1999 WL 983876
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United States District Court, S.D. New York.

Craig COLE, Plaintiff,
v.
Christopher P. ARTUZ, Superintendent, Green Haven Correctional Facility, R. Pflueger, A. Glemmon, Sgt. Stevens, Lt. Haubert, Capt. W.M. Watford, Capt. T. Healey, and John Doe # 1–5, all as individuals, Defendants.

No. 93 Civ. 5981(WHP) JCF.
|
Oct. 28, 1999.

Attorneys and Law Firms

Mr. Craig Cole, Bare Hill Correctional Facility, Malone, New York, Legal Mail, Plaintiff, pro se.

William Toran, Assistant Attorney General, Office of the Attorney General of the State of New York, New York, New York, for Defendant.

MEMORANDUM & ORDER

PAULEY, J.

***1** The remaining defendant in this action, Correction Officer Richard Pflueger, having moved for an order, pursuant to Fed.R.Civ.P. 56, granting him summary judgment and dismissing the amended complaint, and United States Magistrate Judge James C. Francis IV having issued a report and recommendation, dated August 20, 1999, recommending that the motion be granted, and upon review of that report and recommendation together with plaintiff's letter to this Court, dated August 28, 1999, stating that plaintiff does "not contest the dismissal of this action", it is

ORDERED that the attached report and recommendation of United States Magistrate Judge James C. Francis IV, dated August 20, 1999, is adopted in its entirety; and it is further

ORDERED that defendant Pflueger's motion for summary judgment is granted, and the amended complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

REPORT AND RECOMMENDATION

FRANCIS, Magistrate J.

The plaintiff, Craig Cole, an inmate at the Green Haven Correctional Facility, brings this action pursuant to 42 U.S.C. § 1983. Mr. Cole alleges that the defendant Richard Pflueger, a corrections officer, violated his First Amendment rights by refusing to allow him to attend religious services. The defendant now moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, I recommend that the defendant's motion be granted.

Background

During the relevant time period, Mr. Cole was an inmate in the custody the New York State Department of Correctional Services ("DOCS"), incarcerated at the Green Haven Correctional Facility. (First Amended Complaint ("Am.Compl.") ¶ 3). From June 21, 1993 to July 15, 1993, the plaintiff was in keeplock because of an altercation with prison guards. (Am.Compl.¶¶ 17–25). An inmate in keeplock is confined to his cell for twenty-three hours a day with one hour for recreation. (Affidavit of Anthony Annucci dated Dec. 1, 1994 ¶ 5). Pursuant to DOCS policy, inmates in keeplock must apply for written permission to attend regularly scheduled religious services. (Reply Affidavit of George Schneider in Further Support of Defendants' Motion for Summary Judgment dated September 9, 1996 ("Schneider Aff.") ¶ 3). Permission is granted unless prison officials determine that the inmate's presence at the service would create a threat to the safety of employees or other inmates. (Schneider Aff. ¶ 3). The standard procedure at Green Haven is for the captain's office to review all requests by inmates in keeplock to attend religious services. (Schneider Aff. ¶ 3). Written approval is provided to the inmate if authorization is granted. (Affidavit of Richard Pflueger dated April 26, 1999 ("Pflueger Aff.") ¶ 5). The inmate must then present the appropriate form to the gate officer before being released to attend the services. (Pflueger Aff. ¶ 5).

***2** On June 28, 1993, the plaintiff submitted a request to attend the Muslim services on July 2, 1993. (Request to Attend Scheduled Religious Services by Keep–Locked Inmate dated June 28, 1993 ("Request to Attend Services"),

attached as Exh. B to Schneider Aff.) On June 30, 1993, a supervisor identified as Captain Warford signed the request form, indicating that the plaintiff had received permission to attend the services. (Request to Attend Services). Shortly before 1:00 p.m. on July 2, 1993, the plaintiff requested that Officer Pflueger, who was on duty at the gate, release him so that he could proceed to the Muslim services. (Pflueger Aff. ¶ 3). However, Officer Pflueger refused because Mr. Cole had not presented the required permission form. (Pflueger Aff. ¶ 3). The plaintiff admits that it is likely that he did not receive written approval until some time thereafter. (Deposition of Craig Cole dated February 28, 1999 at 33–35, 38).

On August 25, 1993, the plaintiff filed suit alleging that prison officials had violated his procedural due process rights. On December 4, 1995, the defendants moved for summary judgment. (Notice of Defendants' Motion for Summary Judgment dated December 4, 1995). The Honorable Kimba M. Wood, U.S.D.J., granted the motion and dismissed the complaint on the grounds that the plaintiff failed to show that he had been deprived of a protected liberty interest, but she granted the plaintiff leave to amend. (Order dated April 5, 1997). On May 30, 1997, the plaintiff filed an amended complaint, alleging five claims against several officials at the Green Haven Correctional Facility. (Am.Compl.) On November 16, 1998, Judge Wood dismissed all but one of these claims because the plaintiff had failed to state a cause of action or because the statute of limitations had elapsed. (Order dated Nov. 16, 1998). The plaintiff's sole remaining claim is that Officer Pflueger violated his First Amendment rights by denying him access to religious services on July 2, 1993. The defendant now moves for summary judgment on this issue, arguing that the plaintiff has presented no evidence that his First Amendment rights were violated. In addition, Officer Pflueger contends that he is entitled to qualified immunity. (Defendants' Memorandum of Law in Support of Their Second Motion for Summary Judgment).

A. *Standard for Summary Judgment*

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Tomka v. Seiler Corp.,* 66 F.3d 1295, 1304 (2d Cir.1995); *Richardson v. Selsky,* 5 F.3d 616, 621 (2d Cir.1993). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the movant meets that burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute concerning material facts. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). In assessing the record to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Anderson,* 477 U.S. at 255; *Vann v. City of New York,* 72 F.3d 1040, 1048–49 (2d Cir.1995). But the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" and grant summary judgment where the nonmovant's evidence is conclusory, speculative, or not significantly probative. *Anderson,* 477 U.S. at 249–50 (citation omitted). "The litigant opposing summary judgment may not rest upon mere conclusory allegations or denials, but must bring forward some affirmative indication that his version of relevant events is not fanciful." *Podell v. Citicorp Diners Club, Inc.,* 112 F.3d 98, 101 (2d Cir.1997) (citation and internal quotation omitted); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (a non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"); *Goenaga v. March of Dimes Birth Defects Foundation,* 51 F.3d 14, 18 (2d Cir.1995) (nonmovant "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible") ((citations omitted)). In sum, if the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial." ' *Matsushita Electric Industrial Co.,* 475 U.S. at 587 (quoting *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288 (1968)); *Montana v. First Federal Savings & Loan Association,* 869 F.2d 100, 103 (2d Cir.1989).

***3** Where a litigant is *pro se,* his pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest." *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir.1999) (quoting *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994)). Nevertheless, proceeding *pro se* does not otherwise relieve a litigant from the usual requirements of summary judgment, and a *pro se* party's "bald assertion," unsupported by evidence, is not sufficient to overcome a motion for summary judgment. *See Carey v. Crescenzi,* 923 F.2d 18, 21 (2d Cir.1991); *Gittens v. Garlocks Sealing Technologies,* 19 F.Supp.2d 104, 110 (W.D.N.Y.1998); *Howard Johnson International, Inc. v. HBS Family, Inc.,* No. 96 Civ. 7687, 1998 WL 411334, at *3

(S.D .N.Y. July 22, 1998); *Kadosh v. TRW, Inc.,* No. 91 Civ. 5080, 1994 WL 681763, at *5 (S.D.N.Y. Dec. 5, 1994) ("the work product of *pro se* litigants should be generously and liberally construed, but [the *pro se'* s] failure to allege either specific facts or particular laws that have been violated renders this attempt to oppose defendants' motion ineffectual"); *Stinson v. Sheriff's Department,* 499 F.Supp. 259, 262 (S.D.N.Y.1980) (holding that the liberal standard accorded to *pro se* pleadings "is not without limits, and all normal rules of pleading are not absolutely suspended").

B. *Constitutional Claim*

It is well established that prisoners have a constitutional right to participate in congregate religious services even when confined in keeplock. *Salahuddin v. Coughlin,* 993 F.2d 306, 308 (2d Cir.1993); *Young v. Coughlin,* 866 F.2d 567, 570 (2d Cir1989). However, this right is not absolute. *See Benjamin v. Coughlin,* 905 F.2d 571, 574 (2d Cir.1990) (right to free exercise balanced against interests of prison officials). Prison officials can institute measures that limit the practice of religion under a "reasonableness" test that is less restrictive than that which is ordinarily applied to the alleged infringement of fundamental constitutional rights. *O'Lone v. Estate of Shaabazz,* 482 U.S. 342, 349 (1986). In *O'Lone,* the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 349 (quoting *Turner v. Safley,* 482 U.S. 78, 89 (1987)). The evaluation of what is an appropriate and reasonable penological objective is left to the discretion of the administrative officers operating the prison. *O'Lone,* 482 U.S. at 349. Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish,* 441 U.S. 520, 547 (1979).

The policy at issue here satisfies the requirement that a limitation on an inmate's access to religious services be reasonable. The practice at Green Haven was to require inmates in keeplock to present written approval to the prison gate officer before being released to attend religious services. This policy both accommodates an inmate's right to practice religion and allows prison administrators to prevent individuals posing an active threat to security from being released. The procedure is not overbroad since it does not permanently bar any inmate from attending religious services. Rather, each request is decided on a case-by-case basis by a high ranking prison official and denied only for good cause.

***4** Furthermore, in order to state a claim under § 1983, the plaintiff must demonstrate that the defendant acted with deliberate or callous indifference toward the plaintiff's fundamental rights. *See Davidson v. Cannon* 474 U.S. 344, 347–48 (1986) (plaintiff must show abusive conduct by government officials rather than mere negligence). Here, there is no evidence that the defendant was reckless or even negligent in his conduct toward the plaintiff or that he intended to violate the plaintiff's rights. Officer Pflueger's responsibility as a prison gate officer was simply to follow a previously instituted policy. His authority was limited to granting access to religious services to those inmates with the required written permission. Since Mr. Cole acknowledges that he did not present the necessary paperwork to Officer Pflueger on July 2, 1993, the defendant did nothing improper in denying him access to the religious services. Although it is unfortunate that the written approval apparently did not reach the plaintiff until after the services were over, his constitutional rights were not violated. [1]

[1] In light of this finding, there is no need to consider the defendant's qualified immunity argument.

Conclusion

For the reasons set forth above, I recommend that the defendant's motion for summary judgment be granted and judgment be entered dismissing the complaint. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this report and recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable William H. Pauley III, Room 234, 40 Foley Square, and to the Chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

All Citations

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

Charles McALLISTER also known as Charles McCallister, Plaintiff,
v.
Harold CALL, Vocational Supervisor, Mohawk Correctional Facility, Defendant.

No. 9:10–CV–610 (FJS/CFH).
|
Signed Oct. 28, 2014.
|
Filed Oct. 29, 2014.

Attorneys and Law Firms

Charles McAllister, Westbury, NY, pro se.

Hon. Eric T. Schneiderman, Office of the New York State Attorney General, The Capitol, Keith J. Starlin, AAG, of Counsel, Albany, NY, for Defendant.

ORDER

SCULLIN, Senior District Judge.

***1** Currently before the Court are Magistrate Judge Hummel's October 9, 2014 Report–Recommendation and Order, *see* Dkt. No. 81, and Plaintiffs objections thereto, *see* Dkt. No. 83.

Plaintiff, a former inmate who was, at all relevant times, in the custody of the New York Department of Corrections and Community Supervision, commenced this action pursuant to 42 U.S.C. § 1983. In his original complaint, Plaintiff asserted claims against Brian Fischer, Lucien J. LeClaire, Patricia LeConey, Carol Woughter, and John and Jane Does. Defendants moved for summary judgment. *See* Dkt. No. 49. By Report–Recommendation and Order dated July 6, 2012, Magistrate Judge Homer recommended that this Court dismiss all claims against the named individuals and direct Plaintiff to join Harold Call as a Defendant. *See* Dkt. No. 55. This Court accepted the Report and Recommendation and Order in its entirety and directed Plaintiff to file an amended complaint to "include only one cause of action a procedural due process claim in connection with his disciplinary hearing and one Defendant hearing officer Call ." *See* Dkt. No. 58 at 4–5.

Plaintiff thereafter filed his amended complaint and requested compensatory and punitive damages. *See* Dkt. No. 64, Amended Complaint at 4. In this amended complaint, Plaintiff alleged that Defendant violated his constitutional rights under the First, Eighth and Fourteenth Amendments. *See* Dkt. No. 64, Amended Complaint at ¶¶ 33, 34, 43.

On May 9, 2014, Defendant filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See* Dkt. No. 74. In a Report–Recommendation and Order dated October 9, 2014, Magistrate Judge Hummel recommended that this Court grant Defendant's motion in part and deny his motion in part. *See* Dkt. No. 81 at 33. Plaintiff filed objections to Magistrate Judge Hummel's recommendations. *See* Dkt. No. 83.

Where a party makes specific objections to portions of a magistrate judge's report and recommendation, the court conducts a *de novo* review of those recommendations. *See Trombley v. Oneill,* No. 8:11–CV–0569, 2011 WL 5881781, *2 (N.D.N.Y. Nov. 23, 2011) (citing Fed.R.Civ.P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C)). Where a party makes no objections or makes only conclusory or general objections, however, the court reviews the report and recommendation for "clear error" only. *See Salmini v. Astrue,* 3:06–CV–458, 2009 WL 1794741, *1 (N.D.N.Y. June 23, 2009) (quotation omitted). After conducting the appropriate review, a district court may decide to accept, reject, or modify those recommendations. *See Linares v. Mahunik,* No. 9:05–CV–625, 2009 WL 3165660, *10 (N.D.N.Y. Sept. 29, 2009) (quoting 28 U.S.C. § 636(b)(1)(C)).

Although Plaintiff's objections are, in most respects, general or conclusory, given his *pro se* status, the Court has conducted a *de novo* review of Magistrate Judge Hummel's Report–Recommendation and Order. Having completed its review, the Court hereby

***2 ORDERS** that Magistrate Judge Hummel's October 9, 2014 Report–Recommendation and Order is **ACCEPTED in its entirety** for the reasons stated therein; and the Court further

ORDERS that Defendant's motion for summary judgment is **GRANTED in part** and **DENIED in part;** and the Court further

ORDERS that Plaintiff's First Amendment claims, his Eighth Amendment claims, and his challenge to the constitutionality of Directive 4913 are **DISMISSED;** and the Court further

ORDERS that, to the extent that Plaintiff has asserted claims against Defendant in his official capacity, those official-capacity claims are **DISMISSED;** and the Court further

ORDERS that Defendant's motion for summary judgment is **DENIED** with respect to Plaintiff's Fourteenth Amendment due process claims and with respect to Defendant's qualified immunity defense; and the Court further

ORDERS that this matter is referred to Magistrate Judge Hummel for all further pretrial matters; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

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).

CHRISTIAN F. HUMMEL, United States Magistrate Judge.

Plaintiff *pro se* Charles McAllister ("McAllister"), a former inmate who was, at all relevant times, in the custody of the New York Department of Corrections and Community Supervision ("DOCCS"),[2] brings this action pursuant to 42 U.S.C. § 1983 alleging that defendant Harold Call ("Call"), Vocational Supervisor, Mohawk Correctional Facility ("Mohawk"), violated his constitutional rights under the First, Eighth and Fourteenth Amendments. Am. Compl. (Dkt. No. 64) ¶¶ 33, 34; 4. McAllister initially commenced this civil rights action against defendants Brian Fischer, Lucien J. LeClaire, Patricia LeConey, Carol Woughter, and John and Jane Does. Defendants moved for summary judgment. Dkt. No. 49. By report and recommendation dated July 6, 2012, (1) all claims against identified defendants were dismissed; and (2) defendant was directed to join Call, who was identified in the motion papers as a John Doe defendant. Dkt. No. 55; Dkt. No. 58. The report and recommendation was accepted in its entirety, and McAllister was directed to file an amended complaint to "include only one cause of action—a procedural due process claim in connection with his disciplinary hearing—and one Defendant—hearing officer Call." Dkt. No. 58 at 4. McAllister thereafter filed his amended complaint wherein he requested punitive and compensatory damages. Am. Compl. at 4. Presently pending is Call's motion for summary judgment on the amended complaint pursuant to Fed.R.Civ.P. 56. Dkt. No. 74. McAllister did not respond. For the following reasons, it is recommended that Call's motion be granted in part and denied in part.

[2] McAllister is no longer incarcerated and is currently under the supervision of DOCCS.

I. Failure to Respond

The Court notified McAllister of the response deadline and extended the deadline for his opposition papers on two occasions. Dkt. No. 75; Dkt. No. 77; Dkt. No. 80. Call also provided notice of the consequence of failing to respond to the motion for summary judgment in his motion papers. Dkt. No. 74–1. Despite these notices and extensions, McAllister did not respond.

***3** Summary judgment should not be entered by default against a *pro se* plaintiff who has not been given any notice that failure to respond will be deemed a default." *Champion v. Artuz,* 76 F.3d 483, 486 (2d Cir.1996). Thus, "[t]he fact that there has been no response to a summary judgment motion does not ... mean that the motion is to be granted automatically." *Id.* at 486. Even in the absence of a response, defendants are entitled to judgment only if the material facts demonstrate their entitlement to judgment as a matter of law. *Id.;* FED. R. CIV. P. 56(c). "A verified complaint is to be treated as an affidavit ... and therefore will be considered in determining whether material issues of fact exist...." *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995) (internal citations omitted); *see also Patterson v. Cnty. of Oneida, N.Y.,* 375 F.3d 206, 219 (2d Cir.2004) (same). The facts set forth in defendant's Rule 7.1 Statement of Material Facts (Dkt. No. 74–2) are accepted as true as to those facts that are not disputed in McAllister's amended complaint. N.D.N.Y.L.R. 7.1(a)(3) ("The Court shall deem admitted any properly

supported facts set forth in the Statement of Facts that the opposing party does not specifically controvert.").

II. Background

The facts are reviewed in the light most favorable to McAllister as the non-moving party. *See* subsection III(A) *infra.* At all relevant times, McAllister was an inmate at Mohawk. Am. Compl. ¶ 3.

On or about July 15, 2009, nonparty Correction Officer Femia, pursuant to authorization from nonparty Captain Dauphin, searched McAllister's personal property while McAllister was confined in a secure housing unit ("SHU"). [3] Dkt. No. 74–3, Exh. A, at 14; Am. Compl. ¶¶ 5–6. Femia confiscated approximately twenty documents from McAllister's locker, including five affidavits that were signed by other inmates. Dkt. No. 74–3, Exh. A, at 14. As a result of the search, Femia issued McAllister a Tier III misbehavior report, alleging violations of prison rules 113.15 [4] (unauthorized exchange) and 180.17 (unauthorized assistance). [5] *Id.;* Am. Compl. ¶ 7.

3 SHUs exist in all maximum and certain medium security facilities. The units "consist of single-occupancy cells grouped so as to provide separation from the general population ...." N .Y. COMP.CODES R. & REGS. tit 7, § 300.2(b) (1999). Inmates are confined in a SHU as discipline, pending resolution of misconduct charges, for administrative or security reasons, or in other circumstances as required. *Id.* at pt. 301.

4 Rule 113.15 provides that "[a]n inmate shall not purchase, sell, loan, give or exchange a personally owned article without authorization." 7 NYCRR 270.2.

5 Rule 180.17 provides that "[a]n inmate may not provide legal assistance to another inmate without prior approval of the superintendent or designee. An inmate shall not receive any form of compensation for providing legal assistance." 7 NYCRR 270.2.

McAllister was assigned as his inmate assistant nonparty Correction Officer A. Sullivan. Am. Compl. ¶ 7; Dkt. No. 74–3, Exh. A, at 11. McAllister requested five inmate witnesses, documents, prison directives 4933 and 4982, and a facility rule book. Am. Compl. ¶ 8; Dkt. No. 74–3, Exh. A, at 11. He also asked Sullivan for permission to retrieve documents from his personal property. *Id.* The requested witnesses were those inmates whose signatures were affixed to the five confiscated affidavits. Dkt. No. 74–3, Exh. A, at 14. Sullivan retrieved the requested materials, and all inmate witnesses agreed to testify. *Id.* at 11.

On or about July 21, 2009, a Tier III disciplinary hearing was held before Call, who served as the hearing officer. Am. Compl. ¶ 10. McAllister pleaded not guilty to both alleged violations. Dkt. No. 74–3, Exh. A, at 38. McAllister objected to the misbehavior report as violative of prison directive 4932 because the copy he was given (1) provided insufficient notice of the charges against him and (2) differed from the report that Call read into the record. *Id.* at 39–41. McAllister stated that his copy did not list the names of the inmates to whom the confiscated affidavits allegedly belonged. *Id.* Call acknowledged the difference between the reports but concluded that the misbehavior report informed McAllister of the charges against him and the bases for the charges. *Id.* at 39, 41–42. McAllister also argued that his copy of the misbehavior report referred to confiscation of twenty documents from his cell, but did not identify the papers that were taken. *Id.* at 42. He contended that the misbehavior report's general reference to "legal work" was insufficient to provide him with notice of the documents to which the report was referring because he had several volumes of legal work. *Id.* at 42, 59. In response to this objection, Call recited the body of the misbehavior report, which described the confiscated documents as "[a]rticles of paper which appear to be legal work including some signed affidavits" and asked McAllister, "[t]hat didn't ring a bell for you? How much paperwork did you have that fit that description?" *Id.* at 42. Call also expressed his belief that the affidavits qualified as legal work. *Id.* at 45, 57–58.

***4** McAllister next argued that he did not provide unauthorized legal assistance to another inmate in violation of rule 180.17 because the inmate affidavits were used as evidence to prove that the Division of Parole had a "practice" of "fail[ing] to respond to appeals over the last four years .... " Dkt. No. 74–3, Exh. A at 45–49, 56. These inmates were aware that their affidavits were created for, and to be used solely in support of, McAllister's case and that they were receiving no legal benefit. *Id.* at 48–49. McAllister further contended that he did not need permission from prison personnel to collect the affidavits. *Id.* at 64.

McAllister also argued that rule 113.15 is ambiguous because it does not list the specific items which, if found in an inmate's possession, would violate the rule. Dkt. No. 74–3, Exh. A, at 54. Finally, to the extent it can be determined from the hearing transcript, McAllister objected to the SHU procedures for handling his personal property. *Id.* at 70.

At the conclusion of the hearing, Call informed McAllister that he would be considering testimony from a confidential witness. Dkt. No. 73–3, Exh. A, at 13, 38, 73. McAllister objected to consideration of confidential testimony without being informed of the contents. *Id.* at 74. Finally, McAllister declined to call the inmates that he had requested as witnesses. *Id.* at 37, 71.

Call found McAllister guilty of violating prison rules 113.15 and 180.17. Dkt. No. 74–3, Exh. A, at 8–9, 76. He imposed a penalty of three months in SHU and three months loss of privileges. *Id.* at 8. Call relied upon the misbehavior report, the confidential testimony, the packet of legal work containing the other inmates' affidavits, and McAllister's testimony and statements. *Id.* at 9.

The disciplinary determination was reversed upon administrative appeal on the ground that the evidence failed to support a finding of guilt. Dkt. No. 74–3, Exh. B, at 79; Exh. C, at 81. In May 2010, McAllister commenced this action pursuant to 42 U.S.C. § 1983.

III. Discussion [6]

[6] All unpublished decisions referenced herein are appended to this report and recommendation.

McAllister argues that Call violated his rights under (1) the First Amendment, by (a) retaliating against him by finding him guilty and (b) hindering his access to the courts; (2) the Eighth Amendment, by imposing a three-month SHU assignment, plus ten additional days following reversal of the disciplinary hearing; and (3) the Fourteenth Amendment, because (a) he was given insufficient notice of the charges against him, (b) he was denied advance notice of the use of a confidential witness, (c) he was forced to spend approximately fifty-two days in SHU as a result of the misbehavior report, (d) Call failed to follow certain DOCCS directives and prison regulations, (e) Call demonstrated bias against him during the Tier III hearing and prejudged his guilt, and (f) he was denied equal protection.

A. Legal Standard

A motion for summary judgment may be granted if there is no genuine issue as to any material fact, it was supported by affidavits or other suitable evidence, and the moving party is entitled to judgment as a matter of law. The moving party has the burden to show the absence of disputed material facts by providing the court with portions of pleadings, depositions, and affidavits which support the motion. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Facts are material if they may affect the outcome of the case as determined by substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). All ambiguities are resolved and all reasonable inferences drawn in favor of the non-moving party. *Skubel v. Fuoroli,* 113 F.3d 330, 334 (2d Cir.1997).

***5** The party opposing the motion must set forth facts showing that there is a genuine issue for trial, and must do more than show that there is some doubt or speculation as to the true nature of the facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). For a court to grant a motion for summary judgment, it must be apparent that no rational finder of fact could find in favor of the non-moving party. *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219, 1223–24 (2d Cir.1994); *Graham v. Lewinski,* 848 F.2d 342, 344 (2d Cir.1988).

Where, as here, a party seeks judgment against a *pro se* litigant, a court must afford the non-movant special solicitude. *See Triestman v. Federal 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 submissions 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. (citations and footnote omitted); *see also Sealed Plaintiff v. Sealed Defendant,* 537 F.3d 185, 191–92 (2d Cir.2008).

B. Eleventh Amendment

Call argues that he is entitled to Eleventh Amendment immunity relating to McAllister's claims for money damages against him in his official capacity. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. "[D]espite the limited terms of the Eleventh Amendment, a federal court [cannot] entertain a suit brought by a citizen against his [or her] own State." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984) (citing *Hans v. Louisiana,* 134 U.S. 1, 21 (1890)). Regardless of the nature of the relief sought, in the absence of the State's consent or waiver of immunity, a suit against the State or one of its agencies or departments is proscribed by the Eleventh Amendment. *Halderman,* 465 U.S. at 100. Section 1983 claims do not abrogate the Eleventh Amendment immunity of the states. *See Quern v. Jordan,* 440 U.S. 332, 340–41 (1979).

A suit against a state official in his or her official capacity is a suit against the entity that employs the official. *Farid v. Smith,* 850 F.2d 917, 921 (2d Cir.1988) (citing *Edelman v. Jordan,* 415 U.S. 651, 663 (1974)). "Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself," rendering the latter suit for money damages barred even though asserted against the individual officer. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). Here, because McAllister seeks monetary damages against Call for acts occurring within the scope of his duties, the Eleventh Amendment bar applies.

***6** Accordingly, it is recommended that Call's motion on this ground be granted.

C. Personal Involvement

"[P]ersonal 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, supervisory officials may not be held liable merely because they held a position of authority. *Id.; Black v. Coughlin,* 76 F.3d 72, 74 (2d Cir.1996). However, supervisory personnel may be considered personally involved if:

> (1) [T]he defendant participated directly in the alleged constitutional violation;
>
> (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong;
>
> (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;
>
> (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or
>
> (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon, 58 F.3d at 873 (citing *Williams v. Smith,* 781 F.2d 319, 323–24 (2d Cir.1986)). [7] Assertions of personal involvement that are merely speculative are insufficient to establish a triable issue of fact. *See e.g., Brown v. Artus,* 647 F.Supp.2d 190, 200 (N.D.N.Y.2009).

[7] Various courts in the Second Circuit have postulated how, if at all, the Iqbal decision affected the five Colon factors which were traditionally used to determine personal involvement. *Pearce v. Estate of Longo,* 766 F.Supp.2d 367, 376 (N.D.N.Y.2011), *rev'd in part on other grounds sub nom., Pearce v. Labella,* 473 F. App'x 16 (2d Cir.2012) (recognizing that several district courts in the Second Circuit have debated Iqbal's impact on the five Colon factors); *Kleehammer v. Monroe Cnty.,* 743 F.Supp.2d 175 (W.D.N .Y.2010) (holding that "[o]nly the first and part of the third Colon categories pass Iqbal's muster ...."); *D'Olimpio v. Crisafi,* 718 F.Supp.2d 340, 347 (S.D.N.Y.2010) (disagreeing that Iqbal eliminated Colon's personal involvement standard).

As to any constitutional claims beyond those surrounding the denial of due process at the Tier III hearing, the undersigned notes that evaluation of such is unnecessary as it is outside

of the scope set forth in this Court's prior order. Dkt. No. 58 at 4. However, to the extent that Call acknowledges these claims and provides additional and alternative avenues for dismissal, McAllister fails to sufficiently allege Call's personal involvement in impeding his access to the courts, in violation of the First Amendment. McAllister argues that, as a result of Call's determination that he violated rules 113.15 and 180.17, his legal paperwork was confiscated, which impaired his ability to continue to represent himself in pending state and federal court claims. Am. Compl. ¶¶ 38–40. However, McAllister does not suggest that Call was personally involved in either the search and confiscation of paperwork that led to the filing of the misbehavior report nor the subsequent reduction in his paperwork pursuant to directive 4913. To the contrary, McAllister concedes that the paperwork was reduced pursuant to the directive.

McAllister also fails to sufficiently allege Call's personal involvement in the SHU procedures for storing property or in holding him in SHU for ten additional days following the reversal of the Tier III determination. Call stated that hr had no involvment with the storage of property in SHU. Dkt. No. 74–3, at 5. Call also contended that he "was not responsible for plaintiff's being held in SHU for additional days following the August 26, 2009 reversal of the disciplinary hearing decision of July 22, 2009." *Id.* McAllister does not allege Call's involvement in this delay. McAllister's sole reference to the ten-day delay is his claim that he "was not released from Special Housing until September 4, 2009, approximately 10 days after the reversal" Am. Compl. ¶ 43. This conclusory statement is insufficient to demonstrate Call's personal involvement in an extension of his time in SHU following the reversal of the Tier III determination. *Brown,* 647 F.Supp.2d at 200.

***7** Accordingly, it is recommended that Call's motion be granted insofar as McAllister alleges that Call: denied him access to the courts in violation of the First Amendment, was at all involved with the storage of his property while he was in SHU, and caused him to be held an additional ten days in SHU following administrative reversal of the Tier III determination.

D. First Amendment

McAllister appears to argue that, in retaliation for his filing of grievances and lawsuits, Call found him guilty of the misconduct in the Tier III hearing and imposed SHU time. He suggests that his transfer to SHU, as a result of the Tier III determination, triggered enforcement of his compliance with directive 4913, which impeded his ability to proceed with active legal matters and resulted in dismissals. Am. Compl. ¶ 41. Thus, McAllister also argues that he was denied access to the courts. Am. Compl. ¶ 38. As a preliminary matter, McAllister's First Amendment retaliation and access claims are beyond the scope of the prior order of this Court directing McAllister to limit his amended complaint "include only one cause of action—a procedural due process claim in connection with his disciplinary hearing." Dkt. No. 58, at 4. Regardless, McAllister fails to plausibly allege either retaliation or denial of access to the courts.

Courts are to "approach [First Amendment] retaliation claims by prisoners with skepticism and particular care." *See e.g., Davis v. Goord,* 320 F.3d 346, 352 (2d Cir.2003) (citing *Dawes v. Walker,* 239 F.3d 489, 491 (2d Cir.2001), *overruled on other grounds by Swierkiewicz v. Sorema, NA,* 534 U.S. 506 (2002)). A retaliation claim under section 1983 may not be conclusory and must have some basis in specific facts that are not inherently implausible on their face. *Ashcroft,* 556 U.S. at 678; *South Cherry St., LLC v. Hennessee Group LLC,* 573 F.3d 98, 110 (2d Cir.2009). To survive a motion to dismiss, a plaintiff must show "(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 and the adverse action." *Dawes v. Walker,* 239 F.3d 489, 492 (2d Cir.2001), *overruled on other grounds by Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002); *Taylor v. Fischer,* 841 F.Supp.2d 734, 737 (W.D.N.Y.2012). If the plaintiff meets this burden, the defendants must show, by a preponderance of the evidence, that they would have taken the adverse action against the plaintiff "even in the absence of the protected conduct." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). "Types of circumstantial evidence that can show a causal connection between the protected conduct and the alleged retaliation include temporal proximity, prior good discipline, finding of not guilty at the disciplinary hearing, and statements by defendants as to their motives." *See Barclay v. New York,* 477 F.Supp.2d 546, 588 (N.D.N.Y.2007).

***8** Here, McAllister baldly states that Call's disciplinary determination was imposed in retaliation for his filing of grievances and lawsuits; however, McAllister does not identify these grievances and lawsuits nor does he claim that any of these were lodged against Call. *See generally Ciaprazi v. Goord,* No. 02–CV–915, 2005 WL 3531464,

at *9 (N.D.N.Y. Dec. 22, 2005) (dismissing the plaintiff's claim of retaliation where the plaintiff could "point to no complaints lodged by him against or implicating the conduct of [the] defendant ... who issued the disputed misbehavior report."). McAllister also provides no time frame for the apparent grievance and lawsuits. Thus, it cannot be discerned whether or how these unnamed grievances and lawsuits were a "motivating factor" in Call's Tier III determination. *Doyle,* 429 U.S. at 287 (internal quotation marks and citation omitted). McAllister's unsupported, conclusory claim fails to plausibly demonstrate that Call's determination was a product of retaliatory animus.

Undoubtedly, prisoners have a constitutional right to meaningful access to the courts. *Bounds v. Smith,* 430 U.S. 817, 824 (1977); *Lewis v. Casey,* 518 U.S. 343, 350 (1996) ("The right that *Bounds* acknowledged was the (already well-established) right of access to the courts."). This right is implicated when prison officials "actively interfer[e] with inmates' attempts to prepare legal documents[ ] or file them." *Lewis,* 518 U.S. at 350 (internal citations omitted). To establish a denial of access to the courts claim, a plaintiff must satisfy two prongs. First, a plaintiff must show that the defendant acted deliberately and maliciously. *Davis v. Goord,* 320 F.3d 346, 351 (2d Cir.2003). Second, the plaintiff must demonstrate that he suffered an actual injury. *Id.; Monsky v. Moraghan,* 123 F.3d 243, 247 (2d Cir.1997) (internal citations, quotation marks, and alterations omitted) (quoting *Lewis,* 518 U.S. at 329) ("In order to establish a violation of access to courts, a plaintiff must demonstrate that a defendant caused actual injury, *i.e.,* took or was responsible for actions that hindered a plaintiff's effort to pursue a legal claim"). Thus, a plaintiff must allege that the defendant was "responsible for actions that hindered his efforts to pursue a legal claim." *Davis,* 320 F.3d at 351 (internal quotation marks omitted).

Here, there is insufficient evidence to give rise to a genuine dispute of fact regarding either element of a denial of court access claim. As noted, McAllister merely states that, as a result of the property reduction pursuant to directive 4913, his "ability to continue litigation in Federal and State court caused adverse decisions by the court and dismissals." Am. Compl. ¶ 41. This claim is insufficient to demonstrate that Call was responsible for actions that hindered his legal claims. Insofar as McAllister's claim could be read to suggest that Call denied him access to the courts by confiscating his legal documents, as noted *supra,* McAllister fails to present any plausible facts to support a finding that Call was involved in the initial search of his property or in the later reduction of his property or that it was maliciously imposed by Call. As noted, the initial cell search which led to the misbehavior report was ordered by Captain Dauphin and executed by Correction Officer Femia. Similarly, McAllister concedes that his property was reduced pursuant to directive 4913. Although McAllister suggests that his transfer to SHU as a result of the Tier III hearing triggered the application of directive 4913, he was transferred to SHU on July 9, six days before the initial cell search occurred. *Id.* ¶ 5. Thus, if McAllister were forced to comply with directive 4913 because of his transfer to SHU, he failed to demonstrate that the compliance arose from the SHU term ordered by Call rather than the unknown incident that resulted in his transfer to SHU on July 9. Further, McAllister failed to establish any actual injury because he did not specify which cases were allegedly dismissed as a result of the property reduction. *See Monsky,* 123 F.3d at 247.

***9** Accordingly, it is recommended that Call's motion for summary judgment be granted on this ground.

E. Eighth Amendment

In his amended complaint, McAllister references the Eighth Amendment. Am. Compl. ¶ 31. However, McAllister's only reference to the Eighth Amendment is his assertion that Call's use of a confidential witness violated his Eighth Amendment right to be free from cruel and unusual punishment. However, in support of this argument, McAllister states only that this right was violated when Call stated, "[s]o, um there is a lot of stuff going on through my paperwork and I want to bring it to your attention before we move on ..." *Id.* ¶ 33; Dkt. No. 74–3, at 73. When read in context, it becomes clear that Call made this statement immediately before informing McAllister of his consideration of confidential information. Dkt. No. 73–3, at 73. Although, in referencing this portion of the hearing transcript McAllister alleges that he was subject to cruel and unusual punishment, it appears that McAllister intended to assert that the use of a confidential witness was a due process violation. Even if McAllister had intended to argue that use of a confidential witness violates the prohibition of cruel and unusual punishment, such a claim would necessarily fail because the Eighth Amendment protects an inmate's right to be free from conditions of confinement that impose an excessive risk to an inmate's health or safety. *Farmer v. Brennan,* 511 U.S. 825, 834 & 837 (1994). As McAllister makes no claim that he faced conditions of confinement imposing a risk to his health or safety and instead focuses

his argument on notice of a confidential witness, giving McAllister due solicitude, his claim regarding the use of a confidential witness will be incorporated as part of the due process analysis below.

F. **Fourteenth Amendment**

1. **Due Process**

Well-settled law provides that inmates retain due process rights in prison disciplinary hearings." *Hanrahan v. Doling,* 331 F.3d 93, 97 (2d Cir.2003) (per curiam) (citing cases). However, inmates do not enjoy "the full panoply of rights" accorded to a defendant in a criminal prosecution. *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974). For a plaintiff to state a claim that he was denied due process at a disciplinary hearing, the plaintiff "must establish (1) that he possessed a liberty interest and (2) that the defendant(s) deprived him of that interest as a result of insufficient process." *Ortiz v. McBride,* 380 F.3d 649, 654 (2d Cir.2004) (per curiam) (quoting *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir.2001)). To satisfy the first prong, a plaintiff must demonstrate that the deprivation of which he complains is an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484 (1995). "A liberty interest may arise from the Constitution itself, ... or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin,* 545 U.S. 209, 221 (2005) (citations omitted).

a. **Denial of Liberty Interest**

***10** In assessing whether an inmate plaintiff was denied procedural due process, the court must first decide whether the plaintiff has a protected liberty interest in freedom from SHU confinement. *Bedoya v. Coughlin,* 91 F.3d 349, 351 (2d Cir.1996). If the plaintiff demonstrates the existence of a protected liberty interest, the court is then to determine whether the deprivation of this interest "occurred without due process of law." *Id.* at 351, citing *Kentucky Dept. of Corr. v. Thompson,* 490 U.S. 454, 460–61 (1989). Due process generally requires that a state afford an individual "some kind of hearing" prior to depriving them of a liberty or property interest. *DiBlasio v. Novello,* 344 F.3d 292, 302 (2d Cir.2003). Although not dispositive, duration of disciplinary confinement is a significant factor in determining atypicality. *Colon v. Howard,* 215 F.3d 227, 231 (2d Cir.2000); *Blackshear v. Woodward,* No. 13–CV–1165, 2014 WL 2967752 (N.D.N.Y. July 1, 2014).

McAllister suggests that his confinement in SHU for forty-two to fifty-two days is a sufficient deprivation that requires procedural protections. Freedom from SHU confinement may give rise to due process protections; however, the plaintiff must allege that the deprivation imposed "an atypical and significant hardship." *Sandin,* 515 U.S. at 484; *Gaston v. Coughlin,* 249 F.3d 156, 162 (2d Cir.2001) (concluding that SHU confinement does not give rise to due process protections where inmate failed to demonstrate atypical hardship while confined). Although the Second Circuit has cautioned that "there is no bright-line rule regarding the length or type of sanction" that meets the *Sandin* standard (*Jenkins v. Haubert,* 179 F.3d 19, 28 (2d Cir.1999)), it has made clear that confinement in SHU for a period of one year constitutes atypical and significant restraint on inmates, deserving due process protections. *See e.g. Sims v. Artuz,* 230 F.3d 14, 23 (2d Cir.2000) (holding confinement in SHU exceeding 305 days was atypical); *Sealey v. Giltner,* 197 F.3d 578, 589 (2d Cir.1999) (concluding confinement for fewer than 101 days in SHU, plus unpleasant but not atypical conditions, insufficient to raise constitutional claim). Although the Second Circuit has generally held that confinement in SHU for 101 or fewer days without additional indicia of atypical conditions generally does not confer a liberty interest (*Smart v. Goord,* 441 F.Supp.2d 631, 641 (2d Cir.2006)), it has "explicitly noted that SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical." *Palmer v. Richards,* 364 F.3d 60, 65 (2d. Cir.2004) (citing, *inter alia, Ortiz,* 323 F.3d at 195, n. 1).

The undersigned notes that it is unclear what portion of McAllister's relatively brief time in SHU is attributable to the Tier III determination, because it appears that McAllister was already in SHU when the instant disciplinary report was filed. Am. Comp. ¶ 5; Dkt. No. 74–3, Exh. A, at 14. The undersigned also notes that there is no indication that McAllister endured unusual SHU conditions. The only reference McAllister makes to his time in SHU is that, upon his transfer to SHU, several bags of his paperwork were confiscated pursuant to directive 4913. *Id.* ¶ 37. However, review of directive 4913 reveals that the personal and legal

property limit set forth in directive 4913 applies to the general prison population and inmates in other forms of segregated confinement. Dkt. No. 49–2, at 5–19. Thus, the fact that McAllister was forced to comply with directive 4913 does not indicate that he was subjected to conditions more severe than the normal SHU conditions or conditions imposed on the general prison population. Dkt. No. 74–3, Exh. A, at 14.

***11** Although the record is largely absent of detail of the conditions McAllister faced in SHU, there is also nothing in the record comparing the time McAllister was assigned and spent in disciplinary confinement with the deprivations endured by other prisoners "in the ordinary course of prison administration," which includes inmates in administrative segregation and the general prison population. *Welch v. Bartlett,* 196 F.3d 389, 394 (2d Cir.1999) (holding that, after *Sandin,* "the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration, including general population prisoners and those in various forms of administrative and protective custody"). Because "[t]he record does not reveal whether it is typical for inmates not being disciplined to spend similar periods of time in similar circumstances," Call's motion for summary judgment should be denied. *Id.* at 394 (citing *Brooks v. DiFasi,* 112 F.3d 46, 49 (2d Cir.1997)).

Accordingly, it is recommended that defendant's motion for summary judgment on this ground be denied.

b. **Procedural Due Process**

Assuming a liberty interest exists, it must be determined whether McAllister was denied due process at his Tier III hearing. Where disciplinary hearings could result in SHU confinement or loss of good time credit, "[i]nmates are entitled to advance written notice of the charges; a fair and impartial hearing officer; a reasonable opportunity to call witnesses and present documentary evidence; and a written statement of the disposition, including supporting facts and reasons for the action taken." *Luna v. Pico,* 356 F.3d 481, 487 (2d Cir.2004) (citing *Kalwasinski v. Morse,* 201 F.3d 103, 108 (2d Cir.1999)); *see also Wolff,* 418 U.S. at 556; *Sira v. Morton,* 380 F.3d 57, 59 (2d Cir.2004).

i. **Notice**

McAllister first appears to argue that he was denied procedural due process because the misbehavior report (1) violated unnamed DOCCS rules, regulations, and procedures, and (2) failed to provide him with adequate notice of the charges against him because it did not list the five inmates whose affidavits were confiscated and, thus, impacted his ability to prepare a defense to the charges. Am. Compl. ¶¶ 11–13, 16–17. Although inmates are entitled to advance written notice of the charges, "[t]his is not to suggest that the Constitution demands notice that painstakingly details all facts relevant to the date, place, and manner of charged inmate misconduct ...." *Sira,* 380 F.3d at 72 (2d Cir.2004) (citing *Wolff,* 418 U.S. at 564). "[T]here must be sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense." *Id.*

First, to the extent that McAllister's argues that the differing disciplinary reports violated unspecified DOCCS rules, regulations, and procedures (Am.Compl.¶¶ 12–13), this claim must fail. A section 1983 claim is not the "appropriate forum" in which to seek review of a violation of a prison regulation. *Rivera v. Wohlrab,* 232 F.Supp.2d 117, 123 (S.D.N.Y.2002) ("a § 1983 claim brought in federal court is not the appropriate forum to urge violations of prison regulation or state law ... the allegations asserted must constitute violations of constitutional due process standards."). Next, McAllister fails to plausibly allege the existence of a question of fact whether the difference between the misbehavior reports deprived him of the ability to identify relevant evidence so that he could prepare a defense. Although McAllister's copy of the report was missing the names of the inmates whose affidavits were confiscated, it informed McAllister of the date, time, and location of the alleged violations; the rules alleged to have been violated; and a description of the documents that were confiscated. *Johnson v. Goord,* 305 Fed. Appx. 815, 817 (2d Cir.2009) (concluding where the inmate's copy of misbehavior report included details of alleged violation and charges against him, a sentence missing from the inmate's copy of report did not violate the inmate's due process rights). It is clear that the discrepancy between the misbehavior reports did not affect McAllister's ability to prepare and present a defense. Prior to the hearing, McAllister requested as witnesses the five inmates whose affidavits were found during the property search. Indeed, the record demonstrates that McAllister was able to both identify the

documents referenced in the misbehavior report and address them at the hearing. Dkt. No. 74–3, Exh. A at 45, 47–48.

***12** Thus, because he received sufficient notice of the charges against him and was able to prepare and present a defense on his behalf, McAllister fails to raise a question of fact as to whether he was denied sufficient notice of the charges against him.

ii. **Hearing Officer Bias/Pre-determination of Guilt**

McAllister also contends that his procedural due process rights were violated because Call was biased against him and prejudged his guilt. The Fourteenth Amendment guarantees inmates the right to the appointment of an unbiased hearing officer to address a disciplinary charge. *Allen v. Cuomo,* 100 F.3d 253, 259 (2d Cir.1996). An impartial hearing officer "does not prejudge the evidence" and is not to say "how he would assess evidence he has not yet seen." *Patterson v. Coughlin,* 905 F.2d 564, 570 (2d Cir.1990); *see also Francis v. Coughlin,* 891 F.2d 43, 46 (2d Cir.1989) ("it would be improper for prison officials to decide the disposition of a case before it was heard"). However, "[i]t is well recognized that prison disciplinary hearing officers are not held to the same standard of neutrality as adjudicators in other contexts." *Russell v. Selsky,* 35 F.3d 55, 60 (2d Cir.1996). "A hearing officer may satisfy the standard of impartiality if there is 'some evidence in the record' to support the findings of the hearing." *Nelson v. Plumley,* No. 9:12–CV–422, 2014 WL 4659327, at *11 (N.D .N.Y. Sept. 17, 2014) (quoting *Allred v. Knowles,* No. 06–CV–0456, 2010 WL 3911414, at * 5 (W.D.N.Y. Oct. 5, 2010) (quoting *Waldpole v. Hill,* 472 U.S. 445, 455 (1985)). However, "the mere existence of 'some evidence' in the record to support a disciplinary determination does not resolve a prisoner's claim that he was denied due process by the presence of a biased hearing officer." *See Smith v. United States,* No. 09–CV–729, 2012 WL 4491538 at *8 (N.D.N.Y. July 5, 2012).

Prison officials serving as hearing officers "enjoy a rebuttable presumption that they are unbiased." *Allen,* 100 F.3d at 259. "Claims of a hearing officer bias are common in [inmate section] 1983 claims, and where they are based on purely conclusory allegations, they are routinely dismissed." *Washington v. Afify,* 968 F.Supp.2d 532, 541 (W.D.N.Y.2003) (citing cases). "An inmate's own subjective belief that the hearing officer was biased is insufficient to create a genuine issue of material fact." *Johnson v. Fernandez,* No. 09–CV–626 (FJS/ATB), 2011 WL 7629513, at *11 (N.D.N.Y. Mar. 1, 2011) (citing *Francis,* 891 F.2d at 46).

McAllister first argues that Call prejudged his guilt. He supports this contention by pointing to moments during the Tier III hearing where Call expressed his belief that McAllister's possession of affidavits signed by other inmates was sufficient to support a violation of prison rules 113.15 and 180.17. Am. Compl., ¶¶ 13, 15, 23–25, 36. Here, however the challenged affidavits were not evidence that Call prejudged because he had the opportunity to review the affidavits and did so at the hearing. Although McAllister disagreed with Call's opinion that possession of such documents would be a *per se* violation of the rules, Call's assertion of belief in this matter was an opinion he reached following his personal review of this evidence. *See Johnson v. Doling,* No. 05–CV–376, 2007 WL 3046701, at * 10 (N.D.N.Y. Oct. 17, 2007) (holding that where the "[p]laintiff was provided the opportunity to testify, [and] call and question witnesses .... [d]isagreement with rulings made by a hearing officer does not constitute bias"). Thus, it does not appear that Call prejudged this evidence.

***13** To support his claim that Call exhibited bias and partiality against him in the Tier III hearing, McAllister points out that, after he objected to the misbehavior report for failing to provide him sufficient notice of the documents confiscated, Call read the portion of the misbehavior report describing the documents as "[a]rticles of paper which appear to be legal work including some signed affidavits," and stated "that didn't ring a bell for you?" *Id.* ¶¶ 19, 32). When read in context, this statement does not establish bias on Call's part, rather it appears to be a genuine question. Though it may be said that Call could have couched this question in a kinder manner, this statement does not demonstrate bias. Moreover, that the Tier III determination was reversed on appeal, without more, is not evidence of bias or other due process violation. *Eng v. Therrien,* No. 04–CV–1146, 2008 WL 141794, at *2 (N.D.N.Y. Jan. 11, 2008).

Thus, McAllister fails to plausibly allege the existence of question of fact whether Call prejudged his guilt or was otherwise biased in the Tier III hearing.

iii. **Failure to Investigate**

McAllister next suggests that he was denied procedural due process because Call declined to interview the law library officer. Am. Compl. ¶ 29. Call permitted McAllister to present

testimony on his behalf and afforded him the opportunity call witnesses. Had McAllister wished to hear testimony from the law library officer, he could have requested the law library officer as a witness. *Wolff,* 418 U.S. at 566 (inmates have a right to call witnesses in their defense at disciplinary hearings). That Call found it unnecessary to independently interview the law library officer—especially where McAllister did not demonstrate that his testimony would be relevant—does not result in a denial of due process because "[t]here is no requirement ... that a hearing officer assigned to preside over a disciplinary hearing conduct an independent investigation; that is simply not the role of a hearing officer." *Robinson v. Brown,* No. 9:11–CV–0758, 2012 WL 6799725, *5 (N.D.N.Y. Nov. 1, 2012).

Accordingly, McAllister fails plausibly raise a due process violation based on Call's alleged failure to investigate.

iv. **Confidential Witness**

To the extent it can be discerned, McAllister contends that he was denied due process because Call relied on confidential witness testimony, yet failed to provide him with advance notice of the confidential witness and refused to inform him of his or her identity or the nature of the testimony. Am. Compl. ¶¶ 30–34. The Second Circuit has held that a hearing officer must perform an independent assessment of a confidential informant's credibility for such testimony to be considered reliable evidence of an inmate's guilt. *Sira,* 380 F.3d at 78 (noting that, "when sound discretion forecloses confrontation and cross-examination, the need for the hearing officer to conduct an independent assessment of informant credibility to ensure fairness to the accused inmate is heightened.").

***14** Here, the record provides no indication that Call independently assessed the credibility and reliability of the confidential witness. The confidential witness form merely states that Call "was provided confidential information relating to the misbehavior report ." Dkt. No. 74–3, at 13. Similarly, Call does not provide whether or how he performed an assessment of the witness's credibility. *Id.* at 4. Therefore, there exist questions of fact whether Call deprived McAllister of due process by relying on this testimony without an independent assessment of the witness's credibility.

To the extent that McAllister argues that he was denied due process by Call's decision to refuse to disclose the content of the confidential witness's testimony, the law in this circuit provides that where a prison official decides to keep certain witness testimony confidential, he or she "must offer a reasonable justification for their actions, if not contemporaneously, then when challenged in a court action." *Sira,* 380 F.3d at 75 (citing *Ponte v. Real,* 471 U.S. 491, 498 (1985)). Although "[c]ourts will not readily second guess the judgment of prison officials with respect to such matters ... the discretion to withhold evidence is not unreviewable...." *Id.* (citations omitted). Here, Call failed to provide his rationale for refraining to share the substance of this testimony, stating merely that McAllister could not be told the substance of the testimony because "it is by definition it is ... confidential." Dkt. No. 74–3, at 74. As Call presented no reason to justify withholding the identity or substance of the confidential witness's testimony, McAllister presents a viable due process claim based on the nondisclosure of this evidence. *Sira,* 380 F.3d at 76.

Accordingly, Call's motion for summary judgment should be denied on this ground.

v. **Some Evidence**

"Once a court has decided that the procedural due process requirements have been met, its function is to determine whether there is some evidence which supports the decision of the [hearing officer]." *Freeman v. Rideout,* 808 F.2d 949, 954 (2d Cir.1986) (citations omitted). In considering whether a disciplinary determination is supported by some evidence of guilt, "the relevant question is whether there is any evidence in the record [before the disciplinary board] that could support the conclusion reached by the disciplinary board." *Superintendent v. Hill,* 472 U.S. 445, 455–56 (1985) (citations omitted); *Sira,* 380 F.3d at 69. The Second Circuit has interpreted the "some evidence" standard to require "reliable evidence" of guilt. *Luna,* 356 F.3d at 488.

In making his determination, Call relied upon McAllister's testimony and statements, testimony of a confidential witness, the misbehavior report, and the legal documents confiscated during the property search. Dkt. No. 74–3, at 4. As noted, based on the record provided, Call did not perform an independent assessment of the witness's credibility. Thus, Call's reliance on confidential testimony would be insufficient to support a finding of guilt. *Taylor v. Rodriguez,* 238 F.3d 188, 194 (2d Cir.2001) (determining that reliance on confidential informant's testimony insufficient to provide "some evidence" of guilt where there was no independent

examination of indicia relevant to informant's credibility). The remaining evidence relied upon—McAllister's testimony, the misbehavior report, and the affidavits—does not constitute some evidence of guilt, as required by the Due Process clause.

***15** The affidavits alone do not constitute some evidence of guilt because mere possession of affidavits signed by other inmates would not violate prison rules 113.15 and 180.17 were it true that these documents were McAllister's property and drafted solely for his benefit. Similarly, although a written misbehavior report may serve as some evidence of guilt, such is the case where the misbehavior report charges the plaintiff for behavior that the author of the misbehavior report personally witnessed. *Creech v. Schoellkoph,* 688 F.Supp.2d 205, 214 (W.D.N.Y.2010) (citations omitted) (misbehavior report drafted by officer who personally observed plaintiff possess and transfer pieces of sharpened metal to another inmate constituted some evidence of guilt). In this case, where a determination of guilt would appear to turn on knowledge of the ownership of the documents and an understanding of the circumstances under which the papers were drafted, a misbehavior report which merely states that papers appearing to be legal work signed by other inmates were found in McAllister's property, it does not establish a per se violation of rules 113.15 and 180.17. *See Hayes v. Coughlin,* No. 87 CIV. 7401, 1996 WL 453071, at *3 (S.D.N.Y. Aug. 12, 1996) ("if a misbehavior report can serve as 'some evidence' for a hearing decision and thereby insulate a hearing from review, there would be little point in having a hearing"); *see also Williams v. Dubray,* No. 09–CV–1298, 2011 WL 3236681, at *4 (N.D.N.Y. July 13, 2011) (holding that there were questions of fact whether the determination was based upon some evidence of guilt where the hearing officer relied on misbehavior report that was based on a corrections officer's unsupported accounts, without additional evidence to support its charges). Thus, absent additional evidence that these papers belonged to other inmates or that McAllister drafted the documents for other inmates' use, the fact that the misbehavior report identified these documents as being found in McAllister's secured property does not constitute reliable evidence of guilt.

Finally, McAllister's testimony does not constitute reliable evidence of guilt. In response to the charge of violating rule 113.15, McAllister testified that the affidavits were his property because he drafted them solely as evidence in his personal litigation against the Department of Probation. Similarly, in defense of the charge for violating rule 180.17, McAllister repeatedly testified that he did not provide legal assistance to the inmates in question because the affidavits were written solely to serve as supporting evidence in his personal action, the inmates were aware that they would receive no legal benefit as a result, and he did not receive any compensation from the inmates. Regardless whether Call considered McAllister's testimony to be credible, without some other reliable evidence, such as, perhaps, a statement from one of the other inmates claiming that he signed the affidavit under the belief that McAllister would provide him with legal assistance, McAllister's testimony denying violations of the charged prison rules would not constitute some evidence of guilt.

***16** Accordingly, it is recommended that Call's motion for summary judgment be denied as to McAllister's procedural due process claim.

c. **Directive 4913**

McAllister further argues that, as a result of the SHU placement, he suffered an unconstitutional deprivation of his legal and personal property because he was required to comply with the limits set forth in directive 4913. This Court has already ruled upon this claim when it was raised at earlier stages. In deciding Call's motion for summary judgment on the McAllister's first complaint, this Court held that the directive did not violate his Fourteenth Amendment rights:

> Directive # 4913 was reasonably related to valid institutional goals given DOCCS' responsibility to provide for the health and safety of its staff and inmates and the alternatives provided to inmates in being able to seek exceptions and choose which four or five draft bags of material would remain with them. Moreover, the rules were neutral and reasonably related to the ultimate goals of the facility, security and safety.

McAllister v. Fischer, 2012 WL 7681635, at *12 (N.D.N.Y. July 6, 2012) (Dkt. No. 55, at 22–23), *Report and Recommendation adopted by* 2013 WL 954961 (N.D.N.Y. Mar. 12, 2013) (Dkt. No. 58), *appeal dismissed* 2d Cir. 13–

111 (Jan. 13.2014). Further, the Court concluded that directive 4913 "did not violate[ ] McAllister's Fourteen Amendment rights" and was "reasonably related to valid institutional goals." Dkt. No. 55, at 23–24; Dkt. No. 58. Thus, any such claim is barred by the law of the case. *Arizona v. California,* 460 U.S. 605, 618 (1983) (citations omitted); *see also United States v. Thorn,* 446 F.3d 378, 383 (2d Cir.2006) (internal quotation marks and citations omitted) ("The law of the case doctrine counsels against revisiting our prior rulings in subsequent stages of the same case absent cogent and compelling reasons ...."); *Arizona,* 460 U.S. at 618 (citations omitted); *Wright v. Cayan,* 817 F.2d 999, 1002 n. 3 (2d Cir.1987) (citations omitted) ("Even when cases are reassigned to a different judge, the law of the case dictates a general practice of refusing to reopen what has been decided.").

Accordingly, it is recommended that defendant's motion for summary judgment be granted on this ground.

2. **Equal Protection**

McAllister's only reference to an equal protection violation in the amended complaint is his conclusory claim that Call's reference to a confidential witness during the Tier III hearing was in violation of his right to equal protection. Am. Compl. ¶ 31. Further, in this Court's previous order, McAllister's equal protection claim was dismissed for failure to demonstrate, among other things, that he was part of a protected class or that he was treated differently from any similarly-situated inmates. Dkt. No. 58, at 4; Dkt. No. 55, at 24–25. Thus, any such claim would also be barred by the law of the case. *Thorn,* 446 F.3d at 383. Regardless, McAllister's equal protection claim must also fail for the reasons discussed *infra.*

***17** To establish an equal protection violation, a plaintiff must show that "he was treated differently than others similarly situated as the result of intentional or purposeful discrimination." *Phillips v. Girdich,* 408 F.3d 124, 129 (2d Cir.2005). McAllister has not identified, nor does the record disclose, any basis for a reasonable fact-finder to conclude that he was treated differently from similarly-situated individuals. Rather, plaintiffs only support for his equal protection claim is the following:

> Call, throughout the entire disciplinary hearing deprive [sic] plaintiff equal protection when he stated: "This is hearing officer Call, this is 2:21 as I was going through my paperwork I realized something that I wanted to point out to Mr. McAllister."
>
> Defendant Call discriminated against plaintiff when he stated: "I reviewed it this morning the 22nd when it was received again is confidential"

Am. Compl. ¶¶ 31–32. McAllister does not explain how these statements denied him equal protection. McAllister fails to plausibly suggest that he was treated differently from any similarly-situated individuals. Further, even if these statements demonstrate the existence of questions of fact regarding whether McAllister was treated differently from similarly-situated persons, he fails to identify disparity in the conditions "as a result of any purposeful discrimination directed at an identifiable suspect class." *See Dolberry v. Jakob,* No. 11–CV–1018, 2014 WL 1292225, at *12 (N.D.N.Y. Mar. 28, 2014).

Accordingly, it is recommended that defendant's motion on this ground should be granted.

G. **Qualified Immunity**

Call contends that, even if McAllister's claims are substantiated, he is entitled to qualified immunity. The doctrine of qualified immunity is an affirmative defense which "shield[s] an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan,* 555 U.S. 223, 244 (2009). Even if a disciplinary disposition is not supported by "some evidence," prison officials are entitled to qualified immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Luna,* 356 F.3d at 490 (quoting *Wilson v. Layne,* 526 U.S. 603, 614 (1999)) (internal quotation marks omitted). This assessment is made "in light of the legal rules that were clearly established at the time it was taken." *Wilson,* 526 U.S. at 614; *Kaminsky v. Rosenblum,* 929 F.2d 922, 925 (2d Cir.1991). To determine whether a state official is entitled to qualified immunity for acts taken during the course of his or her employment, a reviewing court is to determine: "(1) whether plaintiff has shown facts making out violation of a constitutional right; (2) if so, whether that right was clearly established; and (3) even if the right was clearly established, whether it was objectively reasonable for the [official] to believe the conduct at issue was lawful." *Phillips v. Wright,* 553 Fed. Appx. 16, 17 (2d Cir.2014) (citing *Gonzalez v. City of Schenectady,* 728 F.3d 149, 154 (2d Cir.2013)).

***18** First, as discussed, McAllister presented a viable due process claim that the determination was not based on some evidence of guilt because Call (1) relied on confidential witness testimony without making an independent assessment of the witness's credibility and (2) did not otherwise have sufficient reliable evidence to support his finding of guilt. McAllister has also raised issues of fact whether the remaining evidence relied upon—the misbehavior report, McAllister's testimony and statements, and the confiscated legal papers—provided reliable evidence of guilt.

Addressing the second prong of the analysis, there is a clearly-established right to procedural due process protections, including the right to have a disciplinary determination be based on some evidence of guilt. There is also a clearly-established right to an independent assessment of confidential witnesses performed where a hearing officer relies on the witness's testimony (*Vasquez v. Coughlin,* 726 F.Supp. 466, 472 (S.D.N.Y.1989) (right clearly established by 1986); see also *Sira,* 380 F.3d at 80). Further, although there is no bright-line for what suffices as "some evidence" in every prison disciplinary proceeding (*Woodard v. Shanley,* 505 Fed. Appdx. 55, 57 (2d Cir.2012)), there were questions of fact surrounding the allegedly reliable evidence demonstrating that McAllister was in possession of other inmates' legal documents or that he provided them with unauthorized legal assistance. *Cf. Turner v. Silver,* 104 F.3d 354, at *3 (2d Cir.1996) (some evidence to support determination that the defendant violated rule against unauthorized legal assistance where documentary evidence indicated the plaintiff received payment from other inmates, author of misbehavior report testified regarding an interview with informant who implicated defendant, prison official testified that inmate told her he had been charged for law library services and inmate testified the same). Call both failed to perform an independent assessment of the confidential witness's credibility and provided no explanation for why both the identity of the witness and the substance of his or her testimony could not be disclosed to McAllister. *Sira,* 380 F.3d at 75 (citing *Ponte,* 471 U.S. at 498).

Thus, given the state of the law regarding the rights to which an inmate is entitled in his disciplinary hearing, it was not objectively reasonable for Call to have believed that (1) he need not perform an independent assessment of the witness credibility or (2) the misbehavior report, confiscated affidavits, and McAllister's consistent testimony and statements, without more, sufficiently supported a determination that McAllister violated rules 113.15 and 180.17.

Accordingly, defendant's motion for summary judgment should be denied on this ground.

IV. **Conclusion**

For the reasons stated above, it is hereby **RECOMMENDED** that defendant's motion for summary judgment (Dkt. No. 74) be

***19** 1. **GRANTED** insofar as:

a. dismissing plaintiff's First Amendment claims;

b. dismissing plaintiff's Eighth Amendment claims;

c. dismissing plaintiff's challenge to the constitutionality of Directive 4913;

d. defendant's Eleventh Amendment immunity defense;

2. **DENIED** as to:

a. plaintiff's Fourteenth Amendment procedural due process claims;

b. defendant's qualified immunity defense.

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, 89 (2d Cir.1993); *Small v. Sec'v of HHS,* 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

Dated: October 9, 2014.

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

David DOUGLAS, Sr., Plaintiff,
v.
PERRARA, Corrr. Officer, Great Meadow C.F.; Lawrence, Corr. Officer, Great Meadow C.F.; Whittier, Corr. Officer, Great Meadow C.F.; Mulligan, Corr. Officer, Great Meadow C.F.; Deluca, Corr. Sergeant, Great Meadow C.F.; and Russel, Deputy Superintendent, Great Meadow C.F, Defendants.

No. 9:11–CV–1353 (GTS/RFT).
|
Sept. 27, 2013.

Attorneys and Law Firms

David Douglas, Sr., Liverpool, NY, pro se.

Hon. Eric T. Schneiderman, Attorney General for the State of New York, Colleen D. Galligan, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

DECISION and ORDER

GLENN T. SUDDABY, District Judge.

***1** Currently before the Court, in this *pro se* civil rights action filed by David Douglas, Sr., ("Plaintiff") against the six above-captioned New York State correctional employees, are the following: (1) Defendants' motion for partial summary judgment (requesting the dismissal of Plaintiff's claims against Defendant Russell, and his claims against the remaining Defendants in their official capacities); and (2) United States Magistrate Judge Randolph F. Treece's Report–Recommendation recommending that Defendants' motion be granted. (Dkt.Nos.70, 80.) Neither party filed an objection to the Report–Recommendation, and the deadline by which to do so has expired. (*See generally* Docket Sheet.) After carefully reviewing the relevant filings in this action, the Court can find no clear error in the Report–Recommendation: Magistrate Judge Treece employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. As a result, the Court accepts and adopts the Report–Recommendation for the reasons stated therein. (Dkt. No. 80.)

ACCORDINGLY, it is

ORDERED that Magistrate Judge Treece's Report–Recommendation (Dkt. No. 80) is ***ACCEPTED*** and ***ADOPTED*** in its entirety; and it is further

ORDERED that Defendants' motion for partial summary judgment (Dkt. No. 70) is ***GRANTED;*** and it is further

ORDERED that the following claims are ***DISMISSED*** from this action: (a) all claims asserted against Defendant Russell, and (b) all claims asserted against Defendants in their official capacities only. The Clerk is directed to terminate Defendant Russell from this action; and it is further

ORDERED that the following claims ***REMAIN PENDING*** in this action: (a) Plaintiff's claim that Defendants Whittier, Mulligan, Perrara and/or Lawrence subjected him to inadequate prison conditions by depriving him of meals for approximately five consecutive days in December 2009, in violation of the Eighth Amendment; (b) Plaintiff's claim that Defendants Whittier, Mulligan, Perrara and Lawrence used excessive force against him, and that Defendant Deluca failed to protect him from the use of that excessive force, in violation of the Eighth Amendment and New York State common law; and (c) Plaintiff's claim that Defendant Deluca was deliberately indifferent to Plaintiff's serious medical needs (following the assaults) in violation of the Eighth Amendment; and it is further

ORDERED that Pro Bono Counsel be appointed for the Plaintiff for purposes of trial only; any appeal shall remain the responsibility of the plaintiff alone unless a motion for appointment of counsel for an appeal is granted; and it is further

ORDERED that upon assignment of Pro Bono Counsel, a final pretrial conference with counsel will be scheduled in this action before the undersigned, at which time the Court will schedule a jury trial for Plaintiff's remaining claims as set forth above against Defendants Whittier, Mulligan, Perrara, Lawrence and DeLuca. Counsel are directed to appear at the final pretrial conference with settlement authority from the parties.

REPORT–RECOMMENDATION and ORDER

RANDOLPH F. TREECE, United States Magistrate Judge.

***2** *Pro se* Plaintiff David Douglas brought a civil rights Complaint, pursuant to 42 U.S.C. § 1983, asserting that Defendants violated his constitutional rights while he was in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") and housed in the Great Meadow Correctional Facility. Specifically, Plaintiff alleges that in early December 2009, he wrote a letter to Defendant Eileen Russell [1] complaining that he had been denied meals for several days. *See* Dkt. No. 1, Compl. at ¶¶ 8, 64, & 66. Plaintiff further alleges that the remaining Defendants violated his constitutional rights when they used excessive force against him on several occasions and denied him medical care in order to treat the injuries he sustained therewith. *See generally id.* And, according to Plaintiff, Defendant Russell's failure to take disciplinary action against these individuals and curtail their "known pattern of physical abuse of inmates" renders her liable for violating his constitutional rights. *Id.* at ¶ 66.

1 Although Plaintiff spells this Defendant's name as "Russel," it is clear from Defendants' submissions that the correct spelling of this individual's name is "Russell" and the Court will refer to her accordingly. Compl. at ¶ 8; Dkt. Nos. 10 & 70–3.

Presently pending is Defendants' Motion for Partial Summary Judgment whereby they seek dismissal of Defendant Russell from this action as well as dismissal of all claims against the remaining Defendants in their official capacities. Dkt. No. 70. A response to that Motion was due on February 22, 2013. To date, the Court has not received a response from Plaintiff.

I. DISCUSSION

A. Standard of Review

Pursuant to FED. R. CIV. P. 56(a), summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the burden to demonstrate through "pleadings, depositions, answers to interrogatories, and admissions on file, together with [ ] affidavits, if any," that there is no genuine issue of material fact. *F.D.I. C. v. Giammettei,* 34 F.3d 51, 54 (2d Cir.1994) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). "When a party has moved for summary judgment on the basis of asserted facts supported as required by [Federal Rule of Civil Procedure 56(e)] and has, in accordance with local court rules, served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party." *Glazer v. Formica Corp.,* 964 F.2d 149, 154 (2d Cir.1992).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. FED. R. CIV. P. 56(c); *see also Scott v. Coughlin,* 344 F.3d 282, 287 (2d Cir.2003) ("Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case."); *Rexnord Holdings, Inc. v. Bidermann,* 21 F.3d 522, 525–26 (2d Cir.1994). To that end, sworn statements are "more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion" and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin,* 344 F.3d at 289 (citing *Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983) and *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995)).

***3** When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages, Inc. v. Perrier Group of Am., Inc.,* 164 F.3d 736, 742 (2d Cir.1998). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. P'ship,* 22 F.3d 1219, 1224 (2d Cir.1994). Furthermore, where a party is proceeding *pro se,* the court must "read [his or her] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994), *accord, Soto v. Walker,* 44 F.3d 169, 173 (2d Cir.1995). Nonetheless, mere conclusory allegations, unsupported by the record, are insufficient to defeat a motion for summary judgment. *See Carey v. Crescenzi,* 923 F.2d 18, 21 (2d Cir.1991). Summary judgment is appropriate "[w]here

the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Pursuant to the Local Rules of Practice for the Northern District of New York, "[w]here a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file to serve any papers ... shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown." N.D.N.Y.L.R. 7.1(b)(3). "The fact that there has been no response to a summary judgment motion does not, of course, mean that the motion is to be granted automatically." *Champion v. Artuz,* 76 F.3d 483, 486 (2d Cir.1996). Even in the absence of a response, Defendants are entitled to summary judgment only if the material facts demonstrate their entitlement to judgment as a matter of law. *Id.;* FED. R. CIV. P. 56(c). Because Plaintiff has failed to raise any question of material fact, the Court will accept the facts as set forth in Defendants' Statement Pursuant to Rule 7.1(a)(3) (Dkt. No. 70–2), supplemented by Plaintiffs' verified Complaint (Dkt. No. 1), as true. *See Lopez v. Reynolds,* 998 F.Supp. 252, 256 (W.D.N.Y.1997).

B. Personal Involvement

As noted above, Plaintiff brings this civil rights action for alleged violations of his constitutional rights during his incarceration in December 2009 at Great Meadow Correctional Facility. Plaintiff claims that in early December 2009, he was subjected to threats and harassment by other inmates and correctional officers. Compl. at ¶ 1. Plaintiff alleges that beginning on December 11, 2009, he was denied several meals for several consecutive days by unnamed individuals, prompting him to file grievances and write two letters to Defendant Russell. *Id.* at ¶¶ 2–8.[2] Thereafter, on December 16, 2009, Plaintiff's meals were delivered to him and, on the following date, he was moved to protective custody. *Id.* at ¶¶ 9–10. The remainder of Plaintiff's Complaint describes a series of events wherein the remaining Defendants are accused of using excessive physical force against him and denying him medical attention.

2 Plaintiff alleges that in addition to filing several grievances he submitted sick call requests and sent letters to the Inspector General, all explaining how his Eighth Amendment rights were being violated. Compl. at ¶¶ 5–8.

***4** With regard to the pending, unopposed Motion, the Court notes that there is a paucity of factual allegations contained in the Complaint concerning Defendant Russell. In fact, the only factual allegation that this Court can point to is that Plaintiff wrote two letters to Defendant Russell complaining about being denied meals. Defendant Russell is not named nor referenced throughout the remainder of the Complaint. Nevertheless, in the section of the Complaint where Plaintiff lists his causes of action, he seemingly seeks to hold Defendant Russell liable for her alleged failure to intervene and take disciplinary action against the Defendants in order to curb their known pattern of physical abuse against inmates. *Id.* at ¶¶ 64 & 66.

According to Defendants' uncontroverted submissions, Defendant Eileen Russell is employed by DOCCS and worked at Great Meadow in 2006 as the Assistant Deputy Superintendent for Special Housing assigned to the Behavioral Health Unit. Dkt. No. 70–3, Eileen Russell Decl., dated Feb. 4, 2013, at ¶¶ 1, 3, & 4. During her tenure in that position, Plaintiff neither worked nor was housed as a patient in the Behavioral Health Unit. Russell Decl. at ¶ 11. Russell did not have any responsibilities related to delivery of meals to inmates nor does she have any recollection of speaking with Plaintiff or seeing any correspondence from him. *Id.* at ¶ 13. Furthermore, at no time was she made aware of any assault against Plaintiff by any DOCCS employee. *Id.* at ¶ 15.

The Second Circuit has held 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) (citations omitted). Moreover, "the doctrine of *respondeat superior* cannot be applied to section 1983 actions to satisfy the prerequisite of personal involvement." *Kinch v. Artuz,* 1997 WL 576038, at *2 (S.D.N.Y. Sept. 15, 1997) (citing *Colon v. Coughlin,* 58 F.3d 865, 874 (2d Cir.1995) & *Wright v. Smith,* 21 F.3d at 501) (further citations omitted)). Thus, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the constitution." *Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009).

It appears that Plaintiff seeks to hold Defendant Russell liable due to her employment as a supervisor at Great Meadow. The Second Circuit has stated that a supervisory defendant may have been personally involved in a constitutional deprivation within the meaning of § 1983 if she: (1) directly participated

in the alleged infraction; (2) after learning of the violation, failed to remedy the wrong; (3) created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; (4) was grossly negligent in managing subordinates who caused the unlawful condition or event; or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. [3] *Colon v. Coughlin,* 58 F.3d at 873 (citations omitted); *Williams v. Smith,* 781 F.2d 319, 323–24 (2d Cir.1986) (citations omitted).

[3] The Second Circuit has yet to address the impact of *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), upon the categories of supervisory liability under *Colon v. Coughlin,* 58 F.3d 865 (2d Cir.1995). *See Grullon v. City of NewHaven,* 720 F.3d 133 (2d Cir.2013) (noting that the Court's decision in *Iqbal* "may have heightened the requirements for showing a supervisor's personal involvement," but declining to resolve the issue). Lower courts have struggled with this issue, specifically whether *Iqbal* effectively calls into question certain prongs of the *Colon* five-part test for supervisory liability. *See, e.g., Sash v. United States,* 674 F.Supp.2d 531, 543 (S.D.N.Y.2009). While some courts have taken the position that only the first and third of the five *Colon* categories remain viable and can support a finding of supervisory liability, *see, e.g., Bellamy v. Mount Vernon Hosp.,* 2009 WL1835939, at *6 (S.D.N.Y. June 26, 2009), *aff'd,* 387 F. App'x 55 (2d Cir.2010), others disagree and conclude that whether any of the five categories apply in any particular cases depends upon the particular violations alleged and the supervisor's participatory role, *see, e.g., D'Olimpio v. Crisafi,* 718 F.Supp.2d 340, 347 (S.D.N.Y.2010). Nevertheless, this Court, until instructed to the contrary, continues to apply the entirety of the five-factor *Colon* test.

***5** Here, the evidence shows that Defendant Russell did not directly participate in any constitutional wrongdoing, she was not aware that Plaintiff had been experiencing any problems with other inmates and staff, in her assignment to the Behavioral Health Unit she did not come into contact with the Plaintiff, and, she was not responsible for creating policies or customs nor for rectifying any of the alleged constitutional infirmities Plaintiff is alleged to have been subjected to. Because Plaintiff failed to respond to Defendants' Motion, he has not created any material issue of fact regarding Russell's non-involvement in any constitutional wrongdoing. Thus, based upon the record before the Court, we find that Defendant Russell was not personally involved in any wrongdoing and should be **dismissed** from this action. *See Wright v. Smith,* 21 F.3d at 501 (defendant may not be held liable simply because he holds a high position of authority).

C. Eleventh Amendment

By their Motion, Defendants seek dismissal of claims brought against them in their official capacities. Dkt. No. 70. In making this request, the Defendants note that during the pendency of this action, Plaintiff was released from DOCCS's custody, thereby rendering moot any request he has made for injunctive relief. Dkt. No. 70–4, Defs.' Mem. of Law, at pp. 7–8. After reviewing the Complaint, the Court notes that Plaintiff primarily seeks monetary compensation for both compensatory and punitive damages. *See* Compl. at Relief Requested. In addition, he seeks a declaratory judgment that his rights have been violated, but does not seek other injunctive relief. *Id.*

The Eleventh Amendment states, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although by its terms, the amendment bars suit by citizens of one state against another state, the Supreme Court has held that such amendment similarly bars suits against a state by its own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). "The Eleventh Amendment thus 'affirm[s] that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.' " *Richardson v. New York State Dep't of Corr. Servs.,* 180 F.3d 426, 447–48 (2d Cir.1999) (citing *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984)). Thus, sovereign immunity provided for in the Eleventh Amendment prohibits suits against the state, including a state agency in federal court. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. at 98–101; *Severino v. Negron,* 996 F.2d 1439, 1441 (2d Cir.1993); *Daisernia v. State of New York,* 582 F.Supp. 792, 796 (N.D.N.Y.1984). To the extent a state official is sued for damages in his or her official capacity, "such a suit is deemed to be a suit against the state, and the official is entitled to invoke the eleventh amendment immunity belonging to the state." *Rourke v. New York State Dep't. of Corr. Servs.,* 915 F.Supp. 525, 539 (N.D.N.Y.1995)

(citing *Berman Enters., Inc. v. Jorling,* 3 F.3d 602, 606 (2d Cir.), *cert. denied,* 510 U.S. 1073 (1994); *Ying Jing Gan v. City of New York,* 996 F.2d 522, 529 (2d Cir.1993)); *see also Mathie v. Fries,* 121 F.3d 808, 818 (2d Cir.1997) ("A claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer ....").

***6** However, whether state officials sued in their official capacities are entitled to Eleventh Amendment immunity depends also upon the relief sought in the complaint. The Second Circuit has held that in accordance with *Ex parte Young,* 209 U.S. 123 (1908), "acts of state officials that violate federal constitutional rights are deemed not to be acts of the state and may be subject of injunctive or declaratory relief in federal court." *Berman Enters., Inc. v. Jorling,* 3 F.3d at 606 (citations omitted); *see also Rourke v. New York State Dep't of Corr. Servs.,* 915 F.Supp. at 540. While much of the relief sought herein is compensatory and punitive monetary relief, to the extent Plaintiff seeks some form of declaratory relief, such claims against the Defendants in their official capacities could go forward insofar as the Plaintiff seeks prospective relief. However, in light of his release from DOCCS's custody, the Court finds that any request for prospective injunctive relief is moot and the claims against the remaining Defendants in their official capacities should be **dismissed.** *Khalil v. Laird,* 353 F. App'x 620 (2d Cir.2009) (citing *Muhammad v. City of New York Dep't of Corr.,* 126 F.3d 119, 123 (2d Cir.1997)).

II. CONCLUSION

For the reasons stated herein, it is hereby

RECOMMENDED, that Defendants' Motion for Partial Summary Judgment (Dkt. No. 70) be **GRANTED** and all claims against Defendant Russell be **DISMISSED** and claims against the remaining Defendants in their official capacities be **DISMISSED;** and it is further

RECOMMENDED, that if the above recommendations are accepted, this case be set down for a final pre-trial conference with the parties to assess whether this matter is trial ready; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report–Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.*** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs .,* 892 F.2d 15 (2d Cir.1989)); *see also* 28 U.S.C. § 636(b) (1); FED. R. CIV. P. 72 & 6(a).

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

Kah'sun Creator ALLAH, Plaintiff,
v.
Tim KEMP, Office of Mental Health Unit Chief, Upstate Correctional Facility; Wayne Crosier, Mental Health Social Worker, Upstate Correctional Facility, Defendants.

No. 9:08-CV-1008 (NAM/GHL).
|
Feb. 25, 2010.

Attorneys and Law Firms

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Hon. Andrew M. Cuomo, Attorney General for the State of New York, Charles J. Quackenbush, Esq., of Counsel, Albany, NY, Counsel for Defendants.

REPORT-RECOMMENDATION and ORDER

GEORGE H. LOWE, United States Magistrate Judge.

***1** This *pro se* prisoner civil rights action, commenced pursuant to 42 U.S.C. § 1983, has been referred to me for Report and Recommendation by the Honorable Norman A. Mordue, Chief United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c).

Currently pending before the Court is Defendants' Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). [1] Dkt. No. 14. Plaintiff opposes the motion. Dkt. No. 29. [2]

[1] Defendants filed their Answer on November 17, 2008 and a Mandatory Pretrial Discovery and Scheduling Order was issued. Dkt. Nos. 10, 11. Defendants deposed plaintiff on April 6, 2009 and filed the transcript in support of their Motion for Sanctions arising out of plaintiff's refusal to answer questions regarding his criminal record and prison disciplinary history. *See* Dkt. No. 24. The deposition transcript is not part of the record before this Court on Defendants' Motion for Judgment on the Pleadings.

[2] Plaintiff's opposition papers include excerpts from his mental health records. Dkt. No. 29. Defendants advised in reply that they have no objection to the Court's consideration of these records. Dkt. No. 30 at 1. Defendants object, however, to Plaintiff's request that this motion be converted to a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Id.* As discussed, *infra,* Plaintiff's submissions may be properly considered in addressing Defendants' Motion for Judgment on the Pleadings, and the Court therefore, in the exercise of its discretion, declines to convert the motion to one seeking summary judgment. *See Avgerinos v. Palmyra-Macedon Central School Dist.,* 08-CV-6572, 2010 U.S. Dist. LEXIS 11988, 2010 WL 547173, at *3 (W.D.N.Y. Feb.11, 2010) (federal courts have complete discretion in determining whether to convert a motion to dismiss to one for summary judgment).

The Court will provide Plaintiff with a copy of each unpublished decision in accordance with the Second Circuit's decision in *LeBron v. Sanders,* 557 F.3d 76 (2d Cir.2009).

For the reasons that follow, I recommend that Defendants' Motion for Judgment on the Pleadings be denied.

I. BACKGROUND

Plaintiff Kah'Sun Creator Allah alleges in his Complaint that his Eighth Amendment rights were violated during his confinement at Upstate Correctional Facility ("Upstate") during the period July, 2006 through March, 2007. Dkt. No. 1.

Plaintiff arrived at Upstate on July 24, 2006, three days after he was observed at Downstate Correctional Facility ("Downstate") "putting a noose around his neck attempting suicide" and confined on "suicide watch". Dkt. No. 1 ¶ 9. Plaintiff states that mental health providers at Downstate told him that he had been assigned to the mental health case load and would be seen by mental health staff at Upstate immediately upon his arrival. *Id.* ¶¶ 12-13.

Plaintiff's Downstate providers "recommended continued clinical support and individual therapy." *Id.* ¶ 13; Dkt. No. 29 Exs. A-C.

According to Plaintiff, upon his arrival at Upstate, Defendant Tim Kemp, Mental Health Unit Chief, "never seen to it that plaintiff be seen by his mental health staff." Dkt. No. 1 ¶ 15.

On January 23, 2007, Plaintiff "again attempted suicide by tying a noose around his neck and tying it to shower dead [sic] ... ." *Id.* ¶ 16. Plaintiff's cell-mate intervened and summoned assistance. *Id.* Plaintiff told Defendant Wayne Crosier, Mental Health Social Worker, that "he couldn't take it any more and had nothing to live for and didn't want to live no more." *Id.* ¶ 18. Plaintiff was moved to an observation cell and put on suicide watch. *Id.* ¶ 19. During this time, Plaintiff refused seven meals and was uncommunicative "due to his depression." *Id.* ¶¶ 20, 21. Plaintiff claims that Defendants did not provide for his evaluation by a psychiatrist nor did they otherwise provide him with mental health treatment. *Id.* ¶ 23.

Plaintiff was released from observation on January 25, 2007. *Id.* ¶ 21. Plaintiff was returned to his cell without provision for ongoing mental health care. *Id.* ¶ 23. Plaintiff did not see mental health staff again until March 8, 2007. *Id.*

On March 8, 2007, Plaintiff started hearing voices and attempted suicide by "cutting along his arm severely with a razor causing severe pain and suffering." *Id.* ¶ 24. Correctional officers intervened, and Plaintiff was taken to the facility hospital where his arm wounds were treated. Plaintiff was again taken to an observation cell and placed on suicide watch. *Id.* ¶¶ 26-27.

***2** Plaintiff was moved from the observation cell at Upstate to the Mental Health Satellite Unit at Clinton Correctional Facility on March 12, 2007. While at Clinton, Plaintiff was evaluated by Dr. Berggren, diagnosed with "Brief Psychotic Disorder, Psychosis and Adjustment Disorder," and treated with medication. *Id.* ¶¶ 28-29; Dkt. No. 29 at 4 and Ex. K.

Plaintiff claims that Defendants Kemp and Crosier acted with deliberate indifference in violation of his Eighth Amendment rights in failing to provide Plaintiff with mental health evaluation and treatment upon his arrival at Upstate in July, 2006, and thereafter by returning Plaintiff to his cell two days after his January 23, 2007 suicide attempt without adequate mental health evaluation and treatment. Dkt. No. 1 at ¶¶ 30-32. Plaintiff seeks compensatory and punitive damages.

II. LEGAL STANDARD GOVERNING MOTIONS FOR JUDGMENT ON THE PLEADINGS

"The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Cleveland v. Caplaw Enter. .*, 448 F.3d 518, 521 (2d Cir.2006). In order to state a claim upon which relief can be granted, a complaint must contain, *inter alia,* "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The requirement that a plaintiff "show" that he or she is entitled to relief means that a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.' " *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)) (emphasis added).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949 (quoting *Twombly,* 550 U.S. at 556-57, 570). Accordingly, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not *shown*-that the pleader is entitled to relief." *Iqbal,* 129 S.Ct. at 1950 (internal citation and punctuation omitted) (emphasis added).

It should also be emphasized that, "[i]n reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin,* 18 F.3d 133, 136 (2d Cir.1994) (affirming grant of motion to dismiss); *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.1994). "This standard is applied with even greater force where the plaintiff alleges civil rights violations or where the complaint is submitted *pro se." Hernandez,* 18 F.3d at 136; *see also Deravin v. Kerik,* 335 F.3d 195, 200 (2d Cir.2003). In other words, while all pleadings are to be construed liberally under Rule 8(e), *pro se* civil rights pleadings are to be construed with an *extra* degree of liberality.

***3** For example, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider a plaintiff's papers in opposition to a defendant's motion

to dismiss as effectively amending the allegations of the plaintiff's complaint, to the extent that those factual assertions are consistent with the allegations of the plaintiff's complaint. *See, e.g., Gill v. Mooney,* 824 F.2d 192, 195 (2d Cir.1987) (considering plaintiff's response affidavit on motion to dismiss); *Gadson v. Goord,* 96-CV-7544, 1997 U.S. Dist. LEXIS 18131, 1997 WL 714878, at *1 n. 2 (S.D.N.Y. Nov.17,1997). [3]

[3] This authority is premised, not only on case law, but on Rule 15 of the Federal Rules of Civil Procedure, which permits a plaintiff to amend the complaint once as a matter of right, and otherwise with the court's leave, which should be "freely give[n] ... when justice so requires." Fed.R.Civ.P. 15; *see Washington v. James,* 782 F.2d 1134, 1138-39 (2d Cir.1986) (considering subsequent affidavit as amending *pro se* complaint, on motion to dismiss).

Thus, "courts must construe *pro se* pleadings broadly, and interpret them to raise the strongest possible argument that they suggest." *See Cruz v. Gomez,* 202 F.3d 593, 597 (2d Cir.2000) (internal quotation and citation omitted). Furthermore, when a *pro se* complaint fails to state a cause of action, the court *generally* "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000) (internal quotation and citation omitted). [4]

[4] Of course, an opportunity to amend is not required where the plaintiff has already amended the complaint. *See Advanced Marine Technologies, Inc. v. Burnham Securities, Inc.,* 16 F.Supp.2d 375, 384 (S.D.N.Y.1998) (denying leave to amend where plaintiff had already amended complaint once). In addition, an opportunity to amend is not required where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." *Cuoco,* 222 F.3d at 112.

III. ANALYSIS

A. Eighth Amendment

Reading the complaint generously, Plaintiff alleges that Defendants failed to provide him with mental health evaluation and treatment during the period July, 2006 to January, 2007, notwithstanding the fact that he had attempted suicide three days before he arrived at Upstate, and despite the fact that Plaintiff's health records advised of his need for such care. Plaintiff further alleges that following his second suicide attempt in January, 2007, Defendants again failed to properly evaluate his condition and withheld treatment, leading to a third suicide attempt just two months later. *See* Dkt. No. 1.

Defendants argue that Plaintiff has made an insufficient showing of an Eighth Amendment claim and that dismissal of the Complaint is warranted as a matter of law. Dkt. No. 14-1 at pp. 4-8.

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual" punishments. The word "punishment" refers not only to deprivations imposed as a sanction for criminal wrongdoing, but also to deprivations suffered during imprisonment. *Estelle v. Gamble,* 429 U.S. 97, 102-03, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Punishment is "cruel and unusual" if it involves the unnecessary and wanton infliction of pain or if it is incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle,* 429 U.S. at 102. Thus, the Eighth Amendment imposes on jail officials the duty to "provide humane conditions of confinement" for prisoners. *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). In fulfilling this duty, prison officials must "ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " *Id.* (quoting *Hudson v. Palmer,* 468 U.S. 517, 526-27, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

***4** The duties which fall within the ambit of the Eighth Amendment include both the duty to safeguard inmates from harm, often referred to as the "duty to protect" and the duty to provide medical and mental health care. [5] Violations of the duty to protect are commonly asserted in cases involving inmate on inmate violence and are analyzed under the Eighth Amendment with reference to whether the conditions under which the inmate was confined posed an unreasonable risk of harm. *See Snyder v. McGinnis,* 03-CV-902F, 2004 U.S. Dist. LEXIS 17976, 2004 WL 1949472, *4 (W.D.N.Y. Sep.2, 2004). "The Constitution does not guarantee an assault-free prison environment; it promises only reasonable good faith protection." *McGriff v. Coughlin,* 640 F.Supp. 877, 880 (S.D.N.Y.1986). As a result, not every injury suffered by an inmate at the hands of another constitutes an Eighth Amendment violation by the prison official responsible for the inmate's safety. *See Farmer,* 511 U .S. at 834. Courts in this Circuit have emphasized that "the standard for prisoner

'failure to protect' claims brought under 42 U .S.C. § 1983 is quite high." *Snyder,* 2004 WL 1949472, at *4 (citations omitted); *Hamilton v. Riordan,* 07 Civ. 7163, 2008 U.S. Dist. LEXIS 69116, 2008 WL 4222089, *1 (S.D.N.Y. Sep.11, 2008).

5 "Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a 'serious medical need.' " *Cuoco,* 222 F.3d at 106 (quoting *Meriwether v. Faulkner,* 821 F.2d 408, 413 (7th Cir.1987)).

Presumably in order to invoke the higher standard of scrutiny applicable to "failure to protect" claims, Defendants refer to the Complaint as alleging a claim "that defendants subjected [Plaintiff] to cruel and unusual conditions of confinement by failing to protect him from himself" on the two occasions when he attempted suicide at Upstate. Dkt. No. 14-1 at 3. [6] While claims involving the risk of suicide have been articulated and addressed as violations of the duty to protect, particularly when asserted against non-medical personnel, "[t]he bulk of cases dealing with the right of a person in custody for protection from suicide analyze the issue as an Eighth Amendment claim dealing with the inadequate provision of medical care." *Kelsey v. City of New York,* 03-CV-5978, 2006 U.S. Dist. LEXIS 91977, 2006 WL 3725543, * 4 n. 5 (E.D.N.Y. Dec.18, 2006), *aff'd,* 2009 WL 106374 (2d Cir.2009). [7]

6 Defendants then address the sufficiency of Plaintiff's claims in terms of "the severity of the conditions under which plaintiff has been incarcerated" and whether he faced a "risk" that was objectively substantial, *see* Dkt. No. 14-1 at 5, rather than whether his mental health need was sufficiently "serious".

7 *Kelsey* involved a claim that police officers acted with deliberate indifference to an arrestee's safety while he was in their custody, and failed to prevent his suicide. *Kelsey,* 2006 WL 3725543, at *4. *See also Burke v. Warren County Sheriff's Dept.,* 1994 U.S. Dist. LEXIS 17233, 1994 WL 675042, *6 (N.D.N.Y. Nov.25, 1994) (Munson, J.) (jailers are not required to safeguard every inmate; only those presenting a "strong likelihood of suicide" *e.g.,* due to a previous threat or an earlier attempt are entitled to protection).

In this case, the Court is not aware of any reason to characterize Defendants' duty to provide adequate and proper mental health care to Plaintiff as the duty to protect him from himself, or to invoke the "high" standard applicable to claims arising out of inmate on inmate violence. [8] Accordingly, the Court construes Plaintiff's Eighth Amendment claims as alleging the deprivation of proper and adequate medical care.

8 The Court notes, however, that its conclusion regarding the sufficiency of the Complaint on Defendants' Rule 12(c) motion would not be altered if Plaintiff's Eighth Amendment claim was assessed pursuant to the standard applicable to "failure to protect" claims.

A viable Eighth Amendment claim must contain both an objective and a subjective component. *Farmer,* 511 U.S. at 834. To satisfy the objective component, "the deprivation alleged must be, objectively, 'sufficiently serious.' " *Farmer,* 511 U.S. at 834 (quoting *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Analyzing the objective element of an Eighth Amendment medical care claim requires two inquiries. "The first inquiry is whether the prisoner was actually deprived of adequate medical care." *Salahuddin v. Goord,* 467 F.3d 263, 279 (2d Cir.2006). The word "adequate" reflects the reality that "[p]rison officials are not obligated to provide inmates with whatever care the inmates desire. Rather, prison officials fulfill their obligations under the Eighth Amendment when the care provided is 'reasonable.' " *Jones v. Westchester County Dept. of Corrections,* 557 F.Supp.2d 408, 413 (S.D.N.Y.2008).

***5** The second inquiry is "whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." *Salahuddin,* 467 F.3d at 280. The focus of the second inquiry depends on whether the prisoner claims to have been completely deprived of treatment or whether he claims to have received treatment that was inadequate. *Id.* If "the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is sufficiently serious." *Id.* A "serious medical condition" is "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Nance v. Kelly,* 912 F.2d 605, 607 (2d Cir.1990) (Pratt, J. dissenting) [citations omitted], *accord, Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1996), *cert. denied,* 513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d

1074 (1995); *Chance v. Armstrong,* 143 F.3d 698, 702 (2d Cir.1998). Relevant factors to consider when determining whether an alleged medical condition is sufficiently serious include, but are not limited to: (1) the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; (2) the presence of a medical condition that significantly affects an individual's daily activities; and (3) the existence of chronic and substantial pain. *Chance,* 143 F.3d at 702-03.

If the claim is that treatment was provided but was inadequate, the second inquiry is narrower. *Salahuddin,* 467 F.3d at 280. For example, "[w]hen the basis for a prisoner's Eighth Amendment claim is a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged *delay* or *interruption* in treatment rather than the prisoner's *underlying medical condition* alone in analyzing whether the alleged deprivation" is sufficiently serious. *Smith v. Carpenter,* 316 F.3d 178, 185 (2d Cir.2003).

To satisfy the subjective component of an Eighth Amendment claim, the defendant's behavior must be "wanton." Where a prisoner claims that a defendant provided inadequate medical care, he must show that the defendant acted with "deliberate indifference." *Estelle,* 429 U.S. at 105.

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,* 143 F.3d at 703 (quoting *Farmer,* 511 U.S. at 835). Thus, to establish deliberate indifference, an inmate must prove 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 702-03. The inmate then must establish that the provider consciously and intentionally disregarded or ignored that serious medical need. *Farmer,* 511 U .S. at 835. An "inadvertent failure to provide adequate medical care" does not constitute "deliberate indifference." *Estelle,* 429 U.S. at 105-06. Moreover, "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim ... under the Eighth Amendment." *Id.* Stated another way, "medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.; Smith v. Carpenter,* 316 F.3d 178, 184 (2d Cir.2003). However, malpractice that amounts to culpable recklessness constitutes deliberate indifference. Accordingly, "a physician may be deliberately indifferent if he or she consciously chooses an easier and less efficacious treatment plan." *Chance,* 143 F.3d at 703.

***6** Regarding the objective component, the complaint alleges that Defendants failed to provide Plaintiff with mental health evaluation and care upon his arrival at Upstate on July 24, 2006, notwithstanding the notations in his records that he had attempted suicide three days earlier. Plaintiff further alleges that his need for mental health services remained unmet and that he attempted suicide in January, 2007, and again in March, 2007.

Defendants acknowledge that "death by hanging or self-laceration would obviously be a serious harm." Dkt. No. 14-1 at 5. *See Hamilton v. Smith,* No. 06-CV-805, 2009 U.S. Dist. LEXIS 91032, 2009 WL 3199531, *14 (N.D.N.Y. Jan. 13, 2009) (Homer, M.J.) (plaintiff's claimed history of suicidal thoughts sufficient to raise a question of fact as to serious medical need); *White v. Ghost,* 456 F.Supp.2d 1096, 1102-03 (D. Dakota 2006) (two suicide gestures and/or suicide attempts "obviously created an objective serious medical need."). [9] Defendants argue, however, that the Complaint is subject to dismissal as a matter of law because "based on the circumstances alleged, the risk was not objectively serious" because "OMH staff monitoring [Plaintiff's] status could reasonably discern that he was stable and safe" during the intervals between his suicide attempts. Dkt. No. 14-1 at 6.

9 Moreover, courts have found that depression with suicidal ideation, or severe anxiety attacks are sufficiently severe conditions to meet the objective element of the deliberate indifference standard. *Covington v. Westchester County Dept. of Corrections,* 06 Civ. 5369, 2010 U.S. Dist. LEXIS 11020, 2010 WL 572125, *6 (S.D.N.Y. Jan.25, 2010) (citing cases); *see also Zimmerman v. Burge,* 2009 U.S. Dist. LEXIS 88343, 2009 WL 3111429, *8 (N.D.N.Y. Sep.24, 2009) (Sharpe, J. & Lowe, MJ) (reviewing published case law discussing whether depression either with or without suicidal ideation is a "sufficiently serious" medical condition).

The Court disagrees. Whatever conclusions might be warranted after the record is developed, accepting the material facts alleged in the Complaint as true, and drawing all inferences in Plaintiff's favor, the Complaint states a plausible

claim that Plaintiff's mental health needs were unmet and were, objectively, sufficiently serious. *See Salahuddin,* 467 F.3d at 280.

Regarding the subjective component, the Complaint alleges that Defendants were aware of Plaintiff's July, 2006 suicide attempt and of his need for mental health care, but consciously and intentionally disregarded or ignored that need. The Complaint further alleges that following the January, 2007 suicide attempt, Defendants again withheld mental health care.

Defendants argue that the Complaint is insufficient as a matter of law because "[p]laintiff's two widely-spaced efforts at suicide at Upstate cannot fairly be regarded as the product of wanton, callous indifference to his medical condition." Dkt. No. 14-1 at 7. Rather, Defendants maintain that they "can only be faulted, if at all, for being mistaken in their exercise of psychiatric judgment." *Id.* at 8. [10] However, this conclusion presumes the existence of a factual record which does not exist on Defendants' Rule 12(c) motion. *See Farmer,* 511 U.S. at 842 ("Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways ...."); *Chance,* 143 F.3d at 703 ("Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case.").

10 Defendants cite several cases in which the court concluded either after trial or on a properly supported motion for summary judgment, that the evidence adduced was not sufficient to demonstrate the defendants' subjective culpability. Dkt. No. 14-1 at 8. As discussed above, the inquiry on Defendants' Motion for Judgment on the Pleadings is significantly different, the question being limited to whether the complaint states a claim for relief that is "plausible" on its face. *Iqbal,* 129 S.Ct. at 1949.

***7** The factual allegations in the Complaint, accepted as true, satisfy the subjective component of an Eighth Amendment claim. *See Chance,* 143 F.3d at 703. [11]

11 See *Chance,* 143 F.3d at 703-04 (reversing district court's dismissal of medical indifference claim at 12(b)(6) stage because "even if we think it highly unlikely that Chance will be able to prove his allegations, that fact does not justify dismissal for failure to state a claim, for Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations ....") (citations and quotation marks omitted).

In light of the foregoing, the Court declines to conclude at this stage that Plaintiff has failed to state a claim for deliberate indifference against Defendants. Accordingly, I recommend that Defendants' Motion for Judgment on the Pleadings to dismiss the Eighth Amendment claim be denied.

B. Qualified Immunity

Defendants also assert that they are entitled to dismissal of Plaintiff's Complaint on the ground of qualified immunity. Dkt. No. 14-1 at 8-9.

"Qualified immunity is an affirmative defense that shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Stephenson v. Doe,* 332 F.3d 68, 76 (2d Cir.2003) (quoting *McCardle v. Haddad,* 131 F.3d 43, 50 (2d Cir.1997)).

The Second Circuit has recognized that the availability of qualified immunity may turn "on factual questions that cannot be resolved at [the motion to dismiss] stage of proceedings." *Taylor v. Vermont Dept. of Educ.,* 313 F.3d 768, 793 (2d Cir.2002). [12] Thus, where the "objective reasonableness" of Defendants' actions depends at least in part on what information they had regarding the substance of Plaintiff's complaints, an adjudication as to the applicability of the qualified immunity affirmative defense on the basis of the pleadings alone would be premature.

12 In *Stephenson,* the court advised that a "defendant should press a qualified immunity defense during pretrial proceedings so that such a claim can be disposed of by summary judgment where possible, or factual disputes material to the defense can be identified and presented to the jury." *Stephenson,* 332 F.3d at 76.

Here, after liberally reviewing the Complaint, accepting all of its allegations as true, and construing them in Plaintiff's favor, the Court declines to conclude that Defendants are entitled to qualified immunity at this stage. Plaintiff alleges that Defendants were aware of his need for mental health evaluation and treatment upon his arrival at Upstate in July,

2006, and that mental health services were not provided either before or after his January, 2007 suicide attempt, which was followed by a third attempt in March, 2007, resulting in pain, suffering, and injuries. Thus, "[r]esolution of qualified immunity depends on the determination of certain factual questions that cannot be answered at this stage of the litigation." *Denton v. McKee,* 332 F.Supp.2d 659, 666 (S.D.N.Y.2004). [13]

13 *See McKenna v. Wright,* 386 F.3d 432, 437-38 (2d Cir.2004) (affirming district court's denial of qualified immunity at motion to dismiss stage on deliberate indifference claim, "[h]owever the matter may stand at the summary judgment stage, or perhaps at trial ....").

Therefore, Defendants' motion for judgment on the pleadings dismissing the complaint on the ground of qualified immunity should be denied.

ACCORDINGLY, it is

RECOMMENDED that Defendants' Motion for Judgment on the Pleadings (Dkt. No. 14) be *DENIED,* and it is further

ORDERED that the clerk provide copies of *Avgerinos v. Palmyra-Macedon Central School Dist.,* 08-CV-6572, 2010 U.S. Dist. LEXIS 11988, 2010 WL 547173 (W.D.N.Y. Feb.11, 2010); *Gadson v. Goord,* 96-CV-7544, 1997 U.S. Dist. LEXIS 18131, 1997 WL 714878 (S.D.N.Y. Nov.17, 1997); *Snyder v. McGinnis,* 03-CV-902F, 2004 U .S. Dist. LEXIS 17976, 2004 WL 1949472 (W.D.N.Y. Sep.2, 2004); *Hamilton v. Riordan,* 07 Civ. 7163, 2008 U.S. Dist. LEXIS 69116, 2008 WL 4222089 (S.D.N.Y. Sep.11, 2008); *Kelsey v. City of New York,* 03-CV5978, 2006 U.S. Dist. LEXIS 91977, 2006 WL 3725543 (E.D.N.Y. Dec.18, 2006), *aff'd,* 2009 WL 106374 (2d Cir.2009); *Burke v. Warren County Sheriff's Dept.,* 1994 U.S. Dist. LEXIS 17233, 1994 WL 675042 (N.D.N.Y. Nov.25, 1994); *Hamilton v. Smith,* No. 06-CV-805, 2009 U.S. Dist. LEXIS 91032, 2009 WL 3199531 (N.D.N.Y. Jan. 13, 2009); *Covington v. Westchester County Dept. of Corrections,* 06 Civ. 5369, 2010 U.S. Dist. LEXIS 11020, 2010 WL 572125 (S.D.N.Y. Jan.25, 2010); and *Zimmerman v. Burge,* 2009 U.S. Dist. LEXIS 88343, 2009 WL 3111429 (N.D.N.Y. Sep.24, 2009) to plaintiff.

8** Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN 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), 6(d).

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

Valerie KELSEY, Theodore Goddard, Individually, and as Co-Administrators of the Estate of Curtis Goddard, Plaintiffs,
v.
The CITY OF NEW YORK, P.O. Thomas Marrone, Shield # 07784, Sergeant George Kallas, Shield # 01144, Lt. James Marron, P.O. Michael Sykora, Shield # 18496, P.O. Cory Fink, Shield # 14713, P.O. Martin Halligan, Shield # 18367, P.O. Paul Bernal, Shield # 10349, P.O. Matthew Lindner, Shield # 19417, P.O. Shawline Senior, Shield # 02385, Defendants.

No. 03-CV-5978(JFB)(KAM).
|
Dec. 18, 2006.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge.

***1** Plaintiffs Valerie Kelsey and Theodore Goddard bring this action on behalf of themselves and the estate of Curtis Goddard, alleging, *inter alia,* claims for violation of civil rights under 42 U.S.C. § 1983 and a pendent wrongful death/negligence claim under state law. Defendants move for summary judgment on all claims. For the reasons stated below, summary judgment is granted as to plaintiffs' claim alleging violation of § 1983. Further, with the dismissal of the federal claim from the instant lawsuit, the Court exercises its discretion to decline jurisdiction over the remaining state claim arising in negligence, and, thus, dismisses that claim without prejudice.

I. BACKGROUND

The following facts are undisputed unless otherwise indicated. On August 15, 2002, Curtis Goddard ("Goddard") arrived at and entered an apartment on Beach Channel Drive ("the apartment"), a residence at which Maria Buffamante ("Buffamante") lived with her children. (*See* Defs.' Rule 56.1 Statement of Material Facts ("Defs.' 56.1 Stmt."), ¶¶ 7, 11.) Goddard lived occasionally at the apartment as well, as Buffamante's boyfriend. (*See* Pls.' Rule 56.1 Statement of Material Facts ("Pls.' 56.1 Stmt."), ¶ 7; *see also* Defs.' 56.1 Stmt., ¶ 9.) On the previous day, August 14, 2002, Buffamante had informed Goddard that their relationship was over. (*See* Pls.' 56.1 Stmt., ¶ 10(a); *see also* Defs.' 56.1 Stmt., ¶ 10.) At the time Goddard entered the apartment, it was occupied by Buffamante, her children, and her friends Tyisha Safford, Leonar Jesus Espinal and an individual known as "Blue." (*See* Defs.' 56.1 Stmt., ¶ 8.) After Goddard entered the apartment, Buffamante, Espinal and "Blue" asked Goddard to leave the premises. (*See id.,* ¶ 12.) Goddard refused, and brandished a firearm. [1] (*See* Defs.' 56.1 Stmt., ¶ 13; *see also* Pls.' 56.1 Stmt., ¶ 13(b).)

[1] According to the deposition testimony of Buffamante, Goddard pulled his gun after he observed "Blue" reach into his pocket in a manner appearing to indicate that he was reaching for a knife. (*See* Declaration of K.C. Okoli ("Okoli Decl."), Ex. J at 71-73.) After he pulled the firearm, Goddard forced "Blue" to go out into the hallway outside the apartment, and then locked the door. (*See id.* at 73.)

New York City Police Department Sergeant George Kallas and Police Officers Thomas Marrone, Michael Sykora, Cory Fink, Martin Halligan, and Paul Bernal responded to a call regarding a dispute with a firearm at the apartment. (*See* Defs.' 56.1 Stmt., ¶ 5.) As the officers arrived at the apartment, "Blue" informed them that there was an individual with a gun inside the apartment. (*See* Defs.' 56.1 Stmt., ¶ 14; *see also* Pls.' 56.1 Stmt., ¶ 14.) Although it is disputed whether or not the police officers knocked on the apartment door, it is undisputed that the door was opened by Espinal, and the occupants of the apartment, save Goddard, ran out. (*See* Defs.' 56.1 Stmt., ¶

15; *see also* Pls.' 56.1 Stmt., ¶ 15.) The officers entered the apartment, and observed Goddard run towards the kitchen. [2] (*See* Defs.' 56.1 Stmt., ¶ 16.)

[2] Plaintiffs dispute whether or not Sergeant Kallas followed the other officers into the apartment, but do not cite anything from the record to substantiate this claim, as required in a statement submitted pursuant to Rule 56.1. Local Civil Rule 56.1(d) ("Each statement made by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)."). Notwithstanding that defect, the Court notes that the factual dispute regarding whether Sergeant Kallas followed the other officers into the apartment has no bearing on the adjudication of the instant motion for summary judgment.

The officers attempted to arrest Goddard in the kitchen, who resisted and refused to be handcuffed. (*See id..,* ¶ 17.) The officers were eventually successful in restraining and handcuffing Goddard. (*See id.,* ¶ 22.) The officers searched Goddard and seized a sock filled with ammunition, a ski mask, his gun, and a razor blade. [3] (*See* Defs.' 56.1 Stmt., ¶¶ 22-23, 28; *see also* Pls.' 56.1 Stmt., ¶¶ 22-23, 28.)

[3] Plaintiffs dispute the location from which these items were recovered. (*See* Pls.' 56.1 Stmt., ¶¶ 22-23, 28.) However, plaintiffs do not dispute the fact that these items were in fact seized by the officers from Goddard, which is all that is necessary to address the instant motion for summary judgment.

***2** Goddard was escorted out of the apartment with his hands cuffed behind his back. (*See* Defs.' 56.1 Stmt., ¶ 24.) As he was being escorted out of the apartment, Goddard attempted to grab Officer Barnal's gun, while exclaiming "shoot me, kill me." (*See id.,* ¶ 25.) Officer Marrone held Goddard until he was able to confirm that Officer Bernal had control of his gun. (*See id.,* ¶ 26.) Goddard was brought out into the hallway, and was positioned facing the wall, approximately four to five feet from a stairwell door. (*See* Defs.' 56.1 Stmt., ¶ 27; *see also* Pls.' 56.1 Stmt., ¶ 27(a)). While placed facing the wall, Goddard was surrounded by Officers Sykora, Fink, Hallagan and Bernal in a semi-circle. (*See* Defs.' 56.1 Stmt., ¶ 29.) Sergeant Kallas instructed the officers to physically hold onto Goddard. (*See id.,* ¶ 30.) Pursuant to that order, Officer Sykora held onto Goddard while he was stood against the wall. (*See id.,* ¶ 32.)

Sergeant Kallas requested that the Emergency Services Unit and an ambulance respond to the scene to assist with an emotionally disturbed person (EDP). (*See* Defs.' 56.1 Stmt., ¶ 31; *see also* Pls.' 56.1 Stmt., ¶ 31.) Kallas and Lieutenant Marron then went down the hall to interview the occupants of the apartment. (*See* Defs.' 56.1 Stmt., ¶ 39.) After approximately five minutes, Goddard was turned around, so that he faced the surrounding officers. (*See* Defs.' 56.1 Stmt., ¶ 33.) Officer Sykora spoke to Goddard to ascertain what had happened prior to the arrival of the police at the apartment. (*See id.*) The parties agree that Goddard was relatively calm, although plaintiffs point to evidence in the record indicating that he was sweating and fidgety. (*See* Defs.' 56.1 Stmt., ¶ 34; *see also* Pls.' 56.1 Stmt., ¶ 34.) Officer Sykora released his physical hold on Goddard. (*See* Defs .' 56.1 Stmt., ¶ 35.) Goddard then made a sudden move at Sykora, and Officer Fink pushed Sykora out of the way, in order to prevent contact. (*See* Defs.' 56.1 Stmt., ¶¶ 36-37; *see also* Pls .' 56.1 Stmt., ¶¶ 36-37.) Goddard proceeded to escape from the officers, and ran towards the stairwell door. (*See* Defs.' 56.1 Stmt., ¶ 37.) According to defendants, Officer Shawline Senior was standing next to the stairwell door, and attempted to grab Goddard as he ran through the stairwell door, but failed. [4] (*See* Defs.' 56.1 Stmt., ¶ 38.)

[4] Plaintiffs assert that no officer attempted to grab Goddard when he escaped, citing the deposition testimony of Officer Fink. (*See* Pls.' 56.1 Stmt., ¶ 38.) That testimony proceeded as follows:

> Q. When Mr. Goddard came off the wall, did you attempt to grab him?
> A. No.
> Q. Did you see any officer attempt to grab him?
> A. No.

(Okoli Decl., Ex. D at 32.) On the other hand, defendants cite the deposition of Officer Senior, who testified that she attempted to grab Goddard but her hand slipped off his shirt, and Officer Bernal, who testified that he observed Goddard run through the door while being grasped by Officer Senior. (*See* Affirmation of Jennifer

Rossan ("Rossan Decl."), Ex. J at 58; Ex. L. at 16-21.)

Sykora, Fink, Bernal, Halligan, Marrone, Lindner and Marron immediately chased after Goddard as he ran up the stairway to the rooftop of the building, while rear-cuffed. (*See* Defs.' 56.1 Stmt., ¶ 42.) Officer Sykora observed Goddard lean over a fence on the roof, and then twist his body so that he fell off the rooftop. (*See id.,* ¶ 44.) Goddard died as a result of injuries he assumed from the fall. (*See* Okoli Decl., Ex. O.)

The New York Police Department investigated the incident, and disciplined Officer Sykora for failing and neglecting to safeguard a prisoner, resulting in the loss of the prisoner. (*See* Pls.' 56.1 Stmt., ¶ 54.) The report noted that Sykora was responsible for securing Goddard, and that the circumstances warranted him physically holding on to Goddard. (*See* Okoli Decl., Ex. M.) Further, the report noted that it was Sykora's duty to maintain physical control of Goddard, since he was the one holding Goddard when Kallas gave him the order to not let go of him. (*See id.*) The same report investigated the actions of Fink, Kallas, Marrone, Halligan, Bernal, Linder, Senior and Marron, but found that discipline was not warranted as to those officers. (*See id.*)

***3** Valerie Kelsey and Theodore Goddard, the co-administrators of Curtis Goddard's estate, filed the instant action, against the City of New York and the individual officers mentioned above, alleging causes of action under 42 U.S.C. §§ 1983 and 1985, based upon the following: (1) deliberate indifference to Goddard's safety needs; (2) the failure by the City to train and supervise the defendants; (3) the use of excessive force when handcuffing Goddard; and (4) a conspiracy by the defendants to not recapture Goddard after his escape from custody and/or a conspiracy to let Goddard fall from the rooftop. In addition, the complaint alleged a pendent claim fornegligence arising under state law.

Defendants moved for summary judgment on all claims. In plaintiffs' opposition papers, they explicitly abandoned all claims except "1) damages for wrongful death based upon defendants' deliberate indifference to his safety needs, pursuant to 42 U.S.C. § 1983, and 2) damages for the wrongful death of the decedent due to the negligence of the individual defendants." (Pls.' Opp. Br., at 2.)

The case was re-assigned to the undersigned from the Honorable Carol B. Amon on February 10, 2006. The Court held oral argument on the instant motion as to the two remaining claims on August 11, 2006.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *Globecon Group, LLC v. Hartford Fire Ins. Co.,* 434 F.3d 165, 170 (2d Cir.2006). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones,* 396 F.3d 53, 69 (2d Cir.2005). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty America v. Town of West Hartford,* 361 F.3d 113, 122 (2d Cir.2004) (citation omitted); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (stating that summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts ... [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial." Caldarola v. Calabrese,* 298 F.3d 156, 160 (2d Cir.2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986)).

III. DISCUSSION

***4** As a threshold matter, the Court notes that defendants moved for summary judgment on all claims contained within the Amended Complaint. In their opposition papers, plaintiffs explicitly abandoned all of their claims, save two: (1) plaintiffs' claim under 42 U.S.C. § 1983 against the individual officers, alleging deliberate indifference to Goddard's safety needs under the Fourteenth Amendment; and (2) plaintiffs' state law negligence claim for the alleged wrongful death of Goddard, as against both the City of New York and the individual officer defendants. (*See* Memorandum of Law of Plaintiffs in Opposition to Defendants' Motion for Summary Judgment ("Pls.' Opp. Mem.") at 1-2.) The Court proceeds to address defendants' motion with respect to each of the remaining claims in turn.

A. Failure to Protect Under 42 U.S.C. § 1983

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan,* 443 U.S. 137, 145 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). Section 1983provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983. For claims under § 1983, a plaintiff must prove "that (1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." *Snider v. Dylag,* 188 F.3d 51, 53 (2d Cir.1999) (citation omitted).

Plaintiffs' remaining § 1983 claim alleges a violation of Goddard's substantive due process rights under the Fourteenth Amendment. Specifically, plaintiffs allege that the defendant officers failed to protect Goddard from himself, while he was in custody. When in the custody of police, an arrestee has the right to care and protection, including protection from suicide.[5] *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.,* 402 F.3d 1092, 1115 (11th Cir.2005) ("[P]retrial detainees like [plaintiff] plainly have a Fourteenth Amendment due process right 'to receive medical treatment for illness and injuries, which encompasses a right to psychiatric and mental health care, and a right to be protected from self-inflicted injuries, including suicide.' ") (quoting *Belcher v. City of Foley,* 30 F.3d 1390, 1396 (11th Cir.1994) (citations omitted)); *see also Hare v. Corinth, Miss.,* 74 F.3d 633, 647 & 648 n. 3 (5th Cir.1996) (collecting cases involving claims for failure to protect individuals in custody from suicide). In the detainee suicide context, the relevant inquiry is whether defendants were deliberately indifferent to the medical need of the detainee to be protected from himself. *See Weyant,* 101 F.3d at 856.

5 The bulk of cases dealing with the right of a person in custody for protection from suicide analyze the issue as an Eighth Amendment claim dealing with the inadequate provision of medical care. *See, e.g., Woodward v. Correctional Medical Servs. of Ill., Inc.,* 368 F .3d 917, 926 (7th Cir.2004); *Olson v. Bloomberg,* 339 F.3d 730, 735 (8th Cir.2003). Although Eighth Amendment protections only apply to individuals who have been convicted, the Second Circuit has explicitly noted that pretrial detainees are protected by the Due Process Clause, and their rights to medical treatment are "at least as great as those of a convicted prisoner." *Weyant v. Okst,* 101 F.3d 845, 856 (2d Cir.1996) (citations omitted). "Thus, the official custodian of a pretrial detainee may be found liable for violating the detainee's due process rights if the official denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need." *Id.* (citation omitted); *see also Cuoco v. Motisgugu,* 222 F.3d 99, 106 (2d Cir.2000) (noting that standards from Eighth Amendment context apply to claims brought by pretrial detainees under the Fourteenth Amendment). Based on this logic, other Circuits have applied the same standards applicable to prisoner suicide cases arising under the Eighth Amendment to claims brought by individuals in custody prior to conviction under the Fourteenth Amendment. *See, e.g., Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty, Fla.,* 402 F.3d 1092, 1115 (11th Cir.2005); *Barrie v. Grand Cty, Ut.,* 119 F.3d 862, 868 (10th Cir.1997); *Partridge v. Two Unknown Police Oficers of the City of Houston,* 791 F.2d 1182, 1187 n. 20 (5th Cir.1986).

***5** Defendants argue that summary judgment should be granted in their favor on plaintiffs' § 1983 claim because no jury could reasonably find that defendants acted with deliberate indifference to the safety needs of the decedent.[6] " 'Deliberate indifference' describes a mental state more blameworthy than negligence; but a plaintiff is not required

to show that the defendant acted for the 'very purpose of causing harm or with knowledge that harm will result.' " *Hernandez v. Keane,* 341 F.3d 137, 144 (2d Cir.2003) (quoting *Farmer v. Brennan,* 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)); *Brock v. Wright,* 315 F.3d 158, 164 (2d Cir.2003) ("[N]egligence is not deliberate indifference.") "Deliberate indifference is 'a state of mind that is the equivalent of criminal recklessness.' " *Hernandez,* 341 F.3d at 144 (quoting *Hathaway v. Coughlin,* 99 F.3d 550, 553 (2d Cir.1996)). "[D]eliberate indifference involves unnecessary and wanton infliction of pain, or other conduct that shocks the conscience." *Hathaway,* 99 F.3d at 553 (2d Cir.1996). In order for the plaintiffs to satisfy their burden to show deliberate indifference, they must demonstrate that each charged official "knows of and disregards 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." *Johnson v. Wright,* 412 F.3d 398, 403 (2d Cir.2005) (quoting *Farmer,* 511 U.S. at 837); *accord Phelps v. Kapnolas,* 308 F.3d 180, 185-86 (2d Cir.2002).

6 This argument assumes, *arguendo,* that the defendants owed a duty to protect to the plaintiff from himself at the time of the accident, even though he was no longer in their physical custody because of his escape. The general rule is that the Fourteenth Amendment solely imposes a limitation on the State's power to act, and does not create an affirmative obligation on the State to protect the public from harm. *DeShaney v. Winnebago Dep't of Soc. Servs.,* 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses [of the Fifth and Fourteenth Amendments] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.") Since state actors did not directly kill the decedent-he committed suicide-in order for plaintiffs to proceed, they must demonstrate that they are not subject to the general rule that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *accord Pena v. DePrisco,* 432 F.3d 98, 107-08 (2d Cir.2005). However, defendants concede that they did owe a duty when they had decedent in custody, based upon the "special relationship" theory of liability which escapes the general rule asserted by *DeShaney,* under which a State has a constitutional obligation to protect an individual from private actors. *See Ying Jing Gan v. City of New York,* 996 F.2d 522, 533 (2d Cir.1993). Under the "special relationship" theory, the Supreme Court and Second Circuit have both "recognized that a constitutionally significant special relationship generally involves some type of custody or other restraint on the individuals' ability to fend for themselves." *Matican v. City of New York,* 424 F.Supp.2d 497, 504 (E.D.N.Y.2006) (citing *DeShaney,* 489 U.S. at 200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."); *Ying Jing Gan,* 996 F.2d at 533 ("Special relationships that have been recognized to give rise to a governmental duty to protect against third-person attacks have included custodial relationships such as a prison and inmate or a mental institution and involuntarily committed patient, and the relationship between a social service agency and a foster child.") Although the defendants concede that their affirmative action of taking Goddard into custody formed a special relationship which engendered a duty to protect, they argue that the "special relationship" and accompanying duty terminated at the moment that decedent voluntarily removed himself from custody by escaping. The defendants have not been able to provide any authority directly supporting the proposition that an individual's escape from custody terminates the duty to protect under the Fourteenth Amendment. However, the Court does not reach the issue of whether the duty is terminated because, even assuming *arguendo* that the defendant officers had a duty to protect the decedent, the facts of this case do not permit a jury determination of deliberate indifference, as discussed *infra.*

In the detainee suicide context, deliberate indifference may exist pursuant to one of two broad fact scenarios. *See Rellergert v. Cape Girardeau County, Mo.,* 924 F.2d 794, 796 (8th Cir.1991). First, state officials could be deliberately indifferent to the risk of suicide by failing to discover an individual's suicidal tendencies. *See id.* (collecting cases). Alternatively, the detaining authorities could have discovered and have been aware of the suicidal tendencies, but could be

deliberately indifferent in the manner by which they respond to the recognized risk of suicide, an inquiry which focuses on the adequacy of preventative measures. *See id.* In the instant case, defendants argue that they were not deliberately indifferent in either respect, specifically they argue: (1) that the decedent's acts were more "homicidal" than "suicidal," and so that plaintiffs cannot establish that defendants were deliberately indifferent to decedent's suicidal tendencies; and (2) that the actions of the officers in dealing with the threat of suicide were reasonable and did not exhibit "deliberate or willful lack of concern" to the safety needs of decedent.

As a threshold matter, the Court rejects defendants' argument that the record does not support a finding that the officers were aware of Goddard's suicidal tendencies. The defendants do not dispute that Goddard exclaimed "shoot me, kill me" to the defendant officers when he was trying to grab Officer Bernal's gun. (*See* Defs.' 56.1 Stmt., ¶ 25.) Viewing that statement in a light most favorable to the plaintiffs, a reasonable jury could conclude that decedent was exhibiting a readily ascertainable desire to have his life ended through "suicide by cop." In fact, the actions of Sergeant Kallas support the conclusion that the defendant officers were aware of Goddard's suicidal tendencies because he requested emergency services to respond to assist with an emotionally disturbed person. Thus, the proper inquiry in the instant motion for summary judgment is whether a rational jury could find that insufficient preventative measures were taken by the defendant officers, such that they were deliberately indifferent to the risk of suicide.

***6** Where officers take affirmative and deliberate steps to protect inmates from suicide, other circuits have generally found deliberate indifference lacking, even in the face of potentially negligent actions by the officers and/or a failure to comply with standard policies or procedures. For example, in *Rellergert,* 924 F.2d at 797, the Eighth Circuit assumed, drawing all inferences in favor of a plaintiff's jury verdict, that an officer let an inmate out of his sight with a bedsheet, notwithstanding the fact that the inmate was on suicide watch. The Eighth Circuit noted that the evidence supported the statement that the officer had conflicting responsibilities to which he had to attend, which prevented him from leaving his observation booth and monitoring the inmate. *See id.* Under these facts, the Eighth Circuit affirmed the district court's judgment notwithstanding the verdict, noting that while "the jury might reasonably conclude that [the defendant officer] acted imprudently, wrongly, or negligently," the evidence could not support a finding of deliberate indifference as a matter of law. *See id.* at 797-98.

Similarly, in *Brown v. Harris,* 240 F.3d 383, 390 (4th Cir.2001), the Fourth Circuitasserted the proposition that even where an officer is aware of the substantial risk of serious harm, he or she may avoid liability "if he responded reasonably to the risk of which he knew." The Fourth Circuit noted that the defendant officer had responded to the decedent's medical needs-volatility from drug withdrawal and a suicide risk of some kind-by placing him under "medical watch," which involved constant video surveillance. *See id.* Although it was noted that the officer failed to place the inmate in a paper gown, as was the ordinary custom with suicidal detainees, the court stated that the officer's failure to take certain precautions do not create a jury issue as to deliberate indifference "if his actions were nonetheless reasonable in response to the risk of which he actually knew." *Id.* The officer "simply took less action than he could have, and by his own admission, should have ... at most [the defendant officer's] failure to take additional precautions was negligent, and not deliberately indifferent, because by placing [the decedent] on constant video surveillance, he simply did not 'disregard [ ] an excessive risk to [decedent's] health or safety.' " *Id.* at 390-91 (quoting *Farmer,* 511 U.S. at 837). Accordingly, the Fourth Circuit concluded that there was no basis for a reasonable finder of fact to conclude that the defendant officer acted with deliberate indifference. *See id.* at 391.

Moreover, in *Liebe v. Norton,* 157 F.3d 574, 578 (8th Cir.1998), the Eighth Circuit held that prison officials did not demonstrate deliberate indifference and were entitled to qualified immunity where a detainee classified as a suicide risk was able to hang himself on a metal-framed electrical conduit in a temporary holding cell. In affirming the district court's decision to grant summary judgment for the defendants, the Eighth Circuit recognized the high burden imposed by the deliberate indifference standard and emphasized that the court must closely examine the actions taken by the officials to prevent suicide, even if other steps were omitted:

> ***7** Appellant contends that the district court erred in focusing on the efforts which [the prison official] undertook. Instead, Appellant points to all of the actions which [the official]

> should have taken. Unfortunately, [the official] did not have the benefit of twenty-twenty hindsight, as we do now. Thus, we must examine those precautionary actions which were undertaken. Appellant seems to ignore the fact that [the official] did classify [the detainee] as a suicide risk, and he did take the preventive measures of placing him in the temporary holding cell and removing his shoes and belt. Additionally, [the official] periodically checked on [the detainee]. While [the official] may have been negligent in not checking on [the detainee] more often, or in failing to notice the exposed electrical conduit in the temporary holding cell, we cannot say as a matter of law that his actions were indifferent. To the contrary, [the official's] actions constituted affirmative, deliberate steps to prevent [the detainee's] suicide. Despite [the official's] ultimate failure to prevent that suicide, [the official] did not act with deliberate indifference.

Id. at 578.

Finally, in *Rhyne v. Henderson County,* 973 F.2d 386, 393-94 (5th Cir.1992), the Fifth Circuit held that, as a matter of law, a jury could not find deliberate indifference whereofficials checked suicidal inmates only every ten minutes. The Fifth Circuit noted that, although under the facts of the case, periodic checks may have been in fact inadequate and could form the basis of a sound negligence claim, the periodic checks reflected concern, rather than apathy for inmate safety, and no evidence indicated that frequent periodic checks were obviously inadequate. *See id.*

Viewing the facts of this case in a light most favorable to the plaintiffs, even though the steps taken by the police in hindsight were insufficient to prevent Goddard from committing suicide, there is no reasonable basis for a jury to find that the defendant officers exhibited deliberate indifference to Goddard's safety needs. It is *undisputed* that the defendants took a number of affirmative steps towards protecting Goddard, including the following: (1) they seized dangerous items that he possessed, including a firearm and a razor blade; (2) they handcuffed him behind his back; (3) they called for the assistance of the Emergency Services Unit ("ESU"); (4) they cornered him against a wall in the hallway, surrounded by four police officers while they waited for ESU; and (5) after Goddard escaped, seven officers immediately chased him as he ran up the stairway to the roof. (*See* Defs.' 56.1 Stmt., ¶¶ 22-23, 27-29, 42; *see also* Pls.' 56.1 Stmt., ¶¶ 22-23, 27-29, 42.) These actions exhibited concern, rather than apathy, for Goddard's safety needs.

The real focus of plaintiffs' deliberate indifference claim is the failure of Officer Sykora to physically hold Goddard, rather than merely surrounding him with officers. Although in hindsight it may have been more prudent for Sykora to maintain a physical hold on Goddard, despite the fact that he appeared to be calming down, a reasonable finder of fact could not conclude that the steps taken were obviously inadequate to the risk that Goddard would be able to extricate himself from custody and take his own life by running up the stairwell and jumping off the roof of the building. [7] *See Taylor v. Wausau Underwriters Ins. Co.,* 423 F.Supp.2d 882, 896-97 (E.D.Wis.2006) (finding lack of deliberate indifference as a matter of law where it was not foreseeable that the actions of the state official-allowing cell to be dark for a few minutes-would allow for decedent's suicide). In light of the significant steps taken to protect Goddard, including the belief that surrounding him against a wall would be sufficient to prevent him from escaping, the mere fact that these measures failed does not provide a basis from which a reasonable jury could conclude that the defendants were deliberately indifferent. *See Rellergert,* 924 F.2d at 797 ("It is deceivingly inviting to take the suicide, *ipso facto,* as conclusive proof of deliberate indifference. However, where suicidal tendencies are discovered and preventive measures taken, the question is only whether the measures taken were so inadequate as to be deliberately indifferent to the risk.").

7 Although plaintiffs argue there is evidence that Officer Sykora knew the stairwell door was broken from previous experience in the building, plaintiffs have not pointed to any evidence in the record which would suggest that Sykora or the other police officers were aware that, if Goddard was able to escape to the stairwell doorway while handcuffed, he would be able to obtain ready access to the roof.

***8** Although plaintiffs place emphasis on the fact that Officer Sykora's decision to release his physical hold on

Goddard was contrary to Sergeant Kallas' instruction, the failure to follow that instruction, by itself, does not provide a sufficient basis for a jury to find deliberate indifference. For example, in *Belcher v. Oliver,* 898 F.2d 32, 35-36 (4th Cir.1990), the officers' failure to follow the instruction of the police chief to remove shoelaces and belts from prisoners resulted in a prisoner's suicide. In reversing the district court's denial of summary judgment, the Fourth Circuit noted that "a failure to carry out established procedures, without more, does not constitute 'deliberate disregard for the possibility' that [the prisoner] 'would take his own life.' " *Id.* at 36 (quoting *State Bank of St. Charles v. Camic,* 712 F.2d 1140, 1146 (7th Cir.1983)). One would not generally view a handcuffed prisoner, whose weapons had been removed and was surrounded by police in a hallway, to be at risk for suicide. Given all the other steps taken by the officers to prevent Goddard from harming himself, the failure to follow Sergeant Kallas' instruction to hold Goddard cannot support a finding of "deliberate indifference" by a jury. [8]

8 To the extent that plaintiffs' claim of deliberate indifference attaches to the decision of Officer Fink to push Officer Sykora out of the way when decedent lunged at him, the Court notes that in that context of emergency situations in which officers must make quick decisions, a higher level of culpability is required to make a showing of deliberate indifference. *County of Sacramento v. Lewis,* 523 U.S. 833, 851 (1998) ("[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in one case is less egregious in the other.... As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical ...") (internal citations and footnote omitted). There is absolutely no evidence that Officer Fink sought to facilitate Goddard's escape by pushing Sykora out of Goddard's way as he charged forward; rather, the only evidence in the record, and the only reasonable inference from the facts, is that it was a sudden reaction to ensure officer safety. Consequently, the Court finds that the decision made by Officer Fink in the heat of the moment out of his concern for officer safety cannot rise to the level of culpability required for a finding of deliberate indifference, as a matter of law.

In sum, had the officers acted differently, the tragedy of Goddard's death might have been prevented. The Court is cognizant of the great caution that district courts must exercise in granting summary judgment, especially where state of mind is the core issue. *See Bryant v. Maffuci,* 923 F.2d 979, 985 (2d Cir.1991); *Quarles v. General Motors Corp.,* 758 F.2d 839, 840 (2d Cir.1985). However, the record does not include evidence from which a reasonable jury could find that the defendant officers were deliberately indifferent such that the plaintiffs' constitutional claim may proceed. Far from being deliberately indifferent, the officers took several steps, though insufficient in hindsight, to ensure Goddard would not hurt himself or others once in custody. A reasonable jury could not find deliberate indifference where the officers removed dangerous items from Goddard, handcuffed him, called for ESU, and surrounded him with at least four officers while waiting for ESU. As the Fourth Circuit noted in *Belcher, "[w]e* do not for one moment dismiss the pain of these events for those involved" and "hold only that their tragic character cannot be ameliorated by efforts to affix constitutional blame where it does not belong." *Belcher,* 898 F.2d at 36. That is precisely the situation here. Accordingly, summary judgment is granted with respect to plaintiffs' remaining claim arising under § 1983. [9]

9 Defendants argue that, in deciding the motion for summary judgment, the Court should not consider the testimony of the police liability expert. Specifically, defendants assert that "the expert testimony is speculative, conjectural, illogical, and not grounded in any authoritative source or expertise." (Defendants' Reply Brief, at 18.) The Court finds that, even if the expert's testimony is admissible, the conclusory assertions contained therein are insufficient to create any issues of fact on the question of deliberate indifference.

B. Qualified Immunity

Defendants also argue that, even if the Court found a constitutional duty to prevent someone from escaping custody and that their conduct violated Goddard's constitutional right to be free from harm to himself even after escaping custody, their conduct should still be entitled to qualified immunity. The Court agrees.

***9** It is well settled that a police officer may be shielded from liability for civil damages if "his conduct did not violate

plaintiff's clearly established rights or if it would have been objectively reasonable for the official to believe that his conduct did not violate plaintiff's rights." *Mandell v. County of Suffolk,* 316 F.3d 368, 385 (2d Cir.2003). "The availability of the defense [of qualified immunity] depends on whether a reasonable officer could have believed his action to be lawful, in light of clearly established law and the information he possessed." *Weyant v. Okst,* 101 F.3d at 858 (internal quotation marks, citation and alterations omitted).

Thus, when a qualified immunity defense is raised, a court must conduct a two-fold inquiry. First, the court must ascertain whether the facts, "[t]aken in the light most favorable to the party asserting the injury, ... show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second, even if a constitutional right has been violated, the court should still find qualified immunity exists " 'if either (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that this action did not violate such law.' " *Anderson v. Recore,* 317 F.3d 194, 197 (2d Cir.2003) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.,* 239 F.3d 246, 250 (2d Cir.2001)).

The Court has already concluded that, taking the proof in the light most favorable to plaintiffs, they have failed to demonstrate a violation of a constitutional right in this case under the deliberate indifference standard. Although the inquiry could end there, the Court will proceed to analyze the defendants' conduct under the second part of the qualified immunity test because it demonstrates that, even if Goddard's constitutional right was violated, the officers are entitled to qualified immunity.

Under the second part of the qualified immunity test, "[a] right is clearly established if (1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) 'a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful.' " *Anderson,* 317 F.3d at 197 (alterations in original) (quoting *Young v. County of Fulton,* 160 F.3d 899, 903 (2d Cir.1998)); *accord LaBounty v. Coughlin,* 137 F.3d 68, 73 (2d Cir.1998). Moreover, the right must be clearly established "in light of the specific context of the case." *Saucier,* 533 U.S. at 201.

As noted earlier, the Second Circuit has found that pretrial detainees have the right to medical treatment for serious medical needs under the Fourteenth Amendment, *see, supra,* note 5, which would clearly include treatment to prevent suicide. Thus, a pretrial detainee's right to be free from deliberate indifference by police officers to suicide, *while in custody,* is a clearly established right. Here, however, Goddard committed suicide after he escaped from police custody. [10] As discussed *supra,* the Court is unaware of any Supreme Court or Second Circuit cases which have found that a detainee has the right to medical attention, including prevention of suicide, *after* he has escaped from custody. *See, supra,* note 6; *see also Purvis v. City of Orlando,* 273 F.Supp.2d 1321, 1327 (M.D.Fla.2003) ("[Police officer] cannot be held accountable for [arrestee's] actions subsequent to his escape" where "[officer] had no way of knowing [arrestee] would jump the fences he jumped, or enter the retention pond where he drowned."). Although such a right may exist, the Court does not find any basis to conclude that such a right was "clearly established" at the time the incident took place in the instant case.

10 In its earlier discussion of the duty owed to Goddard by defendants the Court assumed, without deciding, that Goddard remained in custody even after he had escaped. *See, supra,* note 6. The Court made that assumption for the sole purpose of considering plaintiffs' claim that defendants were deliberately indifferent toward Goddard's medical need.

***10** Even assuming *arguendo* that such a right was clearly established, the officers here would still be shielded by qualified immunity because it was objectively reasonable for them to believe that their conduct was not deliberately indifferent to Goddard's needs. *See McKenna v. Wright,* 386 F.3d 432, 437 (2d Cir.2004) ("[T]o establish their qualified immunity defense, the defendants must show that it was 'objectively reasonable' for them to believe that they had not acted with the requisite deliberate indifference.") (citation omitted). As noted earlier, the key decision being challenged here is Officer Sykora's decision not to maintain a hold on Goddard while they waited for ESU to arrive. Against the backdrop of the deliberate indifference standard, that decision cannot be viewed as objectively unreasonable in light of the other evidence in the case. *See Rellergert,* 924 F.2d at 797 ("While we conclude that the law is clearly established that jailers must take measures to prevent inmate suicides once they know of the suicide risk, we cannot say that the law is established with any clarity as to what those measures must be.") In particular, the officers took substantial steps

to ensure Goddard's safety-they seized dangerous items from him, handcuffed him, called ESU, cornered him against a wall in the hallway, and surrounded him with officers. It is also undisputed that Officer Sykora was initially physically holding Goddard when he was standing facing the wall and, after approximately five minutes, turned Goddard outward to begin speaking with him in order to find out what had happened prior to the arrival of the police. (*See* Defs.' 56.1 Stmt., ¶¶ 32-33; *see also* Pls.' 56.1 Stmt., ¶¶ 32-33.) Although plaintiffs point to evidence that Goddard was sweating and fidgety, they also admit he was otherwise calm. (*See* Pls.' 56.1 Stmt., ¶ 34.)

Under such circumstances, the decision to release the physical grasp on Goddard in the hallway (especially when he had calmed down), while he was still handcuffed and surrounded by officers, should not deprive the officers of qualified immunity. In fact, one might conclude that, if the officers had continued to physically hold Goddard even after he calmed down, that could have agitated and unnecessarily provoked him, and exacerbated the situation, rather than de-escalating the situation by releasing the hold. This type of split-second judgment call in an extremely difficult situation is exactly the type of discretionary decision, within the bounds of objectively reasonable conduct under the deliberate indifference standard, that should beprotected under the doctrine of qualified immunity. In particular, the Court notes that, unlike decisions by prison officials usually made under the controlled circumstances of a detention facility, *see supra,* the decisions here had to be made quickly in the context of a temporary detention in the hallway of a residential building. *See Parrish ex rel. Lee v. Cleveland,* 372 F.3d 294, 309 (4th Cir.2004) (finding that the defendant officers were not deliberately indifferent to the medical needs of an arrestee who died while in transport to a detention center where "the record ... contains no evidence suggesting that these officers recognized that their actions were inappropriate *under the circumstances"*) (emphasis added). These officers' inability to spend a substantial period of time deliberating about the best course of action in this uncontrolled hallway environment must be taken into consideration and, under the circumstances of the instant case, it is clear that the officers did not possess a sufficiently culpable state of mind to deprive them of qualified immunity. Accordingly, even if plaintiffs could establish that Goddard's constitutional rights were violated, the defendants would be entitled to dismissal of the claims under the doctrine of qualified immunity.

C. Supplemental Jurisdiction

***11** Having granted summary judgment dismissing plaintiffs' federal claim under § 1983, the only remaining claim is plaintiffs' negligence claim arising under state law. Under 28 U.S.C. § 1367(c)(3), the Court must consider whether it should continue to exercise jurisdiction over the remaining state claim. In determining whether to continue to retain jurisdiction, district courts consider factors such as judicial economy, convenience, fairness and comity. *See Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1191 (2d Cir.1996). Although a court possesses the discretion to retain jurisdiction, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee,* 316 F.3d 299, 305 (2d Cir.2003) (citing *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n. 7 (1988)); *Baylis v. Marriott Corp.,* 843 F.2d 658, 665 (2d Cir.1988) ("When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims.") (quoting *Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966)).

In the instant case, the Court exercises its discretion to decline jurisdiction over the remaining state claim. Although discovery has been completed and the instant case has proceeded to the summary judgment stage, it is not clear to the Court why the discovery would need to be repeated if the negligence claim is litigated in state court. *See Adee Motor Cars, LLC v. Amato,* 388 F.Supp.2d 250, 255 (S.D.N.Y.2005) (exercising discretion to decline jurisdiction over state claims after summary judgment was granted as to all federal claims, noting that there was no indication that discovery would need to be repeated). Moreover, addressing the plaintiffs' negligence claim would require this court to perform at least some non-obvious interpretations of New York State law, including, *inter alia,* whether plaintiffs' recovery is barred by what defendants allege was the commission of a class A misdemeanor, escape in the third degree, under *Johnson v. State,* 253 A.D.2d 274 (N.Y.App.Div.1999), or whether decedent's emotional state removes this action from the ambit of *Johnson.* Resolution of this and similar issues is best left to state courts. [11] *Valencia,* 316 F.3d at 305 (" '[N]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by

procuring for them a surer-footed reading of applicable law.' ") (quoting *Gibbs,* 383 U.S. at 726); *see also Rounseville v. Zahl,* 13 F.3d 625, 631-32 (2d Cir.1994) (finding that although the state law at issue was well-settled, the application of the law to the facts of the case at hand was potentially novel and was therefore more appropriately resolved in state court); *Adee Motor Cars,* 388 F.Supp.2d at 256 (refraining from exercising jurisdiction over remaining state claim and noting that resolution of the claim would "involve at least some nonobvious interpretations of New York state law ... the resolution of these issues would be best left to state courts"). Finally, "since New York's CPLR § 205 allows a plaintiff to recommence a dismissed suit within six months without regard to the statute of limitations, plaintiff[s] will not be unduly prejudiced by the dismissal of [their] state law claims." *Trinidad v. New York City Dept. of Correction,* 423 F.Supp.2d 151, 169 (S.D.N.Y.2006) (citing *Mayer v. Oil Field Systems Corp.,* 620 F.Supp. 76, 77-78 (S.D.N.Y.1985)). Accordingly, plaintiffs' state law claim is dismissed without prejudice.

11 It is important to note that the Court's analysis of the officers' conduct under the "objectively reasonable" standard for purposes of addressing qualified immunity is not the same analysis that would be conducted under the state negligence standard. As noted earlier, the question of objective reasonableness for qualified immunity purposes is conducted against the backdrop of the "deliberate indifference" standard under the circumstances of this case. In other words, the question is whether an objectively reasonable officer could believe that he was not being deliberately indifferent to Goddard's needs. *See McKenna,* 386 F.3d at 437. That analysis is obviously different than simply examining whether an officer's conduct was negligent under state law. *See Hernandez v. Keane,* 341 F.3d 137, 144 (2d Cir.2003) (" 'Deliberate indifference'describes a mental state more blameworthy than negligence.").

IV. CONCLUSION

***12** For the foregoing reasons, summary judgment is GRANTED as to plaintiffs' federal claims arising under 42 U.S.C. § 1983. Further, pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to retain jurisdiction over the remaining claim arising under state law, and dismisses such claim, without prejudice. The Clerk of the Court shall close this case.

SO ORDERED.

All Citations

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United States District Court, D. Connecticut.

Maria SILVERA, Administratrix of
Estate of Andre Mario Lyle, Plaintiff,
v.
DEPT. OF CORRECTIONS, et al., Defendants.

Civil Action No. 3:09–cv–1398 (VLB).
|
March 14, 2012.

Attorneys and Law Firms

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MEMORANDUM OF DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Dkt. # 43]

VANESSA L. BRYANT, District Judge.

I. Introduction

***1** As Judge Kravitz noted, "[t]his case arises out of the tragic suicide death of 22–year–old Andre Mario Lyle on May 21, 2009 during his pretrial detention at the Garner Correctional Institute in Newtown, Connecticut." Plaintiff, Maria Silvera (hereinafter "Silvera") brings this action for damages, as the administrator of Andre Mario Lyle's (hereinafter "Lyle") estate, against the Defendants, Dr. Peter Gasparo (hereinafter "Dr. Gasparo") in his individual capacity, Professional Counselor Samson (hereinafter "Counselor Samson") in his individual capacity, Corrections Officer Standish (hereinafter "Officer Standish") in his individual capacity and Corrections Officer Swan ("Officer Swan") in his individual capacity. Silvera alleges that while in the custody of the Department of Corrections as a pre-trial detainee, Lyle received inadequate mental health care resulting in his suicide. In particular, Silvera raises claims of inadequate mental health care (Count One), denial of medical care (Count Two), substantive due process violations (Count Three) and wrongful death (Count Four).

Silvera's inadequate mental health care claim alleges that Dr. Gasparo deliberately disregarded Lyle's safety and health by failing to follow-up and evaluate Lyle's adjustment to his housing placement and his medication dosage change and by failing to alert custody staff to Lyle's adjustment issues. As a result of the foregoing, the plaintiff alleges that Lyle was allowed to commit suicide by hanging on May 21, 2008 and seeks compensatory damages pursuant to 42 U.S.C. § 1983.

Silvera's denial of medical care claim alleges that Counselor Samson failed to alert custody staff to the deteriorative change in Lyle's mental health status and failed to notify custody staff that Lyle should not have been maintained in single cell housing without constant supervision at a time when he was experiencing adjustment issues and insomnia caused by a change in medication. As a result of these alleged deprivations of medical care, the plaintiff claims that Lyle's self-imposed hanging constituted cruel and unusual punishment in violation of the Fourteenth Amendment.

Additionally, Silvera asserts substantive due process violations alleging that Officers Swan and Standish's failure to employ, utilize and implement certain policies and procedures created a significant risk of lethal consequences to Lyle. As a result of these deficiencies, Silvera claims that Lyle suffered the loss of his life while under their custody.

Lastly, Silvera alleges wrongful death under Conn. Gen.Stat. § 4–147 asserting that the four defendants' intentionally breached the respective duties of care that they owed to Lyle when they acted with reckless disregard for Lyle's liberty.

Currently pending before the Court is a renewed motion for summary judgment asserting the Plaintiff's inability to prove that any of the Defendants were deliberately indifferent to Lyle or acted willfully, wantonly and maliciously. Furthermore, the Defendants assert that their conduct is protected by qualified and statutory immunity.

II. Factual Background

***2** The parties' pleadings and submissions in connection with the motion for summary judgment establish the following facts.

Arrest

Lyle was arrested on April 11, 2008 in the Town of Manchester and charged with carrying a dangerous weapon, carrying a firearm and breach of peace. [Dkt. # 150, Ex. 2, Pl. Rule 56 Stmt., ¶ 6]; [Dkt. # 150, Pl.Ex. 7]. Lyle appeared in the Manchester GA12 Court on April 14, 2008 and was ordered by the presiding judge to be detained pending the resolution of his criminal case, held in protective custody and placed on medical and mental health watch. [Dkt. # 150, Ex. 2, Pl. Rule 56 Stmt., ¶ 7]; [Dkt. # 150, Pl.Ex. 8].

Hartford Correctional Center

On April 14, 2008 following his court appearance Lyle was transported to the Hartford Correctional Center (hereinafter "HCC"). [Dkt. # 136, Ex. 3, Defs. Rule 56 Stmt., ¶ 5). Upon admission to HCC, licensed professional counselor (hereinafter "LPC") Lou Viscosi met with Lyle and performed a suicide risk assessment. *Id.* at ¶ 11. LPC Viscoi discussed the charges with Lyle and reported that Lyle became tearful and estimated that he was facing two and a half years of jail time. *Id.* at ¶ 7; [Dkt. # 151, Ex. 19]. Lyle stated that he has a support system and a girlfriend. *Id.* Viscosi noted that Lyle was future oriented and mentioned that he planned to hire a paid attorney. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 8]; [Dkt.# 151, Ex. 19]. Lyle also mentioned that he thought he would be able to keep his job as a store clerk. Lyle denied having any suicidal intent, stating "I don't want to kill myself. I really don't feel like that." [Dkt. # 151, Pl.Ex. 19]. The suicide risk assessment indicated that Lyle reported overdosing on two occasions, most recently in July 2005, three days after being discharged from the Department of Corrections. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 12]. Lyle also reported overdosing at the age of 14 and driving a car at high rates of speed when depressed or upset. *Id.* at ¶ 13.

LPC Viscosi concluded that given the recent stress and the fact that Lyle had been without medication for the last three days, he should be placed in South Block as a Mental Health Level ("MH") 5. *Id.* at ¶ 14. An MH 5 indicates that an inmate has or may have an acute mental health condition requiring that he be placed in a unit with 24 hour nursing care. *Id.* at ¶ 15. Lyle's mental health screening indicated that his hygiene, eye contact, and psychomotor skills were all appropriate and his thought processes, attention and concentration were normal. *Id.* at ¶ 16.

Lyle was also evaluated by APRN Fritz on April 14, 2008. [Dkt. # 136, Ex. 3, Defs. Rule 56 Stmt., ¶ 17]. APRN Fritz noted that Lyle had firearms charges against him and claimed to have bought the gun with the intent to use it on himself. *Id.* at ¶ 18. APRN Fritz also noted that Lyle reported two prior suicide attempts. *Id.* at ¶ 19. APRN Fritz prescribed 225 mg of Effexor, an anti-depressant, and placed Lyle on suicide watch, giving him a safety blanket and gown. *Id.* at ¶ 20.

***3** Lyle was re-evaluated by Supervising Psychologist Nowinski two days later on April 16, 2008 who noted that Lyle insisted he was not suicidal on intake. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 22]. Lyle admitted to having a history of suicide attempts at home when he felt hopeless but reported that he did not feel that way during his evaluation with Dr. Nowinski. *Id.* at ¶ 23. Dr. Nowinski reported that Lyle was easily engaged, calm and cooperative, and had good eye contact. Lyle stated that he expected to do some time, but did not seem overly concerned. *Id.* at ¶ 24. Dr. Nowinski noted that Lyle had been in general population at HCC on previous admissions and requested to go to general population for more social contact. *Id.* at ¶ 25. Dr. Nowinski also noted that Lyle was compliant with taking his medication, had a depression diagnosis by history. Dr. Nowinski discontinued Lyle's suicide watch, decreased his classification to MH 3, and cleared Lyle for orientation to HCC. *Id.* at ¶ 26. A classification of MH 3 indicates that an inmate has a mild or moderate mental health disorder that may or may not be on psychotropic medication. *Id.* at ¶ 27.

Later on April 16, 2008, Lyle was seen by psychiatric social worker ("PSW") Maldonado because of an emergency request, stating "I am stressed, there is nothing to do in this place." [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 28]. PSW Maldonado noted that Lyle denied being suicidal or having homicidal ideations and hallucinations. *Id.* at ¶ 29. PSW Maldonado provided Lyle with reading materials. *Id.* PSW Maldonado saw Lyle the next day, after Lyle made another emergency request for mental health services stating that he forgot to state that he had difficulty sleeping. *Id.* at ¶ 30. PSW Maldonado reassured Lyle that he would be seen again by the APRN or psychiatrist who would address the insomnia issues. *Id.* at ¶ 31.

Lyle was next seen on May 8, 2008 after making an emergency request to be seen stating that the night he got arrested, he tried to kill himself with the gun but when he tried to shoot himself in the head, his gun jammed. *Id.* at ¶ 32. As a result of this emergency meeting, Lyle was re-classified as an MH Level 5 and was moved to South Block and placed on suicide watch subject to fifteen minute checks. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 33]; [Dkt. # 150, Pl.Ex. 15]. On may 9, 2008, Lyle was evaluated in S-block at his cell door in

response to his yelling and banging. [Dkt. # 150, Pl.Ex. 15]. Lyle stated that he was upset that he was on suicide watch, and commented "I'm gonna be here for the whole weekend." *Id.* Lyle was agitated and frustrated. *Id.* The physician discussed his situation and counseled him on coping with the situation. *Id.* Lyle was receptive to counseling and denied having any suicidal or homicidal ideations. *Id.* The suicide watch was maintained. *Id.*

APRN Fritz saw Lyle again three days later, on May 11, 2008. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 34]. Lyle stated that that he was feeling depressed, had chest pains and his hands were shaking. [Dkt. # 151, Pl.Ex. 12]. Lyle stated that he wanted a magazine to keep his mind off of his problems. *Id.* Lyle admitted to telling the mental health clinician that at the time of his arrest he had tried to kill himself but the gun jammed. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 34]. Lyle stated that he was mostly depressed when he woke up, but was sleeping adequately; his speech was at a normal rate and rhythm, volume and syntax. *Id.* at ¶ 35. APRN Fritz noted that Lyle had bruising in his eyes from punching himself earlier in the week. *Id.* at ¶ 36. APRN Fritz opined that based upon his old records, Lyle might have a psychosis and thus she prescribed an anti-psychotic medication, Risperdal in addition to the Effexor he was taking for depression. *Id.* at ¶ 37.

***4** The next day, on May 12, 2008, APRN Fritz sought to transfer Lyle to Garner but was unable to do so due to DOC policies preventing the transfer of patients classified as MH Level 5. [Dkt. # 151, Ex. 12].

On May 13, 2008, Lyle was seen by Dr. Nowinski, the supervising psychologist at HCC who noted that Lyle was cooperative and compliant with medication. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 38]. Later that day, after being seen by Dr. Nowinski, Lyle's mental health classification was changed to MH Level 4, meaning he had a mental health disorder severe enough to require specialized housing and or ongoing intensive mental health treatment and that he was on psychotropic medication. *Id.* at ¶ 39.

Garner Correctional Institution

Lyle was transferred to Garner Correctional Institution ("Garner") on May 13, 2008 for Mental Health 4 treatment housing. *Id.* at ¶ 47. At the time of his transfer, Lyle had a diagnosis of Dysthymic Disorder which is a chronic type of depression in which a person's moods are regularly low. *Id.* At the time of his transfer Lyle was taking Effexor for symptoms of depression and had recently been prescribed Risperdal for possible psychosis. *Id.* at ¶ 49. Upon admission to Garner, Lyle denied suicidal intent or plan. *Id.* at ¶ 51.

Garner houses MH Level 4 inmates and assigns inmates to different housing sections within Garner based on their level of functioning, measured by their GAF Scores. [Dkt. # 150, Pl.Ex. 10, Dep. of Marmora p. 30 & 33]. Upon arrival at Garner, Lyle had a GAF of 50–53 and was housed at C block. [Dkt. # 150, Pl.Ex. 6, Dep. of Gasparo p. 55; Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 53]. C block was a mental health housing unit with approximately 73 inmates suffering from moderate mental health issues. *Id.* at ¶ 137. Lyle was placed in a cell with inmate Thomas Walker. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 136]. Lyle was housed with Inmate Walker until May 19, 2008 when Walker was transferred to restrictive housing after receiving a disciplinary report. *Id.* at ¶ 136.

On May 13, 2008, the day of his arrival at Garner, Lyle was seen by a nurse clinician who noted that he was alert, oriented to person, place and time and that he denied feeling suicidal or homicidal. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 55]. Lyle also denied suffering from any auditory or visual hallucinations and denied having any medical or mental health issues at the time. *Id* . at ¶ 56. On May 14, 2008, one week prior to his suicide, Lyle wrote a letter to an acquaintance he referred to as "Ice," asking for monetary help with his court case. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 104].

Two days after his transfer to Garner, on May 15, 2008, Dr. Gasparo, a licensed psychiatrist, met with Lyle for a minimum of one hour and noted that Lyle thought that at worst he would receive 2 years on his pending firearm charges. *Id.* at ¶ 57. Lyle reported that he was working full time, had a girlfriend, was living on his own and did not use drugs but drank a little bit. *Id.* at ¶ 58. Lyle also reiterated his history of depression and medical treatment for depression and his most recent attempt to take his own life with a gun. *Id.* at ¶¶ 59–61. Lyle reported that when he was depressed, he teared easily, felt tired, felt lazy, was sleepy, had a loss in appetite and felt suicidal but not daily. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 62].

***5** During his meeting with Dr. Gasparo, Lyle denied feeling suicidal or homicidal. *Id.* at ¶ 63. Dr. Gasparo noted that he was calm, cooperative with normal speech and affect. *Id.* at ¶ 64. Dr. Gasparo discontinued Lyle's prescription for Risperdal after discussing with Lyle the fact that it was an antipsychotic

with risks. *Id.* ¶ 65. Dr. Gasparo and Lyle agreed the risks outweighed any benefits. *Id.* at ¶ 66. Dr. Gasparo continued Lyle's Effexor for depression but evened out the dosage from 150 mg in the morning and 75 mg at night to 112.5 mg in the morning and 112 .5 mg at night. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 68]. A possible side effect of Effexor can be anxiety and Lyle was reporting some anxiety during the day. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 70]. By more evenly distributing the dosage of Effexor, Dr. Gasparo hoped to ensure a more consistent and level blood level. [Dkt. # 136, Ex. 8, Dep. of Gasparo p. 66].

Dr. Gasparo concluded that Lyle had a GAF of 50–55 indicating that he was able to take care of his activities of daily living, able to communicate effectively with others in a rational manner, could sustain employment or school and could be placed into a higher functioning block. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 72]. Dr. Gasparo's evaluation and findings were detailed in Lyle's health services record. *Id.* at ¶ 73. As a result, Dr. Gasparo discontinued Lyle from suicide watch status and recommended his transfer to a higher functioning unit. [Dkt. # 151, Pl.Ex. 27 p. 9]

The next day, on May 16, 2008, Lyle was seen by Licensed Professional Counselor Wordy Samson. *Id.* at ¶ 74. Lyle again denied having suicidal or homicidal ideations. *Id.* at ¶ 75. Lyle informed LPC Samson that his mother had kicked him out of the house when he was 16 and that he was afraid that he might be deported because of his pending charges. *Id.* at ¶ 76. Lyle reported that he was well adjusted to the unit. *Id.* at ¶ 77. LPC Samson noted that Lyle presented as stable and in good spirits. *Id.*

Three days later, on May 19, 2008, Mr. Walker was place in restrictive housing and the Unit Manager, Ms. Marmora, put a hold on Lyle's cellmate, Walker's bed in C block. *Id.* at ¶ 139. It was the practice of Garner to place a hold on the beds of inmates who are temporarily reassigned to a specialized unit such as the restrictive housing unit. *Id.* at ¶ 140. Generally, when a hold is placed on an inmate's bed, the cellmate will remain in the cell by himself until his cellmate returns to the unit. *Id.* at ¶ 147. This was and continues to be a common practice at Garner in the mental health housing units. *Id.* at ¶ 148. The Plaintiffs note that this practice is not reflected in Garner's current unit directives. [Dkt. # 150, Ex. 2, Pl. Rule 56 Stmt., ¶ 140; Dkt. # 150, Pl.Ex. 27 p. 8].

Mr. Walker testified that when Lyle first was placed in his cell, he noticed Lyle was crying, and Walker tried to comfort him by talking to him, asking him what was going on and offering to "assist him on how to think about his situation." [Dkt. # 150, Ex. 4, Dep. of Thomas Walker, p. 30]. Walker then notified a correctional officer walking by that Lyle was crying. *Id.* at 29. During the period of time, approximately a week, in which he shared a cell with Lyle, prior to his placement in restrictive housing, Lyle conveyed thoughts of committing suicide to him. *Id.* at p. 6. Walker stated that Lyle "walked away from mental health, came back into the cell, sat for about ten minutes, not saying nothing. And asked how people hang up around here." *Id.* at 6. Walker clarified that Lyle was asking how he could commit suicide by hanging himself. *Id.* at 6–7. Walker further testified that after this conversation with Lyle he notified the correctional officer on duty that "my cellie needs to speak with mental health. Asap, as soon as possible," but that he could not recall the officer's name and he did not inform the officer that Lyle had asked about how to commit suicide. [Dkt. # 150, Ex. 4, Dep. of Thomas Walker, pp. 7, 28. Walker further testified that he did not think Lyle would act on his suicidal thoughts, stating "he didn't seem like the type ... He was, he wasn't quiet, he wasn't talking about his case or anything. He just—about the moment." *Id.* at p. 28. Walker stated that he did not mention Lyle's comment to anybody else because he didn't think Lyle would try to commit suicide. *Id.* at p. 29.

***6** On May 20, 2008, Dr. Gasparo again saw Lyle when Dr. Gasparo was in C Block. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 78]. Lyle requested that Dr. Gasparo change his dosage of Effexor back to 125 mg in the morning and 75 mg at night because he thought the change in dosage was adversely effecting his ability to fall asleep at night. *Id.* at ¶ 79. Lyle stated that he thought the dosage was better the way it was originally. *Id.* at ¶ 80. Dr. Gasparo asked Lyle if he was sure, and Lyle indicated that he was. *Id.* Dr. Gasparo also asked if everything else was okay and Lyle stated that it was. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 81]. Dr. Gasparo changed Lyle's medication back to 125 mg in the morning and 75 mg at night. *Id.* at ¶ 82. Dr. Gasparo did not note this medication dosage change in Lyle's clinical record as required by University of Connecticut Health Center/Correctional Managed Health Care ("UCHC/CMHC") policy. [Dkt. # 150, Pl.Ex. 17, p. 4 and 9].

Later that evening, Lyle Called LPC Samson to his cell and asked him for a magazine. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 85]. LPC Samson searched for a magazine and was unable to find one. *Id.* Lyle did not complain to LPC Samson about an inability to sleep and didn't complain about being in

the cell by himself. [Dkt. # 150, Pl.Ex. 2, Dep. of Marmora p. 55–57].

Maria Silvera, Andre Lyle's mother, who testified that she had a wonderful relationship with her son, spoke by phone with her son twice, once on May 20th and once on May 21st 2008. *Id.* at ¶¶ 108–09. Ms. Silvera believed her son was more hyper or agitated than usual. *Id.* at ¶ 110. Ms. Silvera did not feel the need to contact anyone about Lyle's state of mind. *Id.* at ¶ 111. Ms. Silvera testified that during their second telephone call, during the evening of May 21, 2008, her son asked her to find another bondsmen and she assured him that she was going to do everything she could to get him out. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 112]. Ms. Silvera testified that she never saw her son's suicide coming. *Id.* at ¶ 113. Lyle wrote a note to his mother just prior to his death which included instructions for arrangements after his death. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 106]

The MH 4 housing units at Garner are monitored by tours conducted every fifteen minutes, consistent with the National Commission on Correctional Health Care guidelines. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 52]. In May 2008, Garner correctional staff toured C block every 15 minutes. *Id.* at ¶ 150. These tours were conducted on an irregular basis, meaning that they were not always conducted on the hour, fifteen minutes past, thirty minutes past or forty five minutes past. *Id.* at ¶ 151. Rather, the times of the tours would be staggered, at a maximum of every fifteen minutes. *Id.* at ¶ 152. Officer Swan toured the unit every fifteen minutes the evening of May 21, 2008. *Id.* at ¶ 153. Two video cameras (C–Pod Dayroom Cameras # 016 and # 017) recorded the C Block of Garner on the night of May 21, 2008, including Officer Swan's tours of the Unit and some of Lyle's movements within his cell. [Dkt. # 151, Ex. 27, pp. 8–9]. The video recording indicates that between approximately 10:30pm and 11:01pm on May 21, 2008, Lyle was moving around in his cell, standing at his cell window and looking out, then moving out of view, and then returning to the cell window, a pattern reflected on the video several times. *Id.* at 9. The video also indicates that at 10:51 pm, Lyle turned the cell lights off and then on and then off again. *Id.* During this period, as reflected on the video, Officer Swan toured the housing unit between 10:26 pm and 10:30pm, and again between 10:47 pm and 10:50pm. *Id.* At 10:58pm, Officer Swan conducted a cell count, checking cell to cell with a flashlight, and noticed inmate Lyle hanging in his cell at 11:01 pm. *Id.; see also* [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 154]; Officer Standish was in central control monitoring the stationary cameras in the various units including C block. *Id.* at ¶ 155.

***7** Officers Standish and Swan report that it is a common practice for inmates to look out their cell window into the unit at various times of the day and evening. *Id.* at ¶ 160. Neither Swan nor Standish believed or thought that Lyle was intending to commit suicide when he turned off his cell light at approximately 10:51 pm and then turned it back on again. *Id.* at ¶ 161. Defendants assert that it takes less than one minute for an inmate to fashion a noose from a bed sheet and to hang himself. *Id.* at ¶ 164. Officer Standish was never in C block the evening of Lyle's suicide. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 171].

III. Standard of Review

"Summary judgment should be granted 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' [Fed.R.Civ.P. 56(a)]. The moving party bears the burden of proving that no factual issues exist. [*Vivenzio v. City of Syracuse,* 611 F.3d 98, 106 (2d Cir.2010)]. 'In determining whether that burden has been met, the court is required to resolve all ambiguities and credit all factual inferences that could be drawn in favor of the party against whom summary judgment is sought.' [*Id.,* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986))]. 'If there is any evidence in the record that could reasonably support a jury's verdict for the nonmoving party, summary judgment must be denied.' [*Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH,* 446 F.3d 313, 315–16 (2d Cir.2006) (internal quotation marks and citation omitted)]. In addition, '[a] party opposing summary judgment cannot defeat the motion by relying on the allegations in his pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible. At the summary judgment stage of the proceeding, Plaintiffs are required to present admissible evidence in support of their allegations; allegations alone, without evidence to back them up, are not sufficient.' [*Welch–Rubin v. Sandals Corp.,* No.3:03cv481, 2004 WL 2472280, at *1 (D.Conn. Oct.20, 2004) (internal quotation marks and citations omitted); *Martinez v. State of Connecticut,* No. 3:09civ1341(VLB), 2011 WL 4396704 at *6 (D.Conn. Sept. 21, 2011)].

IV. Discussion

A. Counts One and Two: Claims against Dr. Gasparo and LPC Samson for Failure to Provide Adequate Mental Health Care

Plaintiff, Silvera, contends that Defendants Gasparo and Sampson demonstrated a deliberate indifference to an obvious and well-documented risk that Lyle would attempt to commit suicide. Silvera asserts that Gasparo and Sampson were familiar with Lyle's DOC medical records detailing a strong history of depression and suicidal ideations and attempts, and from direct conversations with Lyle during which Lyle described his prior suicidal endeavors, including his most recent attempt on April 18, 2008, immediately preceding his placement in the custody of the DOC, that Lyle suffered from chronic depression, Dysthemic Disorder, and recurrent psychotic tendencies. Gasparo and Sampson were also aware, Silvera asserts, that Lyle was transferred from Hartford Correctional Center to Garner Correctional Institute, a detention facility designed to cater to detainees with moderate to severe mental health needs, as a result of Lyle's chronic depression and episodes of self-inflicted harm while at HCC.

***8** Silvera argues that, despite these clear indications of Lyle's risk of suicide, Defendants Gasparo and Sampson failed to provide Lyle with adequate care to prevent him from taking his own life. In particular, Silvera contends that Gasparo failed to follow up with Lyle after his initial screening interview to inquire as Lyle's reaction to the changes in medication and dosage or to follow up on Lyle's complaints of insomnia and anxiety. Silvera further contends that as a result of Gasparo's failure to follow up with Lyle at all, Lyle was forced to reach out for Dr. Gasparo's attention on May 20, 2008 as Gasparo passed through the C–Unit of Garner to plead for Gasparo to again modify the dosage of his depression medication. Silvera asserts that Gasparo also failed to implement a Mental Health Plan for Lyle, including an appropriate housing and custody plan, placing Lyle at risk of lethal physical harm. Silvera claims that Gasparo should have recognized, given his training and experience, that Lyle was demonstrating signs of severe anxiety and depression indicative of an acute risk of suicide, and responded accordingly by closely monitoring his behavior and symptoms as he adjusted to his new housing and medication changes. Therefore Silvera seems to assert that the basis for the deliberate indifference claims is both a failure to recognize indications of an acute risk of suicide, and a failure to provide adequate protection to prevent against suicide.

Defendants assert that Plaintiff has failed to present facts to establish that Lyle was actively suicidal at the time of his death. Rather, Defendants assert that Lyle repeatedly denied being suicidal throughout his detention and did not demonstrate any behavior either on the date of his death or the days leading up to his death to indicate to the Defendants that he was planning or contemplating committing suicide. Moreover, Defendants provided expert testimony opining that the care Lyle received from Defendants Gasparo and Samson was consistent with applicable medical community standards of care and appropriately responded to Lyle's past and present symptoms. [1] Defendants assert that Lyle's death resulted from his failure to alert the staff at Garner to his needs or to seek help.

[1] The Court notes that portions of expert testimony offered by Defendants in support of their motion for summary judgment were not considered by the Court as the testimony addressed adequacy of the care provided and would " 'usurp the role of the jury in applying the law to the facts before it.' " *See United States v. Lumpkin,* 192 F.3d 280, 289 (2d Cir.1999) (quoting *United States v. Duncan,* 42 F.3d 97, 101 (2d Cir.1994). For example, the Defendants offered expert testimony stating that "[i]t is Dr. Ducate's expert opinion that there is nothing in Lyle's health record to indicate that clinical staff at Garner had any indication or should have had any indication that Lyle was planning to harm himself during the limited time the staff had to assess him prior to his suicide." This testimony addresses the question of whether or not the Defendants were aware that Lyle was acutely suicidal, a critical element of the deliberate indifference standard. The Second Circuit has "consistently held ... that expert testimony that usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it, by definition does not 'aid the jury in making a decision; rather it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's." *Nimely v. City of New York,* 414 F.3d 381, 397 (2d Cir.2005) (internal quotations omitted). Accordingly, the Court has overlooked those portions of expert testimony which seek to supplant the jury's role as trier of fact to determine

whether the facts alleged support a finding of deliberate indifference.

At the outset, the Court notes that the Eighth Amendment is not applicable to Lyle as a pre-trial detainee, instead Silvera's constitutional claims regarding Lyle's care while in custody are to be analyzed under the Due Process Clause of the Fourteenth Amendment. *See Weyant v. Okst,* 101 F.3d 845, 856 (2d Cir.1996). However, as the Second Circuit has made clear, "it is plain that an unconvicted detainee's rights are at least as great as those of a convicted prisoner." *Id.* Thus, "[c]laims for deliberate indifference to a serious medical condition or other threat to the health or safety of a person in custody should be analyzed under the same standard irrespective of whether they are brought under the Eight or Fourteenth Amendment." *Caiozzo v. Koreman,* 581 F.3d 63, 71 (2d Cir.2009).

***9** The standard for evaluating a claim of deliberate indifference incorporates both a subjective and an objective component. *See Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994). First, the objective component requires a plaintiff to show that he or she had a "serious medical condition." *See Caiozzo,* 581 F.3d at 71. The Second Circuit has recognized several factors as relevant to the inquiry into the seriousness of the medical condition, including: "the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Chance v. Armstrong,* 143 F.3d 698 (2d Cir.1998) (citing *McGuckin v. Smith,* 974 F.2d 1050, 1059–60 (9th Cir.1992)).

As Judge Kravitz noted in his decision on the motion to dismiss, "[t]here is no disputing that Mr. Lyle had 'serious medical needs' within the meaning of the deliberate indifference standard, as evidenced by both the DOC classifications indicating (at times) that he was a serious threat to himself, as well as by his eventual suicide." [Dkt. # 50, p. 12]; *see also Zimmerman v. Burge,* No. 9:06–cv–0176 (GLS/GHL), 2009 WL 3111429, at *8 (N.D.N.Y. Sept. 24, 2009) (collecting cases holding that a history of depression and suicide attempts is a sufficiently serious medical condition within the context of deliberate indifference).

The subjective component requires the plaintiff to establish that the defendant acted "with a sufficiently culpable state of mind." *Hathaway,* 37 F.3d at 66. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble,* 429 U.S. 97, 105, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Although there existed previously some question as to whether an objective or subjective standard applied in the context of a Fourteenth Amendment deliberate indifference claim, the Second Circuit resolved this ambiguity holding that the standard is indeed subjective, as articulated by the Supreme Court in *Farmer v. Brennan,* 51 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811, —— (1994). *See Caiozzo,* 581 F.3d at 65 ("Because the Supreme Court in *Farmer* articulated the proper standard for analyzing such claims under the Eight Amendment—a standard that we have already applied in *Cuoco* to a Fifth Amendment due process case—we adopt that standard in this case under the Due Process Clause of the Fourteenth Amendment."). Thus, as the Supreme Court made clear in *Farmer,* the culpability component of the deliberate indifference standard is subjective and requires a knowing disregard of "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 harm exists, and he must also draw the inference [of a substantial risk of harm]." *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). As the Supreme Court explained, this subjective standard, requiring both awareness of facts indicating a substantial risk of harm and an inference of a substantial risk of harm drawn from those facts, is necessary to distinguish between "cruel and unusual '*conditions* ' " and "cruel and unusual '*punishments,*' " as only the latter are prohibited under the Eighth Amendment. *Id.* (emphasis added). Therefore, as Supreme Court further elaborated, "an official's failure to alleviate a significant risk that he *should have perceived by did not,* while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

***10** The question of whether "a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer,* 511 U.S. at 842. (internal citation omitted). If evidence is presented as to the obviousness of the risk, a prison official may challenge the claim of deliberate indifference by showing "that the obvious escaped him." *Id.* However, an officer may not hide behind willful blindness, as the Supreme Court noted in *Farmer* that an officer "would not escape liability if the evidence showed that he merely refused to verify the underlying facts that he strongly suspected to be true, or declined to confirm

inferences of risk that he strongly suspected to exist ...” *Id.* at 843. Prison officials may also rebut circumstantial evidence presented of an obvious risk of harm by establishing that they were unaware of this risk, “for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.” *Id.* at 844. Alternatively, where it is established that prison officials were aware of a substantial risk to inmate health or safety, such officials “may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.” *Id.*

In sum, in the context of detainee suicide, “deliberate indifference may exist pursuant to one of two broad fact scenarios.” *See Kelsey v. City of New York,* No. 03–CV–5978 (JFB)(KAM), 2006 WL 3725543, at *5 (E.D.N.Y. Dec. 18, 2006), *aff'd,* 306 Fed.Appx. 700 (2d Cir.2009). “First, state officials could be deliberately indifferent to the risk of suicide by failing to discover an individual's suicidal tendencies. Alternatively, the detaining authorities could have discovered and have been aware of the suicidal tendencies, but could be deliberately indifferent in the manner in which they respond to the recognized risk of suicide, an inquiry which focuses on the adequacy of preventative measures.” *Id.;* see also *Rellegert v. Cape Girardeau County, Mo.,* 924 F.2d 794, 796 (8th Cir.1991).

Here, the Court notes that Plaintiff, Silvera, seems to allege both variations of deliberate indifference, arguing both that the Defendants failed to recognize obvious signs that Lyle was suffering from an acute risk of suicide, despite his long and well-documented history of chronic depression and suicide attempts, and recent incidents of self-harm and anxiety, *and* that the Defendants failed to provide adequate care to prevent against this risk.

Beginning first with the allegation that Defendants Gasparo and Samson failed to recognize that Lyle was suffering from an acute risk of suicide, the Court notes that the record is replete with indications that Defendants Gasparo and Samson were aware of Lyle's extensive history of depression and suicide attempts. Defendants dispute neither this history nor their awareness of it. Rather, Defendants dispute that Lyle manifested prior to his death an acute risk of suicide.

***11** The subjective component of the deliberate indifference standard, as articulated by the Supreme Court in *Farmer* is clear that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.” 511 U.S. at 837. Although awareness of a substantial risk of harm may be established through circumstantial evidence “by the very fact that the risk was obvious,” the Court finds that Silvera has failed to identify a material factual dispute regarding whether or not it was obvious that Lyle faced a substantial risk of suicide. While Lyle's history of depression and prior suicide attempts indicated a possibility that Lyle would make another suicide attempt, there was no indication during Lyle's detention between April 14, 2008 and May 21, 2008 that Lyle was at risk of an imminent suicide attempt.

Silvera identifies several details which she asserts indicate an obvious risk of suicide. First, Silvera notes that prior to Lyle's transfer to Garner on May 13, 2008, Lyle was reported to have been punching himself in the face and banging and screaming at his cell door. Moreover, Silvera refers to the fact that Dr. Nowinski noted on May 13, 2008 that Lyle was low-functioning and suffering from Major Depressive Disorder with Psychotic Features. However, these facts are not disputed by Defendants. Further, these details are referenced in isolation, overlooking the litany of facts indicating that Lyle was not in fact suffering from an acute risk of suicide. Silvera does not dispute that Lyle consistently denied suffering from any suicidal or homicidal ideation. Nor does Silvera dispute a multitude of facts indicating that Lyle was largely stable and not experiencing a heightened state of depression.

Silvera admits that when Lyle met with Dr. Gasparo on May 15, 2008, shortly after his transfer to Garner, Lyle openly discussed his history of depression and his attempt to take his life on April 14, 2008, reported that he was working full time, had a girlfriend, and that thought that at most he was facing a possible two years of jail time on his pending firearm charges. As a result of this rational and calm conversation, addressing future-oriented topics, Dr. Gasparo discontinued Lyle from suicide watch status, raised Lyle's GAF score from a 30, or low functioning, to a 50–55, indicating that he was “able to take care of his activities of daily living, able to communicate effectively with others in a rational manner, could sustain employment or school, and could be placed in a higher functioning block.” [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 72].

Silvera admits that On May 16, 2008 Lyle met with Licensed Professional Counselor Samson, and again denied having

suicidal or homicidal ideations. During the conversation, Lyle discussed the fact that his mother kicked him out of the house when he was sixteen years old, and that he was afraid he might be deported because of his pending charges. Silvera further admits that Lyle reported that he was well adjusted to the unit, and LPC Sampson noted that he seemed stable and in good spirits.

***12** The only facts identified by Silvera as indicative of Lyle's acute risk of suicide include Lyle's behavior in his cell with Walker and question regarding how to hang himself, and the fact that Lyle "grabbed" Dr. Gasparo in C Block and requested to have the evening dosage of his depression medication returned to its original level because he was having trouble sleeping. These facts fail to create a material factual dispute regarding an obvious risk of suicide. Lyle's difficulty falling asleep would not have indicated a heightened risk of suicide given Lyle's prior testimony to Dr. Gasparo that he became lethargic when depression. Further, although Walker testified that he notified a correctional officer on two separate occasions that his cellmate required the attention of mental health professionals, Walker was unable to remember the name of the correctional officer that he notified, and Silvera has provided no evidence to demonstrate that this information was ever conveyed to either Defendant Gasparo or Defendant Samson. Additionally, Silvera neglects to mention that Walker testified that he did not specifically inform the correctional officer that Lyle was contemplating suicide, he merely informed the correctional officer that Lyle required medical attention "ASAP." Silvera also overlooks the fact that Walker testified that he did not persist in his attempts to inform Garner staff of Lyle's comments because he did not feel that Lyle would actually attempt to commit suicide, noting that he did not think Lyle seemed like the suicidal type. Silvera similarly does not acknowledge Lyle's mother's testimony that she did not sense any danger when she spoke to him on the evening of his suicide.

Defendants do not dispute that Lyle reached out to Dr. Gasparo on the evening of May 20, 2008 to request a change in the dosage of his depression medication. Although this request did convey that Lyle was having difficulty sleeping, Lyle made no indication the following day, May 21, 2008, that he was still having difficulty sleeping following the dosage change. Dr. Gasparo's failure to record the dosage change in Lyle's medical records could possibly constitute an act of negligence, however mere negligence cannot establish a claim of deliberate indifference. *See Farmer,* 511 U .S. at 825 (noting that "*Estelle* establishes that deliberate indifference entails something more than mere negligence ..."). Similarly, although Lyle requested a magazine from Defendant Samson on the evening of May 20, 2008, consistent with his comments to Defendant Gasparo that he was having difficulty sleeping, Lyle did not reiterate his request for reading materials on May 21, 2008, nor did he give any indication that he was feeling anxious. Plaintiffs have failed to present any evidence to show that Lyle reached out to Garner staff in any way on May 21, 2008.

In sum, Silvera's allegation that Defendants Gasparo and Samson were deliberately indifferent by failing to recognize that Lyle faced an acute risk of suicide amounts to a challenge to the Defendants medical judgment. *See Hill v. Curcione,* 657 F.3d 116, 123 (2d Cir.2011) (holding that "[i]ssues of medical judgment cannot be the basis of a deliberate indifference claim."). Silvera essentially asserts that Defendants failed to recognize signs of a potentially escalating mental health crisis, ultimately resulting in an unfortunate and tragic suicide. However Silvera admits the facts which reasonably led the Defendants to conclude that Lyle was in fact stable, although nevertheless continuing to suffer from chronic depression. Therefore where Silvera has failed to identify a material factual dispute regarding an obvious risk of suicide, she cannot establish as a matter of law that Defendants Gasparo and Samson were deliberately indifferent by failing to recognize that Lyle suffered from an acute risk of suicide. Rather, at best, Silvera has identified a potentially negligent act of Defendant Gasparo, and has challenged the exercise of Defendant Gasparo and Samson's medical judgment, neither of which are sufficient to constitute deliberate indifference. *See Curcione,* 657 F.3d at 123; *Farmer,* 511 U.S. at 825.

***13** To the extent that Silvera raises a claim of deliberate indifference asserting that Defendants Gasparo and Samson failed to adequately protect Lyle from the risk of suicide, the evidence is similarly deficient. Silvera asserts that Defendants Gasparo and Samson failed to adequately protect Lyle by failing to conduct a suicide risk assessment of Lyle as required by policy, failing to review Lyle's mental health records, failing to instruct custody staff on Lyle's housing assignment and the level of observation he required.

As previously discussed, in order to constitute deliberate indifference, the standard of care provided must exceed mere negligence or medical malpractice. *See Estelle,* 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation just because the victim is a prisoner."); *see also Weyant,* 101 F.3d at 856 ("Deliberate indifference is a 'mental

state more blameworthy than negligence'—it is a 'state of mind that is the equivalent of criminal recklessness.' " (citation omitted). "[D]eliberate indifference involves unnecessary and wanton infliction of pain, or other conduct that shocks the conscience." *Hathaway,* 99 F.3d at 553. Where a prison official responds reasonably to a known risk of harm to an inmate will not be found liable, even if the harm is ultimately not averted. *See Farmer,* 511 U.S. at 844–45. "Simply laying blame or fault and pointing out what might have been done is insufficient. The question is not whether the [defendants] did all they could have, but whether they did all the Constitution requires." *Rellegert v. Cape Girardeau County,* 924 F.2d 794, 797 (8th Cir.1991).

The deficiencies Silvera identifies in the Defendants' treatment of Lyle fall short of the standard for deliberate indifference. The assertion that Defendants Garner and Samson violated DOC and Garner policies by failing to conduct suicide and housing assessments is insufficient to create a material factual dispute regarding the adequacy of the care provided to Lyle. Even if the Defendants did not conduct a suicide assessment or housing assessment on the specific forms of paper contemplated by DOC or Garner policies, the record reflects that the Defendants provided Lyle with a significant amount of medical care, treatment, and attention.

Lyle had regular psychiatric care while in custody. Upon arrival at Garner, Lyle was seen by a nurse clinician who noted that he appeared alert, oriented to person, place and time. Lyle denied feeling suicidal or homicidal. Two days later, Lyle met with Dr. Gasparo who conducted what appears to be a thorough review of Lyle's mental health history and current mental state. Lyle appears to have dismissively acknowledged his pending charges, stating that he thought he would receive at worst two years of jail time on his pending charges. Lyle described his current living and employment situations. Lyle reiterated his history of depression and attempts to commit suicide. Lyle also summarized the standard symptoms of his depression, noting that when depressed he teared easily, felt tired, felt lazy, was sleepy, had a loss in appetite and felt suicidal. Lyle confirmed that he did not feel this way on a daily basis. As a result of this consultation, Dr. Gasparo identified Lyle's level of functioning, assigning him to a GAF score of 50–55. Silvera admits that housing assignments within Garner were assessed on the basis of each inmate's level of functioning. The next day, Lyle met with Defendant Samson, again denying any suicidal or homicidal ideations. Lyle discussed his troubled upbringing with Defendant Samson, admitting that his mother had kicked him out of the house at the age of sixteen, and that he feared that he would be deported as a result of his pending charges. Lyle also reported to Defendant Samson that he was well-adjusted to his housing unit. Although Defendants Gasparo and Samson may have failed to memorialize their analyses and conclusions on the forms contemplated by DOC and Garner policies, these facts, uncontroverted by Silvera, evince an assessment of Lyle's risk of suicide and an analysis of the appropriate level of restrictive housing for Lyle.

***14** The deficiencies of care identified by Silvera, when considered alongside the range of evidence reflecting an awareness of Lyle's history of depression and risk of suicide and ample efforts to protect Lyle from harm fail to create a material factual dispute regarding deliberate indifference such that a rational jury could find that insufficient protective measures were taken by the Defendants. Rather, the evidence reflects that the Defendants responded reasonably to Lyle's exhibited symptoms and mental health needs. Lyle's housing unit was subjected to staggered fifteen minute checks, and the Defendants maintained a video recording of Lyle's housing unit capable of capturing Lyle's movements within his cell. *See Brown v. Harris,* 240 F.3d 383 (4th Cir.2001) (holding that defendants responded reasonably to [detainee's] presented risk of suicide by playing detainee on medical watch which maintained constant video surveillance of detainee's cell); *see also Rhyne v. Henderson County,* 973 F.2d 386 (5th Cir.1992) (holding that a policy of checking on suicidal inmates every ten minutes did not constitute deliberate indifference).

Lyle's medication requests were monitored evidenced by the fact that his requests for modification of the dosage of his depression medication were acknowledged and honored. *See Estelle,* 429 U.S. at 104–05 (recognizing that proof of deliberate indifference may be found where a prison official "intentionally den[ies] or delay[s] access to medical care or intentionally interfer[es] with the treatment once prescribed."). Lyle's death, though tragic, was not the result of deliberate indifference.

Accordingly, the Defendants' motion for summary judgment as to Counts One and Two is GRANTED. Where the Court finds that no constitutional violation has occurred, the Court need not address the issue of qualified immunity. *See Bukovinsky v. Sullivan County Div. of Health and Family Services,* 408 Fed.Appx. 406, 408 (2d Cir.2010) (Concluding that where the defendant's conduct did not violate the appellant's constitutional rights, it was not necessary to reach

the issue of whether the defendant "enjoys qualified immunity for her actions.").

B. Count Three: Substantive Due Process Claims against Correctional Officers Swan and Standish

Silvera's third count alleges that Defendants Swan and Standish violated Lyle's substantive due process rights by failing to prevent his death by suicide. Silvera has conceded that summary judgment should enter in favor of Defendant Standish. Accordingly, the Court's analysis will be limited to the allegations against Defendant Swan.

The Second Circuit has held that while in custody, a pretrial detainee has a Fourteenth Amendment substantive due process right to care and protection, including protection from suicide. *See, e.g., Cuoco v. Moritsugu,* 222 F.3d 99, 106 (2d Cir.2000); *Weyent v. Okst,* 101 F.3d 845, 856 (2d Cir.1996). The Supreme Court has held that in order for an injury to be cognizable as a violation of substantive due process a plaintiff must establish that the challenged conduct shocks the conscience. *Cty of Sacramento v. Lewis,* 523 U.S. 833, 846–47, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). "Substantive due process protects individuals against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against constitutional action that is incorrect or ill-advised. *Lowrance v. Achtyl,* 20 F.3d 529, 537 (2d Cir.1994) (internal citations omitted).

***15** To establish a substantive due process violation, Silvera must establish that Defendant Swan engaged in "egregious conduct which goes beyond merely 'offending some fastidious squeamishness or private sentimentalism' and can fairly be viewed as so 'brutal' and 'offensive to human dignity' as to shock the conscience." *Smith v. Half Hollow Hills Cet. Sch. Dist.,* 298 F.3d 168 (2d Cir.2002) (quoting *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). Very few conditions of prison life are shocking enough to violate a prisoner's right to substantive due process. *Samms v. Fischer,* No. 9:10–CV–0349(GTS/GHL), 2011 U.S. Dist. LEXIS 97810, at *12,2011 WL 3876528 (N.D.N.Y. Mar. 25, 2011) (citing *Sandin v. Conner,* 515 U.S. 472, 479 n. 4, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) (providing only two examples of the type of condition "shocking" enough to offend substantive due process principles—the transfer to a mental hospital and the involuntary administration of psychotropic drugs)).

The Supreme Court has recognized that "deliberately indifferent conduct" satisfies the "fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial." *Cty of Sacramento,* 523 U.S. at 850. Similar to her claims of deliberate indifference against Defendants Gasparo and Swanson, Silvera asserts that Defendant Swan's failure to recognize Lyle's abnormal behavior as indicative of an acute risk of suicide constitutes a violation of Lyle's substantive due process rights. However, Silvera admits that on May 21, 2008, Defendant Swan toured the C Block housing unit of Garner at 10:50pm, and then checked the cells again at 10:58 pm, and then found Lyle hanging in his cell at 11:01 pm. [Dkt. # 150, Ex. 2, Pl. Rule 56 Stmt., ¶ 154]. Therefore Defendant Swan toured the cell block twice in an eight minute time frame, a frequency of monitoring nearly twice as vigilant as mandated by the National Commission on Correctional Health Care guidelines. [Dkt. # 136, Ex. 3, Def. Rule 56 Stmt., ¶ 52]. Although Defendant Samson's inability to deduce Lyle's suicidal intent led to serious harm, this failure does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. No rational jury could find that Defendant Samson's conduct "shocks the conscience." *Cty of Sacramento,* 523 U.S. at 846–47.

Accordingly, Defendant's motion for summary judgment is GRANTED as to Count Three.

C. Count Four: Wrongful Death Claim (against All Defendants)

Silvera's fourth count alleges wrongful death under Connecticut state law. Defendants assert statutory immunity under Connecticut Gen.Stat. § 4–165 and argue that the Court should enter judgment in their favor.

"No action for wrongful death existed at common law or exists today in Connecticut except as otherwise provided by the legislature ." *Rzayeva v. United States,* 492 F.Supp.2d 60, 65 (D.Conn.2007) (citing *Ecker v. Town of West Hartford,* 205 Conn. 219, 231, 530 A.2d 1056 (1987)). Although Silvera failed to identify a Connecticut statute recognizing a cause of action for wrongful death, the Court acknowledges that such a statute exists. Conn. Gen.Stat. § 52–555(a) provides, in relevant part, that "[i]n any action ... for injuries resulting in death ... [the] executor or administrator may recover from the party legally at fault." However, as the Defendants have indicated, Conn. Gen.Stat. § 4–165 provides immunity for state employees in their individual capacity for damage or injury "caused in the discharge of his or her duties or within the scope of his or her employment," so long as the injury

was not caused by "wanton, reckless, or malicious" conduct. Conn. Gen.Stat. § 4–165.

***16** Silvera argues that Defendants Gasparo, Samson and Swan acted outside the scope of their authority in failing to abide by DOC and Garner policies and thereby failing to prevent Lyle's suicide. The Connecticut Supreme Court has held that actions fall outside the scope of employment authority when they "misuse governmental authority for personal gain," such that the actions are taken solely in furtherance of a personal interest rather than to carry out a government policy or to advance an interest of the employer or the state. *See Martin v. Brady,* 261 Conn. 372, 377–79, 802 A.2d 814 (2002). Silvera has wholly failed to present evidence indicating that the Defendants actions misused governmental authority for personal gain. Instead, Silvera relies solely on the argument that their actions contravened DOC and Garner policies. Absent any evidence that the Defendants abused their authority for personal gain, no rational jury could find that the Defendants acted outside the scope of their employment authority. Therefore, the Defendants are entitled to statutory immunity unless their conduct was "wanton, reckless or malicious." Conn. Gen.Stat. § 4–165.

Recognizing that they "have never definitively determined the meaning of wanton, reckless or malicious as used in § 4–165," the Connecticut Supreme Court has incorporated and applied the common law meaning of these terms in the context of § 4–165. *See Martin,* 261 Conn. at 379, 802 A.2d 814. As the Connecticut Supreme Court articulated:

> In order to establish that the defendants' conduct was wanton, reckless, willful, intentional and malicious, the plaintiff must prove, on the part of the defendants, the existence of a state of consciousness with reference to the consequences of one's acts ... [Such conduct] is more than negligence, more than gross negligence ... [I]n order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them ... It is such conduct as indicates a reckless disregard of the just rights or safety of others or the consequences of the action ... [In sum, such] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." *Id.*

Having concluded that Defendants Gasparo and Samson responded reasonably to Lyle's exhibited signs of suicide risk, it follows that these defendants did not act in a wanton, reckless or willful manner in failing to prevent Lyle from committing suicide. Additionally, Silvera has conceded that summary judgment should enter in Officer Standish's favor as to wrongful death. Therefore the Court need only address Officer Swan's conduct.

Silvera admits that in May 2008 correctional staff toured the C Unit of Garner every fifteen minutes on an irregular basis. Further, Silvera admits that Defendant Swan toured the unit every fifteen minutes the evening of May 21, 2008. Silvera has simply failed to present any evidence to indicate that Defendant Swan acted in a wanton, reckless or willful manner in failing to prevent Lyle from taking his own life.

***17** Accordingly, Defendants motion for summary judgment as to Count Four for wrongful death is GRANTED.

V. Conclusion

Unfortunately, the law does not afford a remedy for every tragic event. Based on the above reasoning, Defendants' motion for summary judgment on Silvera's remaining claims is granted in its entirety. Construing the facts in the light most favorable to Silvera, no rational jury could find that the Defendants were deliberately indifferent to Lyle's risk of suicide, provided him with treatment so inadequate as to shock the conscience, or behaved in a wanton, reckless or malicious manner. Accordingly, it is the Court's duty to and by this order the Court does direct the Clerk to close the file and enter judgment in favor of the Defendants.

IT IS SO ORDERED.

All Citations

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