It is the parties' agreement, not any legal determination by the court, that creates enforceable obligations between the parties. Id.

There is no action pending before the district court. Judgment was entered in the federal litigation by Consent Decree. There remain no legal issues for the district court to decide. The purpose of §2-619(a)(3) is to avoid duplicative litigation and the risks of inconsistent legal rulings. There is no ongoing federal litigation, merely the retention of enforcement of the parties' contractual agreement, and no risk of inconsistent legal rulings.

Because the Consent Decree does not constitute other pending litigation, the City is not entitled to dismissal of the Complaint pursuant to §2-619(a)(3).

D. *Section 2-619(a)(9)*

The City also seeks to dismiss the Complaint pursuant to §2-619(a)(9). The City argues the Complaint is moot based upon the Consent Decree. "[A] matter is considered moot when no controversy remains or the issues involved cease to exist, thereby rendering it impossible for the court to grant effective relief to the complaining party." Katherine M. v. Ryder, 254 Ill. App. 3d 479, 485 (1st Dist. 1993). "[W]hen an opinion on a question of law cannot affect the result as to the parties or controversy in the case before it, a court should not resolve the question merely for the sake of setting a precedent to govern potential future cases." In re Adoption of Walgreen, 186 Ill. 2d 362, 365 (1999).

The Complaint alleges ongoing violations of §103-4. The City has not established, as a matter of law, that the Consent Decree moots the claims of all the Plaintiffs regarding §103-4. Therefore, the City's §2-619(a)(9) motion is denied.

III. Conclusion

The City's Motion to Dismiss is granted in part and denied in part as follows:

(1) Count I is dismissed with prejudice, pursuant to §2-615, with regard to §103-3 as Plaintiffs are not entitled to a writ of *mandamus* based upon alleged violations of that statute as a matter of law. The remainder of Count I stands.

(2) Count II is dismissed with prejudice, pursuant to §2-615, as no private cause of action can be inferred under either §103-3 or §103-4.

(3) The City's §2-619(a)(3) motion to dismiss is denied.

(4) The City's §2-619(a)(9) motion to dismiss is denied.

(5) The status date of December 17, 2020 at 9:30 a.m. stands, to be conducted remotely via Zoom:

Meeting ID: 940 2402 4757
Password: 739301
Dial In Number: 312-626-6799

Enter: 12.10.20