IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JESUS MAR GARCIA,

Plaintiff,

v.

JAMES REED, Medical Doctor,[1]

Defendant.

ORDER

06-C-94-C

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The question in this case is whether defendant James Reed, a doctor at the Federal Correctional Institutional in Oxford, Wisconsin, violated the Eighth Amendment rights of plaintiff Jesus Mar Garcia, a prisoner, by failing to adequately treat his acid reflux disease while he was incarcerated in Wisconsin. A prison official violates a prisoner's Eighth Amendment right to medical treatment when the official disregards a known serious medical need of the prisoner. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

Defendant has filed a motion for summary judgment on the ground that no

[1] In his complaint, plaintiff identified this defendant as "Doctor Reed." In his summary judgment motion, defendant provides his full name. I have amended the caption accordingly.

reasonable jury could find in plaintiff's favor. Keri v. Board of Trustees of Purdue University, 458 F.3d 620, 627 (7th Cir. 2006) (moving party entitled to summary judgment when no reasonable jury could find in favor of nonmoving party). Plaintiff has not filed a response either to defendant's brief in support of the motion or to defendant's proposed findings of fact. In fact, plaintiff has submitted nothing to the court since he filed a proposed amended complaint in June 2006. Under these circumstances, it is arguable that the case should be dismissed for plaintiff's failure to prosecute it. Daniels v. Brennan, 887 F.2d 783, 785 (7th Cir.1989) ("District courts have inherent authority to dismiss a case sua sponte for a plaintiff's failure to prosecute.")

However, it is unnecessary to decide whether plaintiff's inaction meets the standard for a failure to prosecute because the case must be dismissed on the merits. Plaintiff has the burden to prove his claim; defendant does not have the burden to disprove it. Pinkston v. Madry, 440 F.3d 879, 889 (7th Cir. 2006). To prevail on his motion for summary judgment, defendant is not required to submit evidence showing that he provided plaintiff with adequate medical treatment. Rather, defendant has to show only that plaintiff has failed to adduce enough evidence to allow a reasonable jury to find that his medical treatment was so inadequate that it violated the Eighth Amendment. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In other words, the plaintiff is required to show at the summary judgment stage that he has enough evidence to sustain a verdict in his favor.

If he fails to do this, summary judgment in favor of the defendant is appropriate. Further, to defeat a motion for summary judgment, a plaintiff may not rely on his complaint as proof of his claim. E.g., Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001). He must set forth such facts "as would be admissible in evidence" through affidavits, depositions, interrogatories, documentary evidence or stipulated facts. Fed. R. Civ. P. 56(e).

When, as in this case, the plaintiff fails to offer *any* evidence in support of his claim at the summary judgment stage, the defendant's burden is all the lighter. In fact, the only way that a defendant could lose his motion for summary judgment in such a case would be if he adduced evidence of his own showing that a reasonable jury could find against him. This is not one of those rare cases.

In the order granting plaintiff leave to proceed, I construed plaintiff's complaint as alleging that defendant knew that plaintiff suffered from ulcers and acid reflux disease and knew that the prescribed treatment (various types of medication) was ineffective, but refused to provide him with an alternative treatment. However, the evidence adduced by defendant would not permit a reasonable jury to find that he disregarded a known risk to plaintiff's health. Defendant makes the following averments in his affidavit:

• Defendant began treating plaintiff for Gastroesophegeal Reflux Disease in the summer of 2001 at the Federal Correctional Institution in Oxford, Wisconsin, after plaintiff complained of "black tarry stools"; defendant instructed plaintiff to take three medications.

• Plaintiff was transferred to a facility in Michigan from February 2002 , where he stayed until May 2004. (Although the record is not clear, it appears that plaintiff was transferred back to Oxford in May 2004).

• Defendant examined plaintiff again in August 2004 after he complained of hoarseness; defendant discovered no evidence of swollen glands but nevertheless requested that plaintiff be provided a consultation with a specialist.

• After the specialist recommended a "wedge device" for elevating plaintiff's head during sleep, defendant informed security staff of the recommendation.

• When plaintiff complained in December 2004 that he was still hoarse, defendant ordered another consultation with the specialist; the specialist recommended that plaintiff use a "proton pump inhibitor."

• Defendant saw plaintiff again in November 2005 after plaintiff continued to complain about acid reflux; defendant requested a consultation with a specialist to consider the possibility of surgery.

• Plaintiff was transferred from Oxford to a facility in Texas in March 2006 and has not returned.

Because plaintiff has not responded to defendant's motion for summary judgment, I must accept these averments as true for the purpose of defendant's motion for summary judgment. Procedure to Be Followed on Motions for Summary Judgment, II.C., attached

to Preliminary Pretrial Conference Order (July 14, 2006), dkt. #9.

These facts show that defendant responded to plaintiff promptly each time he complained. When prescribed treatment was ineffective, defendant sought guidance from a specialist. Plaintiff was transferred to another facility before a determination could be made regarding surgery. Without more, these facts would not permit a reasonable jury to find that defendant intentionally disregarded a serious medical need of plaintiff's.

The Supreme Court and the Court of Appeals for the Seventh Circuit have made clear that the Eighth Amendment does not grant prisoners the right to the treatment of their choice or even to an effective treatment necessarily. Estelle, 429 U.S. at 105; Forbes v. Edgar, 112 F.3d 262, 264 (7th Cir.1997). Rather, the Constitution requires only that prison officials make good faith efforts to treat serious medical problems of which they are aware. A failure to provide surgical treatment would violate the Eighth Amendment only if defendant (1) knew that treatment other than surgery would be ineffective when he provided it; (2) believed surgery *would* be effective; and (3) had the ability to order surgery. The current record would not permit a reasonable jury to infer any of these things.

Although there appear to have been significant gaps in time between examinations, nothing in this record allows me to infer reasonably that those gaps were caused by an intentional delay in treatment rather than by plaintiff's failure to notify defendant when he was dissatisfied with treatment or by other factors outside defendant's control, such as

plaintiff's transfer to other facilities or the unavailability of a specialist for consultation. There are also no facts from which I could infer that plaintiff's condition was so serious or pressing that defendant knew that any delay in treatment would cause needless pain and suffering. Although defendant does not provide a complete statement of facts, at the summary judgment stage, a court may not simply speculate that there may be some version of the facts that could support an Eighth Amendment violation; inferences must be drawn from the evidence. McDonald v. Village of Winnetka, 371 F.3d 992, 1001 (7th Cir. 2004) ("[W]e are not required to draw every conceivable inference from the record. Inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion.") (internal quotation and citations omitted).

In sum, there is no evidence before the court suggesting that defendant was not exercising medical judgment in treating plaintiff or that defendant's judgment was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" plaintiff's condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir.1996) (internal quotations omitted). Without such evidence, defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that defendant James Reed's motion for summary judgment is

GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 13th day of February, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge