UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

BENJAMIN MITCHELL,

Plaintiff,

-against-

CITY OF NEW YORK, WARDEN, ROBERT SHAW; (G.R.V.C.) INDIVIDUAL CAPACITY; C.O. JANI, #17359, (G.R.V.C.) INDIVIDUAL CAPACITY; C.O. HART; (G.R.V.C.) INDIVIDUAL CAPACITY WILLIAM C. THOMPSON; NYC COMPTROLLER, INDIVIDUAL CAPACITY; MICHAEL AARONSON; NYC COMPTROLLER OFFICE, BUREAU CHIEF; INDIVIDUAL CAPACITY; DAVID BARBARO, NYC COMPTROLLER OFFICE, DIVISION CHIEF; INDIVIDUAL CAPACITY; DOCTOR, THOMAS SCHWENOR, PA; PRISON HEALTH SERVICES, INDIVIDUAL CAPACITY,

Defendants.

09 Civ. 3623

OPINION

----------X

A P P E A R A N C E S:

Pro Se

BENJAMIN MITCHELL
#07-a-5226
Upstate Correctional Facility
309 Bare Hill Road
P.O. Box 2001
Malone, NY 12943-2931

Attorneys for Defendants

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street, Room 2-165
New York, NY 10007
By: David A. Rosinus, Jr.

Sweet, D.J.

Defendants City of New York (the "City"), Warden Robert Shaw ("Warden Shaw"), Correction Officer Lavdrim Jani ("Officer Jani"), former New York City Comptroller William C. Thompson ("Comptroller Thompson"), Bureau Chief Michael Aaronson ("Aaronson"), Division Chief David Barbaro ("Barbaro"), and Physician Assistant Thomas Schwaner (s/h/a Thomas Schwenor) ("Schwaner") (collectively, the "Defendants") have moved under Rule 12(b)(6), Fed. R. Civ. P. to dismiss the Amended Complaint of Plaintiff Benjamin Mitchell, pro se ("Mitchell" or the "Plaintiff"). Upon the conclusions set forth below, the motion is granted, and the Amended Complaint is dismissed.

Prior Proceedings

Mitchell filed his complaint on April 9, 2009 and the Amended Complaint on October 5, 2009.

The Amended Complaint alleges that, on July 12, 2007 at approximately 9:45 p.m., Mitchell "fell on a wet floor in front of the Television Room" at the George R. Vierno Center ("G.R.V.C.), Annex 15B on Riker's Island and that there was not

a wet floor sign on the floor when he slipped, and that Officer Jani "never filed an injury report." Am. Compl. § II.D.

It also alleges that, the following day, he saw Schwaner, a physician assistant, after "complaining about pain in his back and chest" and that he had a "Medi-port in his chest attached to his main vein," and was "very concerned that the fall had detached the connection between the Medi-port and the vein." Id. Schwaner prescribed "Tylenol and muscle relaxers" for Plaintiff and gave him a note that would enable him to get an extra mattress "to ease his pain." Id.

The Amended Complaint also alleges that Mitchell sent a Notice of Claim to the New York City Comptroller's Office on July 31, 2007 and that the letter had not been sent out in mid-August of 2007, that he subsequently gave another Notice of Claim to his sister to mail and he received an acknowledgement of the receipt of his claim from the Comptroller's Office on March 19, 2009. Id. Attached to the Amended Complaint is a letter dated October 10, 2007, addressed to him at G.R.V.C. from Aaronson, a bureau chief at the Comptroller's Office, which he says he did not receive until April of 2009 (when it was attached to a subsequent letter from the Comptroller's Office)

because he was incarcerated at Downstate Correctional Facility beginning in September 2007. Id. & Letter from Michael Aaronson dated Oct. 10, 2007 (attached to the Amended Complaint as an unlabelled exhibit; hereinafter "Aaronson Letter").

The instant motion was marked fully submitted on June 9, 2010.

The Rule 12(b)(6) Standard

On a motion to dismiss pursuant to Rule 12(b)(6), all factual allegations are accepted as true, and all inferences are drawn in favor of the pleader. Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir.1993). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir.1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 235-36 (1974)).

Though the pleading standard set forth in Rule 8 of the Fed.R.Civ.P. is a liberal one, it is not without its demands:

> [T]he pleading standard Rule 8 announces ... demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusion or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.

Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937, 1949 (2009) (internal cites and quotes omitted). Thus, a complaint must allege sufficient factual matter to "state a claim to relief that is plausible on its face." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

In meeting this "plausibility standard," the plaintiff must demonstrate more than a "sheer possibility" of unlawful action; pleading facts that are "'merely consistent with' a defendant's liability ... 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557); see also Reddington v. Staten Island Univ. Hosp., 511 F.3d 126, 131 (2d Cir.2007) ("Although the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice. To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level." (internal

quotation marks and citations omitted)); Gavish v. Revlon, Inc., No. 00-CV-7291, 2004 WL 2210269 at *10 (S.D.N.Y. Sept. 30, 2004) ("[B]ald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations and will not defeat a motion to dismiss.").

The Court is not limited to the four corners of the complaint, but may consider outside documents which are integral to it regardless of whether attached to the complaint, so long as the pleader has notice of them or refers to them. See Schnall v. Marine Midland Bank, 225 F.3d 263, 266 (2d Cir. 2000). "[W]hile courts generally do not consider matters outside the pleadings, they may consider documents attached to the pleadings, documents referenced in the pleadings, or documents that are integral to the pleadings in order to determine if a complaint should survive a 12(b)(6) motion." Garcia v. Lewis, 2005 WL 1423253 at *10 (S.D.N.Y. June 16, 2005).

The Amended Complaint Fails To State A Fourteenth Amendment Claim

For a pretrial detainee to show a violation of his Fourteenth Amendment rights regarding jail conditions, he must

meet a two-prong test. As to the first, objective prong, the plaintiff must show that a deprivation is "sufficiently serious" or that jail conditions impose a "substantial risk of serious harm." As to the second, subjective prong, the plaintiff must show that the defendants acted with deliberate indifference. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); see also Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000). "[M]ore than mere negligence" is required to meet the deliberate indifference standard. Cuoco, 222 F.3d at 106 (quoting Weyant v. Okst, 101 F.3d 845, 856 (2d Cir.1996)); see also, e.g., Wilson v. Seiter, 501 U.S. 294, 305 (1991) (noting that "mere negligence" would not satisfy, inter alia, the deliberate indifference standard). Instead, an official must "know[] of and disregard[] an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837.

The Amended Complaint fails to establish that the wet floor posed a substantial risk of serious harm, because "slippery prison floors, at best, pose a claim of negligence, which is not actionable under the United States Constitution." Jennings v. Horn, No. 05 Civ. 9435, 2007 U.S. Dist. LEXIS 57941, at *18 (S.D.N.Y. Aug. 7, 2007) (citing, inter alia, LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir. 1993)); see also Covington v.

Westchester County Dep't of Corr., No. 06 Civ. 5369, 2010 U.S. Dist. LEXIS 11020, at *22 (S.D.N.Y. Jan. 25, 2010) (citing, inter alia, Jennings, 2007 U.S. Dist. LEXIS 57941); Sylla v. City of New York, No. 04 Civ. 5692, 2005 U.S. Dist. LEXIS 31817, at *9-10 (E.D.N.Y. Dec. 8, 2005) ("Courts have regularly held that a wet or slippery floor does not pose an objectively excessive risk to prisoners." (collecting cases)). As in Sylla, Mitchell "has not pleaded facts from which one could infer that the [wet floor] posed an excessively serious risk to him." Sylla, 2005 U.S. Dist. LEXIS 31817, at *10. His allegations that the floor was wet, that no sign to warn him of this had been placed nearby, and that he fell, do not state a claim as to the objective prong of the deliberate indifference test. See also Wehrhahn v. Frank, No. 04-C-475-C, 2004 U.S. Dist. LEXIS 19060, at *3-4 (W.D. Wis. 2004) (failure to place sign warning of wet floor only states a claim of negligence, not a constitutional claim) (cited in Sylla, 2005 U.S. Dist. LEXIS 31817, at *10).

The Amended Complaint also fails to state a claim as to the subjective prong of that test, which requires that a correction officer know of and be deliberately indifferent to the alleged risk. The allegation that Officer Jani "witnessed

the fall and afterwards decided to place [a] big floor fan" on the floor directed at Plaintiff, and that he did not file an injury report fails to state a claim on the deliberate indifference test's subjective prong. The Amended Complaint fails to state a claim on either the subjective or the objective prongs of the deliberate indifference test.

Mitchell has not asserted facts that would prevent his slip-and-fall claim from being properly categorized as "a garden variety tort" that "is not cognizable under Section 1983" as a constitutional violation and that must instead be "litigated in state court." Flowers v. City of New York, 668 F. Supp.2d 574, 578 (S.D.N.Y. 2009) (citing Young v. County of Fulton, 160 F.3d 899, 902 (2d Cir. 1998)). Mitchell refers to this claim as a "tort claim" (Am. Compl. § V) and has alleged that the absence of a wet floor sign in the area where he slipped constituted "a direct breach of duty of care and [was] also foreseeable [sic]," (Id. § II.D (internal quotations omitted and capitalization removed)). Elsewhere in his Amended Complaint, he states that "[n]ot placing a wet floor sign, [sic] is something so easy to do, it's just a neglect of duty of care." Id. By explicitly referring to most of the basic elements of a state law tort claim (see, e.g., Akins v. Glens Falls City Sch. Dist., 53

N.Y.2d 325, 333 (1981)), Mitchell has alleged a state law negligence claim, not a federal civil rights violation arising out of deliberate indifference that would be cognizable under 42 U.S.C. § 1983.

The Amended Complaint has alleged that the day after he slipped and fell, Plaintiff received medical treatment from Schwaner. Am. Compl. § II.C. According to Mitchell, he had a "Medi-port in his chest attached to his main vein" at that time and was "very concerned that the fall had detached the connection between the Medi-port and the vein." Id. Schwaner did not take any x-rays, but prescribed "Tylenol and muscle relaxers" for Plaintiff and gave him a note that would enable him to get an extra mattress "to ease his pain." Id.

Construed liberally, Mitchell is attempting to state a Fourteenth Amendment claim of deliberate indifference to a serious medical need. See Estelle v. Gamble, 429 U.S. 97, 106 (1976); see also Weyant, 101 F.3d at 856 (applying the Estelle standard to case with a pretrial detainee plaintiff). The standard for this type of deliberate indifference is nearly identical to the standard discussed above regarding deliberate indifference to a risk of harm; in this instance, a plaintiff

must show that 1) the medical need was sufficiently serious, and 2) the defendant was deliberately indifferent to that need. Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996).

As to the first prong, a medical need is sufficiently serious if it is "a condition of urgency . . . that may produce death, degeneration, or extreme pain." Id. (quoting Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir.1994)). Mitchell has alleged only that he was experiencing "pain in his back and chest" when he went to see Schwaner. Although he says that he was "very concerned that the fall had detached the connection between the medi-port [on his chest] and his vein" (Am. Compl. § II.C), he does not allege that this connection had in fact detached, and he subsequently notes that his medi-port was removed several months later, in November of 2007, apparently without incident. See Id. § III (Plaintiff states that his fear "increased until the medi-port was removed on 11/30/07," but that after it was removed he "began to feel just a little bit safer"). Mitchell's discomfort, and his concerns, are not the sort of injuries that produce a condition of urgency that could lead to death, degeneration, or extreme pain. See, e.g., Henderson v. Doe, No. 98 Civ. 5011, 1999 U.S. Dist. LEXIS 8672, at *2, *6-7 (S.D.N.Y. June 10, 1999) (broken finger not sufficiently serious medical

need because it was not a condition of urgency that could lead to death, degeneration, or extreme pain); Grant v. Burroughs, No. 96 Civ. 2753, 2000 U.S. Dist. LEXIS 12917, at *11-12 (S.D.N.Y. Sept. 8, 2000) (plaintiff's allegation that he was in pain for two months with a cheek laceration and swollen cheek held not sufficiently serious for the same reason); see also Coqueran v. Eagen, No. 98 Civ. 7185, 2000 U.S. Dist. LEXIS 595, at *10 (E.D.N.Y. Jan. 20, 2000) (discussing Second Circuit cases with examples of delay or denial of medical care that is "sufficiently serious" to survive a motion to dismiss).

As to the subjective prong, Schwaner was not deliberately indifferent to Plaintiff's medical need. Mitchell noted that Schwaner prescribed him Tylenol and muscle relaxers, "and also gave Plaintiff a note for an extra Mattress [sic] to ease his pain" and that this type of medication helps him to sleep. (Am. Compl. § II.C.)

Mitchell's allegation that he did not receive an x-ray on his back, and his claim that his fear "remain[s]" because he has not had an x-ray does not establish the subjective prong. A defendant only acts "with the requisite deliberate indifference when that official 'knows of and disregards an excessive risk to

inmate health or safety,'" Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (quoting Farmer, 511 U.S. at 837), and "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment" under the deliberate indifference standard. Estelle, 429 U.S. at 106. Whether or not the alleged failure to perform an x-ray creates a valid medical malpractice claim, a constitutional claim alleging deliberate indifference "is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law." Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003). Schwaner was plainly not deliberately indifferent to Mitchell's medical needs and even if Mitchell nevertheless believes that Schwaner's failure to order x-rays constituted medical malpractice, that claim is not cognizable under § 1983, since "medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 105-6.

