

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE A. JACKSON,)
)
 Plaintiff,)
)
 v.)
)
 KEITH IVENS, M.D.,) C.A. No. 01-559-KAJ
 and PRISON HEALTH SERVICES)
)
 Defendants.)

MEMORANDUM OPINION

George A. Jackson, SCI, P. O. Box 500, Georgetown, Delaware 19947; Plaintiff *pro se*

Robert Karl Beste, III, Esq., White & Williams, P.O. Box 709, Wilmington, Delaware;
Counsel for Defendants Keith Ivans, M.D. and Prison Health Services

Stuart B. Drowos, Esq., Department of Justice, 820 N. French Street, 8th Fl.,
Wilmington, Delaware 19801; Counsel for Defendants Stanley Taylor, Rick Kearney and
the Delaware Department of Corrections

March 31, 2004
Wilmington, Delaware

JORDAN, District Judge

I. Introduction

George A. Jackson (“Plaintiff”) is a *pro se* litigant who is presently incarcerated at the Sussex Correctional Institution (“SCI”) in Georgetown, Delaware. (D.I. 80 at ¶ 2.) The defendants are Keith Ivens’ (“Dr. Ivens”) and Prison Health Services (“PHS”) (collectively the “Defendants”). Plaintiff filed this action under 42 U.S.C. § 1983 and the Delaware Code for violation of his Eighth Amendment rights and breach of contract. (*Id.* at ¶¶ 18-24.) Presently before the Court is Plaintiff’s Motion for Leave to File an Amended Complaint (Docket Item [“D.I.”] 79), Motion for Subpoena Duces Tecum (D.I. 81), and Motion for Partial Summary Judgment (D.I. 83). Also before the Court is Defendants’ Motion for Summary Judgment (D.I. 89). The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. For the reasons that follow, Plaintiff’s motions are denied and Defendants’ motion is granted.

II. Background

Plaintiff alleges that he developed “expanding neck mass,” which “is a clinical sign[] of a significant injury,” and was referred to Dr. Ivens for a surgical biopsy. (D.I. 80 at ¶ 8.) Plaintiff asserts that in or around November 18, 1999, Dr. Ivens became aware of his “neck mass” and gave Plaintiff the option of six months of observation or an excisional biopsy. (*Id.* at ¶ 9.) Plaintiff claims that he was scheduled to have surgery (i.e., the biopsy) on or about December 16, 1999, the date of Dr. Ivens next visit to SCI, but the surgery was not performed. (*Id.*) On April 28, 2000, Plaintiff filed a grievance

requesting that prison medical staff take a “culture ... from my sinuses and give[] the appropriate antibiotic ... [and take] CT and MRI [scans].” (D.I. 94 at 1-2, see *also* Ex. A). On July 26, 2000, Plaintiff filed a second grievance requesting additional cultures and evaluation by an outside physician. (*Id.* at 2, see *also* Ex. B.) On or about August 16, 2000, Plaintiff states that Dr. Ivens performed his surgery. (D.I. 80 at ¶ 11.) On July 31, 2001, Plaintiff brought this action against the Defendants for the undue injury that was caused to him by having his surgery delayed for approximately ten months. (D.I. 80 at ¶¶ 1, 12.)

Plaintiff contends that, as the Medical Director for the Delaware Department of Corrections (the “DOC”), Dr. Ivens “was responsible for the establishment of policies ... for providing for the medical needs of the Plaintiff and other inmates of the various prisons of the [DOC].” (*Id.* at ¶ 5.) Plaintiff asserts that at the time relevant to his complaint, PHS, a managed health care services provider, was under contract with the DOC “for carrying out DOC’s responsibilities to provide reasonable medical services” to inmates. (*Id.* at ¶ 6.)¹ Plaintiff claims that the Defendants violated his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment because they “intentionally denied” and “unreasonabl[y] delay[ed] in performing” Plaintiff’s surgery, which “constitutes outrageous, intentional, wanton and malicious conduct and is indicative of Defendants’ total reckless disregard of and deliberate indifference to the Constitutional rights of the Plaintiff,” and was “beyond that which is acceptable in

¹Plaintiff claims that PHS’s contract with the DOC to provide medical care to inmates expired on June 30, 2000 (D.I. 80 at ¶ 10) and that Dr. Ivens performed the surgery on Plaintiff as an employee of Correctional Medical Services (“CMS”) (*Id.* at ¶ 11). Plaintiff does not bring suit against CMS.

civilized society.” (*Id.* at ¶¶ 19, 21-22.) Plaintiff also alleges that “PHS has breached its contract with DOC” pursuant to 6 Del. C. § 2701 et. al. “by failing to provide the medical service required by the contract, thereby causing injury to plaintiff-inmate, who is [an] intended third-party beneficiary of the contract.” (*Id.* at 24.) Plaintiff seeks actual damages, punitive damages and costs. (*Id.* at ¶¶ 25-28.)

III. Discussion

A. Motion for Leave to File an Amended Complaint

Plaintiff filed a Motion for Leave to File an Amended Complaint (D.I. 79) on the same day he filed the Amended Complaint (D.I. 80.) In this motion, Plaintiff does not seek to amend the Complaint that he contemporaneously filed, rather, he appears to explain what the Amended Complaint “correctly shows.” (D.I. 79 at ¶¶ 7-9.) Because I have previously granted Plaintiff’s motions to amend the Complaint (D.I. 73), and Plaintiff does not appear to be making a motion to amend the Amended Complaint that he filed on the same day that he filed this motion, Plaintiff’s Motion for Leave to File an Amended Complaint will be denied as moot.

B. The Motions for Summary Judgment

Prior to bringing a claim under 42 U.S.C. § 1983, an inmate must first exhaust the administrative remedies available to him pursuant to the Prison Litigation Reform Act of 1996 (“PLRA”). The PLRA provides that:

[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as available are exhausted.

42 U.S.C. § 1997e(a). See also *Nyhuis v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000); *Booth v. Churner*, 206 F.3d 289, 295 (3d Cir. 2000). Prison conditions have been defined to include the services provided to the prisoner. *Booth*, 206 F.3d at 191. Therefore, Plaintiff's complaint about the Defendants' delay in performing his surgery is subject to the exhaustion of remedies requirement under § 1997e(a).

Delaware's Department of Corrections ("DOC") has established administrative procedures that an inmate must follow for the presentation and resolution of medical grievances. (D.I. 89 at Ex. B, p. 6). DOC policy 4.4 provides that an inmate must first file a grievance with the Inmate Grievance Chair ("IGC"). (*Id.*) The grievance is then forwarded to the medical staff for review, and if action needs to be taken, the medical staff is required to attempt an informal resolution of the grievance with the inmate. (*Id.*) The Medical Grievance Committee ("MGC") conducts a hearing if the grievance cannot be resolved informally, and if the hearing decision does not satisfy the inmate, the inmate must complete a MGC Appeal Statement, which is then submitted to the Bureau Grievance Officer ("BGO"). (*Id.* at 6.) The BGO then recommends a course of action to the Bureau Chief of Prisons, who renders a final decision. (*Id.* at 7.)

Plaintiff submitted grievances on April 28, 2000 and July 26, 2000, and argues, that by submitting these grievances, he "fully exhausted the Administrative process." (D.I. 94 at Ex. A, B; D.I. 91 at ¶¶ 5-10.) Plaintiff's argument is not well founded because neither of Plaintiff's grievances are related to the allegation in his complaint that the Defendants' violated his Eighth Amendment right for the delay in performing his surgery. Plaintiff's April 27, 2000 grievance requested the prison medical staff to take a "culture

... from my sinuses and give[] the appropriate antibiotic ... [and take] CT and MRI [scans].” (D.I. 94 at Ex. A.) Plaintiff’s July 26, 2000 grievance requested to “have a gram stain [sic] and bacterial and fungal culture performed on infected area of neck sinuses and head.” (*Id.* at Ex. B) Because Plaintiff’s grievances are unrelated to the delay in the performance of surgery, the filing of these grievances do not satisfy the DOC requirements, and Plaintiff has thus failed to initiate any administrative procedures, let alone exhaust his administrative remedies as required by the PLRA.

Plaintiff also appears to argue that he should be excused from following the necessary administrative procedures because the Defendants, pursuant to DOC policy 4.4, did not conduct hearings on his grievances. (D.I. 91 at ¶¶ 5-10.) However, notwithstanding the lack of relation between the grievances and his Complaint, Plaintiff accepted an informal resolution of the April 28, 2000 grievance (D.I. 94 at Ex. A), and the July 26, 2000 grievance was apparently resolved by surgery (*Id.* at Ex. B). Therefore, hearings were not necessary, and thus, the Defendants did not violate DOC policy 4.4. (See D.I. 89 at Ex. C.)

As discussed above, Plaintiff alleges that, as a third-party beneficiary, he has been injured by PHS’ breach of contract with the DOC to provide medical services to inmates. The Third Circuit has held that once all claims with an independent basis of federal jurisdiction have been dismissed, the case is no longer properly in federal court. See *Lovell Mfg. Corp. v. Export-Import Bank of the United States*, 843 F.2d 725, 734 (3d Cir.1988); *Markowitz v. Northeast Land Co.* 906 F.2d 100, 106 (3d Cir.1990). See also *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“if the federal

claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well”). Because Plaintiff’s § 1983 claims will be dismissed, I will dismiss Plaintiff’s state law claims without prejudice. Accordingly, Plaintiff’s Motion for Partial Summary Judgment will be denied and the Defendants’ Motion for Summary Judgment will be granted.

C. Motion for Subpoenas Duces Tecum

Because the Defendants’ Motion for Summary Judgment will be granted, Plaintiff’s Motion for Subpoenas Duces Tecum will be denied as moot.

IV. Conclusion

For the reasons set forth above, Plaintiff’s Motion for Leave to File an Amended Complaint (D.I. 79) will be DENIED, Plaintiff’s Motion for Subpoena Duces Tecum (D.I. 81) will be DENIED, and Motion for Partial Summary Judgment (D.I. 83) will be DENIED. The Defendants’ Motion for Summary Judgment (D.I. 89) will be GRANTED. The Plaintiff’s state law claims are dismissed without prejudice.

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ORDER

For the reasons stated in the Memorandum Opinion issued today,
IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File an Amended Complaint (D.I. 79) is DENIED, Plaintiff's Motion for Subpoena Duces Tecum (D.I. 81) is DENIED, and Motion for Partial Summary Judgment (D.I. 83) is DENIED. The Defendants' Motion for Summary Judgment (D.I. 89) is GRANTED. The Plaintiff's state law claims are dismissed without prejudice.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

March 31, 2004
Wilmington, Delaware