

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FURMAN GILMORE,

Plaintiff,

v.

9:16-cv-1300
(DNH/TWD)

WILLIAM FITZMAURICE, GREGORY OVERHOLT,
AND DANIEL MITCHELL,

Defendants.

APPEARANCES:

FURMAN GILMORE
Plaintiff, *pro se*
16-A-4869
Bare Hill Correctional Facility
Caller Box 20
Malone, NY 12953

HON. ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Counsel for Defendants
The Capitol
Albany, NY 12224

OF COUNSEL:

BRIAN W. MATULA, ESQ.
Assistant Attorney General

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER AND REPORT-RECOMMENDATION

I. INTRODUCTION

This *pro se* civil rights action commenced pursuant to 42 U.S.C. § 1983 by Plaintiff Furman Gilmore, an inmate in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), has been referred for a Report and Recommendation by the Hon. David N. Hurd, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Northern District of New York Local Rule 72.3(c).

Plaintiff commenced this action on October 31, 2016, asserting claims arising out of his September 23, 2015, arrest and subsequent confinement in the Greene County and Columbia County Jails against Defendants New York State Police Investigators Overholt, Fitzmaurice, and Mitchell; Parole Officer (“P.O.”) Crossett; Corrections Officer (“C.O.”) McMannis; Nurse Juliano; Dr. Hubicki; Nurse VanAlstyne; and Dr. Johnson. (Dkt. No. 1.) Specifically, Plaintiff alleged (1) Overholt and Fitzmaurice subjected him to excessive force during the arrest; (2) P.O. Crossett failed to protect him and negligently “left” Plaintiff in custody of the arresting officers; (3) Overholt, Fitzmaurice, Mitchell, C.O. McMannis, Nurse Juliano, Dr. Hubicki, Nurse VanAlstyne, and Dr. Johnson were deliberately indifferent to Plaintiff’s serious medical needs and negligently denied and delayed medical evaluation and treatment of Plaintiff’s ankle injury; and (4) Nurse VanAlstyne, Dr. Johnson, Nurse Julian, and Dr. Hubicki were deliberately indifferently to Plaintiff’s need for dental care. *Id.*

Following the District Court’s initial review of Plaintiff’s complaint, conducted pursuant to 28 U.S.C. §§ 1915(e) and 1915A, remaining Defendants are Overholt, Fitzmaurice, and Mitchell. (Dkt. No. 8.) The following claims remain: (1) Plaintiff’s claim that Overholt and Fitzmaurice used excessive force against him in violation of his rights protected under the Fourth Amendment; and (2) Plaintiff’s state law claim that Overholt, Fitzmaurice, and Mitchell negligently denied him medical evaluation and treatment for the injuries inflicted in the alleged assault. *Id.*

Defendants have now moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Dkt. No. 18.) Defendants seek summary judgment on the following grounds: (1) Plaintiff’s excessive force claim against Overholt should be dismissed since Plaintiff testified Overholt was not personally involved in the use of force; (2) Plaintiff’s

excessive force claim against Fitzmaurice should be dismissed pursuant to *Jeffreys v. City of New York*, 426 F.3d 549 (2d Cir. 2005); (3) Plaintiff's negligence claim against Mitchell should be dismissed since Plaintiff is unaware as to Mitchell's involvement in this case; and (4) Plaintiff's negligence claim against Overholt and Fitzmaurice should be dismissed as speculative and unsupported. (Dkt. No. 18-12.) Plaintiff has responded in opposition to the motion and Defendants have filed a reply. (Dkt. Nos. 20, 23.)

For reasons explained below, the Court recommends that Defendants' motion for summary judgment be denied.

II. RELVEVANT BACKGROUND

The summary judgment record contains few undisputed facts. Plaintiff and Defendants provide conflicting accounts of the events surrounding Plaintiff's September 23, 2015, arrest, injury, and request for medical attention.

A. Plaintiff's Verified Complaint¹

Plaintiff claims that on September 23, 2015, at approximately 5:00 a.m., P.O. Crossett accompanied Overholt, Fitzmaurice, and Mitchell to Plaintiff's apartment in the Town of Cairo, New York to execute a search warrant. (Dkt. No. 1 at 6.²) P.O. Crossett told Plaintiff that he was in violation of his "special conditions" of his parole. *Id.* at 7.

After a verbal altercation with Overholt and Fitzmaurice regarding the search warrant, Plaintiff was assaulted by these officers. *Id.* at 6-7. Specifically, Overholt intentionally stomped on Plaintiff's leg restraints. *Id.* at 7. Fitzmaurice shoved Plaintiff in the back, causing him to fall

¹ The Court finds Plaintiff's complaint was adequately verified under 28 U.S.C. § 1746 by Plaintiff's declaration under penalty of perjury. (Dkt. No. 1.)

² Page references to documents identified by docket number are to the numbers assigned by the CM/ECF docketing system maintained by the Clerk's Office.

to the floor, and stomped on Plaintiff's right ankle. *Id.* at 7-8. The use of force was not provoked by Plaintiff. *Id.* at 13. Plaintiff was taken into custody. *Id.* at 6, 8. Overholt and Fitzmaurice disregarded Plaintiff's requests for medical attention. *Id.* at 8. Thereafter, at approximately 5:30 a.m. at the Coxsackie Station in South Cairo, New York, Mitchell ignored Plaintiff's request for medical attention. *Id.*

Upon his arrival at the Greene County Jail, Gilmore told C.O. McMannis that he had been assaulted by the arresting officers and that he was experiencing "pain and swollenness" in his hand and ankle. *Id.* at 6, 9. C.O. McMannis took photographs of Plaintiff's right ankle and told him that he would see "the Jail's Doctor" the next day. *Id.* at 9.

During his medical examination on September 24, 2015, Plaintiff told Nurse Juliano and Dr. Hubicki about the assault. *Id.* at 9-10. No medical treatment was provided; Plaintiff was "medically clear[ed]" and transported to the Columbia County Jail. *Id.* at 6, 10.

On or about September 29, 2015, Gilmore complained to Nurse VanAlstyne that his right ankle was swollen and painful. *Id.* at 6-7, 10. Nurse VanAlstyne told Plaintiff that he would be scheduled for an x-ray. *Id.* at 10. Plaintiff sought medical assistance again on October 11, 2015. *Id.* at 10. This request was "ignored" by Nurse VanAlstyne and Dr. Johnson, as was his later November 10, 2015 request for treatment of his swollen ankle. *Id.* Plaintiff was eventually sent to an outside facility for x-rays of his right foot and ankle on November 20, 2015. *Id.* at 11. The x-rays indicated Plaintiff had an "old fracture deformity of [his] distal fibula." *Id.*

B. Discovery

During discovery, Plaintiff claimed, in relevant part, it was Fitzmaurice who stomped on his leg restraints, shoved him forward, and stomped on his ankle. (Dkt. Nos. 18-8; 18-7.)

Interrogatory 1. Identify each and every injury claimed to have been caused by the Defendant(s). For each injury state: (a) how

the injury is claimed to have occurred [and] (b) how the injury is claimed to have occurred.

Response 1: Plaintiff was injured by the defendant William Fitzmaurice. (a) The defendant William Fitzmaurice intentionally shoved Plaintiff in the back stepping on Plaintiff's leg restraints. The injury occurred as a result of the defendant intentionally stompping (sic) on Plaintiff's right ankle. (b) The injury was caused by defendant William Fitzmaurice.

(Dkt. No. 18-8.)

Plaintiff was deposed on September 6, 2017. (Dkt. No. 18-7.) Plaintiff testified that during the search, he was escorted out of the bedroom to the kitchen where he was "turned over" to Fitzmaurice and Overholt. *Id.* at 20. Plaintiff asked Fitzmaurice to see a copy of the search warrant. *Id.* at 21.

Q: And what did he say, if anything?

A: He flashed me a blank piece of paper and said ["]don't think you're going to get off on these charges["] and came behind me to escort me out. He stomped on my leg restraints and pushed me from behind. And when I fell, I felt him stomp my foot; my right ankle; in that area.

Id. Plaintiff yelled out in pain and kicked off his right sneaker. *Id.* at 31-32. His right ankle bent "inward." *Id.* at 32. Plaintiff told Fitzmaurice and Overholt that he thought his foot was broken and requested medical attention. *Id.* at 34. Fitzmaurice helped Plaintiff off of the floor said to Overholt, "he looks all right to me." *Id.* at 34. Fitzmaurice "rip[ped]" the shoelaces out of his right sneaker and handed the sneaker to Plaintiff. *Id.* Plaintiff slipped his sneaker onto his foot and was escorted out of the residence. *Id.* Plaintiff was taken to the State Police Headquarters. *Id.* at 36.

While being processed at the station, Plaintiff asked Overholt for medical attention. *Id.* at 38. Overholt did not respond. *Id.* at 39. During his deposition, Plaintiff confirmed his only claim against Overholt was for negligently denying him medical attention. *Id.* at 46-47.

Q: Now did Investigator Overholt have anything to do with stomping on your foot or on the restraints or was that just Fitzmaurice?

A: Just Fitzmaurice.

Q: So, the only issue, and correct me if I'm wrong, but the only issue that you have with – with Investigator Overholt, was that he failed to seek medical attention for your right foot?

A: Correct.

Id.

Later that afternoon, Plaintiff was transported to the Green County Jail. *Id.* at 43. Plaintiff told the booking officers he was “assaulted by Investigator Fitzmaurice” and had pain in his right foot. *Id.* at 43-44. Plaintiff also told the officers his hands were swollen and sore from the handcuffs. *Id.* at 44. Photographs of Plaintiff’s ankles were taken. *Id.*

Plaintiff testified only Overholt and Fitzmaurice were aware of his ankle injury and denied him medical attention. *Id.* at 46-47, 49. When questioned about Mitchell’s involvement in this action, Plaintiff responded Mitchell may have been one of the booking officers at the Greene County Jail. *Id.* at 62-63.

Q: So, the [] claim against Investigator Overholt and Fitzmaurice for not providing you with medical attention, what was it that you wanted them to do?

A: That [x-ray] says it healed in deformity.

Q: Okay.

A: So, had they – had I been provided medical treatment, I might have – I might have had a different result.

Q: But in terms of Investigators Overholt and Fitzmaurice what were you hoping they would do in order to get you medical treatment? How were you damaged by them not getting you medical treatment?

A: It healed in deformity.

Q: Okay.

A: I have to wear an ankle device.

Q: Okay.

A: I never spoken to even a doctor today about surgery. Like I said, I get up some mornings, my ankle gives out.

Q: But how is it that -- that Investigator Overholt or Fitzmaurice could have changed that?

A: Who knows today? I -- I might require surgery today to repair it. Maybe they delayed that.

Id. at 62.

While confined at the Columbia County Jail, Plaintiff “kept dropping medical requests” because his ankle continued cause him pain. *Id.* at 56. On November 20, 2016, Plaintiff’s right foot and ankle were x-rayed, which revealed an “old fracture deformity of the distal fibula.” *Id.* at 58-59.

Q: Did they ever tell you how old that injury was?

A: No.

Q: So, the -- the x-ray report just indicated it was an old fracture, right?

A: Correct.

Q: Okay. But no one’s ever told you that that old fracture occurred on the date of this incident in this case, right?

A: No.

Id. at 57.

C. Fitzmaurice's Affidavit

In his affidavit in support of Defendants' motion, Fitzmaurice categorically denies all of Plaintiff's allegations regarding the events of September 23, 2015. (Dkt. No. 18-10.³) Fitzmaurice declares, among other things, that he did not speak to Plaintiff during the search, he was not involved in escorting Plaintiff at any time, he did not take custody of Plaintiff at any time, he did not stomp on Plaintiff's leg restraints and, in fact, Plaintiff's legs were never restrained with metal shackles during the search and arrest, he did not shove or push Plaintiff, he did not stomp on Plaintiff's ankle or have any other physical contact with Plaintiff, he did not witness anyone else use force on Plaintiff, he did not hear Plaintiff complain of any physical injuries or hear him complain that he was in pain, he did not hear Plaintiff make any requests for medical attention, and he did not observe anything that suggested Plaintiff was in any pain or suffering from any medical condition at any time. *Id.* at ¶¶ 12-23.

By way of background, Fitzmaurice states he obtained a search warrant from a County Court Judge in Greene County for the search of 53 Lake Mills Road in the Town of Cairo, New York. *Id.* at ¶ 3. As such, it was his responsibility to coordinate and carry out the search of the residence. *Id.* at ¶ 10. On September 23, 2015, at approximately 5:00 a.m., the New York State Police, together with several other law enforcement agencies executed the search warrant. *Id.* at

³ Attached as "Exhibit A" to the Affirmation of Brian W. Matula, Esq., dated November 8, 2017, are the Incident Report, Incident Supplemental Report, and Arrest Report, all of which Fitzmaurice declares he drafted following the search of the residence and apprehension of Plaintiff and others at the residence. (Dkt. No. 18-10 at ¶ 29; *see* Dkt. No. 18-2 at ¶ 2; Dkt. No. 18-3.) Fitzmaurice avers the reports were prepared in the normal course of his employment with the New York State Police and that the information contained in the reports is true and accurate. (Dkt. No. 18-10 at ¶ 29.)

¶ 4. The New York State Special Operations Response Team (“SORT”) was responsible for the initial entry into the residence and securing all of the individuals in the residence. *Id.* at ¶ 5.

According to Fitzmaurice, the SORT team normally utilize “flexi ties” which are sometimes referred to as “zip ties” for the initial restraint of occupants of a searched residence. *Id.* at ¶ 6. Fitzmaurice explains that “[n]ormally, only an individual’s hands are restrained for purposes of securing the residence – not the individual’s legs.” *Id.*

After the SORT team secured the residence and all of its occupants, Fitzmaurice entered the residence to conduct the search. *Id.* at ¶ 7. Upon entering the residence, Fitzmaurice saw Plaintiff seated on a bed in a bedroom with his hands restrained. *Id.* at ¶ 8. Plaintiff’s legs were not restrained. *Id.* Fitzmaurice states photographs, attached as Exhibit A, were taken shortly after entering the residence. *Id.* at ¶ 9. Other than redactions made by Assistant Attorney General Matula to protect the privacy of the other occupants and minor children, Fitzmaurice states the photographs have not been manipulated and that the photographs fairly and accurately depict aspects of the residence and the occupants on September 23, 2015. *Id.*

D. P.O. Crossett’s Affidavit

In his affidavit in support of Defendants’ motion, P.O. Crossett states he was assigned to supervise Plaintiff in the months leading up to September 2015. (Dkt. No. 18-9 at ¶ 1.) As such, P.O. Crossett was asked to participate in the September 23, 2015, search. *Id.* at ¶ 2. After the SORT team entered and secured the occupants, P.O. Crossett entered the residence with other law enforcement officials. *Id.* at ¶ 3. When he entered the residence, Plaintiff was seated on a bed in a bedroom with his hands restrained behind his back. *Id.* at ¶ 4. P.O. Crossett assisted Overholt in “maintaining control” of Plaintiff, which “consisted of standing in the same room as

the Plaintiff and another individual and watching them.” *Id.* at ¶ 5. P.O. Crossett spoke briefly with Plaintiff concerning parole issues. *Id.* at ¶ 6.

P.O. Crossett declares “[a]t no time, from the time I arrived to find the Plaintiff in the bedroom, until the time Plaintiff left the residence, did I see Investigator Overholt or anyone else assault the Plaintiff.” *Id.* at ¶ 7. According to P.O. Crossett:

I certainly was in a position to see the Plaintiff sitting on the bed and being escorted out of the residence and at no time did the Plaintiff fall or get pushed to the ground or get stomped on. I did not observe any member of law enforcement, including Investigator Fitzmaurice or Investigator Overholt, assault the Plaintiff or otherwise make any physical contact with the Plaintiff other than the limited contact necessary to maintain custody and control.

Id. at ¶ 8.

Further, P.O. Crossett states Plaintiff never complained to him about any assault or pain he was experiencing, nor did he observe anything during the search that would have led him to believe that Plaintiff was physically injured or that he was in pain. *Id.* at ¶¶ 9, 10. After the search of the residence, P.O. Crossett traveled to the State Police barracks in Catskill, New York. *Id.* at ¶ 11. He momentarily saw Plaintiff and at no time did Plaintiff state he had been assaulted by anyone or request medical attention. *Id.*

As to Plaintiff’s claim that his legs were restrained, P.O. Crossett responds:

I do not recall seeing the Plaintiff or anyone else at the residence in any leg restraints on September 23, 2015. While the Plaintiff’s hands were at all times restrained behind his back, his feet were not. Leg restraints are not normally used to secure occupants during a search.

Id. at ¶ 12. P.O. Crossett states he does not recall Plaintiff or anyone else engaging in a verbal altercation concerning the search warrant or anything else. *Id.* at ¶ 13. Lastly, P.O. Crossett opines “the search of the Plaintiff’s residence went smoothly and at all times professionally. The

occupants appeared compliant with the instructions of law enforcement and there was nothing that occurred that was out of the ordinary.” *Id.* at ¶ 14.

E. Plaintiff’s Medical Records⁴

1. Greene County Jail

Plaintiff was received into custody on September 23, 2015, at 3:45 p.m. at the Greene County Jail. (Dkt. No. 18-5 at 6.) The “Inmate Injury Prior to Admission” report indicates: “[Plaintiff] has swollen right ankle. [Plaintiff] stated the injury happened during his arrest.” *Id.* Photographs of Plaintiff’s right ankle were taken by non-party C. Warbick (Badge 601). *Id.*

On September 25, 2015, Dr. Hubicki examined Plaintiff. *Id.* at 1. Dr. Hubicki’s report indicated: “[right] ankle lateral swelling mild to mod w/o erythema, bruising or laceration. [left] hand bigger than [right] w/o trauma, erythema.” *Id.* at 1. It was further noted:

[right] ankle sprain on 9/24/15 (sic) when he was on floor on stomach w/hands zip tied behind back. Officer was walking near his feet & tripped over his ankle. Now swollen & tender lateral aspect of ankle. He is to do ROM exercises & keep walking around w/o activities like basketball for 14 days.

Id. The medical history section also indicated, “slight edema [right] ankle. States was stepped on during arrest.” *Id.* at 2.

2. Columbia County Jail

Plaintiff was transferred to the Columbia County Jail on September 29, 2015. (Dkt. No. 20-2 at 9.) The September 29, 2015, progress note entry noted minimal swelling of Plaintiff’s

⁴ The record does not contain an affidavit authenticating or supporting the admissibility of the medical records annexed to Defendants’ motion and Plaintiff’s opposition. Regardless, the Court considers these records because the parties rely upon them in their submissions and neither party has moved to strike or otherwise objected to the other’s submission of arguably inadmissible evidence. *See, e.g., Goris v. Breslin*, 04-CV-5666 (KAM)(LB), 2010 WL 376626, at *10 n.1 (E.D.N.Y. Jan. 26, 2010) (collecting cases).

right ankle and left hand. *Id.* 5, 9. On October 10, 2015, Plaintiff requested medical attention for, among other things, “left hand and right ankle on right foot has been swollen since date of arrest.” *Id.* at 17. Plaintiff also submitted medical requests on November 11, 2015, January 11, 2016, June 2, 2016, June 6, 2016, and June 27, 2016, all of which referenced his ankle. *Id.* at 18-22.

3. Memorial Hospital Medical Imaging Consultation Report

Plaintiff’s right foot and ankle were x-rayed on November 20, 2015, revealing “an old fracture deformity of the distal fibula.” (Dkt. No. 18-6 at 1-4.)

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment may be granted only if the submissions of the parties taken together “show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists. *Salahuddin v. Goord*, 467 F.3d 263, 272-73 (2d Cir. 2006). A dispute of fact is “genuine” if “the [record] evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248.

Only after the moving party has met this burden is the nonmoving party required to produce evidence demonstrating that genuine issues of material fact exist. *Salahuddin*, 467 F.3d at 272-73. The nonmoving party must do more than “rest upon the mere allegations . . . of the [plaintiff’s] pleading” or “simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

“Conclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact.” *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998).

A party opposing summary judgment is required to submit admissible evidence. *See Spiegel v. Schulmann*, 604 F.3d 72, 81 (2d Cir. 2010) (“It is well established that in determining the appropriateness of a grant of summary judgment, [the court] . . . may rely only on admissible evidence.”) (citation and internal quotation marks omitted). A plaintiff’s verified complaint is to be treated as an affidavit. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) (“A verified complaint is to be treated as an affidavit . . . and therefore will be considered in determining whether material issues of fact exist”) (citations omitted).

In *Jeffreys v. City of New York*, the Second Circuit reminded that on summary judgment motions “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could *reasonably* find for the plaintiff.” 426 F.3d 549, 554 (2d Cir. 2005). “To defeat summary judgment, . . . nonmoving parties may not rely on conclusory allegations or unsubstantiated speculation.” *Id.* (citation and internal quotation marks omitted). “At the summary judgment stage, a nonmoving party must offer some hard evidence showing that its version of the events is not wholly fanciful.” *Id.* (citation and internal quotation marks omitted). “[T]o satisfy Rule 56(e), affidavits must be based upon ‘concrete particulars,’ not conclusory allegations.” *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) (citation omitted); *Smith v. Woods*, No. 9:03-CV-480 (DNH/GHL), 2006 WL 1133247, at *3 & n.10 (N.D.N.Y. Apr. 24, 2006).⁵ “Statements that are devoid of any specifics,

⁵ The Court will provide Plaintiff with copies of all unpublished decisions cited herein in accordance with the Second Circuit’s decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.” *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999).

In determining whether a genuine issue of material fact exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008). “[T]he trial court’s task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at the point to issue-finding; it does not extend to issue-resolution.” *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir. 1994).

Where a party is proceeding *pro se*, the court is obliged to “read [the *pro se* party’s] supporting papers liberally, and . . . interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). However, “a *pro se* party’s ‘bald assertion,’ unsupported by evidence, is not sufficient to overcome a motion for summary judgment.” *Cole v. Artuz*, No. 93 Civ. 5981 (WHP)(JCF), 1999 WL 983876, at *3 (S.D.N.Y. Oct. 28, 1999) (citing *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991)).

IV. DISCUSSION

A. Fourth Amendment Excessive Force Claim

The Fourth Amendment safeguards “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Among the protections afforded by the Fourth Amendment is protection “from the government’s use of excessive force when detaining or arresting individuals.” *Jones v. Parmley*, 465 F.3d 46, 61 (2d Cir. 2006); *see also Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2010); *Malay v. City of Syracuse*, 638 F. Supp. 2d 303, 313-14 (N.D.N.Y. 2009).

1. Overholt

Defendants argue Plaintiff's Fourth Amendment excessive force claim against Overholt should be dismissed for lack of personal involvement since Plaintiff testified Overholt was not involved in the use of force. (Dkt. No. 18-12 at 8-9.) The law is clear that “[p]ersonal involvement of defendants in the alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977). Indeed, in order to prevail on a § 1983 cause of action against an individual, a plaintiff must show some “tangible connection” between the unlawful conduct and the defendant. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986).

The record evidence shows that during the discovery phase Plaintiff attributed all aspects of the alleged use of force to Fitzmaurice. (Dkt. No. 18-7 at 21, 31, 33, 43; *see also* Dkt. No. 18-8 at 1-3.) Specifically, Plaintiff testified Fitzmaurice stomped on his leg restraints, pushed him forward, and stomped on his ankle. *Id.* at 46-47. Plaintiff confirmed his only claim against Overholt was for negligently denying him medical attention. *Id.* at 46-47.

Plaintiff has acknowledged the inconsistencies among his sworn testimony, which he attributes in part to memory loss and confusion during his deposition, and clarifies in his opposition submission that it was Overholt who initiated the use of force by intentionally stomping on his leg restraints. (Dkt. No. 20 at 6.) In their reply, Defendants argue, *inter alia*, Plaintiff's opposition “affidavit” should not be considered because it has not been properly affirmed and, furthermore, should not be considered by the Court because a non-moving party cannot create a triable issue of fact by submitting an affidavit inconsistent with his prior sworn testimony. (Dkt. No. 23 at 5-6.)

The Second Circuit has ruled that “[a] district court has broad discretion to determine whether to overlook a party’s failure to comply with local court rules,” including local rules relating to requirements regarding the submission of and response to statements of material facts on summary judgment motions, and to “conduct an assiduous review of the record.” *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001) (citation and internal quotation marks omitted). In deference to Plaintiff’s *pro se* status, and consideration of the obvious effort Plaintiff has put into responding to Defendants’ motion for summary judgment, the Court has opted to review the entire summary judgment record in this case.

“It is well settled in this circuit that a party’s affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment.” *Mack v. United States*, 814 F.2d 120, 124-25 (2d Cir. 1987) (citing, *inter alia*, *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1967); *accord Palazzo v. Corio*, 232 F.3d 38, 43 (2d Cir. 2000)). The purpose of the doctrine is clear: “[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Palazzo*, 232 F.3d at 43 (quoting *Perma*, 410 F.2d at 578); *see also Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 205 (2d Cir. 2014) (discussing the “sham issue of fact” doctrine). Therefore, “factual allegations that might otherwise defeat a motion for summary judgment will not be permitted to do so when they are made for the first time in the plaintiff’s affidavit opposing summary judgment and that affidavit contradicts [his] own prior deposition testimony.” *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001).

In this case, however, Plaintiff's verified complaint, which is the functional equivalent of an affidavit and may be relied upon to oppose summary judgment, *Patterson v. Cty. of Oneida*, N.Y., 375 F.3d 206, 219 (2d Cir. 2004), claims Overholt intentionally stomped on Plaintiff's leg restraints. (Dkt. No. 1 at 7.) Consequently, even if Plaintiff's opposition affidavit was properly affirmed, Plaintiff has not argued *for the first time* in an effort to avoid the ramifications of summary judgment that Overholt was personally involved in the alleged use of force. Indeed, if that were the case, Plaintiff's excessive force claim against Overholt would not have survived the District Court's initial review.

A personal involvement inquiry on summary judgment "examines only whether there is record evidence to support a factfinder's conclusion that the individual under consideration was involved in the alleged conduct." *Brandon v. Schroyer*, No. 9:13-CV-0939 (TJM/DEP), 2016 WL 1638242, at *14 (N.D.N.Y. Feb. 26, 2016), *adopted by* 2016 WL 1639904 (quotation omitted). Plaintiff's verified complaint constitutes such evidence and "[a]ny discrepancies or inconsistencies in [the] plaintiff's testimony are for a jury to assess." *Latouche v. Tompkins*, No. 9:09-CV-308 (NAM/RFT), 2011 WL 1103045, at *5 (N.D.N.Y. Mar. 23, 2011). Further, although not necessarily dispositive, the summary judgment record lacks a declaration or affidavit from Overholt denying his alleged personal involvement in the use of force.

Simply stated, based on the present record, there exists a dispute of material fact with respect to whether Overholt was personally involved in the alleged use of force. Therefore, the Court recommends that Overholt be denied summary judgment on Plaintiff's Fourth Amendment excessive force claim for lack of personal involvement.

2. Fitzmaurice

Defendants argue Plaintiff's "inconsistent" excessive force claim against Fitzmaurice should be dismissed pursuant to *Jeffreys v. City of New York* because "[a] jury in this case could not return a verdict for the Plaintiff on the evidence presented." (Dkt. No. 18-12 at 9-12.) In support of their motion, Defendants contend Plaintiff has presented three distinct "versions" of what allegedly transpired on September 23, 2015:

Version 1. Shortly after his arrest, Plaintiff informed medical staff at the Greene County Jail that during the initial entry into the residence, Plaintiff was laying on his stomach, with his hand zip tied behind his back and that a member of law enforcement tripped over his ankle, causing the injury.

Version 2. Plaintiff wrote in his complaint that Overholt stomped on Plaintiff's leg restraints, Fitzmaurice shoved Plaintiff causing him to fall, and Fitzmaurice stomped on his right ankle, causing the injury.

Version 3. During discovery Plaintiff claimed Fitzmaurice stomped on Plaintiff's leg restraints, shoved Plaintiff causing him to fall, and stomped on Plaintiff's right ankle, causing injury.

Id. at 6.

First, Defendants argue Plaintiff's "claim of excessive force is dependent upon the existence of leg restraints." *Id.* at 7. Defendants assert Plaintiff's testimony that leg restraints were used on September 23, 2015, "cannot be believed" because the record evidence demonstrates "[t]here were no leg restraints." *Id.* In support of this contention, Defendants rely upon the sworn testimony of Fitzmaurice and P.O. Crossett indicating leg restraints were not used by members of SORT on September 23, 2015. (Dkt. No. 18-10 at ¶ 13; Dkt. No. 18-19 at ¶ 13.) Defendants also claim the photographs taken shortly after the residence was secured by members of SORT prove that none of the individuals, including Plaintiff, had their legs restrained on September 23, 2015. (Dkt. No. 18-12 at 10.)

Second, Defendants argue a reasonable jury could not believe Plaintiff's testimony that Fitzmaurice pushed him to the floor and stomped on his right ankle because shortly after the incident Plaintiff reported to medical personnel he was injured when an officer "tripped" over his ankle. *Id.* In support of this argument, Defendants point to Dr. Hubicki's September 25, 2015, medical history and assessment report indicating Plaintiff injured his right ankle during the search "when he was on floor on stomach [with] hand zip tied behind back [and] an [o]fficer was walking near his feet [and] tripped over his ankle." (No. 18-15 at 1.) Defendants contend this account is "more consistent" with Plaintiff's deposition testimony regarding his positioning during the search, *i.e.*, lying on the floor with his hands zip tied behind his back. (Dkt. No. 18-12 at 10-11; Dkt. No. 18-7 at 13-16, 23-24.) Defendants note this version is "also consistent with the photographs of the Plaintiff's leg showing there were no leg restraints." (Dkt. No. 18-12 at 11.)

In his opposition to Defendants' motion, among other things, Plaintiff: (1) flatly denies telling Greene County Jail's medical staff that his ankle was injured when a member of law enforcement tripped over his ankle, (2) reaffirms that the allegations in his verified complaint are "true and correct," and (3) acknowledges the inconsistencies among his sworn testimony, which he attributes to his "traumatic brain injury along with side effects of his medication [that] leave [him] confuse[d] and forgetful." (Dkt. No. 20 at 5.)

The rule in determining whether to grant summary judgment is that credibility determinations, weighing evidence, and drawing inferences are functions for the jury, not the court. *Blake v. Race*, 487 F. Supp. 2d 187, 202 (E.D.N.Y. 2007) (citing *Liberty Lobby*, 477 U.S. at 255); *Rule v. Brine*, 85 F.3d 1002, 1011 (2d Cir. 1996) ("Assessments of credibility and choices between conflicting versions of the events are matter for the jury, not for the court on

summary judgment.”). The Second Circuit, however, has recognized a very limited exception to this general rule in *Jeffreys v. New York*. In that case, the Second Circuit held that summary judgment may be entered in the rare circumstance where there is nothing in the record to support the plaintiff’s allegations of the defendants’ use of excessive force, aside from his own contradictory and incomplete testimony, and even after drawing all inferences in the light most favorable to the plaintiff, the court determines that “no reasonable person” could credit the plaintiff’s testimony. *Jeffreys*, 426 F.3d at 54-55.

To apply the *Jeffreys* exception, a defendant must satisfy each of the following three requirements: (1) “the plaintiff must rely ‘almost exclusively on his own testimony,’” (2) the plaintiff’s “testimony must be ‘contradictory or incomplete,’” and (3) the plaintiff’s testimony must be contradicted by evidence adduced by the defense. *Benitez v. Ham*, No. 04-CV-1159 (NAM/GHL), 2009 WL 3486379, at *20-21 (N.D.N.Y. Oct. 21, 2009) (quoting *Jeffreys*, 426 F.3d at 554).

In this instance, the Court recommends against application of the *Jeffreys* exception. To be sure, as highlighted by Defendants, Plaintiff has provided inconsistent statements in his sworn testimony. However, they are not so starkly contradictory as to warrant invocation of the narrow *Jeffreys* exception to the well-established rule that the court may not assess credibility on a motion for summary judgment. *See, e.g., Galunas v. Reynolds*, No. 8:11-cv-14 (MAD/RFT), 2013 WL 316618, at *6 (N.D.N.Y. Jan. 28, 2013) (declining to apply *Jeffreys* even though the plaintiff contradicted himself on several occasions because the plaintiff “consistently maintained” that the defendant used excessive force). Any inconsistencies or discrepancies in Plaintiff’s testimony, including whether or not it was Overholt or Fitzmaurice who allegedly stomped on Plaintiff’s leg restraints, goes to the weight accorded to Plaintiff’s testimony.

Likewise, Plaintiff's testimony that he recognized Fitzmaurice from two prior interactions when Fitzmaurice was driving a red truck and Fitzmaurice's testimony that he has never traveled in, or owned, a red truck is also an issue reserved for the jury. Further, unlike the record evidence in *Jeffreys*, the medical records submitted to the Court, albeit in inadmissible form, are not wholly inconsistent with Plaintiff's claim. Indeed, Plaintiff's medical records reflect that Plaintiff's right ankle was injured on September 23, 2015. The manner in which Plaintiff's ankle was injured is an issue of fact reserved for the jury. Accordingly, the Court recommends against dismissal of Plaintiff's excessive force claim against Fitzmaurice pursuant to *Jeffreys*.

In light of the foregoing, the Court recommends Defendants' motion for summary judgment on Plaintiff's Fourth Amendment excessive force claim be denied.

B. State Law Negligence Claim

“Under New York law . . . a plaintiff must establish three elements to prevail on a negligence claim: (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof.” *Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 177 (2d Cir. 2013) (quoting *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 (2d Cir. 2000)). Plaintiff claims Overholt, Fitzmaurice, and Mitchell negligently “failed to seek medical attention for the plaintiff despite the plaintiff's complaint of pain of his right ankle” and transported him to the police station and then to Greene County Jail rather than to a hospital. (Dkt. No. 1 at 14-15.) Plaintiff claims his ankle “injury went untreated resulting in a deformity healing.” *Id.* at 16.

1. Mitchell

Defendants argue Mitchell is entitled to summary because Plaintiff testified the only people who were aware of his alleged ankle injury leading up to his admission to the Greene

County Jail were Overholt and Fitzmaurice and Plaintiff was unsure as to how Mitchell was involved in this case. (Dkt. No. 18-12 at 12.) As such, Defendants argue there is no evidence that Mitchell was aware, or should have been aware of the alleged injury to Plaintiff, that he had any duty to Plaintiff, or did anything that affected Plaintiff in any way whatsoever. *Id.* The Court disagrees.

In his verified complaint, Plaintiff claims he requested medical attention from Mitchell at approximately 5:30 a.m. at the Coxsackie Police Station, which was ignored. (Dkt. No. 1 at 8.) While the summary judgment record contains an affidavit from P.O. Crossett, who states after the search of the residence he traveled to the state police barracks in Catskill, New York and “momentarily” saw Plaintiff and “at no time at the barracks did the Plaintiff complain to me of having been assaulted by anyone, or request medical attention[,]” there is no affidavit or declaration from Mitchell disputing Plaintiff’s allegation. (Dkt. No. 18-9 at ¶ 11.)

If Plaintiff’s testimony is credited, he has produced sufficient evidence to create a disputed issue of material fact as to whether Mitchell breached his duty to Plaintiff by denying or delaying Plaintiff’s medical treatment for his alleged ankle injury. *See, e.g., Hodge v. Vill. of Southampton*, 838 F. Supp. 2d 67, 88-89 (E.D.N.Y. 2012) (denying summary judgment where a disputed issue of fact existed as to whether police officers, *inter alia*, breached their duty in delaying and/or denying the arrestee plaintiff’s medical treatment from injuries sustained during course of arrest). Therefore, the Court recommends Mitchell be denied summary judgment on this basis.

2. Overholt and Fitzmaurice

Defendants argue summary judgment is warranted because Plaintiff has failed to establish the elements of his negligence claim. In support of their motion, Defendants note

Plaintiff has not presented any proof his ankle was fractured on September 23, 2015. *Id.* at 14. Further, even assuming Plaintiff's ankle was fractured on September 23, 2015, Defendants contend Plaintiff has not presented any proof that the ten hour delay at issue caused the healing deformity. *Id.* at 14-15. Lastly, Defendants argue Plaintiff's claim that immediate medical treatment was needed or would have made a difference is belied by the fact that even after medical personnel examined Plaintiff's ankle, no treatment was deemed necessary. *Id.* at 15. In his opposition, Plaintiff admits as much but contends such can be proven at trial with expert testimony. (Dkt. No. 20 at 20-21.) In reply, Defendants argue Plaintiff has failed to present anything which would link the actions or inactions of any Defendant causing Plaintiff's ankle to heal in deformity. (Dkt. No. 23 at 11-12.)

While it is true no doctor has ever attributed the healing deformity at issue to the September 23, 2015, incident, the Court finds issues of proximate cause and damages cannot be resolved on the existing record. To prove causation, a plaintiff must show that breach of a duty was both the cause in fact and proximate cause of their injury. *See Cygan v. New York*, 566 N.Y.S.2d 232, 233 (N.Y. App. Div. 1991). A breach is the cause in fact of an injury if but for the breach, the injury would not have occurred. *Kadyszewski v. Ellis Hosp. Ass'n*, 595 N.Y.S.2d 841, 844 (N.Y. App. Div. 1993). A breach is the proximate cause of an injury if the breach was a substantial factor in causing the injury. *See Said v. Assaad*, 735 N.Y.S.2d 265, 267 (N.Y. App. Div. 2001). Proximate causation is a factual question left to the fact finder. *Peter McKinnon v. Bell Security*, 700 N.Y.S.2d 469, 471 (N.Y. App. Div. 2000).

The undisputed record evidence shows Plaintiff's November 20, 2015, x-ray revealed an "old fracture deformity of the distal fibula." (Dkt. No. 18-6 at 1.) As set forth above, Plaintiff claims his ankle was fractured on September 23, 2015, he yelled out in pain, kicked his sneaker

off of his foot, stated he thought his ankle was broken, and his request for medical attention was ignored by Overholt, Fitzmaurice, and Mitchell. (Dkt. No. 1 at 7-8; Dkt. No. 18-7 at 31-34.) Inasmuch as neither party has submitted an expert affidavit opining on the approximate age of the “old fracture,” the Court finds a genuine issue of fact remains. As such, the Court finds Defendants have not met their burden demonstrating they are entitled to summary judgment as a matter of law.

In light of the foregoing, the Court recommends Defendants’ motion for summary judgment on Plaintiff’s state law negligence claim be denied.

V. CONCLUSION

WHEREFORE, it is hereby

RECOMMENDED that Defendants’ motion for summary judgment (Dkt. No. 18) be **DENIED**; and it is further

ORDERED that the Clerk shall provide Plaintiff with a copy of this Report-Recommendation, along with copies of the unpublished decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2008) (per curiam).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.⁶ Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing

⁶ If you are proceeding *pro se* and are served with this Order and Report-Recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).

Small v. Sec'y of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989) (per curiam)); 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 72, 6(a).

Dated: May 31, 2018
Syracuse, New York



Therese Wiley Dancks
United States Magistrate Judge

2006 WL 1133247

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.

Jeff SMITH, Plaintiff,

v.

Robert K. WOODS, Deputy Superintendent;
Joseph R. Belarge, Captain; G.J. O'Donnell,
Sergeant; F.S.A. Antonelli; and Wayne
Holt, Correction Officer, Defendants.

No. 9:03-CV-480.

|

April 24, 2006.

Attorneys and Law Firms

Jeff Smith Plaintiff, Pro Se, New York, NY.

Hon. Eliot Spitzer, Attorney General of the State of New York, [Kelly L. Munkwitz, Esq.](#), Asst. Attorney General, of Counsel, Department of Law, Albany, NY, for Defendants.

DECISION and ORDER

[DAVID N. HURD](#), District Judge.

*1 Plaintiff, Jeff Smith, brought this civil rights action pursuant to [42 U.S.C. § 1983](#). By Report-Recommendation dated March 17, 2006, the Honorable George H. Lowe, United States Magistrate Judge, recommended that defendants' motion for summary judgment be granted, and that plaintiff's motion for partial summary judgment be denied. (Docket No. 51). The plaintiff has filed objections to the Report-Recommendation. (Docket No. 53).

Based upon a de novo determination of the portions of the report and recommendations to which the plaintiff has objected, the Report-Recommendation is accepted and adopted in whole. *See 28 U.S.C. 636(b)(1)*. Accordingly, it is ORDERED that

1. Defendants' motion for summary judgment is GRANTED;

Plaintiff's motion for partial summary judgment is DENIED. and

The complaint is DISMISSED in its entirety.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

[GEORGE H. LOWE](#), Magistrate Judge.

REPORT-RECOMMENDATION

This matter has been referred to me for Report and Recommendation by the Honorable David N. Hurd, United States District Judge, pursuant to [28 U.S.C. § 636\(b\)](#) and Local Rule 72.3(c) of the Rules of Practice for this Court. In this *pro se* civil rights action brought under [42 U.S.C. § 1983](#), Jeff Smith ("Plaintiff") alleges that five employees of Upstate Correctional Facility-Deputy Superintendent Robert K. Woods, Captain Joseph R. Belarge, Sergeant G.J. O'Donnell, Food Service Administrator Richard Antonelli, and Correction Officer Wayne Holt ("Defendants")-violated his rights under the First, Fourth, Eighth, and Fourteenth Amendments by (1) retaliating against him for having previously filed a complaint, (2) subjecting him to an unreasonable search and seizure, (3) subjecting him to a damaged bunk bed while he was housed in the Upstate Correctional Facility Special Housing Unit, and (4) taking away his "good time" credits without affording him due process. (Dkt. No. 5 [Plf.'s Am. Compl.].)¹

¹ Given my duty to liberally construe a *pro se* plaintiff's civil rights complaint, I construe Plaintiff's Amended Complaint as including a claim that various Defendants violated Plaintiff's rights under the Fourth Amendment to be free from unreasonable searches and seizures. *See Phillips v. Girdich*, 408 F.3d 124, 130 (2d Cir.2005) ("We leave it for the district court to determine what other claims, if any, [the plaintiff] has raised. In so doing, the court's imagination should be limited only by [the plaintiff's] factual allegations, not by the legal claims set out in his pleadings.") [citations omitted]. (*See also* Dkt. No. 5, ¶ 44 [Plf.'s Am. Compl.], alleging that Defendants Woods and Holt "violat[ed] plaintiff's 4th ... Amendment[] rights"], ¶ 15 [alleging that Defendant Belarge "had plaintiff's personal property searched by three officers, one of whom was Holt"]);

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Dkt. No. 37, Part 23, Ex. A at 26-28 [Munkowitz Decl., attaching transcript of deposition of Plaintiff, in which he explains his claim under the Fourth Amendment based on the alleged unjustified search and seizure of his property].)

Currently before the Court is Defendants' motion for summary judgment (Dkt. No. 37), and Plaintiff's motion for partial summary judgment (Dkt. No. 38), both brought pursuant to **Rule 56 of the Federal Rules of Civil Procedure**. Because both motions were filed on the same day (February 11, 2005), and neither was filed in response to the other, I construe each motion as a "motion" and neither motion as a "cross-motion." Both Plaintiff and Defendants have responded to each other's motion (Dkt. Nos. 42, 45), and replied to the other's response (Dkt. Nos. 47, 48).

Generally, Defendants' motion raises six issues: (1) whether Plaintiff has failed to establish (or even state) a First Amendment retaliation claim; (2) whether Plaintiff has failed to state a Fourth Amendment claim, (3) whether Plaintiff has failed to establish (or even state) an Eighth Amendment claim; (4) whether Plaintiff has failed to exhaust his available administrative remedies regarding his Eighth Amendment claim; (5) whether Plaintiff has failed to establish (or even state) a Fourteenth Amendment due process claim; (6) whether Plaintiff has failed to establish (or properly state) a conspiracy claim; and (7) whether Defendants are protected by qualified immunity. (Dkt. No. 37, Part 25 [Defs.' Mem. of Law].)

***2** Generally, Plaintiff's motion raises three issues: (1) whether Plaintiff is entitled to judgment as a matter of law on his First Amendment retaliation claim; (2) whether Plaintiff is entitled to judgment as a matter of law on his Eighth Amendment claim; and (3) whether Plaintiff is entitled to judgment as a matter of law on his Fourteenth Amendment due process claim. (Dkt. No. 38, Part 3 [Plf.'s Mem. of Law].) Although I liberally construe Plaintiff's Amended Complaint as containing a Fourth Amendment claim, I do not liberally construe his motion as requesting judgment as a matter of law on his Fourth Amendment claim, especially given the burden on a movant under the Federal Rules of Civil Procedure. *See Fed.R.Civ.P. 7(b)(1)* (requiring that movants "shall set forth the relief or order sought," and "shall state with particularity the grounds [for the relief requested]").

For the reasons discussed below, I answer each of the six questions posed in Defendants' motion in the affirmative, and I answer each of the three questions posed in Plaintiff's motion in the negative. As a result, I recommend that Defendants' motion for summary judgment be granted and that Plaintiff's motion for partial summary judgment be denied.

I. SUMMARY JUDGMENT STANDARD

Under **Rule 56(e) of the Federal Rules of Civil Procedure**, summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **Fed.R.Civ.P. 56(c)**. In determining whether a genuine issue of material² fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (citation omitted); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990) (citation omitted).

² A fact is "material" only if it would have some effect on the outcome of the suit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

However, when the moving party has met its initial burden of establishing the absence of any genuine issue of material fact, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." **Fed.R.Civ.P. 56(e)**; *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 477 U.S. 574, 585-86 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "A dispute regarding a material fact is *genuine* if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ross v. McGinnis*, 00-CV-0275, 2004 WL 1125177, at *8 (W.D.N.Y. March 29, 2004) [internal quotations omitted] [emphasis added].

Imposed over this general burden-shifting framework is the generous perspective with which the Court must view a *pro se* plaintiff's pleadings. "[I]n actions in which one of the parties appears *pro se*, this Court is faced with the ... responsibility of granting significant liberality in how *pro se* pleadings are construed." *Aziz Zarif Shabazz*

v. *Pico*, 994 F.Supp. 460, 467 (S.D.N.Y.1998); see *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*) (*pro se* pleadings held “to less stringent standards than formal pleadings drafted by lawyers.”); *Ortiz v. Cornetta*, 867 F.2d 146, 148 (2d Cir.1989). For example, where a plaintiff is proceeding *pro se*, and the defendant has filed a dispositive motion, the Court must construe the plaintiff’s complaint and opposition papers liberally so as to raise the strongest arguments that they suggest. See *Weixel v. Bd. of Ed. of City of New York*, 287 F.3d 138, 146 (2d Cir.2002) (motion to dismiss in civil rights case); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994) (motion for summary judgment in civil rights case); *Thomas v. Irving*, 981 F.Supp. 794, 799 (W.D.N.Y.1997) (motion for summary judgment in civil rights case).

*3 However, although “[t]he work product of *pro se* litigants should be generously and liberally construed, ... [a *pro se* litigant’s] failure to allege either specific facts or particular laws that have been violated renders [an] attempt to oppose defendants’ motion ineffectual.” *Kadosh v. TRW, Inc.*, 91-CV-5080, 1994 WL 681763, at *5 (S.D.N.Y. Dec. 5, 1994). In other words, “[p]roceeding *pro se* does not otherwise relieve a [party] from the usual requirements to survive a motion for summary judgment .” *Bussa v. Alitalia Line Aeree Italiane S.p.A.*, 02-CV-10296, 2004 WL 1637014, at *4 (S.D.N.Y. July 21, 2004) (citations omitted), accord, *Durran v. Selsky*, 251 F.Supp.2d 1208, 1211 (W.D.N.Y.2003) (citations omitted).

II. STATEMENT OF MATERIAL FACTS

The facts set forth in a defendant’s Rule 7.1(a)(3) Statement of Material Facts will be taken as true to the extent those facts are supported by the evidence in the record³ and are not specifically controverted by the plaintiff.⁴

³ See *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir.2004) (citations omitted).

⁴ See Local Rule 7.1(a)(3) (“Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.”).

To “specifically controvert[]” each of the statements of material fact in a defendant’s Rule 7.1(a)(3) Statement

of Material Facts, a plaintiff must file a *response* to the Statement of Material Facts that “mirror[s] the movant’s Statement of Material Facts by admitting and/or denying each of the movant’s assertions in matching numbered paragraphs” and that “set[s] forth a specific citation to the record where the factual issue arises.”⁵

⁵ Local Rule 7.1(a)(3); see, e.g., *Jones v. Smithkline Beecham Corp.*, 309 F.Supp.2d 343, 346 (N.D.N.Y.2004) (McAvoy, J.) (“[W]here Plaintiff has failed to provide specific references to the record in support of her denials or has otherwise failed to completely deny Defendant’s assertions of fact, those assertions will be taken as true.”); *Lee v. Alfonso*, 97-CV-1741, 2004 U.S. Dist. LEXIS 20746, at *15 (N.D.N.Y. Feb. 10, 2004) (Scullin, C.J.) (“Plaintiff does not offer any facts to support his claims that would raise an issue of fact. Nor has he overcome his failure to respond to Defendants’ Rule 7.1(a)(3) Statement. Therefore, Defendants’ version of the facts remains uncontroverted.”); *Margan v. Niles*, 250 F.Supp.2d 63, 67 (N.D.N.Y.2003) (Hurd, J.) (“Plaintiff’s Rule 7.1(a)(3) statement, which contains numerous denials, does not contain a single citation to the record. Because plaintiff’s response Rule 7.1(a)(3) statement does not comply with the local rules, it has not been considered.”); *Mehlenbacher v. Slafrad*, 99-CV-2127, 2003 U.S. Dist. LEXIS 9248, at *4 (N.D.N.Y. June 4, 2003) (Sharpe, M.J.) (“Since [the plaintiff] has failed to respond to the defendant’s statements of material fact, the facts as set forth in the defendants’ Rule 7.1 Statement ... are accepted as true.”); *Adams v. N.Y. State Thruway Auth.*, 97-CV-1909, 2001 U.S. Dist. LEXIS 3206, at *2, n. 1 (N.D.N.Y. March 22, 2001) (Mordue, J.) (“[T]o the extent plaintiff’s responses violate Local Rule 7.1, and are not properly admitted or denied, the Court will deem defendant’s statement of fact admitted by plaintiff.”); see also *Holtz v. Rockefeller*, 258 F.3d 62, 74 (2d Cir.2001) (“[A] Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.”).

Portions of the record sufficient to create a “factual issue” include affidavits or verified complaints (which are treated as affidavits for purposes of summary judgment).⁶ However, to be sufficient to create a “factual issue,” such an affidavit or verified complaint must, among other things, be based “on personal knowledge.”⁷ An affidavit or verified complaint is not based on personal knowledge

if, for example, it is based on mere “information and belief” or hearsay.⁸

⁶ See *Patterson v. County of Oneida*, 375 F.2d 206, 219 (2d. Cir.2004) (“[A] verified pleading ... has the effect of an affidavit and may be relied upon to oppose summary judgment.”); *Fitzgerald v. Henderson*, 251 F.3d 345, 361 (2d Cir.2001) (holding that plaintiff “was entitled to rely on [his verified amended complaint] in opposing summary judgment”), *cert. denied*, 536 U.S. 922 (2002); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1993) (“A verified complaint is to be treated as an affidavit for summary judgment purposes.”) [citations omitted]; *Fed.R.Civ.P. 56(c)* (“The judgment sought shall be rendered forthwith if the ... affidavits ... show that there is no genuine issue as to any material fact....”).

⁷ *Fed.R.Civ.P. 56(e)* (“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to the matters stated therein.”); *see also U.S. v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir.1995) [citations omitted], *cert. denied sub nom, Ferrante v. U.S.*, 516 U.S. 806 (1995).

⁸ See *Patterson*, 375 F.3d at 219 (“[Rule 56(e)]’s requirement that affidavits be made on personal knowledge is not satisfied by assertions made ‘on information and belief’.... [Furthermore, the Rule]’s requirement that the affiant have personal knowledge and be competent to testify to the matters asserted in the affidavits also means that the affidavit’s hearsay assertion that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial.”); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir.1988) (“[Defendant’s] affidavit states that it is based on personal knowledge *or* upon information and belief.... Because there is no way to ascertain which portions of [Defendant’s] affidavit were based on personal knowledge, as opposed to information and belief, the affidavit is insufficient under Rule 56 to support the motion for summary judgment.”); *Applegate v. Top Assoc., Inc.*, 425 F.2d 92, 97 (2d Cir.1970) (rejecting affidavit made on “suspicion ... rumor and hearsay”); *Spence v. Maryland Cas. Co.*, 803 F.Supp. 649, 664 (W.D.N.Y.1992) (rejecting affidavit made on “secondhand information and hearsay”), *aff’d*, 995 F.2d 1147 (2d Cir.1993).

Similarly, such an affidavit or verified complaint must not be conclusory.⁹ Of course, an affidavit may be conclusory because its assertions are too general.¹⁰ However, even where an affidavit’s assertions are specific (e.g., with respect to time, place, persons, events, conversation, etc.), that affidavit may still be deemed conclusory if it is (1) “largely unsubstantiated by any other direct evidence” and (2) “so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint.”¹¹ Indeed, it has long been the rule in the Second Circuit that “issues of credibility sufficient to defeat a motion for summary judgment are not created if the contradicting or impeaching evidence is too incredible to be believed by reasonable minds.” *Price v. Worldvision Enterprises, Inc.*, 455 F.Supp. 252, 266, n. 25 (S.D.N.Y.1978), *aff’d without opinion*, 603 F.2d 214 (2d Cir.1979).

⁹ See *Fed.R.Civ.P. 56(e)* (requiring that non-movant “set forth specific facts showing that there is a genuine issue for trial”); *Patterson*, 375 F.3d at 219 (2d. Cir.2004) (“Nor is a genuine issue created merely by the presentation of assertions [in an affidavit] that are conclusory.”) [citations omitted]; *Applegate*, 425 F.2d at 97 (stating that the purpose of Rule 56[e] is to “prevent the exchange of affidavits on a motion for summary judgment from degenerating into mere elaboration of conclusory pleadings”).

¹⁰ See, e.g., *Bickerstaff v. Vassar Oil*, 196 F.3d 435, 452 (2d Cir.1998) (McAvoy, C.J., sitting by designation) (“Statements [for example, those made in affidavits, deposition testimony or trial testimony] that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.”) [citations omitted]; *West-Fair Elec. Contractors v. Aetna Cas. & Sur.*, 78 F.3d 61, 63 (2d Cir.1996) (rejecting affidavit’s conclusory statements that, in essence, asserted merely that there was a dispute between the parties over the amount owed to the plaintiff under a contract); *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir.1985) (plaintiff’s allegation that she “heard disparaging remarks about Jews, but, of course, don’t ask me to pinpoint people, times or places.... It’s all around us” was conclusory and thus insufficient to satisfy the requirements of Rule 56[e]), *cert. denied*, 474 U.S. 829 (1985); *Applegate*, 425 F.2d at 97 (“[Plaintiff] has provided the court [through his affidavit] with the characters and plot line for a novel of intrigue rather than the

concrete particulars which would entitle him to a trial.”).

11 See, e.g., *Jeffreys v. City of New York*, 426 F.3d 549, 554-555 (2d Cir.2005) (affirming grant of summary judgment to defendants in part because plaintiff's testimony about an alleged assault by police officers was “largely unsubstantiated by any other direct evidence” and was “so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint”) [citations and internal quotations omitted]; *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir.1986) (affirming grant of summary judgment to defendants in part because plaintiffs' deposition testimony regarding an alleged defect in a camera product line was, although specific, “unsupported by documentary or other concrete evidence” and thus “simply not enough to create a genuine issue of fact in light of the evidence to the contrary”); *Allah v. Greiner*, 03-CV-3789, 2006 WL 357824, at *3-4 & n. 7, 14, 16, 21 (S.D.N.Y. Feb. 15, 2006) (prisoner's verified complaint, which recounted specific statements by defendants that they were violating his rights, was conclusory and discredited by the evidence, and therefore insufficient to create issue of fact with regard to all but one of prisoner's claims, although verified complaint was sufficient to create issue of fact with regard to prisoner's claim of retaliation against one defendant because retaliatory act occurred on same day as plaintiff's grievance against that defendant, whose testimony was internally inconsistent and in conflict with other evidence); *Olle v. Columbia Univ.*, 332 F.Supp.2d 599, 612 (S.D.N.Y.2004) (plaintiff's deposition testimony was insufficient evidence to oppose defendants' motion for summary judgment where that testimony recounted specific allegedly sexist remarks that “were either unsupported by admissible evidence or benign”), aff'd, 136 Fed. Appx. 383 (2d Cir.2005) (unreported decision).

*4 Here, Defendants have a filed Rule 7.1 Statement of Material Facts, and supporting affidavits and exhibits. (Dkt. No. 37, Parts 2-25.) Plaintiff has filed a response to Defendants' Rule 7.1 Statement. (Dkt. No. 42, Part 1.) In addition, Plaintiff has filed (1) declarations and exhibits in opposition to the affidavits of Defendants Woods, Belarge, Holt, Antonelli, and Holden (Dkt. No. 42, Parts 1, 3), and (2) a verified Amended Complaint (Dkt. No. 5). Finally, because Plaintiff is proceeding *pro se* and this is a civil rights action, I will consider, in evaluating

Plaintiff's response to Defendants' motion for summary judgment, Plaintiff's declaration and exhibits in support of his motion for partial summary judgment. (Dkt. No. 38, Parts 1, 4.)

I address Plaintiff's responsive documents in more detail below. However, a few general observations are appropriate here. Plaintiff's Rule 7.1 Response contains hardly any citations to the record, much less any citations to admissible evidence; rather, to the extent that Plaintiff's Rule 7.1 Response contains any citations at all, those citations are often to other portions of Plaintiff's Response or to his Amended Complaint (which are, themselves, conclusory), or to exhibits that do not support his denial of the fact asserted. Moreover, his Declarations and verified Amended Complaint are often argumentative in nature (in violation of Local Rule 7.1[a][2]) and not based on personal knowledge (but only hearsay or pure speculation). Finally, his Declarations and verified Amended Complaint are often conclusory and replete with inconsistencies and improbabilities.

For example, he asserts that “[a]t no time did [he] possess[] [Inmate Alcivar's] legal materials other than [the times when he and Inmates Lipman and Robles approached Defendant Holt with such materials].”¹² However, his own letters and deposition testimony contain repeated representations that he was, at other times, in possession of such materials.¹³

12 (Dkt. No. 42, Part 1, ¶ 7 [Plf.'s Response to Woods Aff.].)

13 (See, e.g., Dkt. No. 37, Part 22, Ex. A at 31 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he testifies that, when Defendant Holt failed to take “control” of Inmate Alcivar's legal documents, Defendant Holt left Plaintiff “stuck with them as well as the other two inmates”], 31-32 [admitting that he did not return the documents to the law clerk's work station in the law library out of a fear that the document may fall into another inmate's hands], 32 [admitting that he took the documents to “honor” Inmate Alcivar's “wishes”], 33 [admitting that he took the documents after Inmate Alcivar's death based on his belief that “they were not supposed to be in the law library after the inmate was deceased”]; Dkt. No. 37, Part 18, Ex. B at 6-9 [Antonelli Aff., attaching letter dated 7/4/02 from Plaintiff, in which he states, “There is [sic] two inmates

that Peter trusted with his papers and other legal documents, that is one inmate that housed [sic] in the same dorm as him and myself.... Peter told me that you have copies of all his papers, those of which are the same as the papers *I have here*"; Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter from Plaintiff, in which he states, "I am going to *hold a copy of the complaint*" in Inmate Alcivar's federal civil rights action]; Dkt. No. 37, Part 7 [Ex. C to Woods Aff., attaching Plaintiff's 8/5/02 letter, in which he states, "in the future if anything should come of a matter of said documents *being in my possession* ... you and the administration cannot take any action against the inmate's family nor myself"] [emphasis added].)

Similarly, he asserts that the documents allegedly discovered by Defendant O'Donnell in Plaintiff's "cube" on August 31, 2002, were in fact "the exact same materials intercepted by Woods through the U.S. mail."¹⁴ However, those documents contained copies of two letters-dated July 4, 2002, and July 16, 2002-from Plaintiff to Inmate Alcivar's two daughters.¹⁵ Plaintiff offers no explanation as to why Inmate Alcivar's daughters would be returning copies of those letters to Plaintiff between August 19, 2006, and August 31, 2002-the time period during which Defendant Woods allegedly intercepted Plaintiff's mail.¹⁶

¹⁴ (Dkt. No. 42, Part 1, ¶ 5.B. [Plf.'s Response to Antonelli Aff.].)

¹⁵ (Dkt. No. 37, Part 18 at 6-8, 10-12 [Ex. B to Antonelli Aff., attaching contraband allegedly found in Plaintiff's "cube"]).

¹⁶ (Dkt. No. 5, ¶ 12 [Am. Compl.].)

Generally, I find such assertions by Plaintiff to be too incredible to be believed by reasonable minds.

Accordingly, the following material facts, even when viewed most favorably to Plaintiff, are supported by evidence in the record, and are not specifically controverted by Plaintiff:

Background

1. From July of 2002 until November of 2002 (the time period relevant to the allegations contained in Plaintiff's Amended Complaint), Plaintiff was an inmate in the

care and custody of the New York State Department of Correctional Services ("DOCS"), incarcerated at the Greene Correctional Facility ("Greene C.F.").¹⁷

¹⁷ (Dkt. No. 37, Part 2, ¶ 2 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 2 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, ¶ 4 [Am. Compl.].)

*5 At all times relevant to this action, Defendant Robert K. Woods was the Deputy Superintendent for Security at Greene C.F.; Defendant Joseph R. Belarge was a Captain at Greene C.F.; Defendant G.J. O'Donnell was a Sergeant at Greene C.F.; Defendant Richard Antonelli was a Food Services Administrator at Greene C.F.; and Defendant Wayne Holt was a Corrections Officer at Greene C.F.¹⁸

¹⁸ (Dkt. No. 37, Part 2, ¶¶ 4-8 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶¶ 4-8 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, ¶¶ 3, 3(a), 3(b), 3(c) [Am. Compl.].)

Plaintiff's Legal Assistance to Inmate Peter Alcivar and Communications with Inmate Alcivar's Daughters

3. At some point in 2001, Inmate Peter Alcivar filed a civil rights action against DOCS and employees of Greene C.F. and Woodbourne C.F. in the United States District Court for the Northern District of New York (civil action number 9:01-CV-1198).¹⁹

¹⁹ (Dkt. No. 42, Part 1, ¶ 12 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, "Facts of the Incident," ¶¶ 1-3 [Am. Compl.]; Dkt. No. 37, Part 18, Ex. B at 18-37 [Antonelli Aff., attaching pleading and motion from lawsuit].)

4. On or about May 7, 2002, Plaintiff provided legal assistance to Inmate Alcivar by answering a question regarding an affidavit.²⁰ At the time, Plaintiff was not an inmate law clerk.²¹

²⁰ (Dkt. No. 37, Part 2, ¶ 12 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 12 [Plf.'s Rule 7.1 Response, admitting that, on one occasion, Plaintiff answered a question posed by Inmate Alcivar regarding an affidavit, which question and answer were communicated with the help of Inmate Law Clerk George Robles]; Dkt. No. 5, "Facts of the

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Incident," ¶ 2 [Am. Compl.]; Dkt. No. 37, Part 18 [Ex. B. to Antonelli Aff.].)

21 (Dkt. No. 37, Part 2, ¶ 13 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 13 [Plf.'s Rule 7.1 Response].)

5. On or about May 10, 2002, Inmate Alcivar was admitted to Albany Medical Center to receive treatment for [cancer](#).²²

22 (Dkt. No. 1, "Facts of the Incident," ¶ 1 [Am. Compl.]; Dkt. No. 42, Part 1, ¶ 6 [Plf.'s Response to Antonelli Aff.], asserting that Inmate Alcivar was "admitted to Albany Medical Center Hospital three days after Robles asked plaintiff the question [about] an affidavit and its contents").

6. On or about July 4, 2002, Plaintiff wrote and sent a letter to Inmate Alcivar's two daughters about Inmate Alcivar's pending federal civil rights action.²³ In pertinent part, the letter stated,

23 (Dkt. No. 37, Part 18, Ex. B at 6-9 [Antonelli Aff., attaching letter dated 7/4/02 from Plaintiff to Raida and Raisa Alcivar, and letter dated 6/24/02]; Dkt. No. 37, Part 23, Ex. A at 79-80 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which Plaintiff admits having written and sent the letter dated 7/4/02].)

I am writing to inform you of my assistance to Peter [Alcivar] in the above referenced matter [case number 9:01-CV-1198] where he has a Section 1983 of the U.S.C.A. Civil Rights complaint against the Department of Correctional Services now pending in the United States District Court for the Northern District of New York; that is if he (Peter) hasn't already told both of you that I am helping him with the filing of his motions, etc....

Getting right to the point for the purpose of writing you, and letting you know what is going on with Peter's case. There is [sic] two inmates that Peter trusted with his papers and other legal documents, that is one inmate that housed [sic] in the same dorm as him and myself....

I have already wrote [sic] to the court on June 24, 2002, informing said court as to Peter's current situation.... See copy of the *letter addressed to the court* ... enclosed with this letter I am writing you....

Peter told me that you have copies of all his papers, those of which are the same as the papers I have here....

[I]f you wish ... you all could come to the facility to see me, I would then go over the case with all of you, tell all of you what I know from Peter, the research that I have done for him and the list of cases of authority that I have and would cite in his motions and use at trial; I also could give you all of his legal documents right there....

Both of you should ... let Peter know that he should not worry about the case, it is not going to be dismissed ... because I already wrote to the court for him.²⁴

24 (Dkt. No. 37, Part 18, Ex. B at 6-9 [Antonelli Aff., attaching letter dated 7/4/02 from Plaintiff to Raida and Raisa Alcivar, and letter dated 6/24/02].)

7. On or about July 6, 2002, Inmate Alcivar died at Albany Medical Center.²⁵

25 (Dkt. No. 37, Part 2, ¶ 11 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 11 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, "Facts of the Incident," ¶ 3 [Am. Compl.].)

*6 8. On or about July 16, 2002, Plaintiff wrote and sent a second letter to Alcivar's two daughters.²⁶ In pertinent part, the letter states: "The box containing the legal documents should be following this letter, I am going to hold a copy of the complaint so if you should find a lawyer he or she could visit me at the facility and go over the facts the claim is based on."²⁷ In addition, the last page of the letter states:

26 (Dkt. No. 37, Part 2, ¶ 18 [Defs.' Rule 7.1 Statement, asserting that Plaintiff wrote and sent the letter and memorandum]; Dkt. No. 42, Part 1, ¶ 18 [Plf.'s Rule 7.1 Response, not specifically denying that Plaintiff wrote and sent the letter and memorandum]; Dkt. No. 37, Part 16, ¶ 9 [Antonelli Aff.]; Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter, the last page of which refers to an attached "To/From" memorandum]; Dkt. No. 37, Part 23, Ex. A at 81-82 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which he admitted writing and sending the letter and memorandum].)

27 (Dkt. No. 37, Part 18, Ex. B at 10 [Antonelli Aff., attaching 7/16/02 letter].)

NOTE: Read the "TO/From" memo form note that I made up, get it notarize [sic] and sign it in front of the

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notary public. Make a copy for your files and send me the *original*.

It is an idea to have that note in my files so non [sic] of the officers and staff members would ask what I am doing with Mr. Alcivar [sic] legal documents if he is no longer here. By doing the above your [sic] are giving me consent to have said documents in my possession.²⁸

²⁸ (Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter, the last page of which refers to an attached “To/From” memorandum].)

9. On or about August 8, 2002, Plaintiff wrote and sent a third letter to Alcivar's two daughters.²⁹ In pertinent part, the letter states: “Please send me that ‘To/From’ note if you already have it notarized, I told you I need it for the copy of the complaint I told you that I would hold....”

²⁹ (Dkt. No. 37, Part 16, ¶ 9 [Antonelli Aff.]; Dkt. No. 37, Part 18, Ex. B at 13 [Antonelli Aff., attaching 8/8/02 letter]; Dkt. No. 37, Part 23, Ex. A at 81-82 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which he admitted writing and sending the letter].)

Plaintiff's Communications with Defendant Woods and the Search of Plaintiff's Prison Cell (or “Cube”)

10. On or about July 16, 2002, Plaintiff wrote and sent a note to Defendant Woods.³⁰ The note stated: “Please be advised that I need to talk to you in reference to the above subject inmate [i.e., Inmate Alcivar] which is a matter of importance. This must be in person at your earliest convenience. Thank you for your professional attention to this request.”³¹

³⁰ (Dkt. No. 37, Part 3, ¶ 3 [Woods Aff.]; Dkt. No. 37, Part 4, Ex A [Woods Aff.]; Dkt. No. 37, Part 2, ¶ 20 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 20 [Plf.'s Rule 7.1 Response, admitting fact].)

³¹ (Dkt. No. 37, Part 4, Ex A [Woods Aff.].)

11. On or about July 21, 2002, Plaintiff wrote and sent a second note to Defendant Woods.³² The note stated: “Please note that on the above subject date [i.e., July 16, 2002] I wrote to you requesting to see you. I must speak

to you before July 23, 2002. This matter is very important. Thank you for your attention.”³³

³² (Dkt. No. 37, Part 3, ¶ 3 [Woods Aff.]; Dkt. No. 37, Part 5 [Ex. B to Woods Aff.]; Dkt. No. 37, Part 2, ¶ 20 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 20 [Plf.'s Rule 7.1 Response, admitting fact].)

³³ (Dkt. No. 37, Part 5 [Ex. B to Woods Aff.].)

12. Defendant Woods did not respond to Plaintiff's notes for two reasons: (1) Defendant Woods did not receive either of the two notes until after the date referenced by Plaintiff (i.e., July 23, 2002) had passed; and (2) Defendant Woods believed that Plaintiff's notes were “cryptic.”³⁴

³⁴ (Dkt. No. 37, Part 3, ¶¶ 4-5 [Woods Aff.]; Dkt. No. 37, Part 2, ¶ 21 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 21 [Plf.'s Rule 7.1 Response, not specifically controverting either that Defendant Woods did not receive the notes until after July 23, 2003, or that Defendant Woods believed the notes to be “cryptic”]; Dkt. No. 37, Part 8, Ex. D [Woods Aff., attaching Defendant Woods' 8/6/02 memorandum to Plaintiff stating that Plaintiff's two notes were “brief and very vague” and lacked “specifics”].)

13. On or about August 5, 2002, Plaintiff wrote and sent a third note to Deputy Superintendent Woods.³⁵ The note stated, in pertinent part:

³⁵ (Dkt. No. 37, Part 3, ¶ 6 [Woods Aff.]; Dkt. No. 37, Part 7, Ex. C [Woods Aff., attaching note]; Dkt. No. 37, Part 2, ¶ 22 [Defs.' Rule 7.1 Statement, asserting that Plaintiff wrote and sent note]; Dkt. No. 42, Part 1, ¶ 22 [Plf.'s Rule 7.1 Response, not specifically controverting that Plaintiff wrote and sent note].)

Please take notice that since you have neglected to answer the above two (2) requests [i.e., dated July 16, 2002, and July 21, 2002] to meet with me about a very serious matter concerning a <DEAD> man's legal documents, in the future if anything should come of a matter of said documents being in my possession or the inmate's family should have any questions of same and I answer those questions according to law, you and the administration cannot take any action against the inmate's family nor myself.³⁶

³⁶ (Dkt. No. 37, Part 7 [Ex. C to Woods Aff.].)

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*7 14. On or about August 6, 2002, Defendant Woods sent a memorandum to Plaintiff.³⁷ That memorandum stated, in pertinent part:

37 (Dkt. No. 37, Part 3, ¶ 6 [Woods Aff., asserting that he sent this memorandum]; Dkt. No. 42, Part 1, ¶ 6 [Plf.'s Response to Woods Aff., admitting that Defendant Woods sent Plaintiff this memorandum]; Dkt. No. 37, Part 8, Ex. D [Woods Aff., attaching the memorandum].)

Your August 5th letter ... makes reference to legal documents belonging to deceased Inmate Alcivar.... I have directed Law Library Officer Holt to speak to you and recover from you any legal documents of deceased Inmate Alcivar.... In fact, you should have turned over any such documents to Law Library Officer Holt immediately.³⁸

38 (Dkt. No. 37, Part 7, Ex. D [Woods Aff., attaching the 8/6/02 memorandum].)

15. On August 7, 2002, Plaintiff received Defendant Woods' memorandum.³⁹

39 (Dkt. No. 5, "Facts of the Incident," ¶ 11 [Plf.'s Am. Compl.].)

16. Meanwhile, on or about August 5, 2002, Defendant Holt asked Plaintiff for Inmate Alcivar's legal documents.⁴⁰ Plaintiff denied having such documents.⁴¹

40 (Dkt. No. 37, Part 2, ¶ 24 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 24 [Plf.'s Rule 7.1 Response, not specifically controverting fact]; Dkt. No. 37, Part 29, ¶ 7 [Holt Aff.]; Dkt. No. 5, "Facts of the Incident," ¶ 10 [Plf.'s Am. Compl.].)

41 (Dkt. No. 37, Part 2, ¶ 24 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 24 [Plf.'s Rule 7.1 Response, not specifically controverting that Plaintiff denied to Defendant Holt having Inmate Alcivar's legal documents, only citing to Paragraph 12 of Plaintiff's Rule 7.1 Response, which is not material to the asserted fact]; Dkt. No. 37, Part 29, ¶ 7 [Holt Aff.].)

17. As a result, at some point between August 5, 2002, and August 31, 2002, Defendant Woods directed Defendant Belarge to have Plaintiff's cell (or "cube") searched and to interview Plaintiff about his statements made in his August 5, 2002, note.⁴²

42 (Dkt. No. 37, Part 3, ¶¶ 8, 9 [Woods Aff.]; Dkt. No. 37, Part 8, ¶ 3 [Belarge Aff.]; Dkt. No. 37, Part 2, ¶ 25 [Defs.' Rule 7.1 Statement, asserting that Defendant Woods directed Defendant Belarge to have Plaintiff's cell searched]; Dkt. No. 42, Part 1, ¶ 24 [Plf.'s Rule 7.1 Response, admitting that Defendant Woods directed Defendant Belarge to have Plaintiff's "cube" searched].)

18. At some point on August 31, 2002 (apparently between 8:30 a.m. and 11:00 a.m.), Defendant Belarge had Plaintiff's cell (or "cube") searched by Defendant O'Donnell (and apparently Defendant Holt and two other corrections officers).⁴³ At some point (apparently during this search), Defendant O'Donnell discovered Inmate Alcivar's legal documents (as well as various correspondence between Plaintiff and Inmate Alcivar's two daughters).⁴⁴

43 (Dkt. No. 37, Part 8, ¶ 4 [Belarge Aff.]; Dkt. No. 37, Part 2, ¶¶ 25-26 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶¶ 25-26 [Plf.'s Rule 7.1 Response]; Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching misbehavior report which suggests that Defendants Belarge and O'Donnell had in their possession Inmate Alcivar's legal documents as well as various correspondence between Plaintiff and Inmate Alcivar's two daughters, before those Defendants interviewed Plaintiff at 11:00 a.m. on August 31, 2002]; Dkt. No. 5, "Facts of the Incident," ¶¶ 13-14 [Plf.'s Am. Compl.], stating that Defendant Belarge had in his possession a letter that Plaintiff had written to Raisa Alcivar by the time he interviewed Plaintiff at 10:57 a.m. on August 31, 2002].)

44 (Dkt. No. 37, Part 2, ¶ 26 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 26 [Plf.'s Rule 7.1 Response, not citing any admissible evidence in support of his denial of this fact]; Dkt. No. 37, Part 8, ¶ 4 [Belarge Aff.]; Dkt. No. 37, Part 3, ¶ 10 [Woods Aff.]; Dkt. No. 37, Part 16, ¶ 5 [Antonelli Aff.]; Dkt. No. 37, Part 18, Ex. B [Antonelli Aff., attaching documents discovered in Plaintiff's cell, and "Chain of Custody" Record indicating that Defendant O'Donnell was the one who found the documents]; Dkt. No. 38, Part 4 at 90 [exhibit to Plaintiff's motion for summary judgment, attaching Contraband Receipt issued by Defendant O'Donnell]; Dkt. No. 37, Part 22, Ex. A at 31-33 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he admits numerous times that,

after Defendant Holt failed to take “control” of Inmate Alcivar’s legal documents, Plaintiff, along with two other inmates, retained possession of those documents, out of a fear that those documents would be stolen by another inmate, and out of a sense of duty to Inmate Alcivar]; Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter from Plaintiff, in which he states, “I am going to hold a copy of the complaint” in Inmate Alcivar’s federal civil rights action]; Dkt. No. 37, Part 7 [Ex. C to Woods Aff., attaching Plaintiff’s 8/5/02 letter, in which he states, “in the future if anything should come of a matter of said documents being in my possession ... you and the administration cannot take any action against the inmate’s family nor myself”]; *see also* Dkt. No. 37, Part 19, ¶ 3 [Holden Aff., testifying that at some point in the summer of 2002 Plaintiff told Holden that he was helping an inmate who had been taken to the hospital due to an illness]; Dkt. No. 45, Part 6, ¶¶ 4-5 [Belarge Reply Aff., swearing that evidence in question did not come from any interception of Plaintiff’s mail, but from Plaintiff’s personal belongings].)

19. At approximately 11:00 a.m. on August 31, 2002, Defendants Belarge and O’Donnell interviewed Plaintiff about his statements in his August 5, 2002, note to Defendant Woods.⁴⁵ At approximately 2:50 p.m. on August 31, 2002, Defendant O’Donnell stored Inmate Alcivar’s legal documents (as well as various correspondence between Plaintiff and Inmate Alcivar’s two daughters) in an evidence locker at Greene C.F.⁴⁶

⁴⁵ (Dkt. No. 37, Part 2, ¶ 28 [Defs.’ Rule 7.1 Statement, asserting that interview took place]; Dkt. No. 42, Part 1, ¶ 28 [Plf.’s Rule 7.1 Response, admitting that interview took place despite his blanket statement “Deny”]; Dkt. No. 37, Part 8, ¶ 5 [Belarge Aff.]; Dkt. No. 5, “Facts of the Incident,” ¶¶ 13-15 [Plf.’s Am. Compl., stating that interview took place at 10:57 a.m. on 8/31/02]; Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching 8/31/02 misbehavior report, stating that the interview took place at 11:00 a.m. on 8/31/02].)

⁴⁶ (Dkt. No. 37, Part 18, Ex. B [Antonelli Aff., attaching documents discovered in Plaintiff’s cell, and “Chain of Custody” Record indicating that Defendant O’Donnell stored the documents in an evidence locker at 2:50 p.m. on 8/31/02]; Dkt. No. 37, Part 17, Ex. A at 2 [Antonelli Aff., attaching 8/31/02 misbehavior report, stating that Defendant

O’Donnell stored the documents in an evidence locker on 8/31/02].)

Plaintiff’s Misbehavior Report, Disciplinary Hearing, and Appeal

20. Relying on the documents discovered and the subsequent interview conducted, Defendants Belarge and O’Donnell issued Plaintiff a misbehavior report on August 31, 2002.⁴⁷ The misbehavior report charged Plaintiff with three offenses: (1) providing legal assistance to Inmate Alcivar without prior authorization in violation of Inmate Rule 180.17; (2) exchanging legal materials with Inmate Alcivar without authorization in violation of Inmate Rule 113.15; and (3) soliciting materials from Inmate Alcivar’s family members without authorization in violation of Inmate Rule 103.20.⁴⁸

⁴⁷ (Dkt. No. 37, Part 8, ¶ 6 [Belarge Aff.]; Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching 8/31/02 misbehavior report].)

⁴⁸ (Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching 8/31/02 misbehavior report]; Dkt. No. 37, Part 2, ¶ 29 [Defs.’ Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 29 [Plf.’s Response, admitting receipt of the misbehavior report, and not specifically denying that he was charged with the three offenses stated in Defendants’ assertion of fact].)

21. During the time period at issue (i.e., May through August of 2002), Rule 180.17 of DOCS’ Standards of Inmate Behavior prohibited inmates from providing legal assistance to other inmates without prior approval from the Superintendent or his designee;⁴⁹ Rule 113.15 of DOCS’ Standards of Inmate Behavior prohibited inmates from exchanging personal property (such as legal materials) with other inmates without authorization;⁵⁰ and Rule 103.20 of DOCS’ Standards of Inmate Behavior prohibited inmates from requesting or soliciting goods or services from any person other than an immediate family member without the consent or approval of the Superintendent or his designee.⁵¹

⁴⁹ (Dkt. No. 37, Part 16, ¶ 7 [Antonelli Aff.]; Dkt. No. 37, Part 2, ¶ 14 [Defs.’ Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 14 [Plf.’s Response, not denying this fact, only asserting that he received

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permission to assist Inmate Alcivar from Defendant Holt.) *See also* 7 N.Y.C.R.R. § 270.02[B][26][vii].

50 (Dkt. No. 37, Part 3, ¶ 7 [Woods Aff.]; Dkt. No. 37, Part 16, ¶ 8 [Antonelli Aff.]; Dkt. No. 37, Part 2, ¶ 10 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 10 [Plf.'s Response, admitting this fact].) *See also* 7 N.Y.C.R.R. § 270.02[B][14][v].

51 (Dkt. No. 37, Part 16, ¶ 9 [Antonelli Aff.]; Dkt. No. 37, Part 2, ¶ 19 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 19 [Plf.'s Response, not specifically denying this fact, only denying that he indeed requested or solicited "goods or services" from Inmate Alcivar's daughters].) *See also* 7 N.Y.C.R.R. § 270.02[B][4][iii].

*8 22. On September 6, 2002, Plaintiff received a disciplinary hearing, conducted by Defendant Antonelli.⁵² Defendant Antonelli found Plaintiff guilty of all three charges, and imposed the following penalties: 90 days in S.H.U., 90 days loss of packages privileges, 90 days loss of commissary privileges, 90 days loss of telephone privileges, and three months loss of "good time" credits.⁵³ In reaching his finding of guilt, Defendant Antonelli relied on (1) the assertions by Defendants Belarge and O'Donnell in Plaintiff's misbehavior report that Plaintiff had made certain admissions to them during an interview, (2) Defendant Antonelli's belief that Plaintiff had made certain admissions in his correspondence to Inmate Alcivar's daughters, and (3) Defendant Antonelli's understanding that certain legal materials belonging to Inmate Alcivar had been found in Plaintiff's cell (or "cube").⁵⁴

52 (Dkt. No. 37, Part 2, ¶ 30 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 30 [Plf.'s Response, admitting this fact].)

53 (Dkt. No. 37, Part 2, ¶ 31 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 31 [Plf.'s Response, admitting this fact].)

54 (Dkt. No. 37, Part 16, ¶¶ 4-6, 11 [Antonelli Aff., asserting this fact]; Dkt. No. 42, Part 1, ¶¶ 4-6, 11 [Plf.'s Response to Antonelli Aff., admitting part of this fact, not specifically controverting the rest of this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 38, Part 4 at 43-44 [exhibit to Plaintiff's motion for summary judgment, attaching Defendant Antonelli's written hearing decision]; Dkt. No. 5,

¶ 17 [Am. Compl., acknowledging that Defendant Antonelli had, in reaching his decision, relied on, among other things, Plaintiff's misbehavior report and various letters between Plaintiff and Inmate Alcivar's daughters].)

23. Also on September 6, 2002, Plaintiff appealed Defendant Antonelli's disciplinary decision to Donald Seksky, Director of DOCS' Special Housing/Inmate Disciplinary Program, who affirmed that decision on October 28, 2002.⁵⁵ Plaintiff's appeal did not complain about any lack or denial of witnesses at his disciplinary hearing; similarly, Mr. Selby's appellate decision did not address such a complaint.⁵⁶

55 (Dkt. No. 37, Part 2, ¶ 32 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 32 [Plf.'s Response, admitting this fact]; Dkt. No. 42, Part 23 at 46-48 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he discusses the appeal]; Dkt. No. 38, Part 3 at 46, 68 [exhibits to Plaintiff's motion for summary judgment, attaching his appeal and Mr. Selsky's affirmation].)

56 (Dkt. No. 42, Part 23 at 46-48 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he discusses his one-page appeal and acknowledges that it did not complain about any lack or denial of witnesses]; Dkt. No. 38, Part 3 at 46, 68 [exhibits to Plaintiff's motion for summary judgment, attaching his appeal and Mr. Selsky's affirmation].)

24. On October 24, 2002, Greene C.F. officials conducted a discretionary review of Plaintiff's SHU sentence.⁵⁷ Based upon this review, Plaintiff's SHU time was reduced from 90 days to 75 days.⁵⁸ However, Plaintiff's good time loss was unaffected by the discretionary review.⁵⁹

57 (Dkt. No. 37, Part 2, ¶ 31 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 31 [Plf.'s Response, admitting part of this fact, not specifically controverting the rest of this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 8, ¶ 8 [Belarge Aff.].)

58 (*Id.*)

59 (*Id.*)

Meetings Between Defendants Woods, Belarge and O'Donnell

25. At some point between August 5, 2002, and August 31, 2002, Defendant Woods met with Defendant Belarge to discuss Plaintiff.⁶⁰ Defendant Belarge then met with Defendant O'Donnell to discuss Plaintiff.⁶¹

⁶⁰ (Dkt. No. 37, Part 2, ¶ 37 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 37 [Plf.'s Response, not specifically controverting this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 3, ¶¶ 9, 13 [Wood Aff.]; Dkt. No. 37, Part 8, ¶¶ 3, 9 [Belarge Aff.]; Dkt. No. 42, Part 23 at 35-37 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, asserting that such a meeting took place between Defendants Woods and Belarge at some point].)

⁶¹ (Dkt. No. 37, Part 2, ¶ 38 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 38 [Plf.'s Response, admitting this fact]; Dkt. No. 37, Part 8, ¶ 9 [Belarge Aff.]; Dkt. No. 42, Part 22 at 35-37 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, asserting that such a meeting took place between Defendants Belarge and O'Donnell at some point].)

26. Both meetings (which were held *prior* to the issuance of Plaintiff's misbehavior report on August 31, 2002) were held according to standard procedure at Greene C.F.⁶² Specifically, the purpose of the meetings was to discuss how to investigate whether Plaintiff had violated prison rules.⁶³

⁶² (Dkt. No. 37, Part 2, ¶ 39 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 39 [Plf.'s Response, not specifically controverting that the pre-misbehavior report meeting between Defendants Woods and Belarge, and the pre-misbehavior report meeting between Defendants Belarge and O'Donnell, were held according to standard procedure at Greene C.F., and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 3, ¶ 13 [Wood Aff.]; Dkt. No. 37, Part 8, ¶ 9 [Belarge Aff.]; Dkt. No. 37, Part 19, ¶ 2 [Holden Aff., disclaiming any knowledge about an alleged unlawful

meeting between Defendants Woods, Belarge, and O'Donnell concerning Plaintiff].)

⁶³ (Dkt. No. 37, Part 2, ¶¶ 37-39 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶¶ 37-39 [Plf.'s Response, not specifically controverting this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 3, ¶ 13 [Wood Aff.]; Dkt. No. 37, Part 8, ¶¶ 3, 9 [Belarge Aff.]; Dkt. No. 37, Part 19, ¶ 2 [Holden Aff., disclaiming any knowledge about an alleged unlawful meeting between Defendants Woods, Belarge, and O'Donnell concerning Plaintiff].)

Plaintiff's Bunk(s) in SHU

27. As a result of his disciplinary conviction, Plaintiff was housed in Greene C.F.'s SHU from approximately September 6, 2002, to November 21, 2002.⁶⁴

⁶⁴ (Dkt. No. 5, ¶¶ 26, 37 [Am. Comp.]; Dkt. No. 37, Part 23, Ex. A at 57-58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition]; Dkt. No. 42, Part 1, ¶ 43 [Plf.'s Rule 7.1 Response, stating, "Plaintiff left S-Block November 21, 2002...."].)

28. At no point (either during or after the above-described time period) did Plaintiff file any written grievances, or submit any letters of complaint, about an alleged defect in any of the bunk beds that he was assigned while in SHU.⁶⁵

⁶⁵ (Dkt. No. 37, Part 2, ¶ 41 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 41 [Plf.'s Response, not specifically controverting this fact]; Dkt. No. 37, Part 23, Ex. A at 58-62 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he acknowledged this fact]; Dkt. No. 48, Part 6 [Belin Aff.].)

29. On February 8, 2005, Defendant Belarge had photographs taken of the bunk beds that Plaintiff was assigned while he was in SHU; and on April 22, 2005, Defendant Belarge had photographs taken of the other bunk beds that Plaintiff suggests he may have been assigned.⁶⁶ Those photographs are made part of the record at Exhibit A to the February 10, 2005, Affidavit of Defendant Belarge, and at Exhibits A and B to the April 29, 2005, Affidavit of Kenneth Scattergood.⁶⁷ Between September 6, 2002, and February 10, 2005, there was

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no record of any repairs made to any of the bunk beds that Plaintiff was assigned while in SHU; and between September 6, 2002, and April 22, 2005, there was no record of any repairs made to any of the other bunk beds that Plaintiff suggests he may have been assigned while in SHU.⁶⁸

⁶⁶ (Dkt. No. 37, Part 2, ¶ 42 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 42 [Plf.'s Rule 7.1 Response, not specifically controverting this fact, and in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 8, ¶¶ 11-12 [Belarge Aff.]; Dkt. No. 37, Parts 9-12 [Ex. A to Belarge Aff., attaching photographs]; Dkt. No. 48, Parts 4, 8-17 [Defs.' reply affidavits and exhibits, attaching photographs].)

⁶⁷ (Dkt. No. 37, Part 8, ¶¶ 11-12 [Belarge Aff.]; Dkt. No. 37, Parts 9-12 [Ex. A to Belarge Aff., attaching photographs]; Dkt. No. 48, Parts 4, 8-17 [Defs.' reply affidavits and exhibits, attaching photographs].)

⁶⁸ (Dkt. No. 37, Part 2, ¶ 43 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 43 [Plf.'s Rule 7.1 Response, not specifically controverting this fact, and in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 8, ¶¶ 13-14 [Belarge Aff.]; Dkt. No. 37, Parts 13-15, Ex. B [Belarge Aff., attaching work orders]; Dkt. No. 48, Parts 4-5 [Defs.' reply affidavit and exhibits, attaching work orders].)

III. ANALYSIS

A. Whether Plaintiff Has Failed to Establish (or Even State) a First Amendment Retaliation Claim

*9 In their memorandum of law, Defendants argue that Plaintiff has failed to establish (or even state) a First Amendment retaliation claim against Defendant Antonelli because (1) he fails to establish that he had been engaging in speech or conduct that is protected by the First Amendment, and (2) in any event, he fails to establish a causal link between that protected activity and any adverse action against him by Defendant Antonelli. (Dkt. No. 37, Part 25 at 15-16 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response papers argue that (1) he had a constitutionally protected liberty right to make an oral and written complaint about Defendant Antonelli's management of the prison mess hall, and (2) as a result of Plaintiff's complaints (and an "encounter" between Plaintiff and Antonelli one

week before Plaintiff's disciplinary hearing), Defendant Antonelli retaliated against Plaintiff during Plaintiff's disciplinary hearing by, among other things, depriving Plaintiff of his statutorily protected right to receive "good time" credits (which would have accelerated Plaintiff's release on parole). (Dkt. No. 42, Part 2 at 9 [Plf.'s Response].)

Claims of retaliation like those asserted by Plaintiff find their roots in the First Amendment. See *Gill v. Pidlypchak*, 389 F.3d 379, 380-81 (2d Cir.2004). Central to such claims is the notion that in a prison setting, corrections officials may not take actions which would have a chilling effect upon an inmate's exercise of First Amendment rights. See *Gill*, 389 F.3d at 381-383. Because of the relative ease with which claims of retaliation can be invented, however, courts have scrutinized such retaliation claims with "skepticism and particular care." *Colon v. Coughlin*, 58 F.3d 865, 872 (2d. Cir.1995); see also *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983). As the Second Circuit has noted,

[t]his is true for several reasons. First, claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and are therefore easily fabricated. Second, prisoners' claims of retaliation pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act.

Dawes v. Walker, 239 F.3d 489, 491 (2d Cir.2001) (citations omitted), overruled on other grounds, *Swierkewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

To prevail on a First Amendment claim under 42 U.S.C. § 1983, a Plaintiff must prove by the preponderance of the evidence that: (1) the speech or conduct at issue was "protected"; (2) the defendants took "adverse action" against the plaintiff—namely, action that would deter a similarly situated individual of ordinary firmness from

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exercising his or her constitutional rights; and (3) there was a causal connection between the protected speech and the adverse action—in other words, that the protected conduct was a “substantial or motivating factor” in the defendants’ decision to take action against the plaintiff. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Gill*, 389 F.3d at 380 (citing *Dawes v. Walker*, 239 F.3d 489, 492 [2d Cir.2001]). Under this analysis, adverse action taken for both proper and improper reasons may be upheld if the action would have been taken based on the proper reasons alone. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996) (citations omitted).

*10 Here, Plaintiff’s claim fails for several reasons. I acknowledge that the First Amendment protects, not only the filing of written grievances and complaints, but, under some circumstances, the making of oral complaints to corrections officers.⁶⁹ However, even assuming Plaintiff had a constitutionally protected right to make both written and *oral* complaints about Defendant Antonelli, no evidence exists establishing (or even suggesting) that any complaints by Plaintiff against Defendant Antonelli impacted Defendant Antonelli’s disciplinary decision.

⁶⁹ See *Malik’El v. N. Y. State DOCS*, 96-CV-0669, 1998 U.S. Dist. LEXIS 5471, at *7 & n. 1 (N.D.N.Y. March 4, 1998) (Sharpe, M.J.) (under circumstances, plaintiff’s oral complaint to corrections officer might state a First Amendment claim), *adopted* by 1998 U.S. Dist. 5465 (N.D.N.Y. Apr. 8, 1998) (Pooler, D.J.); but see *Rodriguez v. Phillips*, 66 F.3d 470, 479 (2d Cir.1995) (“In the context of the confrontation described in [the plaintiff’s] own words, there was no clearly established First Amendment right to approach and speak to Officer Rubin.”) (emphasis added); *Garrido v. Coughlin*, 716 F.Supp. 98, 101 (S.D.N.Y.1989) (plaintiff’s “verbal confrontation” with corrections officer was not protected speech or conduct under the First Amendment).

For example, no evidence exists that Plaintiff submitted any grievances or complaints against Defendant Antonelli, only that he submitted a letter to Deputy Superintendent Eldred complaining about “Mess Hall Dishwashing Machines” approximately three weeks before the disciplinary hearing.⁷⁰ Plaintiff’s letter did not mention Defendant Antonelli.⁷¹ In any event, no evidence exists indicating that Defendant Antonelli knew about any grievances against him by Plaintiff at the time of

Plaintiff’s disciplinary hearing.⁷² Similarly, no evidence exists that he ever confronted Defendant Antonelli with an oral complaint about the mess hall—other than Plaintiff’s vague and uncorroborated assertions that he “met” with, or had an “encounter” with, Defendant Antonelli about the mess hall before the disciplinary hearing.⁷³ Finally, the record evidence establishes that Defendant Antonelli could, and indeed would, have reached the same disciplinary hearing decision (and imposed the same penalties) despite any such complaints or grievances by Plaintiff (i.e., based upon the evidence as presented to him at Plaintiff’s disciplinary hearing decision).⁷⁴

⁷⁰ (Dkt. No. 48, Parts 6-7, ¶ 6 [Berlin Aff., testifying that the only grievance on file from Plaintiff, from between August 2002 to December 2002 was a grievance dated 8/8/02 about the legal mail limit at Greene C.F., attaching that grievance at Exhibit A]; Dkt. No. 37, Part 24 [Munkowitz Decl., attaching Plaintiff’s 8/16/02 letter of complaint to Deputy Superintendent Eldred regarding the “Mess Hall Dishwashing Machines”]; Dkt. No. 37, Part 23, Ex. A at 86-90 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition].)

⁷¹ (Dkt. No. 37, Part 24 [Munkowitz Decl., attaching Plaintiff’s 8/16/02 letter of complaint to Deputy Superintendent Eldred regarding the mess hall dishwashing machines, not mentioning any specifics, much less the name or position of Defendant Antonelli]; Dkt. No. 37, Part 23, Ex. A at 86-90 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition, in which Plaintiff admits this fact].)

⁷² (Dkt. No. 37, Part 17, ¶ 13 [Antonelli Aff., testifying that “I ... understand that plaintiff alleges that I retaliated against him based upon a grievance that plaintiff made against me. I am not aware of any grievances filed by plaintiff against me”]; Dkt. No. 42, Part 1, ¶ 12 [Plf.’s Response to Antonelli Aff., containing no response to Paragraph 13 of Antonelli’s affidavit, and asserting conclusorily that “[the tier office] had chosen Antonelli to preside over plaintiff’s tier hearing on September 6, 2002 ... and that was due to Antonelli’s encounter with plaintiff one week prior to holding said hearing,” without providing any specifics about the alleged “encounter,” without providing any assertion that it was Antonelli who was motivated by the alleged “encounter,” and without providing reason to believe Plaintiff had personal

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knowledge of the Tier Office's motivation in assigning Antonelli as the hearing officer.)

73 (Dkt. No. 42, Part 1¶ 12 [Plf.'s Response to Antonelli Aff., asserting that, one week before the disciplinary hearing, Plaintiff had an "encounter" with Defendant Antonelli]; Dkt. No. 37, Part 23, Ex. A at 89 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which Plaintiff states that, days before the disciplinary hearing, he "met" with Defendant Antonelli about the condition of the "utensils, dish washing machines, et cetera" in the mess hall].)

74 (See, *supra*, Statement of Fact Nos. 22-23 [stating evidence upon which Defendant Antonelli based his hearing decision, and fact that the decision was affirmed on appeal].)

As a result, I recommend that the Court dismiss Plaintiff's First Amendment retaliation claim.

B. Whether Plaintiff Has Failed to State a Fourth Amendment Claim

I do not construe Defendants' memorandum of law as expressly arguing that any Fourth Amendment claim asserted by Plaintiff should be dismissed for failure to state a claim under **Rule 12(b)(1) of the Federal Rules of Civil Procedure**, which permits motions to dismiss for "lack of jurisdiction over the subject matter" of a claim. However, I do construe that memorandum of law, as well as defense counsel's questions of Plaintiff during his deposition, as *suggesting* that Plaintiff has failed to assert a Fourth Amendment claim (regarding the search of his property by Defendants at Greene C.F.) over which federal courts have subject matter jurisdiction. ⁷⁵

75 (Dkt. No. 37, Part 25 at 8-9 [Defs.' Mem. of Law, addressing the conclusory nature of Plaintiff's claims about a "conspiracy" against him, the subject of which included the search of his property]; Dkt. No. 37, Part 22, Ex. A at 14 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which defense counsel stated, "I don't see how the [F]ourth [A]mendment gives you a right to be free from harmful situations. So I would like you to explain that to me," and Plaintiff stated, "[T]he [F]ourth [A]mendment does not apply to the specific paragraph that you are referring to," i.e., Paragraph 43 of the Amended Complaint], 22 [in which defense counsel asked, "Is there anything else in your second cause of action ..." other than a due process claim, and Plaintiff answered, "Not at this point, ma'am" even though the cause of action cites the Fourth Amendment], 28 [in which defense counsel asked, "Are you alleging that the facts in paragraph

even though that cause of action cites the Fourth Amendment], 26 [in which defense counsel asked, "You have a constitutional right to be free from search and seizure as an inmate?" and Plaintiff answered, "As an inmate, no, ma'am"].) See *Clissuras v. CUNY*, 359 F.3d 79, 81 n. 3 (2d Cir. 2004) (treating a "suggestion" to the court, in the form of a letter, that subject matter jurisdiction was lacking as a request for a dismissal order under **Rule 12[h][3]**).

Under **Rule 12 of the Federal Rules of Civil Procedure**, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." **Fed.R.Civ.P. 12(h)(3)**. Thus, the Court has a duty to examine whether or not it has subject matter jurisdiction over Plaintiff's attempted Fourth Amendment claim.

Here, I find that the Court does not have subject matter jurisdiction (pursuant to **42 U.S.C. § 1983** or otherwise) over that claim, which is asserted in Paragraphs 44 and 15 of Plaintiff's Amended Complaint. ⁷⁶ Specifically, the allegations contained in Paragraph 15 of his Amended Complaint are the sole *factual* basis for Plaintiff's Fourth Amendment claim. ⁷⁷ In pertinent part, that paragraph alleges that on "August 31, 2002, 11:20 A.M., Belarge ... had plaintiff's personal property searched [for Alcivar's materials] by three officers, one of whom was Holt...." ⁷⁸

76 (See Dkt. No. 5, ¶ 44 [Plf.'s Am. Compl., alleging that Defendants Woods and Holt "violat[ed] plaintiff's 4th ... Amendment [] rights"], ¶ 15 [alleging that Defendant Belarge "had plaintiff's personal property searched by three officers, one of whom was Holt"]; Dkt. No. 37, Part 23, Ex. A at 14-22, 26-28 [Munkowitz Decl., attaching transcript of deposition of Plaintiff, in which he explains his claim under the Fourth Amendment based on the alleged unjustified search and seizure of his property].)

77 (Dkt. No. 37, Part 22, Ex. A at 14 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which Plaintiff stated, "[T]he [F]ourth [A]mendment does not apply to" Plaintiff's first cause of action], 22 [in which defense counsel asked, "Is there anything else in your second cause of action ..." other than a due process claim, and Plaintiff answered, "Not at this point, ma'am" even though the cause of action cites the Fourth Amendment], 28 [in which defense counsel asked, "Are you alleging that the facts in paragraph

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15 give rise to a constitutional claim for search and seizure?" and Plaintiff answered, "Yes, ma'am".)

78 (Dkt. No. 5, ¶ 14 [Am. Compl.].)

*11 The problem with Plaintiff's Fourth Amendment claim is that, even if the search occurred as Plaintiff alleged, that search was of a prisoner's cell (or "cube"). "[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).⁷⁹ Nor does the Fourth Amendment proscription apply within the confines of a prison "cube."⁸⁰ Indeed, Plaintiff appears to recognize this point of law.⁸¹

79 See also *Tinsley v. Greene*, 95-CV-1765, 1997 WL 160124, at *7 (N.D.N.Y. March 31, 1997) ("Plaintiff thus may assert no cause of action here based on an alleged violation of his Fourth Amendment rights."); *Demaio v. Mann*, 877 F.Supp. 89, 95 (N.D.N.Y.) ("Searches of prison cells, even arbitrary searches, implicate no protected constitutional rights."), aff'd, 122 F.3d 1055 (2d Cir.1995).

80 See *Freeman v. Goord*, 02-CV-9033, 2005 U.S. Dist. LEXIS 32019, at *5 & n. 4 (S.D.N.Y. Dec. 7, 1995) (granting defendants' motion for summary judgment, in part because plaintiff had no reasonable expectation of privacy, under the Fourth Amendment, in his cell, which plaintiff referred to as his "cube"); *Rodriguez v. Coughlin*, 795 F.Supp. 609, 611, 613 (W.D.N.Y.1992) (granting defendants' motion for summary judgment, in part because prison officials have same need, and right, to search prisoner's "cell" as his "cubicle").

81 (Dkt. No. 37, Part 22, Ex. A at 26 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which defense counsel asked, "You have a constitutional right to be free from search and seizure as an inmate?" and Plaintiff answered, "As an inmate, no, ma'am"].)

I note that I do not liberally construe Plaintiff's Amended Complaint as asserting a Fourth Amendment claim against Defendant Woods for (allegedly) unreasonably searching and seizing various pieces of Plaintiff's outgoing and incoming mail in August of 2002. However, even if I did so construe that Amended Complaint, I would conclude that this Court would not have subject matter jurisdiction over that claim. The only portion of Plaintiff's Amended Complaint that regards such a search and seizure by Defendant Woods of Plaintiff's mail is

vague and conclusory.⁸² Even taking as true Plaintiff's allegations, the mail in question consisted of clearly identifiable contraband (e.g., legal materials belonging to Inmate Alcivar in packages to, or from, persons bearing the last name of Alcivar).⁸³ I fail to see how any search and confiscation of such contraband would have violated the Fourth Amendment. Indeed, such a search and confiscation would appear to have been expressly authorized by DOCS Directive No. 4422 (which regards the Inmate Correspondence Program).⁸⁴

82 (Dkt. No. 5, ¶ 12 [Am. Compl.].)

83 I note that the alleged "interception" by Defendant Woods of these packages was preceded by a letter from Plaintiff to Woods referring to "documents [belonging to Inmate Alcivar] being in [Plaintiff's] possession" and referring to Inmate Alcivar's family members. Furthermore, I note that the alleged contents of these packages would have reasonably appeared (at the very least) to consist of contraband (i.e., allegedly being the same documents that later gave rise to three disciplinary charges against Plaintiff, which charges resulted in a conviction that was affirmed on appeal).

84 See, e.g., DOCS Directive No. 4422, § III.B.17. ("Inmates shall not be permitted to use their correspondence privileges to solicit ... services, or goods."), § III.G.1. ("All incoming general correspondence will be opened and inspected for ... photocopied materials, or contraband.") (5/18/02).

As a result, I recommend that the Court dismiss Plaintiff's Fourth Amendment claim.

C. Whether Plaintiff Has Failed to Establish (or Even State) an Eighth Amendment Claim

In their memorandum of law, Defendants argue that Plaintiff has failed to establish (or even state) an Eighth Amendment claim because (1) Plaintiff has not established (or even alleged) a deprivation that is "sufficiently serious" for purposes of the Eighth Amendment, and (2) he has not established that Defendants were *deliberately* indifferent to Plaintiff's health or safety. (Dkt. No. 37, Part 25 at 11, 13-14 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response papers argue that (1) he has established a deprivation that is "sufficiently serious" through his evidence that he experienced a back injury while in SHU as a result of his "twisted bunk," and (2) he has established

such deliberate indifference through his testimony that he orally complained to Defendants Woods and Belarge (as well as others) of his back injury and the fact that they “ignored” his complaints. (Dkt. No. 42, Part 2 at 13-15 [Plf.’s Response].)

“[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation must be, objectively, ‘sufficiently serious’.... [Second,] a prison official must have a ‘sufficiently culpable state of mind.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). “In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety....” *Farmer*, 511 U.S. at 834.

*12 With regard to the first element, “the plaintiff must demonstrate that the conditions of his confinement resulted in ‘unquestioned and serious deprivations of basic human needs’ or ‘deprive inmates of the minimal civilized measures of life’s necessities.’” *Davidson v. Murray*, 371 F.Supp.2d 361, 370 (W.D.N.Y.2005) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 [1981]). “As recognized by the Supreme Court in *Rhodes*, ‘the Constitution does not mandate comfortable prisons,’ ... and conditions that are ‘restrictive and even harsh ... are part of the penalty that criminal offenders pay for their offenses against society.’” *Davidson*, 371 F.Supp.2d at 370 (quoting *Rhodes*, 452 U.S. at 347, 349).

With regard to the second element, “[i]n prison-conditions cases [the requisite] state of mind is one of deliberate indifference to inmate health or safety....” *Farmer*, 511 U.S. at 834. “[D]eliberate indifference describes a state of mind more blameworthy than negligence.” *Id.* at 835. “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.” *Id.* at 837.

1. Sufficiently Serious Deprivation

Plaintiff alleges that he was diagnosed with “spondylolisthesis”⁸⁵ in September of 2002 as a result of sleeping on a defective bed.⁸⁶ As far as I can tell from available reported decisions, all federal courts faced with evidence of such an injury on a dispositive motion in a prisoner civil rights case explicitly or implicitly assume, for

the sake of argument, that the injury constitutes a serious medical need.⁸⁷ I do not make such an assumption here because, unlike the prisoners in those other civil rights cases, Plaintiff does not allege that his Eighth Amendment deprivation consisted of his “spondylolisthesis” but his defective (or “twisted”) bunk bed. In addition to being supported by the express language of Plaintiff’s Amended Complaint,⁸⁸ this reading of Plaintiff’s allegations is supported by his testimony in his deposition that he is not asserting a claim that the medical staff was deliberately indifferent to any serious medical need.⁸⁹

⁸⁵ “Spondylolisthesis” is defined as “forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or upon the sacrum.” *Rowland v. Hildreth*, 92-CV-6140, 1993 U.S. Dist. LEXIS 10233, at *35, n. 6 (S.D.N.Y. July 27, 1993) (citing *Stedman’s Medical Dictionary* at 1456 [25th ed.1990]).

⁸⁶ (Dkt. No. 5, ¶ 27 [Am. Compl.]; Dkt. No. 38, Part 4 at 58-62 [Plf.’s Motion for Summary Judgment, attaching medical records repeatedly stating “spondylolisthesis”]; Dkt. No. 37, Part 23 at 54-58 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition testimony, in which Plaintiff describes his injury generally].)

⁸⁷ See *Villante v. N.Y. State DOCS*, 96-CV-1484, 2002 U.S. Dist. LEXIS 26279, at *4, 8-9 (N.D.N.Y. March 28, 2002) (Mordue, J.), *adopting report-recommendation*, 2002 U.S. Dist. LEXIS, at *11-12 (N.D.N.Y. Oct. 26, 2001) (Homer, M.J.); *Rowland*, 1993 U.S. Dist. LEXIS 10233, at *13-16, 30; *Smith v. Umar*, 89-CV-6988, 1989 U.S. Dist. LEXIS 14170, at *4-6, 8-10 (E.D.Pa. Nov. 28, 1989).

⁸⁸ (Dkt. No. 5, ¶¶ 35, 37, 38, 43 [Am. Compl., alleging that Defendants-who are non-medical personnel violated Plaintiff’s Eighth Amendment rights by placing him in, and keeping him in, SHU, despite knowing of the allegedly substandard conditions there, which included his allegedly defective bunk].)

⁸⁹ (Dkt. No. 37, Part 23 at 42-43, 53, 58 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition testimony, in which Plaintiff testifies that he was not asserting any claim regarding the medical treatment that he received, or that the medical staff was deliberately indifferent to a serious medical need].)

This is apparently why Defendants, in their motions papers, do not challenge Plaintiff’s allegation that he suffered from “spondylolisthesis,” but do challenge his

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allegation that he was assigned a bunk bed that was in any way defective.⁹⁰ In support of that argument, Defendants submit evidence that none of the bunk beds to which Plaintiff was assigned while in SHU (1) showed any visible defects (much less the defect that Plaintiff alleges, i.e., being “twisted”) at or after the time in question, and (2) were either complained about by other inmates or repaired at or after the time in question.⁹¹

⁹⁰ (Dkt. No. 37, Part 25 at 14 [Defs.' Mem. of Law, arguing that “plaintiff cannot demonstrate that his bunk was ‘damaged’ in any manner,” citing record evidence in an attempt to support that argument].)

⁹¹ (*See, supra*, Statement of Fact No. 29.)

*13 More convincing, however, is the temporal disconnect between the onset of Plaintiff's back injury and his assignment to the allegedly defective bunk bed in question. Although Defendants do not appear to argue that the onset of Plaintiff's injury pre-dated his assignment to the allegedly defective bunk bed,⁹² there is evidence indicating that Plaintiff's back injury existed *before* he was assigned to the allegedly defective bunk bed (i.e., Bunk Number “OS-A1-20(b)”) on September 23, 2002.⁹³ There is even evidence indicating that Plaintiff's back injury existed before he was admitted to SHU on September 6, 2002.⁹⁴

⁹² (Dkt. No. 37, Part 25 at 11, 13-14 [Defs.' Mem. of Law].)

⁹³ (*Compare* Dkt. No. 42, Part 1, ¶ 10(a), 11 [Plf.'s Response to Belarge Aff., swearing that he was assigned to the allegedly “dilapidated” bunk in question-Bunk Number “OS-A1-20(b)”—on 9/23/02, after having been assigned to two different SHU cells, i.e., first in Cell “SH-0013” and then in Cell “B1-18”] with Dkt. No. 5, ¶¶ 26-27 [Plf.'s Am. Compl., containing a sworn allegation that the onset of his back injury was on or before 9/13/02, and that the date of diagnosis was 9/20/02] and Dkt. No. 42, Part 1, ¶ 15 [Plf.'s Response to Belarge Aff., swearing that he orally complained to Belarge about the bunk on 9/18/02] and Dkt. No. 37, Part 23 at 58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition testimony, in which Plaintiff testifies that he first requested sick call on 9/9/02, or three days after his admission to SHU].)

⁹⁴ (Dkt. No. 38, Part 4 at 58-62 [Plf.'s Motion for Summary Judgment, attaching medical record printed on 9/9/02 containing a typed notation, apparently entered on 8/23/02 stating, “Reason for Consultation: H/O sciatica type pain which has responded to PT **in the past**. I request a **repeat treatment** series for 6 weeks” and noting that Plaintiff was 51 years old at the time] [emphasis added].)

Even if Plaintiff were alleging that his back injury existed before September 6, 2002, but that his injury was *exacerbated* by his various bunk beds while in SHU, I would reach the same conclusion. As I described above, the first element of the Eighth Amendment's two-part test is “objective,” not “subjective.” Simply stated, the Eighth Amendment does not mandate “comfortable” bunk beds.⁹⁵ For these reasons, I find that Plaintiff has failed to establish a “sufficiently serious” deprivation for purposes of the Eighth Amendment.

⁹⁵ See *Faunce v. Gomez*, No. 97-16943, 1998 U.S.App. LEXIS 22703, at *3 (9th Cir. Sept. 14, 1998) (affirming district court's grant of summary judgment to defendants in part because the plaintiff's Eighth Amendment claim was premised on his complaint that his mattress was uncomfortable and his bedding was insufficient); *Page v. Kirby*, 314 F.Supp.2d 619, 620 (N.D.W.Va.) (dismissing prisoner's Eighth Amendment claim premised on complaint that his mattress was uncomfortable); *Levi v. District of Columbia*, 92-CV-2653, 1993 U.S. Dist. LEXIS 1948, at *5 (D.D.C. Feb. 24, 1993) dismissing prisoner's Eighth Amendment claim premised on complaint that his mattress was uncomfortable).

2. Deliberate Indifference

Even if Plaintiff had established a “sufficiently serious” deprivation for purposes of the Eighth Amendment, I would find that he has not established that Defendants acted with deliberate indifference to Plaintiff's health or safety.

To the extent that Plaintiff alleges that any of the Defendants “knew” that Plaintiff would be assigned to an allegedly defective bunk (Bunk Number “OS-A1-20(b)” in Cell “A1-20”) *before* Plaintiff began his incarceration in the Greene C.F. SHU on September 6, 2002, I find that those allegations are wholly conclusory and without any evidentiary support whatsoever in the record. (Dkt. No. 5, ¶¶ 3-5, 37, 39, 43 [Am. Compl.].)

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However, Plaintiff also asserts (rather conclusorily) that Defendants knew about the allegedly defective bunk *after* Plaintiff was assigned to it.⁹⁶ More specifically, Plaintiff submits testimony that (1) he orally complained to Defendant Woods about the bunk in question on or about September 27, 2002, (2) Plaintiff orally complained to Defendant Belarge about the bunk in question on September 18, 2002, and (3) Plaintiff orally complained to other corrections officers about the bunk in question at various other times.⁹⁷ Setting aside the lack of any testimony (of which I am aware) that Plaintiff ever orally complained to Defendants O'Donnell, Antontelli or Holt, there is a fatal flaw with Plaintiff's reliance on this evidence.

⁹⁶ (Dkt. No. 5, ¶ 38 [Am. Compl.].)

⁹⁷ (*See, e.g.*, Dkt. No. 42, Part 1, ¶ 15 [Plf.'s Response to Belarge Aff., swearing that he orally complained to Belarge about the bunk on September 18, 2002]; *compare* Dkt. No. 42, Part 1, ¶ 14 [Plf.'s Response to Woods Aff., swearing that his oral complaint to Woods was made on September 27, 2002] *with* Dkt. No. 42, Part 2 at 13 [Mem. of Law, arguing that his oral complaint to Woods was made on September 12, 2002].)

The problem is that, even if this evidence is true, there is no evidence that Defendants or *anyone* "ignored" Plaintiff's oral complaints. Indeed, the evidence shows that Plaintiff was assigned to the allegedly defective bunk bed for only about two weeks (between September 23, 2002, and October 7, 2002), and that he was then moved in response to his oral complaints.⁹⁸ Any assertion by Plaintiff that Defendants Woods and Belarge, upon hearing Plaintiff orally complain about the bunk, told Plaintiff to "[t]ell the officer about it" or "tell it to the officer on the unit" does not indicate deliberate indifference by supervisors such as Defendants Woods or Belarge, especially given that Plaintiff was subsequently then purposely assigned to a different bunk.⁹⁹

⁹⁸ (Dkt. No. 37, Part 8, ¶ 11 [Belarge Aff., identifying second bunk Plaintiff was assigned while in "S-Block" as Bunk Number "OS-A1-20(b)"]; Dkt. No. 42, Part 1, ¶ 11 [Plf.'s Response to Belarge Aff., admitting that fact], ¶ 10(a) [swearing that he was assigned to the allegedly "dilapidated" bunk in question on 9/23/02], ¶ 10(b) [swearing that, at 9:45 p.m. on or about 10/7/02-fourteen days after 9/23/02-he was purposely

moved to a cell "with a better bunk," i.e., Cell "B2-40"].) Any assertions by Plaintiff to the contrary are purely conclusory, self-contradictory, and frankly too incredible to be believed by reasonable minds. (Dkt. No. 5, ¶ 28 [Am. Compl., alleging conclusorily that his verbal complaints about his bunk bed "went unsolved"]; *compare* Dkt. No. 37, Part 23 at 58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition testimony, in which Plaintiff testifies that he was assigned to the same bunk bed during his entire stay in SHU] *with* Dkt. No. 42, Part 1, ¶ 11 [Plf.'s Response to Belarge Aff., admitting that he served his time in SHU in four different cells], ¶ 10(a) [swearing that he was not assigned to the allegedly "dilapidated" bunk in question until 9/23/02, despite his admission to SHU on 9/6/02, and that it was the *third* such bunk to which he had been assigned in SHU], ¶ 10(b) [swearing that, at 9:45 p.m. on or about 10/7/02-fourteen days after 9/23/02-he was purposely moved to a cell "with a better bunk," i.e., Cell "B2-40"].)

⁹⁹ (*Compare* Dkt. No. 42, Part 1, ¶ 14 [Plf.'s Response to Woods Aff.] *and* Dkt. No. 42, Part 1, ¶ 15 [Plf.'s Response to Belarge Aff.] *with* Dkt. No. 42, Part 1, ¶ 10(c) [Plf.'s Response to Belarge Aff.].)

¹⁰⁰ *14 In addition, the evidence shows that no one at Greene C.F. in any way interfered with the prompt and adequate medical care provided to Plaintiff regarding his back. Plaintiff acknowledges that his medical care at Greene C.F. included the following: (1) a **CAT scan** on October 17, 2002, and second **CAT scan** at some point between October 22, 2002, and December 11, 2002, (2) physical therapy on October 24, November 5, November 8, and November 18, 2002; (3) an **MRI** examination on January 10, 2003; and (4) being provided "pain killers" on September 13, 2002, five packets of **Naproxen** (500 mg. each) on December 11, 2002, and more "pain killers" on or after January 10, 2003, along with a **back brace**.¹⁰⁰

¹⁰¹ (Dkt. No. 5, ¶¶ 26-33 [Am. Compl.].)

Finally, I note that the evidence shows that, on October 24, 2002, Greene C.F. officials shortened Plaintiff's stay in SHU 15 days (reducing his sentence in SHU from 90 days to 15 days).¹⁰¹ Under the circumstances, I find that no reasonable fact-finder could conclude, based on the record before me, that Defendants acted with deliberate indifference to Plaintiff's health or safety

¹⁰² (*See, supra*, Statement of Fact No. 24.)

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As a result, I recommend that the Court dismiss Plaintiff's Eighth Amendment claim.

D. Whether Plaintiff Has Failed to Exhaust His Available Administrative Remedies Regarding His Eighth Amendment Claim

In their memorandum of law, Defendants argue Plaintiff has failed to establish that he exhausted his available administrative remedies regarding his Eighth Amendment claim because he acknowledges that he did not file a written administrative grievance with respect to the alleged condition of his bunk bed. (Dkt. No. 37, Part 25 at 11-13 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response papers argue that (1) no administrative remedy was available because a complaint about a defective bunk bed is not a grievable matter, (2) even if a complaint about a bunk bed were a grievable matter, he was misled by the Supervisor of the Inmate

Grievance Resolution Committee ("IGRC") into believing that the matter was not grievable, and (3) in any event, although he did not file a written grievance regarding his bunk, he filed several oral complaints regarding the bunk (i.e., to Defendant Woods, Defendant Belarge, the IGRC Supervisor, and various other corrections officers and/or sergeants). (Dkt. No. 42, Part 2 at 13-15 [Plf.'s Response].)

The Prison Litigation Reform Act of 1995 ("PLRA") requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: "No action shall be brought with respect to prison conditions under § 1983 ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." **42 U.S.C. § 1997e.** The Department of Correctional Services ("DOCS") has available a well-established three-step grievance program:

First, an inmate is to file a complaint with the Grievance Clerk. An inmate grievance resolution committee ("IGRC") representative has seven working days to informally resolve the issue. If there is no resolution, then the full IGRC conducts a hearing and documents the decision. Second, a grievant may appeal the IGRC decision to the superintendent, whose

decision is documented. Third, a grievant may appeal to the central office review committee ("CORC"), which must render a decision within twenty working days of receiving the appeal, and this decision is documented.

*15 *White v. The State of New York*, 00-CV-3434, 2002 U.S. Dist. LEXIS 18791, at *6 (S.D.N.Y. Oct 3, 2002) (citing *N.Y. Comp. Codes R. & Regs. Tit. 7, § 701.7*). Generally, if a prisoner has failed to follow each of these steps prior to commencing litigation, he has failed to exhaust his administrative remedies. *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y.2002); *Reyes v. Punzal*, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002).

However, the Second Circuit has recently held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA. See *Hemphill v. State of New York*, 380 F.3d 680, 686, 691 (2d Cir.2004). First, "the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact 'available' to the prisoner." *Hemphill*, 380 F.3d at 686 (citation omitted). Second, if those remedies were available, "the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants' own actions inhibiting the [prisoner's] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense." *Id.* (citations omitted). Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, "the Court should consider whether 'special circumstances' have been plausibly alleged that justify the prisoner's failure to comply with the administrative procedural requirements." *Id.* (citations and internal quotations omitted).

1. Availability of Administrative Remedies

Plaintiff admits (repeatedly) that he filed no written grievance about his bunk bed.¹⁰² He argues, however, that no written grievance could have been filed, because a defective bunk bed is not a grievable matter. In support of this argument, he offers only conclusory assertions,

testimony containing (at best) inadmissible hearsay, and documents that are completely immaterial to the fact in question.¹⁰³ Defendants, on the other hand, offer the affidavit of IGRC Supervisor Marilyn Berlin, who swears, *inter alia*, that “[c]omplaints about maintenance issues and cell conditions [such as defective bunk beds] are proper subjects of grievances.” (Dkt. No. 48, Part 6, ¶ 3 [Berlin Aff.].) As a result, I must reject Plaintiff’s unsupported assertion that a defective bunk bed is not grievable.

¹⁰² (Dkt. No. 37, Part 23 at 58, 61, 63, 65 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition].)

¹⁰³ (*See, e.g.*, Dkt. No. 42, Part 2 at 13-15 [Plf.’s Response Mem. of Law, in which Plaintiff appears to argue-without any citation to evidence-that he orally complained about his bunk bed to an unidentified IGRC Supervisor, whom Plaintiff alleges orally informed him that a defective bunk bed is not a grievable matter]; Dkt. No. 37, Part 23 at 60, 63, 65 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition, apparently alluding to the same hearsay remark by the IGRC Superintendent]; Dkt. No. 38, Part 4 at 50, 52, 54, 66 [Plf.’s Motion for Summary Judgment, attaching, as exhibits, documents regarding Plaintiff’s grievance about the grounds for his disciplinary conviction and not his allegedly defective bunk bed].)

This does not end the inquiry, however, because “a remedy that prison officials prevent a prisoner from utilizing is not an ‘available’ remedy under [the Prison Litigation Reform Act].” *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir.2001), cited by *Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir.2004) (holding that “[t]he defendants’ failure to implement the multiple rulings in [plaintiff’s] favor rendered administrative relief ‘unavailable’ under the PLRA.”). More specifically, case law exists supporting the proposition that, assuming plaintiff was instructed by prison officials, contrary to prison regulations, that he could not file a grievance, *and plaintiff indeed did not initiate the grievance process by filing that grievance in reliance on that misrepresentation*, “the formal grievance proceeding required by [the prison grievance system] was never ‘available’ to [plaintiff] within the meaning of [the PLRA].” *See Brown v. Croak*, 312 F.3d 109, 112-113 (3d Cir.2002), cited by *Giano v. Goord*, 380 F.3d 670, 677 n. 6 (2d Cir.2004).

*¹⁶ Here, however, I can find absolutely no evidence in the record before me that IGRC Supervisor Berlin (or any

prison official at Greene C.F.) at any time advised Plaintiff that a defective bunk bed is not a grievable matter. Again, in support of his argument that the IGRC made such a remark to him, Plaintiff offers only vague testimony containing (at best) inadmissible hearsay, and documents that are immaterial to the fact in question.¹⁰⁴ Plaintiff’s vague and conclusory argument is made even more incredible in light of IGRC Supervisor Berlin’s sworn statement denying that Plaintiff ever orally complained to her about his (allegedly) defective bunk bed, or that she told him that the matter was not grievable.¹⁰⁵

¹⁰⁴ (*See, e.g.*, Dkt. No. 42, Part 2 at 13-15 [Plf.’s Response Mem. of Law]; Dkt. No. 37, Part 23 at 60, 63, 65 [Munkowitz Decl., attaching transcript of Plaintiff’s deposition]; Dkt. No. 38, Part 4 at 50, 52, 54, 66 [Plf.’s Motion for Summary Judgment, attaching exhibits regarding a grievance about a different matter].)

¹⁰⁵ (Dkt. No. 48, Part 6, ¶¶ 4-5, 8-11 [Berlin Aff.].)

2. Estoppel

Defendants have preserved their affirmative defense of non-exhaustion by raising it in their Answer. (Dkt. No. 17, ¶ 29 [Defs.’ Answer]) Moreover, no evidence (or even an argument) exists that any *Defendant* is estopped from raising this defense because of his or her actions inhibiting Plaintiff’s exhaustion of remedies; Plaintiff merely argues that a non-party to this action (the IGRC Supervisor) advised him that his allegedly defective bunk bed was not a grievable matter.

3. “Special Circumstances” Justifying Failure to Exhaust

Finally, Plaintiff provides no evidence that “special circumstances” exist justifying his failure to exhaust his available administrative remedies. Plaintiff alleges that, on several occasions during the relevant time period, he made oral complaints about his allegedly defective bunk bed to various employees of Greene C.F., including Defendants Woods and Belarge. For the sake of argument, I will set aside the vagueness of this allegation, its incredibility given numerous other inconsistencies and improbabilities in Plaintiff’s papers, and its total lack of support by any corroborating evidence. The problem with Plaintiff’s reliance on this allegation is that, even if it were true, it would not justify Plaintiff’s failure to file a written grievance about his bunk bed.

Plaintiff was 51 years old at the time of this incident; he had been incarcerated in several New York State correctional facilities before the incident; and he had even attended a year of law school.¹⁰⁶ He admits that, at the time of the incident, he was familiar with the grievance process at Greene C.F.¹⁰⁷ Indeed, he had filed grievances immediately before and during this very time period.¹⁰⁸ Simply stated, it would have been unreasonable for Plaintiff to believe that he could fulfill the grievance requirement—which included a requirement that the IGRC's decision be appealed to the Greene C.F. Superintendent and then to CORC before exhaustion had occurred—by making some oral complaints to various passers by, whomever they might be.

¹⁰⁶ (Dkt. No. 37, Part 23 at 6-11 [Munkowitz Decl., attaching transcript of Plaintiff's deposition]; Dkt. No. 38, Part 4 at 58 [Plf.'s Motion for Summary Judgment, attaching medical record showing his date of birth].)

¹⁰⁷ (Dkt. No. 37, Part 23 at 59 [Munkowitz Decl., attaching transcript of Plaintiff's deposition].)

¹⁰⁸ (Dkt. No. 38, Part 4 at 50 [Plf.'s Motion for Summary Judgment, attaching Plaintiff's grievance dated 9/18/02, about the grounds for his disciplinary conviction]; Dkt. No. 48, Part 7 [Defs. Reply, attaching grievance dated 8/7/02, about mail room, and appeal from decision regarding that grievance].)

As a result of Plaintiff's failure to exhaust his available administrative remedies, I recommend that his Eighth Amendment claim be dismissed.

E. Whether Plaintiff Has Failed to Establish (or Even State) a Fourteenth Amendment Due Process Claim

*17 In their memorandum of law, Defendants argue that Plaintiff's due process claim (which is based on the manner in which his disciplinary hearing was conducted, and which sought damages only and not injunctive relief) is not cognizable because a judgment in his favor would necessarily imply the invalidity of his disciplinary conviction (which resulted in a loss of good-time credits and thus affected the overall length of Plaintiff's confinement) and Plaintiff has not established that that conviction has been reversed, expunged, or invalidated. (Dkt. No. 37, Part 25 at 10-11 [Defs.' Mem. of Law, citing, *inter alia*, *Heck v. Humphrey*, 512 U.S.

477 (1994) and *Edwards v. Balisok*, 520 U.S. 641 (1997) J.) Liberally construed, Plaintiff's response papers argue (without any legal support) that, even though Plaintiff's loss of his good-time credits had not been invalidated on appeal, for Defendants to obtain summary judgment “they must prove their innocence beyond a shadow of a reasonable doubt,” which (he argues) they have not done. (Dkt. No. 42, Part 2 at 10-13 [Plf.'s Response].)

I reject Plaintiff's argument, and specifically his proffered legal standard on this motion for summary judgment. Under the circumstances, Defendants have met their modest threshold burden with regard to this issue.¹⁰⁹ To avoid dismissal on summary judgment grounds, Plaintiff must introduce evidence raising a question of fact as to (1) whether or not his disciplinary conviction affected the overall length of Plaintiff's confinement by resulting in a loss of good-time credits or (2) whether or not his disciplinary conviction has been reversed, expunged, or invalidated.¹¹⁰ He has not done so. Indeed, the evidence shows (and Plaintiff concedes) that (1) Plaintiff's disciplinary conviction affected the overall length of Plaintiff's confinement by resulting in a loss of good-time, and (2) his disciplinary conviction was not reversed, expunged, or invalidated.¹¹¹

¹⁰⁹ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Ciaprazi v. Goord*, 02-CV-0915, 2005 WL 3531464, at *8 (N.D.N.Y. Dec. 22, 2005) (Sharpe, J.) (adopting Report-Recommendation by Peebles, M.J.) (“[D]efendants' decision to rely ... upon the lack of evidentiary support for plaintiff's retaliation claims ... is sufficient to cast the burden upon the plaintiff to come forward with evidence demonstrating the existence of genuinely disputed material issues of fact at trial with regard to those claims.”) [citations omitted].

¹¹⁰ See *Griffin v. Selsky*, 326 F.Supp.2d 429, 430 (W.D.N.Y.2004); *McNair v. Jones*, 01-CV03253, 2003 U.S. Dist. LEXIS 15825, at *7-8 (S.D.N.Y.2003); *Dawes v. Dibiase*, 91-CV-0479, 1997 WL 376043, at *7-8 (N.D.N.Y. July 3, 1997) (McAvoy, J.).

¹¹¹ (See, e.g., Dkt. No. 5, ¶ 18 [Am. Compl., containing sworn allegation that Plaintiff was sentenced to three months loss of good-time credits]; Dkt. No. 42, Part 1 [Plf.'s Response to Belarge Aff., admitting Defendants' assertion that the discretionary review of Plaintiff's disciplinary sentence did not affect

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Plaintiff's loss of good-time credits]; Dkt. No. 38, Part 4 at 32 [Plf.'s Motion for Summary judgment, attaching disciplinary hearing decision, showing sentence imposed]; Dkt. No. 42, Part 2 at 13 [Plf.'s Response, arguing that "even though plaintiff's good time was not reversed, expunged, or declared invalid, that by itself does not make plaintiff's claims 'not cognizable'...."].)

As a result, I recommend that Plaintiff's Fourteenth Amendment due process claim be dismissed.

F. Whether Plaintiff Has Failed to Establish (or Even State) a Claim for Conspiracy

In their memorandum of law, Defendants argue that Plaintiff has failed to establish (or even state) a claim for conspiracy because (1) such a claim falls not under [42 U.S.C. § 1983](#) but [42 U.S.C. § 1985](#), which applies specifically to conspiracies, (2) to succeed on a conspiracy claim under [42 U.S.C. § 1985](#), Plaintiff must allege and show "a meeting of the minds," and (3) Plaintiff has not alleged and shown such a meeting of the minds but has offered mere speculative and conclusory allegations of conspiracy, *see, e.g.*, Dkt. No. 5, ¶¶ 21-22 (Am.Compl.). (Dkt. No. 37, Part 25 at 8-9 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response argues that the evidence does establish such a meeting of the minds because (1) in their affidavits, Defendants Woods, Antonelli, and Belarge all swear that they met to plan a strategy regarding Plaintiff, and (2) that strategy clearly violated DOCS' policies and procedures, which never involve a group of high-ranking officials (such as a deputy superintendent, captain, and sergeant) meeting to discuss a Plaintiff. Even if Plaintiff had made this assertion in an affidavit or declaration rather than in a memorandum of law, I would have difficulty imagining how Plaintiff (despite his legal training and considerable experience as an inmate) could possibly have personal knowledge of such a fact. Furthermore, as a matter of common sense, it seems to me that where (as here) an inmate has made a mysterious representation to a deputy superintendent implying that he has possession of a deceased inmate's legal materials, it would be entirely conceivable (and appropriate) for the deputy superintendent to initiate an investigation of the matter, which investigation would involve lawful meetings with subordinates.

***18** I agree with Defendants largely for the reasons stated, and based upon the cases cited, in their memorandum of law. (Dkt. No. 37, Part 25 at 8-9 [Defs.' Mem. of Law].) Plaintiff's attempted conspiracy claim, which is asserted under [42 U.S.C. § 1983](#), should actually be asserted under [42 U.S.C. § 1985](#). *See Webb v. Goord*, 340 F.3d 105, 110 (2d. Cir.2003) (construing Section 1983 claim styled as "Conspiracy to Violate Civil Rights" as Section 1985 claim). To maintain an action under [Section 1985](#), a plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the

unlawful end." *Webb*, 340 F.3d at 110 [internal quotation marks and citations omitted]. Where a plaintiff does not provide such a factual basis, but only conclusory, vague or general allegations, such a conspiracy claim fails. *Id.* (dismissing conclusory allegation "that any such meeting of the minds occurred among any or all of the defendants"); *Boddie v. Schneider*, 105 F.3d 857, 862 (2d. Cir.1997) (dismissal of "conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights" is proper).

Here, Plaintiff's conspiracy claim is conclusory, vague and general. It is uncontested that, at some point between August 5, 2002, and August 31, 2002, a meeting took place between Defendant Woods and Defendant Belarge, and a meeting took place between Defendant Belarge and Defendant O'Donnell, and that the purpose of both meetings was to discuss Plaintiff. (*See, supra*, Statement of Fact Nos. 25-26.) The issue is whether the purpose of that meeting was "to achieve an unlawful end" or to simply investigate whether Plaintiff had violated prison rules.

Defendants offer evidence that the purpose of the meeting was to lawfully investigate Plaintiff, and Plaintiff has offered no *evidence* to the contrary. Plaintiff merely argues that DOCS' policies and procedures would *never* involve a group of high-ranking officials (such as a deputy superintendent, captain, and sergeant) meeting to discuss a Plaintiff. Even if Plaintiff had made this assertion in an affidavit or declaration rather than in a memorandum of law, I would have difficulty imagining how Plaintiff (despite his legal training and considerable experience as an inmate) could possibly have personal knowledge of such a fact. Furthermore, as a matter of common sense, it seems to me that where (as here) an inmate has made a mysterious representation to a deputy superintendent implying that he has possession of a deceased inmate's legal materials, it would be entirely conceivable (and appropriate) for the deputy superintendent to initiate an investigation of the matter, which investigation would involve lawful meetings with subordinates.

In any event, I need not base my recommendation on Plaintiff's lack of personal knowledge or on my common sense: the fact is that Plaintiff has adduced absolutely no evidence in support of his vague and conclusory allegation that Defendants Woods, Belarge and O'Donnell entered into an agreement to achieve an unlawful end. As a result,

I recommend that the Court dismiss Plaintiff's conspiracy claim.

G. Whether Defendants Are Protected by Qualified Immunity

*19 In their memorandum of law, Defendants argue that they are entitled to qualified immunity because they could not have reasonably known that their conduct was in violation of a clearly established statutory or constitutional right. (Dkt. No. 37, Part 25 at 17 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response argues (without citing any evidence) that, under the circumstances, any reasonable person would have reasonably known their conduct was violating Plaintiff's clearly established constitutional rights. (Dkt. No. 42, Part 2 at 15-17 [Plf.'s Response].)

Again, I must reject Plaintiff's conclusory argument. "Once qualified immunity is pleaded, plaintiff's complaint will be dismissed unless defendant's alleged conduct, when committed, violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Williams*, 781 F.2d at 322 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 [1982]). Regarding the issue of whether a particular right was *clearly established*, courts in this circuit consider three factors:

- (1) whether the right in question was defined with 'reasonable specificity';
- (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and
- (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir.1991) (citations omitted), cert. denied, 503 U.S. 962 (1992).¹¹² Regarding the issue of whether a reasonable person would have known he was violating such a clearly established right, this "objective reasonableness"¹¹³ test is met if "officers of reasonable competence could disagree on [the legality of defendant's actions]." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); see also *Malsh v. Correctional Officer Austin*, 901 F.Supp. 757, 764 (S.D.N.Y.1995)

(citing cases); *Ramirez v. Holmes*, 921 F.Supp. 204, 211 (S.D.N.Y.1996). As the Supreme Court explained,

¹¹² See also *Calhoun v. N.Y.S. Div. of Parole*, 999 F.2d 647, 654 (2d Cir.1993); *Prue v. City of Syracuse*, 26 F.3d 14, 17-18 (2d Cir.1994).

¹¹³ See *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective reasonableness of the action.'") (quoting *Harlow*, 457 U.S. at 819); *Benitez v. Wolff*, 985 F.2d 662, 666 (2d Cir.1993) (qualified immunity protects defendants "even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights").

[T]he qualified immunity defense ... provides ample protection to all but the plainly incompetent or those who knowingly violate the law.... Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Malley, 475 U.S. at 341. Furthermore, courts in the Second Circuit recognize that "the use of an 'objective reasonableness' standard permits qualified immunity claims to be decided as a matter of law." *Malsh*, 901 F.Supp. at 764 (citing *Cartier v. Lussier*, 955 F.2d 841, 844 [2d Cir.1992] [citing Supreme Court cases]).

Here, based on my liberal construction of all of Plaintiff's motion papers and response papers, I will assume, for the sake of argument, that Plaintiff is claiming he had, among others, the following rights: (1) a right to have Defendant Holt take control of Inmate Alcivar's legal materials when Plaintiff offered those materials to Defendant Holt, and to later acknowledge his failure to take control of those materials; (2) a right to have Defendant Woods personally visit Plaintiff in his "cube," and not launch a disciplinary investigation against him, following Plaintiff's notes to Defendant Woods; (3) a right to have Defendants Belarge and O'Donnell not open or read Plaintiff's correspondence to and from Inmate Alcivar's two daughters, following Plaintiff's notes to Defendant Woods; (4) a right to have Defendant Antonelli recuse himself based on the (alleged) fact that Plaintiff and Defendant Antonelli, one week before the disciplinary hearing, had had an "encounter"

regarding the conditions of the equipment in the prison mess hall; and (5) a right to be either transferred to a new cell in SHU, or provided with a new bunk bed in SHU, *immediately* upon making an oral complaint about his bunk bed to Defendants Woods, Belarge, O'Donnell, Antonelli and/or Holt (or upon the observations of that bunk bed by those Defendants).

*20 As an initial matter, it is unclear to me that any of these rights were “clearly established” in the summer and fall of 2002 (or are clearly established now). In any event, even if these rights were clearly established, it appears entirely reasonable to me for Defendants to have concluded that their treatment of Plaintiff did not violate these rights (or any rights). Simply stated, I can find no *evidence* in the record that Defendants Holt, Woods, Belarge, O'Donnell or Antonelli did anything wrong. At the very least, officers of reasonable competence could have disagreed as to the lawfulness of Defendants' actions..

As a result, even if the Court does not dismiss all of Plaintiff's claims for the reasons stated earlier in this Report-Recommendation, I recommend that the Court dismiss all of Plaintiff's claims based on qualified immunity.

H. Plaintiff's Motion for Partial Summary Judgment

Based on the above reasons, I find that Plaintiff's motion for partial summary judgment-which (at best) contains arguments regarding the issues discussed above-is without merit. I reach this conclusion for the independent reason that Plaintiff's Rule 7.1 Statement of Material Facts (Dkt.

No. 38, Part 2) generally does not contain any citations to the record; and, to the extent that Rule 7.1 Statement does contain citations to the record, the record generally does not actually support the facts asserted. *See N.D .N.Y. L.R. 7.1(a)(3) (“Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.”)* [emphasis in original].

As a result, I recommend the denial of Plaintiff's motion for partial summary judgment.

ACCORDINGLY, it is

RECOMMENDED that Defendants' motion for summary judgment (Dkt. No. 37) be *GRANTED*; and it is further

RECOMMENDED that Plaintiff's motion for partial summary judgment (Dkt. No. 38) be *DENIED*.

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Svcs.*, 892 F.2d 15 [2d Cir.1989]); [28 U.S.C. § 636\(b\)](#); [Fed.R.Civ.P. 6\(a\), 6\(e\), 72](#).

All Citations

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United States District Court, S.D. New York.

Craig COLE, Plaintiff,
v.
Christopher P. ARTUZ, Superintendent, Green
Haven Correctional Facility, R. Pflueger, A.
Glemmon, Sgt. Stevens, Lt. Haubert, Capt.
W.M. Watford, Capt. T. Healey, and John
Doe # 1-5, all as individuals, Defendants.

No. 93 Civ. 5981(WHP) JCF.
|
Oct. 28, 1999.

Attorneys and Law Firms

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MEMORANDUM & ORDER

PAULEY, J.

*1 The remaining defendant in this action, Correction Officer Richard Pflueger, having moved for an order, pursuant to [Fed.R.Civ.P. 56](#), granting him summary judgment and dismissing the amended complaint, and United States Magistrate Judge James C. Francis IV having issued a report and recommendation, dated August 20, 1999, recommending that the motion be granted, and upon review of that report and recommendation together with plaintiff's letter to this Court, dated August 28, 1999, stating that plaintiff does "not contest the dismissal of this action", it is

ORDERED that the attached report and recommendation of United States Magistrate Judge James C. Francis IV, dated August 20, 1999, is adopted in its entirety; and it is further

ORDERED that defendant Pflueger's motion for summary judgment is granted, and the amended complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

REPORT AND RECOMMENDATION

FRANCIS, Magistrate J.

The plaintiff, Craig Cole, an inmate at the Green Haven Correctional Facility, brings this action pursuant to [42 U.S.C. § 1983](#). Mr. Cole alleges that the defendant Richard Pflueger, a corrections officer, violated his First Amendment rights by refusing to allow him to attend religious services. The defendant now moves for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#). For the reasons set forth below, I recommend that the defendant's motion be granted.

Background

During the relevant time period, Mr. Cole was an inmate in the custody the New York State Department of Correctional Services ("DOCS"), incarcerated at the Green Haven Correctional Facility. (First Amended Complaint ("Am.Compl.") ¶ 3). From June 21, 1993 to July 15, 1993, the plaintiff was in keeplock because of an altercation with prison guards. (Am.Compl.¶¶ 17-25). An inmate in keeplock is confined to his cell for twenty-three hours a day with one hour for recreation. (Affidavit of Anthony Annucci dated Dec. 1, 1994 ¶ 5). Pursuant to DOCS policy, inmates in keeplock must apply for written permission to attend regularly scheduled religious services. (Reply Affidavit of George Schneider in Further Support of Defendants' Motion for Summary Judgment dated September 9, 1996 ("Schneider Aff.") ¶ 3). Permission is granted unless prison officials determine that the inmate's presence at the service would create a threat to the safety of employees or other inmates. (Schneider Aff. ¶ 3). The standard procedure at Green Haven is for the captain's office to review all requests by inmates in keeplock to attend religious services. (Schneider Aff. ¶ 3). Written approval is provided to the inmate if authorization is granted. (Affidavit of Richard Pflueger dated April 26, 1999 ("Pflueger Aff.") ¶ 5). The inmate must then present the appropriate form to the gate officer before being released to attend the services. (Pflueger Aff. ¶ 5).

*2 On June 28, 1993, the plaintiff submitted a request to attend the Muslim services on July 2, 1993. (Request to Attend Scheduled Religious Services by Keep-Locked Inmate dated June 28, 1993 ("Request to Attend Services"), attached as Exh. B to Schneider Aff.) On June 30, 1993, a supervisor identified as Captain Warford signed the request form, indicating that the plaintiff had received permission to attend the services. (Request to Attend Services). Shortly before 1:00 p.m. on July 2, 1993, the plaintiff requested that Officer Pflueger, who was on duty at the gate, release him so that he could proceed to the Muslim services. (Pflueger Aff. ¶ 3). However, Officer Pflueger refused because Mr. Cole had not presented the required permission form. (Pflueger Aff. ¶ 3). The plaintiff admits that it is likely that he did not receive written approval until some time thereafter. (Deposition of Craig Cole dated February 28, 1999 at 33–35, 38).

On August 25, 1993, the plaintiff filed suit alleging that prison officials had violated his procedural due process rights. On December 4, 1995, the defendants moved for summary judgment. (Notice of Defendants' Motion for Summary Judgment dated December 4, 1995). The Honorable Kimba M. Wood, U.S.D.J., granted the motion and dismissed the complaint on the grounds that the plaintiff failed to show that he had been deprived of a protected liberty interest, but she granted the plaintiff leave to amend. (Order dated April 5, 1997). On May 30, 1997, the plaintiff filed an amended complaint, alleging five claims against several officials at the Green Haven Correctional Facility. (Am.Compl.) On November 16, 1998, Judge Wood dismissed all but one of these claims because the plaintiff had failed to state a cause of action or because the statute of limitations had elapsed. (Order dated Nov. 16, 1998). The plaintiff's sole remaining claim is that Officer Pflueger violated his First Amendment rights by denying him access to religious services on July 2, 1993. The defendant now moves for summary judgment on this issue, arguing that the plaintiff has presented no evidence that his First Amendment rights were violated. In addition, Officer Pflueger contends that he is entitled to qualified immunity. (Defendants' Memorandum of Law in Support of Their Second Motion for Summary Judgment).

A. Standard for Summary Judgment

Pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#), summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304 (2d Cir.1995); *Richardson v. Selsky*, 5 F.3d 616, 621 (2d Cir.1993). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." [Celotex Corp. v. Catrett, 477 U.S. 317, 323 \(1986\). Where the movant meets that burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute concerning material facts. \[Fed.R.Civ.P. 56\\(c\\)\]\(#\); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 \(1986\). In assessing the record to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255; *Vann v. City of New York*, 72 F.3d 1040, 1048–49 \(2d Cir.1995\). But the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" and grant summary judgment where the nonmovant's evidence is conclusory, speculative, or not significantly probative. *Anderson*, 477 U.S. at 249–50 \(citation omitted\). "The litigant opposing summary judgment may not rest upon mere conclusory allegations or denials, but must bring forward some affirmative indication that his version of relevant events is not fanciful." *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 101 \(2d Cir.1997\) \(citation and internal quotation omitted\); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 \(1986\) \(a non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"\); *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 \(2d Cir.1995\) \(nonmovant "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible"\) \(\(citations omitted\)\). In sum, if the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co.*, 475 U.S. at 587 \(quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 \(1968\)\); *Montana v. First Federal Savings & Loan Association*, 869 F.2d 100, 103 \(2d Cir.1989\).](#)

*3 Where a litigant is *pro se*, his pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174

F.3d 276, 280 (2d Cir.1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994)). Nevertheless, proceeding *pro se* does not otherwise relieve a litigant from the usual requirements of summary judgment, and a *pro se* party's "bald assertion," unsupported by evidence, is not sufficient to overcome a motion for summary judgment. See *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991); *Gittens v. Garlocks Sealing Technologies*, 19 F.Supp.2d 104, 110 (W.D.N.Y.1998); *Howard Johnson International, Inc. v. HBS Family, Inc.*, No. 96 Civ. 7687, 1998 WL 411334, at *3 (S.D.N.Y. July 22, 1998); *Kadosh v. TRW, Inc.*, No. 91 Civ. 5080, 1994 WL 681763, at *5 (S.D.N.Y. Dec. 5, 1994) ("the work product of *pro se* litigants should be generously and liberally construed, but [the *pro se*'s] failure to allege either specific facts or particular laws that have been violated renders this attempt to oppose defendants' motion ineffectual"); *Stinson v. Sheriff's Department*, 499 F.Supp. 259, 262 (S.D.N.Y.1980) (holding that the liberal standard accorded to *pro se* pleadings "is not without limits, and all normal rules of pleading are not absolutely suspended").

B. Constitutional Claim

It is well established that prisoners have a constitutional right to participate in congregate religious services even when confined in keeplock. *Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir.1993); *Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir.1989). However, this right is not absolute. See *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir.1990) (right to free exercise balanced against interests of prison officials). Prison officials can institute measures that limit the practice of religion under a "reasonableness" test that is less restrictive than that which is ordinarily applied to the alleged infringement of fundamental constitutional rights. *O'Lone v. Estate of Shaabazz*, 482 U.S. 342, 349 (1986). In *O'Lone*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 349 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The evaluation of what is an appropriate and reasonable penological objective is left to the discretion of the administrative officers operating the prison. *O'Lone*, 482 U.S. at 349. Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to

maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

The policy at issue here satisfies the requirement that a limitation on an inmate's access to religious services be reasonable. The practice at Green Haven was to require inmates in keeplock to present written approval to the prison gate officer before being released to attend religious services. This policy both accommodates an inmate's right to practice religion and allows prison administrators to prevent individuals posing an active threat to security from being released. The procedure is not overbroad since it does not permanently bar any inmate from attending religious services. Rather, each request is decided on a case-by-case basis by a high ranking prison official and denied only for good cause.

*4 Furthermore, in order to state a claim under § 1983, the plaintiff must demonstrate that the defendant acted with deliberate or callous indifference toward the plaintiff's fundamental rights. See *Davidson v. Cannon* 474 U.S. 344, 347-48 (1986) (plaintiff must show abusive conduct by government officials rather than mere negligence). Here, there is no evidence that the defendant was reckless or even negligent in his conduct toward the plaintiff or that he intended to violate the plaintiff's rights. Officer Pflueger's responsibility as a prison gate officer was simply to follow a previously instituted policy. His authority was limited to granting access to religious services to those inmates with the required written permission. Since Mr. Cole acknowledges that he did not present the necessary paperwork to Officer Pflueger on July 2, 1993, the defendant did nothing improper in denying him access to the religious services. Although it is unfortunate that the written approval apparently did not reach the plaintiff until after the services were over, his constitutional rights were not violated.¹

¹ In light of this finding, there is no need to consider the defendant's qualified immunity argument.

Conclusion

For the reasons set forth above, I recommend that the defendant's motion for summary judgment be granted and judgment be entered dismissing the complaint. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this report and recommendation. Such objections shall be filed with

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the Clerk of the Court, with extra copies delivered to the chambers of the Honorable William H. Pauley III, Room 234, 40 Foley Square, and to the Chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

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United States District Court,
N.D. New York.

Chamma K. Brandon, Plaintiff,
v.
Dr. Glen Schroyer, et al., Defendants.

Civil Action No. 9:13-CV-0939 (TJM/DEP)

Signed February 26, 2016

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REPORT AND RECOMMENDATION

DAVID E. PEEBLES, U.S. MAGISTRATE JUDGE

*¹ This is an action brought by *pro se* plaintiff Chamma K. Brandon, a prison inmate formerly confined in the Clinton County Jail (“CCJ”), pursuant to **42 U.S.C. §§ 1983, 1985**, and **1986**, against several individuals working at the facility alleging that they deprived him of his civil rights during his period of incarceration there. Plaintiff’s claims fall into three groups, complaining of (1) a one-month hiatus in a low-fat, low-cholesterol (“heart-healthy”) diet; (2) the failure to honor his religious diet by serving him pork products; and (3) the failure to otherwise accommodate his religious beliefs as a Muslim. Plaintiff contends that, by their actions, defendants violated his rights under the First, Eighth, and Fourteenth Amendments to the United States Constitution, as well as

the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), **42 U.S.C. § 2000cc**.

Now that discovery in the action is complete, all of the defendants, including Dr. Glen Schroyer, who is separately represented, have moved for the entry of summary judgment dismissing plaintiff’s claims. For the reasons set forth below, I recommend that the motions be granted in part but otherwise denied.

I. BACKGROUND

Plaintiff was confined in the CCJ beginning on January 14, 2012, and again following his re-arrest on March 2, 2012, until December 28, 2012, when he was transferred into the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”). *Dkt. No. 17 at 3, 12–, 3.* Upon his entry into the CCJ for the first time in January 2012, Brandon was five-feet, eleven-inches in height, weighed 250 pounds, and was considered clinically obese.¹ *Dkt. No. 77–6 at 2; Dkt. No. 77–10 at 4.* Plaintiff alleges that, while he was incarcerated at the CCJ, the defendants (1) deprived him of constitutionally adequate medical care by removing him from a heart-healthy diet for one month; (2) deprived him of his rights under the First Amendment and RLUIPA to freely exercise his Muslim religion by (a) repeatedly providing him with meals that contained pork products, (b) denying him the opportunity to participate in Ramadan, and (c) denying him access to worship space and congregate religious services; and (3) retaliated against him by denying him adequate medical care and depriving him of his right to freely exercise his religion in response to grievances and complaints he filed against them during his incarceration at the CCJ.² *See generally Dkt. No. 17.* Additionally, plaintiff’s amended complaint asserts a failure-to-protect claim against defendants Clancy and Blaise, a corrections sergeant and a corrections officer, respectively, at the CCJ. *Id.*

¹ In his amended complaint, plaintiff alleges that he weighed 275 pounds upon his initial entry into the CCJ, and 225 pounds upon his transfer into the custody of the DOCCS. *Dkt. No. 17 at 11.* In a memorandum submitted in opposition to defendants’ motions, however, plaintiff claims to have lost “about 175 lbs to 130 lbs” while confined in the CCJ due to the deprivation of meals. *Dkt. No. 93–2 at 62.*

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2 A more precise description of the claims asserted against the defendants is included below in Part II. of this report.

A. Plaintiff's Diet

*2 When he first arrived at the CCJ, Brandon reported that he was allergic to shellfish. *Dkt. No. 17 at 4; Dkt. No. 75-6 at 2.* A special diet notification form reflecting that food allergy was forwarded to the facility's kitchen.³ *See Dkt. No. 17 at 47; Dkt. No. 75-1 at 37.* In March 2012, plaintiff reported that tomatoes and tomato by-products cause him to experience severe acid reflux. *Dkt. No. 17 at 4; Dkt. No. 75-6 at 2.* As a result, a notification was sent by medical personnel to the CCJ kitchen indicating "no tomato or tomato products per MD." *Dkt. No. 17 at 48; Dkt. No. 75-1 at 38.*

3 The order was later reiterated on July 5, 2012. *Dkt. No. 17 at 50; Dkt. No. 75-1 at 40.*

In May 2012, defendant Dr. Glen Schroyer, the jail physician at the CCJ, placed plaintiff on a heart-healthy diet due to his high cholesterol levels. *Dkt. No. 17 at 4-5, 49; Dkt. No. 75-1 at 39; Dkt. No. 75-6 at 2.* Plaintiff's heart-healthy diet restriction was later lifted on October 16, 2012, after a review of plaintiff's commissary purchases, which were being monitored by medical staff, revealed the purchase of many items that were inconsistent with plaintiff's dietary restrictions, including products that were high in fat and cholesterol.⁴ *Dkt. No. 17 at 8-9, 52; Dkt. No. 75-1 at 41; Dkt. No. 75-6 at 3.* For example, the record reveals that, during the relevant period, plaintiff's commissary purchases included a wide array of candy, cookies, snacks, and sugared drinks. *Dkt. No. 75-1 at 60-62.* Plaintiff also purchased Ramen chili, which contains tomato powder, and is therefore inconsistent with his previously alleged sensitivity to tomatoes and tomato by-products. *Id.*

4 In his affidavit, defendant Schroyer states that plaintiff was repeatedly counseled by medical staff concerning his non-compliance with his restrictive diets, and was warned, prior to October 16, 2012, that continued non-compliance would result in removal of the dietary restrictions. *Dkt. No. 75-6 at 3.* This assertion is sharply contested by plaintiff, who contends that the restrictions were lifted without warning. *Dkt. No. 83 at 3-4.* Plaintiff notes, moreover, that defendant Schroyer responded as follows to one of his interrogatories:

Interrogatory No. 15:

Did Dr. Schroyer or anyone else within the Medical-Staff notify Plaintiff that purchasing or consuming certain items from commissary would result in the removal (cancellation) of his dietary restriction at anytime [sic] on or before October 16, 2012?

Answer to Interrogatory No. 15:

The applicable medical records indicate that a discussion was held between the defendant and plaintiff on October 16, 2012 regarding plaintiff's non-compliance with his low fat/low cholesterol diet. The records further indicate that the proposed plan discussed in response to such noncompliance and plaintiff's assertion that he would, 'not be compliant with any diet' was the removal of such diet.

Dkt. No. 83-3 at 25. While this presents a disputed question of fact, as will be discussed below in Part III.B.1. of this report, it is not material to plaintiff's deliberate medical indifference claims against defendant Schroyer.

Plaintiff's heart-healthy diet was restored on or about November 21, 2012, after plaintiff promised not to purchase certain designated items from the commissary. *Dkt. No. 17 at 10, 53, 188; Dkt. No. 75-1 at 42.* Following that restoration, plaintiff's restrictive diet remained in place until his transfer out of the CCJ. *Dkt. No. 17 at 10.*

*3 In addition to raising concerns about health-related dietary restrictions implemented at the CCJ, as part of his religious accommodation claim, plaintiff alleges that defendants served him food that was inconsistent with his religion, as a Muslim. Plaintiff alleges that he informed prison officials at the CCJ upon his arrival on January 14, 2012, and again when he was rearrested on March 2, 2012, that, because of his Muslim religion, he cannot eat pork. *Dkt. No. 17 at 12-13; Dkt. No. 83 at 6.* According to plaintiff, despite prison officials' awareness of this restriction, he was served food containing pork on numerous occasions. *Dkt. No. 17 at 17-18, 20-22.* Plaintiff alleges that between the time of his entry into the CCJ through May 28, 2012, he was routinely served pork against his religious beliefs. *Dkt. No. 17 at 13, 17.* He further claims that on May 28, 2012, he filed a complaint with medical staff concerning the failure to receive a religious diet, and that in response, defendant Nurse Kinter stated that the kitchen was aware of his dietary restrictions.⁵ *Id. at 13.*

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⁵ Plaintiff's amended complaint makes reference, in this regard, to Exhibit E. *Dkt. No. 17 at 13*. Relevant portions of the referenced document, however, are illegible. *Id. at 65*. The document is reproduced at *Dkt. No. 83-3 at 2* and *Dkt. No. 93-4 at 68*, and again, half of the document cannot be deciphered.

On June 21, 2012, plaintiff submitted a sick-call request inquiring about a knee brace and complaining of being served pork. *Dkt. No. 17 at 13, 66*. The only response to that sick-call request was recorded as "given knee brace." *Id. at 66*. Plaintiff submitted an additional sick-call request raising concerns about his diet on July 4, 2012. *Id. at 13, 67*. In response, a nurse⁶ wrote, "Done – for no fish/shell fish. Need to ask security staff to submit diet slip for *pork* medical does not do religious diets." *Id. at 67* (emphasis in original).

⁶ Plaintiff alleges that defendant Kinter authored the response to this sick-call request. *Dkt. No. 17 at 14*. It is not clear, however, that this is accurate because in response to other sick-call requests, defendant Kinter would sign "SK." See, e.g. *id. at 65*. The sick-call response dated July 5, 2012 was signed, "S.F. RN." *Id. at 67*.

Plaintiff cites eight additional instances when he was served pork and raised complaints. The first and second occurred on September 24, 2012, during lunch and dinner. *Dkt. No. 93-4 at 82-82*. The next two instances occurred on October 9 and 10, 2012. *Id. at 94-99*. On October 17, 2012, plaintiff contends he was served pork, after which he filed a grievance and was provided a new meal. *Dkt. No. 17 at 18; Dkt. No. 93-4 at 116-17*. Plaintiff was again allegedly served pork on October 29, 2012, although a grievance filed regarding that incident purportedly "disappeared." *Dkt. No. 17 at 20*. Plaintiff was also allegedly served a meal containing pork on November 5, 2012, and although he claims to have lodged a grievance concerning that matter it is not included within his submissions. *Dkt. No. 17 at 21*. The last occurrence of allegedly being served pork was on December 25, 2012, and plaintiff again filed a grievance concerning the matter. *Dkt. No. 17 at 22; Dkt. No. 93-4 at 16465*.

The record evidence raises a number of questions regarding when the CCJ kitchen staff learned of plaintiff's religious dietary restrictions. According to defendant Laurin, when plaintiff first arrived at the CCJ on January 14, 2012, he did not declare any religious affiliation. *Dkt. No. 7714 at 2*. Although plaintiff disputes this, *Dkt. No.*

17 at 12; Dkt. No. 83 at 6, his initial booking intake record does not reflect any religious designation.⁷ *Dkt. No. 77-6 at 2*. There is no dispute, however, that when plaintiff was rebooked on March 2, 2012, he stated that he was a Muslim, and this was reflected on his booking sheet.⁸ *Dkt. No. 17 at 210; Dkt. No. 83-3 at 36*.

⁷ The record is unclear as to how long plaintiff was confined in the CCJ after his initial intake on January 14, 2012. Plaintiff's amended complaint does not state whether he received any meals containing pork between that initial intake and his re-arrest in March and, if so, how many.

⁸ Plaintiff's booking sheet from his rearrest in March 2012 also includes a note that reads, "Cautionary: Muslim Diet." *Dkt. No. 17 at 210*.

*⁴ Defendant Laurin explained that "it is the practice of the CCJ that any religious diets to be issued to inmates are initiated by the Booking Officer after an inmate requests such accommodation and demonstrates that he has a sincerely held belief. Notifications of any religious diets have been forwarded to the kitchen." *Dkt. No. 77-14 at 2*. Defendant Laurin contends that, in light of plaintiff's declaration of his religion in March 2012, a notification was placed in his file indicating that he should be provided with a diet consistent with his religious beliefs. *Dkt. No. 77-14 at 3*. In support of that contention, defendant Laurin cites to a document in the record entitled "SPECIAL DIET NOTIFICATION," reflecting that plaintiff, as a Muslim, was not to receive pork or pork products. *Dkt. No. 77-3 at 7*. Notably, the copy of that notice that is included by defendant Laurin in support of his motion is not dated. *Id.* As an attachment to his amended complaint and in response to defendants' motion, however, plaintiff has submitted copies of the same notice, except his copies both include a date of "10/5/12," which is written in what appears to be defendant Laurin's handwriting. *Dkt. No. 17 at 51; Dkt. No. 83-3 at 42*. Plaintiff contends, and the court finds it plausible, that the version of this notice produced by defendants in support of their motion has been "falsified ... by removing the date written on the notification[.]"⁹ *Dkt. No. 93-3 at 11*.

In any event, a careful review of the chronology, including plaintiff's grievances and responses to those grievances by CCJ staff, buttresses the conclusion that it was not until at least late-September 2012 that the CCJ kitchen staff

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was notified of plaintiff's religious dietary restrictions. *See, e.g., Dkt. No. 77-5 at 21* (entry dated 9/27/12 authored by defendant Laurin stating, “[A]s of 9/27/12 the kitchen was reviewed [sic] of your diet ... and that you are Muslim”); *Dkt. No. 93-4 at 81* (entry dated 9/27/12 and authored by defendant Laurin stating that the “kitchen ... did not have that you were Muslim. You will get no pork or pork products”); *id. at 94* (entry dated 10/10/12 and authored by Corrections Officer Couture stating, “I talked to Michelle in the kitchen and she told me that until recently they had nothing stating that Inmate Brandon was a no pork diet.”); *id. at 104* (entry dated 10/15/12 and authored by defendant Laurin stating, “Inmate Brandon was not marked in the kitchen as Muslim diet. That was corrected 10/5/12”).

9 Defendants characterize plaintiff's accusation as “eccentric” and “evidence of his paranoia.” *Dkt. No. 95-3 at 6*. While the court takes no position on these characterizations, it is worth noting that defendants do not dispute plaintiff's contention that the notice was altered. *Id.*

From the evidence in the record, two things are clear. First, until September 27, 2012, the CCJ kitchen staff was unaware of plaintiff's religious dietary restrictions, giving rise to the inference that, until that date, plaintiff was being served pork and pork products on occasion. Secondly, even after the kitchen learned of plaintiff's religious dietary restriction, plaintiff believes that he was served pork or pork products on six occasions, including (1) October 9, 2012; (2) October 10, 2012; (3) October 17, 2012; (4) October 29, 2012; (5) November 5, 2012; and (6) December 25, 2012.¹⁰ *Dkt. No. 17 at 18, 20, 21, 22; Dkt. No. 93-4 at 9499, 116-17, 164-65.*

10 Defendants contest whether some of those meals included pork or pork products. *See, e.g., Dkt. No. 77-19 at 9.*

B. Other Religious Accommodation

Plaintiff's complaint also alleges that he was denied a location to practice his religion and the opportunity to celebrate Ramadan between July 20, 2012 and August 19, *Defendant*

Dr. Glen Schroyer

Suzanne Kinter

2012. *Dkt. No. 17 at 14-15, 17.* According to plaintiff, his requests to accommodate his observation of the holiday were denied by CCJ security because he was one of the only detainees requesting to honor the holiday and there were only a few Muslim detainees at the CCJ. *Id. at 14.* Plaintiff was further advised that, due to staffing and funding shortages, the CCJ was unable to cater to a specific religious group consisting of only a few participants. *Id.* Plaintiff further claims that his request for the opportunity to engage in congregational prayer, referred to as “Jummah,” which is allegedly obligatory to all male Muslims, was denied by prison officials. *Id. at 15.* Plaintiff alleges that he filed grievances concerning these issues within the CCJ and additionally sought redress through outside sources. *Id. at 15-16.*

C. Assault by a Fellow Inmate

***5** On or about November 17, 2012, plaintiff alleges that defendants Blaise and Clancy housed a mentally ill inmate, referred to by plaintiff as “Tiny,” in the cell next door to him. *Dkt. No. 17 at 31.* Defendant Clancy apparently could be heard by plaintiff to say, “[L]ets [sic] see if he tries that shit on Brandon!” *Id.* According to plaintiff, two days later, defendant Blaise directed him to “exit [his] cell and collect all of the trays[.]” *Id.* Plaintiff, however, informed defendant Blaise that, the night before, Tiny had verbally assaulted plaintiff and that he “would rather not pick-up [Tiny's] tray.” *Id.* Defendant Blaise responded by saying to plaintiff, “[D]on't worry about him, he's a punk. Besides, from what I heard, I'm sure if I let him out, you'd kick his ass.” *Id.* Tiny thereafter became hostile towards plaintiff and spat on him while defendant Blaise observed. *Id.* Defendant Blaise responded by laughing at plaintiff. *Id.*

II. PROCEDURAL HISTORY

Plaintiff commenced this action on or about August 8, 2013, and later filed an amended complaint, the currently operative pleading, on August 15, 2014. Dkt. Nos. 1, 17. In his amended complaint, plaintiff names the following defendants:

Position

CCJ Jail Doctor

CCJ Nurse

Lawrence Bedard	CCJ Food Service Manager
Jim Alger	CCJ Corrections Officer
Joshua Wingler	CCJ Corrections Officer
Thomas Perry	CCJ Corrections Officer
Robert Web	CCJ Corrections Officer
Eric Blaise	CCJ Corrections Officer
Margaret Clansy	CCJ Corrections Sergeant
Kevin Laurin	CCJ Corrections Lieutenant

County of Clinton.¹¹

11 Defendants County of Clinton and Alger were dismissed from the action by District Judge Gary L. Sharpe in a decision and order dated August 15, 2015. *Dkt. No. 16.*

For purposes of this report, the following defendants will be collectively referred to as the "county defendants": (1) Suzanne Kinter, (2) Lawrence Bedard, (3) Joshua Wingler, (4) Thomas Perry, (5) Robert Web, (6) Eric Blaise, (7) Margaret Clancy, and (8) Kevin Laurin.

In his amended complaint, which spans forty-four pages comprised of 336 paragraphs, and is accompanied by approximately 177 pages of exhibits, plaintiff chronicles in detail the occurrences at the CCJ giving rise to his claims. The causes of action set forth in that pleading include deliberate medical indifference, failure to permit plaintiff to freely exercise his chosen religion, retaliation, conspiracy, and failure to protect plaintiff from harm. For the sake of clarity, I have included below a table that reflects the court's understanding of the claims asserted against each of the specific defendants.

Defendant	Claims Asserted
Bedard	(1) First Amendment regarding diet (direct and conspiracy theories of liability); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct and conspiracy theories of liability); (4) RLUIPA (direct and conspiracy theories of liability); and (5) First Amendment retaliation (direct theory of liability only)
Blaise	(1) First Amendment regarding diet (direct theory of liability only); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct theory of liability only); (4) RLUIPA (direct theory of liability only); (5) First Amendment retaliation (direct theory of liability only); and (6) Eighth Amendment failure-to-protect (direct theory of liability only)
Clancy	(1) First Amendment regarding diet (direct and conspiracy theories of liability); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct theory of liability only); (4) RLUIPA (direct and conspiracy theories of liability); (5) First Amendment retaliation (direct theory of liability only); and (6) Eighth Amendment failure-to-protect (direct theory of liability only)

Kinter	(1) First Amendment regarding diet (direct theory of liability only); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct and conspiracy theories of liability); (4) RLUIPA (direct theory of liability only); and (5) First Amendment retaliation (direct theory of liability only)
Laurin	(1) First Amendment regarding diet (direct theory of liability only); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct and conspiracy theories of liability); (4) RLUIPA (direct theory of liability only); and (5) First Amendment retaliation (direct theory of liability only)
Perry	(1) First Amendment regarding diet (direct theory of liability only); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct theory of liability only); (4) RLUIPA (direct theory of liability only); and (5) First Amendment retaliation (direct theory of liability only)
Schroyer	(1) First Amendment regarding diet (direct theory of liability only); (2) Eighth Amendment (direct and conspiracy theories of liability); and (3) First Amendment retaliation (direct theory of liability only)
Web	(1) First Amendment regarding diet (direct and conspiracy theories of liability); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct theory of liability only); (4) RLUIPA (direct and conspiracy theories of liability); and (5) First Amendment retaliation (direct theory of liability only)
Wingler	(1) First Amendment regarding diet (direct theory of liability only); (2) First Amendment regarding Ramadan and congregational services (direct theory of liability only); (3) Eighth Amendment (direct theory of liability only); (4) RLUIPA (direct theory of liability only); and (5) First Amendment retaliation (direct theory of liability only)

On August 3, 2015, defendant Schroyer filed a motion for summary judgment dismissing plaintiff's complaint. *Dkt. No. 75*. On the same date, the county defendants submitted a separate summary judgment motion, also seeking dismissal of plaintiff's claims. *Dkt. No. 77*. The defendants' motions are now fully briefed, and have been referred to me for the issuance of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). See *Fed.R.Civ.P. 72(b)*.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment motions are governed by Rule 56 of the Federal Rules of Civil Procedure. Under that provision, the entry of summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(a)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 82–83 (2d Cir. 2004). A fact is "material" for purposes of this inquiry if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248; see also

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Jeffreys v. City of N.Y., 426 F.3d 549, 553 (2d Cir. 2005). A material fact is genuinely in dispute “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

*7 A party moving for summary judgment bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue, and the failure to meet this burden warrants denial of the motion. *Anderson*, 477 U.S. at 250 n.4; *Sec. Ins. Co.*, 391 F.3d at 83. In the event this initial burden is met, the opposing party must show, through affidavits or otherwise, that there is a material dispute of fact for trial. *Fed.R.Civ.P.* 56(e); *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

When deciding a summary judgment motion, a court must resolve any ambiguities, and draw all inferences, in a light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Jeffreys*, 426 F.3d at 553; *Wright v. Coughlin*, 132 F.3d 133, 137–38 (2d Cir. 1998). The entry of summary judgment is justified only in the event of a finding that no reasonable trier of fact could rule in favor of the non-moving party. *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507–08 (2d Cir. 2002); *see also Anderson*, 477 U.S. at 250 (finding summary judgment appropriate only when “there can be but one reasonable conclusion as to the verdict”).

B. Defendant Schroyer's Motion

In his amended complaint, plaintiff claims that defendant Schroyer was deliberately indifferent to his serious medical needs by discontinuing his heart-healthy diet for a period of approximately one month, and that the discontinuation was in retaliation for plaintiff's many grievances concerning his diet at the facility. Plaintiff also alleges that defendant Schroyer conspired with others at the facility to violate his rights under the First and Eighth Amendments.

1. Deliberate Medical Indifference

Plaintiff's deliberate indifference claim is properly analyzed under the Eighth Amendment, which prohibits punishment that is “incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton

infliction of pain[.]” (*Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (quotation marks and citations omitted)). While the Eighth Amendment “does not mandate comfortable prisons, ... neither does it permit inhumane ones[.]” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation marks and citation omitted). “These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.” *Estelle*, 429 U.S. at 103. Failure to provide inmates with medical care, “[i]n the worst cases, ... may actually produce physical torture or lingering death, [and] ... [i]n less serious cases, ... may result in pain and suffering which no one suggests would serve any penological purpose.” *Id.* (quotation marks and citations omitted).

A claim alleging that prison officials have violated an inmate's Eighth Amendment rights by inflicting cruel and unusual punishment through deliberate indifference to the inmate's serious medical needs must satisfy both objective and subjective requirements. *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir. 2009); *Price v. Reilly*, 697 F.Supp.2d 344, 356 (E.D.N.Y. 2010). To meet the objective requirement, the alleged deprivation must be “sufficiently serious.” *Farmer*, 511 U.S. at 844; *see also Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006) (“[T]he objective test asks whether the inadequacy in medical care is sufficiently serious.”). Factors informing this inquiry include “whether a reasonable doctor or patient would find it important and worthy of comment, whether the condition significantly affects an individual's daily activities, and whether it causes chronic and substantial pain.” *Salahuddin*, 467 F.3d at 280 (quotation marks and alterations omitted). Determining whether a deprivation is sufficiently serious requires a court to examine the seriousness of the deprivation, and whether the deprivation represents “a condition of urgency, one that may produce death, degeneration, or extreme pain[.]” *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (quotation marks omitted). Importantly, it is “the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes.” *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003).

*8 To satisfy the subjective requirement, a plaintiff must demonstrate that the defendant had “the necessary level of culpability, shown by actions characterized by

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'wantonness.' " *Blyden v. Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999). "In medical-treatment cases ..., 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." *Salahuddin*, 467 F.3d at 280. "Deliberate indifference," in a constitutional sense, "requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result." *Id.*; see also *Farmer*, 511 U.S. at 837 ("[T]he 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."). "Deliberate indifference is a mental state equivalent to subjective recklessness, as the term is used in criminal law." *Salahuddin*, 467 F.3d at 280 (citing *Farmer*, 511 U.S. at 839–40).

Based upon the record now before the court, I conclude that plaintiff cannot meet either element of the governing deliberate indifference test. The only tangible effect of the month-long hiatus in plaintiff's heart-healthy diet was a modest increase in his cholesterol level from 249 to 264. *Dkt. No. 17 at 25–26, 62, 63; Dkt. No. 83 at 5*. According to defendant Schroyer, however, such a fluctuation is within normal limits "and does not place a patient at an increased risk for *coronary artery disease*, ischemia or *stroke*." *Dkt. No. 75–6 at 4*. The only "evidence" offered to counter defendant Schroyer's medical opinion is plaintiff's unsupported contention that he was placed at an indiscernible amount of risk for *coronary heart disease*, ischemia, and *stroke* as a result of the changed diet. *Dkt. No. 17 at 36; Dkt. No. 83 at 5*. While plaintiff's high cholesterol may constitute a serious medical need – an assertion not disputed by defendants – there is no evidence aside from plaintiff's sheer speculation that defendant Schroyer's decision to remove plaintiff from the heart-healthy diet for one month was objectively sufficiently serious for purposes of a deliberate medical indifference claim.

Moreover, plaintiff has also failed to adduce any evidence to give rise to a genuine dispute of material fact with respect to whether defendant Schroyer removed plaintiff from the heart-healthy diet with the requisite deliberate indifference. In his affidavit, defendant Schroyer states that plaintiff's heart-healthy diet was discontinued on October 16, 2012, because he repeatedly made commissary purchases that were inconsistent with his diet restrictions.

Dkt. No. 75–6 at 4. Although the parties dispute whether plaintiff was warned ahead of time that his commissary purchases could result in his removal from the diet, compare *Dkt. No. 17 at 27* with *Dkt. No. 75–6 at 3*, there is no record evidence that suggests defendant Schroyer's decision on October 16, 2012 was reckless or executed with a disregard to plaintiff's health.

Plaintiff surmises that defendant Schroyer was complicit in a conspiracy to punish him for filing grievances. Specifically, plaintiff contends that, in retaliation for his filing of grievances up through October 15, 2012, regarding his meal trays, defendant Laurin rendered a medical assessment based on plaintiff's commissary purchases and thereafter instructed defendant Schroyer to remove plaintiff from his heart-healthy diet. *Dkt. No. 17 at 25–27*. Aside from plaintiff's sheer conjecture in this regard, however, he has submitted no evidence from which a reasonable factfinder could conclude that defendant Schroyer was aware of the existence of plaintiff's grievances and took action to discontinue plaintiff's heart-healthy diet for punitive reasons.

Because the record before the court, even when construed most favorably toward the plaintiff, fails to contain evidence from which a reasonable factfinder could conclude that plaintiff has met both the objective and subjective requirements for establishing a claim of deliberate medical indifference, I recommend that it be dismissed.

2. Free Exercise

*9 In addition to claiming deliberate medical indifference, plaintiff contends that defendant Schroyer is responsible for denying him an appropriate religious diet, and specifically, one that conformed to his Muslim faith and did not include pork or pork products.¹² Undeniably, plaintiff was entitled to receive a diet that was consistent with his sincerely held religious beliefs. *See, e.g., Johnson v. Guiffere*, No. 04-CV-0057, 2007 WL 3046703, at *4 (N.D.N.Y. Oct. 17, 2007) (Hurd, J., adopting report and recommendation by Peebles, M.J.).¹³ The record, however, demonstrates that at the CCJ, accommodating diet restrictions in accordance with an inmate's religious beliefs is the responsibility of security staff, rather than medical personnel. *See, e.g., Dkt. No. 75–6 at 2; see also Dkt. No. 75–1 at 44, 50*. To counter this, and in an

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attempt to implicate defendant Schroyer, plaintiff offers only his speculation based upon the fact that, at one point, in response to a sick-call complaint by plaintiff that he was being served pork, defendant Kinter, a nurse at the facility, informed him that his religious diet was still in effect and that she had checked with the kitchen regarding the matter. *Dkt. No. 83 at 3; Dkt. No. 83-3 at 11.* Because this assertion does not contradict defendant Schroyer's contention that medical staff is not responsible for accommodating prisoners' religious dietary needs, it does not suffice to raise a genuine issue of material fact that precludes the entry of summary judgment. In short, I find that no reasonable factfinder could conclude that defendant Schroyer was involved in any violation of plaintiff's religious rights through the failure to provide him a diet consistent with his religious beliefs. I therefore recommend that plaintiff's First Amendment free exercise claim asserted against defendant Schroyer be dismissed.

¹² Even liberally construed, plaintiff's amended complaint does not assert a First Amendment free exercise cause of action against defendant Schroyer with respect to plaintiff's allegations that he was denied the opportunity to participate in Ramadan and/or congregational services. For that reason, I have not analyzed that claim in the context of defendant Schroyer's motion.

¹³ Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff. [Editor's Note: Attachments of Westlaw case copies deleted for online display.]

3. Retaliation

In his motion, defendant Schroyer does not address the retaliation cause of action asserted against him. Accordingly, while I have not addressed that claim in this report, and therefore recommend it survive defendant's motion, I also recommend that defendant Schroyer be permitted to file a second motion for summary judgment addressing it.

4. Conspiracy

Plaintiff's amended complaint includes a conspiracy claim against defendant Schroyer in connection with his deliberate medical indifference cause of action. In

light of my recommended finding that the underlying constitutional claim lacks merit and should be dismissed, however, I also recommend that the accompanying conspiracy claim be dismissed. *See Droz v. McFadden*, 580 F.3d 106, 109 (2d Cir. 2009) ("Because neither of the underlying section 1983 causes of action can be established, the claim for conspiracy also fails.").

C. County Defendants' Motion

1. RLUIPA ¹⁴

¹⁴ While plaintiff's amended complaint mentions in passing the RLUIPA, it does not expressly state a claim under that provision. *See, e.g., Dkt. No. 17 at 16, 36-42.* Nonetheless, mindful that the court is required to construe a *pro se* litigant's pleadings to raise the strongest arguments suggested, *Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013), I have considered plaintiff's amended complaint to assert a cause of action under that provision, as well.

To the extent plaintiff intended to assert RLUIPA claims against any of the county defendants in both their official and individual capacities, they are subject to dismissal. As relief, plaintiff's complaint seeks both money damages and declaratory relief. *Dkt. No. 17 at 42-44.* It is now firmly established, however, that the "RLUIPA does not authorize claims for monetary damages against state officers in either their official or individual capacities." *Holland v. Goord*, 758 F.3d 215, 224 (2d Cir. 2014). While plaintiff ordinarily could pursue a claim for injunctive and declaratory relief under the RLUIPA against defendants in their official capacities, *Williams v. Fisher*, No. 11-CV-0379, 2015 WL 1137644, at *17 (N.D.N.Y. Mar. 11, 2015) (Mordue, J., adopting report and recommendation by Dancks, M.J.), such claims are now moot based upon plaintiff's transfer out of the CCJ. *See Shepherd v. Goord*, 662 F.3d 603, 610 (2d Cir. 2011) ("In this circuit, an inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility."). Accordingly, I recommend that plaintiff's RLUIPA claim asserted against the county defendants be dismissed.

2. Conspiracy

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*10 Plaintiff alleges that there was a “meeting of the minds” among some of the defendants to deprive him of his civil rights. *See, e.g., Dkt. No. 17 at 25, 27–29.* Specifically, he contends that defendant Laurin evaluated plaintiff’s commissary purchases on or about October 15, 2012, and decided that plaintiff’s purchases were inconsistent with his heart-healthy diet. *See Dkt. No. 17 at 24* (“Said conspiracy was initiated on October 15, 2012, as Laurin made a medical assessment stating my commissary buys is a form of non-compliance to my special diet.”). Defendant Laurin thereafter allegedly communicated his “assessment” to defendants Schroyer and Kinter and the three arrived at an agreement to remove plaintiff from the heart-healthy diet. *See id. at 25* (“Kinter concurred [with] said assessment [and] Schroyer rubber-stamped it into effect.... Thus, on October 16th, 2012, said conspiracy went into effect; Kinter informed me of the removal of all previously issued diets, stating I’m not complying to said diets based on my commissary purchases.”). Plaintiff also specifically implicates defendant Bedard in his conspiracy claim, accusing him of “enfor[cing]” the decision by defendants Schroyer and Kinter to remove him from his special diets and intentionally accelerating the conspiracy by mislabeling his food thereafter to reflect that his meals did not contain pork. *Id. at 25, 27.* To further defendant Bedard’s alleged “viciousness,” he “established a meeting of the minds with Clansy and Web.” *Id. at 27.* According to plaintiff, defendant Clancy furthered the conspiracy by admitting to plaintiff that the CCJ kitchen made a mistake on October 17, 2012, by serving plaintiff a meal containing pork products. *Id. at 28.* On November 5, 2012, defendant Web allegedly fielded a concern by plaintiff that his food contained pork by reaching out to the CCJ kitchen, who told Web that the meat was actually turkey. *Id. at 29.* Plaintiff contends that defendant Web’s refusal to disclose who he spoke to in the kitchen perpetuated the conspiracy initiated by defendants Laurin, Kinter, and Schroyer. ¹⁵ *Id.*

15 To be clear, then, in light of all of the allegations described above, I have construed plaintiff’s amended complaint as asserting (1) a deliberate medical indifference claim against defendants Schroyer, Laurin, Kinter, and Bedard based on a conspiracy theory of liability; and (2) free exercise and RLUIPA claims regarding plaintiff’s religious dietary restrictions against defendants Bedard, Clancy, and Web based on a conspiracy theory of liability. In addition, although plaintiff contends that defendants

Clancy and Blaise conspired to violate his rights with respect to the incident involving another inmate on or about November 17, 2012, *see, e.g., Dkt. No. 17 at 31,* I have construed and analyzed those allegations as giving rise to an Eighth Amendment failure-to-protect cause of action, which I will address more completely below in Part III.C.5.c. of this report.

“To prove a [section] 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.” *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999). Conclusory, vague or general allegations of a conspiracy to deprive a person of constitutional rights are not sufficient to support a cognizable claim under *section 1983*. *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983); *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1156 (2d Cir. 1995).

In this case, although plaintiff’s allegations regarding the extent of the conspiracy are detailed, there is no evidence in the record to support them. While defendant Kinter confirms that she discussed the decision to remove plaintiff from his heart-healthy diet with defendants Laurin and Schroyer prior to October 16, 2012, there is no record evidence to suggest that the decision was motivated by plaintiff’s previously filed grievances or any other reason aside from plaintiff’s commissary purchases. *Dkt. No. 7710 at 3–4.* According to defendant Kinter, plaintiff’s commissary purchases were monitored by medical staff from July 25, 2012 until September 30, 2012, because “[p]laintiff showed little medical improvement after [his] dietary restrictions had been implemented.” *Id. at 3.* A review of plaintiff’s commissary purchases, submitted by way of commissary receipts in support of the county defendants’ motion, supports defendants’ assertion that plaintiff was purchasing foods that were inconsistent with a low-fat, low-cholesterol diet during the relevant time period. *Dkt. No. 77–4 at 2–5.* Plaintiff’s bare allegation with respect to the alleged “meeting of the minds” in this respect is not sufficient to defeat the county defendants’ motion.

Similarly, plaintiff’s allegations in his amended complaint are insufficient to give rise to a genuine dispute of material fact regarding whether defendant Bedard furthered any conspiracy by mislabeling his food. Aside from plaintiff’s own allegation, there is no evidence that defendant Bedard

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did, in fact, mislabel any of plaintiff's meals. In addition, there is no evidence in the record to suggest that defendant Bedard acted maliciously in preparing plaintiff's meals, and he states that the CCJ kitchen staff prepared plaintiff's food "in accordance with the records and notifications [they] had on file for him." *Dkt. No. 77-11 at 4*. Defendant Bedard also explained that, "[t]o the extent the Plaintiff grieved of being served pork he would either be provided a replacement meal, or as was most often the case, be instructed that the food being served was not pork at all, but rather a different type of food such as turkey." *Id.*

*11 With respect to plaintiff's allegations that defendant Clancy conspired with defendant Bedard to maliciously mislabel plaintiff's food, again, aside from plaintiff's own contentions in his amended complaint, there is no evidence in the record to support this claim. While plaintiff contends that "a meeting of the minds was established when [defendant Clancy] admitted to speaking to the Kitchen staff" on October 18, 2012, regarding plaintiff having received a meal containing pork in it the day prior, there is no evidence regarding the identity of the person with whom she spoke. *Dkt. No. 17 at 28*. Any contention by plaintiff that defendant Clancy spoke to defendant Bedard or that the two agreed to violate plaintiff's rights at that time is pure conjecture. In any event, plaintiff alleges that defendant Clancy explained to him that he received the meal from the day prior by mistake due to a new CCJ staff employee's error. *Id. at 19*. Contrary to plaintiff's allegations of a large-scale conspiracy to violate plaintiff's rights, defendant Clancy immediately provided him with a new meal. *Dkt. No. 775 at 26*.

There is also no evidence that defendants Bedard and Web conspired. While plaintiff speculates in his amended complaint that "[a] meeting of the minds was established by Web and Bedard" regarding a meal plaintiff was provided on November 5, 2012, there is no other evidence to suggest that those two individuals ever spoke. *Dkt. No. 17 at 29*. According to plaintiff's own allegations, in response to his complaint that his meal on that date contained pork, defendant Web contacted the CCJ kitchen and then informed plaintiff the meat product was turkey, not pork. *Id. at 21-22*. There is no record of the identity of the person with whom defendant Web spoke, rendering plaintiff's allegation that it was defendant Bedard (and the allegation that the two agreed to violate plaintiff's rights) mere speculation.

For all of the reasons discussed above, I find no evidence from which a reasonable factfinder could conclude that defendants Laurin, Kinter, Bedard, Web, and Clancy conspired to violate plaintiff's constitutional rights.

In addition, plaintiff's conspiracy claim appears to be precluded by the intra-agency, or intra-corporate, conspiracy doctrine, which provides "the officers, agents, and employees of a single corporate entity, each acting within the scope of her employment, are legally incapable of conspiring together."¹⁶ *Little v. City of N.Y.*, 487 F.Supp.2d 426, 441-42 (S.D.N.Y. 2007). Because defendants Laurin, Kinter, Bedard, Clancy, and Web are all employees of the County of Clinton, and plaintiff's own allegations suggest that each of them was acting within the scope of his or her employment at the relevant times, plaintiff's conspiracy claims are precluded by virtue of the intra-corporate conspiracy doctrine.

¹⁶ The doctrine is rooted in the Sherman Antitrust Act, 15 U.S.C. § 1, and, although it was developed in the context of business entities, since its inception has been expanded to apply to business corporations and public entities, as well. *Everson v. N.Y. City Transit Auth.*, 216 F.Supp.2d 71, 75-76 (E.D.N.Y. 2002)

Although plaintiff's amended complaint mentions, in passing, 42 U.S.C. § 1985, there is no record evidence to support a conspiracy claim against the defendants under section 1985(3). To sustain a cause of action for conspiracy to violate civil rights under that provision, a plaintiff must demonstrate that defendants acted with racial or other class-based animus in conspiring to deprive the plaintiff of his equal protection of the laws, or of equal privileges and immunity secured by law. *United Bhd. of Carpenters & Joiners, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 835 (1983); *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994). "To establish such intentional or purposeful discrimination, it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently." *Gagliardi*, 18 F.3d at 193. A plaintiff asserting a claim under section 1985(3) need not necessarily offer proof of an explicit agreement; a conspiracy can be demonstrated through circumstantial evidence that "shows the parties have a tacit understanding to carry out the prohibited conduct." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 427 (2d Cir. 1995) (quotation marks omitted).

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*12 In this case, there is no record evidence, including any allegations in plaintiff's amended complaint, regarding race-based animus or that plaintiff's membership in a suspect class provided motivation for the defendants' conduct. Indeed, the plaintiff's theory appears to be that it was his filing of grievances, and not his race, that motivated the defendants to take adverse action against him. Accordingly, I recommend plaintiff's [section 1985\(3\)](#) cause of action be dismissed on the merits.

3. Free Exercise (Regarding Plaintiff's Ramadan and Congregational Prayer Allegations) and Retaliation

Citing plaintiff's alleged failure to exhaust the available administrative remedies prior to filing this lawsuit, defendants seek dismissal of plaintiff's (1) free exercise claims to the extent they are based on allegations that plaintiff was deprived of the opportunity to participate in (a) Ramadan during July and August 2012, and (b) congregational Jummah services; and (2) retaliation claims.

The Prison Litigation Reform Act of 1996 ("PLRA"), Pub.L. No. 104-134, 110 Stat. 1321 (1996), which imposes several restrictions on the ability of prisoners to maintain federal civil rights actions, expressly requires that "[n]o action shall be brought with respect to prison conditions under [section 1983](#) of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." [42 U.S.C. § 1997e\(a\)](#); *see also Woodford v. Ngo*, 548 U.S. 81, 84 (2006) ("Exhaustion is ... mandatory. Prisoners must now exhaust all 'available' remedies[.]"); *Hargrove v. Riley*, No. 04-CV-4587, 2007 WL 389003, at *5-6 (E.D.N.Y. Jan. 31, 2007) ("The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under [Section 1983](#)."). "[T]he PLRA's 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, 532 (2002). In the event the defendant establishes that the inmate plaintiff failed "to fully complete[] the administrative review process" prior to commencing the action, the plaintiff's complaint is subject to dismissal. *Pettus v. McCoy*, No. 04-CV- 0471, 2006 WL 2639369, at *1 (N.D.N.Y.

Sept. 13, 2006) (McAvoy, J.); *see also Woodford*, 548 U.S. at 93 ("[W]e are persuaded that the PLRA exhaustion requirement requires proper exhaustion."). "Proper exhaustion" requires a plaintiff to procedurally exhaust his claims by "compl[ying] with the system's critical procedural rules." *Woodford*, 548 U.S. at 95; *accord*, *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007).¹⁷

17 While placing prison officials on notice of a grievance through less formal channels may constitute claim exhaustion "in a substantive sense," an inmate plaintiff nonetheless must meet the procedural requirement of exhausting his available administrative remedies within the appropriate grievance construct in order to satisfy the PLRA. *Macias*, 495 F.3d at 43 (quoting *Johnson v. Testman*, 380 F.3d 691, 697-98 (2d Cir. 2004) (emphasis omitted)).

As an inmate at the CCJ, plaintiff had available to him a grievance process for use in complaining of prison conditions. *Dkt. No. 77-14* at 3. In accordance with the prescribed grievance procedure, an inmate complaining of prison conditions must first request a grievance form from one of the corrections officers on duty. *Id.* At that point the corrections officer must make an attempt to resolve the grievance informally. *Id.* If those efforts are unsuccessful, a formal grievance must be filed, and the matter is then investigated by defendant Laurin, as the inmate grievance coordinator, who, following his investigation, makes a decision concerning the matter. *Id.* In the event the inmate is dissatisfied with defendant Laurin's decision, he may appeal it to the Citizens Policy and Complaint Review Council ("CPCRC"). *Id.* If a plaintiff fails to follow each of the required steps of the above-described procedure prior to commencing litigation, he has failed to exhaust his administrative remedies. *See Ruggerio v. Cnty. of Orange*, 467 F.3d 170, 176 (2d Cir. 2006) ("[T]he PLRA requires proper exhaustion, which means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." (quotation marks omitted)).

*13 The record reflects that plaintiff availed himself of the grievance process on several occasions during the course of his incarceration at the CCJ.¹⁸ *Dkt. No. 17* at 78-161; *Dkt. No. 77-5* at 2-47; *Dkt. No. 93-4* at 76170. None of those grievances, however, appear to relate to the alleged failure of prison officials to permit him to observe Ramadan, to engage in congregate prayer, or retaliation

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by any defendants. *Id.* In his response to the county defendants' motion, plaintiff argues that, with "respect to Ramadhan and Congregational Prayer, not only did Plaintiff grieve these deprivities [sic], but for exhaustion purposes, he went to the extent of appealing to the direct attention of CPCRC – just as he did all of his other claims." *Dkt. No. 93-2 at 40.* The grievances to which plaintiff cites in support of this contention, however, do not relate to being deprived access to religious services, the right to participate in Ramadan, or retaliation. *Dkt. No. 93-4 at 167-171.* Thus, it appears that plaintiff has failed to exhaust the available administrative remedies with respect to these causes of action.

18 Plaintiff contends that some of his grievances were intentionally lost or destroyed by CCJ staff. *See, e.g., Dkt. No. 17 at 20.*

Plaintiff's failure to exhaust, however, does not warrant dismissal of the amended complaint without further inquiry. In a series of decisions rendered since enactment of the PLRA, the Second Circuit has prescribed a three-part test for determining whether dismissal of an inmate plaintiff's complaint is warranted for failure to satisfy the PLRA's exhaustion requirement. *See, e.g., Hemphill v. N.Y., 380 F.3d 680, 686 (2d Cir. 2004); see also Macias, 495 F.3d at 41.* Those decisions instruct that, before dismissing an action as a result of a plaintiff's failure to exhaust, a court must first determine whether the administrative remedies were available to the plaintiff at the relevant times. *Macias, 495 F.3d at 41; Hemphill, 380 F.3d at 686.* In the event of a finding that a remedy existed and was available, the court must next examine whether the defendant has forfeited the affirmative defense of non-exhaustion by failing to properly raise or preserve it, or whether, through his own actions preventing the exhaustion of plaintiff's remedies, he should be estopped from asserting failure to exhaust as a defense. *Id.* In the event the exhaustion defense survives these first two levels of scrutiny, the court must examine whether the plaintiff has plausibly alleged special circumstances to justify his failure to comply with the applicable administrative procedure requirements. *Id.*

Plaintiff contends that he should be excused from the exhaustion requirement because, on the morning that Ramadan began in July 2012, the "Shift Officer" threatened plaintiff with physical violence. *Dkt. No. 93-2 at 40.* There is no evidence in the record, aside from plaintiff's allegations, however, that this threat actually

occurred or that the assault of another Muslim inmate from the previous day, to which the Shift Officer referred in threatening plaintiff, actually occurred. In any event, according to plaintiff's own amended complaint, on a different occasion, when he was allegedly threatened by defendant Clancy on or about October 18, 2012 about filing a grievance concerning a meal, he, in fact, complained to defendant Laurin "about Clansy's [sic] threat." *Dkt. No. 17 at 19.* This demonstrates that plaintiff had a history of ignoring threats by some corrections officers and suggests he did not find the threats of CCJ security staff necessarily compelling. Most persuasive to me in recommending that the court find that there are no circumstances that exist to excuse plaintiff's failure to exhaust, however, is that courts in this circuit have concluded that the type of vague threat, allegedly directed toward plaintiff by an unidentified individual, cannot serve as a basis for finding an inmate excused from the PLRA exhaustion requirement. *See Singh v. Lynch, 460 Fed.Appx. 45, 4748 (2d Cir. 2012)* ("The test for determining the availability of grievance procedures to a prisoner is objective.... Singh's subjective fear of retaliatory physical harm derives from two facts: the unreported June 6, 2005 assault and other inmates' warnings that Lynch was out to get him. The former fact cannot, by itself, support an objective finding that grievance procedures were unavailable.... As for the alleged inmate warnings, in the absence of any particulars indicating that Lynch was looking to do more than harass Singh ..., this fact cannot support a finding that grievance procedures for an assault claim were effectively unavailable."); *Harrison v. Stallone, No. 06-CV-0902, 2007 WL 2789473, at *6* (N.D.N.Y. Sept. 24, 2007) (Kahn, J., adopting report and recommendation by DiBianco, M.J.) (concluding that the plaintiff was not excused from exhausting available administrative remedies even where the plaintiff alleged in his complaint that he did not file a grievance because he was " 'afraid of retaliation'" and he stated in opposition to the defendants' motion for summary judgment that "he had a 'legitimate fear' of retaliation because his substantive claim is one for retaliation"). To hold otherwise would permit an exception that would be easily and often incanted by inmates, and would potentially eviscerate the PLRA's exhaustion rule. *Harrison, 2007 WL 2789473, at *6.*

4. Personal Involvement

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***14** Defendants seek dismissal of the claims asserted against defendants Bedard, Blaise, Clancy, Perry, Web, and Wingler, arguing that there is no evidence in the record from which a reasonable factfinder could conclude that any of those individuals were personally involved in the alleged unconstitutional conduct.

“Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [section] 1983.” *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (citing *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977)). As the Supreme Court has noted, a defendant may only be held accountable for his actions under section 1983. See *Iqbal*, 556 U.S. at 683 (“[P]etitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic.”). In order to prevail on a section 1983 cause of action against an individual, a plaintiff must show “a tangible connection between the acts of a defendant and the injuries suffered.” *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). “To be sufficient before the law, a complaint must state precisely who did what and how such behavior is actionable under law.” *Hendrickson v. U.S. Attorney Gen.*, No. 91-CV-8135, 1994 WL 23069, at *3 (S.D.N.Y. Jan. 24, 1994).

In the event the recommendations above are adopted, the remaining claims for consideration against the county defendants in this regard are plaintiff’s deliberate medical indifference claim and his free exercise claim regarding his dietary restrictions. At the outset of my analysis, it is worth noting that the thrust of defendants’ arguments with respect to whether the defendants considered below were personally involved is aimed at whether they are in fact *responsible* for the conduct alleged by plaintiff. See, e.g., *Dkt. No. 77-19 at 24* (“Although these Defendants had interactions with the Plaintiff, they did not have any authority to alter Plaintiff’s medical/dietary restrictions. They simply attempted to ensure that Plaintiff was provided a proper meal and provided him with a replacement meal if need be.”). Because a personal involvement inquiry on summary judgment examines only whether there is record evidence to support a factfinder’s conclusion that the individual under consideration was involved in the alleged conduct, I have limited my analysis to that particular question in this part of the report.

a. *Defendant Bedard*

Plaintiff contends that defendant Bedard violated his rights by (1) enforcing the decision by defendants Schroyer and Kinter to remove him from his heart-healthy diet in October 2012, and (2) serving him meals that contained pork. Defendant Bedard’s own affidavit discloses that he was personally involved by admitting that he discussed the status of plaintiff’s meal restrictions with some of the other named defendants. *Dkt. No. 77-11 at 4*. In addition, defendant Bedard stated that, “[w]hen asked, [he] would discuss the components or ingredients of meals with the [corrections officers], and how this related to any restrictions the kitchen had on file for various inmates, in attempts to resolve any issues regarding an inmate being served a non-compliant meal.” *Id.* In light of these statements, and considered in conjunction with plaintiff’s allegations that CCJ corrections officers phoned the CCJ kitchen following his complaints about his food containing pork (and some of the grievances reflecting the same), I find that reasonable factfinder could conclude that defendant Bedard was personally involved in the alleged conduct giving rise to plaintiff’s deliberate medical indifference cause of action and free exercise claim regarding his religious dietary restrictions.

b. *Defendant Blaise*

***15** There is no record evidence that defendant Blaise was involved in either plaintiff’s medical indifference or free exercise claim. Indeed, there are no allegations in the amended complaint, nor has plaintiff subsequently alleged, that defendant Blaise was involved in providing or denying him meals at any time.¹⁹ Plaintiff has acknowledged this in his response to the county defendants’ motion. See *Dkt. No. 93-2 at 54* (“For the purpose of clarity, nowhere within the Amended Complaint is it alleged that Blaise deprived Plaintiff of meals or any of his various diets.”). Accordingly, I recommend that plaintiff’s medical indifference claim and free exercise claim regarding his religious diet be dismissed.

¹⁹

Instead, plaintiff has maintained that defendant Blaise is responsible for housing a mentally ill inmate next door to plaintiff’s cell and asking plaintiff to retrieve the inmate’s meal tray knowing that plaintiff

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may be assaulted by the inmate. *Dkt. No. 17 at 31–32; see also Dkt. No. 93–2 at 54–56.* Those allegations will be addressed in Part III.C.5.c. of this report.

c. Defendant Clancy

Turning first to plaintiff's deliberate medical indifference cause of action, there is no record evidence from which a reasonable factfinder could conclude that defendant Clancy was involved in denying plaintiff any of his heart-healthy meals to which he was entitled. Accordingly, I recommend this claim be dismissed as against defendant Clancy.

Plaintiff alleges, however, and there is evidence in the record confirming that defendant Clancy responded to at least one of plaintiff's complaints regarding whether his meal contained pork. *Dkt. No. 17 at 1819; Dkt. No. 93–4 at 116–17.* As a CCJ Corrections Sergeant, defendant Clancy is considered a supervisory official, and, in that capacity, she may be found personally liable for a constitutional violation in the event she learned of a constitutional violation through a report or appeal and failed to remedy the wrong. *Iqbal v. Hasty*, 490 F.3d 143, 152–53 (2d Cir. 2007), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 554 (2009); *see also Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Wright*, 21 F.3d at 501. Because there is evidence in the record that reflects defendant Clancy learned that plaintiff received a meal that did not comport with his religious dietary restrictions, I recommend defendants' motion be denied to the extent that it seeks dismissal of plaintiff's free exercise claim asserted against defendant Clancy on the basis of personal involvement.

d. Defendant Perry

Turning first to plaintiff's deliberate medical indifference cause of action against this defendant, there is no record evidence from which a reasonable factfinder could conclude that defendant Perry was involved in denying plaintiff any of his heart-healthy meals to which he was entitled. Accordingly, I recommend this claim be dismissed as against defendant Perry.

As to plaintiff's free exercise claim, plaintiff contends that, on December 25, 2012, defendant Perry responded to his

complaint that his meal consisted of "pork rib-eye." *Dkt. No. 17 at 22–23.* Plaintiff requested a grievance form from defendant Perry, and the copy of the completed form that is in the record confirms that defendant Perry responded to plaintiff's request for a new meal. *Dkt. No. 93–4 at 164.* Thus, the record establishes that defendant Perry was involved in the alleged violation of plaintiff's free exercise rights on at least one occasion. For this reason, I recommend defendants' motion be denied to the extent that it seeks dismissal of plaintiff's free exercise claim asserted against defendant Perry on the basis of personal involvement.

e. Defendant Web

*16 Like defendants Blaise, Clancy, and Perry, there is no record evidence from which a reasonable factfinder could conclude that defendant Web was involved in denying plaintiff any of his heart-healthy meals to which he was entitled. Accordingly, I recommend this claim be dismissed as against defendant Web.

Turning to plaintiff's free exercise claim, the amended complaint alleges that, on November 5, 2012, plaintiff complained to defendant Web that his meal contained pepperoni. *Dkt. No. 17 at 21.* In response, defendant Web allegedly told plaintiff that the meat was turkey ham, not pork, and thereafter called the CCJ kitchen to confirm that the meat was not pork. *Id.* at 21–22. Although plaintiff alleges that he filed a grievance regarding this incident, there is no copy of the grievance in the record before the court. *Id.* at 22; *Dkt. No. 93–4 at 76–171.* In his affidavit submitted in support of the county defendants' motion, defendant Web admits to "recall[ing] an occurrence of which the Plaintiff was complaining that he was served pork in contradiction to his religious diet. However the food he claimed was pork was actually turkey." *Dkt. No. 77–16 at 2.* In light of this additional record evidence supporting plaintiff's version of the events on November 5, 2012 as alleged in his amended complaint, I find there is a dispute of material fact as to whether defendant Web was personally involved in depriving plaintiff of a meal consistent with his religious diet on that date.

f. Defendant Winger

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Plaintiff's claims against defendant Wingler stem from allegations that, on two occasions, defendant Wingler ignored plaintiff's complaints that his meals contained tomatoes in violation of his medical dietary restrictions. *Dkt. No. 17 at 7; Dkt. No. 93-2 at 58.* The record evidence includes two grievances, one dated October 3, 2012 and the second October 28, 2012, that confirm, at least, that (1) plaintiff complained of being served tomato products on those dates and (2) defendant Wingler addressed those complaints. *Dkt. No. 93-4 at 92, 139.* Therefore, I find there is sufficient evidence from which a reasonable factfinder could conclude that defendant Wingler was personally involved plaintiff's allegations that he was deprived of medically compliant meals.

With respect to plaintiff's free exercise claim asserted against defendant Wingler, however, there are no allegations in the amended complaint, and plaintiff has failed to subsequently submit any proof, reflecting that defendant Wingler was ever involved in providing or depriving plaintiff of any meals that were not in accordance with his religion. For that reason, I recommend plaintiff's free exercise claim in this regard against defendant Wingler be dismissed.

5. Remaining Claims/Defendants

a. Plaintiff's Deliberate Medical Indifference Claim Asserted Against Defendants Laurin, Kinter, Bedard, and Wingler

As discussed above in Part III.B. of this report with respect to defendant Schroyer, I find that there is no record evidence from which a reasonable factfinder could conclude that the alleged conduct of defendants Laurin, Kinter, Bedard, and Wingler was sufficiently serious to satisfy the objective element of a deliberate medical indifference cause of action. In particular, there is no record evidence, aside from plaintiff's allegation that he suffered an indiscernible amount of risk for a heart attack and stroke, that removing him from his heart-healthy diet for one month is constitutionally significant. *See, e.g., Cleveland v. Eagleton, No. 14-CV-2444, 2015 WL 8919463, at *5* (D.S.C. Nov. 12, 2015) (finding that removing the plaintiff from his cholesterol medicine and his heart-healthy diet does not satisfy the objective element of a medical indifference claim). Because plaintiff cannot establish one of the required elements of the claim,

I recommend that his deliberate medical indifference cause of action be dismissed as to defendants Laurin, Kinter, Bedard, and Wingler.

b. Plaintiff's Free Exercise Claim (Regarding his Religious Dietary Restrictions) Asserted Against Defendants Laurin, Kinter, Bedard, Clancy, Perry, and Web

*17 While inmates confined within prison facilities are by no means entitled to the full gamut of rights guaranteed under the United States Constitution, including its First Amendment, the free exercise clause of that provision does afford them at least some measure of constitutional protection, including their right to "a diet consistent with [their] religious scruples." *Bass v. Coughlin*, 976 F.2d 98, 99 (2d Cir. 1992); *see also Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("In the First Amendment context ... a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."). That right, however, is not without limits, and the task of defining the contours of that right in a prison setting requires striking a delicate balance between the rights of prison inmates and the legitimate interests of prison officials tasked with maintaining prison security. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-49 (1987); *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003); *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990).

As a threshold matter, "[t]he prisoner must show ... that the disputed conduct substantially burdens his sincerely held religious beliefs." ²⁰ *Salahuddin*, 467 F.3d at 274-75. In evaluating this factor, the court must be wary of "'question[ing] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds!'" *McEachin*, 357 F.3d at 201 (quoting *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989)). Instead, a court should consider only whether the particular plaintiff has "demonstrate[d] that the beliefs professed are sincerely held and in the individual's own scheme of things, religious." *Ford*, 352 F.3d at 588 (quotation marks omitted). Once a plaintiff satisfies this burden, defendants must then "bear the relatively limited burden of identifying the legitimate penological interests that justifying impinging conduct." *Salahuddin*, 467 at 275. "[T]he burden [, however,] remains with the prisoner to 'show that these penological concerns

were irrational.'" *Ford*, 352 F.3d at 595 (quoting *Fromer v. Scully*, 874 F.2d 69, 74 (2d Cir. 1989)) (alteration omitted).

20 The Second Circuit has yet to decide whether the "substantial burden" test survived the Supreme Court's decision in *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990), in which the Court suggested that application of the test "puts courts in 'the unacceptable business of evaluating the relative merits of differing religious claims.'" *Ford v. McGinnis*, 352 F.3d 582, 592 (2d Cir. 2003) (quoting *Emp't Div.*, 494 U.S. at 887); *see also Holland v. Goord*, 758 F.3d 215, 220–21 (2d Cir. 2014) (declining to decide whether a prisoner must show, as a threshold matter, that the defendants' conduct substantially burdened his sincerely held religious beliefs in connection with a First Amendment free exercise claim). In the absence of any controlling precedent to the contrary, I have applied the substantial-burden test in this matter.

In this case, there is evidence in the record to support a factfinder's conclusion that plaintiff was initially served a meal that contained pork, which is inconsistent with his religious beliefs, on only ten occasions between March 28, 2012 and December 25, 2012. Specifically, a review of the record evidence, including the allegations in plaintiff's amended complaint, reveal that plaintiff was initially served meals containing pork on (1) June 21, 2012; (2) July 4, 2012; (3) September 24, 2012 at lunch; (4) September 24, 2012 at dinner; (5) October 9, 2012; (6) October 10, 2012; (7) October 17, 2012; (8) October 29, 2012; (9) November 5, 2012; and (10) December 25, 2012. *Dkt. No. 17 at 13, 18, 20, 21, 22, 66, 67; Dkt. No. 93–4 at 82–85, 94–99, 116–17, 164–65*. On September 24, 2012, plaintiff learned that the meat in his meals was vegetarian bacon. *Id.* at 83, 85. Similarly on October 10, 2012, plaintiff was told that the meat was turkey ham, not pork. *Id.* at 99. Nevertheless, there is evidence suggesting that on October 10, 2012 and December 25, 2012, his meal was replaced. *Id.* at 96, 164. While there is a dispute in the record regarding precisely when the CCJ learned of plaintiff's religious dietary restrictions, it is clear from the record that plaintiff may have been served pork only on ten dates during his one-year incarceration at the CCJ. This is not constitutionally significant and does not give rise to a dispute of fact regarding whether his First Amendment rights were substantially burdened. *See Norwood v. Strada*, 249 Fed.Appx. 269, 272 (3d Cir. 2007) (finding that the denial of seven consecutive religious

meals did not substantially burden the plaintiff's free exercise rights); *Washington v. Afify*, 968 F.Supp.2d 532, 538 (W.D.N.Y. 2013) ("Courts have generally held that incidents that are isolated, or few in number, involving religiously-mandated food, do not give rise to a First Amendment claim." (citing cases)); *Evans v. Albany Cnty. Corr. Facility*, No. 05–CV–1400, 2009 WL 1401645, at *8 (N.Y.N.D. May 14, 2009) (Suddaby, J.) (finding the plaintiff's allegations that he was served eighteen "wrong meals" out of an approximate 354 meals was constitutionally de minimis); *Odom v. Dixion*, No. 04–CV–0889, 2008 WL 466255, at *11 (W.D.N.Y. Feb. 15, 2008) (finding the plaintiff's allegation that the defendants failed to provide him with kosher meals on five of the fifteen days he was in keeplock confinement did not give rise to a cognizable constitutional violation). Accordingly, I recommend this claim be dismissed as to defendants Laurin, Kinter, Bedard, Clancy, Perry, and Web.

c. Plaintiff's Failure-to-Protect Claim Asserted Against Defendants Blaise and Clancy

*18 The county defendants do not seek dismissal of this claim in their summary judgment papers. For that reason, I recommend that the claim survive this motion but that defendants Blaise and Clancy be permitted an opportunity to file a second motion for summary judgment specific to this remaining claim.

IV. SUMMARY AND RECOMMENDATION

A careful review of the evidence currently before the court demonstrates that no reasonable factfinder could conclude that any of the defendants were deliberately indifferent to plaintiff's medical needs, based upon a decision to remove him from his heart-healthy diet for a period of one month. Addressing plaintiff's religious claims, his assertion that his religious rights were violated when prison officials failed to permit him to celebrate Ramadan and to engage in congregational prayer are precluded based upon his failure to exhaust available administrative remedies before filing this action. Similarly, his retaliation claims are also not properly exhausted. Plaintiff's free exercise claim regarding his religious diet is also subject to dismissal in light of the absence of any evidence from which a reasonable factfinder could conclude that his rights were substantially burdened. Because defendant Schroyer did not seek dismissal of the plaintiff's retaliation claim, I recommend

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that cause of action survive defendant Schroyer's motion but he be permitted to file a second motion for summary judgment addressing it. Similarly, the county defendants did not address plaintiff's failure-to-protect claim asserted against defendants Blaise and Clancy and, accordingly, I recommend that claim survive but that those individuals be permitted to file a motion for summary judgment regarding that single claim.

Based upon the foregoing, it is hereby respectfully

RECOMMENDED that defendant Schroyer's motion for summary judgment (*Dkt. No. 75*) be GRANTED to the extent it seeks dismissal of plaintiff's claims against him, with the exception of plaintiff's retaliation claim and that the motion be DENIED as to that claim; and it is further

RECOMMENDED that the motion for summary judgment submitted by defendants Bedard, Blaise, Clancy, Laurin, Kinter, Perry, Web, and Wingler (*Dkt. No. 77*) be GRANTED to the extent it seeks dismissal of plaintiff's claims asserted against all defendants, with the exception of plaintiff's failure-to-protect claim asserted against defendants Blaise and Clancy and that the motion be DENIED as to that claim; and it is further

RECOMMENDED that defendant Schroyer be permitted to file a second motion for summary judgment addressing the retaliation claim not addressed in his first motion, and that defendants Blaise and Clancy be permitted to file a second motion for summary judgment addressing the failure-to-protect claim not addressed in their first motion.

NOTICE: Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. [28 U.S.C. § 636\(b\)\(1\)](#); [Fed.R.Civ.P. 6\(a\), 6\(d\), 72](#); *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

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Chamma K. Brandon, Plaintiff,
v.
Dr. Glen Schroyer, et al., Defendants.

9:13-CV-939 (TJM/DEP)
|
Signed 04/25/2016

DECISION & ORDER

Thomas J. McAvoy, United States District Judge

*1 This action, brought pursuant to [42 U.S.C. §§ 1983, 1985](#) and [19 86](#), as well as the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), [42 U.S.C. § 2000cc](#), alleges that Defendants violated the Plaintiff's rights by denying him access to food appropriate to his religion and preventing him participating in religious ceremonies during his incarceration, and by failing to protect him from an assault by a fellow inmate. The action was referred to the Hon. David E. Peebles, United States Magistrate Judge, for a Report-Recommendation pursuant to [28 U.S.C. § 636\(b\)](#) and Local Rule 72.3(c).

The Report-Recommendation, dated February 26, 2016, recommends that Defendants' motions for summary judgment be granted in part and denied in part, and that Defendant Glen Schroyer be permitted to file a supplemental motion for summary judgment to address Plaintiff's claims of retaliation. See dkt. # 99. Defendant Schroyer subsequently filed such a motion. See dkt. # 100.

Plaintiff filed objections to the Report-Recommendation. When objections to a magistrate judge's Report-Recommendation are lodged, the Court makes a “*de novo* determination of those portions of the report or specified proposed findings or recommendations to which

objection is made.” See [28 U.S.C. § 636\(b\)\(1\)](#). After such a review, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.” Id.

Having reviewed the record *de novo* and having considered the issues raised in the Plaintiff's objections, this Court has determined to accept and adopt the recommendation of Magistrate Judge Peebles for the reasons stated in the Report-Recommendation.

It is therefore

ORDERED that the Plaintiff's objections to the Report-Recommendation of Magistrate Judge Peebles, dkt. # 111, are hereby OVERRULED. The Report-Recommendation, dkt. # 99, is hereby ADOPTED, and:

1. Defendant Schroyer's motion for summary judgment, dkt. # 75, is hereby GRANTED in part and DENIED in part. The motion is denied with respect to Plaintiff's retaliation claims against Plaintiff and GRANTED in all other respects;
2. Defendant Schroyer's second motion for summary judgment is hereby accepted as filed. The Clerk of Court shall refer the motion to Magistrate Judge Peebles for a Report and Recommendation; and
3. The motion of summary judgment of Defendants Bedard, Blaise, Clancy, Laurin, Kinter, Perry, Web and Wingler, dkt. # 77, is hereby GRANTED in part and DENIED in part. The motion is DENIED with respect to Plaintiff's failure-to-protect claim against Defendants Blaise and Clancy and GRANTED in all other respects.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 1639904

2011 WL 1103045

Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Valery LATOUCHE, Plaintiff,
v.

Michael C. TOMPKINS, C.O., Clinton Correctional Facility; Dean E. LaClair, C.O., Clinton Correctional Facility; Jeffrey R. Ludwig, C.O., Clinton Correctional Facility; Michael B. King, Sgt., Clinton Correctional Facility; D. Mason, C.O., Clinton Correctional Facility; B. Malark, C.O., Clinton Correctional Facility; John Reyell, C.O., Clinton Correctional Facility; Bob Fitzgerald, R.N., Clinton Correctional Facility; John Doe, C.O. (C.O. Gallery Officer Company Upper F-6); John Doe, C.O. (Mess Hall Supervising C.O.), Defendants.

No. 9:09-CV-308 (NAM/RFT).

|
March 23, 2011.

Attorneys and Law Firms

Valery LaTouche, Ossining, NY, pro se.

Eric T. Schneiderman, Attorney General for the State of New York, Krista A. Rock, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

MEMORANDUM-DECISION AND ORDER

NORMAN A. MORDUE, Chief Judge.

INTRODUCTION

*1 In this *pro se* action under 42 U.S.C. § 1983, plaintiff, an inmate in the custody of the New York State Department of Correctional Services (“DOCS”), claims that defendants violated his Eighth Amendment rights as a result of a physical altercation. Defendants moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Dkt. No. 46) and plaintiff opposed the motion. (Dkt. No. 53). The motions were referred to United States Magistrate Judge Randolph F. Treece for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c).

Magistrate Judge Treece issued a Report and Recommendation (Dkt. No. 60) recommending that defendants' motion be granted in part and denied in part. Specifically, Magistrate Judge Treece recommended awarding summary judgment dismissing the following: (1) plaintiff's claims for monetary relief against all defendants in their official capacity; (2) plaintiff's claims of medical indifference against defendant Fitzgerald; and (3) plaintiff's allegations of verbal harassment by defendant Mason. Magistrate Judge Treece also recommended denying defendants' motion for summary judgment on plaintiff's excessive force claims against defendants Tompkins, LaClair, Mason, Malark and Reyell and plaintiff's failure to protect claims against defendants Ludwig and King.

Defendants filed specific objections to portions of the Report and Recommendation arguing: (1) that the Magistrate Judge erred in “overlooking” plaintiff's failure to comply with Local Rule 7.1(a) (3); (2) that the Magistrate Judge erred when he failed to apply the *Jeffreys* exception as plaintiff's testimony was incredible as a matter of law; and (3) plaintiff's excessive force claims against defendant Reyell are subject to dismissal for lack of personal involvement. (Dkt. No. 61). Plaintiff does not object to the Report and Recommendation. (Dkt. No. 62).

In view of defendants' objections, pursuant to 28 U.S.C. § 636(b) (1)(c), this Court conducts a *de novo* review of these issues. The Court reviews the remaining portions of the Report-Recommendation for clear error or manifest injustice. See *Brown v. Peters*, 1997 WL 599355, *2-3 (N.D.N.Y.), *af'd without op.*, 175 F.3d 1007 (2d Cir.1999); see also *Batista v. Walker*, 1995 WL 453299, at *1 (S.D.N.Y.1995) (when a party makes no objection to a portion of the report-recommendation, the Court reviews that portion for clear error or manifest injustice). Failure to object to any portion of a report and recommendation waives further judicial review of the matters therein. See *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993).

DISCUSSION

I. Local Rule 7.1(a)(3)

The submissions of *pro se* litigants are to be liberally construed. *Nealy v. U.S. Surgical Corp.*, 587 F.Supp.2d 579, 583 (S.D.N.Y.2008). However, a *pro se* litigant

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is not relieved of the duty to meet the requirements necessary to defeat a motion for summary judgment. *Id.* (citing *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir.2003)). Where a plaintiff has failed to respond to a defendant's statement of material facts, the facts as set forth in defendant's Rule 7.1 statement will be accepted as true to the extent that (1) those facts are supported by the evidence in the record, and (2) the non-moving party, if he is proceeding *pro se*, has been specifically advised of the potential consequences of failing to respond to the movant's motion for summary judgment. *Littman v. Senkowski*, 2008 WL 420011, at *2 (N.D.N.Y.2008) (citing *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996)).¹

¹ Local Rule 7.1(a)(3) provides:

Summary Judgment Motions

Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. *Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.*

The moving party shall also advise *pro se* litigants about the consequences of their failure to respond to a motion for summary judgment. See also L.R. 56.2.

The opposing party shall file a response to the Statement of Material Facts. The non-movant's response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises. The non-movant's response may also set forth any additional material facts that the non-movant contends are in dispute in separately numbered paragraphs. *The Court shall deem admitted any facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert.*

Local Rule 7.1(a)(3) (emphasis in original).

*2 The record herein contains few undisputed facts. Plaintiff and defendants disagree on many of the events that transpired and provide conflicting accounts of the circumstances surrounding the incident. In support of the motion, defendants properly filed a Statement of Material Facts pursuant to Local Rule 7.1 and notified plaintiff about the consequences of his failure to respond to the motion for summary judgment. Plaintiff does not dispute that he received such notification from defendants. Plaintiff responded with a handwritten "Statement of Facts", without citations to the record, and failed to specifically admit or deny defendants' factual statements as required by Local Rule 7.1. However, plaintiff also annexed a copy of his deposition transcript. In the deposition, upon questioning from defense counsel, plaintiff testified as follows:

Q. ... Have you read the complaint?

A. Yes, ma'am.

Q. So, you are aware of its contents?

A. Yes, ma'am.

Q. Did anyone help you prepare the complaint?

A. No, ma'am.

Q. Are there any statements contained in the complaint that you now wish to change or modify?

A. I'm not sure.

Q. Well, let me ask you this: So, do you adopt this document under oath as true to the best of your knowledge?

A. Yes, ma'am.

Transcript of Plaintiff's Deposition at 13.

A verified complaint may be treated as an affidavit for the purposes of a summary judgment motion and may be considered in determining whether a genuine issue of material fact exists. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995) (the plaintiff verified his complaint by attesting under penalty of perjury that the statements in the complaint were true to the best of his knowledge). Based upon the aforementioned colloquy, the Court deems plaintiff's complaint to be "verified" and as such, will treat the complaint as an affidavit. See *Torres v.*

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Caron, 2009 WL 5216956, at *3 (N.D.N.Y.2009). While plaintiff has not formally and technically complied with the requirements of Local Rule 7.1(a)(3), his opposition to defendants' motion contains sworn testimony. In light of his *pro se* status and the preference to resolve disputes on the merits rather than "procedural shortcomings", to the extent that plaintiff's "Statement of Facts" and assertions in the complaint do not contradict his deposition testimony, the Court will consider those facts in the context of the within motion. See *Mack v. U.S.*, 814 F.2d 120, 124 (2d Cir.1987); see also *Liggins v. Parker*, 2007 WL 2815630, at *8 (N.D.N.Y.2007) (citing *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir.1996)). The Court has reviewed plaintiff's complaint and compared the allegations with the testimony presented at his deposition and adopts Magistrate Judge Treece's summary of the "facts" as presented by both parties.²

² While the Court adopts Magistrate Judge Treece's recitation of defendants' and plaintiff's versions of the facts, the Court does not adopt the reasoning set forth in the Footnote 2 of the Report and Recommendation.

II. *Jeffreys* Exception

Defendants argue that the Court should apply *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir.2005) and award summary judgment dismissing all claims of excessive force based upon plaintiff's implausible and contradictory claims.

*3 "It is a settled rule that '[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment' ". *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir.2006) (citing *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir.1997) (unfavorable assessments of a plaintiff's credibility are not "within the province of the court on a motion for summary judgment")). A narrow exception to this general rule was created by the Second Circuit in *Jeffreys*:

While it is undoubtedly the duty of district courts not to weigh the credibility of the parties at the summary judgment stage, in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine whether "the jury could reasonably find for the plaintiff," and

thus whether there are any "genuine" issues of material fact, without making some assessment of the plaintiff's account. Under these circumstances, the moving party still must meet the difficult burden of demonstrating that there is no evidence in the record upon which a reasonable factfinder could base a verdict in the plaintiff's favor.

Id. at 554 (internal citations and citations omitted).

Here, while plaintiff relies exclusively on his own testimony, for *Jeffreys* to apply, the testimony must also be "contradictory and incomplete". In this regard, defendants argue that plaintiff's allegations are contradicted by his prior accounts of the incident. Defendants cite to the record and argue that plaintiff told Fitzgerald that, "I hit the officer first" and that "I was hurt when I was subdued". Moreover, defendants point out that these statements were documented in an Inmate Injury Report executed by plaintiff.

Plaintiff does not deny making the aforementioned statements. However, in his deposition, plaintiff explained those discrepancies and testified:

Q. —did Nurse Fitzgerald ask you any questions while he was examining you?

A. I think he asked me how am I feeling, how did this happen?

Q. And what did you say?

A. I told him I was nervous and that [sic] whatever officer D. Mason told me to tell him.

Q. What did you say?

A. I told him I was nervous and whatever officer D. Mason told me to tell him, which was that I got hurt being subdued—

Q. Which was—

A. —and that I started this.

Q. And is that the truth?

A. No.

Q. Why did you tell the nurse that?

A. Because I was being forced to.

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Q. Forced to how?

A. By the officers that [sic] was there.

Q. Did you sign a form admitting that you hit the officer first and you were hurt when you were subdued?

A. Yes, ma'am.

Q. Why did you do that?

A. Because the [sic] officer D. Mason kept smacking me for me to do that.

Transcript of Plaintiff's Deposition at 53–54.

*4 In the Report and Recommendation, Magistrate Judge Treece concluded that plaintiff's "fear of retribution" was a plausible explanation for the discrepancies in his testimony. This Court agrees and adopts the Magistrate Judge's conclusions. See *Langman Fabrics v. Graff California Wear, Inc.*, 160 F.3d 106, 112–13 (2d Cir.1998); see also *Cruz v. Church*, 2008 WL 4891165, at *5 (N.D.N.Y.2008) ("[t]he Court notes that ... it would be have difficulty concluding that [the][p]laintiff's statement of June 5, 2005, and his statement of June 16, 2005, are wholly irreconcilable, given his proffered explanation that he made the statement of June 5, 2005, out of fear of retribution by [the] [d]efendants).

Defendants also argue that plaintiff cannot identify which individuals participated in the attack; that plaintiff's injuries are consistent with the brief use of force as described by defendants to subdue plaintiff; and that plaintiff's version is contradicted by defendants' affidavits. Magistrate Judge Treece found that plaintiff was able to identify some individuals involved in the assault which, "stands in stark contrast to the plaintiff in *Jeffreys* who was unable to identify any of the officers involved in the alleged assault". Upon review of the record, as it presently exists, the Court agrees and finds that plaintiff's testimony is not wholly conclusory or entirely inconsistent to warrant application of the *Jeffreys* exception. See *Percinthe v. Julien*, 2009 WL 2223070, at *7 (S.D.N.Y.2009) (the court rejected the defendants' argument that the plaintiff's claims were subject to dismissal for implausibility as his injuries did not reflect the attack that he described and his description of the incident changed over time holding that the plaintiff's testimony, "[did] not reach the level of inconsistency and

lack of substantiation that would permit the Court to dismiss on these grounds").

Magistrate Judge Treece provided an extensive summary of the record and applicable law and found that the evidence did not support deviating from the established rule that issues of credibility are not be resolved on summary judgment. On review, the Court agrees with the Magistrate's recommendations and concludes that the *Jeffreys* exception does not apply. Accordingly, the Court accepts and adopts the Report and Recommendation on this issue.

III. Reyell's Personal Involvement

Defendants argue that the Magistrate Judge erred when he failed to dismiss the complaint against Reyell on the grounds that he was not personally involved in the attack. Defendants claim that the "RRO erroneously cites plaintiff's declaration as stating that 'it was defendant Reyell and another officer who removed the shirt' ". Defendants claim that the declaration and complaint clearly state that, "Officer Rock orchestrated the removal of plaintiff's shirt" .³ Defendants argue that the assertions in plaintiff's declaration (submitted in response to the motion for summary judgment) and complaint are contradicted by plaintiff's deposition testimony. Defendants claim that plaintiff testified that Reyell tried to cover up the incident by removing the shirt he was wearing.

³ Officer Rock is not a defendant herein.

*5 The Court has reviewed plaintiff's complaint, declaration and deposition transcript and finds defendants' summary of plaintiff's assertions to be inaccurate. In plaintiff's complaint, on page 8, plaintiff alleges:

Feeling extremely weak the claimant responded with a shake of his head. Once this performance was over with Correctional Officer R. Rock, the individual who held on to the photograph camera and who is responsible for capturing the claimant's injuries [sic] photos pointed to the claimant's bloody [sic] stain kitchen white colored uniform [] as co-workers....

Correctional Officer D. Mason then roughly removed the article of clothing and with the help of on[e] other they discarded the item of clothings [sic].

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In Paragraph 22 of plaintiff's declaration, he states:

Officer Rock, the individual who held the photograph camera and was responsible for capturing LaTouche injuries pointed to LaTouche [sic] bloody kitchen white colored uniform to his coworker asking them to remove the article of clothing before he take [sic] any pictures. Mason then roughly removed the clothing and with the help of an other [sic] officer they discarded the items of clothing.

In his deposition, plaintiff testified:

Q. What about Defendant Reyell, why are you suing Reyell?

A. Because defendant Reyell, that's the officer that was holding the camera and he tried to cover up the incident.

Q. How so?

A. That's when him and the other officer that was there, when they was searching me, strip searching me they took my shirt and they kept screaming something about let's remove this bloodstained shirt, let's remove this bloodstained shirt, we can't have this for the camera.

Q. Reyell and another officer took your shirt off?

A. Yes, ma'am.

Q. Do you remember the other officer's name?

A. No, ma'am.

Transcript of Plaintiff's Deposition at 63–64.

Here, the Magistrate Judge stated that any inconsistency or discrepancy [in plaintiff's testimony], “go[es] to the weight ... accorded to plaintiff's testimony”. The Court agrees. Any discrepancies or inconsistencies in plaintiff's testimony are for a jury to assess. In the Second Circuit case of *Fischl v. Armitage*, the plaintiff/inmate alleged

that he was assaulted in his cell by other inmates. *Fischl*, 128 F.3d at 54. The district court dismissed the plaintiff's complaint as against one defendant based upon “inconsistent statements”. *Id.* The Second Circuit vacated the judgment of the district court holding:

[T]he district court apparently questioned whether there had been an attack on Fischl at all, principally because of inconsistencies in his accounts of the event, his failure to report such an attack to prison workers in the area on that morning, and the failure of those workers to notice any indications that he had been beaten. That skepticism, however, rests on both a negative assessment of Fischl's credibility and the drawing of inferences adverse to Fischl.

*6 Likewise, inconsistent statements by Fischl as to, for example, whether it was five, six, or seven inmates who attacked him, and as to what he observed or overheard just prior to the attack, go to Fischl's credibility. While inconsistencies of this sort provide ammunition for cross-examination, and they may ultimately lead a jury to reject his testimony, they are not a proper basis for dismissal of his claim as a matter of law. The jury might well infer, for example, that while Fischl was under siege he was understandably unable to take an accurate census of the number of inmates holding him and kicking him in the face.

Fischl, 128 F.3d at 56.

In this matter, without a credibility assessment of plaintiff, the record does not warrant an award of summary judgment. Accordingly, the Court adopts the Magistrate's recommendation and denies summary judgment on this issue.

CONCLUSION

It is therefore

ORDERED that the Report and Recommendation of United States Magistrate Judge Randolph F. Trece (Dkt. No. 60) is adopted; and it is further

ORDERED that for the reasons set forth in the Memorandum–Decision and Order herein, defendants' motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that the Clerk provide copies of this Order to all parties.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1103045

IT IS SO ORDERED.

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2009 WL 3486379

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.

Henry BENITEZ, Plaintiff,

v.

HAM, et al., Defendant.

No. 9:04-CV-1159.

Oct. 21, 2009.

Attorneys and Law Firms

Henry Benitez, Malone, NY, for Plaintiff.

Hon. [Andrew M. Cuomo](#), Attorney General for the State of New York, [Timothy P. Mulvey, Esq.](#), of Counsel, Syracuse, NY, for Defendants.

ORDER

NORMAN A. MORDUE, Chief Judge.

*1 The above matter comes to me following a Report–Recommendation by Magistrate Judge George H. Lowe, duly filed on the 30th day of September 2009. Following ten days from the service thereof, the Clerk has sent me the file, including any and all objections filed by the parties herein.

After careful review of all of the papers herein, including the Magistrate Judge's Report–Recommendation, and no objections submitted thereto, it is

ORDERED that:

1. The Report–Recommendation is hereby adopted in its entirety.
2. Defendants' motion for summary judgment (Dkt. No. 92) is GRANTED IN PART AND DENIED IN PART. The following claims are dismissed pursuant to Defendants' motion for summary judgment: (1) the Eighth Amendment claims against Defendants Weissman and Richards arising from their treatment of Plaintiff's severe

body itch, left wrist, and right ankle; (2) the claims against Defendant Ham; (3) the claims against Defendants Brousseau and Donelli for their handling of Plaintiff's grievance regarding Defendant Ham; (4) the retaliation claim against Defendants Nephew, Desotelle, and Snyder based on their filing of misbehavior reports against Plaintiff; (5) the claims against Defendants Brousseau, Donelli, Girdich, and Eagen regarding their handling of Plaintiff's grievances regarding the events of January 2 and 3, 2003; (6) the claim against Defendant LaClair; (7) the claims against Defendant Bullis; and (8) the Eighth Amendment claim against Defendants Weissman and Girdich for approving the imposition of the loaf diet.

It is further ordered that the following claims are dismissed *sua sponte* pursuant to [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#): (1) Plaintiff's retaliation claim against Defendants Weissman and Richards; and (2) the claim against Defendant Selsky.

It is further ordered that the following claims survive summary judgment and *sua sponte* review and proceed to trial: (1) the conspiracy claim against Defendants Wright, Snyder, and Duprat; (2) the excessive force claim against Defendants Snyder, Duprat, Bogett, and Wright; (3) the retaliation claim against Defendants Snyder, Duprat, Bogett, and Wright arising from the use of excessive force; (4) the retaliation claim against Wright arising from his filing of a misbehavior report against Plaintiff; (5) the failure to intervene claims against Defendants Bezio and Duprat; (6) the retaliation claim against Defendant Bezio; and (7) the Eighth Amendment claims against Defendants Hensel, Goodwin, Kuhlman, and Costello.

3. The Clerk of the Court shall serve a copy of this Order upon all parties and the Magistrate Judge assigned to this case.

IT IS SO ORDERED.

REPORT–RECOMMENDATION AND ORDER

[GEORGE H. LOWE](#), United States Magistrate Judge.

This *pro se* prisoner civil rights action, commenced pursuant to [42 U.S.C. § 1983](#), has been referred to me for Report and Recommendation by the Honorable Norman A. Mordue, Chief United States District Judge, pursuant to [28 U.S.C. § 636\(b\)](#) and Local Rule 72.3(c). Plaintiff

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Henry Benitez alleges that 21 employees of the New York Department of Correctional Services (“DOCS”) violated his constitutional rights by subjecting him to excessive force, denying him medical care, falsifying misbehavior reports, denying him assistance to prepare for a disciplinary hearing, and imposing a loaf diet on him as punishment. Currently pending before the Court is Defendants' motion for summary judgment pursuant to **Federal Rule of Civil Procedure 56**. (Dkt. No. 92.) For the reasons that follow, I recommend that Defendants' motion be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL SUMMARY

*2 Unless otherwise noted, the facts in this summary are taken from Plaintiff's verified complaint¹. Plaintiff, a New York state prisoner, was transferred to Upstate Correctional Facility on September 14, 2002. (Dkt. No. 1 ¶ 8.) Plaintiff alleges that he was suffering from “ongoing severe pain in his left hand wrist and right foot ankle due to nerve damage.” (Dkt. No. 1 ¶ 9.) From the time he arrived at Upstate, he made “numerous requests” to Defendant Drs. Evelyn Weissman and Richards to receive a medication called **Atarax** that had been prescribed to him previously at Auburn Correctional Facility, an MRI of his left wrist and right ankle, and a referral to an orthopedist. (Dkt. No. 1 ¶ 12.) Plaintiff alleges that Defendants Weissman and Richards refused his requests for **Atarax**, the MRI, and the referral “in retaliation for his having filed numerous formal grievances against them [and other Upstate medical staff members] within a period of two years, and for the purpose of preventing [Plaintiff] from demonstrating in a civil rights action against prison officials the extent of the injuries of his left hand and right foot.” (Dkt. No. 1 ¶ 12–13.) Plaintiff alleges that, as a result, he continues to experience severe pain in his left wrist and right ankle, numbness in different areas of his left hand and right foot, an inability to walk or stand for longer than ten minutes, and ongoing severe body itch. (Dkt. No. 1 ¶ 14.)

¹ Only two of the named Defendants filed affidavits supporting Defendants' motion for summary judgment. Only one of those affidavits—the affidavit of Defendant Dr. Evelyn Weissman—contradicts Plaintiff's version of events.

Regarding Plaintiff's requests for **Atarax**, Dr. Weissman declares that **Atarax** is

non-formulary, which means we do not regularly stock that medication, and special approval must be obtained to issue that medication. However, **Vistaril** and **Hydroxyzine** is the substitute we use for the same purpose as **Atarax**. **Hydroxyzine** is the generic form of **Atarax**. I prescribed **Vistaril** for [P]laintiff on October 2, 2002 ... Dr. Richards requested approval for **Atarax** in April 2004 and it was suggested that [P]laintiff try **Claritin**, which had become a formulary (regularly stocked) drug. Dr. Richards requested approval for **Atarax** again in June 2004, and the response was that if the generic (**Hydroxyzine**) had not worked, it was unclear that the branded drug **Atarax** would work ... Plaintiff's complaints of itching were not ignored, and he [was] constantly given medication for itching.

(Weissman Aff. ¶¶ 4–10.)

As to Plaintiff's other claims, Dr. Weissman declares:

Regarding [P]laintiff's claim that his request for an MRI was denied, Dr. Richards and I felt, in our medical judgment, an MRI was not warranted. However, because his pain and numbness was improving with time, Dr. Richards requested, and I approved, physical therapy for [P]laintiff beginning in January 2003. Regarding [P]laintiff's claim that his request for an orthopedic consult was denied, that is incorrect. Dr. Richards requested an orthopedic consult for [P]laintiff on August 19, 2003 and [P]laintiff saw an orthopedist on September 4, 2003. The orthopedist ... did not suggest an MRI and determined that [P]laintiff was improving and “... there is not much else that I can suggest for Henry to improve or accelerate his healing. For the time being, I am just going to suggest that he be patient.”

*3 (Weissman Aff. ¶¶ 11–13.)

Plaintiff was transferred to Elmira Correctional Facility Reception Center on November 7, 2002, for a court

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appearance. Upon arrival, Plaintiff informed Defendant Correction Officer Ham that he suffered “ongoing severe pain in his left hand wrist and right foot ankle due to nerve damage, and that the handcuffs and leg irons ... were too tight and causing him swelling and enormous pain.” Ham observed that Plaintiff’s hands were swollen. However, he refused to remove or loosen the restraints. Plaintiff remained in the restraints, suffering enormous pain and swelling, until he was transferred to Five Points Correctional Facility three hours later. (Dkt. No. 1 ¶ 9.)

Plaintiff was returned to the Elmira Correctional Facility Reception Center on November 14, 2002. At that time, Plaintiff again informed Defendant Ham that the restraints were too tight and were causing him swelling and extreme pain. Defendant Ham “again verbally acknowledged that [Plaintiff]’s hands were ... swollen” but refused to remove the restraints. Plaintiff remained in the restraints, suffering enormous pain and swelling, until he was transferred out of the facility three hours later. (Dkt. No. 1 ¶ 10.)

On January 2, 2003, Defendant Correction Officers Nephew and Desotelle strip-frisked Plaintiff² in preparation for transferring Plaintiff for a court appearance. Defendant Sgt. Snyder was also in the room. When they had completed the search, Defendant Nephew ordered Plaintiff to put on his coat. Plaintiff told Nephew that wearing the coat would “severely aggravate his continuing body itch stemming from his hepatitis virus.” (Dkt. No. 1 ¶ 15.) Defendant Snyder called Plaintiff a “spick” and threatened to forcibly put the coat on Plaintiff. Plaintiff told Defendants Snyder, Nephew, and Desotelle that he would sue them if they used force. (Dkt. No. 1 ¶ 15.)

² Plaintiff does not allege that the strip-frisk violated his constitutional rights. Even if he did, I would find that such a claim would not survive *sua sponte* review under 28 U.S.C. § 1915(e)(2)(B). Strip searches conducted in a prison setting are constitutional if they are reasonably related to a legitimate penological goal and are conducted in a reasonable manner. *Frazier v. Ward*, 528 F.Supp. 80, 81 (N.D.N.Y.1981). “However, a strip search is unconstitutional if it is unrelated to any legitimate penological goal or if it is designed to intimidate, harass, or punish. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 172 (2d Cir.2007) (pretrial detainee alleged Fourth Amendment violation where he was subjected

to repeated strip and body cavity searches that were not related to legitimate government purposes and designed to punish); *Covino*, 967 F.2d at 80 (strip search accompanied by physical and verbal abuse is unconstitutional); *Hodges v. Stanley*, 712 F.2d 34, 35–36 (2d Cir.1983) (second strip search performed soon after a first strip search served no legitimate interest when prisoner was under continuous escort); *Jean-Laurent v. Wilkerson*, 438 F.Supp.2d 318, 323 (S.D.N.Y.2006).” *Miller v. Bailey*, No. 05-CV-5493, 2008 U.S. Dist. LEXIS 31863, at *1, 2008 WL 1787692, at *9 (E.D.N.Y. Apr. 17, 2008). Plaintiff does not allege, and the evidence does not show, that Defendants conducted the strip-frisk with an intent to intimidate, harass, or punish Plaintiff.

Shortly thereafter, Defendant Lt. Wright approached Plaintiff and asked him if he had spit at staff. Before Plaintiff could respond, Defendant Wright ordered several guards to get a video camera and put a “spittle mask” on Plaintiff. After the guards did so, Defendant Wright escorted Plaintiff to his cell. He asked Plaintiff to explain what had happened in the frisk room. Plaintiff said that Defendant Wright would not believe his account of the incident, accused Defendant Wright of interfering with his court trip and unjustifiably putting a spittle mask on him, and said he would sue Defendants Wright and Snyder. Defendant Wright told Plaintiff that “transportation vans don’t have cameras. You’re going to learn not to spit ... [at] staff and ... threaten us with lawsuits.” (Dkt. No. 1 ¶ 16.)

After Defendant Wright left Plaintiff’s cell, Defendant Capt. Bezio approached and asked Plaintiff to explain what happened in the frisk room. Plaintiff told Defendant Bezio what had happened, denied that he had threatened to spit at a staff member, and asked Defendant Bezio to protect him while he was being transported to court. Defendant Bezio told Plaintiff to be “up and ready to go to court” and that “people don’t like to get spat ... on.”³ (Dkt. No. 1 ¶ 19.)

³ In their motion for summary judgment, Defendants argue that Plaintiff cannot maintain a claim against Defendant Bezio for these statements because (1) Plaintiff did not exhaust his administrative remedies regarding the statements; and (2) threats are not actionable constitutional violations. (Dkt. No. 92–10 at 35–36.) In his opposition to the motion, Plaintiff states that he did not intend to maintain a separate claim against Defendant Bezio based on the statements. Rather, he included this allegation

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in his complaint to provide relevant information for his failure to intervene claim. (Dkt. No. 109 at 48.) Therefore, I will not address Defendants' arguments regarding these statements.

*4 On January 3, 2003, Defendant Correction Officer Duprat escorted Plaintiff to the transportation van. Defendant Duprat told Plaintiff to "remember what we told you about the van."⁴ As they were walking, Plaintiff saw Defendant Bezio and told him that Defendant Duprat had threatened to "employ physical abuse" against him in the van. Defendant Bezio shrugged his shoulders. (Dkt. No. 1 ¶ 20.) Defendant Duprat drove Plaintiff in a van to a different building, where he called Defendant Snyder "to arrange a beating" of Plaintiff. After the phone call, Defendant Duprat drove Plaintiff back to the first building. When they arrived, Defendant Snyder entered the rear section of the van and told Plaintiff that "you like ... suing us. Wright, my boss, doesn't like that and sent this as a reminder." Defendant Snyder then punched and slapped Plaintiff, who was in handcuffs and leg irons, in the face and the back of his head, knocking him unconscious. When Plaintiff revived, Defendants Duprat and Correction Officer Bogett entered the rear section of the van and punched and slapped Plaintiff several times in the head, chest, and right ear. When Plaintiff began to bleed from his right inner ear, Defendants Duprat and Bogett tied a spittoon mask on Plaintiff's head. (Dkt. No. 1 ¶¶ 21–22.)

⁴ In their motion for summary judgment, Defendants argue that Plaintiff cannot maintain a claim against Defendant Duprat for this statement because (1) Plaintiff did not exhaust his administrative remedies regarding the statement; and (2) threats are not actionable constitutional violations. (Dkt. No. 92–10 at 35–36.) In his opposition to the motion, Plaintiff states that he did not intend to maintain a separate claim against Defendant Duprat based on the statement. Rather, he included it in his complaint to provide relevant information for his excessive force claim. (Dkt. No. 109 at 48.) Therefore, I will not address Defendants' arguments regarding these statements.

When Plaintiff arrived at Five Points Correctional Facility later that day, he notified Defendant Nurse Hensel that he had been bleeding from his inner right ear due to a beating by Upstate officials, that he was suffering severe pain in his head and right ear, and that he wanted to be examined by a doctor. Defendant Hensel refused to examine Plaintiff,

made no record of his complaints, and refused to schedule Plaintiff to see a doctor.⁵ (Dkt. No. 1 ¶ 23.)

⁵ The medical records produced by Defendants in support of their motion for summary judgment do not reflect that Plaintiff saw Nurse Hensel on January 3, 2003. However, as the Court has noted previously (Dkt. No. 99 at 3), a SHU log book entry for January 3, 2003, indicates that Plaintiff was "taken to strip frisk room for pictures and to be assessed by R/N Hensel." (Defs.' Resp. to P.'s 1st Req. for Prod. of Docs., Ex. E at 11.) This document corroborates Plaintiff's claim that he saw Defendant Hensel on January 3, 2003. I note, however, that none of the parties included the log book entry in their moving or opposing papers.

Plaintiff's medical record from Five Points indicates that on January 3, 2003, the day he arrived, Plaintiff was seen by Nurse Nancy O'Connor Ryerson. She noted that Plaintiff arrived via van with cuffs and chains and spit net, and that he complained of pain and itching. "It was noted that he takes Naprosyn and Benadryl, and he was escorted to 12 Building. Apparently Naprosyn was not sent with him and it is a medication for which he would need a prescription from a doctor. Since this was not an emergency, the procedure is to place the inmate on the regular physician call-out list for an appointment. Nurse Ryerson also noted that he was Hepatitis C positive." (Bannister Aff. ¶ 5.)

On January 4, 2003, Plaintiff notified Defendant Nurse Goodwin⁶ that he needed emergency medical treatment because of severe pain in his liver, left wrist, and right ear, and that he wanted medicine for his severe body itch. Defendant Goodwin refused to examine Plaintiff, made no record of his complaints, and did not provide any treatment to Plaintiff. (Dkt. No. 1 ¶ 24.)

⁶ The complaint refers to this defendant as Nurse "Good." However, Defendants state that her name is actually Goodwin. (Dkt. No. 92–10 at 1 n. 1.) I will refer to her as Nurse Goodwin.

Plaintiff's medical records from Five Points indicate that on January 4, 2003, Plaintiff was seen by Nurse "Goon" at his cell after security staff told the nurse that Plaintiff stated his asthma was acting up. Nurse "Goon" 's note indicated that Plaintiff never acknowledged shortness of breath and that she checked Plaintiff's transfer form and

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the computer and found that he had no history of **asthma**. (Bannister Aff. ¶ 6.)

*5 On January 5, 2003, Plaintiff alleges that he informed Defendant Nurse Kuhlman ⁷ that he had been bleeding from his inner right ear and that he was suffering from an ongoing, extreme body itch due to his **hepatitis C** and B virus. Defendant Kuhlman told Plaintiff that she would review his medical chart and return to him. Defendant Kuhlman refused to examine Plaintiff, made no record of his medical complaints, and refused to provide treatment. (Dkt. No. 1 ¶ 25.)

⁷ The complaint refers to this defendant as Nurse Coleman. As discussed further below, Plaintiff did not serve this defendant. In his opposition to the motion for summary judgment, Plaintiff states that he ultimately learned through discovery that her name is actually Nurse Kuhlman. (Dkt. No. 109 at 6 n. 2.) I will refer to this defendant as Nurse Kuhlman.

Plaintiff's medical records from Five Points show that Defendant Kuhlman saw Plaintiff on January 5, 2003. Her note indicates that she went to his cell for his 4:00 p.m. medications and he complained about the way she distributed the medication ⁸. He stated that the nurse would be getting a grievance. He was uncooperative and argumentative. (Bannister Aff. ¶ 7.)

⁸ It is not clear what medications Nurse Kuhlman was distributing, since the Affidavit of Linda Bannister establishes that "nurses cannot give medications until they verify allergies and prescription orders" and that as of January 6, the day after Nurse Kuhlman saw Plaintiff, this verification had not been completed. (Bannister Aff. ¶ 8.)

On January 6, 2003, Plaintiff informed Defendant Nurse Costello that he needed treatment due to great pain in his right ear and his ongoing severe body itch. Defendant Costello refused to examine Plaintiff's right ear, made no record of his medical complaint, and refused to promptly provide medical treatment. (Dkt. No. 1 ¶ 26.)

Plaintiff's medical records from Five Points show that Defendant Costello saw him on January 6, 2003. She noted that he was complaining that he needed an emergency prescription for severe headache and severe itching. She noted that he requested a prompt examination by a physician. She instructed him that she would have to

find the chart or the transfer paperwork because nurses cannot give medications until they verify allergies and prescription orders. (Bannister Aff. ¶ 8.)

Plaintiff's medical records from Five Points show that he was seen again the next day by Defendant Costello. Plaintiff's chart was still not available, and he again requested a prescription for itching, **Hepatitis C**, and a physical exam. Defendant Costello again noted that she would have to verify his requests and then possibly schedule an appointment. (Bannister Aff. ¶ 9.)

Plaintiff's medical records from Five Points show that he was seen later that day by non-defendant Nurse Gardner at the request of security staff. Plaintiff stated "I was knocked out and beaten everywhere" and claimed that he had a lump on his head. Nurse Gardner examined him and noted no redness, bruising, or bump on head. (Bannister Aff. ¶ 10.)

Plaintiff alleges that Wright, Nephew, Desotelle, and Snyder retaliated against him for his threat to sue them by filing false misbehavior reports. (Dkt. No. 1 ¶¶ 17–18.) Defendant Correction Officer LaClair was assigned to assist Plaintiff with preparing for the subsequent disciplinary hearing. (Defs.' Ex. 14.)

According to a misbehavior report filed by Defendant LaClair, when he went to Plaintiff's cell to assist him, Plaintiff "stated ... that [LaClair] was to get him what he wanted." Defendant LaClair "informed him that what he needed had to be pertained (sic) to the misbehavior report. [Plaintiff] then stated "Get what I want or I'll fuck you up." Defendant La Clair "informed him the interview was over and left the area." (Defs.' Ex. 15 at 2–3.) Plaintiff alleges that Defendant LaClair "falsified [the] misbehavior report against [Plaintiff] in order to refrain" from assisting Plaintiff. (Dkt. No. 1 ¶ 35.)

*6 On January 15, 2003, Defendant Bullis arrived at Plaintiff's cell and informed him that he would conduct the disciplinary hearing that day. He asked Plaintiff whether he wanted to attend the hearing. Plaintiff said that he did not because Defendant LaClair had not assisted him, but asked Defendant Bullis to interview Defendant LaClair and an inmate witness about the events leading to Defendant LaClair's refusal to provide assistance. Plaintiff asked Defendant Bullis not to impose a loaf diet as a punishment if he found Plaintiff guilty because

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the loaf diet caused Plaintiff severe abdominal pains and constipation due to his [hepatitis](#). (Dkt. No. 1 ¶ 36.)

Defendant Bullis did not interview Defendant LaClair or the inmate witness. He found Plaintiff guilty and imposed a penalty of 21 days of the loaf diet. (Dkt. No. 1 ¶ 37.) Plaintiff alleges that Defendants Weissman and Girdich “maliciously” approved the penalty in “reckless disregard” of the pain it would inflict on Plaintiff. (Dkt. No. 1 ¶ 38.) Plaintiff alleges that “[d]ue to the danger that the ... loaf diet posed” to his well-being, he refused to eat it. As a result, he lost 33 pounds and suffered severe abdominal pains and emotional distress that exacerbated his [hepatitis](#). (Dkt. No. 1 ¶ 39.)

Plaintiff alleges that Defendants Brousseau, Donelli, Selsky, Girdich, and Eagen mishandled the grievances and appeals he filed or attempted to file regarding his claims. (Dkt. No. 1 ¶¶ 28–34, 40.)

Plaintiff filed this lawsuit on October 6, 2004. The parties proceeded to discovery, which proved contentious. Plaintiff successfully moved to compel responses to his discovery requests, and thereafter filed four motions for sanctions seeking Defendants' compliance with the order compelling discovery. (Dkt. Nos. 56, 73, 94, 103.) I granted each of those motions in part. (Dkt. Nos. 62, 79, 99, 107.) As is relevant here, I ruled that because not all of the pages of the Five Points Movement and Control Log Book for November 14, 2003, had been provided to Plaintiff before the original was destroyed, Plaintiff could ask the Court to draw factual inferences favorable to him. (Dkt. No. 99 at 2.) I ruled that because Defendants could not locate the SHU log book for January 2003, Plaintiff could “ask the Court to draw factual inferences favorable to him based upon the missing pages for January 14, 2003” in opposition to Defendants' motion for summary judgment. (Dkt. No. 99 at 1–2.) I noted that Defendants had told Plaintiff that photographs taken of him on January 10, 2003, would be produced but that, without explanation, Defendants could no longer find the photographs. Accordingly, I ruled that Plaintiff could ask the Court to draw factual inferences favorable to him based upon the missing photographs. (Dkt. No. 99 at 2–3.) I ordered that if photographs taken of Plaintiff on January 3, 2003, no longer existed, Plaintiff could similarly request favorable inferences. (Dkt. No. 99 at 3.)

*7 On March 16, 2009, Plaintiff again moved for sanctions. (Dkt. No. 103.) I noted that the photographs from January 3 and 10, 2003, were still missing. (Dkt. No. 107 at 1.) I reiterated that Plaintiff could ask the Court to draw factual inferences favorable to him based upon the missing photographs. (Dkt. No. 107 at 2.)

Currently pending before the Court is Defendants' motion for summary judgment. (Dkt. No. 92.) Plaintiff has opposed the motion. (Dkt. No. 109.)

II. APPLICABLE LEGAL STANDARDS

A. Legal Standard Governing Motions for Summary Judgment

Under [Federal Rule of Civil Procedure 56](#), summary judgment is warranted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#). The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists. [Major League Baseball Properties, Inc. v. Salvino, Inc.](#), 542 F.3d 290, 309 (2d Cir. 2008). Only after the moving party has met this burden is the non-moving party required to produce evidence demonstrating that genuine issues of material fact exist. [Salahuddin v. Goord](#), 467 F.3d 263, 272–73 (2d Cir. 2006). The nonmoving party must do more than “rest upon the mere allegations ... of the [plaintiff's] pleading” or “simply show that there is some metaphysical doubt as to the material facts.”⁹ Rather, “[a] dispute regarding a material fact is *genuine* if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”¹⁰ In determining whether a genuine issue of material¹¹ fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party.¹²

⁹ [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 585–86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); see also [Fed.R.Civ.P. 56\(e\)](#) (“When a motion for summary judgment is properly made [by a defendant] and supported [as provided in this rule], the [plaintiff]

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may not rely merely on allegations ... of the [plaintiff's] pleading").

10 *Ross v. McGinnis*, No. 00-CV-0275, 2004 U.S. Dist. LEXIS 9367, at * 20-21, 2004 WL 1125177, at *8 (W.D.N.Y. Mar.29, 2004) (internal quotations omitted) (emphasis added).

11 A fact is "material" only if it would have some effect on the outcome of the suit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

12 *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997) (citation omitted); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir.1990) (citation omitted).

B. Legal Standard Governing Motion to Dismiss for Failure to State a Claim

To the extent that a defendant's motion for summary judgment under **Federal Rule of Civil Procedure 56** is based entirely on the allegations of the plaintiff's complaint, such a motion is functionally the same as a motion to dismiss for failure to state a claim under **Federal Rule of Civil Procedure 12(b)(6)**. As a result, "[w]here appropriate, a trial judge may dismiss for failure to state a cause of action upon motion for summary judgment." *Schwartz v. Compagnise Gen. Transatlantique*, 405 F.2d 270, 273-74 (2d Cir.1968) (citations omitted); *accord, Katz v. Molic*, 128 F.R.D. 35, 37-38 (S.D.N.Y.1989) ("This Court finds that ... a conversion [of a Rule 56 summary judgment motion to a Rule 12(b)(6) motion to dismiss the complaint] is proper with or without notice to the parties."). Moreover, even where a defendant has not advanced such a failure-to-state-a-claim argument on a motion for summary judgment, a district court may, *sua sponte*, address whether a *pro se* prisoner has failed to state a claim upon which relief may be granted.¹³ For these reasons, it is appropriate to briefly summarize the legal standard governing **Federal Rule of Civil Procedure 12(b)(6)** motions to dismiss.

13 The authority to conduct this *sua sponte* analysis is derived from two sources: (1) **28 U.S.C. § 1915(e)(2)(B)**, which provides that "the court shall dismiss [a] case [brought by a prisoner proceeding *in forma pauperis*] at any time if the court determines that ... the action ... is frivolous or malicious[,] ... fails to state a claim on which relief may be granted[,] ... or ... seeks monetary relief against a defendant who is immune from such relief"; and (2) **28 U.S.C. § 1915A(b)**,

which provides that, "[o]n review, the court shall ... dismiss the [prisoner's] complaint, or any portion of the complaint, if the complaint ... is frivolous, malicious, or fails to state a claim upon which relief may be granted"

*8 Under **Federal Rule of Civil Procedure 12(b)(6)**, a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." **Fed.R.Civ.P. 12(b)(6)**. It has long been understood that a defendant may base such a motion on either or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under **Federal Rule of Civil Procedure 8(a)(2)**;¹⁴ or (2) a challenge to the legal cognizability¹⁵ of the claim.

14 See 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1363 at 112 (3d ed. 2004) ("A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) goes to the sufficiency of the pleading under Rule 8(a)(2).") (citations omitted); *Princeton Indus., Inc. v. Rem*, 39 B.R. 140, 143 (Bankr.S.D.N.Y.1984) ("The motion under F.R.Civ.P. 12(b)(6) tests the formal legal sufficiency of the complaint as to whether the plaintiff has conformed to F.R.Civ.P. 8(a)(2) which calls for a 'short and plain statement' that the pleader is entitled to relief."); *Bush v. Masiello*, 55 F.R.D. 72, 74 (S.D.N.Y.1972) ("This motion under Fed.R.Civ.P. 12(b)(6) tests the formal legal sufficiency of the complaint, determining whether the complaint has conformed to Fed.R.Civ.P. 8(a)(2) which calls for a 'short and plain statement that the pleader is entitled to relief.'").

15 See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.... In addition, they state claims upon which relief could be granted under Title VII and the ADEA."); *Wynder v. McMahon*, 360 F.3d 73, 80 (2d Cir.2004) ("There is a critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted."); *Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d Cir.2002) ("Of course, none of this is to say that a court should hesitate to dismiss a complaint when the plaintiff's allegation ... fails as a matter of law.") (citation omitted); *Kittay v. Kornstein*, 230 F.3d 531, 541 (2d Cir.2000) (distinguishing between a

failure to meet Rule 12[b][6]'s requirement of stating a cognizable claim and Rule 8[a]'s requirement of disclosing sufficient information to put defendant on fair notice); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 379 F.Supp.2d 348, 370 (S.D.N.Y.2005) ("Although Rule 8 does not require plaintiffs to plead a theory of causation, it does not protect a legally insufficient claim [under Rule 12(b)(6)].") (citation omitted); *Util. Metal Research & Generac Power Sys., Inc.*, No. 02-CV-6205, 2004 U.S. Dist. LEXIS 23314, at *4-5, 2004 WL 2613993, at *1-2 (E.D.N.Y. Nov. 18, 2004) (distinguishing between the legal sufficiency of the cause of action under Rule 12[b][6] and the sufficiency of the complaint under Rule 8[a]); *accord, Straker v. Metro Trans. Auth.*, 333 F.Supp.2d 91, 101-102 (E.D.N.Y.2004); *Tangorre v. Mako's, Inc.*, No. 01-CV-4430, 2002 U.S. Dist. LEXIS 1658, at *6-7, 2002 WL 313156 (S.D.N.Y. Jan. 30, 2002) (identifying two sorts of arguments made on a Rule 12(b)(6) motion—one aimed at the sufficiency of the pleadings under Rule 8(a), and the other aimed at the legal sufficiency of the claims).

Rule 8(a)(2) requires that a pleading contain "a short and plain statement of the claim *showing* that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2) (emphasis added). By requiring this "showing," Rule 8(a)(2) requires that the pleading contain a short and plain statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."¹⁶ The main purpose of this rule is to "facilitate a proper decision on the merits."¹⁷ A complaint that fails to comply with this rule "presents far too heavy a burden in terms of defendants' duty to shape a comprehensive defense and provides no meaningful basis for the Court to assess the sufficiency of [plaintiff's] claims."¹⁸

16 *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 1634, 161 L.Ed.2d 577 (2005) (holding that the complaint failed to meet this test) (citation omitted; emphasis added); *see also Swierkiewicz*, 534 U.S. at 512 (citation omitted); *Leathernman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (citation omitted).

17 *Swierkiewicz*, 534 U.S. at 514 (quoting *Conley*, 355 U.S. at 48); *see also Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir.1995) ("Fair notice is that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the

proper form of trial.") (citation omitted); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir.1988) ("[T]he principle function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial.") (citations omitted).

18

Gonzales v. Wing, 167 F.R.D. 352, 355 (N.D.N.Y.1996) (McAvoy, J.), *aff'd*, 113 F.3d 1229 (2d Cir.1997) (unpublished table opinion); *accord, Hudson v. Artuz*, 95-CV-4768, 1998 WL 832708, at *2 (S.D.N.Y. Nov.30, 1998); *Flores v. Bessereau*, No. 98-CV-0293, 1998 U.S. Dist. LEXIS 8750, 1998 WL 315087, at *1 (N.D.N.Y. June 8, 1998) (Pooler, J.). Consistent with the Second Circuit's application of § 0.23 of the Rules of the U.S. Court of Appeals for the Second Circuit, I cite this unpublished table opinion, not as precedential authority, but merely to show the case's subsequent history. *See, e.g., Photopaint Technol., LLC v. Smartlens Corp.*, 335 F.3d 152, 156 (2d Cir.2003) (citing, for similar purpose, unpublished table opinion of *Gronager v. Gilmore Sec. & Co.*, 104 F.3d 355 (2d Cir.1996)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Accordingly, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not *shown*—that the pleader is entitled to relief." *Iqbal*, 129 S.Ct. at 1950 (emphasis added).

It should also be emphasized that, "[i]n reviewing a complaint for dismissal under Fed.R.Civ.P. 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." ¹⁹ "This standard is applied with even greater force where the plaintiff alleges civil rights violations or where the complaint is submitted *pro se*."²⁰ In other words, while all pleadings are to be construed liberally under Rule 8(e), *pro se* civil rights pleadings are to be construed with an *extra* degree of liberality.

19 *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.1994) (affirming grant of motion to dismiss) (citation omitted); *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994).

20 *Hernandez*, 18 F.3d at 136 (citation omitted); *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir.2003) (citations omitted); *Vital v. Interfaith Med. Ctr.*, 168 F.3d 615, 619 (2d Cir.1999) (citation omitted).

For example, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider a plaintiff's papers in opposition to a defendant's motion to dismiss as effectively amending the allegations of the plaintiff's complaint, to the extent that those factual assertions are consistent with the allegations of the plaintiff's complaint.²¹ Moreover, "courts must construe *pro se* pleadings broadly, and interpret them to raise the strongest arguments that they suggest."²² Furthermore, when addressing a *pro se* complaint, *generally* a district court "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated."²³ Of course, an opportunity to amend is not required where the plaintiff has already amended his complaint.²⁴ In addition, an opportunity to amend is not required where "the problem with [plaintiff's] causes of action is substantive" such that "[b]etter pleading will not cure it."²⁵

21 "Generally, a court may not look outside the pleadings when reviewing a Rule 12(b)(6) motion to dismiss. However, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider plaintiff's additional materials, such as his opposition memorandum." *Gadson v. Goord*, No. 96-CV-7544, U.S. Dist. LEXIS 18131 1997 WL 714878, at * 1, n. 2, 1997 (S.D.N.Y. Nov.17, 1997) (citing, *inter alia*, *Gil v. Mooney*, 824 F.2d 192, 195 [2d Cir.1987] [considering plaintiff's response affidavit on motion to dismiss]). Stated another way, "in cases where a *pro se* plaintiff is faced with a motion to dismiss, it is appropriate for the court to consider materials outside the complaint to the extent they 'are consistent with the allegations in the complaint.'" *Donhauser v. Goord*, 314 F.Supp.2d 119, 212 (N.D.N.Y.2004) (considering factual allegations contained in plaintiff's opposition papers) (citations omitted), *vacated in part on other grounds*, 317

F.Supp.2d 160 (N.D.N.Y.2004). This authority is premised, not only on case law, but on **Rule 15 of the Federal Rules of Civil Procedure**, which permits a plaintiff, as a matter of right, to amend his complaint once at any time before the service of a responsive pleading—which a motion to dismiss is not. *See Washington v. James*, 782 F.2d 1134, 1138–39 (2d Cir.1986) (considering subsequent affidavit as amending *pro se* complaint, on motion to dismiss) (citations omitted).

22 *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir.2000) (finding that plaintiff's conclusory allegations of a due process violation were insufficient) (internal quotation and citation omitted).

23 *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir.2000) (internal quotation and citation omitted); *see also Fed.R.Civ.P. 15(a)* (leave to amend "shall be freely given when justice so requires").

24 *Yang v. New York City Trans. Auth.*, No. 01-CV-3933, 2002 U.S. Dist. LEXIS 20223, 2002 WL 31399119, at *2 (E.D.N.Y. Oct.24, 2002) (denying leave to amend where plaintiff had already amended complaint once); *Advanced Marine Tech. v. Burnham Sec., Inc.*, 16 F.Supp.2d 375, 384 (S.D.N.Y.1998) (denying leave to amend where plaintiff had already amended complaint once).

25 *Cuoco*, 222 F.3d at 112 (finding that repleading would be futile) (citation omitted); *see also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir.1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice.") (affirming, in part, dismissal of claim with prejudice) (citation omitted); *see, e.g., See Rhodes v. Hoy*, No. 05-CV-0836, 2007 U.S. Dist. LEXIS 48370, 2007 WL 1343649, at *3, 7 (N.D.N.Y. May 5, 2007) (Scullin, J., adopting Report–Recommendation of Peebles, M.J.) (denying *pro se* plaintiff opportunity to amend before dismissing his complaint because the error in his complaint—the fact that plaintiff enjoyed no constitutional right of access to DOCS' established grievance process—was substantive and not formal in nature, rendering repleading futile); *Thabault v. Sorrell*, No. 07-CV-0166, 2008 U.S. Dist. LEXIS 62919, 2008 WL 3582743, at *2 (D.Vt. Aug. 13, 2008) (denying *pro se* plaintiff opportunity to amend before dismissing his complaint because the errors in his complaint—lack of subject-matter jurisdiction and lack of standing—were substantive and not formal in nature, rendering repleading futile)

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(citations omitted); *Hylton v. All Island Cab Co.*, No. 05-CV-2355, 2005 WL 1541049, at *2 (E.D.N.Y. June 29, 2005) (denying *pro se* plaintiff opportunity to amend before dismissing his complaint arising under 42 U.S.C. § 1983 because the errors in his complaint—which included the fact that plaintiff alleged no violation of either the Constitution or laws of the United States, but only negligence—were substantive and not formal in nature, rendering repleading futile); *Sundwall v. Leuba*, No. 00-CV-1309, 2001 U.S. Dist. LEXIS 737, 2001 WL 58834, at *11 (D.Conn. Jan.23, 2001) (denying *pro se* plaintiff opportunity to amend before dismissing his complaint arising under 42 U.S.C. § 1983 because the error in his complaint—the fact that the defendants were protected from liability by Eleventh Amendment immunity—was substantive and not formal in nature, rendering repleading futile).

*9 However, while this special leniency may somewhat loosen the procedural rules governing the form of pleadings (as the Second Circuit has observed),²⁶ it does not completely relieve a *pro se* plaintiff of the duty to satisfy the pleading standards set forth in Rules 8, 10 and 12.²⁷ Rather, as both the Supreme Court and Second Circuit have repeatedly recognized, the requirements set forth in Rules 8, 10 and 12 are procedural rules that even *pro se* civil rights plaintiffs must follow.²⁸ Stated more plainly, when a plaintiff is proceeding *pro se*, “all normal rules of pleading are not absolutely suspended.”²⁹

26 *Sealed Plaintiff v. Sealed Defendant # 1*, No. 06-1590, 2008 U.S.App. LEXIS 17113, 2008 WL 3294864, at *5 (2d Cir. Aug.12, 2008) (“[The obligation to construe the pleadings of *pro se* litigants liberally] entails, at the very least, a permissive application of the rules governing the form of pleadings.”) [internal quotation marks and citation omitted]; *see also Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir.1983) (“[R]easonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training ... should not be impaired by harsh application of technical rules.”) (citation omitted).

27 See *Prezzi v. Schelter*, 469 F.2d 691, 692 (2d Cir.1972) (extra liberal pleading standard set forth in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), did not save *pro se* complaint from dismissal for failing to comply with Fed.R.Civ.P. 8); *accord, Shoemaker v. State of Cal.*, 101 F.3d 108 (2d Cir.1996) (citing *Prezzi v. Schelter*, 469 F.2d 691) (unpublished disposition cited only to acknowledge the continued

precedential effect of *Prezzi v. Schelter*, 469 F.2d 691, within the Second Circuit); *accord, Praseuth v. Werbe*, 99 F.3d 402 (2d Cir.1995).

28 See *McNeil v. U.S.*, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (“While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed ... we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”); *Faretta v. California*, 422 U.S. 806, 834, n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“The right of self-representation is not a license ... not to comply with relevant rules of procedural and substantive law.”); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir.2006) (*pro se* status “does not exempt a party from compliance with relevant rules of procedural and substantive law”) (citation omitted); *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir.1983) (*pro se* status “does not exempt a party from compliance with relevant rules of procedural and substantive law”) (citation omitted); *cf. Phillips v. Girdich*, 408 F.3d 124, 128, 130 (2d Cir.2005) (acknowledging that *pro se* plaintiff’s complaint could be dismissed for failing to comply with Rules 8 and 10 if his mistakes either “undermine the purpose of notice pleading [] or prejudice the adverse party”).

29 *Stinson v. Sheriff's Dep't of Sullivan County.*, 499 F.Supp. 259, 262 & n. 9 (S.D.N.Y.1980).

III. ANALYSIS

A. Weissman/Richards Health Care

Plaintiff alleges that Defendant Drs. Weissman and Richards violated his Eighth Amendment right to adequate medical care by prescribing an ineffective medication for his body itch, refusing to order an MRI of his left wrist and right ankle, and refusing to refer him to an orthopedist. (Dkt. No. 1 ¶ 12.) Defendants move for summary judgment of these claims, arguing that (1) Plaintiff did not suffer from a serious medical need; and (2) Defendants were not deliberately indifferent. (Dkt. No. 92–10 at 13–14.)

1. Eighth Amendment Standard

The Eighth Amendment to the United States Constitution prohibits “cruel and unusual” punishments. The word “punishment” refers not only to deprivations imposed as a sanction for criminal wrongdoing, but also to deprivations suffered during imprisonment. *Estelle v. Gamble*, 429

U.S. 97, 102–03, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Punishment is “cruel and unusual” if it involves the unnecessary and wanton infliction of pain or if it is incompatible with “the evolving standards of decency that mark the progress of a maturing society.” *Estelle*, 429 U.S. at 102. Thus, the Eighth Amendment imposes on jail officials the duty to “provide humane conditions of confinement” for prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Thus, prison officials must “ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’” *Farmer*, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

A viable Eighth Amendment claim must contain both an objective and a subjective component. *Farmer*, 511 U.S. at 834. To satisfy the objective component, “the deprivation alleged must be, objectively, ‘sufficiently serious.’” *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Analyzing the objective element of an Eighth Amendment medical care claim requires two inquiries. “The first inquiry is whether the prisoner was actually deprived of adequate medical care.” *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir.2006). The word “adequate” reflects the reality that “[p]rison officials are not obligated to provide inmates with whatever care the inmates desire. Rather, prison officials fulfill their obligations under the Eighth Amendment when the care provided is ‘reasonable.’” *Jones v. Westchester County Dept. of Corr. Med. Dept.*, 557 F.Supp.2d 408, 413 (S.D.N.Y.2008).

*10 The second inquiry is “whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner.” *Salahuddin*, 467 F.3d at 280. The focus of the second inquiry depends on whether the prisoner claims to have been completely deprived of treatment or whether he claims to have received treatment that was inadequate. *Id.* If “the unreasonable medical care is a failure to provide any treatment for an inmate’s medical condition, courts examine whether the inmate’s medical condition is sufficiently serious.” *Id.* A “serious medical need” is “a condition of urgency, one that may produce death, degeneration, or extreme pain.” *Nance v. Kelly*, 912 F.2d

605, 607 (2d Cir.1990) (Pratt, J. dissenting) (citations omitted), *accord, Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1996), *cert. denied*, 513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d 1074 (1995); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir.1998). Relevant factors to consider when determining whether an alleged medical condition is sufficiently serious include, but are not limited to: (1) the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; (2) the presence of a medical condition that significantly affects an individual’s daily activities; and (3) the existence of chronic and substantial pain. *Chance*, 143 F.3d at 702–03.

If the claim is that treatment was provided that was inadequate, the second inquiry is narrower. *Salahuddin*, 467 F.3d at 280. For example, “[w]hen the basis for a prisoner’s Eighth Amendment claim is a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged *delay* or *interruption* in treatment rather than the prisoner’s *underlying medical condition* alone in analyzing whether the alleged deprivation” is sufficiently serious. *Smith v. Carpenter*, 316 F.3d 178, 185 (2d Cir.2003).

To satisfy the subjective component of an Eighth Amendment medical care claim, the defendant’s behavior must be “wanton.” What is considered “wanton” must be determined with “due regard for differences in the kind of conduct against which an Eighth Amendment objection is raised.” *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). Where a prisoner claims that a defendant provided inadequate medical care, he must show that the defendant acted with “deliberate indifference.” *Estelle*, 429 U.S. at 105; *Wilson v. Seiter*, 501 U.S. 294, 302–03, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

Medical mistreatment rises to the level of deliberate indifference only when it “involves culpable recklessness, i.e., an act or a failure to act ... that evinces ‘a conscious disregard of a substantial risk of serious harm.’” *Chance*, 143 F.3d at 703 (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir.1996)). Thus, to establish deliberate indifference, an inmate must prove that (1) a prison medical care provider was aware of facts from which the inference could be drawn that the inmate had a serious medical need; and (2) the medical care provider actually drew that inference. *Farmer*, 511 U.S. at 837;

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Chance, 143 F.3d at 702–703. The inmate then must establish that the provider consciously and intentionally disregarded or ignored that serious medical need. *Farmer*, 511 U.S. at 835; *Ross v. Giambruno*, 112 F.3d 505, at *2 (2d Cir.1997). An “inadvertent failure to provide adequate medical care” does not constitute “deliberate indifference.” *Estelle*, 429 U.S. at 105–06. Moreover, “a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim … under the Eighth Amendment.” *Id.* Stated another way, “medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” *Id.*; *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir.2003) (“Because the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law, not every lapse in prison medical care will rise to the level of a constitutional violation.”). However, malpractice that amounts to culpable recklessness constitutes deliberate indifference. Accordingly, “a physician may be deliberately indifferent if he or she consciously chooses an easier and less efficacious treatment plan.” *Chance*, 143 F.3d at 703 (citation omitted). Medical decisions that are contrary to accepted medical standards may constitute deliberate indifference if “the doctor has based his judgment on something other than sound medical judgment.” *Stevens v. Goord*, 535 F.Supp.2d 373, 385 (S.D.N.Y.2008) (citation omitted). For instance, a doctor may be deliberately indifferent if he opts for an easier and less efficacious treatment plan “not on the basis of [his or her] medical views, but because of monetary incentives.” *Chance*, 143 F.3d at 704.

2. *Atarax*

*11 Plaintiff claims that Defendants Weissman and Richards violated his Eighth Amendment rights by refusing to prescribe *Atarax*. (Dkt. No. 1 ¶¶ 1, 12.) Defendants move for summary judgment, arguing that Plaintiff’s claim regarding the *Atarax* medication fulfills neither the objective nor the subjective prong of a viable Eighth Amendment claim. (Dkt. No. 92–10 at 13–14.)

Regarding the objective prong, the parties’ briefs focus entirely on whether Plaintiff suffered from a serious medical need.³⁰ Applying the analytical framework described above, I must first address whether Plaintiff was actually deprived of adequate medical care. I find that there is a triable issue of fact that the refusal to prescribe

Atarax constituted a denial of adequate or reasonable care. I base this finding on the fact that Defendant Dr. Richards twice requested approval to prescribe *Atarax*, noting that he had already tried treating Plaintiff with *Hydroxyzine*, *Vistril*, *Allegra*, and *Zytrec* “all of which worsened [Plaintiff’s] condition.” (Weissman Aff. Ex. A–9.)

30 Defendants argue that Plaintiff’s severe body itch was not a serious medical need because it was not a “condition of urgency, one that may produce death, degeneration, or extreme pain”. (Dkt. No. 92–10 at 13.) Plaintiff argues that severe body itch was a symptom of his Hepatitis C, which is a serious medical need. (Dkt. No. 109 at 28–30.)

Because Plaintiff alleges that he was provided with inadequate treatment, rather than completely deprived of treatment, the next inquiry is whether the *deprivation* was sufficiently serious. This requires an analysis of what harm, if any, the failure to prescribe *Atarax* caused or will cause Plaintiff. Here, there is simply no evidence before the Court that being deprived of *Atarax* harmed or threatened to harm Plaintiff. Rather, the evidence shows that Plaintiff suffered from a severe body itch. While this condition was undoubtedly unpleasant, it simply does not rise to the level of an Eighth Amendment violation. Therefore, I find that Plaintiff has not raised a triable issue of fact regarding the objective prong of his Eighth Amendment claim regarding Defendant Weissman and Richards’ failure to prescribe *Atarax*.

Having found that there is not a triable issue of fact as to the objective prong, it is not necessary to analyze the subjective prong. However, I will briefly address the parties’ contentions for the sake of completeness. Defendants argue that the refusal by Defendants Weissman and Richards to prescribe *Atarax* was not deliberate indifference because the decision of “which medicine to prescribe for a particular condition amount[s] to nothing more than a disagreement with the course of treatment—not deliberate indifference.” (Dkt. No. 92–10 at 13–14.) Defendants’ argument regarding deliberate indifference is based entirely on the affidavit of Dr. Weissman.³¹ Interestingly, in contrast to her statements regarding Plaintiff’s orthopedic care (discussed below), Dr. Weissman does *not* state that the decision not to prescribe *Atarax* was based on her medical judgment. Rather, she states that *Atarax* is a “non-formulary” medication and “special approval must be obtained

to issue that medication.” (Weissman Aff. ¶ 4.) Dr. Weissman does not say who was authorized to approve the use of non-formulary drugs. Dr. Richards twice requested approval to prescribe *Atarax* to Plaintiff. (Weissman Aff. ¶¶ 7–8, Ex. A–9 and A–10.) In one of these requests, he stated that the other medications he had tried “worsened” Plaintiff’s condition. (Weissman Aff. Ex. A–9.) His requests were denied. (Weissman Aff. ¶¶ 7–8, Ex. A–9 and A–10.) This sequence of events raises two interesting and related issues: does the acquiescence of Dr. Weissman and Dr. Richards to a course of treatment for Plaintiff with which they disagreed constitute deliberate indifference?³² Or does the fact that the decision not to prescribe *Atarax* was made by someone other than Dr. Weissman and Dr. Richards indicate that they were not personally involved with, and thus not liable for, the decision? *See Johnson v. Wright*, 412 F.3d 398 (2d Cir.2005) (claims against administrators who refused to approve treatment requested by treating physicians survived summary judgment; treating physicians were not named as defendants). The parties have not addressed these issues, and, due to my finding that there is no triable issue of fact as to the objective prong and in the absence of briefing, I decline to do so.

³¹ Dr. Richards did not file an affidavit supporting Defendants' motion for summary judgment.

³² *See Sulton v. Wright*, 265 F.Supp.2d 292 (S.D.N.Y.2003) (holding that a prisoner stated an Eighth Amendment claim against a doctor and physician's assistant who pursued less vigorous treatment than they had originally recommended when their request for approval of knee surgery was denied).

3. MRI and Orthopedic Referral

***12** Plaintiff claims that Defendants Weissman and Richards violated his Eighth Amendment rights by refusing to take MRIs of his left wrist and right ankle or to refer him to an orthopedist who could determine if medical footwear was necessary to correct his right foot problem. (Dkt. No. 1 ¶ 12.) Defendants argue that (1) any deprivation was not sufficiently serious to trigger Eighth Amendment scrutiny; and (2) they were not deliberately indifferent. (Dkt. No. 92–10 at 13–14.) Defendants are correct.

Even if one assumes that the deprivation was sufficiently serious to trigger Eighth Amendment scrutiny, the

evidence does not raise a triable issue of fact that Defendants were deliberately indifferent. Regarding the MRIs, Dr. Weissman declares that “Dr. Richards and I felt, in our medical judgment, an MRI was not warranted.” Because Plaintiff’s “pain and numbness was improving with time, Dr. Richards requested, and I approved, physical therapy for [P]laintiff beginning in January 2003.” (Weissman Aff. ¶ 11.) In September 2003, Dr. Richards referred Plaintiff to an orthopedist for treatment of his left wrist because, after completing physical therapy, Plaintiff was “still having [a] considerable amount of pain.” (Weissman Aff. Ex. A–13.) The orthopedist examined Plaintiff and reported that Plaintiff “seems to be improving at this point and unfortunately, there is not much else I can suggest for Henry to improve or accelerate his healing.” (Weissman Aff. Ex. A–14.)

Plaintiff filed a grievance a year after seeing the orthopedist complaining that Dr. Richards and Dr. Weissman “willfully refused to examine my injuries, to provide medical treatment for said injuries, and to order an MRI test of said injuries conducted ... in an attempt to prevent me from proving the precise nature and extent of my injuries in a court of law and, thus, to dissuade me from suing.” (P.’s Decl. in Opp’n to Aff. of Evelyn Weissman, Ex. D.) Plaintiff argues that this grievance proves that he “continued to complain to these defendants about continuing severe pain in his left wrist and right ankle for more than one year after he had been evaluated by the orthopedist.” (Dkt. No. 109 at 24–25.) The grievance Plaintiff cites does not mention any “continuing severe pain in his left wrist and right ankle.” Therefore, I recommend that the Court grant Defendants' motion for summary judgment and dismiss Plaintiff's Eighth Amendment claims against Defendants Weissman and Richards.³³

³³ Plaintiff's complaint also asserts a retaliation claim against Defendants Weissman and Richards on these facts. (Dkt. No. 1 ¶ 12.) Defendants have not addressed this claim. I find that it is subject to *sua sponte* dismissal pursuant to 28 U.S.C. § 1915(e) (2)(B) because the evidence does not establish that Defendants took adverse action. While the denial of medical care may establish adverse action, *see e.g.* *Odom v. Poirier*, No. 99 Civ. 4933, 2004 WL 2884409, at * 4 (S.D.N.Y. Dec.10, 2004), I have found that Defendants Weissman and Richards did not deny

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Plaintiff medical care. Therefore, I recommend that the Court dismiss this claim.

B. Ham/Grievances

Plaintiff alleges that Defendant Ham violated his Eighth Amendment rights by refusing to loosen or remove his restraints on November 7 and 14, 2002. (Dkt. No. 1 ¶¶ 9–10.) He further alleges that Defendants Brousseau and Donelli violated his constitutional rights by refusing to forward his grievance regarding Defendant Ham for an investigation. (Dkt. No. 1 ¶¶ 28–29.) Defendants argue that (1) Plaintiff failed to exhaust his administrative remedies regarding his claims against Defendant Ham; (2) Plaintiff's allegations are not “sufficiently serious” to implicate the Eighth Amendment; and (3) Plaintiff's allegations regarding the handling of his grievance do not raise a constitutional claim. (Dkt. No. 92–10 at 21–23, 38.)

1. Exhaustion of Administrative Remedies

*13 Defendants argue that Plaintiff failed to exhaust his administrative remedies regarding his claims against Defendant Ham. (Dkt. No. 92–10 at 21–23.) I find that there is a triable issue of fact that Plaintiff's failure to receive a final decision on the merits of his grievance regarding Defendant Ham was justified.

The Prison Litigation Reform Act (“PLRA”) requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: “No action shall be brought with respect to prison conditions under § 1983 ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”³⁴ “[T]he PLRA's 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.”³⁵ The Department of Correctional Services (“DOCS”) has available a well-established three-step inmate grievance program.³⁶

³⁴ 42 U.S.C. § 1997e.

³⁵ *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002).

³⁶ 7 N.Y.C.R.R. § 701.7.

Generally, the DOCS Inmate Grievance Program (“IGP”) involves the following procedure for the filing of grievances.³⁷ First, an inmate must file a complaint with the facility's IGP clerk within twenty-one (21) calendar days of the alleged occurrence. If a grievance complaint form is not readily available, a complaint may be submitted on plain paper. A representative of the facility's inmate grievance resolution committee (“IGRC”) has sixteen (16) calendar days from receipt of the grievance to informally resolve the issue. If there is no such informal resolution, then the full IGRC conducts a hearing within sixteen (16) calendar days of receipt of the grievance, and issues a written decision within two (2) working days of the conclusion of the hearing. Second, a grievant may appeal the IGRC decision to the facility's superintendent within seven (7) calendar days of receipt of the IGRC's written decision. The superintendent is to issue a written decision within twenty (20) calendar days of receipt of the grievant's appeal. Third, a grievant may appeal to the central office review committee (“CORC”) within seven (7) working days of receipt of the superintendent's written decision. CORC is to render a written decision within thirty (30) calendar days of receipt of the appeal. It is important to note that any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can be appealed to the next level, including CORC, to complete the grievance process.³⁸

If a prisoner has failed to properly follow each of the applicable steps prior to commencing litigation, he has failed to exhaust his administrative remedies. *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006).

³⁷ 7 N.Y.C.R.R. §§ 701.5, 701.6(g), 701.7; see also *White v. The State of New York*, No. 00-CV-3434, 2002 WL 31235713, at *2 (S.D.N.Y. Oct. 3, 2002).

³⁸ 7 N.Y.C.R.R. § 701.6(g) (“[M]atters not decided within the time limits may be appealed to the next step.”); *Hemphill v. New York*, 198 F.Supp.2d 546, 549 (S.D.N.Y.2002), vacated and remanded on other grounds, 380 F.3d 680 (2d Cir.2004); see, e.g., *Croswell v. McCoy*, 01-CV-0547, 2003 U.S. Dist. LEXIS 3442, at *12, 2003 WL 962534, at *4 (N.D.N.Y. March 11, 2003) (Sharpe, M.J.) (“If a plaintiff receives no response to a grievance and then fails to appeal it to the next level, he has failed to exhaust his administrative remedies as required by the PLRA.”); *Reyes v. Punzal*, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002) (“Even assuming that plaintiff never received a response to his grievance, he had

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further administrative avenues of relief open to him."); *Nimmons v. Silver*, 03-CV-0671, Report-Recommendation, at 15-16 (N.D.N.Y. filed Aug. 29, 2006) (Lowe, M.J.) (recommending that the Court grant Defendants' motion for summary judgment, in part because plaintiff adduced no evidence that he appealed the lack of a timely decision by the facility's IGRC to the next level, namely to either the facility's superintendent or CORC), *adopted by* Decision and Order (N.D.N.Y. filed Oct. 17, 2006) (Hurd, J.).

Here, Plaintiff declares that on the day of the first incident with Defendant Ham, he asked a Five Points Correctional Facility officer for a grievance form. (P.'s Decl. in Opp'n to Aff. of Karen Bellamy ¶ 17.) The officer did not give Plaintiff a form and told Plaintiff that he would need to file his grievance at Elmira Correctional Facility, where the incident had occurred. *Id.* Although an April 16, 2004, revision to the inmate grievance procedure specified that grievances "may only be filed at the facility where the inmate is housed even if it pertains to another facility," (*Id.*, at Ex. A), the procedures in effect at the time Plaintiff asked for a form to file a complaint against Defendant Ham were silent as to which facility should handle a particular grievance. Even if one assumes that the Five Points officer's advice was correct under DOCS practice at the time, it is difficult to see how Plaintiff could have filed a grievance at Elmira. Plaintiff was only at Elmira Correctional Facility for a few hours after receiving these instructions from the officer, during which time he was handcuffed and shackled. (Dkt. No. 1 ¶ 10.)

*14 On December 8, 2002, Plaintiff filed a grievance at Upstate Correctional Facility regarding Defendant Ham's actions. (Dkt. No. 92-4, Ex. 4.) Defendant Brousseau, the IGP supervisor, returned the grievance to Plaintiff because Plaintiff failed to submit it within fourteen days of the incident.³⁹ *Id.*

³⁹ The inmate grievance procedures in place at the time of the incident required inmates to file grievances within 14, rather than 21, days.

On December 18, 2002, Plaintiff submitted a grievance complaining that Defendant Brousseau's refusal to accept the previous grievance violated his constitutional right of access to the courts because it prevented him from exhausting his claims against Defendant Ham. (Dkt. No. 92-4, Ex. 4.) The IGRC denied Plaintiff's grievance on December 26, 2002. *Id.* The IGRC stated that Defendant Brousseau's refusal was proper because Plaintiff "did not

present any mitigating circumstances that would warrant accepting the [untimely] complaint ... [Plaintiff] had been back at the facility since 11/15/02 and had filed one grievance during this time period, this shows he had ample opportunity to file this complaint in a timely manner." *Id.* The grievance to which the IGRC's decision referred was a grievance regarding Defendant Richards' denial of *Atarax*. (Dkt. No. 92-4, Ex. 3.) Because that event occurred at Upstate Correctional Facility, there was no ambiguity about where Plaintiff's grievance should be filed.

Plaintiff appealed the IGRC's determination to the Superintendent. (Dkt. No. 92-4, Ex. 4.) Defendant Donelli affirmed the IGRC's determination on January 15, 2003. *Id.*

Defendants assert that Plaintiff "did not appeal [Defendant Donelli's decision] to the CORC." (Dkt. No. 92-3, Stmt. Pursuant to Rule 7.1(a)(3) ¶ 8.) For this proposition, they cite Exhibit 4 and to the Affidavit of Karen Bellamy. *Id.* Exhibit 4 shows that Plaintiff signed an "Appeal Statement" stating that he wished to appeal Defendant Donelli's decision to CORC. (Dkt. No. 92-4, Ex. 4.) The Appeal Statement was signed by a grievance clerk. *Id.* That exhibit also shows that Defendant Brousseau responded to an inquiry regarding the status of the grievance by stating that the grievance had been received by CORC and was being processed. *Id.* However, the record before the Court does include any final disposition from CORC of Plaintiff's appeal. The appeal does not appear in a list provided in the Affidavit of Karen Bellamy of grievances on which Plaintiff received a final decision from CORC. (Bellamy Aff. Ex. B.) Thus, Plaintiff never received a decision from CORC and did not exhaust his administrative remedies. *See Mendez v. Artuz*, No. 01 CIV. 4157, 2002 U.S. Dist. LEXIS 3263, at * 4, 2002 WL 313796, at * 2 (S.D.N.Y. Feb. 27, 2002). Even if CORC had acted on Plaintiff's appeal, I assume that CORC would have upheld the IGRC's finding and denied Plaintiff's grievance as untimely. In that event, I would find that Plaintiff had not exhausted his administrative remedies because "courts consistently have found that CORC's dismissal of a grievance appeal as untimely constitutes failure to exhaust available administrative remedies." *Soto v. Belcher*, 339 F.Supp.2d 592, 595 (S.D.N.Y. 2004).

*15 Plaintiff's failure to exhaust, however, does not end the inquiry. The Second Circuit has held that a three-part inquiry is appropriate where a prisoner has failed to exhaust his administrative remedies.⁴⁰ First, "the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact 'available' to the prisoner."⁴¹ Second, if those remedies were available, "the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants' own actions inhibiting the [prisoner's] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense."⁴² Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, "the Court should consider whether 'special circumstances' have been plausibly alleged that justify the prisoner's failure to comply with the administrative procedural requirements."⁴³ Justification "must be determined by looking at the circumstances which might understandably lead ... uncounseled prisoners to fail to grieve in the normally required way." *Giano v. Good*, 380 F.3d 670, 678 (2d Cir.2004). Here, the silence of the regulations regarding which facility was the proper venue for Plaintiff's grievance, the bad advice that Plaintiff received from the officer at Five Points, and Plaintiff's inability to follow that advice because he was shackled during his entire tenure at Elmira create a triable issue of fact that Plaintiff's failure to file a timely grievance regarding Defendant Ham's actions was justified. I therefore find that summary judgment is not appropriate on the grounds that Plaintiff failed to exhaust his administrative remedies.

⁴⁰ See *Hemphill v. State of New York*, 380 F.3d 680, 686, 691 (2d Cir.2004). The Second Circuit has not yet decided whether the *Hemphill* rule has survived the Supreme Court's decision in *Woodford v. Goord*, No. 07-4787-pr, 2009 U.S.App. LEXIS 13681, 2009 WL 1803454, at *1 (2d Cir. June 25, 2009).

⁴¹ *Hemphill*, 380 F.3d at 686 (citation omitted).

⁴² *Id.* (citations omitted).

⁴³ *Id.* (citations and internal quotations omitted).

2. "Sufficiently Serious"

Defendants argue that there is not a triable issue of material fact regarding Plaintiff's Eighth Amendment claim against Defendant Ham because "Plaintiff's alleged 'enormous pain' is nothing more than *de minimis* for Constitutional purposes." (Dkt. No. 92-10 at 22-23.)

Claims that prison officials applied restraints too tightly are analyzed under the Eighth Amendment as claims of excessive force. See *Davidson v. Flynn*, 32 F.3d 27 (2d Cir.1994). When prison officials are "accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). The extent of any injury suffered by the inmate "is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Id.* at 7 (citation and quotation marks omitted).

*16 In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by responsible officials, and any efforts made to temper the severity of a forceful response. The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.

Id. (citation and quotation marks omitted). In other words, not "every malevolent touch by a prison guard gives rise to a federal cause of action. The Eighth Amendment's prohibition of cruel and usual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id.* at 9 (officers who punched and kicked handcuffed and shackled inmate used unconstitutional force although inmate required no medical attention) (citations omitted); *Davidson*, 32 F.3d at 30 n. 1 (officers who placed handcuffs too tightly on inmate in retaliation

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for filing lawsuits used unconstitutional force where inmate suffered permanent scarring and numbness); compare *Warren v. Purcell*, No. 03 Civ. 8736, 2004 U.S. Dist. LEXIS 17792, at *24, 2004 WL 1970642 (S.D.N.Y. Sept.3, 2004) (officers who placed prisoner in tight restraints did not violate constitution where prisoner suffered temporary pain, numbness and swelling and no improper or wanton motive was suggested for the officers' actions).⁴⁴

⁴⁴ Defendants served this unpublished case on Plaintiff with their moving papers as required by Local Rule 7.1(a)(1). (Dkt. No. 92-11.)

Plaintiff does not allege that he was permanently injured as a result of Defendant Ham's actions. Plaintiff states that he suffered "enormous pain" and "severe swelling" as a result of being shackled so tightly. (Dkt. No. 109 at 38.) Although this would not end the Eighth Amendment inquiry if Defendant Ham's actions had been more egregious, there is simply no evidence in the record that Defendant Ham applied restraints to Plaintiff "maliciously and sadistically to cause harm" or in a way that was "repugnant to the conscience of mankind." Therefore, I recommend that the Court grant Defendants' motion and dismiss Plaintiff's claims against Defendant Ham.

3. Grievances

Plaintiff alleges that Defendants Brousseau and Donelli "refused to forward" his complaint regarding Defendant Ham's actions "for an investigation" (Dkt. No. 1 ¶¶ 28-29), thus violating his First Amendment right to petition the government. (Dkt. No. 109 at 50-51.) Defendants argue that Plaintiff's allegation fails to state a constitutional violation. (Dkt. No. 92-10 at 38.) Defendants are correct.

The First Amendment protects a prisoner's right to meaningful access to the courts and to petition the government for the redress of grievances. See *Bill Johnson's Rest., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). However, inmate grievance programs created by state law are not required by the Constitution and consequently allegations that prison officials violated those procedures does not give rise to a cognizable § 1983 claim. *Cancel v. Goord*, No. 00 Civ.2042, 2001 WL 303713, *3 (S.D.N.Y. Mar. 29, 2001). If prison

officials ignore a grievance that raises constitutional claims, an inmate can directly petition the government for redress of that claim. See *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir.1991). "Therefore, the refusal to process an inmate's grievance or failure to see to it that grievances are properly processed does not create a claim under § 1983." *Cancel*, 2001 WL 303713, at *3; see also *Torres v. Mazzuca*, 246 F.Supp.2d 334, 342 (S.D.N.Y.2003); *Mahotep v. DeLuca*, 3 F.Supp.2d 385, 390 (W.D.N.Y.1998).

⁴⁵ *Shell v. Brzezniak*, 365 F.Supp.2d 362, 369-370 (W.D.N.Y.2005). Therefore, I recommend that the Court grant Defendants' motion for summary judgment and dismiss the claims against Defendants Brousseau and Donelli for their handling of Plaintiff's grievance regarding Defendant Ham.

C. Frisk Room Incident/Aftermath/Grievances

Plaintiff alleges that he threatened to sue Defendants Nephew, Desotelle, and Snyder if they used force to put on his coat. (Dkt. No. 1 ¶ 15.) Plaintiff alleges that, in retaliation for this threat, (1) Defendant Wright conspired with Defendant Snyder to subject Plaintiff to excessive force; (2) Defendants Duprat, Snyder, and Bogett used excessive force on Plaintiff; (3) Defendants Wright, Nephew, Desotelle, and Snyder falsified misbehavior reports against Plaintiff; and (4) Defendant Bezio failed to intervene to prevent the use of excessive force. (Dkt. No. 1 ¶¶ 16-22.) He further alleges that Defendants Brousseau and Donelli would not allow Plaintiff to file a grievance regarding these events. (Dkt. No. 1 ¶¶ 30-31.) Finally, he alleges that Defendants Girdich and Eagen denied the grievance he filed regarding Defendant Brousseau and Donelli's refusal to process Plaintiff's grievance. (Dkt. No. 1 ¶¶ 32-34.)

⁴⁵ The complaint contains some language that could, very liberally construed, assert a claim against these Defendants for denial of Plaintiff's right of access to the courts on the theory that, at the time of these events, Plaintiff was being transported for a court appearance. Defendants addressed this possible claim in their motion for summary judgment. (Dkt. No. 92-10 at 40-42.) In his opposition to the motion, Plaintiff states that he did not intend to assert a claim for denial of access to the courts. (Dkt. No. 109 at 55.) I have therefore not addressed Defendants' arguments.

1. Exhaustion of Administrative Remedies

Defendants argue that Plaintiff failed to exhaust his administrative remedies regarding any of these claims. (Dkt. No. 92-10 at 25-26, 31.) Plaintiff declares that on January 13, 2003, he attempted to submit a grievance to Defendant Brousseau regarding the claims. (P.'s Decl. in Opp'n to Aff. of Karen Bellamy ¶ 26.) Plaintiff declares that Defendant Brousseau "refused to file and process the grievance ... in order to prevent me from suing the officials named in the grievance." *Id.* ¶ 27.

On April 3, 2003, Plaintiff submitted a grievance complaining that Defendant Brousseau had refused to accept his January 13 grievance. (Dkt. No. 92-4, Ex. 8.) Plaintiff requested "[t]hat Ms. Brousseau submit the grievance complaint in question to the IGRC. Alternatively, that I be allowed to resubmit a copy of the grievance complaint in issue to the IGRC before moving for judicial intervention." *Id.* CORC denied the grievance on May 28, 2003, stating that it had "not been presented with sufficient evidence to substantiate any malfeasance" by Defendant Brousseau. *Id.*

As discussed above, Second Circuit precedent holds that a defendant may be equitably estopped from raising the exhaustion defense if he or she engaged in conduct that hindered the plaintiff's ability to pursue his or her administrative remedies. *Ziemba v. Wezner*, 366 F.3d 161, 163-64 (2d Cir.2004). A prison official's refusal to accept or forward a prisoner's grievance is conduct that hinders a plaintiff's ability to pursue administrative remedies. *Sandlin v. Poole*, 575 F.Supp.2d 484, 488 (W.D.N.Y.2008). Thus, Plaintiff's declaration that Defendant Brousseau refused to accept his grievance raises a triable issue of fact that Defendants are estopped from asserting the exhaustion defense. Therefore, I recommend that the Court reject Defendants' argument that they are entitled to summary judgment as a result of Plaintiff's failure to exhaust his administrative remedies.

2. Conspiracy

*18 Defendants move for summary judgment of Plaintiff's conspiracy claim.⁴⁶ They argue that (a) Plaintiff has not shown that there was any meeting of the minds; and (b) the claim is barred by the intracorporate conspiracy doctrine.⁴⁷ (Dkt. No. 92-10 at 31-32.)

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Defendants characterize Defendants Wright and Snyder as the only defendants to the conspiracy claim. Read broadly, the complaint also alleges that Defendant Duprat conspired with Defendants Wright and Snyder by calling Snyder "to arrange a beating" of Plaintiff. (Dkt. No. 1 ¶ 21.) I will include Defendant Duprat in my analysis of Plaintiff's conspiracy claim.

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Defendants also argue that to the extent Plaintiff's conspiracy claim is brought under 42 U.S.C. § 1985, he has not shown that Defendants were motivated by any class-based animus. (Dkt. No. 92-10 at 31-32.) In his opposition to Defendants' motion, Plaintiff states that he did not intend to raise a claim under 42 U.S.C. § 1985. (Dkt. No. 109 at 44 n. 15.) Therefore, I have not addressed Defendants' argument regarding class-based animus.

a. Meeting of the Minds

Defendants argue that Plaintiff has not provided any factual basis for a finding that Defendants had a "meeting of the minds" as required for a conspiracy claim. (Dkt. No. 92-10 at 31-32.) I find that Plaintiff has raised a triable issue of fact.

"To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir.1999) (citations omitted).

Plaintiff has raised a genuine issue of material fact as to all of the elements of his § 1983 conspiracy claim. Plaintiff states in his verified complaint that Defendant Wright told him that "'[t]ransportation vans don't have cameras. You're going to learn not to spit ... [at] staff and not threaten us with lawsuits.'" (Dkt. No. 1 ¶ 16.) The next day, Defendant Duprat called Defendant Snyder "to arrange a beating" of Plaintiff. (Dkt. No. 1 ¶ 21.) Defendant Snyder entered the transportation van in which Plaintiff was sitting, said "Wright, my boss, doesn't like [you suing us] and sent this as a reminder," and then punched and slapped Plaintiff until Plaintiff lost consciousness. (Dkt. No. 1 ¶¶ 21-22.) A reasonable jury could, if it found Plaintiff's testimony credible, return a verdict for Plaintiff on his conspiracy claim based on this evidence.

b. Intracorporate Conspiracy Doctrine

Defendants argue that Plaintiff's conspiracy claim is barred by the intracorporate conspiracy doctrine. (Dkt. No. 92-10 at 32.) Under that doctrine, employees of a single corporate entity are legally incapable of conspiring together. *Bond v. Board of Educ. of City of New York*, 97-cv-1337, 1999 U.S. Dist. LEXIS 3164, at *5, 1999 WL 151702, at *2 (W.D.N.Y. Mar.17, 1999). "This doctrine applies to public entities and their employees." *Lee v. City of Syracuse*, 603 F.Supp.2d 417, 442 (N.D.N.Y.2009) (citations omitted). Although the Second Circuit has recognized the doctrine in the context of 42 U.S.C. § 1985, see *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.1978); *Girard v. 94th and Fifth Avenue Corp.*, 530 F.2d 66, 72 (2d Cir.1976), it has not extended its application of the doctrine to conspiracy claims under § 1983. Several district courts in the Second Circuit have, however, applied the doctrine to § 1983 cases.⁴⁸ The district court cases cited in the footnote applied the intracorporate conspiracy doctrine to § 1983 without discussing whether it was appropriate to do so. In *Anemone v. Metropolitan Transportation Authority*, 419 F.Supp.2d 602, 604 (S.D.N.Y.2006), the Southern District squarely held that the intracorporate conspiracy doctrine should be applied to § 1983 cases because "the doctrine's logic is sound" and not "a single case within the Second Circuit [has] held the doctrine inapplicable to Section 1983 claims." I will assume that the doctrine applies in § 1983 cases.

⁴⁸ See *Green v. Greene*, No. 9:07-CV-0351 (GTS/DEP), 2009 U.S. Dist. LEXIS 68186, 2009 WL 2424353 (N.D.N.Y. Aug.5, 2009); *Sebast v. Mahan*, No. 09-cv-98 (GLS/RFT), 2009 U.S. Dist. LEXIS 64712, 2009 WL 2256949, at *3 (N.D.N.Y. July 28, 2009); *Lee v. City of Syracuse*, 603 F.Supp.2d 417 (N.D.N.Y.2009); *Lukowski v. County of Seneca*, No. 08-CV6098, 2009 U.S. Dist. LEXIS 14282, 2009 WL 467075 (W.D.N.Y. Feb.24, 2009); *Perrin v. Canandaigua City School Dist.*, No. 08-CV-61536, 2008 U.S. Dist. LEXIS 95280, 2008 WL 5054241 (W.D.N.Y. Nov.21, 2008); *Rodriguez v. City of New York*, — F.Supp.2d —, No. 05-CV-5117, 2008 U.S. Dist. LEXIS 9966, 2008 WL 420015 (E.D.N.Y. Feb.11, 2008); *Crews v. County of Nassau*, No. 06-CV-2610, 2009 U.S. Dist. LEXIS 38354, 2007 WL 4591325 (E.D.N.Y. Dec. 27, 2007); *Little v. City of New York*, 487 F.Supp.2d 426 (S.D.N.Y.2007); *Clark v. City of Oswego*, No. 5:03-CV-202 (NAM/

DEP), 2006 U.S. Dist. LEXIS 95769, 2007 WL 925724 (N.D.N.Y. March 26, 2007); *Malone v. City of New York*, No. CV-05-2882, 2006 U.S. Dist. LEXIS 61866, 2006 WL 2524197 (E.D.N.Y. Aug. 30, 2006); *Caidor v. M & T Bank*, No. 5:05-CV-297 (FJS/GJD), 2006 U.S. Dist. LEXIS 22980, 2006 WL 839547 (N.D.N.Y. Mar.27, 2006).

*19 Even where the intracorporate conspiracy doctrine applies, there is an exception to the doctrine where "individuals pursue personal interests wholly separate and apart from the entity." *Orafan v. Goord*, 411 F.Supp.2d 153, 165 (N.D.N.Y.2006) (citation and quotation marks omitted), vacated and remanded on other grounds, *Orafan v. Rashid*, No. 06-2951, 249 Fed. Appx. 217 (2d Cir. Sept.28, 2007). I have previously found that a triable issue of fact exists regarding whether officers acted pursuant to their personal interests where a prisoner alleges that officers assaulted him in retaliation for participating in a federal lawsuit. *Medina v. Hunt*, No. 9:05-CV-1460, 2008 U.S. Dist. LEXIS 74205, 2008 WL 4426748 (N.D.N.Y. Sept.25, 2008). Other courts have found that the personal interest exception applies, and thus allowed conspiracy claims to proceed, where it was alleged that officers conspired to cover up their use of excessive force. *Hill v. City of New York*, No.03 CV 1283, 2005 U.S. Dist. LEXIS 38926, 2005 WL 3591719, at *6 (E.D.N.Y. Dec. 30, 2005). I find that the exception applies here because, as in *Medina*, Defendants allegedly conspired to retaliate against Plaintiff for his exercise of his right to access the courts. Therefore, I recommend that the Court deny Defendants' motion for summary judgment of the conspiracy claim against Defendants Wright, Snyder, and Duprat.

3. Excessive Force

Defendants move for summary judgment of Plaintiff's excessive force claims. They argue that there is no "objective evidence" that any excessive force was used. (Dkt. No. 92-10 at 33-35.) Specifically, Defendants argue that:

[P]laintiff alleges that ... [D]efendants Snyder, Bogett, and Duprat punched him, slapped him, knocked him unconscious, and caused his ear to bleed. There is no objective evidence to support this conclusory allegation. An unusual incident report was generated because of [P]laintiff's behavior on January 3, 2003, but the report specifically states that no force was used on [P]laintiff. To the extent [P]laintiff is claiming the alleged force

was used in the van, after the incidents described in the unusual incident report, there is no objective evidence to support this conclusion either. Plaintiff's medical records for January 3, 2003, upon arrival at Five Points C.F. indicate "arrived via van with cuffs & chains and spit net-complains of pain and itching," that [P]laintiff was escorted to 12 building, and that [P]laintiff was given *Naprosyn* and *Benadryl*. There is no indication of bleeding, or that [P]laintiff reported being assaulted in the January 3, 2003 entry, or the entries for January 4, 5, and 6, 2003. Plaintiff does report being "knocked-out and beaten everywhere" on January 7, 2003, while still at Five Points C.F., but without any record of reporting this type of conduct for the four (4) days prior to January 7, 2003, it is not credible that the incident to which [P]laintiff is referring occurred on January 3, 2003. Moreover, the January 7, 2003, entry does not indicate whether [P]laintiff was claiming to have been "knocked out and beaten everywhere" by staff or other inmates. Plaintiff has no objective evidence to support his claim of excessive force.

*20 (*Id.* at 34–35, citations omitted.)

Defendants refer to Plaintiff's allegations as "conclusory." "Conclusory" means to "express[] a factual inference without stating the underlying facts on which the inference is based." *Black's Law Dictionary* 284 (7th ed.1999). Plaintiff's allegations are not conclusory. Rather, Plaintiff describes the incident in detail. The ultimate determination of whether or not Defendants used excessive force, then, will rest largely on the finder of fact's judgment regarding Plaintiff's credibility.

Defendants, naturally, do not find Plaintiff credible. In general, of course, "[c]redibility determinations ... are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). See also *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir.1996) ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment."). Although Defendants do not explicitly say so, their argument that "Plaintiff has no *objective* evidence" is apparently an attempt to invoke a "narrow exception" to the general rule that credibility determinations are not to be made on summary judgment. *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir.2005); *Blake v. Race*, 487 F.Supp.2d 187, 202 (E.D.N.Y.2007). In *Jeffreys*, the Second Circuit held that in the "rare circumstance where

the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete," the court may appropriately conclude at the summary judgment stage that no reasonable jury would credit the plaintiff's testimony. *Jeffreys*, 426 F.3d at 554.

The narrow holding of *Jeffreys* is not applicable here for three reasons. First, in order for the *Jeffreys* exception to apply, the plaintiff must rely "almost exclusively on his own testimony." *Jeffreys*, 426 F.3d at 554. Here, Plaintiff is not relying "almost exclusively on his own testimony." Rather, because of Defendants' conduct during discovery, Plaintiff is relying on his own testimony plus adverse inferences drawn in his favor. As a consequence of Defendants' conduct during discovery, I ordered that Plaintiff could "ask the Court to draw factual inferences favorable to him based upon the missing photographs of January 3 and 10, 2003." (Dkt. No. 107 at 2.) Plaintiff requests that the Court draw the following inference in his favor: "That were the Defendants to provide the Court with the missing photographs taken of [Plaintiff] at Five Points C.F. on January 3, 2003, such photographs would reveal that [Plaintiff] had bruises and lacerations on his face, right ear, and chest." (Dkt. No. 109 at 46–47 n. 15.) The Court grants Plaintiff's request and draws the inference in his favor.

Second, in order for the *Jeffreys* exception to apply, Plaintiff's testimony must be "contradictory or incomplete." *Jeffreys*, 426 F.3d at 554. Here, Plaintiff's testimony is neither contradictory nor incomplete. In *Jeffreys*, the plaintiff, who alleged that police officers had beaten and defenestrated him, confessed on at least three occasions that he had jumped out of a third-story window rather than having been thrown. *Id.* at 552. The plaintiff did not publicly state that he had been thrown out of a window by police officers until *nine months* after the incident. *Id.* The plaintiff could not identify any of the individuals whom he alleged participated in the attack or describe their ethnicities, physical features, facial hair, weight, or clothing on the night in question. *Id.* Here, in contrast, Plaintiff has never given a contradictory account of the events in the transportation van on January 3, 2003. Although Defendants stress that Plaintiff's medical records do not show that Plaintiff reported the incident upon arrival at Five Points, Plaintiff states in his verified complaint that he informed Defendant Hensel on the day of the incident that he had been beaten by Upstate guards. He further alleges that Defendant Hensel made

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no record of his complaint. (Dkt. No. 1 ¶ 23.) Plaintiff's claim regarding Nurse Hensel is corroborated by the log book entry that shows that he was taken to see Nurse Hensel on January 3, 2003, and the fact that Defendants did not provide the Court with a medical record of that visit with Plaintiff's other Five Points Medical Records. (Defs.' Resp. to P's 1st Req. for Produc. of Docs., Ex. E at 11; Bannister Aff.) As Defendants admit, Plaintiff's medical records show that within four days of the incident he reported that he had been "knocked-out and beaten everywhere." (Bannister Aff. ¶ 10.) In addition, unlike in *Jeffreys*, Plaintiff has specifically identified the officers whom he alleges beat him.

*21 Third, the *Jeffreys* exception is most applicable where the plaintiff's version of events is contradicted by defense testimony. In *Jeffreys*, for instance, one of the arresting officers declared that, contrary to the plaintiff's version of events, he was the only officer who entered the room where the plaintiff was allegedly beaten and that he saw the plaintiff jump out the open window. *Jeffreys*, 426 F.3d at 551–52. Here, Plaintiff's version of events has not been contradicted by an affidavit from any of the officers whom he alleges used excessive force because Defendants' motion for summary judgment is not supported by any affidavit from Defendants Snyder, Duprat, or Bogett. The only proof offered by Defendants that they did *not* use excessive force is a notation on a January 3, 2003, unusual incident report stating "Use of Force: No." (Dkt. No. 92–5, Ex. 16.)

Accordingly, I find that Plaintiff has presented sufficient "objective evidence" to raise a triable issue of fact that Defendants Snyder, Duprat, and Bogett subjected him to excessive force.⁴⁹ I therefore recommend that the Court deny Defendants' motion for summary judgment of this claim.

⁴⁹ Read broadly, the complaint also asserts an excessive force claim against Wright and retaliation claims against Defendants Snyder, Duprat, Bogett, and Wright. Defendants have not addressed these potential claims. I find that the claims are sufficient to withstand *sua sponte* review under 28 U.S.C. § 1915(e) (2)(B).

4. False Misbehavior Reports

Plaintiff alleges that Defendants Nephew, Desotelle, Snyder, and Wright filed false misbehavior reports against

him "in retaliation for his having threatened to sue them." (Dkt. No. 1 ¶¶ 17–18.) Defendants argue that (a) Plaintiff forfeited his claim by refusing to attend the disciplinary hearing on the charges; and (b) they would have issued the misbehavior reports regardless of any alleged retaliatory motive. (Dkt. No. 92–10 at 25–29.)

a. Forfeiture

Defendants argue that Plaintiff "cannot establish a *prima facie* case of retaliation, because although he claims the misbehavior report[s] were] 'falsified,' he has forfeited his opportunity to present any evidence calling into question the truth of the misbehavior report[s] by refusing to attend the disciplinary hearing." (Dkt. No. 92–10 at 26.) Defendants cite *Brewer v. Kamas*, 533 F.Supp.2d 318 (W.D.N.Y.2008). In order to analyze *Brewer*, a review of Second Circuit precedent governing prisoners' allegations regarding false misbehavior reports is required.

A prisoner's claim that a correctional officer filed a false misbehavior report may implicate two separate constitutional provisions: (a) the Fourteenth Amendment right to procedural due process; or (b) the right not to be retaliated against for exercising First Amendment rights such as the right of access to the courts or the right to petition the government for redress of grievances.

In the procedural due process context, the Second Circuit has held that while a prisoner "has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest," he *does* have "the right not to be deprived of a protected liberty interest without due process of law." *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir.1986). Where a prisoner is falsely accused of violating disciplinary rules, and a hearing is held on the allegedly false charges that comports with the procedural due process standards set forth by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), and any resulting guilty finding is based on "some evidence," the correctional officer's filing of unfounded charges does not give rise to procedural due process liability. *Freeman*, 808 F.2d at 953–54.

*22 Two years after its *Freeman* opinion, the Second Circuit addressed the second variety of false misbehavior claim—a claim that an officer filed a false misbehavior report in retaliation for the exercise of constitutionally protected rights—in *Franco v. Kelly*, 854 F.2d 584 (2d

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Cir.1988). In *Franco*, a prisoner alleged that correction officers filed a false misbehavior report against him in retaliation for his cooperation with an investigation by the state Inspector General into incidents of inmate abuse at Attica Correctional Facility. *Franco*, 854 F.2d at 586. The defendants moved for summary judgment, arguing that Plaintiff could not state a claim because he had received a disciplinary hearing that complied with *Wolff v. McDonnell* and resulted in a guilty finding based on “some evidence.” *Id.* The trial court granted the defendants’ motion, relying on *Freeman*. *Id.* The trial court noted, however, “that under [t]his reading of *Freeman*, the mere provision of procedural due process could eliminate all liability in any case in which prison officials had intentionally filed false and unfounded charges.” *Id.* The Second Circuit settled “the substantial and troublesome questions raised in th[e] case” by holding that “[a]lthough our decision in *Freeman* accords prison officials wide latitude in disciplining inmates as long as minimum constitutional procedures are employed, that latitude does not encompass conduct that infringes on an inmate’s substantive constitutional rights” such as the prisoner’s First Amendment rights of access to the courts and to petition for redress of grievances. *Id.* at 590 (citations omitted). Accordingly, the Second Circuit reversed the trial court’s judgment and remanded the matter for further proceedings. *Id.* at 590–91.

In *Jones v. Coughlin*, 45 F.3d 677 (2d Cir.1995), the Second Circuit again clarified that the holding in *Freeman* is doctrinally different and distinct from the type of retaliation claim discussed in *Franco*. In *Jones*, a prisoner alleged that correction officers filed a false misbehavior report against him in retaliation for filing an administrative complaint against one of their colleagues. *Jones*, 45 F.3d at 678. At his disciplinary hearing, the prisoner was denied the opportunity to call witnesses. *Id.* He was found guilty and sentenced to serve 120 days in the SHU. *Id.* After he had served his SHU sentence, DOCS official Donald Selsky reversed the decision and expunged it from the prisoner’s record. *Id.* at 679. The prisoner filed suit. *Id.* The trial court granted the prison officials’ motion for summary judgment, finding that the prisoner’s allegations against the corrections officers failed to state a claim under *Freeman* and that the prisoner’s allegations against the hearing officer failed because any procedural due process defects in the hearing had been cured by Selsky’s reversal of the decision. *Id.*

*23 On appeal, the Second Circuit stated that *Freeman* did not provide the “proper framework” for a decision in the case for both “factual and doctrinal reasons.” *Jones*, 45 F.3d at 679. Factually, the case was distinguishable “if, as alleged, Jones was unfairly denied the right to call key witnesses in defense of the charges against him.” *Id.* Doctrinally, the Second Circuit stated that “we have held that a prisoner has a substantive due process right not to be subjected to false misconduct charges as retaliation for his exercise of a constitutional right such as petitioning the government for redress of his grievances, and that this right is distinct from the procedural due process claim at issue in *Freeman*.” *Id.* at 679–80. The Second Circuit vacated the trial court’s judgment and remanded for further proceedings. *Id.* at 680.

This brings us to *Brewer*. In *Brewer*, a prisoner alleged that correction officers filed false misbehavior reports against him in retaliation for filing grievances. *Brewer*, 533 F.Supp.2d at 323. The prisoner refused to attend his disciplinary hearing and was found guilty. *Id.* He sued the officers in federal court. *Id.* at 324. The officers moved for summary judgment. *Id.* The court granted the motion, finding that the prisoner could not establish that the disciplinary charges were false because (1) he refused to attend his disciplinary hearing; (2) he offered no “explanation as to why he chose not to attend the hearing so as to rebut the charges, or why it was otherwise constitutionally deficient”; and (3) he did not “offer ... , in opposition to [d]efendants’ motion, any evidence calling into question the truth of the ... charges.” *Id.* at 330. (citation omitted). Based on these three factors, the court stated that the plaintiff “was provided with the requisite opportunity to rebut the alleged false disciplinary charges, as required by due process, and Plaintiff, by failing to do so, has waived his right to further challenge the validity” of the misbehavior report. *Id.* (citation omitted).

Brewer is not applicable here for three reasons. First, the case is factually distinguishable. In *Brewer*, the prisoner did not offer any explanation for his refusal to attend the hearing, did not explain why the hearing was constitutionally deficient, and did not offer any evidence calling into question the truth of the charges. *Brewer*, 533 F.Supp.2d at 330. Here, Plaintiff has explained that he did not attend the hearing because Defendant LaClair refused to assist him prepare a defense, has argued that the hearing was constitutionally deficient because Defendant Bullis did not call Defendant LaClair and an inmate

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as witnesses, and has offered his own testimony under penalty of perjury to rebut Defendants' version of the events leading to the misbehavior reports.

Second, Defendants overstate the holding of *Brewer*. The court did not hold that the prisoner had forfeited his opportunity to present evidence calling into question the truth of the misbehavior report simply by refusing to attend the disciplinary hearing. Rather, the court held that the prisoner had waived his right for three reasons, with the refusal to attend being only one of them. *Brewer*, 533 F.Supp.2d at 330.

*24 Third, because the prisoner in *Brewer* asserted a retaliation claim rather than a procedural due process claim, the precedent relied upon by the *Brewer* court is puzzling. The portion of the decision cited at length by Defendants relies on (1) *Freeman*, which is a procedural due process case; (2) language from *Jones* that discusses the ways in which *Jones* was *factually* distinguishable from *Freeman*, rather than the language in *Jones* clarifying that a retaliation claim is *doctrinally* different from the type of procedural due process claim at issue in *Freeman*; and (3) quotes from *Franco* that summarize the procedural due process holding in *Freeman*, rather than quotes from *Franco* discussing the proper analysis of a retaliation claim. Thus, although the prisoner in *Brewer* raised a retaliation claim, the court analyzed it as a procedural due process claim.

Because I find that *Brewer* is factually distinguishable from Plaintiff's case, that the holding in *Brewer* is not as broad as Defendants suggest, and that *Brewer's* legal analysis rests on a line of cases to which the Second Circuit has referred as the improper framework for analyzing a retaliation claim, I recommend that the Court reject Defendants' argument that Plaintiff waived his claim regarding the allegedly false and retaliatory misbehavior reports by failing to appear at his disciplinary hearing.⁵⁰

⁵⁰ I note that *Howard v. Wilkerson*, 768 F.Supp. 1002 (S.D.N.Y.1991) holds that "[a]n inmate's refusal to attend a disciplinary hearing waives his *due process objections* ... only when it occurs through no fault of prison officials." *Howard*, 768 F.Supp. at 1006 (citation and quotation marks omitted) (emphasis added). *Howard* is cited in *Nance v. Villafranca*, No. 91-CV-717, 1994 U.S. Dist. LEXIS 11114 (N.D.N.Y.

June 20, 1994), which Defendants cite for a different proposition. (Dkt. No. 92-10 at 39.)

b. *Regardless of retaliatory motive*

Defendants argue that there is "ample evidence" that Defendants "would have issued the misbehavior report[s] regardless of whether [P]laintiff threatened to sue them." (Dkt. No. 92-10 at 28, 30.)

"An allegation that a prison official filed false disciplinary charges in retaliation for the exercise of a constitutionally protected right ... states a claim under § 1983. A plaintiff alleging retaliatory punishment bears the burden of showing that the conduct at issue was constitutionally protected and that the protected conduct was a substantial or motivating factor in the prison officials' decision to discipline the plaintiff. The burden then shifts to the defendant to show that the plaintiff would have received the same punishment even absent the retaliatory motivation. The defendant can meet this burden by demonstrating that there is no dispute that the plaintiff committed the most serious, if not all, of the prohibited conduct charged in the misbehavior report." *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir.2002) (citations and quotation marks omitted).

Here, the misbehavior reports by Defendants Nephew, Desotelle, and Snyder charged Plaintiff with creating a disturbance, committing an unhygienic act, refusing a direct order, and making threats. (Dkt. No. 92-5, Ex. 11.) As the Second Circuit explained in *Hynes v. Squillace*, 143 F.3d 653 (2d Cir.1998), the "most serious charge" in a misbehavior report that includes charges of creating a disturbance, making threats, and refusing a direct order is the direct order charge. *Hynes*, 143 F.3d at 655, 657. Here, Plaintiff admits that he did not put on his coat when Defendant Nephew ordered him to do so. (Dkt. No. 1 ¶ 15.) Thus, Defendants have met their burden of showing that Plaintiff would have received the same punishment even absent the allegedly retaliatory motive by demonstrating that there is no dispute that Plaintiff committed the most serious of the prohibited conduct charged in the misbehavior report. Therefore, I recommend that the Court grant Defendants' motion for summary judgment and dismiss the retaliation claims against Defendants Nephew, Desotelle, and Snyder arising from the January 2, 2003, misbehavior reports.

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*25 The misbehavior report by Defendant Wright charged Plaintiff with committing an unhygienic act, harassment, and threats.⁵¹ (Dkt. No. 92-5, Ex. 11.) The most serious of these charges was the threat charge.

51 Although Defendants assert that Wright charged Plaintiff with disobeying a direct order, the evidence before the court does not support that assertion. (Dkt. No. 92-5, Exs.11-12.)

Plaintiff admits that when Defendant Wright asked him to explain what happened in the frisk room, Plaintiff “responded that Wright would not believe his account of the incident, that Wright had unjustifiably interfered with [his] court trip ... and that [Plaintiff] would sue Wright and Snyder for their unlawful acts and actions.” (Dkt. No. 1 ¶ 16.) This is certainly an admission to the harassment charge. DOCS Rule 107.11 provides as follows: “An inmate shall not harass an employee or any other person verbally or in writing. Prohibited conduct includes, but is not limited to, using insolent, abusive, or obscene language or gestures.” *N.Y. Comp. Codes R. & Regs.*, tit. 7, § 270.2(B)(8)(ii). However, it is not an admission to the threat charge, which requires that “[i]nmate[s] shall not ... make any threat, spoken, in writing, or by gesture.” *N.Y. Comp. Codes R. & Regs.*, tit. 7, § 270.2(B) (3)(I). Therefore, I recommend that the Court deny Defendants’ motion for summary judgment regarding the retaliation claim against Defendant Wright.

5. Failure to Intervene

Plaintiff alleges that Defendant Bezio violated his constitutional rights by failing to intervene to protect Plaintiff from Defendants Duprat, Bogett, and Snyder. (Dkt. No. 1 ¶¶ 19–20.) Defendants move for summary judgment, arguing that there was no underlying constitutional violation with which to intervene. (Dkt. No. 92–10 at 36–37.)

Law enforcement officials can be held liable under § 1983 for not intervening in a situation where another officer is violating an inmate’s constitutional rights. *Jean-Laurent v. Wilkinson*, 540 F.Supp.2d 501, 512 (S.D.N.Y.2008) (citation omitted). A state actor may be held liable for failing to prevent another state actor from committing a constitutional violation if “(1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer’s position would know that the victim’s constitutional rights were being violated;

and (3) the officer does not take reasonable steps to intervene.” *Id.* (citation omitted); *see also Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129 (2d Cir.1997) (“Failure to intercede to prevent an unlawful arrest can be grounds for § 1983 liability.”). Whether an officer can be held liable on a failure to intervene theory is generally a question of fact for the jury to decide. *See Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994) (“Whether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise.”).

Here, a jury could determine that Defendant Bezio failed to intervene to protect Plaintiff. Plaintiff’s verified complaint states that on the day before the incident he asked Defendant Bezio to protect him while he was being transported to court. (Dkt. No. 1 ¶ 19.) Plaintiff alleges that Defendant Duprat made a threatening comment as he escorted Plaintiff to the transportation van and that Plaintiff informed Defendant Bezio of the threat before they reached the van. (Dkt. No. 1 ¶ 20.) Defendant Bezio merely shrugged his shoulders. *Id.* None of the defendants has filed an affidavit contradicting Plaintiff’s version of events. As discussed above, there is a triable issue of fact that a constitutional violation occurred with which Defendant Bezio could have intervened. Therefore, I recommend that the Court deny Defendants’ motion for summary judgment regarding the failure to intervene claim against Defendant Bezio.⁵²

52 Read broadly, the complaint asserts a retaliation claim against Defendant Bezio based on these same events and a failure to intervene claim against Defendant Duprat because he was present when Defendant Snyder initially beat Plaintiff. (Dkt. No. 1 ¶ 21.) Defendants have not moved for summary judgment of these claims. I find that these claims are sufficient to withstand *sua sponte* review under 28 U.S.C. § 1915(e)(2)(B).

6. Grievances

*26 Plaintiff alleges that Defendants Brousseau, Donelli, Girdich, and Eagen violated his constitutional rights by refusing to allow him to file a grievance regarding the events of January 2 and 3, 2003. (Dkt. No. 1 ¶¶ 30–34.) Defendants move for summary judgment, arguing that Plaintiff has not stated a constitutional claim. (Dkt.

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No. 92–10 at 38.) As discussed above in Section III(B) (3), Defendants are correct. Therefore, I recommend that the Court grant Defendants' motion and dismiss the claims against Defendants Brousseau, Donelli, Girdich, and Eagen regarding the handling of Plaintiff's grievances.

D. Disciplinary Hearing/Sentence

Plaintiff raises several claims regarding the conduct of his disciplinary hearing, his disciplinary sentence, and his appeal of the sentence. Specifically, he claims that (1) Defendant LaClair violated his right to due process by falsifying a misbehavior report against Plaintiff to avoid serving as Plaintiff's pre-hearing assistant (Dkt. No. 1 ¶ 35); (2) Defendant Bullis violated his due process rights by failing to call an inmate and Defendant LaClair as witnesses (Dkt. No. 1 ¶¶ 36–37); (3) Defendant Bullis violated his Eighth Amendment rights by sentencing him to a 21–day loaf diet (Dkt. No. 1 ¶ 36–37) and Defendants Weissman and Girdich violated his Eighth Amendment rights by approving the loaf diet (Dkt. No. 1 ¶ 38); and (4) Defendant Selsky violated Plaintiff's right to due process by affirming Defendant Bullis' disposition (Dkt. No. 1 ¶ 40).

1. LaClair

Plaintiff alleges that Defendant LaClair falsified a misbehavior report against him in order to avoid serving as Plaintiff's pre-hearing assistant "and for the purpose of depriving Benitez of due process."⁵³ (Dkt. No. 1 ¶ 35.)

⁵³ The only version of the events between Defendant LaClair and Plaintiff in evidence before the Court is Defendant LaClair's misbehavior report. According to that report, when Defendant LaClair went to Plaintiff's cell to assist him, Plaintiff "stated ... that [LaClair] was to get [him] what he wanted." Defendant LaClair "informed him that what he needed had to be pertained (sic) to the misbehavior report. [Plaintiff] then stated "Get what I want or I'll fuck you up." Defendant LaClair "informed him the interview was over and left the area." (Dkt. No. 92–5, Ex. 15 at 2–3.) Although Plaintiff states in his verified complaint that Defendant LaClair "intentionally and maliciously falsified" the report, he does not offer any other version of what happened. (Dkt. No. 1 ¶ 35.) He alleges that he asked Defendant Bullis to "interview inmate Rolan and LaClair regarding the acts and actions of LaClair that caused him not to provide Benitez pre-hearing assistance," but he

does not provide any information about what those interviews might have revealed. (Dkt. No. 1 ¶ 36.) Due to Defendants' failure to provide Plaintiff with pages of the SHU log book for January 14, 2003, Plaintiff asks the Court to draw an adverse inference that "were Defendants to provide the Court with the missing pages of the ... log book ... such pages would not support any of the allegations of misconduct set out in the misbehavior report that LaClair filed against Benitez on that date." (Dkt. No. 109 at 41 n. 14.) Plaintiff does not explain, however, why such an inference is logical.

In order to state a claim for violation of his procedural due process rights, a plaintiff must allege facts plausibly suggesting that he was deprived of a liberty interest without due process of law. *Tellier v. Fields*, 280 F.3d 69, 79–80 (2d Cir.2000).

Punishment implicates a protected liberty interest where (1) the state has granted its inmates, by regulation or statute, an interest in remaining free from that particular punishment; and (2) the punishment imposes "an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483–84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995); *Tellier*, 280 F.3d at 80; *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir.1996).

Here, no liberty interest is implicated. As a result of being found guilty of the disciplinary charges, Plaintiff was sentenced to a loaf diet. The Second Circuit has held that the imposition of a loaf diet does not impose an atypical and significant hardship on inmates, even where the inmate alleges that the diet caused severe stomach pain and weight loss. *McEachin v. McGuinnis*, 357 F.3d 197 (2d Cir.2004). Therefore, I recommend that the Court dismiss Plaintiff's due process claim against Defendant LaClair.⁵⁴

⁵⁴ Although Defendants argue, in regard to Plaintiff's other claims regarding his disciplinary hearing, that due process was not required because no liberty interest was implicated by the imposition of the loaf diet, they did not assert that argument regarding the claim against Defendant LaClair. Rather, Defendants argue that Plaintiff waived Defendant LaClair's assistance by threatening him. (Dkt. No. 92–10 at 38–39.) Due process requires that prison officials provide pre-hearing assistance to a prisoner facing disciplinary charges who is confined to the SHU.

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Eng v. Coughlin, 858 F.2d 889 (2d Cir.1988). “An assistant's role is to act as merely a surrogate for the inmate, not a legal advisor or advocate. [A]n assistant's role is to perform tasks like interviewing witnesses that the inmate would perform himself if her were in the general population.” *Jackson v. Johnson*, 30 F.Supp.2d 613, 619 (S.D.N.Y.1998) (citations and punctuation omitted). The assistance “must be provided in good faith and in the best interests of the inmate.” *Ayers v. Ryan*, 152 F.3d 77, 81 (2d Cir.1998) (citation omitted). An “assigned assistant who does nothing to assist a ... prisoner ... has failed to accord the prisoner his limited constitutional due process right of assistance.” *Eng*, 858 F.2d at 898. Defendants cite several cases holding that an inmate may waive his right to assistance by remaining silent when assistance is offered or by refusing to sign a form requesting assistance. (Dkt. No. 92–10 at 39, citing *inter alia*, *Jackson*, 30 F.Supp.2d at 619.) However, Defendants have not cited any cases holding that an inmate waives his right to assistance by threatening his assistant. In light of my finding that Plaintiff was not deprived of a liberty interest, it is not necessary to reach this issue.

2. Failure to Call Witnesses

*27 Plaintiff alleges that Defendant Bullis violated his right to due process by failing to call the witnesses that Plaintiff requested. (Dkt. No. 1 ¶ 37.) Defendants move for summary judgment, arguing that Plaintiff cannot state a due process claim because he was not deprived of a liberty interest. (Dkt. No. 92–10 at 39–40.) As discussed above, Defendants are correct. *McEachin*, 357 F.2d at 200. Therefore, I recommend that the Court grant Defendants' motion for summary judgment and dismiss this claim.

3. Imposition of Loaf Diet

Plaintiff alleges that Defendant Bullis violated his Eighth Amendment rights by imposing the loaf diet on him and that Defendants Weissman and Girdich violated his Eighth Amendment rights by approving the punishment. (Dkt. No. 1 ¶¶ 37–38.) Defendants move for summary judgment of the claim, arguing that (a) Plaintiff failed to exhaust his administrative remedies; and (b) Defendants were not deliberately indifferent. (Dkt. No. 92–10 at 14–20.)

a. Exhaustion of Administrative Remedies

Defendants argue that Plaintiff did not exhaust his administrative remedies regarding his Eighth Amendment

claims against Defendant Bullis because he did not appeal the grievance he filed regarding Defendant Bullis' imposition of the loaf diet to the CORC. (Dkt. No. 92–10 at 14.) Defendants argue that Plaintiff failed to exhaust his administrative remedies regarding his Eighth Amendment claim against Defendants Weissman and Girdich because he did not file a grievance at all. (*Id.* at 15.)

DOCS has a separate and distinct administrative process for inmates to appeal the result of disciplinary hearings, which is not referred to as a “grievance” process. *N.Y. Comp. Codes R. & Regs. tit.7, § 701.3(e)(1)-(2)*. For Tier III superintendent hearings, such as Plaintiff's, the inmate must file an appeal with Donald Selsky, DOCS Director of Special Housing/Inmate Disciplinary Program, pursuant to *New York Compilation of Codes, Rules and Regulations*, title 7, section 254.8. The appeal must be filed within 30 days of the inmate's receipt of the hearing officer's written disposition. *N.Y. Comp. Codes R. & Regs. tit.7, § 254.8*. Plaintiff raised the issue of the loaf diet in his appeal of the disciplinary sentence. (P.'s Decl. in Opp'n to Aff. of Karen Bellamy, Ex. D.) Defendant Selsky denied the appeal. *Id.* at Ex. E. Therefore, Plaintiff exhausted his administrative remedies as to his claim against Defendant Bullis.

Plaintiff declares that on January 18, 2003, he submitted a grievance to Defendant Brousseau complaining about Defendant Bullis' imposition of, and Defendants Weissman and Girdich's approval of, the loaf diet. (P.'s Decl. in Opp'n to Aff. of Karen Bellamy, ¶ 26.) He declares that Defendant Brousseau “deliberately refused to file and process the grievance ... in order to prevent me from suing the officials named in the grievance.” *Id.* ¶ 27. Therefore, as discussed above, there is a question of fact that Defendants are estopped from asserting the exhaustion defense.

b. Deliberate Indifference

*28 Defendants argue that Plaintiff has not raised a triable issue of fact that Defendants Bullis, Weissman, and Girdich acted with deliberate indifference when they ordered and approved that the loaf diet be imposed on Plaintiff. (Dkt. No. 92–10 at 15–20.) Defendants are correct.

Where a prisoner claims that punishment imposed following a disciplinary hearing violates his Eighth Amendment rights, the proper analysis of the subjective

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prong of the claim requires the court to “consider whether the [o]rder was reasonably calculated to restore prison discipline and security and, in that ... context, whether the officials were deliberately indifferent to [the prisoner's] health and safety.” *Trammell v. Keane*, 338 F.3d 155, 163 (2d Cir.2003).

Here, the order imposing the loaf diet on Plaintiff was reasonably calculated to restore prison discipline and security. DOCS regulation allow the imposition of the loaf diet as punishment where, *inter alia*, the inmate is found guilty of committing unhygienic acts in the SHU or the inmate is a long-term SHU inmate who is disruptive and who has lost all other available privileges. (Dkt. No. 92-8, Bezio Aff., ¶ 5.) Here, Plaintiff was found guilty of committing unhygienic acts in the SHU. Moreover, Plaintiff is a long-term SHU inmate (he will remain in the SHU until June 3, 2021, and in keeplock until July 1, 2025) who has lost package, commissary, and phone privileges and has lost 11 years worth of good time credits. (Bezio Aff., ¶ 6.) Therefore, the imposition of the loaf diet was reasonably calculated to restore prison discipline.

There is no evidence that Defendants Bullis, Weissman, and Girdich acted with deliberate indifference when they imposed and approved of the loaf diet. To establish deliberate indifference, an inmate must prove that (1) the defendant was aware of facts from which the inference could be drawn that the inmate had a serious medical need; and (2) the defendant actually drew that inference. *Farmer*, 511 U.S. at 837; *Chance*, 143 F.3d at 702–703. Here, although Plaintiff told Defendant Bullis that the loaf diet would cause him severe abdominal pains and constipation due to his **hepatitis** (Dkt. No. 1 ¶ 36), his medical record did not support his assertion. Dr. Weissman declares that “there is nothing in his medical record that indicates that [Plaintiff] is medically unable to receive the restricted diet penalty ... [T]he fact that [P]laintiff is **Hepatitis C** positive does not mean he cannot receive the restricted diet because **Hepatitis C** is not a contraindication for the restricted diet.” (Weissman Aff. ¶¶ 14–15.) Thus, there is no evidence in the record indicating that Defendants Bullis, Weissman, and Girdich were aware of facts from which the inference could be drawn that the loaf diet would harm Plaintiff or that they drew that inference. Moreover, Plaintiff admits that he refused to eat the loaf diet. (Dkt. No. 1 ¶ 39.) Accordingly, any weight loss and pain that he experienced could not have resulted from the loaf diet itself. Accordingly, I

recommend that the Court grant Defendants' motion and dismiss Plaintiff's Eighth Amendment claims against Defendants Bullis, Weissman, and Girdich.

4. *Selsky*

*29 Plaintiff alleges that Defendant Selsky affirmed Defendant Bullis' “disciplinary determination, even though he knew or should have known that Bullis violated [Plaintiff]’s clearly established due process rights.” (Dkt. No. 1 ¶ 40.) Defendants' motion for summary judgment does not directly address this claim. However, I find that it is subject to *sua sponte* dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) because, as discussed above, Defendant Bullis did not violate Plaintiff's due process rights. Therefore, I recommend that the Court dismiss the claim against Defendant Selsky.

E. Five Points Health Care

Plaintiff alleges that Defendants Hensel, Goodwin, Kuhlman, and Costello violated his Eighth Amendment rights by failing to provide adequate medical care at Five Points Correctional Facility following the alleged beating by Defendants Snyder, Duprat, and Bogett. (Dkt. No. 1 ¶¶ 23–26.) Defendants move for summary judgment, arguing that (1) Plaintiff failed to serve Defendant Kuhlman; and (2) Plaintiff cannot raise a triable issue of fact that these Defendants violated his Eighth Amendment rights because Plaintiff did not suffer from a serious medical need and Defendants were not deliberately indifferent. (Dkt. No. 92–10 at 6, 20.)

1. Failure to Serve Defendant Kuhlman

Defendants argue that the claim against Defendant Kuhlman must be dismissed because she was not served within 120 days of the filing of the amended complaint on October 6, 2004. (Dkt. No. 92–10 at 6.) Under the Federal Rules of Civil Procedure, a defendant must be served with the summons and complaint within 120 days ⁵⁵ after the filing of the complaint. Fed.R.Civ.P. 4(m). The court “must” extend the time for service for an appropriate period if the plaintiff shows good cause for the failure to serve. *Id.*

⁵⁵ This 120-day service period is shortened, or “expedited,” by the Court's Local Rules of Practice (and the Court's General Order 25), which provide that all defendants must be served with the summons

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and complaint within sixty (60) days of the filing of the complaint. N.D.N.Y. L.R. 4.1(b) (emphasis added).

Here, on June 24, 2005, the summons was returned unexecuted as to Defendant “Coleman.” (Dkt. No. 21.) On May 22, 2007, the Clerk’s office sent Plaintiff a letter informing him that the Marshals Service had not been able to serve the defendant because there was no one by that name at Five Points Correctional Facility. The Clerk’s office provided Plaintiff with another USM-285 form and asked for more information about the defendant. (Dkt. No. 54.) Plaintiff states that he was not able to ascertain Defendant Kuhlman’s correct identity until after I issued orders on May 2, 2007, and October 3, 2007, compelling defendants to respond to discovery. (Dkt. No. 109 at 7-8.) The docket shows that on January 31, 2008, Plaintiff attempted to file an amended complaint “correctly identif[ying] defendant Kuhlman by substituting the name ‘Coleman’ ... for ‘Kuhlman.’” (Dkt. No. 74.) On February 4, 2008, I ordered Plaintiff’s motion stricken from the record because the deadline for filing motions to amend had expired on January 30, 2006. (Dkt. No. 75.) I find, therefore, that Plaintiff has demonstrated good cause for his failure to serve Nurse Kuhlman.

2. Merits

***30** Plaintiff claims that Defendants Hensel, Goodwin, Kuhlman, and Costello violated his Eighth Amendment rights by refusing to treat him for head pain, pain in his liver, pain in his left wrist, and severe body itch. Plaintiff also alleges that he informed Defendant Hensel that “he had ... lost blood from within his right ear.” (Dkt. No. 1 ¶¶ 23-26.) Defendants argue that Plaintiff has not raised a triable issue of fact as to either the objective or subjective prong of his Eighth Amendment medical care claim. (Dkt. No. 92-10 at 20.)

As discussed above, the objective prong of an Eighth Amendment medical claim requires the court to determine whether the prisoner was deprived of adequate medical care and, if so, whether the inadequacy was sufficiently serious. *Salahuddin*, 467 F.3d at 279-80. Where the prisoner alleges that he was completely deprived of treatment, the court must examine whether the inmate’s medical condition is sufficiently serious. *Id.* at 280. Here, because Plaintiff alleges that he was totally deprived of medical care, I must consider whether the bleeding in his inner right ear, head pain, pain in his liver, pain in

his left wrist, and severe body itch are “serious medical conditions,” in other words, whether they are conditions “of urgency that may produce death, degeneration, or extreme pain.” *Id.*; *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir.1990) (Pratt, J. dissenting).

Defendants argue, without analysis, that none of Plaintiff’s “conditions constitute a condition of urgency, one that may produce death, degeneration, or extreme pain.” (Dkt. No. 92-10 at 20.) As discussed above in regard to Plaintiff’s claims against Defendant Weissman and Richardson, I agree that Plaintiff’s severe body itch is not a serious medical condition. However, Plaintiff’s bleeding inner ear, head pain, and liver pain, as alleged, appear urgent and capable of producing extreme pain. See *Bjorkstrand v. DuBose*, No. CIV. S-08-1531, 2008 WL 5386637, at * 3 (E.D.Cal. Dec.24, 2008) (finding that dried blood in ear was not a serious medical condition because “there was no emergency problem with the left ear, such as active bleeding.”). I therefore find that Defendants have not met their burden of showing that they are entitled to judgment as a matter of law on the issue of whether Plaintiff suffered from a serious medical condition.

Defendants argue that Plaintiff cannot raise a triable issue of material fact as to deliberate indifference because the issue of “[w]hether or not [P]laintiff needed treatment or to be seen by a physician amounts to nothing more than a disagreement with the course of treatment—not deliberate indifference.” (Dkt. No. 92-10 at 20.) As Plaintiff notes (Dkt. No. 109 at 37), none of the named Five Points Defendants has filed an affidavit supporting Defendants’ motion for summary judgment. They have therefore not established that their treatment of Plaintiff was based on their medical judgment. The evidence, when viewed in the light most favorable to Plaintiff, indicates that he arrived at Five Points on January 3 complaining of severe pain inflicted through excessive force and that he received absolutely no treatment for his injuries until Nurse Gardner examined him on January 7. Therefore, I find that Plaintiff has raised a triable issue of fact that Defendants Hensel, Goodwin, Kuhlman, and Costello violated his Eighth Amendment right to adequate medical treatment.

***31 ACCORDINGLY**, it is

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RECOMMENDED that Defendants' motion for summary judgment (Dkt. No. 92) be **GRANTED IN PART AND DENIED IN PART**; and it is further

RECOMMENDED that the following claims be dismissed pursuant to Defendants' motion for summary judgment: (1) the Eighth Amendment claims against Defendants Weissman and Richards arising from their treatment of Plaintiff's severe body itch, left wrist, and right ankle; (2) the claims against Defendant Ham; (3) the claims against Defendants Brousseau and Donelli for their handling of Plaintiff's grievance regarding Defendant Ham; (4) the retaliation claim against Defendants Nephew, Desotelle, and Snyder based on their filing of misbehavior reports against Plaintiff; (5) the claims against Defendants Brousseau, Donelli, Girdich, and Eagen regarding their handling of Plaintiff's grievances regarding the events of January 2 and 3, 2003; (6) the claim against Defendant LaClair; (7) the claims against Defendant Bullis; and (8) the Eighth Amendment claim against Defendants Weissman and Girdich for approving the imposition of the loaf diet; and it is further

RECOMMENDED that the following claims be dismissed *sua sponte* pursuant to [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#): (1) Plaintiff's retaliation claim against Defendants Weissman and Richards; and (2) the claim against Defendant Selsky; and it is further

RECOMMENDED that the following claims survive summary judgment and *sua sponte* review and proceed to trial: (1) the conspiracy claim against Defendants Wright, Snyder, and Duprat; (2) the excessive force claim against Defendants Snyder, Duprat, Bogett, and Wright; (3) the retaliation claim against Defendants Snyder, Duprat, Bogett, and Wright arising from the use of excessive force; (4) the retaliation claim against Wright arising from his filing of a misbehavior report against Plaintiff; (5) the failure to intervene claims against Defendants Bezio and Duprat; (6) the retaliation claim against Defendant

Bezio; and (7) the Eighth Amendment claims against Defendants Hensel, Goodwin, Kuhlman, and Costello; and it is further

ORDERED that the Clerk provide Plaintiff with Form USM 285 for service on Defendant Kuhlman; and it is further

ORDERED that the Clerk serve copies of *Miller v. Bailey*, No. 05-CV-5493, 2008 U.S. Dist. LEXIS 31863, 2008 WL 1787692 (E.D.N.Y. Apr. 17, 2008); *Odom v. Poirier*, No. 99 Civ. 4933, 2004 U.S. Dist. LEXIS 25059, 2004 WL 2884409 (S.D.N.Y. Dec. 10, 2004); *Warren v. Purcell*, No. 03 Civ. 8736, 2004 U.S. Dist. LEXIS 17792, 2004 WL 1970642 (S.D.N.Y. Sept. 3, 2004); *Bond v. Board of Educ. of City of New York*, 97-cv-1337, 1999 U.S. Dist. LEXIS 3164, 1999 WL 151702 (W.D.N.Y. Mar. 17, 1999); *Medina v. Hunt*, No. 9:05-CV-1460, 2008 U.S. Dist. LEXIS 74205, 2008 WL 4426748 (N.D.N.Y. Sept. 25, 2008); *Hill v. City of New York*, No. 03 CV 1283, 2005 U.S. Dist. LEXIS 38926, 2005 WL 3591719 (E.D.N.Y. Dec. 30, 2005); and *Mendez v. Artuz*, No. 01 CIV. 4157, 2002 U.S. Dist. LEXIS 3263, 2002 WL 313796 (S.D.N.Y. Feb. 27, 2002) on Plaintiff in accordance with the Second Circuit's decision in *LeBron v. Sanders*, 557 F.3d 76 (2d Cir. 2009).

*32 Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); [28 U.S.C. § 636\(b\)\(1\)](#); *Fed.R.Civ.P. 72, 6(a), 6(e)*.

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N.D. New York.

Matthew GALUNAS, Plaintiff,

v.

Detective Robert REYNOLDS, Ulster County Police Department; and Brian Robertson, Detective, Ulster County Police Department, Defendants.

No. 8:11-cv-14 (MAD/RFT).

Jan. 28, 2013.

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MEMORANDUM-DECISION AND ORDER

[MAE A. D'AGOSTINO](#), District Judge.

I. INTRODUCTION

*1 On January 6, 2011, Plaintiff commenced this civil rights action alleging that Defendants violated his constitutional rights. *See* Dkt. No. 1. Currently before the Court are Defendants' motions for summary judgment. *See* Dkt. Nos. 26, 28.

II. BACKGROUND

In his complaint, Plaintiff alleges that, "[o]n February 26, 2008, [upon] exiting my home at 25 Park Drive, Woodstock, N.Y. 12491, various personnel from a multi-agency Task Force, composed of Ulster and Kingston County police officers, absent a warrant, effectuated my arrest based upon allegations of Criminal Sale of Controlled Substance(s)." *See* Dkt. No. 1 at 4.¹ Plaintiff

claims that, upon exiting his home, he complied with the officers commands to drop to the ground and to place his arms behind his back. Plaintiff alleges that, despite his compliance, Defendant Robertson, without an arrest warrant, placed him in handcuffs, "ramm[ed] his knee in [his] rib cage while [Defendant] Reynolds smashed [him] with his tazer gun." *See* Dkt. No. 35-4 at ¶ 4. After this alleged altercation, Plaintiff claims that, because of the pain he was suffering, he was unable to stand up. *See id.* at ¶ 5. When Plaintiff failed to stand, he claims that he was "dragged" across his yard and then "yanked ... up while handcuffed behind [his] back" by Defendant Reynolds, who then continued to assault him. *See id.* Plaintiff alleges that several officers observed this alleged assault and only eventually intervened for fear of who may be watching. *See* Dkt. No. 35 at ¶ 3.

¹ To avoid confusion, anytime the Court references a specific page number for an entry on the docket, it will cite to the page number assigned by the Court's electronic filing system.

As a result of this alleged assault, Plaintiff asserts that he now suffers from "diffused discs L4-L5 L5-S1." *See id.* Moreover, although Plaintiff admits that he suffered from "minor bulging discs" prior to February 26, 2008, he claims that Defendants' use of excessive force caused his previous condition to worsen, leaving him with permanent disabilities. *See id.* Plaintiff further alleges that, after the incident, he "was unable to walk without being helped" and that the attack left the entire right side of his face bruised, including a laceration. *See id.* at ¶ 7. Plaintiff claims that, despite his compliance, he was "hit in the side of the head two times with the 'Tazor Gun' and one time with Det. Reynolds 'Service Revolver.'" *See id.* Although Defendants do not dispute that some force was used while arresting Plaintiff, they contend that it was a reasonable amount of force in light of the fact that Plaintiff was not complying with their commands and because Plaintiff had evaded arrest the day before by fleeing from them. Defendants further contend that once Plaintiff was subdued and placed in handcuffs, they did not strike him or employ any additional force.

Shortly after his arrest, Plaintiff was evaluated by medical personnel at the Ulster County Jail. *See* Dkt. No. 28-5 at Exhibit "G." Plaintiff complained of lower back pain but the medical notes indicate that, upon exiting the vehicle, he was able to put equal weight on both legs, was ambulatory, and was not *limping*. *See id.* at 10. Moreover,

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the medical notes indicate that there were no bruises, swelling or redness present on Plaintiff's back, but that he had a "contusion" to the area above his right eye. *See id.* Moreover, the notes indicate that Plaintiff was alert and that he denied losing consciousness at any point. *See id.* Although Plaintiff claims that he had a "gaping wound" above his right eye, the notes indicate that it was merely a "superficial scratch" with only slight swelling and bruising. *See id.*

*2 On February 28, 2008, Plaintiff was sent to Benedictine Hospital, where it was observed that he was ambulatory but still complaining of back pain. *See Dkt. No. 28-5 at Exhibit "H."* Plaintiff informed the medical staff that he "has a history of nonspecific low back pain" and that he did not lose consciousness during or after the event. *See id.* at 16. Upon review of a **CAT scan**, it was determined that Plaintiff "had disk herniation L4-L5 and L5-S1" and the "clinical impression" was that his lower back pain was "secondary to disk disease." *See id.* at 17; *see also id.* at 18-19 (providing the specific findings of the radiology consultation).

On January 6, 2011, Plaintiff commenced this civil rights action alleging that Defendants violated his Eighth Amendment rights. *See Dkt. No. 1 at 6.* Currently before the Court are Defendants' motions for summary judgment. *See Dkt. Nos. 26, 28.*

III. DISCUSSION

A. Standard of Review

A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the movant as a matter of law. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir.1994) (citations omitted). When analyzing a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Id.* at 36-37 (quotation and other citation omitted). Moreover, it is well-settled that a party opposing a motion for summary judgment may not simply rely on the assertions in its pleading. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed.R.Civ.P. 56(c), (e)).

In assessing the record to determine whether any such issues of material fact exist, the court is required to resolve

all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *See Chambers*, 43 F.3d at 36 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986)) (other citations omitted). Where the non-movant either does not respond to the motion or fails to dispute the movant's statement of material facts, the court may not rely solely on the moving party's Rule 56.1 statement; rather, the court must be satisfied that the citations to evidence in the record support the movant's assertions. *See Giannullo v. City of N.Y.*, 322 F.3d 139, 143 n. 5 (2d Cir.2003) (holding that not verifying in the record the assertions in the motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

In reviewing a *pro se* case, the court "must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.'" *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y.2007) (quoting *Haines v. Kerner*, 303 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)) (other citations omitted). "Indeed, the Second Circuit has stated that '[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" *Id.* (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir.1983)). This does not mean, however, that a *pro se* litigant is excused from following the procedural requirements of summary judgment. *See id.* (citing *Showers v. Eastmond*, No. 00 CIV. 3725, 2001 WL 527484, *2 (S.D.N.Y. May 16, 2001)). Specifically, "a *pro se* party's 'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Lee v. Coughlin*, 902 F.Supp. 424, 429 (S.D.N.Y.1995) (quoting *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991)).

B. Relief under 42 U.S.C. § 1983

*3 Section 1983 imposes liability for "conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976) (quoting 42 U.S.C. § 1983). Not only must the conduct deprive the plaintiff of rights and privileges secured by the Constitution, but the actions or omissions attributable to each defendant must be the proximate cause of the injuries and consequent damages that the plaintiff sustained. *See Brown v. Coughlin*, 758 F.Supp. 876, 881 (S.D.N.Y.1991)

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(citing *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481, *reh. denied*, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed.2d 606 (1980)). As such, for a plaintiff to recover in a section 1983 action, she must establish a causal connection between the acts or omissions of each defendant and any injury or damages she suffered as a result of those acts or omissions. *See id.* (citing *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979)) (other citation omitted).

C. Personal involvement

Section 1983 imposes liability for “conduct which ‘subjects, or causes to be subjected’ the complainant to a deprivation of a right secured by the Constitution and laws.” *Rizzo v. Goode*, 423 U.S. 362, 370–71 (1976) (quoting 42 U.S.C. § 1983). Not only must the conduct deprive the plaintiff of rights and privileges secured by the Constitution, but the actions or omissions attributable to each defendant must be the proximate cause of the injuries and consequent damages that the plaintiff sustained. *See Brown v. Coughlin*, 758 F.Supp. 876, 881 (S.D.N.Y.1991) (citing *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481, *reh. denied*, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed.2d 606 (1980)). As such, for a plaintiff to recover in a section 1983 action, he must establish a causal connection between the acts or omissions of each defendant and any injury or damages he suffered as a result of those acts or omissions. *See id.* (citing *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979)) (other citation omitted).

“[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (internal quotation and citations omitted). “‘[W]hen monetary damages are sought under § 1983, the [] doctrine of *respondeat superior* does not suffice and a showing of some personal responsibility of the defendant is required.’ “ *Id.* (quotation omitted). There is a sufficient showing of personal involvement of a defendant if (1) the defendant directly participated in the alleged constitutional deprivation; (2) the defendant is a supervisory official who failed to correct the wrong after learning about it through a report or appeal; (3) the defendant is a supervisory official who created a policy or custom under which the constitutional deprivation occurred, or allowed such a policy or custom to continue;

or (4) the defendant is a supervisory official that was grossly negligent in managing subordinates who caused the constitutional deprivation. *See Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir.1986) (citations omitted).

D. Excessive force²

2 Although Plaintiff claims that Defendants violated his Eighth Amendment rights, because the complained of conduct occurred while Defendants were effecting Plaintiff’s arrest, it is clear that his claim is properly brought under the Fourth Amendment. *See Bonilla v. Jaronczyk*, 354 Fed. Appx. 579, 581 (2d Cir.2009) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). As such, in light of Plaintiff’s *pro se* status, the Court will treat Plaintiff’s excessive force claim as arising under the Fourth Amendment and deny Defendant Reynolds’ suggestion that the Court should dismiss Plaintiff’s complaint because of this mistake. *See* Dkt. No. 28–7 at 3.

***4** Claims that a law enforcement officer used excessive force in the course of making an arrest are “analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard[.]” *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Scott v. Harris*, 550 U.S. 372, 381 (holding that “a claim of ‘excessive force in the course of making [a] ... ‘seizure’ of [the] person ... [is] properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard” “(quotation omitted)); *Terranova v. New York*, 676 F.3d 305, 308 (2d Cir.2012) (quotations and other citation omitted). “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (quotations and other citation omitted); *see also Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir.2010). “[T]he right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham*, 490 U.S. at 396. Proper application of the Fourth Amendment’s “objective reasonableness” standard “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*,

490 U.S. at 396; *see also Terranova*, 676 F.3d at 308; *Tracy*, 623 F.3d at 96.

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396; *see also Jones v. Parmley*, 465 F.3d 46, 61 (2d Cir.2006) (citation omitted). “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, ... violates the Fourth Amendment.” *Graham*, 490 U.S. at 396 (quotations and other citation omitted); *see also Tracy*, 623 F.3d at 96. However, allegations that an “officer twisted [the plaintiff’s] arm, ‘yanked’ her, and threw her up against a car, causing only bruising” have been held to be sufficient to survive summary judgment. *Maxwell v. City of New York*, 380 F.3d 106, 108 (2d Cir.2004) (citing *Robison v. Via*, 821 F.2d 913, 924–25 (2d Cir.1987)). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 396–97; *see also Tracy*, 623 F.3d at 96; *Jones*, 465 F.3d at 61 (citation omitted). “As in other Fourth Amendment contexts, ... the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at 397; *see also Jones*, 465 F.3d at 61. “Given the fact-specific nature of the [objective reasonableness] inquiry, granting summary judgment against a plaintiff on an excessive force claim is not appropriate unless no reasonable fact-finder could conclude that the officers’ conduct was objectively unreasonable.” *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 123 (2d Cir.2004) (citation omitted).

*5 In the present matter, although questions of fact preclude the Court from granting Defendant Reynolds’ motion for summary judgment on this ground, the undisputed evidence shows that Defendant Robertson was not present during the alleged attack and, therefore, that he was not personally involved. Specifically, Defendant Robertson contends that while several members of the task force traveled to Plaintiff’s home, he proceeded to the Town of Hurley Justice Court to obtain a warrant for Plaintiff’s arrest. *See* Dkt. No. 26–

5 at ¶ 7. After Defendant Robertson obtained the arrest warrant, he radioed to the officers at the scene to advise them that the arrest warrant had been issued. *See id.* at ¶¶ 8–9. Due to heavy snowfall on February 26, 2008, it took Defendant Robertson approximately ten (10) minutes to travel to Plaintiff’s residence. *See id.* at ¶ 10. By the time Defendant Robertson arrived at the scene, Plaintiff had already been placed in handcuffs and was being escorted across the front lawn by Defendant Reynolds. *See id.* at ¶ 11. According to Defendant Robertson’s affidavit, the only contact he had with Plaintiff was to hold “on to one of [his] arms to keep him standing upright and position him next to the vehicle as officers at the scene awaited a patrol vehicle to pick [him] up and transport him for processing.” *See id.* at ¶ 11.

Defendant Robertson’s account of the events at issue is corroborated by Defendant Reynolds and Eric Paulding, a detective for the City of Kingston Police Department, who is not a party to this action. *See* Dkt. No. 28–6 at ¶ 11; Dkt. No. 26–6 at ¶¶ 5–6. Specifically, Detective Paulding states that he was on the scene during the arrest and provided “cover” to Defendant Reynolds during the arrest process. *See* Dkt. No. 26–6 at ¶ 4. Detective Paulding further states that Defendant Robertson was not at the scene while Plaintiff was being arrested. *See id.* at ¶ 5. Defendant Reynolds also confirms that Defendant Robertson was not present during the arrest because he was en route from having obtained the arrest warrant. *See* Dkt. No. 28–6 at ¶ 11.

Although Plaintiff contends that Defendant Robertson was there and participated in the alleged use of force, the uncontested evidence establishes that he was not. Although Defendant Robertson does admit that he assisted in escorting Plaintiff across the yard by holding his arm, no reasonable trier of fact could find that such contact amounted to an unreasonable use of force. Finally, a review of Plaintiff’s affidavit in opposition to Defendant Robertson’s motion for summary judgment makes clear that the only specific factual allegations concerning excessive force involve Defendant Reynolds, not Defendant Robertson. *See* Dkt. No. 35–7.³

³ As is discussed in more detail below with regard to Defendant Reynolds’ motion for summary judgment, although the Court should not usually engage in credibility determinations when deciding a motion for summary judgment, since Plaintiff’s

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evidence against Defendant Robertson is comprised of almost exclusively his own allegations, which are controverted by other evidence in the record, including the testimony of a non-party, the Court may appropriately judge the credibility of Plaintiff's account in determining whether a jury could reasonably find for Plaintiff. *See Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir.2005).

Based on the foregoing, the Court grants Defendant Robertson's motion for summary judgment.

As to Defendant Reynolds, however, issues of fact exist which preclude the Court from granting his motion. Although Defendant Reynolds is correct that Plaintiff had a preexisting back condition, in an excessive force case, a plaintiff may recover damages for the aggravation of a preexisting injury caused by the use of excessive force. *See Ramos v. Samaniego*, No. 07-CV320, 2008 WL 3539252, *6 n. 8 (W.D.Tex. July 24, 2008) (citing *Dunn v. Denk*, 79 F.3d 401, 403 (5th Cir.1996)). Although Defendant Reynolds is correct that Plaintiff has contradicted himself on several occasions regarding the severity of his injuries, Plaintiff's inconsistent statements are more appropriately addressed by a jury since they concern Plaintiff's credibility.

*6 Defendant Reynolds argues that the Court should grant his motion because "no reasonable person would undertake the suspension of disbelief necessary to give credit to the plaintiff's allegations[.]" *See* Dkt. No. 28-7 at 6 (citing *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir.2005)). Specifically, Defendant Reynolds argues that the Court should apply the exception set forth in *Jeffreys*, which allows the Court to make a credibility determination that would normally be made by the jury because of contradictions that Plaintiff has made and the lack of corroborating evidence. *See id.* at 6-7.

Although Plaintiff has contradicted himself on several occasions regarding the severity of the attack and his injuries, Plaintiff's versions of the events underlying this action are far less contradictory than those at issue in *Jeffreys* and in the cases cited by Defendant Reynolds. In *Jeffreys*, the plaintiff alleged in his complaint that police officers beat him and threw him out a window. *See Jeffreys*, 426 F.3d at 551. Before filing the complaint, he confessed on at least three occasions that he had jumped out of the window rather than having been thrown. *See id.* at 552. Further, the plaintiff first alleged that police officers threw him out of the window approximately nine

months after the incident. *See id.* The plaintiff could not identify any of the individuals whom he alleged participated in the attack or describe their ethnicities, physical features, facial hair, weight, or clothing on the night in question. *See id.*

Affirming the district court's decision granting the defendants' motion for summary judgment, the Second Circuit held that "[w]hile it is undoubtedly the duty of district courts not to weigh the credibility of the parties at the summary judgment stage, in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine whether the jury could reasonably find for the plaintiff and thus whether there are any 'genuine' issues of material fact, without making some assessment of the plaintiff's account." *Id.* at 554 (internal quotation marks and citation omitted).

In the present matter, the Court is not persuaded that the exception set forth in *Jeffreys* should be applied as to Defendant Reynolds. Unlike the situation in *Jeffreys*, Plaintiff has consistently maintained that Defendant Reynolds used excessive force while effecting his arrest. Moreover, Defendant Reynolds admits that force was used while placing Plaintiff in handcuffs because he was uncooperative; Defendant Reynolds simply maintains that the force used was not excessive and was reasonable in light of the circumstances. Further, it is uncontested that Plaintiff suffered a laceration during the arrest; the severity of which is dependent entirely on whose testimony you credit. Moreover, Plaintiff contends that even after he was placed in handcuffs, he was subjected to further assault, including being "yanked" up while his hands were handcuffed behind his back, which caused him to feel as though his "arms were going to be ripped out of the sockets[.]" Also, while Detective Paulding does contend that Plaintiff was noncompliant during the arrest, he does not state his opinion as to whether the force Defendant Reynolds' used was reasonable and necessary. *See* Dkt. No. 26-6.

*7 Finally, Plaintiff was seen by medical personnel immediately upon arrival at the prison and was taken to Benedictine Hospital two days after his arrest. Although the medical records do make clear that Plaintiff has suffered from chronic back issues since at least 2004, it is unclear whether the L4-L5 and L5-S1 disk herniations

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he was diagnosed with immediately following his arrest are the result of force used during the arrest, if the condition was exacerbated by any force that was used, or if the condition was entirely preexisting and not impacted in any way by the force that was employed. *See* Dkt. No. 28-5 at Exhibit "H." Whether Defendant Reynolds used reasonable force in subduing Plaintiff and the extent of Plaintiff's injuries, if any, all require credibility determinations that must be resolved by the jury. *See Dallio v. Santamore, No. 9:06-CV-1154, 2010 WL 125774, *9 (N.D.N.Y. Jan. 7, 2010)* (holding that because the court should not weigh the evidence or make credibility determinations, summary judgment would be denied where the plaintiff alleged that he was repeatedly kicked and punched after he was subdued and restrained by the defendants, notwithstanding the relatively minor injuries that the plaintiff suffered and the substantial contrary evidence proffered by the defendants); *Cicio v. Lamora, No. 9:08-CV-431, 2010 WL 1063875, *7-8 (N.D.N.Y. Feb. 24, 2010)* (denying summary judgment on the plaintiff's claim that the defendant hit him several times after he was subdued and helpless, despite "seemingly overwhelming" contradictory evidence, including the fact that the plaintiff suffered only a minor bruise).

Based on the foregoing, the Court finds that questions of fact exist which preclude the Court from granting Defendant Reynolds' motion for summary judgment.

E. Qualified immunity

"The doctrine of qualified immunity shields public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Salahuddin v. Goord, 467 F.3d 263, 273 (2d Cir.2006)* (citing *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)*).

For a constitutional right to be "clearly established" for purposes of determining whether an officer is entitled to qualified immunity, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that *in the light of pre-existing law the unlawfulness must be apparent.*"

Mollica v. Volker, 229 F.3d 366, 370-71 (2d Cir.2000) (quoting *Anderson v. Creighton, 483 U.S. 635, 640 (1987)*) (emphasis in original). "Where the right at issue in the circumstances confronting [the] officers ... was clearly established but was violated, the officers will nonetheless be entitled to qualified immunity 'if ... it was objectively reasonable for them to believe their acts did not violate those rights.'" *Zellner v. Summerlin, 494 F.3d 344, 367 (2d Cir.2007)* (quotation and other citation omitted).

*8 "Although a mere mistake in the performance of an official duty may not deprive the officer of qualified immunity, the doctrine does not shield performance that either (a) was in violation of clearly established law, or (b) was plainly incompetent." *Manganiello v. City of New York, 612, F.3d 149, 165 (2d Cir.2010)* (citations omitted). "With respect to both the legal question and the matter of competence, the officials' actions must be evaluated for objective reasonableness.... That is, '[e]ven if the right at issue was clearly established in certain respects ... an officer is still entitled to qualified immunity if "officers of reasonable competence could disagree" on the legality of the action at issue in its particular factual context.' " *Id.* (quotations omitted).

The determination of whether an official's conduct was objectively reasonable is a mixed question of law and fact. *See Zellner, 494 F.3d at 367* (citing *Kerman v. City of New York, 374 F.3d 93, 109 (2d Cir.2004)*) (other citations omitted). "The ultimate question of whether it was objectively reasonable for the officer to believe that his conduct did not violate a clearly established right, *i.e.*, whether officers of reasonable competence could disagree as to the lawfulness of such conduct, is to be decided by the court. However, [a] contention that ... it was objectively reasonable for the official to believe that his acts did not violate those rights has "its principle focus on the particular facts of the case." ' " *Id.* (quotation and other citations omitted).

If there is no dispute as to any material fact, the issue of whether the official's conduct was objectively reasonable is an issue of law to be decided by the court. *See id. at 368* (citation omitted). Any unresolved factual issues, however, must be resolved by the jury. *See id.* (quoting *Kerman, 374 F.3d at 109*) (other citations omitted). Once the court has received the jury's decision as to "what the facts were that the officer faced or perceived," the court must then "make the ultimate legal

determination of whether qualified immunity attaches on those facts.” *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir.2003) (quotation omitted); *see also Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir.1995) (quotation omitted).

In the present matter, Defendant Reynolds contends that, on February 25, 2008, Plaintiff evaded arrest by fleeing from police, “driving in the wrong lane at 100 mph, forcing at least one motorist off the road and narrowly missing several police vehicles.” *See* Dkt. No. 28-2 at ¶ 1. When Defendant Reynolds attempted to arrest Plaintiff on the following day, he claims that Plaintiff “ignored at least five shouted orders to put his hands up and to get down on the ground.” *See id.* at ¶ 4. At this point, Defendant Reynolds contends that he pushed Plaintiff to the ground from behind. *See id.* at ¶ 5. Defendant Reynolds claims that Plaintiff only sustained a “small scrape near his right eye during his arrest[,]” and that there was no bruising, swelling or redness on Plaintiff’s back. *See id.* at ¶¶ 6, 17. Further, Defendant Reynolds claims that he “never put [his] knee into [Plaintiff’s] back or jumped onto his back during his arrest or while he was in custody.” *See* Dkt. No. 28-6 at ¶ 12. Finally, Defendant Reynolds asserts that did not strike Plaintiff with either a Tazer gun or revolver during the incident in question. *See id.* at ¶ 14.

*9 Plaintiff, on the other hand, has repeatedly asserted that he obeyed all commands while Defendant Reynolds was attempting to place him under arrest. *See* Dkt. No. 35-3 at ¶ 9. Despite his compliance, Plaintiff claims that Defendant Reynolds “brutally attacked” him until fellow officers ordered him to stop. *See id.* Further, Plaintiff claims that Defendant Reynolds then dragged him across the yard, told him that “he oughta put a bullet in [his] ... head and do everybody a favor,” and then struck him in the head with a weapon. *See id.* Plaintiff claims that he was never charged with resisting arrest as proof that he complied with Defendant Reynolds’ orders. *See id.* at ¶ 12. Although Plaintiff’s version of events may have slightly varied throughout the course of this litigation, unlike the situation in *Jeffreys*, he has consistently alleged that he was subjected to these incidents without provocation, including leading up to and during his criminal trial.

In light of the drastically different account of what occurred on February 26, 2008, the Court finds that questions of fact exist which preclude granting Defendant Reynolds’ motion at this time. For the Court to find that Defendant Reynolds is entitled to qualified

immunity, it would have to engage in improper credibility determinations, which it is unwilling to do. Taking Plaintiff’s version of events as true, only a *de minimis* amount of force would have been required to effect his arrest, yet Defendant Reynolds is alleged to have applied considerably more force in both effecting the arrest and after Plaintiff was placed in handcuffs. These questions of fact are material to the reasonableness of the force used and the question of qualified immunity and, therefore, must be decided by a jury. *See Breen v. Garrison*, 169 F.3d 152, 153 (2d Cir.1999) (reversing grant of qualified immunity on excessive force claim where facts were disputed as to allegations that the defendant officer jumped on the plaintiff’s back, yanked his head and neck, pushed his face into a table, intentionally tightened his handcuffs, and hit him); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir.1989) (holding that qualified immunity on excessive force claim was a question for the jury, where the defendant officer shoved the plaintiff to floor, the handcuffs were unduly tight, and the plaintiff was left in an uncomfortable position for several hours); *Robison v. Via*, 821 F.2d 913, 923-24 (2d Cir.1987) (holding that summary judgment was inappropriate where the parties disputed material facts regarding the plaintiff’s allegations that she was pushed against a car, yanked out, thrown against the fender, and had her arm twisted behind her back).⁴

⁴ In his reply to Plaintiff’s opposition to the motion for summary judgment, Defendant Reynolds argues that the Court should deem as admitted all statements in his statement of material facts because of Plaintiff’s failure to comply with the requirements of Local Rule 7.1(a)(3). *See* Dkt. No. 39 at 3. Although Defendant Reynolds is correct that Plaintiff failed to strictly comply with Local Rule 7.1’s requirements and that the Court may deem as admitted all of the statements in Defendant Reynolds’ statement of material facts that have not been specifically controverted, the Court declines to do so. In his response to Defendant Reynolds’ motion for summary judgment, Plaintiff makes specific reference to documents in evidence, including the medical records and his deposition transcript. While the Court is not required to ignore violations of Local Rule 7.1 simply because Plaintiff is proceeding *pro se*, the Court will not turn a blind eye to evidence in the record that creates material issues of fact.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant Reynolds' motion for summary judgment is **DENIED**; and the Court further

***10 ORDERS** that Defendant Robertson's motion for summary judgment is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum–Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

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United States District Court,
E.D. New York.

Simon GORIS, Plaintiff,
v.
Dennis BRESLIN, et al., Defendants.
No. 04-CV-5666 (KAM)(LB).
|
Jan. 26, 2010.

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MEMORANDUM AND ORDER

MATSUMOTO, District Judge.

*1 Pending before the court is a motion for summary judgment by the defendant Public Administrator of Suffolk County as the Administrator of the Estate of Francois Thebaud, M.D., ("the Public Administrator" or "defendant"). Plaintiff Simon Goris ("Goris" or "plaintiff") commenced the pending action against Dr. Francois Thebaud ("Dr.Thebaud") pursuant to [42 U.S.C. § 1983](#) seeking monetary relief for alleged deliberate indifference to his serious medical needs in violation of the Eighth Amendment while plaintiff was incarcerated at Arthur Kill Correctional Facility ("Arthur Kill") between February 2003 and August 2004. On August 25, 2008, Dr. Thebaud passed away and, on March 25, 2009, the Public Administrator was substituted for Dr. Thebaud.

Defendant has moved for summary judgment, arguing that: 1) Plaintiff does not suffer from an objectively serious medical condition and cannot demonstrate that Dr. Thebaud acted with deliberate indifference; and 2) Dr. Thebaud is protected by qualified immunity. (Doc. No.

133, Def.'s Mem of Law in Supp. of Mot. for Summary Judgment at 8-18.) Plaintiff argues that the numerous issues of fact surrounding Dr. Thebaud's liability preclude summary judgment. (See generally, Doc. No. 135, Pl.'s Mem. of Law in Opp'n.) For the following reasons, defendant's motion for summary judgment is granted.

BACKGROUND

I. Procedural History

Plaintiff commenced this action *pro se* on December 20, 2004, against defendants Dennis Breslin, Francois Thebaud, M.D., Gail Buswell, R.N., Syed Haider-Shah, M.D., and Lester Wright, M.D., alleging that defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. Upon defendants' motion to dismiss pursuant to [Fed.R.Civ.P. 12\(b\)\(1\), \(6\), and \(3\)](#), Judge Amon dismissed plaintiff's claim against defendant Dennis Breslin, the Superintendent of Arthur Kill Correctional Facility, in an order dated May 10, 2006. Discovery proceeded with the remaining defendants.

On October 30, 2007, plaintiff obtained *pro bono* counsel. Discovery closed on June 30, 2008. Co-defendants Buswell, Haider-Shah and Wright filed a motion for summary judgment on October 27, 2008, which the court granted on July 6, 2009.

On August 25, 2008, Dr. Thebaud passed away. On March 25, 2009, upon a motion by plaintiff, the Public Administrator was substituted for Dr. Thebaud. On June 26, 2009, the State filed a motion for summary judgment on behalf of the Public Administrator. For the following reasons, the Public Administrator's motion is granted.

II. Undisputed Material Facts

A. Plaintiff's Knee Injury and Subsequent Treatment

Based on the plaintiff's medical records from the Department of Corrections ("DOC") submitted by plaintiff and defendants, the court finds the undisputed material facts to be as follows.¹

¹ The court notes plaintiff's objection to the admission of the declaration of defendant's now deceased expert, Dr. Edward Habermann, on which defendant relies in its Rule 56.1 Statement of Undisputed Material

Facts. Because the court relies on the medical records themselves in deciding this motion, and does not rely on Dr. Habermann's declaration, the court need not reach the admissibility of Dr. Habermann's declaration. Plaintiff's DOC medical records may be admissible under the business records exception to the hearsay rule, provided that such records are "kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation." *Fed.R.Evid. 802*. Neither party has supplied an affidavit containing facts supporting admissibility of the plaintiff's medical records, nor have the records been certified in a manner compliant with *Fed.R.Evid. 902(11)*; therefore, the records are not technically admissible. Nevertheless, the court considers the medical records because the plaintiff relies on the records in support of his claims and in his opposition to the motion for summary judgment. *See Atkinson v. Fischer, No. 07-CV-00368, 2009 WL 3165544, at *3 n. 1 (N.D.N.Y. Sept. 25, 2009)* (Report and Recommendation) (although lack of authentication rendered medical and grievance records "not technically admissible," court considered the records when granting defendants' motion for summary judgment "because Plaintiff relied on many of the same records in his complaint and in his opposition to the motion for summary judgment"); *Sheils v. Flynn, No. 06-CV-0407, 2009 WL 2868215, at *2 n. 2 (N.D.N.Y. Sept. 2, 2009)* (Report and Recommendation) (although court found that lack of authentication rendered medical records attached as exhibits to affidavits "not technically admissible," the court considered the records on defendants' motion for summary judgment "because Plaintiff also relied on the records in his opposition to the motion for summary judgment"). The parties are cautioned that medical records should be properly authenticated and accompanied by an affidavit or certification that complies with *Fed.R.Evid. 803*.

Plaintiff was formerly an inmate in the custody of the New York State Department of Correctional Services. On February 9, 2003, while playing basketball at the Arthur Kill, plaintiff sustained an injury to his right knee. (Doc. No. 110, Oct. 14, 2008 Castiglione Declaration ("10/14/08 Castiglione Decl."), Ex. 1, Ambulatory Health Records of Simon Goris (collectively, "Ambulatory Health Records") at D024.)

*2 Dr. Thebaud examined plaintiff on February 11, 2003 and noted swelling and tenderness of his right

knee, and ordered an x-ray of plaintiff's knee. (*Id.*) The x-ray, taken on February 13, 2003, was negative and plaintiff was so informed on March 6, 2003. (*Id.*; 10/14/08 Castiglione Decl., Ex. 3, 2/13/03 Staten Island University Hospital X-Ray Examination Report at 1; Doc. No. 136, June 18, 2009 Castiglione Declaration ("6/18/09 Castiglione Decl."), Ex. 1, 3/28/08 Deposition of Dr. Thebaud ("Thebaud Dep.") at 80.) Dr. Thebaud gave plaintiff pain medication and an *Ace Bandage*. (Thebaud Dep. at 81.) Dr. Thebaud saw plaintiff on March 14, 2003 to discuss his cholesterol but there is no indication that plaintiff discussed his knee. (Ambulatory Health Records at D025.)

On April 7, 2003, after noting that plaintiff continued to have swelling, buckling and pain in his right knee, Dr. Thebaud ordered an orthopedic consultation for plaintiff at Staten Island University Hospital. (*Id.* at D026; 10/14/08 Castiglione Decl., Ex. 2, Requests and Reports of Consultation of Simon Goris ("Consultation Reports") at D139.) Plaintiff did not make any complaint regarding his knee during visits with a nurse on April 17 or on April 29, 2003. (Ambulatory Health Records at D026.) Plaintiff saw an orthopedic consultant on May 14, 2003, who recommended physical therapy and an MRI of the right knee. (*Id.* at D027; Consultation Reports at D139.) Based on this recommendation, on May 15, 2003, Dr. Thebaud ordered a physical therapy consultation and an MRI. (Consultation Reports at D140-D141.) On June 5, 2003, the physical therapist recommended physical therapy twice a week for an unspecified period. (*Id.* at D140.) On June 12, 2003, Dr. Thebaud ordered another physical therapy consultation. (*Id.* at D142-D143.) Plaintiff had physical therapy in June and July of 2003. (*Id.* at D140-D145.)

On June 16, 2003, an MRI was performed on plaintiff's right knee, which suggested an anterior cruciate ligament ("ACL") tear. (*Id.* at D141; 10/14/08 Castiglione Decl., Ex. 4, 6/18/03 Staten Island University Hospital MRI Report for Simon Goris ("MRI Report") at 1-2.) The MRI also diagnosed an oblique *tear of the medial meniscus* involving the body and posterior horn, mild to moderate degenerative changes (*arthritis*) manifested by joint space narrowing and *osteophyte* formation, and other intact ligaments and tendons. (MRI Report at 1-2.)

On July 3, 2003, referencing the MRI results, Dr. Thebaud referred plaintiff for an orthopedic consultation.

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(Ambulatory Health Records at D033; Consultation Reports at D144.) On July 23, 2003, plaintiff was seen by an orthopedist who noted that plaintiff reported that his right knee pain and instability were “unimproved” since his last visit. (Consultation Reports at D144.) The orthopedist further noted that plaintiff reported pain on flexion of his right knee and prescribed continuing physical therapy and directed that plaintiff not engage in prolonged activity with the right knee. (*Id.*) The orthopedic surgeon recommended plaintiff return to an orthopedist in three weeks. (*Id.*)

*3 On August 5, 2003, Dr. Thebaud referred plaintiff for a follow-up consultation with an orthopedist, as recommended during the July 23, 2003 orthopedic visit. (*Id.* at D146.) Plaintiff saw an orthopedist on September 17, 2003, who again recommended physical therapy, anti-inflammatory pain medication and a return visit as needed (“prn”). (*Id.*) Thereafter, Dr. Thebaud again referred plaintiff for physical therapy on September 18, 2003, November 6, 2003 and March 16, 2004, which plaintiff received during that period through April 2004. (*Id.* at D147, D149-D155.)

Plaintiff's physical therapy records note that plaintiff occasionally complained of knee pain and also reported a reduction of knee pain and buckling to the physical therapist. (*Id.* at D140, D142-D143, D149-D155.) For example, on January 14, 2004, plaintiff reported to his physical therapist that his knee buckled less since he started physical therapy; on January 21, 2004, that his knee felt a little better and stronger and that he did not have buckling of the knee; and on January 26, 2004, that his knee felt stronger and did not buckle as much. (*Id.* at D150-D152.) On January 28 and February 2, 2004, plaintiff reported to his physical therapist that his knee pain increased with snow and cold weather but his knee was not buckling. (*Id.* at D153-D154.)

On March 16, 2004, plaintiff reported to Dr. Thebaud that he was doing better with physical therapy and was given an ace bandage and referred for more physical therapy. (Ambulatory Health Records at D044; Consultation Reports at D155.) Dr. Thebaud's referral of March 16, 2004 noted that plaintiff had “good improvement, increase of strength, decrease of pain,” and that he would improve with more therapy. (Consultation Reports at D155.) The subsequent physical therapy report dated April 14, 2004 notes that plaintiff's right knee had not

buckled over the last month, but that it felt a “little unstable,” with pain and tenderness on the lateral aspect, and that plaintiff was unable to run and jump. (*Id.*)

Plaintiff was seen by a registered nurse on May 14, 2004, who noted that physical therapy “be continued,” provided plaintiff with a limited activity note, and recommended a follow-up medical appointment. (Ambulatory Health Records at D047.) Plaintiff returned on May 18, 2004 to have his restricted activity note verified and extended until June 1, 2004. (*Id.* at D046.) On June 7, 2004, plaintiff requested physical therapy, and the nurse scheduled a medical appointment for June 28, 2004. (*Id.*) The Ambulatory Health Records indicate that a medical doctor was not in the office on June 28, 2004, and, accordingly, plaintiff's appointment was rescheduled for July 19, 2004. (*Id.*) On July 2, 2004, plaintiff requested an appointment to see Dr. Thebaud before July 19, 2004. (*Id.* at D48.) Plaintiff was offered the option of seeing another doctor, Dr. Davis, that same day, but plaintiff refused that appointment. (*Id.*) Plaintiff saw Dr. Thebaud three days later on July 5, 2004, where the results of his cholesterol test and diet were discussed. (*Id.*)

*4 On July 19, 2004, plaintiff returned to see Dr. Thebaud and complained of right knee pain following two physical therapy sessions. (*Id.*) On this date, Dr. Thebaud again referred plaintiff for an orthopedic consultation and again forwarded a copy of the MRI to the consultant, stating “pt has had PT on 2 occasions but still [complains] of pain of rt knee. Please see. Sent copy of MRI.” (Consultation Reports at D156; *see also* Ambulatory Health Records at D048.) The orthopedic consultation was scheduled for August 11, 2004. (Consultation Reports at D156.)

On July 31, 2004, plaintiff was examined by a nurse in the Segregated Housing Unit (“SHU”) who noted no marks, abrasions or swollen areas. (Ambulatory Health Records at D48.) Plaintiff did not attend the August 11, 2004 orthopedic consultation. (Consultation Reports at D156; Doc. No. 133, 9/10/08 Declaration of Dr. Haider-Shah (“Haider-Shah Decl.”) at ¶9.) Plaintiff's medical chart was reviewed for transfer on August 12, 2004. (Ambulatory Health Records at D049.)

On August 13, 2004, plaintiff was transferred from Arthur Kill to Downstate Correctional Facility, then to Ulster Correctional Facility, and finally, on August 17, 2004,

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to Marcy Correctional Facility (“Marcy”). (Haider-Shah Decl. at ¶ 7, Ex. A at 1-2.)². From the medical records, it does not appear that plaintiff saw Dr. Thebaud after July 19, 2004.

2 The DOC doctors do not make decisions to transfer inmates among DOC facilities. (Haider-Shah Decl. at ¶ 8.)

B. Plaintiff's Expert Opinion

Plaintiff's expert, Dr. Andrew D. Pearle, concedes that plaintiff “received appropriate care from February 2003 until ... February 2004.” (10/14/08 Castiglione Decl., Ex. 10, 4/14/08 Report of Pl.'s Expert Dr. Andrew Pearle (collectively, “Pearle Report”) at 4.) However, Dr. Pearle opined that, “after Mr. Goris's initial improvement with physical therapy in February 2004”, “orthopedic follow-up should have occurred in a more expeditious manner”, and specifically that, after this point, Dr. Thebaud “did not follow the Orthopedic recommendations of following up with the Orthopedic clinic prn.” (*Id.* at 4-5.) He also opined that, in his practice, “if a patient has persistent complaints of pain after physical therapy for 4 weeks in the setting of a meniscal and ACL tear, I would order more physical therapy and/or recommend surgical intervention.” (*Id.* at 4.) Dr. Pearle concluded, “[i]n the setting of defined Orthopedic pathology and a failure of physical therapy to provide relief, Orthopedic re-consultation should have occurred within a couple of weeks to one month after the persistence of symptoms.” (*Id.* at 5.)

DISCUSSION

I. Summary Judgment Standard

A court may grant summary judgment only “if 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 moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). The moving party carries the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In deciding a motion for summary judgment, the court's function is not to resolve disputed issues of fact, but only to determine whether there is a genuine issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court

must construe the facts in the light most favorable to the nonmoving party and all reasonable inferences and ambiguities must be resolved against the moving party. *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 83 (2d Cir.2001).

*5 Nevertheless, the nonmoving party cannot rest on “mere allegations or denials” but must instead “set out specific facts showing a genuine issue for trial.” Fed.R.Civ.P. 56(e); see also *Nat'l Westminster Bank USA v. Ross*, 676 F.Supp. 48, 51 (S.D.N.Y.1987) (“Speculation, conclusory allegations, and mere denials are not enough to raise genuine issues of fact.”); *Harlen Assocs. v. Incorporated Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir.2001) (“[M]ere speculation and conjecture is insufficient to preclude the granting of the motion.”).

Nor can the nonmoving party rest only on the pleadings. *Celotex*, 477 U.S. at 324 (Fed.R.Civ.P. 56(e) “requires the nonmoving party to go beyond the pleadings”); *Davis v. New York*, 316 F.3d 93, 100 (2d Cir.2002). Instead, each statement of material fact by the movant or opponent must be followed by citation to evidence which would be admissible, as required by Federal Rule of Civil Procedure 56(e) and Local Civil Rule 56.1(d). Moreover, “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson*, 477 U.S. at 247-48 (emphasis in original). No genuine issue of material fact exists “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50 (internal citations omitted).

II. Section 1983 and Eighth Amendment Claim for Deliberate Indifference to Serious Medical Needs

A. Legal Standard

To prevail in a section 1983 action, a plaintiff must demonstrate that he has been denied a constitutional or federal statutory right and that the deprivation occurred under the color of state law. See 42 U.S.C. § 1983. In order to establish an Eighth Amendment violation based on a claim that a prison official provided inadequate medical treatment, a plaintiff must prove “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The deliberate indifference standard requires an inmate to meet both

an objective and subjective prong. *See, e.g., Griffin v. Crippen*, 193 F.3d 89, 91 (2d Cir.1999).

Under the objective prong, the plaintiff must establish “that an official ‘denied [the patient] treatment needed to remedy a [sufficiently] serious medical condition.’” *Mills v. Fenger*, 216 Fed. Appx. 7, 10 (2d Cir.2006) (quoting *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir.1996)). In order to demonstrate that the alleged deprivation of medical treatment is, “in objective terms, ‘sufficiently serious,’ “ the prisoner “must prove that his medical need was ‘a condition of urgency, one that may produce death, degeneration, or extreme pain.’” *Johnson v. Wright*, 412 F.3d 398, 403 (2d Cir.2005) (quoting *Hemmings v. Gorczyk*, 134 F.3d 104, 108 (2d Cir.1998)).

*6 Under the subjective prong of the analysis, the plaintiff must prove that that the official denied treatment with a “sufficiently culpable state of mind.” *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1994). This requires that the prison 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.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)); accord *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir.2009). *See also Allen v. Wende*, ---F.Supp.2d ---, No. 09-CV-6203L, 2009 WL 4023212, at *2 (W.D.N.Y. Nov.19, 2009) (“In other words, it is not enough that the defendant objectively *should* have perceived the risk to the inmate’s health or safety; he must have *actually* been aware of, but deliberately ignored that risk.” (emphasis in original) (citing *Caiozzo*, 581 F.3d at 69-70)); *Stevens v. Goord*, 535 F.Supp.2d 373, 385 (S.D.N.Y.2008) (“A plaintiff must establish a ‘conscious disregard of a substantial risk of serious harm.’” (quoting *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir.2000))). To demonstrate this prong of the deliberate indifference standard, officials must “ ‘intentionally deny[] or delay[] access to medical care or intentionally interfere with the treatment once prescribed.’” *Demata v. New York State Corr. Dep’t of Health Servs.*, No. 99-CV-0066, 1999 U.S.App. LEXIS 22955, at *4 (2d Cir. Sept. 17, 1999) (quoting *Estelle*, 429 U.S. at 104-05).

It is well-established that mere disagreements with the quality of medical care do not state an Eighth Amendment claim. *See, e.g., Estelle*, 429 U.S. at 106-07; *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir.1998) (“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.”); *Culp v. Koenigsmann*, No. 99-CV-9557, 2000 WL 995495, at *7 (S.D.N.Y. July 19, 2000) (collecting cases). Nor does a delay in medical treatment necessarily invoke the Eighth Amendment. *See, e.g., Morrison v. Mamis*, No. 08-CV-4302, 2008 WL 5451639, at *7 n. 19 (S.D.N.Y. Dec.18, 2008) (Report and Recommendation) (collecting cases). To the contrary, the Second Circuit has reserved classifying delays in providing necessary medical care as “deliberately indifferent” for “cases in which, for example, officials deliberately delayed care as a form of punishment, ignored a ‘life-threatening and fast-degenerating’ condition for three days, or delayed major surgery for over two years.” *Demata*, 1999 U.S.App. LEXIS 22955, at *5 (internal citations omitted).

The Second Circuit addressed facts similar to those presented here in *Demata v. New York State Corr. Dep’t of Health Servs.*, 1999 U.S.App. LEXIS 22955, at *4.³ In that case, the plaintiff alleged that defendant prison officials failed to respond to numerous medical complaints, including injuries to both knees, an ulcer, and *hemorrhoids*. *Id.* at *2. Of particular significance in *Demata* is the plaintiff’s allegations regarding the treatment he received for a *knee injury* sustained while incarcerated. *Id.* at *2-3. Demata reported his *knee injury* to the nurse on duty the day he sustained it in February 1994, and continued to complain of related difficulty for months thereafter. *Id.* In September 1994, an MRI was performed and the knee was examined by an orthopedist. *Id.* at *3. The orthopedist prescribed physical therapy, an injection, and knee supports. *Id.* Demata had several more orthopedic consultations. *Id.* Between the fall of 1995 and May 1996, Demata complained of knee pain and was given *Tylenol*. *Id.* His complaints became more frequent in May 1996 and physical therapy in the form of strengthening exercises was prescribed. *Id.* Additional consultations and MRIs followed, and in March 1997, three years after sustaining the injury, Demata had knee surgery. *Id.*

3 Although *Demata* is a summary order, the court finds the Second Circuit’s analysis persuasive.

*7 In affirming the district court’s grant of summary judgment in favor of the defendant nurse and doctors, the *Demata* court stated that “strengthening exercises are

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in fact a form of medical care," *id.* at *7, and the fact that the plaintiff "fe[lt] something more should have been done to treat his injuries is not a sufficient basis for a deliberate indifference claim," *id.* at *5-6. Further, the *Demata* court found that plaintiff's "mere disagreement with [strengthening exercises as a] form of treatment does not establish deliberate indifference." *Id.* at *7.

The *Demata* court, however, vacated the district court's grant of summary judgment with regard to two of Demata's Eighth Amendment claims against the Medical Director of the prison. *Id.* at *8. The *Demata* court found that the factual record was insufficient to determine whether the medical director, who defended the denial of physical therapy on the basis that the treatment was unavailable, knew of the physical therapy recommendation and any harmful consequences of failing to provide it. *Id.* at *13-15. Additionally, the court remanded to develop the record as to whether the fact that the plaintiff was recommended and scheduled for a [colonoscopy](#) that he never received while under the Director's care constituted an Eighth Amendment violation because a "[f]ailure to heed a physician's recommendation regarding treatment may in some circumstances constitute deliberate indifference." *Id.* at *16.

B. Application of Eighth Amendment Analysis to Dr. Thebaud

Plaintiff alleges two theories whereby Dr. Thebaud purportedly evinced deliberate indifference to plaintiff's serious medical needs: 1) Dr. Thebaud treated plaintiff's [knee injury](#) with physical therapy instead of recommended surgery, (Doc. 29, Am. Compl. at 5); and 2) Dr. Thebaud ignored orthopedists' orders by failing to implement physical therapy prescribed for plaintiff, (Pl.'s Mem. of Law in Opp'n at 1-2; 13-16.) As defendant points out, plaintiff raises the second theory of deliberate indifference for the first time in his opposition to defendant's motion for summary judgment. (Doc. No. 134, Def.'s Reply Mem. in Supp. at 2-3.)

Plaintiff has failed to come forward with evidence from which a reasonable juror could conclude that Dr. Thebaud deliberately disregarded an excessive risk to plaintiff's health by intentionally denying or delaying medical care to plaintiff, or interfering with treatment once prescribed to plaintiff. The undisputed material facts, as reflected in the plaintiff's medical records, establish

that, during the approximately eighteen-months between plaintiff sustaining his injury and being transferred from Arthur Kill to the Marcy facility, Dr. Thebaud prescribed physical therapy, strengthening exercises, [Tylenol](#), restricted activity when requested by plaintiff, and referred plaintiff for orthopedic and physical therapy consults and for an x-ray, MRI and other lab tests. It does not appear that Dr. Thebaud acted with a lack of due care, let alone a conscious disregard of a substantial risk of serious harm. Thus, Plaintiff has not alleged sufficient facts to meet the subjective prong of the two-part deliberate indifference test.

***8** Plaintiff's allegation that Dr. Thebaud treated his [knee injury](#) with physical therapy instead of surgery does not change this conclusion, particularly where the medical records during Dr. Thebaud's treatment of plaintiff do not recommend surgery and plaintiff provides only vague details as to which doctor provided the surgical recommendation and when such recommendation was given. (See Doc. No. 109, Aff. of Simon Goris at ¶ 13 ("At one of these [orthopaedic] consultations, the individual I spoke with indicated that I needed surgery for my knee."); Am. Compl. at 5 ("The specialist at Staten Island University Hospital requested and recommended surgery.").) As defendant argues, and the court notes, the medical records flatly contradict any assertion by plaintiff that one of the orthopedic consultants or specialists who plaintiff saw while he was at Arthur Kill recommended that plaintiff have knee surgery, (Aff. of Simon Goris at ¶ 13; Am. Compl. at 5), or that any such recommendation was conveyed to Dr. Thebaud, (Am. Compl. at 5.) Furthermore, Dr. Thebaud testified that he had to defer to the orthopedists' treatment recommendations and could not recommend treatment on his own. (See, e.g., Thebaud Dep. at 67 ("[T]he orthopedist is the one who is the specialist. He's the one who has to decide what treatment to do for that patient."); *id.* at 114-115 ("I cannot recommend to the orthopedist what to do ... The orthopedist must decide.... It's for the orthopedist to recommend the course of therapy for the patient."); *id.* at 127 ("I cannot recommend. The orthopedist had to recommend the treatment of that patient.").)

Assuming for the purposes of this motion that plaintiff did receive such a recommendation, that this recommendation was conveyed to Dr. Thebaud and that Dr. Thebaud had the power to choose which course of therapy to prescribe, Dr. Thebaud's decision to treat plaintiff

with physical therapy, as undisputedly recommended by numerous orthopedic specialists, instead of with surgery, is at most “a difference in opinion as to [plaintiff’s] medical treatment rather than any deliberate indifference to his medical needs.” *Culp*, 2000 WL 995495, at *9. In fact, plaintiff’s own expert states that he would have recommended “more physical therapy *and/or* recommend surgical intervention” if a patient “had persistent complaints of pain after physical therapy.” (Pearle Report at 4 (emphasis added).) Thus, a “mere disagreement in treatment does not amount to an Eighth Amendment violation.” *Culp*, 2000 WL 995495, at *9 (rejecting deliberate indifference claim based on the fact that one doctor recommended *arthroscopic surgery* for *knee injury*, while another doctor concluded that surgery was not warranted until more conservative measures like physical therapy had been tried and failed); see also *Demata*, 1999 U.S.App. LEXIS 22955, at *5 (rejecting deliberate indifference claim, reasoning that the fact that the plaintiff “fe[lt] something more [than physical therapy] should have been done to treat his [knee] injuries is not a sufficient basis for a deliberate indifference claim”).

***9** Likewise, plaintiff’s recently raised assertion that Dr. Thebaud ignored orthopedists’ orders by failing to implement physical therapy prescribed for plaintiff does not raise facts sufficient to show that Dr. Thebaud’s behavior meets the subjective prong of the deliberate indifference test. Putting aside for the moment that plaintiff improperly raised his second theory of deliberate indifference for the first time in his opposition for summary judgment, the medical records establish that Dr. Thebaud “heed[ed] a physician’s recommendations regarding treatment,” *Demata*, 1999 U.S.App. LEXIS 22955, at *16, by referring plaintiff to physical therapy and additional orthopedic consultations, per the orthopedists’ orders. Plaintiff’s expert admits that Dr. Thebaud provided “appropriate care” from February 2003 until February 2004. (Pearle Report at 4.) Thereafter, it is undisputed from the medical records that in March 2004, plaintiff reported improvement to his knee and Dr. Thebaud referred plaintiff for more physical therapy; that plaintiff attended physical therapy in April 2004; that plaintiff requested physical therapy to a nurse in June 2004; and that Dr. Thebaud referred plaintiff for an orthopedic consultation on July 19, 2004, the first time the plaintiff had complained of knee pain to Dr. Thebaud since March of that year. (Consultation Reports at D156; Ambulatory Health Records at D044-D048.)

Even assuming for purposes of this motion that between March 1, 2004 and August 13, 2004, Dr. Thebaud failed to refer plaintiff to as many physical therapy sessions as plaintiff’s expert would have scheduled per the orthopedic clinic’s “prn” recommendation, any delay in Dr. Thebaud’s physical therapy referrals is insufficient for a finding of subjective intent. As in *Demata*, plaintiff has not alleged, nor is there anything in the record to show, that plaintiff’s *knee injury* was “fast-degenerating” or “life threatening,” that Dr. Thebaud delayed treatment in order to punish plaintiff or that any delay in treatment rose to the egregious level identified in *Hathaway v. Coughlin*, 841 F.2d 48, 50-51 (2d Cir.1988). In fact, uncontested medical records show that every time plaintiff complained of knee pain to Dr. Thebaud, Dr. Thebaud promptly referred him to an orthopedist and followed the orthopedists’ treatment recommendations. Plaintiff’s unsupported, conclusory allegations otherwise are insufficient to avoid summary judgment.

Thus, construing the facts in the light most favorable to the plaintiff, the court finds that Dr. Thebaud was not deliberately indifferent to plaintiff’s medical needs within the meaning of the Eighth Amendment, and summary judgment is appropriate. See, e.g., *Culp*, 2000 WL 995495, at *9-10; *Demata*, 1999 U.S.App. LEXIS 22955 at *4-6. As plaintiff cannot establish that the Dr. Thebaud acted with the requisite culpable mental state, the court need not address whether plaintiff’s injury constitutes a “serious medical condition” for purposes of the Eighth Amendment.

III. Qualified Immunity

***10** Furthermore, even if Dr. Thebaud’s conduct rose to the level of a constitutional violation, he would be entitled to qualified immunity and defendant’s motion for summary judgment is alternatively granted on this basis. “The qualified immunity doctrine protects a governmental official performing discretionary functions from liability to the extent his ‘conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Eng v. Coughlin*, 858 F.2d 889, 895 (2d. Cir.1988) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The inquiry turns on “the ‘objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.’” *Pearson v. Callahan*, --- U.S. ----, ----, 129 S.Ct. 808, 822, 172 L.Ed.2d 565 (2009) (quoting *Wilson v.*

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Layne, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). When an official “reasonably believes that his or her conduct complies with the law,” qualified immunity shields him or her from liability. *Id.* at 823.

The general constitutional right of a prisoner to be free from deliberate indifference to his or her serious medical needs was clearly established at the time of the events giving rise to this action. See *Estelle*, 429 U.S. at 104-05. The Supreme Court has never specifically addressed whether the conduct evidenced in the undisputed facts in this record constitutes deliberate indifference. Nevertheless, the court finds, in light of the Second Circuit's summary order in *Demata*, 1999 U.S.App. LEXIS 22955, discussed at length above, that Dr. Thebaud reasonably believed that his conduct complied with the law. *Pearson*, 129 S.Ct. at 823 (the unlawfulness of the officers' conduct in entering the plaintiff's home without a warrant was not clearly established because lower court decisions at the time held that similar conduct was constitutional). As a result, if any of Dr. Thebaud's conduct, as established in the

current record, amounted to a constitutional violation, the unlawfulness of that conduct was not clearly established. Therefore, Dr. Thebaud is entitled to qualified immunity and summary judgment is granted in defendant's favor.

CONCLUSION

Defendant's motion for summary judgment is granted because there exists no genuine issue of material fact as to whether Dr. Thebaud acted with deliberate indifference. Alternatively, Dr. Thebaud is entitled to qualified immunity. The Clerk of the Court is directed to enter judgment in favor of defendant Administrator of Suffolk County as Administrator of the Estate of Dr. Francis Thebaud and to close the case.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 376626

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