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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARAM MKRTCHYAN,
Plaintiff,
v.
SACRAMENTO COUNTY, et al.
Defendants.

No. 2: 17-cv-2366 TLN KJN P

ORDER

Introduction

Plaintiff is proceeding, through counsel with a civil rights action pursuant to 42 U.S.C. § 1983. On September 16, 2021, the undersigned conducted a hearing regarding plaintiff's motion for sanctions for spoliation of evidence. Patrick H. Dwyer appeared on behalf of plaintiff. Matthew W. Gross and Carl. L. Fessenden appeared on behalf of defendants.

In his motion, plaintiff seeks sanctions for alleged spoliation of videos and medical records. The undersigned separately ordered further briefing regarding plaintiff's request for sanctions for alleged spoliation of videos. For the reasons stated herein, and discussed at the September 16, 2021 hearing, plaintiff's motion for sanctions based on alleged spoliation of medical records is denied.

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1 Legal Standard

2 A party seeking sanctions for spoliation of evidence has the burden of establishing the
3 following elements by a preponderance of the evidence: “(1) the party having control over the
4 evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or
5 loss was accompanied by a ‘culpable state of mind;’ and (3) the evidence that was destroyed or
6 altered was ‘relevant’ to the claims or defenses of the party that sought the discovery of the
7 spoliated evidence.” Conan v. City of Fontana, 2017 WL 3530350, at *3 (C.D. Cal. Aug. 16,
8 2017) (quoting Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1005 (D. Ariz.
9 2011)).

10 Plaintiff’s Allegations

11 All parties and the court are familiar with the allegations and claims raised in this action.
12 For this reason, plaintiff’s allegations and claims need not be set forth in this order.

13 Gallagher Records Regarding Plaintiff

14 In the pending motion, plaintiff seeks sanctions for alleged spoliation of some of
15 plaintiff’s medical records maintained by defendant Gallagher. Plaintiff describes these records
16 as the “records about the referral of plaintiff to a third party orthopedic surgeon” maintained by
17 Gallagher in a paper file in her office. (ECF No. 44-1 at 22.) Plaintiff discovered the existence of
18 these records during his deposition of defendant Gallagher. Plaintiff argues that without these
19 records, there is no way to determine the true reason for the delay in plaintiff’s appointment with
20 an outside orthopedic surgeon. (Id.)

21 In the opposition, defendants argue that the Gallagher records plaintiff refers to in the
22 pending motion were already produced to plaintiff via San Joaquin County Hospital, which
23 included documents from plaintiff’s medical records which have also been produced by the
24 County. (ECF No. 45 at 10.) Defendants argue that plaintiff’s tort claim, administrative
25 grievance and complaint filed November 12, 2017, contained no information indicating to the
26 County that defendant Gallagher had any information or records which would need to be retained,
27 apart from what was in plaintiff’s medical records. (Id.) Defendants contend that it was not until
28 Gallagher’s April 2021 deposition that the parties learned of the possibility of additional records

1 and plaintiff requested Gallagher documents. (Id.) Defendants state that they produced all
2 records retained by Gallagher. (Id.)

3 In the pending motion, plaintiff cites the following sections of Gallagher’s deposition
4 transcript as evidence of the existence of the missing files and their contents: pp. 26:22-28:5;
5 32:15 to 33:9, 40:14-44:10. (ECF No. 44-1 at 22). After reviewing the pages of the Gallagher
6 deposition cited by plaintiff, the undersigned herein finds that plaintiff has not demonstrated that
7 defendants had a duty to preserve the at-issue records.

8 During the deposition, plaintiff’s counsel asked Gallagher if she kept any paperwork from
9 her communications with the third-party provider about the date of the appointment. (ECF No.
10 44-2 at 282 (Gallagher deposition at 26:22-25).) Gallagher answered,

11 Usually I send a packet over that has maybe a copy of the x-ray and
12 the in-house orthopedist examination, and I send over a list of
13 medications and anything else that’s, you know, pertinent to that
patient that the orthopedist who is determining if he’s going to do
surgery would like to see.

14 (Id. at 282-83 (Gallagher deposition at 26:25-27:1-5.)

15 Plaintiff’s counsel then asked Gallagher if she kept a copy of the documents “that you
16 transmit out.” (Id. at 283 (Gallagher deposition at 27: 6-7).) Gallagher responded that she did.
17 (Id. (Gallagher deposition at 27: 8).) Plaintiff’s counsel asked what kind of filing system she
18 used. (Id. (Gallagher deposition at 27: 9-10).) Gallagher testified, “It’s like a manual paper
19 system and it’s considered like my work product, and it does not go into the chart.” (Id.
20 (Gallagher deposition at 27: 11-12).) Gallagher went on to testify that she retained this file for
21 three or four years. (Id. (Gallagher deposition at 27: 13-16).) Gallagher testified that during this
22 lawsuit, she was not asked to look through her files to see if she had a record of what was “sent
23 out” on this patient. (Id. at 284 (Gallagher deposition at 28: 6-9).)

24 In another section of the Gallagher deposition cited by plaintiff in the pending motion,
25 Gallagher was asked if she sent an actual copy of Dr. Kyngys’s form with notes with the ortho
26 consult. (Id. at 288 (Gallagher deposition at 32: 15-18).) Gallagher responded, “Yes.” (Id.
27 (Gallagher deposition at 32: 19).) Plaintiff’s counsel then stated that he did not see a copy of this
28 document, i.e., Dr. Kyngys’s form with notes, in the file that he got from San Joaquin or that was

1 produced to him by defense counsel. (Id. (Gallagher deposition at 32: 20-22).) Gallagher
2 testified that this document would have been sent to San Joaquin for the consult with a packet of
3 explanations of why they wanted him to be seen, and any labs, any medication that he was on and
4 a copy of the x-ray. (Id. at 289 (Gallagher deposition at 33: 5-9).)

5 In the sections of the Gallagher deposition cited by plaintiff, Gallagher testified that she
6 retained (on paper) the packet of documents she sent to the third-party provider for plaintiff's
7 orthopedic consultation. In the pending motion, plaintiff appears to argue that defendants should
8 have retained this packet maintained by Gallagher on paper because it may have contained
9 information explaining the reason for the delay in plaintiff's appointment with an outside
10 orthopedic surgeon. However, Gallagher's deposition testimony does not suggest that Gallagher
11 maintained other records, in addition to the packet sent to the third party provider, that may have
12 contained this information.

13 It also appears that the at-issue paper records maintained by Gallagher are duplicative of
14 the packet of documents received by the third-party provider from Gallagher. Plaintiff apparently
15 received this packet of documents during discovery.

16 In conclusion, the undersigned finds that plaintiff has not demonstrated that the Gallagher
17 records contained the information he seeks, i.e., reasons for the delay in plaintiff's appointment
18 with an outside orthopedic surgeon. Plaintiff's claim that this information may have been in these
19 records is speculative and unsupported by Gallagher's deposition testimony. See In Re Napster
20 Copyright Litig., 462 F.Supp.2d 1060, 1067 (N.D. Cal. 2006) (party has a duty to preserve
21 evidence which it knows or reasonably should know is relevant to the action).¹ Accordingly,
22 plaintiff's motion for sanctions based on these records is denied.

23 Records Regarding Other Inmates

24 Plaintiff moves for sanctions based on alleged spoliation of records regarding the referral
25 of other inmates for orthopedic consultations in support of his Monell² claim. The background to

26 ¹ The undersigned observes that defendant Gallagher was not named as a defendant until the
27 third amended complaint filed July 29, 2021.

28 ² Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658 (1978).

1 this motion follows herein.

2 In interrogatory no. 23, plaintiff asked,

3 Based upon Nancy Gallagher's testimony on April 27, 2021,
4 regarding the referral of inmates to third party medical providers for
5 orthopedic surgical consultations, please provide the following
6 information for each inmate referred to an outside medical provider
7 for an orthopedic surgical consult between January 1, 2016 and
8 December 31, 2020:

- 9 1. Date of completion of Consultation & Case Management
10 Request Form by Correctional Medical Services doctor
11 (employee or contractor);
- 12 2. Date that Case Management arranged for third party orthopedic
13 surgical consult;
- 14 3. Date of third party orthopedic surgical consult; and
- 15 4. Yes/no—did the inmate have surgery for the orthopedic
16 condition.

17 (ECF No. 44-2 at 29.)

18 In a related request for production of documents, plaintiff asked defendant Sacramento
19 County to produce all documents referred to by defendant in preparing its answer to interrogatory
20 no. 23. (Id. at 44-2.)

21 In response to the request for production of documents, defendant Sacramento County
22 stated,

23 Objection—this request is unduly burdensome, harassing and
24 oppressive to the extent that it seeks information or documents that
25 were not within the possession of Adult Correctional Health.
26 Defendants object to this request to the extent that it seeks
27 information protected by any legal privilege, including the attorney-
28 client privilege, the attorney work product doctrine, and the third
party medical patient privilege. Finally, as the parties discussed on
the telephone during a meet and confer process, Adult Correctional
Health did not begin keeping track of this information until July
2019. Subject to and without waiving these objections, defendants
respond as follows: See DEF 413-415.

(ECF No. 45-1 at 5.)

In the pending motion, plaintiff contends that all medical files concerning the referral of
inmates for outside orthopedic surgical consults have been lost through 2018 and most of 2019.

(ECF No. 44-1 at 23.) Plaintiff contends that defendants admitted that the records kept by

1 Gallagher through 2018 and most of 2019 have been destroyed. (Id.) Plaintiff contends that
2 defendants provided him with a chart showing an analysis of such cases for the medical files that
3 still existed. (Id.) Plaintiff contends that there is not enough data in this chart to evaluate past
4 policies, practices and procedures. (Id.)

5 In the opposition, defendants contend, “Plaintiff claims ‘all such medical files concerning
6 the referral of inmates for outside orthopedic surgical consults have been lost through 2018 and
7 most of 2019.’ This is categorically not true.” (ECF No. 45 at 11.) Defendants go on to state,

8 The County did not lose the medical files from 2016 through 2019—
9 it still has the records of every inmate’s medical records, it simply
10 did not keep track of the statistics on all inmates receiving orthopedic
11 surgeries until 2019. As such, these records cannot be produced
12 because they never existed until beginning in July 2019.

11 (Id.)

12 In the reply, plaintiff argues that defendants’ discussion of the other files, i.e., inmate
13 medical files, is a “red herring” intended to distract the court from the paper files kept by
14 Gallagher’s Case Management. (ECF No. 46 at 9.) Plaintiff argues that Gallagher’s paper files
15 were destroyed as a result of defendants’ failure to place a litigation hold. (Id.)

16 Defendant Gallagher apparently maintained files containing the information and
17 documents plaintiff seeks in interrogatory no. 23 and the related request for production of
18 documents. These files are apparently no longer available. Defendants represent that the
19 information and documents plaintiff seeks in these discovery requests are available in inmate
20 medical records.³ Based on this representation, the undersigned denies plaintiff’s spoliation
21 motion regarding these discovery requests without prejudice to the filing of a motion to compel.⁴

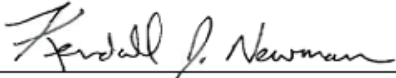
22 ³ It appears to the undersigned that much of the information plaintiff seeks in these discovery
23 requests would be available in inmate medical records, i.e., the Consultation & Case Management
24 Request Forms, records showing when inmates were sent for orthopedic consults and records
25 showing whether inmates received surgery. Whether inmate medical records contain information
26 regarding when Case Management arranged for third party orthopedic surgical consults is less
27 clear.

26 ⁴ In reviewing a motion to compel, the undersigned may make a definitive finding regarding
27 what at-issue records in inmate medical files are available. The undersigned may also make a
28 finding regarding the burden on defendants in producing these records, taking into consideration
defendants’ alleged failure to maintain the Gallagher records.

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Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for sanctions (ECF No. 44) is denied to the extent it concerns the medical records discussed in this order.

Dated: September 23, 2021


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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