UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Submitted: November 19, 2013 Decided: February 13, 2014)

Docket No. 12-4313-pr

CHARLES NIELSEN

Plaintiff-Appellant,

– v. –

ELAINE A. RABIN M.D.,

Defendant-Appellee,

BILL DE BLASIO, MAYOR--NYC; MICHAEL A. STOCKER M.D. CHAIRPERSON-NYC-HHC; CHRISTOPHER CONSTANTINO, EXEC.DIR.ELMHURST HOSP.; SYLVIA TSCHENYAVSKY M.D.,

Defendants.[*]

Before: KEARSE, JACOBS, AND STRAUB, *Circuit Judges.*

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[*] The Clerk of Court is directed to amend the official caption of this case to conform to the listing of the parties shown above. Mayor de Blasio has been substituted for Mayor Bloomberg pursuant to Fed. R. App. P. 43.

Appeal from an order of the United States District Court for the Eastern District of New York (Eric N. Vitaliano, *Judge*) granting the defendant's motion to dismiss and denying the plaintiff leave to amend his complaint. We hold that amendment would not be futile and that leave to amend should have been granted. Accordingly, we **REVERSE** the decision to deny leave to amend and **REMAND** to the District Court for further proceedings consistent with this opinion.

Judge JACOBS dissents in a separate opinion.

CHARLES NIELSEN, *pro se*, *Plaintiff-Appellant*, Ridgewood, N.Y.

TAHIRIH SADRIEH, Assistant Corporation Counsel (Edward F. X. Hart, *on the brief*) *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, N.Y., *for Defendant-Appellee.*

STRAUB, *Circuit Judge*:

Pro se plaintiff Charles Nielsen brought suit against defendant Dr. Elaine A. Rabin, among others, under the Fourteenth Amendment for deliberate indifference to his serious medical needs. The District Court (Eric N. Vitaliano, *Judge*) dismissed the complaint on the ground that Nielsen did not adequately allege an element of his deliberate indifference claim: that Dr. Rabin had a sufficiently culpable state of mind. The court also denied Nielsen leave to amend his complaint because additional allegations in Nielsen's brief in opposition to

Dr. Rabin's motion to dismiss did not cure the deficiencies in his complaint. This, the court reasoned, showed that amendment would be futile.

We conclude that the allegations in the complaint and the opposition brief, taken together, sufficiently set forth the mental state element of the claim. Accordingly, amendment would not be futile, and Nielsen should have been granted leave to amend. We therefore **REVERSE** the decision to deny leave to amend and **REMAND** to the District Court for further proceedings consistent with this opinion.

BACKGROUND

The allegations recited below are taken from the complaint, and we assume they are true for the purposes of this appeal.

Nielsen was beaten by members of the New York City Police Department. His collarbone was fractured, and he sustained a SLAP type labral tear.[1] Nielsen also had injuries to his face, ultimately leaving permanent scarring and requiring

[1] SLAP is an acronym for "Superior Labrum from Anterior to Posterior" – a specific type of labral tear that occurs at the point where the tendon of the biceps muscle inserts on the labrum. *See* Jonathan Cluett, M.D., *SLAP Tear: What is a SLAP tear?*, ABOUT.COM ORTHOPEDICS (updated March 17, 2013), http://orthopedics.about.com/cs/generalshoulder/a/slap.htm.

two nose surgeries. Additionally, he became legally deaf in one ear and has reduced hearing in the other.

After the beating, Nielsen was taken to the emergency room in a wheelchair where he complained of severe pain in his shoulder and back and a broken nose. There, he was evaluated by Dr. Rabin and Dr. Sylvia Tschenyavsky. Even though Nielsen screamed when his shoulder was lightly touched, the doctors reported that his level of pain and discomfort was low: a two out of ten. The doctors diagnosed Nielsen as having "mild bruising" and suggested that he was "malingering" – fabricating or exaggerating his symptoms. No X-rays, CT-scans or MRIs were performed, and no significant treatment was provided. The doctors recommended only that Nielsen be reevaluated within a week.

Nielsen alleged all the above facts in his complaint. Rabin moved to dismiss, and Nielsen filed a brief in opposition, arguing that he had stated a claim for deliberate indifference under the Fourteenth Amendment. In that brief, Nielsen set forth an additional allegation: that the officers who brought him to the emergency room told Dr. Rabin that he had attacked a female police officer and that he should be ignored and left alone. According to Nielsen, no such

attack actually occurred. Nielsen also alleged that Dr. Rabin allowed herself to be influenced by the officers.

The District Court concluded that Nielsen's complaint did not state a claim for deliberate indifference because he did not adequately allege that Dr. Rabin acted with a sufficiently culpable state of mind. The court also denied leave to amend on the ground that amendment would be futile. The court reasoned that the complaint still would not state a claim even if augmented by the new allegations contained in Nielsen's brief. Ultimately, the court dismissed Nielsen's federal claims with prejudice and declined to exercise supplemental jurisdiction over any state law claims. This appeal followed.

DISCUSSION

"Generally, leave to amend should be freely given, and a *pro se* litigant in particular should be afforded every reasonable opportunity to demonstrate that he has a valid claim." *Matima v. Celli*, 228 F.3d 68, 81 (2d Cir. 2000) (internal quotation marks and citation omitted). "A *pro se* complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (internal brackets and

quotation marks omitted). However, "leave to amend a complaint may be denied when amendment would be futile." *Tocker v. Philip Morris Cos.*, 470 F.3d 481, 491 (2d Cir. 2006). "When the denial of leave to amend is based on . . . a determination that amendment would be futile, a reviewing court conducts a *de novo* review." *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011).

The District Court ruled that amendment was futile because, even considering the facts set forth in the opposition to the motion to dismiss, Nielsen did not adequately allege the mental state element of his deliberate indifference claim. We disagree.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "In addressing the sufficiency of a complaint we accept as true all factual allegations and draw from them all reasonable inferences; but we are not required to credit conclusory allegations or legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013). Accordingly,

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

"The plausibility standard is not akin to a probability requirement . . . ." *Id.* (internal quotation marks omitted). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely."[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal quotation marks omitted).

"Where, as here, the complaint was filed *pro se*, it must be construed liberally to raise the strongest arguments it suggests. Nonetheless, a *pro se* complaint must state a plausible claim for relief." *Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013) (internal citations, quotation marks, and brackets omitted).

In this case, the allegations in the complaint and the opposition brief sufficiently set forth the mental state element of his claim – that "the charged

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[2] The dissent's belief that we do not appreciate that this is a personal claim against Dr. Rabin boils down to an argument that the Federal Rules of Civil Procedure should apply differently based on the financial resources of the parties. The "rules govern the procedure in all civil actions and proceedings in the United States district courts . . . ." Fed. R. Civ. P. 1. We require the same "short and plain statement of the claim" for everyone who comes before us, no matter their net worth or calling in life. *See* Fed. R. Civ. P. 8.

official . . . act with a sufficiently culpable state of mind," *Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006). We have described this mental state element in some detail: "In medical-treatment cases not arising from emergency situations, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health." *Id.* "Deliberate indifference is a mental state equivalent to subjective recklessness . . . . This mental state requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result."[3] *Id.* (internal citation omitted).

Reading the *pro se* complaint and opposition brief liberally, Nielsen sufficiently alleged the required mental state, especially considering that "intent is rarely susceptible to direct proof." *See Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (discussing discriminatory intent in an equal protection case).

[3] The deliberate indifference claim in *Salahuddin* was based on the Eighth Amendment. 467 F.3d at 279. Here, Nielsen's deliberate indifference claim is based on the Fourteenth Amendment because his claim arises in the context of pretrial arrest and detainment. *See Caiozzo v. Koreman*, 581 F.3d 63, 69 (2d Cir. 2009). However, this distinction is not material because "[c]laims for deliberate indifference . . . should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment." *Id.* at 72.

According to Nielsen: Officers told Dr. Rabin not to treat him because he had attacked a female officer, and Dr. Rabin allowed herself to be influenced by those statements. Dr. Rabin then only minimally examined Nielsen, despite his complaints of severe pain from significant injuries. She also reported that Nielsen was in a low amount of pain even though accepting his allegations as true, he had, *inter alia*, a SLAP type labral tear and a broken collar bone, and he screamed when his shoulder was touched lightly. Her only recommendation was that Nielsen be reevaluated.

In concluding that Nielsen should not be granted leave to file an amended complaint, the District Court relied on medical records proffered by the defendants, which it regarded as refuting Nielsen's new assertions of statements by police officers inducing deliberate indifference on the part of Dr. Rabin. In so doing, the court inappropriately resolved issues of fact. The court was not entitled to rely on the medical records to conclude that granting leave to amend would be futile.[4]

[4] The dissent also relies on these medical records without appreciating that the complaint relied on the records only to show what treatment Nielsen received at the hospital, not for the truth of their descriptions of his actual condition or complaints of pain. The medical records' description of his complaints is only

"Determining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. We would love to live in a world where it is implausible for a doctor to disregard her oath and refuse to treat a patient she believed had attacked a female officer – just as we would love to live in a world where it is implausible for an employer to be so irrational as to refuse to hire a qualified applicant because of the applicant's skin color. Unfortunately, we do not.[5] Taking the allegations in Nielsen's complaint and his opposition brief as true, Nielsen can plausibly allege that Dr. Rabin acted with a sufficiently culpable state of mind.

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the defendants' version of the events. Nielsen asserts that he had suffered the serious injuries described above and asserts, as the dissent acknowledges, that he complained of being in "severe pain." By assuming that the records are true where they contradict the allegations in the complaint, the dissent turns the Rule 12(b)(6) standard on its head.

[5] The dissent's analogy to a criminal defense attorney tanking his own case highlights the danger of treating allegations that we may suspect and hope are false as "implausible." This conduct does occur. For example, in *State v. Tucker*, the defendant's post-conviction relief counsel "deliberately sabotaged" his case because he felt that his client, who had been sentenced to death, deserved to die and should be executed for his crimes. 353 N.C. 277, 277-78 (2000); *see also The North Carolina State Bar v. David B. Smith*, 02 DHC 14, ¶ 12 (Disciplinary Hearing Comm'n of the N.C. State Bar Feb. 11, 2003), *available at* http://www.ncbar.gov/orders/volume%205/06050395.pdf.

CONCLUSION

If Nielsen's complaint were amended to include the allegations in his opposition to the motion to dismiss, the complaint would sufficiently set forth the mental state element of his deliberate indifference claim. Thus, amendment would not be futile. We therefore **REVERSE** the decision to deny leave to amend and **REMAND** to the District Court for further proceedings consistent with this opinion.