IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, PAULETTE BOSCH, DENISE VOS, CRISA BROWN, LATRECE BAKER, TAMMY SPEERS, LONDORA KITCHENS, STASHIA COLLINS, ANDREA DORN, JUDY PAULEY, and DELILAH WICKLIFFE, individually and on behalf of all similarly situated persons,

Plaintiffs,

vs.

MUSKEGON COUNTY, a municipal corporation; DEAN ROESLER, in his official capacity as Muskegon County Sheriff; LT. MARK BURNS, in his official capacity as Jail Administrator; CORRECTIONAL OFFICERS IVAN MORRIS, GRIEVES, DEYOUNG, and DAVID GUTOWSKI, in their individual capacities; and UNKNOWN CORRECTIONAL OFFICERS, in their individual capacities,

Defendants.

CASE NO: 1:14-cv-01245-JTN

HON. JANET T. NEFF

_____/

PLAINTIFFS' RESPONSE TO DEFENDANTS' REQUEST FOR PRE-MOTION CONFERENCE FOR SUMMARY JUDGMENT

I. Introduction

Defendants' "request for pre-motion conference for summary judgment" seeks permission to file both a (partial) summary judgment motion under Fed. R. Civ. P. 56, and a motion for (partial) judgment on the pleadings under Fed. R. Civ. P. 12(c). Only the latter is procedurally proper at this time, and on the merits it should be denied.

II. Defendants' Motion for Summary Judgment Is Premature Because No Discovery Has Taken Place.

A summary judgment motion is to be considered only "after adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Summary judgment must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) ("full opportunity to conduct discovery" must precede summary judgment); *Bell v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) ("[The] plaintiff must receive a full opportunity to conduct discovery to be able to successfully defeat a motion for summary judgment."). "Typically, when the parties have no opportunity for discovery, . . . ruling on a summary judgment motion is likely to be an abuse of discretion." *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008).

Defendants here seek summary judgment on their version of the facts without plaintiffs having any opportunity to conduct depositions or review jail records. For example, defendants argue that "[t]he evidence will establish that whenever Defendants were aware of an issue with toilets, sewage, drainage, showers, or other physical conditions, immediate steps were taken to alleviate the problem." Dkt. 28, ¶ 8. But the Court cannot know what the "evidence will establish" until after the evidence is obtained through the process of discovery. Because allowing defendants to file a premature summary judgment motion would waste judicial resources, plaintiffs ask that the Court restrict defendants to a motion under Fed. R. Civ. P. 12(c).

III. Defendants Cannot Prevail on a Motion for Judgment on the Pleadings Because the Facts, as Alleged by Plaintiffs, State Plausible Claims for Relief.

"The standard of review for a judgment on the pleadings is the same as that for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001). The court must "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true," *id.*, and determine whether the complaint "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 55, 570 (2007). To prevail, defendants must establish that the facts alleged – pervasive cross-gender viewing, denial of exercise for weeks or months, routine failure to provide hygiene products, and abysmal conditions – are constitutionally permissible.[1]

Defendants cannot prevail on a Rule 12(c) motion because the facts alleged by plaintiffs clearly violate the Constitution. The conditions of confinement – which include sewage spilling into cells, infestations of vermin, non-functional plumbing, and routine exposure to the blood, feces, and vomit of other inmates – pose a substantial risk of serious harm to the health and safety of inmates. *Brown v. Plata*, 131 S. Ct. 1910, 1933 (2011); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Female inmates are denied out-of-cell exercise, even though "a total or near-total deprivation of exercise or recreational opportunity, without penological justification" violates Eighth Amendment guarantees." *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983). Similarly, the denial of hygiene products violates the Constitution, which requires that jails provide "the basic elements of hygiene." *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991). Defendants cannot defeat this claim by mischaracterizing plaintiffs' complaint as alleging

[1] Defendants cannot rely on their own version of the facts. For example, while defendants intend to argue that "the fact of regular distribution" of feminine hygiene products defeats plaintiffs' claims, Dkt 28, ¶ 7, that "fact" directly contradicts plaintiffs' allegations that defendants routinely fail to provide adequate feminine hygiene products. 1st Am. Comp., Dkt. 18 ¶¶108-129.

only "single, temporary, delayed deliver[ies]," Dkt 28, ¶2, when plaintiffs have alleged a widespread, routine failure to provide timely or adequate access to hygiene products. Finally, defendants do not even mention cross-gender viewing (Count I) in their pre-motion conference request. If the Court nevertheless permits them to seek judgment on that issue, their argument would be meritless. *See Everson v. Mich. Dep't of Corrs.*, 391 F.3d 737, 756-57 (6th Cir. 2004) ("degradation [of cross-gender viewing] is not to be visited upon those confined in our prisons").

IV. Defendants' Motion Should Relate to the Claims Actually Brought by the Plaintiffs.

Defendants' request for pre-motion conference fails to make clear on what claims they seek judgment.[2] Plaintiffs' amended complaint clearly delineates five causes of action: 1) violation of privacy and bodily integrity; 2) denial of exercise; 3) denial of hygiene products; 4) abysmal conditions of confinement; and 5) the unlawful incarceration of Michelle Semelbauer. Yet defendants' pre-motion filing suggests they are seeking judgment on claims that do not exist. For example, defendants apparently seek judgment on a non-existent grievance system claim. While defendants utterly non-functional grievance system is *evidence* of defendants' deliberate indifference, plaintiffs have not filed a claim based that non-functional system. Similarly, the fact that defendants have violated the Michigan County Jail Overcrowding State of Emergency Act (JOA) on almost uninterrupted basis for the last four years is *evidence* of the abysmal conditions. 1st Amen. Compl., Dkt. 18 ¶¶ 159-78. But plaintiffs have not brought a claim under the JOA. Defendants should not be allowed to file for judgment on claims plaintiffs did not bring.

[2] Of plaintiffs' five causes of actions, most involve both damages and injunctive claims and both individual and class claims. Some involve claims by particular named plaintiffs against particular individual defendants. For example, on the cross-gender viewing claim, the Female Injunctive Class seeks declaratory and injunctive relief, the Female Damages Class and named plaintiffs seek damages against the municipal defendants, and plaintiffs Vos and Collins seeks damages against, respectively, defendants Gutowski and DeYoung. At the pre-motion conference, defendants should be required to specify on what claims they seek judgment, i.e. on which causes of action by which plaintiffs against which defendant and for what types of relief.

Respectfully submitted,

By: /s/ Miriam J. Aukerman

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