2007 WL 4299992
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United States District Court,
N.D. New York.

Edward KOEHL, Plaintiff,
v.
Gary GREENE, Superintendent; Glenn Goord Commissioner; Howard Silverberg, Facility Doctor; and Julie Daniel, IGRC Supervisor, Great Meadow Correctional Facility, Defendants.

No. 9:06-CV-0478 (LEK/GHL).
|
Dec. 6, 2007.

Attorneys and Law Firms

Edward Koehl, Dannemora, NY, pro se.

Hon. Andrew M. Cuomo, Attorney General for the State of New York, Michael G. McCartin, Esq., Stephen M. Kerwin, Esq., Assistant Attorneys General, Albany, NY, for Defendants.

ORDER

GEORGE H. LOWE, United States Magistrate Judge.

***1** Currently before the Court in this prisoner civil rights action are four submissions recently filed by Plaintiff: (1) an opposition to Defendants' motion to take his deposition (Dkt.Nos.44, 47, 50); (2) a motion for an order permitting Plaintiff to take the depositions of Defendants at the time and place, and in the manner, specified by Plaintiff (Dkt.Nos.45, 47, 50); (3) a motion for a Court conference (Dkt.Nos.48, 50); and (4) a motion to appoint counsel (Dkt.Nos.49, 50). For the reasons set forth below, the Court withdraws its prior Order with regard to Defendants' motion to take Plaintiff's deposition, and issues a new such Order. Furthermore, the Court denies each of Plaintiff's three motions. Finally, the Court cautions Plaintiff regarding the abusive language contained in some of his recent submissions.

I. OPPOSITION TO DEFENDANTS' MOTION TO TAKE PLAINTIFF'S DEPOSITION

On October 2, 2007, Defendants requested an Order authorizing them to take Plaintiff's deposition. (Dkt. No. 41.) On October 4, 2007, the Court filed an Order granting that request. (Dkt. No. 43.) On October 6, 2007, Plaintiff sent to the Court his opposition to Defendants' motion. (Dkt. No. 44.) That opposition was filed on October 11, 2007. (*Id.*) Because I filed my Order granting Defendants' (rather routine) motion on October 4, 2007, without the benefit of having Plaintiff's opposition thereto, I hereby analyze Defendants' request anew, and amend my Order of October 4, 2007 accordingly.

In his opposition to Defendants' motion, Plaintiff asserts that he "does not object to defendants deposing him per se ... [but] objects to the unnamed facility where the deposition[ ] will take place, the presence of security teams during the deposition[,] and the empowering of DOCS security personnel to dictate the terms and conditions of said deposition[ ]." (Dkt. No. 44, ¶ 3.) In particular, Plaintiff objects to the possibility that he will be moved a considerable distance for the deposition merely "as a means of harassment and retaliation." (*Id.* at ¶ 3.) In addition, he objects to having prison security personnel present in the room during his deposition, where they may (1) order him to answer deposition questions under penalty of being issued a misbehavior report if he does not do so, and (2) overhear Plaintiff's testimony regarding his confidential medical condition. (*Id.* at ¶¶ 5-6 .) In support of these objections, he offers sworn testimony about his past experiences being deposed in prisoner civil rights actions against DOCS employees. (*Id.* at ¶¶ 4-5.)

In reply, Defendants argue that (1) the reason for of DOCS' non-disclosure of the location of the deposition is to maintain security, (2) the reason for the presence of security personnel in the room during Plaintiff's deposition is also to maintain security, particularly the security of the court reporter, and (3) Plaintiff's confidentiality argument fails because has placed his alleged medical condition at issue in this action, and in any event the allegedly confidential information in question would come out in open Court anyway should this matter proceed to trial. (Dkt. No. 46.)

***2** In two sur-replies, Plaintiff argues, *inter alia,* that (1) the place for the deposition that is geographically most convenient to the parties is Great Meadow C.F., (2) should a trial occur in this matter, it may be held "under seal," and (3) at the very least, the Court should order that Plaintiff not be deposed on February 6, 2008, since he is scheduled to be

deposed on that date in an unrelated matter pending in New York State Supreme Court, Kings County. (Dkt. No. 47, 50.)

Plaintiff has now been afforded all the process to which he is due with regard to Defendants' motion. After carefully reviewing all of the motion papers with respect to Plaintiff's deposition, I see no reason to disturb my previous Order except to make the following amendments to it: (1) *defense counsel is directed to accommodate Plaintiff's request to not depose him on February 6, 2008, since he is apparently scheduled to be deposed on that date in an unrelated matter pending in New York State Supreme Court, Kings County; (2) defense counsel is directed to, in selecting a place for Plaintiff's deposition, make an effort to select a DOCS Correctional Facility that is within a reasonable distance of the facility in which Plaintiff is housed, such "reasonable distance" to be determined, in part, based on Departmental needs and availability; and (3) Plaintiff's disagreement with the time and/or place of his depositions is not a basis for refusing to go forward with the deposition.*

I issue this ruling largely for the reasons stated by Defendants in their motion papers. (*See generally* Dkt. No. 46.) I would only add three points. First, with respect to the location of the deposition, such information will necessarily be required in the Notice of Deposition, pursuant to Rule 30(b)(1) of the Federal Rules of Civil Procedure. Thus, pursuant to this Court's Order filed on October 4, 2007, Plaintiff will be advised of the location "at least 14 days prior to the scheduled day for his deposition .... " (Dkt. No. 43.)

Second, with respect to the presence of security personnel in the room during Plaintiff's deposition, the facility where Plaintiff will be deposed determines the level of security necessary to protect the facility as well as all persons involved in the taking of the deposition. This Court will not second-guess such determinations based upon Plaintiff's assertions. Of course, with respect to the answering of specific questions at the deposition, the Court does not relinquish its authority to oversee the conduct of this case, including the discovery. Thus, while the correctional facility may control the physical environment of the deposition, any dispute with respect to the propriety of a question, or a party's obligation to answer same, rests ***solely*** with this Court. I am confident that defense counsel understands this fact and the permissible use of security personnel at the deposition. (*See* Dkt. No. 41, ¶¶ 6-8 [McCartin Decl., requesting an order directing that Plaintiff may not refuse to answer questions due to a mere "disagreement with directives of security staff" regarding "security precautions," and stating, "[o]f course, such an order would not require the plaintiff to answer every single question; valid objections in good faith are always permissible.").

***3** Finally, with respect to the asserted confidentiality of Plaintiff's medical condition, [1] Plaintiff has, in this action, asserted claims for damage to his health due to Defendants' alleged deliberate indifference. (Dkt. No. 1.) By asserting such claims, Plaintiff has, indeed, put his medical condition in question, and defendants are entitled to explore same with Plaintiff in his deposition, as well as in written discovery. Thus, his argument regarding privilege or confidentiality fails.

II. MOTION TO TAKE DEFENDANTS' DEPOSITIONS

Plaintiff requests an Order directing that (1) Defendants submit to depositions conducted by Plaintiff, and answer all of Plaintiff's questions, except those questions regarding which they have, in good faith, made valid objections, (2) Defendants provide a room in a DOCS correctional facility near Plaintiff (preferably Great Meadow C .F.) during regular business hours, at which the depositions may occur, and (3) Defendants provide the means by which the depositions may be recorded, such as a stenographer, an ordinary tape recorder, or the recording device used in DOCS disciplinary hearings. (*See, e.g.,* Dkt. No. 45, Part 1, ¶¶ 4, 7-9; Dkt. No. 47, at 1.)

As an initial matter, I note that Plaintiff ignores the cost associated with ensuring that the depositions are taken before a person authorized to administer oaths and take testimony. [2] Moreover, Plaintiff ignores the chain-of-custody issues that would arise were he permitted to store, in his possession, the cassette tape onto which the depositions were recorded. Finally, Plaintiff ignores the cost of a permissible transcription of any such audio tape. In any event, even if Plaintiff had addressed these issues, his request would still lack merit because he has not shown cause for an order shifting the cost of taking several depositions from him to Defendants (or the Court). [3]

Implicit in Plaintiff's motion is an argument that he should be excused from the requirements of having to pay the costs of the depositions because he is impoverished. This argument is without merit. Although Plaintiff has been granted *in forma pauperis* status under 28 U.S.C. § 1915, such status does

not relieve him of the duty to pay his share of the cost of discovery (or somehow shift that cost to either Defendants or the Court). Rather, being granted *in forma pauperis* status affords an inmate only certain benefits, namely, the right to be able to "proceed" in a matter without *prepaying* certain "fees and costs."[4] These "fees and costs" do not include the costs of taking part in discovery. For example, a litigant proceeding *in forma pauperis* does not have a right to a waiver of (1) the cost of a deposition stenographer,[5] (2) the daily attendance fee and mileage allowance that must be presented to an opposing witness under Rule 45 of the Federal Rules of Civil Procedure,[6] or (3) the copying cost of any deposition transcripts.[7]

***4** This is precisely why, in the case of *Murray v. Palmer,* I required the prisoner-plaintiff to bear the cost of hiring a certified court reporter (or its functional equivalent) at the depositions that he requested. *Murray v. Palmer,* 03-CV-1010, 2006 WL 2516485, at *3-4 (N.D.N.Y. Aug. 29, 2006). It is also presumably why Visiting Senior United States District Judge Lyle E. Strom, in the unpublished Order of April 17, 2007, provided by Defendants, required a prisoner-plaintiff to pay, *inter alia,* the cost of hiring a certified court reporter for the depositions he requested. (Dkt. No. 46, Part 2.)

Simply stated, I am not going to require Defendants to bear the cost of a court reporter (or, in the alternative, a person authorized to administer oaths, an audio recording device, and a transcription of an audio recording of the deposition) at Plaintiff's depositions under the circumstances.

I note that Rule 30(a)(2) of the Federal Rules of Civil Procedure permits Plaintiff to conduct the depositions of Defendants without leave of the Court, a fact that is recognized by Defendants. (Dkt. No. 46, Part 1, at 1.) Furthermore, even if Plaintiff indeed lacks the funds necessary to hire a certified court reporter for the depositions he would like to take,[8] he has several other discovery tools at his disposal (with which he is no doubt familiar, given his extensive litigation experience), including (1) conducting depositions upon written questions pursuant to Rule 31, (2) serving interrogatories pursuant to Rule 33, (3) serving document requests pursuant to Rule 34, and (4) serving requests for admissions pursuant to Rule 36. Indeed, it appears that "[t]he preference in [the Southern] District [of New York] in pro se prisoner actions is for interrogatories rather than depositions of defendants." *Boomer v. Grant,* 00-CV-4709, 2001 WL 1580237, at *1 (S.D.N.Y. Dec. 12, 2001) [collecting cases]. This would appear to me to be an eminently sensible policy to adopt in our District.

Plaintiff is reminded that the discovery period in this action closes on February 29, 2008. (Dkt. No. 40, at 1.)

III. MOTION FOR COURT CONFERENCE

Plaintiff requests a Court conference in order to (1) obtain clarification from the Court regarding "the parameters of the Court's Scheduling Order" of October 1, 2006, and "the steps he must go through to accomplish abiding by said Order," and (2) resolve a discovery dispute with Defendants regarding their "illegal possession of his personal and confidential records [while] at the same time precluding Plaintiff from having access to his own personal records." (Dkt.Nos.48, 50). This request is denied without prejudice for several reasons.

First, as was stated in the Court's denial of Plaintiff's previous request for a Court conference, his discovery dispute with Defendants is not yet ripe for adjudication by the Court since neither he nor Defendants have filed a motion to compel or preclude production of the confidential records to which he refers. (Dkt.Nos.24, 35.) Indeed, Plaintiff has not even certified that he engaged in a good-faith effort with Defendants to resolve or reduce the asserted discovery dispute(s), as required by Local Rule 7.1(b) (2), (d).

***5** Second, to the extent Plaintiff requests clarification from the Court regarding the meaning of the Court's Scheduling Order of October 1, 2006, he may, under the circumstances, submit his requests for clarification in a letter to the Court (with a copy to opposing counsel), although he is cautioned that no one at the Court or Clerk's Office can, or will, provide him with legal advice. Plaintiff is directed, in that letter, to expressly refer to this Order, so that the Clerk's Office is aware of the permissibility of the filing of such a letter.

IV. MOTION TO APPOINT COUNSEL

Courts cannot utilize a bright-line test in determining whether counsel should be appointed on behalf of an indigent party. *Hendricks v. Coughlin,* 114 F.3d 390, 392-93 (2d Cir.1997). Instead, a number of factors must be carefully considered by the court in ruling upon such a motion. Among these factors are:

> The indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.

Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1341 (2d Cir.1994) (quoting *Hodge v. Police Officers,* 802 F.2d 58, 61 [2d Cir.1986]). This is not to say that all, or indeed any, of these factors are controlling in a particular case.[9] Rather, each case must be decided on its own facts. *Velasquez v. O'Keefe,* 899 F.Supp. 972, 974 (N.D.N.Y.1995) (citing *Hodge,* 802 F.2d at 61).

Here, after carefully reviewing the file in this action, I find that (1) it appears as though, to date, Plaintiff has been able to effectively litigate this action,[10] (2) it appears that the case does not present issues that are novel or more complex than those raised in most prisoner civil rights actions, (3) while it is possible that there will be conflicting evidence implicating the need for cross-examination at the time of the trial (as is the case in many actions brought under 42 U.S.C. § 1983 by *pro se* litigants),[11] *it is highly probable that this Court will appoint trial counsel at the final pretrial conference* (should this case survive the filing of any dispositive motions), and (4) I am unaware of any special reasons why appointment of counsel at this time would be more likely to lead to a just determination of this litigation.

As a result, Plaintiff's motion for counsel is denied.

V. PLAINTIFF'S RECENT ABUSIVENESS

It bears mentioning in this Order that Plaintiff's extraordinary litigiousness, discussed in a previous Report-Recommendation in this action,[12] has recently spiked (causing him to file three motions, a response, and two replies in a period of about two months),[13] and indeed has grown into abusiveness. For example, in two recent submissions, he refers to the Court as "cowardly," "[f]ascist," and "twisted." (*See* Dkt. No. 47, at 2; Dkt. No. 50, at 1.) While the Court is certainly sympathetic with the stress and frustrations that accompany the litigation process, Plaintiff is advised that such language is never tolerable-by either counsel or *pro se* litigants. Plaintiff is cautioned that he will be sanctioned for any such future abusiveness, including the striking of any submission containing such abusive language.

***6** I note that the source of Plaintiff's abusiveness appears to be partly impatience at having his motions decided, and partly the revocation of his special solicitude in my prior Report-Recommendation. Plaintiff is advised that none of the decisions reached in this Order were the result of the Court's prior revocation of his special solicitude as a *pro se* civil rights litigant, due to his litigiousness. However, even if the decisions reached in this Order had been the result of that revocation, Plaintiff would not be subjected to any sort of disadvantage, only the level playing field that justice requires due to his extraordinary litigation experience.

Finally, I note that, in his Objections to my previous Report-Recommendation, Plaintiff complained that he did not have access to unreported decisions revoking the special status of an overly litigious *pro se* litigant, and that, in any event, he was represented by counsel in several of his previous cases. (Dkt. No. 38, ¶¶ 1-4.) Plaintiff is respectfully referred to four reported decisions cited in my Report-Recommendation: (1) *Davidson v. Flynn,* 32 F.3d 27, 31 (2d Cir.1994); (2) *Davidson v. Dean,* 204 F.R.D. 251, 257 & n. 5 (S.D.N.Y.2001); (3) *Santiago v. C.O. Campisi,* 91 F.Supp.2d 665, 670 (S.D.N.Y.2000); and (4) *Raitport v. Chem. Bank,* 74 F.R.D. 128, 133 (S.D.N.Y.1977). Plaintiff is also advised that, in the case of Mr. Davidson, a careful review of the United States Judiciary's Public Access to Court Electronic Records ("PACER") Service reveals that, of the cases that Mr. Davidson had filed by August of 1994 (when the Second Circuit issued its decision in *Davidson v. Flynn*), he had been represented by counsel in more than one-quarter of them.[14] As a result, prior representation by counsel is not a determinative factor in deciding whether or not to treat an extremely experienced *pro se* litigant the same as any other litigant.

ACCORDINGLY, it is

ORDERED that this Court's Order regarding Plaintiff's deposition, filed on October 4, 2007 (Dkt. No. 43), is ***AMENDED*** as described above in Part I of this Decision; and it is further

ORDERED that Plaintiff's motion for an order permitting him to take the depositions of Defendants at the time and place, and in the manner, specified by him (Dkt.Nos.45, 47, 50) is ***DENIED;*** and it is further

ORDERED that Plaintiff's motion for a Court conference (Dkt.Nos.48, 50) is ***DENIED;*** and it is further

ORDERED that Plaintiff's motion to appoint counsel (Dkt.Nos.49, 50) is ***DENIED.***

All Citations

Not Reported in F.Supp.2d, 2007 WL 4299992

Footnotes

1 This action alleges violations of Plaintiff's Eighth Amendment rights based upon his exposure to second hand tobacco smoke in three different correctional facilities between May 1992 and November 2006. (*See* Dkt. No. 1.)

2 *See* Fed.R.Civ.P. 28(a), 30(b)(4).

3 *See* Fed.R.Civ.P. 30(b)(2) ("Unless the Court orders otherwise, ... the party taking the deposition shall bear the cost of the recording.").

4 *See* 28 U.S.C. § 1915.

5 *See Benitez v. Choinski,* 05-CV-0633, 2006 WL 276975, at *2 (D.Conn. Feb. 2, 2006); *Tajeddini v. Gluch,* 942 F.Supp. 772, 782 (D.Conn.1996); *Doe v. U.S.,* 112 F.R.D. 183, 185 (S.D.N.Y.1986); *Toliver v. Community Action Com. to Help Economy, Inc.,* 613 F.Supp. 1070, 1072 (S.D.N.Y.1985), *aff'd without opinion,* 800 F.2d 1128 (2d Cir.1986), *cert. denied,* 479 U.S. 863 (1986); *Ebenhart v. Power,* 309 F.Supp. 660, 661 (S.D.N.Y.1969).

6 *See* 28 U.S.C.1915(d) ("Witnesses shall attend as in other cases ...."); N.D.N.Y. L.R. 5.4(a) ("The granting of an *in forma pauperis* application shall in no way relieve the party of the obligation to pay all other fees for which such party is responsible regarding such action, including, but not limited to, copying and/or witness fees."); *Malik v. Lavalley,* 994 F.2d 90, 90 (2d Cir.1993) (affirming dismissal of complaint by Di Bianco, M.J., N.D.N.Y.); *Milton v. Buffalo Eng'g, P.C.,* 03-CV-0472, 2004 WL 1179336, at *1 (W.D.N.Y. May 27, 2004); *Fridman v. City of New York,* 195 F.Supp.2d 534, 535 (S.D.N.Y.2002); *Espinal v. Coughlin,* 98-CV-2579, 1999 WL 1063186, at *2 (S.D.N.Y. Nov. 23, 1999); *Smith v. Gracie Square Hosp.,* 96-CV-1327, 1997 WL 698183, at *2 (S.D.N.Y. Nov. 10, 1997); *Malsh v. Police Dep't of City of N .Y.,* 92-CV-2973, 1995 WL 296735, at *1 (S.D.N.Y. May 16, 1995); *Toliver v. Community Action Com. to Help Economy, Inc.,* 613 F.Supp. 1070, 1072 (S.D.N.Y.1985), *aff'd without opinion,* 800 F.2d 1128 (2d Cir.1986), *cert. denied,* 479 U.S. 863 (1986); *Gonzalez v. Fenner,* 128 F.R.D. 606, 607-608 (S.D.N.Y.1989); *see also* Dkt. No. 6, n. 1 (Order granting Plaintiff *in forma pauperis* status, but noting that Plaintiff is "still required to pay fees that he may incur in this action, including copying and/or witness fees").

7 *See* N.D.N.Y. L.R. 5.4(a) ("The granting of an *in forma pauperis* application shall in no way relieve the party of the obligation to pay all other fees for which such party is responsible regarding such action, including, but not limited to, copying and/or witness fees."); *Smith v. Buffalo Bd. of Educ.,* 96-CV-0229, 1997 WL 613255, at *2 (W.D.N.Y. Oct. 2, 1997); *see also* Dkt. No. 6, n. 1 (Order granting Plaintiff *in forma pauperis* status, but noting that Plaintiff is "still required to pay fees that he may incur in this action, including copying and/or witness fees").

8 I am taking Plaintiff at his word that no longer has the funds necessary to hire a certified court reporter for the depositions he would like to take (*see* Dkt. No. 2, ¶ 4; Dkt. No. 38, ¶ 5), despite the considerable settlement

amounts he received from previous prisoner civil rights actions. *See Koehl v. Rowe,* 96-CV-1001 (E.D.N.Y.) (prisoner civil rights action, settled on or about 6/13/02 for payment to Plaintiff of $35,000 plus $7,419.41 in expenses); *Koehl v. Dalsheim,* 94-CV-3351 (S.D.N.Y.) (prisoner civil rights action, settled on or about 5/20/99 for payment to Plaintiff of $25,000).

9 For example, I note that a plaintiff's motion for counsel must always be accompanied by documentation that substantiates his efforts to obtain counsel from the public and private sector, and such a motion may be denied solely on the failure of the plaintiff to provide such documentation. *See* *Terminate Control Corp. v. Horowitz,* 28 F.3d 1335, 1341 (2d Cir.1994); *Cooper v. Sargenti Co., Inc.,* 877 F.2d 170, 172, 174 (2d Cir.1989) [citation omitted].

10 I note that Plaintiff's filings in this action have been quite good, always being clear, organized and cogent, and almost always being typed and supported by exhibits and/or declarations. (*See* Dkt. Nos. 1, 2, 3, 15, 16, 20, 29, 31, 34, 36, 38, 44, 45, 47-50.) As a result, some of Plaintiff's requests have been granted by the Court. (*See* Dkt. Nos. 6, 15.)

11 I note that, again, "this factor alone is not determinative of a motion for appointment of counsel." *Velasquez,* 899 F.Supp. at 974.

12 (Dkt. No. 37, at 8-15 [Report-Recommendation of Lowe, M.J.], *adopted on de novo review,* Dkt. No. 39 [Order of Kahn, J.].)

13 (*See* Dkt. Nos. 44, 45, 47-50.)

14 Specifically, Plaintiff was represented by counsel in the following cases: *Davidson v. Scully,* 81-CV-0390 (S.D.N.Y.); *Davidson v. Scully,* 83-CV-2025 (S.D.N.Y.); *Davidson v. Smith,* 84-CV-6954 (S.D.N.Y.); *Davidson v. Flynn,* 86-CV-0316 (N .D.N.Y.); *Davidson v. Smith,* 87-CV-1342 (W.D.N.Y.); *Davidson v. Wilmot,* 88-CV-0026 (W.D.N.Y.); *Davidson v. Wilmot,* 88-CV-0063 (W.D.N.Y.); *Davidson v. Riley,* 88-CV-1042 (N.D.N.Y.); *Davidson v. Coughlin,* 88-CV-0646 (N.D.N.Y.); *Davidson v. City of New York,* 91-CV-2290 (S.D.N.Y.); *Davidson v. Murray,* 92-CV-0283 (W .D.N.Y.); *Davidson v. Zon,* 94-CV-0184 (W.D.N.Y.).

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United States District Court, N.D. New York.

Jean BERNIER, a/k/a Charles Watson, Plaintiff,
v.
Carl KOENIGSMANN, et al., Defendants.

9:17-CV-254 (DNH/ATB)
|
Signed 04/23/2020

Attorneys and Law Firms

JEAN BERNIER, Plaintiff, pro se.

JAMES A. MEGGESTO, ESQ., for Defendant Jeavons.

NICOLE HAIMSON, ESQ., for the other remaining Defendants.

DECISION and ORDER

ANDREW T. BAXTER, United States Magistrate Judge

***1** In this civil rights action, plaintiff alleges, *inter alia*, that certain defendants refused him necessary medical treatment for hepatitis C.[1] Since February 2019, plaintiff has raised issues with respect to the sufficiency of the discovery responses of the defendants. This court addressed many of those issues during a stenographically-recorded telephone conference on June 12, 2019, and ordered the defendants to supplement various responses to plaintiff's written discovery demands. (Dkt. No. 139).[2] The court subsequently granted plaintiff's motion to reopen discovery for the limited purpose of propounding one additional document demand and one additional interrogatory directed both to defendant Koenigsmann–the former Chief Medical Officer ("CMO") of the New York Department of Corrections and Community Supervision ("DOCCS")–and defendant Jeavons–a former DOCCS Nurse Practitioner ("NP"), who was plaintiff's primary treatment provider at the Auburn Correctional Facility. (Dkt. Nos. 141, 142).

The pretrial proceedings were delayed for approximately six months to address a representation issue relating to the defendants. (*See* Dkt. Nos. 144, 146-54, 156-62; 12/3/2019 TEXT Minute Entry). The defendants, now represented by new counsel, eventually served plaintiff with the supplemental discovery responses previously ordered by this court. (Dkt. Nos. 168, 171). Plaintiff continued to have issues with the defendants' compliance with their discovery obligations. During a follow-up telephone conference, the court directed the parties to meet and confer with respect to plaintiff's objections, but authorized plaintiff to file a motion to compel if his concerns were not addressed. (2/12/2020 TEXT Minute Entry; Dkt. No. 172). By the extended deadline set by the court, plaintiff filed a motion to compel, objecting to the supplemental discovery responses of defendants Koenigsmann and Jeavons, and also moved to reopen discovery. (Dkt. No. 176). Defendants have filed affirmations in opposition to plaintiff's discovery motions. (Dkt. Nos. 178, 179).

The court concludes that defendant Koenigsmann and Jeavons did not fully comply with the court's prior directives, and orders that, in light of the deficiencies of the defendants' discovery responses, they–with the support of (DOCCS)–will be required to search for and produce additional electronically-stored and other documents previously requested by plaintiff.[3] However, plaintiff's motion to otherwise reopen discovery is denied.

***2** On June 12, 2019, I ordered Dr. Koenigsmann to supplement his response to two interrogatories previously served by plaintiff and to answer one interrogatory I allowed plaintiff to add. (Dkt. Nos. 139, 142). I ordered NP Jeavons to supplement her response to three previously-served interrogatories and to answer the same additional interrogatory that was addressed to Dr. Koenigsmann. (*Id.*). During the June 12, 2019 conference, I provided additional direction to the parties in connection with supplementing their discovery responses. While recognizing that some defendants, including Dr. Koenigsmann and NP Jeavons were former DOCCS employees, I repeatedly stressed that they had a responsibility, with the assistance of their lawyers and DOCCS counsel, to make reasonable efforts to refresh their recollections with documents relevant to the interrogatories. (Dkt. No. 167 at 5, 7, 26). The supplemental responses, particularly of defendants Koenigsmann and Jeavons, reflected a failure of the defendants and their lawyers to obtain and review relevant documents that could refresh the defendants' recollections as to pertinent information. (*See, e.g.*, Jeavons's Supplemental Responses, General Statement ¶ 1, Dkt. No. 168 at 1; Koenigsmann Responses, Dkt. No. 178 at 53, 55).

Many of plaintiff's discovery requests as to which I ordered further responses attempted to clarify the defendants' position with respect to two issues. The first issue involved the extent to which DOCCS medical staff had the discretion to prescribe Harvoni to inmates suffering from Hepatitis C after it was approved by the Food and Drug Administration ("FDA") in October 2014, but before it was added to the DOCCS drug formulary or referenced in the DOCCS hepatitis C practice guidelines in April 2015. (*See* approved supplemental interrogatory, Dkt. No. 141-2; approved supplemental document request, Dkt. No. 141-3; Dkt. No. 167 at 8-9). The second issue was why, if the absence of Harvoni in the DOCCS drug formulary or hepatitis C practice guidelines was a factor in the decision not to prescribe that medication to plaintiff or other inmates, did it take DOCCS six months after FDA approval to add Harvoni as a treatment option for its inmates. (*See* Dkt. No. 167 at 5-6, 10-11).

The responses of defendants Koenigsmann and Jeavons are artful, if not evasive, and somewhat inconsistent with respect to the key issues that the pro se plaintiff was trying to address with his interrogatories. The additional interrogatory that plaintiff was allowed to pose to these two defendants asked:

> Between October, 2014, when the FDA approved Harvoni and April, 2015, when the drug was added to DOCCS to its drug formulary, could the CMO have approved a request from a DOCCS medical provider for the drug to treat the Plaintiff, pursuant to DOCCS policies and practices?

(Dkt. No. 141-2). Defendant Koenigsmann raised numerous objections, but then responded: "prior to Harvoni being added to DOCCS's drug formulary or being incorporated into DOCCS's practice guidelines, my former office could have approved its use, but only upon request from a primary care provider." (Dkt. No. 178 at 56). The answer begs the question as to whether DOCCS *would* have ever approved or *did* it ever approve treatment with Harvoni before April 2015. However, to be fair to Dr. Koenigsmann and defense counsel, the answer did track the language of the pro se plaintiff's interrogatory.

Dr. Koenigsmann also was ordered to supplement his response to plaintiff's interrogatory No. 8, which asked, in pertinent part, "Why did not the CMO direct the Auburn medical staff to see and evaluate the Plaintiff for ... treatment with Harvoni during those months [between and including October 2014 and January 2015]." (Dkt. No. 178 at 53). After raising numerous objections, Dr. Koenigsmann responded, in pertinent part:

> I have no specific recollection of being aware that Plaintiff was seeking Harvoni treatment prior to April 2015.... Plaintiff's primary care providers were solely responsible for evaluating him and determining whether and when to request any Hepatitis C treatment.... On April 16, 2015 NP Jeavons requested for the first time that my former office approve Plaintiff for Harvoni. One day later, I approved such treatment and issued regimen instructions. [4]

***3** (*Id.*).

In her most recent supplemental interrogatory response, NP Jeavons stated, inter alia, that she

> does not recall being asked by plaintiff to be treated with Harvoni or to have a medical hold placed while his treatment requests were being evaluated by the plaintiff in February 2015.... Treatment requests to the central office or medical holds were not part of any duties of [NP] Jeavons.

(Dkt. No. 175). The last sentence of NP Jeavons's response appears to contradict Dr. Koenigsmann's statements that the treating provider was solely responsible for recommending treatment for a patient with hepatitis C and that NP Jeavons, as plaintiff's primary care provider, made a recommendation that he be treated with Harvoni on April 16, 2015.

Nurse Jeavons justified her failure to respond to plaintiff's additional interrogatory (Dkt. No. 141-2), quoted above, by stating that "Defendant Koenigsmann answered that

interrogatory in the affirmative and in fact the Plaintiff was approved treatment by Harvoni." [5] (Dkt. No. 179 at 4). However, the clear point of plaintiff's supplemental interrogatory was whether NP Jeavons understood that the DOCCS CMO could (or would) approve treatment of inmates with Harvoni during the time period between FDA approval and the time, in April 2015, when Harvoni was included in the DOCCS drug formulary and practice guidelines. The fact that treatment of plaintiff with Harvoni was approved in April 2015, after DOCCS formally incorporated that medication as a treatment option, is not responsive to the question. Moreover, plaintiff clearly wanted to determine whether NP Jeavons thought she had the option to seek Harvoni treatment for plaintiff before April 2015, not whether Dr. Koenigsmann, years after this lawsuit was filed, stated that he "could" have approved treatment with Harvoni, but only if the treating provider requested it.

The court acknowledges that interrogatory responses in federal civil actions are often artful and not particularly helpful to the propounding party. While the defendants, in my view, have taken advantage of pro se plaintiff's lack of facility in drafting interrogatories to avoid providing the information he is seeking, [6] I conclude that, with one exception, it would not be productive to require the defendants to, yet again, supplement their responses. I am going to direct NP Jeavons to respond to the additional interrogatory quoted above, with the understanding that plaintiff is asking, in essence, whether she thought, between October 2014 and April 2015, that she could recommend treatment of an inmate with hepatitis C with Harvoni, when that medication was not included in the DOCCS drug formulary or hepatitis C treatment guidelines.

***4** Given the defendants' considerable success, so far, in not providing plaintiff with the information that he attempted to obtain through his written discovery demands, the court is going to direct the defendants (and DOCCS) to search for and disclose certain categories of documents, including e-mails, that plaintiff had previously requested. As attorney Haimson stated in her affidavit, she and plaintiff negotiated over search terms relating to his request for correspondence which "shows the process deliberations underwent [sic], and the factors considered to implement direct-acting antiviral drugs [("DAAs")] as part of DOCCS' arsenal." (Dkt. No. 178 at 7, ¶ 30). Counsel rejected plaintiff's efforts to narrow search terms because it would still require defense counsel or DOCCS to review "hundreds of pages of documents, which may or may not be responsive to Plaintiff's demands." (*Id.*). Given the importance of the issue of how and when DOCCS decided to start allowing treatment of inmates with Harvoni, following FDA approval, the court does not view the need to screen "hundreds of documents" as unduly burdensome or disproportional to the needs of the case. So, the court will require defendants and/or DOCCS to conduct the search for documents responsive to plaintiff's request using the search terms he proposed, for the time period between and including October 2014–when the FDA approved Harvoni–and June 2017–several months after the DOCCS Pharmacy and Therapeutics ("P&T") meeting that addressed treatment with Harvoni and similar medications. While the court acknowledges that the February 17, 2017 P&T meeting was almost two years after plaintiff left DOCCS custody, that committee apparently did not previously address the use of DAAs to treat inmates. The discussions from the later period may prove relevant to DOCCS's position about using DAAs during the earlier period after Harvoni was first approved by the FDA.

The search for documents regarding the incorporation of DAAs into DOCCS treatment arsenal for inmates with hepatitis C should also include screening, for the same time period, the e-mail account of Dr. Koenigsmann and Nancy Lyng, Director of Health Services Operations and Management, who was referred to in Dr. Koenigsmann's supplemental interrogatory responses. (Dkt. No. 178 at 53). While Attorney Haimson's affirmation suggested that a preliminary e-mail search involving the archived accounts of Dr. Koenigsmann and a former DOCCS purchasing agent yielded over 5,000 results (Dkt. No. 178 at 8-9, ¶ 36), the court is not mandating a focus on "price" or "pricing information" or the DOCCS purchasing agents, for reasons discussed below. The focus should be on finding documentation of DOCCS's decision making process and the factors considered by its senior medical and other personnel, including the costs of medication, in deciding how and when it would start treating inmates with hepatitis C with DAAs. Hopefully, this focus will narrow the universe of potentially relevant e-mails that need to be reviewed. [7]

Plaintiff's request to reopen discovery will otherwise be denied. The court has given plaintiff reasonable opportunities to make discovery requests, including follow-up requests, and has held the defendants accountable when they have not reasonably met their discovery obligations. The new discovery plaintiff is seeking, particularly the detailed pricing information for DAAs, is not proportional to the needs of the case. Plaintiff was provided with the cost information he originally requested, which provides adequate documentation

of the well-known fact that DAAs were very expensive during the relevant time period.

Plaintiff's request for a document subpoena directed to the supplier of DAAs to DOCCS for pricing information is also not proportional to the needs of the case. While litigants are, under appropriate circumstances, allowed to subpoena non-parties for relevant information, the court must be especially mindful of avoiding undue burden or expense on third parties. Fed. R. Civ. P. 45(d)(1); *Jones v. Hirschfeld*, 219 F.R.D. 71, 74 (S.D.N.Y. 2003).

WHEREFORE, based on the findings above it is

ORDERED that plaintiff's motion to compel and to reopen discovery (Dkt. No. 176) is **GRANTED IN PART**, in that by May 29, 2020:

***5** 1. Defendant Jeavons shall respond to plaintiff's additional interrogatory (Dkt. No. 141-2).

2. To the extent these documents have not yet been produced, all non-privileged documents, including e-mails, reflecting defendant Jeavons's request for approval of treatment of plaintiff with Harvoni and/or the review and approval of that request by defendant Koenigsmann or his office, in April 2015, should be disclosed to plaintiff.

3. Defendants, with the assistance of DOCCS shall, applying the search and screening protocol discussed above, disclose to plaintiff the documents and e-mails, for the period between and including October 2014 and June 2017, that reflect DOCCS's decision making process and the factors considered by its senior medical and other personnel, including the costs of medication, in deciding how and when it would start treating inmates with hepatitis C with Harvoni and other DAAs. [8] And, it is

ORDERED that plaintiff's motion to compel and to reopen discovery (Dkt. No. 176) is otherwise **DENIED.**

All Citations

Slip Copy, 2020 WL 1950873

Footnotes

1 The procedural history and factual background of this action, which was originally filed in the Western District of New York, are summarized in my November 22, 2017 Report-Recommendation (Dkt. No. 96), and will not be recited here. The plaintiff subsequently filed a motion to dismiss several defendants, which District Judge Hurd granted. (Dkt. Nos. 143, 145). Another defendant thereafter died, and plaintiff has not moved to substitute that defendant's estate following the filing of a suggestion of death. (Dkt. No. 170).

2 The transcript of the June 2019 conference is incorporated herein by reference. (Dkt. No. 167).

3 *See, e.g.,* *Gross v. Lunduski*, 304 F.R.D. 136, 141-44 (W.D.N.Y. 2014) (individual defendant, a DOCCS employee, had "the practical ability to access or obtain Plaintiff's requested documents from DOCCS demonstrating a sufficient degree of control over such documents to support an enforceable document request pursuant to Rule 34(a)."); *Wilson v. Hauck*, 141 F. Supp. 3d 226, 229 (W.D.N.Y. 2015) (collecting cases).

4 To the extent these documents have not yet been produced, any correspondence or e-mails reflecting NP Jeavons's request for approval and Dr. Koenigsmann's approval in April 2015 should be disclosed to plaintiff.

5 Shortly after plaintiff was approved for treatment with Harvoni, approval was revoked because he was scheduled to be transferred into federal custody before the 12-week period required for such treatment could be completed. (*See* Dkt. No. 167 at 8-9).

6 Normally, a litigant can overcome artful interrogatory responses by an opposing party through follow-up depositions. Plaintiff, as with most pro se inmates, is not in a position to conduct depositions of the defendants. (Dkt. No. 176 at 10).

7 The court is not in the best position to identify relevant e-mail custodians and search terms, given that I have not seen the content of most of the documents disclosed in discovery, to date. Assuming that defense counsel (and/or DOCCS counsel) accept that they have an obligation, as officers of the court, to conduct a reasonable search to identify documents responsive to the issues that I have identified, they may exercise some discretion with respect to search terms and other e-mail custodians whose account may be more likely to contain relevant information than that of Nancy Lyng. However, defense counsel should notify the court of any significant modification of the search protocol I have described.

8 To the extent defense counsel and DOCCS reasonably require additional time to search for, screen, and disclose these documents, defense counsel shall file a status report by May 29, 2020.

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