

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

JEREMY M. WINE,

Plaintiff,

v.

C.O. PONTOW, *et al.*

Defendants.

ORDER

08-cv-72-bbc

On October 27, 2008, defendants filed a motion to compel plaintiff to sign an authorization for release of medical records related to this case, which I granted in an order entered November 14, 2008. However, before I had an opportunity to decide this matter, the deadline for filing dispositive motions arrived. Although defendants filed a timely motion for summary judgment with supporting materials, they now move to file additional materials in support of that summary judgment following plaintiff's compliance with the order requiring him to sign the authorization. Dkt. 87. I am denying this motion for procedural and substantive reasons: first, defendants failed to move for a stay or an extension of time before filing their motion for summary judgment; second the proffered additional evidence adds nothing to the evidence already submitted.

Although defendants filed a motion to compel plaintiff to sign an authorization form, they did not suggest that resolution of this discovery matter would affect their motion for summary judgment. It was not until their reply brief on the motion to compel that they mention the possibility that a decision on the motion to compel was necessary to prepare the materials in support of their summary judgment motion. Regrettably, the court did not decide defendants' motion to compel until after that date. To deal with the problem, defendants simply filed the motion when it was due and buried (on page 8 of their brief) a request to file additional information later. Now defendants have filed a stand-alone motion on this matter. This is not an effective way to bring such concerns to the court's attention. When this court failed to issue a timely ruling on the motion to compel, defendants should have flagged their dilemma by filing a motion for a stay or an extension

of the deadline. A request nestled on page 8 of a brief on a motion does not constitute a new “motion” and defendants cannot expect such requests to be considered. Indeed, it is unlikely the court even will discover the request until after all the other briefs are submitted and the court takes the motion under advisal. The Federal Rules of Civil Procedure explain the proper format for motions; when in doubt, read the instructions. *See* Fed. R. Civ. P. 7(b). Defendants’ failure to make a timely request to seek an extension of time or to stay the proceedings is reason alone to deny defendants’ motion.

However, my decision to deny defendant’s motion is not a glorification of form over substance. Having reviewed the proposed supplemental evidence, I conclude they it is not dispositive of any issue in the case, and it might not even be relevant. Plaintiff’s remaining claims are that some of the defendants beat him then doused him with urine and other defendants then refused to allow him to shower. In their newly proffered evidence, defendants submit the affidavit of a nurse who treated plaintiff on the day of the alleged beatings, who describes plaintiff’s injuries and opines that his injuries “were not consistent with a severe beating” and were consistent with proper restraint procedures. Defendants also have submitted a videotape of the nurse examining plaintiff.

Putting aside that the new evidence does not support defendants’ original assertion that there is *no* evidence that plaintiff suffered *any* injuries that night, the affidavit and video add nothing to defendants’ case for summary judgment. Defendants have denied that they beat plaintiff, and those facts have been proposed. At the Rule 56 stage, a nurse’s corroboration of defendants’ version of events adds nothing useful. Defendants might be thinking that if they offer a medical opinion on whether plaintiff suffered a beating, then they can prevail against plaintiff’s contrary version of the material facts. This may be true at trial, but it cannot be true for summary judgment. Corroboration of one side of a factual dispute does not eliminate the dispute.

ORDER

It is ORDERED that defendants' motion for leave to file additional materials and proposed findings of fact in support of its motion for summary judgment, dkt. 87, is DENIED.

Entered this 17th day of December, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge