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2003 WL 22211500
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United States District Court,
S.D. New York.

Robert ARROYO, Plaintiff,
v.
THE CITY OF NEW YORK, N.Y.C. Department of Correction, Hospital Administrator, C–73, St. Barnabas Hospital Administrator, Dr. "John" Mohammad, First name being fictitious, real name being unknown, Dr. Harjinger Bhatti, Dr. Jude Aririguzo, Dr. "John" August, First name being fictitious, real name being unknown, Dr. Jean Valcourt, Dr. "John Doe", Full name being fictitious, real name being unknown, Dr. Sung Kim, Dr. Ye Hum Kim, the New York City Health and Hospitals Corporation, St. Barnabus Hospital, St. Barnabus Correctional Health Systems, Inc., the New York City Correctional Health Services, the New York City Department of Health, Defendants.

No. 99 Civ.1458(JSM).
|
Sept. 25, 2003.

Synopsis
Inmate brought a § 1983 suit, alleging that violation of his Eighth Amendment right to be free from cruel and unusual punishment in connection with an eight-month delay of allegedly necessary surgery for an inguinal hernia. On a defense motion for summary judgment, the District Court, Martin, J., held that: (1) inmate failed to exhaust his administrative remedies, and (2) in any event, the alleged delay did not amount to cruel and unusual punishment.

Motion granted.

West Headnotes (2)

[1] Civil Rights
Criminal law enforcement;prisons

Inmate, in failing to renew his grievance or otherwise seek to use an extensive inmate grievance resolution program in place at correctional facility, did not exhaust his administrative remedies, as required by the Prison Litigation Reform Act (PLRA), thus barring his § 1983 suit alleging cruel and unusual punishment in connection with an eight-month delay of allegedly necessary surgery for an inguinal hernia; even if he initially thought that he had been promised prompt surgery after his informal grievance review, shortly thereafter he obviously knew that surgery had not been performed, or even scheduled, and he presented no explanation as to why he did not at least inquire as to why surgery that he allegedly thought he had been promised had not been forthcoming. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(a), as amended, 42 U.S.C.A. § 1997e(a).

6 Cases that cite this headnote

[2] Prisons
Particular Conditions and Treatments
Sentencing and Punishment
Medical care and treatment

Alleged eight-month delay of allegedly necessary surgery for an inmate's inguinal hernia did not amount to cruel and unusual punishment under the Eighth Amendment; the hernia was not a serious enough condition to satisfy the objective prong of the test, and as to the subjective prong, all that the inmate alleged was negligence. U.S.C.A. Const. Amend. 8.

9 Cases that cite this headnote

OPINION & ORDER

MARTIN, J.

***1** Plaintiff Robert Arroyo brings this action pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishments by delaying for eight months allegedly necessary surgery for an inguinal hernia. Defendants have moved for summary judgment on various grounds, including Plaintiff's failure to exhaust administrative remedies, the failure to proffer evidence of deliberate indifference to Plaintiff's serious medical needs, the lack of personal involvement by the individual Defendants, qualified immunity, the failure to plead an unconstitutional pattern or practice by the municipal Defendants, the fact that the Department of Corrections and Correctional Health Services are agencies that may not be sued, and, to the extent that Plaintiff implies that he may have claims under state law, the failure to file a notice of claim.

Failure to Exhaust Administrative Remedies

[1] The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) provides that a prisoner may not bring an action pursuant to 42 U.S.C. § 1983 or any other Federal law until he has exhausted any available administrative remedies. In this case, Plaintiff failed to pursue his administrative remedies, and for that reason alone, this action must be dismissed.

In October 1998, Plaintiff filed a grievance stating that he had been denied surgery for a hernia that caused him great pain and suffering. His complaint was heard in a first level informal proceeding, in which it was proposed that it be resolved as follows:

> "On 10/26/98 the IGRC contacted the Clinic Manger. Grievant will be called down to have an examination. Action requested is accepted."

Plaintiff accepted this resolution, and was further examined in the clinic at Riker's Island. When that examination resulted only in further non-surgical interventions, and he was not scheduled promptly for surgery, he did not renew his grievance or otherwise seek to use the extensive five step inmate grievance resolution program that is in place at Riker's Island. His failure to do so precludes this action, despite his claim that it would have been irrational for him to appeal what he perceived to be a favorable result. Even if Plaintiff though that he had been promised prompt surgery after his informal grievance review, shortly thereafter he obviously knew that surgery had not been performed, or even scheduled. He presents no explanation as to why he did not at least inquire as to why surgery that he allegedly thought he had been promised had not been forthcoming.

Denial of Medical Care

[2] Even if Plaintiff had exhausted his administrative remedies, he has not sufficiently stated a claim for violation of the Eighth Amendment. In order to state a claim for an unconstitutional denial of medical care, a plaintiff must prove "deliberate indifference" to his serious medical needs. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). The deliberate indifference standard has both an objective and a subjective component. First, the alleged condition must be objectively "sufficiently serious." Such seriousness has been defined as "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994), *cert. denied,* 513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d 1074 (1995). Subjective complaints of pain are not sufficient to satisfy this standard. *Espinal v. Coughlin,* 98 Civ. 2579 (RPP), 2002 U.S. Dist. LEXIS 20, *9 (S.D.N.Y. Jan. 2, 2002); *Chatin v. Artuz,* No. 95 Civ. 7994(KTD), 1999 U.S. Dist. LEXIS 11918, *11 (S .D.N.Y. Aug. 4, 1999), *aff'd,* 2002 U.S.App. LEXIS 86 (2002) ("[Plaintiff's] alleged problems in his right foot may indeed be very real. His pain is not, however, of the type contemplated for satisfaction of the objective standard." (citing *Liscio v. Warren,* 901 F.2d 274, 277 (2d Cir.1990)). Second, the Defendant must:

> ***2** know of and disregard an excessive risk to inmate health or safety; the official must both 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.

Hathaway v. Coughlin, 37 F.3d at 66 (2d Cir.1994) (quoting *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994)).

Charges that amount only to allegations of malpractice, and mere disagreements with respect to the quality of medical care do not state an Eighth Amendment claim. *Estelle v. Gamble,* 429 U.S. at 105–06, 97 S. Ct at 292

("Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). *See also Chance v. Armstrong,* 143 F.3d 698, 703 (2d Cir.1998); *Espinal v. Coughlin,* 2002 U.S. Dist. LEXIS 20, *10; *Brown v. McElroy,* 160 F.Supp.2d 699, 705–06 (S.D.N.Y.2001); *Culp v. Koenigsmann,* 99 Civ. 9557(AJP), 2000 U.S. Dist. LEXIS 10168, *32 (S.D.N.Y. July 19, 2000). Accordingly, a delay in treatment does not violate the Eighth Amendment unless it involves an act or a failure to act that evinces "a conscious disregard of a substantial risk of serious harm." *Chance v. Armstrong,* 143 F.3d 698, 703 (2d Cir.1998)); *Espinal v. Coughlin,* 2002 U.S. Dist. LEXIS 20, *9 ("The Second Circuit has 'reserved such a classification for cases in which, for example, officials deliberately delayed care as a form of punishment, ignored a 'life-threatening and fast-degenerating' condition for three days, or delayed major surgery for over two years.").

Application of the deliberate indifference standard to the facts of this case makes clear that summary judgment must be granted in favor of the Defendants. First, Plaintiff's inguinal hernia was not objectively a "serious" enough condition to satisfy the objective prong of the test. In *Gonzalez v. Greifinger,* No. 95 Civ. 7932(RWS), 1997 U.S. Dist LEXIS 18677, *7 (S.D.N.Y. Nov. 22, 1997), the Court found that an 11 month delay in surgically repairing the plaintiff's umbilical hernia, followed by surgery that resulted in complications, failed to satisfy the constitutional serious medical need standard.

Other courts have found objectively insufficient claims relating to a toothache, *Tyler v. Rapone,* 603 F.Supp. 268, 271–72 (E.D.Pa.1985), a broken finger, *Rodriguez v. Joyce,* 693 F.Supp. 1250, 1252–53 (D.Me.1988), and pain in the knee, *Espinal v. Coughlin,* 2002 U.S. LEXIS 20, *9. *See also Abdul–Akbar v. Dept. of Corrections,* 910 F.Supp. 986, 1006 (D.Del.1995), *aff'd,* 111 F.3d 125 (3rd Cir.), *cert. denied,* 522 U.S. 852, 118 S.Ct. 144, 139 L.Ed.2d 91 (1997) ("It is questionable whether a hernia is a 'serious medical need." ').

In this case, Plaintiff's condition was not "one of urgency that may produce death, degeneration, or extreme pain," and was far less serious than the types of conditions that have been found to constitute "serious medical needs." Plaintiff has not alleged, let alone presented evidence to show, that his condition was, at any point, "fast degenerating" or "life threatening," or that Defendants delayed necessary medical treatment in order to punish him.

***3** Secondly, with respect to the subjective prong, all that Plaintiff has alleged is negligence. There is no evidence that Plaintiff ever was denied medical treatment. To the contrary, he testified that he was promptly taken to the clinic whenever he asked to be, and it is clear that he was seen in the clinic at Riker's Island more than 30 times during the eight month period at issue here. [1] Also, there is ample evidence in the record of attempts to ameliorate Plaintiff's condition without surgery. The hernia, which Plaintiff first noticed 1993, and which was repeatedly diagnosed as a reducible hernia, was reduced at least twice. He was prescribed pain medication, a scrotal support, various trusses, ice packs, elevation, and a surgical consultation was requested. Ultimately, in January 1999, the hernia was surgically repaired at Kings County Medical Center. These interventions were consistent with the diagnosis made and treatment prescribed at Beth Israel Hospital one month before Plaintiff was incarcerated. There too he was diagnosed with an "easily reducible RIH [right inguinal hernia]," and told to purchase a scrotal support, or truss, for comfort. At that time, he also was given an appointment for a surgical consultation, which he did not attend. [2]

1 In addition to treatment for the hernia, Plaintiff was treated for a number of other conditions while incarcerated at Riker's Island. He received medical attention for drug dependency, mental health issues, dyspepsia, heartburn, and ingrown toe nails, and was prescribed eyeglasses at the Riker's Island clinic. Thus, there is absolutely no evidence his medical needs were ignored by Defendants.

2 Plaintiff's alleged urgent need and desire for surgery is further undercut by his refusal to undergo prescribed surgery for a left inguinal hernia, which was diagnosed and scheduled at the time of the surgical repair of the right inguinal hernia.

Moreover, Plaintiff has not alleged that the hernia became worse, [3] or that his general condition deteriorated as a result of the alleged delay in surgery. The evidence also is that, unlike in *Gonzalez v. Greifinger,* 1997 U.S.

Dist. LEXIS 18677, the surgery ultimately was performed successfully and without complications.

3 His allegation is that the hernia was, at all times, the size of a softball.

Finally, Defendants have presented evidence that attempting to treat a hernia conservatively prior to performing surgery constitutes reasonable medical practice. Plaintiff, on the other hand, did not present any medical opinion testimony to support his argument that it was unreasonable to first attempt to treat his hernia non-surgically, and to resort to surgery only after such methods had failed. *See Culp v. Koenigsmann,* 2000 U.S. Dist. LEXIS 10168, *11. Accordingly, Plaintiff has failed to meet his burden of proof in opposition to Defendants' motion for summary judgment. *Celotex v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Cifarelli v. Village of Babylon,* 25 C.C.P.A. 785, 93 F.2d 47, 51 (2d Cir.1996) ("[M]ere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment."); *Goenaga v. March of Dimes Birth Defects Foundation,* 51 F.3d 14, 18 (2d Cir.1995).

It also appears that Plaintiff has not alleged that the municipal Defendants engaged in a pattern or practice of indifference to prisoners' medical needs, as required by *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037–38, 56 L.Ed.2d 611 (1978); *Batista v. Rodriguez,* 702 F.2d 393, 397 (2d Cir.1983). Nor has Plaintiff alleged any personal participation by Dr. Ye Hum Kim. However, in light of the foregoing, there is no need to address either these issues or the Defendants' claims of qualified immunity. Furthermore, having dismissed all of Plaintiff's federal claims, the Court also will dismiss whatever state law claims he intended to state pursuant to this Court's supplemental jurisdiction. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Conclusion

***4** For the foregoing reasons, Defendants' motion for summary judgment is granted and the Second Amended Complaint is dismissed.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 22211500

2010 WL 6230937
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Aror Ark O'DIAH, Plaintiff,
v.
A. MAWHIR, Cayuga Correctional Facility; Michael Corcoran, Superintendent, Cayuga Correctional Facility; Scott C. Carlsen, Superintendent, Ulster Correctional Facility; P. Buttarazzi, Chief Physician, Cayuga Correctional Facility Inmate Clinic; Jesus Floresca, Chief Physician, Ulster Correctional Facility Inmate Clinic; K. Stevenson, Cayuga Correctional Facility Program Coordinator; Ms. Daly; Mary Warner, Nurse Administrator, Cayuga Correctional Facility; and T. Napoli, Defendants.

No. 9:08–CV–322 (TJM)(DRH).
|
Dec. 14, 2010.

Attorneys and Law Firms

Aror Ark O'Diah, Collins, NY, pro se.

Hon. Andrew M Cuomo, Attorney General for the State of New York, Roger W. Kinsey, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

REPORT–RECOMMENDATION AND ORDER [1]

[1] This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

DAVID R. HOMER, United States Magistrate Judge.

***1** Plaintiff *pro se* Aror Ark O'Diah ("O'Diah"), an inmate in the custody of the New York State Department of Correctional Services (DOCS), commenced this action against against nine DOCS employees pursuant to 42 U.S.C. §§ 1983 and related federal and state law alleging violations of his civil rights. Second Am. Compl. (Dkt. No. 46.) Presently pending is defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b). Dkt. No. 53. O'Diah opposes the motion. Dkt. No. 56. For the following reasons, it is recommended that defendants' motion be granted in part and denied in part.

I. Background

The facts as alleged in the Second Amended Complaint are assumed to be true for the purposes of this motion. *See* subsection II(A) *infra.*

O'Diah was previously incarcerated at Ulster Correctional Facility ("Ulster"), and Cayuga Correctional Facility ("Cayuga") among other facilities. Second Am. Compl. ¶ 3. O'Diah alleges that beginning in August 2007, he was, among other things, denied medical care in deliberate indifference to his serious medical needs, retaliated against for filing complaints and grievances, issued false misbehavior reports, denied due process and equal protection, and discriminated against on account of his race and national origin.

On August 8, 2007, defendant K. Stevenson, a Cayuga program director, acting under the direction of defendant Michael Corcoran, Cayuga's Superintendent, told O'Diah that he should participate in the prison's general equivalency diploma GED program even though Stevenson and Corcoran knew that O'Diah had already held a number of advanced degrees. Second Am. Compl. ¶ 41. O'Diah alleges that their actions amounted to "reckless and gross intentional disregard[ ] for [his] academic credentials." *Id.* O'Diah's refusal prompted an unnamed correctional officer, at the direction of Corcoran and Stevenson, to issue Tier II and Tier III disciplinary charges [2] against O'Diah. *Id.* O'Diah lost his good time credit and was assaulted by another unnamed correctional officer. *Id.* ¶ 42.

[2] DOCS regulations provide for three tiers of disciplinary hearings depending on the seriousness of the misconduct charged. A Tier II hearing, or disciplinary hearing, is required whenever disciplinary penalties not exceeding thirty days may be imposed. N.Y. Comp.Codes R. & Regs. tit. 7, §§ 253.7(iii), 270.3(a). A Tier III hearing, or superintendent's hearing, is required whenever disciplinary penalties exceeding thirty days may be imposed. *Id.*

On September 13, 2007, defendant Jesus Dr. Floresca, a physician at Ulster, examined O'Diah. Second Am.

Compl. ¶ 43. O'Diah claimed that he had a urinary tract infection because he experienced intense pain along his urinary tract. *Id.* ¶¶ 43–44. Dr. Floresca prescribed Motrin, which O'Diah refused. *Id.* ¶ 44. Dr. Floresca denied O'Diah's request for a urine analysis and antibiotics. *Id.* O'Diah then lost control and began shouting because of the pain. *Id.* ¶ 45. Dr. Floresca contacted Ulster's security personnel and told them that O'Diah was "crazy." *Id.* ¶ 46. Dr. Floresca and Ulster Superintendent Scott Carlsen, also a defendant herein, took O'Diah to an unnamed Ulster psychiatrist who told Dr. Floresca and Carlsen that O'Diah was not crazy. *Id.* ¶ 48. O'Diah then received a Tier II disciplinary charge, esd gounf huily, and was sentenced to thirty days in keeplock.[3] *Id.* ¶ 50. On September 18, O'Diah was transferred from Ulster to Cayuga where he remained in keeplock. *Id.* ¶ 52. O'Diah appears to allege that this transfer was in retaliation for some unspecified conduct. *Id.* ¶ 88. Defendant Michael Corcoran, Cayuga's Superintendent, kept O'Diah in keeplock until October 24, six days beyond his thirty-day sentence. *Id.* ¶ 53.

[3] "Keeplock is a form of disciplinary confinement segregating an inmate from other inmates and depriving him of participation in normal prison activities." *Green v. Bauvi,* 46 F.3d 189, 192 (2d Cir.1995); N.Y. Comp.Codes R. & Regs. tit. 7, § 301.6.

***2** On October 24, 2007, prison officials gave O'Diah antibiotics to treat a lesion on his urinary tract. Second Am. compl. ¶ 55. He needed treatment for both gram negative and gram positive bacteria but the antibiotics he received were effective against gram negative bacteria only. *Id.* ¶ 56. He also claims that defendants then intentionally and wrongly gave him treatment for cancer, epilepsy, and tuberculosis with the intention of poisoning him. *Id.* That same day, in response to the bacterial diagnosis, O'Diah appealed his Tiers II and III disciplinary determinations from September 13. *Id.* ¶ 59. Corcoran and Carlsen refused to amend the disciplinary determinations. *Id.*

Also on October 24, O'Diah requested special access to use the law library for an additional ninety days because he had fallen behind on responding to motions in a matter pending in the United States District Court for the Eastern District of New York. Second Am. Compl. ¶ 61. Corcoran granted a thirty-day extension. *Id.* ¶ 64. On November 9, O'Diah informed Cayuga correctional officers that he was no longer in need of the special access. *Id.* ¶ 65. On November 11, O'Diah refused an opportunity to use the library. *Id.* ¶ 66. The next day, he received a Tier II disciplinary ticket, which resulted in thirty days of keeplock. *Id.* ¶¶ 67, 69. O'Diah alleges that the issuance of the disciplinary tickets and his medical mistreatment were in retaliation for his refusal to participate in the GED program in August. *Id.* ¶ 68.

O'Diah filed grievances against Corcoran and other Cayuga officials on February 25 and 26, 2008, because they had failed to refund money that was unlawfully seized by defendant Daly, Cayuga's Deputy Superintendent for Administration, in September 2007. Second Am. Compl. ¶¶ 71–72. Defendant T. Napoli refused to process the grievances. *Id.* ¶ 71. Between November 21, 2007, and March 5, 2008, a number of correctional officers and prison inmates, led by defendant A. Mawhir, physically abused O'Diah by beating him and pouring cold water on him while he was sleeping. *Id.* ¶¶ 74–75. O'Diah filed grievances against Corcoran and other Cayuga officials because they ignored the abuse. *Id.* ¶ 74.

O'Diah saw defendant Dr. P. Buttarazzi, a physician at Cayuga, on February 25, 2008, because O'Diah needed antibiotic ointment for a lesion on his urinary tract caused by a bacterial infection. Second Am. Compl. ¶ 76. O'Diah told Dr. Buttarazzi that he saw microscopic particles in his urine. *Id.* ¶ 77. Rather than providing antibiotic ointment or conducting medical tests, Dr. Buttarrazzi provided ointment designed to treat an enlarged prostate. *Id.* The next day, O'Diah spoke with an unidentified private physician who advised O'Diah not to use the ointment because it would not treat the infection. *Id.* ¶ 78.

Prior to February 26, 2008, O'Diah had been placed on high blood pressure watch by two nurses at Cayuga. Second Am. Compl. ¶ 79. While at Cayuga's Inmate Health Service on March 4, 2008, Mawhir told O'Diah that O'Diah would not be examined by medical personnel because he had filed grievances against Cayuga officials. *Id.* ¶ 80. Mawhir then told O'Diah that he would be placed in segregation even though O'Diah had not been issued disciplinary charges. *Id.*

***3** O'Diah was excused from Cayuga's work programs on March 5, 2008, because he was completing blood work with medical personnel. Second Am. Compl. ¶ 81. O'Diah, however, alleges that his requests for further medical

treatment and additional excuses from work programs were refused as a part of a conspiracy by defendants to deprive him of his constitutional rights. *Id.* ¶ 82. As soon as O'Diah returned, a correctional officer assigned O'Diah to complete "lawn ground and utility work." *Id.* ¶ 83. O'Diah states that his elevated blood pressure, severe dizziness, excruciating headaches, and his urinary tract infection would prevent him from doing such work. *Id.* He argues that prison officials, aware of his health problems, forced him to do such work in retaliation for certain unstated conduct. *Id.* O'Diah requested a grievance form from Napoli but Napoli refused to provide the form. *Id.* Later, unnamed correctional officers unnecessarily pushed him into a wall and threw him onto vehicles. *Id.* ¶ 84. Defendants subjected him to thirty days of confinement without a hearing. *Id.* As a result, he was denied visits or mail and his mail was searched without his consent. *Id.*

Three days later, Corcoran and Mawhir refused to provide O'Diah with his legal documents. Second Am. Compl. ¶ 85. O'Diah had wanted to provide the documents to a legal processing advocate who would be visiting him at Cayuga. *Id.* O'Diah argues that Corcoran and Mawhir refused to return the documents in retaliation for O'Diah's exercise of his constitutional rights. *Id.* Mawhir then subjected O'Diah to another Tier II disciplinary determination, resulting in an additional thirty days of confinement. *Id.*

On March 10, 2008, Daly wrote to O'Diah regarding some of O'Diah's funds that Daly had allegedly unlawfully seized. Second Am. Compl. ¶¶ 86–87. O'Diah was then sentenced to sixty days of segregated confinement because his response to Daly had included threats. *Id.* ¶ 88. This determination was reversed on administrative appeal before O'Diah completed the sentence. *Id.*

O'Diah, an African–American, alleges that Defendants' unlawful and unconstitutional conduct were all motivated by their animus toward O'Diah's race. Second Am. Compl. ¶ 88.

II. Discussion

O'Diah brings this action under 42 U.S.C. § 1983, alleging that defendants violated his rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Second Amend. Compl. ¶ 2. He also alleges violations of 42 U.S.C. §§ 1985, 1986, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and N.Y. Correction Law § 138(4). *Id.* ¶¶ 2, 9. He brings this action against Defendants in their individual and official capacities. *Id.* Defendants contend that O'Diah has failed to state causes of action upon which relief can be granted, that defendants are entitled to qualified immunity, and that the claims are barred by the statute of limitations.

A. Legal Standard

***4** Rule 12(b)(6) authorizes dismissal of a complaint that states no actionable claim. When considering a motion to dismiss, "a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.1994). However, this "tenet ... is inapplicable to legal conclusions[; thus, t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 554–55 (2007) (holding that "entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action ... [as] courts are not bound to accept as true a legal conclusion couched as a factual allegation.")).

Accordingly, to defeat a motion to dismiss, a claim must include "facial plausibility ... that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 556 (explaining that the plausibility test "does not impose a probability requirement ... it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].")); *see also Arar v. Ashcroft,* 585 F.3d 559, 569 (2d Cir.2009) (holding that "[o]n a motion to dismiss, courts require enough facts to state a claim to relief that is plausible ....") (citations omitted). Determining whether plausibility exists is "a content specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 129 S.Ct. at 1950–51.

When, as here, the non-moving party is a *pro se* litigant, the court must afford the non-moving party special solicitude. *See Triestman v. Fed. Bureau of Prisons,* 470

F.3d 471, 477 (2d Cir.2006). As the Second Circuit has stated,

> [t]here are many cases in which we have said that a *pro se* litigant is entitled to "special solicitude,"; that a *pro se* litigant's submissions must be construed "liberally,"; and that such submission must be read to raise the strongest arguments that they "suggest[.]" At the same time, our cases have also indicated that we cannot read into *pro se* submissions claims that are not "consistent" with the *pro se* litigant's allegations, or arguments that the submissions themselves do not "suggest,"; that we should not "excuse frivolous or vexatious filings by *pro se* litigants," and that *pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law."

Id. (internal citations and footnote omitted); *see also Sealed Plaintiff v. Sealed Defendant # 1,* 537 F.3d 185, 191–92 (2d Cir.2008) ("On occasions too numerous to count, we have reminded district courts that 'when [a] plaintiff proceeds *pro se,* ... a court is obliged to construe his pleadings liberally." (citations omitted)).

B. Personal Involvement

***5** Personal involvement is an essential prerequisite for section 1983 liability. *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994). A section 1983 defendant, however, cannot be liable "merely because he held a supervisory position of authority." *Black v. Coughlin,* 76 F.3d 72, 74 (2d Cir.1996). Supervisory personnel may be considered "personally involved" only if the defendant: (1) directly participated in the alleged constitutional violation; (2) failed to remedy that violation after learning of it through a report or appeal; (3) created, or allowed to continue, a policy or custom under which the violation occurred; (4) had been grossly negligent in managing subordinates who caused the violation; or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that violation was occurring. *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995) (citing *Williams v. Smith,* 781 F.2d 319, 323–24 (2d Cir.1986)). [4]

[4] The Supreme Court's decision in *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), arguably casts in doubt the continued viability of some of the categories set forth in *Colon.* See *Sash v. United States,* 674 F.Supp.2d 531 (S.D.N.Y.2009). Here, it will be assumed *arguendo* that all of the *Colon* categories apply.

1. Carlsen, Corcoran, and Napoli

Even after construing the second amended complaint liberally, there appear no claim or allegation of personal involvement by either Corcoran, Carlsen, or Napoli. Although Corcoran and Carlsen supervised prison personnel, a position in a hierarchal chain of command, without more, is insufficient to support a showing of personal involvement. *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994). Further, the second amended complaint fails to make any claim that Carlsen or Corcoran failed to train any of the defendants, that Carlsen or Corcoran were grossly negligent in performing their employment duties, or that the two received and responded to any complaints or grievances.

Finally, although defendant Napoli has not moved to dismiss for lack of personal involvement, a review of the second amended complaint reveals that O'Diah has failed to allege sufficient facts showing that Napoli participated in any alleged constitutional violations. [5] Receiving grievances, without more, is insufficient to establish personal involvement as there exists no allegation that Napoli took any action. *See Bodie v. Morgenthau,* 342 F.Supp.2d 193, 203 (S.D.N.Y.2004) (citation omitted) (finding personal involvement only where official received, reviewed, and responded to a prisoner's complaint).

[5] Since O'Diah is proceeding *in forma pauperis* and is suing government officials, the court will address this claim *sua sponte* pursuant to 28 U.S.C. §§ 1915(e)(2)(B), 1915A.

As such, all claims against Carlsen, Corcoran, and Napoli should be dismissed.

2. Daly and Stevenson

Daly and Stevenson also move to dismiss O'Diah's medical indifference claim based on a lack of personal involvement. Even after construing the second amended complaint liberally, O'Diah has failed to allege any facts to show the personal involvement of either Daly or Stevenson in the alleged medical indifference. As such, the

medical indifference claim should be dismissed as to Daly and Stevenson.

C. Verbal Harassment [6]

[6] This section addresses the claimed verbal harassment only. O'Diah also alleges that defendants' violations of his rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments were incidents of harassment against him based on his race and national origin and in retaliation for exercising constitutionally protected conduct. The alleged violations of those rights are addressed in the sections that follow.

O'Diah claims that he was verbally harassed by defendants. Second Amend. Compl. ¶¶ 12, 17, 24–26, 28. O'Diah, however, fails to allege specific incidents of verbal harassment. Even if he were to do so, allegations of verbal harassment alone are not actionable under § 1983. *See Purcell v. Coughlin,* 790 F.2d 263, 265 (2d Cir.1986) ("The claim that a prison guard called [plaintiff] names ... did not allege any appreciable injury and was properly dismissed."); *Shabazz v. Pico,* 994 F.Supp. 460, 474 (S.D.N.Y.1998) ("[V]erbal harassment or profanity alone unaccompanied by any injury no matter how inappropriate, unprofessional, or reprehensible it might seem do not constitute the violation of any federally protected right and therefore is not actionable under ... § 1983."). Accordingly,, to the extent that they are based only on verbal harassment, O'Diah's harassment claims should be dismissed as to all defendants.

D. First Amendment

1. Retaliation

***6** O'Diah alleges that all of the defendants' alleged unconstitutional actions were in retaliation for engaging in constitutionally protected conduct. To state an actionable claim for retaliation, a plaintiff must first allege that the plaintiff's conduct was constitutionally protected and that this protected conduct was a substantial factor that caused the adverse action against plaintiff. *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996). Courts must view retaliation claims with care and skepticism to avoid judicial intrusion into matters of prison administration. *Jackson v. Onondaga County,* 549 F.Supp.2d 204, 214–15 (N.D.N.Y.2008) (McAvoy, J., adopting report and recommendation of Lowe, M.J.). Conclusory allegations alone are insufficient. *Id.* at 214 (citing *Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983) (explaining that "claim[s] supported by specific and detailed factual allegations ... ought usually be pursued with full discovery.")).

There are numerous instances in the second amended complaint where O'Diah makes a retaliation claim without alleging any facts to establish that any of defendants' alleged actions were motivated by, or temporally related to, any constitutionally protected conduct. All O'Diah offers are conclusory allegations to demonstrate that he was the victim of retaliatory conduct. These conclusory allegations, without more, are insufficient to maintain a claim. *Jackson,* 549 F.Supp.2d at 214.

Also contained in the second amended complaint, however, are other allegations of retaliation that deserve greater analysis. First, as to the claims of retaliation for refusing to participate in the GED program, O'Diah does not have a constitutionally protected right to refuse such a program. As such, any claim of retaliation arising from this incident should be dismissed. Second, although there may be a temporal connection between O'Diah losing control in front of Dr. Floresca and O'Diah being kept in keeplock for six days beyond the imposed sentence, O'Diah did not have a constitutionally protected right to act out simply because Dr. Floresca refused O'Diah's request for urine analysis and blood work. Finally, even though O'Diah was confined to keeplock for refusing to take the prescribed medication, disagreeing over the proper course of medical treatment does not raise a constitutional violation. *See* Section E(1) *infra.* Thus, any claim of retaliation arising out of these incidents should be dismissed. [7]

[7] O'Diah's argument that the deprivation of medical care violated the Eighth Amendment is discussed in subsection E(1) *infra.*

Although there is no right to file grievances, the right to file a grievance is a constitutionally protected activity for retaliation purposes. *See Davis v. Goord,* 320 F.3d 346, 352–53 (2d Cir.2003). O'Diah alleges that he was deprived of medical care on March 4, 2008, because he filed grievances on February 25 and 26, 2008, alleging that

prison officials had refused to refund money unlawfully seized by Ms. Daly. The temporal proximity between the filing of the grievance and the alleged retaliatory act could support a First Amendment retaliation claim. Accordingly, defendants' motion to dismiss this claim should be denied with respect to this incident and against defendants Mawhir, Dr. Buttarazzi, and Warner.

***7** Liberally construing the second amended complaint, O'Diah alleges that defendants violated New York Correction Law § 138(4).[8] Correction Law § 138(4) prohibits disciplining inmates who "mak[e] written or oral statements, demands, or requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution." A federal court may exercise supplemental jurisdiction over a state law claim when that claim arises out of the same facts upon which the federal claim is based. *See Kirschner v. Klemons,* 225 F.3d 227, 238 (2d Cir.2000) (citations omitted). O'Diah argues that defendants violated Correction Law § 138(4) when they issued disciplinary charges and refused to provide him with the proper medication in retaliation for filing grievances. Second Amend. Compl. ¶¶ 42, 80. Because those incidents arise out of the same facts as the federal retaliation claim, the Court should exercise pendent jurisdiction over the state law claim. Accordingly, defendants' motion to dismiss O'Diah's Correction Law § 138(4) claim should be denied as to Mawhir, Buttarazzi, and Warner.

8 This argument is addressed in this section as N.Y. Correction Law § 138(4) reflects New York's protection of inmates' First Amendment right to be free from retaliation for engaging in constitutionally protected conduct. *See Salahuddin v. Harris,* 657 F.Supp. 369, 376 (S.D.N.Y.1987) (finding that Correction Law § 138(4) "suggests that New York views the broad exercise of inmates' First Amendment rights as consistent with its own penological interests").

2. Retaliatory Transfer

Construing the second amended complaint liberally, O'Diah alleges that his September 2007 transfer from Ulster to Cayuga was in retaliation for some unspecified conduct. Second Amend. Compl. ¶¶ 52, 88. It is well settled that an inmate does not have a constitutional right to be incarcerated in a particular facility. *Montanye v. Haymes,* 427 U.S. 236, 243 (1976); *Meachum v. Fano,* 427 U.S. 215, 224 (1976). However, prison officials may not transfer an inmate in retaliation for the inmate's exercise of constitutional rights. *See Meriwether v. Coughlin,* 879 F.2d 1037, 1046 (2d Cir.1989). O'Diah fails to allege sufficient facts suggesting that he had exercised any constitutional rights in retaliation for which defendants might have acted. Thus, the defendants' motion on this ground should be granted.

3. Mail Tampering

"A prisoner's right to the free flow of incoming and outgoing mail is protected by the First Amendment." *Davis,* 320 F.3d at 351 (citations omitted). While legal mail is afforded the greatest protection, "greater protection [is afforded] to outgoing mail than to incoming mail." *Id.* (citations omitted). "Restrictions ... are justified only if they further one or more of the substantial governmental interests of security, order, and rehabilitation and must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* (citations omitted).

"Interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution." *Id.* In order to state a claim for denial of access to the courts, including those premised on interference with legal mail, a plaintiff must allege "that a defendant caused 'actual injury,' i.e. took or was responsible for actions that 'hindered [a plaintiff's] efforts to pursue a legal claim." *Id.* (citing *Monsky v. Moraghan,* 127 F.3d 243, 247 (2d Cir.1997) (quoting *Lewis v. Casey,* 518 U.S. 343, 351 (1996)). "[A]n isolated incident of mail tampering is usually insufficient to establish a constitutional violation.... Rather, the inmate must show that prison officials regularly and unjustifiably interfered with the incoming legal mail." *Id.* (citations omitted); *see also Washington v. James,* 782 F.2d 1134, 1139 (2d Cir.1986) (explaining that an action may not give rise to damages if there was "no showing ... that the inmate's right of access to the courts was chilled or the legal representation was impaired."); *Morgan v. Montanye,* 516 F.2d 1367, 1371 (2d Cir.1975) (holding that a single instance of mail tampering which did not lead the plaintiff to suffer any damage was insufficient to support a constitutional challenge).

***8** In this case, O'Diah alleges that Corcoran and Mawhir refused to provide O'Diah with documents related to his appeals. Second Amend. Compl. ¶ 85. O'Diah wanted to provide the documents to a legal processing advocate who would be visiting him at Cayuga. *Id.* Even if true, this single incident is insufficient to support O'Diah's claim of mail tampering. Further, the general allegations of mail tampering found elsewhere in the complaint are insufficient to establish a constitutional violation. With respect to those claims, O'Diah has failed to plead with any particularity with what mail defendants tampered. Those conclusory allegations make no reference to time, place, person or manner of tampering.

As such, defendants' motion should be granted as to this claim.

E. Eighth Amendment

The Eighth Amendment explicitly prohibits the infliction of "cruel and unusual punishment." U.S. Const. amend. VIII.

1. Medical Care

This prohibition extends to the provision of medical care. *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994). The test for a § 1983 claim is twofold. First, the prisoner must show that the condition to which he was exposed was sufficiently serious. *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). Second, the prisoner must show that the prison official demonstrated deliberate indifference by having knowledge of the risk and failing to take measures to avoid the harm. *Id.* "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844.

" 'Because society does not expect that prisoners will have unqualified access to healthcare,' a prisoner must first make [a] threshold showing of serious illness or injury" to state a cognizable medical indifference claim. *Smith v. Carpenter,* 316 F.3d 178, 184 (2d Cir.2003) (quoting *Hudson v. McMillian,* 503 U .S. 1, 9 (1992)). Because there is no distinct litmus test, a serious medical condition is determined by such factors as "(1) whether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain." *Brock v. Wright,* 315 F.3d 158, 162–63 (2d Cir.2003) (citing *Chance v. Armstrong,* 143 F.3d 698, 702 (2d Cir.1998)). The severity of the denial of care should also be judged within the context of the surrounding facts and circumstances of the case. *Smith,* 316 F.3d at 185.

Deliberate indifference requires the prisoner "to prove that the prison official knew of and disregarded the prisoner's serious medical needs." *Chance,* 413 F.3d at 702. Thus, prison officials must be "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). "Mere disagreement over proper treatment does not create a constitutional claim" as long as treatment was adequate. *Chance,* 143 F.3d at 703. Thus, "disagreements over medications, diagnostic techniques (e.g., the need for X-rays), forms of treatment, or the needs for specialists ... are not adequate grounds for a section 1983 claim." *Sonds v. St. Barnabas Hosp. Corr. Health Servs.,* 151 F.Supp.2d 303, 312 (S.D.N.Y.2001).

***9** In this case, defendants do not appear to challenge that O'Diah was suffering from a serious medical condition. Instead, defendants assert only that O'Diah has failed to allege deliberate indifference by defendants. For the purposes of the pending motion, it will be assumed that O'Diah suffered a serious medical condition,[9] and suffered substantial pain arising from the infection. Second Amend. Compl. ¶¶ 43–44.

9 *See Santiago v. Stamp,* 303 F. App'x 958 (2d Cir. Dec. 23, 2008) (assessing deliberate indifference prong where plaintiff suffered from a urinary tract infection).

Defendants argue that their actions amounted to nothing more than a mere disagreement with O'Diah regarding his treatment. Defs. Mem. of Law at 18–20. O'Diah argues that defendants refused to provide the proper treatment in retaliation for O'Diah's refusal to participate in the GED program. Second Amended. Compl. ¶ 53. Although the refusal to participate in a GED program is not a protected right, the refusal to provide the proper treatment for non-medical reasons may demonstrate an intentional

disregard for O'Diah's serious medical needs. Moreover, Dr. Floresca did not conduct a test to determine whether O'Diah had a urinary tract infection before providing O'Diah with Motrin. *Id.* ¶¶ 43–44. Likewise, defendant Dr. Buttarazzi did not conduct any tests on O'Diah before prescribing an ointment for an enlarged prostate. *Id.* ¶¶ 77–78. Construing these facts in the light most favorable to O'Diah, he has advanced a claim that defendants' actions rose past a level of mere disagreement and into one of intentional disregard. Further, the refusal to provide O'Diah with a medical examination on March 4, 2008, because he had filed grievances against Cayuga officials could support a claim for deliberate indifference.

Accordingly, defendants' motion to dismiss the medical indifference claim should be denied with respect to Drs. Buttarazzi and Floresca and as to Warner but granted in all other respects.

2. Working Conditions

The constitutional prohibition against cruel and unusual punishment includes the right to be free from conditions of confinement that impose an excessive risk to an inmate's health or safety. *Farmer,* 511 U.S. at 825; *Hathaway,* 37 F.3d at 66. Establishing an Eighth Amendment claim based on medically inappropriate working conditions requires the plaintiff to show that (1) he was incarcerated under conditions that posed a substantial risk of serious harm, and (2) prison officials acted with deliberate indifference to his health or safety. *Farmer,* 511 U.S. at 834. Such a claim may be analogized to a claim for inadequate medical care, which also requires proof of deliberate indifference. *See, e.g., Gill v. Mooney,* 824 F.2d 192, 196 (2d Cir.1987) (prisoner alleged Eighth Amendment medical claim when he alleged that prison guards deliberately ignored doctor's order that prisoner pursue exercise in gym); *Cooke v. Stern,* No. 9:07–CV–1292 (GLS/ATB), 2010 U.S. Dist. LEXIS 88387, at *24–30, 2010 WL 3418393, at *6–8 (N.D.N.Y. Aug. 2, 2010) (Baxter, M.J.) (alleging of Eighth Amendment medical claim where prison officials assigned plaintiff to a work that a doctor determined to be inappropriate for his medical condition); *Atkinson v. Fischer,* No. 9:07–cv–00368 (GLS/GHL), 2009 U.S. Dist. LEXIS 88480, at *4–5, 2009 WL 3165544, at *2 (N.D.N.Y. Sept. 25, 2009) (same).

***10** "The deliberate indifference standard embodies both an objective and subjective prong." *Hathaway,* 37 F.3d at 66. Under the objective standard, a plaintiff must allege a deprivation "sufficiently serious" to make out a constitutional violation. *Id.* (quoting *Wilson v. Seiter,* 501 U.S. 294, 298 (1991)). An inmate may satisfy this element by alleging that his prison work duties created a substantial risk of serious injury or harm. *Howard v. Headly,* 72 F.Supp.2d 118, 123–24 (E.D.N.Y.1999) (collecting cases).

The subjective element focuses on whether the defendant acted with a "sufficiently culpable state of mind." *Salahuddin v. Goord,* 467 F.3d 263, 280 (2d Cir.2006) (citing *Wilson,* 501 U.S. at 300). "Deliberate indifference" requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. *Farmer,* 511 U.S. at 835. A prison official acts with deliberate indifference when he knows of and disregards an excessive risk to an inmate's health or safety. *Hathaway,* 37 F.3d at 66. The official must both 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. *Id.*

Defendants characterize O'Diah's allegation regarding his assignment to lawn and ground utility work as a Due Process claim based on not receiving the work assignment of his choice. *See* Defs. Mem. of Law at 12. A "New York [state] ... prisoner has no protected liberty interest in a particular job assignment." *Frazier v. Coughlin,* 81 F.3d 313, 318 (2d Cir.1996). However, forcing O'Diah to complete a job assignment with the intention of aggravating his medical condition could state a claim for violating O'Diah's right against unconstitutional conditions of confinement.

As such, defendants' motion to dismiss this claim should be denied as to Warner, Dr. Buttarazzi, Stevenson, and Mawhir.

3. Excessive Force

Inmates enjoy an Eighth Amendment protection against the use of excessive force and may recover damages for its violations under 42 U.S.C. § 1983. *Hudson,* 503 U.S. at 9–10. The Eighth Amendment's prohibition against cruel and unusual punishment precludes the "unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153,

173 (1976); *Sims v. Artuz,* 230 F.3d 14, 20 (2d Cir.2000). To bring a claim of excessive force under the Eighth Amendment, a plaintiff must satisfy both objective and subjective elements. *Blyden v. Mancusi,* 186 F.3d 252, 262 (2d Cir.1999).

The objective element is "responsive to contemporary standards of decency" and requires a showing that "the injury actually inflicted is sufficiently serious to warrant Eighth Amendment protection." *Hudson,* 502 U.S. at 9 (internal citations omitted); *Blyden,* 186 F.3d at 262. However, "the malicious use of force to cause harm constitute[s][an] Eighth Amendment violation *per se"* regardless of the seriousness of the injuries. *Blyden,* 186 F.3d at 263 (citing *Hudson,* 503 U.S. at 9); *see also Wilkins v. Gaddy,* 130 S.Ct. 1175, 1178 (2010) ("The 'core judicial inquiry' ... was not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."). "The Eighth Amendment's prohibition of 'cruel and unusual' punishments excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Hudson,* 502 U.S. at 9–10 (citations omitted). " 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Sims,* 230 F.3d at 22 (citation omitted).

***11** The subjective element requires a plaintiff to demonstrate the "necessary level of culpability, shown by actions characterized by wantonness." *Id.* at 21 (citation omitted). The wantonness inquiry "turns on 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' " *Id.* (quoting *Hudson,* 503 U.S. at 7). In determining whether defendants acted in a malicious or wanton manner, the Second Circuit has identified five facts to consider:

> "the extent of the injury and the mental state of the defendant[;] ... the need for the application of force; the correlation between that need and the amount of force used; the threat reasonably perceived by the defendants; and any efforts made by the defendants to temper the severity of a forceful response."

Scott v. Coughlin, 344 F.3d 282, 291 (2d Cir.2003) (internal quotation marks and citations omitted).

Liberally construing O'Diah's second amended complaint, he has satisfied the objective component of the excessive force inquiry. The second amended complaint alleges that Mawhir and others repeatedly poured cold water on O'Diah without provocation and while O'Diah was sleeping. Although one incident might be insufficient to state an Eighth Amendment violation, O'Diah alleges that this occurred "whenever [he] was sleeping." Second Amend. Compl. ¶ 74. Such repeated conduct would rise beyond *de minimis* use of physical force and evinces maliciousness. Moreover, in addition to pouring cold water on O'Diah, O'Diah alleges that Mawhir had joined other inmates in beating O'Diah without provocation. Accordingly, defendant's motion to dismiss the excessive force claim should be denied as to Mawhir but granted in all other respects. [10]

10 O'Diah has also alleged other incidents where he was assaulted by unnamed correctional officers. Second Amend. Compl. ¶¶ 42, 74–75. However, O'Diah has failed to allege any claims against John Doe or Jane Doe defendants. To the extent that O'Diah is alleging excessive force against these unnamed correctional officers, he must file an amended complaint in accordance with N.D.N.Y.L.R. 7.1(a)(4). Moreover, although not raised in the second amended complaint, O'Diah's reply to defendants' motion accuses defendants of "repeatedly" stripping him, shackling him, and parading him around like a slave. Dkt. No. 56 ¶ 40. The defendants also allegedly told O'Diah that he had to do "what his master had told him to do." *Id.* If true, this incident could support an Eighth Amendment claim. To the extent that O'Diah intends to rely on this allegation, however, he must file an amended complaint in accordance with Local Rule 7.1(a)(4).

4. Failure to Protect

Eighth Amendment obligations also include the duty to protect prisoners from known harms. *Farmer,* 511 U.S. at 829. "The Constitution does not mandate comfortable prisons but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison

and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Id* . at 832. Where the inmate is alleging "a failure to protect harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834 (citing *Helling v. McKinney,* 509 U.S. 25, 31–32 (1993)).

As with other Eighth Amendment claims, a "plaintiff must satisfy both an objective ... and subjective test." *Jolly v. Coughlin,* 76 F.3d 468, 480 (2d Cir.1996) (citations omitted). To state a cognizable failure to protect claim, (1) "the inmate [must be] incarcerated under conditions imposing a substantial risk of serious harm," and (2) the prison offic[ial] must "know of and disregard an excessive risk to inmate health and safety; the official must be both 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." *Matthews v. Armitage,* 36 F.Supp.2d 121, 124–25 (N.D.N.Y.1999) (internal citations and quotation marks omitted).

***12** Liberally construing O'Diah's complaint, he alleges that defendants failed to protect him from beatings by other inmates. At best, however, the allegations are sufficient to state the elements of a constitutional claim against Mawhir only. Mawhir allegedly participated in beating O'Diah and failed to prevent other inmates from doing so even though Mawhir was aware of the beatings. Second Amend. Compl. ¶ 74–75. Accordingly, defendants' motion to dismiss should be denied with respect to Mawhir but should be granted as to all other defendants.

F. Due Process

An inmate asserting a violation of his or her right to due process must establish the existence of a protected interest in life, liberty, or property. *See Perry v. McDonald,* 280 F.3d 159, 173 (2d Cir.2001).

1. Grievance Procedures

"Prisoners, including pretrial detainees, have a constitutional right to access to the courts...." *Bourden v. Loughren,* 386 F.3d 88, 92 (2d Cir.1994) (internal quotation marks omitted) (citing *Bounds v. Smith,* 430 U.S. 817, 21–22 (1977) (citations omitted) (holding that all prisoners have a well-established Constitutional right to "adequate, effective, and meaningful" access to courts). "[I]nmate grievance programs created by state law are not required by the Constitution and consequently allegations that prison officials violated those procedures does not give rise to a cognizable § 1983 claim." *Shell v. Brzezniak,* 365 F.Supp.2d 362, 370 (W.D.N.Y.2005) (citations omitted). However, "[i]f prison officials ignore a grievance that raises constitutional claims, an inmate can directly petition the government for redress of that claim." *Id.* at 370 (citations omitted).

In this case, O'Diah alleges that Napoli refused to process O'Diah's grievance petition, and, on one occasion, refused to provide O'Diah with a grievance form. Second Amend. Compl. ¶¶ 69, 71, 73–74, 83, 90. However, O'Diah cannot allege facts sufficient to establish that he had a liberty interest which required constitutional protection. Rather, O'Diah uses conclusory language to make broad claims of unconstitutional conduct. As such, defendants' motion to dismiss on this ground should be granted.

2. Disciplinary Determinations and Keeplock Confinement

To establish a protected interest, a prisoner must satisfy the standard set forth in *Sandin v. Conner,* 515 U.S. 472, 483–84 (1995). In the context of prison disciplinary proceedings, this standard requires that the confinement was atypical and significant in relation to ordinary prison life. *Jenkins v. Haubert,* 179 F.3d 19, 28 (2d Cir.1999); *Frazier,* 81 F.3d at 317.

O'Diah alleges that his due process rights were violated during various disciplinary hearings. However, O'Diah was never sentenced to confinement for more than thirty days. "[K]eeplock ... of 30 days or less in New York prisons is not 'atypical or significant hardship' under *Sandin." Auleta v. LaFrance,* 233 F.Supp.2d 396, 398 (N.D.N.Y.2010) (citing *Williams v. Keane,* No. Civ. 95–0379(AJP)(JGK), 1997 U.S. Dist. LEXIS 12665, at *13–22, 1997 WL 527677, at *6–8 (S.D.N.Y. Aug. 25, 1997) (Peck, M.J.) (citing cases)). To the extent that O'Diah also alleges that he lost certain privileges, "the loss of phone, package, and commissary privileges does not give rise to a protected liberty interest under New York law." *Smart v. Goord,* 441 F.Supp.2d 631, 640 (S.D.N .Y.2006) (citing *Husbands v. McClellan,* 990 F.Supp. 214, 217 (W . D.N.Y.1998), citing in turn *Frazier,* 81 F.3d at 317).

***13** O'Diah alleges that on at least one occasion, he was confined to keeplock for thirty-six days, six days beyond the imposed sentence. Second Amend. Compl. ¶ 51. As to this claim, more intensive fact-finding is required and dismissal at this stage is precluded on this ground. *See Sealey v. Giltner,* 116 F.3d 47, 52 (2d Cir.1997) ("we have indicated the desirability of fact-finding before determining whether a prisoner has a liberty interest in remaining free from segregated confinement."). Therefore, defendants' motion on this ground as to O'Diah's claim based on the alleged service of thirty-six days in keeplock should be denied.

As to the merits of O'Diah's Due Process claims, inmates are not given "the full panoply of [due process] rights" but are still afforded procedural process. *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974). Prisoners are "entitled to advance written notice ...; a hearing affording him a reasonable opportunity to call witnesses and present documentary evidence; a fair and impartial hearing officer; and a written statement of the disposition including the evidence relied upon and the reasons for the disciplinary actions taken." *Sira v. Morton,* 380 F.3d 57, 69 (2d Cir.2004) (citations omitted). O'Diah's only claims here rest on allegations that are wholly conclusory. He fails to allege facts from which a reasonable fact-finder could conclude that he failed to receive adequate advanced notice, an opportunity to be heard, a fair hearing officer, or any of the other aspects of fairness in the proceedings to which he was due.

As such, defendants' motion as to this ground should be granted.

3. Defamation

O'Diah makes broad claims that defendants defamed him. Second Am. Compl. ¶ 70. With one possible exception, O'Diah fails to allege any specific instances of defamation. Rather, he merely makes conclusory allegations accusing officials of slander and libel. Thus, his defamation claim falls far short of the plausibility standard required by *Ashcroft v. Iqbal. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' ") (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

Construing the Second Amended Complaint liberally, O'Diah appears to claim Dr. Floresca and Carlsen defamed him when those defendants told Ulster personnel that O'Diah was "crazy." Second Amend. Compl. ¶¶ 46–48. Even if this statement were defamatory, a "state defamation action for slander by a government official, without more, cannot be converted into a federal action for loss of liberty under the Due Process Clause of the Fourteenth Amendment." *Patterson v. City of Utica,* 370 F.3d 322, 328 (2d Cir.2004); *see also Paul v. Davis,* 424 U.S. 693, 709 (1976). "Section 1983 requires that the alleged conduct violate a constitutionally safeguarded right." *Venable v. Goord,* No. 03 Civ. 4434(RMB), 2004 U.S. Dist. LEXIS 18275, at *13, 2004 WL 2033069, at *5 (S.D.N.Y. Sept. 7, 2004) (citing *Savage v. Snow,* 575 F.Supp. 828, 837 (S . D.N.Y.1983)).

***14** Thus, defendants' motion as to O'Diah's defamation claim should be granted.

4. Forced Participation in GED Program

O'Diah accuses Stevenson and Corcoran of "reckless and gross intentional disregards [sic] for [O'Diah's] academic credentials" because they forced O'Diah into a GED program. While O'Diah may not agree with the necessity to complete the program, "it is not the function of this court to micromanage the New York prison system or to second guess officials, including those regarding programming." *Sumpter v. Skiff,* No. 05–cv–868, 2008 WL 4518996, at *9 (N.D.N.Y. Sept. 30, 2008). Rather, the court's function "in a case of this nature is to ensure that the rights guaranteed to a prison inmate by the United States Constitution and federal law are protected." *Id.* Further, "prison officials have a relatively strong interest in maintaining order in the prison and encouraging inmates to comply with mandatory programs as part of their rehabilitation." *Dixon v. Leonardo,* 886 F.Supp. 987, 993 (N.D .N.Y.1995). Therefore, even if defendants forced O'Diah to participate in a GED program, defendants did not deprive O'Diah of a constitutional right. Accordingly, O'Diah has failed to present a cognizable claim and defendants' motion as to this claim should be granted.

5. Confiscation of Property

O'Diah contends that Daly unlawfully confiscated his property. Second Amend. Compl. ¶¶ 71–72, 86–87. An inmate has a right not to be deprived of property without due process. However, federal courts do not provide redress for the deprivation of property if there is an adequate state court remedy which the plaintiff can pursue. *Hudson v. Palmer,* 468 U.S. 517, 533 (1984). "An Article 78 proceeding permits a petitioner to submit affidavits and other written evidence, and where a material issue of fact is raised, have a trial on the disputed issue, including constitutional claims." *Locurto v. Safir,* 264 F.3d 154, 174 (2d Cir.2001) (citations omitted); *see also* N.Y. C.P.L.R. §§ 7803, 7804; *Campo v. New York City Employees' Ret. Sys.,* 843 F.2d 96, 101 (2d Cir.1988) ("Article 78 ... provides a summary proceeding which can be used to review administrative decisions."). State law also provides that "[a]ny claim for damages arising out of an act done ... within the scope of ... employment and in the discharge of the duties of any officer or employee of the department [of corrections] shall be brought and maintained in the court of claims as a claim against the state." N.Y. Corr. Law § 24(2).

In this case, O'Diah contends that there was an unconstitutional deprivation when his personal property was allegedly confiscated by Daly. Such claims fail as a matter of law for several reasons. First, the Article 78 [11] procedure exists and affords an adequate state court remedy. Second, because O'Diah is suing for damages, he must pursue his claims here against New York State in the New York Court of Claims pursuant to Corrections Law § 24. Thus, the correct venue to litigate these claims is in state court.

11 N.Y. C.P.L.R. art 78 (McKinney 1994 & Supp.2007) (establishes the procedure for judicial review of the actions and inactions of state and local government agencies and officials.

***15** Accordingly, defendants' motion should be granted as to this claim.

G. Equal Protection

The Fourteenth Amendment's Equal Protection Clause mandates equal treatment under the law. Essential to that protection is the guarantee that similarly situated persons be treated equally. *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985); *Philips v. Girdich,* 408 F.3d 124, 129 (2d Cir.2006) ("To prove a violation of the Equal Protection Clause ... a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination.").

> [T]he Equal Protection Clause bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

Vega v. Artus, 610 F.Supp.2d 185, 209 (N.D.N.Y.2009) (internal quotation marks and citations omitted).

In this case, O'Diah alleges that, as an African American, he was treated differently from others but has failed to show how he was treated differently. Vague and conclusory allegations of Equal Protection violations are insufficient to state a claim. *See, e.g .*, *John Gil Constr. Inc. v. Riverso,* 99 F.Supp.2d 345, 353 (S.D.N .Y.2000) ("[A]ssertions of selective enforcement and racial animus [that] are wholly conclusory and unaccompanied by any supporting allegations ... are insufficient to state a claim under the Equal Protection Clause or 42 U.S.C. § 1983") (citations omitted). Accordingly, defendants' motion should be granted on this ground.

H. Conspiracy

O'Diah alleges that the defendants conspired together to deprive him of his constitutional rights. "Section 1985 prohibits conspiracies to interfere with civil rights." *Davila v. Secure Pharmacy Plus,* 329 F.Supp.2d 311, 316 (D.Conn.2004). To state a claim for relief under § 1985(3), a plaintiff must show:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges

> and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States.

United Bd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 828–29, 103 S.Ct. 3352 (1983); *see also Iqbal v. Hasty,* 490 F.3d 143, 176 (2d Cir.2007). "In addition, the conspiracy must be motivated by some class-based animus." *Hasty,* 490 F.3d at 176 (citations omitted).

Once again, O'Diah does not assert any facts giving rise to a conspiracy. First, O'Diah vaguely asserts conclusory statements relating to an alleged conspiracy among defendants. This is insufficient. *See generally Thomas v. Roach,* 165 F.3d 137, 147 (2d Cir.1999) (granting summary judgment for a § 1985(3) claim where the "assertions were conclusory and vague, and did not establish the existence of an agreement among defendants to deprive [plaintiff] of his constitutional rights"). Second, there has been proffered no evidence relating to agreements between the defendants, the purpose of their alleged conspiracy, or an intent by defendants to deprive O'Diah of his civil rights.

***16** Third, "[a]s the Second Circuit has noted repeatedly, conspiracy claims are to be viewed with skepticism and must be supported by more than mere conclusory allegations." *Webb v. Goord,* 340 F.3d 105, 110 (2003) ("In order to maintain an action under Section 1985, a plaintiff must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.") (internal quotation marks omitted). O'Diah's conclusory allegations of a conspiracy against him fail to provide any factual basis plausibly to support a meeting of the minds between the defendants or that defendants entered into an agreement to violate his rights.

Finally, even if O'Diah's allegations were found to be more than merely conclusory, O'Diah's conspiracy claims are barred by the "intra-corpo rate conspiracy" doctrine. The doctrine provides that a corporation or public entity "generally cannot conspire with its employees or agents as all are considered a single entity." *Everson v. New York City Transit Auth.,* 216 F.Supp.2d 71, 76 (E.D.N.Y.2002) (citation omitted); *see also Orafan v. Goord,* 411 F.Supp.2d 153, 165 (N.D.N.Y.2006) (holding that the conspiracy claim failed because the alleged co-conspirators were all DOCS officials and employees acting within the scope of their employment) (internal citations and quotation marks omitted).

An exception exists if the individuals are motivated by personal interests, separate and apart from the entity. *Orafan v. Goord,* 411 F.Supp.2d at 165. To allege facts plausibly suggesting that defendants were pursuing personal interests, more is required than merely alleging defendants were motivated by personal bias. *See Peters v. City of New York,* No. 04–cv–9333 (LAK), 2005 U.S. Dist. LEXIS 2303, at *10–11, 2005 WL 387141, at *4 (S.D.N.Y. Feb. 16, 2005). "[P]ersonal bias does not constitute personal interest and is not sufficient to defeat the intra-corporate conspiracy doctrine." *Everson,* 216 F.Supp.2d at 76 (citations omitted).

In this case, all of the defendants were DOCS employees during the period set forth in the second amended complaint and all were acting within the scope of their employment. Therefore, the intra-corporate conspiracy doctrine applies. Additionally, the exception to the doctrine does not apply here. O'Diah does not claim that each defendant was pursuing his or her independent personal interests, but merely that their actions were motivated by their personal bias against his "African origin." Accordingly, defendants' motion as to O'Diah's § 1985(3) claim should be granted.

O'Diah also alleges violations of 42 U.S.C. § 1986. If any defendant "ha[d] knowledge that any of the wrongs ... mentioned in section 1985 ... [we]re about to be committed, and ha[d] power to prevent or aid in preventing the commission of the same, [and] neglect[ed] or refuse[d] to do so ..., [he] shall be liable to the party injured. 42 U.S.C. § 1986. However, a "claim under section 1986 lies only if there is a viable conspiracy claim under section 1985." *Gagliardi v. Vill. of Pawling,* 18 F.3d 188, 194 (2d Cir.1994). No such claim exists here.

***17** Accordingly, defendants' motion as to O'Diah's § 1986 claim should be granted.

I. ADA Claim

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be

excluded from participation in or be denied the benefits of ... a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II applies to state inmates. *Giraldi v. Bd. of Parole,* No. 04–CV–877 (FJS/DRH), 2008 WL 907321, at *5 (N.D.N.Y. Mar. 31, 2008). To state a claim under the ADA, an inmate must demonstrate that

> (1) he or she is a "qualified individual with a disability"; (2) he or she is being excluded from participation in, or being denied the benefits of some service, program, or activity by reason of his or her disability; and (3) [the facility that] provides the service, program or activity is a public entity.

Clarkson v. Coughlin, 898 F.Supp. 1019, 1037 (S.D.N.Y.1995); 42 U.S.C. § 12132.

As to the first element, a person is an individual with a qualified disability if "(A) a physical or mental impairment ... substantially limits one or more of the major life activities of such individual, (B) [there is] a record of such an impairment, or (C) [the individual is] being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). If a plaintiff fails to identify the specific activity limited by the impairment and fails to allege that it constitutes a major life activity, the ADA claim must be dismissed. *Reeves v. Johnson Controls World Servs.,* 140 F.3d 144, 153–54 (2d Cir.1998).

First, a claim under the ADA cannot be brought against individuals and, therefore, the claims against the individual defendants under the ADA must be dismissed. *See Fox v. State Univ. of N.Y.,* 497 F.Supp.2d 446, 451 (E.D.N.Y.2007); *Hallet v. New York State Dep't of Corr. Serv.,* 109 F.Supp.2d. 190, 199 (S.D.N.Y.2000). Second, O'Diah has alleged no facts to establish the first element of his claim. In fact, he presents no evidence of any disability at all. Although O'Diah had a urinary tract infection and high blood pressure, he has failed to allege any facts showing how those conditions have substantially limited his life activities. Finally, O'Diah fails to allege any facts that show an exclusion or denial of benefits based on any alleged disabilities.

Accordingly, defendants' motion as to the ADA claim should be granted.

J. Qualified Immunity

Defendants claim that they are entitled to qualified immunity even if O'Diah's constitutional claims are substantiated. Qualified immunity generally protects governmental officials from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Aiken v. Nixon,* 236 F.Supp.2d 211, 229–30 (N.D.N.Y.2002), *aff'd,* 80 F. App'x 146 (2d Cir. Nov. 10, 2003). However, even if the constitutional privileges "are so clearly defined that a reasonable public official would known that his objections might violate those rights, qualified ... immunity might still be available ... if it was objectively reasonable for the public official to believe that his acts did not violate those rights." *Kaminsy v. Rosenblum,* 929 F.2d 922, 925 (2d Cir.1991); *Magnotti v. Kuntz,* 918 F.2d 364, 367 (2d Cir.1990) (internal citations omitted).

***18** A court must first determine whether, if plaintiff's allegations are accepted as true, there would be a constitutional violation. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Only if there is a constitutional violation does a court proceed to determine whether the constitutional rights were clearly established at the time of the alleged violation. *Aiken,* 236 F.Supp.2d at 230. Here, the second prong of the inquiry must be discussed with regard to O'Diah's First Amendment claim to be free from retaliation for filing a grievance against abuse claim, and O'Diah's Eighth Amendment claims of excessive force, medical indifference, and medically inappropriate work conditions. None of O'Diah's other claims need be addressed because, as discussed *supra,* it has not been shown that defendants violated O'Diah's constitutional rights as alleged in those claims.

There is no question that it was settled in November 2007 and March 2008 that the Eighth Amendment prohibited (1) a corrections officer from assaulting or intentionally inflicting harm on an inmate, *Hudson,* 503 U.S. at 9–10, and (2) required that inmates are provided "with ... reasonable safety [as i]t is cruel and unusual punishment to hold criminals in unsafe conditions," *Helling,* 509 U.S. at 33 (internal quotation marks and citations omitted), whether they pertain to medical care or expectation

of protection from corrections staff from dangerous situations. Thus, accepting all of O'Diah's allegations as true, qualified immunity should not be granted at this stage to (1) Mawhir for his involvement in his use of excessive force against O'Diah and his failure to protect O'Diah from beatings by other inmates; (2) defendants for retaliating against O'Diah for filing grievances alleging beatings; (3) Warner, Dr. Buttarazzi, Stevenson, and Mawhir for assigning him to medically inappropriate work conditions, and (4) Drs. Floresca and Buttarazzi for alleged deliberate indifference to O'Diah's serious medical needs. Defendants' motion on this ground as to those defendants should be denied.

K. Statute of Limitations

Defendants' Notice of Motion asserts the affirmative defense of statute of limitations. Dkt. No. 53. Defendants, however, fail to discuss this affirmative defense in their Memorandum of Law. O'Diah addresses this argument. Dkt. No. 56 ¶¶ 49–50.

While there is no provision in § 1983, § 1988 provides that state law may not apply if inconsistent with the Constitution or federal law. 42 U.S.C. § 1988(a); *Moor v. County of Alameda,* 411 U.S. 693, 702–03 (1973). In New York, the applicable statute of limitations for a § 1983 suit is the three-year period governing suits to recover upon a liability created or imposed by a statute. *See Owens v. Okure,* 488 U.S. 235, 249–51 (1989); *Romer v. Leary,* 425 F.2d 186, 187 (2d Cir.1970); N.Y. C.P.L.R. 214(2) (McKinney 2003). Under the "prison mailbox rule," a *pro se* prisoner's § 1983 complaint is deemed filed, for statute of limitations purposes, when it is delivered to prison officials." *Tapia–Ortiz v. Doe,* 171 F.3d 150, 152 (2d Cir.1999) (citing *Dory v. Ryan,* 999 F.2d 679, 682 (2d Cir.1993); *Houston v. Lack,* 487 U.S. 266, 270 (1988)). Here, this affirmative defense should be discussed with regard to O'Diah's First Amendment right to file a grievance against abuse claim, and O'Diah's Eighth Amendment claims of excessive force, medical indifference, and medically inappropriate work conditions. None of O'Diah's other claims need be addressed here because, as discussed *supra,* it has not been shown that defendants violated O'Diah's constitutional rights.

***19** The earliest incident of an alleged constitutional violation that survives defendants' motion to dismiss occurred on September 13, 2007, when Dr. Floresca provided O'Diah with Motrin instead of administering a test for a urinary tract infection. All other alleged constitutional violations that survive the pending motion occurred after this date. The second amended complaint is deemed filed on October 23, 2009. [12] As such, all events giving rise to the surviving claims occurred within the statute of limitations. Accordingly, defendants' motion is denied on this ground.

12 The original complaint here was filed on July 11, 2008. Dkt. No. 1. However, the applicability of the "relation back doctrine" need not be addressed since all claims were asserted within three years of the filing of the second amended complaint.

III. CONCLUSION

For the reasons stated above, it is hereby **RECOMMENDED** that defendants' motion to dismiss (Dkt. No. 53) be:

1. **DENIED** as to O'Diah's claims of,

A. Retaliation, including violations of New York Correction Law § 138(4), against defendants Mawhir, Dr. Buttarazzi, and Warner;

B. Medical indifference against defendants Dr. Buttarazzi, Dr. Floresca, and Warner;

C. Medically inappropriate work conditions against defendants Dr. Buttarazzi, Warner, Stevenson, and Mawhir;

D. Excessive force against defendant Mawhir; and

E. Failure to protect against defendant Mawhir; and

2. **GRANTED** as to all other claims and all other defendants.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court "within fourteen (14) days after being served with a copy of the ... recommendation." N.Y.N.D.L.R. 72 .1(c) (citing 28

U.S.C. § 636(b)(1)(B)-(C)). **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a).

All Citations

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2011 WL 933846
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Aror Ark O'DIAH, Plaintiff,
v.
A. MAWHIR, Cayuga Correctional Facility; Michael Corcoran, Superintendent, Cayuga Correctional Facility; Scott C. Carlsen, Superintendent, Ulster Correctional Facility; P. Buttarazzi, Chief Physician, Cayuga Correctional Facility Inmate Clinic; Jesus Floresca, Chief Physician, Ulster Correctional Facility Inmate Clinic; K. Stevenson, Cayuga Correctional Facility Program Coordinator; Ms. Daly; Mary Warner, Nurse Administrator, Cayuga Correctional Facility; and T. Napoli, Defendants.

No. 9:08–CV–322 (TJM)(DRH).
|
March 16, 2011.

Attorneys and Law Firms

Aror Ark O'Diah, Collins, NY, pro se.

Roger W. Kinsey, Office of Attorney General, Albany, NY, for Defendants.

DECISION & ORDER

THOMAS J. McAVOY, Senior District Judge.

I. INTRODUCTION

***1** This *pro se* action brought pursuant to 42 U.S.C. § 1983 was referred by this Court to the Hon. David R. Homer, United States Magistrate Judge, for a Report–Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule N.D.N.Y. 72.3(c). In his December 14, 2010 Report–Recommendation and Order, Magistrate Judge Homer recommended that Defendants' motion to dismiss (Dkt. No. 53) be:

1. DENIED as to O'Diah's claims of,

A. Retaliation, including violations of New York Correction Law § 138(4), against defendants Mawhir, Dr. Buttarazzi, and Warner;

B. Medical indifference against defendants Dr. Buttarazzi, Dr. Floresca, and Warner;

C. Medically inappropriate work conditions against defendants Dr. Buttarazzi, Warner, Stevenson, and Mawhir;

D. Excessive force against defendant Mawhir; and

E. Failure to protect against defendant Mawhir; and

2. GRANTED as to all other claims and all other defendants.

Plaintiff has filed objections to these recommendations.

II. STANDARD OF REVIEW

When objections to a magistrate judge's report and recommendation are lodged, the district court makes a *"de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See* 28 U.S.C. § 636(b)(1)(C). General or conclusory objections, or objections which merely recite the same arguments presented to the magistrate judge, are reviewed for clear error. *Farid v. Bouey,* 554 F.Supp.2d 301, 306 n. 2 (N.D.N.Y.2008); *see Frankel v. N.Y.C.,* 2009 WL 465645 at *2 (S.D.N.Y. Feb.25, 2009).[1] After reviewing the Report–Recommendation, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C).

1 The Southern District wrote in *Frankel:*

> The Court must make a *de novo* determination to the extent that a party makes specific objections to a magistrate's findings. *United States v. Male Juvenile,* 121 F.3d 34, 38 (2d Cir.1997). When a party makes only conclusory or general objections, or simply reiterates the original arguments, the Court will review the report strictly for clear error. *See Pearson–Fraser v. Bell Atl.,* No. 01 Civ. 2343, 2003 W L 43367, at *1 (S.D.N.Y. Jan. 6, 2003); *Camardo v. Gen. Motors Hourly–Rate Employees Pension Plan,* 806 F.Supp. 380, 382 (W.D.N.Y.1992). Similarly, "objections that are merely perfunctory responses argued in

> an attempt to engage the district court in a rehashing of the same arguments set forth in the original [papers] will not suffice to invoke de novo review." *Vega v. Artuz,* No. 97 Civ. 3775, 2002 W L 31174466, at *1 (S.D.N.Y. Sept.30, 2002).
>
> 2009 WL 465645, at *2.

III. DISCUSSION

Having reviewed *de novo* those portions of the Report–Recommendation and Order that Plaintiff has lodged objections to, the Court determines to adopt the recommendations for the reasons stated in Magistrate Judge Homer's thorough report.

IV. CONCLUSION

Therefore, the Court **ADOPTS** the recommendations made by Magistrate Judge Homer in their entirety. Accordingly, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. No. 53) is:

1. **DENIED** as to O'Diah's claims of,

A. Retaliation, including violations of New York Correction Law § 138(4), against defendants Mawhir, Dr. Buttarazzi, and Warner;

B. Medical indifference against defendants Dr. Buttarazzi, Dr. Floresca, and Warner;

C. Medically inappropriate work conditions against defendants Dr. Buttarazzi, Warner, Stevenson, and Mawhir;

D. Excessive force against defendant Mawhir; and

E. Failure to protect against defendant Mawhir; and

2. **GRANTED** as to all other claims and all other defendants, and these other claims are **DISMISSED.**

***2 IT IS SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 933846

1999 WL 4961
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Shawn GREEN, Plaintiff,
v.
N.Y.C. DEPARTMENT OF CORRECTION; Disciplinary Hearing Officer, and Correction Officer Middleton, # 6678, Defendants.

No. 97Civ.8191 (JSR)(KNF).
|
Jan. 6, 1999.

MEMORANDUM and ORDER

FOX, Magistrate J.

INTRODUCTION

***1** In this action, brought under 42 U.S.C. § 1983, *pro se* plaintiff alleges that, while an inmate in the defendants' custody, defendants denied him due process because they failed to provide him a means to appeal from the imposition of a disciplinary penalty. Plaintiff has made a motion pursuant to Federal Rules of Civil Procedure 15(a) and 19(a) to amend his complaint to: (a) substitute the City of New York ("City") as a defendant in the place of the City's Department of Correction; (b) withdraw a claim for mental anguish; (c) assert a claim under the Fourteenth Amendment to the United States Constitution; and (d) have the Court exercise its supplemental jurisdiction so that claims based upon New York General Municipal Law § 50–j and various provisions of the New York State Constitution might be entertained. Defendants oppose only that branch of plaintiff's motion which seeks to join the City as a defendant; defendants contend that it would be futile to do so. For the reasons which follow, plaintiff's application is granted in part and denied in part.

BACKGROUND

At a pretrial conference held with the parties on October 20, 1998, the prospect of plaintiff making an application to amend his complaint was discussed. At that time, plaintiff was unable to articulate, with any specificity, the rationale for amending his complaint. By Order dated October 21, 1998, the Court directed plaintiff to serve and file such information as would clarify further the plaintiff's position respecting his desire to amend his complaint. Thereafter, on October 30, 1998, plaintiff submitted to the Court an Addendum Motion for Leave to File an Amended Complaint ("Addendum Motion"). Defendants responded to plaintiff's Addendum Motion in a writing addressed to the Court dated November 5, 1998. In that writing, as noted above, defendants opposed only that portion of the Addendum Motion which seeks to substitute the City as a party defendant in the place of the Defendant Department of Correction.

DISCUSSION

Fed.R.Civ.P. 15(a) provides that: "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.... Otherwise a party may amend the party's pleading by leave of the court ... and leave shall be freely given when justice so requires." The determination to grant or to deny a motion to amend a complaint is within the discretion of the Court. *New York State Nat'l Org. for Women v. Cuomo,* 182 F.R.D. 30, 36 (S.D.N.Y.1998). However, there must be good reason to deny such a motion. *Acito v. Imcera Group, Inc.,* 47 F.3d 47, 55 (2d Cir.1995)(citing *S.S. Silverblatt, Inc. v. East Harlem Pilot Block–Bldg., 1 Hous. Dev. Fund Co., Inc.,* 608 F.2d 28, 42 [2d Cir.1979]). Futility of the amendment is a valid reason to deny the motion. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

In the case at bar, defendants maintain that substituting the City for defendant Department of Correction would be futile because: (1) plaintiff failed to file a notice-of-claim timely with the City as required by New York General Municipal Law §§ 50–e and 50–i and that the period during which plaintiff might have filed a late notice-of-claim has expired; and (2) even if the City were named as a defendant, plaintiff has failed to allege that a custom, practice or policy of the City caused a Constitutional violation, a prerequisite for municipal liability under 42 U.S.C. § 1983. Therefore, defendants assert, plaintiff's complaint, even if amended, could not withstand either a motion to dismiss or one for summary judgment.

I. *Notice–of–Claim*

***2** Defendants' reliance upon plaintiff's failure to file a notice-of-claim timely, in support of their contention that permitting plaintiff to amend his complaint would be futile, is misplaced. The notice-of-claim provisions found in New York's General Municipal Law are not applicable to actions brought in federal district court pursuant to 42 U.S.C. § 1983. *See Felder v. Casey,* 487 U.S. 131, 140–141, 108 S.Ct. 2302, 2308 (1988); *Day v. Moscow,* 955 F.2d 807, 814 (2d Cir.1992). Consequently, the Court finds that plaintiff's failure to comply with the notice-of-claim provisions in New York's General Municipal Law should not bar his attempt to amend his complaint by naming the City as a defendant.

II. *City as Defendant*

Fed.R.Civ.P. 19(a), in its most pertinent part, informs that "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties...."

In the case at bar, plaintiff seeks to name the City as a defendant because he determined, after initiating this action, that the City's Department of Correction is not a suable entity. [1] The court's jurisdiction over the subject matter of this action will not be jeopardized by making the City a defendant. Moreover, the applicable provision of the City's Charter, Ch. 17, § 396, makes clear that if plaintiff wishes to recover damages for the alleged unlawful conduct recited in his complaint, he cannot do so unless the City is a party to the action. *See Adams v. Galletta,* 966 F.Supp. 210, 212 (S.D.N.Y.1997)(collecting cases). Therefore, complete relief could not be accorded among those already parties in the absence of the City. Accordingly, making the City a party to this action appears reasonable and appropriate.

[1] New York City Charter Ch. 17, § 396 provides that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law."

Defendants also argue that plaintiff's request to amend his pleadings, by substituting the City as a defendant, would be futile because plaintiff has not alleged, as required by the Supreme Court in *Monell v. Dep't of Social Services,* 436 U.S. 658, 690–91, 98 S.Ct. 2018, 2035–36 (1978), that the City, through its customs, practices or policies, caused plaintiff to suffer any deprivation of Constitutional rights. Defendants are wrong.

A complaint drafted by a *pro se* litigant, like plaintiff, must be construed liberally and " 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers," ' *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976)(quoting *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594 [1972]).

At paragraph IV of plaintiff's proposed amended complaint, he alleges that the Department of Correction does not have an established appeal procedure for inmates who are aggrieved by disciplinary determinations. As a consequence, plaintiff maintains that his Constitutional right to due process was denied because he received a 30–day penalty, after being accused of committing an infraction, and had no appellate avenue to pursue to challenge the imposition of the penalty. In essence, plaintiff is alleging that the City's practice or custom of denying inmates a means by which to obtain review of adverse Department of Correction disciplinary determinations is violative of due process. The Court finds that such a claim satisfies the requirements of *Monell.* Therefore, permitting plaintiff to name the City as a defendant, so that he might amend his complaint to challenge the constitutionally infirm practice he alleges exists, would not be futile.

III. *Supplemental Jurisdiction*

***3** "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

28 U.S.C. § 1367(a)

A federal district court has broad discretion to decide whether to exercise its supplemental jurisdiction over state claims. *See United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726–28, 86 S.Ct. 1130, 1139–40 (1966); *Seabrook v. Jacobson,* 153 F.3d 70, 73 (2d Cir.1998); *Fay v. South Colonie Central,* 802 F.2d 21, 34 (2d Cir.1986). Generally,

when a state law claim and a federal claim derive from a common nucleus of operative fact, and thus form the same case or controversy under Article III of the United States Constitution, and where it would be expected that the claims would be tried together in the same judicial proceeding, it is appropriate for the court to exercise its supplemental jurisdiction over the state law claim. The exercise of the court's supplemental jurisdiction, under such circumstances, is appropriate because it is an efficient and economical use of judicial resources. *See United Mine Workers,* 383 U.S. at 725–26, 86 S.Ct. at 1138–39 (1966). However, where there exists compelling reasons which militate against the court exercising its supplemental jurisdiction, 28 U.S.C. § 1367(c)(4) informs that the court may decline to do so.

In the instant case, plaintiff's action is brought pursuant to 42 U.S.C. § 1983, a law of the United States. Federal district courts have original jurisdiction of all civil actions arising under, *inter alia,* the laws of the United States. *See* 28 U.S.C. § 1331. As a result, plaintiff's state law claims may be heard under the court's supplemental jurisdiction if they are sufficiently related to the federal claim(s) plaintiff has asserted and do not come within any of the exceptions enumerated in 28 U.S.C. § 1367(c).

Plaintiff seeks to have the Court entertain state law claims arising under New York "General Municipal Law § 50–j, etc.," and Article I, §§ 6, 11, "etc." of the New York Constitution.[2] The New York statutory and constitutional provisions are addressed below.

[2] Plaintiff's use of the abbreviation for the words et cetera after referring to New York General Municipal Law 50–j and to the provisions of New York's Constitution does not indicate to the Court, with sufficient clarity, what other specific provisions of New York's General Municipal Law or New York's Constitution plaintiff wishes the Court to consider. Absent such clarity, the Court has determined to limit its analysis to the specific statute and constitutional provisions cited by plaintiff.

A. *New York General Municipal Law § 50–j*

General Municipal Law § 50–j, entitled "Civil actions against correction employees' is, by its express language, inapplicable to the City of New York. *See* New York General Municipal Law § 50–j(9).[3] Consequently, there is no basis for interjecting claims based on that law into this action.

[3] Two sections of New York's General Municipal Law are denominated 50–j. One provision addresses the liability of police officers for negligence in the performance of their duties. The other, referenced above, pertains to correction employees. Given the allegations in the instant case, the Court has focused on the provision germane to correction employees only.

B. *The New York Constitution*

1. Article I, § 6

Article I, § 6 of the New York Constitution, among other things, states that "[n]o person shall be deprived of life, liberty or property without due process of law." The subject matter of this action is plaintiff's claim that defendants, through their inmate infraction adjudicatory procedure, violated his right to due process because their adjudicatory procedure has no appellate component.[4] Inasmuch as the proposed amendment to plaintiff's complaint—a due process claim under Article I, § 6 of the New York Constitution—derives from the same nucleus of operative fact as does his federal claim under 42 U.S.C. § 1983, and since these claims could be tried together, the exercise of the court's supplemental jurisdiction, with respect to this proposed amendment to plaintiff's complaint, seems appropriate; but it is not.

[4] Plaintiff has proposed that his complaint be amended to permit him to assert a due process claim under Amendment Fourteen to the United States Constitution. Defendants do not oppose such an amendment to the pleadings; therefore, that portion of plaintiff's motion is granted. In like manner, defendants have not opposed plaintiff's request to withdraw his claim for mental anguish; that application is also granted.

***4** While similar language is found in Article I, § 6 of the New York Constitution and in Amendment Fourteen to the United States Constitution, the language of these two constitutions' provisions is not identical. Moreover, New York courts have interpreted Article I, § 6 of the New York Constitution more broadly than federal courts have interpreted the federal counterpart. *See Under 21 v. City of New York,* 65 N.Y.2d 344, 360, 492 N.Y.S.2d 522, 529, n. 6 (1985). Given this fact, and the requirement that

the Court be mindful of federal-state comity concerns, it is preferable that any interpretation of this provision of New York's constitution be left to the New York courts. It would be imprudent for the Court to undertake to prepare an exegesis on New York State constitutional law when such an endeavor is unnecessary to the resolution of the claims made in this action. The Court finds that this is a compelling reason to refuse to permit plaintiff to amend his complaint to assert a claim under Article I, § 6 of the New York Constitution. The Court also finds that this is a compelling reason to decline to entertain that claim under the court's supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(4).

2. Article I, § 11

Article I, § 11 of the New York Constitution assures all persons that they will not be denied equal protection under the laws of New York and proscribes discrimination in civil rights. Unlike Article I, § 6 of the New York Constitution, discussed above, this provision of the state's constitution is no broader in coverage than the federal provision and was merely designed to embody in the state's constitution the provisions of the Federal Constitution. *See Under 21,* 65 N.Y.2d at 359, 492 N.Y.S.2d at 528, n. 6. Therefore, the same analysis that will be undertaken when plaintiff's equal protection claim under the Fourteenth Amendment to the United States Constitution is considered, will be undertaken with respect to plaintiff's parallel state constitutional claim. Under these circumstances, the Court finds that it is appropriate to permit plaintiff to amend his complaint to assert this state constitutional claim and to entertain that claim under the court's supplemental jurisdiction authority.

CONCLUSION

For the reasons outlined above, plaintiff's application to amend his complaint to substitute the City for Defendant New York City Department of Correction is granted. Plaintiff's applications to withdraw his claim for mental anguish and to assert a claim under the Fourteenth Amendment to the United States Constitution, having been made without opposition from the defendants, are granted. Plaintiff's request that the Court invoke its supplemental jurisdiction and entertain claims based upon New York General Municipal law § 50–j and Article I, §§ 6 and 11 of the New York Constitution is granted to the extent that plaintiff may amend his pleadings to assert a claim under Article I, § 11 of the New York Constitution. In all other respects, plaintiff's application that the Court exercise supplemental jurisdiction over state law claims is denied.

***5** On or before January 25, 1999, plaintiff shall serve and file an amended complaint consistent with this Memorandum and Order.

All Citations

Not Reported in F.Supp.2d, 1999 WL 4961

2010 WL 2609054
Only the Westlaw citation is currently available.

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

Clifford TULLOCH, Plaintiff,
v.
ERIE COUNTY HOLDING CENTER, Defendant.

No. 10–CV–0207S.
|
June 24, 2010.

Attorneys and Law Firms

Clifford Tulloch, Buffalo, NY, pro se.

DECISION AND ORDER

CHARLES J. SIRAGUSA, District Judge.

INTRODUCTION

***1** Plaintiff, Clifford Tulloch, who, at the time the complaint was filed, appears to have been a pre-trial detainee at the Erie County Holding Center, has filed this *pro se* action seeking relief under 42 U.S.C. § 1983 (Docket No. 1) and has both requested permission to proceed *in forma pauperis* and filed a signed Authorization (Docket No. 2). Plaintiff also seeks the appointment of counsel, which at this time is denied as premature. [1]

[1] A more fully developed record will be necessary before the Court can determine whether plaintiff's chances of success warrant the appointment of counsel. Therefore, plaintiff's application is denied without prejudice to its renewal at such time as the existence of a potentially meritorious claim may be demonstrated, *See Hendricks v. Coughlin,* 114 F.3d 390, 392 (2d Cir.1997) (when determining whether to appoint counsel, the Court must first look to the "likelihood of merit" of the underlying dispute).

Plaintiff claims that the defendants, Erie County Holding Center, Timothy Howard, Sheriff of the County of Erie, and Christopher Collins, County Executive of the County of Erie, violated his rights by denying his access to the law library, using excessive force against him, and forcing him to live in unsanitary conditions. For the reasons discussed below, plaintiffs request to proceed as a poor person is granted, several of plaintiffs claims are hereby dismissed, some of the claims are sufficient as pled, and others must be dismissed under 28 U.S.C. § 1915(e)(2)(B) unless plaintiff files an amended complaint as directed below.

DISCUSSION

Because plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a) and filed an Authorization with respect to this action, plaintiff is granted permission to proceed *in forma pauperis.* Section 1915(e)(2)(B) of 28 U.S.C. provides that the Court shall dismiss a case in which *in forma pauperis* status has been granted if the Court determines that the action (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief. In addition, 28 U.S.C. § 1915A(a) requires the Court to conduct an initial screening of "a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," *id.,* regardless of whether or not the inmate has sought *in forma pauperis* status under 28 U.S.C. § 1915.

In evaluating the complaint, the Court must accept as true all of the factual allegations and must draw all inferences in plaintiff's favor. *See Larkin v. Savage,* 318 F.3d 138, 139 (2d Cir.2003) (per curiam); *King v. Simpson,* 189 F.3d 284, 287 (2d Cir.1999). Moreover, "a court is obliged to construe [*pro se*] pleadings liberally, particularly when they allege civil rights violations." *McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir.2004); *and see Chance v. Armstrong,* 143 F.3d 698, 701 (2d Cir.1998). Nevertheless, even pleadings submitted *pro se* must meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure. *Wynder v. McMahon,* 360 F.3d 73 (2d Cir.2004). "Specific facts are not necessary," and the plaintiff "need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Erickson v. Padus,* 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955,

167 L.Ed.2d 929 (2007)) (internal quotation marks and citation omitted); *see also Boykin v. Keycorp,* 521 F.3d 202, 213 (2d Cir.2008) (discussing pleading standard in *pro se* cases after *Twombly*).

***2** Generally, the Court will afford a *pro se* plaintiff an opportunity to amend or to be heard prior to dismissal " 'unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.' " *Abbas,* 480 F.3d at 639 (quoting *Gomez v. USAA Federal Savings Bank,* 171 F.3d 794, 796 (2d Cir.1999) (*per curiam*)).

A. MUNICIPAL LIABILITY

Plaintiff herein names as defendants the Erie County Holding Center, Erie County Sheriff Timothy Howard, and Erie County Executive Chris Collins. Although municipalities are considered "persons" for purposes of 42 U.S.C. § 1983, a local government may not be held liable under § 1983 unless the challenged action was performed pursuant to a municipal policy or custom. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Municipalities are not subject to § 1983 liability solely on the basis of a *respondeat superior* theory. *Collins v. City of Harker Heights,* 503 U.S. 115, 121, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Monell,* 436 U.S. at 694. To hold a municipality liable in a § 1983 action, a plaintiff is required to plead and prove three elements: (1) an official custom or policy that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right. *Zahra v. Town of Southold,* 48 F.3d 674, 685 (2d Cir.1995) (citations and quotations omitted); *see Gottlieb v. County of Orange,* 84 F.3d 511, 518 (2d Cir.1996) ("In order to establish the liability of a municipality in an action under § 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy.").

The claims against the Erie County Holding Center must be dismissed because (1) the Erie County Holding Center is merely an arm of the County, and does not have a legal identity separate and apart from the County and thus cannot be sued, *see Brockport v. County of Monroe Pure Waters Div.,* 75 A.D.2d 483, 486, 429 N.Y.S.2d 931 (4th Dept.1980), *aff'd* 54 N.Y.2d 678, 442 N.Y.S.2d 510, 425 N.E.2d 898 (1981); *Loria v. Town of Irondequoit,* 775 F.Supp. 599, 606 (W.D.N.Y.1990), and (2) there are no allegations that the challenged actions were performed pursuant to a municipal policy or custom of the County. *Monell,* 436 U.S. at 694. Accordingly, the claims against the Erie County Holding Center must be dismissed in their entirety but, as discussed below, plaintiff will be allowed the opportunity to amend the complaint to name the County of Erie as a defendant and set forth facts which give rise to a claim of municipal liability under *Monell.*

To the extent that plaintiff sues the Sheriff and County Executive in their official capacities, plaintiff's claims are equivalent to a claim against the municipality itself, *see Alger v. County of Albany,* 489 F.Supp.2d 155, 165 (N.D.N.Y.2006) ("A claim against an individual in her official capacity is nothing more than a claim against the municipality itself), and therefore said claims must be dismissed because plaintiff has not alleged that the constitutional violations occurred pursuant to a policy of custom of the County of Erie. *See Gottlieb,* 84 F.3d at 518. To the extent plaintiff has sued the Sheriff and County Executive, in their individual capacities, [2] he has set forth no allegations regarding their personal involvement in the alleged constitutional violations nor has he made any allegations that could support a claim that they created a County policy or custom that led to the constitutional violations alleged herein. *See Colon v. Coughlin,* 58 F.3d 865, 874 (2d Cir.1995).

[2] The complaint indicates that the defendants are being sued in their official capacities but the Court will liberally construe the complaint as alleging claims against the defendants in both their individual and official capacities. *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996) ("the pleadings of a pro se plaintiff must be read liberally and should be interpreted 'to raise the strongest arguments that they could suggest' ") (quoting *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994)).

***3** Plaintiff appears to claim that these defendants are liable solely because they hold the positions of Sheriff and County Executive. It is well-settled, however, that an individual may not be held personally responsible merely because he is in a position of authority. *Sealey v. Giltner,* 116 F.3d 47, 51 (2d Cir.1997); *see also Colon,* 58 F.3d at 874 ("The bare fact that [the defendant] occupies a high position in the New York prison hierarchy is insufficient to sustain [plaintiff's] claim"). Thus, plaintiff's allegations against defendants Howard and Collins fail to state a § 1983 claim against them. Accordingly, plaintiff's claims

against defendants Sheriff Howard and County Executive Collins are dismissed with prejudice. Any opportunity to amend the claims against them would be futile and therefore leave to amend the claims against Howard and Collins is denied. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Jones v. New York State Div. of Military & Naval Affairs,* 166 F.3d 45, 50 (2d Cir.1999) (holding that "a district court may properly deny leave when amendment would be futile.")

B. PLAINTIFF'S CLAIM OF EXCESSIVE FORCE

Plaintiff alleges that when he refused to go to a City Court hearing, Sgt. Webster and Sgt. Evens, deputies from the Erie County Holding Center, beat him and caused an injury to his eye. He further alleges that the deputies refused to address his injury as he was returned from court to the Holding Center. He was taken to Erie County Medical Center the next morning, where he received treatment for a scratched cornea. (Docket No. 1, Complaint, Section 5A, Second Claim, at 6.) While the complaint does not name Sgt. Webster and Sgt. Evens as defendants, it does allege that they assaulted him. [3]

[3] The Court applies the same standard of law to excessive force claims brought by pretrial detainees, which arise underthe Fourteenth Amendment ratherthan the Eighth, as it does to claims brought by convicted incarcerated inmates. *See United States v. Walsh,* 194 F.3d 37, 50 (2d Cir.1999). A correctional officer's use of force violates the Eighth Amendment when two requirements are met: the use of force "must be, objectively, sufficiently serious," and "the prison official involved must have a sufficiently culpable state of mind." *Bod die v. Schnieder,* 105 F.3d 857, 861 (2d Cir.1997) (internal quotation marks and citations omitted).

As discussed above, the Erie County Holding Center, Sheriff Howard, and County Executive Collins cannot be held liable for this claim both because there are no allegations that this assault occurred pursuant to a policy or custom of the County of Erie, *see Monell,* 436 U.S. at 694, and because there are no allegations that Howard and Collins were personally involved in the assault, *Colon,* 58 F.3d at 874. Based on its evaluation of the complaint, the Court finds that the caption of plaintiff's complaint should be amended to include as defendants Sgt. Webster and Sgt. Evans and, as thus amended, plaintiff's complaint may proceed against Webster and Evans with respect to the claimed use of excessive force. [4] (Complaint, Section 5A, Second Claim, at 6.)

[4] *See, e.g., McEachin v. McGuiniss,* 357 F.3d 197, 200 (2d Cir.2004) ("We have frequently reiterated that '[s]ua *sponte* dismissals of *pro se* prisoner petitions which contain non-frivolous claims without requiring service upon respondents or granting leave to amend is disfavored by this Court.' ") (quoting *Moorish Sci. Temple of Am. Inc. v. Smith,* 693 F.2d 987, 990 (2d Cir.1982); *Benitez v. Wolff,* 907 F.2d 1293, 1295 (2d Cir.1990) (*per curiam*) ("*Sua sponte* dismissal of a *pro se* complaint prior to service of process is a draconian device, which is warranted only when the complaint lacks an arguable basis in law or fact. Where a colorable claim is made out, dismissal is improper prior to service of process and the defendants' answer.") (citations and internal quotations omitted)).

C. DENIAL OF ACCESS TO THE COURTS

As noted, plaintiff alleges that while he was in administrative segregation at the Holding Center, he was not allowed access to the law library. (Complaint, ¶ 5A, First Claim, at 5.) While it is true that under the Constitution a correctional facility must provide an inmate with meaningful access to the courts, *Bounds v. Smith,* 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), the mere limitation of access to legal materials, without more, does not state a constitutional claim, as " 'the Constitution requires no more than reasonable access to the courts.' " *Jermosen v. Coughlin,* 877 F.Supp. 864, 871 (S.D.N.Y.1995) (quoting *Pickett v. Schaefer,* 503 F.Supp. 27, 28 (S.D.N.Y.1980)). Moreover, in order to state a constitutional claim, a plaintiff must make a showing that he has suffered, or will imminently suffer, actual harm; that is, that he was "hindered [in] his efforts to pursue a legal claim." *Lewis v. Casey,* 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). *Accord Morello v. James,* 810 F.2d 344, 347 (2d Cir.1987).

***4** Thus, plaintiff must show that he has suffered an actual injury traceable to the challenged conduct of prison officials. A plaintiff has not shown actual injury unless he shows that a "nonfrivolous legal claim had been frustrated or was being impeded" due to the actions of prison officials. *Lewis,* 518 U.S. at 351–52. In the complaint, plaintiff claims that his placement in administrative segregation, and resulting restrictions, denied his access to the Holding Center's law library. (Docket No. 1). This,

however, in-and-of itself does not state a claim under the First Amendment of a denial of access to the courts. *See Lewis,* 518 U.S. at 351. Plaintiff, however, will be allowed an opportunity to amend his complaint, to show that the denial of access to the law library led to some actual injury —*i.e.,* a "nonfrivolous legal claim had been frustrated or was being impeded" due to his not be permitted access to the law library. *Id.,* at 351–52. Plaintiff may name the County of Erie as a defendant to this claim but only if he can allege sufficient facts that the denial of access to the courts through administrative segregation restrictions occurred pursuant to a municipal policy or custom. *See Monell,* 436 U.S. at 694. Plaintiff may also name as defendants in the amended complaint those individuals, if any, whom he claims were personally involved in the alleged denial.

D. DENIAL OF SANITARY LIVING CONDITIONS

Plaintiff also alleges that he was forced to live in unsanitary living conditions while at the Holding Center, which included flaky paint on the walls and shower ceiling, lack of water, linens that were not regularly changed, uncomfortable mattresses, and cell walls, floors, and ceilings that were soiled with food and human waste. (Docket No. 1). Because plaintiff was a pre-trial detainee at the time of the events alleged in the complaint, his conditions of confinement claim arise under the due process clause of the Fourteenth Amendment, not the Eight Amendment's prohibition against cruel and unusual punishment. "As a general rule, conditions of confinement imposed in pretrial detention do not give rise to a violation of a prisoner's due process rights unless they are punitive." *Palacio v. Department of Corrections,* 345 Fed.Appx. 668, 2009 WL 2923120, at * 1 (2d Cir. Sept.14, 2009) (citing *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee."); *see also Lareau v. Manson,* 651 F.2d 96, 102 (2d Cir.1981) (the "constitutional standard by which the legality of conditions of confinement for pretrial detainees is to be measured ... is whether the conditions amount to 'punishment' without due process in violation of the Fourteenth Amendment.") (citing *Bell,* 441 U.S. at 536–38)). "Absent a showing of express intent to punish, the determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Lareau,* 651 F.2d at 103 (internal quotation marks and alterations omitted).

***5** Plaintiff's complaint does not state a claim of denial of due process based on the allegation that he was subjected to unconstitutional conditions at the Holding Center. *See Rush v. Astacio,* 159 F.3d 1348, 1998 WL 480751, at *1 (Table) (2d Cir. July 31, 1999) (Unpublished Disposition) ("[Plaintiff] has not alleged that [defendant]'s refusal to remove him from the cold room ... was motivated by an intent to punish. Absent such an allegation ..., we need determine only whether there could have been a legitimate governmental purpose justifying defendant's behavior and whether such behavior was excessive in light of this rationale.) There are no allegations that the "hardships," if any, caused by the alleged unsanitary conditions were substantial or that they caused any injuries to plaintiff. Simple unpleasantness does not state a claim of a violation of a pretrial detainee's due process rights. *Rush,* 1998 WL 480751, at *2. Plaintiff will, however, be allowed an opportunity to amend his complaint to allege facts which show that the living conditions of the Erie County Holding Center amounted to "punishment" and were thusunconstitutional. *See Davidson v. Flynn,* 32 F.3d 27, 31 (2d Cir.1994) ("Sparse pleadings by a pro se litigant unfamiliar with the requirements of the legal system may be sufficient at least to permit the plaintiff to amend his complaint to state a cause of action"); Fed.R.Civ.P. 15(a) (leave to amend "shall be freely given when justice so requires"). While plaintiff may wish to name the County of Erie as a defendant to this claim, if he does so he must allege facts to support a claim that the alleged due process violation occurred pursuant to a municipal policy or custom. *See Monell,* 436 U.S. at 694. He may also name as defendants any individual whom he can claim was personally involved in the unsanitary living conditions.

CONCLUSION

Because plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a) and filed an Authorization with respect to the filing fee, his request to proceed *in forma pauperis* is granted. For the reasons set forth above, plaintiff's claims against Timothy Howard, Christopher Collins, and the Erie County Holding Center are dismissed with prejudice.

In addition, plaintiff's claims of denial of access to the courts and denial of sanitary living conditions must be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A unless he files an amended complaint by **July 22, 2010,** which includes the necessary allegations regarding these two claims as directed above and in a manner that complies with Rules 8 and 10 of the Federal Rules of Civil Procedure. Plaintiff's claim of excessive force may proceed against Sgt. Webster and Sgt. Evens only, and the Clerk of the Court shall amend the caption herein to include Sgt. Webster and Sgt. Evans as defendants.

Plaintiff is advised that an amended complaint is intended to **completely replace** the prior complaint in the action, and thus it "renders [any prior complaint] of no legal effect." *International Controls Corp. v. Vesco,* 556 F.2d 665, 668 (2d Cir.1977), *cert. denied sub nom., Vesco & Co., Inc. v. International Controls Corp.,* 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 758 (1978); *see also Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir.1994). Therefore, plaintiff's amended complaint must include all of the allegations against each of the defendants against whom the case is going forward so that **the amended complaint may stand alone as the sole complaint** in this action which the defendants must answer.

***6** Plaintiff is forewarned that if he fails to file an amended complaint as directed, the claims related to the denial of access to the law library and the unsanitary living conditions at the Holding Center will be dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A, and service will be made of only the excessive force claim against Webster and Evans.

ORDER

IT HEREBY IS ORDERED, that plaintiff's motion to proceed *in forma pauperis* is granted and his motion for appointment of counsel is denied without prejudice;

FURTHER, that plaintiff's claims against Timothy Howard, Christopher Collins, and the Erie County Holding Center are dismissed with prejudice and the Clerk of the Court is directed to terminate these defendants as parties to this action;

FURTHER, the Clerk of the Court is directed to amend the caption to include as defendants "Sgt. Webster" and "Sgt. Evans;"

FURTHER, that plaintiff is granted leave to file an amended complaint regarding his claims of denial of access to the courts and denial of sanitary living conditions as directed above by **July 22, 2010;**

FURTHER, that the Clerk of the Court is directed to send to plaintiff with this order a copy of the original complaint, a blank § 1983 complaint form, and the instructions for preparing an amended complaint;

FURTHER, that in the event plaintiff fails to file an amended complaint as directed above by **July 22, 2010,** all the claims set forth in the complaint, except the assault claim against Webster and Evans will be dismissed with prejudice,

FURTHER, that in the event plaintiff fails to file an amended complaint as directed above by **July 22, 2010,** the Clerk of the Court is directed to cause the United States Marshal to serve copies of the Summons, Complaint, and this Order regarding the excessive force claim upon defendants Webster and Evans (Complaint, ¶ 5A, Second Claim, at 6), without plaintiff's payment therefor, unpaid fees to be recoverable if this action terminates by monetary award in plaintiff's favor; and

FURTHER, upon service of the complaint defendants are directed, pursuant to 42 U.S.C. § 1997(g)(2), to answer the complaint.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2609054

2016 WL 1357737
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Bruce Flynn, Plaintiff,
v.
Joe Ward et al., Defendants.

9:15-CV-1028
|
Signed 04/05/2016

Attorneys and Law Firms

BRUCE FLYNN, 10-A-1558, Mid-State Correctional Facility, P. O. Box 2500, Marcy, New York 13403, Plaintiff, pro se.

AMENDED DECISION AND ORDER

GARY L. SHARPE Senior United States District Judge

I. INTRODUCTION

Pro se plaintiff Bruce Flynn commenced this civil rights action asserting claims arising out of his confinement in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). Dkt. No. 1 ("Compl."). In a Decision and Order filed December 4, 2015 ("December Order"), the Court reviewed the complaint in accordance with 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A, and determined that the complaint failed to state a claim upon which relief could be granted and, therefore, was subject to dismissal. Dkt. No. 11. In light of his pro se status, plaintiff was afforded an opportunity to submit an amended complaint. *See* Dkt. No. 11 at 18. Currently before the Court is plaintiff's amended complaint. Dkt. No. 20 ("Am. Compl.").

II. LEGAL STANDARD

The legal standard governing the dismissal of a pleading for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A w as discussed at length in the December Order and it will not be restated in this Decision and Order. *See* Dkt. No. 11 at 2-3. The Court will construe the allegations in plaintiff's amended complaint with the utmost leniency. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (holding that a pro se litigant's complaint is to be held "to a less stringent standards than formal pleadings drafted by lawyers").

III. December Order and Amended Complaint [1]

[1] The amended complaint contains approximately 329 pages of exhibits. *See* Dkt. Nos. 20-1 through 20-7. The Court will consider the amended complaint as well as any documents attached as exhibits. *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (holding that the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference).

Plaintiff, an inmate currently being held at Mid-State Correctional Facility ("Mid-State C.F."), filed a complaint asserting claims against Joe Ward ("Ward"), Superintendent at Mid-State C.F. and Lief Wellenstein ("Wellenstein"), Correctional Officer/Law Library Supervisor at Mid-State C.F. *See generally* Compl. In the December Order, the Court dismissed the following, without prejudice: (1) claims that defendants denied plaintiff his right to access to the courts in violation of the First Amendment; (2) claims that Wellenstein retaliated against plaintiff in violation of his First Amendment rights; (3) claims that defendants violated DOCCS Directives and the Facility Operations Manual; (4) claims related to plaintiff's FOIL request; (5) supervisory claims against Ward; and (6) state law claims. *See* Dkt. No. 11.

In the amended complaint, plaintiff names four new defendants: L. Goppert ("Goppert"), Security Captain at Mid-State C.F.; Digert ("Digert"), Correctional Officer at Mid-State C.F.; Carpenter ("Carpenter"), Correctional Sergeant at Mid-State C.F.; and Tourtelot ("Tourtelot"), Nurse at Mid-State C.F. [2] *See* Am. Compl. at 2, 3.

[2] The Clerk of the Court is directed to add these defendants to the docket report for this action.

***2** On November 15, 2010, plaintiff was transferred to DOCCS custody to serve a ten year term for burglary and criminal use of a firearm. *See* Am. Compl. at 9. At the relevant time, plaintiff was confined in the Long Term Protective Custody ("LTPC") Unit at Mid-State C.F. [3] *See* Am. Compl. In November 2010,

the DOCCS Directive (#4833) regarding Law Library Services provided, in pertinent part:

> Cell Study Services: Inmates prohibited by their confinement status from visiting the Law Library shall be allowed to study Law Library materials in their cells and obtain legal services normally available to general population inmates.
>
> Such inmates may request, in writing, a maximum of two items per day and these will be delivered, if available, within 24 hours of receipt of the request. Inmates may retain said legal materials for a period of not less than 16 hours nor more than 24 hours.

Dkt. No. 20-1 at 5.

[3] The LTPC Unit is part of the Special Housing Unit ("SHU"). *See* Am. Compl. at 9.

Under the Cell Study Program, requests for legal materials are restricted to two per day. *See* Am. Compl. at 15. As a result, inmates in protective custody often incur a two or three month delay in obtaining material. *See id.*

On October 3, 2011, Captain Admik[4] issued a memorandum to the security staff at Mid-State C.F. directing that inmates in the LTPC Unit be permitted physical access to the law library.[5] *See* Am. Compl. at 9; Dkt. No. 20-1 at 2.

[4] Captain Admik is not a defendant herein.

[5] The memorandum was copied to Superintendent Ward. *See* Dkt. No. 20-1 at 2.

On September 5, 2014, the Inmate Law Library Procedures, as outlined in the Mid-State C.F. Facility Operations Manual (No. 21.04), provided, in relevant part:

> 3. Inmates in SHU areas may request, in writing, legal assistance from the Law Library.
>
> a. All requests for assistance must be sent to the Law Library Officer via facility mail and each request should document what kind of service is needed.
>
> ...
>
> c. SHU inmates will only be allowed to have two (2) legal research resources in their possession at a time. Pick-up and delivery of legal materials will be made on a daily basis, Monday through Sunday.

Dkt. No. 20-1 at 17.[6]

[6] Plaintiff refers to this as the "Cell Study Program." *See* Am. Compl. at 15.

In October 2014, Wellenstein was designated as the law library officer. *See* Am. Compl. at 11. In November 2014 and December 2014, plaintiff had several arguments with Wellenstein over access to reference books available for SHU inmates, copies of legal work and printing court cases. *See id.* Wellenstein also insisted that plaintiff leave his legal work in the library. *See id.* One week after an argument with Wellenstein, plaintiff received a Tier II misbehavior report from C.O. Jordan ("Jordan") involving a razor.[7] *See* Am. Compl. at 12, 13; Dkt. No. 20-7 at 3. After a disciplinary hearing, plaintiff was sentenced to thirty days in keeplock and a loss of privileges including phones, packages, commissary, and recreation.[8] *See id.* Plaintiff served the entire sentence and appealed the determ ination.[9] *See* Am. Compl. at 13.

[7] Jordan is not a named defendant in this action. The amended complaint does not contain facts related to the report and the report was not annexed as an exhibit to the amended complaint.

[8] The amended complaint lacks any facts related to the hearing.

[9] The amended complaint does not include information related to when or to whom plaintiff filed his appeal.

***3** On January 6, 2015, plaintiff filed a grievance claiming that Wellenstein interfered with plaintiff's access to the courts when he refused to perform "word" and "key number searches." *See* Am. Compl. at 13; Dkt. No. 20-3 at 11. As a result of Wellenstein's refusal to perform the searches, plaintiff had to delay filing a habeas corpus petition and writ of error coram nobis while he performed manual research on "outdated" digests. *See id.* On January 20, 2015, plaintiff forwarded a memorandum to Carpenter, the Law Library Supervisor, advising Carpenter that the stapler in the law library was

inoperable and asked for a replacement. *See* Dkt. No. 20-4 at 4.

In February 2015, plaintiff filed two grievances against Wellenstein claiming that Wellenstein refused to make copies of legal documents. *See* Dkt. No. 20-3 at 8, 10.

On March 5, 2015, Goppert issued a Memorandum to the LTPC Population stating that law library services would be modified to comply with the Facility Operations Manual. Dkt. No. 20-1 at 3. LTPC inmates were advised to request, in writing, legal assistance from the law library and to forward requests to the law library officer via facility mail. *See id.* Consequently, plaintiff was forced to use the cell study program, controlled by Wellenstein, which limited his legal research. *See* Am. Compl. at 15. Wellenstein deliberately and intentionally restricted access to materials by delivering the wrong materials or delivering the same material multiple times. *See id.* Wellenstein also denied requests for materials on Friday, Saturday and Sunday. *See id.* As a result, plaintiff was prevented from filing his habeas corpus petition and writ of error coram nobis, which could have reduced his prison time. *See id.*

On March 10, 2015, plaintiff filed a grievance against Wellenstein for failing to provide a list of books available to SHU inmates and tax forms. *See* Am. Compl. at 16; Dkt. No. 20-3 at 12. On March 13, 2015, plaintiff received a misbehavior report, issued by C.O. Miller, for smoking. [10] *See id.* As a result of the report, plaintiff was sentenced to keeplock for six days with a loss of phone privileges. *See id.*

10 The report is not part of the exhibits annexed to the complaint. Miller is not a defendant herein.

On April 5, 2015, plaintiff filed a grievance claiming that Wellenstein committed fraud, destroyed his property, refused to provide envelopes, a stapler or hole punch for legal papers, refused to answer requests for legal material on the weekends, denied plaintiff legal supplies and denied plaintiff access to current legal materials. *See* Dkt. No. 20-3 at 15-21. On April 28, 2015, plaintiff filed a grievance against Wellenstein claiming that Wellenstein was harassing plaintiff and deliberately destroying plaintiff's documents related to plaintiff's error coram nobis and habeas corpus petition. *See* Dkt. No. 20-3 at 34.

On April 30, 2015, Wellenstein entered plaintiff's cell, without plaintiff's permission and "pushed [plaintiff] aside." *See* Am. Compl. at 17; Dkt. No. 20-3 at 42. On the same day, plaintiff filed a grievance with respect to the incident. Plaintiff described the occurrence as follows:

> On 4/30/15 after having me sign for materials through the feed up port. He said he could smell smoke. He opened my cell door and pushed me aside and came into my cell. Wellenstein looked around my cell made a couple of smart remarks then left.

Dkt. No. 20-3 at 42.

On the same day, plaintiff received a misbehavior report from Wellenstein related to the incident. [11] *See* Am. Compl. at 17. As a result of the report, plaintiff was confined to keeplock for nineteen days with a loss of privileges. *See id.*

11 The misbehavior report is not part of the record herein.

***4** On May 8, 2015, Wellenstein appeared at plaintiff's cell shouting "threats." *See* Am. Compl. at 18. Wellenstein called plaintiff names and threatened plaintiff with violence and misbehavior reports. *See id.* On May 11, 2015, plaintiff field a grievance related to the incident. *See id.*; Dkt. No. 20-3 at 44. On May 14, 2015, plaintiff filed a grievance against Wellenstein for failing to provide books related to mental health treatment and property rights. *See* Am. Compl. at 19; Dkt. No. 20-3 at 46. On the same day, plaintiff filed a second grievance complaining that he could not order legal materials on Saturday and Sunday due to mail restrictions. *See* Am. Compl. at 19; Dkt. No. 20-3 at 47.

On May 26, 2015, plaintiff sent correspondence to Dr. Liu ("Liu") at Mid-State C.F., stating that he asked defendant, Nurse Practitioner Tourtelot ("Tourtelot") to provide plaintiff with his 2013 medications because the current level of his medication was not strong enough to calm his nerves and anxiety. [12] *See* Dkt. No. at 20-6 at 73. Despite plaintiff's repeated requests, Tourtelot refused to increase plaintiff's medication. *See* Am. Compl. at 39.

12 In September 2012, plaintiff was diagnosed with schizoaffective disorder, depressed type. *See* Am. Compl. at 41-42. Liu is not a defendant herein.

On July 21, 2015, plaintiff filed a grievance against Wellenstein for refusing to provide plaintiff with envelopes, intentionally making distorted copies and tampering with his mail. *See* Am. Compl. at 19; Dkt. No. 20-6 at 2-3.

On August 1, 2015, plaintiff filed a grievance against Wellenstein for failing to provide copies of cases. *See* Am. Compl. at 20; Dkt. No. 20-6 at 4. On the same day, plaintiff received two misbehavior reports. The first report charged plaintiff with violating the rules pertaining to smoking [13] and the second misbehavior report, from Wellenstein, charged plaintiff with failing to obey a direct order. *See* Am. Compl. at 20; Dkt. No. 20-6 at 5, 6. On August 7, 2015, plaintiff filed a grievance against Wellenstein for failing to make copies of legal documents. *See* Am. Compl. at 21.; Dkt. No. 20-6 at 7. Plaintiff claimed that Wellenstein was acting in retaliation for plaintiff's grievances against him. *See id.* Ward responded and denied the grievance noting that plaintiff had not, "substantiated his claim that he has been the victim of harassment by staff." *See* Dkt. No. 20-6 at 53. On August 17, 2015, plaintiff received a misbehavior report charging plaintiff with placing a three-way call in violation of facility phone procedures. [14] *See* Dkt. No. 20-6 at 8. As a result of the misbehavior report, plaintiff was confined in keeplock for eighteen days with a loss of privileges. *See* Am. Compl. at 21. On August 20, 2015, plaintiff filed a grievance complaining that he was being harassed and threatened by Wellenstein. *See id.*; Dkt. No. 20-6 at 10. On August 22, 2015, plaintiff filed a grievance stating Wellenstein refused to provide large manilla envelopes for plaintiff to mail his legal work. *See id.*; Dkt. No. 20-6 at 11. On August 24, 2015, plaintiff received a misbehavior report from Wellenstein charging plaintiff with harassment and threats. Dkt. No. 20-6 at 12.

13 The name of the officer who reported this violation is illegible. Dkt. No. 20-6 at 6. However, plaintiff does not contend that the report was issued by Wellenstein.

14 The misbehavior report was not issued by Wellenstein.

On September 16, 2015, plaintiff filed a grievance claiming that Wellenstein destroyed forty-five pages of legal exhibits. *See* Am. Compl. at 32. On September 18, 2015, Goppert issued a memorandum stating that, as of September 22, 2015, LTPC inmates would be allowed physical access to the law library. *See id.* at 22. On September 27, 2015, C.O. Kiernan, [15] Wellenstein's friend, issued a misbehavior report charging plaintiff with smoking. *See id.*

15 Kiernan is not a defendant in this action.

***5** On October 23, 2015, plaintiff filed a grievance claiming that Wellenstein placed a sign on the copier indicating that it was "not in use" and refused to give the relief officer the password for the copier. Dkt. No. 20-6 at 14. As a result, plaintiff had to "remake" pages and have "10 copies re-notarized." *See* Dkt. No. 20-6 at 14.

On November 6, 2015, plaintiff filed a grievance against Wellenstein claiming that he refused to make copies and routinely closed the library early. Dkt. No. 20-6 at 15. On November 12, 2015, another inmate set fire to plaintiff's cell. *See* Am. Compl. at 33. On the same day, plaintiff received a misbehavior report, issued by U. Upshaw ("Upshaw"), [16] charging him with smoking, arson, making false statements, and possessing flammable materials. *See id.*; Dkt. No. 20-6 at 24. The charges in the misbehavior report were dismissed after plaintiff was confined in keeplock for eight days. *See* Am. Compl. at 40. After the incident, plaintiff cleaned his old cell but Goppert refused to allow plaintiff to return to his cell. *See id.* Instead, plaintiff was forced to occupy the second cell on the company, next to the cell used as the inmate bathroom. *See id.* Plaintiff filed numerous complaints with the security staff regarding his placement in a cell where he was "constantly harassed by other inmates" and subjected to slamming doors, banging on the walls and defamatory remarks. *See id.* at 40-41.

16 Upshaw is not a defendant in this action.

On November 18, 2015, Wellenstein issued a misbehavior report charging plaintiff with harassment. *See* Dkt. No. 20-6 at 16. On November 19, 2015, plaintiff's cell was searched. *See* Am. Compl. at 34. During the search, the officers walked on his legal work and dumped his work into a pile with trash on top of it. *See id.* Plaintiff's envelopes were confiscated and plaintiff's Koran was thrown in the garbage and removed from his cell. *See id.* On November 22, 2015, plaintiff's cell was searched and his legal work was placed in draft bags. *See id.*

On December 11, 2015, plaintiff received a misbehavior report from Wellenstein charging plaintiff with harassment and failing to obey a direct order. *See* Am. Compl. at 34; Dkt. No. 20-6 at 26. On December 8, 2015 and December 23, 2015, Wellenstein disposed of a list of cases that plaintiff printed related to a decision and order in the civil rights action presently before this court. *See* Am. Compl. at 35. On December 15, 2015, Ward issued a decision denying plaintiff's November 18, 2015 grievance regarding "inefficient operation in law library."[17] *See* Dkt. No. 20-6 at 55. Ward found that plaintiff failed to substantiate his claim that he was the victim of harassment. Dkt. No. 20-6 at 55.

17 The November 18, 2015 grievance is not annexed as an exhibit to the amended complaint.

On January 4, 2015, plaintiff was forced to submit to a "urine analysis." *See* Am. Compl. at 35. On January 14, 2016, plaintiff filed a grievance claiming that the photocopier was not operating correctly because Wellenstein manipulated the memory function. Dkt. No. 20-6 at 60. On January 6, 2016, plaintiff filed a grievance related to his cell location claiming that he receives verbal abuse from other inmates.[18] *See* Am. Compl. at 41. On January 15, 2016, Ward responded and denied the grievance noting that plaintiff was not entitled to the housing and/or bed location of his choice. *See id.*; Dkt. No. 20-6 at 58.

18 The grievance was not annexed as an exhibit to the complaint.

***6** On January 14, 2016, plaintiff had a medical appointment and, at 8:30 A.M., plaintiff was waiting for the medical trip officers to escort him to the appointment. *See* Am. Compl. at 42. At 8:30 A.M., 9:30 A.M., 10:30 A.M. and 12:30 P.M., defendant Corrections Officer Digert ("Digert") repeatedly told plaintiff that the "trip officers were coming." *See id.* When the trip officers failed to appear, plaintiff assumed that the medical appointment was cancelled and, being a diabetic, plaintiff decided to eat and drink a cup of coffee. *See id.* at 42-43. At approximately 1:45 P.M., plaintiff was transferred to a local hospital for a heart test. *See id.* at 43. Upon arrival, plaintiff was advised that the test could not be performed and needed to be rescheduled because plaintiff drank coffee. *See id.* Plaintiff was deemed to have "refused" the appointment. *See* Am. Compl. at 36, 42.

From 2010 until January 2016, plaintiff had a prayer rug in his cell. *See* Am. Compl. at 37. On January 16, 2016, Carpenter told plaintiff that he did not have the proper permits for the rug and confiscated the rug because plaintiff was not a registered Muslim.[19] *See id.* Plaintiff asked to retain his rugs until he filed the proper form and a grievance but his request was denied. *See* Am. Compl. at 37. Plaintiff was compelled to mail the prayer rug to his home. *See id.*

19 Plaintiff concedes that he changed he never filed a change of religion form. *See* Am. Compl. at 37.

On January 18, 2016, at approximately 4:00 P.M., someone "slammed plaintiff's cell door" causing a coffee cup to spill onto plaintiff's legal work. *See* Am. Compl. at 38. Plaintiff's legal work was destroyed. *See id.* Plaintiff assumed that the person who slammed the door was Inmate Donah and retaliated by dropping a tray of milk in Donah's cell. *See id.* at 44. At 9:05 P.M., Donah assaulted plaintiff while plaintiff was in the recreation room and a fight ensured. *See id.* at 44. Plaintiff later learned that Wellenstein slammed plaintiff's cell door shut. *See* Am. Compl. at 38, 44. After the assault, without a disciplinary hearing, plaintiff was locked in his cell and his property, including legal work, was confiscated. *See id.* Plaintiff's property was placed in a storage room. *See id.* On January 23, 2016, plaintiff's property was returned to him, but his file related to his Section 1983 civil rights complaint was missing. *See id.*

Construed liberally, the amended complaint contains the following claims: (1) Wellenstein, Goppert and Ward violated plaintiff's First Amendment right to access to the courts; (2) Wellenstein violated plaintiff's Eighth Amendment rights with use of excessive force; (3) Digert and Tourtelot were deliberately indifferent to plaintiff's serious medical needs in violation of plaintiff's Eighth Amendment rights; (4) conditions of confinement claims; (5) Carpenter and Goppert violated plaintiff's First Amendment rights to religious freedom; (6) Ward and Wellenstein denied plaintiff's FOIL requests; (7) plaintiff's property was destroyed in violation of his constitutional rights; (8) defendants retaliated against plaintiff in violation of his First Amendment rights; and (9) supervisory claims against Carpenter, Ward and Goppert. *See* Am. Compl.

IV. Analysis

A. Access to Court Claims

The Court discussed the law pertaining to First Amendment claims and access to the courts in the December Order. *See* Dkt. No. 11 at 5-6. The Court dismissed plaintiff's access to court claims holding:

> Here, plaintiff alleges that he was denied access to the courts because he would not "be able to address conditions of confinement, appeals, and the ability to respond to the Attorney General now or in the future, or be able to submit any effective brief's [sic] and memorandums of law." *See* Compl. at 10. Plaintiff also claims that he was not able to bind any of his briefs or documents due to defendants' failure to provide supplies. *Id.* at 6. Plaintiff does not state any facts to plausibly suggest that he suffered any injury related to a legal claim or material prejudice as a result of defendants' actions, or inactions. The complaint lacks facts establishing that defendants' misconduct resulted in "actual harm" such as the "the dismissal of an otherwise meritorious legal claim." *See Cancel v. Goord*, No. 00 Civ 2042, 2001 WL 303713, at *4 (S.D.N.Y. March 29, 2001) ("[I]n order to survive a motion to dismiss [an access-to-the-courts claim] a plaintiff must allege not only that the defendant's conduct was deliberate and malicious, but also that the defendant's actions resulted in actual injury to the plaintiff such as the dismissal of an otherwise meritorious legal claim.").

***7** Dkt. No. 11 at 6.

In the amended complaint, plaintiff reasserts his allegations against Wellenstein and pleads additional facts and a cause of action against Ward and Goppert.

1. Wellenstein

Plaintiff claims that Wellenstein infringed upon his First Amendment right to access to the courts. Plaintiff also claims that Wellenstein knew that the law library was inadequate and refused to correct the deficiencies. *See id.* at 30. In the amended complaint, plaintiff claims that from November 2014 until January 2016, Wellenstein refused to provide plaintiff with legal materials including books, computer assistance, supplies, copies of cases and exhibits for legal submissions. *See* Am. Compl. at 11, 14, 20, 21. Plaintiff also alleges that Wellenstein deliberately "mixed up" and destroyed legal exhibits, played the radio in the library to disrupt inmates and closed the library early. *See id.* at 13, 15, 20, 23, 25, 33, 38. As the supervisor of the Cell Study Program, Wellenstein delivered the wrong materials and refused to accept legal requests on Friday, Saturday, and Sunday. *See id.* at 15, 23 and 25. With respect to the library, the books have not been updated since 2011 and the Law Journal Magazine is the only publication available to LTPC inmates that contains current caselaw and court decisions. *See* Am. Compl. at 30.

As a result of Wellenstein's actions, plaintiff asserts that he was prevented from filing a writ of error coram nobis, a petition for habeas corpus relief, a petition with the Department of Veterans' Affairs, an Article 78 petition and an appeal with the New York State Retirement System. *See* Am. Compl. at 10, 11, 35, 39, 46, 47. Plaintiff also alleges that his submissions in his Court of Claims case and in the civil matter currently before this court were delayed as a result of defendants' actions. *See* Am. Compl. at 24, 32, 34, 35, 45.

At this juncture, the Court finds that plaintiff's First Amendment access to court claims against Wellenstein survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed motion to dismiss or for summary judgment.

2. Ward and Goppert

Plaintiff contends that Goppert and Ward violated his First Amendment rights because he was denied plaintiff physical access to the law library.[20] *See* Am. Compl. at 26.

20 In March 2015, Goppert issued a memorandum prohibiting LTPC inmates from having physical access to the law library. *See* Dkt. No. 20-1 at 3. On September 18, 2015, Goppert issued a memorandum directing that LTPC inmates have physical access to the law library. *See* Am. Compl. at 22.

The constitutional right to access to the courts encompasses the right to meaningful access to legal materials, not physical access to a law library. *See Benjamin v. Jacobson*, 923 F.Supp. 517, 522 (S.D.N.Y. 1996) (citing *Bounds v. Smith*, 430 U.S. 817, 823 (1977)). Here, plaintiff has failed to plead facts suggesting that defendants violated his constitutional rights by restricting

him to the cell study program from March 2015 until September 2015. *See Clanton v. Horn*, 2009 WL 1285868, at *1 (S.D.N.Y. May 4, 2009) (finding no constitutional violation in cell study program as the plaintiff was provided an "adequate alternative means of performing legal research.").

***8** Consequently, plaintiff's First Amendment claims against Ward and Goppert are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) f or failure to state a claim upon which relief may be granted. [21]

21 Plaintiff also alleges that Goppert implemented a policy by which legal requests would not be picked up on Friday, Saturday, and Sunday and Ward "knew the law library was inadequate." *See* Am. Compl. at 19, 30. These allegations are discussed in Part IV(F), *infra.*

B. Eighth Amendment Claims

1. Excessive Force

The Eighth Amendment's prohibition against cruel and unusual punishment encompasses the use of excessive force against an inmate, who must prove two components: (1) subjectively, that the defendant acted wantonly and in bad faith, and (2) objectively, that the defendant's actions violated "contemporary standards of decency." *Blyden v. Mancusi*, 186 F.3d 252, 262-63 (2d Cir. 1999) (internal quotations omitted) (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). In this regard, while "a *de minimis* use of force will rarely suffice to state a constitutional claim," *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993), the malicious use of force to cause harm constitutes an Eighth Amendment violation per se because in such an instance " contemporary standards of decency are always violated." *Blyden*, 186 F.3d at 263 (citing *Hudson*, 503 U.S. at 9). The key inquiry into a claim of excessive force is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7 (citing *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)); *see Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973); *see also Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (per curiam) explaining that the nature of the force applied is the " core judicial inquiry " in excessive force cases—not "whether a certain quantum of injury was sustained"). "Accordingly, when considering the subjective element of the governing Eighth Amendment test, a court must be mindful that the absence of serious injury, though relevant, does not necessarily negate a finding of wantonness." *Wynter v. Ramey,* No. 11-CV-0257 (DNH/DEP), 2013 W L 5465343, at *5 (N.D.N.Y. Sept. 30, 2013) (citations omitted).

In this case, plaintiff claims that Wellenstein "assaulted" him on April 30, 2015. *See* Am. Compl. at 17. Plaintiff makes no specific accusation regarding the force exerted but summarily states that Wellenstein "assaulted [him] by pushing me around my cell." *See id.* Plaintiff's grievance, filed on the same day, belies his excessive force claims. In the grievance, plaintiff stated that Wellenstein, "opened my cell door and pushed me aside and came into my cell." *See* Dkt. No. 20-3 at 42. Plaintiff did not describe the incident as an "assault" or an "attack" and did not suggest that the use of force was more than de minimis. *See Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997) (holding that the plaintiff's allegations that he was "bumped, grabbed, elbowed, and pushed" by the defendants did not "approach an Eighth Amendment claim"). Plaintiff's allegations against Wellenstein fail to suggest that Wellenstein used malicious force that caused plaintiff harm. Consequently, plaintiff's Eighth Amendment excessive force claims are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

2. Deliberate Indifference to Serious Medical Needs

***9** To state an Eighth Amendment claim for medical indifference, a plaintiff must allege that the defendant was deliberately indifferent to a serious medical need. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Deliberate indifference has two necessary components, one objective and the other subjective. *See Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). The objective component of an Eighth Amendment deliberate indifference claim "requires that the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (quoting *Hathaway*, 99 F.3d at 553) (internal quotation marks omitted). Under the subjective element, medical mistreatment rises to the level of deliberate indifference only when it "involves culpable recklessness, i.e., an act or a failure to act ... that evinces 'a conscious disregard of a substantial risk of serious harm.'" *Chance v. Armstrong*, 143 F. 3d 698, 703 (2d Cir. 1998) (quoting *Hathaway*, 99 F.3d at 553). "Deliberate indifference requires more

than negligence but less than conduct undertaken for the very purpose of causing harm." *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994). To assert a claim for deliberate indifference, an inmate must allege that (1) a prison medical care provider was aware of facts from which the inference could be drawn that the inmate had a serious medical need; and (2) the medical care provider actually drew that inference. *Farmer*, 511 U.S. at 837; *Chance*, 143 F.3d at 702. The inmate must also demonstrate that the provider consciously and intentionally disregarded or ignored that serious medical need. *Farmer*, 511 U.S. at 835.

Here, plaintiff claims that he is diabetic and suffers from chest pains, anxiety, depression, and stress. *See* Am. Compl. at 39, 43. Even assuming that plaintiff suffered from a serious medical need, plaintiff must allege facts suggesting that defendants acted with the necessary culpable state of mind.

a. Digert

Plaintiff claims that due to Digert's deliberate and intentional conduct, plaintiff's heart stress test was cancelled and rescheduled. *See* Am. Compl. at 36, 42. As a result, plaintiff suffered from constant and "prolonged" chest pains. *See id.* "Non-medical prison personnel engage in deliberate indifference where they 'intentionally delayed access to medical care when the inmate was in extreme pain and has made his medical problem known to the attendant prison personnel.'" *Baumann v. Walsh*, 36 F. Supp. 2d 508, 512 (N.D.N.Y. 1999). Here, the amended complaint does not suggest that plaintiff was in any pain while he awaited his transport to the hospital f or the stress test. The amended complaint is void of any facts suggesting that Digert knew that plaintiff suffered from any serious medical condition or that plaintiff sustained any substantial harm or pain due to the delay in transporting plaintiff. Plaintiff does not claim that he voiced any concern to Digert about the delay. *Cf. Hoover v. Hardman*, No. 99-CV-1855 (FJS), 2005 W L 1949890, at *6 (N.D.N.Y. Aug. 15, 2005) (finding an issue of fact where the plaintiff claimed that the defendant delayed his access to medical care with the knowledge that the plaintiff was in extreme pain). Moreover, plaintiff does not allege the Digert knew that plaintiff was diabetic or that Digert somehow forced or compelled plaintiff to "have something to eat and a cup of coffee." Rather, that was plaintiff's decision and, as a result, his stress test states was rescheduled. *See* Am. Compl. at 43. Nothing in the amended complaint suggests that Digert was deliberately indifferent to plaintiff's medical needs.

Plaintiff's Eighth Amendment deliberate indifference claims against Digert are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) f or failure to state a claim upon which relief may be granted.

b. Tourtelot

Plaintiff claims that Tourtelot was deliberately indifferent to his medical needs when she refused to provide plaintiff with his "2013 medications." *See* Am. Compl. at 39. Plaintiff has not plead facts suggesting that Tourtelot was aware that withholding unspecified medication would result in an excessive risk to plaintiff's health or that defendant acted with the necessary culpable state of mind. *See Baskerville v. Blot,* 224 F. Supp. 2d 723, 735-36 (S.D.N.Y. 2002) (dismissing Eighth Amendment claim because the plaintiff's assertions did not suggest that the defendant "acted intentionally to withhold prescribed medication or was in any way responsible for the delay in obtaining a refill of his medication from the outside pharmacy"). Plaintiff's allegation amounts to nothing more than a quarrel over the nature of his treatment. *See Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir.1998) (" Courts have repeatedly held that disagreements over treatment do not rise to the level of a Constitutional violation."). Plaintiff's Eighth Amendment deliberate indifference claims against Tourtelot are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

3. Conditions of Confinement

***10** From March 13, 2015 through January 31, 2016, plaintiff was placed in keeplock confinement, with a loss of recreation, for a total of 108 days. *See* Am. Compl. at 42. As a result, plaintiff suffered from severe mental disorders and "many other symptoms." *See id.* Even assuming plaintiff's allegations are sufficient to satisfy the objective prong of the Eighth Amendment analysis, the complaint lacks facts establishing which correctional officers were responsible or personally involved in the alleged unconstitutional conditions. It is well settled

that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991)). Thus, "a Section 1983 plaintiff must 'allege a tangible connection between the acts of the defendant and the injuries suffered.'" *Austin v. Pappas*, No. 04-CV-7263, 2008 W L 857528, at *2 (S.D.N.Y. Mar. 31, 2008) (quoting *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986)) (other citation omitted). Here, plaintiff does not identify who was responsible for his keeplock confinement, whether he complained about his conditions of confinement and, if so, to whom he forwarded complaints. Plaintiff has not pleaded any facts against the defendants related to his conditions of confinement and thus, has failed to sufficiently allege that any defendant acted with a deliberate state of mind. Consequently, plaintiff's Eighth Amendment claims related to his conditions of confinement are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim. *See Toliver v. Dep't of Corrs.*, No. 10 Civ. 6298, 2012 W L 4510635, at *9 (S.D.N.Y. Apr. 10, 2012) (dismissing the deliberate indifference claim for failure to plead facts identifying a responsible official who acted with a sufficiently culpable state of mind).

C. First Amendment Religious Freedom Claims

Plaintiff claims that Carpenter and Goppert denied plaintiff the right to exercise his religious beliefs when they confiscated plaintiff's prayer rug. *See* Am. Compl. at 51. Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause. *See Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)); *see also Nolley v. County of Erie*, No. 07-CV-488S, 2008 W L 859165 (W.D.N.Y. Mar. 31, 2008) (applying First Amendment freedom of religion protections to a pretrial detainee). "Balanced against the constitutional protections afforded prison inmates, including the right to free exercise of religion, [however,] are the interests of prison officials charged with complex duties arising from administration of the penal system." *Id.* (citing *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990)). To state a First Amendment Free Exercise claim, a plaintiff must allege that (1) the practice asserted is religious in the person's scheme of beliefs, and that the belief is sincerely held; (2) the challenged practice of the prison officials infringes upon the religious belief; and (3) the challenged practice of the prison officials furthers some legitimate penological objective. *Farid v. Smith*, 850 F.2d 917, 926 (2d Cir.1988) (citations omitted). A prisoner "must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs." *Salahuddin v. Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006) (citing *Ford*, 352 F.3d at 591). A religious belief is "sincerely held" when the plaintiff subjectively, sincerely holds a particular belief that is religious in nature. *Ford*, 352 F.3d at 590. A prisoner's sincerely held religious belief is "substantially burdened" where "the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Jolly v. Coughlin*, 76 F.3d 468, 476–77 (2d Cir.1996). Once a plaintiff establishes that a sincerely held religious belief has been substantially burdened,"[t]he defendants then bear the relatively limited burden of identifying the legitimate penological interests that justify the impinging conduct; the burden remains with the prisoner to show that these articulated concerns were irrational." *Salahuddin*, 467 F.3d at 275 (quoting *Ford*, 352 F.3d at 595) (punctuation omitted).

Here, the amended complaint lacks any facts establishing that plaintiff's religious beliefs were "sincerely held" or that his beliefs were "substantially burdened." Indeed, the complaint contains nothing more than vague accusations that plaintiff was forced to send his rug home and is "still without a prayer rug to say his prayer's [sic]" without dates, times or facts establishing how he was burdened. The allegations, without more, fail to plausibly suggest that Carpenter or Goppert burdened plaintiff's right to freely practice his religion. Thus, plaintiff's First Amendment claims against are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted. [22]

22 To the extent that the amended complaint could be construed as asserting a claim for a First Amendment violation based upon the allegation that plaintiff's Koran was thrown in the garbage and removed from his cell during the November 2015 cell search, that claim is subject to dismissal. The amended complaint does not contain any facts related to who was responsible for this action. Indeed, the amended complaint lacks any facts identifying any officer involved in the cell search.

D. FOIL Requests

***11** In the amended complaint, plaintiff claims that he filed twelve FOIL requests for the following documents: Captain Goppert's March 2015 memorandum; all grievances filed related to the law library; Directive 4933; facility operations manual; legal materials request forms; and legal materials sign out sheet for April 20, 2015 and April 21, 2015. *See* Am. Compl. at 31, 47; Dkt. No. 20-4 at 20-25.

A violation of New York State FOIL does not give rise to a federal claim under Section 1983. *Sonds v. Cuomo*, No. 9:11-CV-0895 (NAM/ATB), 2012 WL 952540, at *3 (N.D.N.Y. Feb. 3, 2012) ("Plaintiff's state FOIL request cannot be the basis of a federal action."); *see also Pollnow v. Glennon*, 757 F.2d 496, 501 (2d Cir. 1985) (" Clearly, a violation of state law is not cognizable under § 1983."). "The appropriate vehicle for challenging denials of access guaranteed by the New York Freedom of Information law is a state court proceeding pursuant to N.Y.C.P.L.R. Article 78 upon exhaustion of administrative remedies." *Schuloff v. Fields*, 950 F. Supp. 66, 67-68 (E.D.N.Y. 1997); *Posr v. City of N. Y.*, No. 10-CV-2551, 2013 WL 2419142, at *14 (S.D.N.Y. June 4, 2013) ("Under New York state law, if an agency or government official fails to comply with the provisions of FOIL, the person submitting the FOIL request must pursue an administrative appeal or seek remedies in state court pursuant to N.Y. C.P.L.R. Article 78." (citing N.Y. Pub. Off. Law § 89)).

Accordingly, plaintiff's claim that defendants violated FOIL is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) f or failure to state a claim upon which relief may be granted pursuant to Section 1983.

E. Destruction of Property

Plaintiff claims that his property was destroyed during the January 2015 cell search. *See* Am. Compl. at 38. The Supreme Court has held that the unauthorized intentional destruction of prisoner's property may not be the basis for constitutional claims if sufficient post deprivation remedies are available to address the claim. *Hudson v. Palmer*, 468 U.S. 517, 531 (1984) (citing *Parratt v. Taylor*, 451 U.S. 527, 541 (1981)); *see Rivera-Powell v. N. Y.C. Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006) (" When the state conduct in question is random and unauthorized, the state satisfies procedural due process requirements so long as it provides meaningful post deprivation remedy."); *Davis v. New York*, 311 F. App'x 397, 400 (2d Cir. 2009) ("An alleged loss of property, 'whether intentional or negligent-will not support a due process claim redressable under § 1983 if adequate state post-deprivation remedies are available.'") (quoting *Hudson*, 468 U.S. 533). "New York in fact affords an adequate post-deprivation remedy in the form of, *inter alia*, a Court of Claims action." *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir. 2001). Because plaintiff has access to adequate state law remedies, he has not been deprived of property without due process of law and therefore cannot state a claim for relief pursuant to Section 1983. *See Love v. Coughlin*, 714 F.2d 207, 208-09 (2d Cir. 1983) (per curiam). Plaintiff's claims are also subject to dismissal as plaintiff failed to identify any individual involved in or responsible for the cell search. For the reasons set forth herein and in Part IV(B)(3), plaintiff's claim that defendants destroyed his property is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted pursuant to Section 1983

F. Supervisory Claims

***12** In the original complaint, plaintiff alleged that Ward was personally involved in the constitutional violations because he reviewed plaintiff's grievance appeals and was responsible for the "care and custody of inmates." *See* Compl. at 11. In the December Order, the Court discussed the law related to supervisory liability. *See* Dkt. No. 11 at 10-12. The Court dismissed plaintiff's claims holding:

> Even assuming plaintiff sufficiently pleaded a constitutional violation, plaintiff's claims against Ward are subject to dismissal as the allegations are nothing more than legal conclusions, unsupported by any facts. The complaint lacks any facts establishing that Ward was personally involved in any decision related to plaintiff's use of the law library or access to legal materials. The conclusory assertion that Ward was responsible for "grievance appeals" is unsupported by the 237 pages of exhibits or any facts that plausibly suggest that Ward was "confronted with a situation that he f ailed to remedy."

Id. at 12.

In the amended complaint, plaintiff attempts to cure the deficiencies in his allegations against Ward and asserts new supervisory claims against Goppert and Carpenter.

1. Ward

Plaintiff reiterates his claim that Ward was aware of Wellenstein's actions because he responded to plaintiff's grievances. *See* Am. Compl. at 23, 27, 31. Plaintiff also contends that Ward knew that the law library was inadequate. "[C]ourts in this circuit have held that personal involvement may be found where a supervisor receives, reviews, and responds to a plaintiff's grievance." *Lewis v. Wallace*, No. 9:11-CV-0867 (DNH/DEP), 2013 W L 1566557, at *5 (N.D.N.Y. Feb. 22, 2013) (collecting cases) *report and recommendation adopted*, No. 9:11-CV-0867 DNH/DEP, 2013 W L 1566555 (N.D.N.Y. Apr. 12, 2013).

Plaintiff identified four grievances that he filed against Wellenstein in August 2015, and December 2015 and annexed copies of Ward's responses to those grievances. *See* Dkt. No. 20-6 at 53, 55. In those grievances, plaintiff refers to Wellenstein's alleged retaliatory conduct and the inefficient operation in the law library. *See id.* At this juncture, the Court finds that plaintiff's supervisory claims against Ward survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether this claim can withstand a properly filed motion to dismiss or for summary judgment.

2. Goppert

In the amended complaint, plaintiff claims that Goppert was aware of Wellenstein's harassment because Goppert responded to plaintiff's appeals related to his disciplinary hearings. *See* Am. Compl. at 23, 27, 31, 40, 44. " [W]hile personal involvement cannot be founded solely on supervision, liability can be found if the official proactively participated in reviewing the administrative appeals as opposed merely to rubber-stamping the results." *Woodward v. Mullah*, No. 08–CV–0436A, 2009 W L 4730309, at * 2–3 (W.D.N.Y. Dec.7, 2009) (quoting *Hamilton v. Smith*, 2009 WL 31995331, at * 22 (N.D.N.Y. 2009), *report and recommendation adopted as modified*, 2009 WL 3199520). The amended complaint lacks facts to plausibly suggest that Goppert reviewed any appeal. Indeed, the am ended complaint is void of any facts related to any disciplinary hearings or appeals including when, where or how plaintiff appealed. Without such allegations, plaintiff has failed to plead that Goppert investigated or reviewed his appeals to establish personal involvement in any constitutional violation. *See Brown v. Brun*, No. 10-CV-0397A, 2010 W L 5072125, at *3 (W.D.N.Y. Dec. 7, 2010) (holding that the allegation that the defendant upheld the hearing, without more, was insufficient to state a claim against the defendant).

***13** Plaintiff also claims that Goppert implemented a policy inconsistent with Section 21.04 of the Facilities Operation Manual because he " told law library officers they did not have to pick up request forms on weekends." *See* Am. Compl. at 19. In support of his claims against Goppert, plaintiff annexed copies of correspondence addressed to Goppert wherein plaintiff advised that his legal requests were not being picked up on the weekends and claimed that Wellenstein intentionally destroyed his legal exhibits. *See* Dkt. No. 20-4 at 12, 14. The Second Circuit has cautioned against dismissing claims for failure to allege personal involvement without granting leave to amend where the plaintiff may allege that an official failed to respond to a letter of complaint. *Grullon v. City of New Haven,* 720 F.3d 133, 141 (2d Cir. 2013) (holding that a prisoner's letter of complaint sent to a prison warden "at an appropriate address and by appropriate means" would suffice to state facts plausibly suggesting personal involvement). While cognizant of *Grullon*, the Court finds that, as presently pleaded, plaintiff has failed to establish that Goppert was personally involved in any constitutional deprivation. While the memoranda contain Goppert's name, plaintiff has failed to plead facts establishing where the memoranda were sent, by what means they were forwarded and what response, if any, he received from Goppert. Without more, the allegations are not enough to allege personal involvement in any constitutional deprivation. *See Guillory v. Cuomo*, 616 F. App'x 12, 14 (2d Cir. 2015) (summary order). Plaintiff's supervisory claims against Goppert are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

3. Carpenter

Plaintiff alleges that Carpenter, as the law library supervisor, was responsible for Wellenstein's actions. As the Court discussed in the December Order, conclusory allegations that a supervisor failed to monitor a subordinate are insufficient to establish personal liability. *See* Dkt. No. 11 at 11. The allegations in the amended complaint do not cure the deficiencies in plaintiff's supervisory claim against Carpenter. While plaintiff annexed a copy of a letter to Carpenter, the letter does not mention Wellenstein and merely advised Carpenter that

the law library stapler was inoperable. [23] *See* Am. Compl. at 14; Dkt. No. 20-4 at 4. For the reasons set forth in the December Order, plaintiff's supervisory claims against Carpenter are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

[23] As discussed in Part IV(F)(2), the amended complaint does not contain any facts related to where plaintiff forwarded this letter to Carpenter, how it was forwarded or what response, if any, plaintiff received.

G. First Amendment Retaliation Claims

The Court discussed the law pertaining to retaliation claims in the December Order. *See* Dkt. No. 11 at 6-8. In the amended complaint, plaintiff reiterates his retaliation claims against Wellenstein and asserts additional retaliation claim s against other defendants.

1. Claims Against Wellenstein

In the original complaint, plaintiff alleged that Wellenstein retaliated against him when he filed a false misbehavior report and destroyed plaintiff's legal work. *See* Compl. at 11. The Court dismissed the claim holding:

> In this instance, plaintiff annexed copies of several grievances filed against Wellenstein. *See* Dkt. No. 1-2. Even assuming plaintiff sufficiently pleaded that he engaged in protected conduct and that the destruction of legal work and receipt of a misbehavior report constitute adverse actions, the complaint lacks any facts suggesting a causal connection between the conduct and actions. The complaint is devoid of any facts related to the substance of the misbehavior report, the date that it was issued, or any other circumstantial evidence to suggest a causal relationship. Plaintiff's conclusory allegations fail to state a claim for retaliation against Wellenstein. *See Geer v. Brown*, No. 14-CV-650 (DNH/CFH), 2015 WL 847426, at *2 (N.D.N.Y. Feb. 26, 2015) (finding that the plaintiff failed to proffer any facts showing a causal connection between filing grievances and a false misbehavior report).

Dkt. No. 11 at 8.

In the amended complaint, plaintiff provided facts related to eighteen grievances that he filed against Wellenstein from January 6, 2015 through November 15, 2015. *See* Dkt. No. 20-3 at 2, 3, 8, 10-12, 15-21, 34, 42, 43, 44, 46 and 47; Dkt. No. 20-6 at 1-4, 10, 14 and 15. Plaintiff also alleges that as a result of filing those grievances, Wellenstein retaliated against him when he issued misbehavior reports in April 2015, August 2015, November 2015 and December 2015. [24] *See* Dkt. No. 20-6 at 5-6, 8, 12, 24 and 26. Plaintiff further contends that Wellenstein assaulted him, denied him access to the courts and threatened him in retaliation for grievances filed in April 2015 and May 2015. *See* Am. Compl. at 17, 18, 32.

[24] Plaintiff annexed copies of the grievances and misbehavior reports as exhibits to the amended complaint.

***14** The Court finds that the retaliation claims against Wellenstein survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed motion to dismiss or for summary judgment.

2. Package Room Incident, Cell Search, and Urinalysis

Plaintiff asserts retaliation claims based upon the following incidents: (1) on August 22, 2015, the "package room officer" refused to provide a large manilla envelope for plaintiff to mail his personal and legal mail; (2) retaliatory cell search on November 19, 2015; (3) January 14, 2016 "urine analysis"; and (4) keeplock confinement. *See* Am. Compl. at 18, 20-21, 34, 35. Plaintiff contends that these incidents occurred in retaliation f or "the numerous grievances filed on the law library." *See id.*

With respect to these incidents, plaintiff does not identify the person or persons responsible for the alleged conduct and has not named any "John Doe" defendants. Plaintiff's failure to identify the parties responsible for the aforementioned incidents requires the Court to dismiss these retaliation claims. *See Renelique v. Doe*, No. 99

CIV.10425, 2003 WL 23023771, at *12 (S.D.N.Y. Dec. 29, 2003) (finding that plaintiff failed to name, as defendants, any individuals who were personally involved with the denial of medical care).

3. Retaliation Claims Based Upon Misbehavior Reports Issued by Other Officers

Plaintiff claims that he received five misbehavior reports from individuals other than Wellenstein, in retaliation for the grievances plaintiff filed against Wellenstein. Specifically, plaintiff alleges that Jordan,[25] Miller, Upshaw, and Kieran, among others, issued misbehavior reports in retaliation for plaintiff filing grievances against Wellenstein. *See* Am. Compl. at 13, 16, 20-21, 32 and 33. T he aforementioned individuals are not named in the caption of the complaint or otherwise identified as defendants in this action and thus, plaintiff's claims are subject to dismissal. *See Lewis v. Cunningham*, No. 05 Civ. 9243, 2007 W L 2412258, at *3 (S.D.N.Y. Aug. 23, 2007) (dismissing retaliation claims against staff who were not defendants in the action).

25 With respect to the misbehavior report issued by Jordan, the amended complaint lacks any facts suggesting that plaintiff engaged in any protected conduct prior to the date that the misbehavior report was issued.

4. Retaliation Claims Against Carpenter, Digert, and Goppert

Plaintiff contends that, in November 2015, Goppert refused to allow him the return to his original cell after the fire and confiscated his prayer rug in retaliation for the grievances filed against Wellenstein. *See* Am. Compl. at 40. Plaintiff also claims that, in January 2016, Carpenter confiscated his prayer rug in retaliation for the "many grievances and lawsuits filed against them and their agents." *See id.* at 51. Plaintiff asserts a retaliation claim against Digert claiming that, on January 14, 2016, Digert intentionally lied to plaintiff resulting in the cancellation of plaintiff's medical appointment in retaliation for the grievances and law suits plaintiff filed against Wellenstein. *See id.* at 20.

Even assuming that plaintiff engaged in protected conduct and that the aforementioned actions were "adverse," these retaliation claims are subject to dismissal. The amended complaint lacks facts suggesting a causal connection between the action and any of plaintiff's grievances. Plaintiff has failed to plead how Goppert, Digert and Carpenter became aware that plaintiff engaged in protected conduct, i.e., filed grievances. *See Faulk v. Fischer*, 545 F. App'x 56, 59 (2d Cir. 2013) (holding that the plaintiff failed to produce evidence suggesting that the defendants were "motivated by, or even aware of," his grievance); *see also Davidson v. Talbot*, No. 01-CV-473 (RFT), 2005 WL 928620, at *16 (N.D.N.Y. March 31, 2005) (concluding that the plaintiff's allegation that he was attacked for filing grievances failed to allege when the grievances were filed and thus, "th[e] Court had no way of assessing the [+] validity of such claim[ ]."); *see Guillory v. Haywood*, No. 13-CV-1564 (MAD/TWD), 2015 WL 268933, at *23 (N.D.N.Y. Jan. 21, 2015) (dismissing claim where the plaintiff failed to allege facts identifying the lawsuits or facts from which her awareness could be inferred). The allegations in the amended complaint fail to sufficiently plead a retaliation claim related to these incidents.

V. CONCLUSION

***15 WHEREFORE**, it is hereby

ORDERED that the amended complaint (Dkt. No. 20), and all exhibits annexed thereto is accepted for filing and is deemed the operative pleading; and it is further

ORDERED that the Clerk of the Court is directed to add Goppert, Digert, Carpenter, and Tourtelot to the docket as defendants herein; it is further

ORDERED that the following claims are **DISMISSED** pursuant to U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b) f or failure to state a claim upon which relief may be granted: (1) First Amendment access to court claims against Ward and Goppert; (2) Eighth Amendment excessive force claims against Wellenstein; (3) Eighth Amendment claims against Digert and Tourtelot; (4) Eighth Amendment conditions of confinement claims; (5) First Amendment freedom of religion claims; (6) claims based upon the destruction or deprivation of property; (7) FOIL claims; (8) retaliation claims related to the package room officer, urine test, cell search, and keeplock confinement; (9) retaliation claims against Digert, Carpenter and Goppert; and (10) supervisory claims against Carpenter and Goppert; it is further

ORDERED that Digert, Tourtelot, Goppert and Carpenter are **DISMISSED** as defendants in this action; and it is further

ORDERED that plaintiff is afforded an opportunity to request an order of this Court directing service by the U.S. Marshal and provide payment of the service fee to the U.S. Marshal in full by money order or certified check; and it is further

ORDERED that, upon plaintiff's request for assistance with service of process, the Clerk shall return the file to the Court for further review; and it is further

ORDERED that, if plaintiff does not request for assistance with service of process **within twenty (20) days** of the filing date of this Decision and Order, the Clerk shall issue summonses and forward them to plaintiff, who shall be responsible for effecting service of process on defendants. Upon issuance of the summonses, the Clerk shall send a copy of the summonses and complaint to the Office of the New York Attorney General, together with a copy of this Decision and Order; and it is further

ORDERED that defendants or their counsel, file a response to the complaint as provided for in the Federal Rules of Civil Procedure after service of process upon them; and it is further

ORDERED that all pleadings, motions and other documents relating to this action must bear the case number assigned to this action and be filed with the Clerk of the United States District Court, Northern District of New York, 7th Floor, Federal Building, 100 S. Clinton St., Syracuse, New York 13261-7367. **Any paper sent by a party to the Court or the Clerk must be accompanied by a certificate showing that a true and correct copy of same was served on all opposing parties or their counsel. Any document received by the Clerk or the Court which does not include a proper certificate of service will be stricken from the docket.** Plaintiff must comply with any requests by the Clerk's Office for any documents that are necessary to maintain this action. All parties must comply with Local Rule 7.1 of the Northern District of New York in filing motions. **Plaintiff is also required to promptly notify the Clerk's Office and all parties or their counsel, in writing, of any change in his address; their failure to do so will result in the dismissal of his action**; and it is further

***16 ORDERED** that the Clerk of the Court shall serve a copy of this Decision and Order on plaintiff in accordance with the Local Rules.

All Citations

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

Carlos Abreu, Plaintiff,
v.
Travers, et al., Defendants.

9:15-CV-0540(MAD/ATB)
|
Signed 10/20/2016

Attorneys and Law Firms

CARLOS ABREU, 99-A-3027, Green Haven Correctional Facility, P.O. Box 4000, Stormville, NY 12582, Plaintiff, pro se.

DECISION and ORDER

MAE A. D'AGOSTINO, United States District Judge

I. INTRODUCTION

***1** Presently before the Court for review is a complaint submitted for filing by pro se plaintiff Carlos Abreu pursuant to 42 U.S.C. § 1983 ("Section 1983"). [1] Dkt. No. 1 ("Compl."). Plaintiff, who is presently incarcerated at Green Haven Correctional Facility, has paid the filing fee required for this action.

1 Plaintiff has three other civil actions pending in this District. *See Abreu v. Kooi*, No. 9:14-CV-1529 (GLS/RFT); *Abreu v. Miller*, No. 9:15-CV-1306 (TJM/DJS); and *Abreu v. Lipka*, No. 9:16-CV-0776 (LEK/DEP).

II. RELEVANT BACKGROUND

This action was originally commenced by plaintiff and fifteen other inmates in October, 2012, against more than seventy defendants. *See Weathers, et al. v. Travers, et al.*, No. 9:12-CV-1582 (GLS/RFT) ("*Weathers*"). Plaintiff's claims were severed from the remaining plaintiffs' claims in *Weathers*, he was granted permission to file his complaint in this action, and his complaint in this action was deemed filed on October 22, 2012 – the date that the *Weathers* action was filed. *See* Dkt. Nos. 6, 7. The full history of *Weathers* is set forth in multiple Decisions and Orders issued by then-Chief United States District Judge Gary L. Sharpe in that action and will not be repeated here unless relevant to the Court's review. *See* Dkt. Nos. 4-7 (copies of relevant orders from *Weathers*).

III. DISCUSSION

The legal standard governing the dismissal of a pleading for failure to state a claim pursuant to 28 U.S.C. § 1915A(b) was discussed at length in this Court's Decision and Order filed on September 14, 2015, and it will not be restated in this Decision and Order. [2] *See* Dkt. No. 8 (the "September 2015 Order") at 4-8. Among other things, the September 2015 Order dismissed the Eighth Amendment medical indifference claims against defendants Travers, Marlow, and Lashway arising between February, 2012, and August, 2012, because those claims were clearly duplicative of claims asserted by plaintiff in an earlier-filed action. September 2015 Order at 9-10; *see also Abreu v. Lira*, No. 9:12-CV-1385 (NAM/DEP) ("*Abreu* I"), Dkt. No. 1. Since those claims have been dismissed, the factual allegations supporting them will not be discussed in this Decision and Order unless necessary to clarify the remaining claims. Travers, Marlow, and Lashway remain defendants as there are other claims asserted against them.

2 Plaintiff is not proceeding in forma pauperis therefore 28 U.S.C. § 1915(e)(2)(B) does not apply.

A. Summary of the Complaint

Plaintiff asserts numerous claims that arose, if at all, while he was incarcerated at Upstate Correctional Facility ("Upstate C.F."). Plaintiff states that all of the defendants are sued in their individual capacities. Compl. at 8. The Court will use its best efforts in an attempt to discern plaintiff's claims and will set forth the facts as alleged by plaintiff in his complaint.

1. Medical and Mental Health Treatment

Plaintiff suffers from chronic asthma, high cholesterol, allergies, hemorrhoids, and "other medical conditions." Compl. at 9. Prior to arriving at Upstate C.F., plaintiff was housed at Southport Correctional Facility ("Southport C.F."), where the mental health staff determined that plaintiff suffered from "serious mental

conditions/psychological traumas." *Id.* Also while at that facility, the medical staff ordered that plaintiff be scheduled for x-rays or an MRI, that he see a specialist and an eye doctor, that he undergo a rectal examination, and receive physical therapy and "other medical attentions." *Id.* At either Southport C.F. or Five Points Correctional Facility, plaintiff was given an asthma inhaler, Lipitor for his high cholesterol, and allergy and pain medication. *Id.* at 10.

***2** On or about February 29, 2012, while waiting for medical appointments and physical therapy that had been scheduled at Southport C.F., plaintiff was transferred to Upstate C.F. Compl. at 10. Plaintiff was regularly intimidated, retaliated against, and denied medical services by the nurses, security, and staff at Upstate C.F. because they claimed that he had stabbed two correctional officers at Five Points C.F. *Id.* at 11. On April 17, 2012, plaintiff filed a grievance claiming that defendants Travers and Lashway were harassing and threatening him. *Id.* at 18-19.

From November, 2012 until February, 2013, at Upstate C.F., plaintiff filed nearly daily sick call requests reporting chronic pain, rectal bleeding, vision and hearing problems, and headaches, and requesting a back brace, physical therapy, a colonoscopy, various medications, and specialist appointments, but the requests were repeatedly denied or ignored. [3] Compl. at 11-12. Plaintiff was told by nurses that there was no real doctor at Upstate C.F. and only defendant nurse practitioner Lashway could schedule him to see a doctor. *Id.* at 12. Plaintiff had previously sued Lashway in 2008; the lawsuit was settled in 2010. *Id.* at 12. Defendant Lashway remembered plaintiff from her previous contact with him at Clinton Correctional Facility and she "mentioned" plaintiff's lawsuit and complaints against her, and asked if it was true that plaintiff settled the lawsuit against her. *Id.* at 13.

3 Plaintiff does not attribute this alleged misconduct to a particular person.

Plaintiff advised defendants Rock, Schroyer, Kornigsmann, Grinbergs, Smith, Rabideau, and Otis that defendants Travers, Marlow, and Lashway were not addressing his medical needs, but they did not correct the problem. Compl. at 15. On May 10, 2012, plaintiff wrote to defendant Fischer complaining about the medical staff misconduct and also told him that he had written several times to defendants Rock, Uhler, Lira, Zernia, and Quinn about the same problems but they did not respond. *Id.* at 25-26, 34.

On August 16, 2012, defendant Travers denied plaintiff his cholesterol and allergy medication. Compl. at 36. In an attempt to cover up her misconduct, defendant Travers lied that plaintiff threw his medication on the floor, and therefore she asked defendant Lashway to discontinue all of plaintiff's medications, including his pain medication. *Id.* at 36-37.

In August, 2012, plaintiff filed multiple complaints and sick call slips asking for new glasses because his were broken, but defendants Travers and Lashway "fail[ed] or refuse[d] to assist" him. Compl. at 38. Without his glasses, plaintiff suffers from eye pain, blurred vision, double vision, headaches or migraines, and cannot read well. *Id.* Plaintiff wrote to defendants Otis, Schroyer, Smith, Rabideau, Grinbergs, and Kornigsmann about his glasses, but they ignored him. *Id.* On August 23, 2012, plaintiff wrote to defendant Bellnier about the continued misconduct of defendants Travers and Lashway, asking that he investigate, but Bellnier did not correct the problem. *Id.* at 47.

Defendant Marlow denied plaintiff adequate medical care on August 30 through September 2, 2012, after he complained that the disciplinary loaf diet was causing him pain and other medical issues; she just smiled and walked away without examining plaintiff or reporting the problem to a doctor. Compl. at 40-41. On September 5, 14, and 15, 2012, defendant Travers denied plaintiff medical care when he reported medical problems arising from being placed on the loaf diet. *Id.* at 41, 45. Defendant Travers denied plaintiff medical care on October 17 and 18, 2012, for a sore throat, hoarseness, and difficulty swallowing. *Id.* at 50.

***3** On November 27, 2012, plaintiff filed a grievance against defendants Travers and Lashway, claiming that they ignored his complaints of pain and his requests for his asthma inhaler, Lipitor, allergy medications, eyeglasses, an MRI, a colonoscopy, and that he be examined by a "doctor/specialist." Compl. at 54. From November, 2012, and forward, defendants Travers and Lashway continued to deny plaintiff medical care. *Id.* at 54-55.

Defendant nurse Waterson would not give plaintiff any pain medication for his injuries suffered as a result of an assault on January 24, 2013, and failed to report plaintiff's serious injuries in the medical records or to report the sexual assault by defendant Sisto. Compl. at 65. Plaintiff requested sick call for his injuries from January 24, 2013, through February 3 or 7, 2013, and reported his "eye conditions, pains, and injuries" to defendants Greenizen, Uhler, Rock, and Otis in person and in letters and grievances. *Id.* at 67. Defendants Laramay and Bell were also notified. *Id.*

Plaintiff sent letters to defendants Kemp, Gonzalez, and Bosco "reporting his medical and mental health conditions" and also advised defendant Evans. Compl. at 68.

2. Excessive Force/Sexual Assault

On September 18, 2012, defendant Patterson placed handcuffs on plaintiff's wrist too tight, pulled plaintiff back aggressively and violently, conducted a pat frisk, and intentionally touched plaintiff's genitals and buttocks. Compl. at 45-46. As a result, both of plaintiff's wrists were cut and bleeding and he had pain in his testicles, hands, wrists, and shoulders. *Id.* at 46. Plaintiff wrote to defendants Rock, Uhler, Fischer, and Oropallo about Patterson's misconduct but they failed to correct it. *Id.* at 46.

On December 3, 2012, defendants Marshall, Lipka, Tuper, Whitford, and Greenizen physically assaulted plaintiff in his cell, pulled down his pants, and placed an unknown object in his "butt/anus/rectal area" and hit him on his butt, penis/testicles, and other parts of his body. Compl. at 55. Defendant Marlow refused to report the sexual assault and noted in plaintiff's record that he suffered no injuries, even though plaintiff had cuts on both wrists, several bruises, and his hands were swollen. *Id.* at 56. On December 3 and 4, 2012, plaintiff wrote to defendants Otis, Rock, and Fischer to report the incident, and defendant Rock sent defendant Oropallo to investigate the incident. *Id.* at 56. Despite this, defendants Rock, Otis, Bellnier, and Uhler did not move plaintiff out of Upstate C.F. *Id.* at 57.

On January 24, 2013, plaintiff was falsely accused of refusing to return his lunch tray and an extraction team arrived at his cell, accompanied by defendant Zernia, who stated that defendants Rock and Otis had approved the cell extraction. Compl. at 64.[4] Defendant Phillips opened plaintiff's cell door hatch, and a chemical agent was sprayed in the cell. *Id.* Plaintiff was ordered to put his hands through the cell hatch, and when he did, he was hit with a heavy metal stick. *Id.* Defendants Grant, Dunning, Richter, and Sisto entered the cell and beat plaintiff, who was not resisting but was lying face down on the floor. *Id.* at 64-65. Plaintiff was taken to the decontamination room in handcuffs, where he was beaten again while defendant Phillips blocked the hand held video camera. *Id.* at 65-66. Defendant Sisto choked plaintiff and put his finger inside of plaintiff's rectum while defendant Phillips falsely yelled that plaintiff was resisting. *Id.* at 65. Defendant Sisto continued to assault plaintiff back at his cell. *Id.*

[4] Plaintiff also claims that the cell extraction had been approved by the medical staff who claimed that plaintiff did not suffer from asthma, but plaintiff does not identify an individual from the medical staff who approved it. *Id.* at 64.

3. Conditions of Confinement

***4** Between March 2012 until April 2012, defendant Williams commenced a "campaign of harassment, discrimination[ ] and retaliation[ ]" by denying plaintiff toilet paper, tampering with his incoming magazines and newspapers which he had been approved to receive, and denying him cleaning supplies and food when she worked on his block. Compl. at 23. On June 15, 2012, plaintiff filed a grievance reporting the unsanitary conditions on 9-Block where he was housed, including numerous insects, mice, rats, and vermin, but defendant Williams told plaintiff that insects, mice, rats, and vermin will not harm him but only want food. *Id.* at 32.

On August 27, 2012, defendants Forbes, Jarvis, and Santamore refused to give plaintiff his dinner or general library materials and closed the "vision panel" on plaintiff's cell door. Compl. at 40.

On November 14, 2012, defendant Bilow claimed that he observed plaintiff sticking an object up his rectal area. Compl. at 53. As a result of the accusation, defendant Bilow strip searched plaintiff in front of two other correctional officers during which time plaintiff was forced to "open his butt, show his penis, [and] open

his mouth." *Id.* When nothing was found, plaintiff was placed under 24-hour observation for several days in a cold room, where he had to go to the bathroom in front of correctional officers, female and male. *Id.* Plaintiff was denied showers and clean clothes and did not have adequate toilet paper or water. *Id.* at 54. The room was lit 24 hours a day, and plaintiff had to sit in the boss chair multiple times. *Id.* at 53. Defendant Oropallo and Greenizen approved the foregoing. *Id.*

4. Restricted Diet

In May, 2012, plaintiff complained to defendants Rock, Kornigsmann, Fischer, Prack, Bellnier, Schroyer, and Otis about the medical problems that he was suffering from being placed on the disciplinary loaf diet. Compl. at 27-28. Defendants Rock, Kornigsmann, Fischer, Prack, Bellnier, Schroyer, Otis, Lashway, Uhler, Travers, and Lira knew that the loaf diet was inadequate and likely to cause pain. *Id.* at 27. Among other things, plaintiff suffered nausea, vomiting, stomach pains, increased bleeding and pains in his rectal area, constipation, and dry lips. *Id.* As a result of disciplinary proceedings held before defendant Lira, plaintiff was placed on the disciplinary loaf diet, which defendant Lashway approved on August 24, 2012, without first examining plaintiff, even knowing that the loaf diet created medical issues for plaintiff. *Id.* at 40-42; 47. Defendant Lira knew that it was not an adequate diet and if he placed plaintiff on the diet it would harm his health. *Id.* at 47.

5. Mail Interference, Destruction of Property, and Access to the Courts

Defendant Wilson denied plaintiff access to law library materials from February 29, 2012 until March 10, 2012, even though plaintiff had court deadlines. Compl. at 16. Defendant Wilson denied plaintiff copies of state court papers and other legal supplies needed to litigate his state court actions, and denied his requests for legal books and legal supplies. *Id.* at 21-23, 30, 49. Plaintiff filed grievances against defendant Wilson on March 10, 2012; April 9, 2012; and April 25, 2012. *Id.* at 16, 22, 23. On October 12, 2012, defendant Wilson told plaintiff that the legal documents that he had sent to the law library for copying were "missing/lost," however defendant Wilson intentionally threw them out because he saw his name in the papers. *Id.* at 51. Defendant Wilson acted in retaliation for the grievances and complaints that plaintiff had filed against him. *Id.* Plaintiff wrote to defendant Laramay, who is "responsible for the law library area," complaining about defendant Wilson's misconduct but he failed to resolve the problem. *Id.* at 52.

***5** On May 16, 2012, defendant Williams refused to put plaintiff's legal mail into the mail box but instead threw it on the floor and it went into the trash. Compl. at 29. On August 27, 2012, defendants Forbes, Jarvis, and Santamore denied plaintiff his incoming mail, law library materials, the responses to his grievances and appeals, and letters from his family. *Id.* at 40. On October 24, 2012, defendant Gokey ripped up plaintiff's law library slip. *Id.* at 50. In January, 2013, correctional officers ordered defendant Hungerford to deny plaintiff notary services, and she stated that she did not care if the courts rejected plaintiff's papers for lack of a notary. *Id.* at 59.

On January 24, 2013, defendants Garland and Gokey searched plaintiff's cell and threw his legal papers all over the cell and in the shower. Compl. at 61. The legal papers were out of their envelopes, and many were ripped, wet, or covered in peanut butter, jelly, and toothpaste. *Id.* Plaintiff's personal photos and magazines were destroyed or ripped, his clothes and jacket were wet and dirty, his headphones and radio were broken or unusable, and his legal books were confiscated. *Id.* Plaintiff reported the incident to defendant Phillips, who looked at plaintiff's cell, laughed, and said that's what happens when you file grievances. *Id.* at 62.

6. Processing Grievances

Between March, 2012, through June, 2012, defendants White and Woodward failed or refused to adequately or properly process plaintiff's grievances or appeals and mis-coded some of his grievances. Compl. at 18, 21, 31, 51-52. On May 10, 2012, plaintiff wrote to defendant Bellamy about the misconduct of White and Woodward, but she did not correct the misconduct. *Id.* at 26. Plaintiff also wrote to defendants White and Cromp requesting information on grievances that he filed. *Id.* at 58.

7. Threats and Harassment

Defendant Patterson threatened to assault plaintiff on September 6, 2012. Compl. at 45. Defendant Gokey harassed, discriminated, and retaliated against plaintiff on September 6, September 17, and October 12, 2012, and continued to threaten him until he left Upstate C.F. *Id.* at 48. On October 24, 2012, while defendant Gokey was escorting defendant Mainville in 9-Block, he stopped in front of plaintiff's cell and threatened him for filing a grievance against him. *Id.* at 50. On November 14, 2012, defendants Travers and Bilow stopped in front of plaintiff's cell and verbally sexually harassed him. *Id.* at 55. In December, 2012, defendants Oropallo and Marshall threatened plaintiff that if he reported misconduct again he would be beaten and raped. *Id.* at 56-57. On January 8, 2013, defendant Whitford threatened plaintiff with physical violence. *Id.* at 59.

8. Religion Claims

On August 27, 2012, defendants Forbes, Jarvis, and Santamore refused to feed plaintiff his kosher meal at dinner. Compl. at 40.

9. False Misbehavior Reports

False misbehavior reports were issued to plaintiff by defendants Bilow and Wilson on November 14, 2012; defendants Whitford and Tabb on December 3, 2012; defendant Forbes on December 24, 2012; and defendant Hungerford on January 2, 2013. Compl. at 55-59.

10. Due Process

In August, 2012, defendant Lira presided as hearing officer over three of plaintiff's disciplinary hearings. Compl. at 47. Defendant Lira denied plaintiff due process during the hearings because he denied plaintiff video tapes and audio records of the alleged incidents, and found plaintiff guilty without sufficient evidence. *Id.* Defendant Lira sentenced plaintiff to seven days on the disciplinary loaf diet for each of the hearings, amounting to twenty-one days total, even though he knew that being on the loaf caused harm to plaintiff and was not an adequate diet. *Id.*

11. Denial of Access to Medical Records

***6** On May 11, 2012, plaintiff filed a grievance complaining that defendants Smith and Rabideau were denying plaintiff copies of his medical records in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. 104-191, 110 Stat. 1936, and New York State Department of Corrections and Community Supervision ("DOCCS") regulations. Compl. at 20. Plaintiff wrote to defendant Schroyer about the problem with his medical records. *Id.* at 35. Plaintiff wrote to defendant Kornigsmann on May 13, 2012 about the misconduct of defendants Grinsberg, Lashway, Travers, and Marlow regarding violating HIPAA and state regulations, but he did not respond. *Id.* at 27. Grinsberg responded to plaintiff telling him that there is no provision allowing him to send grievances directly to the Central Office. *Id.* at 29.

Plaintiff requests monetary damages. Compl. at 82. For a more complete statement of plaintiff's claims, refer to the complaint.

12. Summary of Claims

In deference to plaintiff's pro se status, the complaint is liberally construed to assert the following claims: (1) Eighth Amendment medical indifference claims against defendants Travers, Lashway, Marlow, Smith, Rock, Rabideau, Schroyer, Kornigsmann, Grinbergs, Otis, Bellnier, Fischer, Waterson, Laramay, Quinn, Bell, Evans, Kemp, Gonzalez, and Bosco; (2) Eighth Amendment excessive force claims against defendants Patterson, Marshall, Lipka, Tuper, Whitford, Greenizen, Otis, Rock, Fischer, Oropallo, Zernia, Phillips, Grant, Dunning, Richter, Sisto, Bellnier, and Uhler; (3) Eighth Amendment conditions of confinement claims against defendants Williams, Forbes, Jarvis, Santamore, Bilow, Oropallo, and Greenizen; (4) Eighth Amendment claims against defendants Rock, Kornigsmann, Fischer, Prack, Bellnier, Schroyer, Otis, Lashway, Uhler, Travers, and Lira relating to the restricted diet; (5) property destruction claims against defendants Gokey and Garland; (6) First Amendment mail interference claims against defendants Forbes, Jarvis, Santamore, and Williams; (7) First Amendment access to the courts claims against defendants Wilson, Laramay, Gokey, Hungerford, Garland, and

Phillips; (8) First Amendment retaliation claims against defendants Travers, Lashway, Wilson, Gokey, and Phillips; (9) interference with grievance claims against defendants White, Woodward, Bellamy, and Cromp; (10) claims that defendants Travers, Patterson, Bilow, Lashway, Phillips, Gokey, and Marshall threatened and harassed plaintiff; (11) First Amendment religion claims against defendants Forbes, Jarvis, and Santamore; (12) false misbehavior report claims against defendants Whitford, Tabb, Forbes, Bilow, Wilson, and Hungerford; (13) a Fourteenth Amendment due process claim against defendant Lira; (14) claims that defendants Kornigsmann, Grinbergs, Lashway, Travers, Marlow, Smith, Rabideau, and Schroyer violated HIPAA and DOCCS regulations; (15) Fourteenth Amendment Equal Protection claims; (16) conspiracy claims; and (17) state law tort claims.

B. Analysis

Plaintiff brings this action pursuant to Section 1983, which establishes a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In order to maintain a Section 1983 action, a plaintiff must allege two essential elements. First, "the conduct complained of must have been committed by a person acting under color of state law." *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir. 1994). Second, "the conduct complained of must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Id.*

It is well settled that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991)); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). "[A] Section 1983 plaintiff must 'allege a tangible connection between the acts of the defendant and the injuries suffered.' " *Austin v. Pappas*, No. 04-CV-7263, 2008 WL 857528, at *2 (S.D.N.Y. Mar. 31, 2008) (quoting *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986)) (other citation omitted). "[V]icarious liability is inapplicable to ... § 1983 suits." *Iqbal*, 556 U.S. at 676. Prior to *Iqbal*, the Second Circuit held that supervisory personnel may be considered "personally involved" only if they (1) directly participated in the violation, (2) failed to remedy that violation after learning of it through a report or appeal, (3) created, or allowed to continue, a policy or custom under which the violation occurred, (4) had been grossly negligent in managing subordinates who caused the violation, or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that the violation was occurring. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)). [5]

5 The Second Circuit has not yet addressed how the Supreme Court's decision in *Iqbal* affected the standards in *Colon* for establishing supervisory liability. *See Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir. 2013) (noting that *Iqbal* may have "heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations" but not reaching the impact of *Iqbal* on *Colon* because the complaint "did not adequately plead the Warden's personal involvement even under *Colon*"); *see also Hogan v. Fischer*, 738 F.3d 509, 519 n.3 (2d Cir. 2013) (expressing "no view on the extent to which [*Iqbal*] may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations[.]" (citing *Grullon*, 720 F.3d at 139)).

1. Eighth Amendment Medical Indifference Claims

***7** To state an Eighth Amendment claim for medical indifference, a plaintiff must allege that the defendant was deliberately indifferent to a serious medical need. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Deliberate indifference has two necessary components, one objective and the other subjective. *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). The objective component of an Eighth Amendment deliberate indifference claim "requires that the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (quoting *Hathaway*, 99 F.3d at 553) (internal quotation marks omitted). Under the subjective element, medical mistreatment rises to the level of deliberate indifference only when it "involves culpable recklessness, i.e., an act or a failure to act ... that evinces 'a conscious disregard of a substantial risk of serious harm.' " *Chance v. Armstrong*, 143 F. 3d 698, 703 (2d Cir. 1998) (quoting *Hathaway*, 99 F.3d at 553). "Deliberate indifference requires more than negligence but less than conduct undertaken for the very purpose of causing harm." *Hathaway*, 37 F.3d at 66. To

assert a claim for deliberate indifference, an inmate must allege that (1) a prison medical care provider was aware of facts from which the inference could be drawn that the inmate had a serious medical need; and (2) the medical care provider actually drew that inference. *Farmer*, 511 U.S. at 837; *Chance*, 143 F.3d at 702. The inmate must also demonstrate that the provider consciously and intentionally disregarded or ignored that serious medical need. *Farmer*, 511 U.S. at 835; *see also Blyden v. Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999) (With respect to the subjective element, a plaintiff must also demonstrate that defendant had "the necessary level of culpability, shown by actions characterized by 'wantonness.' "). An "inadvertent failure to provide adequate medical care" does not constitute "deliberate indifference." *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976).

Plaintiff alleges that defendants Travers, Marlow, Lashway, and Waterson denied him adequate medical care for various medical issues including, but not limited to, chronic pain, rectal bleeding, vision problems, migraines, side-effects suffered as a result of being placed on the disciplinary loaf diet, and injuries suffered from an assault by staff. Compl. at 36-37, 38, 40-42, 45, 47, 50, 54, and 65. Plaintiff also claims that he reported the misconduct of defendants Travers, Marlow, and Lashway to defendants Fischer, Rock, Schroyer, Kornigsmann, Grinbergs, Smith, Rabideau, Otis, Bellnier, Greenizen, Uhler, Laramay, Quinn, and Bell (*see* Compl. at 15, 24-26, 34, 38, 47, and 67) but they failed to correct the misconduct. Mindful of the Second Circuit's direction that a pro se plaintiff's pleadings must be liberally construed, *see e.g. Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008), the Court finds that plaintiff's Eighth Amendment medical indifference claims against defendants Travers, Marlow, Lashway, Waterson, Fischer, Rock, Schroyer, Kornigsmann, Grinbergs, Smith, Rabideau, Otis, Bellnier, and Uhler survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed dispositive motion.

With respect to defendants Laramay, Quinn, Bell, Greenizen, whom plaintiff identifies respectively as two Lieutenants, a Captain, and a Sergeant, there are no facts to plausibly suggest that they had the authority or the ability to correct alleged misconduct by the medical staff. Accordingly, plaintiff's Eighth Amendment medical indifference claims against defendants Laramay, Quinn, Bell, and Greenizen are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

Finally, plaintiff claims that defendants Evans, Kemp, Gonzalez, and Bosco failed to provide him with adequate mental health care. Compl. at 68. Conclusory allegations that defendants were aware of a plaintiff's medical needs and failed to provide adequate care are generally insufficient to state an Eighth Amendment claim of inadequate medical care. *See, e.g., Gumbs v. Dynan*, No. 11-CV-0857, 2012 WL 3705009, at *12 (E.D.N.Y. Aug. 26, 2012) ("conclusory allegations that the defendants were aware of plaintiff's medical needs and chronic pain but failed to respond are generally not sufficient proof of defendant's deliberate indifference and cannot survive a Rule 12(b)(6) motion to dismiss") (citing *Adekoya v. Holder*, No. 09 Civ 10325, 751 F. Supp. 2d 688, 691 (S.D.N.Y. Nov. 12, 2010) (finding conclusory allegations that medical staff defendants were aware of plaintiff's medical needs and failed to provide adequate care insufficient to defeat a motion to dismiss a claim of inadequate medical care)). There is also nothing to plausibly suggest that these defendants exhibited the requisite state of mind to sustain an Eighth Amendment deliberate indifference claim. Therefore, plaintiff's Eighth Amendment medical indifference claims against defendants Evans, Kemp, Gonzalez, and Bosco are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

2. Eighth Amendment Excessive Force Claims

***8** The Eighth Amendment protects prisoners from "cruel and unusual punishment" at the hands of prison officials. *Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991); *Estelle*, 429 U.S. at 104. This includes punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The Eighth Amendment's prohibition against cruel and unusual punishment encompasses the use of excessive force against an inmate, who must prove two components: (1) subjectively, that the defendant acted wantonly and in bad faith, and (2) objectively, that the defendant's actions violated "contemporary standards of decency." *Blyden v. Mancusi*, 186 F.3d 252, 262-63 (2d Cir. 1999) (internal quotations omitted) (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). [6]

6 In this regard, while "a *de minimis* use of force will rarely suffice to state a constitutional claim," *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993), the malicious use of force to cause harm constitutes an Eighth Amendment violation per se because in such an instance "contemporary standards of decency are always violated." *Blyden*, 186 F.3d at 263 (citing *Hudson*, 503 U.S. at 9). The key inquiry into a claim of excessive force is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7 (citing *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)); *see also Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

Mindful of the Second Circuit's direction that a pro se plaintiff's pleadings must be liberally construed, *see* e.g. *Sealed Plaintiff*, 537 F.3d at 191, the Court finds that plaintiff's Eighth Amendment excessive force claims against defendants Patterson, Marshall, Lipka, Tuper, Whitford, Greenizen, Otis, Rock, Zernia, Phillips, Grant, Dunning, Richter, and Sisto survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed dispositive motion.

Plaintiff's Eighth Amendment excessive force claims against defendants Fischer, Oropallo, Bellnier, and Uhler stand on a different footing. Construing the complaint liberally, plaintiff alleges that after he was assaulted by staff on December 3, 2012, he notified these defendants about an alleged assault and they failed to take corrective measures. Compl. at 56-57. Plaintiff does not contend that defendants Fischer, Oropallo, Bellnier, or Uhler directly participated in the alleged constitutional violation, namely plaintiff's December 3, 2012 assault. Rather, the gravamen of plaintiff's complaint against these defendants is that he advised of them of misconduct after the fact. However, "[i]f the official is confronted with a violation that has already occurred and is not ongoing, then the official will not be found personally responsible for failing to 'remedy' a violation." *Harnett v. Barr*, 538 F. Supp. 2d 511, 524 (N.D.N.Y. 2008); *see also Young v. Kihl*, 720 F. Supp. 22, 23 (W.D.N.Y. 1989) ("[T]he wrong ... [must] have been capable of mitigation at the time the supervisory official was apprised thereof ... Without such caveat, the personal involvement doctrine may effectively and improperly be transformed into one of *respondeat superior*."); *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir. 2001) ("[A] 'failure to remedy' theory of liability is not available with respect to discrete and completed violations."). Thus, here, because the assault had already occurred, defendants Fischer, Oropallo, Bellnier, and Uhler cannot be held liable on the basis of a failure to correct. Accordingly, plaintiff's Eighth Amendment excessive force claims against defendants Fischer, Oropallo, Bellnier, and Uhler are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

3. Eighth Amendment Conditions of Confinement Claims

***9** The Eighth Amendment explicitly prohibits the infliction of "cruel and unusual punishment." U.S. Const. amend. VIII. The Second Circuit, in addressing the needs protected by the Eighth Amendment, has stated that sentenced prisoners are entitled to "adequate food, clothing, shelter, sanitation, medical care and personal safety." *Wolfish v. Levi*, 573 F.2d 118, 125 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979); *Lareau v. Manson*, 651 F.2d 96, 106 (2d Cir. 1981). "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Not every governmental action affecting the interests or well-being of a prisoner is actionable under the Eighth Amendment. "To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see also Gaston v. Coughlin*, 249 F.3d 156, 163 (2d Cir. 2001).

To demonstrate that the conditions of confinement constitute cruel and unusual punishment in violation of the Eighth Amendment, a plaintiff must satisfy both an objective and subjective element. *See Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996). A plaintiff must demonstrate that (1) the conditions of confinement resulted in "unquestioned and serious deprivations of basic human needs," *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985); *see also Jolly*, 76 F.3d at 480, and (2) that the defendants acted with "deliberate indifference." *Wilson v. Seiter*, 501 U.S. 294, 303-04 (1991).

Plaintiff's allegations that defendants Forbes, Jarvis, and Santamore denied him dinner and general library materials on one day and closed the "vision panel" on his cell door, *see* Compl. at 40, do not plausibly suggest

that these defendants deprived plaintiff of basic human needs. *See Rhodes*, 452 U.S. at 347 (Routine discomfort and restrictive or even harsh prison conditions "are part of the penalty that criminal offenders pay for their offenses against society."); *see also Hudson*, 503 U.S. at 9. Plaintiff's allegations also do not plausibly suggest that these defendants acted with the requisite deliberate indifference. Accordingly, the Eighth Amendment conditions of confinement claims against defendants Forbes, Jarvis, and Santamore are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

Mindful of the Second Circuit's direction that a pro se plaintiff's pleadings must be liberally construed, *see e.g. Sealed Plaintiff*, 537 F.3d at 191, the Court finds that plaintiff's Eighth Amendment conditions of confinement claims against defendants Williams, Bilow, Oropallo, and Greenizen, *see* Compl. at 32, 53-54, survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed dispositive motion.

4. Restricted Diet Claims

The Eighth Amendment requires "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it." *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir. 1983) (per curiam) (internal quotation marks omitted); *see also Willey v. Kirkpatrick*, 801 F.3d 51, 61 (2d Cir. 2015). Plaintiff alleges that the food that he was served when placed on the restricted diet was nutritionally inadequate and caused him physical harm. In light of *Sealed Plaintiff*, 537 F.3d at 191, the Court finds that plaintiff's Eighth Amendment restricted diet claims against defendants Rock, Kornigsmann, Fischer, Prack, Bellnier, Schroyer, Otis, Lashway, Uhler, Travers, and Lira survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed dispositive motion.

5. Destruction of Property Claims

***10** The Supreme Court has held that the unauthorized intentional destruction of prisoner's property may not be the basis for constitutional claims if sufficient post deprivation remedies are available to address the claim. *Hudson v. Palmer*, 468 U.S. 517, 531 (1984) (citing *Parratt v. Taylor*, 451 U.S. 527, 541 (1981)); *see also Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006) ("When the state conduct in question is random and unauthorized, the state satisfies procedural due process requirements so long as it provides meaningful post deprivation remedy."). "New York in fact affords an adequate post-deprivation remedy in the form of, *inter alia*, a Court of Claims action." *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir. 2001); *Davis v. New York*, 311 Fed.Appx. 397, 400 (2d Cir. 2009) ("The existence of this adequate post-deprivation state remedy would thus preclude [plaintiff's] due process claim under § 1983 [for lost personal property].").

The destruction of property claims against defendants Gokey and Garland are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim under Section 1983 upon which relief may be granted.

6. First Amendment Mail Interference Claims

The First Amendment protects an inmate's right to send and receive both legal and nonlegal mail, although prison officials may regulate that right if the restrictions they employ are " 'reasonably related to legitimate penological interests.' " *Thornburgh v. Abbott,* 490 U.S. 401, 409 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)); see *Johnson v. Goord,* 445 F.3d 532, 534 (2d Cir. 2006) (holding that prisoners do have a right – albeit a limited one – to send and receive mail (citation omitted)). Legal mail is entitled to greater protection from interference than nonlegal mail. *See Davis v. Goord,* 320 F.3d 346, 351 (2d Cir. 2003) (citations omitted). A single instance of mail tampering that does not result in the plaintiff suffering any damage is generally insufficient to support a constitutional challenge. *See Morgan v. Montanye*, 516 F.2d 1367, 1371 (2d Cir. 1975).[7] "Rather, the inmate must show that prison officials 'regularly and unjustifiably interfered with the incoming legal mail.' " *Davis,* 320 F.3d at 351 (quoting *Cancel v. Goord*, No. 00 CIV 2042, 2001 WL 303713, at *6 (S.D.N.Y. Mar. 29, 2001) (citing *Washington v. James*, 782 F.2d 1134,1139 (2d Cir. 1986))). Indeed, courts have consistently applied *Morgan* to dismiss suits by inmates alleging unconstitutional opening of their legal mail without any showing of

damages. *See Pacheo v. Comisse,* 897 F. Supp. 671, 681 (N.D.N.Y. 1995) (dismissing inmate's claim based on a single instance in which defendants allegedly opened his legal mail outside of his presence because "he has shown no prejudice as a result of the allegedly unauthorized opening"); *Walton v. Waldron,* 886 F. Supp. 981, 986 (N.D.N.Y. 1995) ("Existing precedent on an inmate's claim that his 'legal' mail has been improperly handled by prison officials requires a showing of harm."); *Gittens v. Sullivan,* 670 F. Supp. 119, 124 (S.D.N.Y. 1987), *aff'd,* 848 F.2d 389 (2d Cir. 1988) (holding that inmate's allegation that his legal mail was "interfered with on one occasion is insufficient to state a cause of action given that the interference complained of did not affect plaintiff's access to the courts").

7 To the extent that plaintiff may be attempting to assert that he was denied access to the courts as a result of this mail interference, that purported claim is discussed below.

Plaintiff alleges that on May 16, 2012, defendant Williams threw a piece of plaintiff's legal mail in the trash, Compl. at 29, and on August 27, 2012, defendants Forbes, Jarvis, and Santamore did not give plaintiff his incoming mail, *id.* at 40. Even accepting as true all of the allegations in plaintiff's complaint and drawing all inferences in plaintiff's favor, plaintiff has alleged only that each of the forgoing defendants interfered with his mail on one occasion, and there is nothing to plausibly suggest that any single instance of mail interference caused plaintiff to suffer a constitutionally significant injury.

***11** Accordingly, the First Amendment mail interference claims against defendants Williams, Forbes, Jarvis, and Santamore are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

7. First Amendment Access to the Courts Claims

It is well settled that inmates have a First Amendment right to "petition the Government for a redress of grievances."[8] This right, which is more informally referred to as a "right of access to the courts," requires States "to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." *Bounds v. Smith*, 430 U.S. 817, 828 (1977), *modified on other grounds, Lewis v. Casey*, 518 U.S. 343, 350 (1996); *see also Bourdon v. Loughren*, 386 F.2d 88, 92 (2d Cir. 2004). "However, this right is not 'an abstract, freestanding right ....' and cannot ground a Section 1983 claim without a showing of 'actual injury.' " *Collins v. Goord*, 438 F. Supp. 2d 399, 415 (S.D.N.Y. 2006) (quoting *Lewis*, 518 U.S. at 351).

8 *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

To state a claim for denial of access to the courts, a plaintiff must assert non-conclusory allegations demonstrating both (1) that the defendant acted deliberately and maliciously, and (2) that the plaintiff suffered an actual injury. *Lewis*, 518 U.S. at 353. "A hypothetical injury is not sufficient to state a claim for violation of the right of access to the courts." *Amaker v. Haponik,* No. 98 Civ. 2663, 1999 WL 76798, at *3 (S.D.N.Y. Feb. 17, 1999). Instead, a plaintiff must demonstrate "actual injury" by establishing that the denial "hindered his efforts" to pursue a non-frivolous legal claim. *Lewis*, 518 U.S. at 349, 351-53. "Mere 'delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation.' " *Davis*, 320 F.3d at 352 (citing *Jermosen v. Coughlin*, 877 F. Supp. 864, 871 (S.D.N.Y. 1995)).

The Supreme Court has stated that in order to allege a denial of access to the courts claim, "the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint ...." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The Supreme Court instructed that the underlying claim "must be described well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the underlying claim is more than hope." *Id.* at 415-16. "[T]he complaint should state the underlying claim in accordance with Federal Rule of Civil Procedure 8(a), just as if it were being independently pursued, and a like plain statement should describe any remedy available under the access claim and presently unique to it." *Id.* at 417-18 (footnote omitted).

Here, plaintiff alleges only that he was denied legal materials and supplies, and some of his legal papers were destroyed. Compl. at 16, 21-23, 30, 40, 49, 50-52,

59-60. Even accepting plaintiff's allegations as true, he nevertheless offers no facts to suggest how the denial or destruction of legal materials "prejudiced his ability to seek redress from the judicial system." *Smith v. O'Connor,* 901 F. Supp. 644, 649 (S.D.N.Y. 1995). Plaintiff fails to provide any information in the complaint about the basis of any court action or proceeding which was actually frustrated as a result of the loss or destruction of legal materials. *See Christopher*, 536 U.S. at 416 ("Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant.") (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-515 (2002)). Simply stated, plaintiff fails to allege any facts to plausibly suggest that a non-frivolous claim was actually hindered or prejudiced because of the alleged denial of access to legal materials. *See Lewis*, 518 U.S. at 360 n.7 ("Courts have no power to presume and remediate harm that has not been established."); *Arce v. Walker*, 58 F. Supp. 2d 39 (W.D.N.Y. 1999) ("a prisoner's conclusory assertion that he suffered prejudice does not suffice to support an access to courts claim ... some showing of impaired access is required"); *see also Davis*, 320 F.3d at 352 ("Mere 'delay in being able to ... communicate with the courts does not rise to the level of a constitutional violation.' ").

***12** Accordingly, plaintiff's First Amendment access to the courts claims against defendants Wilson, Laramay, Gokey, Hungerford, Garland, and Phillips do not survive sua sponte review and are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

8. First Amendment Retaliation Claims

Courts must approach claims of retaliation " 'with skepticism and particular care' because 'virtually any adverse action taken against a prisoner by a prison official–even those otherwise not rising to the level of a constitutional violation–can be characterized as a constitutionally proscribed retaliatory act.' " *Davis*, 320 F.3d at 352 (quoting *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001), *overruled on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)). To state a plausible claim, a plaintiff asserting a First Amendment retaliation claim must advance "non-conclusory" allegations establishing "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech [or conduct] and the adverse action." *Davis*, 320 F.3d at 352 (quoting *Dawes*, 239 F.3d at 492). "[A] complaint which alleges retaliation in wholly conclusory terms may safely be dismissed on the pleadings alone." *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983).

Plaintiff alleges that he filed grievances against defendants Travers and Lashway on April 17, 2012, and November 27, 2012. Compl. at 38, 54. Plaintiff filed a grievance against defendant Travers on June 14, 2012, and against defendant Lashway on June 15, 2012. *Id.* at 21-22. Plaintiff also filed a lawsuit against defendant Lashway in 2008, which was settled in 2010; defendant Lashway mentioned the lawsuit to plaintiff and said that she remembered him. *Id.* at 12-13. From November, 2012, through February, 2013, plaintiff claims that defendants Travers and Lashway denied him adequate medical care. *See*, e.g. Compl. at 12-13, 18-19, 36-38, 50.

Plaintiff filed grievances against defendant Wilson on March 10, 2012, April 9, 2012, and April 25, 2012. Compl. at 16, 22-23. On October 12, 2012, defendant Wilson intentionally destroyed some of plaintiff's legal documents because he saw that his name was mentioned in them and allegedly in retaliation for plaintiff's grievances. *Id.* at 51.

On October 24, 2012, defendant Gokey threatened to harm plaintiff because plaintiff had filed a grievance against him. Compl. at 50. Defendant Gokey told plaintiff that his "time [will come] very soon" and he ripped up plaintiff's law library slip. *Id.* On January 24, 2013, defendant Gokey destroyed some of plaintiff's legal papers and personal property. *Id.* at 61. Plaintiff complained to defendant Phillips, the block officer, and he told plaintiff that's what happens when you file grievances. *Id.* at 62.

In light of *Sealed Plaintiff*, 537 F.3d at 191, the Court finds that the First Amendment retaliation claims against defendants Travers, Lashway, Wilson, Gokey, and Phillips survive sua sponte review and require a response. In so ruling, the Court expresses no opinion as to whether these claims can withstand a properly filed dispositive motion.

9. Interference with Grievance Claims

***13** It is well-established that a prison inmate has no constitutional right of access to such an internal grievance process. *Rhodes v. Hoy*, No. 9:05-CV-0836 (FJS/DEP), 2007 WL 1343649, at *6 (N.D.N.Y. May 5, 2007) (noting that inmates have "no constitutional right of access to the established inmate grievance program"); *Davis v. Buffardi*, No. 9:01-CV-0285 (PAM/GJD), 2005 WL 1174088, at *3 (N.D.N.Y. May 4, 2005) ("[P]articipation in an inmate grievance process is not a constitutionally protected right."); *Cancel*, 2001 WL 303713, at *3 (holding that "inmate grievance procedures are not required by the Constitution" and therefore failure to see to it that grievances are properly processed does not create a claim under Section 1983). Simply stated, there is no underlying constitutional obligation to afford an inmate meaningful access to the internal grievance procedure, or to investigate and properly determine any such grievance.

Plaintiff's interference with grievance claims against defendants White, Woodward, Bellamy, and Cromp do not survive sua sponte review and are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

10. Verbal Threats and Harassment

Verbal threats and harassment, absent physical injury, are not constitutional violations cognizable under Section 1983. *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986) (per curiam); *Aziz Zarif Shabazz v. Pico*, 994 F. Supp. 460, 474 (S.D.N.Y. 1998) ("verbal harassment or profanity alone, unaccompanied by any injury no matter how inappropriate, unprofessional, or reprehensible it might seem, does not constitute the violation of any federally protected right and therefore is not actionable under 42 U.S.C. § 1983") (quotation omitted); *Rivera v. Goord*, 119 F. Supp. 2d 327, 342 (S.D.N.Y. 2000) (collecting cases).

Accordingly, plaintiff's claims that defendants Travers, Patterson, Bilow, Lashway, Phillips, Gokey, and Marshall verbally threatened and harassed him are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

11. First Amendment Religion Claims

The First Amendment Free Exercise Clause guarantees the right to free exercise of religion. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Free Exercise Clause, and the First Amendment generally, applies to prison inmates, subject to certain limitations. *Ford v. McGuinnis*, 352 F.3d 582, 588 (2d Cir. 2003) ("Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause.") (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). "[A] prisoner has a right to a diet consistent with his or her religious scruples." *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003). To state a claim under the First Amendment Free Exercise Clause, a plaintiff must demonstrate that his or her sincerely held religious beliefs were substantially burdened by defendant's conduct. *Singh v. Goord,* 520 F. Supp. 2d 487, 498, 509 (S.D.N.Y. 2007); *see also Salahuddin v. Goord*, 467 F.3d at 274-75 (To prevail on a free-exercise claim, a prisoner "must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs."). In order to be considered a "substantial burden," the plaintiff "must demonstrate that the government's action pressure[d] him to commit an act forbidden by his religion or prevent[ed] him from engaging in conduct or having a religious experience mandated by his faith." *Muhammad v. City of New York Dep't of Corr.,* 904 F. Supp. 161, 188 (S.D.N.Y. 1995) (citations omitted). The burden must be more than an inconvenience, it must substantially interfere with a tenet or belief that is central to the religious doctrine. *Id.*

***14** Here, plaintiff fails to identify his religion, thus making it impossible for the Court to determine if the denial of one kosher meal placed a substantial burden on his religious beliefs. Plaintiff alleges no facts to suggest that defendants interfered with a tenet or belief that is central to any religious doctrine. Accordingly, plaintiff's First Amendment free exercise claims against defendants Forbes, Jarvis, and Santamore are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

12. False Misbehavior Reports

It is well settled that "a prison inmate has no general constitutional right to be free from being falsely accused

in a misbehavior report." *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997) (citing *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986)); *accord, Pittman v. Forte*, No. 9:01-CV-0100, 2002 WL 31309183, at *5 (N.D.N.Y. July 11, 2002) (Sharpe, M.J.); *see also Santana v. Olson*, No. 07-CV-0098, 2007 WL 2712992, at *2 (W.D.N.Y. Sept. 13, 2007) ("[T]he filing of a false behavior report by a correctional officer does not state a claim for relief."). The only way that false accusations contained in a misbehavior report can rise to the level of a constitutional violation is when there has been more such as "retaliation against the prisoner for exercising a constitutional right." *Boddie*, 105 F.3d at 862. In addition, "[t]he filing of a false report does not, of itself, implicate the guard who filed it in constitutional violations which occur at a subsequent disciplinary hearing."[9] *Williams v. Smith*, 781 F.2d 319, 324 (2d Cir. 1986) (rejecting prisoner's "but for" argument as to guard who prepared misbehavior report but was not involved in Tier III hearing) (citation omitted).

9 "The only constitutional violation that could occur in this situation is if plaintiff were not provided adequate due process in any proceeding which is based upon the misbehavior report. In that case, the claim is not based on [the] truth or falsity of the misbehavior report but instead on the conduct of the hearing itself." *Santana*, 2007 WL 2712992, at *2.

Plaintiff's claims that defendants Whitford, Tabb, Forbes, Bilow, Wilson, and Hungerford issued him false misbehavior reports are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

13. Fourteenth Amendment Due Process Claim

"A prisoner's liberty interest is implicated by prison discipline, such as SHU confinement, only if the discipline 'imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life'...." *Palmer v. Richards,* 364 F.3d 60, 64 (2d Cir. 2004) (quoting *Sandin v. Conner,* 515 U.S. 472, 484 (1995)).

Here, defendant Lira found plaintiff guilty of misconduct as a result of each of the three disciplinary hearings and after each hearing sentenced plaintiff to seven days of the disciplinary diet. The Second Circuit has held that the imposition of a loaf diet does not impose an atypical and significant hardship on inmates, even where the inmate alleges that the diet caused severe stomach pain and weight loss. *McEachin v. McGuinnis*, 357 F.3d 197 (2d Cir. 2004) (finding that a seven-day post-hearing restricted diet did not impose an atypical and significant hardship).

Based upon the foregoing, the Fourteenth Amendment due process claims against defendant Lira are dismissed pursuant to U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

14. Denial of Access to Medical Records

***15** Insofar as plaintiff's complaint could be liberally construed to allege a claim under the HIPAA, "Congress did not intend to create a private right of action through which individuals can enforce HIPAA's provisions." *Pecou v. Forensic Comm. Personnel*, No. 06-CV-3714, 2007 WL 1490450, at *2 (E.D.N.Y. Jan. 5, 2007) (citing *Barnes v. Glennon*, No. 9:05-CV-0153 (LEK/RFT), 2006 WL 2811821, at *5 (N.D.N.Y. Sept. 28, 2006) (The HIPAA statute does not "either explicitly or implicitly, confer to private individuals a right of enforcement."); *University of Colorado Hosp. Auth. v. Denver Publ'g Co.*, 340 F. Supp. 2d 1142, 1144 (D. Colo. 2004) (finding no evidence that Congress intended to create a private right of action under HIPAA)). Accordingly, plaintiff may not maintain a claim for the alleged denial of access to his medical records under HIPAA.

Construing the complaint liberally, plaintiff also claims that defendants Kornigsmann, Grinbergs, Lashway, Travers, Marlow, Smith, Rabideau, and Schroyer violated DOCCS regulations. A Section 1983 claim brought in federal court is not the appropriate forum to raise violations of prison regulations or state law. *See Hyman v. Holder*, No. 96 Civ. 7748, 2001 WL 262665, at *6 (S.D.N.Y. Mar. 15, 2001) (the failure to follow a New York State DOCCS Directive or prison regulation does not give rise to a federal constitutional claim); *see also Patterson v. Coughlin*, 761 F.2d 886, 891 (2d Cir. 1985) ("[A] state employee's failure to conform to state law does not itself violate the Constitution and is not alone actionable under § 1983 ...."); *Fluent v. Salamanca Indian Lease Auth.*, 847 F. Supp. 1046, 1056 (W.D.N.Y. 1994) (Section 1983 imposes liability for violations of rights protected by the Constitution and laws of the United States, not for violations arising solely out of state or common-law principles).

Thus, plaintiff's claims that defendants Kornigsmann, Grinbergs, Lashway, Travers, Marlow, Smith, Rabideau, and Schroyer violated HIPAA and DOCCS regulations are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

15. Fourteenth Amendment Equal Protection Claims

The Equal Protection Clause requires that the government treat all similarly situated people alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Specifically, the Equal Protection Clause "bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if 'such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.' " *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980)). To state a viable claim for denial of equal protection, a plaintiff generally must allege "purposeful discrimination ... directed at an identifiable or suspect class." *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995). In the alternative, under a "class of one" theory, plaintiff must allege that he has been intentionally treated differently from others similarly situated, with no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *DeMuria v. Hawkes*, 328 F.3d 704, 706 (2d Cir. 2003).

Plaintiff's allegation that defendants denied him equal protection is entirely conclusory, with no facts to support any claim that he was discriminated against, or even to suggest on what basis he was discriminated against. *See* Compl. at 74 (alleging only that defendants "intentionally discriminated against [him] and treated him differently from other similarly situated inmates... [with] no rational basis."). *See Iqbal*, 556 U.S. at 678 (noting that a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice) (internal quotations and alterations omitted).

***16** As a result, plaintiff's Equal Protection claims are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

16. Conspiracy Claims

A conspiracy claim under Section 1983 must allege that: (1) an agreement existed between two or more state actors to act in concert to inflict an unconstitutional injury on plaintiff and (2) an overt act was committed in furtherance of that goal. *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed. *Ciambriello*, 292 F.3d at 325; *see also Sommer v. Dixon,* 709 F.2d 173, 175 (2d Cir. 1983) ("A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."); *Brown v. City of Oneonta,* 106 F.3d 1125, 1133 (2d Cir. 1997) (complaints containing only conclusory, vague or general allegations of a conspiracy to deprive a person of constitutional rights do not state a claim for relief). To state a conspiracy claim, plaintiff "must provide some factual basis supporting a meeting of the minds." *See Webb v. Goord*, 340 F.3d 105, 110-11 (2d Cir. 2003). Thus, plaintiff must "make an effort to provide some details of time and place and the alleged effects of the conspiracy ... [including] facts to demonstrate that the defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Warren v. Fischl*, 33 F. Supp. 2d 171, 177 (E.D.N.Y. 1999) (citations omitted).

Here, plaintiff does not assert any facts giving rise to a conspiracy, but instead makes only vague statements that defendants somehow conspired to deny him rights. *See* Compl. at 81. There are no facts upon which it may be plausibly inferred that the defendants came to an agreement, or a "meeting of the minds," to violate his constitutional rights. *See Iqbal*, 556 U.S. at 680-81 (allegations that the defendants "willfully and maliciously agreed to subject" the plaintiff to harsh conditions of confinement "solely on account of his religion, race, and/or national origin" found conclusory); *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (finding allegations of conspiracy "baseless" where the plaintiff "offer[ed] not a single fact to corroborate her allegation of a 'meeting of the minds' among the conspirators"); *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997) (dismissal of "conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights" is proper).

Plaintiff's conspiracy claims are dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

17. Defendants R. Isobella, Nason, and Spinner

The Court notes that there are no allegations of wrongdoing against defendants R. Isobella, Nason, and Spinner in the body of the complaint. "Dismissal is appropriate where a defendant is listed in the caption, but the body of the complaint fails to indicate what the defendant did to the plaintiff." *Cipriani v. Buffardi*, No. 9:06-CV-889 (GTS/DRH), 2007 WL 607341, at *1 (N.D.N.Y. Feb. 20, 2007) (citing *Gonzalez v. City of New* York, No. 97 CIV. 2246, 1998 WL 382055, at *2 (S.D.N.Y. Jul. 9, 1998)); *see also Crown v. Wagenstein*, No. 96 CIV. 3895, 1998 WL 118169, at *1 (S.D.N.Y. Mar. 16, 1998) (mere inclusion of warden's name in complaint insufficient to allege personal involvement); *Taylor v. City of New York,* 953 F. Supp. 95, 99 (S.D.N.Y. 1997) (same).

***17** Accordingly, R. Isobella, Nason, and Spinner are dismissed as defendants to this action.

18. State Law Tort Claims

Plaintiff asserts state law tort claims. Compl. at 76-80. [10]

10 Plaintiff asserts claims for Intentional and Negligent Infliction of Emotional Distress, Assault, Battery, and False Imprisonment under New York common law. *Id.*

Section 24 of the New York State Correction Law provides in pertinent part:

> 1. No civil action shall be brought in any court of the state ... against any officer or employee of the department ... in his or her personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.
>
> 2. Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the department shall be brought and maintained in the court of claims as a claim against the state.

N.Y. Correct. Law § 24. "[T]he Second Circuit has held that the immunity from suit in state court provided to [DOCCS] employees by § 24 extends to suits for tort claims based on state law against [DOCCS] employees in federal court." *Brown v. Dep't of Corr. Servs.*, No. 09 Civ. 949, 2011 WL 2182775, at *9 (W.D.N.Y. June 2, 2011) (citing *Baker v. Coughlin*, 77 F.3d 12, 14 (2d Cir. 1996)). Nothing in the complaint suggests that the DOCCS defendants acted outside the scope of their employment in connection with state law tort claims asserted by plaintiff. *See* Compl. at 76-80. Thus, to the extent plaintiff seeks monetary damages from the DOCCS defendants in their personal capacities, plaintiff's state law tort claims are barred by N.Y. Correction Law § 24(1), and those claims are dismissed without prejudice pursuant to N.Y. Correction Law § 24(2).

Defendants Kemp, Gonzalez, and Bosco are identified by plaintiff as employees of the New York State Office of Mental Health ("OMH"). Compl. at 7-8. [11] New York State Mental Hygiene Law § 19.14 states in relevant part:

> (a) No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against an officer or employee of the office who is charged with the duty of securing the custody of a person in need of care and treatment for alcoholism in his personal capacity for damages arising out of any act done or the failure to perform any act within the scope of employment and in the discharge of official duties by such officer or employee.
>
> (b) Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of such officer or employee shall be brought and maintained in the court of claims as a claim against the state.

N.Y. Mental Hyg. Law § 19.14. Therefore, to the extent plaintiff seeks monetary damages from the OMH defendants in their personal capacities, plaintiff's state law tort claims against them are barred by Mental Hyg. Law § 19.14(a), and those claims are dismissed without prejudice pursuant to Mental Hyg. Law § 19.14(b).

11 Additionally, the Federal claims against defendants Kemp, Gonzalez, and Bosco have been dismissed

without prejudice therefore the Court would in any event decline to exercise supplemental jurisdiction over the state law claims against them.

C. Service of Process

***18** Where a plaintiff has been authorized by the Court to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, the U.S. Marshals Service is appointed to effect service of process of the summons and complaint on his behalf. *See* Fed. R. Civ. P. 4(c)(2) (U.S. Marshal must be appointed to serve process when plaintiff is authorized to proceed in forma pauperis); 28 U.S.C. § 1915(d) ("the officers of the court shall issue and serve all process and perform all duties in [in forma pauperis] cases."). However, in this case, plaintiff's IFP Application was denied pursuant to 28 U.S.C. § 1915(g). As a result, he is responsible for serving the summons and complaint on the defendants.

Rule 4(c) of the Federal Rules of Civil Procedure also provides that "[a]t the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court." Fed. R. Civ. P. 4(c)(3). Therefore, in order to advance the disposition of this action, and in light of the fact that plaintiff is incarcerated and proceeding pro se, plaintiff is advised that he may submit a motion requesting service by the United States Marshal on the following conditions. Plaintiff must (1) pay the service fee due to the U.S. Marshal in full **in advance** by money order or certified check [12] and (2) provide all necessary papers for service, including a completed U.S. Marshals Form (USM-285 Form) for each of the remaining thirty-three defendants, and thirty-three copies of the complaint. Plaintiff is directed to send the service documents and payment of the service fee to the Clerk of the United States District Court, Northern District of New York, 7th Floor, Federal Building, 100 S. Clinton St., Syracuse, New York 13261-7367, to be forwarded by the Clerk to the U.S. Marshal.

12 Payment in cash or by personal check is not acceptable. For service by mail, the fee is $8.00 per summons and complaint. The cost of service by mail on the twenty defendants in this action is $264.00. Plaintiff is also advised that, if initial service is unsuccessful, he will be required to pay the U.S. Marshal any additional fee, also in advance, for subsequent service attempts according to the fee schedule set by the U.S. Marshal.

IV. CONCLUSION

WHEREFORE, it is hereby

ORDERED that the following claims survive sua sponte review and require a response: (1) the Eighth Amendment medical indifference claims against defendants Travers, Marlow, Lashway, Waterson, Fischer, Rock, Schroyer, Kornigsmann, Grinbergs, Smith, Rabideau, Otis, Bellnier, and Uhler; (2) the Eighth Amendment excessive force claims against defendants Patterson, Marshall, Lipka, Tuper, Whitford, Greenizen, Otis, Rock, Zernia, Phillips, Grant, Dunning, Richter, and Sisto; (3) the Eighth Amendment conditions of confinement claims against defendants Williams, Bilow, Oropallo, and Greenizen; (4) the Eighth Amendment restricted diet claims against defendants Rock, Kornigsmann, Fischer, Prack, Bellnier, Schroyer, Otis, Lashway, Uhler, Travers, and Lira; and (5) the First Amendment retaliation claims against defendants Travers, Lashway, Wilson, Gokey, and Phillips; and it is further

ORDERED that all remaining claims are **DISMISSED without prejudice** pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted; and it is further [13]

13 Should plaintiff seek to pursue any of the claims dismissed without prejudice, he must file an amended complaint. Any amended complaint, which shall supersede and replace the original complaint in its entirety, must allege claims of misconduct or wrongdoing against each named defendant which plaintiff has a legal right to pursue, and over which jurisdiction may properly be exercised. Any amended complaint filed by plaintiff must also comply with the pleading requirements of Rules 8 and 10 of the Federal Rules of Civil Procedure.

***19 ORDERED** the Clerk shall issue summonses for defendants Travers, Marlow, Lashway, Waterson, Fischer, Rock, Schroyer, Kornigsmann, Grinbergs, Smith, Rabideau, Otis, Bellnier, Greenizen, Uhler, Patterson, Marshall, Lipka, Tuper, Whitford, Zernia, Grant, Dunning, Richter, Sisto, Williams, Bilow, Oropallo, Prack, Lira, Wilson, Gokey, and Phillips and forward them to plaintiff. It is plaintiff's responsibility to immediately serve the named defendants with a summons and a copy of his complaint in accordance with the Federal Rules of Civil Procedure. The Clerk shall forward a copy

of the summons and complaint by mail to the Office of the New York State Attorney General, together with a copy of this Decision and Order; and it is further

ORDERED that a response to the complaint be filed by the defendants Travers, Marlow, Lashway, Waterson, Fischer, Rock, Schroyer, Kornigsmann, Grinbergs, Smith, Rabideau, Otis, Bellnier, Greenizen, Uhler, Patterson, Marshall, Lipka, Tuper, Whitford, Zernia, Grant, Dunning, Richter, Sisto, Williams, Bilow, Oropallo, Prack, Lira, Wilson, Gokey, and Phillips, or their counsel, as provided for in the Federal Rules of Civil Procedure; and it is further

ORDERED that Bell, Bellamy, Bosco, Cromp, Evans, Forbes, Garland, Gonzalez, Hungerford, Jarvis, Kemp, Laramay, Santamore, Tabb, White, Woodward, Isobella, Nason, Quinn, and Spinner are **DISMISSED without prejudice** as defendants to this action; and it is further

ORDERED that plaintiff may submit a motion requesting service of process by the U.S. Marshal in accordance with Federal Rule of Civil Procedure 4(c)(3) **to the limited extent set forth above**. The Clerk shall send plaintiff thirty-three blank USM-285 Forms for his use should he choose to request such service. As a courtesy, the Clerk shall also send plaintiff one copy of his complaint for his use in making additional copies; [14] and it is further

14 Plaintiff may, if he so chooses, make copies of his complaint for service on double-sided paper.

ORDERED that upon receipt from the Clerk of plaintiff's payment of the service fee and the documents required for service, the U.S. Marshal shall attempt to serve the summons and complaint upon the remaining defendants in accordance with Rule 4 of the Federal Rules of Civil Procedure; and it is further

ORDERED that, if plaintiff requests service by the U.S. Marshal, he must comply with any additional requests from the U.S. Marshal for documents that are necessary to effectuate service, and must provide payment in advance to the U.S. Marshal for any subsequent service attempt if the original attempt to serve any defendant is unsuccessful; and it is further

ORDERED that all pleadings, motions and other documents relating to this action be filed with the Clerk of the United States District Court, Northern District of New York, 7th Floor, Federal Building, 100 S. Clinton St., Syracuse, New York 13261-7367. Plaintiff must comply with any requests by the Clerk's Office for any documents that are necessary to maintain this action. All parties must comply with Local Rule 7.1 of the Northern District of New York in filing motions. All motions will be decided on submitted papers without oral argument unless otherwise ordered by the Court. **Plaintiff is also required to promptly notify, in writing, the Clerk's Office and all parties or their counsel of any change in plaintiff's address; his failure to do so may result in the dismissal of this action**; and it is further

ORDERED that the Clerk serve a copy of this Decision and Order on plaintiff.

IT IS SO ORDERED.

Dated: October 20, 2016.

All Citations

Not Reported in F.Supp.3d, 2016 WL 6127510