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United States District Court, S.D. New York.

Thomas HIGGINS, Plaintiff,
v.
Philip COOMBE Jr., Acting Commissioner of the New York State Department of Correctional Services; Christopher Artuz, Superintendent of Green Haven Correctional Facility; Dr. Beckles, Physician at Green Haven Correctional Facility; D. Bliden, Deputy Superintendent of Programs at Green Haven Correctional Facility; Bushek, Deputy Superintendent of Administration at Green Haven Corr. Fac. Individually and in Their Official Capacities, Defendants.

No. 94 CIV. 7942 (MGC). | Sept. 4, 1996.

Attorneys and Law Firms

Thomas Higgins, Attica, New York, pro se.

Dennis C. Vacco, Attorney General of State of New York, New York City by Robert F. Bacigalupi, Assistant Attorney General, for defendants.

Opinion

MEMORANDUM OPINION AND ORDER

CEDARBAUM, District Judge.

***1** This is an action by a state prisoner under 42 U.S.C. § 1983 for damages and injunctive relief against prison officials and a prison doctor in their personal and official capacities. Plaintiff claims that defendants deprived him of his rights under the Eighth and Fourteenth Amendments including his right to access to the courts. Defendants have moved for summary judgment. Because defendants' papers do not address the claim of interference with plaintiff's access to the courts, I construe defendants' motion to be a motion for partial summary judgment limited to plaintiff's other claims. For the reasons that follow, defendants' motion is granted.

Background

It is undisputed that in 1994, plaintiff injured his ankle while playing handball on the handball court at Green Haven Correctional Facility, where he was an inmate. Plaintiff was sent to an outside hospital and received surgery to reattach his achilles tendon. Plaintiff characterizes this surgery as "successful." Upon his release from the hospital, plaintiff was required to spend three days in the Green Haven infirmary before being returned to his cell.

Plaintiff's complaint alleges a number of violations of his constitutional rights by Green Haven officials and a Green Haven doctor. Specifically, plaintiff complains that the following violated his Eighth Amendment rights:

1. Christopher Artuz, D. Bliden, and Bushek failed to repair the Green Haven handball court, thereby causing the injury to plaintiff's ankle.

2. Green Haven officers, following a prison policy, prevented plaintiff from bringing with him an undescribed "therapeutic device" that he received from the hospital to help him stop smoking.

3. Artuz, Bliden, and Bushek failed to provide plaintiff with clean clothing to wear upon his release from the hospital—plaintiff alleges he had to wear the dirty clothing in which he was injured for three days.

4. Mice "were running all over the place" in the Green Haven infirmary, creating an unsanitary condition.

5. Dr. Beckles prohibited plaintiff from receiving items prescribed by the doctor at the outside hospital, including pain medication and pillows to elevate his ankle.

6. Plaintiff was provided with crutches rather than a wheelchair.

7. Although the doctor at the outside hospital stated that plaintiff's foot should not be exposed to cold, the prison superintendent and his agents failed to keep the temperature in the cell block sufficiently warm.

The complaint also alleges that the prohibition against taking the therapeutic device to Green Haven violated the consent judgment entered in *Milburn v. Coughlin,* 79 Civ. 5077 (RJW).

In addition, plaintiff claims that Artuz, Bliden, and Bushek deprived him of due process of law and equal protection of the law by failing to provide earphones and working wall plugs in the infirmary. The complaint alleges that while plaintiff was in the infirmary, he received a set of headphones that he had ordered but was unable to use because the wall plugs did not operate properly. It alleges further that inmates in the infirmary "were not issued headphones as the rest of the population

was." (Compl. at 9.)

***2** Finally, the complaint alleges that officials at Green Haven violated plaintiff's right to access to the courts. The complaint alleges that although the doctor who treated plaintiff at the outside hospital had stated that he could return to his cell, plaintiff was required to stay in the Green Haven infirmary for three days. Plaintiff alleges that his inability to return to his cell interfered with his efforts to complete a petition to the United States Supreme Court for a writ of certiorari that he was preparing in connection with his criminal case. Plaintiff claims that although Dr. Beckles was informed of his need to return to his cell to work on the petition, she refused to release him. (Compl. at 7–8.) He also alleges that Dr. Beckles told him that Green Haven policy required inmates returning from an outside hospital to stay in the infirmary regardless of whether observation was medically necessary. (*Id.* at 10.)

The complaint alleges further that on September 27, after he had returned to his cell, plaintiff gave his completed petition to Correction Officer Strothers (not a defendant) to be mailed by Express Mail on the next day, which was the deadline for filing the petition. According to the complaint, "Officer Strothers signed for the delivery of the [petition for the] Writ of Certiorari on the 27th, but ... it wasn't sent out until the 29th of September. This is a day after the deadline and they still charged the plaintiff for the overnight delivery." (Compl. at 12.) Plaintiff has affirmed under penalty of perjury that his petition was denied as untimely. (Pl's Affirmation in Opp. to Mot. for Summ.J. ¶ 13.)

Defendants move for partial summary judgment. Plaintiff filed an affirmation in opposition to the motion.

Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To defeat a motion for summary judgment by the party that does not bear the burden of proof, the party with the burden of proof must make a showing sufficient to establish the existence of every element essential to that party's claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In deciding whether a genuine issue of material fact exists, the court must "examine the evidence in the light most favorable to the party opposing the motion, and resolve ambiguities and draw reasonable inferences against the moving party." *In re Chateaugay Corp.,* 10 F.3d 944, 957 (2d Cir.1993) (citation omitted). In addition, because plaintiff proceeds pro se, I must read his papers liberally and "interpret them to raise the strongest arguments that they suggest." *Soto v. Walker,* 44 F.3d 169, 173 (2d Cir.1995) (citation and internal quotation marks omitted); *see also Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam) (pro se complaints held to less stringent standards than pleadings drafted by lawyers).

A. *Eighth Amendment*

***3** The Eighth Amendment prohibits prison officials from imposing prison conditions that involve the "wanton and unnecessary infliction of pain." *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981). A claim that prison officials violated the Eighth Amendment comprises two essential elements. The first element is a deprivation that is "sufficiently serious" to amount to a constitutional violation. *Farmer v. Brennan,* 114 S.Ct. 1970, 1977 (1994). A prison official's act or omission is sufficiently serious when it deprives a prisoner of "basic human needs" such as essential food, medical care, and sanitation. In other words, this element requires a deprivation of "the minimal civilized measure of life's necessities." *Rhodes,* 452 U.S. at 347–48.

The second element concerns the state of mind of the prison official. The required state of mind is "deliberate indifference" to inmate health or safety. *Wilson v. Seiter,* 501 U.S. 294 (1991). A prison official acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 114 S.Ct. at 1979.

As discussed below, plaintiff has proffered no evidence to show a genuine issue of material fact with respect to either element.

1. *Sufficiently Serious Deprivation*

a. *Failure to Repair the Handball Court.* Plaintiff has proffered no evidence concerning the condition of the handball court and has not even identified the specific cause of his injury on the handball court. Accordingly, plaintiff has not made a showing from which a fact finder could determine that the handball court was in such a state of disrepair that it presented a serious risk to inmate health or safety.

b. *Therapeutic Device.* Plaintiff also has proffered no evidence to show that the deprivation of the undescribed device provided to him by the hospital to assist him in giving up smoking was sufficiently serious to satisfy this

requirement. Plaintiff has made no showing that the absence of this device interfered with his basic human needs.

c. *Unsanitary Conditions—Failure to Provide Clean Clothing and "Rodent Problem."* Neither the failure to provide clean clothes upon a prisoner's release from the hospital nor the presence of rodents in the prison infirmary, without more, constitutes a sufficiently serious deprivation. Plaintiff has proffered no evidence to show that either of these conditions of his confinement resulted in his being deprived of "the minimal civilized measure of life's necessities."

d. *Failure to Provide Pain Medication, Pillows, and Wheelchair, and to Maintain Adequate Cell Temperature.* Plaintiff has proffered no evidence to show that the pain medication, pillows, wheelchair, and increased cell temperature were necessary to treat serious medical needs or to avert a serious injury. Plaintiff's affirmation does not include an avowal that he was in extreme pain while he was at Green Haven. Indeed, the allegation in the complaint that after plaintiff "illegally got some extra strength tylenol, which [didn't] relieve the pain" he completed a petition to the Supreme Court for a writ of certiorari suggests that plaintiff's pain was not disabling.

***4** Although there is no dispute that Green Haven officials failed to provide plaintiff with pillows to elevate his leg despite the doctor's instruction that the leg be elevated, plaintiff has proffered no evidence to show that the absence of pillows posed a serious risk to the healing of his ankle. Plaintiff does not assert that he did not keep his leg elevated while he was in the infirmary. His medical record for September 21, submitted by defendants, states "no extra pillows avail." and "Instructed I/m to roll up coat/blanket for leg elevation." (Mot. for Summ.J. Ex. A at 12.) Plaintiff has not made a showing that the deprivation of pillows was sufficiently serious to amount to an Eighth Amendment violation.

2. *Deliberate Indifference*

Even if one or more of plaintiff's claims alleged a deprivation sufficiently serious to satisfy the first element necessary to establish an Eighth Amendment violation, plaintiff has not proffered any evidence to satisfy the second. Plaintiff has proffered no evidence to show that defendants knew of and disregarded an excessive risk to his health or safety. Indeed, plaintiff's complaint includes allegations that suggest that the officials at Green Haven did not act with deliberate indifference. The complaint alleges that plaintiff was promptly taken to an outside hospital where "successful" surgery was performed on his achilles tendon. The allegations that plaintiff was kept in the Green Haven infirmary upon his return from the hospital and that while in the infirmary he "received his prescribed pain medication both at night and in the morning," (Compl. at 10), undermine plaintiff's contention that defendants were indifferent to his condition.

B. *Milburn v. Coughlin*

Plaintiff claims that the Green Haven officers' refusal to permit him to bring a "therapeutic device" with him to Green Haven violated the consent judgment entered in *Milburn v. Coughlin.* That judgment provides that Green Haven security officers shall not "confiscate any therapeutic device for which an inmate has written authorization in his possession" except when certain conditions are met. *Milburn v. Coughlin,* 79 Civ. 5077 (RJW), modified final judgment at 25 (Sept. 27, 1991). Assuming that plaintiff may sue under § 1983 for a violation of the *Milburn* judgment, plaintiff has neither alleged nor submitted any evidence to show that when he was released from the hospital, he had in his possession written authorization for the therapeutic device. Thus, he has not raised a genuine issue of fact that would defeat summary judgment on this issue.

C. *Due Process and Equal Protection*

Plaintiff alleges that the deprivation of working headphones and wall plugs violated the Fourteenth Amendment's guarantees of due process of law and equal protection of the law. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972). Plaintiff's interest in usable headphones and wall plugs is neither liberty nor property protected by the Fourteenth Amendment. Plaintiff has proffered no evidence to show that the actions of Green Haven officials with respect to headphones and wall plugs discriminated against him in violation of the Equal Protection Clause.

Conclusion

***5** For the foregoing reasons, defendants' motion for partial summary judgment is granted. All claims other than the claim for violation of plaintiff's right to access to the courts are dismissed.

SO ORDERED.