2011 WL 1135934
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United States District Court,
N.D. New York.

Ronald LOADHOLT, Plaintiff,
v.
William LAPE, Superintendent of Coxsackie Corr. Facility; Dr. Miller, Facility Health Services Director; K. Cavanaugh, Psychological Services Unit Chief; McDermott, Lieutenant; Dr. Schlenger, Dental Health Services; J. Smith, Deputy Superintendent of Health Services, Defendants.

Civ. No. 9:09–CV–0658 (LEK/RFT).
|
March 3, **2011**.

Attorneys and Law Firms

Ronald Loadholt, Hempstead, NY, pro se.

Hon. Eric T. Schneiderman, New York State Attorney General, Cathy Y. Sheehan, Esq., Richard Lombardo, Esq., Assistant Attorney Generals, of Counsel, Albany, NY, for Defendants.

REPORT–RECOMMENDATION and ORDER

RANDOLPH E. TREECE, United States Magistrate Judge.

***1** *Pro se* Plaintiff Ronald Loadholt filed this civil rights action, pursuant to 42 U.S.C. § 1983, alleging that the Defendants violated his constitutional rights under the Eighth and Fourteenth Amendments. Dkt. No. 9, Second Am. Compl. Defendants bring a Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), Dkt. No. 28, which Plaintiff opposes, Dkt. No. 36. For the reasons that follow, we recommend that Defendants' Motion be **granted** and Plantiff's Second Amended Complaint be dismissed in its entirety.

I. BACKGROUND

Plaintiff initiated this action on June 8, 2009, while an inmate at Coxsackie Correctional Facility, with the filing of a civil rights Complaint. *See* Dkt. No. 1. The Honorable Lawrence E. Kahn, Senior United States District Judge, found that both Plaintiff's Complaint and his subsequent Amended Complaint (Dkt. No. 7) could not proceed as drafted, but permitted Plaintiff, in light of his *pro se* status, the opportunity to amend his pleadings to cure various deficiencies therein. *See* Dkt. Nos. 6, Order, dated Aug. 12, 2009 & 8, Order, dated Sept. 29, 2009. In accordance with those Orders, Plaintiff filed his Second Amended Complaint with this Court on October 10, 2009. Dkt. No. 9.

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See* *Cruz v. Beto,* 405 U.S. 319, 322 (1972). In light of the terse, sparse, and vague claims in Plaintiff's Second Amended Complaint, we now restate the allegations in full and verbatim:

> defendant McDermott refuse to give Plaintiff hearing assistance Plaintiff is Learning disable and refuse OMH testment of Plaintiff mental illness Dates 10/20/08, 12/5/08, 10/23/08 causing Plaintiff to lose freedom
>
> defendant K cavanaugh no Psychological crisis treatment or suicide prevention when Plaintiff stop eat And drink lost alot of weight pacing not sleeping, or showering Date 12–23–08 to 1–5–09 causing Plaintiff Mental condition to get even more bad coming close to dead phyical pain,
>
> defendant: Dr: Schlenger no dental services for tooth pain from 10–3–09 to 2–3–09[1] wait at coxsaxie receive no dental services causing Plaintiff more pain and lost of tooth
>
> defendant: J SMITH refuse to remove Plaintiff from RMV and place (Plaintiff) in hospital after lose alot of weight to be force feeded Date 12–21–09 to 1–05–09[2] causing mental and phyical pain
>
> defendant: William Lape
>
> > not given Plaintiff hearing, or grievance or legal assistance from 10–20–08 to 2–3–09 causing mental and phyical pain
> >
> > defendant Dr Miller allow mental ill patients to lose alot of weight 12–23–08 to 1–5–09 place plaintiff on 3 floor and not on flat 10–5–09–2–2–09[3] not give better pain medical, cane, mattress, pillow, no medical accomodational better shoe's etc.

Second Am. Compl. at pp. 5–7.

II. DISCUSSION

A. Standard of Review

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See* *Cruz v. Beto,* 405 U.S. 319, 322 (1972). The trial court's function "is merely to assess the legal feasability of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir.1980). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974) (*overruled on other grounds by* *Davis v. Scherer,* 468 U.S. 183 (1984)).

***2** "Generally, in determining a 12(b)(6) motion, the court may only consider those matters alleged in the complaint, documents attached to the complaint, and matters to which the court may take judicial notice." *Spence v. Senkowski,* 1997 WL 394667, at *2 (N .D.N.Y. July 3, 1997) (citing *Kramer v. Time Warner Inc.,* 937 F.2d 767, 773 (2d Cir.1991)). Moreover, "even if not attached or incorporated by reference, a document 'upon which [the complaint] *solely* relies and which is *integral to the complaint'* may be considered by the court in ruling on such a motion." *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir.2007) (emphasis in original) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir.1991)).

The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *See* *Retail Clerks Intern. Ass'n, Local 1625, AFL–CIO v. Schermerhorn,* 373 U.S. 746, 754 n. 6 (1963); *see also* *Arar v. Ashcroft,* 532 F.3d 157, 168 (2d Cir.2008). Nevertheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 1949 (2009). Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

A motion to dismiss pursuant to Rule 12(b)(6) may not be granted so long as the plaintiff's complaint includes "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. at 1960 (citing *Twombly*).[4] "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." *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. at 1949. This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, in spite of the deference the court is bound to give to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts [which he or she] has not alleged, or that the defendants have violated the ... laws in ways that have not been alleged." *Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983). The process of determining whether a plaintiff has "nudged [his] claims ... across the line from conceivable to plausible," entails a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. at 1950–51.

With this standard in tow, we consider the plausibility of Plaintiff's Second Amended Complaint.

B. Eighth Amendment

***3** Plaintiff claims, albeit in a quite cursory manner, that the Defendants violated his constitutional rights under the Eighth Amendment by their deliberate indifference to his medical needs and by subjecting him to harsh and atypical prison conditions.

To state a claim under § 1983 for deprivation of medical treatment in violation of the Eighth Amendment, a plaintiff must show that the defendant acted with "deliberate indifference to serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). Thus, "[t]he deliberate indifference standard embodies both an objective and a subjective prong" which the plaintiff must establish. *Hathaway v.*

Coughlin, 37 F.3d 63, 66 (2d Cir.1994), *cert. denied,* 513 U.S. 1154 (1995). Under the objective prong, the alleged medical need must be "sufficiently serious." *Id.; Chance v. Armstrong,* 143 F.3d 698, 702 (2d Cir.1998). Under the subjective component, the plaintiff must demonstrate that the defendants acted with "a sufficiently culpable state of mind." *Hathaway v. Coughlin,* 37 F.3d at 66. This standard must be met for each claim against each individual Defendant in this action.

1. Defendant Cavanaugh

Plaintiff alleges that Defendant Cavanaugh did not provide "psychological crisis treatment or suicide prevention" after Plaintiff stopped eating, drinking, sleeping, or showering. Second Am. Compl. at p. 5. In accordance with the deliberate indifference standard, we will delve into Plaintiff's allegation to determine if this statement—Plaintiff's only mention of Defendant Cavanaugh—is enough to implicate both an objective substantial risk of serious harm and a sufficiently culpable state of mind.

"A serious medical condition must be 'a condition of urgency, one that may produce death, degeneration, or extreme pain.' " *Osacio v. Greene,* 2009 WL 3698382, at *4 (N.D.N.Y. Nov. 2, 2009) (quoting *Hathaway v. Coughlin,* 37 F.3d at 66). "Factors that have been considered in determining whether a condition is serious include '[t]he 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.' " *Id.* (quoting *Chance v. Armstrong,* 143 F.3d at 702) (other citations omitted). The "factors listed above, while not the only ones that might be considered, are without a doubt highly relevant to the inquiry into whether a given medical condition is a serious one." *Chance v. Armstrong,* 143 F.3d at 703.

Here, the question is whether the deprivation of psychological treatment or suicide prevention procedures triggers an objectively serious risk of harm within the context of the Eighth Amendment. Taking the Plaintiff's claims as true, it appears he had a need for mental health services that went unmet. This Court, in accord with multiple decisions in this Circuit, recognizes that allegations of mental illness, especially when accompanied with suicidal ideation, state a plausible claim that Plaintiff's mental health needs were sufficiently serious. *See, e.g., Allah v. Kemp,* 2010 WL 1036802, at *6, n. 9 (N.D.N.Y. Feb. 25, 2010) (finding the failure to provide plaintiff with a mental health evaluation, notwithstanding his attempted suicide three days earlier, was enough to meet the "sufficiently serious" standard); *Hamilton v. Smith,* 2009 WL 3199531, at *14 (N.D.N.Y. Jan. 13, 2009) (finding plaintiff's claimed history of suicidal thoughts sufficient to raise a question of fact as to serious medical need); *Covington v. Westchester Cnty. Dept. of Corrs.,* 2010 WL 572125, at *6 (S.D.N.Y. Jan. 25, 2010) (citing cases where courts have found that depression with suicidal ideation, or severe anxiety attacks, are sufficiently severe conditions to meet the objective prong of deliberate indifference); *see also Zimmerman v. Burge,* 2009 WL 3111429, at *8 (N.D.N.Y. Sept. 24, 2009) (reviewing published case law discussing whether depression either with or without suicidal ideation is a "sufficiently serious" medical condition). Therefore, Plainitiff's statement pertaining to Defendant Cavanaugh, though brief, is enough to satisfy the objective prong of the deliberate indifference standard.

***4** Regarding the subjective component, however, Plaintiff does not allege that Defendant Cavanaugh denied him medical services with any ill state of mind, or even that Cavanaugh was aware of the substantial medical risk. An official acts with the requisite deliberate indifference when that 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." *Farmer v. Brennan,* 511 U.S. 825, 837 (1994).

Upon reading Plaintiff's Second Amended Complaint liberally, as well as his Opposition to Defendants' Motion to Dismiss, Dkt. No. 36, we conclude that Plaintiff makes no allegation as to Cavanaugh's awareness of Plaintiff's serious health risk. Thus, while mental illness and corresponding suicidal tendencies left untreated can be sufficiently serious to reach an Eighth Amendment claim, there are no facts in Plaintiff's pleading to allow this court to infer, let alone find, that Defendant Cavanaugh possessed the culpable state of mind required to allege deliberate indifference to a medical need. Accordingly, we recommend Plaintiff's claim against Defendant Cavanaugh be **dismissed.**

2. Defendant Miller

Plaintiff additionally alleges Eighth Amendment violations against Defendant Miller, who, according to the best interpretation this Court can muster, violated Plaintiff's constitutional rights by allowing him to lose weight and by failing to give Plaintiff "better pain medica[tion], cane, mattress, pillow ... better shoes," and by placing Plaintiff on "3 floor and not on flat." Second Am. Compl. at p. 7.

This claim against Defendant Miller also fails to allege facts sufficient to survive Defendants' 12(b)(6) Motion to Dismiss. As with Defendant Cavanaugh, Plaintiff does not make any mention that Defendant Miller was aware of any serious risk to the Plaintiff, let alone that he acted with the requisite wantonness. Therefore, Plaintiff cannot claim Miller was deliberately indifferent to his medical needs.

Furthermore, to the extent that Plaintiff is claiming that the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth Amendment, this claim also falls short. In the context of an Eighth Amendment claim based on prison conditions, the prisoner must demonstrate that the deprivation is objectively sufficiently serious such that the plaintiff was "den[ied] the minimal civilized measure of life's necessities," and that the prison officials subjectively "knew of and disregarded an excessive risk to inmate health or safety." *Branham v. Meachum,* 77 F.3d 626, 630–31 (2d Cir.1996) (internal citations omitted).

Turning to the objective analysis, Plaintiff's allegations do not trigger the conclusion that Plaintiff was denied the minimal civilized measure of life's necessities, as the Constitution "does not mandate comfortable prisons," *Rhodes v. Chapman,* 452 U.S. 337, 349 (1981), but instead only requires that inmates not be deprived of their "basic human needs —*e.g.,* food, clothing, shelter, medical care, and reasonable safety," *Helling v. McKinney,* 509 U.S. 25, 32 (1993) (citation omitted). In accord, courts in this Circuit have found the deprivations of better pain medicine, a cane, a mattress, a pillow, or "better shoes," as the Plaintiff has alleged, do not meet, neither singularly nor collectively, the objective standard under the Eighth Amendment. [5] However, it is more complete to say that Plaintiff's failure to allege any facts indicating that Defendant Miller acted, or did not act, with a wanton state of mind, forecloses any colorable allegation that he was denied his constitutional rights under the Eighth Amendment regarding prison conditions. *See Vaughan v. Erno,* 8 F. App'x 145, 146–47 (2d Cir.2001) (finding complained conditions of confinement did not constitute an Eighth Amendment violation because plaintiff failed to show defendants acted with deliberate indifference, even assuming that he sufficiently alleged a serious harm); *Carr v. Canty,* **2011** **WL** 309667, at *2 (S.D.N.Y. Jan. 19, **2011**) (finding a plaintiff did not satisfy the deliberate indifference requirement of an Eighth Amendment claim regarding conditions of confinement because defendants responded to complaints of a wet and slippery floor "albeit, not in the manner in which [plaintiff] preferred" and took action to cover the water); *Hughes v. Butt,* 2009 **WL** 3122952, at *10 (N.D.N.Y. Sept. 28, 2009) (concluding that a defendant, who the plaintiff did not allege to have any visual indication or awareness that plaintiff needed a cane, back brace, or knee brace, did not act deliberately indifferent towards plaintiff); *Savage v. Brue,* 2007 **WL** 3047110, at *9 (N.D.N.Y. Oct. 18, 2007) (finding a nurse, who refused pain medication to an inmate confined in a special housing unit for forty-eight (48) hours with no mattress and back and neck pain due to a recent injury and who advised the inmate that he would need to "adjust to it," to be possibly negligent in her care, but not deliberately indifferent). Therefore, we recommend Plaintiff's claim against Defendant Miller be **dismissed.**

3. Defendant Schlenger

***5** Plaintiff also claims that Defendant Schlenger, presumably in his position as a doctor of dental health at Coxsackie, did not give Plaintiff "dental services for tooth pain from 10–3–09 to 2–3–09 ... causing Plaintiff more pain and los[s] of tooth." Second Am. Compl. at p. 6.

"Dental conditions, like other medical conditions, may be of varying severity." *Chance v. Armstrong,* 143 F.3d at 702. Thus, the constitutionality of a decision to leave a dental condition untreated will depend on the facts of the particular case. *Harrison v. Barkley,* 219 F.3d 132, 137–38 (2d Cir.2000). The Second Circuit has held, in the context of failing to treat a dental injury, that a "serious medical condition exists where 'the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.' " *Id.* at 136 (finding that while a tooth cavity is not strictly a serious medical condition, it is a degenerative condition which "is likely to produce agony and to require more invasive and

painful treatments" if left untreated) (quoting *Chance v. Armstrong,* 143 F.3d at 702).

However, Plaintiff does not allege any facts regarding any particular type of oral injury or condition that would aid this Court in its 12(b)(6) inquiry, but rather only "tooth pain," which eventually led to the loss of the tooth. Plaintiff also alleges no facts to suggest that Defendant Schlenger or anyone else should have been aware of his tooth pain.[6] This claim against Defendant Schlenger is utterly bereft of factual allegations which would allow for the Court to deduce the plausibility of a cognizable cause of action, *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct.1937, 1949 & 1960 (2009), or which would permit a defendant "to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery," *Ricciuti v. New York City Transit Auth.,* 941 F.2d 119, 123 (2d Cir.1991). Thus, because this claim is without factual allegations setting forth that Defendant Schlenger violated Plaintiff's constitutional rights, we recommend that this claim be **dismissed.**

4. Defendant Smith

Lastly, Plaintiff alleges that Defendant Smith, Deputy of Health Services, violated his rights under the Eighth Amendment by refusing to place him in a hospital after Plaintiff lost a lot of weight, resulting in "mental and physical pain." Second Am. Compl. at pp. 3 & 6.

In this case, unlike with Plaintiff's allegations against any of the previously considered Defendants, Plaintiff claims that "Smith refuse[d]" to act, which led to the alleged constitutional violation. As this Court is charged with the mandate of construing Plaintiff's claims leniently, we are willing to impute from the use of the word "refuse" enough to satisfy the wanton state of mind requirement of deliberate indifference. In order to "refuse" or decline to do something, one must necessarily be aware of the request or the issue, and subsequently choose not to act, implicating that Defendant Smith acted, or did not act, with a culpable mind set of more than mere negligence. Thus, Plaintiff has alleged enough, in this case, to satisfy the subjective prong of Eighth Amendment deliberate indifference.

***6** Regardless, Plaintiff's claim must fail, as he does not allege a sufficiently serious injury or risk of injury. He claims that Defendant Smith failed to place Plaintiff in a hospital due to Plaintiff's loss of weight. Plaintiff does not allege how much weight he lost, if that weight loss was dangerous to his health, or why he lost the weight.[7] Notably, Plaintiff also does not state why hospitalization was warranted or necessary to remedy this weight loss, as opposed to another form of treatment. *See O'Connor v. McArdle,* 2006 WL 436091, at *5 ("It is well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, that fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation."). Therefore, there are no allegations in the pleading to "conclude that [P]laintiff's ... weight loss concerns represented a condition of urgency or resulted in degeneration or extreme pain sufficient to implicate an Eighth Amendment violation." *Evans v. Albany Cnty. Corr. Facility,* 2009 WL 1401645, at *10 (N.D.N.Y. May 14, 2009) (quoting *Bost v. Bockelmann,* 2007 WL 527320, at *8 (N.D.N.Y. Feb. 20, 2007)). Thus, while Plaintiff has alleged enough to satisfy the subjective prong of the Eighth Amendment deliberate indifference standard, his failure to allege a sufficiently serious medical condition means this claim should be **dismissed.**

C. Due Process

While not explicitly stated in Plaintiff's pleadings, this Court concludes that, by liberally construing Plaintiff's Second Amended Complaint, some of his allegations concern a violation of his rights under the Due Process clause of the Fourteenth Amendment. Specifically, Plaintiff complains that Defendants Lape and McDermott acted in such a way that they violated his right to procedural due process. We will examine the claims against each Defendant *seriatim.*

1. Defendant Lape

Plaintiff claims, in cursory fashion, that Defendant Lape, who Plaintiff describes as the "superintendent" of Coxsackie, did "not give[ ] Plaintiff hearing, or grievance or legal assistance from 10–20–08 to 2–3–09 causing mental and physical pain." Second. Am. Compl. at pp. 1 & 6.

It is well-settled that the personal involvement of a defendant is a prerequisite for the assessment of damages in a § 1983 action. *McKinnon v. Patterson,* 568 F.2d 930, 934 (2d Cir.1977). Furthermore, the doctrine of *respondeat superior*

is inapplicable to § 1983 claims. *See* *Polk County v. Dodson,* 454 U .S. 312, 325 (1981) (internal citations omitted); *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). Thus, a defendant may not be liable for damages simply by virtue of holding a supervisory position, without more. *See, e.g.,* *Black v. Coughlin,* 76 F.3d 72, 74 (2d Cir.1996). Rather, the personal involvement of a supervisory defendant may be shown by evidence that:

> ***7** (1) the 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 v. Coughlin, 58 F.3d at 873.

Plaintiff does not explain what Defendant Lape purportedly did to deny Plaintiff of assistance in any hearing or grievance process, nor suggest facts that Lape himself was involved in any way in any constitutional violation. Rather, Plaintiff appears to be bringing legal action against Lape due to his supervisory position only. Because the "proper focus is the [D]efendant's direct participation in, and connection to, the constitutional deprivation," *McClary v. Coughlin,* 87 F.Supp.2d 205, 215 (W.D .N.Y.2000), and because one cannot be liable solely from holding a supervisory position, we find Plaintiff's claim against Defendant Lape should be **dismissed** for lack of personal involvement.

2. Defendant McDermott

Liberally construed, Plaintiff claims that Defendant McDermott refused to give Plaintiff "hearing assistance" or allow the Office of Mental Health to testify that Plaintiff is "learning disable[d]" and has a mental illness, which caused the Plaintiff to "lose freedom." Second Am. Compl. at p. 5.

In order to state a procedural due process claim pursuant to the Fourteenth Amendment, an inmate must show that he possessed an actual liberty or property interest, and that he was deprived of that interest without sufficient process. *See* *Shakur v. Selsky,* 391 F.3d 106, 118 (2d Cir.2004). Inmates' liberty interests are typically derived from two sources: the Due Process Clause of the Fourteenth Amendment, and state statute or regulations. *Arce v. Walker,* 139 F.3d 329, 333 (2d Cir.1998) (citing *Kentucky Dep't of Corr. v. Thompson,* 490 U.S. 454, 460 (1989)). With regard to liberty interests arising directly under the Due Process Clause, the Supreme Court has "narrowly circumscribed its scope to protect no more than the 'most basic liberty interests in prisoners.' " *Id.* (quoting *Hewitt v. Helms,* 459 U.S. 460, 467 (1983)). With regard to State created liberty interests, the Supreme Court held in *Sandin v. Conner* that state created liberty interests shall be limited to those deprivations which subject a prisoner to "atypical and significant hardship ... in relation to the ordinary incidents of prison life." 515 U.S. 472, 484 (1995).

Here, Plaintiff has not alleged enough facts to indicate a viable Due Process violation under the Constitution. He argues, in effect, that he did not receive a meaningful hearing because Defendant McDermott denied Plaintiff assistance in some unidentified hearing. The only liberty interest that Plaintiff alleged to have lost was the loss of freedom. *See* Second Am. Compl. at p. 5. Without specifics about the nature and conditions of the alleged loss of freedom, Plaintiff does not state an "atypical and significant hardship ... to which the conditions of the disciplinary segregation differ from other routine prison conditions and the duration of the disciplinary segregation compared to discretionary confinement." *Shuler v. Brown,* 2009 WL 790973, at *7 (N.D.N.Y. Mar. 23, 2009) (quoting *Palmer v. Richards,* 364 F.3d 60, 64 (2d Cir.2004)). The loss of freedom, inherent in the "ordinary incidents of prison life," *Sandin v. Conner,* 515 U.S. at 483–86, does not constitute, without alleging more, an atypical and significant hardship on an inmate. Nor has he shown a deprivation of liberty under the Due Process Clause. Furthermore, this statement is devoid of any factual allegation

that this Court could examine to determine if the procedure provided by the State to Plaintiff was in fact insufficient, or what the deprivation exactly was. Plaintiff does not specify what hearing or hearings he is referring to, or even what the hearings were regarding. Therefore, because Plaintiff's naked assertions do not rise to the pleading standards required to withstand a Motion to Dismiss under Rule 12(b) (6), we recommend that the claim against Defendant McDermott be **dismissed.**

D. Americans with Disability Act

***8** In his Second Amended Complaint, Plaintiff states that he has a cause of action under the Americans with Disability Act ("ADA"). Second Am. Compl. at p. 7. This claim is not supported with any facts, nor the names of the parties it is purportedly directed. Besides previously stating, with relation to his claims against Defendant McDermott, that he suffers from some type of learning disability, Plaintiff does not specifically allege what disability he suffers from, nor what he was denied. Furthermore, Plaintiff does not allege under which Title of the ADA he is suing under. Thus, for the preceding reasons and because the Plaintiff states no facts, allegations, nor specific discussion of this claim, we find that to the extent that Plaintiff is attempting to assert a claim under the ADA against any individual Defendant, the claim should be **dismissed.**

III. CONCLUSION

While this Court recognizes the Second Circuit's preference to provide *pro se* plaintiffs with leave to amend their pleadings prior to dismissal, Loadholt has already been afforded two opportunities to amend his Complaint.

For the reasons stated herein, it is hereby

RECOMMENDED, that the Defendants' Motion to Dismiss (Dkt. No. 28) be **GRANTED** and Plaintiff's Second Amended Complaint (Dkt. No. 9) be **DISMISSED;** 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), & 6(e).

All Citations

Not Reported in F.Supp.2d, 2011 WL 1135934

Footnotes

1 Without additional supporting facts or clarification, this Court is unsure whether Plaintiff means to claim the pertinent dates were from February 3, 2009 until October 3, 2009, and simply stated in reverse, or rather from October 3, 2008 until February 3, 2009, and simply inserted a typographical error. Regardless, ambiguity on the stated dates does not change this Court's analysis.

2 *See supra* note 1.

3 *See supra* note 1.

4 By its opinion in *Bell Atl. Corp. v. Twombly* and then again in *Ashcroft v. Iqbal,* the Supreme Court abrogated the often-cited language of *Conley v. Gibson* "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bell Atl. Corp. v. Twombly,* 550 U.S. 561 (2007) (quoting *Conley,* 355 U.S. 41, 45–46 (1957)). In so doing, the Court found that *Conley* "described the breadth of opportunity to prove

what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id.* at 563.

5 *See Brown v. Eagen,* 2009 WL 815724, at *9 (N.D.N.Y. Mar. 26, 2009) (stating that the prison officials have the broad discretion to determine the nature and character of the medical treatment afforded to inmates, as "[a]n inmate does not have the right to treatment of his choice") (citing, *inter alia,* *Dean v. Coughlin,* 804 F.2d 207, 215 (2d Cir.1986)); *Williams v. Perlman,* 2009 WL 1652193, at *6–7 (N.D.N.Y. Feb. 5, 2009) (finding a prisoner who specifically complained that his orthopedic shoes created "intense pain on [his] toes and arches" and caused him to develop painful callouses which needed to be "lanced from [his] feet" did not adequately suggest in his complaint that his foot, ankle, or arch condition presented an issue of degeneration or extreme pain); *Borges v. McGinnis,* 2007 WL 1232227, at *4–6 (W.D .N.Y. Apr. 26, 2007) (find that an inmate given only a paper gown, slippers, a thin mattress, and no blanket, while confined for three days in a room with an open window that reduced the temperature to approximately 50 degrees, failed to meet the objective element of an Eighth Amendment violation); *Bell v. Artuz,* 1999 WL 253607, at *3–4 (S.D.N.Y. Apr. 29, 1999) (noting that no Eighth Amendment claim is implicated where prisoner alleges no pillows, a lack of space in double-occupancy cell, poor ventilation, asbestos on catwalk behind cells, no bacterial soap, and insufficient lighting); *Veloz v. New York,* 35 F.Supp.2d 305, 309 & 312 (S.D.N.Y.1999) (stating prisoner's foot condition, which involved increasing pain and required surgery, was not sufficiently serious); *Alston v. Howard,* 925 F.Supp. 1034, 1040 (S.D.N.Y.1996) (finding prisoner's ankle condition and resulting foot pain requiring the use of special footwear was not sufficiently serious).

6 Curiously, in opposing Defendants' request for dismissal, Plaintiff fails to mention Defendant Schlenger or allegations of facts supporting his claim of tooth pain, though he references his various other claims. *See* Dkt. No. 36.

7 The Court notes that Plaintiff mentions he "stop[ped] eat[ing] and drink[ing] lost alot [sic] of weight" in relation to a claim separate from his claim against Defendant Smith. Second Am. Compl. at p. 5.

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Only the Westlaw citation is currently available.

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

Deshawn BANKS, Plaintiff,
v.
8932 CORRECTIONAL OFFICER; # 12025 Correctional Officer, Defendants.

No. 11 Civ. 8359(LAP).
|
Feb. 25, **2013**.

MEMORANDUM AND ORDER

LORETTA A. PRESKA, District Judge.

***1** This is one of several actions Plaintiff Deshawn Banks ("Plaintiff"), a prisoner currently in New York State custody, has brought *pro se* against various New York State prison officials under 42 U.S.C. § 1983. In this case, Plaintiff sues two correctional officers in their "individual, personal capacity": Stacey Hiers and Richard Pacheco ("Defendants"), New York City Department of Corrections employees. [1]

Plaintiff's Complaint ([dkt. no. 2] ("Complaint" or Compl.") filed on November 17, **2011**, involves a single incident while Plaintiff was at Bellevue Hospital. On September 29, **2011**, Plaintiff was residing at the Bellevue Hospital intake and was being observed by Defendants. (Compl.§ II. C.) Plaintiff alleges that the Defendants turned their attention elsewhere, whereupon Plaintiff began to inflict harm upon himself. (*Id.* at 3.) On April 9, 2012, Defendants moved to dismiss the Complaint (Def.Memo), arguing that (1) Plaintiff failed to state a claim on § 1983; (2) Plaintiff failed to allege deliberate indifference to a serious medical need; and (3) Plaintiff is not entitled to the relief he seeks. On June 18, 2012, following a telephone conference with Magistrate Judge Maas and all parties, Plaintiff was ordered to respond to all pending motions to dismiss by July 9, 2012. (*See* Dkt. No. 18). Plaintiff has failed to oppose the instant motion to dismiss. For the reasons that follow, Defendants' motion to dismiss [dkt. no. 14] is GRANTED.

I. *BACKGROUND*

The following facts are taken from Plaintiff's Complaint and do not constitute findings of fact by the Court. The Court assumes these facts to be true only for purposes of deciding the pending motion and construes them in a light most favorable to Plaintiff, the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

On September 29, **2011**, Plaintiff was in the Bellevue Hospital intake observation cell awaiting admission to the hospital's psychiatric ward. (Compl. at 3.) Plaintiff asserts that at that time he was being observed by two correctional officers, the named Defendants. (*Id.*) Plaintiff claims that the Defendants directed their focus elsewhere leaving Plaintiff unsupervised at which point he "[b]ecame very schipopentic [sic] and paranoid, discovered broken sharp objects within the observation cell area and began to inflict self mutilation that sustained injuries to plaintiff Banks['] forearm." (*Id.*) Plaintiff was treated by the emergency department at Bellevue Hospital and was discharged later the same day. (*Id.* at 3, 6.)

Plaintiff states that he filed a grievance while at Bellevue Hospital. (*Id.* § 4.) In the grievance, Plaintiff made complaints about not being observed. (*Id.*) Plaintiff claims he has not received a response to his initial grievance. (*Id.*) Plaintiff files the instant action and seeks one million and one hundred thousand dollars in compensatory damages, and seven hundred thousand dollars in punitive damages. (*Id.* § 5.)

II. *DISCUSSION*

A. *Legal Standard-Motion to Dismiss*

***2** "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. *See* *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir.2002). However, the Court does not credit "mere

conclusory statements" or "threadbare recitals of the elements of a cause of action." *Iqbal,* 556 U.S. at 677.

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

B. *Analysis*

1. *Section 1983*

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the violation was committed by a person acting under the color of state law. *See West v. Atkins,* 487 U.S. 42, 48 (1988); *McKithen v. Brown,* 481 F.3d 89, 99 (2d Cir.2007). In addition, "[i]t is well settled in this Circuit 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) (internal citations omitted).

Plaintiff fails to point to a specific constitutional provision or federal law that has been violated in his Complaint. (*See* Compl. generally.) In order to succeed on a § 1983 claim the Plaintiff must show that "defendant's conduct deprived him of a federal right." *Sykes v. James,* 13 F.3d 515, 519 (2d Cir.1993). Construed liberally, Plaintiff's Complaint amounts to a deliberate indifference allegation of a Due Process violation under the Fourteenth Amendment of the Constitution.[2] In order to succeed on the merits in a deliberate indifference claim a plaintiff must show both objective and subjective violations. *See, e.g., Farmer v. Brennan,* 511 U.S. 825, 834 (1994) ("Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, *objectively,* sufficiently serious, a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities.... The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. To violate the Cruel and Unusual Punishments Clause, a prison official must have a *sufficiently culpable state of* mind.") (emphasis added) (internal quotation marks and citations omitted); *see also Wilson v. Seiter,* 501 U.S. 294, 298 (1998); *Branham v. Meachum,* 77 F.3d 626, 631 (2d Cir.1996).

***3** As will be discussed, *infra,* Plaintiff has not adequately plead a sufficiently serious act or omission of Defendants, or the requisite culpable state of mind. (*See* Compl. generally). None of Plaintiff's allegations meets the required objective standard set forth in *Farmer.* 511 U.S. at 298.

C. *Deliberate Indifference to a Serious Medical Need*

Plaintiff has failed to allege facts that would indicate he had a serious medical need and that Defendants were deliberately indifferent to it. In *Estelle v. Gamble,* 429 U.S. 97, 104 (1976), the Supreme Court held that "deliberate indifference to serious medical needs constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." "Deliberate indifference" must be evidenced by proof that a defendant intentionally denied, delayed access to, or interfered with prescribed treatment. *Id.* at 104–06; *Hathaway v. Coughlin,* 37 F.3d 63, 66–68 (2d Cir.1994); *Gill v. Mooney,* 824 F.2d 192, 195–96 (2d Cir.1987); *Collins v. Ward,* 652 F.Supp. 500, 510 (S.D.N.Y.1987); *Williams v. Coughlin,* 650 F.Supp. 955, 957 (S.D.N.Y.1987).

The deliberate indifference standard embodies both an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious." *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 2324, 115 L.Ed.2d 271 (1991). *See Nance v. Kelly,* 912 F.2d 605, 607 (2d Cir.1990) (Pratt, J., dissenting) (standard contemplates "a condition of urgency, one that may produce death, degeneration, or extreme pain") (citations omitted). Second, the charged official must act with a sufficiently culpable state of mind. *See Wilson,* 501 U.S. at 298.

Hathaway, 37 F.3d 63 at 66. At a minimum, there must be "at least some allegation of a conscious or callous indifference to a prisoner's rights." *Zaire v. Dalsheim,* 698 F.Supp. 57, 59 (S.D.N.Y.1988) (citations and internal quotation marks omitted); *see also* *Gill,* 824 F.2d at 195–96.

Plaintiff has failed to allege facts that would satisfy the deliberate indifferent standard. As for establishing an objectively urgent medical emergency, Plaintiff fails to assert any facts that indicate he suffered from a serious or urgent medical condition. The only medical condition mentioned in the Complaint is the self-inflicted wound to the forearm, which was treated after Plaintiff inflicted it. While the Complaint alleges the Defendants directed their focus elsewhere, which occurred before the Plaintiff's self mutilation, it does not contain facts that raise the inference that Plaintiff needed to be continuously and personally watched while secured in a psychiatric observation cell. Plaintiff fails to assert any facts that indicate that the Defendants had a reason to believe the Plaintiff might attempt self-injury and that reasonable care was not taken in supervising the Plaintiff. *See* *Dinnerstein v. United States,* 486 F.2d 34, 38 (2d Cir.1973). In addition, the Complaint does not identify any specific or general deprivation of medical care or safety. Consequently, the Complaint fails to allege facts that satisfy the objective prong of the deliberate indifference standard.

***4** The Complaint does not raise the inference that the Defendants acted intentionally to deprive Plaintiff of medical care or protection. Indeed, Plaintiff's placement in Bellevue Hospital's mental health unit rebuts the assertion that his mental illness was ignored. A prison guard's deliberate indifference to a serious medical need of a prisoner means intentionally denying or delaying access to medical care or intentionally interfering with medical treatment once it was prescribed. *Estelle,* 429 U.S. at 104. Plaintiff failed to raise any fact that would suggest an intentional threat to Plaintiff's health or safety. Plaintiff failed to raise any fact that would suggest Defendants disregarded the well-being of the Plaintiff in any way. The Complaint does not contain any information about the Defendants except that their focus was not exclusively directed to the Plaintiff. Thus, the Complaint fails to allege facts that satisfy the subjective prong of the deliberate indifference standard.

D. *Relief Sought*

Finally, even were the Court to find merit in Plaintiff's claims, he is not entitled to the relief he seeks. Plaintiff seeks seven hundred thousand dollars in punitive damages and one million one hundred thousand dollars in compensatory damages. (Compl.§ V.) The Court of Appeals has stated that "evidence of the 'evil motive or intent' or 'callous indifference' [of a defendant's conduct] ... is essential to an award of punitive damages." *Ivani Contracting Corp. v. City of N.Y.,* 103 F.3d 257, 262 (2d Cir.1997) (citing *Smith v. Wade,* 461 U.S. 30, 56, (1983)). As discussed, Plaintiff has not adequately alleged either Defendant's involvement in the claimed deprivations let alone pleaded particular facts that suggest they acted with an "evil motive" or with "callous indifference." Compensatory damages are denied because Plaintiff has not pleaded a valid claim.

In light of the multiple deficiencies of the Complaint and Plaintiff's failure to oppose the motion to dismiss, the Court finds that amendment would be futile, Accordingly, all claims are dismissed with prejudice.

III. *CONCLUSION*

For the foregoing reasons, Defendants' motion to dismiss the Complaint in its entirety [dkt. no, 14] is GRANTED with prejudice.

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

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 673883

Footnotes

1 Although not specifically named in the Complaint, these individuals were identified based on the shield numbers provided in the Complaint. (Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, filed April 10, 2012 [dkt. no. 15] (“Def .Memo”)).

2 The analysis of “[c]laims for deliberate indifference to a serious medical condition or other serious threat to the health or safety of a person in custody should be analyzed under the same standard ... [of] the Eighth or Fourteenth Amendment.” *Caiozzo v. Koreman,* 581 F.3d 63, 72 (2d Cir.2009). The Eighth Amendment applies to the federal government, and the Fourteenth Amendment applies to the states through incorporation. *Gideon v. Wainwright,* 372 U.S. 335, 343 (1963). Thus, the Court will equally consider due process cases brought under the Eighth and Fourteenth Amendments.

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Evering v. Rielly, S.D.N.Y., September 28, 2001

143 F.3d 698
United States Court of Appeals,
Second Circuit.

Stanley CHANCE, Plaintiff–Appellant,
v.
John ARMSTRONG, I/O; Dr. Brewer, I/O; Esther McIntosh, I/O; Michael Bonzagni, I/O; Dr. Hutchinson, I/O; Dr. Barnard, I/O; Amy Cobuzzi, I/O, Defendants, Dr. Gary W. Murphy, I/O; Dr. Moore, I/O, Defendants–Appellees.

Docket No. 97–2028.
|
Submitted Jan. 28, 1998.
|
Decided May 7, 1998.

Synopsis
State prisoner brought § 1983 action against state correctional officials and dentists and doctors who treated him during his incarceration at state facility, alleging failure to provide him with adequate dental care. Defendants moved to dismiss. The United States District Court for the District of Connecticut, Dominic J. Squatrito, J., granted motion. Prisoner appealed. After appeal was dismissed as to all defendants except two doctors, the Court of Appeals, Calabresi, Circuit Judge, held that: (1) prisoner sufficiently alleged existence of serious medical condition, and (2) prisoner sufficiently alleged deliberate indifference by doctors.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (20)

[1] **Federal Civil Procedure** Matters considered in general

On motion to dismiss, court may consider facts set forth in exhibits attached as part of complaint as well as those in formal complaint itself.

25 Cases that cite this headnote

[2] **Federal Courts** Pleading

Court of Appeals reviews de novo district court's dismissal of complaint for failure to state claim upon which relief may be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

11 Cases that cite this headnote

[3] **Federal Courts** Dismissal for failure to state a claim

Like the district court, Court of Appeals is required to accept the material allegations in the complaint as true in reviewing dismissal for failure to state claim upon which relief may be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

38 Cases that cite this headnote

[4] **Federal Civil Procedure** Clear or certain nature of insufficiency

Dismissal for failure to state claim upon which relief may be granted is not appropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

117 Cases that cite this headnote

[5] **Federal Civil Procedure** Clear or certain nature of insufficiency

Rule that dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief applies with particular force when the plaintiff alleges civil rights violations or when the complaint is submitted pro se. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

272 Cases that cite this headnote

[6] **Federal Civil Procedure** Pleading, Defects In, in General

At stage in proceedings at which complaint is challenged for failure to state claim, issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims; it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

339 Cases that cite this headnote

[7] **Federal Civil Procedure** Insufficiency in general

Dismissal for failure to state claim upon which relief may be granted was improper when plaintiff alleged facts that were not impossible to prove and that, if demonstrated, would state legally cognizable claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3 Cases that cite this headnote

[8] **Sentencing and Punishment** Cruelty and unnecessary infliction of pain

Eighth Amendment's prohibition against cruel and unusual punishments includes punishments that involve the unnecessary and wanton infliction of pain. U.S.C.A. Const.Amend. 8.

39 Cases that cite this headnote

[9] **Sentencing and Punishment** Medical care and treatment

To establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove deliberate indifference to his serious medical needs. U.S.C.A. Const.Amend. 8.

1029 Cases that cite this headnote

[10] **Sentencing and Punishment** Medical care and treatment

In context of prisoner's claim for inadequate medical care, Eighth Amendment standard of deliberate indifference includes both subjective and objective components: alleged deprivation must be, in objective terms, sufficiently serious, and defendant must act with a sufficiently culpable state of mind. U.S.C.A. Const.Amend. 8.

870 Cases that cite this headnote

[11] **Sentencing and Punishment** Deliberate indifference in general

Sentencing and Punishment Medical care and treatment

Prison official acts with the deliberate indifference required to establish Eighth Amendment violation when that 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. U.S.C.A. Const.Amend. 8.

557 Cases that cite this headnote

[12] **Sentencing and Punishment** Medical care and treatment

State prisoner asserting § 1983 claim under Eighth Amendment for provision of inadequate dental care sufficiently alleged existence of serious medical condition, so as to defeat motion to dismiss for failure to state claim, when he alleged that, due to treating doctors' actions, he was in great pain for at least six months, was unable to chew properly, and choked on his food, and that as result of inadequate treatment at least one and possibly three of his teeth degenerated to point of requiring extraction. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

583 Cases that cite this headnote

[13] **Sentencing and Punishment** Medical care and treatment

Standard for Eighth Amendment violations arising from inadequate prison medical care contemplates condition of urgency that may

result in degeneration or extreme pain. U.S.C.A. Const.Amend. 8.

420 Cases that cite this headnote

[14] **Sentencing and Punishment** Medical care and treatment

Cognizable Eighth Amendment claim regarding inadequate dental care provided by prison officials, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, deterioration of the teeth due to a lack of treatment, or the inability to engage in normal activities. U.S.C.A. Const.Amend. 8.

79 Cases that cite this headnote

[15] **Sentencing and Punishment** Medical care and treatment

Prisoner asserting Eighth Amendment claim for provision of inadequate dental care sufficiently alleged deliberate indifference, as required to defeat motion to dismiss, when he alleged that doctors treating his dental problems recommended unnecessary course of treatment, that other dentists had recommended less invasive procedures that would have saved his teeth, and that doctors recommended extraction of his teeth due to monetary incentives, and not on basis of their medical views. U.S.C.A. Const.Amend. 8; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

84 Cases that cite this headnote

[16] **Sentencing and Punishment** Medical care and treatment

Mere disagreement over the proper treatment provided to prisoner does not create Eighth Amendment claim; so long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation. U.S.C.A. Const.Amend. 8.

883 Cases that cite this headnote

[17] **Sentencing and Punishment** Medical care and treatment

Negligence in treatment of prisoner, even if it constitutes medical malpractice, does not, without more, engender Eighth Amendment claim. U.S.C.A. Const.Amend. 8.

266 Cases that cite this headnote

[18] **Sentencing and Punishment** Medical care and treatment

While mere medical malpractice is not tantamount to deliberate indifference in context of prisoner's inadequate medical care claim, certain instances of medical malpractice may rise to the level of deliberate indifference, as when the malpractice involves culpable recklessness, i.e., an act or a failure to act by the prison doctor that evinces a conscious disregard of a substantial risk of serious harm. U.S.C.A. Const.Amend. 8.

576 Cases that cite this headnote

[19] **Sentencing and Punishment** Medical care and treatment

For purposes of prisoner's inadequate medical care claim under Eighth Amendment, physician may be deliberately indifferent if he or she consciously chooses an easier and less efficacious treatment plan. U.S.C.A. Const.Amend. 8.

143 Cases that cite this headnote

[20] **Federal Civil Procedure** Fact issues

Rule governing dismissals for failure to state claim does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3 Cases that cite this headnote

Attorneys and Law Firms

***700** Stanley Chance, pro se.

Richard Blumenthal, Atty. Gen., and Ann E. Lynch, Asst. Atty. Gen., for Defendant–Appellee.

Before: CALABRESI, CABRANES, and HEANEY, Circuit Judges. [*]

Opinion

CALABRESI, Circuit Judge:

Stanley Chance, *pro se* and incarcerated, appeals from a judgment of the United States District Court for the District of Connecticut (Dominic J. Squatrito, *Judge*), granting the defendant's motion to dismiss Chance's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Chance sued under 42 U.S.C. § 1983, alleging that the defendants failed to provide him with adequate medical care and thereby violated his constitutional rights. We hold that the claim should not have been dismissed under Rule 12(b)(6) and we therefore reverse.

I. Facts & Procedural History

Chance filed suit against state correctional officials as well as various dentists and doctors, including Dr. Moore and Dr. Murphy, who were involved in treating him while he was incarcerated at the MacDougall Correctional Institution in Connecticut. The gravamen of Chance's complaint was that he received inadequate dental treatment in violation of the Eighth Amendment of the United States Constitution. He also alleged that state correctional officials ignored his correspondence complaining about the dental treatment he received.

[1] Chance's original complaint alleged that he had an overbite that made it difficult for him to chew or speak. He also claimed that he had a cavity that caused him "great pain." In his amended complaint, he outlined further details of his dental problems and the treatment he had received. [1] In November 1994, Dr. Moore told Chance that two of his teeth, number one and number eight, needed to be pulled. Chance did not believe that extraction was necessary and therefore refused to allow Dr. Moore to pull them. He attached to his complaint a letter from Dr. David Feinerman, another oral surgeon who had treated him during his incarceration. According to Chance, the letter indicated that Dr. Feinerman believed that tooth number one could be saved. The letter itself ambiguously referred to a tooth that could be saved as tooth number two.

In March 1995, Dr. Moore examined the plaintiff again and recommended that tooth number three be pulled. Dr. Moore communicated this recommendation to Dr. Murphy, an oral surgeon at the prison. Again, Chance thought extraction was unnecessary and refused this treatment. He alleged in his complaint that Dr. Murphy would have been paid extra for the extractions and that Dr. Murphy was planning to give some of the money to Dr. Moore.

Chance asserted that less invasive procedures, such as filling his teeth instead of ***701** extracting them, would have remedied his dental problems. In February 1996, Chance was examined by another dentist, Dr. Holder, who advised him that tooth number one had to be extracted, but that tooth number eight could be filled. Later that month, Chance saw yet another dentist, Dr. Ashwood, who took x-rays and filled tooth number eight. Chance alleged that this exam proved that tooth number eight and tooth number three did not have to be pulled. Chance further claimed that if Drs. Moore or Murphy had filled tooth number one earlier (at the time when he refused extraction) that that tooth could have been saved as well.

In September 1996, the defendants moved under Rule 12(b)(6) to dismiss Chance's complaint for failure to state a claim. They argued that the plaintiff had failed: 1) to allege a legally cognizable injury; 2) to establish a sufficiently serious medical condition; and 3) to show that the defendants had acted with deliberate indifference to his medical needs. Chance argued in response that, as a result of Dr. Moore's and Dr. Murphy's failure to fill his cavities in a timely manner, he now has to have his teeth pulled. In addition he asserted that the defendants were deliberately indifferent to his medical needs.

In an unpublished order filed on November 6, 1996, the district court granted the defendants' motion to dismiss. With respect to the claims against Drs. Moore and Murphy, the court held that the plaintiff's cavities were not "a sufficiently serious medical condition for Eighth Amendment purposes." In addition, the court found that the facts alleged by the plaintiff did not constitute deliberate indifference, and at best showed negligence or medical malpractice. Finally, in regard to Chance's claims that certain correctional officials had responded inadequately to his complaints, the

court concluded that the plaintiff had not demonstrated any violation of his constitutional rights.

The plaintiff appealed. In an order dated June 18, 1997, this Court dismissed Chance's appeal pursuant to 28 U.S.C. § 1915(e) as to all of the defendants except Dr. Moore and Dr. Murphy, but indicated that the claims against them were non-frivolous. *See Chance v. Armstrong,* 143 F.3d 698 (2d Cir.1997). Chance's claims against these two defendants are the only ones properly before us.

II. Discussion

A. Dismissal under Rule 12(b)(6) for Failure to State a Claim

[2] **[3]** **[4]** **[5]** We review *de novo* the district court's dismissal of a complaint pursuant to Rule 12(b)(6). *See, e.g., Sykes v. James,* 13 F.3d 515, 518–19 (2d Cir.1993). Like the district court, we are required to accept the material allegations in the complaint as true. Dismissal is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957). This rule applies with particular force where the plaintiff alleges civil rights violations or where the complaint is submitted *pro se. See, e.g., Hernandez v. Coughlin,* 18 F.3d 133, 136 (2d Cir.1994).

[6] It is important to recognize the difference between disposing of a case on a 12(b)(6) motion and resolving the case later in the proceedings, for example by summary judgment. At the 12(b)(6) stage, "[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Branham v. Meachum,* 77 F.3d 626, 628 (2d Cir.1996) (quoting *Gant v. Wallingford Bd. of Educ.,* 69 F.3d 669, 673 (2d Cir.1995) (internal quotation marks omitted)).

[7] The case before us should not have been dismissed for failure to state a claim. Stanley Chance might not be able to prove his claims at trial. And even at the summary judgment stage, it may well become clear that Chance cannot proffer sufficient proof to create genuine issues of material fact. But in his complaint, he has alleged facts that are not impossible to prove and that, if demonstrated, would state a legally cognizable claim. Accordingly, we reverse.

***702** *B. Eighth Amendment Violation*

[8] **[9]** **[10]** **[11]** The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend VIII. This includes punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976). In order to establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove "deliberate indifference to [his] serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). The standard of deliberate indifference includes both subjective and objective components. "First, the alleged deprivation must be, in objective terms, 'sufficiently serious.' " *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994) (citations omitted). Second, the defendant "must act with a sufficiently culpable state of mind." *Id.* An official acts with the requisite deliberate indifference when that 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." *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994).

1. Serious Medical Condition

[12] In the case before us, the district court held that the plaintiff's dental condition was, as a matter of law, insufficiently serious to give rise to an Eighth Amendment claim. We disagree. At the 12(b)(6) stage, we must accept Chance's allegations as true. Chance has alleged that he has been in "great pain" for at least six months, that he has been unable to chew properly, and that he has choked on his food, all because of Dr. Moore's and Dr. Murphy's actions. He further claims that, as a result of Dr. Moore's and Dr. Murphy's inadequate treatment, at least one and possibly three of his teeth have degenerated to the point of requiring extraction. Any person who has spent a night tossing and turning in suffering from an abscessed tooth knows that dental pain can be excrutiatingly severe. And while losing three teeth is not the same as losing an arm or a leg, it is not an inconsequential harm. As the plaintiff noted in one of his letters to the prison officials, "I am 27 years old and I know I should not have dentures at 27."

[13] Of course, not all claims regarding improper dental care will be constitutionally cognizable. Dental conditions, like other medical conditions, may be of varying severity. The standard for Eighth Amendment violations contemplates "a condition of urgency" that may result in "degeneration" or "extreme pain." *Hathaway,* 37 F.3d at 66 (quoting *Nance v. Kelly,* 912 F.2d 605, 607 (2d Cir.1990) (Pratt, *J.,* dissenting)). A prisoner who nicks himself shaving obviously does not have a constitutional right to cosmetic surgery. But if prison officials deliberately ignore the fact that a prisoner has a five-inch gash on his cheek that is becoming infected, the failure to provide appropriate treatment might well violate the Eighth Amendment. *Compare Arce v. Banks,* 913 F.Supp. 307, 309–10 (S.D.N.Y.1996) (small cyst-like growth on forehead not sufficiently serious), *with Gutierrez v. Peters,* 111 F.3d 1364, 1373–74 (7th Cir.1997) (large cyst that had become infected was a serious medical condition). Similar distinctions may be drawn with respect to dental conditions.

Other circuits have held a serious medical condition existed where "the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain,' " *Gutierrez,* 111 F.3d at 1373 (citation omitted). Factors that have been considered include "[t]he 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." *McGuckin v. Smith,* 974 F.2d 1050, 1059–60 (9th Cir.1992); *accord Gutierrez,* 111 F.3d at 1373 (citing *McGuckin* and collecting cases from other circuits employing a similar standard). We agree with the Eleventh Circuit that "[i]t is a far easier task to identify a few exemplars of conditions so plainly trivial and insignificant as to be outside the domain of Eighth Amendment concern than it is to articulate a workable standard for determining ***703** 'seriousness' at the pleading stage." *Gutierrez,* 111 F.3d at 1372. Nonetheless, the factors listed above, while not the only ones that might be considered, are without a doubt highly relevant to the inquiry into whether a given medical condition is a serious one. *Cf. Koehl v. Dalsheim,* 85 F.3d 86, 88 (2d Cir.1996) (inmate's need for prescription eyeglasses constituted a serious medical condition where, as result of not having glasses, the inmate suffered headaches, his vision deteriorated, and he was impaired in daily activities).

[14] A cognizable claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, *see Fields v. Gander,* 734 F.2d 1313, 1314–15 (8th Cir.1984) ("severe pain" due to infected tooth), the deterioration of the teeth due to a lack of treatment, *see Boyd v. Knox,* 47 F.3d 966, 969 (8th Cir.1995) (three-week delay in dental treatment aggravated problem), or the inability to engage in normal activities, *Hunt v. Dental Dep't,* 865 F.2d 198, 200 (9th Cir.1989) (plaintiff complained that he was unable to eat properly); *cf. Dean v. Coughlin,* 623 F.Supp. 392, 404 (S.D.N.Y.1985) (holding that "dental needs—for fillings, crowns, and the like—are serious medical needs as the law defines that term"), *vacated on other grounds,* 804 F.2d 207 (2d Cir.1986). The plaintiff in the case before us has alleged that, as the result of the defendants' actions, he suffered extreme pain, his teeth deteriorated, and he has been unable to eat properly. It may become clear, at summary judgment or at some later stage in the litigation, that these claims are not adequately supported. But at the 12(b)(6) stage, we must accept the plaintiff's allegations as true and may not dismiss the case unless is clear that it would be impossible for the plaintiff to make out a legally cognizable claim. Under this standard, the case before us should not have been dismissed.

2. Deliberate Indifference

[15] **[16]** **[17]** **[18]** In addition, the district court held that the plaintiff's complaint did not show that Dr. Moore and Dr. Murphy acted with deliberate indifference. As noted above, the deliberate indifference standard requires the plaintiff to prove that the prison official knew of and disregarded the plaintiff's serious medical needs. *See Farmer,* 511 U.S. at 837, 114 S.Ct. at 1978–79; *Hathaway,* 37 F.3d at 66. It is well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation. *See, e.g., Dean v. Coughlin,* 804 F.2d 207, 215 (2d Cir.1986). Moreover, negligence, even if it constitutes medical malpractice, does not, without more, engender a constitutional claim. *See Estelle,* 429 U.S. at 105–06, 97 S.Ct. at 291–92. At the same time, however,

> while 'mere medical malpractice' is not tantamount to deliberate indifference, certain instances of medical malpractice may rise to the level of deliberate indifference; namely, when the malpractice involves culpable recklessness, i.e., an act or a failure to act by the prison doctor that evinces 'a conscious disregard of a substantial risk of serious harm.'

Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir.1996) (citation omitted).

[19] In certain instances, a physician may be deliberately indifferent if he or she consciously chooses "an easier and less efficacious" treatment plan. *Williams v. Vincent,* 508 F.2d 541, 544 (2d Cir.1974); *see also* *Waldrop v. Evans,* 871 F.2d 1030, 1035 (11th Cir.1989) (reaffirming position that "choice of an easier but less efficacious course of treatment can constitute deliberate indifference"). In *Williams,* for example, the plaintiff alleged that the prison doctors chose simply to close a wound caused by the severing of his ear rather than attempting to reattach the organ. We held that this form of treatment could constitute deliberate indifference rather than a mere difference of opinion over a matter of medical judgment.

[20] Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case. In the action before us, Chance claims that Dr. Moore and Dr. Murphy ***704** recommended an unnecessary course of treatment, and that other dentists had recommended less invasive procedures that would have saved his teeth. Crucially, he has also alleged that Dr. Moore and Dr. Murphy recommended extraction not on the basis of their medical views, but because of monetary incentives. This allegation of ulterior motives, if proven true, would show that the defendants had a culpable state of mind and that their choice of treatment was intentionally wrong and did not derive from sound medical judgment. It may be that Chance has no proof whatsoever of this improper motive, and that lack of proof may become apparent at summary judgment. But 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." *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989). We cannot say at this stage that " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief.' " *Staron v. McDonald's Corp.,* 51 F.3d 353, 355 (2d Cir.1995) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957)). Accordingly, dismissal under Rule 12(b)(6) was inappropriate.

* * *

The judgment of the district court dismissing the complaint under Rule 12(b)(6) is reversed and the case is remanded for further proceedings consistent with this opinion.

All Citations

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Footnotes

* The Honorable Gerald W. Heaney, Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

1 Some of these allegations appear in the complaint itself, and some are in exhibits attached to that complaint. On a motion to dismiss, the court may consider facts set forth in exhibits attached as part of the complaint as well as those in the formal complaint itself. *See, e.g.,* *Newman & Schwartz v. Asplundh Tree Expert Co.,* 102 F.3d 660, 662 (2d Cir.1996); *see also* *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir.1991) (noting that a "complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference").

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