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

Edward MCKENNA, Plaintiff,
v.
Lester K. WRIGHT, Associate Commissioner/Chief Medical Officer DOCS, John P. Keane, Superintendant, Woodbourne Correctional Fac., T .J. Miller, Deputy Supt. for Admin., Woodbourne Correctional, Facility, Frank Lancellotti, Physician, Mervat Makram, Physician, Health Care Unit, Woodbourne Correctional Facility; and All Unnamed Persons, Individuals, Officers, Civilians, Individually and in Their Official Capacities, Defendants.

No. 01 Civ. 6571(WK). | Feb. 11, 2003.

Inmate, proceeding in forma pauperis, filed a section 1983 suit against corrections officials, alleging that they failed to timely diagnose and treat him for Hepatitis C. On the inmate's request for appointment of counsel, the District Court, Whitman Knapp, Senior District Judge, held that inmate would be granted appointment of counsel.

Request granted.

West Headnotes (1)

[1] Civil Rights
Criminal Law Enforcement; Prisons

Indigent inmate alleging that corrections officials violated his civil rights in failing to timely diagnose and treat him for Hepatitis C would be granted appointment of counsel; his claims appeared at least somewhat likely to be of substance, his ability to investigate the facts would likely be limited, he would likely require assistance from someone with medical expertise, and legal issues implicated by claims of deliberate indifference to medical needs tended to be complex. 28 U.S.C.A. § 1915(e)(1).

1 Cases that cite this headnote

Attorneys and Law Firms

Edward McKenna, Woodbourne Correctional Facility, Woodbourne, NY, for Plaintiff, pro se.

John E. Knudsen, Assistant Attorney General, Office of the Attorney General of the State of New York, New York, NY, for Defendants.

Opinion

MEMORANDUM & ORDER

KNAPP, Senior J.

***1** Plaintiff Edward McKenna ("Plaintiff"), proceeding *pro se,* brings this action pursuant to 42 U.S.C. § 1983 against Defendants Lester K. Wright, John P. Keane, T.J. Miller, Frank Lancelloti, and Mervat Makram (collectively the "Defendants"). He contends that the Defendants previously violated and continue to violate his rights under the Eighth and Fourteenth Amendments to the Constitution.

The Plaintiff has asked the Court to appoint counsel to represent him in this action. For the reasons that follow, we GRANT the Plaintiff's application for the appointment of counsel.

BACKGROUND

We set forth the factual background for this case in extensive detail in our previous decision in this matter. *See McKenna v. Wright* (S.D.N.Y. Mar. 27, 2002) No. 01 Civ. 6571(WK), 2002 WL 338375. Familiarity with that decision is assumed.

To briefly summarize, the Plaintiff alleges that the Defendants failed timely to diagnose him with Hepatitis C before 1999 and thereafter failed to treat or delayed the treatment of his Hepatitis C infection in 1999 and 2000. As a purported consequence, the Plaintiff contends that he developed cirrhosis of the liver. The Plaintiff also asserts that the Defendants continue to provide him with inadequate medical treatment for his medical conditions even to this day.

When the Plaintiff first filed his action in July 2001, he applied to the Court for the appointment of counsel. (*See* Docket No. 3.) Although the Court has not yet addressed this application, the Plaintiff has recently renewed his

request for the appointment of counsel. (*See* Docket No. 26.) We now turn to these applications.

DISCUSSION

"Unlike criminal defendants, prisoners, such as [P]laintiff, and indigents filing civil actions have no constitutional right to counsel." *Edmonds v. Greiner* (S.D.N.Y. June 14, 2002) No. 99 Civ. 1681(KNF), 2002 WL 131527, at *1. "Under 28 U.S.C. § 1915(e)(1), however, the Court may request an attorney to represent any person unable to afford counsel." *See also Arce v. Keane* (S.D.N.Y. Aug. 1, 2001) No. 01 Civ. 2648(BSJ)(DF), 2001 WL 868000, at *1. In this case, the Plaintiff applied to proceed *in forma pauperis* and that application was granted in July 2001. (*See* Docket No. 1.) As such, the Plaintiff has demonstrated that he cannot afford counsel and he therefore falls within the ambit of § 1915(e)(1).

"In deciding whether to appoint counsel, ... the district [court] should first determine whether the indigent's position seems likely to be of substance." *Hodge v. Police Officers* (2d Cir.1986) 802 F.2d 58, 61. In order to make such a determination, the Court must decide whether, "from the face of the pleading," *Stewart v. McMikens* (S.D.N.Y.1988) 677 F.Supp. 226, 228, the claims asserted by the Plaintiff " 'may have merit" ' or whether the Plaintiff " 'appears to have some chance of success." ' *Baskerville v. Goord* (S.D.N.Y. May 16, 2001) No. 97 Civ. 6413(BSJ)(KNF), 2001 WL 527479, at *1 (internal citations omitted). While the Court should not appoint counsel " 'indiscriminately' just because an indigent litigant makes such a request," *Hendricks v. Coughlin* (2d Cir.1997) 114 F.3d 390, 393 (internal citation omitted), "it is not necessary for the plaintiff to demonstrate that his claims will survive a motion to dismiss or a motion for summary judgment." *Arce,* 2001 WL 868000, at *1. "[R]ather, the Court must find that the claims satisfy a 'threshold showing of merit." ' *Rush v. Artuz* (S.D.N.Y. Oct. 26, 2001) No. 00 Civ. 3436(LMM)(DF), 2001 WL 1313465, at *3 (citation omitted).

***2** Setting aside his Eighth Amendment and Fourteenth Amendment claims as they pertain to his ongoing medical treatment since 2001,[1] the Plaintiff here alleges, *inter alia,* that the Defendants failed timely to diagnose him with Hepatitis C before 1999 and thereafter failed to treat or delayed the treatment of his Hepatitis C infection in 1999 and 2000. As a purported consequence, the Plaintiff contends that he developed cirrhosis of the liver.

The Plaintiff has not rested on these allegations alone; instead, he has submitted numerous exhibits (attached to his Complaint and the various briefs filed thereafter) which further suggest that the Plaintiff apparently received little if any treatment for his Hepatitis C infection between 1999 and 2000. As of yet, nothing in the record available to us definitively indicates that the decision not to treat the Plaintiff's hepatitis C infection during these years was made on the basis of any medical judgment. Under these circumstances, the Plaintiff's position seems at least somewhat likely to be of substance. *See Symmonds v. Wright* (S.D.N.Y. Dec. 11, 2002) No. 01 Civ. 6930, 2002 WL 31921171, at *1 (granting the plaintiff's application for the appointment of counsel where he alleged that he was denied adequate medical care for his Hepatitis C infection while incarcerated in violation of the Eighth Amendment); *Johnson v. Wright* (S.D.N.Y.2002) 234 F.Supp.2d 352, 361–362 (denying the defendants' motion to dismiss where the inmate alleged that the defendants failed to provide him with Rebetron therapy for his Hepatitis C infection for 15 months); *Carbonell v. Goord* (S.D.N.Y. June 13, 2000) No. 99 Civ. 3208(AJP), 2000 WL 760751, at *9 (denying nurse's motion for summary judgment where the plaintiff alleged that the nurse denied him medication for his Hepatitis C infection). *Cf. Rush,* 2001 WL 1313465, at *4 (recognizing that the *pro se* plaintiff had met his threshold burden for the appointment of counsel where he did not merely make conclusory statements but described his ailments, recounted his efforts to obtain treatment, and submitted documents to support his claim).

Where, as here, a plaintiff satisfies the threshold requirement of demonstrating that his position is likely to be of substance, the Court should then consider: (1) the indigent's ability to investigate the crucial facts; (2) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact-finder; (3) the indigent's ability to present the case; (4) the complexity of the legal issues; and (5) any special reason in the case why appointment of counsel would be more likely to lead to a just determination. *See Hodge,* 802 F.2d at 61–62; *Hendricks,* 114 F.3d at 392. These factors favor granting the Plaintiff's application for the appointment of counsel.

This Plaintiff's ability to investigate the facts relevant to his claims, and in particular his ability to depose or otherwise question the defendant physicians regarding (a) their treatment decisions and (b) the medical basis, if any, for the development and application of the relevant portions of the New York State Department of Correctional Services' Hepatitis C Primary Care Practice Guideline, will likely be limited as the Plaintiff is incarcerated. *See Hendricks,* 114 F.3d at 394 (holding that the plaintiff's incarceration severely limited his ability to investigate and present crucial facts, including his ability to take depositions of the DOCS officers involved in the case). In an action such as this, where the crux of the litigation centers around the aforementioned treatment decisions and policy provisions, the ability to take

depositions or otherwise secure information about such facts may well prove to be of critical importance. Hence, this factor favors the appointment of counsel. *See Rush,* 2001 WL 1313465, at *4 (granting an application for the appointment of counsel in part because the incarcerated plaintiff's ability to investigate facts and conduct necessary depositions in a case involving the denial of medical treatment would be limited). *See also Arce,* 2001 WL 868000, at *2; *Johnson v. Bendheim* (S.D .N.Y. Nov. 13, 2000) No. 00 Civ. 720(JSR)(KNF), 2000 WL 1705785, at *1–*2.

***3** In addition, the Plaintiff will likely require the assistance of someone with expertise in medicine who will be able to speak to (a) the medical ramifications stemming from any failure or delay in providing the Plaintiff with treatment for his Hepatitis C infection in 1999 and 2000 and (b) the medical basis, if any, for the relevant policy provisions and their application to the Plaintiff's treatment in this instance. This also militates in favor of appointing counsel. *See Rush,* 2001 WL 1313465, at *4 (granting an application for the appointment of counsel in part because the plaintiff would require the assistance of someone with expertise in medicine in order to speak to the nature and severity of the plaintiff's injuries and other medical conditions); *Arce,* 2001 WL 868000, at *2 (same); *Baskerville,* 2001 WL 527479, at *2 (granting an application for the appointment of counsel in part because it was likely that the parties would need to present medical testimony); *Johnson,* 2000 WL 1705785, at *1 (granting an application for the appointment of counsel in part because any investigation of the case would require someone with expertise in medicine who could review judgments made by health care providers when determining the appropriate course of conduct to pursue with a given patient).

Moreover, the legal issues implicated by claims of deliberate indifference to medical needs are often complex. *See Lombardo v. Goord* (S.D.N.Y. Oct. 28, 1999) No. 99 Civ. 1676(JSR)(KNF), 1999 WL 983875, at *2. This is particularly true where, as here, an inmate contends that he was denied adequate medical care for Hepatitis C in violation of the Eighth Amendment; the medical treatment issues in such a case are likely to be relatively complex, which further suggests that the Plaintiff should, if possible, be represented by counsel. *See Symmonds,* 2002 WL 31921171, at *1. Otherwise, the complexity of the legal and factual issues in this case will likely hamper the Plaintiff's ability fully and appropriately to respond to motions made during the course of litigation. *See Johnson,* 2000 WL 1705785, at *2. *Cf. Symmonds,* 2002 WL 31921171, at *1. Furthermore, the corresponding level of cross-examination skill which will be required to elicit relevant facts in a case of such relative complexity is likely to be beyond that possessed by this *pro se* litigant. *See Rush,* 2001 WL 1313465, at *5 (granting an application for the appointment of counsel in part because the legal issues involved in the Eighth Amendment case were complex and the level of cross-examination skill required to elicit relevant facts was likely beyond that possessed by the *pro se* plaintiff); *Arce,* 2001 WL 868000, at *3 (same); *Johnson,* 2000 WL 1705785, at *2 (same).

CONCLUSION

For the foregoing reasons, we hereby GRANT the Plaintiff's applications (i.e. Docket No. 3 and Docket No. 26) for the appointment of counsel. The Pro Se Office for this judicial district is directed to request *pro bono* counsel for the Plaintiff in accordance with the *pro bono* panel's procedures.

***4** We caution the Plaintiff that, due to the scarcity of volunteer attorneys in this district, a lengthy period of time may pass before the Pro Se Office is able to find an attorney willing to provide *pro bono* representation in this case. Indeed, there is no guarantee that any attorney will decide to take the case. Accordingly, if at any time the Plaintiff wishes to continue to proceed *pro se,* he shall so notify us.

In the interim, the Defendants' motion to dismiss the Plaintiff's action (Docket Nos. 12 and 13) is held in abeyance until August 31, 2003. However, the supplemental briefs and affidavits or, in the alternative, the supplemental statement of non-opposition which the Defendants must shortly submit in response to the Plaintiff's motion for reconsideration in accordance with our February 10, 2003 Order shall NOT BE affected by our decision to grant the instant applications. The Defendants shall submit the necessary documents as directed by March 12, 2003. Whether or not the motion shall then be held in abeyance will depend upon the Plaintiff's review of the Defendants' forthcoming submissions. If no counsel has volunteered to provide the Plaintiff with *pro bono* representation when those submissions are filed, the Plaintiff shall notify us regarding whether he (a) would prefer to proceed expeditiously and *pro se* with his motion for reconsideration or (b) would prefer that we hold the motion in abeyance until August 31, 2003 to determine whether any attorney will volunteer to represent him before that date. If the Plaintiff thus notifies us that he would prefer to hold his motion for reconsideration in abeyance, the Plaintiff is free to change his mind before August 31, 2003, and may notify us when and if he would prefer to continue to proceed *pro se* before that date.

SO ORDERED.

Footnotes

1 In March 2002, we denied the Plaintiff's motion for a preliminary injunction which would have required the Defendants to arrange a consultation for the Plaintiff with a specialist. *See McKenna v. Wright* (S.D.N.Y. Mar. 4, 2002) No. 01 Civ. 6571(WK), 2002 WL 338375, at *13. Our decision was premised, in part, on our determination that the Plaintiff had failed to demonstrate that he had a substantial likelihood of succeeding on the merits of his claims under the Eighth and Fourteenth Amendments to the extent that they were based on his ongoing medical treatment. However, the Plaintiff has since moved for reconsideration of that decision. He argues, among other things, that we misapprehended the nature of his claims as they related to his ongoing medical treatment. He has also submitted a letter from one of the defendant physicians, which he received after we denied his motion for a preliminary injunction, that potentially casts at least some measure of doubt on a number of the conclusions underlying our decision to deny that motion. Since we have recently directed the Defendants to submit additional briefs and evidence with respect to that motion for reconsideration in light of these arguments and have not yet had an opportunity to address that motion, we do not now address whether the Plaintiff's claims, as they relate to his ongoing medical treatment since 2001, satisfy a threshold showing of merit.