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United States District Court, N.D. New York.

Charles TRAVIS, Petitioner,
v.
NEW YORK STATE DIVISION OF PAROLE; New York State Dept. of Corrections, Respondents.

No. 96CV759TJMGLS.
|
Aug. 26, 1998.

Attorneys and Law Firms

Charles Travis, Petitioner, Pro Se, Mid–State Correctional Facility, Marcy.

Hon. Dennis C. Vacco, Attorney General of the State of New York, Attorney for Respondent, Department of Law, The Capitol, Albany, Darren O'Connor, Esq., Asst. Attorney General, of Counsel.

REPORT–RECOMMENDATION

SHARPE, Magistrate J.

***1** This matter has been referred to the undersigned by Chief United States District Judge Thomas J. McAvoy, pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

Petitioner filed the instant habeas corpus petition on May 13, 1996. This court issued an Order pursuant to the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. fol. § 2254, granting petitioner leave to proceed *in forma pauperis,* ordering service of the petition on respondent, and requiring service of an answer or other pleading by respondent. Respondent has filed his answer, together with the pertinent state court records [1] and a memorandum of law. Petitioner has filed a memorandum of law and a traverse.

[1] The state court records submitted by respondent are listed in the first paragraph of the answer.

Petitioner complains that he is unlawfully being held in prison beyond his conditional release date. In 1981, petitioner was convicted of three counts of sodomy and sentenced to concurrent terms of eleven to twenty-two years imprisonment. His conditional release date was March 14, 1995.

Petitioner raises four claims in his application for habeas corpus relief. Petitioner alleges that: (1) he was denied the right to appeal from the Appellate Division's decision; (2) he was denied the effective assistance of counsel in connection with his state habeas corpus proceeding; (3) he was denied due process in that the Division of Parole is "arbitrarily and capriciously" holding him past his conditional release date; and (4) he is being subjected to cruel and unusual punishment and discrimination because he is a sex offender.

Respondent argues for dismissal of the petition, claiming that grounds one and two are not cognizable on federal habeas review, and petitioner failed to exhaust all available state remedies with regard to grounds three and four.

1. *Facts:*

In January 1974, petitioner was convicted of attempted homicide for trying to smother his three year old son. Petitioner was sentenced to five years in prison. In July 1978, petitioner was released to parole supervision. (Record on Appeal ("RA") 21, 27, 28).

In January 1980, while still under parole supervision, petitioner sodomized his two sons, who were both under the age of eleven. In July 1980, petitioner again sodomized one of the boys. (RA 26–28). Petitioner was subsequently convicted of three counts of sodomy in the first degree and sentenced to concurrent terms of eleven to twenty-two years imprisonment. (RA 66). His sentence expires on July 14, 2002. (RA 67).

The Board of Parole considered petitioner for parole in May 1991 and again in May 1993, but denied petitioner's release due to the gravity of petitioner's offenses, his prior conviction, and his apparent resistance to treatment for sexual offenders. [2] The Board that considered petitioner for parole in May 1993 devised a set of special conditions in anticipation of petitioner's conditional release in 1995. The conditions required petitioner to: (1) seek, obtain and maintain employment; (2) obtain outpatient mental health counseling; (3) avoid any unsupervised contact with

children; and (4) avoid contact of any kind with his former wife and children, absent written permission of a parole officer. (RA 22, 34).

[2] During the 1991 parole hearing, petitioner's parole officer noted that petitioner appeared to be in denial regarding the sexual dynamic of his criminal behavior. (RA 33). At the 1993 hearing, the Board noted that petitioner had recently discontinued treatment for sexual offenders. (RA 34).

***2** On March 14, 1995 (petitioner's conditional release date), Commissioner Mulholland (a member of the Board panel that considered petitioner for parole in 1993) imposed two additional special conditions pursuant to Executive Law § 259–g(1) and N.Y.Code R. & Regs., tit. 9 § 8003.3. The conditions were:

> 1. I will propose a residence to be approved by the Division of Parole, and will assist the Division in any efforts it may make on my behalf to develop an approved residence; and,
>
> 2. I will reside only in the residence approved by the Division of Parole.

Petitioner expressly agreed to the conditions, in writing. (RA 35–36, 68). Efforts to locate an approved residence have apparently been unsuccessful.

In July 1995, petitioner filed a petition for a writ of habeas corpus in New York Supreme Court, Oneida County, claiming that he was being held illegally beyond his conditional release date. Following a hearing, the court granted the petition and ordered plaintiff released. Respondents appealed and moved for a stay pending appeal. The stay was granted and on September 15, 1995, the Appellate Division, Fourth Department, reversed the grant of the writ. Petitioner failed to make a timely application for leave to appeal to the New York Court of Appeals.

2. *Claims Not Cognizable on Federal Habeas Review:*

A federal court may entertain a habeas petition only to the extent that it alleges custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Thus, claims based on violations of state law are not generally cognizable on federal habeas review. *Estelle v. McGuire,* 502 U.S. 62, 67 (1991) (citing *Lewis v. Jeffers,* 497 U.S. 764, 780 (1990)) (additional citation omitted); *Hameed v. Jones,* 750 F.2d 154, 160 (2d Cir.1984), *cert. denied,* 471 U.S. 1136 (1985).

Prisoners' Legal Services (PLS) represented petitioner in his state habeas corpus proceeding. According to petitioner, PLS refused to appeal the Appellate Division's September 15, 1995, Memorandum and Order vacating the writ of habeas corpus, [3] but didn't tell him until the time to file an appeal had passed. In ground one, petitioner claims that he was denied the right to appeal from the Appellate Division's September 15, 1995, Memorandum and Order vacating the writ of habeas corpus. In ground two, petitioner claims that he was denied the effective assistance of counsel in connection with his state habeas corpus proceeding. However, because states have no obligation to provide collateral postconviction relief or to supply a lawyer for such proceedings, *Pennsylvania v. Finley,* 481 U.S. 551, 556–57 (1986), grounds one and two are not cognizable on federal habeas review and must be dismissed.

[3] According to petitioner, PLS wanted a case that they would be more likely to win on the issue of holding inmates past their conditional release dates.

3. *Exhaustion:*

Prior to seeking relief in federal court, it is well settled that a petitioner must exhaust available state remedies or show that there is either an absence of available state remedies or that such remedies are ineffective to protect petitioner's rights. *Ellman v. Davis,* 42 F.3d 144, 147 (2d Cir.1994), *cert. denied,* 115 S.Ct. 2269 (1995). The petitioner's claims must be fairly presented so that the state court has the opportunity to decide any federal constitutional issues. *Id.* In addition, the petitioner must have presented the substance of his federal claims to the highest available court of the state. *Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994), *cert. denied,* 115 S.Ct. 1436 (1995) (citation omitted).

***3** In the present case, petitioner has not exhausted his state court remedies with regard to the claims raised in grounds three and four of the petition. In ground three, petitioner claims that he has been denied due process by being held illegally past his conditional release date. Petitioner failed to present this claim to the state's highest court when he failed to appeal the Appellate Division's September 15, 1995, Memorandum and Order. In ground four, petitioner claims he is being subjected to

cruel and unusual punishment and discrimination because respondents refuse to release him ("thus making him suffer punishment") while releasing all categories of felons other than sex offenders. This claim was not presented to any state court for review. Thus, petitioner has failed to satisfy the exhaustion requirement with respect to grounds three and four of the petition.

Although petitioner's claims are technically unexhausted, the court must still determine whether the claims should be "deemed" exhausted because they would be procedurally barred from presentation in state court. *Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991). Respondents argue that petitioner is now procedurally barred from asserting the claims in ground three in state court because he failed to apply for permission to appeal the Appellate Division's September 15, 1995, Memorandum and Order within thirty (30) days. *See* N.Y. C.P.L.R. § 5513(b) (motion for permission to appeal must be made within thirty days). As it is unlikely that the Court of Appeals would grant petitioner permission to appeal the Appellate Division's decision, the petitioner will be deemed to have exhausted, but procedurally defaulted upon, the claim in ground three of the petition.

A state prisoner who has procedurally defaulted on his federal claims in state court is entitled to federal habeas review of those claims only if he can show both cause for the default and actual prejudice resulting from the alleged violation of federal law, *Coleman v. Thompson,* 501 U.S. 722, 750 (1991), or establish that he is "probably ... actually innocent." *Murray v. Carrier,* 477 U.S. 478, 496 (1986). Petitioner has not alleged cause for his failure to pursue his claim to the Court of Appeals.[4] Since petitioner cannot show cause for his procedural default, and the state court records do not suggest that he is actually innocent, it is unnecessary for the court to determine whether he has suffered actual prejudice. *Stepney v. Lopes,* 760 F.2d 40, 45 (2d. Cir.1985). Therefore, ground three of the petition must be dismissed.

4 The failure of petitioner's counsel to file a timely notice of appeal cannot be considered "cause" for procedural default. *Wise v. Williams,* 982 F.2d 142 (4th Cir.1992), *cert. denied,* 508 U .S. 964 (1993).

Respondent further argues that petitioner would be precluded from raising the claims in ground four by *res judicata,* because the Appellate Division has already determined that petitioner failed to meet the special conditions for release and is not being illegally held beyond his conditional release date. *Res judicata,* however, is not a procedural bar. It does not appear that petitioner would be prevented from raising his claim in state court via a second habeas corpus petition or an Article 78 proceeding. *See* N.Y. C.P.L.R. § 7001, *et seq.* (habeas corpus); § 7801, *et seq.* (Article 78).

***4** Nonetheless, the Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2254(b) to permit courts to deny applications for a writ of habeas corpus on the merits, notwithstanding a petitioner's failure to exhaust state remedies. Pub.L. No. 104–132, § 104, 110 Stat. 1214, 1218 (1996) (codified at 28 U.S.C. § 2254(b)(2)). The claim raised by petitioner in ground four of the petition, though characterized as an Eighth Amendment "cruel and unusual punishment" claim, appears to state only an Equal Protection claim.[5] The Equal Protection Clause of the Constitution essentially mandates that all similarly situated persons be treated alike. *Artway v. Attorney General of State of N .J.,* 81 F.3d 1235, 1267 (3d Cir.1996) (citing *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439 (1985)). The level of scrutiny applied to determine whether a particular classification complies with this guarantee differs according to the nature of the classification. Strict scrutiny is applied to classifications involving suspect or quasi-suspect classes, or to classifications impacting certain fundamental constitutional rights. Other classifications, however, need only be rationally related to a legitimate governmental purpose. *Id.* (citing *Chapman v. United States,* 500 U.S. 453, 465 (1991)); *Riddle v. Mondragon,* 83 F.3d 1197, 1207 (10th Cir.1996).

5 The Eighth Amendment sets constitutional boundaries on the conditions of imprisonment. *Boddie v. Schneider,* 105 F.3d 857, 861 (2d Cir.1997). Cruel and unusual punishment exceeds those boundaries, and involves the unnecessary and wanton infliction of pain. *Id.* (citing *Whitley v. Albers,* 475 U.S. 312, 319 (1986)). An official violates the Eighth Amendment when punishment administered is "objectively sufficiently serious" and the official has a "sufficiently culpable state of mind." *Id.* (citations omitted). Petitioner's allegations do not support an Eighth Amendment claim.

Sex offenders do not comprise a suspect or quasi-suspect class for Equal Protection purposes. *See Artway, supra; Riddle, supra.* Nor does the placement of residential

conditions on sex offenders, or holding them beyond their conditional release dates if the conditions are not met, deprive these inmates of a fundamental right. *See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 7 (1979) (finding "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence").

The conditions placed on petitioner's release, and holding petitioner past his conditional release date because the conditions were not met, are rationally related to legitimate governmental purposes. According to the record, the conditions were added to increase the likelihood of petitioner's successful reintegration in society; ensure that he is in a stable residence with a cooperating adult on the premises who can alert petitioner's parole officer to any sign that petitioner is reverting to criminal sexual behavior; and to limit petitioner's exposure to potential victims. (RA 22–23, 35, 40–41). Ground four of the petition is without merit and must be dismissed.

WHEREFORE, based on the findings in the above Report, it is

RECOMMENDED that the petition be DENIED and DISMISSED.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e), and it is

***5** ORDERED that the state court records herein be returned directly to the office of the Assistant Attorney General at the conclusion of these proceedings. He has agreed to make them available for any appellate review.

All Citations

Not Reported in F.Supp.2d, 1998 WL 34002605

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480 Fed.Appx. 44
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals, Second Circuit.

Shawn GREEN, Plaintiff–Appellant,
v.
Kenneth McLAUGHLIN, Inspector General, Donald Selsky, Director Inmate Disciplinary Program, Thomas G. Eagen, Director Inmate Grievance Program, Affirmation Action Administrator, W.E. Phillips, Superintendent, C.J. Koeignsmann, GHCF Senior Counselor, James Temple, GHCF Senior Counselor, Delores Thronton, Program Deputy, L. Goidel, of IGP, Unidentified Personnel, J. Rosario, Records Access Officer, T. Gotsch, Lieutenant, Sergeant Markham, F. Sarles, Officer, D. Huttell, Officer, G. Tilltoson, Officer, Defendants–Appellees.

No. 11–5451–pr.
|
May 8, 2012.

Synopsis

Background: State prisoner filed civil rights action under § 1983 against various correctional officers and staff. The United States District Court for the Southern District of New York, Griesa, J., dismissed the complaint. Prisoner appealed. The Court of Appeals, 374 Fed.Appx. 173, remanded. On remand, the District Court, Griesa, J., 2010 WL 2034437, again dismissed the complaint. Prisoner appealed.

Holdings: The Court of Appeals held that:

[1] prisoner failed to plead a plausible conspiracy claim;

[2] doctrine of issue preclusion, or collateral estoppel, barred prisoner's retaliation claim;

[3] prisoner failed to allege defendants' personal involvement in alleged constitutional deprivations;

[4] prisoner failed to state an equal protection claim;

[5] prisoner failed to state a medical deliberate indifference claim;

[6] prisoner failed to state a claim for excessive use of force; and

[7] District Court was not required to convert the motion to dismiss into one for summary judgment.

Affirmed.

West Headnotes (7)

[1] Conspiracy
Pleading

State prisoner's allegation that there was a meeting of the minds between defendants was conclusory and failed to plead a plausible conspiracy claim in § 1983 action against various correctional officers and staff, where prisoner failed to allege any facts upon which it could be plausibly inferred that defendants came to an agreement to violate his constitutional rights. 42 U.S.C.A. § 1983.

16 Cases that cite this headnote

[2] Judgment
Issues or Questions Presented

Under New York law, doctrine of issue preclusion, or collateral estoppel, barred state prisoner's claim that, in retaliation for his various grievances and complaints against prison officials, those officials filed false misbehavior reports against him, where prisoner had raised his retaliation claim in a previous proceeding in state court, and he did not assert that he did not have a full and fair opportunity to litigate the claim in the state court proceeding.

Cases that cite this headnote

[3] Civil Rights
Criminal law enforcement;prisons

State prisoner failed to allege any personal involvement of defendants in the alleged constitutional deprivations, as required to recover damages under § 1983 in action against various correctional officers and staff, alleging class-of-one equal protection and medical deliberate indifference claims. U.S.C.A. Const.Amends. 8, 14; 42 U.S.C.A. § 1983.

9 Cases that cite this headnote

[4] Civil Rights
Prisons and jails;probation and parole

State prisoner failed to describe inmates to which he compared himself with sufficient specificity, or to identify any other similarly situated inmates with diabetes whose medical holds were not rescinded and who were allowed to remain at the prison, as would support his class-of-one equal protection claim in § 1983 action against various correctional officers and staff. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[5] Prisons
Disability or illness
Sentencing and Punishment
Medical care and treatment

State prisoner failed to allege that any prison medical staff members were aware of a substantial risk that, if he were transferred to another prison, serious harm would result, and then consciously disregarded that risk by approving his transfer, as would support his medical deliberate indifference claim in § 1983 action against various correctional officers and staff, where prisoner never explained why prison to which he was transferred was ill-equipped to treat his diabetes. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[6] Civil Rights
Prisons and jails;probation and parole

State prisoner's allegation that he was "attack[ed]" by correctional officers was insufficient to state § 1983 Eighth Amendment excessive force claim, absent allegation of facts supporting a reasonable inference that the officers either used excessive force or acted sadistically or with malice. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[7] Federal Civil Procedure
Matters considered in general
Federal Civil Procedure
Motion

District Court was not required to convert motion to dismiss into one for summary judgment, in state prisoner's § 1983 action against various correctional officers and staff, where the court chose to exclude additional material attached to defendants' motion to dismiss, and it did not rely on material other than the complaint. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

***45** Appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, J.). **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Attorneys and Law Firms

Shawn Green, Elmira, NY, pro se.

Patrick J. Walsh, Assistant Solicitor General for Eric T. Schneiderman, Attorney General of the State of New York, New York, NY, for Petitioner–Appellee.

PRESENT: PIERRE N. LEVAL, PETER W. HALL, and DEBRA ANN LIVINGSTON, Circuit Judges.

SUMMARY ORDER

****1** Appellant Shawn Green, *pro se,* a prisoner serving a New York State sentence, appeals from the May 21, 2010

order of the district court adhering to its March 31, ***46** 2008 judgment and order dismissing Green's 42 U.S.C. § 1983 claims on the Appellees' motion to dismiss. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues raised on appeal.

By summary order of April 22, 2010, after determining that the district court's March 31, 2008 order did not explain the basis for the dismissal of Green's complaint, we remanded pursuant to the procedure outlined in *United States v. Jacobson,* 15 F.3d 19, 22 (2d Cir.1994), for the district court to clarify the basis for its decision. *Green v. McLaughlin,* 374 Fed.Appx. 173 (2d Cir.2010). In its May 21, 2010 order, the district court provided an expanded explanation for its dismissal and we now turn to the merits of Green's arguments on appeal.

We review *de novo* a district court decision dismissing a complaint pursuant to Rule 12(b)(6). *See Jaghory v. N.Y. State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997). Under Rule 12(b)(6), pro se complaints are to be construed liberally, accepting as true all factual allegations in the complaint, and drawing all reasonable inferences in the plaintiff's favor. *See Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474 (2d Cir.2006). To survive a Rule 12(b)(6) motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir.2009) (quoting *Iqbal,* 556 U.S. at 679, 129 S.Ct. 1937). Thus, plausibility "depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render [the] plaintiff's inferences unreasonable." *L–7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 430 (2d Cir.2011). While *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, *see Harris,* 572 F.3d at 72, we look for such allegations by reading the complaint with "special solicitude" and interpreting it to raise the strongest claims it suggests. *Triestman,* 470 F.3d at 474–75 (quoting *Ruotolo v. I.R.S.,* 28 F.3d 6, 8 (2d Cir.1994)).

****2** **[1]** We have conducted a *de novo* review of the record in light of these principles and now affirm the district court's dismissal of Green's complaint. First, the district court correctly concluded that Green's allegations of a conspiracy were conclusory and insufficient to state a claim. *See Webb v. Goord,* 340 F.3d 105, 110–11 (2d Cir.2003) (to maintain a conspiracy action, the plaintiff "must provide some factual basis supporting a meeting of the minds"). Aside from his conclusory statement that there was a "meeting of the minds" between the defendants, Green's complaint alleged no facts upon which it may be plausibly inferred that the defendants came to an agreement to violate his constitutional rights. *See Iqbal,* 556 U.S. at 680–81, 129 S.Ct. 1937 (allegations that the defendants "willfully and maliciously agreed to subject" the plaintiff to harsh conditions of confinement "solely on account of his religion, race, and/or national origin" found conclusory); *Gallop v. Cheney,* ***47** 642 F.3d 364, 369 (2d Cir.2011) (finding allegations of conspiracy "baseless" where the plaintiff "offer[ed] not a single fact to corroborate her allegation of a 'meeting of the minds' among the conspirators").

[2] Green's claim that, in retaliation for his various grievances and complaints against prison officials, those officials filed false misbehavior reports against him, was also properly dismissed because the claim is precluded. The doctrine of issue preclusion, or collateral estoppel, provides that "an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the parties or their privies." *Ali v. Mukasey,* 529 F.3d 478, 489 (2d Cir.2008) (internal quotation marks and emphasis omitted). Under New York law, issue preclusion occurs where "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Vargas v. City of New York,* 377 F.3d 200, 205–06 (2d Cir.2004). Green raised his retaliation claim in a previous Article 78 proceeding in the New York Supreme Court, Dutchess County. *See Green v. Selsky,* No. 3862/04 at *3 (N.Y.Sup.Ct. Jan. 28, 2005) (unpublished decision). When addressing Green's

retaliation claim, the New York Supreme Court stated that "there was nothing in the record before this court which would support such a claim." *Id.* Because Green has not asserted that he did not have a full and fair opportunity to litigate this issue, he is precluded from raising this claim in federal court. *See Evans v. Ottimo,* 469 F.3d 278, 281–82 (2d Cir.2006) ("[T]he party attempting to defeat [the] application [of issue preclusion] has the burden of establishing the absence of a full and fair opportunity to litigate the issues.").

[3] In his superceding brief, Green argues that the "ambulatory health records" attached to his complaint support his class-of-one equal protection and medical deliberate indifference claims by illustrating that Appellee C.J. Koeignsmann removed Green's medical hold "without any sound medical judgment." A review of those health records clearly refutes Green's argument as they show that the decisions to remove Green's medical hold and change his medical level from one to two were signed, not by Koeignsmann, but by a different medical staff member who was not named as a defendant. As "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983," Koeignsmann's lack of involvement in these actions is fatal to Green's argument. *Farid v. Ellen,* 593 F.3d 233, 249 (2d Cir.2010).

3 **[4] In addition, even if Green had named the correct defendant, the allegations supporting his class-of-one and medical deliberate indifference claims would fail to state claims upon which relief may be granted. First, plaintiffs alleging a class-of-one equal protection violation must, *inter alia,* " 'show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.' " *Ruston v. Town Bd. for the Town of Skaneateles,* 610 F.3d 55, 59 (2d Cir.2010) (quoting *Clubside, Inc. v. Valentin,* 468 F.3d 144, 159 (2d Cir.2006)). Here, Green variously described the inmates to which he compared himself as "other inmates at Green Haven with medical holds," and "other inmates with acute medical problems." Neither of these broad categories is sufficient to demonstrate the level of specificity required by class-of-one claims as they do not permit an inference **48 that the members of these classes are "so similar [to Green] that no rational person could see them as different." *Ruston,* 610 F.3d at 60. Most importantly, Green has not identified any other similarly situated inmates with diabetes whose medical holds were not rescinded and who were allowed to remain at Green Haven. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam) (plaintiff must allege that he "has been intentionally treated differently from others similarly situated").

[5] Second, with respect to his medical deliberate indifference claim, Green alleged in his complaint that GHCF medical staff knew of his diabetes and nonetheless transferred him to Southport Correctional Facility, where he suffered three hypoglycemic incidents. The Eighth Amendment medical deliberate indifference analysis is composed of both objective and subjective components. *Hathaway v. Coughlin,* 99 F.3d 550, 553 (2d Cir.1996). Under the subjective prong, mere negligence is not actionable, nor is " 'mere medical malpractice' ... tantamount to deliberate indifference." *Chance v. Armstrong,* 143 F.3d 698, 703 (2d Cir.1998) (quoting *Hathaway,* 99 F.3d at 553). Instead, deliberate indifference is "equivalent to subjective recklessness, as the term is used in criminal law ... [and] requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result." *Salahuddin v. Goord,* 467 F.3d 263, 280 (2d Cir.2006); *see also Chance,* 143 F.3d at 703 (culpable recklessness is "an act or failure to act ... that evinces a conscious disregard of a substantial risk of serious harm" (citation and internal quotation marks omitted)).

Assuming that diabetes is "sufficiently serious" to satisfy the objective component of the medical deliberate indifference test, Green has not satisfied the subjective prong by alleging that any of the GHCF medical staff was aware of a substantial risk that, if he were transferred to Southport, serious harm would result. Specifically, Green has never explained why Southport was ill-equipped to treat his diabetes and, more importantly, he has not alleged that any individual at Green Haven knew that there was a substantial risk that Southport would provide inadequate treatment for Green's diabetes, and then consciously disregarded that risk by approving the transfer. *See Salahuddin,* 467 F.3d at 280. Accordingly, there is no indication that Green could state a plausible medical deliberate indifference claim, even if he had named the correct defendant.

4 **[6] Green also argues that his ambulatory health records substantiated his Eighth Amendment excessive

force claim. The Eighth Amendment "prohibits the infliction of cruel and unusual punishments, including the unnecessary and wanton infliction of pain." *Griffin v. Crippen,* 193 F.3d 89, 91 (2d Cir.1999) (citation and internal quotation marks omitted). For excessive force claims, "the core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian,* 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

Green's ambulatory health records indicate that on the day after the incident in the prison shower involving Appellees Huttell, Sarles, and Tilltoson, Green received treatment for a slight abrasion on his right wrist and was given Motrin for pain. While his health records support his allegation that he suffered some injury following this incident, Green's complaint must still be examined to determine whether he plausibly alleged that the force that caused this injury was used "maliciously or sadistically," rather than in a good faith attempt ***49** to restore discipline. *See id.* at 6–7, 112 S.Ct. 995. Although Green characterizes his encounter with the officers as an "attack," he has not alleged facts supporting a reasonable inference that the officers either used excessive force or acted either sadistically or with malice. While we recognize that *pro se* complaints must be read with solicitude, Green has not adequately alleged facts that could constitute cruel and unusual punishment in violation of the Eighth Amendment.

[7] Finally, Green argues that, in light of the exhibits attached to the defendant's motion to dismiss and the documents he submitted in connection with his cross-motion for summary judgment, the district court should have converted the motion to dismiss into one for summary judgment. "[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone *or* convert the motion to one for summary judgment under Fed.R.Civ.P. 56 and afford all parties the opportunity to present supporting material." *Friedl v. City of New York,* 210 F.3d 79, 83 (2d Cir.2000) (alteration in original) (emphasis added) (internal quotation marks omitted). In its decision, the district court clearly chose to exclude the additional material attached to the defendants' motion to dismiss—it first summarized the allegations made in Green's complaint, citing no facts other than those alleged in the complaint, and then referenced no documents other than the complaint in its discussion of Green's claims. Accordingly, because the mere "[a]ttachment of an affidavit or exhibit to a Rule 12(b)(6) motion ... does not without more establish that conversion is required," *Amaker v. Weiner,* 179 F.3d 48, 50 (2d Cir.1999), and there is no indication "that the district court relied on inappropriate material in granting the motion," *id.,* Green's arguments are without merit.

****5** We have considered all of Green's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

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480 Fed.Appx. 44
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

Shawn GREEN, Plaintiff–Appellant,
v.
Kenneth McLAUGHLIN, Inspector General, Donald Selsky, Director Inmate Disciplinary Program, Thomas G. Eagen, Director Inmate Grievance Program, Affirmation Action Administrator, W.E. Phillips, Superintendent, C.J. Koeignsmann, GHCF Senior Counselor, James Temple, GHCF Senior Counselor, Delores Thronton, Program Deputy, L. Goidel, of IGP, Unidentified Personnel, J. Rosario, Records Access Officer, T. Gotsch, Lieutenant, Sergeant Markham, F. Sarles, Officer, D. Huttell, Officer, G. Tilltoson, Officer, Defendants–Appellees.

No. 11–5451–pr.
|
May 8, 2012.

Synopsis

Background: State prisoner filed civil rights action under § 1983 against various correctional officers and staff. The United States District Court for the Southern District of New York, Griesa, J., dismissed the complaint. Prisoner appealed. The Court of Appeals, 374 Fed.Appx. 173, remanded. On remand, the District Court, Griesa, J., 2010 WL 2034437, again dismissed the complaint. Prisoner appealed.

Holdings: The Court of Appeals held that:

[1] prisoner failed to plead a plausible conspiracy claim;

[2] doctrine of issue preclusion, or collateral estoppel, barred prisoner's retaliation claim;

[3] prisoner failed to allege defendants' personal involvement in alleged constitutional deprivations;

[4] prisoner failed to state an equal protection claim;

[5] prisoner failed to state a medical deliberate indifference claim;

[6] prisoner failed to state a claim for excessive use of force; and

[7] District Court was not required to convert the motion to dismiss into one for summary judgment.

Affirmed.

West Headnotes (7)

[1] Conspiracy
Pleading

State prisoner's allegation that there was a meeting of the minds between defendants was conclusory and failed to plead a plausible conspiracy claim in § 1983 action against various correctional officers and staff, where prisoner failed to allege any facts upon which it could be plausibly inferred that defendants came to an agreement to violate his constitutional rights. 42 U.S.C.A. § 1983.

16 Cases that cite this headnote

[2] Judgment
Issues or Questions Presented

Under New York law, doctrine of issue preclusion, or collateral estoppel, barred state prisoner's claim that, in retaliation for his various grievances and complaints against prison officials, those officials filed false misbehavior reports against him, where prisoner had raised his retaliation claim in a previous proceeding in state court, and he did not assert that he did not have a full and fair opportunity to litigate the claim in the state court proceeding.

Cases that cite this headnote

[3] Civil Rights
Criminal law enforcement;prisons

State prisoner failed to allege any personal involvement of defendants in the alleged constitutional deprivations, as required to recover damages under § 1983 in action against various correctional officers and staff, alleging class-of-one equal protection and medical deliberate indifference claims. U.S.C.A. Const.Amends. 8, 14; 42 U.S.C.A. § 1983.

9 Cases that cite this headnote

[4] Civil Rights

Prisons and jails;probation and parole

State prisoner failed to describe inmates to which he compared himself with sufficient specificity, or to identify any other similarly situated inmates with diabetes whose medical holds were not rescinded and who were allowed to remain at the prison, as would support his class-of-one equal protection claim in § 1983 action against various correctional officers and staff. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[5] Prisons

Disability or illness

Sentencing and Punishment

Medical care and treatment

State prisoner failed to allege that any prison medical staff members were aware of a substantial risk that, if he were transferred to another prison, serious harm would result, and then consciously disregarded that risk by approving his transfer, as would support his medical deliberate indifference claim in § 1983 action against various correctional officers and staff, where prisoner never explained why prison to which he was transferred was ill-equipped to treat his diabetes. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[6] Civil Rights

Prisons and jails;probation and parole

State prisoner's allegation that he was "attack[ed]" by correctional officers was insufficient to state § 1983 Eighth Amendment excessive force claim, absent allegation of facts supporting a reasonable inference that the officers either used excessive force or acted sadistically or with malice. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[7] Federal Civil Procedure

Matters considered in general

Federal Civil Procedure

Motion

District Court was not required to convert motion to dismiss into one for summary judgment, in state prisoner's § 1983 action against various correctional officers and staff, where the court chose to exclude additional material attached to defendants' motion to dismiss, and it did not rely on material other than the complaint. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

***45** Appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, J.). **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Attorneys and Law Firms

Shawn Green, Elmira, NY, pro se.

Patrick J. Walsh, Assistant Solicitor General for Eric T. Schneiderman, Attorney General of the State of New York, New York, NY, for Petitioner–Appellee.

PRESENT: PIERRE N. LEVAL, PETER W. HALL, and DEBRA ANN LIVINGSTON, Circuit Judges.

SUMMARY ORDER

****1** Appellant Shawn Green, *pro se,* a prisoner serving a New York State sentence, appeals from the May 21, 2010

order of the district court adhering to its March 31, ***46** 2008 judgment and order dismissing Green's 42 U.S.C. § 1983 claims on the Appellees' motion to dismiss. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues raised on appeal.

By summary order of April 22, 2010, after determining that the district court's March 31, 2008 order did not explain the basis for the dismissal of Green's complaint, we remanded pursuant to the procedure outlined in *United States v. Jacobson,* 15 F.3d 19, 22 (2d Cir.1994), for the district court to clarify the basis for its decision. *Green v. McLaughlin,* 374 Fed.Appx. 173 (2d Cir.2010). In its May 21, 2010 order, the district court provided an expanded explanation for its dismissal and we now turn to the merits of Green's arguments on appeal.

We review *de novo* a district court decision dismissing a complaint pursuant to Rule 12(b)(6). *See Jaghory v. N.Y. State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997). Under Rule 12(b)(6), pro se complaints are to be construed liberally, accepting as true all factual allegations in the complaint, and drawing all reasonable inferences in the plaintiff's favor. *See Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474 (2d Cir.2006). To survive a Rule 12(b)(6) motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir.2009) (quoting *Iqbal,* 556 U.S. at 679, 129 S.Ct. 1937). Thus, plausibility "depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render [the] plaintiff's inferences unreasonable." *L–7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 430 (2d Cir.2011). While *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, *see Harris,* 572 F.3d at 72, we look for such allegations by reading the complaint with "special solicitude" and interpreting it to raise the strongest claims it suggests. *Triestman,* 470 F.3d at 474–75 (quoting *Ruotolo v. I.R.S.,* 28 F.3d 6, 8 (2d Cir.1994)).

****2** **[1]** We have conducted a *de novo* review of the record in light of these principles and now affirm the district court's dismissal of Green's complaint. First, the district court correctly concluded that Green's allegations of a conspiracy were conclusory and insufficient to state a claim. *See Webb v. Goord,* 340 F.3d 105, 110–11 (2d Cir.2003) (to maintain a conspiracy action, the plaintiff "must provide some factual basis supporting a meeting of the minds"). Aside from his conclusory statement that there was a "meeting of the minds" between the defendants, Green's complaint alleged no facts upon which it may be plausibly inferred that the defendants came to an agreement to violate his constitutional rights. *See Iqbal,* 556 U.S. at 680–81, 129 S.Ct. 1937 (allegations that the defendants "willfully and maliciously agreed to subject" the plaintiff to harsh conditions of confinement "solely on account of his religion, race, and/or national origin" found conclusory); *Gallop v. Cheney,* ***47** 642 F.3d 364, 369 (2d Cir.2011) (finding allegations of conspiracy "baseless" where the plaintiff "offer[ed] not a single fact to corroborate her allegation of a 'meeting of the minds' among the conspirators").

[2] Green's claim that, in retaliation for his various grievances and complaints against prison officials, those officials filed false misbehavior reports against him, was also properly dismissed because the claim is precluded. The doctrine of issue preclusion, or collateral estoppel, provides that "an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the parties or their privies." *Ali v. Mukasey,* 529 F.3d 478, 489 (2d Cir.2008) (internal quotation marks and emphasis omitted). Under New York law, issue preclusion occurs where "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Vargas v. City of New York,* 377 F.3d 200, 205–06 (2d Cir.2004). Green raised his retaliation claim in a previous Article 78 proceeding in the New York Supreme Court, Dutchess County. *See Green v. Selsky,* No. 3862/04 at *3 (N.Y.Sup.Ct. Jan. 28, 2005) (unpublished decision). When addressing Green's

retaliation claim, the New York Supreme Court stated that "there was nothing in the record before this court which would support such a claim." *Id.* Because Green has not asserted that he did not have a full and fair opportunity to litigate this issue, he is precluded from raising this claim in federal court. *See Evans v. Ottimo,* 469 F.3d 278, 281–82 (2d Cir.2006) ("[T]he party attempting to defeat [the] application [of issue preclusion] has the burden of establishing the absence of a full and fair opportunity to litigate the issues.").

[3] In his superceding brief, Green argues that the "ambulatory health records" attached to his complaint support his class-of-one equal protection and medical deliberate indifference claims by illustrating that Appellee C.J. Koeignsmann removed Green's medical hold "without any sound medical judgment." A review of those health records clearly refutes Green's argument as they show that the decisions to remove Green's medical hold and change his medical level from one to two were signed, not by Koeignsmann, but by a different medical staff member who was not named as a defendant. As "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983," Koeignsmann's lack of involvement in these actions is fatal to Green's argument. *Farid v. Ellen,* 593 F.3d 233, 249 (2d Cir.2010).

****3** **[4]** In addition, even if Green had named the correct defendant, the allegations supporting his class-of-one and medical deliberate indifference claims would fail to state claims upon which relief may be granted. First, plaintiffs alleging a class-of-one equal protection violation must, *inter alia,* " 'show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.' " *Ruston v. Town Bd. for the Town of Skaneateles,* 610 F.3d 55, 59 (2d Cir.2010) (quoting *Clubside, Inc. v. Valentin,* 468 F.3d 144, 159 (2d Cir.2006)). Here, Green variously described the inmates to which he compared himself as "other inmates at Green Haven with medical holds," and "other inmates with acute medical problems." Neither of these broad categories is sufficient to demonstrate the level of specificity required by class-of-one claims as they do not permit an inference ***48** that the members of these classes are "so similar [to Green] that no rational person could see them as different." *Ruston,* 610 F.3d at 60. Most importantly, Green has not identified any other similarly situated inmates with diabetes whose medical holds were not rescinded and who were allowed to remain at Green Haven. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam) (plaintiff must allege that he "has been intentionally treated differently from others similarly situated").

[5] Second, with respect to his medical deliberate indifference claim, Green alleged in his complaint that GHCF medical staff knew of his diabetes and nonetheless transferred him to Southport Correctional Facility, where he suffered three hypoglycemic incidents. The Eighth Amendment medical deliberate indifference analysis is composed of both objective and subjective components. *Hathaway v. Coughlin,* 99 F.3d 550, 553 (2d Cir.1996). Under the subjective prong, mere negligence is not actionable, nor is " 'mere medical malpractice' ... tantamount to deliberate indifference." *Chance v. Armstrong,* 143 F.3d 698, 703 (2d Cir.1998) (quoting *Hathaway,* 99 F.3d at 553). Instead, deliberate indifference is "equivalent to subjective recklessness, as the term is used in criminal law ... [and] requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result." *Salahuddin v. Goord,* 467 F.3d 263, 280 (2d Cir.2006); *see also Chance,* 143 F.3d at 703 (culpable recklessness is "an act or failure to act ... that evinces a conscious disregard of a substantial risk of serious harm" (citation and internal quotation marks omitted)).

Assuming that diabetes is "sufficiently serious" to satisfy the objective component of the medical deliberate indifference test, Green has not satisfied the subjective prong by alleging that any of the GHCF medical staff was aware of a substantial risk that, if he were transferred to Southport, serious harm would result. Specifically, Green has never explained why Southport was ill-equipped to treat his diabetes and, more importantly, he has not alleged that any individual at Green Haven knew that there was a substantial risk that Southport would provide inadequate treatment for Green's diabetes, and then consciously disregarded that risk by approving the transfer. *See Salahuddin,* 467 F.3d at 280. Accordingly, there is no indication that Green could state a plausible medical deliberate indifference claim, even if he had named the correct defendant.

****4** **[6]** Green also argues that his ambulatory health records substantiated his Eighth Amendment excessive

force claim. The Eighth Amendment "prohibits the infliction of cruel and unusual punishments, including the unnecessary and wanton infliction of pain." *Griffin v. Crippen,* 193 F.3d 89, 91 (2d Cir.1999) (citation and internal quotation marks omitted). For excessive force claims, "the core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian,* 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

Green's ambulatory health records indicate that on the day after the incident in the prison shower involving Appellees Huttell, Sarles, and Tilltoson, Green received treatment for a slight abrasion on his right wrist and was given Motrin for pain. While his health records support his allegation that he suffered some injury following this incident, Green's complaint must still be examined to determine whether he plausibly alleged that the force that caused this injury was used "maliciously or sadistically," rather than in a good faith attempt ***49** to restore discipline. *See id.* at 6–7, 112 S.Ct. 995. Although Green characterizes his encounter with the officers as an "attack," he has not alleged facts supporting a reasonable inference that the officers either used excessive force or acted either sadistically or with malice. While we recognize that *pro se* complaints must be read with solicitude, Green has not adequately alleged facts that could constitute cruel and unusual punishment in violation of the Eighth Amendment.

[7] Finally, Green argues that, in light of the exhibits attached to the defendant's motion to dismiss and the documents he submitted in connection with his cross-motion for summary judgment, the district court should have converted the motion to dismiss into one for summary judgment. "[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone *or* convert the motion to one for summary judgment under Fed.R.Civ.P. 56 and afford all parties the opportunity to present supporting material." *Friedl v. City of New York,* 210 F.3d 79, 83 (2d Cir.2000) (alteration in original) (emphasis added) (internal quotation marks omitted). In its decision, the district court clearly chose to exclude the additional material attached to the defendants' motion to dismiss—it first summarized the allegations made in Green's complaint, citing no facts other than those alleged in the complaint, and then referenced no documents other than the complaint in its discussion of Green's claims. Accordingly, because the mere "[a]ttachment of an affidavit or exhibit to a Rule 12(b)(6) motion ... does not without more establish that conversion is required," *Amaker v. Weiner,* 179 F.3d 48, 50 (2d Cir.1999), and there is no indication "that the district court relied on inappropriate material in granting the motion," *id.,* Green's arguments are without merit.

****5** We have considered all of Green's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

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