

18-1144
McCray v. Lee

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2019

5 (Argued: February 19, 2020 Decided: June 18, 2020)

6 Docket No. 18-1144

7 _____
8 LIONEL MCCRAY,

9 *Plaintiff-Appellant,*

10 - v. -

11 Superintendent WILLIAM LEE, Watch Commander Lt. PLIMLEY,
12 Sergeant KUTZ,

13 *Defendants-Appellees.**
14 _____

15 Before: KATZMANN, *Chief Judge*, KEARSE and BIANCO, *Circuit Judges*.
16

* The Clerk of Court is instructed to amend the official caption to conform with the above.

1 Plaintiff *pro se*, a New York State prisoner, appeals from a judgment of
2 the United States District Court for the Southern District of New York, Kenneth M.
3 Karas, *Judge*, dismissing his action under 42 U.S.C. § 1983 against correctional facility
4 officials for failure to clear snow and ice from outdoor exercise yards for an entire
5 winter, thereby allegedly violating plaintiff's rights under the Eighth Amendment by
6 (a) denying him physical exercise for four months, and (b) causing him to be injured
7 in a slip-and-fall accident. The district court granted defendants' motion to dismiss
8 pursuant to Fed. R. Civ. P. 12(b)(6) on grounds of qualified immunity and failure to
9 state a claim on which relief can be granted under the Eighth Amendment, and of
10 mootness as to plaintiff's requests for injunctive relief given his transfer to a different
11 correctional facility. *See McCray v. Lee*, No. 16-CV-1730, 2018 WL 1620976 (S.D.N.Y.
12 Mar. 29, 2018). On appeal, plaintiff challenges these rulings and contends that
13 defendants' failure also violated a 1985 consent decree. We conclude that the district
14 court erred in dismissing pursuant to Rule 12(b)(6) the Eighth Amendment claims
15 seeking damages for the denial of exercise, but we affirm the dismissal of the
16 remaining Eighth Amendment claims.

17 Affirmed in part, vacated and remanded in part.

1 Lionel McCray, Auburn, New York, *Plaintiff-*
2 *Appellant pro se.*

3 DAVID LAWRENCE III, Assistant Solicitor General, New
4 York, New York (Letitia James, Attorney General of
5 the State of New York, Barbara D. Underwood,
6 Solicitor General, Anisha S. Dasgupta, Deputy
7 Solicitor General, New York, New York, on the brief),
8 *for Defendants-Appellees.*

9 KEVIN KING, Washington, D.C. (Amy Leiser, Covington
10 & Burling, on the brief), *Court-Appointed Amicus-*
11 *Curiae, in support of Plaintiff-Appellant.*

12 KEARSE, *Circuit Judge:*

13 Plaintiff *pro se* Lionel McCray, a New York State prisoner, appeals from
14 a judgment of the United States District Court for the Southern District of New York,
15 Kenneth M. Karas, *Judge*, dismissing his claims brought under 42 U.S.C. § 1983 and
16 state law, alleging that the defendant officials at the correctional facility where he was
17 previously incarcerated failed to clear snow and ice from outdoor exercise yards for
18 an entire winter and thereby violated his rights under the Eighth Amendment by (a)
19 denying him a meaningful opportunity for physical exercise for four months, and (b)
20 causing him to be injured in a slip-and-fall accident. The district court granted
21 defendants' motion to dismiss McCray's second amended complaint pursuant to
22 Federal Rule of Civil Procedure 12(b)(6), principally ruling that McCray failed to state

1 a claim under the Eighth Amendment; that if such a claim for damages were stated,
2 defendants would be entitled to qualified immunity; and that requests for injunctive
3 relief were moot because McCray had been transferred to a different correctional
4 facility. The court also declined to exercise supplemental jurisdiction over McCray's
5 state-law claims. On appeal, McCray challenges these rulings and contends that
6 defendants' failure also violated a 1985 consent decree. We conclude that the district
7 court erred in granting a Rule 12(b)(6) dismissal of McCray's Eighth Amendment
8 claims seeking damages for the denial of physical exercise; and as those claims are to
9 be reinstated, we also reinstate McCray's state-law claims. In all other respects, we
10 affirm.

11 I. BACKGROUND

12 The second amended complaint in this action (hereinafter "Complaint"
13 or "SAC") alleged the following facts, which must be taken as true for purposes of
14 considering a dismissal pursuant to Rule 12(b)(6).

1 A. *The Events*

2 During part of 2013-2014, McCray was incarcerated at Green Haven
3 Correctional Facility ("Green Haven") in Stormville, New York. During that period,
4 defendant William Lee was Green Haven's Superintendent and was responsible for
5 operations, management, policymaking, and correctional officer supervision;
6 defendant William Plimley, who served as Facility Watch Commander, was an agent
7 of Lee and was responsible for implementing policies adopted by Lee. (*See* SAC ¶¶ 2,
8 4.) Defendant Sergeant Kutz was an agent of Lee; his duties included inspection of
9 the outdoor exercise yard available to McCray, and supervision of McCray's physical
10 activity. (*See id.* ¶ 12.)

11 1. *The Denial of Physical Exercise*

12 For part of the winter of 2013-2014 ("Winter of 2014" or "Winter"),
13 McCray was on "keeplock" status. In that status, he was allowed out of his cell each
14 day for one hour of exercise. Green Haven had several outdoor exercise yards and
15 one indoor gymnasium. McCray was permitted to exercise only in an outdoor yard;
16 access to the indoor gymnasium, which was sometimes used for special events, was
17 restricted to inmates in other categories. (*See* SAC ¶¶ 8, 9.)

1 In the Winter of 2014, Lee's policy was not to have snow and ice removed
2 from any outdoor exercise yard. Rather, the snow and ice were allowed to
3 accumulate in each yard, to remain there until the arrival of sufficiently warm
4 weather to melt the snow and ice away. During the winter months, any natural
5 melting that occurred refroze into slippery ice overnight, and the yard remained
6 uncleared. (*See id.* ¶¶ 6, 10.)

7 In that Winter, Lee closed one or more outdoor recreational yards. Given
8 that Green Haven's prisoner population was at the facility's maximum capacity, the
9 closures and the snow-and-ice accumulations created overcrowding in the open
10 yards, blocked access to the yards' exercise equipment, and prevented McCray from
11 moving sufficiently freely to be able to exercise. (*See id.* ¶¶ 6, 9.) These impediments
12 to exercise persisted for four months. (*See id.* ¶ 11.)

13 Defendants Lee and Plimley were aware of these circumstances. The
14 conditions (a) were "easily visible from the facility's long hallways," and (b) were the
15 subject of inmate grievances and complaints. (SAC ¶ 7.)

16 2. McCray's Slip and Fall

17 By February 20, 2014, all of the recreational yards at Green Haven were

1 covered with uncleared snow and ice; in more than 75 percent of the areas,
2 accumulated snow and ice were waist-high. On that day, Sergeant Kutz inspected the
3 G and H block yard and ordered McCray and other inmates to enter for exercise,
4 despite those conditions. While attempting to avoid a large sheet of ice, McCray
5 stepped into a snowbank and slipped on concealed ice, permanently injuring his
6 ankle and shoulder. (See SAC ¶¶ 10, 12-14, 17.)

7 *B. Dismissal of the Present Action*

8 McCray commenced the present action in 2016, by which time he had
9 been moved to a different correctional facility. The Complaint--filed after various
10 proceedings addressing his original and his first amended pleadings--alleged that the
11 refusal of defendants at Green Haven to have snow and ice removed from the only
12 exercise areas available to McCray had deprived him, for four months, of his Eighth
13 Amendment right to exercise, and had caused his slip-and-fall accident by denying
14 him a "hazard free environment" as required by the Eighth Amendment and state law
15 (SAC ¶ 18). McCray requested declaratory and injunctive relief, as well as
16 compensatory, punitive, and future damages.

17 Defendants moved to dismiss the Complaint principally pursuant to Fed.

1 R. Civ. P. 12(b)(6). They argued that the Complaint failed to state a claim under the
2 Eighth Amendment; that they were entitled to qualified immunity on the ground that
3 no such Eighth Amendment rights had been clearly established; that McCray's
4 requests for injunctive relief were moot because he was no longer at Green Haven;
5 and that, absent any viable Eighth Amendment claim, the court lacked jurisdiction
6 over McCray's state-law claims.

7 In an Opinion and Order reported in *McCray v. Lee*, No. 16-CV-1730, 2018
8 WL 1620976 (S.D.N.Y. March 29, 2018) ("*McCray I*"), the district court granted
9 defendants' motions. It held, first, that the Complaint failed to state a claim under the
10 Eighth Amendment with respect to McCray's slip-and-fall accident. The court noted
11 that slip-and-fall claims are seldom viewed as having constitutional dimension, *see*,
12 *e.g., id.* at *7, and it rejected McCray's argument that Kutz's ordering McCray onto the
13 slippery yard constituted an "exceptional circumstance" that rose to the level of a
14 constitutional violation, reasoning (1) that "conditions such as winter snow and ice
15 'constitute a daily risk faced by members of the public at large,'" *id.* at *8 (quoting
16 *Reynolds v. Powell*, 370 F.3d 1028, 1031 (10th Cir. 2004)); (2) that McCray was not
17 ordered to walk on ice but was ordered simply to proceed into the yard, *see McCray I*,
18 2018 WL 1620976, at *8; and (3) that

1 [t]he allegations in the SAC are insufficient to allege plausibly that
2 any Defendant acted with a sufficiently culpable state of mind
3 because Plaintiff has, at most, alleged that Defendants were
4 negligent, not that any [D]efendant obdurately and wantonly
5 refused to remedy a specific risk to [P]laintiff,

6 *id.* at *9 (internal quotation marks omitted).

7 Turning to McCray's Eighth Amendment denial-of-exercise claims, the
8 court viewed McCray as requesting only injunctive relief, *see McCray I*, 2018 WL
9 1620976, at *10 n.11, and it held that his claims were moot because he was no longer
10 housed at Green Haven, *see id.* at *10. The court held that to the extent that McCray
11 requested damages for denial of exercise, he failed to allege a viable Eighth
12 Amendment claim, stating as follows:

13 If Plaintiff in fact seeks damages for an Eighth Amendment claim
14 for restricted access to exercise separate from his slip and fall
15 injuries, . . . his allegations are insufficient to state a claim.
16 "[T]emporary limitations on access to exercise, without full denial
17 of opportunities, do[] not violate the Eighth Amendment." *Burns*
18 *v. Martuscello*, No. 13-CV-486, 2015 WL 541293, at *12 (N.D.N.Y.
19 Feb. 10, 2015). Defendants' choice to *temporarily restrict access* to
20 some of the recreation yards *due to the presence of ice*, is not "based
21 on a culpable state of mind or deliberate indifference to
22 [Plaintiff's] health or safety, but the *legitimate penological interest of*
23 *waiting until the yard was cleared of ice and snow so that it would be*
24 *safe for inmates to use.*" *Id.*

25 *McCray I*, 2018 WL 1620976, at *10 n.11 (emphases ours). The court continued:

1 "[A]n occasional day without exercise when weather conditions preclude
2 outdoor activity [is not] cruel and unusual punishment. With outdoor
3 recreation space provided and opportunity for its daily use assured, the
4 absence of *additional* exercise space indoors and of recreational
5 equipment for use in the outdoor space is not a denial of
6 constitutional rights." And, . . . Plaintiff made use of outdoor
7 recreation options

8 *Id.* (quoting *Anderson v. Coughlin*, 757 F.2d 33, 36 (2d Cir. 1985) (emphases ours)).

9 The court also concluded that if McCray had sufficiently pleaded a claim
10 under the Eighth Amendment, defendants would be entitled to qualified immunity.
11 It stated that "a prisoner[']s constitutional right against a failure to remedy naturally
12 accumulating ice or snow during winter months has not been clearly established by
13 either the Supreme Court or the Second Circuit." *Id.* at *10.

14 Having dismissed McCray's federal claims, the court declined to exercise
15 supplemental jurisdiction over his state-law claims. *See id.* at *11.

16 McCray timely appealed and filed his appellate brief *pro se*. During the
17 appeal, he moved for appointment of counsel. The motion was granted to the extent
18 that counsel was to brief the Eighth Amendment issues; but, for various reasons,
19 McCray declined the appointment. Following defendants' filing their brief, this Court
20 appointed counsel to present Eighth Amendment positions on behalf of McCray as
21 *amicus curiae*.

II. DISCUSSION

On appeal, McCray contends that the district court should have denied defendants' motion to dismiss in its entirety. He argues principally that the Eighth Amendment (a) protects a prisoner's right to meaningful physical exercise, and (b) requires the state to maintain conditions that do not jeopardize a prisoner's health or safety.

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) ("*Twombly*"). While the court is not required to accept as true allegations that are wholly conclusory, *see, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("*Iqbal*"), the Federal Rules of Civil Procedure provide that the complaint should contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2). Thus, "the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555 (other internal quotation marks omitted)). Allegations of facts that would show "that a risk was obvious or otherwise must have

1 been known" can be sufficient. *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013)
2 ("Walker") (internal quotation marks omitted).

3 A complaint filed by a plaintiff *pro se* is to be construed "liberally to raise
4 the strongest arguments [it] suggest[s]." *Id.* at 124 (internal quotation marks omitted);
5 *see, e.g., Erickson*, 551 U.S. at 94. To avoid dismissal pursuant to Rule 12(b)(6), it "must
6 contain sufficient factual matter, accepted as true, to state a claim to relief that is
7 plausible on its face," *i.e.*, sufficient factual content to "allow[] the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*,
9 556 U.S. at 678 (internal quotation marks omitted).

10 Given these principles, we conclude that the Complaint states cognizable
11 Eighth Amendment claims for damages with regard to the denial of physical exercise.

12 A. *The Eighth Amendment Claims for Denial of Physical Exercise*

13 We begin by noting that the district court properly dismissed as moot
14 McCray's requests for injunctive or declaratory relief against officials at Green Haven.
15 The Complaint itself showed that McCray had been moved to a different correctional
16 facility. An inmate's transfer from a prison facility moots his claims for declaratory
17 or injunctive relief against officials of the transferring facility. *See, e.g., Salahuddin v.*

1 *Goord*, 467 F.3d 263, 272 (2d Cir. 2006). However, the transfer does not moot his claim
 2 for damages, *id.*; and contrary to the district court's view, McCray's Complaint alleged
 3 viable damages claims for the denial of physical exercise.

4 The Eighth Amendment prohibits the infliction of "cruel and unusual
 5 punishments." U.S. Const. amend. VIII. To state an Eighth Amendment claim against
 6 a prison official based on conditions of confinement,

7 an inmate must allege that: (1) objectively, the deprivation the
 8 inmate suffered was "sufficiently serious that he was denied the
 9 minimal civilized measure of life's necessities," and (2)
 10 subjectively, the defendant official acted with "a sufficiently
 11 culpable state of mind . . . , such as deliberate indifference to
 12 inmate health or safety."

13 *Walker*, 717 F.3d at 125 (quoting *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir. 2001));
 14 see *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

15 Conditions of confinement inflict cruel and unusual punishment
 16 when they result "in unquestioned and serious deprivations of
 17 basic human needs" or "deprive inmates of the minimal civilized
 18 measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347,
 19 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981). . . . Courts have
 20 recognized that some opportunity for exercise must be afforded to
 21 prisoners.

22 *Anderson v. Coughlin*, 757 F.2d 33, 34-35 (2d Cir. 1985) (emphasis added) (citing *Ruiz*
 23 *v. Estelle*, 679 F.2d 1115, 1151-52 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th

1 Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Newman v. Alabama*, 559 F.2d 283, 291 (5th
2 Cir. 1977), *rev'd in part on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978));
3 *see also Jolly v. Coughlin*, 76 F.3d 468, 480-81 (2d Cir. 1996) (affirming preliminary
4 injunction requiring prison officials to allow plaintiff inmate, after prolonged
5 confinement to his cell with little exercise, a meaningful opportunity for physical
6 exercise); *Williams v. Greifinger*, 97 F.3d 699, 703-04 (2d Cir. 1996) ("*Williams*") (in this
7 Circuit a prisoner's Eighth Amendment right to "receive some opportunity for
8 exercise" is "settled"). Although deprivations of physical exercise for short periods
9 will not rise to constitutional dimension, Eighth Amendment claims for periods far
10 shorter than the four months for which McCray alleged he was deprived have been
11 held viable. *See, e.g., Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996) (reversing
12 dismissal of complaint for seven-week deprivation); *Lopez v. Smith*, 203 F.3d 1122,
13 1132-33 (9th Cir. 2000) (en banc) (reversing summary judgment dismissal of a claim
14 for six-and-one-half-week deprivation).

15 The Complaint alleged that McCray had been deprived of any
16 meaningful opportunity for physical exercise for four months because of the policy
17 adopted by Lee, and administered by Plimley, of declining to have any snow or ice
18 cleared from any Green Haven outdoor exercise yard in the entire Winter of 2014.

1 Without suggesting that McCray's monetary requests were limited to his slip-and-fall
2 claims, the Complaint requested compensatory damages of \$550,000 and \$425,000
3 from Lee and Plimley, respectively, and punitive damages of \$2 million from Lee.
4 (*See* SAC ¶ "V. Relief.") We thus cannot agree with the district court's view that
5 McCray requested only equitable relief for his Eighth Amendment claims of denial
6 of physical exercise.

7 Nor do we agree with the district court's suggestion that the Complaint
8 alleged merely a "temporar[y] restrict[ion of] access," *McCray I*, 2018 WL 1620976,
9 at *10 n.11, to snow- and ice-covered yards. While the denial of access to meaningful
10 physical exercise ended when warm weather allowed the snow and ice to melt fully
11 and not refreeze, the Complaint did not allege that defendants merely imposed
12 temporary restrictions. It alleged that one or more yards were entirely closed down
13 for the Winter of 2014, and that Lee adopted a policy, followed by Plimley, to allow
14 the exercise yards to accumulate snow and ice, without clearing any of it away, for
15 the entire Winter. The Complaint does not suggest that there was any penological
16 reason, in disregard of the rights of inmates for a meaningful opportunity for physical
17 exercise, to refuse to have the yards cleared of ice and snow for an entire third of a
18 year.

Further, having characterized the actions of Lee and Plimley as merely "temporarily restrict[ing exercise yard] access" and noting that "there is no constitutional right to indoor exercise," the court stated that "Plaintiff made use of outdoor recreation options." *Id.* This characterization of McCray's acts did not accept the factual allegations of the Complaint as true. And to the extent that the court may have zeroed in solely on the principle that it does not violate Eighth Amendment rights to have "'an occasional day without exercise,'" *id.* (quoting *Anderson v. Coughlin*, 757 F.2d at 36), that fragment of language cannot safely be unbundled from the stated hypothesis that informed it. In *Anderson v. Coughlin*, we made those observations that the lack of "indoor" exercise and the "occasional day without exercise" do not give rise to a constitutional claim where "outdoor recreation space [is] provided[,] and opportunity for its daily use [is] assured." 757 F.2d at 36 (emphasis added). We stated that "the absence of *additional* exercise space indoors . . . is not a denial of constitutional rights." *Id.* (emphasis added). Any assumption that defendants here assured the opportunity for meaningful daily outdoor exercise in the Winter of 2014 is squarely contradicted by McCray's Complaint, which alleged that with the overcrowding, the closure of one or more of the yards, and the shrinking space within the yards because of defendants' refusal to have ice and snow cleared away, leaving

1 more than 75 percent of yard space with snow and ice at waist height, McCray in fact
2 did not have room to exercise and was denied any meaningful exercise opportunity
3 for four months. (*See, e.g.*, SAC ¶¶ 6, 9-11.)

4 Defendants argue that these allegations in the Complaint should be
5 discredited because McCray made "admissions" in his earlier pleadings that Green
6 Haven employed inmates to clear snow and ice from walkways. (*E.g.*, Defendants'
7 brief on appeal "in Response to Amicus Curiae" at 5.) However, even if plaintiff's
8 statements in an earlier complaint are determined to be inconsistent with allegations
9 in the superseding complaint, if not repeated they are not part of the operative
10 complaint. Though the prior statements may be admissible against the plaintiff in
11 later stages of the proceedings as admissions, consideration of a motion under Rule
12 12(b)(6) is limited to the contents of the operative complaint and documents attached
13 to it or incorporated into it by reference. *See, e.g., Dangler v. New York City Off Track*
14 *Betting Corp.*, 193 F.3d 130, 138 (2d Cir. 1999); *Chambers v. Time Warner, Inc.*, 282 F.3d
15 147, 152-53 (2d Cir. 2002). We decline defendants' invitation to affirm a Rule 12(b)(6)
16 dismissal on the basis of matters beyond the operative complaint and documents
17 deemed part of it.

18 The district court also found that the Complaint failed to allege that

1 defendants had a "sufficiently culpable state of mind," stating that its allegation of
2 "deliberate indifference" was a "conclusory legal allegation[]." *McCray I*, 2018 WL
3 1620976, at *9 (internal quotation marks omitted). However, the Complaint included
4 allegations that the impassible conditions in the yards were visible through windows
5 at the ends of hallways and that Lee and Plimley received grievances and complaints
6 from inmates about those conditions. In addition, given the Complaint's allegation
7 that the prisoner population at Green Haven was at the maximum for the facility, it
8 permits a reasonable inference that Lee and Plimley must have known that their
9 closing of one or more yards was causing overcrowding in the yards that remained
10 open, even as the accumulating snow and ice, which they refused to have cleared,
11 was constricting that space. These allegations are ample to give Lee and Plimley fair
12 notice as to the nature of McCray's claims and the basis for his assertion that their
13 adamant refusal to have any yards cleared of snow and ice for the entire Winter
14 resulted from their deliberate indifference to inmates' constitutional rights to a
15 meaningful opportunity for physical exercise.

16 Finally, we disagree with the district court's alternative ruling that even
17 if the Complaint stated a cause of action for denial of a meaningful opportunity for
18 physical exercise in violation of the Eighth Amendment, defendants would be entitled

1 to dismissal on the ground of qualified immunity. Qualified immunity shields
2 officials "from liability for civil damages insofar as their conduct does not violate
3 clearly established statutory or constitutional rights of which a reasonable person
4 would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see generally* *Tellier*
5 *v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000) (such clarity may be established by decisions
6 of the Supreme Court or of the appropriate circuit).

7 The operation of the "clearly established" standard "depends
8 substantially upon the level of generality at which the relevant 'legal rule' is to be
9 identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). To deny qualified
10 immunity, "[t]he contours of the right must be sufficiently clear that a reasonable
11 official would understand that what he is doing violates that right." *Id.* at 640. But
12 this does "not" mean that the official enjoys immunity "unless the very action in
13 question has previously been held unlawful." *Id.*

14 In this Circuit the rights of prisoners to a meaningful opportunity for
15 physical exercise had been clearly established nearly three decades before the events
16 of which McCray complains:

17 In 1985, in *Anderson v. Coughlin*, . . . we described the right to
18 exercise in unequivocal terms, stating that "[c]ourts have
19 recognized that some opportunity for exercise *must* be afforded to

1 prisoners." 757 F.2d 33, 35 (2d Cir. 1985)

2 *Williams*, 97 F.3d at 704 (emphasis in *Williams*); see, e.g., *Paul v. LaValley*, 712 F. App'x
3 78, 79 (2d Cir. 2018) ("we have held that this right" of prisoners to have "some
4 opportunity for exercise . . . was clearly established for qualified immunity purposes
5 by no later than 1985" (internal quotation marks omitted)).

6 In *McCray I*, the court acknowledged that *Anderson v. Coughlin* is the law
7 in the Circuit. However, the district court defined the right to a meaningful
8 opportunity for physical exercise at an unduly narrow level of specificity, stating that
9 defendants here would be entitled to qualified immunity "because there is no clearly
10 established constitutional right to a prison yard without naturally accumulating ice
11 or snow during winter months." *McCray I*, 2018 WL 1620976, at *10. But the right to
12 a meaningful opportunity for physical exercise is not confined to a particular season;
13 although not constant, the right is ongoing. The right need not be described with
14 specific references to the weather or characteristics of the seasons of the year in order
15 for a reasonable prison official to understand that climatic features may necessitate
16 responsive measures to ensure that the right to a meaningful opportunity for physical
17 exercise not be denied.

18 In sum, we conclude that *McCray*'s Eighth Amendment damages claims

1 for denial of physical exercise, at least as against Lee and Plimley, should not have
2 been dismissed. Because it is unclear from the Complaint whether McCray intended
3 to assert his denial-of-exercise claim also against Kutz, that issue should be explored
4 further by the district court on remand, including through a potential request that
5 McCray, in order to avoid entry of a Rule 12(b)(6) dismissal of that claim as to Kutz,
6 amend the Complaint to state facts showing the plausibility of such a claim against
7 Kutz.

8 In light of the reinstatement of the Eighth Amendment denial-of-exercise
9 claims, we also vacate the district court's decision to decline supplemental jurisdiction
10 over McCray's state-law claims. Those claims are reinstated against all defendants.

11 *B. The Slip-and-Fall Claims*

12 We affirm the dismissal of so much of the Complaint as seeks relief on
13 the basis that the combination of the slippery conditions in the recreation yards and
14 Kutz's order that McCray go into the yard on February 20, 2014, violated McCray's
15 rights under the Eighth Amendment. When a prisoner asserts a claim predicated on
16 an unsafe condition, the court must determine "whether society considers the risk that
17 the prisoner complains of to be so grave that it violates contemporary standards of

1 decency to expose *anyone* unwillingly to such a risk." *Helling v. McKinney*, 509 U.S.
2 25, 36 (1993) (emphasis in original). "In other words, the prisoner must show that the
3 risk of which he complains is not one that today's society chooses to tolerate." *Id.* As
4 the district court noted, McCray's Complaint did not make any claims of exceptional
5 circumstances that would elevate the Green Haven yard conditions beyond the
6 typical level of danger presented by a slippery sidewalk or a wet floor. We affirm the
7 dismissal of these claims substantially for the reasons stated by the court in *McCray I.*

8 C. Other Matters

9 On appeal, McCray has contended that defendants' refusal to have Green
10 Haven's recreational yards cleared of snow and ice in the Winter of 2014 also violated
11 the terms of a consent decree entered in 1985. In connection with this contention, he
12 has filed several motions in this Court: a motion to enforce the decree and hold
13 defendants in contempt for nonperformance, a motion for judicial notice of a Supreme
14 Court ruling as to a possible defense against such a motion for contempt, a motion for
15 leave to reply to defendants' opposition to his motion for judicial notice, and a motion
16 for a writ of sequestration.

17 The contention that defendants have failed to comply with a consent

1 decree is not pleaded in the Complaint and was not raised in the district court. It is
2 not properly before us, and we decline to address it. McCray's motions, to the extent
3 not previously ruled on, are denied.

4 CONCLUSION

5 We have considered all of the parties' arguments in support of their
6 respective positions on this appeal and have found them to be without merit except
7 to the extent indicated above. For the reasons stated above, the judgment of the
8 district court is vacated insofar as it (a) dismissed McCray's claims seeking damages
9 under the Eighth Amendment for denial of a meaningful opportunity for physical
10 exercise, and (b) declined to exercise supplemental jurisdiction over McCray's state-
11 law claims. The judgment is affirmed to the extent that it dismissed claims for
12 declaratory and injunctive relief and claims under the Eighth Amendment for
13 McCray's slip-and-fall injury. The matter is remanded for further proceedings not
14 inconsistent with this opinion.