UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIRGILIO JIMENEZ,

Plaintiff,

-against-

M.D. DIANE SOMMER, P.A. BRIDGET BAKER, UNITED STATES,

Defendants.

No. 14-cv-5166 (NSR)
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff Virgilio Jimenez ("Plaintiff") brings this action *pro se*,[1] against Defendants Diane Sommer, M.D. ("Sommer"), Bridget Baker, P.A. ("Baker") and the United States (collectively, "Defendants"),[2] alleging negligence with respect to the maintenance of the Federal Correctional Institution in Otisville, New York ("Otisville"), and deliberate indifference toward serious medical needs caused by an ankle fracture Plaintiff sustained in a fall while incarcerated at Otisville. Plaintiff asserts a *Bivens* claim for violation of his Eighth Amendment rights[3] and a negligence claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. Before this court is Defendant's motion to dismiss the *Bivens* claim asserted in Plaintiff's Amended Complaint. For the foregoing reasons, Defendant's motion to dismiss is GRANTED.

[1] Plaintiff received assistance with his opposition brief from law student interns in the form of research and help formulating arguments. (*See* Pl. Opp. to Def. Mot. to Dismiss, at 1, ECF No. 61.)

[2] By Order dated September 16, 2014, this Court dismissed Plaintiff's claims against Defendant Warden Hufford of Otisville and the United States Bureau of Prisons ("BOP") for failure to state a claim. (*See* ECF No. 7.) The Court construed the Complaint to allege claims under the FTCA, which required adding the United States as a defendant, and directed the Clerk to amend the caption to reflect this addition. (*Id.*) Furthermore, on February 3, 2016, the Court dismissed Plaintiff's medical malpractice claim under the Federal Tort Claims Act, and *Bivens* claim. (*See* ECF No.35.) The undersigned subsequently granted Plaintiff's partial motion for reconsideration and reinstated Plaintiff's *Bivens* claim. (*See* ECF No. 51.)

[3] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*").

BACKGROUND

The following facts are drawn from Plaintiff's Amended Complaint, ECF No. 46, unless otherwise indicated.[4]

Plaintiff's action arises out of an incident that occurred when he was incarcerated at F.C.I. Otisville. (*See* Am. Compl. at 1.) Plaintiff alleges that the windows above the cell in which he was housed were damaged, and that when it rained puddles of water would form on the ground. (*Id*.) On the night of June 28, 2013, it rained, causing large puddles to form. (*Id*.) Early the next morning, an officer unlocked all of the cell doors and presumably prompted the inmates to step out by yelling "clear." (*Id*.) Plaintiff stepped out of his cell and proceeded to walk toward a staircase. (*Id*.) After taking a few steps, Plaintiff slipped, "crashing" into the floor, hitting his head, lower back, right ankle and right wrist. (*Id*.) Plaintiff was able to get up, but could not walk. (*Id*.)

A fellow inmate assisted in bringing Plaintiff to the medical facility, where he was seen by R.N. Cheryl Brooks ("RN Brooks"). (*Id*. at 2.) RN Brooks observed Plaintiff's injuries, gave him four Ibuprofen tablets and crutches,[5] which he contends were mismatched, and according to the

[4] Plaintiff asks the Court to take judicial notice of medical records (the "Medical Records") attached to his opposition brief, on the basis that they are incorporated by reference and integral to the complaint. (*See* Pl. Opp. at 3.) In the alternative, Plaintiff asks for permission to file a second amended complaint to include these records. (*Id*.) Both parties refer to these records. (*See id*; *see, e.g*., Def. Reply In Support of Mot. to Dismiss, at 5, ECF No. 64.) Although, on a motion to dismiss, the Court's review is generally limited to the facts alleged in the complaint, given Plaintiff's desire to amend, the Court will take judicial notice of these records for the purposes of this motion. *See Martinez v. Aycock-W.*, 164 F. Supp. 3d 502, 508 (S.D.N.Y. 2016) ("in deciding a motion to dismiss a pro se complaint, it is appropriate to consider 'materials outside the complaint' including 'documents that a pro se litigant attaches to his opposition papers'") (citing *Alsaifullah v. Furco*, 12-CV-2907 ER, 2013 WL 3972514, at *4 n.3 (S.D.N.Y. Aug. 2, 2013); *Agu v. Rhea*, 09–CV–4732, 2010 WL 5186839, at *4 n. 6 (E.D.N.Y. Dec. 15, 2010)).

[5] Plaintiff's Amended Complaint indicates he received crutches on July 3, 2013, but his Medical Records indicate he received crutches on the same day of his accident, after being seen by RN Brooks. (*Compare* Am. Compl. at 2 *with* Plaintiff's Medical Records Attached to Pl. Opp. ("Medical Records"), at 24, ECF No. 61.) *See Tavares v. New York City Health & Hosps. Corp.*, 13-CV-3148 (PKC) (MHD), 2015 WL 158863, at *3 (S.D.N.Y. Jan. 13, 2015) ("While a court deciding a motion to dismiss must generally accept the complaint's factual allegations as true, it is permitted to reject the truthfulness of those allegations when they are contradicted by matters of which judicial notice may be taken"); *see also Matusovsky v. Merrill Lynch*, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) ("a court may consider documents attached to the complaint as exhibits, or incorporated by reference, as well as any documents that are

Medical Records, recommended elevation and that he follow up at "sick call" as needed. (*Id*.; Medical Records at 24.) On July 3, 2013, Plaintiff was seen by P.A. Bridget Baker ("PA Baker"). (Am. Compl. at 2.) X-rays were performed, revealing that Plaintiff's ankle was fractured. (*Id*.; Medical Records at 27.) According to the Medical Records, Plaintiff reported no excessive pain at this time, but had been using the crutches incorrectly and bearing weight on the ankle; he was also experiencing swelling and decreased range of motion in the area. (*Id*.) Plaintiff was also given an air-cast, and anti-inflammatories for the pain and swelling (Medical Records at 29-30; *see also* Pl. Opp. at 4 (indicating receipt of "air-cast"), and given a vaccine to help him with dizziness and vomiting due to a concussion he sustained from the fall. (Am. Compl.at 2.) Plaintiff contends that he was refused a wheelchair and told that he could not be taken to the hospital due to a "holiday schedule" at the time. (*Id*.)

On or about July 5, 2013, Plaintiff obtained a wheelchair. (*Id*.; Medical Records at 33.) Plaintiff alleges that the wheelchair had no foot rest and loose screws. (Am. Compl. at 3.) A few days later, on July 9, 2013, Plaintiff was taken to a hospital off-site, where a second x-ray was performed, and his ankle was put in a cast. (*Id*. at 3.) Later that same month, on July 19, 2013, Plaintiff went to medical to address damage to his cast. (*Id*.) Specifically, the cast was breaking apart because it had been dragging on the floor due to the lack of a foot rest on his wheelchair, and water damage, as Plaintiff had received nothing to protect the cast during showers. (*Id*.) Plaintiff alleges that when he was leaving the Medical Unit, a warden noticed the state of the wheelchair and ordered P.A. Baker to provide Plaintiff with a new one, which was presumably received. (*Id*.)

integral [there]to …. If a plaintiff's allegations are contradicted by such a document, those allegations are insufficient to defeat a motion to dismiss.")

On July 23, 2013, Plaintiff returned to the Medical Unit for lower back pain and received a "vaccine." (*Id*.)

On August 8, 2013, Plaintiff's cast was removed and Plaintiff's foot was placed in a "boot," which was removed on August 28, 2013; Plaintiff was given ibuprofen for his pain. (*Id*.) Months later, on November 14, 2013, Plaintiff went to medical for lower back pain and dizzy spells. (*Id*. at 4.)

Plaintiff contends that he continues to suffer from back pain, and his ankle and foot continue to swell up whenever he walks around for more than thirty minutes to two hours, or whenever he climbs stairs. (*Id*.) Plaintiff also states that both his ankle and wrist "have never been the same" and that he cannot "run around" like he used to. (*Id*.)

As to Dr. Sommer, Plaintiff alleges that she was aware of his fall because, as the head of the medical unit at Otisville F.C.I. "all decisions big or small go thru [sic] her." (*Id*. at 4.) Plaintiff alleges that Sommer was aware he required immediate medical attention, including pain medication, a wheelchair, x-rays, MRIs, and a lower tier cell. (*Id*.) Plaintiff notes that he did not receive an x-ray until five days after his fall, and a cast until six days after an x-ray revealed he had a fracture, and that, as such, his needs were not met in a timely fashion. (*Id*. at 4-5.)

STANDARD ON A MOTION TO DISMISS

Under Rule 12(b)(6), the inquiry is whether the complaint "contain[s] 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)); *accord Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. To survive a motion to dismiss, a complaint must supply "factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98

(2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). The Court must take all material factual allegations as true and draw reasonable inferences in the non-moving party's favor, but the Court is "'not bound to accept as true a legal conclusion couched as a factual allegation,'" or to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

In determining whether a complaint states a plausible claim for relief, a district court must consider the context and "draw on its judicial experience and common sense." *Id*. at 662. A claim is facially plausible when the factual content pleaded allows a court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

Furthermore, with regard to *pro se* Plaintiffs, the Court must "'construe [ ] [the] [Complaint] liberally and interpret[ ] [it] to raise the strongest arguments that [it] suggest[s].'" *Martinez*, 164 F. Supp. 3d at 508 (quoting *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir.2013). Yet, "the liberal treatment afforded to pro se litigants does not exempt a *pro se* party from compliance with relevant rules of procedural and substantive law." *Id.* (quoting *Bell v. Jendell*, 980 F.Supp.2d 555, 559 (S.D.N.Y.2013) (emphasis added) and citing *Caidor v. Onondaga Cty.*, 517 F.3d 601, 605 (2d Cir.2008) ("[P]ro se litigants generally are required to inform themselves regarding procedural rules and to comply with them.")).

DISCUSSION

I. Eighth Amendment Claim

Plaintiff alleges that Defendant failed to provide him with adequate, timely medical treatment for injuries sustained from his fall while incarcerated at Otisville. (Pl. Opp. at 8-13.) Defendant moves to dismiss this claim on the grounds that Plaintiff has failed to plausibly allege that Defendant was deliberately indifferent to his serious medical needs. (Def. Mem. at 6-12.) Defendant also asserts that she is protected by the qualified immunity doctrine.

Under *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (1972), a plaintiff may bring a claim against a federal officer in her personal capacity for a violation of certain constitutional rights. "To state a claim under *Bivens*, a plaintiff must allege that an individual defendant personally committed a specific wrongful act that violated a well-established constitutional right of which a reasonable person would have known." *Adekoya v. Holder*, 751 F. Supp. 2d 688, 694 (S.D.N.Y. 2010) (citing *Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir. 1987)); *see Barbaro v. U.S. ex rel. Fed. Bureau of Prisons FCI Otisville*, 521 F. Supp. 2d 276, 281 (S.D.N.Y. 2007) ("The elements of a *Bivens* claim are: (1) that a defendant acted "under color of federal law" (2) "to deprive plaintiff of a constitutional right.") (quoting *Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995)). In this instance, Plaintiff alleges a deprivation of adequate medical care in violation of the Eighth Amendment. *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996).

