

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

WILLIE C. SIMPSON,

Plaintiff,

v.

CYNTHIA THORPE and DR. COX,

Defendants.

ORDER

09-cv-532-bbc

Plaintiff Willie Simpson is proceeding in forma pauperis on his claims that defendants Burton Cox and Cynthia Thorpe are denying him adequate medical care for his HIV symptoms and lesions on his organs, in violation of the Eighth Amendment. On September 10, 2010, defendants filed a motion for summary judgment. Rather than submit a brief and supporting materials in response to that motion, plaintiff has filed two motions to amend his complaint, along with a proposed amended complaint adding new defendants. Also, he has filed a motion for an extension of time to respond to defendants' motion for summary judgment, stating that he cannot oppose the motion until his amended complaint is properly served upon the new defendants.

Plaintiff argues that it is an abuse of discretion to refuse a pro se plaintiff's request to

amend his complaint to name the appropriate defendants. For this proposition, he cites Marshall v. Knight, 445 F.3d 965 (7th Cir. 2006), which in turn cites Donald v. Cook County Sheriff's Department, 95 F.3d 548, 556-57 (7th Cir. 1996). However, plaintiff's current situation is distinguishable from either of these cases. In Marshall, the district court denied the pro se plaintiff's motion to amend his complaint before a responsive pleading was filed. The court of appeals found that this denial violated Fed. R. Civ. P. 15(a), which allows a plaintiff to amend the complaint once "as a matter of course" in such a situation. Marshall, 445 F.3d at 970.

In Donald, the pro se plaintiff filed a § 1983 suit against the Cook County Sheriff's Department and defendant moved to dismiss on the ground that the complaint failed to name individual defendants. Donald, 95 F.3d at 551-52. Plaintiff then sought leave to amend the complaint to add individual defendants, but the district court denied the motion, holding that the amendment would not relate back under Rule 15(c)(1). Id. at 559. The Court of Appeals for the Seventh Circuit reversed, finding that the plaintiff had satisfied the mistake element of Rule 15(c)(1) because he had labored under the misunderstanding that he need not name individual persons as defendants in the action. Id. at 560.

Contrary to Marshall, plaintiff has already been allowed to amend his complaint once, and this case has progressed to the summary judgment stage; indeed, I have already denied plaintiff's own motion for summary judgment. Plaintiff is aware that he must name as

defendants the individuals who caused him harm; he is asking for leave to add new defendants now because he states that he has finally uncovered who is responsible for his harm.

At this point, plaintiff may amend his complaint only with defendants' written consent or at the court's leave, which should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). At this late date in the proceedings, I conclude that justice does not require granting leave to plaintiff; in fact, justice requires denying his motions to amend. It would be unfair to defendants to put the case against them on hold and essentially start over by screening plaintiff's claims against new defendants. Plaintiff remains free to bring a new lawsuit against his proposed new defendants. Burks v. Raemisch, 555 F.3d 592, 596 (7th Cir. 2009) ("a judgment in favor of people who did not cause Burks's injury cannot prevent a suit against those who did").

Because plaintiff pursued his motion to amend his complaint in lieu of responding to defendants' motion for summary judgment, I will grant plaintiff's motion for an extension of time to respond. He will have until December 10, 2010 to file his brief, proposed findings of fact and supporting materials. Defendants will have until December 20, 2010 to file a reply.

ORDER

IT IS ORDERED that

1. Plaintiff Willie Simpson's motions for leave to amend his complaint, dkt. ##94, 103, are DENIED.

2. Plaintiff's motion for an extension of time to respond to defendants' motion for summary judgment, dkt. #105, is GRANTED. Plaintiff will have until December 10, 2010 to file his brief, proposed findings of fact and supporting materials. Defendants will have until December 20, 2010 to file a reply.

Entered this 18th day of November, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge