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

RAYMOND D. SHAW,

Plaintiff,

v.

PAUL PERSSON, R.N.,
STEVE HELGERSON, R.N. and
LORI ALSUM, HSM,

Defendants.

ORDER

10-cv-598-slc

Plaintiff Raymond Shaw is a state prisoner who proceeds *pro se* and *in forma pauperis*. This case is ready for trial and it has been reduced to one issue: whether defendants Steve Helgerson and Lori Alsum violated plaintiff's constitutional right to medical care by ignoring his complaints of severe knee pain from December 11, 2008 to February 23, 2009. At plaintiff's request, I granted an extension of time to prepare for trial and gave the parties five dates to choose from in June or July, 2012. Of those dates, defendants indicate that only July 2, 2012 works for them. Plaintiff picked the latest date I offered (July 23, 2012) or even sometime in August. Plaintiff also requests the appointment of counsel to assist him at trial, which he believes will require an expert witness, and he asks for an additional extension of certain pretrial deadlines until counsel is appointed to represent him. Having considered both sides' input, I am setting the trial for July 2, 2012, and I am denying plaintiff's motions.

Plaintiff's motion for counsel must be denied because it fails to meet the threshold requirement of reasonable diligence. In that respect, before deciding whether to appoint counsel, I must find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Plaintiff has provided names and

addresses of three attorneys, at least two of whom have responded by declining his request for *pro bono* representation.

Although plaintiff has provided the names and addresses as required, the chronology that he provides does not reflect a reasonable effort on his part to obtain counsel. Plaintiff indicates that he contacted the first attorney in May of 2009, before suit was filed. Plaintiff filed the complaint on his own in October of 2010. Plaintiff waited 18 months to contact two other attorneys on March 20, 2012, and March 30, 2012, respectively. Plaintiff then waited until April 25, 2012 to file his first motion for appointment of counsel.

Plaintiff has been aware of the deadlines in this case since the pretrial conference order issued more than a year ago on March 17, 2011. Plaintiff does not explain his delay or allege facts showing that, but for the fact of his incarceration, he was precluded from seeking counsel before this time. Waiting until the eve of trial to attempt to locate *pro bono* counsel or to file a motion for appointment of counsel is not reasonable. Granting this last-minute motion would surely force this court to move the trial date back even further in order to give new counsel time to prepare, resulting in undue delay. Plaintiff's lack of diligence is reason enough to deny his motion for appointment of counsel. *See Jackson*, 953 F.2d at 1072. Because plaintiff offers no valid reason for his delay, the motion for appointed counsel will be denied.

Alternatively, even had plaintiff filed his motion well in advance of trial, I would still deny his request for appointment of counsel. The test for determining whether to appoint counsel is two-fold: "[T]he question is whether the difficulty of the case – factually and legally – exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). In other words, given the complexity of the case, does this plaintiff appear to be competent to try the case on his own? *See Santiago v. Walls*, 599 F.3d 749, 761 (7th Cir. 2010) (citing *Pruitt*, 503 F.3d at 654). Here, plaintiff argues that counsel is needed because he is restricted to temporary lock-up status without full access to the law library or to other inmates who have been assisting him in this

case. Plaintiff contends further that he suffers from an unspecified "mental health" impairment and that counsel is needed because he lacks legal training or the ability to retain an expert witness. Plaintiff's allegations are insufficient to show that counsel is required under the two-part inquiry.

With regard to the difficulty of the claim, as well as plaintiff's assertion that expert witness testimony is necessary, I conclude that appointed counsel is not warranted because the challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every other *pro se* litigant claiming deliberate indifference to a serious medical need. Plaintiff posits that an expert witness could help him present evidence about the defendants' state of mind. To the extent that plaintiff expects a volunteer attorney to bear the cost of an expert witness fee for him, appointing counsel for the mere purpose of shifting cost of litigation to the lawyer is neither required nor appropriate. *See, e.g., Romanelli v. Suliene*, 615 F.3d 847, 853-54 (7th Cir. 2010) (concluding that it was reasonable to deny a request for appointed counsel by a plaintiff who argued that counsel was necessary in order to secure expert medical testimony to support his claims). Although it is true that prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," *Hudson v. McHugh*, 148 F.3d 859, 862, n.1 (7th Cir. 1998), this is not sufficient reason by itself to find that plaintiff's case presents exceptional circumstances warranting appointment of counsel. This court told plaintiff orally during the March 16, 2011 telephonic preliminary pretrial conference and in the written order that followed that his deadline to disclose an expert witness would be August 19, 2011 and that plaintiff would be on his own to find expert witnesses if he wanted them . The court warned then plaintiff that "there is no extra time in the schedule to allow for extensions, so the parties should begin looking for expert witnesses right away if this type of witness might be important for summary judgment or for trial." March 17, 2011 Preliminary Pretrial Conference Order, dkt. 13, at 5. Here we are, over a year later, and for the first time plaintiff is voicing concerns that he does not have an expert

witness to support his claims. This is too little, too late. Defendants are entitled to the resolution of plaintiff's claims against them, so we will not delay this trial beyond the next date that is convenient for them, which still is two months away.

The court has narrowed plaintiff's complaint to a straightforward Eighth Amendment claim that two defendants (a nurse and a health services manager) were deliberately indifferent to his serious medical need. The law governing this type of claim has been settled since *Estelle v. Gamble*, 529 U.S. 97 (1976), and the court explained all this to plaintiff both in the order granting him leave to proceed over 15 months ago, *see* dkt. 7, and in connection with defendants' motion for summary judgment. Like the plaintiff in *Hudson*, plaintiff will have to prove defendants' state of mind and the medical causation for the injuries he suffered, if any. Such proof may well be difficult to come by. But the fact that matters of state of mind and medical causation are tricky to prove is not by itself an exceptional circumstance warranting appointment of counsel. If it were, then every prisoner civil rights case involving deliberate indifference would require such an appointment.

The record in this case reveals that plaintiff has competently represented himself thus far and that he is capable of continuing to litigate his claims. All of his submissions have been articulate and neatly typed. These submissions also reflect that plaintiff has an understanding of the issues present in an Eighth Amendment deliberate indifference case and that he has ample access to discovery materials. Plaintiff successfully defeated defendants' motion for summary judgment, although his claims against one individual defendant (Paul Persson) were dismissed. Plaintiff's asserted lack of legal training does not amount to an exceptional circumstance given that most inmates have little or no formal education and limited courtroom experience. Plaintiff has been provided with a trial preparation order, dkt. 65, which contains detailed instructions relating to the conduct of trial. Although he alludes to a mental health issue, plaintiff provides no specific facts to describe his status and he fails to show that he cannot formulate coherent voir dire questions beyond the court's standard questions if he believes them to be necessary, or

exercise peremptory strikes against the panel of jurors called forward at trial. Likewise, plaintiff supplies no facts showing that he is unable to pose simple questions to the witnesses or to conduct examination regarding the limited issue that remains in this case. Based on this record, I conclude plaintiff's motion for appointment of counsel, and his related motion for an additional extension of pretrial deadlines, must be denied.

ORDER

It is ORDERED that:

(1) Plaintiff's motion for appointment of counsel, dkt. 89, is DENIED.

(2) Plaintiff's motion to hold all deadlines in abeyance pending the appointment of counsel, dkt. 91, is DENIED.

(3) **Jury selection and trial shall begin July 2, 2012, at 9:00 a.m.**

(4) The deadlines found in the March 22, 2012 trial preparation order are extended to as follows:

(a) The parties' **final pretrial submissions**, namely a list of proposed witnesses and their location, a list of proposed exhibits, any proposed changes to the voir dire questions or jury instructions, and any motions in limine, **must be filed with the court not later than June 4, 2012.**

(b) **Any opposition to any submission filed by the other side must be filed with the court not later than June 18, 2012.**

(c) The court shall hold the **final pretrial conference on July 2, 2012 at 8:30 a.m.**

(5) The Clerk is directed to issue a writ for plaintiff's appearance at trial.

Entered this 3rd day of May, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge