IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRIAN KEITH FORSHEE,

OPINION AND ORDER

Plaintiff,

12-cv-152-bbc

v.

DENNIS BRIGHTWELL, SARAH KOWALSKI and MARK TWOMBLY,

Defendants.

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The question in this case is whether defendants Dennis Brightwell, Sarah Kowalski (now Sarah Van Vorst) and Mark Twombly violated the Constitution by failing to provide medication for plaintiff Brian Keith Forshee's attention deficit hyperactivity disorder while he was incarcerated at the Dane County jail. All of the defendants have filed motions for summary judgment, which are ready for review. Dkt. ##31, 33 and 40.

At all relevant times, defendant Brightwell was a psychiatrist working at the jail, Brightwell Aff. ¶¶ 2-3, dkt. #42; defendant Kowalski was the health services administrator, Van Vorst Decl. ¶ 2, dkt. #6; defendant Twombly was the jail administrator. Twombly Aff. ¶ 2, dkt. #26. In his motion, defendant Brightwell argues that plaintiff has failed to show he suffered from ADHD while he was at the jail or, if he did, that it was a serious medical need or, if it was, that Brightwell was "deliberately indifferent" to that need. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (prison official may violate prisoner's constitutional

right to medical care if official is "deliberately indifferent" to "serious medical need"). Defendants Kowalski and Twombly argue that, as nonmedical staff, they were entitled to rely on Brightwell's determination that plaintiff did not need medication. Lee v. Young, 533 F.3d 505, 511 (7th Cir. 2008) ("[P]rison officials who are not medical professionals are entitled to rely on the opinions of medical professionals."). Finally, defendant Kowalski argues that plaintiff's claim against her should be dismissed under Fed. R. Civ. P. 41(b) because he did not respond to any of her discovery requests.

In response to these motions, plaintiff did not submit any evidence to support his claim. Instead, he filed a one-page document in which he stated that the "Dane County jail has ignored my requests for release of my medical and mental health records," but that he believes "there is enough evidence to support my claims of mental abuse as dictated in the original filing, in the already existing paperwork." Dkt. #45.

Plaintiff's statement that the "Dane County jail" has ignored his requests for records is not a ground for denying defendants' summary judgment motions. If a defendant is refusing to comply with a request for documents, the plaintiff may file a motion to compel with the court. Fed. R. Civ. P. 37. If a nonparty is refusing to provide documents, the plaintiff may request a subpoena. Fed. R. Civ. P. 45. Alternatively, a plaintiff may file a motion under Fed. R. Civ. P. 56(d) if the defendant has filed a motion for summary judgment before the plaintiff has the discovery he needs to respond to the motion. Plaintiff did none of these things, so it is too late for him to complain now about any withheld documents. In any event, he does not identify the request he made or to whom he made it

or what he believes the records would show, so it is impossible to determine whether he was denied any documents wrongfully or whether they could have made a difference in the case.

Plaintiff says that he believes there is enough evidence in the record to support his claim, but the only documents he has submitted are his complaint and the grievances that he filed. Dkt. #1. Although these documents were sufficient at the pleading stage to show that plaintiff had stated a claim upon which relief may be granted, the standard at summary judgment is very different. "[S]ummary judgment [is] the 'put up or shut up' moment in litigation," which means "that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case. And by evidence, we mean evidence on which a reasonable jury could rely." Goodman v. National Security Agency, Inc., 621 F.3d 651, 654 (7th Cir. 2010). In other words, conclusory allegations are not sufficient; the plaintiff must come forward with specific evidence that proves his claim. Cedar Farm, Harrison County, Inc. v. Louisville Gas and Electric Co., 658 F.3d 807, 812 (7th Cir. 2011); Knight v. Wiseman, 590 F.3d 458, 463-64 (7th Cir. 2009).

Plaintiff's complaint and grievances show that he was unhappy with his care at the jail, but the documents are not admissible evidence that plaintiff had a serious medical need related to ADHD or that defendant Brightwell's determination that plaintiff did not need ADHD medication was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that [Brightwell] did not base the decision on such a judgment." King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012) (setting forth standard for prisoner medical care claim). In the absence of such evidence, defendants are entitled

to summary judgment. This makes it unnecessary to decide whether plaintiff's claim against defendant Kowalski should be dismissed for failure to prosecute under Rule 41.

ORDER

IT IS ORDERED that the motions for summary judgment filed by defendants Mark Twombly, dkt. #31, Sarah Kowalski, dkt. #33, and Dennis Brightwell, dkt. #40, are GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 26th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge