

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

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ONTARIO DAVIS,

Plaintiff,

v.

BARBARA DeLAP, SGT. NOVINSKA,  
PETER HUIBREGTSE and  
VICKI DORN a.k.a. "JANE DOE",

Defendants.

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ORDER

10-cv-674-slc

This case is before the court on plaintiff Ontario Davis's motion for default judgment against defendant Vicki Dorn. Dkt. 94. For the reasons stated below, I am denying Davis's motion and granting judgment against him on his claim against Dorn, even though Dorn has never appeared in this case or contested Davis's claims.

Davis was granted leave to proceed on his claim that Dorn, a contract nurse who worked at the Wisconsin Secure Program Facility for a short time period in 2010, violated his rights under the Eighth Amendment by failing to provide adequate care for his headache and face pain on July 27, 2010. Although Dorn was served with the complaint on September 15, 2011, *see* Marshal Service Return, dkt. 54, she has not answered the complaint or otherwise appeared to defend this lawsuit. Meanwhile, on April 2, 2012, this court entered an order granting summary judgment in favor of the remaining defendants. Dkt. 97.

In that order, I found that Davis's Eighth Amendment claim against defendant Lesa Novinska failed in part because the evidence submitted by Davis showed that his headache and face pain on July 27, 2010 was not a "serious medical need" that triggered the protections of the Eighth Amendment. Dkt. 97, at 15-16. The Court of Appeals for the Seventh Circuit has held that if a district court grants one defendant's motion for summary judgment, it may decide on

its own to enter summary judgment in favor of non-moving defendants, if granting the motion would bar the claim against those non-moving defendants. *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 280 (7th Cir. 1986); *see also Acequia, Inc. v. Prudential Ins. Co. of Am.*, 226 F.3d 798, 807 (7th Cir. 2000) (*sua sponte* grant of summary judgment appropriate “where one defendant succeeds in winning summary judgment on a ground common to several defendants, if the plaintiff had an adequate opportunity to argue in opposition”). Here, the court’s finding that Davis’s pain on July 27 was not a serious medical need means that Dorn, like Novinska, did not violate Davis’s Eighth Amendment rights, no matter how unreasonable or callous her actions may have been. Accordingly, I find that entry of summary judgment in favor of Dorn is appropriate, even though she did not move for summary judgment.

Davis might question why a defendant who never even bothered to respond to his claims can win. Although this court strongly disapproves of Dorn’s inaction and omissions, as a legal matter, it ends up not mattering to the outcome in this particular lawsuit. It is true that a properly-served defendant like Dorn who fails to plead or otherwise defend commits a default. Fed. R. Civ. P. 55(a). There is a difference, however, between a default and a default *judgment*. Although a default may serve as the *basis* for a default judgment, the entry of default alone does not determine the rights of the parties. *United States v. Borchardt*, 470 F.2d 257, 260 (7<sup>th</sup> Cir. 1972). A default judgment, on the other hand, “establishes, as a matter of law, that defendants are liable to plaintiff on each cause of action alleged in the complaint.” *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 602 (7<sup>th</sup> Cir. 2007).

Here, to enter default judgment against Dorn—and thereby find as a matter of law that she is liable to Davis on his Eighth Amendment claim—would conflict directly with the summary judgment order finding that Davis failed to meet his burden of showing that he had a serious

medical need on July 27, 2010. Although default has not yet been entered against Dorn, this court's ruling in the summary judgment order would amount to "good cause" to set any such entry of default aside. *See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 385 (7<sup>th</sup> Cir. 2008) (district court had authority to act *sua sponte* to set aside entry of default against non-appearing defendant and grant summary judgment in its favor, where plaintiff's evidentiary burden against that defendant was the same as it was against appearing defendants and plaintiff failed to meet it). Rather than engage in that futile exercise, I will instead deny Davis's motion for default judgment and grant summary judgment in favor of Dorn, as it is the fairest and most efficient outcome under the circumstances of this case.

#### ORDER

IT IS ORDERED that:

1. Plaintiff Ontario Davis's motion for default judgment as to defendant Vicki Dorn, dkt. 94, is DENIED.
2. Summary judgment is GRANTED to defendant Vicki Dorn on the court's own motion, for the reasons stated above.
3. The clerk of court is directed to enter judgment for defendant Dorn and close this case.

Entered this 6<sup>th</sup> day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge