

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFFREY JON BONNIN,

Plaintiff,

v.

EAU CLAIRE COUNTY,
WILLIAM R. BOELKE,
KEVIN J. OTTO,
JONATHAN J. PENDERGAST,
MICHAEL P. MAYER and
SHEILA A. BLANAS,

Defendants.

ORDER

03-C-65-C

Plaintiff is proceeding in forma pauperis in this action against defendants Boelke, Otto, Pendergast, Mayer and Blanes on a claim that he was subjected to the use of excessive force on November 11, 2002. In addition, plaintiff has been allowed to proceed against these same individuals on a claim that one or more of them knew of plaintiff's chest pains following his placement in a holding cell and deliberately refused to arrange for him to receive his heart medication or see a nurse. Finally, plaintiff is proceeding against the defendant county on the possibility that he might prove that defendants' conduct stems

from an official municipal policy or custom.

On October 30, 2003, defendants moved for summary judgment. According to the magistrate judge's May 29, 2003 preliminary pretrial conference order, plaintiff had until November 30, 2003, in which to oppose the motion. He did not do so. Instead, he wrote to the court on December 1, 2003, admitting that he did not send a copy of his letter to counsel for defendants. In the letter, plaintiff states that he cannot prosecute this case on his own. He suggests that although he has used every resource available, he has no idea how to defend against defendants' motion for summary judgment. He asks that the court appoint counsel to represent him and, if that request is denied, either to send him a "step by step packet of what [he] must fill out," or be allowed to dismiss the action voluntarily without prejudice to his refiling it again in 2007, when he is released from prison.

Because plaintiff did not serve his letter on counsel for the defendants, I am sending it to him with a copy of this order. However, as plaintiff is well aware, it is his responsibility to serve his submissions on opposing counsel. If he fails to do so in the future, I will not consider the submission.

Turning first to plaintiff's request for appointed counsel, the request will be denied. Plaintiff's lawsuit alleges a one-time incident of the use of excessive force and a one-time denial of medical care following the incident. In support of their motion for summary judgment, defendants proposed facts to explain what force they used and why they did not

immediately provide plaintiff with the medical care he requested following the incident. Their version of the facts is simple and straightforward. Each numbered proposed fact describing the incident is a one sentence statement.

Plaintiff received this court's Procedures to be Followed on Motions for Summary Judgment at the time he received the magistrate judge's preliminary pretrial conference order. Those procedures were specifically designed to explain step by step what a person unfamiliar with the law would have to do to oppose a motion for summary judgment. It is clear from plaintiff's submissions that he can read and write. Indeed, his communications to this court have been plain and direct. In addition, plaintiff states in his motion for appointed counsel that the prison's "law library here is great" and that "many inmates have helped" him with his case. Plaintiff has personal knowledge of the incident that is the subject of his complaint. Given all these factors, I am not persuaded that he was incapable of responding to each of defendants' simple and uncomplicated proposed facts by admitting the fact or telling his version of it, and I am not persuaded that a lawyer would make a difference in the outcome of the case.

Alternatively, plaintiff asks for step by step instructions telling him what to say in response to defendants' motion or dismissal of the action without prejudice to his refiling the case at some later time. As I noted above, plaintiff has received all the step by step instructions he can get to help him with the prosecution of this case. The court cannot give

plaintiff the kind of close guidance that he wants without becoming his legal advocate, an act that runs afoul of the court's duty to be an impartial decisionmaker in the case.

I am willing to accept plaintiff's notice of voluntary dismissal. However, I am not willing to allow the dismissal to be without prejudice to plaintiff's filing a new lawsuit against the defendants at some time in the future.

When a motion for voluntary dismissal is filed after the defendants have filed an answer or motion for summary judgment such as in this case, Fed. R. Civ. P. 41(a)(2) provides that the action may be dismissed by the plaintiff "only upon order of the court and upon such terms and conditions as the court deems proper." Because defendants have been required to defend this action, I will grant plaintiff's motion for voluntary dismissal only on the condition that the dismissal is with prejudice. This means that the order dismissing the case will serve as a judgment on the merits in favor of defendants.

If plaintiff is opposed to a dismissal of his case with prejudice, he should advise the court no later than January 5, 2004, that he is withdrawing his motion for voluntary dismissal. If he chooses to proceed, I will take defendants' motion for summary judgment under advisement and decide it without the benefit of having received plaintiff's view of the facts.

ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel or, alternatively,

for a “step by step packet” of information advising him how to respond to defendants’ motion for summary judgment is DENIED.

Further, IT IS ORDERED that plaintiff may have until January 5, 2004, in which to withdraw his motion for voluntary dismissal. If, by January 5, 2004, plaintiff fails to request withdrawal of his notice of voluntary dismissal, the clerk of court is directed to enter judgment dismissing this case with prejudice. Otherwise, the motion for summary judgment will be taken under advisement.

Entered this 16th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge