

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 09-cv-00642-WYD-KLM

GEORGE ALLENKALINI DUTRO,

Plaintiff,

v.

CCA - CROWLEY COUNTY CORRECTIONAL FACILITY CONTRACTOR FOR CDOC,
JUDY BRIZENDINE, Medical HAS, individually and as agent for CCA,
DR. SUTTON, individually and as agent for CCA,
DR. CABILING, individually and as agent for CCA,
DR. OBBA, individually and as agent for CCA, and
RENAE JORDAN, individually and as agent for CCA,

Defendants.

**ORDER AFFIRMING AND ADOPTING RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

THIS MATTER is before the Court in connection with Defendant Jere G. Sutton, M.D.'s Motion to Dismiss Plaintiff's Amended Prisoner Complaint Under Fed. R. Civ. P. 12(b)(6). This motion was referred to Magistrate Judge Mix for a recommendation by Order of Reference dated November 10, 2009, and Memorandum of January 5, 2010. A Recommendation on the Motion to Dismiss was issued on June 1, 2010, and is incorporated herein by reference. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Magistrate Judge Mix recommends therein that Defendant Sutton's Motion to Dismiss be granted. She notes that the only allegation asserted against Defendant Sutton in Plaintiff's Amended Complaint is an Eighth Amendment claim relating to Plaintiff's hepatitis B claim. (Recommendation at 2-3.) She found as to that claim that assuming without deciding that Plaintiff has stated an objectively serious medical need,

he did not make sufficient factual allegations against Defendant Sutton to satisfy the subjective component of the Eighth Amendment analysis. (*Id.* at 6-8.) That is because Plaintiff's allegations were conclusory, without supporting factual averment, and did not "demonstrate a malicious intent or the degree of recklessness sufficient to state a claim for a constitutional violation." (*Id.* at 8) (quotations omitted). However, rather than a dismissal with prejudice against Defendant Sutton, Magistrate Judge Mix recommends that the dismissal of Defendant Sutton be without prejudice to Plaintiff filing an amended complaint, if any, to remedy the stated deficiencies.

Magistrate Judge Mix advised the parties that written objections were due within fourteen days of service of the Recommendation (Recommendation at 10) and no objections were filed. No objections having been filed, I have discretion to review the Recommendation "under any standard [I] deem[] appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985) (stating that "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings"). Nonetheless, though not required to do so, I review the Recommendation to "satisfy [my]self that there is no clear error on the face of the record."¹ *See* Fed. R. Civ. P. 72(b) Advisory Committee Notes.

Having reviewed the Recommendation, I am satisfied that there is no clear error on the face of the record. I agree with Magistrate Judge Mix that Plaintiff has failed to state an Eighth Amendment claim against Defendant Sutton. I further agree that

¹ Note, this standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a *de novo* review, Fed. R. Civ. P. 72(b).

Defendant Sutton should be dismissed without prejudice to enable Plaintiff, if he wishes, to file an amended complaint to remedy any deficiencies since he is proceeding *pro se*.

Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge of June 1, 2010 (doc. # 65) is **AFFIRMED and ADOPTED**. In accordance therewith, it is

ORDERED that Defendant Jere G. Sutton, M.D.'s Motion to Dismiss or in the Alternative, Motion for Summary Judgment (doc. # 33) is **GRANTED**. Defendant Sutton is **DISMISSED WITHOUT PREJUDICE** from this case.

Dated: June 24, 2010

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Chief United States District Judge