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United States District Court,
 W.D. New York.
 Anthony ROSS, 94-A-6742, Plaintiff,
 v.

Michael MCGINNIS, Superintendent; Dr. Shah, M.D.;
 John V. Hagn, RN; Paul Daugherty, NP; Victor Herbert,
 Superintendent; Robert Takos, MD; Stephen Laskowski,
 MD; B. Higley, RN; C. Yohe, RN; Susan Nolder, RN; and
 Sherley Stewart, RN Defendants.

No. 00-CV-0275E(SR).

March 29, 2004.

Anthony Ross, Comstock, NY, pro se.

[Michael A. Siragusa](#), New York State Attorney General's
 Office, Buffalo, NY, for Defendants.

DECISION AND ORDER

[SCHROEDER](#), Magistrate J.

*1 Pursuant to [28 U.S.C. § 636\(c\)](#), the parties have
 consented to the assignment of this case to the undersigned
 to conduct all proceedings in this case, including the entry of
 final judgment. Dkt. # 29.

Plaintiff's third amended *pro se* complaint, pursuant to [42](#)

[U.S.C. § 1983](#), alleges that defendants denied him adequate
 medical treatment during his incarceration at Southport
 Correctional Facility ("Southport"), and Attica Correctional
 Facility ("Attica"), in violation of his constitutional rights
 under the Eighth and Fourteenth Amendments to the United
 States Constitution. Dkt. # 83. Specifically, plaintiff claims
 that officials at these facilities were deliberately indifferent
 to his complaints of abdominal pain, vomiting, heartburn,
 constipation, body odor, and extreme body heat. Dkt. # 83.

Currently before me is plaintiff's motion to compel
 production of documents (Dkt.# 92), and defendants' motion
 for summary judgment. Dkt. # 103. For the following
 reasons, plaintiff's motion is denied and defendants' motion
 is granted.

BACKGROUND

Upon plaintiff's transfer to Southport on August 24, 1998,
 plaintiff indicated no chronic medical problems or current
 medical complaints. Dkt. # 114, Exh. A.

On October 10, 1998, Registered Nurse John VonHagn
 ("RN VonHagn"), examined plaintiff for complaints of
 stomach upset, bubbling and gas. Dkt. # 106, ¶ 9. RN
 VonHagn dispensed one bottle of Maalox to plaintiff. Dkt.
 # 106, ¶ 9. Plaintiff was given another bottle of Maalox on
 October 14, 1998. Dkt. # 106, ¶ 10. When plaintiff requested
 a third bottle of Maalox on October 16, 1998, RN VonHagn
 instead gave plaintiff Alamay, a heartburn medication. Dkt.
 # 106, ¶ 11. Plaintiff was prescribed Zantac on October 18,
 1998. Dkt. # 107, ¶ 8.

On November 3, 1998, RN VonHagn ordered Simethecone
 for plaintiff after he complained of gas and belching after

eating and indicated concern that he had an infection in his stomach. Dkt. # 106, ¶ 14.

On November 17, 1998, plaintiff informed RN VonHagn that he was not experiencing any relief from the medication prescribed and complained that his body was hot and that he thought he had an infection in his stomach. Dkt. # 106, ¶ 15. RN VonHagn scheduled an appointment for plaintiff with NP Dougherty. Dkt. # 106, ¶ 15.

On November 20, 1998, NP Dougherty examined plaintiff for complaints of gastric distress and prescribed a blood test to rule out *Helicobacter Pylori*. Dkt. # 107, ¶ 6. NP Dougherty avers that the results were negative. Dkt. # 107, ¶ 6. Because plaintiff's gastric acidity was higher than normal, plaintiff was "continued on Zantac, which is used to treat acid reflux, and which is the medication of choice for hyperacidity." Dkt. # 107, ¶ 6.

Plaintiff was transferred to Attica on or about December 13, 1998.

On December 14, 1998, plaintiff complained to Registered Nurse Barbara Higley ("RN Higley"), that he was experiencing increased burping and gas and that the Zantac was not helping his stomach problems. Dkt. # 109, ¶ 6. RN Higley placed plaintiff on the weekend sick-call list as he requested. Dkt. # 109, ¶ 6.

*2 On December 17, 1998, while distributing medications, plaintiff complained of abdominal discomfort to Registered Nurse Stewart ("RN Stewart"), but refused his Zantac until he saw the doctor. Dkt. # 108, ¶ 6. RN Stewart placed the plaintiff on the "Physician's Assistant call-out" list. Dkt. # 108, ¶ 6. Plaintiff again refused to take his Zantac on December 22, 1998, stating that it was not working. Dkt. # 108, ¶ 8.

On December 23, 1998, plaintiff continued to complain of stomach problems to RN Higley, but refused to take his Zantac. Dkt. # 109, ¶ 7. RN Higley again placed plaintiff on the weekend sick-call list. Dkt. # 109, ¶ 7. Plaintiff again refused his Zantac on December 27, 1998. Dkt. # 114, ¶ 6.

At plaintiff's request, Dr. Laskowski discontinued the Zantac prescription on December 27, 1998. Dkt. # 114, ¶ 7. However, the Zantac prescription was renewed by Dr. Laskowski and provided to plaintiff during the evening of December 29, 1998 after plaintiff requested Zantac during sick-call that morning. Dkt. # 114, ¶ 8. RN Higley noticed no change in plaintiff's weight on that date. Dkt. # 109, ¶ 8.

Dr. Laskowski examined plaintiff for complaints of epigastric distress on January 1, 1999. Dkt. # 109, ¶ 8. Plaintiff reported that Zantac was partially helpful. Dkt. # 114, ¶ 9. Dr. Laskowski prescribed blood work for plaintiff. Dkt. # 114, ¶ 9.

On January 3, 1999, plaintiff complained of a stomach ache to RN Stewart, who provided him with Amalay. Dkt. # 108, ¶ 9.

On January 17, 1999, Dr. Laskowski received the results of plaintiff's blood work, which was positive for H-Pylori, a bacteria which causes gastritis. Dkt. # 114, ¶ 12. Plaintiff's H-Pylori reference range was 32. Dr. Laskowski prescribed antibiotics and anti-acids to treat this condition. Dkt. # 114, ¶ 12.

On January 25, 1999, plaintiff refused his monthly weight check by RN Higley. Dkt. # 109, ¶ 9.

On February 8, 1999, plaintiff asked to have x-rays taken of his abdomen. Dkt. # 109, ¶ 10. RN Higley placed plaintiff on the weekend call-out list. Dkt. # 109, ¶ 10.

On February 13, 1999, plaintiff reported substantial improvement in his symptoms following treatment for H-Pylori. Dkt. # 114, ¶ 13. Dr. Laskowski planned to “continue a full course of H2 blockers after the antibiotic therapy is completed.” Dkt. # 114, ¶ 13.

On February 27, 1999, plaintiff complained of abdominal problems to RN Higley and was placed on the weekend call-out list. Dkt. # 109, ¶ 11. On February 28, 1999, Dr. Laskowski examined plaintiff and diagnosed him with residual gastritis and possible urinary tract infection. Dkt. # 114, ¶ 14. Dr. Laskowski ordered a urine test and prescribed Avid for plaintiff. Dkt. # 114, ¶ 14.

On March 4, 1999, plaintiff informed Dr. Laskowski that he continued to experience gastric burning and pain despite the prescription of Avid. Dkt. # 114, ¶ 15. Dr. Laskowski prescribed Prilosec and determined that he would request a gastric consult if the symptoms continued. Dkt. # 114, ¶ 16.

*3 On March 5, 1999, plaintiff complained of abdominal pain and informed RN Higley that the antibiotics were not helping. Dkt. # 109, ¶ 12. RN Higley placed plaintiff on the weekend sick-call list. Dkt. # 109, ¶ 12.

On March 7, 1999, Dr. Laskowski encouraged plaintiff to continue taking Prilosec despite his report of no improvement, as Dr. Laskowski felt that plaintiff had not been taking the medication for a sufficient period of time to be able to assess its efficacy. Dkt. # 114, ¶ 17.

On April 8, 1999, Dr. Laskowski referred plaintiff to a GI specialist for an upper endoscopy after plaintiff reported that the Prilosec and anti-acids were not relieving his symptoms. Dkt. # 114, ¶ 19.

On April 29, 1999, Dr. Laskowski advised plaintiff to discontinue Prilosec and wait the results of the GI consult. Dkt. # 114, ¶ 21.

Plaintiff was examined by Dr. Chaudhry, a Gastroenterologist, on April 30, 1999. Dkt. # 114, ¶ 22. Dr. Chaudhry observed no acute distress and diagnosed plaintiff with chronic dyspepsia. Dkt. # 114, ¶ 22. Dr. Chaudhry recommended an upper endoscopy and ordered blood work to test whether the H-Pylori had cleared up. Dkt. # 114, ¶ 22. Dr. Takos ordered a complete blood work-up for plaintiff on May 27, 1999. Dkt. # 114, ¶ 24.

On May 29, 1999, plaintiff requested anti-acid tablets to relieve his complaints of stomach pain which was creating “heat that comes up to my head.” Dkt. # 112, ¶ 6. Registered Nurse Cathie Yohe Turton (“RN Turton”), noted that plaintiff was scheduled to meet with Dr. Takos and provided plaintiff with the anti-acid tablets he requested. Dkt. # 112, ¶ 6.

On June 2, 1999, plaintiff was examined by Dr. Takos, who ordered lab work to rule out ulcers. Dkt. # 111, ¶ 6. The lab work reported a H-Pylori level of 15, which is an equivocal range. Dkt. # 114, Exh. A, p. 76. Plaintiff also received an x-ray of his abdomen, which revealed “a normal gas pattern.” Dkt. # 114, Exh. A, p. 84.

On June 7, 1999, plaintiff complained that he smelled, but Dr. Takos “was unable to appreciate any odor or smell about the patient while in the examination room.” Dkt. # 111, ¶ 6.

On June 11, 1999, plaintiff again complained of gas to RN Turton, but refused her recommendation of Simethicone. Dkt. # 112, ¶ 6. RN Turton provided plaintiff with the medication plaintiff requested. Dkt. # 112, ¶ 6.

On June 18, 1999, Dr. Laskowski examined plaintiff and reassured him that no additional treatment was necessary at that time. Dkt. # 114, ¶ 28.

On June 29, 1999, plaintiff requested Simthecone but complained that he was still experiencing gas even with this medication. Dkt. # 112, ¶ 6. RN Turton noted that plaintiff was scheduled for medical call-out with Dr. Takos the next day, so she advised him to wait until his appointment before taking any additional medication. Dkt. # 112, ¶ 6. RN Turton reviewed plaintiff's medical records, including his complaints of "bad odor" "made by my body" which "comes out of my head," and, unable to detect any odor when plaintiff was in her presence, referred plaintiff for a mental health evaluation. Dkt. # 112, ¶ 6.

*4 On June 30, 1999, Dr. Takos found no masses or tenderness upon examination of plaintiff's abdomen. Dkt. # 111, ¶ 9. Dr. Takos continued plaintiff's prescription for Simethecone for gas relief. Dkt. # 111, ¶ 9.

On July 10, 1999, plaintiff again complained to RN Turton that "there is something eating me up inside," that he was experiencing "constant bubbling" from his groin up to his head, and that there was a bad odor coming from his body. Dkt. # 112, ¶ 10. RN Turton could not detect any odor and advised plaintiff to continue taking Simthecone pending his GI referral. Dkt. # 112, ¶ 10.

On July 12, 1999, plaintiff complained to RN Turton that his head was sore under the skin and that he had vomited the day before. Dkt. # 112, ¶ 11. RN Turton determined that plaintiff was in no acute distress and noted that he was scheduled for the GI Clinic and a doctor call-out. Dkt. # 112, ¶ 11.

On July 15, 1999, plaintiff was examined by Dr. Laskowski for complaints of urinary problems which were treated with a urine test and antibiotic. Dkt. # 114, ¶ 33.

On July 21, 1999, plaintiff complained of stomach pain and soreness between his toes. Dkt. # 112, ¶ 12. RN Turton noted that plaintiff had already been prescribed medication to take for relief of his gastritis and provided plaintiff with antifungal powder for his feet. Dkt. # 112, ¶ 12.

On July 23, 1999, Registered Nurse Susan Nolder ("RN Nolder"), provided plaintiff with Maalox in response to his complaints of GI upset. Dkt. # 113, ¶ 6. On July 26, 1999, plaintiff complained of stomach problems and body odor, but refused RN Nolder's offer of Simthecone. Dkt. # 113, ¶ 7.

On August 9, 1999, plaintiff complained that he was vomiting and could not keep food down. Dkt. # 113, ¶ 9. RN Nolder weighed plaintiff and determined that there had been no significant change in plaintiff's weight and noted that plaintiff was scheduled to be seen for a GI consult that month. Dkt. # 113, ¶ 9.

August 20, 1999, Dr. Chaudhry examined plaintiff in follow-up for his diagnosis of chronic dyspepsia. Dkt. # 114, Exh. A, p. 93. Dr. Chaudhry noted that plaintiff had previously cancelled an upper endoscopy because he didn't want to be sedated, but was experiencing increasingly worse symptoms. Dkt. # 114, Exh. A, p. 93. Accordingly, Dr. Chaudhry recommended that the upper endoscopy under IV sedation be rescheduled. Dkt. # 114, Exh. A, p. 93.

On August 29, 1999, RN Turton examined plaintiff with respect to stomach complaints, determined he was not in acute distress, noted he was scheduled for an endoscopy, and provided him with Maalox. Dkt. # 112, ¶ 13.

On August 31, 1999, plaintiff was seen by Dr. DePerio with complaints of a stomach virus. Dkt. # 114, ¶ 39. Plaintiff

requested to be seen by Dr. Laskowski instead. Dkt. # 114, ¶ 39. Dr. Laskowski examined plaintiff and noted that an upper endoscopy was being rescheduled. Dkt. # 114, ¶ 40.

*5 Dr. Chaudhry performed an upper endoscopy on plaintiff on September 14, 1999, revealing a “small hiatal hernia” and “mild reflux esophagitis.” Dkt. # 114, ¶¶ 41-42. Dr. Chaudhry recommended anti-reflux measures and Prilosec, which was prescribed by Dr. Laskowski. Dkt. # 114, ¶ 42.

On September 23, 1999, RN Nolder scheduled plaintiff to see the physician's assistant to rule out a urinary tract infection in response to plaintiff's complaints of straining and smell with urination and sweat. Dkt. # 113, ¶ 11.

On October 8, 1999, plaintiff complained to RN Turton that Prilosec was not helping his symptoms and was given additional medication as requested. Dkt. # 112, ¶ 14. On October 14, 1999, RN Nolder renewed plaintiff's prescription for Prilosec. Dkt. # 113, ¶ 12. Plaintiff complained that Prilosec was ineffective and claimed that his armpit smelled like feces, causing RN Nolder to schedule plaintiff for a call-out with Dr. Laskowski. Dkt. # 113, ¶ 12.

On October 20, 1999, plaintiff complained of pains in his chest and gas “running all around the body.” Dkt. # 113, ¶ 12. RN Nolder took plaintiff's blood pressure, which was normal, noted that he was scheduled to see Dr. Laskowski, and provided him with Simethecone. Dkt. # 113, ¶ 13.

On October 27, 1999, plaintiff complained of “shitty smelling armpits.” Dkt. # 113, ¶ 14. RN Nolder noted no odor and advised plaintiff to speak to Dr. Laskowski about his concerns. Dkt. # 113, ¶ 14.

On November 5, 1999, plaintiff complained of pain in his armpit, which moved down into his lower chest and

abdomen, and of strained bowel movements. Dkt. # 113, ¶ 15. RN Nolder provided plaintiff with fiber. Dkt. # 113, ¶ 15.

On November 30, 1999, Dr. Laskowski referred plaintiff back to Dr. Chaudhry in response to plaintiff's complaints that the Prilosec was not helping and that he had body odor. Dkt. # 114, ¶ 46.

On December 13, 1999, plaintiff requested Maalox and Advil. Dkt. # 113, ¶ 16. RN Nolder provided him with Maalox, but substituted Tylenol for Advil because of plaintiff's history of GI distress. Dkt. # 113, ¶ 16.

Dr. Chaudhry examined plaintiff on December 17, 1999 and noted no weight loss and no acute distress. Dkt. # 114, ¶ 47. Dr. Chaudhry recommended a barium enema and upper GI to rule out irritable bowel syndrome. Dkt. # 114, ¶ 47. If the findings were normal, Dr. Chaudhry recommended treatment with a mild-antidepressant. Dkt. # 114, ¶ 47. Dr. Chaudhry also recommended indefinite continuation of Prilosec or Prevacid for the hiatal hernia and reflux. Dkt. # 114, ¶ 47.

Plaintiff continued to complain of stomach problems on January 3, 2000 and was seen by Dr. Laskowski in response to those complaints on January 6, 2000. Dkt. # 113, ¶ 17.

The upper GI series was completed on January 19, 2000, revealing normal esophagus, stomach, duodenum and bowel motility. Dkt. # 114, ¶ 49.

On February 10, 2000, RN Nolder provided plaintiff with a stool softener as requested. Dkt. # 113, ¶ 17.

*6 Plaintiff again requested Advil on February 18, 2000, but was provided with Tylenol by RN Nolder because of the

contraindication of Advil for individuals with gastric issues.
Dkt. # 113, ¶ 19.

Dr. Laskowski prescribed Prozac for plaintiff, but was informed that this medication could only be ordered by a psychiatrist. Dkt. # 114, ¶ 51. After consultation with psychiatry, plaintiff was prescribed Elavil, "a similar medication used for GI pathology." Dkt. # 114, ¶ 51. "After a lengthy discussion with the plaintiff regarding the use of Elavil, and the rationale for the treatment, the plaintiff refused the same." Dkt. # 114, ¶ 51. Plaintiff states that he refused the Elavil because of fears that Dr. Laskowski "was experimenting on him" and because "he has no mental problem and ... won't take any mental health medication for stomach pain." Dkt. # 118, ¶¶ 68-69.

Plaintiff was transferred to Shawangunk Correctional Facility on April 6, 2000. Dkt. # 118, ¶ 74.

In support of this motion for summary judgment, Dr. Laskowski and Dr. Takos opine that

The plaintiff, at all times, was given appropriate and proper treatment, outside diagnostic consults (i.e., GI specialist), numerous blood tests, numerous x-rays, including EGD's, an upper GI and a barium enema. Plaintiff was eventually diagnosed as having a hiatal hernia and mild reflux esophagitis. The treatment he had been receiving all along was the same treatment recommended by the GI specialist. All recommendations given by the GI specialist were followed by the medical staff at [Attica]. The plaintiff was diagnosed and treated appropriately, however, he often was noncompliant with medication protocol which would help his condition. The plaintiff was either unable or unwilling to understand that this is a chronic condition that will have to [be] dealt with on a symptomatic basis through diet, medication and lifestyle changes.

Dkt. # 111, ¶ 12; Dkt. # 114, ¶ 55.

In opposition to defendants' motion for summary judgment, plaintiff submitted affidavits from two inmates who noticed "a pungent odor" and "smells of feces" coming from plaintiff's body. Dkt. # 119. Plaintiff also submitted a letter from one cell mate complaining that plaintiff "be gasing all the time and he also be smelling like urine everyday, even after he takes a shower" and another cell mate complaining that he was "really in a difficult situation by being in a double bunk cell with someone who has the cell that smell like shit." Dkt. # 118, Exh. A-B.

ANALYSIS

Motion to Compel

Plaintiff moves to compel production of the following documents:

(1) Produce the amount of prisoner[s] Dr. Shah ever examined at Southport on or about August of 1998 to [M]ay of 2001.

(2) Any logs, list, or other document reflecting grievance[s] filed by Southport Correctional Facility inmates from August of 1998 to May of 2001.

(3) Produce any and all written statements logged in any logbook[s] concerning Plaintiff's transfer from B-West to C-West behind plexi-glass from on or about January 1, 1999 to January 20, 1999 the day of plaintiff [sic] transfer.

*7 (4) Produce any and all documents created by any Attica staff member concerning plaintiff's transfer from B-West to

C-West behind plexi-glass without a misbehavior report from on or about January 1, 1999 to January 20, 1999.

Dkt. # 94, Exh. 1.

With respect to the first demand, defendants argue that it would be impossible for them to determine the number of inmates Dr. Shah examined during this period without reviewing the medical records of every inmate housed at Attica during that time period and, in any event, this information is not relevant to the question of whether plaintiff was denied adequate medical treatment at Attica. Dkt. # 100, ¶¶ 12-13. Plaintiff responds that this information is “relevant to show a pattern of mistreatment and neglect of how care free Dr. Shah is towards inmates.” The Court agrees with defendants that the medical care provided by Dr. Shah to other inmates is irrelevant to a determination of the quality of care afforded plaintiff.

With respect to the second demand, defendants argue that plaintiff's demand is over broad and oppressive inasmuch as it seeks grievances relating to issues other than medical care and, to the extent it seeks grievances with respect to medical care, seeks information of a confidential nature with respect to other inmates. Dkt. # 100, ¶¶ 15-16. Plaintiff argues that this is necessary to establish that inmates are forced to file grievances to get the medical care they need. Dkt. # 93. This request is not relevant to the question of whether plaintiff received adequate medical care at Attica, which is the question before the Court on defendants' motion for summary judgment. Accordingly, plaintiff does not require access to this information prior to consideration of defendants' motion for summary judgment.

Defendants object to the third and fourth requests on the ground that plaintiff's transfer from one cell to a cell with a plexiglass shield has nothing to do with plaintiff's allegations of inadequate medical care. Dkt. # 100, ¶¶ 17-18. Plaintiff alleges that he was placed in a cell with a plexiglass shield

because the corrections officers could no longer stand the odor coming from plaintiff's cell. Dkt. # 93. Even if that were true, defendants argue that it would not demonstrate deliberate indifference on the part of defendants. Dkt. # 100, ¶ 18. In any event, defendants note that they provided plaintiff with copies of the log book entries concerning this transfer. Dkt. # 100, ¶ 19. Inasmuch as the Court will credit plaintiff's allegation of body odor for purposes of defendant's motion for summary judgment, there is no need to compel any additional information regarding the reason for plaintiff's transfer prior to deciding the motion for summary judgment. Accordingly, plaintiff's motion to compel discovery is denied.

Motion for Summary Judgment

Defendants argue that plaintiff's allegations fail to rise to the level of a serious medical need or to demonstrate deliberate indifference by any of the defendants. Dkt. # 104.

*8 Plaintiff responds that there is a question of fact whether defendants' delay of “approximately two and a half months to begin any diagnostic test on plaintiff” despite his complaints that defendants “continuous offerings of maalox, simethecone and zantac” were not relieving his symptoms, constitutes deliberate indifference to his serious medical needs. Dkt. # 124. Following receipt of the blood test indicating positive H-Pylori in November of 1998, plaintiff argues that defendants concealed the results from plaintiff and “did not treat the infection at all.” Dkt. # 124. “In total,” plaintiff claims that he “was allowed to suffer for four and a half months and sustain needless pain and organ damage to the pancreas” as a result of the defendants' deliberate indifference. Dkt. # 124. Plaintiff argues that “H-Pylori causes various types of ulcers and, if left untreated, perforations develop in the stomach wall. It is in this manner that the bacteria (as well as stomach acids and other toxins) escape out of the stomach and infiltrate other areas of the body.” Dkt. # 124.

Summary Judgment

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#). “In reaching this determination, the court must assess whether there are any material factual issues to be tried while resolving ambiguities and drawing reasonable inferences against the moving party, and must give extra latitude to a pro se plaintiff.” [Thomas v. Irvin](#), 981 F.Supp. 794, 799 (W.D.N.Y.1997) (internal citations omitted).

A fact is “material” only if it has some effect on the outcome of the suit. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); see [Catanzaro v. Weiden](#), 140 F.3d 91, 93 (2d Cir.1998). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” [Anderson](#), 477 U.S. at 248; see [Bryant v. Maffucci](#), 923 F.2d 979 (2d Cir.), cert. denied, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

Once the moving party has met its burden of “demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely upon a ‘metaphysical doubt’ concerning the facts, or on the basis of conjecture or surmise.” [Bryant](#), 923 F.2d at 982. A party seeking to defeat a motion for summary judgment

must do more than make broad factual allegations and invoke the appropriate statute. The [party] must also show, by affidavits or as otherwise provided in [Rule 56 of the Federal Rules of Civil Procedure](#), that there are specific factual issues that can only be resolved at trial.

[Colon v. Coughlin](#), 58 F.3d 865, 872 (2d Cir.1995).

*9 Pursuant to [Fed.R.Civ.P. 56\(e\)](#), affidavits in support of or in opposition to a motion for summary judgment “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Thus, affidavits “must be admissible themselves or must contain evidence that will be presented in an admissible form at trial.” [Santos v. Murdock](#), 243 F.3d 681, 683 (2d Cir.2001), citing [Celotex Corp. v. Catrett](#), 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); see also [H.Sand & Co. v. Airtemp Corp.](#), 934 F.2d 450, 454-55 (2d Cir.1991) (hearsay testimony that would not be admissible if testified to at trial may not properly be set forth in an affidavit)._____

Deliberate Indifference to Serious Medical Needs

In [Estelle v. Gamble](#), the Supreme Court of the United States determined that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment” to the United States Constitution. 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). To establish such a claim, the prisoner must demonstrate both that the alleged deprivation is, in objective terms, “sufficiently serious,” and that, subjectively, the defendant is acting with a “sufficiently culpable state of mind.” [Hathaway v. Coughlin](#), 37 F.3d 63, 66 (2d Cir.1994).

In assessing whether a medical condition is “sufficiently serious,” the Court considers all relevant facts and circumstances, including whether a reasonable doctor or patient would consider the injury worthy of treatment; the impact of the ailment upon an individual's daily activities; and the severity and persistence of pain. See [Chance v. Armstrong](#), 143 F.3d 698, 702 (2d Cir.1998). A serious medical condition exists where the failure to treat a

prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. *Id.*

constitutes medical malpractice, does not, without more, engender a constitutional claim.

“When the basis for a prisoner's Eighth Amendment claim is a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged *delay* or *interruption* in treatment rather than the prisoner's *underlying medical condition* alone in analyzing whether the alleged deprivation is, in ‘objective terms, sufficiently serious,’ to support an Eighth Amendment claim.” *Smith v. Carpenter*, 316 F.3d 178, 185 (2d Cir.2003), quoting *Chance*, 143 F.3d at 702. Moreover, although an Eighth Amendment violation may be based upon exposure to an unreasonable risk of future harm, “the absence of present physical injury will often be probative in assessing the risk of future harm.” *Smith*, 316 F.3d at 188. “[I]n most cases, the actual medical consequences that flow from the alleged denial of care will be highly relevant to the question of whether the denial of treatment subjected the prisoner to a significant risk of serious harm.” *Id.* at 187.

Chance, 143 F.3d at 703.

At the outset, the Court notes that there is a question of fact as to when the presence of H-Pylori bacteria should have initially been detected. Although NP Dougherty avers that the results of plaintiff's November 20, 1998 blood test were negative, the blood test report indicates a reference range of 68.8, with anything greater than 25 constituting a positive result. Dkt. # 114, Exh. A, p. 126. However, even assuming that plaintiff should have been treated for the presence of H-Pylori bacteria following his blood test on November 20, 1998, the two month delay in providing such treatment until January 17, 1999 may constitute negligence, but it does not rise to the level of a constitutional violation.

*10 With respect to the defendant's state of mind, it is clear that “a prison official does not act in a deliberately indifferent manner unless that official ‘knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’” *Hathway*, 37 F.3d at 66, quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). “Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm.” *Hathway*, 37 F.3d at 66, citing *Farmer*, 511 U.S. at 835. Accordingly,

Plaintiff's complaints of abdominal pain, vomiting, heartburn, constipation, body odor and extreme body heat did not constitute a serious medical need. Even if they did, defendants were not deliberately indifferent to these complaints. Plaintiff was examined frequently and found to be in no acute distress. He underwent blood tests and was given a variety of medications to relieve his complaints. When these medications failed to provide relief, plaintiff was referred to a gastroenterologist and underwent additional blood tests, x-rays, and a lower and upper endoscopy, a barium enema and upper GI series.

It is well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation. Moreover, negligence, even if it

As a result, plaintiff was diagnosed with chronic dyspepsia, a small hiatal hernia, and mild reflux esophagitis. The recommended treatment for these diagnoses was indefinite continuation of Prilosec or Prevacid and a mild antidepressant, which plaintiff refused to take. Nothing in the record before the Court suggests that plaintiff's chronic medical needs rose to the level of a serious medical need or that defendants exhibited deliberate indifference to those chronic medical needs. See *Obispo v. Alves*, 1999 WL

[1390248 \(W.D.N.Y. Aug.23, 1999\)](#); [Demata v. Greifinger, 1999 WL 47241, at *3 \(S.D.N.Y. Feb.3, 1999\)](#); [Felipe v. New York State Dep't of Correctional Servs., 1998 WL 178802 \(N.D.N.Y. April 10, 1998\)](#). Accordingly, defendants' motion for summary judgment is granted.^{[FN1](#)}

[FN1](#). In light of this determination, defendants' alternative arguments need not be addressed. See Dkt. # 104.

CONCLUSION

*11 For the foregoing reasons, plaintiff's motion to compel production of documents (Dkt.# 92), is DENIED, and defendants' motion for summary judgment (Dkt.# 103), is GRANTED. The Clerk of the Court is directed to enter judgment in favor of defendants.

The Court hereby certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is denied. [Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 \(1962\)](#). Further requests to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with [Rule 24 of the Federal Rules of Appellate Procedure](#).

SO ORDERED.

W.D.N.Y.,2004.
Ross v. McGinnis
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