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

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JOSEPH VAN PATTEN,

Plaintiff,

v.

MATTHEW FRANK, *et al.*

Defendants.

ORDER

06-C-374-C

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This is a pro se prisoner lawsuit in which plaintiff alleges that after he broke his ankle in a machine shop accident, defendants were deliberately indifferent to his medical needs, starting with his walk to the infirmary and continuing through months of x-rays, casts, crutches, wheel chairs, orthopedic boots, outside consultations, surgery, painkillers and anti-inflammatories. Now before the court are competing discovery motions, demands and disputes, brought to a head by defendants' recently-filed summary judgment motion. Plaintiff is seeking belated discovery and some breathing room on his response deadline; defendants request a discovery stay. I will give plaintiff two extra weeks to respond but will not require the defendants to provide any of the requested discovery at this point of this particular lawsuit. Plaintiff has not been diligent in obtaining necessary discovery; most alarmingly (although not before the court today), plaintiff has no expert witness to support his claims. Now that defendants have filed for summary judgment, plaintiff is in a bind and he wants this court to change its procedures to get him out of it. That is not going to happen.

Last fall, plaintiff filed his lawsuit; on October 18, 2006, this court granted him leave to proceed on some of his Eighth Amendment claims against some of the defendants. *See* dkt. 7. In November 2006, the court denied plaintiff's first motion for appointment of counsel, noting among other things that plaintiff could use his own medical records to attempt to prove his allegations that he repeatedly requested medical treatment but was ignored. *See* dkt. 12 at 4.

On December 19, 2006, this court held a telephonic preliminary pretrial conference, after which it sent plaintiff a copy of its order, which is specially written for use by litigators such as plaintiff. Two intertwined goals of the order (and the telephonic conference that precedes it) are to explain to a prisoner litigant what he needs to do to obtain discovery, and to explain how important it is to stay on top of the schedule. Plaintiff is in a discovery bind now because he ignored many of the advisals and directions in the order, and tries to excuse his noncompliance by claiming that he's not very well educated and nobody told him what was supposed to happen. These claims are provably incorrect, as a review of the preliminary pretrial conference order establishes (dkt. 13)(all emphasis in original):

> **Important Information**
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> So that there are no misunderstandings or mistakes, I am reminding the parties of some important points:
>
> **Read this whole order NOW**
>
> This federal civil lawsuit is a serious matter. As a party to a federal civil lawsuit, it is your duty to understand what you are supposed to do and when you are supposed to do it. To help you, this order explains what your duties are and what your deadlines are. This court has a number of rules that you must follow. It will not be easy to do everything that you are supposed to do, and you will not

have a lot of time. Therefore, it is important for you to read this order now so that you can do things the right way.

**Review the Federal Rules of Civil Procedure**

The Federal Rules of Civil Procedure are the rules that control much of what happens in this lawsuit. . . . It is your duty to know the rules of procedure that apply to you in this case.

* * *

**You are responsible for making or obtaining your own copies**

This court will not make copies for you and it will not give you money to make copies. If you are in an institution, you must use your own money or money from your legal loan account to pay for copies. If you have reached your loan limit, or if you think you will reach it during this case, then you must plan accordingly. You have no legal right to require the prison to make free photocopies of documents that you write by hand. That means that you must write your own copies of these documents by hand to serve on your opponent and to keep a copy for yourself. This court will not order the institution to provide photocopies of large amounts of documents if those documents already have been submitted by you or by the defendants. This court will not order the institution to photocopy documents for you in this lawsuit if you already have a federal lawsuit in this court that has used up your legal loan account, unless there is some special reason to do so, such as your present physical safety.

**2. Disclosure of Expert Witnesses: Plaintiff: April 20, 2007**
**Defendants: May 18, 2007**

Because expert witnesses are different from other witnesses, there is a special rule telling how plaintiffs and defendants must name their experts and explain what those experts are going to say at trial. That rule is Rule 26(a)(2) of the Federal Rules of Civil Procedure. If a party does not follow the requirements of Rule 26(a)(2) by his (or her) deadline to disclose expert witnesses, then this court will not allow that expert witness to present evidence in this case.

* * *

The parties are on their own and they should keep this in mind if they think they might want expert witnesses in this case. 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.

**3. Deadline for Filing Dispositive Motions: June 1, 2007**

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**B) Motions for Summary Judgment**

Summary judgment is a way for plaintiff or defendants to win this lawsuit (or parts of it) before the trial. Rule 56 of the Federal Rules of Civil Procedure explains how the parties must present their evidence and their legal arguments when they file or respond to a summary judgment motion. Rule 56 is important, so you should read it carefully, even before a summary judgment is filed, so that you can be ready for a summary judgment motion and then to do things correctly.

This court has a written set of rules that explains how to file a summary judgment motion and how to respond to your opponent's summary judgment motion. This "Procedure Governing Summary Judgment" is attached to this order and you should read it **now.** This will help you to understand how much work will be involved, and understand the parts that give plaintiffs trouble, like writing good responses to the defendants' proposed findings of fact.

Because it is very hard for an imprisoned plaintiff to prepare everything needed to respond to a summary judgment motion, the court will give you 30 calendar days to file every part of your response and to serve it on the defendants' attorney. The court will start counting your 30 day response deadline on the day that it receives defendants' motion for summary judgment. Any reply must be filed and served not later than 10 calendar days after service of the response.

**BE AWARE: you are not going to get an extension of this 30 day deadline.** The only way to get more time would be if you can convince the court that something totally unfair happened that actually prevented you from meeting your deadline, and this was completely somebody else's fault. Some things that might seem unfair to you are **not** reasons to get more time. For example, you will not get more time just because you claim that you did not have enough time or money to make copies. You will not get more time if you waited too long to get all the information you think you need to respond to the motion. You will not get more time if you have been put in segregation for actually committing some infraction.

Also, if you do not follow the court's procedure for how to respond to summary judgment, then you will not get more time to do it over unless the court decides on its own that you should get a second chance.

**The only way to make sure that the court will consider your documents is to start early, do them right the first time, and file them and serve them on time. If you do not do things the way it says in Rule 56 and**

**in the court's written summary judgment procedure, then the court will not consider your documents.** . . .

**4. Discovery Cutoff: September 28, 2007**

"Discovery" is the word used in federal courts to describe how plaintiffs and defendants can learn information and get documents that are useful to deciding this lawsuit. Rules 26 through 37 of the Federal Rules of Civil Procedure explain how you may get information and documents from the defendants and how the defendants may get information and documents from you. You should read Rules 26 through 37 **now** so that you understand how this works, and so that you can begin taking discovery in this case.

The court expects both sides to follow Rules 26 through 37. You have no right to get information or documents to use in this case except in the way these rules say. For example Rule 26(b) says that you may discover evidence that is relevant to the claims or defenses in this lawsuit.

* * *

If the parties disagree about discovery requests, then this court would like them to try to work it out if they can do so quickly, but the court does not require this if it would be a waste of time. If either side thinks that the other side is not doing what it is supposed to do for discovery and they cannot work it out, then either the plaintiff or the defendant quickly should file a motion with the court. If the parties do not bring discovery problems to the court's attention quickly, then they cannot complain that they ran out of time to get information that they needed for summary judgment or for trial.

*See* dkt. 13.

Over five months passed between issuance of this order in December 2006 and defendants' motion for summary judgment, which they filed at the end of May, 2007. As best I can deduce, plaintiff attempted no discovery during this time period except to ask the state to provide him with a free copy of his medical records. The Assistant Attorney General responded on January 2, 2007, informing plaintiff that it would make a copy for him at the

usual rate of 15¢/page. *See* Attachment to dkt. 18. As is clear from plaintiff's current complaint, he did not follow through with this.

Instead, plaintiff: (1) filed two missives with the court, complaining about the way he was being treated at his current facility (dkts. 14 and 16); (2) attempted to dismiss this lawsuit without prejudice (dkt. 18, to which the state refused to agree, dkt. 20), and (3) filed then withdrew an ill-advised interlocutory appeal that did nothing but cost him a hefty appellate filing fee (dkt. 23). On April 20, 2007, plaintiff announced that he was unable to obtain expert witnesses to assist him in this case because he had no money and did not have the training or education to prepare any documents relating to this. (Dkt. 28). Next plaintiff filed a second motion to appoint counsel (dkt. 29) which the court denied on May 11, 2007 (dkt. 31).

On May 29, 2007, the state filed a motion for summary judgment supported by a brief and affidavits. The state contends that everyone involved at all times did what he or she thought was appropriate to diagnose and treat plaintiff's stubborn leg and ankle injuries, including x-rays, casts, an orthopedic boot, crutches, a wheelchair, painkillers, outside consultations and surgery. *See* dkts. 32-37 and 39.[1]

On May 30, 2007, plaintiff filed a document titled "motion for discovery for production of documents" (dkt. 38) that actually was a request for production of documents more properly directed to defendants and requiring no court action at that time. This prompted the state to file a motion to stay discovery pending a decision on its summary judgment motion (dkt.40), in part based on a claim of qualified immunity.

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[1] Dogged by bad luck, plaintiff also suffered and was treated for a heart attack during treatment for his ankle, and now suffers from chronic degenerative disc disease, *see* dkt. 32 at 13-14 but these maladies are not part of this lawsuit.

This prompted a flurry of filings from plaintiff: on June 12, 2007, he filed with the court four different sets of interrogatories directed to defendants and state witnesses (dkts. 44-47), a letter asking for more time to respond to defendants' summary judgment motion, claiming to have misunderstood when discovery was supposed to begin and pleading poverty as a reason not to have obtained necessary documents. Plaintiff also filed a copy of his letter to defendants' attorney claiming that he thought discovery had not started yet, which prompted a June 11, 2007 response from counsel noting the error of plaintiff's thought process and sticking with defendants' motion to stay discovery. (dkt. 42) This prompted a June 17, 2007 letter to this court in which plaintiff claims that he has been unable to obtain discovery needed to respond to defendants' summary judgment motion and offering his "firm belief" that the state was trying to take advantage of him. (Dkt. 48).

Under these circumstances, it is difficult to muster sympathy for plaintiff. He claims to be uneducated and inexperienced, yet throughout this case he has peppered the court and defendants' attorney with articulate and rational (though misdirected and unpersuasive) letters and demands. Every issue that plaintiff claims now to be a problem was thoroughly explained in the preliminary pretrial conference order, quoted at great length above. One reason this court issues an order of this nature and scope is to prevent exactly the sorts of problems plaintiff now claims to be experiencing. He has no one to blame but himself if, six months after the preliminary pretrial conference, he has not obtained copies of his own medical records, he has made no discernible genuine attempt to obtain an expert witness and he has waited to serve any discovery at all on the defendants. The preliminary pretrial conference order warned plaintiff

that behavior of this sort would not be grounds to obtain an extension of his summary judgment response deadline.

That said, I nonetheless will provide plaintiff with two additional weeks, until July 13, 2007, within which to file and serve his response. This at least gives plaintiff a chance to put his own version of events into the record in an attempt to refute the defendants' proposed findings of fact and legal arguments. Defendants may have until July 23, 2007, within which to file and serve any reply in support of summary judgment.

On the other hand, pursuant to Rule 26(c) and based on the singular circumstances presented at this juncture of this particular lawsuit, I am granting defendants' motion to stay discovery. In the absence of an expert witness who is prepared to opine that the treatment outlined in defendants' summary judgment affidavits could be viewed as deliberate indifference to plaintiff's injuries, there is nothing to be gained by putting the state, the defendants or their attorneys to the time and expense of providing the information sought in plaintiff's pending discovery requests. I honestly hope that plaintiff's ankle, back and heart conditions all are improving, but his Eighth Amendment lawsuit is on life support.

ORDER

For the reasons stated above, it is ORDERED that:

(1) Defendants' motion to stay discovery is GRANTED;

(2) Plaintiffs' motions and requests to compel discovery are DENIED; and

(3) Plaintiff's motion to extend his response deadline is GRANTED IN PART and DENIED IN PART: plaintiff's new response deadline is July 13, 2007, and defendants' reply deadline is July 23, 2007.

Entered this 22nd day of June, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge