UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOVAN CANDELARIO,

Plaintiff,

-v-

QUALITY CHOICE CORRECTIONAL HEALTHCARE; A. CUPERTINO, RN; J. REYNOLDS, RN; and DITTMEIER, RN,

Defendants.

No. 16-CV-2083 (KMK)

OPINION & ORDER

Appearances:

Jovan Candelario
Lords Valley, PA
Pro Se Plaintiff

Kenneth W. Rudolph, Esq.
McMillan Constabile Foster & Perone LLP
Larchmont, NY
Counsel for Defendant Quality Choice Healthcare, Inc.[1]

Michael H. Sussman, Esq.
Heather M. Abissi, Esq.
Sussman & Associates
Goshen, NY
Counsel for Defendant A. Cupertino, RN

KENNETH M. KARAS, District Judge:

Pro se Plaintiff Jovan Candelario ("Plaintiff") brings this Action against Quality Choice Correctional Healthcare ("Quality Choice"), A. Cupertino, RN ("Nurse Cupertino"), J. Reynolds, RN ("Nurse Reynolds"), and Dittmeier, RN ("Nurse Dittmeier" and collectively, "Defendants").

[1] While named as "Quality Choice Correctional Healthcare" in Plaintiff's pleadings, the correct name of the Defendant entity is "Quality Choice Healthcare, Inc." (*See* Def. Quality Choice's Mem. of Law in Supp. of Mot. To Dismiss 1 (Dkt. No. 40); *see also* Dkt. No. 32).)

Plaintiff alleges that Defendants violated his rights under the Eighth Amendment by failing to follow policies and procedures, failing to provide adequate medical treatment, and neglecting Plaintiff's medical needs. (*See generally* Compl. (Dkt. No. 1).) Before the Court are Defendants Quality Choice's and Nurse Cupertino's Motions To Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c), respectively (the "Motions"). (*See* Dkt. Nos. 35, 38.) For the reasons to follow, the Motions are granted.

I. Background

A. Factual Background

The following facts are taken from the Complaint and the documents appended thereto, and are assumed true for the purpose of resolving the Motions.

On February 10, 2016, Plaintiff was incarcerated at Orange County Jail when he began suffering from abdominal pain. (*See* Compl. 3.) Plaintiff sought medical attention for his pain, and Nurses Cupertino and Dittmeier gave him "Phenergan 25mg and Maalox 30mL," and offered Plaintiff a "[c]ompazine [s]uppository," which he refused. (*Id.*) Plaintiff alleges that Nurses Cupertino and Dittmeier assumed he was suffering from "gas or maybe a virus," (*id.*), but Plaintiff "knew it wasn't either one" due to "the pain that [he] was going thr[ough]," (*id.*). Plaintiff's symptoms included being "on the floor throwing up," and the inability to move, sleep, eat, or use the bathroom. (*Id.*) When Plaintiff asked to see a doctor, Defendants told Plaintiff there was no doctor on the property and put him on bed rest. (*See id.*)

On February 13, 2016, Plaintiff was still suffering from severe pain and could barely move. (*See id.*) Plaintiff asked correctional officer Mackey to "send [him] to medical," and when Plaintiff arrived, he was given "chews for gas." (*Id.*) Plaintiff again asked for a doctor, but was told there was no doctor available and was sent back to his housing unit. (*See id.*) On

February 16, 2016, Sergeant Mararino came to Plaintiff's cell during dinner and asked Plaintiff "why . . . [he was] walking like [he had] been shot or something." (*Id.*) Plaintiff explained he had been in pain for six days and "ha[d]n't had any help," and Sergeant Mararino "sent [him] to medical." (*Id.*) Plaintiff was subsequently sent to a hospital. (*See id.*) While at the hospital, Plaintiff underwent surgery to have an abscess removed near his gall bladder. (*See id.*)

As a result of his alleged pain and suffering, Plaintiff seeks one million dollars in compensatory damages and "medical reimbursement." (*Id.* at 5.)

B. Procedural Background

Plaintiff filed his Complaint on March 21, 2016. (*See* Dkt. No. 1.) Plaintiff's request to proceed in forma pauperis was granted on May 3, 2016. (*See* Dkt. No. 6.) On October 13, 2016 Quality Choice and Nurse Cupertino (the "Moving Defendants") filed their Motions To Dismiss and accompanying papers. (*See* Dkt. Nos. 35–42.) Plaintiff did not file an opposition to either Motion and Defendants did not file papers in reply. (*See* Dkt.)

II. Discussion

A. Standard of Review

Defendant Quality Choice filed a Motion To Dismiss pursuant to Rule 12(b)(6), (*see* Dkt. No. 38), and Defendant Nurse Cupertino filed a Motion To Dismiss Pursuant to Rule 12(c), (*see* Dkt. No. 35).

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). "[T]he standards for dismissal pursuant to Rule 12(c) are the same

as for a dismissal pursuant to Rule 12(b)(6) . . . ." *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 324 (2d Cir. 2011). To survive a motion to dismiss under Rule 12(c), therefore, "a complaint must allege sufficient facts which, taken as true, state a plausible claim for relief." *Keiler v. Harlequin Enters. Ltd.*, 751 F.3d 64, 68 (2d Cir. 2014). In reviewing a complaint, the Court "accept[s] all factual allegations as true and draw[s] every reasonable inference from those facts in the plaintiff's favor." *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 133 (2d Cir. 2014) (internal quotation marks omitted). Moreover, along with the complaint itself, the Court "may consider . . . any written instrument attached to the complaint as an exhibit, any statements or documents incorporated in it by reference, and any document upon which the complaint heavily relies." *ASARCO LLC v. Goodwin*, 756 F.3d 191, 198 (2d Cir. 2014) (internal quotation marks omitted).

The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss," and by extension, a Rule 12(c) motion for judgment on the pleadings, "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (second alteration in original) (citation omitted). Instead, the Supreme Court has emphasized that the "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.*, and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563. A plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. But if a plaintiff has "not nudged [his] claims across the line from conceivable to plausible, the[] complaint must be dismissed." *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)

("Determining 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. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (second alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))). Where, as here, the complaint was filed pro se, it must be construed liberally with "special solicitude" and interpreted to raise the strongest claims that it suggests. *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (internal quotation marks omitted).

B. Analysis

Moving Defendants both argue that Plaintiff's Complaint must be dismissed because Plaintiff fails to plausibly allege a claim for deliberate indifference under the Eighth Amendment. Additionally, Quality Choice asserts that it is not liable under § 1983 because Plaintiff fails to allege that a policy, custom, or practice directly caused the purported deprivation of Plaintiff's constitutional rights. For the reasons that follow, the Court agrees.

1. Deliberate Indifference

"The Eighth Amendment forbids 'deliberate indifference to serious medical needs of prisoners . . . .'" *Spavone v. N.Y. State Dep't of Corr. Servs.*, 719 F.3d 127, 138 (2d Cir. 2013) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). "A convicted prisoner's claim of deliberate indifference to his medical needs by those overseeing his care is analyzed under the Eighth Amendment because the right the plaintiff seeks to vindicate arises from the Eighth Amendment's prohibition of cruel and unusual punishment." *Caiozzo v. Koreman*, 581 F.3d 63, 69 (2d Cir. 2009) (footnote and quotation marks omitted), *overruled on other grounds*, *Darnell v.*

Pineiro, 849 F.3d 17 (2d Cir. 2017).[2] "There are two elements to a claim of deliberate indifference to a serious medical condition." *Id.* at 72. "First, the plaintiff must establish that he suffered a sufficiently serious constitutional deprivation. Second, the plaintiff must demonstrate that the defendant acted with deliberate indifference." *Feliciano v. Anderson*, No. 15-CV-4106, 2017 WL 1189747, at *10 (S.D.N.Y. Mar. 30, 2017).

[2] The status of a plaintiff as either a convicted prisoner or pretrial detainee dictates whether his conditions of confinement are analyzed under the Eighth or Fourteenth Amendment. Until recently, "[c]laims for deliberate indifference to a . . . serious threat to the health or safety of a person in custody [were] analyzed under the same standard irrespective of whether they [we]re brought under the Eighth or Fourteenth Amendment." *Caiozzo*, 581 F.3d at 72. However, the Second Circuit's recent decision in *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017), overruled *Caiozzo* "to the extent that it determined that the standard for deliberate indifference is the same under the Fourteenth Amendment as it is under the Eighth Amendment." *Id.* at 35. While the decision in *Darnell* proscribed a new analysis for claims brought by pretrial detainees, *see id.*, the analysis under the Eighth Amendment remains intact.

Here, Plaintiff's Complaint and the briefing on the instant Motions did not indicate whether Plaintiff was a convicted prisoner or a pretrial detainee at the time of the alleged violations. In an Order dated May 4, 2017, the Court requested that the Parties "inform the Court by no later than May 11, 2017 whether Plaintiff was a convicted prisoner or a pretrial detainee when the alleged violations occurred in February 2016." (Order 1–2 (Dkt. No. 43).)

In a letter dated May 11, 2017, Defendant Quality Care stated that it "does not have any direct knowledge as to . . . [P]laintiff's status at the relevant time, nor does it presently have access to any records maintained by the Orange County Jail, where . . . [P]laintiff was incarcerated at the time of the alleged violations." (Letter from Kenneth W. Rudolph, Esq., to Court (May 11, 2017) 1 (Dkt. No. 44).) However, Quality Care detailed the results of a criminal history record search and provided the Court with an Office of Court Administration ("OCA") report, demonstrating that "[P]laintiff (or someone with the same name and date of birth as . . . [P]laintiff) . . . pled guilty to [two charges of petit larceny] and was sentenced to a $400 fine and 1 year of imprisonment" on February 4, 2016. (*Id.* at 2.) Defendant Nurse Cupertino informed the Court on May 11, 2017 that she "ha[s] no information on [Plaintiff's] precise status . . . during the relevant time period." (Letter from Michael H. Sussman, Esq., to Court (May 11, 2017) (Dkt. No. 45).) Plaintiff failed to respond to the Court's Order. Indeed, mail sent to Plaintiff at the address listed on the docket was returned because the intended recipient was "no longer [t]here." (*See* Dkt. (entry for May 16, 2017).)

Upon review of the OCA report, the Court agrees with Quality Care that while it cannot "conclusively answer the question," it appears that "[P]laintiff was serving time for one or both . . . petit larceny charges" and therefore "was incarcerated as a convicted prisoner when the alleged violations occurred in February 2016." (Letter from Kenneth W. Rudolph, Esq., to Court (May 11, 2017) 1–2.) Accordingly, the Court analyzes Plaintiff's claims under the Eighth Amendment standard.

"The first requirement is objective: the alleged deprivation of adequate medical care must be sufficiently serious." *Spavone*, 719 F.3d at 138 (internal quotation marks omitted). Analyzing this objective requirement involves two inquiries: "[t]he first inquiry is whether the prisoner was actually deprived of adequate medical care," *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006), and the second "asks whether the inadequacy in medical care is sufficiently serious. This inquiry requires the [C]ourt to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner," *id.* at 280. To meet the objective requirement, "the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health." *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013). "There is no settled, precise metric to guide a court in its estimation of the seriousness of a prisoner's medical condition." *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003). Nevertheless, the Second Circuit has "presented the following non-exhaustive list of factors to consider when evaluating an inmate's medical condition: (1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain." *Morales v. Fischer*, 46 F. Supp. 3d 239, 247 (W.D.N.Y. 2014) (internal quotation marks omitted).

"The second requirement is subjective: the charged officials must be subjectively reckless in their denial of medical care." *Spavone*, 719 F.3d at 138. Under the second prong, the question is whether a defendant "knew of and disregarded an excessive risk to [a plaintiff's] health or safety and that [the defendant was] both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and also drew the inference." *Caiozzo*, 581 F.3d at 72 (alterations and internal quotation marks omitted). In other words, "[i]n medical-

treatment cases not arising from emergency situations, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health." *Nielsen v. Rabin*, 746 F.3d 58, 63 (2d Cir. 2014) (internal quotation marks omitted). "Deliberate indifference is a mental state equivalent to subjective recklessness," and it "requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result." *Id.* (internal quotation marks omitted). By contrast, mere negligence is not enough to state a claim for deliberate indifference. *See Walker*, 717 F.3d at 125; *see also Vail v. City of New York*, 68 F. Supp. 3d 412, 424 (S.D.N.Y. 2014) (same). Importantly, "mere disagreement over the proper treatment does not create a constitutional claim," and accordingly, "[s]o 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." *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998).

With respect to the objective component, Plaintiff alleges that he suffered from severe abdominal pain that resulted in him throwing up and having difficulty eating, as well as being unable to move, sleep, or use the bathroom. (*See* Compl. 3.) Unsurprisingly, courts have held that such symptoms are sufficiently "extreme and/or serious" under the objective prong. *Bell v. Jendell*, 980 F. Supp. 2d 555, 560 (S.D.N.Y. 2013) (finding allegations that Plaintiff had "suffered five days of acid-reflux symptoms" sufficient to meet the objective prong of the Eighth Amendment analysis); *see also Dobbey v. Randle*, No. 10-CV-3965, 2012 WL 3544769, at *2–3 (N.D. Ill. Aug. 16, 2012) (finding that plaintiff with symptoms such as abdominal pain and blood in his stool, "[met] the objective standard, at least at the pleading stage"). Thus, taken as true for the purposes of this Motion, the Court is willing to assume that Plaintiff's allegations satisfy the objective prong.

With respect to the second prong, however, Plaintiff has not adequately alleged that Nurse Cupertino acted "with a sufficiently culpable state of mind." *See Bell*, 980 F. Supp. 2d at 559 (internal quotation marks omitted). Simply put, Plaintiff's medical needs were not ignored. The Complaint recounts the specific dates on which Plaintiff met with medical staff, including Nurse Cupertino, and the treatment he received during those encounters. On February 10 and February 13, 2016, Plaintiff was evaluated and the Individual Defendants believed he was experiencing gas pain or suffering from a virus and proscribed medication to address those ailments. (*See* Compl. 3.) While Plaintiff may have disagreed with the diagnosis and corresponding treatment he received, (*see id.* ("They w[]ere giving me [the] wrong medication, and assuming I had gas"), such complaints do not rise to the level of an Eighth Amendment violation, *see Harris v. Westchester Cty. Med. Ctr.*, No. 08-CV-1128, 2011 WL 2637429, at *3 (S.D.N.Y. July 6, 2011) ("As for misdiagnosis, without more, allegations of negligent treatment and misdiagnosis do not state a cause of action under the Eighth Amendment." (alteration and internal quotation marks omitted)); *see also Hill*, 657 F.3d at 123 (holding that an inmate failed to state a claim for deliberate indifference where he alleged that stronger medication was necessary to treat his medical condition); *Chance*, 143 F.3d at 703 ("It is well-established that mere disagreement over the proper treatment does not create a constitutional claim."); *Ripple Dir./Sec'y of Cal. Dep't of Corrs. and Rehab.*, No. 11-CV-396, 2015 WL 2193883, at *6 (C.D. Cal. May 5, 2015) (granting a motion to dismiss a claim for deliberate indifference where the defendant "delayed diagnostic tests for [the] plaintiff's severe gastrointestinal ailments after mistakenly concluding they were . . . side-effects [of a treatment]"); *Diaz v. Dixon*, No. 13-CV-130, 2014 WL 1744110, at *4 (N.D. Tex. May 1, 2014) (finding that the delayed diagnosis of the plaintiff's gastrointestinal disorder did not amount to a violation of the Eighth Amendment);

Washington v. Westchester Cty. Dep't of Corr., No. 13-CV-5322, 2014 WL 1778410, at *6 (S.D.N.Y. Apr. 25, 2014) ("[I]t is well-settled that the ultimate decision of whether or not to administer a treatment or medication is a medical judgment that, without more, does not amount to deliberate indifference."); *Barnes v. Huffman*, No. 06-CV-745, 2007 WL 3339311, at *5 n.9 (W.D. Va. Nov. 7, 2007) (finding the plaintiff's "complaints [about gastrointestinal issues] amount[ed] to nothing more than disagreements between medical staff and an inmate as to proper diagnostic methods and a course of treatment" and were not an Eighth Amendment violation), *aff'd*, 275 F. App'x 260 (4th Cir. 2008); *Sonds v. St. Barnabas Hosp. Corr. Health Servs.*, 151 F. Supp. 2d 303, 312 (S.D.N.Y. 2001) ("[D]isagreements over medications, diagnostic techniques (e.g., the need for X-rays), forms of treatment, or the need for specialists or the timing of their intervention, are not adequate grounds for a [§] 1983 claim. These issues implicate medical judgments and, at worst, negligence amounting to medical malpractice, but not the Eighth Amendment."). At best, Plaintiff may have alleged a claim for medical malpractice. Such allegations, however, cannot "support an Eighth Amendment claim unless 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." *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003) (internal quotation marks omitted). "In other words, 'the charged official [must] act or fail to act while *actually aware* of a substantial risk that serious inmate harm will result.'" *Bell*, 980 F. Supp. 2d at 561 (alteration in original) (quoting *Salahuddin*, 467 F.3d at 280).

In sum, Plaintiff's conclusory allegations that Defendants "didn't do the[ir] job correctly . . . [and] medically neglected [him]," (Compl. 3), have not nudged his claims across the line from conceivable to plausible, *see Flemming v. Smith*, No. 11-CV-804, 2014 WL 3698004, at *6

(N.D.N.Y. July 24, 2014) ("Conclusory allegations that medical staff defendants were aware of a [prisoner's] medical needs and failed to provide adequate care are generally insufficient to state an Eighth Amendment claim of inadequate medical care."); *Gumbs v. Dynan*, No. 11-CV-857, 2012 WL 3705009, at *12 (E.D.N.Y. Aug. 26, 2012) ("[C]onclusory allegations that [the] defendants were aware of [the] plaintiff's medical needs and chronic pain but failed to respond are generally not sufficient proof of [the] defendants' deliberate indifference and cannot survive a Rule 12(b)(6) motion to dismiss.").

Accordingly, Plaintiff's deliberate indifference claims are dismissed.

2. Liability for Employers

Quality Choice also argues that it is not liable under § 1983 for the alleged constitutional torts of its employees. (*See* Def. Quality Choice's Mem. of Law in Supp. of Mot. To Dismiss 2 (Dkt. No. 40).) As a general rule, private entities are not liable under § 1983, but "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations [p]laced upon state action." *Perez v. Sugarman*, 499 F.2d 761, 764 (2d Cir. 1974) (some internal quotation marks omitted) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)). The Supreme Court has "found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *see generally Perez*, 499 F.2d at 764 (holding that state action was present for private institution's acts where the City of New York removed a child from the mother's custody and placed the child in a private child care institution); *Mercado v. City of New York*, No. 08-CV-2855, 2011 WL 6057839, at *7 n.10 (S.D.N.Y. Dec. 5, 2011) ("Corporate entities like [private medical providers] are treated the same as a municipality when performing the public function of running a jail.").

In *Monell v. Department of Social Services of the City of New York*, the Supreme Court held that municipalities may be sued under § 1983 "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers." 436 U.S. 658, 690 (1978). Accordingly, in order to state a *Monell* claim, "[t]he plaintiff must first prove the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries. . . . Second, the plaintiff must establish a causal connection—an 'affirmative link'—between the policy and deprivation of his constitutional rights." *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.8 (1985)). Furthermore, an employer "cannot be held liable under § 1983 on a theory of respondeat superior." *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 125 (2d Cir. 2004) (italics omitted). Rather, there must be a causal link between the defendant entity's policy, custom, or practice and the alleged constitutional injury. *See Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008).

"Although the Supreme Court's interpretation of § 1983 in *Monell* applied to municipal governments and not to private entities acting under color of state law, caselaw . . . has extended the *Monell* doctrine to private § 1983 defendants" acting under color of state law. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir. 2003) (footnote omitted); *see Rojas v. Alexander's Dep't Store*, 924 F.2d 406, 408–09 (2d Cir. 1990) (citing cases); *Cruz v. Corizon Health Inc.*, No. 13-CV-2563, 2016 WL 4535040, at *8 n.11 (S.D.N.Y. Aug. 29, 2016) (concluding that "[t]he analysis under *Monell* . . . applies equally to Corizon," a private entity that "provides medical care in prisons and thus performs a role traditionally within the exclusive prerogative of the state" (internal quotation marks omitted)). Nonetheless, as is true for

municipal defendants, "[p]rivate employers are not [vicariously] liable under § 1983 for the constitutional torts of their employees." *Rojas*, 924 F.2d at 408 (citing cases); *accord Whalen v. Allers*, 302 F. Supp. 2d 194, 202–03 (S.D.N.Y. 2003) (finding a private employer cannot be held vicariously liable under § 1983 because "there is no tenable reason[] to distinguish a private employer from a municipality" (internal quotation marks omitted)). Rather, to state a § 1983 claim against a private entity, a plaintiff must allege that an action pursuant to some official policy caused the constitutional deprivation. *See Rojas*, 924 F.2d at 409 ("[T]o recover under § 1983, it is not enough for Rojas to show that his arrest . . . was without probable cause. He must show that [the defendant] had a policy of arresting shoplifting subjects on less than probable cause."); *Jouthe v. City of New York*, No. 05-CV-1374, 2009 WL 701110, at *18 (E.D.N.Y. Mar. 10, 2009) ("It is well-established that private employers are not liable under [§] 1983 for the constitutional torts of their employees, unless the plaintiff proves that action pursuant to official *policy* of some nature caused a constitutional tort." (alterations and internal quotation marks omitted)); *Fisk v. Letterman*, 401 F. Supp. 2d 362, 375 (S.D.N.Y. 2005) ("[A] private corporation could be held liable under [§] 1983 for its own unconstitutional policies. Therefore, a plaintiff must prove that action pursuant to official policy of some nature caused a constitutional tort." (alteration, citation, and internal quotation marks omitted)); *see also Garcia v. Corr. Med. Care, Inc.*, No. 16-CV-575, 2017 WL 913637, at *6 n.5 (N.D.N.Y. Mar. 7, 2017) (finding the plaintiff "ha[d] failed to allege facts plausibly suggesting the existence of a policy, custom, or practice followed by [the defendant prison medical provider] and pursuant to which he was injured, as required by *Monell*.").

Here, Plaintiff is not asserting that the policies of Quality Choice were unconstitutional or themselves caused the constitutional foul he allegedly suffered, but rather that personnel and

employees *failed to follow* established policies or procedures that would have otherwise prevented the alleged constitutional violations. (*See* Compl. 3 ("Quality Choice . . . didn't do the[ir] job correctly [and didn't] follow[] the[ir] policies or procedures . . . ."). Therefore, Plaintiff has failed to make the necessary connection between Quality Choice's policies and practices and the alleged deprivation of medical care. Instead, Plaintiff is left only to complain about the supposed misconduct of Quality Choice's employees, thus leading to dismissal of Quality Choice. *Cf. Guerrero v. City of New York*, No. 12-CV-2916, 2013 WL 673872, at *2 (S.D.N.Y. Feb. 25, 2013) ("At the pleading state, the mere assertion . . . that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." (alteration in original) (internal quotation marks omitted)); *see also Lowery v. City of New York*, No. 10-CV-7284, 2014 WL 2567104, at *6 (S.D.N.Y. June 6, 2014) (dismissing a pro se plaintiff's *Monell* claim for failing to allege either an underlying violation or sufficient facts beyond "boilerplate, conclusory allegations"); *Simms v. City of New York*, No. 10-CV-3420, 2011 WL 4543051, at *3 (E.D.N.Y. Sept. 28, 2011) (citing *Iqbal*, 556 U.S. at 678–79) (dismissing conclusory allegations that did not provide any facts that would allow the court to infer what city policies or practices led to the alleged deficiency), *aff'd*, 480 F. App'x 627 (2d Cir. 2012); *Moore v. City of New York*, No. 08-CV-8879, 2010 WL 742981, at *6 (S.D.N.Y. Mar. 2, 2010) ("Allegations that a defendant acted pursuant to a policy or custom without any facts suggesting the policy's existence, are plainly insufficient." (internal quotation marks omitted)); *Brodeur v. City of New York*, No. 99-CV-651, 2002 WL 424688, at *6 (S.D.N.Y. Mar. 18, 2002) (dismissing complaint against a defendant that "flatly assert[ed]" the existence of a policy but contained no "factual allegations sufficient to establish that a municipal policy or custom caused [the plaintiff's] alleged injury").

3. Supplemental Jurisdiction

As the Court ultimately dismisses the federal claims against the Moving Defendants, it need not exercise its discretion to maintain supplemental jurisdiction over any pending state-law claims against these Defendants. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . . ."). Thus, to the extent Plaintiff asserts a claim for negligence arising under state tort law, the Court declines to exercise supplemental jurisdiction over this claim. *See Matican v. City of New York*, 524 F.3d 151, 154–55 (2d Cir. 2008) ("[I]f [the plaintiff] has no valid claim under § 1983 against any defendant, it is within the district court's discretion to decline to exercise supplemental jurisdiction over the pendent state-law claims.").

III. Conclusion

For the reasons stated above, Defendants Quality Choice's and Nurse Cupertino's Motions To Dismiss are granted.

In light of Plaintiff's pro se status, and because this is the first adjudication of Plaintiff's claims on the merits, his claims are dismissed without prejudice. If Plaintiff wishes to file an Amended Complaint alleging additional facts and otherwise addressing the deficiencies identified above, Plaintiff must do so within 30 days of the date of this Opinion & Order. Failure to do so will result in the dismissal of this Action with prejudice.

Nurses Reynolds and Dittmeier have yet to be served or appear in this Action. (*See* Dkt.) An attempt to serve these Defendants was made on July 26, 2016, (*see* Dkt. Nos. 14–15), and the "Process Receipt and Return" forms note that both Defendants no longer work at the listed address, (*see id.*). Plaintiff's time to effect service expired on September 19, 2016 and he has not

requested an extension of time. However, as the Court has an obligation "to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training," *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (italics omitted), and because the Second Circuit has a "clearly expressed preference that litigation disputes be resolved on the merits," *Mejia v. Castle Hotel, Inc.*, 164 F.R.D. 343, 346 (S.D.N.Y. 1996); *see also Cody v. Mello*, 59 F.3d 13, 15 (2d Cir. 1995) (same), the Court will provide additional time for Plaintiff to effect service on the unserved Defendants. Accordingly, within 14 days of the date of this Order, Quality Choice is directed to file a letter with the Court, providing addresses at which Nurses Reynolds and Dittmeier can be served. The Court will issue an Order of Service upon receipt.

The Clerk of Court is respectfully direct to terminate the pending Motions, (*see* Dkt. Nos. 35, 38), and mail a copy of this Opinion & Order to the pro se Plaintiff.

SO ORDERED.

Dated: July 17, 2017
White Plains, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE