UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS FORTUNATO,

Plaintiff,

v.

DR. BHOPALE,

Defendant.

12 Civ. 1630 (KPF)

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiff Louis Fortunato[1] brought this action pursuant to 42 U.S.C. § 1983, alleging that Defendant Dr. Vishwas Bhopale[2] was deliberately indifferent to Plaintiff's serious medical needs in violation of the Eighth Amendment. In particular, Plaintiff alleges that but for Defendant's substandard medical treatment, Plaintiff's glaucoma would not have progressed as it did, to the point where Plaintiff's vision is now compromised. Defendant has moved for summary judgment, contending alternatively that (i) there is no genuine dispute of material fact and he is entitled to judgment as

[1] Plaintiff has brought this lawsuit using the first name "Louis." Defendant has informed the Court that Plaintiff's New York State Department of Corrections and Community Supervision ("DOCCS") records uniformly refer to Plaintiff as "Lewis." (Dkt. #82, at 1 n.1). The Court notes the disagreement but need not resolve it. There is no dispute that Plaintiff is the individual to whom the DOCCS records pertain. In this Opinion, the Court will refer to Plaintiff simply as "Plaintiff."

[2] The surname of Defendant Bhopale was misspelled as "Bhople" in Plaintiff's Amended Complaint (the "AC" (Dkt. #12)). The Clerk of Court is directed to amend the caption as indicated above.

a matter of law, and (ii) he is entitled to qualified immunity. For the reasons that follow, Defendant's motion is granted.

BACKGROUND[3]

A. Factual Background

1. The Parties

At all times relevant to this case, Plaintiff was an inmate incarcerated in the DOCCS system. (Def. 56.1 ¶ 1). Plaintiff was housed at Green Haven

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[3] For convenience, the Court will refer to Defendant's memorandum of law in support of his motion for summary judgment as "Def. Br." (Dkt. #82), Plaintiff's letter in opposition to Defendant's motion as "Pl. Opp." (Dkt. #89), and Defendant's reply memorandum of law in further support of his motion as "Def. Reply" (Dkt. #90). The letter Defendant construes as Plaintiff's sur-reply will be referred to as "Pl. Sur-Reply" (Dkt. #91). Defendant's letter opposing this sur-reply will be referred to as "Def. Opp." (Dkt. #92).

The facts in this Opinion are drawn from the parties' submissions in connection with Defendant's motion for summary judgment, including Defendant's Local Rule 56.1 Statement ("Def. 56.1" (Dkt. #83)); the declarations of Dr. Vishwas Bhopale ("Bhopale Decl." (Dkt. #84)), Dr. Charles Rheeman ("Rheeman Decl." (Dkt. #85)), Defendant's counsel Jeb Harben ("Harben Decl." (Dkt. #86)), and Dr. Thaddeus Wandel ("Wandel Decl." (Dkt. #87)); and the exhibits attached to these declarations. The exhibits will be referred to by their letter designation: "Bhopale Decl., Ex. [ ]," for example.

Citations to a party's Local Rule 56.1 Statement incorporate by reference the documents cited therein. Generally, where facts stated in a party's Local Rule 56.1 Statement are supported by testimonial or documentary evidence, and denied with only a conclusory statement by the other party, the Court finds such facts to be true. *See* Local Rule 56.1(c), (d); *Biberaj* v. *Pritchard Indus., Inc.*, 859 F. Supp. 2d 549, 553 n.3 (S.D.N.Y. 2012) ("A nonmoving party's failure to respond to a Rule 56.1 statement permits the court to conclude that the facts asserted in the statement are uncontested and admissible." (internal quotation mark omitted) (quoting *T.Y.* v. *N.Y.C. Dep't of Educ.*, 584 F.3d 412, 418 (2d Cir. 2009))).

In this case, Plaintiff did not oppose Defendant's Rule 56.1 Statement despite being provided with the appropriate "Notice to Pro Se Litigant" under Local Civil Rule 56.2. (*See* Dkt. #81). But "[w]hile *pro se* litigants are 'not excused from meeting the requirements of Local Rule 56.1,' the Court nonetheless 'retains some discretion to consider the substance of the [*pro se* party's] arguments, where actually supported by evidentiary submissions.'" *Betts* v. *Rodriquez*, No. 15 Civ. 3836 (JPO), 2017 WL 2124443, at *1 n.1 (S.D.N.Y. May 15, 2017) (quoting *Wali* v. *One Source Co.*, 678 F. Supp. 2d 170, 178 (S.D.N.Y. 2009)) (citing *Holtz* v. *Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) ("A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules" and may "opt to conduct an assiduous review of the record even where one of the parties has failed to file such a statement.)). Here, Plaintiff's opposition letters neither directly respond to Defendant's 56.1 statement nor contain factual allegations supported by citations to evidence. (Dkt. #89, 91). However, because Plaintiff is proceeding *pro se*, "this Court has conducted an

Correctional Facility ("Green Haven") from approximately January 2007 through May 2011, at which time he was transferred to Southport Correctional Facility ("Southport"). (*Id.* at ¶ 2).

Defendant was employed by DOCCS as a physician at Green Haven from April 2005 through his retirement in February 2016. (Def. 56.1 ¶ 3). Defendant "did not have specialized training in ophthalmology or optometry." (*Id.* at ¶ 4 (citing Bhopale Decl. ¶¶ 16-17)).

2. Plaintiff's Medical History at Green Haven

Plaintiff first complained of vision problems to Green Haven's medical staff on or around December 6, 2007. (Def. 56.1 ¶ 5). He was evaluated in the Putnam Hospital Center Emergency Room on December 10, 2007, and found to have an elevated intraocular pressure ("IOP") of 23 in his right eye. (*Id.* at ¶¶ 5-6).[4] It was recommended that Plaintiff follow up with an ophthalmologist, and an ophthalmological consultation was requested by Plaintiff's primary medical care provider at the time, Green Haven Physician Assistant Novoa ("PA Novoa").

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assiduous review of the record to determine if there is any evidentiary support for his assertions of fact that do not cite to evidence and to determine if there are any other material issues of fact." *Betts*, 2017 WL 2124443, at *1 n.1 (quoting *Geldzahler* v. *N.Y. Med. Coll.*, 746 F. Supp. 2d 618, 620 n.1 (S.D.N.Y. 2010)); *see also, e.g.*, *Anderson* v. *City of New Rochelle*, No. 10 Civ. 4941 (ER), 2012 WL 3957742, at *7 (S.D.N.Y. Sept. 4, 2012). The Court will consider the transcript of Plaintiff's deposition ("Pl. Dep. Tr." (Dkt. #86-1)), Plaintiff's Complaint (Dkt. #2), and the Amended Complaint (Dkt. #12), as if they had been presented in opposition to Defendant's motion. *See, e.g., Patterson* v. *Cty. of Oneida, N.Y.*, 375 F.3d 206, 219 (2d Cir. 2004) ("[A] verified pleading, to the extent that it makes allegations on the basis of the plaintiff's personal knowledge, and not merely on information and belief, has the effect of an affidavit and may be relied on to oppose summary judgment."); *Laster* v. *Mancini*, No. 07 Civ. 8265 (DAB) (MHD), 2013 WL 5405468, at *23 (S.D.N.Y. Sept. 25, 2013) (using plaintiff's deposition, incorporated as part of the record by defendants, to determine if there were any factual disputes).

[4] The Court understands that a normal IOP measurement is within the range of 10-21 (Def. 56.1 ¶ 12), though a measurement of IOP up to at least 25 "would not result in pain or discomfort" (*id.* at ¶ 27; *see also* Rheeman Decl. ¶¶ 18-19).

(*Id.* at ¶ 9). On December 19, 2007, Plaintiff was examined by an ophthalmological specialist and found to have a normal IOP of 19 in both eyes and normal visual acuity. (*Id.* at ¶¶ 9-10).

Two months later, on February 25, 2008, Plaintiff was again seen by a specialist upon the referral of PA Novoa. (Def. 56.1 ¶ 13). Plaintiff had been evaluated at Green Haven after complaining of blurry vision, and was found to have 20/70 vision in his right eye and 20/40 in his left eye. (*Id.*). However, the specialist found that Plaintiff had normal visual acuity in both eyes. (*Id.* at ¶ 14). Plaintiff's IOP was 21 in his right eye and 22 in his left. (*Id.* at ¶ 15). Accordingly, the specialist recommended a visual field test. (*Id.* at ¶ 16). "Following a referral by Green Haven Physician Assistant Rodas, an Octopus Visual Field Test was performed on March 19, 2008, which showed normal results in both eyes." (*Id.* at ¶ 18).

Sometime within the subsequent year, Defendant was assigned to serve as Plaintiff's primary medical care provider. (Def. 56.1 ¶ 19). When Plaintiff complained of blurry vision, Defendant referred Plaintiff to a specialist on April 9, 2009. (Def. 56.1 ¶ 19 (citing Rheeman Decl. ¶ 14, Ex. F); Bhopale Decl. ¶ 14). "Plaintiff was seen by the specialist on May 11, 2009, and his IOP was found to be slightly elevated at 22 in the right eye and 24 in the left eye, and his vision was measured as normal, 20/25, in both eyes." (*Id.* at ¶ 20). "[T]he specialist recommended another visual field test." (*Id.* at ¶ 21). Defendant issued an additional referral, and an additional Octopus Visual Field Test was performed on June 4, 2009[.]" (*Id.* at ¶ 23). The test results were normal as to

both of Plaintiff's eyes. (*Id.*). Accordingly, "[n]o course of treatment or follow-up testing was recommended by the specialist who conducted the June 4, 2009 visual field test." (*Id.* at ¶ 24).[5]

Plaintiff's next consultation with a specialist took place on January 19, 2010, upon an additional referral from Defendant. (Def. 56.1 ¶ 26). The specialist found that Plaintiff's IOP was 25 in his right eye and 24 in his left. (*Id.*). Plaintiff's visual acuity was normal, measuring at 20/25 in both eyes. (*Id.* at ¶ 28). "The specialist recommended another visual field test, which, after a referral by [Defendant], was performed on February 12, 2010." (*Id.* at ¶ 29). "The Octopus Visual Field Test showed claimed nonspecific scattered scotoma (small isolated areas of claimed vision loss) in [the] superior visual field in the right eye and a claimed superior arcuate (top of the eye) visual field defect in the left eye." (Rheeman Decl. ¶ 20 (citing *id.* at Ex. I)).[6]

Therefore, Defendant referred Plaintiff for a follow-up appointment with a specialist, which appointment occurred on February 22, 2010. (Def. 56.1 ¶ 30). Plaintiff's IOP was measured to be 23 in his right eye and 22 in his left. (*Id.* at ¶ 31). Plaintiff had normal visual acuity of 20/25 in both eyes. (*Id.* at

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[5] The Court understands that "[s]pecialists who treat DOCCS inmates normally convey recommendations for treatment or additional testing to the inmate's primary care providers ... in writing in the materials returned to the provider and DOCCS." (Def. 56.1 ¶ 25 (citing Bhopale Decl. ¶¶ 12, 16-18)).

[6] Defendant takes pains to note that a "visual field test is subjective and its results may be impacted by a patient who does not give accurate responses and the test itself cannot rule out malingering." (Def. 56.1 ¶ 22 (citing Rheeman Decl. ¶ 15)).

¶ 32). Following this appointment, Plaintiff was prescribed Lumigan eye drops[7] to treat his elevated IOP and referred to a glaucoma specialist.[8] (*Id.* at ¶ 33). Additionally, upon Defendant's referral, "an MRI of Plaintiff's brain was taken" on February 23, 2010, "which showed normal results." (*Id.* at ¶ 36).

On March 19, 2010, Plaintiff was examined by glaucoma specialist Dr. Wandel, again upon a referral from Defendant. (Def. 56.1 ¶ 37). Plaintiff's IOP was 15 in his right eye and 20 in his left. (*Id.* at ¶ 38). His vision was normal, 20/20 and 20/30 in each of Plaintiff's eyes. (*Id.* at ¶ 39).

"Following a referral by [Defendant], Dr. Wandel ordered a Humphrey Visual Field Test and a Heidelberg Retina Tomograph ('HRT'), which was conducted on May 4, 2010, and was normal except [for] a subtle superior eyelid defect in both eyes, a condition that is not a symptom of glaucoma." (Def. 56.1 ¶ 40). A "superior visual field defect in both eyes" detected on February 22, 2010, "appeared to have resolved." (*Id.* at ¶ 41). "Plaintiff also had OCT (Optical Coherence Tomography) of NFL (Nerve Fiber Layer) … , which showed normal results." (*Id.* at ¶ 42 (citing Rheeman Decl. ¶ 27, Ex. M; Wandel Decl. ¶ 7)).[9]

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[7] "Lumigan is often provided to glaucoma patients, but can also be provided to patients just suffering from elevated IOP." (Def. 56.1 ¶ 35 (citing Rheeman Decl. ¶ 22; Wandel Decl. ¶¶ 6-8)).

[8] The Court understands that "[e]levated IOP is one potential symptom of and/or a precursor to glaucoma." (Def. 56.1 ¶ 34 (citing Rheeman Decl. ¶ 22; Wandel Decl. ¶ 8)). Elevated IOP is not enough on its own, however. "[O]ther criteria must be present for there to be a diagnosis of glaucoma" (*id.*), such as "progressive cupping [of a patient's optic nerves], [or] progressive thinning of nerve fiber layer" (*id.* at ¶ 75 (citing Rheeman Decl. ¶ 45)). As detailed in the remainder of this Opinion, the record is bereft of evidence of these other criteria.

[9] An "OCT measures the thickness of nerve fiber layer around the optic nerve." (Def. 56.1 ¶ 43 (citing Rheeman Decl. ¶ 27, Ex. M)). "[A]dvancing glaucoma would show

"Following referrals by [Defendant], Plaintiff was seen again by Dr. Wandel on November 12, 2010, and February 25, 2011." (Def. 56.1 ¶ 45). "Plaintiff was found to have normal IOP on November 12, 2010, and February 25, 2011, while being treated with Lumigan." (*Id.* at ¶ 46). "Plaintiff's vision was normal, measur[ing] at 20/25 in both eyes on November 12, 2010, and February 25, 2011." (Def. 56.1 ¶ 47). Moreover, "Plaintiff's optic nerves continued to be normal in appearance without cupping, which indicated that Plaintiff was not suffering from glaucoma." (*Id.* at ¶ 48 (citing Rheeman Decl. ¶ 28, Ex. N; Wandel Decl. ¶¶ 6-7)).

3. Plaintiff's Medical History After His Transfer from Green Haven

In May 2011, Plaintiff was transferred from Green Haven to Southport, and Defendant's responsibilities for Plaintiff's medical care ceased. (Def. 56.1 ¶¶ 49-50). However, Plaintiff continued to receive care from DOCCS.

On June 7, 2011, pursuant to a referral from Plaintiff's "medical providers at Southport, Plaintiff was seen by a new ophthalmological specialist." (Def. 56.1 ¶ 49). Plaintiff's IOP was 17 in his right eye and 21 in the left. (*Id.* at ¶ 51). On July 6, 2011, pursuant to an additional referral, "Plaintiff was seen by an optometrist ... and Plaintiff's vision was corrected, by

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progressive cupping, as well as progressive thinning of nerve fiber layer on OCT[.]" (*Id.* at ¶ 75 (citing Rheeman Decl. ¶ 45)). The benefit of an OCT is that unlike a "visual field test, which is effort dependent on the subject, [an] OCT is completely objective [and] ... will typically show abnormality even before visual field defect occurs in glaucoma." (*Id.* at ¶ 44 (citing Rheeman Decl. ¶ 27, Ex. M)).

glasses, to 20/20 in both eyes, with mild correction for myopia/near sightedness." (*Id.* at ¶ 52).

Plaintiff was next seen by a specialist on June 25, 2012, at which time his IOP was normal, measuring at 12 in his right eye and 14 in his left. (Def. 56.1 ¶¶ 53-54). Plaintiff was seen by a specialist again on September 25, 2012, and his IOP was still normal, measuring at 18 in his right eye and 14 in his left. (*Id.* at ¶ 55).

On July 3, 2013, an optometrist found that Plaintiff's visual acuity was 20/50 in both eyes. (Def. 56.1 ¶ 57). Plaintiff was given glasses, which improved his vision to 20/30. (*Id.*).

Plaintiff was next seen by a specialist on May 8, 2015. (Def. 56.1 ¶ 59). At that time, Plaintiff's optic nerves were examined and found to still be "normal in appearance with an estimated cup of 0.2 in both eyes." (*Id.*).

Plaintiff was seen by a glaucoma specialist on January 27, 2016, and his IOP was normal, measuring 17 in both eyes. (Def. 56.1 ¶¶ 60-61). An additional Humphrey Visual Field Test was conducted, which test "showed high false negatives (35% in the right and 21% in the left eye) and showed dense superior and temporal visual field defect in both eyes. An OCT of NFL came back normal in the right eye and significant nerve fiber layer thinning in the left eye." (*Id.* at ¶ 62). This abnormality was the result of "the scan being off centered and was thus not accurate." (*Id.* at ¶ 63). However, in light of the "dense superior and bitemporal visual field defect seen, which is very atypical

of glaucoma, the glaucoma specialist recommended referring Plaintiff to a neuroophthalmologist." (*Id.* at ¶ 63).

Accordingly, Plaintiff was referred to and seen by Dr. Charles Rheeman on February 24, 2016. (Def. 56.1 ¶ 64; *see also* Rheeman Decl. ¶ 42, Ex. BB). Without his glasses, Plaintiff's visual acuity was 20/50 in his right eye and 20/80 in his left. (*Id.* at ¶ 65). "Plaintiff's pupillary exam was normal without afferent pupillary defect[,] and … Plaintiff's IOP was normal at 19 in the right and 18 in the left eye." (*Id.* at ¶¶ 66-67). "An OCT of NFL came back normal in both eyes." (*Id.* at ¶ 70). "[An] HVF test showed moderate to severely constricted visual field defect in both eyes, which was different than [the] complete superior and temporal visual field defect in both eyes seen on January 27, 2016." (*Id.* at ¶ 69). But overall, "Plaintiff's entire eye exam was normal, including normal appearing optic nerves with normal cup of 0.2 in both eyes." (*Id.* at ¶ 68 (citing Rheeman Decl. ¶ 42, Ex. BB)). Indeed, "Plaintiff's cup/disc ratio of his optic nerve was 0.2 on February 24, 2016, which was the same as it was when measured in 2008." (*Id.* at ¶ 74 (citing Rheeman Decl. ¶ 45)).

B. Procedural Background[10]

The operative pleading in this action, Plaintiff's Amended Complaint, was filed on May 17, 2012. (Dkt. #12). The then-Defendants moved to dismiss the Amended Complaint on May 20, 2015. (Dkt. #44-46).

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[10] Judge Analisa Torres, to whom this case was previously assigned, recounted in detail the procedural history of this case in her Memorandum and Order issued September 1, 2015, which granted then-Defendants Bernstein's and Zabin's motions to dismiss and

On September 1, 2015, Judge Analisa Torres issued the September 1 Memorandum and Order (the "September 1 Memorandum") dismissing Plaintiff's claims against all Defendants but for Defendant Bhopale. *Fortunato* v. *Bernstein*, No. 12 Civ. 1630 (AT), 2015 WL 5813376 (S.D.N.Y. Sept. 1, 2015). (Dkt. #50). On September 10, 2015, Defendant Bhopale and former-Defendant Bernstein filed a motion for reconsideration of certain arguments they had made under Federal Rule of Civil Procedure 12(b)(2). (Dkt. #51-52). After resolving various service-related issues (Dkt. #55-62), the Court granted the reconsideration motion on February 22, 2016. (Dkt. #63). "However, upon reconsideration, the Court adhere[d] to its prior decision," pursuant to its discretion under Federal Rule of Civil Procedure 4(m). (*Id.*). Defendant Bhopale, the only remaining Defendant, filed his Answer to the Amended Complaint on April 14, 2016, in which he raised several affirmative defenses, including the defense of qualified immunity. (Dkt. #68).

On October 6, 2016, at Defendant's request (Dkt. #76), Judge Torres set a schedule for the briefing of Defendant's contemplated motion for summary

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denied Bhopale's motion to dismiss. *See Fortunato* v. *Bernstein*, No. 12 Civ. 1630 (AT), 2015 WL 5813376, at *1-2 (S.D.N.Y. Sept. 1, 2015) (the "September 1 Memorandum" (Dkt. #50)). The Court incorporates that recitation by reference, and will focus its attention on the events that followed the issuance of the September 1 Memorandum.

However, before the Court does so, the Court pauses to resolve an outstanding issue. In the September 1 Memorandum, Judge Torres dismissed then-Defendants Bernstein and Zabin without prejudice and offered Plaintiff leave to amend his claims against them. *See Fortunato*, 2015 WL 5813376, at *5-7. Plaintiff was reminded to amend, and given additional time to do so, both in a subsequent order resolving Bhopale's and Bernstein's motion for reconsideration (Dkt. #63), and in an order issued on April 12, 2016 (Dkt. #67). Plaintiff never filed an additional amended pleading. Accordingly, the Court hereby orders that Plaintiff's claims against Defendants Bernstein and Zabin are dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b), as Judge Torres repeatedly warned Plaintiff they would be.

judgment. (Dkt. #77). After the schedule was extended on November 9, 2016 (Dkt. #79), Defendant filed his motion on November 22, 2016 (Dkt. #80-88). Plaintiff filed a letter in opposition to Defendant's motion dated November 27, 2016 (Dkt. #89), and Defendant filed his reply in further support of his motion on January 11, 2017 (Dkt. #90). Plaintiff filed a second letter dated January 24, 2017 (Dkt. #91); Defendant construed this submission as a sur-reply and opposed it by letter dated February 15, 2017 (Dkt. #92).

On February 21, 2017, the case was transferred to the undersigned. (Docket Entry dated February 21, 2017).

DISCUSSION

A. Applicable Law

1. Rule 56 Motions for Summary Judgment

Rule 56(a) provides that a "court shall grant summary judgment 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). Thus, "[a] motion for summary judgment may properly be granted … only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *Rogoz* v. *City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015) (internal quotation marks omitted) (quoting *Kaytor* v. *Elec. Boat Corp.,* 609 F.3d 537, 545 (2d Cir. 2010)).

"The function of the district court in considering [a] motion for summary judgment is not to resolve disputed questions of fact but only to determine

whether, as to any material issue, a genuine factual dispute exists." *Rogoz*, 796 F.3d at 245 (quoting *Kaytor*, 609 F.3d at 545). And "'[i]n determining whether summary judgment is appropriate,' a court must 'construe the facts in the light most favorable to the non-moving party and … resolve all ambiguities and draw all reasonable inferences against the movant.'" *Kuhbier* v. *McCartney, Verrino & Rosenberry Vested Producer Plan*, — F. Supp. 3d —, No. 14 Civ. 888 (KMK), 2017 WL 933126, at *7 (S.D.N.Y. Mar. 8, 2017) (omission in original) (quoting *Brod* v. *Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011)).

A party moving for summary judgment "bears the initial burden of demonstrating 'the absence of a genuine issue of material fact.'" *ICC Chem. Corp.* v. *Nordic Tankers Trading a/s*, 186 F. Supp. 3d 296, 301 (S.D.N.Y. 2016) (quoting *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986)). "[A] fact is material if it 'might affect the outcome of the suit under the governing law.'" *Royal Crown Day Care LLC* v. *Dep't of Health & Mental Hygiene of City of N.Y.*, 746 F.3d 538, 544 (2d Cir. 2014) (quoting *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). And "[a] dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Negrete* v. *Citibank, N.A.*, — F. Supp. 3d —, No. 15 Civ. 7250 (RWS), 2017 WL 758516, at *6 (S.D.N.Y. Feb. 27, 2017) (quoting *Liberty Lobby*, 477 U.S. at 248).

The Second Circuit has further clarified that

> Where, as here, the nonmovant bears the burden of proof at trial, the movant may show prima facie entitlement to summary judgment in one of two

> ways: [i] the movant may point to evidence that negates [his] opponent's claims or [ii] the movant may identify those portions of [his] opponent's evidence that demonstrate the absence of a genuine issue of material fact, a tactic that requires identifying evidentiary insufficiency and not simply denying the opponent's pleadings.

Salahuddin v. *Goord*, 467 F.3d 263, 272-73 (2d Cir. 2006) (citing *Celotex*, 477 U.S. at 323; *Farid* v. *Smith*, 850 F.2d 917, 924 (2d Cir. 1988)). "If the movant makes this showing in either manner, the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Id.* at 273 (citing Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Neither the movant nor the nonmovant may rest on allegations in the pleadings; each party must point to specific evidence in the record to carry its burden on summary judgment. *Celotex*, 477 U.S. at 324; *Matsushita*, 475 U.S. at 586.[11]

2. Section 1983 Claims of Inadequate Medical Care

Section 1983 provides a remedy when a state actor deprives a plaintiff of federally protected rights. *See* 42 U.S.C. § 1983. An actionable § 1983 claim requires the plaintiff to show (i) a violation of a right, privilege, or immunity

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[11] The Court is mindful of Plaintiff's *pro se* status, and the "special solicitude" to which it entitles him. *See Tracy* v. *Freshwater*, 623 F.3d 90, 100-04 (2d Cir. 2010); *see also McLeod* v. *Jewish Guild for the Blind,* No. 15-2898-cv, 2017 WL ——, (2d Cir. July 19, 2017 (per curiam) (affirming "well-worn precedent concerning a district court's obligation to liberally construe pro se submissions"). The Court notes however, that "[s]uch special solicitude is not unlimited." *Blalock* v. *Jacobsen*, No. 13 Civ. 8332 (JMF), 2016 WL 796842, at *2 (S.D.N.Y. Feb. 22, 2016). "Provided the moving party has met its initial burden of demonstrating the absence of a genuine issue of material fact, a *pro se* party opposing summary judgment must still 'come forward with evidence demonstrating that there is a genuine dispute regarding material fact.'" *Id.* (quoting *Bennett* v. *Bailey*, No. 07 Civ. 7002 (PKC), 2010 WL 1459192, at *3 (S.D.N.Y. Apr. 9, 2010)).

protected by the Constitution or laws of the United States, and (ii) that an actor committed that violation under the color of state law. *See Cruz* v. *City of N.Y.*, No. 15 Civ. 2265 (PAE), 2017 WL 544588, at *7 (S.D.N.Y. Feb. 8, 2017) (citing *West* v. *Atkins*, 487 U.S. 42, 48 (1988); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 155-56 (1978)); *see also City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985) ("By its terms, of course, [Section 1983] creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere.").

"The Eighth Amendment forbids 'deliberate indifference to serious medical needs of prisoners[.]'" *Spavone* v. *N.Y.S. State Dep't of Corr. Servs.*, 719 F.3d 127, 138 (2d Cir. 2013) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976)). To establish an Eighth Amendment "constitutional claim arising out of inadequate medical care, an inmate must prove that prison or jail officials were deliberately indifferent to his serious medical needs." *Gomez* v. *Cty. of Westchester*, 649 F. App'x 93, 95 (2d Cir. 2016) (summary order) (citing *Smith* v. *Carpenter*, 316 F.3d 178, 183 (2d Cir. 2003)); *accord Salahuddin*, 467 F.3d at 279-80.

"A deliberate indifference claim contains two requirements. The first requirement is objective: 'the alleged deprivation of adequate medical care must be sufficiently serious.'" *Spavone*, 719 F.3d at 138 (quoting *Salahuddin*, 467 F.3d at 279); *see also Farmer* v. *Brennan*, 511 U.S. 825, 834-40 (1994). To show that a deprivation is sufficiently serious, a "plaintiff must plead that 'a condition of urgency, one that may produce death, degeneration, or extreme pain' exists." *Estevez* v. *City of N.Y.*, No. 16 Civ. 73 (JGK), 2017 WL 1167379,

at *5 (S.D.N.Y. Mar. 28, 2017) (quoting *Hathaway* v. *Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996)); *accord, e.g.*, *Lewis* v. *Cavanugh*, No. 15-3238-pr, — F. App'x —, —, 2017 WL 1187455, at *1 (2d Cir. Mar. 30, 2017).

However, "[i]n cases where the inadequacy is in the medical treatment given, the seriousness inquiry is narrower." *Salahuddin*, 467 F.3d at 280. Where, for example "the prisoner is receiving on-going treatment and the offending conduct is an unreasonable delay … in that treatment, the seriousness inquiry 'focuses on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone.'" *Id.* (alteration omitted) (quoting *Smith*, 316 F.3d at 185); *see also Smith*, 316 F.3d at 186 ("[It is] the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes.").

"The second requirement is subjective: the charged officials must be subjectively reckless in their denial of medical care." *Spavone*, 719 F.3d at 138 (citing *Salahuddin*, 467 F.3d at 280). "This means 'that the charged official [must] act or fail to act while *actually aware* of a substantial risk that serious inmate harm will result.'" *Id.* (alteration and emphasis in original) (quoting *Salahuddin*, 467 F.3d at 280); *see also Salahuddin*, 467 F.3d at 280 ("Deliberate indifference is a mental state equivalent to subjective recklessness, as the term is used in criminal law."). "[R]ecklessness entails more than mere negligence; the risk of harm must be substantial and the official's actions more

than merely negligent." *Salahuddin*, 467 F.3d at 280. But an "[o]fficial[] need only be aware of the risk of harm, not intend harm," and his or her "awareness may be proven 'from the very fact that the risk was obvious.'" *Spavone*, 719 F.3d at 138 (quoting *Farmer*, 511 U.S. at 842). Thus, in certain circumstances, "even if objectively unreasonable, a defendant's mental state may be nonculpable." *Salahuddin*, 467 F.3d at 281.

3. Qualified Immunity

Defendant has also argued that his conduct is subject to qualified immunity. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, — U.S. —, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009)). Thus, "[w]hether qualified immunity can be invoked turns on the 'objective legal reasonableness' of the official's acts." *Ziglar* v. *Abbasi*, — U.S. —, 137 S. Ct. 1843, 1866 (2017) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982)). "And reasonableness of official action, in turn, must be 'assessed in light of the legal rules that were clearly established at the time [the action] was taken.'" *Id.* (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987)).

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle* v. *Howards*, — U.S. —, 132 S. Ct. 2088, 2093 (2012)). Because the rights allegedly violated may appear

abstract, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Ziglar*, 137 S. Ct. at 1866 (emphasis in original) (internal quotation marks omitted) (quoting *Mullenix*, 136 S. Ct. at 308). "It is not necessary, of course, that 'the very action in question has previously been held unlawful.'" *Id.* (quoting *Anderson*, 483 U.S. at 640). "But 'in the light of pre-existing law,' the unlawfulness of the officer's conduct 'must be apparent.'" *Id.* at 1867 (quoting *Anderson*, 483 U.S. at 640). Thus, in effect, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).

"To determine whether a given [official] falls into either of those two categories, a court must ask whether it would have been clear to a reasonable [official] that the alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar*, 137 S. Ct. at 1867 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)). If the court answers that question in the affirmative,

> then the defendant [official] must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however — *i.e.*, if a reasonable [official] might not have known for certain that the conduct was unlawful — then the officer is immune from liability.

Id.

B. Analysis

1. The Parties' Disputes

Plaintiff does not dispute the treatment timeline outlined above. Nor does Plaintiff dispute the efficacy of his current treatment. (Pl. Dep. Tr. 50:10-

17 ("The eye drops is the best for right now. They've offered a lot of options but I'd rather the eye drops.")). Rather, Plaintiff disputes the speed with which he was prescribed that treatment, and the consequences of Defendant's purported delay.

It is Plaintiff's firm belief that he "ha[s] glaucoma," because he has "been told that [he] has glaucoma by many ophthalmologists." (Pl. Dep. Tr. 33:11-13; *see also id.* at 59:20-25 ("[P]ractically every ophthalmologist that I've been to acknowledges that I have glaucoma. Some say it's possibly something else, but practically all of them say you do have glaucoma.")). Plaintiff also believes that his "eyesight is diminishing." (*Id.* at 34:10-11; *see also id.* at 53:13-23). To the extent Plaintiff's DOCCS paperwork does not reflect the extent to which his eyesight has diminished, Plaintiff indicates that that is because his DOCCS medical providers "don't want the paperwork to reflect that [his] eyesight is diminishing at a rapid rate and it's not in their convenience to admit it because it's deliberate indifference." (*Id.* at 49:13-23; *see also* Pl. Opp. 3).

Plaintiff further believes that his glaucoma would not have progressed as he contends it has, leaving Plaintiff's vision compromised, if Plaintiff had been given proper medical care by Defendant. (Pl. Dep. Tr. 42:14-20 ("[H]ad I been diagnosed much sooner, had I knew that I had glaucoma much sooner I would have been taking the eye drops, it would not be as bad as it is. ... I'm in the middle stages of glaucoma. I could lose my eyesight at any time.")). More specifically, Plaintiff believes that if Defendant had sent Plaintiff "to a specialist years before [Defendant] got [Plaintiff there[,] [i]f [Defendant] would have looked

at the test results[,] [Defendant] would have noticed that [Plaintiff] needed to see a specialist[,] [t]hat [Plaintiff] had middle stages glaucoma[.] … [Defendant] would have noticed it at the beginning stages." (Pl. Dep. Tr. 24:10-16; *see also* Pl. Opp. 2 ("[Defendant] is the cause why [Plaintiff] didn't get medical treatment on time[.]"); Pl. Opp. 2-3 ("[H]ad [Plaintiff] been treated on time it wouldn't be this bad."); Pl. Sur-Reply (same)). Because "[Defendant] didn't know how to read the actual test," Plaintiff believes he was denied proper medical treatment. (Pl. Dep. Tr. 24:17-18; *see also id.* at 25:8-9 ("[Plaintiff] could have got the [Lumigan] eye drops much sooner.")).

Plaintiff also complains that he was denied access to his medical testing. Plaintiff indicates that

> if [Plaintiff] wouldn't complaint about the glaucoma[,] [Defendant] would not call [Plaintiff] to tell the results. There would be times where [Defendant] had the results there for months. [Defendant] had it sitting in his office for months and he wouldn't even look at it to let [Plaintiff] know what the results were. So unless [Plaintiff] went and asked him for it he would not confirm anything.

(Pl. Dep. Tr. 26:14-22). Plaintiff alleges that he was "putting down for sick call as much as possible and [Defendant] was denying [Plaintiff] — he wasn't giving [Plaintiff] the medical treatment. [Defendant] felt like [Plaintiff] was harassing him or bothering him too much in regards to the glaucoma situation." (*Id.* at 27:10-15).

Defendant disputes Plaintiff's contentions. Defendant claims that while "Plaintiff has elevated IOP, controlled with Lumigan, [Plaintiff] does not have, and has never had, glaucoma." (Def. 56.1 ¶ 73 (citing Rheeman Decl. ¶¶ 43-

44; Wandel Decl. ¶¶ 5-8)). "Many people with above normal IOP never develop glaucoma and do not necessarily have to be treated." (*Id.* at ¶ 77 (citing Rheeman Decl. ¶ 46)). And Defendant indicates that Plaintiff was such a person. Thus, "[s]tarting Plaintiff on Lumigan in February 2010, rather than at an earlier date, did not cause any long term visual deficit or injury to Plaintiff." (*Id.* at ¶ 76 (citing Rheeman Decl. ¶ 47)).

2. Plaintiff Fails to State a § 1983 Claim for Deliberate Indifference as a Matter of Law

Plaintiff has not shown that his claim satisfies both the objective and subjective requirements of a deliberate indifference claim. The Court will consider each requirement in turn.

The objective element requires Plaintiff to show that the deprivation of his medical care was sufficiently serious. *See Spavone*, 719 F.3d at 138 (quoting *Salahuddin*, 467 F.3d at 279). Here, because Plaintiff claims that it was treatment he was given (as opposed to treatment he was not given) that was inadequate, "the seriousness inquiry is narrower." *Salahuddin*, 467 F.3d at 280. The Court's "seriousness inquiry 'focuses on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone.'" *Id.* (alteration omitted) (quoting *Smith*, 316 F.3d at 185).

Plaintiff has not demonstrated that any delay occasioned by Defendant's treatment has caused death, degeneration, or extreme pain. Indeed, the parties agree that Plaintiff's elevated IOP has been successfully treated with Lumigan. (Pl. Dep. Tr. 50:10-17; Rheeman Decl. ¶ 49). And Plaintiff's DOCCS records and the medical testimony provided by Defendant demonstrate that

Plaintiff's visual acuity and IOP did not progressively decline following Plaintiff's treatment at Defendant's hands. (*See, e.g.*, Rheeman Decl. ¶¶ 46-49).

To the extent that the parties disagree about the reality of Plaintiff's declining visual acuity and glaucoma diagnosis, and about the accuracy of the DOCCS documentation thereof, that dispute is not material and does not preclude entry of summary judgment in Defendant's favor. Even accepting *arguendo* the truth of Plaintiff's allegations regarding his eyesight and the DOCCS records, Plaintiff's deliberate indifference claim fails because Plaintiff has not proven the second, subjective requirement of that claim.[12] To satisfy this requirement, Plaintiff must show that Defendant failed to act while actually aware of a substantial risk that serious harm would result from his inaction. *See Spavone*, 719 F.3d at 138 (quoting *Salahuddin*, 467 F.3d at 280).

Plaintiff has not done so. The Court understands that Defendant did not refer Plaintiff to a specialist as quickly as Plaintiff wished him to. But "[i]t 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

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[12] The Court observes that Plaintiff has offered no evidence of his diagnosis or declining vision but for his own self-serving, conclusory testimony and the hearsay testimony of medical professionals, at least one of whom testifies that Plaintiff's hearsay evidence is false. (*See* Wandel Decl. ¶¶ 4-5 ("I have been informed that in the course of the above litigation, [Plaintiff] has asserted that I told him that he had glaucoma and that if he had been started on Lumigan eye drops earlier, his glaucoma would not be severe. This is incorrect.")). Therefore, the Court cannot find that Plaintiff has "point[ed] to specific evidence in the record to carry [his] burden on summary judgment." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court considers *arguendo* Plaintiff's arguments in this section, in an abundance of caution and in light of Plaintiff's *pro se* status, to show that they would fail as a matter of law even if Plaintiff could provide or had provided proper evidence to support them. In point of fact, he has done neither.

fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation." *Benitez* v. *Parmer*, 654 F. App'x 502, 504-05 (2d Cir. 2016) (summary order) (internal quotation marks omitted) (quoting *Chance* v. *Armstrong,* 143 F.3d 698, 703 (2d Cir. 1998)).

The evidence here shows that Plaintiff received adequate treatment; there is no indication that Defendant knew of and disregarded a substantial risk of serious harm. The results of Plaintiff's testing before he was assigned to Defendant's care gave Defendant no reason to be concerned that Plaintiff would be seriously harmed from a seven-month gap in treatment. The specialist who provided the June 4, 2009 visual field test "did not recommend a course of treatment or follow-up diagnostic testing in connection with the results" of that test. (Bhopale Decl. ¶ 18). Defendant himself was not trained in ophthalmology or optometry, and therefore "relied on the designated specialist to interpret the test results and recommend a course of treatment, if any, and to recommend whether any additional testing was required." (*Id.* at ¶ 17). Because the specialist made no such recommendations, Defendant "did not request any additional treatment or testing at that time." (*Id.* at ¶ 18). However, Defendant did refer Plaintiff for a follow-up with a specialist on January 19, 2010, according to his usual practice of "hav[ing] follow-up testing in six to twelve month intervals for patients who had complained … of vision issues." (*Id.* at ¶ 19). When that specialist recommended Lumigan eye drops to treat Plaintiff's IOP, and recommended a referral to a glaucoma specialist,

Defendant promptly issued that referral and "began Plaintiff on that medication immediately." (*Id.* at ¶ 23; *see also id.* at ¶¶ 21-22 (citing *id.* at Ex. J)).

Defendant did not know of and disregard an actual risk to Plaintiff. Defendant believed that there was no risk, because a specialist had indicated that that was the case. This was adequate treatment. (*See* Rheeman Decl. ¶ 17 ("In my medical opinion, no treatment was required at that time, nor was any immediate testing required. In my medical opinion, continued monitoring of Plaintiff's condition was the appropriate course of treatment at that time."); *id.* at ¶ 46). Even if, at worst, Defendant were negligent in not investigating any additional complaints sooner than seven months after Plaintiff's June 2009 evaluation, such negligence is not sufficient to support a deliberate indifference claim. *See Salahuddin*, 467 F.3d at 280. Plaintiff's claim fails as a matter of law.

3. Defendant Is Entitled to Qualified Immunity

Even if the Court were to find a genuine dispute of material fact concerning Plaintiff's deliberate indifference claim, it would still enter judgment in Defendant's favor because Defendant is entitled to qualified immunity.

Whenever the Court considers the appropriateness of this affirmative defense, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Ziglar*, 137 S. Ct. at 1866 (alteration and emphasis in original) (internal quotation marks omitted) (quoting *Mullenix*, 136 S. Ct. at 308). Thus, the Court must determine here "whether it would have been clear to a reasonable [official] that [Defendant's] alleged conduct 'was

unlawful in the situation he confronted.'" *Ziglar*, 137 S. Ct. at 1867 (quoting *Saucier*, 533 U.S. at 202).

The Court finds that it would not have been. The particular conduct that Plaintiff alleges violated his rights under the Eighth Amendment was Defendant's delayed treatment of Plaintiff's ocular maladies. The Court finds as a matter of law that it would not have been clear to a reasonable official that it was unlawful for Defendant to delay for a seven-month period in referring Plaintiff for follow-up treatment in reliance on a specialist's conclusion that no additional treatment was warranted. The law in this Circuit supports a reasonable official's belief that a delay in treatment does not violate the Eighth Amendment except in extreme cases, such as where, "for example, officials deliberately delayed care as a form of punishment; ignored a life threatening and fast degenerating condition for three days; or delayed major surgery for over two years." *Freeman* v. *Stack*, No. 99 Civ. 9878 (AJP), 2000 WL 1459782, at *6 (S.D.N.Y. Sep. 29, 2000) (quoting *Demata* v. *N.Y. State Corr. Dep't of Health Servs.*, 198 F.3d 233 (2d Cir. 1999) (table)). Moreover, Defendant has introduced evidence supporting the reasonableness of his belief in the appropriateness of his treatment for this particular Plaintiff. (*See, e.g.*, Rheeman Decl. ¶ 46 ("I found no aspect of [Defendant's] treatment and monitoring of Plaintiff's vision-related issues that deviated from the standard of care.")). Defendant is therefore entitled to qualified immunity.

CONCLUSION

For the reasons outlined above, Defendant's motion for summary judgment is GRANTED. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith; therefore, *in forma pauperis* status is denied for purposes of an appeal. *See Coppedge* v. *United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: July 24, 2017
New York, New York

KATHERINE POLK FAILLA
United States District Judge

A copy of this Order was mailed by Chambers to:

Louis Fortunato
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Ossining, NY 10562