

2003 WL 549398

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United States District Court,
S.D. New York.

Edward MCKENNA, Plaintiff,

v.

Lester K. WRIGHT, Associate
Commissioner/Chief Medical Officer Docs, John
P. Keane, Superintendent, Woodbourne
Correctional Fac., T.J. Miller, Deputy Supt. for
Admin., Woodbourne Corr., Facility, Frank
Lancellotti, Physician, Mervat Makram, Physician,
Health Care Unit, Woodbourne Correctional
Facility; and All Unnamed Persons, Individuals,
Officers, Civilians, Individually and in Their
Official Capacities, Defendants.

No. 01 Civ. 6571(WK). | Feb. 10, 2003.

Attorneys and Law Firms

Edward McKenna, Woodbourne Correctional Facility,
Woodbourne, NY, for Plaintiff, pro se.

John E. Knudsen, Assistant Attorney General, Office of
the Attorney General of the State of New York, New
York, NY, for Defendants.

Opinion

ORDER

KNAPP, Senior J.

*1 Plaintiff Edward McKenna (“Plaintiff”), proceeding *pro se*, brings this action pursuant to 42 U.S.C. § 1983 against Defendants Lester K. Wright (“Dr. Wright”), John P. Keane, T.J. Miller, Frank Lancellotti, and Mervat Makram (“Dr. Makram”) (collectively the “Defendants”) alleging violations of his rights under the Eighth and Fourteenth Amendments to the Constitution. His action is predicated, *inter alia*, upon the Defendants’ purported failure to provide him with adequate medical treatment after he was diagnosed with the Hepatitis C viral infection in 1999. According to the Plaintiff, the Defendants failed timely to diagnose him with Hepatitis C before 1999, and thereafter failed to treat or delayed the treatment of his Hepatitis C infection in 1999 and 2000. As a purported consequence, the Plaintiff contends that he developed cirrhosis of the liver.

The Plaintiff also alleges that the Defendants continue to

provide him with inadequate medical treatment even to this day. For this reason, the Plaintiff sought a preliminary injunction which would have required the Defendants to arrange a consultation for him with Dr. Benedict Maliakkal (“Dr. Maliakkal”), a gastroenterologist. The injunction would also have required the Defendants to carry out any plan of treatment that Dr. Maliakkal eventually recommended. In March 2002, we denied the Plaintiff’s motion. *See McKenna v. Wright* (S.D.N.Y. Mar. 4, 2002) No. 01 Civ. 6571(WK), 2002 WL 338375, at *13. Our decision was premised, in part, on our determination that the Plaintiff had failed to demonstrate that he had a substantial likelihood of succeeding on the merits of his Eighth Amendment claim to the extent that it was based on his ongoing medical treatment. *See id.* at *5–*8.

Thereafter, the Plaintiff moved for reconsideration. He initially argued that we had misapprehended the nature of the relief he sought with respect to his ongoing medical treatment and that we should reconsider our decision accordingly. We directed the Defendants to respond to this motion. *See McKenna v. Wright* (S.D.N.Y. March 27, 2002) No. 01 Civ. 6571(WK), 2002 U.S. Dist. LEXIS 5001, at *1. In accordance with that order, the Defendants were directed to provide us with, at a minimum, certain information pertaining to the Plaintiff’s medical condition and medical treatment. *See id.* at *1–*2. After further prompting, *See McKenna v. Wright* (S.D.N.Y. June 10, 2002) No. 01 Civ. 6571(WK), 2002 U.S. Dist. LEXIS 10537, at *1–*2, the Defendants eventually submitted an affidavit from Dr. Makram addressing most, but not all, of the questions enumerated in our previous order.¹ The Plaintiff responded to this affidavit with a letter brief. (*See* July 23, 2002 Letter from Edward McKenna (hereinafter “Plaintiff’s Reply Brief”).) That reply brief raised, among other things, a variety of new arguments based on a letter sent by Dr. Wright to the Plaintiff in April 2002. The information in Dr. Wright’s letter potentially bears on a number of the conclusions underlying our decision to deny the Plaintiff’s motion for a preliminary injunction.

*2 In light of both (a) Dr. Makram’s somewhat incomplete answers to our previous directive and (b) the information set forth in the Plaintiff’s Reply Brief and the letter from Dr. Wright attached thereto, the Defendants are hereby directed to submit a supplemental response to the Plaintiff’s motion for reconsideration. If the Defendants no longer oppose either his motion for reconsideration or the motion for a preliminary injunction on which it is predicated, they should submit a supplemental statement to that effect. If, on the other hand, they continue to oppose his motions for reconsideration and for a preliminary injunction, then they should submit a supplemental affidavit (or if necessary, multiple affidavits). In such affidavit(s), the Defendants

McKenna v. Wright, Not Reported in F.Supp.2d (2003)

should:

(a) explain the nature of the Hepatitis C viral infection from which the Plaintiff is suffering and the symptoms generally associated therewith, how such infections and symptoms can ordinarily be treated (if, in fact, they can usually be treated), and what treatment, if any, the Plaintiff has received and continues to receive for both his Hepatitis C infection and his cirrhosis condition as well as any associated symptoms from which he may be suffering;

(b) explain why some of the defendant physicians previously concluded that the Plaintiff was suffering from decompensated cirrhosis of the liver;

(c) explain why the medical staff which was assigned by Dr. Wright to investigate the Plaintiff's "situation" determined that he was suffering from compensated cirrhosis rather than from decompensated cirrhosis, *see* Plaintiff's Reply Brief at 16, and whether the defendant physicians disagree with that determination (and if so, their reasons for that disagreement);

(d) explain the difference between compensated cirrhosis and decompensated cirrhosis and how it affects the treatment of the Plaintiff's Hepatitis C infection;

(e) explain why the defendant physicians continue to believe that the Plaintiff is not "a candidate for medical treatment of Hepatitis C," *see* Plaintiff's Reply Brief at 16, despite the aforementioned medical staff's compensated cirrhosis diagnosis;

(f) explain whether the blood tests performed on the Plaintiff in 2001 accurately reflected his ineligibility for Hepatitis C treatment in light of any other medication he may have been taking at the time of those blood tests;

(g) explain how the new blood tests performed on the Plaintiff in June 2002 or thereafter affected the determination that he is still not a candidate for the medical treatment of his Hepatitis C infection;

(h) explain why, if the Plaintiff is not a candidate for any

medical treatment for his Hepatitis C infection because of his compensated or decompensated cirrhosis, he is still "not sick enough," *see* Plaintiff's Reply Brief at 16, to be eligible for a liver transplant;

(i) explain whether the medication which the Plaintiff is taking for his purported emphysema and bronchitis contains "non-steroidals" in contravention of Dr. Maliakkal's recommendation that he avoid such "non-steroidals," and if so, why he is permitted to take such medication (as well as how the effect of any such "non-steroidals" on the Plaintiff is then monitored);

*3 (j) explain how the treatments for the Plaintiff's Hepatitis C infection and cirrhosis condition and the symptoms associated therewith are being monitored (or, if they are not being monitored, the reasons for why the treatments and any symptoms are not being monitored);

(k) explain when and why an inmate with Hepatitis C and cirrhosis of the liver is generally referred to an outside specialist for consultation regarding the treatment of these conditions and why, in the defendant physicians' medical judgment, the Plaintiff does not appear to qualify for further consultation with an outside specialist regarding the treatment of these two conditions.

Along with the aforementioned affidavit (or affidavits), the Defendants should submit a supplemental opposition brief wherein they explain why they contend that reconsideration is inappropriate. That brief should also address their legal and factual arguments, if any, for why they continue to oppose the Plaintiff's motion for a preliminary injunction should this Court reconsider its previous decision to deny that motion.

The Defendants should submit the relevant statement of non-opposition or, in the alternative, their supplemental opposition brief and supplemental affidavit (or affidavits) on or before March 12, 2003.

SO ORDERED.

Footnotes

¹ To the extent that the Plaintiff's physicians were treating the symptoms associated with his portal hypertension with the medication recommended by Dr. Maliakkal, we directed the Defendants to provide us with information about how that treatment was being monitored (or, if it was not being monitored, to explain the reasons for why the treatment was not being monitored). Although Dr. Makram indicated that the Plaintiff "was started on a prophylactic treatment for his esophageal varices as per the gastroenterologist's recommendation," Makram Aff. ¶ 8, she did not provide any information with respect to how that treatment was being monitored (of, if no monitoring was taking place, the reasons for the lack thereof).

