MAILED TO ~~COUNSEL~~ Litigant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Petition of Peter Anekwe

LOUIS MILBURN,

Plaintiff,

v.

THOMAS A. COUGHLIN, III, et al.,

Defendants.

79 Civ. 5077 (LAP)

MEMORANDUM & ORDER

LORETTA A. PRESKA, Chief United States District Judge:

On March 5, 2012 Petitioner Peter Anekwe ("Petitioner" or "Anekwe") filed a Motion for Notice of Contempt ("Anekwe Contempt Motion") [dkt. no. 391] (contempt of the September 27, 1991 Modified Final Judgment in this case ("Milburn II Consent Decree")). For the reasons below, Petitioner's motion is denied with prejudice.

I. Background

Petitioner, an inmate presently incarcerated at the Green Haven Correctional Facility ("Green Haven"), claims that Defendants violated Section VI(D) of the Milburn II Consent Decree by failing to "construct a plan for treatment or other appropriate follow-up" in connection with his gynecomastia. (See Anekwe Contempt Mot., Ex. A ("Anekwe Aff.") ¶ 38.) Petitioner also alleges that defendants violated Section VI(B)(2)(3), "Access to Specialists," by failing timely to refer

him to a specialist for his gynecomastia in accordance with the severity of his health condition. (Id. ¶ 39.) According to Petitioner, his request for surgery to remove this condition was denied from January, 2009, until October, 2011, and such denial resulted in a secondary illness. (Id. ¶ 38 to Conclusion.) A review of the pertinent facts follows.

On January 7, 2009, Petitioner was examined on his complaint of breast pain by his primary medical provider, Nurse Practitioner Albert Acrish. (Declaration of Albert Acrish, N.P. ("Acrish Decl.") [dkt. no. 401] ¶ 7.) On January 23, 2009, Petitioner received a mammogram that was negative for malignant breast cancer.[1] (Id. ¶ 9.) Petitioner claims he then verbally requested that Acrish remove the lump but that Acrish denied the request due to the negative result. (Id. ¶¶ 10-11.) Nevertheless, Petitioner states that between January 23 and November, 2009, he "continued to request removal of the lump at all scheduled appointments with his provider, regardless of the

[1] The parties continue to dispute the relevance of the term "cancer." Petitioner claims that cancer is an "abnormality" in the body and that gynecomastia is a form of benign cancer and "should be addressed in an expedicious [sic] manner." (See id. Conclusion.) Defendants, however, relying upon the declarations of two medical professionals, state that "[g]ynecomastia is not a form of cancer. It is the development of normal female breast tissue in a male. . . . [T]here can be no benign cancer. A mass is either . . . malignant (cancerous) or benign (non-cancerous)." (See Defendants' Memo. of Law in Opposition to Pl.'s Mot. for an Order of Contempt ("Defs.' Br.") [dkt. no. 396], at 8.)

basis for said appointment" but that he continued to be denied because Green Haven does not provide "'cosmetic'" surgery (Id. ¶¶ 12-13.) During this time, Petitioner alleges that "Acrish began to term [his] condition as 'gynecomastia[]' and explained that such condition is enlarged breast and is common amongst men on medication." (Id. ¶ 14.) Dr. Frederick Bernstein, the Facility Health Services Director at Green Haven, upon review of Petitioner's medical records,[2] has confirmed that Petitioner suffers from bilateral gynecomastia. (See Declaration of Frederick Bernstein, M.D. ("Bernstein Decl.") [dkt. no. 400] ¶ 5.) Petitioner claims he was told the condition was a side effect of medication and denies ever being on a medication that would cause such a condition. (Id. ¶ 28.)

Petitioner's affirmation states that he began complaining of pain associated with the lump "on or about July 2009" and was then informed that pain is normal with such a condition. (Id. ¶¶ 15-16.) A review of the declaration offered by Acrish and Dr. Bernstein, however, demonstrate that Petitioner also suffers from coronary artery disease and many of his complaints of chest-related pains were made in association with that

[2] Annexed to the Acrish Declaration as Exhibit A is the medical records of Petitioner ("Anewke Medical Records"), as maintained by the New York State Department of Corrections and Community Supervision ("DOCCS"), filed under seal pursuant to this Court's May 15, 2012 Order [dkt. no. 397].

affliction. (See Acrish Decl. ¶ 9; Bernstein Decl. ¶ 10.) According to Acrish, while he saw Petitioner numerous times between February 13, 2009, and October 22, 2010, such visits involved "complaints of chest pain associated with his cardiac condition" and that "[o]n none of these occasions did he complain of breast pain or his gynecomastia." (See Acrish Decl. ¶ 9.) Petitioner, though, contends that he complained again during a sick call in November, 2009. (Id. ¶ 18.)

Nearly a year later, on or about October 22, 2010, Petitioner states that he wrote to the medical director seeking "supervisory intervention" and removal of the lump. (Id. ¶ 19.) According to Petitioner, the medical director responded on or about October 22, 2010, by denying his request. (Id. ¶ 20.)[3] It is Defendants position that this October 22, 2010, date was the first instance that Petitioner associated his complaints regarding chest pains with his gynecomastia, (see Acrish Decl. ¶ 11; Bernstein Decl. 9), but Acrish concluded that the more appropriate response was to order an EKG and cardiologist consult, (see Acrish Decl. ¶ 11).

Plaintiff cites another appearance at sick call sometime between October 22, 2010, and June 13, 2011, at which time he

[3] Petitioner cites as proof of said communication a letter from the Legal Aid Society. (See id.) The Court notes that the letter, however, was not included in the exhibits Petitioner provided with his moving papers.

complained to a nurse named "Charlie." (Id. ¶ 21.) Charlie allegedly "informed [Petitioner] that pain is an indication that something is wrong relating to a condition of gynecomastia" and "scheduled an appointment to see Acrish for [a] consult." (Id.) Petitioner claims, however, that Acrish failed to act. (Id.) Petitioner further states that, sometime during this same span of eight months, he saw a facility emergency room doctor named "Dr. Bendheim," who also informed Petitioner that gynecomastia should not be painful and scheduled an appointment for Petitioner with Acrish. (See id. ¶¶ 22-25.) Defendants submission indicates that such a visit or visits may have occurred on or about June 3, 2011, which is their next record of such complaints. (See Acrish Decl. ¶ 12; Bernstein Decl. ¶ 11.)

Thereafter, on or about June 13, 2011, Petitioner attended an appointment with Acrish, during which Petitioner says he "recounted that two medical professionals noted that [his] gynecomastia condition was problematic" as a result of the pain he was experiencing. (Id. ¶¶ 26-27.) Allegedly, Acrish then consulted a medical encyclopedia/dictionary desk reference and conducted a physical examination. (See id. ¶¶ 27-30.) Acrish subsequently submitted a request for consult for surgery. (Id. ¶ 30.)

Acrish's request for a consult for surgery was denied, however, and a second mammogram instead was performed on August

22, 2011. (Id., Ex. 2(A) and (B); id. ¶ 31.) According to Petitioner, the result was so severe that irregular measures were used to get approval for an ultrasound. (Id. ¶ 32.) An ultra-sound guided biopsy was conducted on September 2, 2011, and the report indicated that Petitioner had a papillary lesion and gynecomastia and that resection should be considered. (Id. ¶¶ 33-34.) On September 22, 2011, Petitioner attended a pre-op interview with Dr. Roth, the general surgeon. (Id. ¶ 35.) According to Petitioner, Dr. Roth informed him at the interview that the lump should have been removed earlier. (Id.; Ex. 4.) The lump was eventually removed on October 28, 2011. (Id. ¶ 36.)

As noted previously, Petitioner filed a motion for contempt on May 5, 2012. In addition to offering a memorandum in opposition, Defendants responded to Petitioner's motion by filing declarations by Nurse Practitioner Acrish and Dr. Frederick Bernstein. (See generally Acrish Decl.; Bernstein Decl.) Defendants assert that Petitioner's allegations "amount[] to nothing more than a disagreement with the type of treatment that was provided" and that "the treatment [provided] for his gynecomastia was appropriate at all times." (See Defs.' Br., at 6-7.) On May 24, 2012, Petitioner filed his Reply to Defendant's Opposition of Plaintiff's Motion for an Order of Contempt ("Petitioner's Reply") [dkt. no. 402].

II. Discussion

A. Standard of Review

Where an individual brings a claim for civil contempt of a court order or consent decree, as here, he must prove the alleged noncompliance with clear and convincing evidence. See U.S. v. N.Y.C. Dist. Council of N.Y.C., 229 Fed. Appx. 14, 18 (2d Cir. 2007) (citing King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995)). Moreover, a court's inherent power to hold a party in civil contempt should only be exercised when: (1) the order the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply. Id. (citing New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989)). Courts are not "entitled to expand or contract the agreement of the parties as set forth in the consent decree," Berger v. Heckler, 771 F.2d 1556, 1558 (2d Cir. 1988); courts must narrowly construe the terms of a consent decree and not impose supplementary obligations on the parties. Barcia v. Sitkin, 367 F.3d 87, 106 (2d Cir. 2004) (internal citation omitted). The Court now turns to Petitioner's claims.

B. Analysis

Petitioner's motion is denied because he fails to demonstrate by clear and convincing evidence, as he must, that

the Milburn II Consent Decree unambiguously requires the specific treatment requested here or that Green Haven has not diligently attempted in a reasonable manner to comply with the relevant provisions of the Consent Decree.

1. Section VI(D)

Section VI(D) of the Milburn II Consent Decree provides that the results of a laboratory test should be entered "in the patients' active medical record with a plan for treatment or appropriate follow-up of abnormal results." (Milburn II Consent Decree, at 11.) Petitioner alleges that Defendants violated this provision by not formulating a plan to treat his gynecomastia after the January 23, 2009, mammogram. (See Anekwe Aff. ¶ 38.) Upon a review of the parties' submissions, however, the Court finds that Petitioner has failed to demonstrate by clear and convincing evidence that Defendants' course of action was a violation of Section VI(D).

Other than his own opinion and his own sworn account of hearsay offered by Dr. Roth, (see id., at Conclusion; Ex. 4), Petitioner has not presented any evidence demonstrating that gynecomastia is a form of cancer or that, in most settings, is nothing more than a cosmetic concern, as explained by two medical professionals proffered by Defendants, (see Bernstein Decl. ¶¶ 5, 7; Acrish Decl. ¶ 10).

Further, Petitioner's citation in his reply of pages 208 and 218 of his medical records as proof that Defendants failed to comply with the appropriate procedures is unpersuasive. (See Pet.'s Reply ¶ 1.) The first of these involves Petitioner's July 8, 2010, visit to his cardiologist. The record reflects that Acrish reviewed the cardiologist's report questioning whether or not Petitioner needed a surgical consult with the Regional Medical Director and noted on the consult form that no surgical consult was necessary. (See Acrish Decl. ¶ 10.) Whether Petitioner agrees with this assessment is not material to Section VI(D). Rather, it seems that Defendants did consider the proper course of action and, at that time, determined a course of action of no action based on the information available. Additionally, Petitioner's page 218 reference relates to the October 22, 2010, visit. (See Anekwe Med. Records, at 218.) Again, even though it is clear at this point that Acrish and Petitioner disagreed about the causes of his chest pains (coronary artery disease versus gynecomastia), such does not amount to clear and convincing evidence that Defendants failed to plan for treatment or appropriate follow-up of abnormal results. In fact, Acrish did plan for follow-up, albeit for another cardiologist consult. (See Acrish Decl. ¶ 10.)

Thereafter, Petitioner fails to offer any substantive evidence of why there is no other mention of his complaints of pain until on or about June 3, 2011. Insofar as his allegations involving visits to Charlie and Dr. Bendheim, Petitioner has not put forth any evidence indicating that these visits are distinct from those on or about June 3, 2011, at which time it is clear that Acrish subsequently did consider a plan forward. Considering that Defendants have not been shown to have violated Section VI(D) previously, failure to take further action without other documented complaints from Petitioner cannot amount to Petitioner carrying his burden that the consent decree has been violated.

As a result, considering that gynecomastia generally is a cosmetic affliction and the patient here also suffers from coronary artery disease, the Court is not persuaded that clear and convincing evidence exists of a violation of Section VI(D) where Petitioner's complaints of chest pains seemed reasonably attributable to his coronary artery problems and the record indicates Defendants attempted to chart an appropriate response based upon the information at hand. Moreover, it is clear upon a review of the record that once Petitioner's complaints became such that the pain clearly could be attributed to his gynecomastia, Defendants ordered further appropriate follow-ups and eventually removed the lump.

2. Section VII(B)

Section VII(B) concerns a class member's access to specialists, and provides:

> B. Defendants shall insure that all patients needing specialist care receive consultations with specialists in accordance with the severity of their health conditions, as follows:
>
> 1. Priority One Cases: Patients with emergency conditions who need specialist consultation shall be seen by a specialist or transported to an emergency room without delay.
> 2. Priority Two Cases: Patients with urgent but not emergent conditions where prompt examination or treatment is necessary to prevent threat to the patient's life or risk of permanent harm or where more than a short delay would exacerbate the condition to the point of creating an emergency shall wait no more than two weeks from the date a specialist consultation is ordered by a Green Haven provider to the date the consultation occurs.
> 3. Priority Three Cases: Except as provided in ¶ VII-B-4, no other patient shall wait more than forty-five calendar days from the date a specialist consultation is ordered by a Green Haven provider to the date the consultation occurs.
> 4. Priority Four Cases: Patients awaiting appointments with an optometrist or podiatrist who have stable conditions without risk of decline by delay and whose conditions are not painful and do not involve substantial impairment of function may wait up to seventy-five (75) calendar days for such appointments. Patients referred to optometry by a Green Haven health care provider shall be given an optometry appointment regardless of whether they have been seen by the optometrist within the last two years.

(Milburn II Consent Decree, at 12-13.) Petitioner and Defendants disagree as to whether Petitioner's case is Priority Two or Three. (Compare Anekwe Aff. ¶ 39, with Defs.' Br., at 15.)

Petitioner has not shown by clear and convincing evidence that Defendants violated Section VII(B). First, the Court is not persuaded that this is a Priority Two case. Defendants have established that Petitioner's lump was not malignant, and Petitioner has not put forth any evidence demonstrating that his gynecomastia required "prompt examination or treatment . . . to prevent threat to the patient's life or risk of permanent harm or where more than a short delay would exacerbate the condition to the point of creating an emergency." Taking even Petitioner's account of Dr. Roth's statement as true, such is not clear and convincing evidence that a failure to remove the lump within nine months of discovery amounted to a threat to Petitioner's life, a risk of permanent harm, or an exacerbation of the condition to the point of creating an emergency. Therefore, Defendants' actions must be reviewed under the timeline and standard appropriate for Priority Three cases.

As a Priority Three case, Petitioner again has failed to carry his burden. The Court is persuaded that the record demonstrates that Defendants evaluated Petitioner's gynecomastia in light of the general nature of the condition as one of

cosmetic concern and against competing concerns related to Petitioner's coronary artery disease. Considering DOCCS policies against cosmetic procedures, (see Bernstein Decl. ¶ 7), Defendants were not required to pursue additional specialist consultations for a condition that they apparently did not anticipate to worsen, and it seems reasonable for such medical professionals to attribute chest pains to coronary artery diseas as opposed to a condition that usually is cosmetic.

Additionally, where Defendants concluded that specialist consultation was required, the consultation with the relevant specialist (whether a cardiologist when attributed to Petitioner's coronary artery disease or eventually a general surgeon with regards to his gynecomastia) occurred within a timely fashion under Section VII(B)(3). Again, as for Petitioner's allegations that Charlie scheduled a consult and Acrish failed to act, this mere allegation is insufficient to amount to clear and convincing evidence that Acrish did not see Petitioner within the specified timeframe. Accordingly, Petitioner has failed to demonstrate by clear and convincing evidence that Defendants violated this portion of the Milburn II Consent Decree.

III. Conclusion

For the foregoing reasons, Petitioner's Motion for Contempt [dkt. no. 391] is denied with prejudice.

III. Conclusion

For the foregoing reasons, Petitioner's Motion for Contempt [dkt. no. 391] is denied with prejudice.

SO ORDERED.

Dated: New York, New York
March 28, 2013

Loretta A. Preska

LORETTA A. PRESKA
Chief U.S. District Judge