

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NAM DANG, by and through his
Power of Attorney, VINA DANG,

Case No.: 6:14-CV-37-ORL-31TBS

Plaintiff,

vs.

DONALD F. ESLINGER, in his official
Capacity as the SHERIFF OF SEMINOLE
COUNTY; OLUGBENGA OGUNSANWO,
M.D.; SANDRA WILT, LPN; BRENDA
PRESTON-MAYLE, RN; ALECIA SCOTT,
LPN; SHARYLE ROBERTS, LPN; and
MARTHA DENSMORE, RN,

Defendants.

**PLAINTIFF'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT, SHERIFF'S MOTION FOR PROTECTIVE ORDER WITH RESPECT
TO PLAINTIFF'S RULE 34 REQUEST TO ENTER JAIL AND INSPECT,
PHOTOGRAPH AND VIDEO-RECORD (DOC. 81)**

Plaintiff, NAM DANG, by and through his Power of Attorney, VINA DANG, files this Response and Memorandum of Law in Opposition to Defendant, Sheriff's Motion for Protective Order with Respect to Plaintiff's Rule 34 Request to Enter Jail and Inspect, Photograph and Video-Record. In support thereof, Plaintiff states and alleges as follows:

INTRODUCTION

Nam Dang was a pretrial detainee in the John E. Polk Correctional Facility in Seminole County, Florida from January 26, 2012 through February 23, 2012. At the time that Nam Dang was arrested and taken into custody, his mother informed the arresting officers that Nam Dang was sick, to which she was assured that he would be well cared for at John E. Polk Correctional

Facility. (First Amended Complaint, herein after also referred to as “FAC”, ¶9) Over the course of Nam Dang’s twenty-nine (29) day pretrial detention, Nam Dang’s complaints of worsening head and neck pain, neck stiffness and fever went ignored and/or insufficiently responded to by Defendants. (FAC ¶¶11-36) Rather than investigating the source of his pain and related symptoms, Defendants sent him to mental health isolation where he was left to suffer. (FAC ¶24) Defendants’ flawed conclusion that Nam Dang was faking his symptoms was documented by jail staff, including stating that he had “fluttering eye syndrome” which is a common term to describe when somebody is faking unconsciousness. (FAC ¶30) It was not until Nam Dang suffered multiple severe brain infarcts (strokes) that his serious condition was finally addressed and sent to the hospital. (FAC ¶¶32-34) Yet, even after sending him to the hospital, Defendants further conveyed inaccurate information and failed to convey critical information regarding Nam Dang’s condition to the hospital. (FAC ¶36) Shortly after presentation to the hospital, Nam Dang was diagnosed with meningitis. (FAC ¶37) As a result of the Defendants’ deliberate indifference and violation of Nam Dang’s constitutional rights under the Fourteenth Amendment, Nam Dang suffered horrendous damages and is totally and permanently disabled. (FAC ¶¶ 37-39)

A key issue in this case is the observation of Nam Dang while he was housed in D-Pod (mental health unit) and the medical unit. (FAC ¶¶28-35) As Defendant has pointed out in his Motion, no surveillance video of Nam Dang has been produced. Therefore, it is imperative that Plaintiff and his experts have an opportunity to view the layout of the “pods” Nam Dang was placed in to evaluate the extent and ability that correctional officers could observe Nam Dang as required under the confinement protocols. If correctional officers relied upon the video surveillance to complete the visual checks of Nam Dang, it is critical to know exactly what they could observe from the surveillance system. The focus of the inquiry is not on how the security

system works, but rather how and to what extent corrections officers and defendants could observe and monitor Nam Dang. Without being allowed to inspect the premises, Plaintiff's experts are left only to speculate.

Defendant, SHERIFF ESLINGER, is seeking to prevent Plaintiff from having an opportunity to inspect, photograph and video-record the specific areas of the correctional facility that are relevant to this action.

As demonstrated below, the discovery requested pursuant to Rule 34 is relevant to the issues in this action and Plaintiff should be afforded the opportunity to inspect the specific areas of the correctional facility in which Plaintiff, Nam Dang, was housed in January and February, 2012. Defendant has failed to show good cause as to why the discovery should not be allowed. For the reasons set forth herein, Defendant's Motion must be denied.

STANDARD OF REVIEW

Rule 26(b)(1), Fed. R. Civ. P., states as follows:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim** or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). [Emphasis added.]

In addition, pursuant to Rule 34(a)(2), Fed. R. Civ. P., a party is allowed "to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it". Finally, section I(C)(3) of the Middle District Discovery Handbook states:

“Tailoring Discovery Requests to the Needs of the Case. A party should tailor discovery requests to the needs of each case. The content of the requests should apply to the particular case, and the form of discovery requested should be the one best suited to obtain the information sought. In each case a party should carefully determine which discovery methods will achieve the discovery goal of obtaining useful information as efficiently and inexpensively as possible for everyone concerned.”

In a case involving federal civil rights violations, state law restrictions on access to discoverable information were generally held not to apply. *Askew v. Rigler*, 130 F.R.D. 26 (S.D.N.Y., March 7, 1990). However, in an effort to respect the spirit of the state laws and any confidentiality issues, the Court may impose a requirement for the parties to enter into a confidentiality agreement to prevent public disclosure of sensitive discoverable information. *Id.* See also, *Covad Communications Company v. Revonet, Inc.*, 258 F.R.D. 5 (D.D.C., May 27, 2009).

Pursuant to Rule 26(c), “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” The party seeking a protective order has the burden to demonstrate good cause and must make a particular and specific demonstration of fact rather than mere conclusory statements supporting the need for a protective order. *Auto-Owners Insurance Company v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426 (M.D. Fla. September 28, 2005).

LEGAL ARGUMENT

I. Plaintiff is entitled to inspect the correctional facility pursuant to Rule 34.

Plaintiff has made a request to inspect specific areas of the John E. Polk Correctional Facility pursuant to Rule 34. The primary reason for the request is to allow Plaintiff’s expert(s) to understand the specific layout of the units that Nam Dang was housed in and further to better understand the correctional officers’ ability to observe Nam Dang as required under the facility’s segregation/seclusion policies. Therefore, Plaintiff has requested an opportunity to enter the

correctional facility to inspect the specific areas requested (D-Pod and the medical unit) as well as look at the capabilities and limitations of the video surveillance system that was relied upon by correctional officers in doing their routine “checks” of units.¹ In addition to a visual inspection, Plaintiff seeks to take photographs and videotape in order to allow the Court an opportunity to review specific information for purposes of dispositive motions as well as for Plaintiff’s expert(s) to explain their opinions to the jury at trial.

Generally, experts in cases such as this “typically conduct site inspections when information relevant to their opinions can be uncovered in that manner” and “the layout of the jail itself meets the appropriate relevance standard”. *Ruiz-Bueno v. Scott*, 2014 WL 576400 (S.D. Ohio, February 12, 2014) Moreover, Plaintiff has made every effort to tailor his request for inspection specific to the needs of his case pursuant to §I(C)(3) of the Middle District Discovery Handbook. Plaintiff is not seeking broad open-ended access to the facility or security system. Rather, Plaintiff is merely seeking to obtain relevant discoverable information to assist in proving his claims.

Defense has wholly failed to establish any good cause as required under Rule 26(c) to support that it needs protection from Plaintiff’s request. Specifically, Defendant has failed to identify or establish that the inspection would cause the necessary annoyance, embarrassment, oppression, or undue burden or expense needed to support its motion.

II. There is no “jail security” privilege that prevents Plaintiff from inspecting the correctional facility and Plaintiff’s request is not prohibited under Florida law.

Defendants’ Motion (Doc. 81) and argument in support thereof is misplaced. While Florida law may impose some restrictions on the public disclosure of specific information pertaining to the security systems used by state agencies, this does not translate to a basis to bar

¹ Plaintiff anticipates including no more than four people participate in the inspection, including Plaintiff’s counsel, expert witness and a videographer.

discovery of the layout of a correctional facility and a review of what correctional officers were able to see as it pertains to the observation (or lack of observation) that is relevant in this case. Moreover, Defendant has failed to identify with any specificity the harm that would result in allowing Plaintiff an opportunity to view the specific areas of the correctional facility where Nam Dang was housed.²

Defendant attempts to make a general argument that the disclosure of “security” information would jeopardize public safety. (See Mot., p.3). However, this type of generalized “jail security” privilege has been rejected with regard to discovery in §1983 claims. *Ellis v. City of Anniston, Alabama*, 289 F.R.D. 352, 356-357 (N.D. Ala., January 28, 2013).

Defendant’s further argue that “[a]s to the request to inspect, photograph and video-record the mental health unit (‘D-Pod’) and the medical unit where Mr. Dang was housed, Defendant Sheriff has a protectable interest because of the inherent and obvious issues of jail security and operation that such inspection and documentation as requested implicate, as well as issues of inmate privacy and health confidentiality.” (Def. Mot., p. 4) This general and conclusory argument gives no specific statutory basis nor addresses the fact that Plaintiff has agreed to enter into a confidentiality agreement to avoid any public disclosure of sensitive information, as described in Footnote 1 *supra*.

² Plaintiff has advised Defense counsel that we would be agreeable to enter into a confidentiality agreement to prevent any public disclosure of photographs or videotape obtained from the inspection. Despite numerous requests for defense counsel to provide Plaintiff’s counsel with a draft confidentiality agreement, none has been provided. Moreover, Plaintiff would be agreeable to make every attempt to avoid capturing specific persons (either inmates or staff) in any photographs or videotape. To the extent any faces are captured Plaintiff would be agreeable to blur out the faces in the even the photographs or videotape would be produced to the Court for review or shown at trial. Plaintiff has not requested that the correctional facility move inmates or empty the pods/units.

III. Plaintiff has offered to sign a mutually agreeable confidentiality agreement to prevent public disclosure of any photographs or videotape of the correctional facility prior to trial to address Defendant's confidentiality concerns.

To the extent that the Court determines that Defendant has some interest that requires protection, an absolute bar of the inspection is not necessary as a confidentiality agreement can be put in place to address Defendant's concerns. As previously stated, Plaintiff has offered to enter into a confidentiality agreement to ensure that unnecessary public disclosure of sensitive information be prevented. Despite numerous requests by Plaintiff's counsel to provide a written agreement for review and consideration, Defense counsel has never provided one.³

CONCLUSION

Based upon the foregoing, Defendant has not met its burden in establishing that a bar on the discovery requested by Plaintiff pursuant to Rule 34 is necessary. Therefore Plaintiff respectfully requests that Defendant's Motion be denied.

³ In its Motion, Defendant first raises the idea that they can have a staff member take photographs and provide them to Plaintiff's counsel. However, even in the case they cite for support of same references the fact that Plaintiff's counsel was present in the jail when the photographs were taken.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all parties named on the attached Service List.

/s/ Melissa H. Powers

Melissa H. Powers

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Respectfully submitted this 29th day of December, 2014.

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