IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Warren Morris, Appellant	:	
v.	:	No. 79 C.D. 2009
Robert W. Meyers, Superintendent, Terry L. Whitman, Deputy Superintendent, Frank J. Tennis, Deputy Superintendent, Jack M. Allar, Unit Manager, Dr. John Symons, Kathleen Kennedy, Physicians Assistant, Angela Auman, Physicians Assistant, Davis, Correctional Activities Officer, Ellers, Correctional Health Care Administrator, Margie Miller, Correctional Health Care Administrator, and Doctor Joseph Romeo, M.D.	:	Submitted: August 14, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 21, 2009**

Warren Morris, a state prison inmate representing himself, appeals an order of the Court of Common Pleas of Centre County (trial court) dismissing his third amended complaint as legally insufficient. In his statement of questions involved, Morris assigns error in the trial court's order sustaining preliminary objections to his claims of negligence and breach of duty to protect. Morris also

seeks review of the court's denial of his motion to lift a stay of discovery. We affirm.

In May 2003, Morris filed a civil rights complaint against several employees of the Department of Corrections (DOC), State Correctional Institution at Rockview. According to the complaint, Morris' cellmate attacked him on September 2, 2001 and caused him to suffer severe back and ankle injuries.

Morris alleged that Superintendent Robert W. Meyers, former Deputy Superintendent Terry L. Whitman, Deputy Superintendent Frank J. Tennis, and Unit Manager Jack M. Allar (Defendants) breached their duty to protect Morris by housing a non-assaultive inmate (Morris) with an assaultive inmate. Seeking compensatory and punitive damages, Morris alleged Defendants' actions violated his right to be free from cruel and unusual punishment under both the federal and state constitutions.

Defendants filed preliminary objections alleging in part that the complaint failed to state a claim upon which relief may be granted. After review, the trial court granted Morris leave to amend his complaint to allege that Defendants knew or should have known of the cellmate's assaultive behavior, that such behavior posed a risk to Morris' health and safety, and that Defendants deliberately disregarded said risk.

Morris filed an amended complaint to which Defendants preliminarily objected.[1] The trial court granted Morris leave to file a second amended complaint. In this complaint, Morris reiterated his claim Defendants knowingly housed him with an assaultive inmate with deliberate disregard for his safety. The allegations further suggested Defendants conspired to disregard DOC policy prohibiting the housing of non-assaultive inmates with assaultive inmates. Morris sought compensatory and punitive damages as well as injunctive relief. Defendants filed preliminary objections to the second amended complaint.

Prior to disposition of Defendants' preliminary objections, Morris served a request for admissions on Defendant Tennis. In response, Defendants filed a motion for stay of discovery. According to Defendants, it was unclear whether Morris' second amended complaint cured the defects of the original and amended complaints. Defendants further alleged that the relevancy of discovery could not be resolved until resolution of the outstanding preliminary objections and that there were reasonable grounds to assert certain discovery was protected from disclosure. The trial court granted Defendants' motion for stay of discovery pending further court order.

Also before disposition of Defendants' preliminary objections, the trial court granted Morris' application for leave to file a third amended complaint. This rendered Defendants' preliminary objections to the second amended

[1] Defendants successfully moved for entry of *non pros* on the ground Morris failed to comply with the trial court's order directing him to file an amended complaint by a date certain. However, Defendants filed their motion for entry of non pros after Morris filed the amended complaint. The trial court therefore vacated the *non pros* order.

complaint moot. For the first time, Morris also named as defendants Doctors John Symons and Joseph Romeo and Physicians' Assistants Kathleen Kennedy and Angela Auman (Medical Defendants). Morris further named additional Commonwealth personnel as defendants: Nursing Supervisor Margaret Miller, Correctional Activities Officer Richard Davis and Correctional Health Care Administrator Richard Ellers (collectively, Defendants).

The third amended complaint once again raised state and federal claims alleging Defendants deliberately disregarded their duty to protect Morris by knowingly housing him with an assaultive inmate in violation of DOC policies. He also averred Defendants conspired to violate DOC policies in retaliation for the filing of a grievance. In all, Morris' third amended complaint alleged Defendants: failed to protect Morris from cruel and unusual punishment; deliberately disregarded his need for medical attention; and, conspired to deny his civil rights. Morris further sought injunctive relief barring Defendants from housing him with an assaultive inmate.

Defendants filed a fourth set of preliminary objections raising numerous grounds.[2] The trial court disposed of Defendants' preliminary objections by addressing each claim which could arise from Morris' third amended complaint.

[2] Medical Defendants filed an answer and new matter to Morris' third amended complaint. In new matter, Medical Defendants averred Morris failed to state a claim upon which relief could be granted, the statute of limitations barred Morris' claims and Medical Defendants did not deliberately disregard Morris' medical needs. Original Record (O.R) at 48. Upon motion, the trial court subsequently granted Medical Defendants' summary relief on the basis Morris' failed to exhaust his administrative remedies. Id. at 64. Morris does not appeal the trial court's order granting summary relief in favor of Medical Defendants.

After a thorough analysis, the trial court overruled Defendants' preliminary objections alleging lack of jurisdiction, failure to exhaust administrative remedies and immunity inasmuch as these are affirmative defenses properly raised by way of new matter. The trial court agreed, however, that Morris failed to state claims for conspiracy, retaliation, loss of job, breach of fiduciary duty, assault, failure to protect, habeas corpus relief, negligence and injunctive relief. Accordingly, the trial court dismissed Morris' complaint without leave to file a fourth amended complaint. The court's order dismissing Morris' third amended complaint is the subject of this appeal.[3]

On appeal, Morris assigns error only in the dismissal of his negligence and duty to protect claims.[4] He further seeks reversal of the trial court's order denying his motion to lift the stay of discovery. Our review of an order sustaining preliminary objections and dismissing the complaint is limited to determining whether the trial court committed an error of law or abused its discretion. R.H.S. v. Allegheny County Dep't of Human Servs., Office of Mental Health, 936 A.2d

[3] In his appellate brief, Morris identifies the order on review as the trial court's order granting leave to amend the original complaint. He specifically states the second and third amended complaints are not at issue in this appeal. Morris' Br. at 7. However, an amended complaint has the effect of eliminating a prior complaint. Hionis v. Concord Twp., 973 A.2d 1030 (Pa. Cmwlth. 2009). If Morris believed the trial court erred by granting leave to amend the original complaint, he could have sought an order dismissing the original complaint with prejudice and appealed the trial court's order. Id. As Morris elected to re-plead, the operative complaint for our purposes is the third amended complaint.

[4] Morris waived any challenge to the trial court's order to the extent it dismissed his claims of conspiracy, retaliation, loss of job, breach of fiduciary duty, assault, habeas corpus relief, and injunctive relief. Steiner v. Markel, __ Pa. __, 968 A.2d 1253 (2009) (issues not properly preserved on appeal are waived).

1218 (Pa. Cmwlth. 2007), appeal denied, 598 Pa. 753, 954 A.2d 579 (2008). We accept all well-pled facts in the complaint as true, as well as any reasonable inferences deducible from those facts. Id. Preliminary objections in the nature of a demurrer will be sustained only where the pleadings are clearly insufficient to establish a right to relief; any doubt must be resolved in favor of overruling the demurrer. Id.

Morris' lawsuit constitutes prison condition litigation. Section 6601 of the Act commonly known as Prison Litigation Reform Act,[5] defines "prison conditions litigation" in relevant part as "[a] civil proceeding arising in whole or in part under Federal or State law with respect to the conditions of confinement or the effect of actions by a government party on the life of an individual confined in prison." 42 Pa. C.S. §6601. A court is required to dismiss prison conditions litigation at any time if it determines

> [t]he prison conditions litigation is frivolous or malicious or fails to state a claim upon which relief may be granted or the defendant is entitled to assert a valid affirmative defense, including immunity, which, if asserted, would preclude relief.

42 Pa. C.S. §6602(e)(2) (emphasis added).

Morris' particular claims allege a violation of his right to be free from cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. The Eighth Amendment, which applies to the States through the Due

[5] 42 Pa. C.S. §§6601-6608.

Process Clause of the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments …." U.S. CONST. amend. VIII; see also PA. CONST. art. 1 §13. The conditions of confinement are therefore subject to scrutiny under the Eighth Amendment. Neely v. Dep't of Corrs., 838 A.2d 16 (Pa. Cmwlth. 2003).

The decisive case addressing claims of cruel and unusual punishment is Farmer v. Brennan, 511 U.S. 825 (1994). There, a pre-operative male transsexual prisoner claimed officials showed deliberate indifference to his situation by housing him in the general male prison population. Another inmate severely beat him.

Addressing the prisoner's claims, the Supreme Court acknowledged the Eighth Amendment precludes prison officials from using excessive physical force against inmates. Officials must provide humane conditions of confinement, ensure inmates receive adequate food, clothing, shelter, and medical care, and take reasonable steps to guarantee inmates' safety. Id. Citing numerous federal decisions, the Court further recognized that "prison officials have a duty … to protect prisoners from violence at the hands of other prisoners." Id. at 833. See also Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987) ("[a]lthough the state is not obliged to insure an assault-free environment, a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates"). The Supreme Court then set forth the criteria for determining whether prison officials violated the Eighth Amendment.

To succeed on a claim that prison conditions violate the Eighth Amendment, a prisoner must satisfy both an objective and subjective requirement. The conditions must be "sufficiently serious" from an objective point of view, meaning the official's act or omission must result in the denial of the "minimal civilized measure of life's necessities." Farmer, 511 U.S. at 834. Subjectively, the prisoner must show the officials acted with "deliberate indifference." Id. "Deliberate indifference exists if an official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" Neely, 838 A.2d at 20 n.6 (quoting Farmer, 511 U.S. at 837).

Initially, the objective component of an Eight Amendment claim is contextual and responsive to contemporary standards of decency. Schwartz v. County of Montgomery, 843 F. Supp. 962 (E.D. Pa. 1994). Here, there is no dispute Morris' third amended complaint meets the objective component: Morris alleges prison conditions sufficiently serious that, if proven, deprive him of the right to be free from cruel and unusual punishment. See Wilson v. Seiter, 501 U.S. 294 (1991) (describing the protection an inmate is afforded against other inmates as a condition of confinement subject to the strictures of the Eight Amendment). Morris pleads Defendants' knowledge of a serious risk to his health prior to housing him with a known assaultive inmate and resulting injury. See Original Record (O.R.) at 39, Third Amended Compl. at ¶13 (alleging date of housing Morris with cellmate); ¶20 (alleging knowledge of cellmate's assaultive history

prior to housing of Morris with cellmate); ¶23 (alleging Defendants disregarded risk to Morris which resulted in injury).

However, we respectfully disagree with the trial court's conclusion Morris' third amended complaint does not sufficiently allege the subjective component of Defendants' state of mind so as to proceed beyond the preliminary objection stage. Morris' allegations, taken as true for preliminary objection purposes, go beyond the trial court's view that Morris alleged Defendants are solely liable as a result of their supervisory positions and merely had access to reports of cellmate's behavior.[6] See Trial Ct. Op., 10/10/08 at 10.

In particular, Morris pleads Defendants read and authored reports concerning cellmate's assaultive behavior (O.R. at 39, Third Amended Compl. at ¶¶21; 23) and, therefore, knew or reasonably should have known of cellmate's propensity to attack other inmates (Id. at ¶22). Morris further alleges Defendants, after reviewing and authoring said reports, drew the inference that cellmate's assaultive behavior posed a substantial risk of harm to Morris' health (Id. at ¶21). With prior knowledge of cellmate's conduct and the conclusion such behavior

[6] Moreover, the Third Circuit Court of Appeals has recognized that actual knowledge and acquiescence suffices for supervisor liability because it can be equated with "personal direction" and "direct discrimination by the supervisor." Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997), abrogated on other grounds by, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). See also Black v. Stephens, 662 F.2d 181, 189 (3d Cir. 1981) ("mere acquiescence by police chief when he is on notice of constitutional violations [by his subordinates] is sufficient to trigger liability" under 42 U.S.C. §1983). In this case, Morris alleges actual knowledge of cellmate's assaultive behavior and acquiescence of the risk of harm to Morris by housing the inmates together. O.R. at 39, Third Amended Compl. at ¶¶20; 21; 23.

posed a risk of harm, Defendants nevertheless deliberately disregarded the risk of harm to Morris by housing him with cellmate (Id. at ¶¶20; 22; 23). These allegations are sufficient to state a cause of action for Defendants' deliberate disregard of Morris' right to be free from cruel and unusual punishment at the hands of his cellmate.[7] Cf. Jones v. Lockett, No. 08-16, 2009 WL 2232812 (W.D. Pa. July 23, 2009) (allegations that prison officials knew staff shortage impeded inmate's ability to receive diabetic medication shortly after meals sufficient to state an Eighth Amendment claim for deliberate disregard); see Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988); Morgan.[8]

Notwithstanding this conclusion, we nevertheless affirm the trial court's order dismissing Morris' complaint on different grounds.[9] In particular, we

[7] Morris also asserts error in the trial court's dismissal of his negligence claim. Mere negligence, however, is not sufficient to establish the requisite state of mind necessary for a violation of the Eighth Amendment. Wilson v. Seiter, 501 U.S. 294 (1991); Morgan v. Dist. of Columbia, 824 F.2d 1049 (D.C. Cir. 1987). No error is therefore apparent in the dismissal of Morris' negligence claim.

[8] Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988) and Morgan, precede the Supreme Court's decision in Farmer v. Brennan, 511 U.S. 825 (1994) and present a different procedural posture, but they are instructive on the issues here. In both cases, the plaintiffs proved prison officials had prior knowledge of prison conditions which lead to an inmate's injuries. In Cortes-Quinones, overcrowded prison conditions lead to the murder of an inmate by a psychiatric inmate housed in the general population. In Morgan, a known violent inmate attacked another inmate. Despite prior knowledge of these conditions, prison officials disregarded the risks to other inmates by housing the psychiatric and violent inmates with the general population. Although Cortes-Quinones and Morgan do not address the requirement that prison officials drew an inference of risk of harm based on facts within their knowledge, they are suggestive of this requirement and support our determination the complaint here sufficiently sets forth an Eighth Amendment claim.

[9] We may affirm on different grounds where they exist. Bonifate v. Ringgold Sch. Dist., 961 A.2d 246 (Pa. Cmwlth. 2008), appeal denied, __ Pa. __, __ A.2d __ (2009).

note that in his third amended complaint, Morris pleads retaliation by Defendants for his filing of a grievance and lawsuit. O.R. at 39, Third Amended Compl. ¶42. However, he does not plead the subject matter of the grievance or whether it was administratively appealed. Nor does he generally aver that he exhausted grievance procedures.

Without more, the third amended complaint fails to plead exhaustion of administrative remedies, and it must be dismissed. Porter v. Nussle, 534 U.S. 516 (2002) (an inmate is required to exhaust his administrative remedies before pursuing a civil rights action for injuries sustained in a single episode of alleged excessive force or some other wrong); see also Jones v. Bock, 549 U.S. 199 (2007); Woodford v. Ngo, 548 U.S. 81 (2006); Flanyak v. Hopta, 410 F. Supp.2d 394 (M.D. Pa., 2006); Richardson v. Thomas, 964 A.2d 61 (Pa. Cmwlth. 2009); LeGrande v. Dep't of Corrs., 894 A.2d 219 (Pa. Cmwlth. 2006).[10]

Moreover, we have no reason to believe this defect is correctable. This is because the trial court previously granted summary judgment to the Medical Defendants based on Morris' failure to exhaust administrative remedies. O.R. at 64 (Opinion and Order of September 8, 2006). Indeed, in the two years following the grant of summary judgment, Morris did not seek leave to amend his pleading to address this issue.

[10] As noted above, Section 6602(e) of the Prison Litigation Reform Act directs a court to dismiss an action where defendant is entitled to assert a valid affirmative defense. 42 Pa. C.S. §6602(e). The failure to exhaust administrative remedies is an affirmative defense. Porter.

Accordingly, we affirm the trial court's order dismissing the third amended complaint with prejudice.[11]

ROBERT SIMPSON, Judge

[11] Because we affirm the trial court's order dismissing Morris' third amended complaint, we need not address his allegations the trial court erred by refusing to lift a stay of discovery.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Warren Morris, Appellant	:	
v.	:	No. 79 C.D. 2009
Robert W. Meyers, Superintendent, Terry L. Whitman, Deputy Superintendent, Frank J. Tennis, Deputy Superintendent, Jack M. Allar, Unit Manager, Dr. John Symons, Kathleen Kennedy, Physicians Assistant, Angela Auman, Physicians Assistant, Davis, Correctional Activities Officer, Ellers, Correctional Health Care Administrator, Margie Miller, Correctional Health Care Administrator, and Doctor Joseph Romeo, M.D.	:	

O R D E R

AND NOW, this 21st day of October, 2009, the order of the Court of Common Pleas of Centre County is hereby **AFFIRMED**.

ROBERT SIMPSON, Judge