IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IVORY WADE,

Plaintiff, ORDER

3:07-cv-462-bbc

v.

DR. CASTILLO, Psychiatrist,

Defendant.

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The April 11, 2008 deadline within which the parties had to amend pleadings in this case has passed. Nevertheless, on August 27, 2008, plaintiff moved for leave to file an amended complaint to add a new defendant, Dr. Joseph Drinka, who is alleged to have been deliberately indifferent to plaintiff's serious medical need for psychiatric care and to have failed to meet the minimum standard of care for a psychiatrist when he took plaintiff off his psychiatric medications on January 23, 2007. Plaintiff contends that as a result of Dr. Drinka's actions, plaintiff suffered a series of mental health crises, including two suicide attempts. The motion to amend and plaintiff's motion for leave to file a reply to defendant's response to the motion are presently before the court.

In deciding plaintiff's motion to amend, I have considered the clarifications made in plaintiff's reply brief. Therefore, plaintiff's motion for leave to file a reply brief will be granted.

Fed. R. Civ. P. 15(a)(2) provides that pleadings may be amended by leave of court and directs the courts to give leave freely "when justice so requires." "'The terms of [Rule 15], however, do not mandate that leave be granted in every case.'" Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 666 (7th Cir. 2007) (quoting Park v. City of Chicago, 297 F.3d 606, 612 (7th Cir. 2002)). Leave should not be granted for several reasons, including "'undue delay, bad faith or dilatory motive on part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment[or] futility of amendment . . . .'" Id. (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). A "decision to grant or deny a motion for leave to file an amended pleading is 'a matter purely within the sound discretion of the district court.'" Guise v. BWM Mortgage, LLC, 377 F.3d 795, 801 (7th Cir. 2004) (quoting J.D. Marshall International, Inc. v. Redstart, Inc., 935 F.2d 815, 819 (7th Cir. 1991)).

Defendant argues that plaintiff should not be allowed to file his proposed amended complaint because he was not diligent in discovering that he had a potential Eighth Amendment and medical malpractice claim against Drinka. Plaintiff admits that he did not learn until August 14, 2008, that Drinka may not have exercised any professional judgment

when he removed plaintiff from his psychiatric medications or that his decision fell below the minimum standard of care required of psychiatrists. (At the time, plaintiff had a "preliminary diagnosis" of Psychotic Disorder NOS for which he was taking medication.) He explains that it was not until August 14 that defendant first located and disclosed a health services request form that plaintiff had submitted to Drinka saying, "I would like my medication discontinued (A.S.A.P.)," to which Drinka had responded, "Okay!" He notes that because the Department of Corrections could not locate the form, it was not provided with defendants' initial document disclosures. Moreover, plaintiff explains that the importance of the form did not become apparent until he learned in early July during Drinka's deposition that it was Drinka's practice to record the reason for his medical decisions on health services request forms and that without the form, Drinka could not say whether he had reviewed plaintiff's medical records, met with and examined plaintiff to determine why plaintiff was asking to be taken off his medications, explained to plaintiff the risks of removing him from his medications, or consulted with the Department of Corrections doctor who had prescribed plaintiff's medication why the medications might be necessary.

I am not persuaded by defendant's arguments that plaintiff's counsel lacked due diligence because plaintiff should have found his copy of the missing health services request form and turned it over to his lawyer before defendant produced it, or that plaintiff should

have known earlier that he had a claim against Drinka because a notation that Drinka had discontinued his medication is revealed in plaintiff's medical records. As plaintiff points out, the records did not disclose the reason for Drinka's decision or any other basis for suspecting that Drinka's decision was not made in the exercise of professional judgment, and it is not reasonable to expect that a severely mentally ill inmate should have better bookkeeping skills than the Department of Corrections' health services department.

Defendant suggests that if I conclude that plaintiff did not lack due diligence in discovering his claim against Dr. Drinka, I should nevertheless deny the motion to amend because the amended complaint is futile in light of plaintiff's failure to file a timely notice of claim with the Wisconsin Attorney General. However, the allegations of the proposed amended complaint allow an inference to be drawn that Drinka's decision to cut plaintiff off his psychiatric medications was so lacking in professional medical judgment that deliberate indifference may be inferred. Moreover, I am not persuaded that defendant is right that plaintiff has failed to file a timely notice of his medical malpractice claim against Dr. Drinka. Plaintiff represents that he is presently in the process of filing a notice of claim concerning Dr. Drinka's actions. Plt.'s Reply Br., dkt. #40, at 5. In light of the fact that the relevant notice of claim statute, Wis. Stat. § 893.82(5m) permits notice of claims of medical malpractice to be filed "180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered," and the fact that

plaintiff, even exercising reasonable diligence, did not discover until he took Drinka's deposition in July 2008 that Drinka appeared not to have met the minimum standard of care for a psychiatrist when he discontinued plaintiff's medications, plaintiff's notice of claim appears to have been timely filed. In sum, I conclude that plaintiff did not lack due diligence in learning that plaintiff has a viable claim of wrongdoing against Dr. Drinka and that plaintiff's amended pleading adding Dr. Drinka as a defendant and raising both an Eighth Amendment claim and a state law medical malpractice claim against him is not futile.

The parties dispute whether defendant will be prejudiced by the grant of permission to add a defendant so near the October 17, 2008 deadline for filing dispositive motions, but the dispute can be put to rest by rescheduling that deadline and the remaining deadlines in this case, including the trial date. Where, as here, the interests of justice require that the amended pleading be allowed, the court's previously issued scheduling order must give way.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for leave to file a reply brief is GRANTED.

2. Plaintiff's motion for leave to amend his complaint to add Dr. Joseph Drinka as a defendant is GRANTED. Plaintiff may proceed under 28 U.S.C. § 1915A on his claim that Drinka violated his rights under the Eighth Amendment and state law when he

discontinued plaintiff's psychiatric medication on January 23, 2007. The proposed amended complaint will be considered as the operative pleading as of this date.

3. The amended complaint and a copy of this order is being forwarded today to the Attorney General for informal service on Dr. Drinka.

4. All previously imposed deadlines in this case are vacated. The clerk of court is requested to arrange promptly for a new scheduling conference to be held before United States Magistrate Judge Stephen Crocker as promptly as the magistrate judge's calendar permits so that a dispositive motions deadline, trial date and other necessary deadlines may be set.

Entered this 15th day of September, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge