

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997) ("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). When reviewing complaints pursuant to 28 U.S.C. §1915(e)(2)(B), the Court must apply the standard of review set forth in Fed.R.Civ.P. 12(b)(6), and the Court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11 Cir. 1985). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of

facts in support of his claim which would entitle him to relief." Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Eleventh Circuit recently confirmed that there is a heightened pleading standard in §1983 actions against entities that can raise qualified immunity as a defense. Swann v. Southern Health Partners, Inc., 388 F.3d 834, 837 (11 Cir. 2004). While Fed.R.Civ.P. 8 allows a plaintiff considerable leeway in framing a complaint, the Eleventh Circuit has tightened the application of Rule 8 with respect to §1983 cases in an effort to weed out nonmeritorious claims, requiring that a §1983 plaintiff allege with some specificity the facts which make out its claim. GJR Investments, Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1367 (11 Cir. 1998); Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11 Cir. 1992), cert. denied sub nom. Deutchsh v. Oladeinde, 507 U.S. 987 (1993). Nevertheless, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11 Cir. 1985).

B. History

A summary of the facts reveals that the plaintiff, confined in the South Bay Correctional Facility in March of 2010 claimed that several defendants were deliberately indifferent to his medical needs. He contends he has degenerative disc disease, causing great pain and has been given other treatments, but has been refused surgery. A detailed Report and Recommendation were entered, recommending that the claims for denial of adequate medical treatment continue against Drs. Dauphin and Heller, and against Dr. Heller for retaliation. The Report further recommended dismissal of the remaining defendants. An Order entered by United States District Judge William Dimitrouleas adopted the Report in part, but

allowed the claims to continue against Finisse and stayed the action as to the Currently bankrupt New England Compounding Center.

The plaintiff was given permission to amend his complaint against Officer McIntire and to add additional defendants in support of a claim of retaliation. The plaintiff filed an amended complaint on March 26, 2013.

C. Amended Complaint (DE#21)

The plaintiff reiterates the claims raised in his initial complaint, however he includes more specific information as to McIntire. He claims she was told he had undergone recent surgery, but ignored his pain and medical condition. When he informed her he could not stand or walk, she forced him out of the chair. He then fell, aggravating his injury, while she stood there and watched. He was later picked up by other nurses and placed in a wheel chair. McIntire later stated she was not aware of plaintiff's conditions. At this stage, it appears the plaintiff has stated a claim against McIntire which requires further development of the facts.

III. Recommendation

1. It is therefore recommended that the amended complaint shall be admitted solely as to permit the claim of denial of adequate medical care to continue against Officer McIntire. (DE#21)
2. She will be served by separate order.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated this 5th day of April, 2013.



UNITED STATES MAGISTRATE JUDGE

cc: Darrel E. Cummings, Pro Se
#088532
South Bay Correctional Facility
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-81413-CIV-DIMITROULEAS
MAGISTRATE JUDGE P. A. WHITE

DARREL CUMMINGS, :

Plaintiff, :

v. :

CEO BARRY CADEN, et al., :

Defendants. :

REPORT OF
MAGISTRATE JUDGE
(DE#17 & 22)

This Cause is before the Court upon the plaintiff's Motions for Preliminary Injunction and Temporary Restraining Order. [DE#s 17 & 22).

Darrel Cummings, currently incarcerated at the South Bay Correctional Facility, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 seeking monetary damages and other relief for denial of adequate medical treatment. The plaintiff has been granted leave to proceed in forma pauperis.

Motion for Preliminary Injunction (DE#17)

The plaintiff suffers from third degree spondylolisthesis and degenerative disc changes, which causes severe pain. In this motion the plaintiff seeks immediate surgery for fusion of his back to prevent further permanent disability. He seeks this relief from Michael Crews, the Secretary for the Department of Corrections, Warden Levins, South Bay Correctional Facility, and the Health Service Administrator Ms. Finesse.

The preliminary injunction the plaintiff seeks is an extraordinary remedy. See California v. American Stores Company, et al., 492 U.S. 1301 (1989). The standard for issuing a preliminary injunction, which is the same as is required for a temporary restraining order, is to be based upon consideration of four factors, as follows: The party seeking relief must demonstrate: 1) a substantial likelihood that he will prevail on the merits, 2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, 3) that the threatened injury to him outweighs the potential harm the injunction may do to the defendant, and 4) that the public interest will not be impaired if the injunction is granted. Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1128 (11 Cir. 2005) (citations omitted), cert. denied, 126 S.Ct. 2862 (2006). Furthermore, a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly establishes the burden of persuasion as to all four prerequisites. See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11 Cir. 1998).

In this case, the claims in the motion are also the gravamen of the plaintiff's complaint. By Order of United States District Judge William Dimitrouleas, following the entering of a Report and Recommendation by the Undersigned, Defendants Dauphin, Heller, and Finisse were served for deliberate indifference to the plaintiff's medical needs.

Service was ordered upon Finisse on March 18, 2013, and has not been completed. Crews and Levins have been dismissed from this case. The remaining named defendant for purposes of the Preliminary Injunction is Finisse. When service is completed upon this defendant, the plaintiff may renew his motion for Preliminary Injunction.

Therefore it is recommended that the motion for preliminary injunction be dismissed without prejudice as premature (DE#17).

Motion for Injunction and Restraining Order (DE#22)

The plaintiff in his motion states he is being retaliated against for filing lawsuits by Warden Levins and Assistant Librarian Rootes, who are attempting to hinder his litigation. He claims Rootes denied a request for priority legal access to comply with a deadline of a Massachusetts Court issued Order. He filed a grievance to Levins. Ms Rootes refused to schedule a telephonic hearing and he could not prepare motions. In March of 2013, Rootes denied him entry to the Library and asked him to leave on multiple occasions. She also kept his approved request and wrote a disciplinary report against him. He states he has not been able to file a continuance in the Massachusetts Courts.

In his complaint, the plaintiff stated a claim against Dr. Heller for retaliation, and was Ordered by Judge Dimitrouleas on March 13, 2013, that he must file an amended complaint, if he wished to add additional defendants to the claim. The plaintiff filed an amended complaint on March 25, 2013. The Amendment has not yet been screened, however it appears that Rootes was not mentioned in the amendment and the incident of denial of access to the law library was not included. Instead, the plaintiff filed a second Motion for Temporary Restraining Order alleging retaliation. This is not in compliance with Judge Dimitrouleas' Order. Rootes is not a defendant and Crews has been dismissed.

It is therefore recommended that the motion for Temporary Restraining Order (DE#22) be denied, and the plaintiff either file

an amended complaint related to the issue of retaliation or Dr. Heller shall remain the sole defendant as to that claim.

Lastly, the plaintiff is cautioned that service has been returned un-executed for Defendant Dauphin. The Marshal noted the defendant no longer is employed at South Bay Correctional Facility, and no further information is known for this defendant. It is the plaintiff's responsibility to file an updated address for this defendant or risk dismissal.

Objections to this Report may be filed with the United States District Judge within fourteen days following receipt of this Report.

Dated at Miami, Florida, this 5th day of April, 2013.



UNITED STATES MAGISTRATE JUDGE

cc: Darrel Cummings, Pro Se
DC No. 088532
South Bay Correctional Facility
Address of record

7757

UNITED STATES DISTRICT COURT
Southern District of Florida

Case No. 12-81413-CIV-DIMITOULEAS
MAGISTRATE JUDGE P.A. WHITE

DARREL CUMMINGS,

Plaintiff,

vs.

NEW ENGLAND COMPOUNDING CENTER, et. al.

Defendants.

**DEFENDANT, DR. JULES HELLER'S ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S COMPLAINT**

COMES NOW, the Defendant, DR. JULES HELLER (hereafter "HELLER"), by and through his undersigned counsel, and files his Answer and Affirmative Defenses to Plaintiff's Complaint dated December 20, 2012 as follows:

STATEMENT OF FACTS

1-168. Defendant HELLER denies the allegations contained in paragraphs 1 through 168 of Plaintiff's Complaint.

STATEMENT OF CLAIM

Defendant, HELLER, denies that Plaintiff's rights were violated.

RELIEF REQUESTED

Defendant, HELLER, denies the allegations and claims raised by Plaintiff under this section.

Cummings v. Heller, et al.
Case No.: 12-cv-81413
Defendant, Heller's Answers & Affirmative Defenses
Page 2

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint is a medical malpractice claim and is barred based upon Fla. Stat. § 766.106 and therefore should be dismissed.

SECOND AFFIRMATIVE DEFENSE

The allegations against the Defendant, HELLER, does not rise to the level of a constitutional claim in that the allegations in Plaintiff's statement of facts and statement of claim are nothing more than a disagreement over the medical care that he received.

THIRD AFFIRMATIVE DEFENSE

At all times material hereto, the Defendant, HELLER, acted in good faith when dealing with the allegations in the Plaintiff's Complaint.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiff's Complaint fails to state a cause of action against the Defendant, HELLER.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff has failed to comply with any and all conditions precedent to bringing these claims against the Defendant, HELLER, and his claims against Defendant, HELLER, are therefore precluded.

Cummings v. Heller, et al.
Case No.: 12-cv-81413
Defendant, Heller's Answers & Affirmative Defenses
Page 3

SIXTH AFFIRMATIVE DEFENSE

The Plaintiff has failed to comply with any and all administrative procedures prior to bringing these claims against the Defendant, HELLER, and his claims against HELLER are therefore precluded.

SEVENTH AFFIRMATIVE DEFENSE

The Plaintiff has failed to comply with any and all grievance procedures before bringing his claims against the Defendant, HELLER, and his claims against the Defendant, HELLER are therefore precluded.

EIGHTH AFFIRMATIVE DEFENSE

The negligence of the Plaintiff was the sole legal cause of any loss, injuries or damage to Plaintiff and, therefore, Plaintiff is precluded from recovery herein.

NINTH AFFIRMATIVE DEFENSE

Plaintiff failed to mitigate his damages.

TENTH AFFIRMATIVE DEFENSE

That at all times material hereto, the doctrine of comparative fault was applicable to the Plaintiff's lawsuit and, therefore, the Plaintiff's alleged claims for damages against the Defendant, HELLER, should be reduced and/or extinguished pursuant to the doctrine of comparative fault.

Cummings v. Heller, et al.
Case No.: 12-cv-81413
Defendant, Heller's Answers & Affirmative Defenses
Page 4

DEMAND FOR JURY TRIAL

Defendant, HELLER, demands trial by jury on all issues so triable as of right.

By s/Gregory A. Kummerlen

Gregory A. Kummerlen, Esquire
Florida Bar No. 595691
Attorneys for Heller
WIEDERHOLD, MOSES, KUMMERLEN
& WARONICKI, P.A.
560 Village Blvd., Suite 240
West Palm Beach, Florida 33409
561-615-6775; Fax: 561-615-7225
Gkummerlen@wmrfla.com

I HEREBY CERTIFY that on this 11th day of April, 2013 I electronically filed the foregoing with the Clerk of the Southern District Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant: Darrel Cummings, DC #088532, South Bay Correctional Facility, P.O. Box 7171, South Bay, FL 33493-7171.

By s/Gregory A. Kummerlen

Gregory A. Kummerlen, Esquire
Florida Bar No. 595691
Attorneys for Heller
WIEDERHOLD, MOSES, KUMMERLEN
& WARONICKI, P.A.
560 Village Blvd., Suite 240
West Palm Beach, Florida 33409
561-615-6775; Fax: 561-615-7225
Gkummerlen@wmrfla.com

APR 22 2013
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA - MIAMI

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 9: 12-CV-81413- WPD
MAGISTRATE JUDGE P.A. WHITE

DARREL CUMMINGS,
Plaintiff,

vs.

NEW ENGLAND COMPOUNDING CENTER, et. al.,
Defendants.

PLAINTIFF’S OBJECTIONS TO SUPPLEMENTAL REPORTS
TO MAGISTRATE JUDGE

COMES NOW, Plaintiff, Darrel Cummings, pro se, hereby files his objections to the Magistrate Judge’s Supplemental Reports issued on April 5, 2013. Doc. 25., and Doc. 26.

Plaintiff States the following in support:

1. The Magistrates Supplemental Report states in pertinent part that, “The Plaintiff was given permission to amend his complaint against Officer McIntire and to add additional defendants in support of a claim of retaliation . . .”

Further, the Magistrate Report recommended that “it is therefore recommended that the amended complaint shall be admitted solely as to permit the claim of denial of adequate medical care to continue against Officer McIntire (DE #21).” Doc 25. P. 4.

2. Here, the Magistrate’s Recommendation, excluded additional retaliation claims against Defendant Finisse and Defendant Dr. Dauphin.
3. Plaintiff filed amended complaint on March 26, 2013, which clarified and fully set forth the facts and legal theories in support of a claim of retaliation, which may have been

overlooked. Essentially, where no findings were made as it pertains to retaliation of Defendant(s) Finisse, and Dauphin.

4. In regards to the second report of the Magistrate Judge Doc. 26. P. 4. It states in pertinent part that, Dr. Heller shall remain the sole defendant as to a retaliation claim. To the contrary claims against Defendant Finisse and Dauphin should not have been excluded.
5. The Magistrate Judge's report in regards to preliminary injunction overlook the facts that, Plaintiff is currently suffering in excruciating pain and his injury is deteriorating. Doc. 26
6. Service was ordered on Defendant Finisse, H.S.A., on March 18, 2013, who is still employed at South Bay Correctional Facility for the purpose of service to be soon perfected. Whereas here treatment is now imminent.
7. Do to the degree of Plaintiff's pain and nature of his injuries, of which have been delayed, prolonged and denied surgery for years to his detriment and disability.
8. Thus, Plaintiff respectfully pray this most Honorable Court grant his motion for preliminary injunction at this stage to stop the excruciating pain, and prevent permanent disability. Essentially where the Magistrates Report and Recommendation did not indicate that it should have been denied.
9. The Magistrates Report, further, as it pertains to temporary restraining order, or obstruction of justice by Librarian Roots, who is knowingly and willingly engaging in misleading conduct in denying Plaintiff communication to federal official of constitution violations. Doc. 26.
10. Librarian Roots is further retaliating against Plaintiff for filing grievances and a amended complaint against her and her co-workers. Essentially, where she is not permitting Plaintiff to comply with the court issued orders on March 13, 2013.
11. The Honorable U.S. District Judge Dimitroules, ordered Plaintiff to file an amended complaint to add additional defendants. Complaints was only timely because Plaintiff

involuntarily choose to comply with this court's order, rather than the U.S. Massachusetts Bankruptcy Court orders.

12. Librarian Rootes, knowingly and willfully obstructed justice by hindering Plaintiff to comply with both court orders intentionally to 'chill' complaint against her co-workers. She wasn't added to the court ordered amended complaint because this is what brought her denial of access to the court, to which this court retains jurisdiction.
13. As a direct result of the submission of grievances regarding this issue Plaintiff was then retaliated against, with disciplinary measures, and thrown out of law library by Librarian Rootes, irregardless and in violation of the courts issued orders. This is what brought the Plaintiff's submission of temporary restraining order.
14. On April 5, 2013, the Honorable Magistrate Judge P.A. White, issued an order denying temporary restraining order. However, the Honorable Judge White recommended Plaintiff could file an amended complaint related to Librarian Rootes retaliation within (14) days.
15. Librarian Rootes, reviewed this order, for the purpose of providing priority legal access to prepare objections to Doc. 25, 26, and amend complaint to add her as a Defendant. Rather than providing (14) days pursuant to courts order, Rootes, only provided (3) days in blatant disregard and in violation of another court issued orders.
16. Plaintiff respectfully refuted this issue, Librarian Rootes then threaten additional disciplinary action, and had security to escort Plaintiff to Captain Nonob office, to have Plaintiff placed in solitary confinement, in further violation of court orders.
17. Do to the knowingly and willfully misleading conduct of Librarian Rootes, the amended complaint adding her as a Defendant could not be filed with theses objections. Even if this Honorable Court granted a continuance as previously indicated above, it would be

blatantly disregarded and violated. Thus, Plaintiff will be further retaliated against and confined.

18. Further on April 15, 2013, Plaintiff's submitted a grievance on this issue. Then on April 18, 2013, Librarian Rootes apparently ordered Her untrained and uncertified Law Clerk Inmate Reginald Holston, who was named grievance to assault me by pushing me in the face while I was sitting in my wheel chair. Therefor, due to the nature of these circumstances, this Honorable Court already retains jurisdiction over this case and multiple Geo Inc. Correctional Officials, to which Librarian Rootes is also employed.
19. Reginald Holston further threaten me that if I write another grievance on him or Ms. Rootes he would smash (beat) my ass to death. As such, this court has the authority to enter an appropriate order prohibiting Librarian Rootes from further hindering and interfering with federal litigations and the court ordered deadlines until she is named as a Defendant, and Geo Inc., and/or Rootes in that to violate "This Order" they or Librarian Rootes could be held in contempt of court pursuant to 18 U.S.C. 1512(b)(3); 18 U.S.C. 401[1-3], and 11 U.S.C.S. 105. (Obstruction of Justice or Contempt of Court).
20. Further, Plaintiff was cautioned that service was returned un-executed for Defendant Dauphin. On April 3, 2013, Plaintiff forwarded an updated address for this Defendant, to the U.S. Marshal Service. See Attached(Process Receipt and Return)_.
21. The updated address is listed: Dr. Jean R. Dauphin, 512 W. Oakland Park Blvd., Ft. Lauderdale, FL 33311.
22. Lastly, Plaintiff has also obtained Geo Inc., Attorney for Defendants employees of South Bay Correctional Facility, Gregory Kummerlen, P.A., 560 Village Blvd. Suite #240, West Palm Beach, FL 33402 (561)615-6775.

MEMORANDUM

Case Law suggests that it is the Marshal's responsibility to serve Defendant as long as you provide enough information to identify them. *Graham v. Satroski*, 51 F.3d 710, 713 (7th Cir. 1995)(stating, "Once the former prison employee is properly identified, the Marshals service should be able to ascertain the individual's current address and on the basis of that information, complete service.); *Sellers v. U.S.*, 902 F.2d 598, 602 (7th Cir. 1995); *Jones-Bey v. Wright*, 876 F. Supp. 195, 197-98 (ND Ind. 1995), if a defendant is no longer employed at an institution. The Marshal shall ask the prison or the prison department the defendant's current address and shall attempt service at that address).

Prison officials are extremely reluctant to provide the home address of staff or former staff because they think it would be an invasion of privacy and a possible threat to security as it pertains to an inmate a home address would be virtually impossible for plaintiff to obtain on a former correctional official as he is an inmate. However, he has fully cooperated with this most Honorable Court and the U.S. Marshal Service with all the available information that he has regarding Defendant Dr. Jean R. Dauphin, who has been identified and should not be dismissed.

WHEREFORE, Plaintiff respectfully request that this most Honorable Court to **grant** motion for preliminary injunction, and include additional claims of retaliation against Defendant Finisse, and Defendant Dauphin. Further, that it issue an order against Geo Inc., and/or Librarian Rootes prohibiting hindrance, to which a continuance is requested to amend and an order requiring the U.S. Marshal service to process addition information or have Dr. Dauphin served at his home address, which could be sealed by this Honorable Court.

Respectfully Submitted,

April 19th, 2013
Date



Darrel Cummings DC# 088532
South Bay Correctional Facility
P. O. Box 7171
South Bay, Florida 33493

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

FILED by PG D.C.
APR 25 2013
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

DARREL CUMMINGS
Inmate # 088532

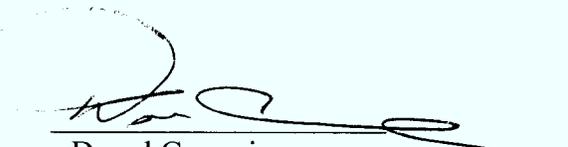
Vs.

CASE NUMBER: 9: 12-CV-81413-WPD

NEW ENGLAND COMPOUNDING CENTER, CEO., BARRY CADEN,
GEO GROUP INC., TOM LEVINS, WARDEN,
MS. N. FINNISSE, MSM, HSA,
DR. J. DAUPHIN, D.O.,
DR. JULES HELLER, M.D.,
DR. ROBERT LINS, M.D.,
OFFICER MCINTIRE, CO1,
Defendant(s)

**PLAINTIFF OBJECTION TO MAGISTRATED REPORT
ATTACHMENT PROCESS RECEIPT AND RETURN UNITED
STATES MARSHALL SERVICE**

4/19/13
Date



Darrel Cummings pro se
DC# 088532
South Bay Corr. Fac.
P. O. Box 7171
SOUTH BAY, FL 33413

USM-285 is a 5-part form. Fill out the form and print 5 copies. Sign as needed and route as specified below.

U.S. Department of Justice
United States Marshals Service

PROCESS RECEIPT AND RETURN

See "Instructions for Service of Process by U.S. Marshal"

PLAINTIFF Darrel Cummings,	COURT CASE NUMBER 12-81413-Civ-Dimitrouleas/White
DEFENDANT New England Compounding Center, et al.,	TYPE OF PROCESS Summons and Complaint

SERVE AT { NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN

Dr. J. Dauphin, Physician, South Bay Correctional Facility,
ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
600 U.S. Highway 27, South Bay, FL 33493

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW

Darrel Cummings, Pro Se, DC#088532 South Bay Correctional Facility 600 U.S. Highway 27 South South Bay, FL 33493	Number of process to be served with this Form 285	
	Number of parties to be served in this case	
	Check for service on U.S.A.	

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available for Service):

Fold *A.M.H.E OF FLORIDA, LISTS DR. JEAN A. DAUPHIN AS HAVING A PARTICE @ 512 W OKLAND PARK BLVD., FT. LAUDERDALE 33311* Fold

Signature of Attorney other Originator requesting service on behalf of: *[Signature]* PLAINTIFF DEFENDANT TELEPHONE NUMBER DATE *4/13/13*

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total number of process indicated. (Sign only for USM 285 if more than one USM 285 is submitted)	Total Process	District of Origin No. C04	District to Serve No. C04	Signature of Authorized USMS Deputy or Clerk <i>Paula Sherman</i>	Date 03/07/2013
--	---------------	-------------------------------	------------------------------	--	--------------------

I hereby certify and return that I have personally served, have legal evidence of service, have executed as shown in "Remarks", the process described on the individual, company, corporation, etc., at the address shown above on the on the individual, company, corporation, etc. shown at the address inserted below.

I hereby certify and return that I am unable to locate the individual, company, corporation, etc. named above (See remarks below)

Name and title of individual served (if not shown above) A person of suitable age and discretion then residing in defendant's usual place of abode

Address (complete only different than shown above)

Date *3/29* Time *12:05* am pm

Signature of U.S. Marshal or Deputy *[Signature]*

Service Fee	Total Mileage Charges including endeavors)	Forwarding Fee	Total Charges	Advance Deposits	Amount owed to U.S. Marshal* or (Amount of Refund*)
					\$0.00

REMARKS *① 3/21/13 - DR DAUPHIN NO LONGER WORKS AT SOUTH BAY CORP. NO FURTHER INFO AVAILBLE AS TO ANOTHER ADDRESS. NEEDED MORE INFO TO NARRIN COMPUTER SEARCH.*

PRINT 5 COPIES:

1. CLERK OF THE COURT
2. USMS RECORD
3. NOTICE OF SERVICE
4. BILLING STATEMENT*: To be returned to the U.S. Marshal with payment, if any amount is owed. Please remit promptly payable to U.S. Marshal.
5. ACKNOWLEDGMENT OF RECEIPT

PRIOR EDITIONS MAY BE USED

7757

UNITED STATES DISTRICT COURT
Southern District of Florida

Case No. 12-81413-CIV-DIMITOULEAS
MAGISTRATE JUDGE P.A. WHITE

DARREL CUMMINGS,

Plaintiff,

vs.

NEW ENGLAND COMPOUNDING CENTER, et. al.

Defendants.

**DEFENDANT, MS. N. FINISSE'S ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S COMPLAINT**

COMES NOW, the Defendant, MS. N. FINISSE (hereafter "FINISSE"), by and through her undersigned counsel, and files her Answer and Affirmative Defenses to Plaintiff's Complaint dated December 20, 2012 as follows:

STATEMENT OF FACTS

1-168. Defendant, FINISSE, denies the allegations contained in paragraphs 1 through 168 of Plaintiff's Complaint.

STATEMENT OF CLAIM

Defendant, FINISSE, denies that Plaintiff's rights were violated.

RELIEF REQUESTED

Defendant, FINISSE, denies the allegations and claims raised by Plaintiff under this section.

Cummings v. Heller, et al.
Case No.: 12-cv-81413
Defendant, Finisse's Answers & Affirmative Defenses
Page 2

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint is a medical malpractice claim and is barred based upon Fla. Stat. § 766.106 and therefore should be dismissed.

SECOND AFFIRMATIVE DEFENSE

The allegations against the Defendant, FINISSE, does not rise to the level of a constitutional claim in that the allegations in Plaintiff's statement of facts and statement of claim are nothing more than a disagreement over the medical care that he received.

THIRD AFFIRMATIVE DEFENSE

At all times material hereto, the Defendant, FINISSE, acted in good faith when dealing with the allegations in the Plaintiff's Complaint.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiff's Complaint fails to state a cause of action against the Defendant, FINISSE.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff has failed to comply with any and all conditions precedent to bringing these claims against the Defendant, FINISSE, and his claims against Defendant, FINISSE, are therefore precluded.

Cummings v. Heller, et al.
Case No.: 12-cv-81413
Defendant, Finisse's Answers & Affirmative Defenses
Page 3

SIXTH AFFIRMATIVE DEFENSE

The Plaintiff has failed to comply with any and all administrative procedures prior to bringing these claims against the Defendant, FINISSE, and his claims against FINISSE are therefore precluded.

SEVENTH AFFIRMATIVE DEFENSE

The Plaintiff has failed to comply with any and all grievance procedures before bringing his claims against the Defendant, FINISSE, and his claims against the Defendant, FINISSE, are therefore precluded.

EIGHTH AFFIRMATIVE DEFENSE

The negligence of the Plaintiff was the sole legal cause of any loss, injuries or damage to Plaintiff and, therefore, Plaintiff is precluded from recovery herein.

NINTH AFFIRMATIVE DEFENSE

Plaintiff failed to mitigate his damages.

TENTH AFFIRMATIVE DEFENSE

That at all times material hereto, the doctrine of comparative fault was applicable to the Plaintiff's lawsuit and, therefore, the Plaintiff's alleged claims for damages against the Defendant, FINISSE, should be reduced and/or extinguished pursuant to the doctrine of comparative fault.

Cummings v. Heller, et al.
Case No.: 12-cv-81413
Defendant, Finisse's Answers & Affirmative Defenses
Page 4

DEMAND FOR JURY TRIAL

Defendant, FINISSE, demands trial by jury on all issues so triable as of right.

By s/Gregory A. Kummerlen

Gregory A. Kummerlen, Esquire
Florida Bar No. 595691
Attorneys for Heller & Finisse
WIEDERHOLD, MOSES, KUMMERLEN
& WARONICKI, P.A.
560 Village Blvd., Suite 240
West Palm Beach, Florida 33409
561-615-6775; Fax: 561-615-7225
Gkummerlen@wmrfla.com

I HEREBY CERTIFY that on this 2nd day of May, 2013 I electronically filed the foregoing with the Clerk of the Southern District Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant: Darrel Cummings, DC #088532, South Bay Correctional Facility, P.O. Box 7171, South Bay, FL 33493-7171.

By s/Gregory A. Kummerlen

Gregory A. Kummerlen, Esquire
Florida Bar No. 595691
Attorneys for Heller & Finisse
WIEDERHOLD, MOSES, KUMMERLEN
& WARONICKI, P.A.
560 Village Blvd., Suite 240
West Palm Beach, Florida 33409
561-615-6775; Fax: 561-615-7225
Gkummerlen@wmrfla.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-81413-CIV-DIMITROULEAS
MAGISTRATE JUDGE P. A. WHITE

DARREL CUMMINGS, :
 :
 Plaintiff, :
 :
 v. :
 :
 CEO BARRY CADEN, et al., :
 :
 :
 Defendants. :

REPORT OF
MAGISTRATE JUDGE
(DE#31 & 34)

This Cause is before the Court upon the plaintiff's Motions for Preliminary Injunction and Temporary Restraining Order. [DE#s 31 and 34).

Darrel Cummings, currently incarcerated at the South Bay Correctional Facility, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 seeking monetary damages and other relief for denial of adequate medical treatment. The plaintiff has been granted leave to proceed in forma pauperis. The plaintiff has filed two prior motions for Preliminary Injunction and this is his third motion.

Motions for Preliminary Injunction (DE#s31 & 34

The plaintiff suffers from third degree spondylolisthesis and degenerative disc changes, which causes severe pain. In this motion the plaintiff seeks immediate surgery for fusion of his back to prevent further permanent disability. He seeks this relief from Michael Crews, the Secretary for the Department of Corrections,

Warden Levins, South Bay Correctional Facility, and the Health Service Administrator Ms. Finesse.

The preliminary injunction the plaintiff seeks is an extraordinary remedy. See California v. American Stores Company, et al., 492 U.S. 1301 (1989). The standard for issuing a preliminary injunction, which is the same as is required for a temporary restraining order, is to be based upon consideration of four factors, as follows: The party seeking relief must demonstrate: 1) a substantial likelihood that he will prevail on the merits, 2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, 3) that the threatened injury to him outweighs the potential harm the injunction may do to the defendant, and 4) that the public interest will not be impaired if the injunction is granted. Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1128 (11 Cir. 2005) (citations omitted), cert. denied, 126 S.Ct. 2862 (2006). Furthermore, a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly establishes the burden of persuasion as to all four prerequisites. See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11 Cir. 1998).

In this case, the claims in the motion are also the gravamen of the plaintiff's complaint. By Order of United States District Judge William Dimitrouleas, following the entering of a Report and Recommendation by the Undersigned, Defendants Dauphin, Heller, and Finesse were served for deliberate indifference to the plaintiff's medical needs.

An Answer has been filed by Finesse and Heller. Service ordered upon Dauphin was returned un-executed and he will be served at an updated address.

At this time the Court cannot compel defendants to provide surgery to the plaintiff, until the merits of the claim are determined. It is therefore recommended that the motions for preliminary injunction be dismissed without prejudice as premature (DE#31 & 34).

Objections to this Report may be filed with the United States District Judge within fourteen days following receipt of this Report.

Dated at Miami, Florida, this 25th day of June, 2013.



UNITED STATES MAGISTRATE JUDGE

cc: Darrel Cummings, Pro Se
DC No. 088532
South Bay Correctional Facility
Address of record

Attorneys of record