

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TYRONE GLENN,	:	No. 1:cv-13-0325
Plaintiff,	:	
	:	(Judge Kane)
v.	:	
	:	
JAMES J. McGRADY, <u>et al.</u> ,	:	
Defendants	:	

**ORDER**

AND NOW, this 11th day of March, 2014, in accordance with the accompanying

Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Defendants' motion to dismiss (Doc. No. 13) is **GRANTED**. All claims set forth in the complaint against Defendants are dismissed in their entirety.
2. Plaintiff's motion to amend/correct (Doc. No. 26) is **DENIED**.
3. The Clerk of Court is directed to **close this case**.
4. Any appeal from this order will be deemed frivolous, lacking in probable cause and not taken in good faith.

S/ Yvette Kane  
Yvette Kane, District Judge  
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TYRONE GLENN,	:	CIVIL NO. 1:CV-05-1934
Plaintiff,	:	
	:	(Judge Kane)
v.	:	
	:	
JOSEPH MATALONI, et al.,	:	
Defendants	:	

MEMORANDUM AND ORDER

Plaintiff Tyrone Glenn, an inmate at the State Correctional Institution at Retreat, Hunlock Creek, Pennsylvania, filed this action on September 26, 2005, pursuant to 42 U.S.C. § 1983. (Doc. 1). The Prison Litigation Reform Act of 1995, (the "Act"), obligates the court to engage in a screening process when a prisoner wishes to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915, as is the case here. (Doc. 5). Specifically, §1915(e)(2), which was created by § 805(a)(5) of the Act provides:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

The complaint has been screened in accordance with the above, and, for the following reasons, the action will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief can be granted.

I. Factual Background.

\_\_\_\_\_ Named as defendants are Joseph Mataloni, Health Care Administrator, Dr. Renato Diaz, and Physician's Assistant Larisa Yarczower. Glenn alleges that these defendants were deliberately indifferent to his medical condition and that he has suffered pain and mental anguish as a result of

their conduct.

Glenn alleges that he reported to sick call on August 2, 2004, to report that he was suffering from a "parasitic worm-like creature squirming around inside [his] anal cavity that had mandibles." (Doc. 1, p. 2). Defendants Yarczower and Diaz concluded that Glenn had hemorrhoids. Over the course of the next few days, he was prescribed a laxative, prescribed creams, was directed to give a stool sample and had blood work done. On August 7, 2004, Glenn was informed that the tests did not show any sign of a parasite.

Because Glenn was convinced that he had a parasite living in his anal cavity, he filed a grievance. His grievance was denied at every administrative level. While pursuing his administrative remedies, he continued to seek medical treatment so as to obtain "the proper diagnosis and treatment." He was assured by Defendant Mataloni that the "logical steps" would be taken to discern the source of his pain and discomfort. (Doc. 1, p. 5).

Out of concern for Glenn, Glenn's brother-in-law, Mr. Green, contacted the Department of Corrections and spoke with the Assistant Medical Director, Dr. Scharff. Dr. Scharff reviewed Glenn's medical file and on June 9, 2005, wrote to Glenn explaining the following:

I understood Mr. Green to say you were experiencing persistent anal pain over a prolonged period; such pain can be the result of an anal fissure (a sort of tear), and I wished to be sure the anus had been examined. Anal fissure does not cause the sort of sensation you are describing. It can be caused by pinworm, an intestinal parasite which lives in the colon but migrates to the anus to lay eggs, particularly at night. Hemorrhoids can also cause sensations like those you have described. The diagnosis of hemorrhoids can be made on inspection, but the diagnosis of pinworm usually requires that the anal area be blotted with cellophane tape to pick up the eggs, which can then be seen under a microscope. Other parasites are diagnosed by microscopic examination of the stool. Colonoscopy is not used for diagnosing intestinal parasites. The cellophane tape examination was done in August and was negative. There have also been several negative stool examinations for ova and parasites. It is thus unlikely that your symptom is caused by an intestinal worm or parasite.

Doc. 1, Exhibit J). Glenn contends that he is being deprived of proper medical care and that his “condition requires significant and continuous medication and causes excruciating pain every time the parasite repositions itself.” (Doc. 1, p. 6). He states that “defendants prevented [him] from receiving adequate medical diagnosis and treatment and denied access to a physician capable of evaluating plaintiff’s needs.” (Id.)

## II. Standard of Review.

In considering the complaint under this provision, the Court is guided by Federal Rule of Civil Procedure 12(b)(6) which allows for dismissal of a claim or claims for “failure to state a claim upon which relief can be granted. . . .” In evaluating whether a claim is subject to dismissal, the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the Plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that “no relief could be granted under any set of facts that could be proved consistent with the allegations. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). A complaint that sets out facts which affirmatively demonstrate that the Plaintiff has no right to recover is properly dismissed without leave to amend. Estelle v. Gamble, 429 U.S. 97, 107-108 (1976).

“In determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record.” Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court, however, need not accept “bald assertions” or “legal conclusions.” Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

III. Discussion.

“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” Farmer v. Brennan, 511 U.S. 825, 827 (1994) citing Helling v. McKinney, 509 U.S. 25 (1993); Wilson v. Seiter, 501 U.S. 294 (1991); Estelle, 429 U.S. 97. An inadequate medical care claim, as is presented here, requires allegations that the prison official acted with “deliberate indifference to serious medical needs” of the plaintiff, while a prisoner. Estelle, 429 U.S. at 104; Unterberg v. Correctional Medical Systems, Inc., 799 F. Supp. 490, 494-95 (E.D. Pa. 1992). The official must know of and disregard an excessive risk to inmate health or safety. Farmer, 511 U.S. at 837. “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Id. “The question . . . is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health.’” Farmer, 511 U.S. at 843. This test “affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients. Courts will ‘disavow any attempt to second guess the propriety or adequacy of a particular course of treatment . . . which remains a question of sound professional judgment.’” Little v. Lycoming County, 912 F.Supp. 809, 815 (M.D. Pa) *aff’d*, 103 F.3d 691 (1996) citing Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754,762 (3d Cir. 1979), quoting Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977).

Furthermore, a complaint that a physician or a medical department “has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment . . .” Estelle, 429 U.S. at 106. More than a decade ago, the Third Circuit ruled that “while the distinction between deliberate indifference and malpractice can be subtle, it is

well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights." Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990). "A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice." Estelle, 429 U.S. at 107.

Where an inmate is provided with medical care and the dispute is over the adequacy of that care, an Eighth Amendment claim does not exist. Nottingham v. Peoria, 709 F.Supp.542, 547 (M.D.Pa. 1988). Disagreement among individuals as to the proper medical treatment does not support an Eighth Amendment claim. Monmouth County Correctional Inst. Inmates v. Lensario, 834 F.2d 326, 346 (3d Cir. 1987). Only flagrantly egregious acts or omissions can violate the standard. Mere medical malpractice cannot result in an Eighth Amendment violation, nor can any disagreements over the professional judgment of a health care provider. White v. Napoleon, 897 F.2d 103, 108- 10 (3d Cir. 1990).

Throughout the time period in question, Glenn was seen by physician's assistants and examined by a physician and other medical personnel on numerous occasions. Blood work was done on more than one occasion, stool samples were elicited and examined, and the cellophane tape test was performed. In addition, Glenn was prescribed medication and creams in an effort to make him more comfortable. He is convinced that he is suffering from a condition involving a parasitic worm. None of the tests performed indicate that this is Glenn's problem. Despite all of the medical intervention, defendants have not been able to resolve Glenn's condition to his satisfaction. This is clearly a case where the Plaintiff has been given significant medical attention and is simply dissatisfied with the results. Consequently, Glenn's complaint is subject to dismissal pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) as he fails to state a claim upon which relief can be granted.

IV. Order.

**AND NOW**, this 28th day of November 2005, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's application to proceed *in forma pauperis* (Doc. 5) is **GRANTED**.
2. Plaintiff's complaint (Doc. 1) is **DISMISSED** pursuant to 28 U.S.C. §1915(e)(2)(B)(ii).
3. The Clerk of Court is directed to **CLOSE** this case.
4. Any appeal from this order will be deemed frivolous, lacking in probable cause, and not taken in good faith.

\_\_\_\_s/ Yvette Kane\_\_\_\_  
Yvette Kane  
United States District Judge



anal/intestinal cavity.” Brief, p. 5. Tests the medical staff at Retreat conducted in August of that year did not indicate the presence of such creature or creatures. Glenn filed an Inmate Grievance on August 25, 2004, because he rejected the medical staff’s diagnosis, and believed that the cause of his pain was, and presumably continues to be, the above-noted condition. The correctional authorities ultimately denied the grievance.

In July 2006, Glenn had an annual physical at Retreat during which he requested that one of the named defendants, Yarczower, during her performance of a prostate examination, attempt digitally to locate the creature Glenn believed to be in the body cavity. However, Yarczower reiterated the medical staff’s continued belief that hemorrhoids were the cause of his discomfort.

Following that examination, Glenn filed in the trial court a complaint against the defendants that sought damages for alleged negligence and medical malpractice. Glenn first attempted to file his complaint on July 25, 2006. However, he did not include a filing fee. He filed again on October 5, 2006, but the filing office returned the complaint because the time for service had expired. Concurrent with that filing, Glenn filed a request for an extension of time to file a certificate of merit, in which he stated that he was having difficulty obtaining a certificate, but, presumably because of the expiration of service, the trial court did not act on the extension request. Following a reissue of process and service of the complaint in November 2006, the defendants filed a praecipe for judgment of non pros under Pa. R.C.P. No. 1042.6 in December. Glenn filed a response to the praecipe on December 27. On January 1, 2007, Glenn then filed a second request for a sixty-day extension of time to file the certificate of merit, asserting that he had thought the trial court would act on his first motion for an extension of time to

file the certificate and again stating that he was having difficulty obtaining a certificate of merit. The trial court denied this request on February 9, 2007,<sup>3</sup> and the defendants filed a second non pros praecipe. Glenn filed a response to the second non pros praecipe on April 23, 2007. Glenn filed an additional motion for an extension of time to file a certificate of merit on the same day.<sup>4</sup> On May 11, 2007, the trial court entered its order granting the praecipe for judgment of non pros. Glenn then filed (1) a petition to open judgment of non pros on May 23, and (2) a petition for relief from judgment of non pros on June 4.

In its order denying Glenn's request for relief from the trial court's grant of non pros, the subject of this appeal, the court stated that Glenn's complaint failed to state a meritorious claim and that Glenn could have obtained a certificate of merit before filing his complaint.

Glenn raises the following issues: (1) whether the trial court abused its discretion by failing to strike the non pros judgment; (2) whether the trial court erred by denying Glenn an extension of time to file the certificate of merit; (3) whether Rule 1042.3 requires a certificate of merit regarding all of the defendants, and if not, whether the trial court's order constitutes an error of law; and (4) whether the trial court violated Glenn's due process right of equal access to the courts in applying Rule 1042.3 to a person incarcerated for life, such as himself, because inmates have no opportunity to obtain such certificates. As the defendants point out, a trial court may open a judgment of non pros only if the plaintiff has

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<sup>3</sup> Glenn filed an appeal of this order with the Superior Court. Glenn had also filed a motion seeking an "abeyance" in the proceedings pending the outcome of his appeal to the Superior Court, which the trial court denied. Glenn similarly appealed the trial court's denial of that motion. The Superior Court quashed both appeals.

<sup>4</sup> Glenn had also filed, on April 5, a motion for a preliminary injunction seeking to compel the defendants to provide him with an independent medical examination; the trial court denied that motion on May 25.

demonstrated in a manner to satisfy the court that he has a reasonable explanation for the delay that formed the basis for entry of judgment. A court reviewing a trial court's denial may reverse such a decision only if the order reflects an unreasonable result, partiality, prejudice, bias, animus, or no rational support such as would suggest that the court entered the order erroneously. See, for example, *Neshaminy Constructors, Inc. v. Plymouth Township*, 572 A.2d 814 (Pa. Cmwlth. 1990).

As noted by the defendants, although Glenn asserted that he was having difficulty obtaining a statement of a physician to include in a certificate of merit, his actions belie the assertion. The averments in Glenn's first and second requests for an extension of time do not demonstrate any actions Glenn took to try to obtain a medical statement before he filed his requests. Further, the exhibits Glenn included in his later pleadings to the trial court only indicate the affirmative steps he took in sending letters to physicians after the trial court denied the motion for an extension of time.

Having failed to have articulated the reason for his difficulty in obtaining a statement of a medical professional, the trial court had little insight into the reasons why Glenn was having "difficulty." The trial court could have thought that he was simply having trouble obtaining the certificate because no doctor agreed that the care he received was inadequate. The Court could also have thought that Glenn's prison status made the objective difficult, as Glenn indicated in his later pleadings after the entry of the praecipe for non pros. However, with so few facts, the trial court would have reached the latter conclusion based solely on conjecture. Hence, because any conclusion the trial court reached, based upon the

pleading, would have been nothing more than guesswork, his conclusion that Glenn was not entitled to an extension is not unreasonable.

Although Glenn here asserts constitutional grounds suggesting that the trial court's order deprives him of his right to access to the courts, we are bound to simply consider whether the trial court abused its discretion in denying the motion to open judgment. In neither his initial request, nor his second request in January, did Glenn assert that the denial would raise constitutional concerns. Although that factor alone would not preclude either the trial court or this court from addressing his constitutional claims, and although we agree with Glenn that he raised the issue in his petition to open judgment, we must reject his argument on the basis of our analysis above. Glenn simply did not provide a sufficient factual basis upon which the trial court could consider his claim in his motion for an extension of time. By failing to inject his request with facts that demonstrate some constitutional issue, and as noted above, the trial court lacked any ability to consider the motion in any constitutional context. Simply asserting his "difficulty" in trying to comply with the rule was insufficient to form any support for his claim of abuse of discretion on the basis of a subsequent constitutional claim.<sup>5</sup> Accordingly, we reject this argument.

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<sup>5</sup> Glenn raises a number of other issues concerning (1) the timing of his motion and possible tolling of the sixty-day period based upon the filing of the motion for an extension, (2) whether a certificate of merit is required for two of the non-physician defendants, (3) whether expert testimony is not required in certain medical malpractice cases if the negligence is obvious, and (4) whether the rule permits a plaintiff to file an unlimited number of extension requests (in this case, Glenn filed a third motion in May upon which the trial court never acted); however, with the exception of sub (4), involving the number of times a plaintiff may submit a motion for extension, Glenn did not raise these issues before the trial court and consequently, they are waived. *Commonwealth v. Holtzapfel*, 895 A.2d 1284 (Pa. Cmwlth. 2006). With regard to his claim that the trial court erred in granting the non pros motion without first resolving Glenn's outstanding third extension request, we believe that that rule intends to allow for subsequent extensions following an initial request where a trial court has found persuasive the reasons

Considering now, these aspects of the proceedings in light of the abuse of discretion standard, we note again that we may overturn the trial court's decision only if his order reflects a manifestly unreasonably resolution or lack of support that demonstrates clear legal error. *Womer v. Hilliker*, 589 Pa. 256, 908 A.2d 269 (2006). Based upon the foregoing discussion of Glenn's pleading, notably the failure to include specific reasons why he needed extra time to comply with the Rule, we cannot conclude that the trial court's order represents manifest unreasonableness or a resolution that is so lacking in support as to be clearly erroneous.

Based upon the foregoing, we affirm the decision of the trial court denying Glenn's motion to open judgment of non pros.

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JAMES GARDNER COLINS, Senior Judge

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offered and has already granted an extension, rather than repetitive requests that a court has already considered and denied, as in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tyrone Glenn,	:
	:
Appellant	:
	:
v.	:
	:
Joseph Mataloni, Renato Diaz	: No. 264 C.D. 2008
and Larisa Yarczower	:

**ORDER**

AND NOW, this 4<sup>th</sup> day of June, 2008, the order of the Court of Common Pleas of Luzerne County is affirmed.

JAMES GARDNER COLINS, Senior Judge