UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHNNY TOBIN	:	
	:	PRISONER
v.	:	CASE NO. 3:04V952 (SRU)
	:	
JOHN DOE, JAILOR ON DUTY	:	
JOHN DOE, MAINTENANCE JANITOR	:	
CITY OF STAMFORD	:	
STAMFORD POLICE DEPARTMENT	:	
SERGEANT ROBERT S. BRACCIA	:	

RULING AND ORDER

Johnny Tobin, currently an inmate at the Corrigan Correctional Institution in Uncasville, Connecticut, brings this civil rights action *pro se* pursuant to 42 U.S.C. § 1983. Tobin alleges that in July 2002 he was in the custody of the Stamford Police Department. On July 22, 2002, a loud noise awakened him and he tried to stand up. As he stood up, he slipped on the wet floor and fell back into the toilet hitting his head. Tobin's cellmate, Jason Miller, called for help. The officers in the police station did not respond immediately. Later medics put the plaintiff on a back board and transferred him to Stamford Hospital. He still experiences pain in his back, neck and head and takes medication to ease his pain. The plaintiff seeks monetary compensation for medical bills and pain and suffering. For the reasons set forth below, the complaint is dismissed in part.

The plaintiff has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed *in forma pauperis* in this action. 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). This requirement applies both where the inmate has paid the filing fee and where he is proceeding *in forma pauperis*. *See Carr v. Dvorin*, 171 F.3d 115 (2d Cir. 1999) (per curiam).

"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 v. Wolf*, 907 F.2d 1293, 1295 (2d Cir. 1990)).

> 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*, 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 section 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. § 1915(e)(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"); *Cruz*, 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. *Cruz*, 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 is also 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 section 1915(e)(2)(B)(iii) of official capacity claims in section 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, the plaintiff must satisfy a two-part test. First, the plaintiff must allege facts demonstrating that the defendant acted under color of state law. Second, the plaintiff must allege facts demonstrating that he has been deprived of a constitutionally or federally protected right. *See Lugar v. Edmondson Oil Co.*,

457 U.S. 922, 930 (1982); *Washington v. James*, 782 F.2d 1134, 1138 (2d Cir. 1986).

The plaintiff names the Stamford Police Department as a defendant. A municipality is subject to suit pursuant to 42 U.S.C. § 1983. *See Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). A municipal police department, however, is not a municipality. Rather, it is a sub-unit or agency of the municipal government through which the municipality fulfills its policing function. Because a municipal police department is not an independent legal entity, it is not subject to suit under § 1983. *See, e.g., Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992) (affirming district court's dismissal of claims against county sheriff's department because, under state law, sheriff's department lacked capacity to be sued); *PBA Local No. 38 v. Woodbridge Police Dep't*, 832 F. Supp. 808, 825-26 (D.N.J. 1993) (citing cases to support statement that courts considering this issue have unanimously concluded that municipal police departments are not proper defendants in section 1983 actions). Accordingly, there is no legal basis for the plaintiff's claims against the Stamford Police Department. The amended complaint is dismissed as against defendant Stamford Police Department. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

The plaintiff also names the City of Stamford as a defendant. In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court set forth the test for municipal liability. To establish municipal liability for the allegedly unconstitutional actions of a municipal employee, the plaintiff must "plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995). Municipal liability cannot be premised on a theory of respondeat superior. *See Monell*, 436 U.S. at 691.

The plaintiff does not allege the existence of a municipal policy or custom that led to his fall or the delay in the response to his fall by the defendants. One incident of improper action, without more, is insufficient to demonstrate the existence of such a municipal policy or custom unless taken by a final policymaking official. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820-24 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."); *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993) ("A single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy.") Thus, the plaintiff has not alleged facts to support a claim for municipal liability under *Monell* and the claims against the City of Stamford are dismissed. *See* 28 U.S.C. § 1915(e)(2)(B)(ii)

The plaintiff names the John Doe maintenance worker/janitor as a defendant and claims that he/she failed to put signs up indicating that the floor was wet in the cell bock. The plaintiff also alleges that Sergeant Braccia neglected to oversee the individuals in the custody of the Stamford Police Department on July 22, 2002. Inadvertent and negligent conduct that causes injury, does not support an action pursuant to 42 U.S.C. § 1983. *See Daniels v. Williams*, 474 U.S. 327, 336 (1986). *See also Davidson v. Cannon*, 474 U.S. 344, 347 (1986) ("Due Process clause of the Fourteenth Amendment is not implicated by lack of due care of an official causing unintended injury to life, liberty or property"). Instead, it is when a government official acts with deliberate indifference to the consequences of his action that a claim may be supported under section 1983. *See Morales v. New York State Dep't of Corrections*, 842 F.2d 27, 30 (2d Cir.

1988).

The plaintiff does not allege that the maintenance worker/janitor intentionally caused the condition that resulted in the plaintiff's fall and injuries to his head, neck and back, but rather that he/she neglected to place signs indicating that the floor was wet. As to Sergeant Braccia, the plaintiff simply alleges that "he neglected his duty to oversee the safety of all." Compl. at 3. The allegations set forth, at most, a state law negligence claim. Although prison officials may owe a special duty of care to those in their custody under state tort law, the Supreme Court has rejected the contention that such tort law claims implicate a constitutionally or federally protected right. *See Daniels*, 474 U.S. at 335-36. Thus, the plaintiff's negligence claims against John Doe Maintenance/Janitor and Sergeant Braccia are dismissed because they"lack[] an arguable basis in law...." *Nietzke*, 490 U.S. at 325; 28 U.S.C. § 1915(e)(2)(B)(i).

The plaintiff also claims that Sergeant Braccia failed to timely respond to his Freedom of Information Act request for a report of the July 22, 2002 incident. The federal Freedom of Information Act authorizes suits against federal agencies. See 5 U.S.C. § 552a(g)(1). The act does not apply to state agencies or state government. *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981); *Davidson v. State of Georgia*, 622 F.2d 895, 897 (5th Cir. 1980); 5 U.S.C. § 551(1)(C). Thus, the plaintiff's claims that defendants Braccia violated the Freedom of Information Act are without merit and are dismissed. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

The only remaining defendant is John Doe, who was the "jailer on duty." Am. Compl. at 1. The plaintiff claims that John Doe failed to respond to his cellmate's calls for help in a timely manner. On page two of the amended complaint, the plaintiff alleges that he was left on the floor

for over thirty minutes after he slipped and fell. On page three of the amended complaint, the plaintiff claims John Doe left him on the floor for several minutes before checking on him and calling for Emergency Medical Services. On page 4 of the amended complaint, the plaintiff alleges that John Doe left him on the floor for ten minutes before responding to the calls for help.

Viewed in the light most favorable to the plaintiff, the claims regarding John Doe's failure to timely respond to plaintiff's accident and injuries may state a claim of deliberate indifference to plaintiff's safety and serious medical needs. Without a name, however, the United States Marshal is unable to serve John Doe with a summons and complaint.

Conclusion

All claims against defendants City of Stamford, Stamford Police Department, Sergeant Robert S. Braccia and John Doe Maintenance Janitor are **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii). The court declines to exercise supplemental jurisdiction over any state law claims against these defendants. *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 plaintiff will be permitted to file an amended complaint against John Doe "jailer on

duty." The amended complaint must identify John Doe "jailer on duty" and clarify Tobin's claims against that individual. This case is stayed for sixty days to permit the court to seek counsel to assist Tobin in identifying John Doe "jailer on duty" and to assist with the drafting of an amended complaint.

It is certified that any appeal *in forma pauperis* from this order would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a).

SO ORDERED this 28th day of March 2005, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge