

IP 06-1387-C H/K Gottlieb v USA
Judge David F. Hamilton

Signed on 04/04/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|----------------------------|---|---------------------------|
| AVRAM GOTTLIEB, |) | |
| |) | |
| Plaintiff, |) | |
| vs. |) | NO. 1:06-cv-01387-DFH-TAB |
| |) | |
| UNITED STATES OF AMERICA |) | |
| FEDERAL BUREAU OF PRISONS, |) | |
| |) | |
| Defendant. |) | |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AVRAM GOTTLIEB,)
)
 Plaintiff,)
)
 v.) CAUSE NO. 1:06-CV-1387-DFH-TAB
)
 UNITED STATES OF AMERICA)
 (Federal Bureau of Prisons),)
)
 Defendant.)

ENTRY ON DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

When plaintiff Avram Gottlieb was an inmate of the United States Penitentiary in Terre Haute, Indiana (“USP”), he suffered a detached retina in his right eye. He brought a negligence action against the United States of America pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671-80. Mr. Gottlieb alleges, among other theories, that the prison guards who accompanied him to the hospital knew or should have known that his emergency could not be treated at the hospital to which they brought him. Mr. Gottlieb originally filed the action in New Jersey, where he is now an inmate in a state prison. The case was transferred to this district because the relevant events occurred here. The government has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. Mr. Gottlieb responded that the motion should be denied without prejudice pursuant to Federal Rule of Civil Procedure 56(f) because he has not yet

had a reasonable opportunity for discovery. For the reasons below, the government's motion is denied without prejudice on two issues and denied on the merits on the third issue.

Alleged Facts

Mr. Gottlieb was housed in the USP in October 2002. Compl. ¶ 7. The USP has a medical clinic on site, but for services beyond the medical expertise of those who worked in the medical clinic, the USP contracted with Terre Haute Regional Hospital ("Regional Hospital"). Compl. ¶¶ 9-10. On October 22, 2002, Mr. Gottlieb began experiencing vision problems. Compl. ¶ 11. The next day, after some controversial delays, he reported to the medical clinic. Prison officials took him to the emergency room at Regional Hospital within a couple of hours. Compl. ¶¶ 12, 14. Physicians at Regional Hospital examined him but were unable to have an ophthalmologist examine him until the next morning. Mr. Gottlieb was admitted overnight, and prison guards remained with him. Compl. ¶¶ 28-30. Mr. Gottlieb did not see an ophthalmologist until about 11 a.m. on October 24, 2002, about 18 hours after he first arrived at Regional Hospital. The ophthalmologist, Dr. McGlothan examined Mr. Gottlieb and immediately referred him to a retina specialist, Dr. Kim, who performed an emergency retina reattachment surgery in Indianapolis. Compl. ¶¶ 32, 34. Mr. Gottlieb alleges that the delays he experienced caused the surgery to be less successful than it would have been if he had received faster treatment. He alleges that the government was negligent

in a number of respects, including failing to provide staff qualified to diagnose his condition, failing to ensure that his conditions was treated urgently, failing to ensure that a qualified ophthalmologist was available to treat him, and failing to ensure that Regional Hospital's staff treated his condition urgently.

Discussion

In response to the complaint, the government has moved for summary judgment. After clearing away some preliminary issues, the government now seeks summary judgment on three grounds: (1) Regional Hospital is an independent contractor, so that the FTCA does not apply to Mr. Gottlieb's treatment there; (2) Mr. Gottlieb was contributorily negligent; and (3) Mr. Gottlieb's claim is barred by the discretionary function exemption to the FTCA. Mr. Gottlieb has responded by arguing that he needs relief under Rule 56(f) and an opportunity to take discovery, at least on the independent contractor and discretionary function issues.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

“A party seeking the protection of Rule 56(f) must make a good faith showing that it cannot respond to the movant’s affidavits. The rule requires the filing of an affidavit stating the reasons for a claimant’s inability to submit the necessary material to the court.” *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1057-58 n.5 (7th Cir. 2000), citing *United States v. All Assets & Equipment of West Side Bldg. Corp.*, 58 F.3d 1181, 1190 (7th Cir. 1995). To justify a delay under Rule 56(f), the party’s failure to secure discovery cannot be due to his own lack of diligence. *Id.* The party requesting relief pursuant to Rule 56(f) “is under an obligation to bring the issue before the court in an expeditious manner,” *id.*, and Mr. Gottlieb has done so in this case.

The court agrees with Mr. Gottlieb that an opportunity for discovery should be authorized pursuant to Rule 56(f). Mr. Gottlieb has met his burden under Rule 56(f) by showing there is a reasonable prospect that he may discover relevant evidence as to the existence of genuine issues of material fact regarding the independent contractor and discretionary function issues.

Before addressing those issues, the court disposes of the government’s affirmative defense of contributory negligence. Under the FTCA, Indiana law applies to Mr. Gottlieb’s claim because the alleged negligence occurred in Indiana. See 28 U.S.C. § 1346(b)(1). The issue is whether the federal government, “if a private person, would be liable to the claimant” in accordance with Indiana law. Claims of negligence against private persons in Indiana are not subject to the

defense of contributory negligence. Such claims are governed by the Indiana Comparative Fault Act, Ind. Code § 34-51-2-5, which was designed to abrogate the harshness of the common law rule of contributory negligence. *Brumfiel v. United States*, 2005 WL 4889255, *8 (S.D. Ind. Oct. 25, 2005) (Tinder, J.), quoting *Koziol v. Vojvoda*, 662 N.E.2d 985, 988 (Ind. App. 1996); *In re Greenwood Air Crash*, 924 F. Supp. 1518, 1534 (S.D. Ind. 1995) (applying comparative fault to tort claim against federal government). Obviously, then, the government could not be entitled to summary judgment on a theory of contributory negligence even if the government had supported its motion with evidence conclusively showing fault on the part of Mr. Gottlieb, which it did not.¹

Turning to the more substantive issues of independent contractor status and the discretionary function exemption, a district court may not grant summary judgment if the non-moving party has not had a fair opportunity to conduct discovery needed to show the existence of a genuine issue of material fact. See *Farmer v. Brennan*, 81 F.3d 1444, 1450-51 (7th Cir. 1996) (reversing summary judgment; district court abused discretion by denying plaintiff an opportunity to seek needed discovery); see generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (affirming summary judgment granted after parties had conducted discovery; plaintiff had not been “railroaded” by a premature motion, but had

¹The briefing on this issue was done by the United States Attorney’s office for the District of New Jersey.

failed to come forward with evidence needed to prove essential element of the case).

The government filed its motion in this case before the parties had held a discovery conference under Rule 26(f). By its terms, therefore, Rule 26(d) of the Federal Rules of Civil Procedure barred discovery. The parties have taken no discovery except a voluntary exchange of documents because the court has not authorized discovery yet. The complaint alone does not show that Mr. Gottlieb's claim is barred by either the independent contractor defense or the discretionary function exemption under the FTCA. Mr. Gottlieb is entitled to take discovery needed to address those issues. He has not neglected to take advantage of a reasonable opportunity for discovery.

Mr. Gottlieb has also carried his Rule 56(f) burden by showing that, with proper discovery, there is a reasonable prospect that he may discover relevant evidence showing the existence of a genuine issue of material fact on the independent contractor or discretionary function issues.

The FTCA applies to torts committed by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); see also *Logue v.*

United States, 412 U.S. 521, 529-30 (1973) (federal government not liable under FTCA for alleged wrongdoing by employees of county jail that contracted to house federal prisoners). Accordingly, Mr. Gottlieb must frame his claim against the government in terms of acts or omissions of government employees. He has done so in his complaint. Deciding whether he can prove negligence by government employees must await a fair opportunity for discovery on these issues.

The FTCA also excludes any claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . .” 28 U.S.C. § 2680(a). To attempt to avoid application of the discretionary function exception, Mr. Gottlieb has shown, he needs discovery that may reveal whether any mandatory policies, rules, regulations or procedures were in effect regarding care for inmates in his position, particularly as an inmate needing specialized emergency medical care that was not readily available at the hospital where he was taken. See *Palay v. United States*, 349 F.3d 418, 428-30 (7th Cir. 2003) (reversing dismissal of prisoner’s negligence claim; application of discretionary function exception would require consideration of evidence beyond plaintiff’s complaint).

Given the lack of opportunity for discovery and some showing that discovery might lead to the discovery of relevant evidence on the key issues, denying Mr. Gottlieb’s Rule 56(f) request would deprive him of his opportunity to come forth with evidence of an issue of material fact. See *Harris v. Pate*, 440 F.2d 315, 318-

19 (7th Cir. 1971) (Stevens, J.) (reversing summary judgment; district court abused discretion by denying Rule 56(f) request for time to obtain affidavits: “The right to respond by affidavit or otherwise cannot be denied merely because the trial judge believes that plaintiff’s claim is insubstantial or frivolous.”). Accordingly, the court denies without prejudice the government’s motion for summary judgment on the independent contractor and discretionary function issues.

Conclusion

For the foregoing reasons, the court denies the government’s motion for summary judgment without prejudice on the issues of whether the independent contractor and discretionary function exceptions to the waiver of sovereign immunity in the FTCA apply. The court denies summary judgment on the issue of contributory negligence. Counsel shall promptly confer on a proposed case management plan and shall submit such a plan no later than April 30, 2007.

So ordered.

Date: April 4, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Jeffrey L. Hunter
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
jeff.hunter@usdoj.gov

David J. Cutshaw
Cohen & Malad, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
dcutshaw@cohenandmalad.com

Brian E. Appel
Law Office of Brian E. Appel
230 South Broad Street, Suite 304
Philadelphia, PA 19102
appelesq@comcast.net