

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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RICHARD McFEE,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	18-11158-PBS
	)	
DIRECTOR YEH, et al.,	)	
	)	
Defendants.	)	
_____	)	

ORDER ON PENDING MOTIONS

Kelley, M.J.

For the reasons set forth below, the (1) plaintiff's motions (Docket Nos. 52, 63) for counsel are denied without prejudice; (2) plaintiff's motions for leave to file an amended complaint (Docket Nos. 51, 62) are allowed to the extent that plaintiff must identify one operative complaint (either of the proposed amended complaints or a new amended complaint); (3) the defendants' motion (Docket No. 68) for extension of time to answer the original complaint is allowed and defendants shall respond after plaintiff identifies the operative amended complaint; and (4) plaintiff's motion (Docket No. 64) to compel process is granted in part and denied in part.

RELEVANT BACKGROUND

The above-captioned action was opened on May 25, 2018, upon receipt of a pleading filed by Richard McFee, a prisoner at FMC

Devens, seeking appointment of counsel and injunctive relief stating that various correctional staff and medical providers failed to treat plaintiff's serious medical issues. (Docket No. 1). McFee alleges that on September 26, 2017, while in federal custody in Minnesota, he was the victim of a serious assault. McFee alleges that he was denied medical treatment in Minnesota and, when transferred to FMC Devens a little more than two months later, continued to be denied adequate medical treatment to address the injuries that he suffered during the assault. McFee also complains of inadequate medical care concerning his chronic medical conditions, including Crohn's disease. By Order dated June 7, 2018, the Court directed McFee to file a complaint. (Docket No. 4).

On June 21, 2018, McFee filed his complaint. (Docket No. 6). After the complaint was filed, summonses issued for service of the complaint on defendants Tidwell, Yeh, Vondyes,<sup>1</sup> Wagner, Woods, and Lund (Docket Nos. 11, 20). After several insufficient attempts to serve the complaint on the defendants, the Clerk again delivered to the United States Marshals Service

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<sup>1</sup> The correct name for the defendant identified in the original complaint as "Vondyes" is Felicitas Fandreyer. (Docket Nos. 48, 59, 68).

the documents for service. See Oct. 18, 2018 Electronic Order (Docket No. 41).

Now pending before the Court are defendants' motion<sup>2</sup> (Docket No. 68) for extension of time to answer; plaintiff's motions (Docket Nos. 51, 62) for leave to file amended complaints; plaintiff's motions (Docket Nos. 52, 63) for appointment of counsel; plaintiff's motion (Docket No. 64) to compel process; plaintiff's motion (Docket No. 68) to extend time to serve; and plaintiff's motions (Docket Nos. 42, 68) for Preliminary Injunction and/or Temporary Restraining Order.

#### DISCUSSION

##### A. Plaintiff's Motions to Appoint Counsel

Although the Court "may request an attorney to represent any person unable to afford counsel," 28 U.S.C. § 1915(e)(1), a civil plaintiff lacks a constitutional right to free counsel, see DesRosiers v. Moran, 949 F.2d 15, 23 (1st Cir. 1991). The Court does not have the funds to pay attorneys to represent plaintiffs in civil cases, and it is difficult to find attorneys who will accept appointment as pro bono counsel. To qualify for this scarce resource, a party must be indigent and exceptional

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<sup>2</sup> The motion is filed on behalf of defendants Yeh, Fandreyer, Lund and Tidwell (in their individual capacities), but not defendant Abbigail R. Woods, who waived service of the summons on November 18, 2018. (Docket No. 58).

circumstances must exist such that the denial of counsel will result in fundamental unfairness impinging on the party's due process rights. See DesRosiers, 949 F.2d at 23. To determine whether there are exceptional circumstances sufficient to warrant the appointment of counsel, a court must examine the total situation, focusing on the merits of the case, the complexity of the legal issues, and the litigant's ability to represent himself. See id. at 24. At this early stage of the proceedings, the Court cannot determine whether exceptional circumstances exist that would justify appointment of counsel.

B. Plaintiff's Motions for Leave to file an Amended Complaint

After filing the original complaint, plaintiff subsequently filed two motions for leave to amend. The first motion for leave to amend was filed on November 5, 2018. (Docket No. 51). The second motion for leave to amend was filed on December 11, 2018. (Docket No. 62). Both proposed amended complaints seek to drop defendant Woods as a defendant, and the second proposed amended complaint seeks to add two new defendants (J. Berkowitz and T. O'Connor). (Docket Nos. 51-1, 62-1). Although both proposed amended complaints include similar allegations, it appears that the second proposed amended adds additional factual allegations without repeating factual allegations from either

the original or proposed first amended complaint. See Docket Nos. 51-1, 62-1).

An amended complaint normally supersedes the original pleading. See ConnectU LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008). Here, however, plaintiff's second amended complaint does not repeat allegations either from the original complaint and/or the proposed first amended complaint.

Although plaintiff may amend his pleadings once as a matter of course, it is unclear which of the proposed amended complaints plaintiff intends to be the operative complaint in this action. Therefore, plaintiff will be granted additional time either to (1) inform the court which proposed complaint should be the operative complaint or (2) file a new amended complaint. If plaintiff chooses to file a new amended complaint, he should repeat in such amended complaint any allegations from the earlier pleadings that he wishes to be included in the amended complaint. Plaintiff is reminded that in addition to the pleading requirements of Fed. R. Civ. P. 8(a), an amended complaint should comply with other provisions of the Federal Rules of Civil Procedure. Under Fed. R. Civ. P. 10(a), "[t]he title of the complaint must name all the parties," and the claims in a complaint must be set forth "in numbered paragraphs,

each limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b).

C. Defendants' Motion for Extension of Time

In requesting an extension of time to respond to plaintiff's original complaint, defendants correctly note that plaintiff has submitted two proposed amended complaints, one of which adds two new defendants. (Docket No. 68).

In light of this Court's ruling on plaintiff's motions for leave to amend, defendants will be granted additional time to respond to the operative complaint as identified by plaintiff.

Based on the foregoing, it is hereby ordered that:

1. Plaintiff's motions (Docket Nos. 52, 63) for counsel are denied without prejudice. All communications by plaintiff with the Court must be served on the defendants, or defendants' counsel if counsel has been designated for that defendant, by mailing a copy of the document to defendants or defendants' counsel.
2. Plaintiff's motions (Docket Nos. 51, 62) for leave to file an amended complaint are allowed to the extent that plaintiff must identify one operative complaint (one of the proposed amended complaints or a new amended complaint). **Unless plaintiff files a new amended complaint by January 25, 2019,** the second proposed amended complaint (Docket No. 62-1) will be the operative complaint. The Clerk shall send to plaintiff a copy of this Order accompanied by copies of the original complaint and two proposed complaints (Docket Nos. 6, 51-1, 62-1).
3. Defendants' motion (Docket No. 68) is allowed. Defendants shall have sixty days from the date plaintiff identifies the operative amended complaint or, if no response is received from plaintiff, March 26, 2019, to respond to

plaintiff's proposed second amended complaint (Docket No. 62-1).

4. Plaintiff's motion (Docket No. 64) to compel process is denied except (1) the Clerk will be directed to correct the docket to reflect that defendant Vondyes should be identified as Felicitas Fandreyer; and (2) the Clerk shall arrange for service by USMS of a summons, plaintiff's original complaint, and this order on the Attorney General for the United States and Felicitas Fandreyer.

SO ORDERED.

/s/ M. Page Kelley

M. PAGE KELLEY

UNITED STATES MAGISTRATE JUDGE

DATE: December 21, 2018