2016 WL 6778794
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Robert E. THOMAS, Plaintiff,
v.
Ms. K. WASHBURN, Ms. Belanda Krusen, James Esgrow, Mr. Lt. Donahue, Mr. Lt. Mackay, Southport Corr. Facility, Defendants.

13-CV-303V(F)
|
Signed November 14, **2016**
|
Filed 11/16/**2016**

Attorneys and Law Firms

Robert E. Thomas, Attica, NY, pro se.

David J. Sleight, Office of the Attorney General, Buffalo, NY, for Defendants.

ORDER

LAWRENCE J. VILARDO, UNITED STATES DISTRICT JUDGE

***1** The Court (Hon. Richard J. Arcara) referred this case to United States Magistrate Judge Leslie G. Foschio for all pretrial matters, including those that a magistrate judge may hear and determine, *see* 28 U.S.C. § 636(b)(1)(A), and those that a magistrate judge may hear and thereafter file a report and recommendation, *see* 28 U.S.C. § 636(b)(1)(B). Docket Item 20. On March 8, **2016**, this case was reassigned from Judge Arcara to the undersigned. Docket Item 32.

On February 27, 2015, three defendants – Washburn, Krusen, and MacKay – moved to dismiss the Amended Complaint for failure to state a claim. Docket Item 17. On September 28, 2015, defendant Donahue made the same motion. Docket Item 26. On September 7, **2016**, Judge Foschio issued a Report and Recommendation, recommending that the Court grant the defendants' motions and that the "Plaintiff's action against the Southport Correctional Facility should also be dismissed as it is not a suable entity under § 1983." Docket Item 40. The plaintiff did not object to the Report and Recommendation, and the time to file objections now has expired. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2).

A district court may accept, reject, or modify, in whole or in part, the findings or recommendation of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A district court must conduct a *de novo* review of those portions of a magistrate judge's recommendation to which objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). But neither 28 U.S.C. § 636 nor Federal Rule of Civil Procedure 72 require a district court to review the recommendation of a magistrate judge to which no objections are addressed. *See* *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985).

Although not required to do so in light of the above, this Court nevertheless has reviewed Judge Foschio's Report and Recommendation as well as the parties' submissions. Based on that review and the absence of any objections, the Court accepts and adopts Judge Foschio's recommendation to grant the motions to dismiss the Amended Complaint against the moving defendants, as well as to dismiss the Amended Complaint against Southport Correctional Facility.

For the reasons stated above and in the Report and Recommendation, the defendants' motions to dismiss (Docket Items 17 and 26) are GRANTED, and the action is dismissed against defendants Washburn, Krusen, Donahue, MacKay, and Southport Correctional Facility. Consistent with the Order of Referral already in place, this matter is referred back to Magistrate Judge Leslie G. Foschio for further proceedings against the remaining defendant. See Docket Item 20.

IT IS SO ORDERED.

DATE: November 14, **2016**.

All Citations

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13-CV-303V(F)
|
Signed 09/07/**2016**

Attorneys and Law Firms

ROBERT E. THOMAS, 08-A-5415, Attica Correctional Facility, Box 149, Attica, New York 14011, Pro se.

ERIC T. SCHNEIDERMAN, New York State Attorney General, DAVID J. SLEIGHT, Assistant New York State Attorney General, of Counsel, 350 Main Street, Suite 300A, Buffalo, New York 14202, Attorney for Defendants.

REPORT and RECOMMENDATION

LESLIE G. FOSCHIO, UNTIED STATES MAGISTRATE JUDGE

JURISDICTION

***1** This case was referred to the undersigned by Hon. Richard J. Arcara[1] on March 9, 2015 (Dkt. 20); it is presently before the court on Defendants Washburn, Krusen and MacKay's motion to dismiss (Dkt. 17) filed February 27, 2015, and Defendant Donahue's motion to dismiss (Dkt. 26) filed September 28, 2015 ("Defendants' motions").

BACKGROUND

Plaintiff commenced this action in the Northern District of New York by Complaint filed February 7, 2013. The case was transferred to this district on March 27, 2013. On October 9, 2014, Plaintiff filed an Amended Complaint adding Defendants Esgrow, Donahue, and MacKay which was combined by the court, Dkt. 10, with the Complaint into a Second Amended Complaint. Dkt. 11. As noted, Defendants have moved to dismiss for failure to state a claim by papers filed February 27, 2015 ("Defendant Washburn, Krusen, and MacKay's motion") and September 28, 2015 ("Defendant Donahue's motion") together with a Memorandum of Law in Support of Motion to Dismiss, Dkt. 18 ("Defendant Washburn, Krusen, and MacKay's Memorandum") and Memorandum of Law in Support of Motion to Dismiss filed September 28, 2015, Dkt. 27 ("Defendant Donahue's Memorandum").[2]

Plaintiff's responses to Defendant Washburn, Krusen, and MacKay's motion were filed March 17, 2015 (Dkt. 21) and on April 30, 2015 (Dkt. 27) ("Plaintiff's Responses to Defendant Washburn, Krusen, and MacKay's motion"); Plaintiff's Response to Defendant Donahue's motion was filed October 8, 2015 (Dkt. 29) ("Plaintiff's Response to Defendant Donahue's motion"). Plaintiff filed a further response to Defendants' motions on April 6, **2016** (Dkt. 37) ("Plaintiff's Further Response"). Oral argument was deemed unnecessary. Based on the following, Defendants' motions should be GRANTED.

FACTS[3]

Plaintiff alleges that while he was incarcerated at the N.Y. State Department of Corrections and Community Service's ("DOCCS") Southport Correctional Facility ("Southport"), Defendant Karen Washburn, Senior Mail Room Clerk, intercepted and opened without authorization, Plaintiff's private, non-legal, out-going mail on June 16, 2011 and August 26, 2011, and that Defendant Belanda Krusen, Senior Mail Clerk, intercepted and opened without authorization Plaintiff's private, non-legal, out-going mail on August 17, 2011, in violation of Plaintiff's First Amendment Rights ("the mailings"). Dkt. 11 ¶¶ 18-19. Upon reading Plaintiff's mail on these occasions, based on the content of the mailings, Washburn and Krusen filed disciplinary charges against Plaintiff alleging violations of various prison rules pertaining to improper soliciting, smuggling, unauthorized drug possession, exchanges, gangs, requesting funds for another inmate, tobacco, visiting, and correspondence procedures. After disciplinary hearings on these charges were conducted by Defendants Donahue, Esgrow, and MacKay, Plaintiff was found guilty and sentenced to 18, three and 15 days of SHU, respectively, together with loss of good time and a loss of correspondence privileges. Plaintiff alleges Defendants Washburn and Krusen as well as Donahue,

Esgrow and MacKay violated Plaintiff's Due Process rights in connection with such hearings. Plaintiff also asserts a violation of his First Amendment rights against MacKay. Plaintiff further alleges that the disciplinary charges filed by Washburn and Krusen were not supported by evidence. Dkt. 11 ¶ 18.

DISCUSSION

***2** In considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) ("Rule 12(b)(6)"), the Supreme Court requires application of "a 'plausibility standard,' which is guided by '[t]wo working principles.' " *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.' " *Id.* at 72 (quoting *Iqbal*, 556 U.S. at 678). " 'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss,' and '[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' " *Id.* (quoting *Iqbal*, 556 U.S. at 670).

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.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim will have 'facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Sykes v. Bank of America,* 723 F.3d 399, 403 (2d Cir. 2013) (quoting *Ashcroft*, 556 U.S. at 678); *see* *Twombly*, 550 U.S. at 570 (the complaint must plead "enough facts to state a claim to relief that is plausible on its face"). The factual allegations of the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 570.

"In ruling on a 12(b)(6) motion, ... a court may consider the complaint as well as 'any written instrument attached to [the complaint][4] as an exhibit or any statements or documents incorporated in it by reference.' " *Kalyanaram v. American Ass'n of University Professors at New York Institute of Technology, Inc.*, 742 F.3d 42, 44 n. 1 (2d Cir. 2014) (quoting *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001)). "Moreover, 'on a motion to dismiss, a court may consider ... matters of which judicial notice may be taken, [and] documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.' " *Id.* (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

As a prerequisite to relief under § 1983, a plaintiff must establish the personal involvement of defendants in the alleged deprivations. *Warren v.* Pataki, 823 F.3d 125, 136 (2d Cir. **2016**) ("To establish a section 1983 claim, a plaintiff must establish a given defendant's personal involvement in the claimed violation in order to hold that defendant liable ....") (quoting *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 229 (2d Cir. 2004)).

A. Plaintiff's First Amendment and Due Process Claims Against Defendants Washburn, Krusen and MacKay.

Under the First Amendment, interference with an inmate's out-going non-legal mail is permitted if the alleged interference furthers " 'an important or substantial governmental interest unrelated to the suppression of expression ... [and] ... must be no greater than is necessary or essential to the protection of the particular governmental interest involved.' " *Hall v. Curran*, 818 F.2d 1040, 1044 (2d Cir. 1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (bracketing in original)). *See also* *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989) (prison regulations or practices affecting prisoner's receipt of non-legal mail must be "reasonably related to legitimate penological concerns"). Although, as "legal mail" receives greater protection under the First Amendment than an inmate's "regular mail," *Cancel v. Goord*, 2001 **WL** 303713, at *6 (S.D.N.Y. Mar. 29, 2001) (citing *Morgan v. Montanye,* 516 F.2d 1367, 1368 (2d Cir. 1975)), "[t]he penological interests for interference with out-going private mail must be more than just the general security interest which justifies most

interference with incoming mail." *Cancel*, 2001 WL 303713, at *5 (citing *Davidson v. Scully*, 694 F.2d 50, 52 (2d Cir. 1982)). However, unless the challenged interference represents a "regular pattern or practice of such interference absent other prison concerns with regards to a particular inmate," the interference does not state a claim of First Amendment violation. *Cancel*, 2001 WL 303713, at *6 (citing *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999)). Thus, in the case of in-coming private non-legal mail, a First Amendment claim based on three incidents of alleged interference which are not supported by any legitimate penological concern related to a prisoner fails as a matter of law to state a claim under § 1983. *Williams v. Lane*, 2016 WL 4275738, at *2 (N.D.N. Y Aug. 15, 2016) (citing *Singleton v. Williams*, 2014 WL 2095024, at *4 (S.D.N.Y. May 20, 2014)) (internal citations omitted). Courts have therefore held that such limited interference with a prisoner's out-going regular mail, without legitimate penological concern, similarly does not constitute a constitutional violation. *See* *Rickett v. Orsino*, 2013 WL 1176059, at *19 (S.D.N.Y. Feb. 20, 2013) (two instances of interference with plaintiff-inmate's attempted mailing of a letter to a relative complaining of plaintiff's ill-treatment insufficient to state a First Amendment claim (citing *Green v. Niles*, 2012 WL 987473 Mar. 23, 2012)) (First Amendment claim not cognizable where two pieces of out-going non-legal mail intentionally interfered with, *Report and Recommendation adopted,* 2013 WL 1155354 (S.D.N.Y. Mar. 21, 2013)).

***3** Here, Plaintiff alleges Defendants conducted three inspections of his out-going non-legal mail without authorization for a mail-watch ordered by the Southport Superintendent pursuant to DOCCS Directive 4422, Dkt. 11 ¶¶ 18-19, which provides for a review of a prisoner's outgoing mail where there is evidence that such mail threatens the safety or well-being of a person or the safety, security or good order of the facility. *See* DOCCS Directive 4422 [III][B][9]; 7 N.Y.C.R.R. § 720.3(e).[5] However, given that the three interferences with Plaintiff's out-going mail as alleged by Plaintiff fails to establish an actionable pattern or practice sufficient to state a claim for a First Amendment mail violation, *see* *Cancel*, 2001 WL 303713, at *6, that the alleged interruptions and inspections may not have been specifically authorized by the Southport Superintendent is irrelevant to whether Plaintiff's First Amendment claim is viable.[6] Moreover, as to Defendant MacKay, Plaintiff's First Amendment claim must also be dismissed because even liberally read, it fails to allege any basis upon which it could be found that this Defendant was personally involved in the alleged violation. *See* *Warren*, 823 F.3d at 136 (defendant's personal involvement in alleged constitutional violation prerequisite to § 1983 liability). Thus, Defendants' motion directed to Plaintiff's First Amendment claim against Defendants Washburn, Krusen and MacKay should be GRANTED on this ground.

Nor is there any allegation by Plaintiff that either Washburn or Krusen was personally involved in Plaintiff's disciplinary hearings so as to have violated Plaintiff's due process rights in connection with such hearings. *Id.* Further, although Plaintiff asserts that Washburn and Krusen had no evidence to support the three disciplinary charges, no due process violation is alleged where the plaintiff asserts that such charges were false. *See* *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1985). Accordingly, Plaintiff's First Amendment claim against MacKay and Plaintiff's Fourteenth Amendment claims against Washburn and Krusen should be dismissed on these grounds.

As to Plaintiff's Due Process claim against Defendant MacKay, the court finds the Second Amended Complaint, liberally read, fails to state any facts on which it may be determined that in connection with Plaintiff's disciplinary hearing conducted by Defendant MacKay based on the August 26, 2011 Disciplinary Charge, Second Amended Complaint, Exh. E (Dkt. 11 at 21), MacKay violated any procedural right of Plaintiff such as fair notice of the charge, an opportunity to call witnesses or receive assistance, to receive a written statement of the evidence MacKay relied upon and the reasons for the disciplinary action, and support for the finding upon "some evidence in the record." *Walpole v. Hill*, 472 U.S. 445, 454 (1985). In short, no facts are alleged in the Amended Complaint upon which it may be found that this claim meets the plausibility requirement under *Iqbal*. Accordingly, Plaintiff's due process claim against MacKay should be dismissed on this ground.

***4** Additionally, while the record is not entirely clear on this point it is also fair to conclude that as to Defendant MacKay, Plaintiff's due process claim is time-barred. The Second Amended Complaint does not specify the date of Plaintiff's disciplinary hearing conducted by MacKay, however, based on the date of the August 26, 2011 Disciplinary Charge, Defendants' Memorandum at 9, assuming a thirty-day period

within which the hearing should have been conducted, *id.*, given that the Amended Complaint adding MacKay as a defendant was filed October 9, 2014, the Amended Complaint was filed more than three years after the probable outside hearing date of September 26, 2011 as Defendant asserts. *See* *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (§ 1983 suits subject to a three-year statute of limitations which accrues when the plaintiff first becomes or should become aware of the constitutional violation sought to be enforced); *see* *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980) (citation omitted). Accordingly, Plaintiff's Due Process claim against MacKay is time-barred.

Finally, Plaintiff's action against the Southport Correctional Facility should also be dismissed as it is not a suable entity under § 1983. *See Davis v. City of New York*, 1998 **WL** 29247, at *2 (S.D.N.Y. Jan 28, 1998); *see also Iran Rivera v. Division of Parole State,* **2016** **WL** 297724, at *1 (S.D.N.Y. Jan 22, **2016**) ("DOCCS cannot be sued under 42 U.S.C. § 1983.") (citing cases).

B. Plaintiff's Claim Against Defendant Donahue.

Plaintiff alleges that Donahue, who presided over Plaintiff's disciplinary hearing based on the disciplinary charge information obtained from the August 17, 2011 mail opening by Defendant Krusen, Defendant's Memorandum at 9 n. 1, Dkt. 18, failed to thoroughly investigate the matter, Dkt. 10 at 2, was aware Plaintiff's mail was opened without prior authorization by the Southport Superintendent, Dkt. 29 at 1-2, and prior to the commencement of the hearing stated to Plaintiff that Donahue believed Plaintiff was guilty of the charge and should plead guilty. Dkt. 29 at 2. However, such assertions of bias do not appear in the Amended Complaint and, even if they did, do not support a procedural due process claim in connection with a prison disciplinary hearing if a prisoner has an opportunity to rebut the charges, *see Maydak v. Warden, FCI Raybrook*, 1 Fed.Appx. 55, 56 (2d Cir. Jan. 10, 2001) (due process required for prison disciplinary hearing limited to 24-hour notice of charges, opportunity to appear at hearing, call witnesses and present rebuttal evidence, and written statement of evidence relied on and reasons for hearing decision), provided the adverse outcome is based on "some evidence." *See* *Hill*, 472 U.S. at 454. Plaintiff's allegations do not plausibly support that Plaintiff was not given such opportunities at the hearing Donahue conducted nor does Plaintiff allege that no evidence was presented sufficient to find Plaintiff was in fact guilty of this charge. *Iqbal*, 566 U.S. at 678. Moreover, even a false disciplinary charge does not support a denial of due process. *See* *Freeman*, 808 F.2d at 951. Additionally, the Second Amended Complaint is unclear whether Plaintiff alleges Donahue is also liable on Plaintiff's First Amendment claim based on Defendant Krusen's alleged interference with Plaintiff's mail on August 17, 2011. However, as Plaintiff fails to allege Donahue was personally involved in such violation, any First Amendment violation claim Plaintiff may have intended to assert against Donahue also fails on this ground. *See* *Warren*, 823 F.3d at 136.

Furthermore, insofar as Plaintiff argues, Dkt. 29 at 2-3, that Defendant Donahue deprived Plaintiff of due process by failing, as the presiding hearing officer, to investigate the facts underlying the disciplinary charges, which investigation would have revealed the absence of the superintendent's written authorization to inspect Plaintiff's out-going, non-legal mail as required, DOCS Directive 4422 [III][B][9], 7 N.Y.C.R.R. § 720.3(e), it generally "is not the duty of an impartial hearing officer to conduct an investigation of the merit of the disciplinary charges against an inmate; rather, the duty of a hearing officer is merely to review the evidence presented to him at the disciplinary hearing ...." *Moore v. Peters*, 92 F.Supp.3d 109, 126 (W.D.N.Y. 2015) (citation and quotation marks omitted). Moreover, as discussed, Discussion, *supra*, at 5-7, in light of Plaintiff's failure to allege a pattern or practice of unwarranted interference with his outgoing private mail, the absence of a formal mail-watch order by the Southport Superintendent is irrelevant to Plaintiff's claims. This aspect of Plaintiff's Due Process Claim against Donahue thus should also be dismissed for failure to state a claim.

CONCLUSION

***5** Based on the foregoing, Defendants' motions, Dkts. 17 and 26, should be GRANTED and the matter remitted to the undersigned for further proceedings. [7]

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen

(14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiff and the Defendants.

SO ORDERED.

All Citations

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Footnotes

1 The case was reassigned to Hon. Lawrence J. Vilardo by order filed March 8, **2016**.

2 Defendant Esgrow has not been served. Dkt. 24.

3 Taken from the pleadings and papers in this action.

4 All bracketed material is added unless indicated otherwise.

5 The relevant regulation and DOCCS Directive provide, in pertinent part, that outgoing mail, unless "Privileged Correspondence" as specified in 7 N.Y.C.R.R. § 721.3(a)(2) and DOCCS Directive 4421, § 721.3(a)(2), "shall not be opened, inspected, or read without express written authorization from the facility Superintendent." 7 N.Y.C.R.R. § 720.3(e); DOCCS Directive 4422 [III][B][9]. Further, the opening or inspection of an inmate's outgoing mail shall not be authorized by the Superintendent

> without any reason to believe that the provisions of any department directive, rule or regulation have been violated, that any applicable state or Federal law has been violation, or that such mail threatens the safety, security or good order of a facility or the safety or well being of any person. Such written authorization shall set forth the specific facts forming the basis for the action.

7 N.Y.C.R.R. § 720.3(e)(1); DOCCS Directive 4422 [III][B][9][a].

6 The court notes that, to date, the Second Circuit has yet to indicate how many instances of interference with an inmate's outgoing non-legal mail constitutes a pattern or practice actionable under the First Amendment. *See Acevedo v. Fischer,* 2015 **WL** 7769486, at *7 (S.D.N.Y. Dec. 2, 2015), *Report and Recommendation adopted*, **2016** **WL** 884909 (Mar. 2, **2016**).

7 Because Defendant Esgrow has not been served the case cannot be closed at this time and based on Plaintiff's IFP status, the court has ordered personal service upon this Defendant. Dkt. 39.