

STATE OF VERMONT
WINDSOR COUNTY, SS

Louis Gilbeau
Plaintiff

v.

Vermont Department of Corrections, et al.
Defendants

SUPERIOR COURT
Docket No. 165-3-09 Wrcv

Decision on Motion for Summary Judgment on Medical Issues

Defendants have moved from summary judgment in their favor concerning medical issues, asserting that Plaintiff will be unable to sustain his burden of proof on medical issues. Plaintiff has not responded to the motion.

Facts Not in Dispute

Plaintiff is an inmate in the care and custody of the Department of Corrections. Plaintiff filed a claim in this court on March 10, 2009. The complaint, liberally read, asserts a failure to protect Plaintiff from assault by other inmates and perhaps asserts failure to provide proper medical services following the alleged attack by other inmates in a correctional institution. Subsequently, Plaintiff amended his complaint twice, most recently at a status conference in October 2009. The Court considers the Plaintiff's complaint to include claims for medical negligence and deliberate indifference to medical needs, although such allegations are far from clear. Given the Plaintiff's *pro se* status, the Court is applying the most liberal reading possible to Plaintiff's complaint.

Defendants answered the complaint on July 1, 2009 and served upon Plaintiff requests for admission, expert interrogatories and requests for production seeking medical expert information at that time. The requests for admission requested Plaintiff to admit that he had no medical expert and did not intend to call a medical expert at the time of trial. There have been no responses made by Plaintiff to date.

On August 19, 2009 Defendants' counsel wrote to Plaintiff reminding him of his obligation to respond. Counsel indicated that if no responses were received by September 15, 2009, a summary judgment motion would be filed. Despite this correspondence, no response was received from Plaintiff.

FILED
DEC 29 2009

Windsor County Clerk

CONFORMED COPY

Conclusions of Law

Summary judgment is appropriate where, taking the allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. This standard presupposes that the nonmoving party has had the opportunity to develop his factual case. *Zukatis v. Perry*, 165 Vt. 298 (1996). In order to prevail on a motion for summary judgment, the moving party must satisfy the stringent two-part test; that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23 (1992).

It has long been recognized that summary judgment is mandated where a party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989). The nonmoving party is not entitled to rest upon mere allegations or denials in his pleadings but rather is required to, "set forth specific facts showing there is a genuine issue for trial." V.R.C.P. 56(e). Accordingly, a nonmoving party cannot rely on speculation and conclusory statements to oppose a motion for summary judgment. *Richards v. Nowicki*, 172 Vt. 142 (2001).

As a starting point, medical malpractice, even if established, does not create an Eighth Amendment violation, if such is even being alleged by Plaintiff. To establish an Eighth Amendment violation, the Plaintiff must show the Defendant's acts or omissions were sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle v. Gamble*, 29 U.S. 97 (1976). Plaintiff has made absolutely no showing sufficient to meet this standard and his possible Eighth Amendment complaints are unsupported.

In a claim of medical malpractice, the burden is on the Plaintiff to establish that malpractice has been committed. *Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310 (1982). It is the Plaintiff's burden to establish the proper standard of medical skill and care, a departure from that standard by the Defendant(s), and that such departure was the proximate cause of harm to the Plaintiff. *Utzler v. Medical Center Hospital of Vermont*, 149 Vt. 126 (1987).

Here, Plaintiff has made no showing of the proper standard of medical skill and care, a departure from that standard or any resulting harm. Plaintiff has had adequate time to develop this evidence, having had many months post-filing to provide this information. There has been an adequate time for discovery in this matter; and despite the discovery requests from Defendants including requests for admission, a written reminder, and despite the filing of a motion for summary judgment by Defendants, Plaintiff has failed to produce evidence upon which he bears the burden of proof at trial.

V.R.C.P. 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim. *Bay v. Times Mirror*

FILED
DEC 29 2009

Windsor County Clerk


CONFORMED COPY

Magazines, Inc., 936 F.2d 112 (2d Cir. 1991). Since the Plaintiff has failed to make a showing sufficient to establish the existence of several elements essential to his case, including the standard of care, breach of that standard and resulting harm, summary judgment on medical issues is appropriate in this instance.

This court is mindful that Plaintiff is proceeding pro se. However, Plaintiff's status as a pro se litigant does not excuse him from the obligation to support his claims. Plaintiff has had adequate time to do so here and has failed to produce evidence essential to his claims.

Defendants' Motion for Summary Judgment on medical issues is **GRANTED**.

Dated at Woodstock this 29th day of December, 2009.



Harold E. Eaton, Jr.
Superior Court Judge

CONFIRMED COPY

FILED
DEC 29 2009

Windsor County Clerk