UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DUSTIN RUOCCO	:	
	:	PRISONER
v.	:	Case No. 3:04cv1561 (SRU)
	:	
DR. OMPREKASH PILLAI, et al.	:	

RULING ON MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

The plaintiff, Dustin Ruocco ("Ruocco"), brings this civil rights action pro se pursuant to 28 U.S.C. § 1915. He alleges that he has been denied proper medical treatment by medical staff at Osborn Correctional Institution for a pre-incarceration injury to his foot. This action covers the period from July 2003 until July 26, 2004, the date the complaint was signed. Pending are Ruocco's motions for temporary restraining order and preliminary injunction. For the reasons that follow, Ruocco's motions are denied.

Ruocco also asks the court to waive the costs of copying these motions. The court has sent copies to the Office of the Attorney General with its request that they respond to the motions. Thus, this request now is moot.

I. Standard of Review

"[I]nterim injunctive relief is an 'extraordinary and drastic remedy which should not be routinely granted.'" Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981) (quoting Medical Society of New York v. Toia, 560 F.2d 535, 538 (2d Cir. 1977)). In addition, a federal

court should grant injunctive relief against a state or municipal official "only in situations of most compelling necessity." Vorbeck v. McNeal, 407 F. Supp. 733, 739 (E.D. Mo.), aff'd, 426 U.S. 943 (1976).

In this circuit the standard for injunctive relief is well established. To warrant preliminary injunctive relief, the moving party "must demonstrate (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor." Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d 738, 743-44 (2d Cir. 2000). Where the moving party seeks a mandatory injunction, i.e., injunctive relief that changes the parties' positions rather than maintains the status quo, or the injunction requested "will provide substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits," the moving party must make a stronger showing of entitlement. Brewer, 212 F.3d at 744 (internal quotation marks and citation omitted). A mandatory injunction "should issue only upon a clear showing that the moving party is entitled to the relief requested" or where "extreme or very serious damage will result from a denial of preliminary relief." Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985) (citations omitted).

Although a showing that irreparable injury will be suffered before a decision on the merits may be reached is insufficient by itself to require the granting of a preliminary injunction, it is nevertheless the most significant condition that must be demonstrated. See Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985). To demonstrate irreparable harm, plaintiff must show an "'injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary

damages.'" Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 153 (2d Cir. 1999) (quoting Rodriguez v. DeBuono, 162 F.3d 56, 61 (2d Cir. 1998)).

Although a hearing is generally required on a properly supported motion for preliminary injunction, oral argument and testimony are not required in all cases. See Drywall Tapers & Pointers Local 1974 v. Local 530, 954 F.2d 69, 76-77 (2d Cir. 1992). Where, as here, "the record before a district court permits it to conclude that there is no factual dispute which must be resolved by an evidentiary hearing, a preliminary injunction may be granted or denied without hearing oral testimony." 7 James W. Moore, et al., Moore's Federal Practice ¶ 65.04[3] (2d ed. 1995). Upon review of the record, the court determines that oral testimony and argument are not necessary in this case.

II. Discussion

Ruocco seeks preliminary injunctive relief in the form of orders (1) that he receive the same medication he had been prescribed before he was incarcerated, (2) that he receive new orthopedic boots and (3) that he be examined by an outside specialist for damage to his left ankle and nerves in his left leg. To demonstrate that he is entitled to an award of preliminary injunctive relief, Ruocco must demonstrate that he is likely to prevail on the merits of his claim or that he will suffer extreme or very serious damage should the motion be denied.

Deliberate indifference by prison officials to a prisoner's serious medical need constitutes cruel and unusual punishment in violation of the Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976). To prevail on such a claim, however, plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate indifference" to a serious medical need. Id. at 106. A prisoner must show intent to either deny or unreasonably delay access to needed medical care or the wanton infliction

of unnecessary pain by prison personnel. See id. at 104-05. Mere negligence will not support a section 1983 claim; the conduct complained of must "shock the conscience" or constitute a "barbarous act." McCloud v. Delaney, 677 F. Supp. 230, 232 (S.D.N.Y. 1988) (citing United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970)).

"Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106. A treating physician will be liable under the Eighth Amendment only if his conduct is "repugnant to the conscience of mankind." Tomarkin v. Ward, 534 F. Supp. 1224, 1230 (S.D.N.Y. 1982) (quoting Estelle, 429 U.S. at 105-06). Inmates do not have a constitutional right to the treatment of their choice. See Dean v. Coughlin, 804 F.2d 207, 215 (2d Cir. 1986). Thus, mere disagreement with prison officials about what constitutes appropriate care does not state a claim cognizable under the Eighth Amendment. See Ross v. Kelly, 784 F. Supp. 35, 44 (W.D.N.Y.), aff'd, 970 F.2d 896 (2d Cir.), cert. denied, 506 U.S. 1040 (1992).

There are both subjective and objective components to the deliberate indifference standard. See Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994), cert. denied sub nom. Foote v. Hathaway, 513 U.S. 1154 (1995). The alleged deprivation must be "sufficiently serious" in objective terms. Wilson v. Seiter, 501 U.S. 294, 298 (1991). In addition, an inmate also must present evidence that, subjectively, the charged prison official acted with "a sufficiently culpable state of mind." Hathaway, 37 F.3d at 66. "[A] prison official does not act in a deliberately indifferent manner unless that official 'knows and disregards an excessive risk to inmate health or safety; the 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. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

Ruocco seeks three specific orders regarding his medical care: prescriptions for the same medications he was taking prior to his incarceration, new orthopedic boots and an independent medical examination of his "good" ankle and sciatic nerve. Ruocco has submitted various medical records in support of his motion and defendants have provided the affidavits of defendant Pillai, currently Roucco's treating physician, and Dr. Fedus, Ruocco's treating podiatrist.

Ruocco first seeks an order that he receive the same medications that he was prescribed in 1999, before his incarceration. The evidence provided by the parties indicates that the medical professionals have prescribed various medications, both narcotic and non-narcotic, to treat Ruocco's pain with varying success. At various times, Ruocco has been prescribed some of the medications he received prior to incarceration at various times during his incarceration. The records reveal, however, that at no time since his incarceration has Ruocco been prescribed the medications he now seeks. Further, Ruocco has not presented evidence suggesting that he can be treated effectively only with the same medications that he received before he was incarcerated. Thus, the court concludes that Ruocco fails to present any evidence suggesting that he is likely to prevail on the merits of this claim or that he will suffer extreme or serious damage should this request be denied.

Regarding his second request, Ruocco states that his boots are two years old and are not providing the same support that they did when he first received them. Dr. Fedus examined Ruocco on October 4, 2004. He noted that Ruocco's current footwear consisted of extra-depth boots with an orthotic insert, not orthopedic boots. Dr. Fedus found the current footwear to be in good condition and affirmed his view that this footwear, not orthopedic boots, was the best treatment for Ruocco's condition. Dr. Fedus concluded that there was no reason why Ruocco would need new orthopedic

boots at this time. Ruocco has provided no medical evidence to contradict Dr. Fedus' opinion. Accordingly, the court concludes that Ruocco has not shown that he is likely to prevail on the merits of this claim or that he will suffer extreme or serious damage should this request be denied.

Ruocco's final request is for an independent medical examination of his "good ankle." He alleges that he suffers sciatic pain in his good leg as a result of putting all of his weight on the good leg. Ruocco has presented no evidence to support a need for such medical examination. The exhibits attached to the complaint reveal that defendant Pillai was to meet with Ruocco regarding the claims of damages to his leg and ankle. Ruocco has not, however, provided the results of that examination or any medical records in which he seeks treatment for the leg and ankle. Thus, Ruocco has made no showing that he will suffer irreparable harm should this request for examination be denied.

III. Conclusion

Ruocco's motions for temporary restraining order and preliminary injunction [**docs. #3 & #4**] are **DENIED**. In addition, Ruocco's motion that the court waive copy costs for his motions [**doc. #5**] is **DENIED** as moot.

SO ORDERED in Bridgeport, Connecticut, this 2nd day of November 2004.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge