D/F

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMEL FLOYD,

Plaintiff,

-against-

NASSAU COUNTY FOOD SERVICES, SHERIFF SPOSOTO, ACTING WARDEN and NASSAU COUNTY HEALTH CARE CORPORATION,

Defendants.

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ORDER
09-CV-2876 (SJF) (WDW)

FEUERSTEIN, J.

I. Introduction

On July 1, 2009, incarcerated *pro se* plaintiff Jamel Floyd ("plaintiff") filed a complaint ("the complaint") against Sheriff Sposoto, the Nassau County Food Services of the Nassau County Correctional Center (the "County Defendants") and the Nassau County Health Care Corporation ("NHCC," collectively "defendants") pursuant to 42 U.S.C. § 1983 ("section 1983") for alleged injuries arising from his ingestion of a paperclip at the Nassau County Correctional Center. On March 15, 2011, defendants moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, the defendants' motions are granted and the complaint is dismissed.

II. Background

The facts are largely undisputed. On January 11, 2009, plaintiff was incarcerated at the Nassau County Correctional Center ("NCCC"), and alleges that he was injured when he swallowed with his food a piece of metal reported to be part of a paperclip. County Defendant's Rule 56.1 Statement ("C.D. Stmt.") ¶¶ 1-2, 7; NHCC Rule 56.1 Statement ("NHCC Stmt.") ¶¶ 1-2; compl. ¶ IV. X-ray examinations taken that day at Nassau University Medical Center revealed a "metallic foreign body" in his digestive tract. C.D. Stmt. ¶ 8; NHCC Stmt. ¶ 3; compl. ¶ IV. Follow-up x-ray examination on January 30 and August 17, 2009 revealed that the metallic object was no longer in plaintiff's body. C.D. Stmt. ¶¶ 9-10; NHCC Stmt. ¶¶ 4-5. Although the NCCC had a prisoner grievance procedure, plaintiff did not file an inmate grievance with respect to this incident. C.D. Stmt. ¶ 11-12; NHCC Stmt. ¶ 6; compl. at 2.

III. Discussion

A. Summary Judgment Standard

Summary judgment should not be granted unless "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In ruling on a summary judgment motion, the district court must resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment and determine whether there is a genuine dispute as to a material fact, raising an issue for trial."

McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (citations and quotation marks omitted). "A fact is material when it might affect the outcome of the suit under governing law." Id. An issue of fact is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of establishing the absence of any genuine issue of material fact, after which the burden shifts to the nonmoving party to establish the existence of a factual question that must be resolved at trial. See Koch v. Town of Brattleboro, VT, 287 F.3d 162, 165 (2d Cir. 2002) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

"In order to defeat a motion for summary judgment supported by proof of facts that would entitle the movant to judgment as a matter of law, the nonmoving party is required under Rule 56(e) to set forth specific facts showing that there is a genuine issue of material fact to be tried. If the nonmoving party does not so respond, summary judgment will be entered against him." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993) (citations omitted). The nonmoving party "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, or upon the mere allegations or denials of the nonmoving party's pleading." Id. at 532-33 (quotations and citations omitted).

B. The Prison Litigation Reform Act (the "PLRA")

The PLRA bars a prisoner in any jail, prison or correctional facility from initiating an action "with respect to prison conditions under section 1983 . . . or any other Federal law" without exhausting available administrative remedies. 42 U.S.C.A. § 1997e(a). This exhaustion requirement

"applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516; see also Ruggiero v. County of Orange, 467 F.3d 170, 173 (2d Cir. 2006). The "PLRA exhaustion requirement requires proper exhaustion," pursuant to the rules of the grievance procedure. Woodford v. Ngo, 548 U.S. 81, 93 (2006); Espinal v. Goord, 558 F.3d 119 (2d Cir. 2009). An informal complaint is not sufficient to meet this requirement. Ruggiero, 467 F.3d at 177-78 (citing Marvin v. Goord, 255 F.3d 40 (2d Cir. 2001)). Although "'special circumstances' may excuse a prisoner's failure to exhaust, . . . when remedies are no longer available, [dismissal with prejudice] is required 'in the absence of any justification for not pursuing [such] remedies.'" Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004) (citing Berry v. Kerik, 366 F.3d 85, 87-88 (2d Cir. 2004).

C. Section 1983

Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed.2d 443 (1989). To succeed on a section 1983 claim, a plaintiff must show that a defendant, acting under the color of state law, deprived the plaintiff of a constitutional right. 42 U.S.C. § 1983; Rendell-Baker v. Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed.2d 418 (1982).

1. Monell Claim

In order to impose liability under § 1983 on a municipality or municipal agency, a plaintiff

must prove that a "municipal custom or policy" caused the violation of his constitutional rights. See Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed.2d 611 (1978). Proof of a single incident is not sufficient to establish a claim pursuant to Monell "unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S. Ct. 2427, 85 L. Ed.2d 791 (1985). Causation may be proved by showing "either that the official who is a final policymaker in the area directly committed or commanded the violation of the plaintiff's federal rights, or that while the policymaker himself engaged in 'facially lawful ... action,' he indirectly caused the misconduct of a subordinate municipal employee." Jeffes v. Barnes, 208 F.3d 49, 61 (2d Cir. 2000) (citations omitted). Courts must apply "rigorous standards of culpability and causation . . . to ensure that" the indirect-causation theory [will] not result in the municipality's being "held liable solely for the actions of its employee." Id. (citing Bd. of the County Comm's v. Brown, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed.2d 626 (1997)).

2. Individual Liability

"[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986) (quoting McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977)). This can occur by direct participation in the alleged violation by a defendant, a supervisory official's failure to remedy a wrong, a supervisory official's creation of a policy or custom under which unconstitutional acts

occurred, or through a supervisory official's gross negligence in managing his or her subordinates. Id. at 323-24. If plaintiff has failed to raise a genuine issue of material fact regarding a defendant's involvement in the alleged violation of a constitutional right, summary judgment must be granted. Id.

3. Denial of Medical Care

A section 1983 claim alleging inadequate medical care in violation of the Eight Amendment contains an objective and subjective component. The physical injury must have been "sufficiently serious," meaning that it "may produce death, degeneration, or extreme pain," and the charged official must have acted with "a sufficiently culpable state of mind." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (internal quotations and citations omitted). A defendant has the requisite state of mind if he or she shows "deliberate indifference to [a prisoner's] serious medical needs"; negligence is insufficient. Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 50 L. Ed.2d 251 (1976); Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 128 L. Ed.2d 811 (1994). "So 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). "Claims asserting 'deliberate indifference' concerning medical care are allegations that fall within the exhaustion requirement of the PLRA." Davis v. Reilly, 324 F.Supp.2d 361, 365 (E.D.N.Y. 2004) (collecting cases).

IV. Analysis

1. Exhaustion

Plaintiff has admittedly failed to exhaust his claims pursuant to the available administrative remedy, namely the inmate grievance procedure. Plaintiff argues that "special circumstances" exist for his failure to file a grievance because, while he was held in a "dry cell" for the week after his injury, he "asked for the grievance and was denied," and was told the correctional officers were "under orders to not allow [plaintiff] to have anything in [his] cell . . . ." Opp. to County Defendants Motion, ECF No. 63, at 5. After he was released from the "dry cell," plaintiff argues, he had failed to meet the requirement that a grievance be filed within five (5) days of the date of the incident, and that there was no process by which to file a grievance after that. *Id.* at 5-6; County Defendants Mot. Exhibit L ¶ III(C) (grievance policy).

The "Inmate Grievance Resolution Program" states that "[a]n inmate **must** be given a grievance form upon request." County Defendants Mot. Exhibit L ¶ III(B) (emphasis in original). Plaintiff's assertion that he was refused a grievance form is in a memorandum and is not in a sworn affidavit; even if plaintiff had established a "special circumstance" which would obviate the need for exhaustion, plaintiff has nevertheless failed to set forth specific facts showing that he could succeed on the merits of his section 1983 claims.

2. County Defendants

A. Nassau County Food Services

Plaintiff alleges that the existence of the metal object in his food was "a mistake that the facility food services made." Compl. at 6. Plaintiff fails to allege or provide any evidence of a policy or custom of the Nassau County Food Services to place foreign objects in inmate's food. In any event, a single instance of a paper clip accidentally served with plaintiff's food on a single date fails to amount to a policy

Plaintiff's opposition articulates, for the first time, his argument that his injury resulted from the Nassau County Food Services policy of "useing [sic] the inmates . . . who are not fit to handle the preperation [sic] of food." Opp. to County Defendants Motion at 3. Plaintiff states that inmates "can easily make mistakes" and may overlook "harmful things" in the food of other inmates.

Plaintiff fails to identify a constitutional right which is violated by the alleged policy to allow inmates to prepare food. To the extent plaintiff argues that inmate preparation of food violates his right to be free from cruel and unusual punishment pursuant to the Eighth Amendment, he must establish that the alleged deprivation is objectively "sufficiently serious, . . . result[ing] in the denial of the minimal civilized measure of life's necessities," and that the policymaker was "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, 834-37 114 S. Ct. 1970, 128 L. Ed.2d 811 (1994) (internal citations omitted). Plaintiff has not alleged or provided any facts that demonstrate that inmate preparation of food creates the inference of a substantial risk of harm, in this case allegedly poor oversight, or that County Defendant's actually drew the inference. A "mistake"

by an inmate in the preparation of food does not establish that there was a substantial risk of harm. Moreover, the possibility of misconduct of an inmate participating in the program is insufficient to establish the policymaker's culpability.

B. Sheriff Sposato

Plaintiff fails to establish Sheriff Sposato's personal involvement in his injury. He argues that his liability arises from "the dutys[sic], practice, policy, and customs that he mandates his employees to impose within Nassau County Jail." Opp. to County Defendants Motion, ECF No. 63, at 4. This is insufficient to establish liability for a specific act of one of his employees or of the inmates serving food. As plaintiff has failed to establish personal involvement or a policy or custom in violation of his constitutional rights, Sheriff Sposoto's implementation of the policy fails to meet the requirements for a section 1983 claim.

3. Nassau County Health Care Corporation

Assuming, without deciding, that plaintiff's injury was sufficiently serious to establish a section 1983 claim, plaintiff has failed to allege or demonstrate deliberate indifference to his medical needs. The day he ingested the metal object he was taken for an examination at Nassau University Medical Center. The examination report acknowledged the object and found "no evidence of bowel obstruction or pneumoperitoneum." NHCC Motion, Exhibit D. Employees of NHCC reviewed a follow-up x-ray examination taken later that month and one taken seven (7) months later which both

indicated that the object was no longer in plaintiff's body. *Id.* at Exhibits E, F. Plaintiff contends he suffers occasional stomach cramps and bleeding, but does not provide evidence that, if true, demonstrates an indifference to his medical needs. The mere fact that he may have desired further treatment will not establish a section 1983 claim.

Plaintiff's argument that the failure to remove metal chains around his waist and stomach during the x-rays "did not allow a clear view of the area," Opp. to NHCC's Motion, ECF No. 64, at 3, is controverted by the doctor's examination report. NHCC Motion, Exhibit D.

V. Conclusion

For the foregoing reasons, defendants' motion for summary judgment is granted, and therefore plaintiff's claims are dismissed with prejudice.

The Clerk of the Court is directed to close the case.

SO ORDERED.

/S/
SANDRA J. FEUERSTEIN
United States District Judge

Dated: June 10, 2011
Central Islip, New York