In order to show that prison medical treatment was so inadequate that it could amount to "cruel or unusual punishment" prohibited by the Eighth Amendment, a plaintiff must demonstrate that "the defendant['s] actions or omissions amounted to 'deliberate indifference to a serious medical need.'" *Shuler v. Edwards*, 485 F. Supp. 2d 294, 297–98 (W.D.N.Y. 2007) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). This test has both a subjective and objective component, requiring a plaintiff to plausibly allege: "(1) objectively, the deprivation the inmate suffered was sufficiently serious that he was denied the minimal civilized measure of life's necessities," and "(2) subjectively, the defendant official acted with a sufficiently culpable state of mind, such as deliberate indifference to inmate health or safety." *Martinez v. Aycock-W.*, 164 F. Supp. 3d 502, 510–11 (S.D.N.Y. 2016) (citing *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013)).

Broadly interpreted, the Amended Complaint alleges deliberate indifference to a serious medical need based on two aspects of Plaintiff's medical treatment: the delay in receiving medical

treatment; and the adequacy of the medical care received. To reiterate, Plaintiff contends that Defendant provided inadequate care by allowing six days to pass between Plaintiff's diagnosis of a distal fibula fracture, and the provision of a cast (with a total of nine days between the accident and casting), which caused "extra unnecessary pain and suffering." (*See* Am. Compl. at 8.) Plaintiff also contends that the care he received was inadequate because he required pain medication, a wheelchair, x-rays, MRIs, and a lower tier cell following his fall. (*See id*. at 4.) The Court notes that according to the Amended Complaint, Plaintiff received ibuprofen, vaccines for dizziness and back pain, x-rays, crutches, a wheelchair (which may have been replaced by one of better quality), an "air-cast," a fiber glass cast, and a "boot." (*See id*. at 2-3; Pl. Opp. at 4; Medical Records at 30; 37.)

I. Objective Prong of Deliberate Indifference Claim

"Only an 'unquestioned and serious deprivation of basic human needs' or of the 'minimal civilized measure of life's necessities' will constitute a violation of Plaintiff's Eighth Amendment rights." *Martinez*, 164 F. Supp. 3d at 511 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). To determine whether there has been an objectively, sufficiently serious deprivation the Court considers "whether the prisoner was actually deprived of adequate medical care," and if so, whether "the inadequacy in medical care is sufficiently serious." *Salahuddin v. Goord*, 467 F.3d 263, 278–79 (2d Cir. 2006). As to the first consideration, adequate medical care is often considered "reasonable care" or that which would not result in liability. *Martinez*, 164 F. Supp. 3d at 511. As to the second consideration, Courts look to "how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." *Salahuddin*, 467 F.3d at 280. Harm is considered "sufficiently serious" if it could "produce death, degeneration, or extreme pain," *Hill v. Curcione*, 657 F3d. 116, 122 (2d Cir. 2011) (internal quotation marks and

citations omitted), or "the failure to treat [the] condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Harrison v. Barkley*, 219 F.3d 132, 136 (2d Cir. 2000) (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998)).

a) Medical Treatment Plaintiff Received

Plaintiff alleges he was deprived of adequate medical care because he did not receive pain medication, a wheelchair, x-rays, MRIs, and a lower tier cell. (*See id*. at 4.) According to Plaintiff's Amended Complaint, immediately after his fall he was brought to the medical unit where he was examined by R.N. Brooks, who gave him four ibuprofen, crutches, (which Plaintiff contends were "mismatched,") and an air-cast. (Am. Compl. at 2; Pl. Opp. at 4.) Five days later, on July 3, 2013, he was seen by P.A. Barker who performed an x-ray, revealing an ankle fracture. (*Id*.; Pl. Opp. at 4.) Plaintiff also alleges he was given vaccinations to assist with his dizziness and vomiting. (Am. Compl. at 2.) Two days later, on July 5, 2013, according to Plaintiff's Medical Records, a request was made for him to be issued a wheelchair. (*See* Medical Records at 33.) The following day, Plaintiff was given a wheelchair which he contends was broken. (Am. Compl. at 2-3.) Three days after that, he was taken to an outside hospital, where another x-ray was performed, and his ankle was placed in a cast. (*Id*.) Ten days later, on July 19, 2013, he went to medical due to damage to his cast; on that day, a new wheelchair was ordered for him. (*Id*. at 3.) Four days later, on July 23, 2013, he returned to medical due to lower back pain and was given a vaccine. (*Id*.) On August 8, 2013, sixteen days later, the cast was removed and his foot was placed in a "boot." (*Id*.) On August 28, the boot was removed and he was given ibuprofen for pain. (*Id*.) Plaintiff's medical records indicate that he was given medication for pain and inflammation throughout this time. (*See generally*, Medical Records at 24-42.)

Based upon Plaintiff's own complaint and documents incorporated therein, the Court cannot find that the medical care he received was inadequate under the Eighth Amendment deliberate indifference standard. Plaintiff was seen within hours of his accident, and based upon his own allegations, within several days of the injury, Plaintiff appeared to receive regular treatment, which included pain medication, x-rays, crutches, a wheelchair (which may have been replaced by one of better quality) and a cast. *See Santiago v. City of New York*, No. 98-cv- 6543 (RPP), 2000 WL 1532950, at *6 (S.D.N.Y. Oct. 17, 2000) (holding that plaintiff failed to state a deliberate indifference claim because he received prompt medical treatment within hours after he complained of pain). Plaintiffs' contention that he should have received other forms of treatment amounts to a difference of opinion as to appropriate medical treatment, which is not actionable under the Eighth Amendment. *See Wandell v. Koenigsmann*, 99-CV-8652 (WHP), 2000 WL 1036030, at *3 (S.D.N.Y. July 27, 2000) ("it is well established that mere differences in opinion regarding medical treatment do not give rise to an Eighth Amendment violation.") (citing *Muhammad v. Francis*, 9-CV-2244 (SS), 1996 WL 657922, at *6 (S.D.N.Y. Nov. 13, 1996) (internal citations omitted)); *see also id.* *4 (citing *Skinner v. Bloschak*, 1988 WL 96799, at *1 (E.D. Pa. Sept. 14, 1988) (allegations of failure to provide crutches "describe a medical malpractice claim, and not the deliberate and harmful indifference to [plaintiff's] medical needs required")).

The Court also notes that injuries both similar to Plaintiff's and of a more severe nature have not been found to rise to the level of a "serious medical condition" warranting Eighth Amendment protection. *See Chatin v. Artuz*, 28 F. App'x 9, 10 (2d Cir. 2001) (Plaintiff's "condition, which medical staff diagnosed as a sprained ankle, a bone spur, and a neuroma, did not rise to the level of seriousness that the Eighth Amendment requires."); *Patterson v. Westchester Cnty*, 13-CV-9194, PAC AJP, 2014 WL 1407709, at *7 (S.D.N.Y. Apr. 11, 2014*), report and*

recommendation adopted, 13-CV-0194 (PAC) (AJP), 2014 WL 2759072 (S.D.N.Y. June 16, 2014) (finding plaintiff's torn ankle ligaments did not establish serious medical and noting "[u]nlike cases where injuries demonstrate the requisite urgency leading to death, degeneration or extreme pain, the case law holds that prisoner complaints about ligaments or other ankle problems do not establish the objective prong of the deliberate indifference standard"); *Sloane v. Borawski*, 64 F. Supp. 3d 473, 494 (W.D.N.Y. 2014) ("broken ribs, an ankle fracture and a lower right-side back injury" not sufficiently serious to meet objective prong); *Bonner v. New York City Police Dep't*, 99–CV–3207, 2000 WL 1171150, at *4 (S.D.N.Y. Aug. 17, 2000) (holding that the *inability to "close" a finger due to inadequate treatment of swelling* in one's hand is *insufficiently serious* to constitute Eighth Amendment violation because the "[c]ourt could [not] conclude plaintiff suffered or suffers from a condition that may produce death, degeneration, or extreme pain") (emphasis added); *see also Gomez v. Zwillinger*, 1998 U.S. Dist. LEXIS 17713, at *16 (S.D.N.Y. November 6, 1998) (holding that *back pain and discomfort* were *not sufficiently serious*).

However, even assuming, without deciding, that a fractured distal fibula constitutes a serious medical need, the Court notes that in similar cases involving fractured fibulas, courts in this Circuit have denied deliberate indifference claims (even, for example, where there was a seventeen-day delay between an x-ray and surgery) on the basis that the care provided was adequate where Defendants "took steps to immobilize the ankle area, gave plaintiff crutches and pain relievers, and provided for further evaluation and treatment;" finding in light of this treatment that "[a]ll that the record shows, then, is that the x-rays and surgery were not performed as soon as plaintiff would have liked." *Shuler*, 485 F. Supp. 2d at 299. Based upon the foregoing, even drawing all reasonable inferences in favor of Plaintiff, the allegations of inadequate medical care are legally insufficient to satisfy the objective standard of a deliberate indifference claim.

b) Alleged Delay in Receipt of Cast

Plaintiff also alleges that he was provided inadequate medical care in the form of a six-day delay between his x-ray and the receipt of a cast, and that this delay was "sufficiently serious" under the objective prong. (*See* Pl. Opp. at 8.)

As to the first inquiry of the objective prong – whether Plaintiff was actually deprived of inadequate medical care – the Court notes that delays longer than the one complained of here have not been found to constitute an inadequacy in care. *See also Torres v. Alers*, 2005 WL 2372741 at *1 (S.D.N.Y. Sept. 26, 2015) (finding that failure to order an x-ray until two months after plaintiff fractured distal fibula did not give rise to a claim of deliberate indifference) (emphasis added); s*ee also Patterson v. Westchester Cnty*, 13-CV-9194, 2014 WL 1407709 at *24 (S.D.N.Y. Apr. 11, 2014) (no deliberate indifference claim where plaintiff's ankle was x-rayed three days after injury but was not diagnosed as suffering from torn ligaments until eleven days after injury); *Ruiz v. Homerighouse*, 01-CV-0266E (SR), 2003 WL 21382896 (W.D.N.Y. Feb. 13, 2003) (finding that a one week delay in visit to orthopedist for treatment of a hand fracture was not sufficiently serious where Plaintiff received splint, ace bandage and ibuprofen). Thus, the six-day delay between an x-ray and cast (and even the nine-day delay between the initial injury and cast) are not sufficient to be deemed inadequate under the Eighth Amendment.

"Where the challenge is to the adequacy of the treatment provided, such as in cases where treatment is alleged to have been delayed or interrupted, the seriousness inquiry [of the objective prong] focuses on the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition considered in the abstract." *Rosseter v. Annetts*, 10-CV-1097 (NAM) (TWD), 2012 WL 4486082, at *9 (N.D.N.Y. June 29, 2012), *report and recommendation adopted*, 9:10-CV-1097 (NAM) (TWD), 2012 WL

4482858 (N.D.N.Y. Sept. 27, 2012) (internal quotation marks and citations omitted); *see Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003) ("where the prisoner … brings a narrower denial of medical care claim based on a temporary delay or interruption in treatment, the serious medical need inquiry can properly take into account the severity of the temporary deprivation alleged by the prisoner."). Along these same lines, "[t]o establish an Eighth Amendment claim based on the denial of medical care, "[the] plaintiff must make an 'objective' showing that the deprivation was 'sufficiently serious,' or that the result of defendant's denial was sufficiently serious." *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003) (internal quotation marks and citations omitted). "In cases where temporary delays or interruptions in the provision of medical treatment have been held to satisfy the objective seriousness requirement, they have involved either a needlessly prolonged period of delay or a delay that caused extreme pain or exacerbated a serious illness." *Gantt*, 09-CV-7310 (PAE), 2013 WL 865844, at *9 (S.D.N.Y. Mar. 8, 2013). *See Hill*, 657 F3d. at 122 (delay "sufficiently serious" if it could have resulted in "death, degeneration or extreme pain,").

As indicated above, the "delay" alleged does not rise to the level of inadequate medical care as a matter of law. Even assuming as Plaintiff alleges, that the delay created "unnecessary" pain, suffering, discomfort, and affected his mobility, these injuries are not sufficiently serious as a matter of law to satisfy the objective prong of a deliberate indifference claim. *See e.g*., *Bonner*, 2000 WL 1171150, at *4 (inability to "close" a finger due to inadequate treatment of swelling in one's hand insufficiently serious where it did not "produce death, degeneration, or extreme pain"); *Chatin*, 1999 U.S. Dist. LEXIS 11918, at *4-6, 11 & n.5 (S.D.N.Y. Aug. 4, 1999) (prisoner's foot condition, which involved pain and swelling was not sufficiently serious), *aff'd*, 99-0266, 2002 U.S. Dist. LEXIS 86 (2d Cir. Jan. 3, 2002) (unpublished opinion). Nor are these alleged ailments

sufficient to show that the modest delay, nor overall treatment received here, placed Plaintiff at risk of serious harm.

As such, Plaintiff has failed to satisfy the objective prong of his Eighth Amendment deliberate indifference claim with regard to both the allegedly inadequate treatment received, and the alleged delay in receiving a cast.

II. Subjective Prong

To satisfy the subjective component of a deliberate indifference claim a plaintiff must plausibly allege that Defendant "kn[e]w[] of and disregard[ed] 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, 834 (1994); *see Salahuddin v. Goord*, 467 F.3d at 280 (requisite mental state "requires that … [defendant] act[ed] or fail[ed] to act while actually aware of a substantial risk that serious inmate harm [would] result.") (internal quotation marks and citations omitted). Thus, the mental state required is akin to "recklessness" in criminal law. *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002). The Court notes that simple negligence, or inadvertent failure to provide adequate medical care, even if it amounts to medical malpractice, is not enough to plausibly allege deliberate indifference. *Pabon v. Wright*, 459 F.3d 241, 248 at *10 (2d Cir. 2006); *see also Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (noting that "negligent malpractice does not state a claim of deliberate indifference."); *See Torres*, 2005 WL 2372741, at 3 ("At most, Defendant might be accused of negligence in failing to order an x-ray of Plaintiff's ankle, but ... simple negligence, even if it amounts to medical malpractice, does not establish deliberate indifference.").

Plaintiff alleges that Defendant Sommer was aware of his fall and broken ankle, but failed to recommend proper medical treatment in the form of a cast. (*See, e.g.*, Pl. Opp. at 12.) Plaintiff also argues that Defendant Sommer was deliberately indifferent because he was not treated until six days after an x-ray revealed his ankle was fractured, and nine-days after the incident. This conclusory assertion does not indicate that Sommer had the requisite culpable state of mind to satisfy the subjective prong of a deliberated indifference claim. *See Skyers v. Sommer*, 12-CV-3432, 2016 WL 4484241, at *14 (S.D.N.Y. Aug. 23, 2016) (finding that conclusory assertions that defendant was deliberately indifferent because plaintiff was not treated for four days did not satisfy the subjective prong of a *Bivens* claim); *James v. Correct Care Solutions*, 13-CV-0019 (NSR), 2013 WL 5730176, at *6 (S.D.N.Y. Oct. 21, 2013) (noting that even if plaintiff's burn wounds were untreated on multiple occasions over the course of three weeks, plaintiff needed to allege more than a mere delay in treatment to make a plausible claim that defendant had a culpable state of mind); *see also Bell v. Jendell*, 980 F. Supp. 2d 555, 562) (S.D.N.Y. Oct. 31, 2013) (dismissal of deliberate indifference claim warranted where prisoners merely alleged a delay in the provision of medication or treatment, but failed to allege that the delay was either intentional or reckless); *Crique v. Magill*, 12-CV-3345 (PAC) (GWG), 2013 WL 3783735, at *3 (S.D.N.Y. July 9, 2013) (dismissing claim where plaintiff failed to show that defendant "knowingly or intentionally" delayed his treatment, and noting that "while delays in providing necessary medical care may in some cases demonstrate deliberate indifference, the Second Circuit has reserved those instances to cases when prison officials deliberately delayed care as a form of punishment, ignored a life-threatening and fast-degenerating condition for three days or delayed major surgery for over two years") (internal quotation marks and citations omitted)). To the contrary, the medical records incorporated by reference in Plaintiff's complaint indicate that the Medical Unit was fairly

attendant to his medical needs. Plaintiff merely disagrees with the course of treatment provided by Sommer and Medical Unit staff; as previously indicated *supra*, at 9, as a matter of law, disagreement over the course of treatment is insufficient to support a deliberate indifference claim. *Gantt*, 2013 WL 865844, at *10 ("mere disagreement over the proper treatment does not create a constitutional claim.") (internal quotation marks and citations omitted). Furthermore, Plaintiff's own submissions indicate that Sommer was away on July 5, 2013; returned on July 9, 2013 and reviewed the records on that same day; and, that Plaintiff received his cast on that very same date. (*See* ECF No. 61 at 33, 35.)

Construing the Amended Complaint in the light most favorable to Plaintiff, he alleges no facts that suggest that Sommer was aware of his medical needs and consciously disregarded a substantial risk of serious harm to his health. Nor does he allege any conduct that could be deemed to reach the extreme level equivalent to criminal recklessness. As such, Plaintiff has failed to allege sufficient facts to satisfy both the subjective and objective prongs. Accordingly, Plaintiff has not alleged a plausible claim of deliberate indifference.[6]

II. Qualified Immunity

Given the Amended Complaint fails to state a claim for a violation of Plaintiff's constitutional rights, Sommer is "qualifiedly immune to suit from the *Bivens* claim". *Skyers v. Sommer*, 12-CV-3432, 2016 WL 4484241, at *6 (S.D.N.Y. Aug. 23, 2016). The qualified immunity doctrine protects federal and state officials from suit for acts undertaken in their official capacity if "(1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Id*. (citing *Martinez v. Simonetti*, 202 F.3d 625, 633-34 (2d Cir. 2000)). As such, "the qualified immunity

[6] Given Plaintiff fails to plausibly allege a *Bivens* claim against Defendant, the Court expresses no opinion as to whether Plaintiff would have adequately pled personal involvement on her part otherwise.

standard 'gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (citing *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)). Plaintiff has not plausibly alleged conduct that violated any established constitutional right, or that Defendant's actions were objectively unreasonable. As such, Sommer is also entitled to qualified immunity.[7]

CONCLUSION

For the foregoing reasons, the Defendant's motion to dismiss is GRANTED. Only Plaintiff's FTCA negligence claim remains. The parties are directed to notify Magistrate Judge McCarthy of this decision. The Clerk of Court is respectfully directed to terminate the motion at ECF No. 62.

Dated: July 28, 2017
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

[7] Plaintiff points to a series of actions against Sommer that were, according to Plaintiff, "successfully dismissed," as proof of a "custom of indifference" in order to demonstrate Sommer's personal involvement in "unconstitutional practices." (*See* Pl. Opp. at 18.) Plaintiff acknowledges the appropriate legal standards to be applied to a *Bivens* claim. (*See id.* at 6-13.) The Court has applied these standards to Plaintiff's *Bivens* claim, and finds Plaintiff's remaining arguments with regard to a "culture of routine indifference," (*see id.* at 19), unavailing here.