

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY HOLLOMAN : CIVIL ACTION
 :
 v. :
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 CORRECTIONS OFFICER M. NEILY, :
 CORRECTIONS OFFICER ROSS AND :
 CORRECTIONS OFFICER PREZLY : NO. 97-8067

MEMORANDUM ORDER

Presently before the court in this pro se prisoner civil rights action is defendant James Ross' "Second Motion for Reconsideration of its [sic] Motion for Summary Judgment with Additional Applicable Law." The motion is not in fact one for reconsideration and is accompanied by no additional pertinent law. Rather, it is a renewed motion for summary judgment accompanied by a new expanded affidavit from defendant Ross presumably designed to address the inadequacy of the affidavit filed with the initial motion recently denied by the court.

Plaintiff alleges that he was attacked by another inmate in the presence of CO Ross who "did nothing to stop the assault."

On July 9, 1998, defendant filed a motion for summary judgment which, because it was based solely on the contents of the pleadings, the court treated as a motion for judgment on the pleadings and denied.

Apparently in the belief that the motion was denied merely because it was incorrectly titled, on September 3, 1998 defendant filed a substantially identical motion captioned "Motion for Judgment on the Pleadings Formerly a Motion for Summary Judgment." The motion was denied for the same reason as the first motion, i.e., an allegation that a corrections officer witnessed and did nothing to stop a physical attack by one inmate upon another adequately stated a § 1983 claim.

On September 22, 1998, defendant filed another motion for summary judgment. This time defendant submitted an affidavit in which he stated that the altercation between plaintiff and the other inmate was "sudden and unexpected" and that at "no time prior to the incident was I ever made aware that Mr. Holloman's health could have been potentially at risk." Defendant, however, produced no evidence from which the court could conscientiously conclude that there is no triable issue of fact regarding the reasonableness of defendant's actions once the assault began. Counsel's attempt to substitute statements in his brief for affidavits or other competent evidence was, of course, rejected. Accordingly, this motion was also denied.

With the instant "Second Motion for Reconsideration of its Motion for Summary Judgment," defendant submits a new affidavit in which he further states that he attempted to intervene but was unable to do so immediately without causing

injury to himself and that he separated plaintiff and his attacker "[a]s soon as the opportunity arose."

Defendant has presented no basis for reconsideration of the court's denial of his earlier summary judgment motion. Rather, he has simply filed a second motion for summary judgment. A court may entertain a successive summary judgment motion, particularly when the defendant has expanded the factual record on which summary judgment is sought. See, e.g., Whitford v. Boglino, 63 F.3d 527, 530 (7th Cir. 1995) (whether to allow renewed motions for summary judgment is matter of district court's discretion); Enlow v. Tishomingo County, 962 F.2d 501, 506-07 (5th Cir. 1992); Kirby v. P.R. Mallory & Co., 489 F.2d 904, 913 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); Goss v. George Washington Univ., 942 F. Supp. 659, 661 (D.D.C. 1996); Stubblefield v. City of Jackson, 871 F. Supp. 903, 905 (S.D. Miss. 1994); United States v. Two A-37 Cessna Jets and their Equipment, 1994 WL 167998, at *4 (W.D.N.Y. Apr. 20, 1994); Adley Express Co. v. Highway Truck Drivers and Helpers Local No. 107, 349 F. Supp. 436, 447 n.3 (E.D. Pa. 1972). Denial of a motion for summary judgment is not a final judgment and does not have res judicata effect. See, e.g., Whitford, 63 F.3d at 530.

The prohibition on cruel and unusual punishment requires corrections officers to take reasonable steps to protect inmates from attacks by other inmates. See Wilson v. Seiter, 501

U.S. 294, 296-97 (1991). A prison official is liable if he knows of a sufficiently serious threat to a prisoner of physical violence at the hands of another prisoner and then acts with deliberate indifference to the risk of harm created by that threat. See Farmer v. Brennan, 511 U.S. 825, 831-34 & n.2 (1994).

The risk of serious injury to an inmate who is being assaulted by another inmate wielding a heavy crate would seem to be evident to any observer. Even a corrections officer who perceives a serious risk of injury, however, is not liable when he responds reasonably even if he ultimately fails to avert the harm. Id. at 842-46.

Prison guards are not constitutionally required to take heroic measures and risk serious physical harm by intervening immediately in an inmate's armed assault on another inmate. See, e.g., Winfield v. Bass, 106 F.3d 525, 532-33 (4th Cir. 1997) (en banc); Prosser v. Ross, 70 F.3d 1005, 1008 (8th Cir. 1995); MacKay v. Farnsworth, 48 F.3d 491, 493 (10th Cir. 1995). Calling for backup in such circumstances would be a reasonable response. See MacKay, 48 F.3d at 493.

If uncontroverted, defendant's averments that he attempted to intervene but found it impossible to do so without risking injury to himself and that he separated plaintiff and his assailant as soon as practicable would show the absence of a

triable issue of fact regarding the reasonableness of defendant's reaction to the assault and any deliberate indifference on his part. Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings, but must come forward with evidence from which a reasonable jury could return a verdict in his favor. See Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

Plaintiff has not presented contrary evidence from which one could reasonably find that defendant Ross acted with deliberate indifference toward plaintiff's rights at the time of the assault. Plaintiff's decision to treat and oppose this motion simply as one "for reconsideration," however, is understandable as it was so captioned by defendant.

This action should be resolved on the merits, giving plaintiff a reasonable opportunity to oppose summary judgment and to present evidence from which one could find that defendant acted with deliberate indifference to the physical attack on

plaintiff. Under the circumstances, the most fair and appropriate course is to deny defendant's motion without prejudice to file a final unequivocal motion for summary judgment on as full a record as can reasonably be presented.

The parties appear to agree that CO Rivera, CO Thompson and Lt. Newton witnessed at least some of the events giving rise to this suit. The court strongly suggests that with any subsequent motion for summary judgment, defendant submit to the court and ensure delivery to plaintiff of any incident report regarding the assault at issue and any report of disciplinary proceedings related to the assault, as well as affidavits of the other three witnesses detailing any competent testimony they could offer regarding the incident and the conduct of defendant Ross.

ACCORDINGLY, this day of November, 1998, upon consideration of defendant James Ross' Second Motion for Reconsideration of its Motion for Summary Judgment (Doc. #39) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED** without prejudice to file and serve a final motion for summary judgment, clearly identified as such, on a complete record.

BY THE COURT:

JAY C. WALDMAN, J.