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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD L. ASHKER,

Plaintiff,

v.

MICHAEL C. SAYRE, et al.,

Defendants.

No. C 05-03759 CW

ORDER FOR SPECIFIC
PERFORMANCE

The trial in this case took place from May 11 through May 15, 2009. One of the issues tried was whether Matthew Cate, in his official capacity as the Director of the California Department of Corrections and Rehabilitation (CDCR), breached the 2002 Settlement Agreement that Plaintiff and the CDCR entered into to settle a 1997 lawsuit, case number C 97-1109 CW, that Plaintiff had filed against the CDCR for, among other things, deliberate indifference to his serious medical need: his injured right arm and wrist.

On June 1, 2009, the Court granted Plaintiff's request to brief the issue of specific performance in regard to his claim for breach of the 2002 Settlement Agreement. Plaintiff and Defendant

1 Cate have submitted briefs on this issue.¹

2 BACKGROUND

3 In exchange for Plaintiff's release of the CDCR from his
4 medical claims in case number C 97-1109 CW, the CDCR agreed to the
5 following:

6 1. The Releasees (CDCR) agree to allow Releasor
7 (Plaintiff) appropriate use of his arm brace. Releasor
8 shall have appropriate use of the arm brace until his
9 medical needs require otherwise.

10 2. The Releasees further agree to refer Releasor to a
11 pain management specialist at UC Davis clinic for a pain
12 management examination and consultation. The Releasees
13 further agree to implement the pain management regimen
14 recommended by the specialist, and to continue doing the
15 pain management regimen until Releasor's medical needs
16 change.

17 3. The Releasees agree to reinstate Releasor's receipt of
18 the physical therapy he was previously receiving to
19 rehabilitate his arm. The physical therapy shall
20 continue until a change in Releasor's medical needs
21 contraindicate the therapy.

22 2002 Settlement Agreement, ¶ 4.

23 Plaintiff testified that, at the time he entered into the 2002
24 Settlement Agreement, he intended to agree to resolve his medical
25 claims against the CDCR in exchange for a referral by the CDCR to a
26 neutral, third-party pain management specialist for an examination,
27 a consultation, and a recommendation of a pain management regimen.
28 Plaintiff also intended that the CDCR would follow the recommended
regimen until his medical needs changed such that the regimen was
no longer necessary. Plaintiff testified that he agreed to UC
Davis medical clinic as a reputable, neutral third party
specialist. The CDCR did not put on any witnesses to testify to

¹Defendant objects to many of the statements in Plaintiff's
declaration. The Court has reviewed these evidentiary objections
and has not relied on any inadmissible evidence.

1 the intent of the CDCR at the time it entered into the 2002
2 Settlement Agreement. Therefore, there is no dispute of extrinsic
3 evidence regarding the intent of the contracting parties at the
4 time the 2002 Settlement Agreement was signed.

5 The evidence adduced at trial established that the CDCR had
6 twice sent a written referral for Plaintiff to be seen by a pain
7 management specialist at the UC Davis clinic. The referral was not
8 accepted either time. UC Davis clinic doctor Paul Kreis testified
9 that the clinic denied the referral because it was too busy to
10 accept new patients. Without consulting Plaintiff about changing
11 his referral to a different medical clinic, the CDCR referred
12 Plaintiff to a clinic in Manteca. Plaintiff refused to go to the
13 clinic in Manteca. The CDCR failed to put on any evidence
14 regarding the kind or quality of medical care provided by the
15 Manteca medical clinic, or its independence from the CDCR.

16 The evidence also established that the CDCR had not provided
17 Plaintiff with a properly fitting arm brace and that it had
18 discontinued Plaintiff's physical therapy while it was still
19 beneficial to him.

20 I. Contract Interpretation

21 A. Legal Standard

22 A contract must be interpreted to give effect to the mutual
23 intention of the parties as it existed at the time of contracting.
24 Cal. Civ. Code § 1636. When interpreting a contract, the whole of
25 a contract is to be taken together, so as to give effect to every
26 part, each clause helping to interpret the other. Cal. Civ. Code
27 § 1641. A contract may be explained by reference to the
28 circumstances under which it was made, and the matter to which it

1 relates. Cal. Civ. Code § 1647. Particular clauses of a contract
2 are subordinate to its general intent. Cal. Civ. Code § 1650.

3 "It is solely a judicial function to interpret a written
4 instrument unless the interpretation turns upon the credibility of
5 extrinsic evidence." Parsons v. Bristol Dev. Co., 62 Cal. 2d 861,
6 865 (1965); De Guere v. Universal City Studios, Inc., 56 Cal. App.
7 4th 482, 501 (1997). The interpretation of a contract involves a
8 two-step process. Wolf v. Superior Court, 114 Cal. App. 4th 1343,
9 1351 (2004). First, the court provisionally receives all credible
10 evidence concerning the parties' intentions to determine if there
11 is an ambiguity. Id.; Pacific Gas & Elec. Co. v. G.W. Drayage &
12 Rigging Co., Inc., 69 Cal. 2d 33, 39-40 (1968). If, in light of
13 the extrinsic evidence, the court determines the language of the
14 contract is ambiguous, the extrinsic evidence is admitted to aid in
15 the second-step: interpreting the contract. Id. The trial court's
16 determination of whether there is an ambiguity is a question of
17 law. Wolf, 114 Cal. App. 4th at 1351. Likewise, the trial court's
18 resolution of an ambiguity is a question of law if no parol
19 evidence is admitted or the parol evidence is not in conflict. Id.
20 If the parol evidence is in conflict, the trial court's
21 interpretation is a question of fact. Id. When two equally
22 plausible interpretations of the language of the contract may be
23 made and the extrinsic evidence is contradictory, a question of
24 fact exists which must be resolved by a jury. Id.; see also City
25 of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375, 395
26 (2008) (interpretation of a contract is a judicial function when it
27 is based on the words of the instrument alone or when the extrinsic
28 evidence is not in conflict).

1 B. Analysis

2 The parties disputed the meaning of the term, "refer," in the
3 first sentence of ¶ 4.2 of the 2002 Settlement Agreement, which
4 reads, "The Releasees further agree to refer Releasor to a pain
5 management specialist at UC Davis clinic for a pain management
6 examination and consultation." The parties also disputed the
7 meaning of the term, "contraindicate," in the second sentence of
8 ¶ 4.3 of the Settlement Agreement, which reads, "The physical
9 therapy shall continue until a change in Releasor's medical needs
10 contraindicate the therapy."

11 The Court considered all proffered evidence regarding the
12 interpretation of these two terms. It concluded that the term
13 "refer" is ambiguous. It could mean, as urged by Plaintiff, that
14 the CDCR was required to ensure that Plaintiff would be examined by
15 a pain management specialist, or, as urged by the CDCR, that the
16 CDCR was required only to send a request to UC Davis for an
17 appointment for Plaintiff. Thus, the Court admitted all proffered
18 extrinsic evidence on the meaning of the word, "refer."

19 The only such evidence submitted was Plaintiff's testimony
20 regarding his intent at the time he signed the Settlement
21 Agreement. The CDCR did not put on evidence regarding its intent
22 at the time the contract was signed. Because there is no
23 contradictory extrinsic evidence, the Court interprets the term,
24 "refer," as a matter of law. By using the term, "refer," the
25 parties intended that the CDCR would arrange for an examination and
26 consultation with a neutral, third-party pain specialist at the UC
27 Davis clinic, who would then recommend a pain management regimen
28 for Plaintiff which the CDCR would follow, as described in the next

1 sentence of that paragraph. Thus, the word "refer" meant an
2 efficacious referral; if it meant otherwise, the second sentence in
3 the paragraph, which requires the CDCR to implement the recommended
4 pain management regimen until Plaintiff's medical needs changed,
5 would have no meaning or effect.

6 Furthermore, if the CDCR had used its best efforts to obtain a
7 consultation for Plaintiff, had failed and discontinued its
8 efforts, it would, in effect, be asserting the defense of
9 impossibility. Performance of a contract is excused where it is
10 prevented or rendered impossible by the conduct of the opposite
11 party. Taylor v. Sapritch, 38 Cal. App. 2d 478, 481 (1940).
12 However, where a party enters into a contract that cannot be
13 performed without the cooperation of a third person, performance is
14 not excused by the promising party's inability to secure the
15 cooperation of the third person; this is subjective impossibility
16 that does not excuse non-performance of a contract. Ocean Air
17 Tradeways, Inc. v. Arkay Realty Corp., 480 F. 2d 1112, 1117 (9th
18 Cir. 1973) (applying California law). Therefore, any defense that
19 the contract was impossible to perform because of the conduct of UC
20 Davis medical clinic fails.

21 With regard to the disputed term, "contraindicate," the Court
22 concludes that it is not ambiguous and that it means what the
23 dictionary says it means: to indicate against the advisability of a
24 particular remedy or treatment. See Webster's Third New
25 International Dictionary 495 (1993). The medical testimony at the
26 trial was in accord. The phrase containing the word
27 "contraindicate" cannot mean, as urged by the CDCR, "Plaintiff no
28 longer has a medical necessity for physical therapy." The parties

1 used three different formulations in the Settlement Agreement to
2 address future changes: "use of the arm brace until his medical
3 needs require otherwise," (¶ 4.1) continue the pain management
4 regimen "until Releasor's medical needs change," (¶ 4.2) and the
5 "contraindicate" language in ¶ 4.3. These different formulations
6 must be construed to express different meanings, and contraindicate
7 must be construed to connote more than simply that the physical
8 therapy is no longer needed. Accordingly, the sentence, "The
9 physical therapy shall continue until a change in Releasor's
10 medical needs contraindicate the therapy," means that the CDCR will
11 continue the physical therapy that Plaintiff was receiving as of
12 the date of the Settlement Agreement unless that therapy became
13 inadvisable or no longer beneficial to Plaintiff. The CDCR
14 complains that this is burdensome and unreasonable; however, the
15 CDCR agreed to the settlement.

16 II. Judgment as a Matter of Law on Breach of Contract

17 Under Federal Rule of Civil Procedure 50(a), the district
18 court may grant judgment as a matter of law at any time before the
19 case is submitted to the jury if "there is no legally sufficient
20 evidentiary basis for a reasonable jury to find for that party on
21 that issue . . ." Fed. R. Civ. Proc. 50(a).

22 Given the interpretation of the contract, as discussed above,
23 at the close of all evidence, the Court concluded that no evidence
24 had been presented that would allow a reasonable jury to find for
25 Defendant Cate on the breach of contract claim.

26 The Court found that the CDCR breached the 2002 Settlement
27 Agreement by failing to make sufficient efforts to arrange for an
28 examination and consultation with a pain management specialist at

1 the UC Davis clinic. Because it did not arrange the examination,
2 it also did not fulfill its obligation to follow a regimen
3 recommended by a specialist. The CDCR also breached the contract
4 by failing to provide Plaintiff with an appropriate arm brace, in
5 that it was undisputed that the arm brace Plaintiff had did not fit
6 properly and could not be used. Because the physical therapist had
7 ordered exercises with a therapeutic ball and band as part of
8 Plaintiff's therapy, and because there was no evidence that these
9 exercises were contraindicated, the CDCR breached the Settlement
10 Agreement by discontinuing the orders that allowed Plaintiff to
11 exercise with the therapeutic ball and band. Finally, the CDCR
12 breached the Settlement Agreement by discontinuing Plaintiff's
13 regular visits to the physical therapist and concomitant use of the
14 therapeutic hot whirlpool treatments because there was no evidence
15 that these treatments were contraindicated.

16 III. Specific Performance

17 Plaintiff seeks specific performance of the 2002 Settlement
18 Agreement.² Specific performance of a contract may be decreed
19 whenever: (1) its terms are sufficiently definite;
20 (2) consideration is adequate; (3) there is substantial similarity
21 of the requested performance to the contractual terms; (4) there is
22 mutuality of remedies; and (5) the plaintiff's legal remedy is
23 inadequate. Blackburn v. Charnley, 117 Cal. App. 4th 758, 766

24
25 ²Plaintiff also asks the Court to order the CDCR to provide
26 him with thermal underwear, a typewriter and daily showers. These
27 provisions were not included in the 2002 Settlement Agreement. At
28 issue is the 2002 Settlement Agreement--whether it was breached
and, if so, the appropriate remedy for that breach. Thus, any
items not included in the 2002 Settlement Agreement are beyond the
scope of this order.

1 (2004).

2 In this case, the terms of the 2002 Settlement Agreement are
3 sufficiently definite; the consideration, that Plaintiff release
4 the CDCR from liability for the claims in case number
5 C 97-1107 CW, is adequate; there is substantial similarity of the
6 requested performance to the contractual terms; there is a
7 mutuality of remedies; and Plaintiff's legal remedy is inadequate
8 in that money damages are not adequate to compensate Plaintiff for
9 further degeneration of his arm and his future pain and suffering
10 caused by the CDCR's failure to perform its obligations under the
11 2002 Settlement Agreement.

12 Citing Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 905
13 (2002), the CDCR argues that Plaintiff is not entitled to specific
14 performance because he sought money damages for the breach of the
15 2002 Settlement Agreement, and the jury found that he had not been
16 harmed by the breach and, thus, awarded no damages. Therefore, he
17 is not entitled to "a second bite of the apple." For breach of
18 contract, a plaintiff can choose the remedy of specific performance
19 or monetary damages. Union Oil Co. of Cal. v. Greka Energy Corp.,
20 165 Cal. App. 4th 129, 135 (2008). In Mycogen, the court held that
21 a party may not obtain both specific performance and damages for
22 the same breach of contract because it would constitute a double
23 recovery. Id. However, the court distinguished the situation in
24 which a plaintiff may recover both specific performance and damages
25 for delay in the commencement of the defendant's performance. Id.
26 at 906. Furthermore, a plaintiff does not have to suffer monetary
27 damages in order to have a right to specific performance. Union
28 Oil, 165 Cal. App. 4th at 135.

1 Here, after the close of evidence, the Court informed the jury
2 that it had found that the 2002 Agreement had been breached as a
3 matter of law and that it would order the CDCR to follow the terms
4 of the agreement. The Court instructed the jury that it could
5 award damages to Plaintiff for the past pain and suffering caused
6 by the CDCR's failure to perform the 2002 Settlement Agreement from
7 2002 to the present. The jury did not do so. However, the jury
8 could not have awarded future damages because it was instructed
9 that the CDCR would be required to perform the terms of the
10 contract.

11 The CDCR argues that Plaintiff cannot obtain specific
12 performance because he has served notice of his intention to move
13 for a new trial on damages. Because that motion has not been
14 filed, this argument is unpersuasive.

15 Citing Barndt v. County of Los Angeles, 211 Cal. App. 3d 397,
16 403-04 (1989), the CDCR argues that Plaintiff cannot obtain
17 specific performance because this remedy is not available to
18 procure personal services or the act of a third person.
19 Plaintiff's request for physical therapy is for a personal service
20 and his request for a pain consultation requires procuring the act
21 of a third person. Barndt is not applicable here. In Barndt, the
22 issue was the breach of a settlement agreement regarding the
23 plaintiff's appointment as a doctor in the cardiology section of a
24 hospital. Id. at 400-01. In applying the rule against specific
25 performance of personal service contracts, the court explained that
26 this rule evolved for several reasons: the difficulty for courts to
27 judge the quality of the work performed; the avoidance of friction
28 and social costs that often result when employer and employee are

1 reunited in a relationship that has previously failed; and the
2 avoidance of a situation that might involve involuntary servitude.
3 Id. at 403-04. None of these reasons applies here. Plaintiff is
4 not seeking the enforcement of an employment contract. Rather, the
5 2002 Settlement Agreement was entered into to settle disputes
6 regarding the inadequate medical care the CDCR was providing to
7 Plaintiff for the treatment of his serious medical needs. As
8 discussed below, the Court need not judge the quality of the
9 treatment Plaintiff receives; that will be accomplished by the pain
10 consultant and Plaintiff's doctor. Involuntary servitude is not an
11 issue; the Settlement Agreement does not require that any
12 particular person perform services. It requires that the CDCR
13 procure and pay for certain medical care for Plaintiff.

14 In sum, all of Defendant's arguments against specific
15 performance fail.

16 Therefore, the Court orders the following: (1) Within one
17 week from the date of this order, the CDCR shall begin the process
18 of obtaining for Plaintiff a custom-made³ properly-fitting arm
19 brace. (2) Within one month from the date of this order, the CDCR
20 shall provide Plaintiff with the properly fitting arm brace.
21 Plaintiff shall be allowed to use this brace until such time as a
22 qualified health care provider not employed by the CDCR certifies
23 to the Court in writing that his medical needs require otherwise.
24 If the brace becomes worn or damaged or no longer fits, it shall be
25 promptly replaced by a new custom-made brace. (3) Within one week
26 from the date of this order, the CDCR shall reinstate Plaintiff's

27 ³Defendant's expert testified that an arm brace for Plaintiff
28 would have to be custom-made.

1 physical therapy two times per week, consisting of the whirlpool
2 treatments he was receiving as of May 24, 2002, the date of the
3 Settlement Agreement. That therapy shall continue until
4 Plaintiff's medical needs contraindicate the therapy, that is,
5 until a physical therapist not employed by the CDCR certifies in
6 writing to the Court that the therapy is no longer beneficial to
7 Plaintiff. Plaintiff shall also be allowed to exercise with the
8 theraband and theraball in his cell, and this equipment shall be
9 replaced as necessary. (4) Within one week from the date of this
10 order, the CDCR shall refer Plaintiff to a pain management
11 specialist at the UC Davis clinic, and use its best efforts⁴ to
12 ensure that Plaintiff is accepted for a consultation at the clinic.
13 (5) If, within three months from the date of this order, despite
14 the CDCR's best efforts, the UC Davis clinic does not accept
15 Plaintiff for a consultation, the CDCR shall use its best efforts
16 to refer Plaintiff to a pain management specialist at the

17
18 ⁴For example, the CDCR should inform the UC Davis doctors and
19 legal department of the following circumstances of the case: A UC
20 Davis clinic consultation was offered by the state as part of a
21 settlement for a prior lawsuit alleging deliberate indifference to
22 serious medical needs and the state is thus obliged to provide it.
23 Plaintiff was initially injured in a shooting by a prison guard
24 that a prior jury found amounted to a civil rights violation. The
25 medical care he received from a prison doctor after the shooting
26 was found by the same jury to constitute medical malpractice.
27 Another jury has recently found that the medical care and pain
28 management Plaintiff has been receiving for the last three years
has constituted deliberate indifference to serious medical needs
and medical malpractice. Because of the state's responsibility for
the past mistreatment of Plaintiff, the federal Court and the state
are very desirous of ensuring that Plaintiff and the prison medical
staff are advised of the best course of treatment to follow and are
confident that UC Davis medical staff can provide a regimen in
which all concerned will have confidence. Further, top-ranking
CDCR medical staff should take advantage of their personal and
professional courtesy relationships with UC Davis medical staff to
persuade them to accept Plaintiff for a consultation.

1 University of California at San Francisco (UCSF), and, if within
2 three months thereafter, UCSF does not accept Plaintiff for
3 consultation, the CDCR must use its best efforts to ensure that
4 Plaintiff is referred to and seen by a pain management specialist
5 acceptable to Plaintiff and to Dr. Corey Weinstein. If Plaintiff
6 is not seen by a pain management specialist within three months
7 thereafter, the CDCR shall apply to this Court for guidance.

8 (6) Within one week from obtaining a pain management regimen
9 recommended by the UC Davis or UCSF clinic or another mutually
10 acceptable pain management specialist, the CDCR shall implement the
11 specialist's recommended pain management regimen and continue that
12 regimen until Dr. Weinstein or the specialist and the CDCR's
13 physician concur in the opinion that Plaintiff's medical needs have
14 changed such that the regimen should be changed or discontinued.

15 (7) Within one week from the date of this order and until Plaintiff
16 is seen by a pain management specialist and his recommended regimen
17 has commenced, the CDCR shall reinstate the pain medication order
18 that was in effect as of the date Dr. Sayre discontinued
19 Plaintiff's prescription for Tramadol, unless Plaintiff consents,
20 in writing, to a change in the pain medication prescription or the
21 CDCR applies in writing to the Court for a change with written
22 justification from a qualified medical doctor.

23 The Court shall retain jurisdiction to enforce this order.
24 Beginning two weeks from the date of this order and every three
25 months thereafter, the CDCR shall submit a report to the Court,
26 served on Plaintiff, indicating the status of its performance of
27 the 2002 Settlement Agreement and the Court's order. If disputes
28 arise regarding compliance with the Settlement Agreement or this

1 order, the Court will appoint Magistrate Judge Nandor Vadas to
2 conduct an evidentiary hearing at the prison and report to the
3 Court.

4 The clerk of the court shall enter judgment. Plaintiff shall
5 recover his costs of action.

6

7 IT IS SO ORDERED.

8

Claudia Wilken

9 Dated: February 4, 2010

CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 ASHKER,

5 Plaintiff,

6 v.

7 ALAMEIDA ET AL et al,

8 Defendant.

Case Number: CV05-03759 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on February 4, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Todd A. Ashker C58191
16 Pelican Bay State Prison
17 Box 7500
18 D1-119
19 Crescent City, CA 95532

20 Dated: February 4, 2010

21 Richard W. Wieking, Clerk
22 By: Ronnie Hersler, Deputy Clerk
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