

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

AMONTRE ROSS,

Plaintiff,

v.

MENDOTA MENTAL HEALTH
INSTITUTE, SIMPIE, and
ANOTHER IDENTIFIABLE MALE,

Defendants.

OPINION AND ORDER

No. 19-cv-255-wmc

Plaintiff Amontre Ross, a patient at the Mendota Mental Health Institute (“Mendota”), filed a proposed civil complaint, seeking to proceed on claims that defendants violated his constitutional rights when two defendants physically assaulted him and then failed to provide adequate medical care for his injuries and lost his records related to these events. Ross has also filed multiple motions, seeking assistance in recruiting counsel and that defendants turn over evidence. (Dkt. ##10, 13, 14, 15, 16.) Since plaintiff seeks to proceed in this lawsuit *in forma pauperis*, the court is required to screen this complaint pursuant to 28 U.S.C. § 1915(e)(2). For the reasons that follow, the court will permit Ross to proceed on a Fourteenth Amendment excessive force claim against two defendants, but the court is denying Ross’s motions at this time.

ALLEGATIONS OF FACT¹

In March of 2017, Ross was admitted to Mendota for a competency evaluation, where defendants Simprie and another individual were working. One day Simprie told Ross he could not have access to his canteen items, and when Ross asked why, Simprie responded by pushing him into his cell. Ross threw a carton of milk at him, and Simprie responded by charging at him. The other individual then ran behind him and pressed his thumbs into Ross's eyes. Ross was then slammed to the ground, at which point Simprie rammed his head into the floor three times. Ross, suffering from severe shoulder pain, was moved to the seclusion area.

Even though Ross reported severe pain and his shoulder was hanging out of its socket, he did not receive medical attention. The supervisor on duty took pictures of his eye injuries but refused to give Ross copies of the pictures. Ross states that since that day he has been in severe pain. While he receives physical therapy for his shoulder, he has been told that his shoulder condition is worsening and he needs surgery. Ross adds that he left Mendota temporarily, and when he returned, documents related to his complaints about the incident were missing.

¹ In addressing any *pro se* litigant's complaint, the court must read the allegations generously, resolving ambiguities and drawing reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

OPINION

I. Section 1915(e)(2) Screening

The court understands plaintiff to be seeking leave to proceed against Simpie and the other individual that harmed him on an excessive force claim, and against Mendota on a claim related to his missing records and inability to obtain medical care for his injury. The court will infer that plaintiff was involuntarily civilly committed during the relevant time period, a fact that is material to the standard governing his claims. *See Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009) (“The scope of an individual’s right to be free from punishment -- and, derivatively, the basis for an excessive force action brought under § 1983 -- hinges on his status within the criminal justice system.”). As a civilly committed detainee, plaintiff’s claims arise under the Fourteenth Amendment’s Due Process Clause, not the Eighth Amendment. *Sain v. Wood*, 512 F.3d 886, 893 (7th Cir. 2008). Civil detainees are “entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *McGee v. Adams*, 721 F.3d 474, 480 (7th Cir. 2013) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)).

Under the Fourteenth Amendment, to succeed on an excessive force claim, a plaintiff must show “that the force purposely or knowingly used against him was objectively unreasonable.” *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). In determining whether plaintiff meets this burden, relevant factors to be considered include “the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force;

the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.” *Id.*

As to Simprie and the unidentified individual, plaintiff’s allegations are sufficient to permit an inference that both of them used excessive force in violation of plaintiff’s Fourteenth Amendment rights. Indeed, while plaintiff may have acted inappropriately in throwing his milk carton at Simprie, defendants’ responses -- pressing his eyes and slamming his head into the ground several times -- appears to have disproportionately escalated matters and thus support an inference that their responses were objectively unreasonable. Therefore, the court will allow plaintiff to proceed on this claim against both defendants. For the sake of clarity, the court will designate the unidentified defendant as “John Doe.” Once plaintiff learns the identity of this defendant, he may amend his complaint to add that defendant.

As for his remaining claims, plaintiff’s allegations that he has been unable to receive care for his shoulder injury may support a Fourteenth Amendment claim. *See Miranda v. County of Lake*, 900 F.3d 335, 352-53 (7th Cir. 2018) (applying the *Kingsley* standard to medical care claims for detained individuals). However, Mendota is not a suable entity under § 1983. *See Smith v. Knox County Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012) (“A prison or department in a prison cannot be sued because it cannot accept service of the complaint.”). Moreover, with respect to his allegations related to his missing documentation, to be held liable under § 1983, a defendant must have been personally involved in the alleged constitutional violation. *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010). Accordingly, while plaintiff may amend his complaint to allege facts that

implicate other Mendota staff that were involved in his medical care or the confiscation of his materials, he may not proceed on a claim related to these issues as currently pled.

II. Plaintiff's motions (dkt. ##10, 13, 14, 15, 16)

The court is denying plaintiff's motions without prejudice at this time. First, plaintiff has filed a motion for assistance in recruiting counsel, representing that he contacted two attorneys about representing him and he has received rejection letters from both. (Dkt. #10-1.) Civil litigants have no constitutional or statutory right to the appointment of counsel. *E.g., Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866 (7th Cir. 2013); *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997). The court may, however, use its discretion to determine whether to help recruit counsel to assist an eligible plaintiff who proceeds under the federal in forma pauperis statute. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent an indigent civil litigant *pro bono* publico.") Ross is proceeding in forma pauperis, so he is eligible for recruitment of counsel.

Before deciding whether to recruit counsel, a court must find that the plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful. *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992). Ross attaches letters from two different law firms declining to represent him. While the court typically requires *pro se* litigants to contact at least three attorneys about representation, the court will conclude in Ross's circumstances that he has satisfied this requirement. Still, recruitment of counsel is not warranted at this stage in the lawsuit.

The central question is "whether the difficulty of the case -- factually and legally --

exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). Ross does not provide *any* explanation as to how he is incapable of litigating this case without an attorney, and the court sees no basis to conclude that he needs an attorney to navigate this stage of this lawsuit.

So far, only screening has been completed in this case. The court will schedule a telephonic preliminary pretrial conference soon, at which point Magistrate Judge Stephen Crocker will set this lawsuit for trial and provide an outline for how this lawsuit will proceed. Shortly after that hearing, Ross will receive an order that memorializes the trial schedule and provides further details about how the parties will litigate this case. Ross will be able to use that order -- as well as the materials attached to that order providing additional guidance -- as a guide going forward. At this point in this lawsuit, when Ross has shown his ability to understandably outline his claims in his complaint, the court is not persuaded that the demands of this lawsuit exceed Ross's abilities. Accordingly, the court is denying this motion. The denial will be without prejudice to Ross's ability to review it, provided that any renewed motion details the specific challenges he is facing that he believes warrants recruitment of counsel.

Additionally, plaintiff has filed three motions seeking to collect evidence from defendants related to his claims in this lawsuit. In particular, he seeks medical records, surveillance video footage and photographic evidence related to his claims. Now that this lawsuit has been screened, the discovery process will begin as well. Following the Federal Rules of Civil Procedure (which will be outlined in the order Ross will receive after the

preliminary pretrial conference), Ross may serve defendants with proper discovery requests. As Judge Crocker will explain, the court rarely gets involved in the exchange of discovery between the parties, only doing so after the parties have been unable to informally resolve their disputes. Since it is apparent that Ross has filed these motions prematurely, the court is denying them without prejudice.

Finally, plaintiff has filed a motion asking to file certain documents as evidence. The court is denying the motion because it is unnecessary for him to submit evidence in this lawsuit at this point. This lawsuit is in its preliminary stages, and it is unnecessary for plaintiff to submit evidence related to the merits of his claim. Indeed, in most cases, the parties will do not need to present evidence to the court until the summary judgment or trial phase of the lawsuit. Furthermore, unless explicitly directed to do so by the court, parties should not file free-standing pieces of evidence with the court. If plaintiff files a motion with the court, or defendants file a motion to which plaintiff must respond, plaintiff may submit evidence related to that motion, in accordance with the court's procedures.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Amontre Ross is GRANTED leave to proceed on Fourteenth Amendment due process claims against defendants Simprie and the unidentified individual, to be designated "John Doe."
- 2) Plaintiff may not proceed on any other claim, and Mendota Health Institute is DISMISSED.
- 3) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendant Simprie. Under the

agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for that defendant.

- 4) Summons will not issue for the Doe defendant until plaintiff identifies the name of this individual and amends his complaint accordingly.
- 5) For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, he should serve the lawyer directly rather than the defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendant or to the defendant's attorney.
- 6) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 7) If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claims may be dismissed for his failure to prosecute him.
- 8) Plaintiff's motion for assistance in recruiting counsel and discovery-related motions (dkt. ##10, 13, 14, 15, 16) are DENIED without prejudice.
- 9) Plaintiff's motion for screening (dkt. #11) is DENIED as moot.

Entered this 12th day of March, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge