

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

MENG XIONG,

Plaintiff,

v.

JOHN AND JANE DOES OF THE UNITED STATES
MARSHAL SERVICE, JOHN AND JANE DOES,
HEALTH CARE PROVIDERS AT THE DANE
COUNTY JAIL, T. MICHAEL NORK,
JOHN AND JANE DOES, HEALTH CARE
PROVIDERS AT THE COLUMBIA COUNTY JAIL,
and JOHN AND JANE DOES HEALTH CARE
PROVIDERS AT THE MARATHON COUNTY JAIL,

OPINION and ORDER

22-cv-348-jdp

Defendants.

Plaintiff Meng Xiong, appearing pro se, is currently incarcerated at Federal Correctional Institution-Gilmer. Xiong alleges that United States Marshals and jail staff delayed needed treatment for his only working eye and that a doctor botched surgery on that eye, leaving him blind. Xiong has already made an initial partial payment of the filing fee as previously directed by the court.

The next step is for me to screen Xiong's complaint and dismiss any portion that is legally frivolous or malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In doing so, I must accept his allegations as true and construe the complaint generously, holding it to a less stringent standard than formal pleadings drafted by lawyers. *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011).

I conclude that Xiong may proceed on claims under the Federal Tort Claims Act, the United States Constitution, and Wisconsin negligence law.

ALLEGATIONS OF FACT

Xiong was blind in one of his eyes and had a detached retina in his working eye. In March 2019, before Xiong was incarcerated, a doctor performed surgery repair the detached retina. I take Xiong to be saying that as part of the procedure, “silicone oil” was inserted into his eye for a temporary period of time. His doctor told him that he would need to have the oil removed from his eye no later than nine months after the surgery; he scheduled a surgery for November 2019.

In September 2019, Xiong was arrested and held at the Marathon County Jail. Xiong told unidentified “John Doe” staff there about his eye problem and the necessity of having oil-removal surgery by December 2019. But staff did nothing to arrange for a surgery or even have him meet with a health care provider.

In October 2019, Xiong was arraigned in this court and transferred to the Dane County Jail. Xiong told John Doe officials there about the necessity of prompt surgery. Jail officials told Xiong that they could not schedule a surgery because they were waiting for permission from John Doe United States Marshals who controlled his custody. I take Xiong to be saying that the Marshals delayed in approving any treatment until January 2020, when Xiong saw defendant Dr. T. Michael Nort. Xiong wanted the oil-removal surgery to be performed by the doctor who repaired his retina because that doctor had described Xiong’s condition as “complicated,” but Nort and the Marshals denied that request; Nort said that the surgery would be easy to perform.

In February 2020—two months after the deadline given to Xiong by his previous doctor—Nort performed the oil-removal surgery. The surgery did not work. Days later Xiong was sent to the emergency room from complications from the surgery; Xiong had suffered nerve

damage blinding him in that eye. A glaucoma specialist told Xiong that to reduce the pain and pressure in his eye he should have laser surgery or use eye drops. Xiong sought a second opinion from his surgeon who repaired his retina but John Doe Marshals denied that request. In July 2020, Xiong was transferred to the Columbia County Jail. John Doe jail officials and Marshals again denied Xiong's request for a second opinion. Instead, Xiong received another surgery that did not help him.

ANALYSIS

A. Xiong's claims

Xiong contends that United States Marshals and jail staff delayed needed treatment for his only working eye and that a doctor botched surgery on that eye, leaving him blind.

Xiong states that he wishes to bring claims against the John Doe Marshals under the Federal Torts Claims Act (FTCA) for their negligence in delaying his needed oil-removal surgery until it was too late and denying his requests to have the surgery done by his original doctor or even to get a second opinion from that doctor. The FTCA provides the exclusive remedy for certain individuals, including prisoners, to recover for damages caused by the negligent or wrongful act of a federal government employee. 28 U.S.C. §§ 2671–2680; *Levin v. United States*, 568 U.S. 503, 506–07 (2013). Because the relevant events occurred in Wisconsin, Wisconsin negligence law governs his FTCA claims. *See* 28 U.S.C. § 1346(b); *FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994). Under Wisconsin law, a negligence claim includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 507, 625 N.W.2d 860. I will allow Xiong to proceed on FTCA claims about the Marshals' negligence in delaying his surgery. But the United States is

the proper defendant for FTCA claims, so I will direct the clerk of court to substitute the United States for the John Doe Marshals. *See* 28 U.S.C. § 2679(b)(1); *Jackson v. Kotter*, 541 F.3d 688, 693 (7th Cir. 2008).

Xiong also seeks to bring claims against John Doe officials at the Marathon County and Dane County jails for ignoring his need to have prompt surgery to remove the silicone oil from his eye, and against John Doe officials at the Columbia County jail for failing to allow him to get a second opinion instead of sending him back to the medical group that botched his oil-removal surgery. These allegations support claims both under Wisconsin negligence law and the Fourteenth Amendment to the United States Constitution, which prohibits prison officials from acting “objectively unreasonably” toward a detainee’s medical needs. *See McCann v. Ogle Cty., Ill.*, 909 F.3d 881, 886.

Xiong contends that Dr. Nort negligently botched the oil-removal surgery resulting in Xiong’s total blindness, so I will allow Xiong to proceed on a Wisconsin-law medical malpractice claim against Nort. In Wisconsin, medical malpractice claims have the same elements as a negligence claim.

B. Recruitment of counsel

Xiong has also filed a motion for appointment of counsel, stating that he cannot litigate the case himself given that he is now totally blind and that the inmate who helped him draft the complaint will soon be transferred elsewhere.

Litigants in civil cases do not have a constitutional right to counsel, and I do not have the authority to appoint counsel to represent a pro se plaintiff in a civil matter. Rather, I can only assist in recruiting counsel who may be willing to serve voluntarily. *See* 28 U.S.C. § 1915(e)(1); *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007) (en banc).

I have just screened the complaint, so it is unclear whether this case will later boil down to issues too complex for a typical pro se litigant to handle. But the medical issues raised in the complaint suggest that the issues in dispute will be complex. And Xiong's filings make clear that his abilities are far below those of the typical prisoner because of his total blindness. Xiong's filings persuade me that it is appropriate to recruit counsel for him.

The case will be stayed pending recruitment of counsel. If I find counsel willing to represent Xiong, I will advise him of that fact and I will give counsel a chance to amend the complaint before serving it on multiple entities with currently only John Does named as defendants. I advise Xiong that the court receives many requests for counsel, so the search for counsel may take several months, and there is no guarantee that the court will find counsel willing to represent him.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to substitute the United States for the Doe Marshal defendants.
2. Plaintiff Meng Xiong is GRANTED leave to proceed on the following claims:
 - Federal Tort Claims Act claims against the United States.
 - Fourteenth Amendment and Wisconsin-law negligence claims against "John and Jane Doe" officials from the Dane County Jail, Marathon County Jail, and Columbia County Jail.
 - A Wisconsin-law medical malpractice claim against defendant T. Michael Nort.
3. Plaintiff's motion for the recruitment of counsel, Dkt. 3, is GRANTED.

4. The case is STAYED pending recruitment of counsel for plaintiff.

Entered December 5, 2022.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge