UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GORDON WAYNE STEWART	:	
	:	PRISONER
v.	:	Case No.3:03CV1703(WWE)
	:	
JOHN DEMPSEY HOSPITAL, et al.[1]	:	

MEMORANDUM OF DECISION

The plaintiff, Gordon Wayne Stewart ("Stewart"), was confined at the Willard-Cybulski Correctional Institution in Enfield, Connecticut, at the time he submitted his complaint to the court. He alleges that the defendants failed to provide proper medical care. For the reasons that follow, the complaint will be dismissed in part.

Standard of Review

Section 1915 requires the court to conduct an initial screening of complaints filed by prisoners to ensure that the case goes forward only if it meets certain requirements. This requirement applies both where the inmate has paid the filing

[1]The named defendants are: John Dempsey Hospital University of Connecticut Health Center, Dr. Edward Blanchett, Nurse Delores Rodrigous, Dr. John Gittus, Nurse Donald Germaine, Dr. Mark Buchana, Dr. Bianchi, and Department of Correction Commissioner Lantz.

fee and where he is proceeding in forma pauperis.[2] See Carr v. Dvorin, 171 F.3d 115 (2d Cir. 1999) (per curiam).

Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case 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." 28 U.S.C. § 1915 (e)(2)(B)(i) - (iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000).

"When an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915 (e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez, 907 F.2d at 1295).

> An action is "frivolous" when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" Nance v. Kelly,

[2]Stewart paid the filing fee in this action on October 6, 2003.

> 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The court exercises caution in dismissing a case under § 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. 19159e)(2)(B)(ii) ("court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim upon which relief may be granted"); Gomez, 202 F.3d at 596 ("Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) [] provided that dismissal for failure to state a claim is mandatory"). In reviewing the complaint, the court "accept[s] as true all factual allegations in the complaint" and draws inferences from these allegations in the light most favorable to the plaintiff. Gomez, 202 F.3d at 596 (citing King v.

Simpson, 189 F.3d 284, 287 (2d Cir. 1999)). Dismissal of the complaint under 28 U.S.C. 1915(e)(2)(B)(ii), is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

In addition, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit "a pro se plaintiff who is proceeding in forma pauperis" to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

A district court also is required to dismiss a complaint if the plaintiff seeks monetary damages from a defendant who is immune from suit. See 28 U.S.C. § 1915(e)(2)(B)(iii); Spencer v. Doe, 139 F.3d 107, 111 (2d Cir. 1998) (affirming dismissal pursuant to § 1915(e)(2)(B)(iii) of official capacity claims in § 1983 action because "the Eleventh Amendment immunizes state officials sued for damages in their official capacity").

In order to state a claim for relief under section 1983 of the Civil Rights Act, Stewart must satisfy a two-part test.

First, he must allege facts demonstrating that each defendant acted under color of state law. Second, he must allege facts demonstrating that he has been deprived of a constitutionally or federally protected right. Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986).

Discussion

After careful review of the complaint, the court concludes that several claims should be dismissed.

I. Claim Against John Dempsey Hospital

Stewart names as a defendant in this action John Dempsey Hospital University of Connecticut Health Center. It is well-settled that a state agency is not a "person" within the meaning of section 1983. See Fisher v. Cahill, 474 F.2d 991, 992 (3d Cir. 1973) (state prison department cannot be sued under section 1983 because it does not fit the definition of "person" under section 1983); Grabow v. Southern State Correctional Facility, 726 F. Supp. 537, 538-38 (D.N.J. 1989) (Department of Corrections not a person under section 1983); Cassells v. University Hosp. at Stony Brook, 1987 WL 3717, at *4 (E.D.N.Y. Jan 12, 1987) (holding that section 1983 claims against state university and university hospital fail because neither entity is a person within the meaning of section

1983); Allah v. Commissioner of Dep't of Correctional Services, 448 F. Supp. 1123, 1125 (N.D.N.Y. 1978) (New York Department of Correctional Services not a person under section 1983). The John Dempsey Hospital is part of the University of Connecticut Medical Center. Thus, the John Dempsey Hospital is not a person within the meaning of section 1983. Stewart's claims against John Dempsey Hospital lack an arguable legal basis and must be dismissed. See Neitzke, 480 U.S. at 325.

II. Claim Against Commissioner of Correction Lantz

Stewart also has named as a defendant Commissioner Lantz, the current Commissioner of the Department of Correction. He states in his complaint that all defendants are named in their individual capacities only.

It is settled law in this circuit that in a civil rights action for monetary damages against a defendant in his individual capacity, a plaintiff must demonstrate the defendant's direct or personal involvement in the actions which are alleged to have caused the constitutional deprivation. See Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994). "A supervisor may not be held liable under section 1983 merely because his subordinate committed a constitutional tort." Leonard v. Poe, 282 F.3d 123, 140 (2d Cir. 2002). Section 1983 imposes liability only on the official causing

the violation. Thus, the doctrine of *respondeat superior* is inapplicable in section 1983 cases. See Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999); see also Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 692-95 (1978).

> [A] supervisor may be found liable for his deliberate indifference to the rights of others by his failure to act on information indicating unconstitutional acts were occurring or for his gross negligence in failing to supervise his subordinates who commit such wrongful acts, provided that the plaintiff can show an affirmative causal link between the supervisor's inaction and [his] injury.

Leonard, 282 F.3d at 140.

Stewart alleges no facts demonstrating any link between defendant Lantz and his specific medical care. Although she now is the Commissioner of the Connecticut Department of Correction, defendant Lantz did not hold that position during most of the time period relating to Stewart's claims. Thus, the court concludes that Stewart has named defendant Lantz for her supervisory role only. The claims against defendant Lantz are not cognizable in a section 1983 action on a theory of *respondeat superior* and are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). See Blyden, 186 F.3d at 264.

III. Claims Pursuant to 42 U.S.C. §§ 1986 & 1988

Stewart states that he also brings this action pursuant

to 42 U.S.C. §§ 1986 and 1988.

Section 1986 provides no substantive rights; it provides a remedy for the violation of 42 U.S.C. § 1985. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 222 n.28 (1970) (Brennan, J., concurring in part and dissenting in part). Thus, a prerequisite for an actionable claim under section 1986 is a viable claim under section 1985.

Stewart has not included a section 1985 claim in this action. Thus, his section 1986 claim is not cognizable. Any claim pursuant to 42 U.S.C. § 1986 is dismissed. See 28 U.S.C. § 1915(e)(2)(B)(ii).

Stewart also seeks relief pursuant to 42 U.S.C. § 1988. Section 1988(a) provides that the district courts shall exercise their jurisdiction over civil right cases in conformity with federal law where appropriate or state law. This section, however, does not provide an independent cause of action. See Moor v. Alameda County, 411 U.S. 693, 702-06, reh'g denied, 412 U.S. 963 (1973).

Furthermore, to the extent that the plaintiff is seeking attorneys' fees pursuant to section 1988(b), his claim also fails. A pro se litigant is not entitled to attorney's fees under § 1988. See Kay v. Ehrler, 499 U.S. 432, 435 (1991); Presnick v. Santoro, 832 F. Supp. 521, 531 (D. Conn. 1993).

Thus, all claims brought pursuant to section 1988 are dismissed. See 28 U.S.C. § 1915 (e)(2)(B)(ii).

IV. State Law Claims

Supplemental or pendent jurisdiction is a matter of discretion, not of right. Thus, the court need not exercise supplemental jurisdiction in every case. See United Mine Workers v. Gibbs, 383 U.S. 715, 715-26 (1966). The federal court should exercise supplemental jurisdiction and hear a state claim when doing so would promote judicial economy, convenience and fairness to the litigants. The court should decline to exercise supplemental jurisdiction, however, when state law issues would predominate the litigation or the federal court would be required to interpret state law in the absence of state precedent. See id. at 726. In addition, the court may decline to exercise supplemental jurisdiction where the court has dismissed all claims over which it has original jurisdiction. See 28 U.S.C. § 1367(c)(3); Carnegie- Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) ("in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine–judicial economy, convenience, fairness, and comity–will point toward declining to exercise jurisdiction over the remaining state-law claims"); Spear v.

Town of West Hartford, 771 F. Supp. 521, 530 (D. Conn. 1991) ("absent unusual circumstances, the court would abuse its discretion were it to retain jurisdiction of the pendant state law claims on the basis of a federal question claim already disposed of"), aff'd, 954 F.2d 63 (2d Cir.), cert. denied, 506 U.S. 819 (1992).

The court has dismissed all federal law claims against defendants John Dempsey Hospital and Commissioner Lantz. Thus, the court declines to exercise supplemental jurisdiction over any remaining state law claims asserted against these two defendants. Any state law claims against the remaining defendants remain pending.

Conclusion

All federal law claims against defendants John Dempsey Hospital University of Connecticut Health Center and Department of Correction Commissioner Lantz and all claims brought pursuant to 42 U.S.C. §§ 1986 and 1988 are **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). The court declines to exercise supplemental jurisdiction over any state law claims against defendants John Dempsey Hospital and Commissioner Lantz. Thus, the Clerk is directed to terminate John Dempsey Hospital and Commissioner Lantz as defendants in this case.

Because Stewart paid the filing fee to commence this action, he is responsible for effecting service of the complaint on the remaining defendants. Stewart is directed to effect service on defendants Blanchett, Rodrigous, Gittus, Germaine, Buchana and Bianchi in their individual capacities in accordance with Rule 4, Fed. R. Civ. P., within **120** days from the date of this order and to file a return of service within **130** days from the date of this order. For each defendant, the return shall include a signed waiver of service of summons or documentation completed by the person who effected service of a summons and the complaint on the defendant in his or her individual capacity. Failure to effect service and file the return within the time specified may result in the dismissal of this action. The Clerk is directed to send Stewart instructions on effecting service of the complaint with this order.

Each defendant is ordered to file an appearance within **sixty (60)** days from the date he or she signs a waiver of service of summons or within **thirty (30)** days from the date of service of summons.

Stewart informed the court that he anticipated being released on parole no later than November 15, 2003. The court has contacted Stewart's last know place of incarceration and

learned that he no longer is confined in that facility. The Clerk is directed to send a copy of this order to Stewart at 121 East Avenue, West Haven, CT 06516, the address he provided to the court. Upon receipt of this order Stewart is directed to send a letter to the court confirming his current address.

SO ORDERED this _____ day of January, 2004, at Bridgeport, Connecticut.

/s/
Warren W. Eginton
Senior United States District Judge