For the reasons stated above, the Amended Complaint fails to state a Fourteenth Amendment claim.

The Amended Complaint Fails To State A Claim Against Comptroller Aaronson And Barbaro

The Amended Complaint alleges that Mitchell sent a Notice of Claim to the New York City Comptroller's Office on July 31, 2007 and that the letter had not been sent out in mid-August of 2007 and that he subsequently gave another Notice of Claim to his sister to mail. Am. Compl. § II.D. Mitchell received an acknowledgement of the receipt of his claim from the Comptroller's Office on March 19, 2009. He also received the Aaronson Letter, dated October 10, 2007, acknowledging receipt of his Notice of claim, which he says he did not receive until April of 2009 because he was incarcerated at Downstate Correctional Facility beginning in September 2007 but the letter was addressed to him at G.R.V.C. and "the legal mail never followed" him. Id. & Aaronson Letter.

The Amended Complaint appears to take issue with Barbaro's letter dated April 16, 2009 (which Plaintiff has also attached to his Amended Complaint as an unlabelled exhibit; hereinafter "Barbaro Letter"), which noted that his "[notice of] claim was filed timely" and appears to confuse two requirements: General Municipal Law § 50-e(1)(a)'s requirement that the Notice of Claim itself be filed within 90 days of the incident in question (which Plaintiff did do in a timely fashion), and General Municipal Law § 50-i(1)(c)'s requirement that any

lawsuit (or special proceeding) be filed within one year and 90 days of the incident (which, it appears, Mitchell did not do in a timely fashion).

If construed liberally, the Amended Complaint might be interpreted to claim that Plaintiff "lost (or was severely hampered in) the ability to file a lawsuit," which would constitute a violation of his Due Process rights. Ponterio v. Kaye, No. 06 Civ. 6289, 2007 U.S. Dist. LEXIS 4105, at *34 (S.D.N.Y. Jan. 22, 2007). The allegation would be that, because the Comptroller's Office did not send the October 2007 letter acknowledging receipt of his Notice of Claim to him at Downstate Correctional Facility, his new address, Mitchell was unable to file a lawsuit concerning his slip-and-fall. See Am. Compl. § II.D.

Mitchell does not allege that he contacted the Comptroller's Office to let them know of his change of address but implies that the Comptroller's Office should affirmatively determine his latest address whenever they send him a mailing.

Given the applicable law, Mitchell's failure to receive the October 2007 acknowledgement letter did not affect

his ability to file a lawsuit. Although General Municipal Law § 50-i(1)(a) does require, as a condition precedent, that a litigant have filed a Notice of Claim before bringing any lawsuit or special proceeding, there is no requirement that the Comptroller's Office respond to that litigant's Notice of Claim before a lawsuit is filed arising out of its subject matter. See Gen. Mun. Law § 50-i(1)(b) (action or special proceeding may be prosecuted if, inter alia, "at least thirty days have elapsed since the service" of the litigant's Notice of Claim "and adjustment or payment thereof has been neglected or refused"). Even if Mitchell is correct that the Comptroller's Office should be blamed for his lack of timely receipt of the October 2007 acknowledgement letter, that purported fault of the Comptroller's Office did not result in any infringement of his Due Process rights.

Even if the Amended Complaint did state a Due Process claim on this basis, it does not identify any individuals from the Comptroller's Office who could be held liable under the law. It alleges that individual Defendants "William C. Thompson, David Barbaro and Michael Aaronson all have Supervisory positions [sic] and should have made sure that Plaintiff's legal mail" reached him in a timely manner. Am. Compl. § II.D.

However, "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948 (2009); see also Id. at 1949 (noting that supervisors "may not be held accountable for the misdeeds of their agents"); see also Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) ("It 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.") (quoting Wright v. Smith, 21 F.3d 496, 501 (2d Cir.1994)). Absent direct participation in a constitutional violation, a supervisor may only be liable if he "create[d] a policy or custom under which unconstitutional practices occurred." Bellamy v. Mount Vernon Hospital, No. 07 Civ. 1801, 2009 U.S. Dist. LEXIS 54141, at *27 (S.D.N.Y. June 26, 2009); see also Joseph v. Fischer, No. 08 Civ. 2824, 2009 U.S. Dist. LEXIS 96952, at *40-41 (S.D.N.Y. Oct. 7, 2009). The Amended Complaint has not alleged direct involvement of any of the Comptroller defendants, nor does it allege that anyone created a policy or practice that violated Plaintiff's rights. As such, he does not allege facts sufficient to support a finding of liability on

behalf of the individual Defendants from the Comptroller's Office.

The Amended Complaint Fails To State A Claim For Denial Of Access To The Mails

The Amended Complaint alleges that the Notice of Claim had not been sent for approximately half a month after Plaintiff had submitted it for mailing; that he gave another Notice of Claim to his sister to mail; that he did not receive the Aaronson Letter, dated October 10, 2007, until April of 2009, because he had been transferred to Downstate Correctional Facility by the time the response was sent to G.R.V.C.; and that he "believes that someone tampered with the legal mail so that [his] claim would not be heard." Am. Compl. § II.D. Construed liberally, this portion of the Amended Complaint appears to be attempting to plead that Mitchell's First Amendment right of access to the mails was abridged without sufficient penological justification. See Thornburgh v. Abbott, 490 U.S. 401, 408-13 (1989).

However, the alleged delay in the mailing of Mitchell's Notice of Claim does not appear to have injured Plaintiff. The Comptroller's Office undisputedly received the

Notice of Claim by October 10, 2007, based on the Aaronson Letter; and, as a result, his Notice of Claim was filed timely, as Barbaro noted in his letter dated April 16, 2009. Am. Compl. § II.D & Barbaro Letter. Thus, no cognizable injury arising out of this alleged delay has been stated. See also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("Allegations of sporadic and short-term delays in receiving mail are insufficient to state a cause of action grounded upon the First Amendment.").

The Amended Complaint alleges that Mitchell believes "someone" tampered with his legal mail (Am. Compl. § II.D) but it does not allege that any particular correction officer or other City employee was responsible. Because "[i]t is well settled in th[e Second] Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983" (Colon, 58 F.3d at 873 (quoting Wright, 21 F.3d at 501)), and because Mitchell seeks only monetary damages in this lawsuit (see Am. Compl. § V), his failure to identify any defendant as personally involved in the alleged "tampering" is fatal to his claim.

In addition, the allegations concerning tampering do not "state[] a plausible claim for relief" because there is an "'obvious alternative explanation'" based on the well-pleaded facts. Iqbal, 129 S.Ct. at 1950, 1951-2 (quoting Twombly, 550 U.S. at 567). At the time that the Comptroller's Office sent Aaronson's responsive letter to Mitchell at G.R.V.C., he had recently been transferred to Downstate Correctional Facility. See Am. Compl. § II.D. Based on the well-pleaded facts in the Amended Complaint, it appears that his "legal mail never followed" him. Conversely, the Amended Complaint fails to allege any facts to support a tampering claim. The fact that one piece of Mitchell's mail was not forwarded to his new address does not constitute tampering with the mails, nor does it violate Plaintiff's First Amendment rights. See Higgs v. Carver, No. 99-148-C, 2000 U.S. Dist. LEXIS 18930, at *36-37 (S.D. Ind. Dec. 15, 2000) (citing Zimmerman, 226 F.3d at 573) (allegation that three letters were not forwarded to detainee plaintiff when he was housed at a diagnostic center does not state a cause of action under the First Amendment), aff'd in part, vacated in part on other grounds, 286 F.3d 437 (7th Cir. 2002).

The Amended Complaint thus fails to state a First Amendment claim.

The Amended Complaint Fails To State A Claim Against The City

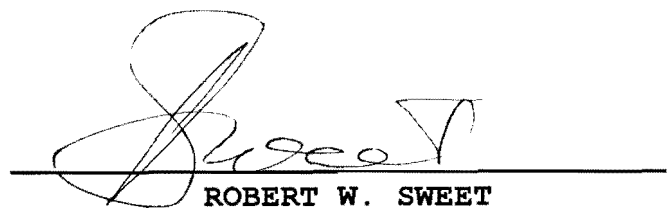
It is well-established that a municipality may be liable under § 1983 only if a plaintiff has pled and proved three elements: "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir. 1995) (quoting Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983); citing, inter alia, Monell v. New York City Dep't of Soc. Services, 436 U.S. 658, 690-91 (1978)). The Amended Complaint has failed to allege that Plaintiff's alleged injuries resulted from an unconstitutional municipal policy or practice. The Amended Complaint does not even contain a "[t]hreadbare recital[] of the elements of" a so-called Monell claim, much less provide "sufficient factual matter . . . to state a claim to relief that is plausible on its face." Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 555).

Conclusion

Based upon the conclusions set forth above, the motion of the Defendants to dismiss the Amended Complaint is granted. Mitchell is granted leave to replead within 20 days.

It is so ordered.

New York, NY
September 22, 2010



ROBERT W. SWEET
U.S.D.J.