

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARK EDWARD HURST,

Plaintiff,

vs.

Civil Action 2:11-cv-1090
Judge Smith
Magistrate Judge King

OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court on plaintiff's *Motion to Sanction State of Ohio Attorney General, Mike Dewine, and Dr. David Weil* ("Plaintiff's Motion for Sanctions"), Doc. No. 44. Defendants oppose Plaintiff's *Motion for Sanctions*. Defendants' *Memorandum in Opposition to Plaintiff's Motion for Sanctions*, Doc. No. 46. Plaintiff has not filed a reply. Also before the Court is plaintiff's motion to amend the *Complaint*, for a discovery hearing, and to appoint counsel ("Plaintiff's Motion to Amend"), Doc. No. 49. Defendants have not filed a response to *Plaintiff's Motion to Amend*.

I. Background

Plaintiff Mark Hurst, a former state inmate, brings this civil rights action alleging that he was denied medical care in contravention of his constitutional rights when allegedly necessary surgery was cancelled. The *Complaint*, Doc. No. 4, names as defendants, *inter alios*, Dr. David Weil, the "Collegial Review Committee" ["the Committee"] and the members of the Committee, who are otherwise unidentified. *Id.* at 2. Attempted service on the

unidentified members of the Committee was returned unexecuted. See Doc. No. 12.

On July 6, 2012, plaintiff filed a motion to compel defendants to produce the names and addresses of the members of the Committee at the time plaintiff's surgery was cancelled. *Motion to Compel*, Doc. No. 26, p. 5. On September 13, 2012, the Court granted in part plaintiff's motion to compel and directed defendants to provide to plaintiff "identifying information regarding the members of the Collegial Review Committee sufficient to enable plaintiff to effect service of process and propound discovery on these individuals." *Opinion and Order*, Doc. No. 40, p. 5.

Plaintiff represents that defendant Weil provided the following response to this Court's September 13, 2012 order:

Answer: The Collegial Review Process was not fully implemented at the time of the cancellation of Plaintiffs [sic] surgery. Dr. Weil did make the recommendation to cancel Plaintiff's surgery and conferred with Andrew Eddy, M.D. Chief Medical Officer and John Gardner, Bureau of Medical Services, both located at Central Office, 770 West Broad Street, Columbus, OH 43229.

Plaintiff's Motion for Sanctions, p. 2.

On December 3, 2012, the Court granted defendants' motion summary judgment on all claims except plaintiff's § 1983 individual capacity claim against Dr. Weil. *Opinion and Order*, Doc. No. 52, p. 8.

II. Discussion

A. Plaintiff's Motion for Sanctions

Plaintiff's Motion for Sanctions requests sanctions against defendant Dr. Weil and his counsel, the Ohio Attorney General, for allegedly acting in "bad faith" and "perpetrating a fraud" on plaintiff and this Court in his response to the Court's September 13,

2012 order. *Id.* at pp. 1-3. Plaintiff argues that the Ohio Department of Rehabilitation and Correction has continually changed the name of the Committee "to stay one step ahead of [l]itigation." *Id.* Plaintiff also argues that defendant's statement that the Committee "was not fully implemented at the time of the cancellation of Plaintiff's surgery" is a "fraud." *Id.* at p. 3.

The Court notes, initially, that there is no evidence of fraud or bad faith on the part of Dr. Weil. Nevertheless, the Court is not entirely satisfied with Dr. Weil's response to the September 13, 2012 order. In ordering Dr. Weil to provide identifying information regarding the members of the Committee, the Court noted that "the exhibits submitted in connection with plaintiff's *Motion to Compel* suggest that the Committee and its members may in fact been involved in the decision to cancel plaintiff's surgery." *Opinion and Order*, Doc. No. 40, pp. 4-5 (citing *Motion to Compel*, Doc. No. 26, Exhibit P ("First, your surgery consult was sent to the collegial review committee (Operations Support Center-formerly known as Central Office). This committee had a conference with Dr. Weil on 3/4/11. A determination was made to cancel surgery and advise you to sign up for doctor sick call if pain persists."), Exhibit N (indicating that plaintiff's surgery was cancelled on the same day that the Committee conducted a conference with Dr. Weil), Exhibit R (indicating that the Committee consulted with Dr. Weil about the decision to cancel plaintiff's surgery)). In responding to this Court's order, Dr. Weil provided identifying information for two individuals with whom he "conferred" in connection with plaintiff's scheduled surgery. *Plaintiff's Motion for Sanctions*, p. 2. Dr. Weil also stated that the

"Collegial Review Process was not fully implemented at the time" plaintiff's surgery was cancelled. *Id.* Dr. Weil did not, however, represent that the Committee did not exist at the time plaintiff's surgery was cancelled or that it had no members. The Court did not order Dr. Weil to provide identifying information for those individuals with whom he "conferred;" the Court ordered Dr. Weil to provide plaintiff with "identifying information regarding the members of the Collegial Review Committee sufficient to enable plaintiff to effect service of process and propound discovery on these individuals." *Opinion and Order*, Doc. No. 40, p. 5. Absent information that either no committee existed or that it had no members, the Court cannot conclude that Dr. Weil's response complied with the September 13, 2012 order.

Rule 37(b) of the Federal Rules of Civil Procedure authorizes the imposition of sanctions in connection with a party's failure to obey an order requiring discovery. Fed. R. Civ. P. 37(b)(2)(A). In determining the appropriate sanction, the United States Court of Appeals for the Sixth Circuit has directed trial courts to consider four factors: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether the party was warned that failure to cooperate could lead to the sanction; and (4) whether less drastic sanctions were first imposed or considered. *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 366-67 (6th Cir. 1997).

In the case presently before the Court, there is no evidence that Dr. Weil acted bad faith, that plaintiff has been prejudiced by Dr.

Weil's failure to comply with this Court's order, and that Dr. Weil has been warned that failure to cooperate could lead to sanctions. Plaintiff's request for sanctions is therefore **DENIED**.

Plaintiff is, however, entitled to information identifying the members of the Collegial Review Committee, if any, at the time plaintiff's surgery was cancelled, sufficient to enable plaintiff to effect service of process and propound discovery on these individuals. Dr. Weil is therefore **ORDERED** to provide this information to plaintiff within fourteen (14) days.

To the extent that *Plaintiff's Motion for Sanctions* seeks to compel additional discovery, see *Plaintiff's Motion for Sanctions*, p. 4, it is **DENIED**. Plaintiff has not certified that he "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 37(a)(1). See also S.D. Ohio Civ. R. 37.2.

B. Plaintiff's Motion to Amend

Plaintiff's Motion to Amend first seeks to amend the *Complaint* to add John Gardner and Andrew Eddy, M.D., as defendants. *Plaintiff's Motion to Amend*, p. 1. As discussed *supra*, Dr. Weil provided the names and addresses of John Gardner and Dr. Eddy in response to the Court's September 13, 2012 order. Plaintiff sought leave to amend the *Complaint* on November 1, 2012, five months after the May 31, 2012 deadline to file motions or stipulations for leave to amend the pleadings or to join new parties. See *Scheduling Order*, Doc. No. 14. In seeking leave, plaintiff did not tender a proposed amended complaint. Plaintiff's request to amend the *Complaint* is therefore **DENIED** without prejudice to renewal should plaintiff tender a proposed

amended complaint and demonstrate good cause for permitting the requested amendment.

Plaintiff's Motion to Amend also seeks a hearing to address defendant's "stone walling tactics," "objections to discovery" and "denial" of discovery. *Plaintiff's Motion to Amend*, pp. 2-3. Plaintiff argues that defendant has repeatedly objected to discovery requests on the grounds that the requested discovery does not exist or that response to the discovery request would be burdensome. *Id.* Again, it is not apparent to the Court that plaintiff has used all extrajudicial means of resolving this discovery dispute, see S.D. Ohio Civ. R. 37.2, and he has not filed a motion to compel. Plaintiff's request for a discovery hearing is therefore **DENIED**.

Finally, *Plaintiff's Motion to Amend* seeks an appointment of counsel. *Plaintiff's Motion to Amend*, pp. 3-5. A district court has discretion to appoint counsel for an indigent civil litigant. *Reneer v. Sewell*, 975 F.2d 258, 261 (6th Cir. 1992) (citations omitted). However, plaintiff is no longer incarcerated and yet he has not demonstrated that he has made any attempt to retain counsel. After careful consideration of plaintiff's request for counsel, including the type and nature of the case, its complexity, and plaintiff's ability to prosecute his claim, the Court **DENIES** that request without prejudice to renewal.

WHEREUPON, *Plaintiff's Motion for Sanctions*, Doc. No. 44, is **DENIED** without prejudice to renewal should Dr. Weil fail to fully comply with this *Order*. Defendant Dr. Weil is **ORDERED** to provide to plaintiff, within fourteen (14) days, information identifying the members of the Collegial Review Committee, if any, at the time

plaintiff's surgery was cancelled, so as to enable plaintiff to effect service of process and propound discovery on these individuals. To the extent that *Plaintiff's Motion for Sanctions* seeks additional discovery, it is **DENIED**.

To the extent that *Plaintiff's Motion to Amend*, Doc. No. 49, seeks to amend the *Complaint*, it is **DENIED** without prejudice to renewal should plaintiff tender a proposed amended complaint and demonstrate good cause for permitting the requested amendment. To the extent that *Plaintiff's Motion to Amend* seeks the appointment of counsel, the motion is **DENIED** without prejudice to renewal.

January 24, 2013

s/Norah McCann King
Norah M^cCann King
United States Magistrate Judge