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

UNITED STATES OF AMERICA ex rel. EFFRAIN REYES	:	CIVIL ACTION
v.	:	
EDWARD SWEENEY, et al.	:	NO. 97-3922

MEMORANDUM AND ORDER

J. M. KELLY, J. **AUGUST 10, 1999**

Presently before the Court is the summary judgment motion of Defendant Erik Fluk Von Kiel ("Von Kiel"), identified in Plaintiff Effrain Reyes' ("Reyes") complaint as John Doe Doctor #1. For the reasons that follow, Defendant's motion is granted.

I. BACKGROUND

Reyes, a prisoner prosecuting this action pro se, has sued various Defendants in this civil rights suit. His theory of liability against Von Kiel is that Von Kiel, a physician, recklessly and maliciously failed to diagnose his tuberculosis during the several months Reyes was incarcerated at Lehigh Valley Prison ("LVP"). More specifically, Reyes claims that he complained he was not feeling well during his stay at LVP, and subsequently was tested on four occasions for tuberculosis. Each of these tests yielded a negative result. After he left LVP, he was tested twice more, and again those tests indicated he had not been exposed to tuberculosis. Finally, approximately twenty-three months after he left LVP, he tested positive for tuberculosis. This positive result, Reyes believes, demonstrates Von Kiel was deliberately indifferent to his medical needs, establishing an Eighth Amendment violation.

Judge Joseph McGlynn of this District dismissed Reyes' original complaint, ruling Reyes' complaint was too vague for an adequate response by any of the named defendants.

Judge McGlynn allowed Reyes to file an amended complaint, which Reyes did, although his allegations again were general. Reyes, now a prisoner at the State Correctional Institute at Albion, has conducted very limited discovery since.

II. DISCUSSION

A. The Summary Judgment Standard

Summary judgment is appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material if it might affect the outcome of the suit under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party is entitled to every favorable inference that can be drawn from the record. Sharrar v. Felsing, 128 F.3d 810, 817 (3d Cir. 1997). The nonmovant, however, may not avoid summary judgment by relying on evidence that is merely colorable or not significantly probative, Anderson, 477 U.S. at 249-50, and similarly may not rely on mere allegations, general denials, or vague statements, Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d Cir.), cert. denied, 502 U.S. 940 (1991). It is the movant's initial burden to identify portions of the record demonstrating what it believes is an absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the burden of proof at trial is the non-movant's, however, the movant can meet its obligation under Celotex by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. Summary judgment is appropriate if the non-movant is unable to rebut the movant's absence of evidence claim. Id. at 323;see also Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.

574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts.").

B. Von Kiel's Motion For Summary Judgment

Reyes struggles to raise even a metaphysical doubt concerning the material facts. He has offered no proof whatsoever connecting his illness to Von Kiel. To begin with, it appears from the record that Reyes does not have tuberculosis, but only has tested positive to a PPD test. (Letter from Brennan, Superintendent, to Reyes of 9/16/96.) More importantly, Reyes has failed to produce any evidence that Von Kiel was reckless or deliberately indifferent. The allegations Reyes makes in his amended complaint and response actually contradict his conclusion concerning Von Kiel: he acknowledges he received repeated PPD testing while at LVP, and that none of these tests showed a positive reaction to tuberculosis. He further acknowledges the PPD tests he received after leaving LVP also were negative. Von Kiel, therefore, could not have acted indifferently because Reyes' condition presented nothing to treat. Reyes' sole evidence of any wrongdoing is his positive reaction to a PPD test taken nearly two years after he left Von Kiel's care. Unlike at the motion to dismiss stage, his bare conclusion that Von Kiel must have been deliberately indifferent because he later tested positive to a PPD test is insufficient to allow his case against Von Kiel to continue. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 252 (3d Cir. 1999). Reyes certainly would not be able to sustain his burden of proof at trial, and therefore Von Kiel's motion appropriately is granted.

An Order follows.

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ORDER

AND NOW, this 10th day of August, 1999, upon consideration of Defendant Erik Fluk Von Kiel's Motion for Summary Judgment (Document No. 32), and Plaintiff Effrain Reyes' response thereto, it is hereby **ORDERED**:

1. Defendant Eric Fluk Von Kiel's motion is **GRANTED**; and

2. Judgment is entered in favor of Defendant Eric Fluk Von Kiel, and against Plaintiff Effrain Reyes.

BY THE COURT:

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JAMES McGIRR KELLY, J.