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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. 7492(MGC). | March 13, 1998.

Attorneys and Law Firms

Thomas Higgins, Attica Correctional Facility, Attica, New York, plaintiff pro se.

Dennis C. Vacco, Attorney General of the State of New York, New York City, by Richard J. Cardinale, Assistant Attorney General, for defendants.

Opinion

MEMORANDUM OPINION AND ORDER

CEDARBAUM, J.

***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. By order dated September 4, 1996, I granted partial summary judgment in defendants' favor and dismissed all claims except plaintiff's claim of violation of his right of access to the courts, which was not addressed in defendants' motion. *Higgins v. Coombe,* 1996 WL 502409 (S.D.N.Y. September 4, 1996).

Defendants now move for summary judgment on the remaining claim. Defendants served their motion for summary judgment on April 9, 1997, supported by an affidavit, a Local Rule 56.1 Statement of Material Facts, and a Memorandum of Law. After plaintiff failed to respond, he was reminded of the pending motion by letter dated July 1, 1997, and was given an extension to September 2, 1997 to oppose the motion. Plaintiff has not submitted any papers; he has not requested an extension of time nor has he opposed the motion. For the reasons set forth below, the motion is granted.

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, 106 S.Ct. 2548, 91 L.Ed.2d 265 (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, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam) (pro se complaints held to less stringent standards than pleadings drafted by lawyers).

Rule 56(e) provides that if the non-movant fails to respond to a summary judgment motion by setting forth "specific facts showing that there is a genuine issue for trial," then "summary judgment, if appropriate, shall be entered against the adverse party." Local Civil Rule 56.1 provides that all material facts set forth in the movant's Statement of Material Facts "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

***2** The Second Circuit has instructed that summary judgment should not be entered by default against a pro se party who has not been given notice that a failure to respond will be deemed a default. *Champion v. Artuz,* 76 F.3d 483, 486 (2d Cir.1996). Here, defendants' notice of motion stated that:

> pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, when a motion for summary judgment is made and properly supported, you may not simply rely

> on your complaint, but you must respond by affidavits or as otherwise provided in the Federal Rules of Civil Procedure, setting forth specific facts showing that there is a genuine issue of material fact for trial. Any factual assertions in defendants' affidavit will be accepted by the District Judge as being true unless you submit an affidavit or other documentary evidence contradicting defendants' assertions. If you do not so respond, summary judgment, if appropriate, may be entered against you. If summary judgment is granted against you, your case will be dismissed and there will not be a trial.
>
> PLEASE TAKE FURTHER NOTICE that Local Rule 3(g) requires you to include a separate, short and concise counter-Rule 3(g) statement of all material facts as to which you contend there is a genuine issue. In the absence of such a counter-Rule 3(g) statement, all material facts set forth in defendants' Rule 3(g) statement will be deemed admitted.

(Defendants' Notice of Motion, at 2.) A letter from my law clerk dated July 1, 1997 provided a nearly identical warning to plaintiff. Nonetheless, the plaintiff has failed to oppose defendants' motion or respond in any other way. Under these circumstances, the statements in defendants' Local Civil Rule 56.1 Statement of Material Facts are deemed admitted. *Champion,* 76 F.3d at 486–487. If those facts show that summary judgment is appropriate, summary judgment should be granted. *Id.* at 486; Fed.R.Civ.P. 56(e).

It is undisputed that in 1994, plaintiff was injured while playing handball at Green Haven Correctional Facility. He received surgery on September 16, 1994 at an outside hospital to reattach his achilles tendon. Upon his release from the hospital, plaintiff was required to spend three days in the Green Haven infirmary before returning to his cell, although, according to plaintiff, the doctor who treated him at the outside hospital had stated that he could return to his cell. 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 from the infirmary. (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.)

***3** The complaint alleges further that plaintiff was released from the infirmary on September 22, 1994 and that he completed his petition for a writ of certiorari on September 26, 1994. (*Id.* at 10–12.) On September 27, 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.)

Even on these facts as alleged in the complaint, summary judgment is appropriate. To prevail on a claim for violation of the right of access to the courts, a plaintiff must show deliberate and malicious conduct by defendants that actually interfered with his access to the courts or materially prejudiced an existing action. *See Smith v. O'Connor,* 901 F.Supp. 644, 649 (S.D.N.Y.1995); *Herrera v. Scully,* 815 F.Supp. 713, 725 (S.D.N.Y.1993). Here, plaintiff suffered no material prejudice to his petition for a writ of certiorari as a result of being confined in the infirmary for three days following surgery. Plaintiff himself admits that, following his release from the infirmary, he completed his petition for certiorari two days before it was due. (Compl. at 12.) It is apparent from the face of the complaint that, although plaintiff finished the petition in time for it to be mailed, it was late because it was not sent out for two days after plaintiff finished it—that is, until the day after plaintiff's alleged filing deadline. (*Id.*) Plaintiff completed the petition in time for it to be delivered to the Supreme Court in a timely manner. Under these circumstances, such a delay does not constitute the material prejudice required for denial of access to the courts.

Moreover, there is no evidence of deliberate and malicious conduct on the part of Dr. Beckles or any other defendant in keeping plaintiff in the infirmary for three days after surgery. Defendants have submitted the affidavit of Dr. Norman Selwin, Acting Medical Director of Green Haven Correctional Facility, who reviewed plaintiff's medical records and is familiar with the prison's medical policies. Dr. Selwin, whose affidavit is uncontroverted, states that under Green Haven policy an inmate cannot be discharged from the prison infirmary unless his health is stable enough to permit independent functioning in the general population. (Selwyn Aff. at ¶ 3.) Dr. Selwyn states that a prison physician must determine that an inmate's condition is stable and will not revert to an emergency condition, and that it was necessary to observe plaintiff in the infirmary for a few days before that determination could be made. (*Id.* at ¶ 3–4.) Plaintiff's failure to come forward with any evidence showing deliberate and malicious conduct, an essential element of its claim, shows that at trial a motion to dismiss will be successful at the end of plaintiff's case because of plaintiff's failure to make a prima facie showing.

Conclusion

***4** For the foregoing reasons, defendants' motion for summary judgment is granted.

SO ORDERED.