Harrison v. Barkley

United States District Court for the Northern District of New York
January 14, 1997, Decided ; January 17, 1997, FILED
95-CV-964 (RSP-DS)

Reporter: 1997 U.S. Dist. LEXIS 5102
DUANE HARRISON, Plaintiff, vs. WAYNE BARKLEY, Superintendent of Riverside Corr. Facility; DR. ROBERT HOEHN, Dentist at Riverside Corr. Facility; TAMMY BECHAZ, Inmate Grievance Supervisor; and SYLVIA LAGUNA, Inmate Grievance Director, Defendants.

Subsequent History: [*1] Adopting Order of April 11, 1997, Reported at: 1997 U.S. Dist. LEXIS 5105.

Disposition: Plaintiff's motion for partial summary judgment (dkt. 13) denied. Defendants' cross motion for summary judgment (dkt. 22) granted. Plaintiff's motion to strike defendants' answers (dkt. 12) denied as moot. Plaintiff's motion to compel discovery (dkt. 31) denied as moot. Defendants' request for a protective order and stay of further discovery (dkt. 32) denied as moot.

Counsel: APPEARANCES:

DUANE HARRISON, Plaintiff Pro Se, Hudson Correctional Facility, Hudson, New York.

DEBORAH A. FERRO, Asst. Attorney General, DENNIS C. VACCO, Attorney General for the State of New York, Attorney for Defendants, Albany, New York.

Judges: Daniel Scanlon, Jr., U.S. Magistrate Judge

Opinion by: Daniel Scanlon, Jr.

Opinion

REPORT RECOMMENDATION and ORDER

I. Introduction

This matter was referred to the undersigned for report and recommendation by the Hon. Rosemary S. Pooler by Standing Order dated November 12, 1986. Currently before the Court are four motions, all of which are opposed: plaintiff's motion to strike defendants' answers (dkt. 12); plaintiff's motion for partial summary judgment (dkt. 13); defendants' cross motion for summary judgment (dkt. 22); and plaintiff's motion to compel discovery (dkt. [*2] 31). Also before this Court is defendants' request for a protective order and stay of further discovery (dkt. 32).

Plaintiff brought this suit against defendants under title *42 U.S.C. § 1983*, alleging violations of his *Eighth Amendment constitution*al rights. He alleges that during his incarceration at Riverview Correctional Facility, he requested dental assistance for tooth pain on three occasions: June 31, 1994 (sic); August 24, 1994; and September 11, 1994. On September 27, 1994, plaintiff claims that he was examined by defendant Dr. Hoehn, a dentist. Plaintiff states that he instructed to Hoehn of his tooth pain and requested a filling, but was told by Dr. Hoehn that he had "a carious non-restorable tooth" that had to be extracted before he could receive his filling. Complaint at 2. He did not want to have the carious non-restorable tooth extracted, he alleges, because it was not causing him any pain, and because he has only fourteen of his teeth left due to his fondness for "sweets." Complaint at 2-2a; Plaintiff's Reply to Dr. Mirza'a Affidavit at P 3 (dkt. 29). Plaintiff contends that after he refused Dr. Hoehn permission to extract his carious non-restorable tooth, Dr. Hoehn [*3] would not fill the tooth that was causing plaintiff pain. He claims that he filed a grievance demanding both that his cavity be filled and that Dr. Hoehn be removed from his position. The grievance, he states, was denied initially by defendant Bechaz, and afterwards denied on appeal to defendants Barkley and Laguna. Ultimately plaintiff proceeded in an Article 78 proceeding to the Supreme Court, St. Lawrence County, where per decision of Hon. David Demarest, J.S.C., dated May 31, 1995, plaintiff's request for a filling was granted. Decision and Order dated May 31, 1995, (Demarest, J.), County Court, attached as Ex. A to Plaintiff's Response to Defendants' Cross Motion (dkt. 25). Plaintiff contends that he endured unbearable pain and suffering as a result of defendants actions, wherefore he seeks compensatory damages.

II. Discussion

A. Summary Judgment

Rule 56 allows for summary judgment where the evidence demonstrates that "there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is properly regarded . . . as [*4] an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265

(1986) (quoting FED. R. CIV. P. 1). A motion for summary judgment may be granted when the moving party carries its burden of showing that no triable issues of fact exist. Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990). In light of this burden, any inferences to be drawn from the facts must be viewed in the light most favorable to the non-moving party. Id.; *see also,* United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962) (per curiam). Once the moving party has met its burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986). A dispute regarding a material fact is genuine "if evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 [*5] U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). When reasonable minds could not differ as to the import of the evidence, then summary judgment is proper. Id. at 250-251, 106 S. Ct. 2505, 2510. An issue of credibility is insufficient to preclude the granting of a motion for summary judgment. Neither side can rely on conclusory allegations or statements in affidavits. The disputed issues of fact must be supported by evidence that would allow a "rational trier of fact to find for the non-moving party." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). The motion will not be defeated by a non-movant who raises merely a "metaphysical doubt" concerning the facts or who offers only conjecture or surmise. Id. Nor will factual disputes that are irrelevant to the dispositions of the suit under governing law preclude entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

Although *Rule 56* allows courts to consider depositions, answers to interrogatories, and admissions on file in ruling on summary judgment motions, it [*6] does not require that discovery take place before a motion for summary judgment may be considered. Banks v. Mannoia, 890 F. Supp. 95 (N.D.N.Y. 1995) (C.J. McAvoy), citing *FED.R.CIV.PROC. 56(c)*; Mills v. Damson Oil Corp., 931 F.2d 346, 350 (5th Cir. 1991); Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017 (5th Cir. 1983); Walker v. United States Environmental Protection Agency, 802 F. Supp. 1568 (D.C.Tex. 1992). Indeed, summary judgment can and often should be granted without discovery. Banks at 98.

B. Plaintiff's *Eighth Amendment* Claim under *42 U.S.C. § 1983*

1. Collateral Estoppel

This Court must give a prior state court decision the same preclusive effect that the courts of that state would give to it, so this Court must look to New York law to determine the effect, if any, of plaintiff's Article 78 proceeding. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466, 102 S. Ct. 1883, 1889, 72 L. Ed. 2d 262 (1982); 28 U.S.C. § 1738.

Under New York law, the doctrine of issue preclusion only applies if: (1) the issue in question was actually and necessarily decided in a prior proceeding; and (2) the party against whom the doctrine is asserted had a full and [*7] fair opportunity to litigate the issue in the first proceeding. Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995) (citing Hill v. Coca Cola Bottling Co., 786 F.2d 550, 552-53 (2d Cir. 1986); Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985)). Issue preclusion will apply only if it is quite clear that these requirements have been satisfied, lest a party be "precluded from obtaining at least one full hearing on his or her claim." Colon at 869 (quoting Gramatan Homenvestors Corp. v. Lopez, 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 311, 386 N.E.2d 1328, 1331 (1979)). The party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, while the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in the prior proceeding. Kaufman, 65 N.Y.2d at 456, 492 N.Y.S.2d at 588, 482 N.E.2d at 67.

Plaintiff has the burden of showing that the issue at bar before this Court was identical to the issue previously decided in his Article 78 proceeding. He has not met this burden. He has produced no evidence that the cogent [*8] issues in this matter, namely that of whether plaintiff's tooth pain amounted to a constitutionally cognizable "serious medical need," or whether defendants acted with "deliberate indifference" to plaintiff in light of him facing such a need. Plaintiff does offer the Court a copy of Judge Demarest's Decision and Order, but it does nothing to advance his offensive collateral estoppel argument. It is true that Judge Demarest held that plaintiff's petition for a filling must be granted, but nowhere in his decision does Judge Demarest conclude that plaintiff faced a serious medical need or that defendants acted with deliberate indifference to plaintiff. Judge Demarest plainly states that plaintiff must show that the respondents in the Article 78 proceeding, Superintendent Barkley and Dr. Hoehn, demonstrated a deliberate indifference to plaintiff's needs; but the Judge notes that it would be improper for his Court to substitute its judgment for Dr. Hoehn. Decision and Order at 2, 3. Such a statement clearly indicates that plaintiff has not shown deliberate indifference either on the part of Dr. Hoehn (in his treatment of plaintiff) or Superintendent Barkley (in his handling of plaintiff's [*9] grievance proceedings).

Indeed, Judge Demarest's holding was motivated by his interpretation of the DOCS dental policy. A DOCS training

manual indicated that "immediate relief of pain" should be treated on the same priority level as the extraction of a non-restorable tooth. Plaintiff had indicated in his dental request slips that he suffered from tooth pain, therefore the Judge held that plaintiff's request for a filling must be granted. Decision and Order at 3. Accordingly, plaintiff may not assert offensive collateral estoppel herein because the issues decided in his Article 78 proceeding are not identical to the issues before the case currently at bar.

2. Serious Medical Need

Plaintiff alleges that defendants have subjected him to cruel and unusual punishment under the *Eighth Amendment*, which prohibits such conduct. U.S. CONST. amend. VIII. In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), the Supreme Court held that prison officials under the *Eighth Amendment* must provide humane conditions of confinement, namely adequate food, clothing, shelter, and medical care. Id. at 832, 114 S. Ct. at 1976. A constitutional violation occurs only [*10] if plaintiff both alleges a deprivation alleged that is "sufficiently serious," when objectively measured, and a prison official has acted with "deliberate indifference" to inmate health or safety in light of the deprivation. Id. at 825, 114 S. Ct. at 1977 (quoting Wilson v. Seiter, 501 U.S. 294, 298, 302-03, 111 S. Ct. 2321, 2324, 2326-27, 115 L. Ed. 2d 271 (1991)). Under *42 U.S.C.§ 1983*, the standard for examining whether there has been an unconstitutional denial of medical care is to determine if there has been a deliberate indifference to a prisoner's serious medical need, illness, injury, or right to privacy. Banks at 98, (citing Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991); and Hathaway v. Coughlin, 841 F.2d 48 (2d Cir. 1988)). It follows, therefore, that before the issue of defendants' deliberate indifference should be addressed, this Court must first determine whether plaintiff's tooth pain amounted to a "serious medical need."

A not inconsiderable number of courts have examined the question of what constitutes a serious medical need, and their holdings indicate that [*11] "the serious medical need requirement contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain." Banks at 98, (citing Archer v. Dutcher, 733 F.2d 14, 16-17 (2d Cir. 1984) ("extreme pain"); Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) ("physical torture and lingering death"). The medical conditions that have been held to fall under the constitutional rubric of serious medical need include a brain tumor, Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); refusal of a doctor to treat an allergic reaction after the injection of penicillin, despite his knowledge that the inmate was allergic to the drug, Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), cert. denied sub nom. *Thomas v. Cannon, 419 U.S. 879, 95 S. Ct. 143, 42 L. Ed. 2d 119 (1974)*; after delay in removing broken pins from a hip for over two years and nearly fifty complaints of pain, Hathaway v. Coughlin, 37 F.3d 63 (2d Cir. 1994); premature return to prison after surgery, Kelsey v. Ewing, 652 F.2d 4 (8th Cir. 1981); diabetes requiring special diet, Johnson v. Harris, 479 F. Supp. 333 (S.D.N.Y. 1979); a bleeding ulcer, Massey [*12] v. Hutto, 545 F.2d 45 (8th Cir. 1976); and loss of ear, Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) (claim stated against doctor who threw away prisoner's ear and stitched up the stump). Banks at 98. "Serious medical need" comprises a limited category of only the most grievous infirmities.

Many conditions fall short of being recognized by the courts a serious medical need, including a toothache. Tyler v. Rapone, 603 F. Supp. 268 (E.D.Pa. 1984). Other conditions that do not meet the constitutional standard of serious medical need include a variety of infirmities, such as a broken pin setting an injured shoulder, Wood v. Housewright, 900 F.2d 1332 (9th Cir. 1990); a mild concussion and broken jaw, Jones v. Lewis, 874 F.2d 1125 (6th Cir. 1989); cold symptoms, Gibson v. McEvers, 631 F.2d 95 (7th Cir. 1980); headaches, Dickson v. Colman, 569 F.2d 1310 (5th Cir. 1978); a kidney stone, Hutchinson v. United States, 838 F.2d 390 (9th Cir. 1988); a broken finger, Rodriguez v. Joyce, 693 F. Supp. 1250 (D.Me.1988); and bowel problems, Glasper v. Wilson, 559 F. Supp. 13 (W.D.N.Y. 1982).

Plaintiff's complaint states that he has been subject to "unbearable [*13] pain and suffering" because of defendants' actions, though defendants counter this assertion with an affidavit by Dr. S. Mirza, the dentist who ultimately filled plaintiff's problematic tooth. Dr. Mirza testifies that in his examination and treatment of plaintiff's teeth, he noted that the tooth that plaintiff maintains was the source of this pain ("tooth # 26") had a small cavity in its outer enamel. Dr. Mirza also swears that the cavity was not deep, and that the tooth's dentin, or underlayer of sensitive calcified tissue, was not exposed. He also states that no nerve was exposed by the cavity and that there was no sign of visible decay. It is Dr. Mirza's judgment that there was nothing revealed during his examination of plaintiff that would indicate that tooth # 26 would produce tooth pain, though he admits that plaintiff may have had sensitivity in this tooth. Dr. Mirza Affidavit at PP 5-9, 11 (dkt. 22). Plaintiff suggests, adamantly and rather vituperatively, that Dr. Mirza's diagnosis is incorrect and that plaintiff did suffer pain and decay in tooth # 26. Plaintiff's Reply to Dr. Mirza's Affidavit at P 3.

Regardless of the quantum of pain and sensitivity that plaintiff may [*14] have felt in tooth # 26, nowhere does

he express that his dental problem constituted an emergency or a "serious medical need." Malsh v. Austin, 901 F. Supp. 757, 762 (N.D.N.Y. 1995). Indeed, though his pain may have been discomforting or worse, plaintiff's actions indicate that he did not consider his want of a filling to rise to a "condition of urgency, one that may produce death, degeneration, or extreme pain." Banks at 98. If his dental problems rose to the level of a serious medical need, plaintiff hardly would have opposed Dr. Hoehn decision to treat the carious non-restorable tooth before treating the tooth pain, regardless of how disgruntled he felt about Dr. Hoehn's approach or bedside manner. Malsh at 762. In light of plaintiff's actions and the holding in Tyler that a toothache is not a serious medical need, this Court finds that plaintiff's tooth pain cannot be considered to be a serious medical need.

3. Deliberate Indifference

Defendants correctly note that plaintiff must prove both a serious medical need and defendants acted with a deliberate indifference to this need. Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). If plaintiff [*15] cannot meet either of these two requisites, he cannot succeed in his present *Eighth Amendment* claim. As this Court has determined that plaintiff cannot demonstrate that his tooth pain entailed a serious medical need, plaintiff cannot prevail in his claim. Accordingly, this Court should not address whether defendants actions amounted to deliberate indifference.

4. Qualified Immunity.

Finally, whether or not plaintiff has a valid constitutional claim on any of the aforementioned grounds, which this Court finds he does not, defendants are entitled to qualified immunity. Qualified immunity shields government officials from liability for civil damages when they are sued in their personal capacity as a result of their performance of discretionary functions, and serves to protect government officials from the burdens of costly, insubstantial lawsuits. Lennon v. Chief William P. Miller of the City of Troy, 66 F.3d 416, 420 (2d Cir. 1995), citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The use of summary judgment is encouraged when a qualified immunity defense is raised, and an appropriate motion cannot be defeated by immaterial factual [*16] disputes. Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992). In their performance of discretionary functions, government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S. Ct. at 2738; *see also*Zavaro v. Coughlin, 970 F.2d 1148, 1153 (2d Cir. 1992); Williams v. Smith, 781 F.2d 319, 322 (2d Cir. 1986). Even where the plaintiff's federal rights and the scope of the official's permissible conduct are clearly established, the qualified immunity defense protects a government actor if it was "objectively reasonable" for him to believe that his actions were lawful at the time of the challenged act. Malsh at 764 (citing Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987); Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987) (citing Malley v. Briggs, 475 U.S. 335, 340-41, 106 S. Ct. 1092, 1095-1096, 89 L. Ed. 2d 271 (1986))). Defendants meet the objective reasonableness test and are entitled to qualified immunity if "officers of reasonable competence [*17] could disagree" on the legality of defendants' actions. Malley, 475 U.S. at 341, 106 S. Ct. at 1096; *accord*Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991), cert. denied sub nom. *Lillis v. Golino, 505 U.S. 1221, 112 S. Ct. 3032, 120 L. Ed. 2d 902 (1992)*. Further, the use of an "objective reasonableness" standard permits qualified immunity claims to be decided as a matter of law. Malsh at 764 (citing Cartier at 844).

Plaintiff must demonstrate that he possessed a clearly established constitutional right to overcome defendants' qualified immunity defense. Three factors are considered when determining whether there is a clearly established right: (1) whether the right in question was defined with "reasonable specificity;" (2) whether relevant decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991), cert. denied, *503 U.S. 962, 112 S. Ct. 1565, 118 L. Ed. 2d 211 (1992)*. Under Farmer, plaintiff has a right [*18] to adequate medical care, which undoubtedly includes dental care. Farmer. at __, 114 S. Ct. at 1976. To the extent that plaintiff claims he has any statutory or constitutional right beyond his clearly established right to adequate dental care, such as the right to dental care on demand for a condition that was not a serious medical need, regardless of a treating dentist's diagnosis and DOC guidelines in such an instance, or to have various grievance procedures followed, the record unambiguously demonstrates that such a right was not clearly established and that it would not have been recognizable by a reasonable official. Malsh at 764. Even if the record did present a violation of a constitutional right, which again this Court finds it does not, refusing to give plaintiff a filling when the DOC's policy was to treat the more serious condition first *(i.e.,* plaintiff's carious non-restorable tooth), and thereafter affording the plaintiff the benefit of a grievance proceeding and an appeal, were objectively reasonable actions; and even if reasonable officials could disagree about the constitutionality of

defendants' actions, defendants still would be entitled to qualified [*19] immunity. Malley, 475 U.S. at 431, 106 S. Ct. at 1096.

C. Production of Documents

Plaintiff has before this Court a motion to compel production of documents (dkt. 31), to which defendants have responded with a request for a protective order and stay of further discovery (dkt.32). Considering that plaintiff has been unable to prove that his tooth pain amounted to a serious medical need and the fact that defendants are entitled to qualified immunity, which means plaintiff cannot succeed in his instant claim, this Court finds that both his motion to compel and defendants' request for a protective order and stay of further discovery are moot. Again, although *Rule 56* allows courts to consider depositions, answers to interrogatories, and admissions on file in ruling on summary judgment motions, it does not require that discovery take place before a motion for summary judgment may be considered. Banks at 98.

D. Plaintiff's Motion to Strike

Plaintiff currently has before this Court a motion to strike defendants answers as insufficient (dkt. 12), which is opposed by defendants. For the reasons discussed in the previous paragraph, this Court finds plaintiff's motion to strike [*20] is moot.

III. Conclusion.

WHEREFORE, on the basis of the Court's review of the entire file in this matter, it is

RECOMMENDED, that plaintiff's motion for partial summary judgment (dkt. 13) be denied; and it is further

RECOMMENDED, that defendants' cross motion for summary judgment (dkt. 22) be granted; and it is further

ORDERED, that plaintiff's motion to strike defendants' answers (dkt. 12) is denied as moot; and it is further

ORDERED, that plaintiff's motion to compel discovery (dkt. 31) is denied as moot; and it is further

ORDERED, that defendants' request for a protective order and stay of further discovery (dkt. 32) is denied as moot; and it is further

ORDERED, that the Clerk of Court serve a copy of this Order on the parties hereto by regular mail.

Pursuant to *28 U.S.C. § 636(b)(1)* and Local Rule 72.1(c), the parties have ten (10) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW**. Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993) (citing Small v. Secretary of Health and Human Services, [*21] 892 F.2d 15 (2d Cir. 1989)); *28 U.S.C. § 636(b)(1)*; FED. R. CIV. P. 6(a), 6(e) and 72.

Dated: January 14, 1997

Watertown, New York

Daniel Scanlon, Jr.

U.S. Magistrate Judge