UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALDOLFO CORDERO,	:	
	:	
Plaintiff,	:	Civ. No. 13-2023 (RBK)
	:	
v.	:	
	:	
FNU RICKNAUER,	:	**OPINION**
	:	
Defendant.	:	
	:	

ROBERT B. KUGLER, U.S.D.J.

I. INTRODUCTION

Plaintiff is proceeding through counsel with a civil rights complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Presently pending before this Court is defendant Robert Whritenour's[1] motion for summary judgment. For the following reasons, the motion will be denied.[2]

II. LEGAL STANDARD ON MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Boyle v. Cnty. of Allegheny Pa.*, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no

[1] The complaint improperly pleads this defendant's last name as Ricknauer. For purposes of this Opinion, this Court will use the correct spelling of this defendant's name.

[2] Defendant's request for an extension of time to file his reply brief to his motion for summary judgment (Dkt. No. 66) will be granted, and his April 4, 2016 reply brief is considered timely.

genuine issue of material fact remains. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof ... the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

If the moving party meets its threshold burden, the opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *See Anderson,* 477 U.S. at 248; *see also* FED. R. CIV. P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist). "[U]nsupported allegations ... and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation,* 912 F.2d 654, 657 (3d Cir.1990); *see also Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir.2006) ("To prevail on a motion for summary judgment, the nonmoving party needs to show specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial.").

III. BACKGROUND

This Court noted in a prior Opinion the allegations giving rise to this action as follows:

> Plaintiff was incarcerated at F.C.I. Fort Dix in September 2010 when the circumstances giving rise to this complaint occurred. At that time, inmates of Mexican heritage, who were gang "shot callers" or "Paisas," were assigned to plaintiff's prison unit. These "Paisas" began to dominate the microwaves and televisions on the unit and threatened plaintiff and other inmates of Cuban heritage. Plaintiff and another inmate warned Unit Manager Whritenour about the threats to bodily harm they were receiving from the "Paisas" on September 1, 2010. Whritenour told plaintiff that he would bring the matter to the attention of the SIS. On September 14, 2010, plaintiff gave Whritenour a note containing a list of names of the inmates who were threatening him. On September 28, 2010, plaintiff and another inmate again complained to Whritenour about the threats they were receiving. Whritenour again stated to

> plaintiff and the other inmate that he would take the matter to the SIS.
>
> On September 30, 2010, plaintiff was attacked by the "Paisas." The attack included being struck with make shift improvised weapons as well as being pushed down a flight of stairs. A unit officer eventually stopped the attack and plaintiff was transferred to the hospital. Plaintiff was diagnosed with CI multiple fractures and placed in a cervical spine stabilizing halo brace for three months. Doctors have told plaintiff that he will probably continue to experience moderate to severe thoracic spine pain for the rest of his life and possibly arthritis of the thoracic spine as a result of the injuries he suffered.

(Dkt. No. 23 at p. 3-4) Plaintiff's allegations gave rise to a failure to protect claim against Whritenour.

IV. DISCUSSION

Whritenour asserts that he is entitled to summary judgment on plaintiff's failure to protect claim. To state a claim for failure to protect from inmate violence, a plaintiff must allege that: (1) he was incarcerated under conditions posing a substantial risk of harm; (2) the official was deliberately indifferent to that substantial risk of harm; and (3) the official's deliberate indifference caused the harm. *See Bistrian v. Levi,* 696 F.3d 352, 367 (3d Cir. 2012) (citing *Farmer v. Brennan,* 511 U.S. 825, 834 (1994); *Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir.1997)). With respect to showing deliberate indifference, the Third Circuit has stated that:

> "Deliberate indifference in this context is a subjective standard: "the prison official-defendant must actually have known or been aware of the excessive risk to inmate safety." *Beers–Capitol [v. Whetzel],* 256 F.3d 120, 125 [(3d Cir.2001)]. It is not sufficient that the official should have known of the risk. *Id.* at 133. A plaintiff can, however, prove an official's actual knowledge of a substantial risk to his safety "in the usual ways, including inference from circumstantial evidence." *Farmer,* 511 U.S. at 842. In other words, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.*

> Prison officials may escape liability for deliberate indifference claims in several ways. They "might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.* at 844"In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.*

Bistrian, 696 F.3d at 367.

A. Objective Risk of Harm

Whritenour argues that he is entitled to summary judgment because plaintiff has failed to show an objectively intolerable risk of harm. According to defendant, "the record demonstrates that Plaintiff was not threatened and thus, a substantial risk of harm did not exist." (Dkt. No. 62-1 at p. 12) However, viewing the evidence in the light most favorable to the plaintiff, there is a material issue of fact on this issue. Indeed, at one point in plaintiff's deposition, he appears to indicate that one of the Mexican inmates did in fact threaten to beat him up. (*See* Dkt. No. 65-4 at p. 30-31). Furthermore, another inmate testified at his deposition that Cordero told the unit manager that somebody had threatened to hurt him. (*See* Dkt. No. 62-7 at p. 10-11) Thus, this Court finds that there is a fact issue present as to whether plaintiff has shown an objective risk of harm. Accordingly, defendant is not entitled to summary judgment based on this argument.

B. Defendant's State of Mind

Defendant also argues that he is entitled to summary judgment because plaintiff has failed to establish that there is a material issue of fact as to whether he acted with a sufficiently culpable state of mind to support plaintiff's failure to protect claim. Defendant argues as follows in his brief:

> The undisputed record reveals that on at least two occasions, Plaintiff and Fabalo [another Cuban inmate] approached Mr. Whritenour to provide information about the activities of other inmates in the unit. On these occasions, Plaintiff and Fabalo first approached Mr. Whritenour during mainline in the dining facility, and then followed up with him in his office. During their meetings, Cordero mostly served as Fabalo's translator because Fabalo did not speak English and Mr. Whritenour did not speak Spanish. For that reason, Fabalo did not understand the conversation between Plaintiff and Mr. Whritenour. Plaintiff would explain to Fabalo what was discussed afterwards in Plaintiff's room.
>
> During one of those meetings, Plaintiff and Fabalo provided Mr. Whritenour a list of fifteen inmates that identified each inmate's ethnicity, room number, and bunk assignment in the unit. The list also identified each inmate's contraband activities. The note only identified three Mexican inmates as being involved in disruptive activities. The other inmates were of different ethnicities. None of the three Mexican inmates listed in the note were involved in the later assault on Cordero.
>
> Based on these meetings, Mr. Whritenour did not perceive a threat to Plaintiff. Instead, Mr. Whritenour viewed the purpose of these meetings as a means for Plaintiff and Fabalo to provide information about the inmates in the unit with contraband or to express concerns about the building.
>
> Further, the record does not contain evidence of other circumstances from which Mr. Whritenour should have inferred a threat. For example, Plaintiff never asked Mr. Whritenour to be placed in protective custody. *Plaintiff never told Mr. Whritenour he felt threatened or feared for his safety*. Plaintiff never asked Mr. Whritenour to reassign his unit or his room within the unit. Plaintiff never filed a copout or a formal complaint relating to his safety. Mr. Whritenour never received information from any other source which would indicate that Plaintiff's safety was threatened. And Mr. Whritenour never observed any circumstances in the unit that would lead him to suspect that Plaintiff's safety was in jeopardy. Plaintiff has provided no evidence from which an inference could be drawn that Mr. Whritenour should have believed otherwise.

(Dkt. No. 62-1 at p. 13-14 (emphasis added))

This Court does not find that it is appropriate to grant summary judgment in favor of defendant based on his state of mind argument. Indeed, plaintiff stated in his deposition that he asked that Whritenour to separate the Cuban inmates from the Paisas. (*See* Dkt. No. 65-4 at p. 1) Furthermore, plaintiff stated at his deposition that he told Whritenour that he feared for his safety and that "Alaniz' threatened to beat him up. (*See* Dkt. No. 65-4 at p. 29) Fabalo also stated in his deposition that plaintiff told the unit manager that he felt threatened. (*See* Dkt. No. 62-7 at p.10-11) Accordingly, this Court finds that there is a material issue of fact outstanding on this issue as to whether defendant should have inferred a threat based on what he was told and the circumstances of the unit.

C. Steps in Response to Risk

Defendant also argues that he is entitled to summary judgment because he took reasonable steps in response to the information plaintiff and Fabalo provided him. According to defendant, he shared plaintiff and Fabalo's information with the Special Investigation Section. Furthermore, defendant states that the counselors and officers on duty used the information given to him to plan and conduct living quarter searches.

As indicated above, defendant indicates in his brief that he was under the impression that plaintiff and Fabalo were meeting with him to provide information about contraband and to express concerns about the building. However, when plaintiff and Fabalo's deposition testimony is viewed in the light most favorable to plaintiff, their meetings with defendant also appeared to express a fear for plaintiff's safety. This is different than the risk that defendant indicates he was responding to with respect to contraband being present and television/microwave use. Accordingly, this Court cannot determine at this stage of the proceedings whether defendant's

actions after his meetings with plaintiff were reasonable in response to the risk as there is a fact issue outstanding as to what risk was presented to defendant.

D. Qualified Immunity

Finally, defendant asserts that he is entitled to summary judgment because he is protected by qualified immunity. "'The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ray v. Twp. of Warren*, 626 F.3d 170, 173 (3d Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009)). "[I]f a reasonable officer is not on notice that his or her conduct under the circumstances is clearly unlawful, then application of qualified immunity is appropriate." *Id.* "Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 173–74 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In deciding whether a governmental official is entitled to qualified immunity, a court examines: (1) whether the facts alleged make out a violation of a constitutional right; and (2) if so, whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *See Pearson*, 555 U.S. at 232. Courts are permitted to address either prong of the analysis first in light of the circumstances at hand. *See id.* at 236. The defendant bears the burden to prove qualified immunity. *See Thomas v. Independence Twp.*, 463 F.3d 285, 293 (3d Cir. 2006) (citation omitted).

According to defendant, he is entitled to qualified immunity because "Plaintiff cannot show that [he] ought reasonably to have known that his individual conduct would violate the Constitution." (Dkt. No. 62-1 at p. 19) By 2010, when the events giving rise to this claim occurred, the Supreme Court had made clear that "prison officials have a duty to protect

prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833. Furthermore, "a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Hamilton*, 117 F.3d at 746 (quoting *Farmer*, 511 U.S. at 828). Thus, if this Court views the record in the light most favorable to the plaintiff as it must, when plaintiff, along with Fabalo, informed defendant that he feared for his safety from the Mexican inmates, it is possible for a factfinder to conclude that reasonable officials in defendant's position would have understood that not taking meaningful steps to address plaintiff's concerns (as opposed to defendant's interpretation of concerns about contraband and television/microwave use) would constitute deliberate indifference in violation of plaintiff's constitutional rights. As indicated above, there is a central fact issue remaining regarding what specifically defendant was told by plaintiff with respect to the risk that he was purportedly facing from other inmates. Accordingly, this Court does not find at this time that defendant is entitled to qualified immunity from suit.

V. CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is denied. An appropriate order will be entered.

DATED: June 21, 2016

s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge