At a Special Term of the Supreme Court of the State of New York held for the County of Broome at the Broome County Courthouse in Binghamton, New York on July 29, 2022.

PRESENT: HON. OLIVER N. BLAISE, III
JUSTICE, SUPREME COURT

STATE OF NEW YORK
SUPREME COURT :: BROOME COUNTY

JUSTICE AND UNITY FOR THE SOUTHERN TIER,

Plaintiff,

vs.

DAVID HARDER, Broome County Sheriff,

Defendant.

DECISION AND ORDER

Index No. EFCA2022000924
RJI Year 2022

APPEARANCES:

COUNSEL FOR PLAINTIFF:
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HON. OLIVER N. BLAISE, III, J.S.C.

This Decision and Order addresses plaintiff Justice and Unity for the Southern Tier's motion seeking a preliminary injunction pursuant to CPLR § 6301 to restore in-person visitation for pre-trial detainees at the Broome County Jail ("the Jail") with reasonable safety protocols.[1] Defendant, David Harder, Broome County Sheriff, opposes plaintiff's motion.

BACKGROUND

This action was commenced on May 11, 2022 by the filing of a summons and complaint, subsequently amended, containing two causes of action, namely violations of Article 1, § 6 and § 8, of the New York State Constitution. Plaintiff seeks a preliminary and permanent injunction to re-open in-person visitation for pre-trial detainees, together with a declaratory judgment that the policy of failing to offer such visits violates the New York Constitution. Defendant interposed a verified answer, together with opposition to the motion for a preliminary injunction. Plaintiff's motion for a preliminary injunction was returnable before the court on June 29, 2022. Post-argument submissions were directed by the court and the matter was deemed fully submitted on July 29, 2022.[2]

By way of background, before the COVID-19 pandemic, the Jail held in-person visitation hours for inmates housed therein Monday through Friday from 9:00 a.m. to 10:00 p.m., subject

[1]The court's decision addresses only pre-trial detainees at the Jail, not any convicted inmates including state ready prisoners.

[2]The court also held attorney conferences in an attempt to guide the parties to an amicable resolution, but the parties were either unable or unwilling to make concessions.

to various protocols including the requirement that visitors sign-in and undergo screening by corrections staff.[3]

In March 2020, defendant canceled all in-person visitation at the Jail in an effort to prevent the spread of COVID-19 among inmates and staff. In place of in-person visitation, defendant provided inmates with electronic means, such as phone calls and video tablets, to communicate with their families and contacts outside the Jail. Over two years later, at the time of the filing of this action in May 2022, defendant continues the electronic only form of visitation (with certain non-contact exceptions not relevant here), refuses to reinstate in-person visitation, and has continued the complete restriction on in-person visitation at the Jail.

In the motion before the court, plaintiff contends that a preliminary injunction resuming in-person visitation at the Jail is not only proper, but required, due to the prevalence of vaccinations in the general population, the relative decline in COVID-19 cases and hospitalizations, the enhanced scientific knowledge about the COVID-19 virus and its transmission, and the loosening of restrictions on in-person contact at other county and state prison facilities, as well as at nursing homes, schools, courthouses and private venues. In opposition, defendant represents that the decision to prohibit in-person visitation at the Jail "[i]s to attempt to prevent the spread of COVID-19 between visitors and inmates with the goal of reducing the risk to inmates in the facility and the public" (NY St Cts Elec Filing [NYSCEF] Doc No. 14, ¶ 6).

[3]The Jail's visitation policy, pre-pandemic, is set forth in its inmate handbook, which is available online and cited in plaintiff's amended complaint [justicest.com/wp-content/uploads/2020/07/Handbook-foil-7-2-20.pdf] (NY St Cts Elec Filing Doc No. 4, n 1).

DISCUSSION

Plaintiff has moved for a preliminary injunction directing defendant to resume in-person visitation for pre-trial detainees at the Jail, with reasonable COVID-19 safety precautions. Defendant opposes plaintiff's motion on the merits, as well as asserting that plaintiff lacks standing to bring the present action. The court will first address defendant's argument regarding standing before addressing the substance of plaintiff's motion.

I. STANDING

Defendant asserts that plaintiff lacks standing to challenge visitation restrictions at the Jail because it is the inmates' personal right to visitation at issue and no individual inmates are named as plaintiffs herein. Defendant relies on two cases from the Third Department in support of the position that individual inmates at the Jail must be named as plaintiffs to challenge the defendant's visitation restrictions (*Matter of Grigger v Goord*, 27 AD3d 803 [3d Dept 2006], *lv denied* 7 NY3d 702 [2006]; *Matter of Cortorreal v Goord*, 36 AD3d 1005 [3d Dept 2007], *lv denied* 8 NY3d 811 [2007]).

The court disagrees with defendant's position. In *Grigger* and *Cortorreal*, the cases relied upon by defendant, the Third Department dismissed inmate claims that denial of visitation by inmates' family members, who had transgressed prison visitation policies, violated the visitors' constitutional rights. According to the Third Department, the exclusion of specific family members was not an undue restriction of the *inmates'* right to receive visitors because the restriction was limited to those individuals – the visitors - who had violated prison rules. In fact, *Grigger* makes clear that *visitors* have standing to challenge the denial of jail visitation (*Grigger*,

27 AD3d at 803). The record here reflects that plaintiff provides a visitation program where members of plaintiff meet with inmates that may not otherwise receive visitors and, as such, plaintiff qualifies as a visitor (NYSCEF Doc No. 4, ¶ ¶ 62-64).

However, plaintiff, a non-for-profit organization, can challenge defendant's visitation policy as a visitor only if it satisfies the general standing requirements for organizations. For a group to have standing, it "[m]ust show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members [citations omitted]" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Here, the court finds that plaintiff meets the requirements for standing. First, as noted, it has been recognized that a visitor has standing to challenge the denial of jail visitation (*Grigger*, 27 AD3d at 803). Thus, any member of the corporate plaintiff would have the right to sue defendant because the blanket denial of visitation prohibits everyone - including plaintiff's members - from visiting any prisoner at the jail. Second, plaintiff's express purpose as a not-for-profit corporation is supporting those incarcerated at the Jail. Third, the participation of an individual member of the plaintiff corporation is unnecessary since plaintiff is challenging a policy that applies to all its members, as well as the public at large, and is seeking only injunctive relief (*Dezer Entertainment Concepts, Inc. v City of New York*, 8 AD3d 37 [1st Dept 2004], *lv dismissed* 3 NY3d 700 [2004]).

Based on the forgoing, the court finds that defendant's challenge to plaintiff's standing is without merit and is dismissed.

II. PRELIMINARY INJUNCTION

Plaintiff's motion for a preliminary injunction seeks to compel defendant to resume in-person visitation for pre-trial detainees at the Jail. It is well-settled that a moving party can obtain a preliminary injunction by demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits of the claims asserted, (2) that irreparable harm will result if the relief sought is not granted, and (3) a balancing of the equities in the movant's favor (*Doe v Axelrod,* 73 NY2d 748 [1988]; CPLR § 6301). The fundamental purpose of a preliminary injunction is not to give a plaintiff the relief sought in the plenary action, but to preserve the status quo and prevent irreparable damage until a decision can be reached on the merits (*Matter of Heisler v Gingras*, 238 AD2d 702 [3d Dept 1997]).[4]

A. Likelihood of Success on the Merits

Both sides agree that pre-trial detainees have a right to in-person visitation under the State Constitution (*Cooper v Morin*, 49 NY2d 69 [1979], *rearg denied* 49 NY2d 901 [1980], *cert denied* 446 US 984 [1908]).

As plaintiff argues, the widespread availability of vaccines, increased knowledge about safety protocols (*e.g.*, effective masking, social distancing, temperature checks, health screening), lower rates of infections, effective treatments for those infected with COVID-19, *etc.*, mitigate in favor of restoring in-person visitation with reasonable and appropriate safety measures. Indeed, the guidelines for jails promulgated by the Center for Disease Control and

[4]Evidentiary hearings to determine preliminary injunctions are permissible, but not mandatory (Siegel, NY Prac § 328 at p 598 [6th ed 2018]). Here, the parties agreed that an evidentiary hearing was not necessary, and the motion could be decided on the papers submitted.

Prevention ("CDC"), on which both parties rely, does not recommend the long term suspension of contact visitation.[5] Taken together, the court finds these factors demonstrate plaintiff's likelihood of success on the merits.

In opposition, defendant cites the risk of spreading COVID-19 within the Jail as the basis for the blanket prohibition of all contact visitation. While this may have been sufficient justification for restricting all in-person visitation at the Jail in March 2020, defendant has failed to account for significantly changed circumstances since that time. The court finds that defendant has failed to adequately rebut plaintiff's argument that COVID-19 conditions no longer necessitate an absolute ban on in-person visitation, let alone impact safety issues within the Jail. Stated another way, the court finds defendant has failed to meet the "exacting standard" of a "compelling governmental necessity" needed to curtail a recognized liberty interest, namely a pre-trial detainees right to in-person visitation (*People ex rel. Schipski v Flood*, 88 AD2d 197, 199 [2d Dept 1982]).[6] To the extent that the cost of resuming in-person visitation for pre-trial detainees is a reason for defendant's position, *Cooper* makes clear that the costs associated with restoring in-person visitation cannot be used as an impediment to prisoner's and visitor's liberty interests (*Cooper*, 49 NY2d at 81-82). Moreover, simply asserting that a risk of COVID-19 transmission exists, which appears to be the essence of defendant's defense, is insufficient to restrict the significant liberty interests guaranteed both pre-trial detainees and visitors.

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[5]For example, the CDC's *Guidance of Prevention and Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* calls for reducing contact between the facility and the community to prevent transmission "for short-term periods" and urges facilities to "consider the impact of prolonged restrictions on mental health and well-being for residents . . ." (NYSCEF Doc No. 16, p 7).

[6]A compelling government necessity typically concerns "the maintenance of security" (*Cooper*, 49 NY2d at 81).

In view of the foregoing, the court finds that plaintiff has demonstrated a likelihood of success on the merits.

B. Irreparable Harm

For the reasons set forth above and based on the fundamental liberty interest at stake for both pre-trial detainees and visitors, as expressed in *Cooper* and *Grigger*, the court finds plaintiff has demonstrated that irreparable harm will result if in-person visitation for pre-trial detainees and visitors at the Jail is not resumed promptly with adequate safety protocols.

C. Balancing of Equities

The court has considered the parties' arguments on the balancing of the equities and finds that the equities of resuming in-person visitation for pre-trial detainees and visitors weigh in plaintiff's favor when measured against defendant's generalized concerns about the risk of transmitting COVID-19 within the Jail.[7]

Based upon consideration of the foregoing factors, the court finds plaintiff's motion for a preliminary injunction should be granted and directs defendant to resume in-person visitation for pre-trial detainees and visitors at the Jail pursuant to the terms of the Jail's own inmate handbook, namely the schedule set forth at pages 15-16 thereof (NYSCEF Doc No. 4, n 1). The court further directs that in-person visitation for pre-trial detainees and visitors at the Jail is to be

[7]Plaintiff also argues, and the court agrees, that in weighing the equities, defendant has failed to account for its complete restriction on contact visitation in light of numerous other similarly situated facilities, such as nursing homes, schools, courts, sporting and entertainment venues, *etc.*, where in-person and larger scale gatherings have resumed.

reinstated no later than September 5, 2022. Defendant may put in place any reasonable safety protocols that are recommended or required by the CDC, Department of Corrections and Community Supervision, or other pertinent federal, state or local agencies. Said protocols are to be the least restrictive means given the circumstances. Furthermore, defendant will have discretion to restrict, modify, or suspend in-person visitation in response to determinations by applicable county, state or federal authorities of an elevated risk of COVID-19 transmission that is impactful to the Jail, but shall be accomplished by the least restrictive means under the circumstances and for the least amount of time.

Finally, pursuant to CPLR § 6312 (b), plaintiff shall give an undertaking prior to the granting of a preliminary injunction. Upon the exercise of the court's discretion, the court finds that a nominal undertaking is proper given plaintiff's non-for-profit status and the lack of any allegations of damages to which defendant would be entitled in the event the injunction is ultimately deemed unwarranted. Under the circumstances, the court finds a nominal undertaking of $500.00 should be imposed.

CONCLUSION

In view of the foregoing, plaintiff's motion for a preliminary injunction is GRANTED to be effective as of September 5, 2022, subject to the terms of this Decision and Order. Plaintiff shall file an undertaking in the amount of $500.00 to be filed with the Broome County Clerk, as Clerk of the Supreme Court, Broome County, within ten (10) days of the date of this Decision and Order and prior to the effective date of the preliminary injunction. Plaintiff shall serve a copy of the undertaking on defendant.

The parties are directed to confer and submit a proposed discovery schedule for the litigation of this action based on a form to be provided by the court.

HON. OLIVER N. BLAISE, III
Justice, Supreme Court

Dated: August 18, 2022
Binghamton, New York

All papers submitted in connection with this motion, and the Decision and Order, have been electronically filed with the Broome County Clerk through the NYSCEF System.