UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONELL L. PRINCE,	
Plaintiff,	**Civil Action No. 09-5429 (JLL)**
v.	
SGT. THOMAS AIELLOS, badge #221, individually and as police officer in Police Department, City of Hackensack, ET AL.,	**ORDER**
Defendants.	

This matter having come before the Court by way of plaintiff Donell L. Prince's ("plaintiff") motion for the Court to grant court-appointed expert witnesses pursuant to Fed. R. Evid. 706, see Mot., Feb. 13, 2013, ECF No. 221;[1]

and defendant Sgt. Thomas Aiellos ("defendant") having timely filed a letter brief in opposition to plaintiff's motion, see Def.'s Letter Br., Feb. 19, 2013, ECF No. 222;[2]

[1] Plaintiff requests that the Court grant court-appointed expert witnesses, one medical expert, and one legal expert. (Mot. ¶¶ 25–27, ECF No. 221). The medical expert is purportedly necessary to testify to the nature and treatment of spine and disk injuries that may result from an auto accident. (Id. ¶ 25). The "neutral legal expert" is requested to answer plaintiff's questions regarding probable cause, collateral estoppel, summary judgment, admissibility of evidence, and Fourth Amendment rights on issues of search and seizure. (Id. ¶ 27). Plaintiff further requests that the Court stay his motion for the "neutral legal expert" until it rules on summary judgment or provides plaintiff further guidance with respect to his questions. (Id. ¶¶ 26–27). Lastly, plaintiff states that the filing of this motion (ECF No. 221) in no way indicates "that he need[s] expert testimony to prove elements or damages of [his] malicious prosecution case." (Id. ¶ 28).

[2] Defendant argues that pro se plaintiff is inappropriately seeking legal advice from the Court (p. 1–2, ECF No. 222), that plaintiff's motion is barred by Rule 16 because the deadline for

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and the Court having considered the submissions, the record, and the applicable law;

and Fed. R. Evid. 706 stating, "On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing." Fed. R. Evid. 706(a);

and, pursuant to Fed. R. Evid. 706, the Court having "broad discretion to appoint an independent expert answerable to the court, whether *sua sponte* or on the motion of a party," Ford v. Mercer Cnty. Corr. Ctr., 171 F. App'x 416, 420 (3d Cir. 2006);

and the Court noting that the policy underlying Fed. R. Evid. 706 is to aid the Court[3] and the jury's fact-finding ability;[4]

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[2](...continued)
expert reports, March 20, 2012, has long since passed (p. 3, id.), and that appointment of expert witnesses is not warranted in this procedural context and would essentially equate to the Court assisting plaintiff's case (p. 3–4, id.). (Def.'s Letter Br., ECF No. 222).

[3] "[T]he purpose of Rule 706 is to appoint independent experts that will aid the Court. Rule 706 . . . allows only for the appointment of an expert to aid the Court, and not for the purpose of aiding an indigent litigant." Locascio v. Balicki, No. 07-4834 (RBK), 2010 WL 5418906, at *3 (D.N.J. Dec. 23, 2010) (quoting Kerwin v. Varner, No. 03-3352 (WWC), 2006 WL 3742738, at *2 (M.D.Pa. Dec. 15, 2006)) (internal quotations omitted). While courts in the Seventh, Eleventh, and Ninth Circuits have used Rule 706 to appoint an expert for the purpose of assisting an indigent civil litigant, the Third Circuit has declined to adopt such a rule, "leaving the exercise of such authority . . . (by the very terms of the Rule) . . . in the discretion of district court judges." Born v. Monmouth Cnty. Corr. Inst., 458 F. App'x 193, 197–98 (3d Cir. 2012) (internal citations omitted).

[4] "The policy goal of Rule 706 is to promote accurate factfinding . . . . Expert testimony frequently concerns complex matters with which the trier of fact is unfamiliar. Where the adversaries present conflicting expert testimony on such matters, the trier of fact may be incapable of determining which expert is correct or even locating a sensible middle-ground position . . . . Thus, Rule 706 powers are properly invoked where the issues are complex, and the parties' experts have presented conflicting testimony that is difficult to reconcile or have
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and, in determining whether appointment of expert witnesses is warranted under Fed. R. Evid. 706, the Court examining the complexity of the issues[5] sought to be presented to a jury and whether they are sufficiently complex that the standard lay juror would be unable to comprehend them without the assistance of an expert witness, see Ford, 171 F. App'x at 420–21;

and the Court noting that caution should be used in appointing an expert witness because

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[4](...continued)
otherwise failed to provide a sufficient basis for deciding the issues." Wright & Gold, 29 Fed. Prac. & Proc. Evid. § 6302 (1st ed.).

None of the situations that would otherwise warrant the appointment of independent experts are present in the instant case. Here, plaintiff seeks to prove his claim of conspiracy resulting in malicious prosecution, which he asserts violated his constitutional rights. In New Jersey, a claim for malicious prosecution requires a plaintiff to prove "(1) the initial suit was brought without reasonable or probable cause; (2) it was actuated by malice; (3) it was terminated favorably to the plaintiff; and (4) the counterclaimant suffered a 'special grievance.'" 52 N.J. Prac., Elements of Action § 37:2 (2012-2013 ed.). The elements necessary for proving a malicious prosecution claim, therefore, are not complex or esoteric, and are within the comprehension of the average lay person. Further, appointment of experts under Rule 706 is "rare under virtually any circumstances[,]" and even where it could arguably be warranted, "it is not an abuse of discretion to refuse to make that appointment." Wright & Gold, 29 Fed. Prac. & Proc. Evid. § 6304 (1st ed.) (citing a survey that found only 20% of federal judges had ever appointed an expert under Rule 706, and of that 20% more than half had done so only once). Thus, given the straightforward malicious prosecution claim that plaintiff advances, and the rarity with which courts exercise their authority to appoint experts pursuant to Rule 706, the Court finds no basis on which to grant plaintiff's request to appoint expert witnesses under Rule 706. In addition, because defendant has not submitted any expert reports or testimony, there is no indication that there will be an issue of conflicting expert testimony that would make factfinding more difficult and thereby compel the Court to appoint independent expert witnesses.

[5] Courts consistently cite the complexity of the relevant issues as the determinative factor in whether they exercise their authority to appoint an expert. See Ford, 171 F. App'x at 420 ("The most important factor in favor of appointing an expert is that the case involves a complex or esoteric subject beyond the trier-of-fact's ability to adequately understand without expert assistance.") (quoting Wright & Gold, 29 Fed. Prac. & Proc.: Evid. § 6304 (1997)); see also Eldridge v. Williams, No. 10-0423 (LTS), 2012 WL 1986589, at *1 (S.D.N.Y. June 1, 2012) (quoting Ford, supra) (citing Reynolds v. Goord, No. 98-6722 (DLC), 2000 WL 825690, at *2 (S.D.N.Y. June 26, 2000)).

there is a risk that fact-finders will give undue weight to such a witness, on the basis of that witness's perceived association with the Court;[6]

and the Court noting that the purpose of Rule 706 is to assist either the Court or the fact-finder in analyzing complex issues, and not to assist parties in proving their cases;[7]

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[6] "[I]n the eyes of a jury, a court's expert wears the mantle of judicial authority and impartiality[;] thus, the opinion of a biased court-appointed expert may mislead since juries might ignore his bias when weighing his testimony." Wright & Gold, 29 Fed. Prac. & Proc. Evid. § 6304 (1st ed.) (citing Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, 1994, p. 553).

In Born, plaintiff was denied appointment of an expert witness, but later introduced an inadmissible doctor's report at trial without providing notice to the Court. Born, 458 F. App'x at 195–96. The report was inadmissible because it stated no connection between the diagnosis of post-traumatic stress disorder and any of the defendants' actions, or even any reference to the events at issue in the lawsuit. Id. Plaintiff argued that the Court wrongfully denied her motion to appoint experts and, as evidence, pointed to the fact that the jury requested to re-hear the portion of her testimony where she impermissibly brought in the report. Id. The Court disagreed, holding that the jury's request "demonstrate[d] [the] genuine risk that [jurors] might give [expert] evidence undue weight despite the report's failure to mention the defendants." Id. at 198.

[7] "Rule 706 is not designed to assist lawyers in routine cases. Further, it is not appropriate for a court to appoint a medical expert solely to benefit a party who has otherwise failed to gather such evidence." Caliendo v. Trump Taj Mahal Assocs., No. 03-5145 (JBS), 2007 WL 1038854, at *1 (D.N.J. Mar. 29, 2007); see Ford, 171 F. App'x at 420 (noting that "[a] trial judge does not abuse his discretion in declining to appoint an independent expert solely to benefit a party who has otherwise failed to gather such evidence as would suffice to overcome summary judgment.") (citations omitted). While plaintiff here is not a lawyer and is proceeding pro se, so was the plaintiff in Caliendo. See Caliendo, 2007 WL 1038854, at *2. Therefore, the principle remains the same: where an issue is not so complex as to confuse the Court or the fact finder, appointment of an expert witness is inappropriate. Id. If the risk of confusion is not present, the moving party must make a showing of "unusual or compelling circumstances" that would warrant appointment of an expert witness. Id.; see also Locascio, 2010 WL 5418906, at *3 (holding Rule 706 is "not for the purpose of of aiding [a] . . . litigant").

Here, the Court finds no risk of confusion and plaintiff has failed to make a showing of "unusual or compelling circumstances." Plaintiff alleges conspiracy to commit malicious prosecution (¶¶ 20–34), vicarious liability for the City of Hackensack (¶ 35), denial of civil rights (¶ 36), and resulting damages (¶ 37). (See Third Am. Compl., Oct. 28, 2010, ECF No. 119).

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and the Court finding that the issues in the instant case do not involve matters beyond the comprehension of a jury with appropriate instructions from a judge;

and the Court finding that it cannot provide any party – even a pro se party – legal advice

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[7](...continued)
Plaintiff states that a medical expert is necessary to testify to the nature and extent of his injuries resulting from an auto accident in the past (not involving any of the defendants herein). (ECF No. 221 ¶ 25). Plaintiff, however, fails to explain why an expert witness is necessary for the Court, or the jury, to understand the issues in this matter. See Ford, 171 F. App'x at 421 (affirming a district court's denial of a motion for a court-appointed medical expert, "finding that the medical issues presented were not so complex as to require an independent court-appointed expert[,]" where the plaintiff claimed to "have experienced shortness of breath, diminished lung capacity, production of a black substance in his lungs, eye irritation, light headedness, forgetfulness, a general lack of energy, and headaches" due to second-hand smoke and poor air quality within the prison). The issues presented in this case are not complicated medical conditions or scientific theories that are beyond the comprehension of the average lay juror. See id. (affirming the lower court's finding that the medical issues presented were not so complex as to require an independent court-appointed expert); see also Ledford v. Sullivan, 105 F.3d 354, 359–60 (7th Cir. 1997) (finding fact-finders could understand whether the plaintiff's medical needs were "serious" without the testimony of an expert; stating, "the symptoms which [Plaintiff] experienced were not beyond a lay person's grasp."). Here, though fairly intricate, plaintiff's claims of conspiracy and civil rights violations are still well within the average juror's ability to understand upon proper instruction by the Court.

As to the "neutral legal expert," the Court finds no precedent stating a permissible reason for such an appointment, with the possible exception of a legal malpractice case where the standard of care is at issue or whether legal fees are unreasonable. See Gans v. Mundy, 762 F.2d 338, 342 (3d Cir. 1985) (holding the standard of care in a legal malpractice suit must be established by expert testimony); see also United States v. Monaghan, 648 F. Supp.2d 658, 662 (E.D. Pa. 2009) (holding an expert could not testify as to the substantive ethics laws governing state employees, but only to the method and scope of their publication). Plaintiff cites to no case law that supports his proposed use of a legal expert in the instant factual context. Rather, plaintiff's request seems akin to a motion for pro bono counsel. While the Court is sympathetic to the difficulties of a pro se litigant navigating the legal system, it cannot, under Rule 706, provide plaintiff with legal assistance.

or analysis;[8]

and the Court finding that none of the issues here are so complex as to warrant appointment by the Court of an expert witness under Rule 706;

and the Court finding in its discretion pursuant to Federal Rule of Evidence 706[9] that the appointment of an expert witness is unwarranted at this stage of the proceedings;

IT IS THEREFORE on this 18th day of March, 2013

ORDERED that plaintiff's motion to grant court-appointed expert witnesses pursuant to Fed. R. Evid. 706 (ECF No. 221) is **denied** with prejudice.

s/*Michael A. Hammer*
UNITED STATES MAGISTRATE JUDGE

[8] "Pro se complaints must be construed liberally, and all reasonable latitude must be afforded the pro se litigant." Peterson v. Weiss, No. 12-5431 (NLH), 2012 WL 6042795, at *1 (D.N.J. Dec. 3, 2012) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)). However, "pro se litigants must still plead the essential elements of their claim and are not excused from conforming to the standard rules of civil procedure," Peterson, 2012 WL 6042795, at *1 (quoting McNeil v. United States, 508 U.S. 106, 113 (1993)) (quotations and modifications omitted). The Court must remain impartial throughout the proceedings, even where it will not act as the fact-finder. See ABA Model Code of Judicial Conduct CANON 2A (2010) ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). To do otherwise would jeopardize severely the impartiality necessary for a fair trial. Thus, to the extent plaintiff requests that the Court provide legal advice or analysis in relation to the instant action (see Mot. ¶¶ 24, 26–27, ECF No. 221), the Court declines to do so.

[9] Rule 706 uses the word "may" throughout, indicating that the decision to appoint expert witnesses is within the discretion of the Court. Fed. R. Evid. 706; see also Wright & Gold 29 Fed. Prac. & Proc. Evid. § 6304 (1st ed.) ("The first two sentences of subdivision (a), which address the questions of appointment and selection, use the word "may" no less than four times. Accordingly, these questions are matters within the discretion of the trial court.").