567 Fed.Appx. 56
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE(WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Roy JOSEPH, Petitioner–Appellant,
v.
James CONWAY, Superintendent,
Respondent–Appellee.

No. 13–1154.
|
May 27, 2014.

Synopsis

Background: After affirmance, 20 A.D.3d 435, 797 N.Y.S.2d 310, of his state conviction and sentence for murder in second degree, attempted murder in second degree, and criminal possession of weapon in second degree, and 45 A.D.3d 865, 845 N.Y.S.2d 754, denial of his application for writ of error coram nobis, petitioner sought federal habeas relief. The United States District Court for the Eastern District of New York, Mauskopf, J., 2013 WL 632118, dismissed petition as time barred and subsequently granted certificate of appealability.

Holding: The Court of Appeals held that further factfinding was required to determine petitioner's eligibility for statutory or equitable tolling of limitations period.

Vacated and remanded.

West Headnotes (1)

[1] Habeas Corpus
Particular issues and problems

District court's dismissal of habeas petition as time barred, under Antiterrorism and Effective Death Penalty Act (AEDPA), would be remanded for additional factfinding to determine whether petitioner was eligible for statutory or equitable tolling of limitations period based on his attempt to file writ of error coram nobis petition for which he invoked prison mailbox rule, providing that pro se prisoner's notice of appeal was filed upon delivery to prison authorities for forwarding to district court. 28 U.S.C.A. § 2244(d)(2).

5 Cases that cite this headnote

***57** Appeal from the United States District Court for the Eastern District of New York (Mauskopf, J.).
UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is VACATED and the case is REMANDED.

Attorneys and Law Firms

Georgia J. Hinde, New York, NY, for Petitioner–Appellant.

Diane R. Eisner, Assistant District Attorney (Leonard Joblove, Amy M. Applebaum, Assistant District Attorneys, on the brief), for Kenneth P. Thompson, District Attorney, Kings County, Brooklyn, NY, for Respondent–Appellee.

PRESENT: ROSEMARY S. POOLER, REENA RAGGI, DENNY CHIN, Circuit Judges.

SUMMARY ORDER

Petitioner-appellant Roy Joseph appeals the district court's judgment dated February 20, 2013, dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. By memorandum decision entered February 20, 2013, the district court dismissed the petition as time-barred, concluding that Joseph was not entitled to either statutory or equitable tolling of the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1).

Joseph seeks relief from a 2002 New York State conviction, following a jury trial, for murder in the second degree, attempted murder in the second degree, and criminal possession of a weapon in the second degree. He is serving a sentence of consecutive terms of imprisonment of twenty years to life on the murder and attempted murder counts and a concurrent term of ten years' imprisonment on the weapon count.

This Court granted a certificate of appealability, *see* 28 U.S.C. § 2253(c), limited solely to whether Joseph's attempt to file a *coram nobis* petition in 2006 sufficed to toll the limitations period and render his § 2254 petition timely. We assume the parties' familiarity with the facts and record of the prior proceedings.

1. ***Applicable Law***

The timeliness of a habeas petition presents a question of law that we review *de* ***58** *novo*. *See Pratt v. Greiner,* 306 F.3d 1190, 1195 (2d Cir.2002) (citing *Smaldone v. Senkowski,* 273 F.3d 133, 136 (2d Cir.2001)). Where the district court makes factual findings relevant to an assessment of timeliness under a provision of 28 U.S.C. § 2244(d), we review those findings for clear error, *see Hemstreet v. Greiner,* 491 F.3d 84, 89 (2d Cir.2007), but ultimately review *de novo* the legal determination of whether on those facts the petition was timely filed, *see Fernandez v. Artuz,* 402 F.3d 111, 112 (2d Cir.2005).

The tolling provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA") provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). Under § 2244(d)(2), therefore, a petition is statutorily tolled from the time it is "properly filed" and while it is "pending." *Id.*

The limitations period in § 2244(d) may also be "subject to equitable tolling in appropriate cases"—specifically, where the petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida,* 560 U.S. 631, 645, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (internal quotation marks omitted); *see also Doe v. Menefee,* 391 F.3d 147, 159 (2d Cir.2004) ("To qualify for [equitable tolling], the petitioner must establish that extraordinary circumstances prevented him from filing his petition on time, and that he acted with reasonable diligence throughout the period he seeks to toll." (internal quotation marks omitted)).

Under the "prison mailbox rule," a *pro se* prisoner's notice of appeal is filed when he delivers it to prison authorities for forwarding to the district court. *See Houston v. Lack,* 487 U.S. 266, 270–72, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). We have extended the prison mailbox rule to apply to prisoners' filings of *coram nobis* petitions. *See Fernandez,* 402 F.3d at 111–13, 116 (deeming *coram nobis* petition timely where it was placed in prison mailbox two days before statutory deadline, but not received until ten days after; delay was caused by the "prison's mistaken belief that Fernandez's prison account had insufficient funds to cover postage").

2. ***Application***

In the district court, Joseph filed an affirmation and an affidavit, accompanied by certain documentary evidence. He stated that during the week of August 24, 2006, a "legal research clerk assigned to assist [him] filed his writ of error *coram nobis* with the Appellate Division, Second Department." (App. 47). Joseph was incarcerated at Attica Correctional Facility at the time, and he (or his legal research clerk) apparently filed his papers by handing them to a prison official. In June 2007, Joseph wrote the Clerk of the Court of the Appellate Division, Second Department, to inquire as to the "motion of Writ of Error Coram Nobis" he had "submitted" on August 24, 2006. (App. 49). The Second Department responded on June 19, 2007, advising that the court had not received his motion. By letter dated August 10, 2007, Joseph wrote the Inmate Correspondence Office at Attica asking for information

about "legal papers" he had sent to the "Kings County Supreme Court" in August 2006. (App. 51). Someone in the Correspondence Office wrote back, confirming that "one free legal envelope" went out for Joseph during the week of August *59 21, 2006, but that no record was made of to whom the envelope was sent. (*Id.*).

Joseph then sent a new set of *coram nobis* papers to the Appellate Division on August 21, 2007. The Appellate Division denied the petition on November 27, 2007.

Joseph acknowledges that his habeas petition would be time-barred unless the limitations period is statutorily or equitably tolled. [1] On appeal, he argues that pursuant to the prison mailbox rule, he filed the *coram nobis* petition with the state court in August 2006—when he contends he submitted the papers to the prison authorities—and the petition remained pending until the Appellate Division denied it on November 27, 2007. Because the state court never received the petition, however, the district court declined to apply the prison mailbox rule, stating it did "not believe based on the record before it that a *coram nobis* application was properly filed with the Appellate Division." *Joseph v. Conway,* No. 07–CV–05223 (RM), 2013 WL 632118 at *5 (E.D.N.Y. Feb. 20, 2013).

1 As Joseph's conviction became final for the purposes of AEDPA on November 28, 2005, he had until November 28, 2006 to seek habeas relief, unless he had (1) a pending state application for collateral review or (2) grounds for equitable tolling. *See* 28 U.S.C. § 2244(d).

We remand to the district court for amplification of the record. As noted in the certificate of appealability, "[w]hat constitutes sufficient evidence of a properly filed petition in compliance with the applicable law and rules governing filing" is unsettled in this Circuit. (App. 69). Indeed, the question whether the prison mailbox rule is available when the state court never receives an alleged filing is unanswered in this Circuit, and other circuits have reached different results. *Compare Ray v. Clements,* 700 F.3d 993, 1008 (7th Cir.2012) (setting forth burden-shifting standard, in which petitioner must make prima facie showing of delivery before burden shifts to state to disprove delivery), *and Allen v. Culliver,* 471 F.3d 1196, 1198 (11th Cir.2006) (per curiam) (same), *and Caldwell v. Amend,* 30 F.3d 1199, 1202–03 (9th Cir.1994) (same), *with Grady v. United States,* 269 F.3d 913, 916–17 (8th Cir.2001) (placing "ultimate burden" on petitioner to show he should "benefit from the [prison mailbox] rule"). We decline to answer this question on the record before us, however, because of the factual uncertainties. *See Grimo v. Blue Cross/Blue Shield of Vt.,* 34 F.3d 148, 152–53 (2d Cir.1994) (remand is proper where factual record is "unclear"). Moreover, depending on the answers to the factual questions, it may be that the statutory tolling question need not be reached.

First, the record contains conflicting evidence as to whether Joseph sent his *coram nobis* petition to the Appellate Division or to the Supreme Court, Kings County. The district court resolved the conflict against Joseph, even though he submitted some evidence that he did send the papers to the Appellate Division. Second, although the Inmate Correspondence Office reported using one free legal envelope for Joseph during the period he purportedly mailed his petition, the record is unclear as to what was sent and where it was sent. Indeed, as the state conceded at oral argument, no effort was undertaken to locate whatever prison mail logs exist. Third, Joseph states in his affidavit that "the legal research clerk assigned to assist [him] filed his writ of error *coram nobis* petition." (App. 47). It is unclear who this "legal research clerk" was, and we cannot discern whether he or she qualifies as a "prison authority" within the meaning of the prison mailbox rule. *See* *60 *Knickerbocker v. Artuz,* 271 F.3d 35, 37 (2d Cir.2001) (suggesting that the prison mailbox rule is unavailable where the "delay ... is not attributable to prison officials"). Finally, the record is unclear whether Joseph has a copy of the *coram nobis* petition he allegedly filed in 2006. Counsel argues that a document apparently dated August 21, 2007 is the document that Joseph submitted in 2006, with the "6" in 2006 altered to a "7." But this is just speculation, and further inquiry should be made. The district court essentially concluded that because Joseph did not submit a copy, he must not have actually submitted the original in 2006. Again, the district court drew an inference against Joseph.

The State argues that the district court's order to show cause of January 10, 2008 gave Joseph the opportunity to make a case for statutory or equitable tolling, but Joseph failed to do so. Joseph clearly attempted to make his case, however, as he filed an affirmation, an affidavit, and supporting documentation. But some of the information he needed was not in his possession, such as the mail log or other records from the Inmate

Correspondence Office, and some of Joseph's statements were not as clear as they could have been. Because he is incarcerated, Joseph is not in a position to carry out his own investigation to substantiate his allegations. As Joseph's *pro se* status entitled him to "special solicitude" and "liberal" construction of his submissions, *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474–75 (2d Cir.2006) (internal quotation marks omitted) (per curiam), [2] the district court should have inquired further. *Accord Valentin v. Dinkins,* 121 F.3d 72, 75–76 (2d Cir.1997) (holding that district courts must assist *pro se* incarcerated litigants with their inquiry into the identities of unknown defendants); *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983) (noting the "obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training").

2 "It is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they *suggest.*' " *Triestman,* 470 F.3d at 474 (quoting *Pabon v. Wright,* 459 F.3d 241, 248 (2d Cir.2006)).

We remand to the district court for additional fact-finding and to decide, on the basis of a more complete factual record, whether Joseph is eligible for statutory or equitable tolling. If the facts do not support Joseph's contention that he attempted to file a *coram nobis* petition in August 2006, the question posed by the certificate of appealability may not need to be reached. If the facts do demonstrate that Joseph "properly filed" his petition, then the district court shall decide whether the statute of limitations was tolled.

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** for further proceedings.

All Citations

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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE(WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Joseph BEJJANI, Henry Bolejszo, Alain Breda, Ahmad Bulla, Geoffrey Haberer, Ruhel Hassan, Ricky Garcia, Abdelkabir Kahtane, Mohammed Khanfri, Kathy Krinke, Stylianos Loukissas, Erich Lunzer, Jario Martinez, Edilberto Morcos, Aart Van Derlaan, Oscar Flores, Plaintiffs–Appellants,
John O'Connor, Plaintiff,
v.
MANHATTAN SHERATON CORPORATION, dba St. Regis Hotel, New York Hotel and Motel Trades Council, AFL–CIO, Defendants–Appellees.

No. 13–2860–cv.
|
May 27, 2014.

Synopsis

Background: Hotel union workers filed suit against union for breach of duty of fair representation. The United States District Court for the Southern District of New York, J. Paul Oetken, J., dismissed complaint for failure to state claim, 2013 WL 3237845, and workers appealed.

Holdings: The Court of Appeals held that:

[1] legal and non-arbitrary actions taken by union by entering into concealed agreement were not retaliatory, and thus, were not in breach of duty of fair representation;

[2] union had no duty to disclose to union workers agreement in negotiations to settle prior lawsuit against union in which union workers were represented by counsel; and

[3] six-week delay between workers' prior lawsuit against union and concealed agreement in settlement of lawsuit did not state claim for bad faith or conspiracy to retaliate.

Affirmed.

West Headnotes (3)

[1] Labor and Employment
Duty to Act Impartially and Without Discrimination;Fair Representation

Legal and non-arbitrary actions taken by hotel workers' union by entering into concealed agreement that benefited certain union members were not retaliatory, and thus, were not in breach of duty of fair representation, simply because the agreement did not benefit hotel banquet workers, absent showing that union's actions were irrational, dishonest, or unrelated to union objectives.

3 Cases that cite this headnote

[2] Labor and Employment
Duty to Act Impartially and Without Discrimination;Fair Representation

Union had no duty to disclose to union workers agreement in negotiations to settle prior lawsuit against union in which union workers were represented by counsel.

1 Cases that cite this headnote

[3] Conspiracy
Conspiracy to injure in property or business

Labor and Employment

Duty to Act Impartially and Without Discrimination;Fair Representation

Six-week delay between union workers' lawsuit against union for breach of duty of fair representation and concealed agreement in settlement of lawsuit did not state claim for bad faith or conspiracy to retaliate against union workers.

7 Cases that cite this headnote

***61** Appeal from a judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on June 28, 2013, is AFFIRMED.

Attorneys and Law Firms

Robert N. Felix, Esq., New York, NY, for Appellants.

Michael Starr (Katherine Healy Marques, on the brief), Holland & Knight, LLP, New York, NY, for Appellee Manhattan Sheraton Corp., dba St. Regis Hotel.

Barry Neal Saltzman (Vincent F. Pitta, Danya Ahmed, on the brief), Pitta & Giblin LLP, New York, NY, for Appellee New ***62** York Hotel and Motel Trades Council, AFL–CIO.

PRESENT: ROBERT D. SACK, REENA RAGGI, DENNY CHIN, Circuit Judges.

SUMMARY ORDER

Plaintiffs are banquet servers employed by defendant Manhattan Sheraton Corporation, doing business as St. Regis Hotel (the "Hotel"), and represented by defendant New York Hotel and Motel Trades Council, AFL–CIO (the "Union"). Plaintiffs appeal from the dismissal of their claims that the Hotel violated terms of the operative collective bargaining agreement and that the Union violated its duty of fair representation. We review *de novo* the dismissal of a complaint under Fed.R.Civ.P. 12(b)(6), *see Vaughn v. Air Line Pilots Ass'n, Int'l,* 604 F.3d 703, 709 (2d Cir.2010), accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiffs, *see Askins v. Doe No. 1,* 727 F.3d 248, 252–53 (2d Cir.2013). We assume the parties' familiarity with the facts and the record of underlying proceedings, which we reference only as necessary to explain our decision to affirm.

1. *Legal Standard for Hybrid " § 301/Fair Representation" Claims*

To pursue this " § 301/Fair Representation" claim, plaintiffs were required plausibly to allege both (1) the employer's breach of a collective bargaining agreement and (2) the union's breach of "its duty of fair representation vis-a-vis the union members." *White v. White Rose Food, Div. of DiGiorgio Corp.,* 237 F.3d 174, 178 (2d Cir.2001). The latter breach cannot be supported only by allegations of negligence. See *Barr v. United Parcel Serv., Inc.,* 868 F.2d 36, 43 (2d Cir.1989). Rather, plaintiffs must plausibly allege union actions "are wholly arbitrary, discriminatory, or in bad faith." *Spellacy v. Airline Pilots Ass'n–Int'l,* 156 F.3d 120, 126 (2d Cir.1998) (internal quotation marks and alteration omitted). To be "arbitrary," the alleged actions, considered "in light of the factual and legal landscape at the time of the union's actions," must fall "so far outside a wide range of reasonableness as to be irrational." *Vaughn v. Air Line Pilots Ass'n, Int'l,* 604 F.3d at 709. To be "discriminatory," the allegations must plausibly allege disparate treatment "that was intentional, severe, and unrelated to legitimate union objectives." *Id.* (internal quotation marks omitted). Finally, "bad faith" requires allegations that the union engaged in "fraud, dishonesty, [or] other intentionally misleading conduct" with "an improper intent, purpose or motive." *Id.* at 709–10 (internal quotation marks omitted). Our review of a claimed breach of the duty of fair representation is "highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991); *accord Vaughn v. Air Line Pilots Ass'n, Int'l,* 604 F.3d at 709. Thus, to plead breach, plaintiffs must further plausibly allege a "causal connection between the union's wrongful conduct and their injuries." *Spellacy v. Airline Pilots Ass'n–Int'l,* 156 F.3d at 126; *accord Vaughn v. Air Line Pilots Ass'n, Int'l,* 604 F.3d at 709.

2. *Application*

[1] On independent review of the record and relevant case law, we conclude that plaintiffs failed to plead a plausible claim of union breach essentially for the reasons stated by the district court in its thorough and well-reasoned Memorandum Opinion and Order granting dismissal of ***63** the hybrid action. On appeal, plaintiffs argue that the district court failed to consider the context and history of the parties' relationship and, therefore, failed to recognize that the complaint plausibly alleged that the Union had endeavored to retaliate against them by entering into a concealed agreement (the "Adour Agreement") benefitting Union members who are not banquet servers at the expense of banquet servers. The record does not support this argument. [1]

1 Plaintiffs argued below that the Union breached its duty of fair representation by failing to arbitrate the Hotel's alleged practice of shifting work to non-banquet servers. Plaintiffs concede that the Union has since sought arbitration on this issue and, instead, argue that the Union cannot be trusted to address their grievances in the arbitration. This new argument effectively asserts that other alleged breaches of the duty of fair representation preclude effective arbitration and allow them to maintain a hybrid action in court against both the Union and the Hotel. Because we conclude that plaintiffs have not plausibly alleged a breach of the duty of fair representation, the argument is without merit.

[2] The complaint alleges nothing more than legal and non-arbitrary Union actions that plaintiffs conclusorily construe as retaliatory because they do not benefit banquet servers. Even assuming the Adour Agreement operated to the disadvantage of banquet servers, it was hardly irrational, dishonest, or unrelated to Union objectives for the Union to enter into such an agreement, given its benefits for other Union members. *See Spellacy v. Airline Pilots Ass'n–Int'l,* 156 F.3d at 129 ("A union's reasoned decision to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct."); *see also Vaughn v. Air Line Pilots Ass'n, Int'l,* 604 F.3d at 712 (stating that "there is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives" and "[t]he complete satisfaction of all who are represented is hardly to be expected" (internal quotation marks omitted)). Nor does the Union's failure to disclose the Adour Agreement plausibly state a claim of breach. Although the Union represents plaintiffs in negotiations and disputes with the Hotel, it was under no duty to disclose the Adour Agreement in negotiations to settle a prior lawsuit in which plaintiffs were represented by counsel, not the Union, as the Union was adverse to plaintiffs. *See White v. White Rose Food, Div. of DiGiorgio Corp.,* 237 F.3d at 179 n. 3 (stating that duty of fair representation arises from exclusive representational status); *see also Freeman v. Local Union No. 135,* 746 F.2d 1316, 1321 (7th Cir.1984) ("If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation."). Moreover, not alerting plaintiffs to the Adour Agreement when they complained about the Hotel shifting work to non-banquet servers does not create an inference of bad faith because plaintiffs do not plausibly allege that the Adour Agreement violated any "unambiguous contractual entitlement[s]," *Spellacy v. Airline Pilots Ass'n–Int'l,* 156 F.3d at 129, and plaintiffs do not allege any "intentionally misleading conduct" with regard to plaintiffs' rights, *id.* at 126. Indeed, plaintiffs have cited no authority holding that the duty of fair representation requires disclosure of all agreements that may in some way affect certain union members. *Cf. White v. White Rose Food, a Div. of DiGiorgio Corp.,* 237 F.3d at 183 ("[T]he mere failure to provide notice and an opportunity to be heard regarding [an agreement], without more, does not amount to bad faith.").

***64** **[3]** Plaintiffs argue that the timing of the Adour Agreement in relation to plaintiffs' first lawsuit allows a plausible inference of collusive Union and Hotel retaliation against them. We disagree. The six-week delay between plaintiffs' first suit against the Union and the Ardour Agreement, by itself, fails to raise a plausible inference of bad faith or conspiracy to retaliate, leaving nothing but plaintiffs' conclusory allegations. *See Anderson News, LLC v. Am. Media, Inc.,* 680 F.3d 162, 182 (2d Cir.2012) ("Conclusory allegations of 'participation' in a 'conspiracy' have long been held insufficient to state a claim."). Moreover, the specific misstatements at issue, *see, e.g.,* J.A. 19–23 (alleging that Union misrepresented that it sent requests for information to the Hotel); *id.* at 22–23 (alleging "[c]ertain previous meeting dates were claimed to have contained facts that belonged to other meeting dates"), are minor discrepancies that do not indicate intentional misrepresentation and, when viewed in totality, instead support at most an inference of negligence, not bad faith or a conspiracy to retaliate. *See*

Vaughn v. Air Line Pilots Ass'n, Int'l, 604 F.3d at 710; *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (requiring allegations to "nudge[ ] ... claims across the line from conceivable to plausible" in order to survive motion to dismiss).

Accordingly, we affirm substantially for the reasons stated by the district court in its Memorandum Opinion and Order of Dismissal.

We have considered the remainder of plaintiffs' claims and consider them to be without merit. The order of the district court is AFFIRMED.

All Citations

567 Fed.Appx. 60

378 Fed.Appx. 50
This case was not selected for publication in West's Federal Reporter.
United States Court of Appeals, Second Circuit.

Joel MURRAY, Plaintiff–Appellant,
v.
George E. PATAKI, Governor of New York State, Kang Yeon Lee, M.D., Daniel Senkowski, Superintendent of Clinton Correctional Facility, Dr. Melendez, R. Leduc, Corrections Officer, N. Irwin, J. Travers, J. Forth, Corrections Officer, R. Girdich, Superintendent at Franklin Correctional Facility, Glenn S. Goord, Commissioner of N.Y.S. D.O.C.S., Richard Roy, Inspector General, T. Reif, Corrections Officer, CNY Psychiatric Center, S. Jones, Defendants–Appellees. *

* The Clerk of the Court is respectfully directed to amend the official caption as it appears above.

No. 09–1657–pr.
|
May 24, 2010.

Synopsis

Background: Pro se prisoner brought civil rights action against various government defendants. The United States District Court for the Northern District of New York, dismissed certain § 1983 claims, Lawrence E. Kahn, J., 2007 WL 956941, and granted summary judgment in favor of defendants on his remaining § 1983 and § 1985 claims, and dismissed his claim against prison employee defendant, Suddaby, J., 2009 WL 981217. Prisoner appealed.

Holding: The Court of Appeals held that United States Marshals' failure to effect service automatically constituted "good cause" for extension of time in which to serve prison employee defendant.

Affirmed in part, and vacated and remanded in part.

West Headnotes (1)

[1] Process
Time for service

Pro se prisoner provided information sufficient to identify prison employee defendant, and therefore United States Marshals' failure to effect service automatically constituted "good cause" for an extension of time in which to serve. Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

24 Cases that cite this headnote

***50** Appeal from a judgment of the United States District Court for the Northern District of New York (Suddaby, J., Treece, M.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART** and **VACATED AND REMANDED IN PART.**

Attorneys and Law Firms

Joel Murray, pro se, Romulus, NY.

Andrew M. Cuomo, Attorney General of the State of New York; Barbara D. Underwood, Solicitor General; Benjamin N. Gutman, Deputy Solicitor General (Sudarsana Srinivasan, Assistant Solicitor General; ***51** Kate H. Nepyeu, of Counsel), New York, NY, for Defendants–Appellees.

PRESENT: B.D. PARKER, DEBRA ANN LIVINGSTON, and DENNY CHIN, Circuit Judges.

SUMMARY ORDER

****1** Plaintiff–Appellant Joel Murray appeals *pro se* from an order of the United States District Court for the Northern District of New York (Suddaby, *J.*), entered March 29, 2007, 2007 WL 956941, dismissing certain of his 42 U.S.C. § 1983 claims against various of the Defendants–Appellees, and from a second order, entered on April

9, 2009, 2009 WL 981217, granting summary judgment in favor of Defendants–Appellees on Murray's remaining claims under 42 U.S.C. §§ 1983 and 1985, and dismissing his claim against Defendant–Appellee Dr. Melendez for failure to timely effect service of process upon her pursuant to Federal Rule of Civil Procedure 4(m). We assume the parties' familiarity with the underlying facts and procedural history of the case, and with the issues presented on appeal.

We review *de novo* a district court's dismissal of claims pursuant to Fed.R.Civ.P. 12(b)(6), "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152 (2d Cir.2002). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). 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." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). We also review a district court's grant of summary judgment *de novo,* and determine whether there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Miller v. Wolpoff & Abramson, L.L.P.,* 321 F.3d 292, 300 (2d Cir.2003). While we construe the evidence in the light most favorable to the non-moving party, *id.,* "conclusory statements or mere allegations [are] not sufficient to defeat a summary judgment motion," *Davis v. New York,* 316 F.3d 93, 100 (2d Cir.2002).

We have undertaken a *de novo* review of the record and relevant cases and, except as noted below, we affirm the dismissal of Murray's claims against all defendants for substantially the same reasons set forth in Magistrate Judge Treece's thorough reports and recommendations of March 5, 2007, and March 3, 2009; these reports were adopted by the district court in their entirety.

We vacate the district court's dismissal of Murray's claim against Dr. Melendez for failure to serve process. We review a district court's dismissal pursuant to Federal Rule of Civil Procedure 4(m) for abuse of discretion. *Zapata v. City of New York,* 502 F.3d 192, 195 (2d Cir.2007). A district court abuses its discretion if it bases its ruling on an erroneous view of the law or clearly erroneous findings of fact, or its decision "cannot be located within the range of permissible decisions." *Lynch v. City of New York,* 589 F.3d 94, 99 (2d Cir.2009) (quoting *Sims v. Blot,* 534 F.3d 117, 132 (2d Cir.2008)).

****2** Rule 4(m) provides that "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed.R.Civ.P. 4(m). If the plaintiff shows "good cause for the failure" to serve, the ***52** district court is required to grant an "appropriate" extension of time in which to serve. *Id.* District courts also have discretion to enlarge the 120–day period even in the absence of good cause. *See Zapata,* 502 F.3d at 196. A *pro se* prisoner proceeding *in forma pauperis,* such as Murray, is "entitled to rely on service by the U.S. Marshals." *Romandette v. Weetabix Co.,* 807 F.2d 309, 311 (2d Cir.1986). As long as the *pro se* prisoner provides the information necessary to identify the defendant, the Marshals' failure to effect service automatically constitutes "good cause" for an extension of time within the meaning of Rule 4(m). *See, e.g., id.*; *see also Moore v. Jackson,* 123 F.3d 1082, 1085–86 (8th Cir.1997); *Byrd v. Stone,* 94 F.3d 217, 220 (6th Cir.1996); *Dumaguin v. Sec'y of Health & Human Servs.,* 28 F.3d 1218, 1221 (D.C.Cir.1994); *Sellers v. United States,* 902 F.2d 598, 602 (7th Cir.1990); *Puett v. Blandford,* 912 F.2d 270, 275 (9th Cir.1990). A *pro se* prisoner proceeding *in forma pauperis* is only required to provide the information necessary to identify the defendant, *see, e.g., Sellers,* 902 F.2d at 602, and it is "unreasonable to expect incarcerated and unrepresented prisoner-litigants to provide the current addresses of prison-guard defendants who no longer work at the prison," *Richardson v. Johnson,* 598 F.3d 734, 739–40 (11th Cir.2010).

Here, albeit after receiving a number of extensions of time within which to serve Melendez, Murray provided information that was sufficient to identify Dr. Melendez by full name and as an employee formerly assigned to Clinton Correctional Facility. *See* Doc. 103, *Murray v. Pataki,* 9:03–CV–1263 (N.D.N.Y. Apr. 13, 2007) (letter from Murray to the district court styled "Notification of Defendant"). This was sufficient to satisfy Murray's burden to provide sufficient information for the Marshals to identify the defendant. Although the Marshals subsequently failed to serve Dr. Melendez at the Clinton

facility on March 11, 2008, *id.* Doc. 134, they were clearly able to identify her from the information proffered by Murray, and service was unsuccessful merely because Dr. Melendez apparently no longer worked at Clinton. *See id.* As Murray had satisfied his burden, it was an abuse of discretion for the district court to require him to provide additional information regarding Dr. Melendez, and to dismiss Murray's claims against her pursuant to Rule 4(m) for failure to serve process upon her. District courts have a responsibility to assist *pro se* plaintiffs in their efforts to serve process on defendants. *See Valentin v. Dinkins,* 121 F.3d 72, 75–76 (2d Cir.1997) (recognizing district court's obligation to allow *pro se* plaintiff limited discovery to identify defendant for service of process). With the information that Murray provided, the district court here could have ordered the other defendants to contact Dr. Melendez to see if she would accept service or to provide the Marshals with Dr. Melendez's last known address.

3 For the foregoing reasons, the judgment of the district court dismissing the claims against Dr. Melendez for failure to serve process is **VACATED, and we **REMAND** to the district court for further proceedings in accordance with this decision. The judgment is **AFFIRMED** in all other respects.

All Citations

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

Michael WALKER, pro se, Plaintiff,
v.
Robert SHAW, Warden, Gang Intelligence Unit, the City of New York, New York City Department of Corrections, Department of Placement and Movements, Defendants.

No. 08 Civ. 10043(CM).
|
June 23, 2010.

Attorneys and Law Firms

Michael Walker, Newark, NJ, pro se.

DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

McMAHON, District Judge.

***1** Pro se plaintiff Michael Walker ("Plaintiff") brings this action pursuant to 42 U.S.C. § 1983 against the City of New York (the "City"), the New York City Department of Corrections, the New York City Department of Placement and Movements, the George R. Vierno Center Correctional Facility's Gang Intelligence Unit, and the Warden of the George R. Vierno Center, Robert Shaw (collectively, "Defendants"). Plaintiff alleges that GRVC officials deprived him of his right to due process by classifying him as an "SRG [Security Risk Group] Bloods gang member" without giving him notice or affording him an opportunity to be heard. Plaintiff also alleges that George R. Vierno Center Correctional Facility ("GRVC") officials exhibited deliberate indifference to his well-being and put his life in danger by housing him in an area occupied by members of the rival "Crips" gang for about two months. As a result, Plaintiff says he was threatened by another inmate and feared for his life.

On November 23, 2009, the City filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth in more detail below, Plaintiff's complaint fails to state a claim—he brings this action against three non-suable entities (the Department of Corrections, the Department of Placement and Movements and the Gang Intelligence Unit), has not adequately pleaded his claim for municipal liability against the City of New York, and has failed to allege that Warden Robert Shaw is amenable to suit, since Warden Shaw does not appear to have been personally involved in any of the facts giving rise to Plaintiff's claims.

However, Plaintiff has pleaded sufficient facts, which, if proven, would state a deliberate indifference claim against the specific (albeit as of yet unnamed) prison officials who are alleged to have deprived Plaintiff of his constitutional rights, and against Warden Shaw, assuming Warden Shaw was personally involved in the events giving rise to Plaintiff's claim. Because Plaintiff has failed to name these individual officials as defendants in this action, his complaint is dismissed with prejudice as to all claims against all named defendants except for his deliberate indifference claim against Warden Shaw, which is dismissed without prejudice. Plaintiff has 60 days from the date of this order to amend his complaint to name the relevant officials as defendants and/or to plead specific facts alleging that Warden Shaw was personally involved in the events underlying Plaintiff's claim. If Plaintiff fails to amend his complaint in the next 60 days, the Court will dismiss the action.

BACKGROUND

I. Facts

Because Plaintiff is proceeding pro se, the Court looks to all of Plaintiff's pleadings and motion papers in ascertaining the facts underlying his claim.

Plaintiff was, at all relevant times, a pre-trial detainee at the GRVC. The GRVC has a policy of separating and housing inmates based on gang affiliation. (Pl.'s Mem. of Law in Opp. to Defs.' Mot. to Dismiss, Dec. 15, 2009 ("Pl.'s Mem."), at 4.) Crips are housed in cell blocks 15, 17 and 19, and Bloods are housed in cell blocks 3–10.

(*Id.*) This policy of separation extends to all areas of the GRVC, including the law library, the clinic, the yard, the gym room and the visiting area. (*Id.*) The policy is the result of "a long and violent history between these gangs," and the safety issues that arise when members of rival gangs are housed in close proximity to one another. (*Id.*)

***2** In January 2008, Plaintiff was housed in a Crips cell block. On or about January 30, 2008, another inmate told Plaintiff that Plaintiff was classified as an "SRG [Security Risk Group] Bloods leader." (Am. Compl. at 3.) This inmate, who was a member of the Crips gang, confronted Plaintiff about his purported involvement in the Bloods immediately after speaking to a corrections officer. The Crips member suggested that this officer was "my boy." (Pl.'s Mem. at Addendum.) The Crips member told Plaintiff that he should "leave the 'Block' " because he "deserved to be fucked up," and that the "only thing saving [him] was [his] age." (Am. Compl. at 3.) (Plaintiff is fifty-two years old.)

Plaintiff alleges that he has never been a member of the Bloods gang and has never received a "ticket" for gang activity or for any other infraction. (*Id.*)

Plaintiff believed his life to be in danger while he was housed in a Crips cell block as a result of his SRG classification. Plaintiff alleges that a former inmate who had been a Crips gang member was killed while placed in a Bloods housing area. (*Id.* at 6.) The Court is certainly aware of the long-lasting feud between two vicious gangs; it has been a feature of a number of cases before this Court.

Plaintiff feared an attack by Crips inmates, so he went to "the bubble"—an enclosed security area in each housing unit that is manned by prison officers—to tell prison officials about his misclassification. (*Id.*) The officer on duty was the very officer who Plaintiff believed had disclosed his (mis)classification as a Blood to the Crips gang member. According to Plaintiff, the (unnamed) officer in the "bubble" was "belligerent and uncooperative," and chased Plaintiff away, saying "get of [sic] [my] window with that shit." (Pl.'s Mem. at Addendum.)

Plaintiff then asked to speak to a captain. Although the officer in the bubble refused to give Plaintiff permission, the floor officer granted him access to Captain Van Williams and Gang Intelligence Officer Louis. They told Plaintiff that his classification was "a matter of security and they [would] get back to [him]—just wait." (Am. Compl. at 3.) Both officers allegedly were sympathetic to Plaintiff's claim that he had been erroneously classified; they indicated that Plaintiff was "probably ... labelled [sic] erroneously by an overjealous [sic] officer in the intake, because the computer doesn't given [sic] any specifics as to why [he] was so labelled [sic], neither was [he] ever given a ticket for gang activity or for any other infraction." (*Id.*)

Plaintiff also complained to Security Captain Colon and Officer Stolely about his classification as a Blood, but "to no avail." (*Id.*) They "seem[ed] to find his situation funny" because they laughed at him. They also allegedly asked him to name other inmates who had threatened him as a condition to removing him from the Crips cell block.

Plaintiff filed a grievance with the GRVC Grievance Committee. Because no grievance forms were available, Plaintiff put his name on a "programs list in the cell block" and "sp[oke] to three people about [his] complaint at the programs office." (*Id.* at 5–6.) He complained that he was wrongly classified as a Bloods gang member and then placed in a Crips housing area. (*Id.* at 5.) The Grievance Committee said only that his classification "was a security issue." (*Id.*) Neither the Grievance Committee nor the prison officials provided him with guidance or advice about what remedies were available to him. (*Id.* at 6.)

***3** Plaintiff was moved to a different housing area in March, when his classification "went down." (*Id.*)

II. Procedural History

Plaintiff filed a complaint with the Pro Se Office in the U.S. District Court, Southern District of New York on June 20, 2008.

By Order dated November 19, 2008, Judge Harold Baer, Jr. directed Plaintiff to amend his complaint within sixty days. (Pl.'s Mem. Ex. A.) On March 19, 2009, Judge Baer dismissed the complaint because he never received an amended complaint. But on April 3, 2008, Plaintiff submitted a Motion to Reconsider the Judgment, alleging that he had in fact submitted an amended complaint. Plaintiff attached his amended complaint to the motion. Judge Baer granted the motion and reopened the case. (*Id.*) The case was reassigned in accordance with the procedures of the Clerk's Office, and is now before this Court.

Defendants have moved to dismiss the amended complaint. They argue that (1) Plaintiff failed to state a claim for deprivation of due process, deliberate indifference or municipal liability; (2) Plaintiff failed to exhaust his administrative remedies as required under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e; (3) Plaintiff cannot recover damages for emotional or mental injury without a prior showing of physical injury, as required under PLRA § 1997e(e); (4) the Department of Corrections, Department of Placement and Movements and Gang Intelligence Unit are non-suable entities under the New York City Charter, Chapter 17 § 396; and (5) Warden Shaw (the only individual named as a defendant) was not alleged to have been personally involved in any conduct causing the deprivation of Plaintiff's constitutional rights, and should be dismissed from the suit.

The Court concludes that Plaintiff has failed to raise a viable constitutional claim for deprivation of due process or municipal liability, and therefore grants the motion to dismiss with respect to those claims. But Plaintiff has raised a claim of deliberate indifference against the GRVC prison officials who allegedly failed to promptly relocate him to a different cell block, and so the Court denies the Defendants' motion to dismiss Plaintiff's deliberate indifference claims. Finally, the Court grants the motion to dismiss Warden Shaw from the suit for lack of personal involvement.

DISCUSSION

I. Standard of Review

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cargo Partner AG v. Albatrans, Inc.,* 352 F.3d 41, 44 (2d Cir.2003); *see also Roth v.. Jennings,* 489 F.3d 499, 510 (2d Cir.2007).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (*quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has 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." *Id.* (*citing Twombly,* 550 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff's well-pleaded allegations have "nudged his claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Id.* at 570; *Iqbal,* 129 S.Ct. at 1950–51.

***4** Despite this recent tightening of the standard for pleading a claim, complaints by pro se parties continue to be accorded more deference than those filed by attorneys. *Erickson v. Pardus,* 551 U.S. 89, 127 (2007). So *Twombly* and *Iqbal* notwithstanding, this Court must continue to "construe [a pro se complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests." *Weixel v. Bd. of Educ.,* 287 F.3d 138, 146 (2d Cir.2002). Allegations made in a pro se plaintiff's memorandum of law, where they are consistent with those in the complaint, may also be considered on a motion to dismiss. *Braxton v. Nichols,* No. 08 Civ. 08568, 2010 WL 1010001, at *1 (S.D.N.Y. Mar. 18, 2010).

II. Three Defendants Are Non–Suable Entities

As a threshold matter, Plaintiff has named the Department of Corrections ("DOC"), the Department of Placement and Movements ("DPM"), and the Gang Intelligence Unit ("GIU") as parties to this lawsuit. The DOC is a city agency, and the DPM and GIU are both departments within the DOC. (*See* Defs.' Mem. at 13.)

However, Plaintiff cannot sue an agency of the City of New York; he must sue the City. *See* N.Y. City Charter ch. 17, § 396. "[T]he overwhelming body of authority holds that DOC is not a suable entity." *Renelique v. Doe,* No. 99 Civ. 10425, 2003 WL 23023771, at *6 (S.D.N.Y. Dec. 29, 2003). Since the DPM and GIU are entities within the DOC, they too are non-suable entities. Therefore, to the extent that Plaintiff asserts § 1983 claims against the DOC, DPM and GIU, those claims are dismissed.

III. Plaintiff Has Failed to State a Claim for Deprivation of Due Process

Plaintiff asserts that he was deprived of due process because he was not notified about his classification as an SRG Bloods gang member or about the criteria used to classify him. (Pl.'s Mem. at 3 .)

To succeed on a procedural due process claim, a plaintiff must establish that (1) he possessed a liberty interest, and (2) he was deprived of that interest through insufficient process. *Ortiz v. McBride,* 380 F.3d 649, 654 (2d Cir.2004); *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir.2001). "Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the states." *Hewitt v. Helms,* 459 U.S. 460, 466 (1983).

It is well settled that the administrative classification of prisoners does not give rise to a protectable liberty interest under the Due Process Clause. *See Hewitt,* 459 U.S. at 468; *Lowrance v. Achtyl,* 20 F.3d 529, 535 (2d Cir.1994); *Corvino v. Vt. Dep't of Corr.,* 933 F.2d 128, 129 (2d Cir.1991). Administrative classification is used to separate potentially disruptive groups of inmates. It is precisely "the sort of [condition of] confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Hewitt,* 459 U.S. at 468. Prison officials have "full discretion" to control conditions of confinement such as prisoner classification, and prisoners have "no legitimate statutory or constitutional entitlement sufficient to invoke due process" in connection with such conditions. *Pugliese v. Nelson,* 617 F.2d 916, 923 (2d Cir.1980).

***5** Because prisoners have no liberty interest in being free from classification, they are also not entitled to due process before they are classified or prior to the imposition of conditions necessitated by their classification. *Cf. McFadden v. Solfaro,* No. 95 Civ. 1148, 1998 WL 199923 (S.D.N.Y., 1998) (non-punitive transfers of inmates are a "condition of confinement" that does not give rise to a liberty interest, and so plaintiff has no constitutional right to process before or after a transfer).

States can create liberty interests through statutes or regulations, but in order to do so, they must use "explicitly mandatory language in connection with ... specific substantive predicates." *Hewitt,* 459 U.S. at 472. A liberty interest could arise, for instance, when a state creates "some right or justifiable expectation ... that [a detainee] will not be transferred except for misbehavior or upon the occurrence of other specified events." *Cofone v. Munson,* 594 F.2d 934, 937–38 (2d Cir.1979) (*quoting Montanye v. Haymes,* 427 U.S. 236, 242 (1975)). However, "the mere adoption of procedural guidelines governing day-to-day prison administration, without more, will not give rise to a state-generated liberty interest." *Hewitt,* 459 U.S. at 472; *see also Mativn v. Henderson,* 841 F.2d 31, 34 (2d Cir.1988).

The New York City Board of Correction has implemented regulations (called "Minimum Standards") that set forth procedures for the administrative classification of inmates in New York City correctional facilities for security purposes:

> (i) [The security classification] shall be in writing and shall specify the basic objectives, the classification categories, the variables and criteria used, the procedures used and the specific consequences to the prisoner of placement in each category.
>
> (ii) It shall include at least two classification categories.
>
> (iii) It shall provide for an initial classification upon entrance into the corrections system. Such classification shall take into account only relevant factual information about the prisoner, capable of verification.
>
> (iv) It shall provide for involvement of the prisoner at every stage with adequate due process.
>
> (v) Prisoners placed in the most restrictive security status shall only be denied those rights, privileges and opportunities that are directly related to their status and which cannot be provided to them at a different time or place than provided to other prisoners.
>
> (vi) It shall provide mechanisms for review of prisoners placed in the most restrictive security status at intervals not to exceed four weeks for detainees and eight weeks for sentenced prisoners.

40 RCNY § 1–02(e).

If Plaintiff's allegations are true, then GRVC prison officials did not follow procedures when they classified Plaintiff as a Blood. According to Plaintiff, he was not notified in writing of his classification, was not involved in his classification or afforded any process, and was not given any classification review when he protested.

***6** However, despite the City's use of mandatory language and the words "due process," several of my colleagues have concluded that the Minimum Standards do not create a protectable liberty interest. *Adams v. Galletta,* No. 96 Civ. 3750, 1999 WL 959368, at *5–6 (S .D.N.Y. Oct. 19, 1999) (Koeltl, J.); *Korkala v. N.Y.C. Dep't of Corr.,* No. 84 Civ. 5740, 1986 WL 9798, at *4–5 (S.D.N.Y. Sep. 4, 1986) (Carter, J.). They place no "substantive limitations on official discretion," *Korkala,* 1986 WL 9798, at *4–5, and "do not purport to grant individual prisoners the right not to be in any particular category," *Adams,* 1999 WL 959368, at *5–6. The implementing regulation for the Minimum Standards (Directive 4505) also gives prison officials "unlimited discretion to select inmates for evaluation or reclassification and to determine whether ... they may be assigned to restrictive housing units." *Id.* at *4–5; *see also Adams,* 1999 WL 959368, at *6. "[T]he adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the state chose to require." *Korkala,* 1986 WL 9798, at *4.

Because of the lack of a protectable liberty interest, the court in *Korkala* dismissed the due process claims of a prisoner who was wrongly classified as a maximum-security inmate and denied a proper hearing to address his classification. *Korkala,* 1986 WL 9798.

In the case at bar, which is analogous to *Korkala,* Plaintiff was also wrongly classified as a security risk. Plaintiff believes he should have received "constructive notice of being assessed" as an SRG Blood, and of the "criteria of assessment" used to classify him. (Am. Compl. at 3.) But neither the Due Process Clause nor the Minimum Standards gives rise to a liberty interest that protects Plaintiff from security classification (or mis-classification). And because Plaintiff's "designation [as an SRG Bloods member] is not the deprivation of a liberty interest, the prison authorities were not constitutionally required to afford due process in imposing it." *Adams,* 1999 WL 959368, at *6 n. 2. Plaintiff's claim for denial of due process is dismissed.

IV. Plaintiff Has Failed to State a Claim for Municipal Liability

In order to plead a § 1983 claim against a municipality, plaintiff must allege that a municipal policy or custom caused the deprivation of his constitutional rights. *Monell v. Dep't of Soc. Serv.,* 436 U.S. 658, 690–91 (1978); *Sarus v. Rotundo,* 831 F.2d 397, 400 (2d Cir.1987). A municipality may not be held liable solely on the basis of respondeat superior in a 1983 action. *Monell,* 436 U.S. at 694–95. Rather, the plaintiff must first allege "the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries.... Second, the plaintiff must establish a casual connection—an "affirmative link"—between the policy and deprivation of his constitutional rights." *Vippolis v. Village of Haverstraw,* 768 F.2d 40, 44 (2d Cir.1985), *cert. denied,* 480 U.S. 916 (1987) (*citing Oklahoma City v. Tuttle,* 471 U.S. 808, 824 n. 8 (1985)).

***7** Plaintiff makes two separate claims of municipal liability against the City of New York. First, Plaintiff claims that his misclassification by the Gang Intelligence Unit was deliberate and "stem[med] from City policy." (Am. Compl. at 3, 6.) However, he alleges no specific facts to support his conclusory statement; rather, the facts alleged in his pleadings suggest either the *absence* of any such policy or the failure to follow a policy (which is the antithesis of a link between policy and action).

Plaintiff was told by prison officials that he was likely misclassified by an "overjealous [sic] officer in the intake, because the computer doesn't give any specifics as to why [he] was so labelled [sic], neither was [he] ever given a ticket for gang activity or for any other infraction." (Am. Compl. at 3.) It appears the prison has in place some system of labeling inmates based on information collected and stored in its database, and the prior gang activity of the detainee. Plaintiff also describes in his motion papers the GRVC's policy of separating inmates based on gang affiliation—a policy that was created to prevent the safety issues that may arise when members of rival gangs are housed in close proximity to one another. (Pl.'s Mem. at 4.) There is no allegation of fact suggesting that GRVC prison officials followed a City policy by deliberately misclassifying Plaintiff as a member of one gang and then placing him in a rival gang's cell block.

Furthermore, Plaintiff pleads no facts to show that his misclassification was more than an isolated incident. A single incident alleged in a complaint can be sufficient to establish a municipal policy, but only if it is accomplished by a city official with final policymaking authority. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986).

Here, the individual officers in the Gang Intelligence Unit who were responsible for making the SRG assessments and classifying inmates are not alleged to have had final policymaking authority.

Second, Plaintiff also claims that the City failed to properly train its prison officials in making gang intelligence assessments. But he has not alleged any of the following elements of a failure-to-train claim: "(1) that a policymaker knows 'to a moral certainty' that city employees will confront a particular situation; (2) that the situation presents the employee with 'a difficult choice of the sort that training or supervision will make less difficult;' and (3) that 'the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.' " *Cabbie v. City of New York,* No. 04 Civ. 9413, 2010 WL 1222035 (S.D.N.Y. Mar. 29, 2010) (*quoting Walker v. City of New York,* 974 F.2d 293, 297–98 (2d Cir.1992)).

A "simple recitation that there was a failure to train ... does not suffice to allege that a municipal custom or policy caused the plaintiff's injury." *Dwares v. City of New York,* 985 F.2d 94, 100–101 (2d Cir.1993). Because Plaintiff does not allege a single fact in support of this claim, both of Plaintiff's municipal liability claims are dismissed with prejudice.

V. Plaintiffs Claim for Deliberate Indifference

***8** Plaintiff claims that unnamed prison officials acted with deliberate indifference to his safety by: (1) failing to promptly remove him from the Crips cell block once notified of his classification as a Blood; (2) disclosing his classification as a Blood to a Crips member; (3) laughing at him when he asked to be transferred; and (4) retaliating against him for accusing the officer in the bubble of disclosing his status, by demanding that he name other inmates who threatened him as a condition of removing him from the Crips cell block. (*See* Am. Compl. at 3; Pl.'s Mem. at 4.)

The failure to name as defendants any of the officials who allegedly did these things—even as "John Does" (there is no allegation that the warden or the only individual defendant in the caption did any of the above)—dooms this claim. However, this particular claim must be dismissed without prejudice.

Because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law," the constitutional rights of a detainee are analyzed under the Due Process Clause of the Fourteenth Amendment. *Bell v. Wolfish,* 441 U.S. 520, 535–36 (1979). However, claims of prison officials' deliberate indifference to the health or safety of a prisoner are "analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment." *Caiozzo v. Koreman,* 581 F.3d 63, 72 (2d Cir.2009). "[P]rison officials owe the same duty to provide the same quantum of basic human needs and humane conditions of confinement to both [convicted inmates and pretrial detainees] .... [T]here is no legally significant situation in which a failure to provide an incarcerated individual with ... protection from violence *is* punishment yet *is not* cruel and unusual." *Id.* (*quoting Hare v. City of Corinth, Miss.,* 74 F.3d 633, 649 (5th Cir.1996)). Therefore, Plaintiff's claims are analyzed under the Eighth Amendment "deliberate indifference" standard.

The Eighth Amendment proscribes the unnecessary and wanton infliction of pain, and imposes a duty on prison officials to take "reasonable measures to guarantee the safety of inmates." *Farmer,* 511 U.S. at 532. In light of this duty, a prison official acts with deliberate indifference when two requirements are met: (1) a plaintiff was subjected to conditions posing a substantial risk of serious harm, and (2) the prison officials knew of and disregarded the risk by failing to take reasonable measure to abate the harm. *Haves v. N.Y.C. Dep't of Corr.,* 84 F.3d 614, 620 (2d Cir.1996) (*citing Farmer v. Brennan,* 511 U.S.825, 834 (1994)).

A. Prison Officials Failed to Promptly Remove Plaintiff From the Crips Cell Block

Plaintiff would meet both requirements of a deliberate indifference claim if he alleged that identified, responsible prison officials failed to promptly relocate him from the Crips cell block after he was classified as a Blood.

***9** First, Plaintiff was subjected to a "substantial risk of serious harm" by prison officials, whose alleged acts or omissions were "sufficiently serious" as to create "unduly harsh conditions of confinement." *Branham v. Meachum,* 77 F.3d 626, 630 (2d Cir.1996); *see also Farmer,* 511 U.S. at 834. Plaintiff requested a transfer from his Crips cell block in January 2008, when he first complained to prison officials about his misclassification as an SRG Blood. At

that time, Plaintiff's classification as a Blood was known to at least one Crips inmate in the cell block, who threatened Plaintiff by saying that Plaintiff "deserved to be fucked up." (Am. Compl. at 3.) There had already been at least one prior instance of deadly gang violence between the Bloods and Crips at the GRVC, where a Crips member was killed while housed in a Bloods cell block, and the Court would have to be woefully ignorant not to be aware of the bloody history between these two deadly gangs. Yet prison officials did not grant Plaintiff's request to be removed from the Crips cell block until two months after Plaintiff's initial complaint.

Defendants argue that Plaintiff cannot maintain any claims for constitutional deprivation because he did not suffer any physical attack during those two months. (*See* Defs.' Br. at 9.) But an actual attack is not necessary to allege the existence of a substantial risk of serious harm, since it is based on hindsight rather than on "circumstances of which [an] official was aware at the time he acted or failed to act." *Heisler v. Kralik,* 981 F.Supp. 830, 837 (S.D.N.Y.1997).

In the absence of a physical attack, "extreme and officially sanctioned psychological harm" can also give rise to an Eighth Amendment Claim. *See id.* at 837. The fear of assault, when unaccompanied by specific threats or imminent harm, is "not the kind of extreme and officially sanctioned psychological harm that supports a claim of damages under the Eighth Amendment." *Manos v.. Decker,* No. 03 Civ. 2370, 2005 WL 545215, at *8–9 (S.D.N.Y. Mar. 7, 2005); *Cruz v. Hillman,* No. 01. Civ. 4169, 2002 WL 31045864, at *8–9 (S.D.N.Y. May 16, 2002); *Bolton v. Goord,* 992 F.Supp. 604, 627 (S.D.N.Y.1998). However, when a prisoner is subjected to specific threats from another inmate, and there are "indication[s] that the threat will be carried out," the failure of prison officials to act may give rise to a deliberate indifference claim. *Green v. City of N.Y. Dep't of Corr.,* No. 06 Civ. 4978, 2008 WL 2485402, at *6–7 (S.D.N.Y. June 19, 2008).

In *Green v. City of New York Department of Corrections,* a prisoner who was falsely designated as a member of the Netas gang claimed that prison officials acted with deliberate indifference by failing to change his designation for six months. The court dismissed the complaint for, among other things, the plaintiff's failure to allege that "any inmate perceived to be a Neta member was physically harmed." *Green,* 2008 WL 2485402, at *7.

***10** In this case, unlike in *Green,* Plaintiff has alleged that the violent history between the Bloods and Crips caused at least one inmate to be killed while placed in the opposing gang's housing area. The existence of a policy of separating rival gang members further demonstrates that the threat of harm to inmates housed in a rival gang's cell block is real and significant. Due to these factors, the prison officials' failure to relocate Plaintiff created a substantial risk of serious harm to Plaintiff.

Plaintiff could also successfully allege that the responsible officers knew of and disregarded the risk by failing to take reasonable measure to abate the harm, provided he named them as defendants.

In order to act with "sufficient culpable intent" to constitute deliberate indifference, a prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *See Hayes v. N.Y.C. Dep't of Corr.,* 84 F.3d 614, 620 (2d Cir.1996); *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994). The prison official "need not desire to cause such harm or be aware that such harm will surely or almost certainly result. Rather, proof of awareness of a substantial risk of the harm suffices." *Salahuddin v. Goord,* 467 F.3d 263, 280 (2d Cir.2006).

Here, Plaintiff alleges that unnamed prison officials acted with the requisite mental state. Plaintiff complained to them numerous times. The officials knew that Plaintiff was classified as an SRG Bloods member and housed in a Crips cell block—facts from which they could draw the inference that Plaintiff was at a substantial risk of serious harm.

These officials also allegedly drew the inference that Plaintiff was subjected to a substantial risk of harm. A plaintiff can satisfy this criteria by "showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented or expressly noted by prison officials in the past, and ... that the defendant[s] ... had been exposed to information concerning the risk." *Warren v. Goord,* 476 F.Supp.2d 407, 411 (S.D.N.Y.2007) (internal quotations and citations omitted). According to Plaintiff, the GRVC's policy of separating inmates based on gang affiliation is the result of "a long and violent

history between [the Bloods and Crips].” (Pl.'s Mem. at 4.) The policy demonstrates that the prison is well aware of the substantial risk of attack to inmates who are affiliated with one gang and housed with members of a rival gang. Given that Plaintiff complained to several prison officials, including Gang Intelligence Officer Louis and Captain of Security Colon, Plaintiff has pleaded facts that establish that the prison officials knew that Plaintiff was subjected to a substantial risk of serious harm.

Yet the prison officials allegedly disregarded this risk by failing to take reasonable measures to abate the threatened harm to Plaintiff. They left Plaintiff in the Crips cell block for two months, while Plaintiff feared for his safety. Even if Plaintiff's SRG classification was a “security issue” that was not immediately addressable by the prison officials, this Court cannot think of any reason why Plaintiff could not have been moved to a different cell block in the meantime. After all, Plaintiff was still classified as a Blood at that time, and his then-classification should have warranted an immediate relocation to a different housing area.

***11** In *Swift v. Tweddell,* 582 F.Supp.2d 437, 446–47 (W.D.N.Y.2008), the court determined that prison officials took reasonable measures to protect the safety of a prisoner by granting the prisoner's request to be transferred to a different housing area within one or two hours of the prisoner's complaints about threats from other inmates. In contrast, the court in *Warren v. Goord* denied a motion to dismiss a prisoner's deliberate indifference claims against prison officials who were allegedly aware of a substantial risk to the prisoner's safety and did nothing to remedy the situation. *Warren,* 476 F.Supp.2d at 412; *see also Hayes v. New York City Department of Corrections,* 84 F.3d 614, 621 (2d Cir.1996) (determining that a genuine issue of fact existed about whether prison officials acted reasonably in denying the threatened prisoner a transfer, when the record indicated that another inmate who reported that he was threatened was transferred that same day, and DOC officials testified that “it is standard procedure to relocate an inmate whenever an inmate informs officials that his life is threatened”).

In the present case, Plaintiff was left in the Crips cell block for two months, during which time nothing was done to move him, despite the threats to Plaintiff's safety. Plaintiff was relocated only upon his reclassification (i.e., *not* as a Blood) in March 2008. Given these facts, a trier of fact could conclude that the prison officials failed to take reasonable measures to abate the harm. Thus, Plaintiff's allegations relating to deliberate indifference are sufficient to state a cause of action against the individual officials who participated in the actions of which he complains.

However, Plaintiff has failed to name these individual officers in his amended complaint. Rather, Plaintiff brings his complaint against three non-suable entities as well as against the GRVC Warden, Robert Shaw, who is not alleged to have been personally involved in the deprivation of Plaintiff's constitutional rights. The only other defendant Plaintiff has named in this case is the City of New York—but as explained above, Plaintiff fails to state a claim for municipal liability.

Plaintiff could amend his complaint to add these individuals as defendants if he knows their names or badge numbers; indeed, it is possible that he already knows who some of them are (Louis and Colon are possibilities). If not, Plaintiff could amend to sue “John Doe” defendants and then take discovery to learn the identity of the officers he wishes to sue. The Court grants Plaintiff 60 days from the date of this order to file an amended complaint that does one or the other.

B. Prison Officials Acted With Deliberate Indifference to Plaintiff's Safety by Disclosing Plaintiffs SRG Classification to a Crips Gang Member

As with the officials discussed above, although Plaintiff has not named the prison official in “the bubble” as an individual defendant, he has also sufficiently pleaded that one corrections officer acted with deliberate indifference by disclosing Plaintiff's SRG classification to another inmate.

***12** A prison official's disclosure of information about one inmate to other inmates may give rise to a cause of action if the “alleged disclosure ... caused plaintiff to be subjected to any harm, actual or threatened.” *Swift v. Tweddell,* 582 F.Supp.2d 437, 447–48 (W.D.N.Y.2008). Here, the officer in the bubble clearly created the substantial risk of serious harm to Plaintiff by disclosing Plaintiff's SRG Blood classification to a Crips inmate who was housed in the same Crips cell block as Plaintiff. Because of the officer's disclosure, Plaintiff was threatened by the Crips inmate, who told Plaintiff that he “deserved to be fucked up.”

Furthermore, the officer allegedly knew of and disregarded the risks to Plaintiff by failing to take reasonable measures to abate the harm. The bubble is an enclosed security area within each housing area (Defs.' Mem. of Law in Supp. of Mot. to Dismiss, Nov. 23, 2009, at 3 n. 3), and the officer in the bubble knew that Plaintiff was housed in his cell block—a Crips cell block. However, he allegedly still revealed Plaintiff's SRG Blood classification to the Crips inmate in the same cell block. Given the violent history between the rival gangs, and the GRVC's policy of separating inmates affiliated with rival gangs, the prison official allegedly drew the inference that his act subjected Plaintiff to a substantial risk of serious harm. *See Warren v. Goord,* 476 F.Supp.2d 407, 411 (S.D.N.Y.2007) (internal quotations and citations omitted).

Finally, this unnamed officer failed to take reasonable measures to abate the harm by chasing Plaintiff away from the bubble when Plaintiff tried to complain, saying "get of [sic] my window with that shit." (Pl.'s Mem. at Addendum.) Therefore, Plaintiff could state a claim against the prison official in the bubble—but he must identify and name his as a defendant.

C. Prison Officials Did Not Act with Deliberate Indifference By Laughing When Plaintiff Asked To Be Transferred

Although Plaintiff's other deliberate indifference allegations do state a claim, his argument that Captain Colon and Officer Stolely (who are identified but not named as defendants) acted with deliberate indifference to his safety by laughing at him when he asked to be transferred is plainly insufficient.

Laughter, verbal harassment or even spitting by prison officials, when "unaccompanied by any injury, no matter how inappropriate, unprofessional, or reprehensible it might seem," does not constitute the violation of any federally protected right. *Aziz Zarif Shabazz v. Pico,* 994 F.Supp. 460, 475 (S.D.N.Y.1998); *see also Show v. Patterson,* 955 F.Supp. 182, 191–92 (S.D.N.Y.1997); *Greene v. Mazzuca,* 485 F.Supp.2d 447, 451 (S.D.N.Y.2007); *Moncrieffe v. Witbeck,* No. 97 Civ. 253, 2000 WL 949457, at (N.D.N.Y. June 29, 2000). Therefore, Plaintiff has failed to raise a deliberate indifference claim on the ground that two prison officials laughed at him.

D. Prison Officials Did Not Retaliate Against Plaintiff By Asking Him To Name Other Inmates Who Threatened Him As A Condition of Relocating Plaintiff

***13** Finally, Plaintiff claims that prison officials retaliated against him by asking him to name other inmates that had threatened him as a condition to moving Plaintiff from the Crips cell block. Plaintiff believes the officials were retaliating against him for claiming that the officer in the bubble had disclosed Plaintiff's SRG classification.

"Courts must approach prisoner claims of retaliation with skepticism and particular care" for two reasons: they are "easily fabricated," and "any adverse action taken against a prisoner by a prison official ... can be characterized as a ... retaliatory act." *Dawes,* 239 F.3d at 491 (*citing Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983)). To plead retaliation, a plaintiff must advance "non-conclusory allegations" that (1) he engaged in a protected action, (2) the prison officials took adverse action against him, and (3) a causal connection existed between the protected act and the adverse action. *See Dawes,* 239 F.3d at 491–92.

Here, Plaintiff claims that Captain Colon and Officer Stolely took adverse action against him by asking him to name other inmates who had threatened him as a condition of relocating him. But asking for information, in and of itself, does not amount to adverse action. The issue is whether conditioning a move that was dictated by safety concerns on providing information constituted retaliation—not whether the request for information itself constituted retaliation. Because Plaintiff alleges no facts to suggest that these two officials retaliated against him, the Court dismisses Plaintiff's retaliation claims.

VI. Dismissal for Failure to Exhaust Administrative Grievances At This Stage Would Be Improper

Defendants assert the affirmative defense that Plaintiff failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act ("PLRA").

Section 1997e(a) of the PLRA provides that "no action shall be brought with respect to prison conditions [under section 1983] ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. §

1997e(a). The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532 (2002). The requirement cannot be satisfied by an "untimely or otherwise procedurally defective administrative grievance or appeal." *Woodford v. Ngo,* 548 U.S. 81, 83–84 (2006). Instead, the plaintiff must properly exhaust his remedies by "using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Id.* at 90 (internal quotation marks omitted).

The Second Circuit has recognized three circumstances, however, that may excuse a plaintiff from the exhaustion requirements: (1) when administrative remedies are not available to plaintiff, (2) when defendant is estopped from asserting exhaustion as an affirmative defense, and (3) when special circumstances, such as a reasonable misunderstanding of the grievance procedures, otherwise justify the prisoner' failure to comply with the requirements. *See Macias v. Zenk,* 495 F.3d 37, 41 (2d Cir.2007) (*citing Hemphill v. New York,* 380 F.3d 680, 686 (2d Cir.2004)).

***14** Plaintiff contends that he exhausted administrative remedies by complaining to several prison officials, filing a grievance with the GRVC Grievance Committee, and filing a "follow up grievance as a form of appeal." (Am. Compl. at 4; Pl.'s Mem. at 6.)

These actions do not technically comply with the DOC Inmate Grievance Resolution Program ("IGRP"), which requires an inmate at Rikers Island must take the following four steps to exhaust his administrative remedies: (1) file a complaint with the grievance committee, (2) appeal to the facility warden, (3) appeal to the Central Office Review Committee, and (4) appeal to the NYC Board of Correction. (*See* DOC Directive 3375 R–A, at 1, *available at* http:// www.nyc.gov/html/doc/downloads/pdf/3375R-A.pdf.)

However, the pleadings raise the possibility that Plaintiff has met either one or two of the three exceptions excusing his failure to exhaust. First, Plaintiff's failure to exhaust could be excusable because administrative remedies were unavailable to him. *See Marias,* 495 F.2d at 41. Under DOC Directive 3375 R–A, certain "classification designations" are considered non-grievable, and SRG classifications may fall within that category. (*Id.* at 2.) None of the parties has briefed this issue, so the Court lacks an adequate basis from which to form a conclusion regarding grievability of SRG classifications.

Second, even if SRG classifications are grievable, there is evidence to suggest that Plaintiff was prevented from grieving. Every time Plaintiff complained about his classification as an SRG, he was told that it was a security issue. (Am. Compl. at 5.) He was unable to acquire a grievance form and instead had to file his grievance on a cell block "programs list." (Am. Compl. at 5–6.) He was never told that his grievances were denied, and he was never advised that he could appeal. He was never provided with available forms of relief. (*Id.*) In his complaint, Plaintiff answered to the question, "Does the grievance procedure at the jail, prison or other correctional facility where your claim(s) arose cover some or all of your claims(s)?" by checking "No." (Am. Compl. at 5). At this stage of the litigation, these allegations are more than sufficient to warrant denial of defendants' motion to dismiss on failure to exhaust grounds. *See Burns v. Moore,* 2002 WL 91607, at 4–5 (S.D.N.Y.2002); *Feliciano v. Goord,* No. 97 Civ. 263, 1998 WL 436358, at *2 (S.D.N.Y. July 27, 1998) (holding that dismissal for failure to exhaust is not appropriate where plaintiff was unable to file a grievance as a result of prison officials' telling him that the incident he wished to complain about was not a "grievance matter" and refusing to provide him with grievance forms).

For these reasons, dismissal for failure to exhaust is not appropriate at this stage.

VII. The Claims Against Warden Shaw Are Dismissed

Plaintiff also names Warden of GRVC Robert Shaw as a Defendant to this lawsuit. However, § 1983 claims must be brought against officials who were personally involved in the conduct that allegedly violated a plaintiff's constitutional rights. *Williams v. Smith,* 781 F.2d 319, 323 (2d Cir.1983). Since Plaintiff has failed to allege any personal involvement by Shaw, or even mention Shaw anywhere else in the Amended Complaint or motion papers, any § 1983 claims that Plaintiff asserts against Shaw are dismissed without prejudice. However, since Plaintiff could plead a deliberate indifference claim against Warden Shaw, if Warden Shaw was involved in the events giving rise to Plaintiff's claim, Plaintiff is granted 60 days to replead his deliberate indifference claim against Warden Shaw.

VIII. No Claim for Unnecessary Searches as Seizures

***15** As a final matter, Plaintiff mentions in the "Relief" section of his Amended Complaint that his classification "left [him] up to unnecessary and unreasonable searches." (Am. Compl. at 6.) But "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Powell v.. Schriver,* 175 F.3d 107, 112 n. 3 (2d Cir.1999) (*citing Hudson v.. Palmer,* 468 U.S. 517, 526 (1984)). As Plaintiff does not even allege that he was actually subjected to unnecessary searches as a result of his SRG classification, Plaintiff fails to raise a claim for any violation of his constitutional rights on those grounds.

IX. Failure to Meet the Physical Injury Requirement under PLRA § 1997e(e)

Under the PLRA, an inmate who seeks to recover compensatory damages for a mental or emotional injury must first establish that he has suffered a "physical injury." *See* 42 U.S.C. § 1997e(e); *Petty v. Goord,* No. 00 Civ. 803, 2008 WL 2604809, *6 (S.D.N.Y. June 25, 2008). However, a plaintiff is not required to show physical injury in order to recover nominal damages, punitive damages, or to obtain declaratory relief. In fact, it is error for courts not to award nominal damages in § 1983 actions when a constitutional violation has been established. *See Robinson v. Cattaraugus,* 147 F.3d 153, 162 (2d Cir.1998).

Here, Plaintiff has failed to plead that he suffered a physical injury; therefore, he is barred from recovering compensatory damages for any alleged emotional injury he suffered. But he is still entitled to recover nominal and (potentially) punitive damages for the violation of his constitutional rights.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted with prejudice as to all claims against all defendants except Plaintiff's deliberate indifference claim against Warden Shaw. Plaintiff is granted 60 days from the date of this order to replead his deliberate indifference claim, naming either (1) the appropriate individual defendants by name; or (2) "John Doe" defendants, listed separately so that it is possible to take discovery as to who they are. Within the 60 day period, Plaintiff must also plead specific facts alleging that Warden Shaw was personally involved in the events underlying Plaintiff's claim, or the Court will dismiss the remaining claim against Warden Shaw. If Plaintiff fails to amend his complaint during the next 60 days, the Court will dismiss the action.

Plaintiff has also filed two motions to compel with this Court (docket nos. 21 and 27). The motion to compel at docket no. 27 was denied by Magistrate Judge Kevin Nathaniel Fox, on January 26, 2010. (*See* docket no. 30.) The magistrate judge has informed this Court that the motion to compel at docket no. 21 is a duplicate of the motion to compel at docket no. 27. Therefore, this Court now denies the motion to compel at docket no. 21.

The Clerk of the Court is instructed to remove the motion to dismiss (docket no. 16) and the motion to compel (docket no. 21) from the Court's active motion list.

***16** This constitutes the order and decision of this Court.

All Citations

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Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Darryl GREENE, Plaintiff,
v.
Captain GARCIA, et al., Defendants.

No. 12 CV 4022(LAP)(MHD).
|
March 26, 2013.

Memorandum and Order

LORETTA A. PRESKA, Chief Judge.

***1** Plaintiff Darryl Greene ("Plaintiff") filed the instant action *pro se* on May 18, 2012 alleging that his constitutional rights had been violated by Defendants Captain Garcia ("Captain Garcia") and Captain Van Williams ("Captain Van Williams"), both of whom are corrections officers at the New York City Department of Corrections' George R. Vierno Center ("GRVC"). In his Complaint, Plaintiff invokes 42 U.S.C. § 1983 and alleges that Garcia and Van Williams (together, the "Defendants") deprived him of due process and acted with deliberate indifference to his safety when he was incarcerated as a pre-trial detainee at the GRVC. Defendants have moved to dismiss the Complaint in its entirety, and for the reasons discussed, the Court GRANTS in part and DENIES in part Defendants' motion [dkt. no. 12].

I. BACKGROUND

For the purpose of deciding the motion to dismiss, the Court takes as true the following factual allegations in the Complaint and draws all reasonable inferences in favor of Plaintiff. *See Goldstein v. Pataki,* 516 F.3d 50, 56 (2d Cir.2008).

On June 20, 2011, while he was incarcerated as a pre-trial detainee at the GRVC, Plaintiff went to the Law Library to take an exam to become a Suicide Prevention Aide. (Compl. 4–5, ¶¶ 1, 12 .)[1] While waiting to take the exam, Plaintiff submitted his identification card to the Law Library Officer, non-defendant Officer Harris. *Id.* After reviewing Plaintiff's information, Officer Harris informed Plaintiff that he was ineligible to be a Suicide Prevention Aide because he had been designated in the GRVC's database as "S.R.G., Bloods." *Id.* The "S.R.G. Bloods" designation refers to an inmate being identified as a member of the "Security Risk Group" the Bloods' gang. *Id.* ¶ 5. Officer Harris then informed Plaintiff that, in order to correct his S.R.G. designation, he should speak to GRVC Security. *Id.* 4, ¶ 2.

1 Because the paragraph numbers used in the Complaint are repeated across sections, for ease of reference, the Court cites to the Complaint's ECF page number in addition to its paragraph number.

Plaintiff originally contacted non-defendant Security Captain Butler on June 22, 2011 to inform him that he had been incorrectly designated as a member of the Bloods' gang, but because Captain Butler had since retired, Plaintiff never received a response to this inquiry. *Id.* 5, ¶ 5. However, on July 14, 2011, Plaintiff spoke in the corridor with the new Security Captain, Captain Garcia. *Id.* 5, ¶ 7. In the course of their conversation, Plaintiff addressed with Captain Garcia his desire to correct his improper designation as a member of the Bloods. *Id.* Plaintiff further explained to Captain Garcia that his incorrect designation was of particular concern to him because he was being housed in an area for inmates with an S.R.G. Crips designation. *Id.* 5, ¶ 8. Although Plaintiff expressed that he had no preference in his housing location, as long as his medical needs[2] were accommodated, he expressed a clear desire to have his assessment cleared of any gang affiliation. *Id.* In response to Plaintiff's inquiry, Captain Garcia first responded that he would look into the situation and see what he could do. *Id.* 5, ¶ 9. Plaintiff then informed Captain Garcia that, as a result of his incorrect designation and current housing assignment, he feared that he may be threatened or attacked by fellow inmates who believed him to be a member of a rival gang.[3] *Id.* Captain Garcia then responded to Plaintiff "Welcome to G ... R ... V ... C," before walking away as if nothing had been said to him. *Id.* 5, ¶ 10.

2 Plaintiff has a medical condition which requires him to be housed in a heat sensitive housing unit. (Compl.5, ¶ 8.)

3 Due to a long and violent history between members of the Bloods and Crips, at the time of Plaintiff's

incarceration, the GRVC had a policy of separating inmates based on gang affiliation. *Id.* 5, ¶¶ 12–14. This policy of separation results in Bloods and Crips being housed in separate housing facilities, as well as being separated when in the communal areas of the GRVC (i.e. Law Library, yard, gym, and visiting area.) *Id.*

***2** On or about January 19, 2012, Plaintiff was involved in a physical altercation with a member of the Crips. *Id.* 6, ¶ 17. The incident was brought to the attention of Captain Van Williams, who investigated the particulars of the fight. *Id.* 6, ¶ 18. When questioned by Captain Van Williams as to what had occurred, Plaintiff informed Captain Van Williams that the fight had transpired because a member of the Crips had assaulted Plaintiff based on a belief that Plaintiff was a Blood "on the low." *Id.* Captain Van Williams then questioned Plaintiff as to whether he was in fact a member of the Bloods, to which Plaintiff responded in the negative. *Id.* 6, ¶ 19. Captain Van Williams then reviewed the S.R.G. master sheet and asked for Plaintiff's identification, both of which reflected that Plaintiff was designated as "S.R.G. Bloods." *Id.* Upon seeing Plaintiff's designation, Captain Van Williams said to Plaintiff "You don't even suppose to be in this house." *Id.* Plaintiff then responded to Captain Van Williams that he had a medical condition which made him sensitive to heat and he did not care where he was housed, as long as the housing was heat-sensitive. *Id.*

Later, on the evening of January 19, 2012, Plaintiff was taken to the GRVC Intake area to be re-housed in a housing area designated for Bloods' members. *Id.* 6, ¶ 20. Due to Plaintiff's heat sensitivity, however, Plaintiff was later instructed to "pack-up" and was told that he was being returned to a housing area designated for Crips' members. *Id.* Although he was aware that his incorrect designation as a Blood made it dangerous for him to be housed with Crips, Plaintiff complied with the order to move back to a Crips' housing area. *Id.* 6, ¶ 21.

At all times, Captain Van Williams was aware that: (1) Plaintiff continued to be incorrectly designated as a Bloods member; (2) Plaintiff was being returned to a Crips housing area; and (3) Plaintiff had previously been attacked by a Crips' affiliated inmate as a result of his designation. *Id.* 6, ¶¶ 22, 23 and 28. Captain Van Williams' decision to move an inmate designated as a Blood into a Crips' housing area was in direct violation of the GRVC's policy of separating inmates who are designated as belonging to rival gangs. *Id.* 6, ¶¶ 22–23.

As a direct result of his incorrect designation as a member of the Bloods, Plaintiff's right to work in the GRVC Barber Shop has been revoked. *Id.* 7, ¶ 25. In addition, Plaintiff has also been subjected to random searches, including strip searches, of his cell and person. *Id.* 7, ¶ 26. Finally, Plaintiff has been subject to harm to his reputation as well as threats from other inmates. *Id.* 7, ¶ 26.

Plaintiff seeks as relief from the Defendants' actions: (1) to have the "S.R.G. Bloods" assessment expunged from his records; and (2) compensation in the amount of $350.00 for each day that he was incorrectly designated as a member of the Bloods. *Id.* 7.

***3** In bringing the instant action, Plaintiff filed a sworn declaration in which he stated that: (1) he had not received income from any source in the past twelve months; (2) he did not have any money; and (3) he understood that the Court "shall dismiss this case if I give a false answer to any questions in this declaration." (Decl. in Supp. Of Request to Proceed in Forma Pauperis 1–2.) Plaintiff's Inmate Transaction List reflects that Plaintiff received third party mail and/or visitor deposits in the total amount of $8,826.48 during the twelve months preceding his IFP application, and as of the date of his IFP application, Plaintiff's inmate account reflected a balance of $3,981.85. *See* (Decl. in Supp. Of Defs.' Mot. to Dismiss ("Yi Decl.") Ex. A.).

II. DISCUSSION

A. *Standard of Review* [4]

[4] The Court notes that, prior to instituting a federal cause of action, an inmate like Plaintiff must satisfy the exhaustion requirements of the Prison Litigation Reform Act of 1996 ("PLRA"). 42 U.S.C. § 1997e(a). Plaintiff's Complaint alleges that he has exhausted his administrative remedies, *id.* 6, ¶ 16, and Defendants have not argued otherwise in their motion to dismiss. Because neither party has placed the question of administrative exhaustion before the Court, the Court will not address this issue in its decision on the instant motion.

Defendants have moved to dismiss the Complaint pursuant to 28 U.S .C. § 1915(e)(2)(A), or in the alternative, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure.

In assessing a motion to dismiss under Rule 12(b)(6), a court accepts as true all non-conclusory factual allegations and draws all reasonable inferences in the plaintiff's favor. *Goldstein,* 516 F.3d at 56. Although a complaint need not contain " 'detailed factual allegations' " to survive a motion to dismiss, there must be "sufficient factual matter" which, if accepted as true, would " 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* Accordingly, a pleading that merely offers "labels and conclusions" or "a formalistic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555.

In the case of a *pro se* litigant, the Court reads the pleadings leniently and construes them to raise "the strongest arguments that they suggest." *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir.1999) (citation omitted). This guidance applies with particular force when the plaintiff's civil rights are at issue. *See McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir.2004); *see also Flaherty v. Lang,* 199 F.3d 607, 612 (2d Cir.1999). Nevertheless, to survive a Rule 12(b)(6) motion to dismiss, a *pro se* plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level." *Twombly,* 550 U .S. at 555.

B. ***Analysis***

1. 28 U.S.C. § 1915(e)(2)(A)

Defendants argue in the first instance that the Complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(A). This statute outlines the fees and costs for litigants who proceed before the court *in forma pauperis* ("IFP"), and the subsection relied upon by Defendants provides that "[n]otwithstanding 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—(A) the allegation of poverty is untrue...." 28 U.S.C. § 1915(e)(2)(A). Relying on numerous decisions in this district in which the district court judge dismissed a complaint based on the plaintiff's misrepresentations in his/her IFP application, Defendants argue that Plaintiff's actions in the instant case warrant dismissal because "[i]t is well-established that an allegation of poverty is untrue when an IFP applicant conceals a source of income in order to gain access to a court without prepayment of fees." *Cuoco v. U.S. Bureau of Prisons,* 328 F.Supp.2d 463, 468 (S.D.N.Y.2004). *See also Williams v. Dep't of Corr.,* 11 Civ. 1515, 2011 U.S. Dist. LEXIS 100803, at *9 (S.D.N.Y. Sept. 6, 2011) ("[P]laintiff deliberately concealed his finances and misrepresented on his IFP application to convey the impression that he could not pay the filing fee. Accordingly, plaintiff's IFP status must be revoked and the instant case dismissed.") (internal quotations omitted); *Smith v. City of New York,* 11 Civ. 418, 2011 U.S. Dist. LEXIS 86753, at *3 (S.D.N.Y. Aug. 5, 2011) ("Here, because Plaintiff offers no explanation for omitting the $832.20 from his application, this Court finds that the omission was intentional ... and, further, that the allegation of poverty is untrue."); *and Rodriguez v. Shiro,* 10 Civ. 8019, 2011 U.S. Dist. LEXIS 77554, at *3 (S.D.N.Y. July 18, 2011) ("Here, because Plaintiff offers no explanation for omitting the $3,770.00 from his application, this Court finds that the omission was intentional ... and, further, that the allegation of poverty is untrue.").

***4** From its review of the inmate account statements submitted by Defendants, whose authenticity Plaintiff has not disputed, [5] it appears to the Court that Plaintiff misrepresented his financial circumstances in his IFP application. Although the Court agrees with other courts in this district which have held that "the ability to proceed IFP is a privilege provided for the benefit of indigent persons" and that "the court system depends on the honesty and forthrightness of applicants to ensure that the privilege is not abused," *Cuoco,* 328 F.Supp.2d at 467 (internal citations omitted), it also acknowledges that "[t]wo features of the IFP system as it applies to prisoners are relevant in considering whether plaintiff acted in bad faith: (1) prisoners are responsible for the full filing fee even if they are granted IFP status, and (2) prisoners must authorize the facility to disclose their prison account statements to the court." *White v. Schriro,* No. 11 Civ. 5285, 2012 WL 1414450, at *4 (S.D.N.Y. March 7, 2012). Although Plaintiff's IFP form did misrepresent his finances, it simultaneously authorized the New York City Department of Corrections to: (1) disclose to the Court the Plaintiff's prison account statement for the past six months; and (2) pay the Court's filing fee from available funds in his prison account. (Decl. in Supp. Of Request to Proceed in Forma Pauperis 3.) In light of these circumstances, although the Court looks extremely

critically upon any statement made by a litigant which is less than completely truthful, the Court finds that Plaintiff's actions in the instant action did not undermine the "purpose of the Court's *In Forma Pauperis* form" which is "to determine if the plaintiff is sufficiently indigent to entitle him to a waiver of the Court's filing fee," *Morales v. City of N. Y.,* No. 10 Civ. 9534, 2011 WL 4448951, at * 1 (S.D.N.Y. Sept.23, 2011). Accordingly, the Court finds that dismissal pursuant to 28 U.S.C. § 1915(e)(2)(A) is unwarranted.

5 Plaintiff did not file a formal opposition to the instant motion, but he did send a letter to Magistrate Judge Dolinger in response to the Defendants' motion. Defendants have provided the Court a copy of this letter (attached), in which Plaintiff states that he received $4,809.47 into his inmate account in February 2012.

1. Plaintiff's Due Process Claims

The Complaint asserts as a first cause of action that Defendants' erroneous S.R.G. designation "deprived Plaintiff of his liberty without due process of law." (Compl.7, ¶ 27). The Court finds, however, that the Complaint's allegations are insufficient to support a claim for a violation of procedural due process. "To present a due process claim, a plaintiff must establish (1) that he possessed a liberty interest and (2) that the defendants deprived him of that interest as a result of insufficient process." *Ortiz v. McBride,* 380 F.3d 649, 654 (2d Cir.2004) (internal quotations omitted). With respect to the first requirement, that plaintiff possessed a liberty interest, "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources-the Due Process Clause itself and the laws of the States." *Hewitt v. Helms,* 459 U.S. 460, 466, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). In the instant action, Plaintiff cannot prevail on his due process claim because, as a matter of law, he does not have a constitutionally protected interest in his S.R.G. designation.

***5** It is well established that the administrative classification of prisoners does not give rise to a protectable liberty interest under the Due Process Clause itself. *See Hewitt,* 459 U.S. at 468; *and Lowrance v. Achtyl,* 20 F.3d 529, 535 (2d Cir.1994). Because prison officials have "full discretion to control ... conditions of confinement" such as a prisoner's security classification, prisoners have no "legitimate statutory or constitutional entitlement sufficient to invoke due process" in connection with such conditions. *Pugliese v. Nelson,* 617 F.2d 916, 923 (2d Cir.1980). To the extent that Plaintiff asserts a liberty interest created by the GRVC's own policies on inmate S.R.G. designations, this Court agrees with other judges in this district who have held that "[t]he laws and regulations applicable to the classification of prisoners in the custody of the New York City DOC provide substantial discretion to the DOC and do not create a liberty interest." *Adams v. Galleta,* No. 96 Civ. 3750, 1999 WL 959368, at *5 (S.D.N.Y. Oct.19, 1999). *See also Walker v. Shaw,* No.08 Civ. 10043, 2010 U.S. Dist. LEXIS 62664, at *16–17 (S.D.N.Y. June 23, 2010) ("[N]either the Due Process Clause nor the Minimum Standards gives rise to a liberty interest that protects Plaintiff from security classification (or mis-classification).") The Court accordingly grants Defendants' motion as to this cause of action.

2. Plaintiff's Claims of Deliberate Indifference

In addition to his due process claim, Plaintiff also asserts causes of action for deliberate indifference to his safety. Plaintiff alleges that both Captain Garcia and Captain Van Williams acted with deliberate indifference to his safety by placing him in a Crips housing area in spite of his S.R.G. Bloods designation. (Compl.7, ¶¶ 28–29.) Pre-trial detainees' § 1983 claims for deliberate indifference to serious threats to their health and safety are analyzed under the same standard used to address Eighth Amendment claims, regardless of whether the plaintiff has brought the claims under the Eighth or Fourteenth Amendment. *Caiozzo v. Koreman,* 581 F.3d 63, 72 (2d Cir.2009). The Court accordingly engages in an Eighth Amendment deliberate indifference analysis to assess Plaintiff's claims, and following this analysis, it finds that the Complaint sufficiently pleads this cause of action against Defendants.

When assessing a claim that prison officials acted with deliberate indifference in violation of the Eighth Amendment, courts conduct a two-pronged analysis. "First, the plaintiff must demonstrate that he is incarcerated under conditions posing a substantial risk of serious harm. Second, the plaintiff must demonstrate that the defendant prison officials possessed sufficient culpable intent." *Hayes v. N.Y. City Dept. of Corr.,* 84 F.3d 614, 620 (2d Cir.1996). The second prong of the analysis itself involves a two-tier inquiry. "Specifically, a prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of harm and he disregards

that risk by failing to take reasonable measures to abate the harm." *Id.* Defendants argue in their pending motion to dismiss that Plaintiff has failed to plead either: (1) that he faced a substantial risk of harm; or (2) that Defendants acted with a culpable mindset.

***6** With respect to whether the Complaint alleges that Plaintiff faced a substantial risk of serious harm, the Court finds Defendants' arguments wholly unavailing. Defendants first argue that, because Plaintiff did not request to be re-housed, the Court should discredit the Complaint's allegation that Plaintiff's housing assignment posed a substantial risk. This argument misconstrues the source of Plaintiff's alleged concerns. The Complaint asserts that Plaintiff faced a substantial risk of harm because he was simultaneously: (1) designated S.R.G. Bloods; and (2) housed in a Crips housing area. Due to his heat-sensitivity, Plaintiff requested that the risk to him be addressed by correcting his S.R.G. designation. The Complaint makes very clear, however, that, to the extent the Defendants failed to correct his S.R.G. Bloods designation, Plaintiff consistently felt that his assignment to a Crips housing area placed him at substantial risk. (Compl.5–6, ¶¶ 8–9, 21.) The Defendants' second argument on this point, that Plaintiff cannot demonstrate a substantial risk of harm because he prevailed in the sole physical altercation which resulted from his incorrect designation, is similarly flawed. Even accepting the Defendants' position that Plaintiff was not injured in the altercation, that Plaintiff happened to escape injury when the attack that he feared ultimately occurred does not undermine the Complaint's allegations that, due to the history of extreme violence between Bloods and Crips within the GRVC, Defendants' actions placed Plaintiff in a position of great personal risk. *See Walker,* 2010 U.S. Dist. LEXIS 62664, at *22–23 ("Plaintiff would meet both requirements of a deliberate indifference claim if he alleged that identified, responsible prison officials failed to promptly relocate him from the Crips cell block after he was classified as a Blood.") The Court accordingly finds that the Amended Complaint adequately pleads that Plaintiff was subject to conditions that posed a substantial risk of serious harm.

Defendants' second argument in support of their motion to dismiss Plaintiff's claims of deliberate indifference is that the Complaint fails to allege that either defendant acted with the requisite culpable mindset. Specifically, Defendants argue that the Complaint fails to allege that: (1) Defendants were aware of specific threats to Plaintiff; (2) Plaintiff's S.R.G. designation was known by other inmates; (3) Defendants were aware that Plaintiff's S.R.G. designation was known by other inmates; and (4) Plaintiff complained to either defendant of his subsequent re-housing in a Crips area.

Having reviewed the allegations in the Complaint, the Court disagrees that Plaintiff has failed to allege sufficient facts to support his claims of deliberate indifference. The Complaint alleges that there was an extensive history of violence between the Bloods and Crips and that there were in fact policies in place to respond to this history. (Compl.5, ¶¶ 13–15.) The Complaint further alleges that Defendants were each informed by Plaintiff that his designation and housing assignment were together in violation of this policy but that Defendants each consciously disregarded this information. *Id.* 5–6, ¶¶ 9–10, 19–22. "[C]onstru[ing] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor," *Looney v. Black,* 702 F.3d 701, 719–20 (2d Cir.2012), the Court finds that the Complaint adequately pleads that Defendants acted with the requisite culpable mindset to support a claim of deliberate indifference.

3. 42 U.S.C. § 1997e(e)

***7** Defendants' final argument in support of their motion to dismiss is that the Complaint must be dismissed because Plaintiff is not entitled to any of the relief that he seeks in this action. In support of their position, Defendants cite to Section 1997e(e) of the PLRA, which states that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Defendants argue that, because the Complaint does not specify a physical injury sustained by Plaintiff, Plaintiff's Complaint must be dismissed because Section 1997e(e) bars Plaintiff from recovery.

As an initial matter, the Court notes that Plaintiff does not exclusively seek compensatory damages. In addition to compensation in the form of $350 for each day that he was incorrectly designated, Plaintiff also seeks to have the S.R.G. Bloods designation expunged from his record and classification. *See* (Compl.7.) Therefore, given that the Court has found that the Complaint adequately pleads a claim for deliberate indifference, dismissal of

the entire action pursuant to Section 1997e(e) would be inappropriate. *See Thompson v. Carter,* 284 F.3d 411, 418 (2d Cir.) ("Both in its text and in its caption, Section 1997e(e) purports only to limit recovery for emotional and mental injury, not entire lawsuits. Therefore, it does not prevent Thompson from vindicating his constitutional right to be free of cruel and unusual treatment ... without due process by injunctive and declaratory relief.")

Furthermore, although Section 1997e (e) does not itself define "physical injury," to the extent that "the developing case law in this area reflects the view that" the "predicate injury" must be "consistent with Eighth Amendment jurisprudence," *Warren v. Westchester Cnty. Jail,* 106 F.Supp.2d 559, 570 (S.D.N.Y.2000), having found that the Complaint adequately pleads a substantial risk of serious harm, the Court finds that it satisfies the physical injury requirement of Section 1997e(e) as well.

III. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendants' motion to dismiss [dkt. no. 12]. The Complaint's claims for violations of Plaintiff's procedural due process are dismissed, but its claims for deliberate indifference survive.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. *See Coppedge v. United States,* 369 U.S. 438, 444–45, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2013 WL 1455029

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2002 WL 31082948
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Larry McNAIR, Plaintiff,
v.
SGT. JONES, C.O. Shepherd, C.O. Zoufaly, Registered Nurse Matthews, C.O. K. Koenig, Sick Call Nurse for Shu, Dr. Supple, Capt. Lowry, Superintendent Strack, Jose Pico, Nurse Daly and Lieutenant A. Caves, Defendants.

No. 01 Civ. 3253(RCC)(GWG).
|
Sept. 18, 2002.

State prisoner brought § 1983 action against prison officials alleging claims such as excessive force, unsanitary conditions, conspiracy, and denial of medical needs. Prison officials moved to dismiss. The District Court, Gorenstein, J., recommended that: (1) prisoner failed to exhaust his administrative remedies pursuant to Prison Litigation Reform Act (PLRA) regarding certain claims or justify such failure, and (2) allegations that conduct of prison disciplinary hearings was procedurally flawed and that inappropriate penalties were imposed did not state a claim under § 1983.

Report and recommendation issued.

West Headnotes (5)

[1] Civil Rights
Criminal Law Enforcement;Prisons

State prisoner did not file grievance through state administrative prison grievance process regarding his § 1983 claims of excessive force, unsanitary conditions, conspiracy, and denial of medical needs, and, thus, failed to exhaust his administrative remedies pursuant to Prison Litigation Reform Act (PLRA) regarding these claims. 42 U.S.C.A. §§ 1983, 1997e(a); 7 N.Y.C.R.R. §701.

9 Cases that cite this headnote

[2] Civil Rights
Criminal Law Enforcement;Prisons

State prisoner's verbal complaints of confinement conditions, letters to legal aid organization for indigent litigants, and letters to offices for prison superintendent and inspector general were not sufficient to satisfy requirement of Prison Litigation Reform Act (PLRA) that he exhaust his administrative remedies before bringing § 1983 action; prisoner was required to go through prison administrative process requiring written grievances and setting forth procedure for such grievances which did not allow submission of letters directly to prison management. 42 U.S.C.A. §§ 1983, 1997e(a); 7 N.Y.C.R.R. §701.

12 Cases that cite this headnote

[3] Civil Rights
Criminal Law Enforcement;Prisons

State prisoner's general allegations of conspiracy by prison officials, and his claims that he did not file prison grievance due to pending disciplinary charges against him because he did not trust prison officers to file charges and because such grievance would be futile, did not excuse prisoner's failure to file prison grievance regarding disciplinary charges before bringing § 1983 action, for purposes of showing exhaustion of administrative remedies under Prison Litigation Reform Act (PLRA). 42 U.S.C.A. §§ 1983, 1997e(a); 7 N.Y.C.R.R. §701.

6 Cases that cite this headnote

[4] Civil Rights
Administrative Remedies in General

Exhaustion of administrative remedies after § 1983 complaint is filed will not save case from

dismissal for failure to exhaust administrative remedies. 42 U.S.C.A. §§ 1983, 1997e(a).

5 Cases that cite this headnote

[5] Civil Rights

Discipline and Classification;Grievances

Prison disciplinary proceeding and penalties imposed on state prisoner, such as loss of good time credit, were not invalidated on appeal, and thus prisoner's claims that conduct of hearings was procedurally flawed and that inappropriate penalties were imposed did not state a claim under § 1983. 42 U.S.C.A. §1983.

2 Cases that cite this headnote

REPORT AND RECOMMENDATION

GABRIEL W. GORENSTEIN, Magistrate Judge.

***1** Larry McNair, the *pro se* plaintiff, brings this action pursuant to 42 U.S.C. § 1983, alleging that correction officers used excessive force against him during a pat frisk that occurred on June 7, 1999 while McNair was imprisoned in the Fishkill Correctional Facility; that medical personnel were deliberately indifferent to his serious medical needs; that he was forced to live in unsanitary conditions while confined as part of a "drug watch"; that all of the defendants were involved in a conspiracy to cover up the officers' malicious conduct; and that certain procedural defects occurred during his disciplinary hearing. The defendants have moved to dismiss pursuant to Fed.R.Civ.P. 12(b) or in the alternative for summary judgment pursuant to Fed.R.Civ.P. 56. For the following reasons, the defendants' motions should be granted.

I. *STATEMENT OF FACTS*

The details of the incident underlying the complaint are not directly relevant to the grounds for dismissal that are the subject of this Report and Recommendation. Nonetheless, they are recounted here to provide some background for the dispute.

A. *Allegations of Excessive Force*

At approximately 5:50 p.m. on June 7, 1999, while McNair was proceeding to his evening program at the Fishkill prison, Sergeant Jones directed McNair into the prison yard for a random pat frisk. Complaint, dated March 1, 2001 ("Complaint"), at § IV; Memorandum from E. Shepherd, dated June 7, 1999 ("Shepherd Report") (reproduced as Ex. D to Exhibits "A to D" in Support of Plaintiff's Statement Pursuant to Local Civil Rule 56.1, dated April 15, 2002), at 1.[1] Officer Shepherd instructed McNair to remove everything from his pockets and to stand against the wall so that the search could be performed. Shepherd Report at 1. McNair cooperated, first handing the officers his books, cigarettes and wallet, and then turning to place his hands on the wall. Complaint at § IV; Shepherd Report at 1.

1 A number of documents discussed herein, including the Rule 56.1 Statement cited above, were not filed with the Clerk at the time of their service or submission to Chambers. The documents consist of: (1) the defendants' notice of motion and memorandum of law dated August 6, 2001; (2) the exhibits, identified as "A to U," that were submitted as part of McNair's opposition papers to this motion, dated September 5, 2001; and (3) McNair's papers submitted in opposition to the defendants' February 2002 motion to dismiss or for summary judgment, consisting of an affirmation, memorandum of law, statement under Rule 56.1, a declaration and two sets of exhibits, all of which are dated April 15, 2002. These documents are now being docketed along with this Report and Recommendation.

According to a misbehavior report filed by Officer Shepherd, during the frisk Shepherd discovered a rolled up piece of toilet paper containing a small white packet of paper in McNair's wallet. At this point, according to the report, McNair began pushing Shepherd's hands, knocking the white packet to the ground. McNair immediately bent down, picked up the white packet and put it in his mouth. A struggle ensued, during which Shepherd lost his balance and fell to the ground. Shepherd ordered McNair to spit out the packet but McNair refused. Shepherd then placed his hands under McNair's chin in an attempt to force McNair to spit out the item. McNair, however, responded "I swallowed it." Officers Shepherd and Zoufaly then placed restraints on McNair, with Shepherd controlling McNair's left arm and Zoufaly controlling his right. Shepherd Report at 1–2.

According to McNair's version of events, however, Shepherd never discovered a white packet of paper in McNair's wallet. Rather, after McNair placed his hands against the wall, Shepherd asked McNair about a bulge in his left shoe. McNair, who was injured in a basketball game the night before, reached down to his ankle, revealing an ace bandage protecting his Achilles tendon. Shepherd reacted to this gesture by attacking McNair—choking him and knocking him to the ground. Sergeant Jones then instructed Zoufaly to grab McNair's right arm and to break it if necessary. McNair claims that Shepherd held him on the ground in a choke hold as Zoufaly twisted his arm and wrist. When Sergeant Jones asked Shepherd what happened, Shepherd replied that he thought McNair had swallowed something. Complaint at § IV.

***2** Officer Jones and another unnamed officer then escorted McNair through the facility, toward the Special Housing Unit. McNair claims that the officers took a route that placed the men out of view of the general population. According to McNair, during this trip Sergeant Jones threatened to harm him if he reported any injuries to the medical staff. Complaint at § IV.

B. *Medical Examination and Drug Watch*

Upon arrival at the Special Housing Unit, Nurse Matthews examined McNair. Complaint at § IV. Matthews asserts that, although McNair told Matthews that he had a cut on his face, Matthews was not able to find any damage. Defendant Matthews' Declaration in Support of Defendants' Motion to Dismiss And/Or for Summary Judgment, dated February 21, 2002 ("Matthews Decl.") (annexed to Notice of Motion to Dismiss And/Or for Summary Judgment, filed February 22, 2002 ("Feb.Mot.") (Docket # 22)), at ¶ 7. Nurse Matthews did notice that McNair's knuckle was swollen but states that McNair retained a full range of motion in his hand. *Id.* McNair denies this, claiming that he was unable to clench his hand into a fist. Complaint at § IV. During the examination, Matthews states that McNair also drew attention to his ankle, which had been injured the previous night. Matthews Decl. at ¶ 7. Matthews' observations, however, revealed that McNair did not have difficulty walking. *Id.*

McNair asserts that he also discussed his history of high blood pressure with Nurse Matthews but was not placed on a low cholesterol diet. Complaint at § IV. McNair alleges that Dr. Supple, a physician who had examined McNair on three prior occasions for problems unrelated to the June 7 incident, should have either placed Nurse Matthews on notice of his condition or prescribed a remedy himself. *See* Affirmation in Opposition, dated September 5, 2001, ("McNair Aff.") (filed December 4, 2001, Docket # 20), at ¶¶ 2–3. Dr. Supple states that upon review of McNair's medical records, McNair did have high cholesterol, but his failure to prescribe special dietary provisions did not affect McNair negatively. Defendant Dr. Supple's Declaration in Support of Defendants' Motion to Dismiss And/Or for Summary Judgment, dated February 21, 2002, at ¶ 7. After the exam, McNair was not given any medication nor was he deemed to require any further medical attention. Matthews Decl. at ¶ 10.

At the conclusion of his examination, Officer Koenig took pictures of McNair as required by Directive No. 4944. *See* Photographs Taken by Officer K. Koenig After Use of Force and Directive 4944 (reproduced as Ex. O to Exhibits "A to U" in Support of Affirmation in Opposition, dated September 5, 2001 ("9/5/2001 Exs.")). McNair, however, claims that Officer Koenig refused to take pictures of his ankle and right hand. Complaint at § IV. McNair was then placed on a drug watch in the Special Housing Unit. *Id.* The purpose of such a watch is to monitor the progress of contraband suspected to have been ingested by the inmate. Declaration of Robert Ercole in Support of Defendants' Motion to Dismiss And/Or Summary Judgment, dated February 21, 2002 ("Ercole Decl.") (annexed to Feb. Mot.), at ¶ 6. Consequently, McNair was placed in a "dry cell" in which the water supply was turned off to enable the officers to monitor his bowel movements. Ercole Decl. at ¶ 7. McNair's cell was also lacking soap, a towel, toothpaste and a toothbrush. Complaint at § IV. However, as required by DOCS Directive No. 4910, such items were to have been provided to McNair when he was allowed out of his cell to wash himself. Ercole Decl. at ¶¶ 6–8. Though inmates are permitted to have bed linens in their cells, Ercole Decl. at ¶ 7, McNair alleges that his mattress remained undressed. Complaint at § IV.

***3** On the morning of June 8, 1999, Nurse Daly walked through the Special Housing Unit. Though she refused to stop at his cell, as she walked by, McNair told her that his ankle was causing him pain. According to McNair, Daly agreed to send him something to relieve his discomfort. However, no medication was ever sent. Complaint at §

IV; Amended Complaint, dated July 2001 ("Amended Complaint"), at ¶ 2.

McNair remained on the drug watch for a total of 48 hours. Complaint at § IV. During this time, no contraband was found. A urinalysis test designed to recognize the existence of drugs also came back negative. *Id.*

McNair received no further medical treatment during his stay at the Fishkill Facility. Plaintiff's Statement Pursuant to Local Civil Rule 56.1, dated April 15, 2002 ("McNair 56.1"), at ¶ 24. McNair alleges that as a result of the incident, the tendon in his right hand was torn and his left ankle was injured. Complaint at § IV–A. He also alleges that he needed physical therapy on his right hand and surgery, resulting in diminished usage of his hand. *Id.*

On July 6, 1999, McNair was transferred to Southport Correctional Facility. McNair 56.1 at ¶ 24. At Southport, McNair was given a health screening, Ambulatory Health Record, dated July 6, 1999 (reproduced as Ex. Q to 9/5/2001 Exs.), at 1, after which he was placed on a low cholesterol, low fat diet. Therapeutic Diet Order Form, dated July 6, 1999 (reproduced as Ex. Q to 9/5/2001 Exs.), at 2. In July 2000, a medical report showed that the tendon in the long finger of McNair's right hand had been torn. Surgical Pathology Report, dated July 11, 2000 (reproduced as Ex. T to 9/5/2001 Exs.).

C. *The Disciplinary Charge and Appeal*

On June 7, 1999, the day of the pat frisk, Shepherd filed an Inmate Misbehavior Report in which he described his version of events. Inmate Misbehavior Report, dated June 7, 1999 (reproduced as Ex. E to Strack Declaration in Support of Defendants' Motion to Dismiss And/Or Summary Judgment, dated February 21, 2002 ("Strack Decl.") (annexed to Feb. Mot.)). As a result, a disciplinary hearing was held before officer Jose Pico on June 18, 1999 in which McNair was charged with refusing a direct order, assaulting staff, and refusing to be searched or frisked. Inmate Disciplinary History (reproduced as Ex. P to 9/5/2001 Exs.). In support of his version of events, McNair presented a witness. Excerpt of Transcript from Disciplinary Hearing ("Disc.Hg.Transcript") (reproduced as Ex. P to 9/5/2001 Exs.), at 2. Nevertheless, Officer Pico found McNair guilty of all charges and sentenced him to loss of twelve months "good time" credits and 365 days in the Special Housing Unit, with a loss of package, commissary and phone call privileges. Disc. Hg. Transcript at 1.

McNair immediately sought to appeal this finding. On July 2, 1999, McNair sent Superintendent Strack the first of two letters requesting discretionary review of his disciplinary hearing. Letter to Wayne Strack, dated July 2, 1999 (reproduced as Ex. I to Exhibits "A to M" in Support of Plaintiff's Affirmation in Opposition to Defendant's Motion to Dismiss And/Or Summary Judgment, dated April 15, 2002 ("4/15/2002 A to M Exs.")). In his first letter, McNair stated that Officer Pico denied him his right to call a witness during the hearing. *Id.* That same day, William Mazzuca, on Strack's behalf, wrote to McNair, refusing to alter the results of the disciplinary hearing. Letter to McNair, dated July 2, 1999 (reproduced as Ex. K to 4/15/2002 A to M Exs.). On July 3, 1999, McNair sent a second letter to Superintendent Strack, this time informing him that he may be held personally liable if he failed to remedy the alleged violation of McNair's right to call witnesses. Letter to Wayne Strack, dated July 3, 1999 (reproduced as Ex. J to 4/15/2002 A to M Exs.).

***4** McNair also claims that he sent a letter to Superintendent Strack on June 16, 1999 in which he complained about the lack of medical attention he was receiving. McNair 56.1 at ¶ 20. Superintendent William Mazzuca apparently received this letter, although he asserted in January 2001 that he no longer had a copy. *See* Mazzuca Sworn Affidavit, dated January 26, 2001 (reproduced as Ex. G to 9/5/2001 Exs.), at ¶¶ 215, 220. Confusingly, defendants have submitted a copy of a letter dated June 16, 1999, from McNair to Superintendent Strack, which does not mention McNair's medical status or his disciplinary hearing but relates only to a missing package of cigarettes. Letter dated June 16, 1999 (reproduced as Ex. B to Hartofilis Declaration in Support of Defendant's Motion for Summary Judgment, dated February 22, 2002).

On September 1, 1999, McNair formally appealed the ruling in the disciplinary hearing. Inmate Disciplinary History (reproduced as Ex. P to 9/5/2001 Exs.). His appeal was heard by Donald Selsky, the Director of the Special Housing and Inmate Disciplinary Programs, who affirmed Hearing Officer Pico's order. *Id.* McNair sent out another letter appealing the ruling on October 19, 1999. *See* Response from Donald Selsky, dated October 28, 1999 ("Selsky Response") (reproduced as Ex. C to

Affirmation in Opposition Exhibits "A to P", Docket # 41, dated June 11, 2002 ("6/11/2002 Exs.")). Selsky and Lucien J. Leclaire, Jr., Deputy Commissioner of the Department of Correctional Services, each received copies of the letter. Both declined to reconsider Pico's ruling and refused to reduce McNair's confinement time. *See* Selsky Response; Letter from Lucien J. Leclaire, Jr., dated November 8, 1999 (reproduced as Ex. D to 6/11/2002 Exs.).

McNair then filed a petition with the Supreme Court of the State of New York, Dutchess County, challenging his disciplinary hearing. *See* Order to Show Cause, dated November 29, 1999 (reproduced as Ex. A to 6/11/2002 Exs.). On August 11, 2000, that court entered a judgment against McNair. *Cf.* Notice of Appeal for Article 78, dated August 23, 2000 (reproduced as Ex. E to 6/11/2002 Exs.). McNair then filed a notice of appeal on August 23, 2000. *Id.* On May 30, 2001, the Appellate Division, Second Department, dismissed the appeal because it had not been perfected within the time limit specified in 22 N.Y.C.R.R. § 670.8(e). Decision & Order on Motion, dated May 30, 2001 (reproduced as Ex. O to 6/11/2002 Exs.), at 2–3.

D. *Complaint to Inspector General*

In December 1999, McNair made a complaint to the Inspector General's Office. *See* Inspector General's Office Investigative Report, dated May 25, 2000 ("Investigative Report") (annexed to Memorandum of Law in Opposition of Defendant's Motion to Dismiss And/Or Summary Judgment and Supplemental Brief, dated April 15, 2002 ("McNair 4/15/2002 Mem.")). On December 15, 1999, Officer Todd of the Inspector General's Office interviewed McNair about his complaints. Supplemental Brief and Memorandum of Law in Decision of Interest, dated June 11, 2002 (Docket # 40) ("McNair Supp. Mem."), at 2. In May 2000, a second officer, Investigator Holland took over the investigation. *Id.* This officer, Investigator Holland, found McNair's claims to be unsubstantiated and recommended that the case be closed. *See* Investigative Report.

E. *The Present Action*

***5** On April 19, 2001, McNair filed the complaint in this matter pursuant to 42 U.S.C. § 1983 against defendants Jones, Shepherd, Zoufaly, Matthews, Koenig, an unidentified "sick call nurse," Dr. Supple, Captain Lowry and Superintendent Strack. The complaint, brought under 42 U.S.C. § 1983, describes the alleged attack, the resulting injuries, the denial of medical care and unsanitary conditions. McNair seeks monetary damages in the amount of $5 million. Complaint at § V. On July 25, 2001, McNair filed an Amended Complaint which did not repeat any of the allegations in the original complaint but instead stated that it was being filed to add three new defendants: Jose Pico, Nurse T. Daly and a "Watch Commander." Amended Complaint at ¶¶ 1–3. McNair alleges that Pico, as Hearing Officer of McNair's disciplinary hearing, imposed improper penalties, denied "witnesses" and "adequate assistance," and was arbitrary and capricious. *Id.* at ¶ 1. McNair alleges that Daly failed to provide adequate medical care. *Id.* at ¶ 2. The "Watch Commander" is alleged to have "approved the photographs[ ] that were taken on June 7, 1999, with knowledge that these photographs were not in accordance with the 'Use of Force' Directive." *Id.* at ¶ 3.

On August 6, 2001, the defendants submitted a motion to dismiss the complaint arguing that the complaint should be dismissed because of McNair's failure to exhaust his administrative remedies and because the complaint did not state a claim for the various constitutional violations alleged. McNair thereafter submitted an "Affirmation in Opposition" dated September 5, 2001, along with other papers, that provided additional detail about his allegations—particularly the allegations regarding his improper medical treatment. *See* McNair Aff.; Memorandum of Law dated September 5, 2001, filed December 4, 2001 (Docket # 21). Upon McNair's request, made by letter dated November 3, 2001, the Court construed this affirmation as supplementing his complaint. *See generally* Order, dated October 25, 2001 (Docket # 18).

On February 22, 2002, defendants Shepherd, Matthews, Supple and Strack moved to dismiss McNair's complaint, as amended, pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(6) and/or 56(c). *See* Feb. Mot. They argued that the complaint should be dismissed for a number of reasons: McNair had not exhausted his administrative remedies; he had failed to state a "deliberate indifference" claim with respect to his medical needs; there was no personal involvement by certain of the defendants; the defendants were entitled to qualified immunity; McNair had failed to state a claim regarding the allegation that a false misbehavior report had been filed; and he had failed to state a claim for conspiracy. On March 28, 2002,

these same defendants filed a supplemental memorandum (Docket # 30) to argue the effect of the Supreme Court's decision the previous month in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). By memorandum endorsement dated, April 2, 2002 (Docket # 31), the defendants' motion was deemed to include defendants Pico, Daly, Jones, and the Watch Commander (who had since been identified as A. Caves). The plaintiff submitted opposition papers to this motion, which are all dated April 15, 2002, and included an affirmation, a statement under Local Civil Rule 56.1, a memorandum of law, and exhibits identified as "A to M." On May 9, 2002, the defendants filed a reply memorandum of law (Docket # 34).

***6** On the same date that the defendants filed the reply brief on the pending motion, defendants Pico and Strack again moved to dismiss McNair's complaint—this time citing Fed.R.Civ.P. 12(b)(1) and (6). *See* Notice of Motion, dated May 9, 2002 (Docket # 32). While Pico and Strack had previously made (or, in Pico's case, been deemed to have made) the motion filed February 22, 2002 to dismiss or in the alternative for summary judgment, Pico and Strack filed the 12(b)(1) and (6) motion in order to make specific arguments regarding McNair's claims that the disciplinary hearing had not been properly conducted. *See* Memorandum of Law In Support of Jose Pico and Superintendent Strack's Motion to Dismiss the Amended Complaint, filed May 9, 2002 (Docket # 33), at 1 n. 1. McNair opposed this new motion with an affirmation, exhibits and a brief, all of which are dated June 11, 2002 (Docket # 's 39, 40 and 41). The defendants filed a reply brief on July 26, 2002 (Docket # 42).

II. *Discussion*

A. *Summary Judgment Standard*

A district court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *New York Stock Exchange, Inc. v. New York, New York Hotel LLC,* 293 F.3d 550, 554 (2d Cir.2002). A genuine issue is one that "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir.1999). A material issue is a "dispute[ ] over facts that might affect the outcome of the suit under the governing law." *Anderson,* 477 U.S. at 248. Thus, " '[a] reasonably disputed, legally essential issue is both genuine and material' " and precludes a finding of summary judgment. *McPherson,* 174 F.3d at 280 (quoting *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996)).

When determining whether a genuine issue of material fact exists, courts must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *McPherson,* 174 F.3d at 280. Moreover, the pleadings of a pro se plaintiff must be read liberally and interpreted "to raise the strongest arguments that they suggest." *Id.* (citation omitted). Nonetheless, "mere speculation and conjecture is insufficient to preclude the granting of the motion." *Harlen Assocs. v. Incorporated Village of Mineola,* 273 F.3d 494, 499 (2d Cir.2001).

B. *Exhaustion of Administrative Remedies*

Under the Prison Litigation Reform Act, 110 Stat. 1321–73, as amended, 42 U.S.C. § 1997e(a), "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This means the prisoner "must pursue his challenge to the conditions in question through the highest level of administrative review prior to filing suit." *Flanagan v.. Maly,* 2002 WL 122921, at *2 (S.D.N.Y. Jan.29, 2002); *see also Porter v. Nussle,* 534 U.S. 516, ——, 122 S.Ct. 983, 988, 152 L.Ed.2d 12 (2002) ("All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy and effective.' ") (citations omitted). The Supreme Court has clarified that "PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter,* 122 S.Ct. at 992. [2]

2 Even though McNair filed this action before *Porter v. Nussle* was decided, "the broad exhaustion requirement announced in *Nussle* applies with full force" to litigants in such a situation. *Espinal v. Goord,* 2002 WL 1585549, at *2 n. 3 (S.D.N.Y. July 17, 2002). *See generally Harper v. Virginia Dep't of Taxation,* 509

> U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) ("When [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule.").

***7** 7 N.Y.C.R.R. § 701 outlines the Inmate Grievance Program under which New York prison inmates may file grievances regarding prison life. First, the inmate must file a complaint with the Inmate Grievance Resolution Committee ("IGRC"). 7 N.Y.C.R.R. § 701.7(a). Next, after receiving a response from the IGRC, the inmate may appeal to the Superintendent of the facility. *Id.* at § 701.7(b). Finally, after receiving a response from the Superintendent, the prisoner can seek review of the Superintendent's decision with the Central Office Review Committee ("CORC"). *Id.* at § 701.7(c). *See, e.g., Anderson v. Pinto,* 2002 WL 1585907, at *1 (S.D.N.Y. July 17, 2002). In New York, a "prisoner has not exhausted his administrative remedies until he goes through all three levels of the grievance procedure." *Hemphill v. New York,* 198 F.Supp.2d 546, 548 (S.D.N.Y.2002). As was noted in *Flanagan,* "New York permits inmates to file internal grievances as to virtually any issue affecting their confinement." 2002 WL 122921, at *1. Exhaustion is not accomplished by an inmate's appeal of a disciplinary hearing decision brought against the inmate. *See, e.g .., Benjamin v. Goord,* 2002 WL 1586880, at *2 (S.D.N.Y. July 17, 2002) (citing *Cherry v. Selsky,* 2000 WL 943436, at *7 (S.D.N.Y. July 7, 2000)).

[1] McNair's claims regarding the assault and subsequent denial of medical care were grievable under the prison regulations. *See* 7 N.Y.C.R.R. § 701.2(a) (permitting grievances for any "complaint about the substance or application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units, or the lack of a policy, regulation, procedure or rule"); 7 N.Y.C.R.R. § 701.11 (describing special expedited grievance process for "[e]mployee misconduct meant to ... harm an inmate"); *see also Espinal v. Goord,* 2002 WL 1585549, at *2 (S.D.N.Y. July 17, 2002) ("It is undisputed that '[a] claim of excessive force is a proper subject of a grievance inmates may file through [DOCS's] Inmate Grievance Program.' ") (citation omitted); *Cruz v. Jordan,* 80 F.Supp.2d 109, 111–12 (S.D.N.Y.1999) ("New York State provides administrative remedies that are available to prevent, stop and mitigate deliberate indifference to the medical needs of prisoners."); Thomas G. Eagen's Affidavit in Support of Defendant's Motion to Dismiss, dated August 2, 2001 ("Eagen Aff.) (annexed to Feb. Mot.), at ¶ 4.

[2] In the face of defendants' assertions that McNair's complaint must be dismissed for his failure to exhaust administrative remedies, McNair argues that he accomplished exhaustion through verbal complaints and by writing to the Legal Aid Society, the Superintendent's office, and the Inspector General's Office. McNair 4/15/2002 Mem. at 2.

Making a verbal complaint, however, does not satisfy the exhaustion requirement because the administrative grievance process permits only written grievances. *See Flanagan,* 2002 WL 122921, at *2. A complaint made to the Legal Aid Society is likewise not permitted by the administrative grievance process. McNair's letters to the Superintendent could not satisfy the exhaustion requirement for two reasons. First, the only letters in the record complain of procedural defects in the disciplinary hearing and do not assert any of his other claims. *See* Exhibits "A to M", dated April 15, 2002, Exs. I, J. Second, forgoing the step of filing a claim with the IGRC by submitting letters directly to the superintendent does not satisfy the exhaustion requirement. *See, e.g., Byas v. New York,* 2002 WL 1586963, at *2 (S.D.N.Y. July 17, 2002) ("Permitting a plaintiff to bypass the codified grievance procedure by sending letters directly to the facility's superintendent would undermine the efficiency and the effectiveness that the prison grievance program is intended to achieve."); *Nunez v. Goord,* 2002 WL 1162905, at *1 (S.D.N.Y. June 3, 2002). [3]

3 Although the Inmate Grievance Program does allow for an expedited procedure for allegations of inmate harassment by prison employees, which in some cases allows for review by the IGRC to be bypassed, the inmate must still file a grievance with the employee's supervisor before the superintendent can review the allegations to determine if the grievance presents a bona fide harassment issue. *See* 7 N.Y.C.R.R. § 701.11(b); *Hemphill v. New York,* 198 F.Supp.2d 546, 549 (S.D.N.Y.2002) (describing expedited grievance procedure). The regulations provide that if the superintendent fails to respond, the prisoner may appeal the grievance to the CORC. 7 N.Y.C.R.R. § 701.11(b)(6).

***8** Finally, although McNair eventually made a complaint to the Inspector General, that action does not satisfy the exhaustion requirement. *Grey v. Sparhawk,* 2000 WL 815916, at *2 (S.D.N.Y. June 23, 2000) ("Any complaint [plaintiff] may have made directly to the Inspector General's office does not serve to excuse plaintiff from adhering to the available administrative procedures. To allow plaintiff to bypass those procedures would obviate the purpose for which the procedures were enacted."); *Houze v. Segarra,* 2002 WL 1301555, at *2 (S.D.N.Y. July 16, 2002).

In any event, McNair at no time suggests that he went through the appeal process permitted by 7 N.Y.C.R.R. §§ 701.7(b), (c); 701.11(b)(6). This failure alone means that McNair has not exhausted his administrative remedies. *Hemphill,* 198 F.Supp.2d at 548.

[3] McNair offers several arguments why the lack of exhaustion should be excused. First, he seems to argue that he should be excused from the exhaustion requirement because he seeks "monetary damages." McNair 4/15/2002 Mem. at 2. In *Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001), however, the Supreme Court held that the exhaustion requirement applies to a plaintiff seeking relief unavailable in the prison administrative proceeding such as monetary damages. *Id.* at 740–41. Second, McNair adverts generally to a conspiracy among the defendants to cover up their misconduct. *See, e.g.,* Complaint at § IV. He does not, however, claim that any of the defendants prevented him from filing a grievance complaint.

Third, McNair contends that had he filed a complaint earlier it would have been disregarded because of the pending disciplinary charges against him. McNair 4/15/2002 Mem. at 1. Assuming for purposes of argument that use of the administrative process would have been futile, the Supreme Court has made clear that where a statute mandates exhaustion, even a futile administrative process must be observed. *Booth,* 532 U.S. at 741 n. 6. Fourth, McNair implies that the "Grievance supervisor" failed to conduct his rounds in the segregated housing unit he was in at the time. McNair 4/15/2002 Mem. at 1–2.[4] But the grievance process allowed McNair to have filed a grievance without interacting with the "Grievance supervisor"—either by requesting a grievance form from any accessible officer, 7 N.Y.C.R.R. 701.13(a)(1), or simply writing the complaint on a plain sheet of paper. 7 N.Y.C.R.R. 701.7(a)(1).

4 McNair never directly states that the "Grievance supervisor" failed to conduct these rounds. Instead, his memorandum states that the defendants' motion papers did not verify that this occurred. McNair 4/15/2002 Mem. at 2.

In fact, McNair admits that the reason the grievance was not filed was not due to any inability to file such a grievance but rather that he "could not trust an officer to mail his grievance due to the assault on staff he was being charged with." McNair 4/15/2002 Mem. at 3. McNair's own distrust of the system, however, in the absence of any indication that he made an affirmative effort to file a grievance, does not permit avoidance of the exhaustion requirement. *See Reyes v. Punzal,* 206 F.Supp.2d 431, 434 (W.D.N.Y.2002) ("There is no suggestion in the record that plaintiff was somehow prevented from appealing his grievance, and even if plaintiff believed that further attempts to seek relief through administrative channels would prove fruitless, 'the alleged ineffectiveness of the administrative remedies that are available does not absolve a prisoner of his obligation to exhaust such remedies when Congress has specifically mandated that he do so.' ") (citing *Giano v. Goord,* 250 F.3d 146, 150–51 (2d Cir.2001)). The fact that McNair does not suggest that prison employees prevented him from filing a complaint distinguishes this case from those where the failure to exhaust was excused because the prisoner made reasonable efforts to exhaust but was prevented from doing so by prison employees. *See, e.g., Rodriguez v. Hahn,* 2000 WL 1738424 (S.D.N.Y. Nov.22, 2000); *see also Miller v. Norris,* 247 F.3d 736, 740 (8th Cir.2001) ("a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a)").

***9** With respect to his medical needs claim, McNair states that he was threatened by Sergeant Jones and warned not to complain to the medical staff about his injuries. Complaint at § IV. Mere verbal threats from correctional officers, however, do not excuse the exhaustion requirement. *See Flanagan v. Maly,* 2002 WL 122921, at *2 n. 3 (rejecting argument that prisoner could be excused from exhausting administrative remedies where correctional officers threatened him with violence if he filed a grievance because the prisoner "made no effort to file a written grievance, and verbal discouragement by

individual officers does not prevent an inmate from filing a grievance").

Finally, McNair argues that he has not submitted "sufficient information" to establish whether he exhausted administrative remedies and that he should be allowed to take discovery concerning the Inspector General's investigations and to depose various prison officials. McNair Supp. Mem. at 4. In support of this argument he cites *Perez v. Blot,* 195 F.Supp.2d 539 (S.D.N.Y.2002). In *Perez,* the plaintiff was permitted to take discovery on his informal grievance efforts because the Court concluded that it was not clear if the plaintiff had complied with the "informal" provisions of § 701.11. *Id.* at 546. Here, McNair has explicitly stated what he in fact did with respect to submitting his complaints and nothing he states suggests that he complied with the § 701.11 procedures. Thus, discovery is not necessary. *See, e.g., Byas,* 2002 WL 1586963, at *3 (plaintiff's attempt to invoke *Perez* to suggest that he satisfied exhaustion requirement unavailing because, among other reasons, he did not submit evidence that he notified the defendants' supervisor of the alleged assaults as required by § 701.11).

In sum, having determined that McNair has not exhausted his administrative remedies nor offered a justification for failing to do so, the claims of excessive force, unsanitary conditions, conspiracy, and denial of medical needs must be dismissed without prejudice. *See Morales v. Mackalm,* 278 F.3d 126, 126 (2d Cir.2002) (dismissal for failure to exhaust should be without prejudice to refiling following exhaustion).

[4] In a recent filing with the Court, McNair states that on April 7, 2002, nearly a year after the complaint in this case was filed, he filed a grievance with the Inmate Grievance Resolution Committee. *See* Grievance, dated April 7, 2002 (annexed to Affirmation in Opposition to Defendant's Motion to Dismiss, filed July 29, 2002 (Docket # 39)). He does not contend, however, that he has completed this process.[5] In any event, exhausting administrative remedies after a complaint is filed will not save a case from dismissal. *Neal v. Goord,* 267 F.3d 116, 121–23 (2d Cir.2001), *overruled on other grounds by Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002).

[5] In fact, McNair complains that the Department of Corrections has failed to respond to his grievance complaint. *See* Letter, dated June 11, 2002 (annexed as last page to Affirmation in Opposition to Defendant's Motion to Dismiss, filed July 29, 2002 (Docket # 39)). The Court notes that McNair filed this grievance nearly three years after the alleged incidents, and that inmate grievances must be filed within 14 days of the incident or be time-barred, unless the inmate demonstrates mitigating circumstances justifying the delay. 7 N.Y.C.R.R. § 701.7(a)(1). In any event, the Inmate Grievance Program regulations provide that "matters not decided within the time limits" for the initial step of review (14 days) "may be appealed to the next step." 7 N.Y.C.R.R. § 701.8.

C. *Claims of Procedural Defects*

[5] At the conclusion of his disciplinary hearing on June 18, 1999, McNair was found guilty of various rule violations. Disc. Hg. Transcript at 1. McNair challenges the conduct of this hearing on the grounds that it was procedurally flawed. He alleges that Pico "imposed inappropriate penalties of 365 days Special Housing Unit, 365 days loss of Telephones, Packages, and 365 days of recommended loss of good time" based on a prior weapons charge and a misbehavior report that is not in McNair's disciplinary record. Amended Complaint at ¶ 1; McNair Aff. at ¶ 3. McNair also claims that Pico denied McNair his right to call witnesses in his defense, denied him "adequate assistance," and that his ruling was "arbitrary and capricious." Amended Complaint at ¶ 1. In addition, McNair claims that because he gave Superintendent Strack notice of the alleged constitutional violations by way of his July 3, 1999 letter, Strack is also liable for damages. *See* Affirmation in Opposition Of Motion To Dismiss And/Or for Summary Judgment, dated April 15, 2002 ("McNair April Aff."). Defendants now move to dismiss these claims not on exhaustion grounds but rather pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6) on the ground that McNair's claims are not cognizable under 42 U.S.C. § 1983. *See* Notice of Motion, dated May 9, 2002 (Docket # 32); Memorandum of Law In Support of Jose Pico and Superintendent Strack's Motion to Dismiss the Amended Complaint, filed May 9, 2002 (Docket # 33).

1. *Standard for Motion to Dismiss*

***10** A court should dismiss a complaint pursuant to Rule 12(b)(6) if it appears beyond doubt that the plaintiff can prove no set of facts in support of the complaint that

would entitle the plaintiff to relief. *See, e.g., Strougo v. Bassini,* 282 F.3d 162, 167 (2d Cir.2002); *King v. Simpson,* 189 F.3d 284, 286–87 (2d Cir.1999). The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See, e.g., Koppel v. 4987 Corp.,* 167 F.3d 125, 130 (2d Cir.1999); *Jaghory v. New York State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997). The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his or her claims. *See, e.g., Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995), *cert. denied,* 519 U.S. 808, 117 S.Ct. 50, 136 L.Ed.2d 14 (1996). The Court must "confine its consideration 'to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.' " *Leonard F. v. Israel Disc. Bank of New York,* 199 F.3d 99, 107 (2d Cir.1999) (quoting *Allen v. WestPoint–Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir.1991)); *Hayden v. County of Nassau,* 180 F.3d 42, 54 (2d Cir.1999).

When considering motions to dismiss the claims of a plaintiff proceeding *pro se,* pleadings must be construed liberally. *See, e.g., Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (a *pro se* complaint may not be dismissed under Rule 12(b)(6) unless " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' ") (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *Lerman v. Board of Elections,* 232 F.3d 135, 139–40 (2d Cir.2000), *cert. denied,* 533 U.S. 915, 121 S.Ct. 2520, 150 L.Ed.2d 692 (2001); *Flaherty v. Lang,* 199 F.3d 607, 612 (2d Cir.1999).

2. *Merits of McNair's Claims*

In *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Supreme Court held that a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," unless the prisoner can demonstrate that the conviction or sentence had previously been invalidated. *Id.* at 486–87. Later in *Edwards v. Balisok,* 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), the Court made clear that a claim may not be brought under 42 U.S.C. § 1983 alleging a violation of procedural due process in a prison disciplinary proceeding where the nature of the challenge to the procedures necessarily implies the invalidity of the judgment or punishment imposed, unless of course the disciplinary proceeding is first invalidated. *Id.* at 648.

Here, McNair seeks damages based on his allegations that the disciplinary proceedings were improperly conducted, *inter alia,* because McNair was not permitted to call witnesses, he did not have adequate assistance, and the hearing officer relied on improper evidence (the prior weapons charge). Amended Complaint at ¶ 1. McNair's own filings with this Court concede that his disciplinary sanction—the loss of good time credits and other privileges—has never been invalidated. *See, e.g.,* Notice of Appeal for Article 78, dated August 23, 2000 (reproduced as Ex. E to 6/11/2002 Exs.); Decision & Order on Motion, dated May 30, 2001 (reproduced as Ex. O to 6/11/2002 Exs.), at 2–3. Thus, *Heck* and *Edwards* bar consideration of his claim in a § 1983 action.

***11** McNair asserts in reply that his appeal to the Appellate Division, Second Department, was dismissed for failure to perfect his appeal within 10 days and that he was unable to perfect the appeal because of the disruption of his legal mail. *See* Affirmation in Opposition to Defendant's Motion to Dismiss, filed July 29, 2002 (Docket # 39), at ¶ 19. But even assuming this to be true, any attempt to seek relief for the untimely filing would have been properly addressed only to the state court. Because McNair has not "fully exhausted available state remedies," he has "no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Heck,* 512 U.S. at 489. In fact, nothing prevents McNair from returning to federal court on some later date if in fact he is able to obtain review from the state court and that review results in a reversal or expungement of the disciplinary action. *See id.* (statute of limitations for bringing § 1983 claim does not commence until state court proceedings have terminated in plaintiff's favor).

In addition, the Court notes that the case of *Jenkins v. Haubert,* 179 F.3d 19 (2d Cir.1999), is of no help to McNair because *Jenkins* held only that a § 1983 action would be available to a prisoner challenging the constitutionality of a disciplinary proceeding where the suit "does not affect the overall length of the prisoner's confinement." *Id.* at 27. Here, however, the sanction against McNair included the loss of "good time" credits, which is precisely the sort of sanction that affects the length of confinement. *See Edwards,* 520 U.S. at 646–

48; *Hyman v. Holder,* 2001 WL 262665, at *3 (S.D.N.Y. Mar.15, 2001).

While McNair does not make the argument, it is also of no moment that McNair's disciplinary hearing resulted in additional sanctions that did not affect the length of McNair's sentence (for example, the placement in segregated housing and the loss of telephone privileges). This is because a judgment in favor of McNair in a § 1983 suit for damages would nonetheless imply the invalidity of his sentence through its reinstatement of good-time credits. McNair has not suggested that he seeks damages for the non-good-time sanctions by themselves and he would be unable in any event to so "split" his claim. *See Gomez v. Kaplan,* 2000 WL 1458804, at *7–11 (S.D.N.Y. Sept.29, 2000) (citing cases) (dictum).

Accordingly, McNair's claim challenging the process and validity of the disciplinary decision is not cognizable under § 1983 and must be dismissed with prejudice for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). [6]

6 The claim is not so patently without merit, however, that dismissal is appropriate for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). *See, e.g., Town of West Hartford v. Operation Rescue,* 915 F.2d 92, 100 (2d Cir.1990). Accordingly, the defendants' motion must be denied on this ground.

Additionally, the request to dismiss unserved defendants, made in a reply brief, *see* Defendants Reply Memorandum of Law in Further Support of Their Motion to Dismiss the Amended Complaint And/Or For Summary Judgment, dated July 26, 2002, at 1 n. 1, is now moot as the complaint does not state a claim against any defendant.

III. *CONCLUSION*

Judgment should be entered in favor of the defendants on all claims. With respect to McNair's claims against Pico and Strack alleging due process violations, these claims should be dismissed with prejudice. All other claims should be dismissed without prejudice for failure to exhaust administrative remedies.

Notice of Procedure for Filing of Objections to this Report and Recommendation

***12** Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report to file any written objections. *See also* Fed.R.Civ.P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Richard C. Casey, 40 Centre Street, New York, New York 10007, and to the chambers of the undersigned at the same address. Any request for an extension of time to file objections must be directed to Judge Casey. The failure to file timely objections will result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn,* 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

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