

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3602

OMAR FOLK,
Appellant

v.

PRIME CARE MEDICAL; DAUPHIN COUNTY PRISON; PERRY COUNTY
PRISON; ATTORNEY GENERAL OF PENNSYLVANIA; DAVID E. YEINGST;
DOMINICK DEROSE; P.A. TONYA SCHISLER; LPN TOM TOOLAN; DR.
MATTHEW LEGAL; LT. TWIGG; SGT. KELLER; THOMAS LONG; CITY OF
HARRISBURG; PERRY COUNTY CITY; HEIDI R. FREESE; DAUPHIN COUNTY;
C.O. CHARLES DONBAUGH; P.A. YOUNG; BOARD CHAIRMAN; PERRY
COUNTY PRISON; CHAD CHENET; PERRY COUNTY PRISON BOARD

(M.D. Pa. Civil No. 3:13-cv-00474)

SUR PETITION FOR PANEL REHEARING

Present: McKEE, SHWARTZ, and BIBAS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case
having been submitted to the judges who participated in the decision of this Court, it is
hereby

O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: July 30, 2019

PDB/cc: Omar Sierre Folk

John R. Ninosky, Esq.
Joshua M. Autry, Esq.
Elizabeth L. Kramer, Esq.
Matthew R. Clayberger, Esq.
Sean A. Kirkpatrick, Esq.

ALD-170

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3602

OMAR FOLK,
Appellant

v.

PRIME CARE MEDICAL; DAUPHIN COUNTY PRISON; PERRY COUNTY PRISON; ATTORNEY GENERAL OF PENNSYLVANIA; DAVID E. YEINGST; DOMINICK DEROSE; P.A. TONYA SCHISLER; LPN TOM TOOLAN; DR. MATTHEW LEGAL; LT. TWIGG; SGT. KELLER; THOMAS LONG; CITY OF HARRISBURG; PERRY COUNTY CITY; HEIDI R. FREESE; DAUPHIN COUNTY; C.O. CHARLES DONBAUGH; P.A. YOUNG; BOARD CHAIRMAN; PERRY COUNTY PRISON; CHAD CHENET; PERRY COUNTY PRISON BOARD

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. Civil No. 3:13-cv-00474)
District Judge: Honorable Robert D. Mariani

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
April 25, 2019

Before: McKEE, SHWARTZ and BIBAS, Circuit Judges

(Opinion filed: June 18, 2019)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Pro se appellant Omar Folk, proceeding in forma pauperis, appeals from the District Court's denial of his motion for reconsideration. For the reasons that follow, we will summarily affirm the District Court's judgment.

In February 2013, Folk filed a complaint in the District Court alleging a series of claims about his medical care while he has been incarcerated, access to the prison law library, and his public defender's actions in a criminal case. The District Court ultimately dismissed all of Folk's claims with prejudice for failure to state a claim and denied his motions for reconsideration. We affirmed the District Court's judgment on July 10, 2018.

Soon after, Folk filed another motion for reconsideration in the District Court. Folk primarily restated and added to the allegations he had previously made and discussed several new unrelated incidents regarding his medical care. Additionally, Folk maintained that the medication he was taking somehow prevented him from fully explaining his allegations during the five years that his case and his previous appeal were pending. The District Court denied his motion. Folk timely appealed.¹

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review the denial of a motion for reconsideration for abuse of discretion. See Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999). We may summarily affirm a district court's decision "on any basis supported by the record" if the

¹ Folk also moves to consolidate this appeal with his earlier appeal at C.A. No. 18-1352.

appeal fails to present a substantial question. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

The District Court did not abuse its discretion in denying Folk's motion, as it was not based on a proper ground for reconsideration, such as an intervening change in law, newly discovered evidence, or "the need to correct a clear error of law or fact or to prevent manifest injustice." See Max's Seafood Café, 176 F.3d at 677. Rather, Folk's motion relied on allegations that he either already made or could have made in the District Court and in his prior appeal. Accordingly, we will summarily affirm the District Court's judgment.²

² Additionally, we deny Folk's motion to consolidate.

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

OMAR FOLK,

No. 3:13-cv-00474

Plaintiff,

(Judge Mariani)

v.

PRIME CARE MEDICAL, et al,

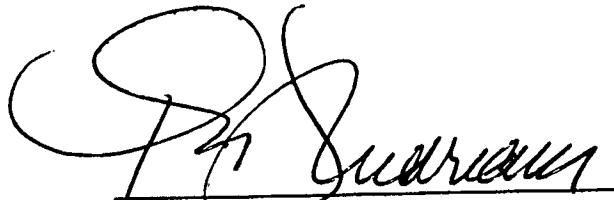
Defendants.

ORDER

Omar Folk has filed a motion to consolidate two separate appeals that he has taken from this action. (ECF No. 134). This Court is without power to consolidate cases on the United States Court of Appeals for the Third Circuit's docket and, thus, Folk's motion should instead be presented to that court. Consequently, on this 15th day of March 2019, it is hereby ordered that:

1. Folk's motion to consolidate (ECF No. 134) is DENIED.

BY THE COURT:



Robert D. Mariani
United States District Judge

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

OMAR FOLK,

Plaintiff

v.

CIVIL NO. 3:CV-13-474

PRIME CARE MEDICAL, ET AL.,

(Judge Mariani)

Defendants

ORDER

I. **Background**

This *pro se* civil rights complaint was filed by Omar Folk, an inmate presently confined at the Allenwood United States Penitentiary, White Deer, Pennsylvania (USP-Allenwood). Plaintiff's action was initially assigned to Judge Richard P. Conaboy of this Court. Since Judge Conaboy recently passed away, this matter was reassigned to the undersigned.

By Memorandum and Order dated January 26, 2018, Judge Conaboy dismissed the Plaintiff's remaining claims. Following a direct appeal, the United States Court of Appeals for the Third Circuit issued an Opinion on July 10, 2018, which concluded that "[t]he District Court properly dismissed Folk's claims against all defendants." Doc. 128-2, p. 5.

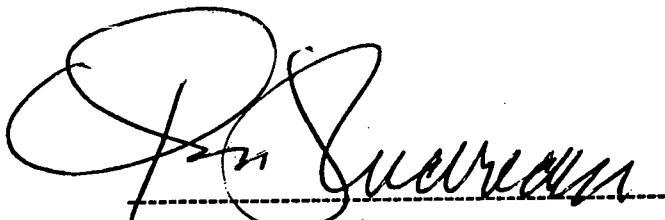
Presently pending is Plaintiff's motion seeking relief from judgment and requesting that Defendants be sanctioned for failure to disclose discovery. See Doc. 129. The motion appears to suggest that Plaintiff could have avoided dismissal of his claims had he been provided with discovery.

Rule 60(b) states upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for fraud, (whether heretofore denominated intrinsic or extrinsic), misrepresentation, newly discovered evidence, mistake, inadvertence, surprise, excusable neglect, or misconduct by an adverse party. Rule 60(c) adds that any such motion must be made no more than a year after the entry of judgment.

Judge Conaboy as well as the Third Circuit have already reviewed Folk's action and concluded that entry of dismissal in favor of the Defendants was appropriate. Since Folk's pending motion fails to set forth any basis for relief under Rule 60, it will be denied. An appropriate Order follows.

AND NOW, this 19th day of November, 2018, IT IS HEREBY ORDERED
THAT:

Plaintiff's motion seeking relief from judgment and requesting that Defendants be sanctioned for failure to disclose discovery (Doc. 129) is **DENIED**.



Robert D. Mariani
United States District Judge

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

OMAR FOLK, :
Plaintiff :
v. : CIVIL NO. 3:CV-13-474
PRIME CARE MEDICAL, ET AL., : (Judge Conaboy)
Defendants :
:

MEMORANDUM
Background

This pro se civil rights complaint was filed by Omar Folk, an inmate presently confined at the Allenwood United States Penitentiary, White Deer, Pennsylvania (USP-Allenwood). A Memorandum and Order issued August 18, 2016, granted dismissal in favor of Defendants Perry County, Pennsylvania Prison; Warden David Yeingst, Deputy Warden Thomas Long; Lieutenant Twigg; Sergeant Keller; the Perry County Prison Board and Chairman Charles Chenot. See Doc. 64.

By Memorandum and Order dated August 24, 2016, the Attorney General of Pennsylvania's motion to dismiss was granted. See Doc. 67. A September 1, 2016 Memorandum and Order granted Defendants City of Harrisburg, Dauphin County Prison, and Warden DeRose's motion to dismiss. See Doc. 69. By Memorandum and Order dated January 27, 2017, a motion to dismiss by Defendant Heidi R. Freese, an Assistant Federal Public Defender was granted.

By Memorandum and Order dated February 13, 2017 a motion to dismiss by Defendants include PrimeCare Medical, Inc.;¹ Physician's Assistant (PA) Tanya Shisler; Nurse Tom Toolan; and Doctor William Young was granted. See Doc. 85. As a result of those prior decisions the only remaining Defendant is Doctor Matthew Legel.

Presently pending is Defendant Prime Care's motion to strike service of the Remaining Defendant. See Doc. 90. According to the motion, service for Doctor Legel was improperly accepted by PrimeCare Medical's designated agent, its Director of Risk Management Sandra Ulerick. Thereafter Ulerick determined that Dr. Legel was not and never had been an employee of PrimeCare Medical.

An exhibit accompanying the motion indicates that during the relevant time period Doctor Legel was a first year orthopedic resident employed by Pinnacle Health System. See Doc. 90-4.

In a response to the motion, Folk asserts that he did not know and was never made aware of the fact that Doctor Legel was actually employed by Pinnacle health. See Doc. 105, p. 1. The Plaintiff has also prepared and filed a new notice of summons for Doctor Legel. See Doc. 107.

Discussion

In an initial notice of summons prepared by the Plaintiff, he identified Doctor Legel as being an employee of Prime Care medical. See Doc. 17, p. 3. As noted above, PrimeCare Medical's designated agent thereafter accepted service of the complaint on behalf of Dr. Legal.

1. PrimeCare is a private corporation which has been contracted to provide health care for inmates.

There is no dispute that Dr. Legel was never a PrimeCare Medical employee and that Ulerick was not authorized to accept service on Legel's behalf. Since the alleged failure to properly serve Doctor Legel was in part due to the Plaintiff's improper identification of said Defendant as being an employee of PrimeCare the motion to strike will be granted.

The only portion of the Complaint relating to Doctor Legel vaguely states "Doctor Matthew Legel stated I'm surprised you can still move your leg and also stated from it taking so long I will need reconstructed knee surgery and cast [sic] on my leg." Doc. 1, ¶ IV.

As previously discussed by this Court's February 13, 2017 Memorandum and Order, in order to establish an Eighth Amendment medical claim, an inmate must allege acts or omissions by prison officials sufficiently harmful to evidence deliberate indifference to a serious medical need. See Spruill v. Gillis, 372 F.3d 218, 235-36 (3d Cir. 2004); Natale v. Camden Cty. Correctional Facility, 318 F.3d 575, 582 (3d Cir. 2003). Under the subjective deliberate indifference component of Estelle, the proper analysis for deliberate indifference is whether a prison official "acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 841 (1994).

A complaint that a physician "has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment [as] medical malpractice does not become a constitutional violation

merely because the victim is a prisoner." Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

Based upon an application of the above standards and other decisions cited in the February 13, 2017 Memorandum to Plaintiff's sole, Folk's sparse assertion that Doctor Legel expressed an opinion that the inmate required knee surgery, a viable deliberate indifference claim has not been stated against the Remaining Defendant.

Since it has been concluded that a viable civil rights claims has not been asserted against Remaining Defendant Doctor Legel, sua sponte dismissal will be entered in his favor. See 28 U.S.C. § 1915 (e)(2)(B)(ii). An appropriate Order will enter.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: JANUARY 26, 2018