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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
Urbana Division

CAUIRECE HERNDON,

Plaintiff,

v.

TIMOTHY F. BUKOWSKI, et al.,

Defendants.

Case No. 16-2148

ORDER

Defendants Timothy F. Bukowski, Chad Kolitwenzew, Brent Huffines, and Heather Gill (collectively "Defendants") filed a Motion for Summary Judgment (#39) to which Plaintiff filed a Response (#42). Defendants in turn filed a Reply (#43). For the reasons discussed below, the Court grants summary judgment to Defendants.

I. Background

Before the Court recounts the background facts, it must first determine what facts constitute the "undisputed material facts." Local Rule 7.1(D) of the Central District of Illinois states that "[a]ny filing not in compliance" with the requirements of the local rule on summary judgment motions "may be stricken by the court." Regarding motions for summary judgment, Rule 7.1(D)(1)(b) requires that the movant "[l]ist and number each undisputed material fact which is the basis for the motion for summary judgment[,]" and that for each fact asserted, the movant is to "provide citations to the documentary evidence that supports it, appropriately referencing the exhibit and page." Under Rule 7.1(D)(2)(b)(1), respondents to the motion for summary judgment must "[l]ist by number each fact from Section B of the motion for summary judgment which is conceded to be undisputed and material[,]" and, if the respondent disputes any of the movant's facts, Rule 7.1(D)(2)(b)(2) requires him to list by number each fact "which is conceded to be material but is claimed to be disputed," and further requires that "[e]ach claim of

disputed fact must be supported by evidentiary documentation referenced by specific page." Local Rules 7.1(D)(2)(b)(3), (4), and (5) contain similar requirements for disputed immaterial facts, undisputed immaterial facts, and additional facts. Rule 7.1(D)(2)(b)(6) notes that "[a] failure to respond to any numbered facts will be deemed an admission of the fact."

Plaintiff has failed to properly respond to Defendants' statement of undisputed material facts under the local rules. Plaintiff's Response includes two "Points" under which he argues that Plaintiff had a serious medical need and Defendants acted with deliberate indifference. Plaintiff does not list any of Defendants' facts by number, and does not specifically refer to Defendants' facts and what he disputes about them. Moreover, Plaintiff does not respond to a single fact Defendants alleged. Instead, Plaintiff's response is essentially a jumble of paragraphs mixing fact and argument.

Plaintiff is proceeding pro se, and this court has treated Plaintiff with the leniency usually accorded to pro se parties in federal court. *Pearle Vision, Inc. v. Romm*, 541 F.3d 751, 758 (7th Cir. 2008). However, even pro se parties must comply with local rules in the absence of good cause. *Garcia v. Illinois State Police*, 545 F.Supp.2d 823, 836 (C.D. Ill. 2015). It is also well established that pro se litigants are not excused from compliance with procedural rules:

> [P]ro se litigants are presumed to have full knowledge of applicable court rules and procedures. Therefore, although the plaintiff is proceeding pro se, he must follow the Federal Rules and procedural rules of the Central District of Illinois. See *Metro Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002). The defendants are correct Local rules serve an important function in the summary judgment process. "Such rules assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side proposed to prove a disputed fact with admissible evidence." *Bordelon v. Chicago Sch. Reform Bd. Of Trustees*, 233 F.3d 524, 527, citing *Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999). The Seventh Circuit has consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules governing summary judgment." *Bordelon v. Chicago Sch. Reform Bd. of Trustees*, 233 F.3d 524, 527 (7th Cir. 2000) (upholding the district court's decision to strike response in its entirety rather than selectively due to failure to comply with local rules);

Midwest Imports, Ltd. v. Coval, 71 F.3d 1311, 1316 (7th Cir. 1995); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994) (collecting cases).

Moralis v. Flageole, 2007 WL 2893652, at *3 (C.D. Ill. Sept. 28, 2007).

Here, Plaintiff did not respond to a single disputed fact. Further, Plaintiff did not propose any competing facts. Therefore, pursuant to Rule 7.1(D)(2)(b)(6), the court deems all of Defendants' undisputed material facts to be admitted.[1]

Factual Background

Plaintiff, a former federal pre-trial detainee at the Jerome Combs Detention Center ("JCDC") filed his Complaint pursuant to 42 U.S.C. § 1983 against Defendants, alleging they were deliberately indifferent to his serous medical need. The Complaint alleges that Defendants failed to schedule him for a nerve surgery to repair a damaged nerve in his arm, resulting in a delay of surgery and causing irreparable damage.

Defendants include Kankakee County Sheriff Timothy Bukowski, Chief of Corrections Chad Kolitwenzew, Nurse Heather Gill, and Physician's Assistant Brent Huffines.[2] Bukowski and Kolitwenzew were supervisors at JCDC at the time of the events. Huffines and Gill were members of JCDC's medical staff.

On May 10, 2014, Plaintiff was injured after his sister slashed him with a knife. Plaintiff's wife took him to the emergency department at Mount Sinai Hospital in Chicago due to the resulting deep laceration approximately 8 cm long on his right forearm. Plaintiff's radial, median, and ulnar nerves and radial and ulnar arteries in his right forearm were severed. Two physicians, Dr. Katz and Dr. Kaymakcalan, performed emergency surgery. Dr. Kaymakcalan repaired the radial nerve to Plaintiff's right arm during the emergency surgery. Dr. Katz repaired the radial and ulnar arteries in Plaintiff's forearm. Due to the length of the surgery, and the risk of injuring arteries, Dr.

[1] Defendants treated statements made by Plaintiff at his deposition to be undisputed material facts. The Court will do the same in its ruling. These facts come from Plaintiff's deposition, Dr. Kaymakcalan's deposition, Plaintiff's medical record, and the affidavits of Brent Huffines, Heather Gill, Chad Kolitwenzew, and Timothy F. Bukowski.

[2] Plaintiff also named Angie Kemps and Ken Robinson as Defendants, but the Court dismissed these Defendants in its Merit Review Order (#39). Plaintiff named Gill under her former name, Heather Pasel. The Merit Review Order left a single claim: deliberate indifference to a serious medical need against Huffines, Gill, Kolitwenzew, and Bukowski.

Kaymakcalan chose not to operate on the median and ulnar nerves. In the weeks following the surgery, Plaintiff had several dressing changes, which were considered in-patient surgical procedures requiring anesthesia, as well as skin grafts. Dr. Kaymakcalan testified that Plaintiff would need a future nerve surgery on his hand, but they were waiting for Plaintiff's wounds to heal. According to Dr. Kaymakcalan, this subsequent surgery would occur two to three months after the initial surgery.

On July 22, 2014, Dr. Kaymakcalan saw Plaintiff and scheduled him for explorative surgery on August 11, 2014. Dr. Kaymakcalan stated that the surgical procedure was exploratory in nature. Any resulting action would depend on Plaintiff's healing from the first surgery, and the options included performing a nerve graft, reattachment, or transfer.

Plaintiff was arrested on federal drug conspiracy charges on August 7, 2014, and was incarcerated at JCDC. As a result, he missed the appointment for his surgery on August 11, 2014.

Plaintiff's intake record at JCDC reported Plaintiff's arm injury and prescriptions for Gabapentin, Norco, and ibuprofen. Seven days after Plaintiff arrived at JCDC, physician assistant Brent Huffines ("Huffines") examined Plaintiff. Plaintiff informed Huffines that he had been stabbed three months prior and that he had been treated at Mount Sinai Hospital. Plaintiff told Huffines of his first surgery and that he had missed his second surgery scheduled for August 11, 2014. Huffines noted Plaintiff's wound and found limited range of motion. Plaintiff began receiving his medications on this same day. Huffines instructed his staff to obtain Plaintiff's medical records from Mount Sinai dating back to May 2014.

Nurse Heather Gill had Herndon complete a medical records release form. Gill faxed the form requesting Herndon's records from Mount Sinai on August 19, 2014. Gill logged the request for records on the same day.

On August 20, 2014, Huffines treated Plaintiff for a blister caused by his arm brace.

On August 24, 2014, Plaintiff submitted a medical request in which he complained that he was not receiving Gabapentin three times daily. Gill informed Plaintiff that JCDC

policy provided for twice daily medication delivery and that he could supplement his medication with over the counter ibuprofen.

On August 29, 2014, Plaintiff submitted a medical request due to increased pain in his arm. In response, Huffines increased Plaintiff's Gabapentin prescription on September 2, 2014.

On September 2, 2014, Mount Sinai had not sent Plaintiff's medical records, so Gill re-faxed the medical release request to the hospital. Gill noted they were in "constant communication" with Plaintiff about the difficulty they were experiencing in obtaining his record. On multiple occasions, Gill asked Plaintiff for the name of his surgeon so they could seek his surgery and after-care records. Gill further explained that the medical department sought to communicate with Plaintiff's surgeon about whether Plaintiff should be rescheduled for the surgery he missed. Plaintiff failed to provide the name of his surgeon.

The medical staff's plan for Plaintiff's treatment was to refer him to his original surgeon for development of a treatment plan. The medical staff planned to treat Plaintiff with medication until they heard back from the surgeon.

On September 11, 2014, Plaintiff submitted another medical request complaining of fluid build-up around his arm wound and was seen the next day by Huffines. Huffines noted swelling, but Plaintiff did not complain of changes in sensation or range of motion and Huffines did not change the treatment plan.

Also in September, Plaintiff filed grievances and complained about the twice daily delivery of his medication and asked that his medication be left with his housing officer unit because the medication was wearing off too quickly. The medical staff denied the request and reminded Plaintiff of the JCDC policy. The staff increased Plaintiff's Gabapentin dose.

On November 10, 2014, Huffines saw Plaintiff in the clinic and based on Plaintiff's pain complaints, Huffines increased the Gabapentin dose again and directed Plaintiff to receive physical therapy. Huffines informed Plaintiff that they were still attempting to obtain his medical records so that Plaintiff could be referred back to his original surgeon.

On November 22, 2014, Plaintiff filed another grievance related to his arm. Gill informed Plaintiff that they were still attempting to get his records and again asked him the name of his surgeon, which Plaintiff failed to provide.

On November 29, 2014, Plaintiff filed another grievance complaining about the medical staff's response to the November 22, 2014 grievance.

On December 3, 2014, the medical department received Plaintiff's medical records from Mount Sinai and discovered that Dr. Kaymakcalan was Plaintiff's surgeon. Gill attempted to contact Dr. Kaymakcalan's office "multiple times" and asked for information about Plaintiff's surgery and after-care. Huffines recalled his staff telling him that they were having a difficult time getting ahold of Dr. Kaymakcalan's office.

On January 18, 2015, Plaintiff submitted a grievance to Chief Kolitwenzew regarding his medical care and requesting a transfer. Chief Kolitwenzew contacted the medical department and they informed Kolitwenzew that they had received Plaintiff's medical records, but had not been able to reach Dr. Kaymakcalan's office.

On January 29, 2015, Gill received a call from Dr. Kaymakcalan's office. Gill reports that Dr. Kaymakcalan's office informed her that Plaintiff would not be rescheduled for surgery at that time due to his incarceration, instead his surgery could wait until he left the facility at which point he should make an appointment directly with Dr. Kaymakcalan's office. This information is supported by a log note made by Gill on January 29, 2015.

Gill reported this information to Huffines who informed Plaintiff that he would not be referred out to Dr. Kaymakcalan for surgery, and that his treatment plan would include pain management and physical therapy.

Gill began contacting outside providers to schedule Plaintiff for physical therapy, but then Plaintiff was transferred out of JCDC on March 26, 2015.[3]

Dr. Kaymakcalan testified that his staff handles all record requests and that he personally did not handle Plaintiff's record requests. According to Dr. Kaymakcalan,

[3] Plaintiff was transferred to the Metropolitan Correctional Center (MCC). Plaintiff did not raise claims against MCC or its staff in his Complaint.

Plaintiff's chart included "a lot of requests of(sic) forms" which would have been handled by his secretaries. Dr. Kaymakcalan did not know if the jail had called his office in December 2014, but Plaintiff's records included a note from the nursing staff that the jail had called regarding Plaintiff's care on January 29, 2015.

Dr. Kaymakcalan started seeing Plaintiff again in September 2015. Dr. Kaymakcalan evaluated Plaintiff and ordered an EMG nerve test. Plaintiff did not appear for the nerve test scheduled on November 17, 2015, and it was rescheduled for February 2016. Dr. Kaymakcalan next saw Plaintiff in May and July 2016, at which time Dr. Kaymakcalan changed the treatment plan to an alternative tendon surgery.

On December 9, 2016, Dr. Kaymakcalan performed the tendon transfer surgery to give function to Plaintiff's thumb and index fingers. The surgery was successful and Plaintiff regained some function in his right hand.

Dr. Kaymakcalan gave several reasons for his decision to do the tendon surgery instead of the prior scheduled nerve surgery. Dr. Kaymakcalan noted that the two year delay after the first surgery was one influencing factor, but he also considered that results from nerve surgeries are "not very accurate," the tendon surgery allowed for a much faster healing and progress; and the fact that Plaintiff had shown improvement in his function since the first surgery.

Dr. Kaymakcalan estimated that 60% of surgeons in the Chicago area would not have performed the planned August 11, 2014 surgery as it was "very difficult" and "not done everywhere." Dr. Kaymakcalan noted that the surgery "could have given him some more function, but not necessarily the hundred percent." Dr. Kaymakcalan acknowledged that the "earlier the better" for the surgery and it could not have waited five years due to atrophy. In the end, Dr. Kaymakcalan opined that he was not certain whether Plaintiff's recovery would have been any better if he had had the initial surgery.

Plaintiff also sued former Sheriff Timothy Bukowski and Chief of Corrections Chad Kolitwenzew. Neither Bukowski and Kolitwenzew saw or spoke with Plaintiff during his incarceration at JCDC. Both Defendants testified that they had no personal involvement in the medical decisions or medical care given to Plaintiff. Chief

Kolitwenzew noted that he responded to one grievance submitted by Plaintiff. This grievance requested a transfer due to "constant pain" and "missed surgery appointments." Kolitwenzew testified that he followed up with the JCDC medical department who informed him that they had been calling Plaintiff's doctor's office with no return calls and that they would continue to try and reach the doctor. Other than Kolitwenzew's knowledge of this single grievance, neither Bukowski nor Kolitwenzew had first-hand knowledge of any complaints made by Plaintiff.[4]

II. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A movant may demonstrate the absence of a material dispute through specific cites to admissible evidence, or by showing that the nonmovant "cannot produce admissible evidence to support the [material] fact." FED. R. CIV. P. 56(c)(B). If the movant clears this hurdle, the nonmovant may not simply rest on his or her allegations in the complaint, but instead must point to admissible evidence in the record to show that a genuine dispute exists. *Id*.; *Harvey v. Town of Merrillville*, 649 F.3d 526, 529 (7th Cir. 2011). "In a § 1983 case, the plaintiff bears the burden of proof on the constitutional deprivation that underlies the claim, and thus must come forward with sufficient evidence to create genuine issues of material fact to avoid summary judgment." *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010).

At the summary judgment stage, the evidence is viewed in the light most favorable to the nonmovant, with material factual disputes resolved in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A genuine dispute of material fact exists when a reasonable juror could find for the nonmovant. *Id*. However, only admissible evidence may be considered. *Baines v. Walgreen Co.*, 863 F.3d 656 (7th Cir. 2017)

[4] Plaintiff testified that he wrote Bukowski grievances, but that he did not receive an answer from Bukowski. Bukowski testified that he was not personally involved with reviewing or responding to grievances submitted by Plaintiff.

("Evidence offered at summary judgment must be admissible to the same extent as at trial, . . .").

III. Analysis

Section 1983 creates civil liability for anyone who "under color of any statute, ordinance, regulation, custom, or usage…subjects…any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Ordinarily, the liberties secured by the Bill of Rights create no positive obligation on behalf of state agents to act or intervene to provide help or medical assistance. *See DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). However, courts have long recognized an exception: when the government incarcerates people, rendering them unable to protect themselves or to provide for their own health, the Eighth Amendment's ban on cruel and unusual punishment prohibits the government from acting with deliberate indifference to serious threats to their health or safety. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This protection is extended to pretrial detainees under the Due Process Clause of the Fourteenth Amendment. *See Chapman v. Kaltner*, 241 F.3d 842, 845 (7th Cir. 2001).

a. Defendants Bukowski and Kolitwenzew

Plaintiff's Complaint raises § 1983 claims against Bukowski and Kolitwenzew in their individual capacities. Bukowski and Kolitwenzew are entitled to summary judgment on these claims.

Plaintiff's Complaint does not address any specific acts of deliberate indifference by Bukowski or Kolitwenzew. The only conceivable statement from Plaintiff's Complaint relating to Bukowski and Kolitwenzew is this: "After many failed request(sic) for proper medical treatment/surgery and therapy I begin(sic) filing grievances about the situation only to have them not responded to or was(sic) responded to in a very condescending, dismissive, and indifferent matter." In his deposition, Plaintiff testified that he sued Bukowski because he supervised the facility and Kolitwenzew because he was the chief of corrections.

Supervisors and entities are not liable under Section 1983 for the unconstitutional acts of their subordinates under a theory of *respondeat superior*. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691-95 (1978). Thus, to the extent Plaintiff seeks to hold Bukowski and Kolitwenzew liable because of their supervisory role, those claims are dismissed.

Plaintiff must establish that Bukowski and Kolitwenzew personally participated in the alleged unconstitutional conduct. *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988). A superior may be personally involved by formulating and directing an unconstitutional policy, *Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986), or by knowing about unconstitutional conduct and then facilitating, approving, condoning, or ignoring it. "They must, in other words, act either knowingly or with deliberate, reckless indifference." *Jones*, 856 F.2d at 992. Supervisors who are negligent, or even grossly negligent, in failing to detect and prevent subordinates' misconduct are not liable. *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Jones*, 856 F.2d 992.

Neither Bukowski nor Kolitwenzew had any involvement in the medical decisions or care given at JCDC. They had no interaction with Plaintiff during his incarceration. The only conceivable claim of personal involvement raised against Bukowski and Kolitwenzew relates to their response/lack of response to Plaintiff's grievances. But, merely addressing a grievance to Bukowski and Kolitwenzew was insufficient to establish personal involvement. *Crawford v. Bukowski*, 2013 WL 363923, ¶ 4 (C.D. Ill. January 30, 2013). Showing that Defendants were notified of Plaintiff's medical requests does not demonstrate that Bukowski and Kolitwenzew had any authority over the resulting care. *Id.* Further, Kolitwenzew testified that he received only one grievance. In response to this grievance, Kolitwenzew consulted with the medical staff to ensure that Plaintiff was receiving treatment. Kolitwenzew reasonably relied on the medical staff to care for Plaintiff. *Johnson v. Dougherty*, 433 F.3d 1001, 1011 (7th Cir. 2006).

Government entities may be liable when a plaintiff can show the existence of a municipal policy or custom and a sufficient causal link between the policy or custom and the constitutional deprivation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978).

Plaintiff's Complaint does not allege any unconstitutional policies or customs. Plaintiff does reference the JCDC's policy of passing medication twice daily in his Response. However, Plaintiff presents no evidence that this policy is unconstitutional.

For these reasons, Bukowski and Kolitwenzew's Motion for Summary Judgment is granted.

b. Defendants Huffines and Gill

Plaintiff's only remaining claim is that Defendants Huffines and Gill were deliberately indifferent to Plaintiff's serious medical condition by delaying his surgery. Viewing the evidence in the light most favorable to Plaintiff, Plaintiff has not met his burden of establishing a genuine issue of material fact to avoid summary judgment.

Deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. *Townsend v. Cooper*, 759 F.3d 678, 689 (7th Cir. 2014). A medical need is considered serious under the Eighth Amendment if a physician has diagnosed the need as requiring treatment, or if the need is so obvious that even a layperson would recognize that treatment was needed. *Id.* The medical staff at JCDC considered Plaintiff's complaints serious enough to provide treatment, so the question is whether any Defendants were deliberately indifferent.

Deliberate indifference is the conscious disregard of a known and substantial risk of serious harm to an inmate's health. *Townsend*, 759 F.3d at 689; *Rice ex rel. Rice v. Correctional Medical Serv.*, 675 F.3d 650, 665 (7th Cir. 2012) ("An official is deliberately indifferent when he is subjectively aware of the condition or danger complained of, but consciously disregards it."). A prison doctor must have actually known of the substantial risk; that the doctor should have known is not enough. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016). An inference of deliberate indifference arises "'if the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment.'" *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011) (*quoting Sain v. Wood*, 512 F.3d 886, 894-95 (7th Cir. 2009)). However, "[a] medical professional is entitled to deference in treatment decisions unless no minimally competent professional

would have so responded under those circumstances." *Sain*, 512 F.3d at 894-95. Malpractice is not deliberate indifference, nor are professional differences of opinion. *Petties*, 836 F.3d at 729 ("evidence that some medical professionals would have chosen a different course of treatment is insufficient to make out a constitutional claim.").

Deliberate indifference requires both objective and subjective elements. *See Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996). The former requires that the deprivation suffered by the prisoner be "objectively, 'sufficiently serious,'" *Id.* (*quoting Farmer v. Brennan*, 511 U.S. 825 (1994)). In the medical care context, the objective element requires that the inmate's medical need be sufficiently serious. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997) (*citing Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996)). The subjective element requires that the officials act with a "sufficiently culpable state of mind." *Farmer*, 511 U.S. 834. This means that "the official knows of 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.* at 837. Whether a prison official acted with deliberate indifference is normally a question of fact. *Johnson v. Doughty*, 433 F.3d 1001, 1018 (7th Cir. 2006).

No reasonable juror could find that Huffines or Gill were deliberately indifferent. Plaintiff's evidence of deliberate indifference is primarily his own testimony that the delay in surgery prevented him from obtaining "maximum medical improvement." The flaw in this argument is that no evidence has been presented showing that Gill or Huffines were responsible for the delay in surgery. Plaintiff informed the medical staff of his missed surgery on August 15, 2014, seven days after he was incarcerated. Gill immediately provided Plaintiff with a medical records authorization, and submitted the form to Mount Sinai one day later. Gill made at least one additional records release request to Mount Sinai in September 2014. Dr. Kaymakcalan confirmed that his office received multiple record requests from JCDC.

At no time did Gill or Huffines ignore Plaintiff's complaints of pain. Gill and Huffines treated Plaintiff on numerous occasions. Defendants continually modified the medications in response to Plaintiff's complaints. Once the medical staff received

Plaintiff's records, they reasonably relied on his physician's opinion that the surgery could wait.

Plaintiff himself contributed to the delay, as he was unable to provide the name of his surgeon at Gill's request. As a result, Gill had to send the record request to Mount Sinai without directing it to a specific office, likely contributing to the delay.

Plaintiff has not shown either the objective or subjective element of deliberate indifference. There was no known and substantial risk to Plaintiff. Gill and Huffines were unable to ascertain any risk from August 15, 2015 – January 29, 2015, as they were unable to obtain records from Plaintiff's surgeon. Once they obtained the records, Dr. Kaymakcalan advised them that Plaintiff's surgery was not urgent and that it could wait until he left incarceration. Gill and Huffines reasonably relied on Dr. Kaymakcalan's opinion. There is no evidence that Gill or Huffines knew of a substantial risk of serious harm. It would be unlikely for a jury to find that Gill and Huffines were even negligent in their medical care. No rational juror would find them to have been deliberately indifferent.

Dr. Kaymakcalan's testimony does little to support Plaintiff's claim. He testified that his office did receive "a lot of requests of(sic) forms" regarding Plaintiff. Dr. Kaymakcalan acknowledged that most physicians would not have done the initial surgery and that the surgery was only exploratory in nature. While Dr. Kaymakcalan testified the "earlier the better" for the surgery, this does not establish that the delay was the fault of Gill or Huffines. Moreover, Dr. Kaymakcalan was not certain whether Plaintiff's recovery would have been any better if he had had the surgery as originally scheduled.

From the evidence in the record, no genuine issue of material fact remains in this case. Thus, Plaintiff's only remaining claim of deliberate indifference is dismissed.

IT IS THEREFORE ORDERED:

(1) Defendants' Motion for Summary Judgment (#39) is GRANTED.

(2) Judgment is entered in favor of Defendants and against Plaintiff.

(3) This case is terminated.

ENTERED this 26th day of January, 2018.

s/ERIC I. LONG
UNITED STATES MAGISTRATE JUDGE