UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARK EDWARDS,

Plaintiff,

-against-

MEMORANDUM & ORDER
05-CV-5427(JS)(GRB)

LT. SCHOENIG, SGT. STASKY, C.O. GARAFOLO, C.O. RANT, C.O. ARMINI, C.O. WHITE, C.O. PU, C.O. ROMAN, NASSAU COUNTY UNIVERSITY MEDICAL CENTER, DR. JOHN DOE (with a foreign accent), C.O. B. SHEFTIC, (all in their individual as well as official capacities), and NASSAU UNIVERSITY MEDICAL CENTER,

Defendants.
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APPEARANCES

For Plaintiff: Mark Edwards, pro se
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

For Defendants: Liora M. Ben-Sorek, Esq.
Nassau County Attorney's Office
One West Street
Mineola, NY 11501

SEYBERT, District Judge:

Currently pending before the Court are pro se plaintiff Mark Edwards' ("Plaintiff") objections to Magistrate Judge Gary R. Brown's September 27, 2013 Memorandum and Order granting in part and denying in part Plaintiff's motion to compel discovery regarding a Behavior Management Unit ("BMU") written policy (the "BMU Order," Docket Entry 119) and Judge Brown's electronic order from the same day denying Plaintiff's

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motion to appoint an expert witness (Sept. 27, 2013 Electronic Order (the "Electronic Order")). For the following reasons, Plaintiff's objections are OVERRULED and Judge Brown's rulings are AFFIRMED.

BACKGROUND[1]

I. Factual Background

Plaintiff commenced this action on November 9, 2005 against corrections officers at the Nassau County Correctional Center and two medical centers (collectively "Defendants") alleging, inter alia, that the corrections officers verbally threatened and assaulted him in his cell in the BMU and denied him adequate medical attention. (Compl. ¶¶ 16, 38-48.) Specifically, Plaintiff alleges that Corrections Officer Schoenig confronted and verbally threatened Plaintiff in his cell on August 13, 2004, and that Schoenig spread rumors to other officers about what occurred. (Compl. ¶¶ 14, 15.) According to Plaintiff, in the following days, other officers teased and made fun of him. (Compl. ¶ 15.)

Plaintiff further alleges that on August 24, 2004, Schoenig, along with Corrections Officers Rant and Garafolo, mercilessly beat Plaintiff causing him to suffer several serious injuries including a black eye, bruised leg, bruised elbow,

[1] The Court has summarized only those facts relevant to Plaintiff's pending objections.

fractured jaw, and a broken nose. (Compl. ¶¶ 16-17.) Plaintiff claims that several of his requests to see a doctor and to receive painkillers were ignored, and that as a result he is partially incapacitated and mentally unstable. (Compl. ¶ 20.) Plaintiff asserts that when he did get medical attention, he was referred to the emergency room where a doctor filled out "fit for confinement" papers before examining Plaintiff and sent him back to jail without a full examination or painkillers. (Compl. ¶¶ 39, 42-47.)

II. Procedural Background

During the course of discovery on this matter, Defendants provided Plaintiff with a copy of the Behavioral Management Unit Inmate Rules Regulations and Information ("BMU Policy")--which describes fundamental protocols of the BMU--with particular redactions. On January 24, 2013, Plaintiff filed a motion before Judge Brown seeking "an in camera review of the redactions in question, or a simple order compelling the defendants to comply by disclosing the redacted BMU Policy & Procedure pages . . . ." (Pl.'s Mot. to Compel, Docket Entry 112, at 1.) He argued that the redacted information "is likely to be used as evidence or critical information in this case . . . ." (Pl.'s Mot. to Compel at 1.) Defendants countered that the law enforcement privilege applies to protect that information. (Defs.' Opp. to Mot. to Compel, Docket Entry

113.) Defendants summarized that the redacted portions include: "(1) issues of Corrections Department supervision of the BMU, including but not limited to the numbers and placement of Corrections Personnel, and the duties of Personnel; (2) the restraint and escort of BMU inmates through the facility and during activities; (3) the utilization of video cameras." (Defs.' Opp. to Mot. to Compel at 2.)

On September 27, 2013, Judge Brown issued the BMU Order granting in part and denying in part Plaintiff's request that he be provided a full, unredacted copy of the BMU Policy. Judge Brown held that Defendants should unredact Paragraph 1.c. of Section V, subsection B, which sets forth the BMU's corrections officers' responsibilities concerning inmate medical care and distribution of medication. (BMU Order at 5.) He held that this portion appropriately related to Plaintiff's medical indifference claim and that the information did not present an obvious danger to law enforcement such that it should be kept confidential. (BMU Order at 5.) However, Judge Brown found that the law enforcement privilege applied to the other redacted portions of the BMU Policy because those portions "reveal the number and distribution of corrections officers and their respective security duties; the protocols for restraining and transporting BMU inmates; and the rules governing utilization of video cameras." (BMU Order at 6.) He further held that there

appears to be little merit to Plaintiff's claims that the relevant information in the BMU Policy can be made available through other means, and that "[t]he importance of the redacted portions of the BMU Policy to plaintiff's excessive force claim is . . . attenuated." (BMU Order at 6-7.)

Additionally, and separate from any issue regarding the BMU Policy, Plaintiff "move[d] [on May 15, 2013] to request the appointment of a medical expert for trial testimony, or that the defendants be ordered to show cause why an expert witness should not be appointed . . . ." (Pl.'s Mot. to Appoint Expert, Docket Entry 115, at 1.) Judge Brown denied this motion in his Electronic Order, holding that Plaintiff failed to meet the necessary conditions for appointment of an expert. (Electronic Order.)

DISCUSSION

Plaintiff objects to the BMU and Electronic Orders. The Court will first review the applicable legal standard before turning to the merits of Plaintiff's motion.

I. Standard of Review

District courts review nondispositive orders issued by a magistrate judge for clear error. FED. R. CIV. P. 72(a). "'A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed.'" Travel Sentry, Inc. v. Tropp, 669 F. Supp. 2d 279, 283 (E.D.N.Y. 2009) (quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)).

II. Plaintiff's Objections

The Court begins with Plaintiff's objections regarding the BMU Order. Plaintiff again asserts that the redacted information is necessary to his claims and that the redactions do not allow him a reasonable opportunity to discover relevant information and evidence for trial purposes.[2] (See generally Pl.'s Objs., Docket Entry 120, ¶¶ 1-10.) The Court disagrees.

The Court can find no clear error in Judge Brown's BMU Order. The Order cites relevant and valid case law; it appropriately begins by confirming that the redacted content contains information concerning privileged law enforcement

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[2] Plaintiff also asserts that Judge Brown erred in discussing the Eighth Amendment because Plaintiff was a pre-trial detainee at the time of the incident. (Pl.'s Objs. ¶ 7.) This assertion, however, while it may be correct, does not change the Court's analysis nor render the law enforcement privilege inapplicable. See DeBoe v. Du Bois, 503 F. App'x 85, 87 (2d Cir. 2012) ("We have equated the standard used for excessive force claims brought by detainees under the Fourteenth Amendment with that used to analyze Eighth Amendment excessive force claims, but we have also held that a detainee may set forth a constitutional due process violation by showing that indignities he suffered constituted punishment or involved an intent to punish." (internal quotation marks and citations omitted)); United States v. Walsh, 194 F.3d 37, 47-48 (2d Cir. 1999) (applying same standard to excessive force claim regardless of whether the plaintiff was a pre-trial detainee).

techniques and procedures (BMU Order at 5-6) and then considers whether Plaintiff sufficiently refuted the finding that the privilege applies. (BMU Order at 6.) See Dinler v. City of N.Y., (In re The City of N.Y.), 607 F.3d 923, 945 (2d Cir. 2010) (requiring a showing that (1) the suit is non-frivolous and brought in good faith, (2) the information sought is not available through other discovery or sources, and (3) that the information sought is important to the party's case); Dorsett v. Cnty. of Nassau, 762 F. Supp. 2d 500, 520 (E.D.N.Y. 2011) (same), aff'd, 800 F. Supp. 2d 453 (E.D.N.Y. 2011). Using this analysis, Judge Brown properly held that the law enforcement privilege protects the redacted portions of the BMU Policy dealing with law enforcement techniques and procedures.

Once again, this Court reiterates Judge Brown's holding that Plaintiff's conclusory assertions that the redacted portions of the BMU Policy are necessary is insufficient to make public such information as the number and locations of corrections officers in a given facility. See Dorsett, 762 F. Supp. 2d at 520 (noting that the law enforcement privilege specifically encompasses "information pertaining to law enforcement techniques and procedures"). In fact, Plaintiff admits in his objections that the portion of the BMU Policy regarding "use of force," which would be relevant to Plaintiff's excessive force claim, has been provided in unredacted form.

(Pl.'s Objs. ¶ 8.) His conclusory assertion that additional portions of the BMU Policy are being "hidden to cover up the fact that the Defendants' actions did not conform" to specific policies is not enough to render this highly sensitive information accessible. (Pl.'s Objs. ¶ 8.) Accordingly, Plaintiff's objections in this regard are OVERRULED and Judge Brown's BMU Order is AFFIRMED.

As to Plaintiff's Motion to Appoint an Independent Expert Witness, the Court also finds no clear error in Judge Brown's Electronic Order. As Judge Brown points out in his Order, the appointment of an expert is not commonplace and is within the Court's discretion. See In re Joint E. & S. Dists. Asbestos Litig., 830 F. Supp. 686, 693 (E.D.N.Y. 1993) ("The enlistment of court-appointed expert assistance under Rule 706 is not commonplace."); Benitez v. Mallioux, No. 05-CV-1160, 2007 WL 836873, at *2 (N.D.N.Y. Mar. 15, 2007) (denying pro se prisoner's motion to appoint an expert witness because such appointment is discretionary and should be granted sparingly). Here, Plaintiff's motion simply requested the appointment of a medical expert. (See generally Pl.'s Mot. to Appoint Expert.) However, if, as Plaintiff claims, he was forcefully beaten and sustained serious injuries including a fractured jaw and broken bones, such injuries can be demonstrated through documentary evidence and a jury does not need a doctor to orally testify to

such matters. Accordingly, Plaintiff's objections in this regard are OVERRULED and Judge Brown's Electronic Order is AFFIRMED.

CONCLUSION

For the forgoing reasons, Plaintiff's objections are OVERRULED and Judge Brown's Orders are AFFIRMED in their entirety.

The Court notes that that the present case has been trial ready since September 6, 2012, despite that fact that Judge Brown has entertained continued discovery disputes. Accordingly, the Court is prepared to hold a pre-trial conference and to set this case down for trial.

The Court certifies that pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith and therefore in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

The Clerk of the Court is directed to mail a copy of this Memorandum and Order to pro se Plaintiff.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: September 16, 2014
Central Islip, NY