

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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KIAZA LOCCENITT,	:	
	:	
Plaintiff,	:	11 Civ. 5651 (PAC) (HBP)
	:	
-against-	:	REPORT AND
	:	<u>RECOMMENDATION</u>
THE CITY OF NEW YORK,	:	
	:	
Defendant.	:	

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PITMAN, United States Magistrate Judge:

TO THE HONORABLE PAUL A. CROTTY, United States  
District Judge,

I. Introduction

In a complaint filed on August 2, 2011 (Docket Item 2), plaintiff, pro se, brings this action for damages pursuant to 42 U.S.C. § 1983 against the City of New York (the "City"). The City has moved to dismiss the complaint for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6) (Notice of Motion to Dismiss, filed Feb. 17, 2012 (Docket Item 13)).

For the reasons set forth below, I respectfully recommend that the City's motion to dismiss be granted in all respects.

II. Facts

Plaintiff, an inmate in the custody of the New York City Department of Correction and housed on Rikers Island, alleges that he has suffered from a number of maladies, and fear of contracting maladies, as a result of his alleged exposure to environmental pollutants. Relying in principal part on an article in the New York Daily News which reported that several Corrections Officers assigned to Rikers Island had brought a lawsuit asserting similar claims (Complaint at 5<sup>1</sup>), plaintiff alleges that various substances in the soil on Rikers Island have either caused him harm or to suffer anxiety about contracting certain conditions in the future (Complaint at 6). Specifically, plaintiff alleges he has been exposed to the following contaminants: wood, plastic, "decaying organics," radon, formaldehyde gas, petroleum by-products, M.T.B.E., methane, alkalis, acids, "black gas," bacteria, mold, mildew, viruses, mites, pollen, animal dander, water borne lead, atmospheric lead and asbestos (Complaint at 6). As a result of the alleged exposure, plaintiff claims to have suffered "post traumatic stress, sick building

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<sup>1</sup> The complaint consists of the Court's form Section 1983 Prisoner Complaint and a three-page addendum inserted between pages three and four of the form complaint. I cite to the pages of the complaint as if the complaint were a single, unified, serially-paginated document.

syndrome, shortness of breath, psychological and physical paranoia, back pains, headaches, stomach pain, skin rashes, & loss of hair" (Complaint at 3). Plaintiff also alleges that he received inadequate medical care for these conditions (Complaint at 3).<sup>2</sup>

### III. Analysis

#### A. Standards Applicable to a Motion to Dismiss Pursuant to Rule 12(b)(6)

The standards applicable to a motion to dismiss pursuant to Rule 12(b)(6) are well-settled and require only brief review.

When deciding a motion to dismiss under Rule 12(b)(6), [the court] must accept as true all well-pleaded factual allegations of the complaint and draw all inferences in favor of the pleader. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 493, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986); Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977) (referring to "well-pleaded allegations"); Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). "[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." Int'l Audiotext Network, Inc. v.

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<sup>2</sup> Plaintiff's complaint is a verbatim copy of the complaint filed in Cepeda v. Bloomberg, 11 Civ. 2914 (WHP). The Honorable William H. Pauley, III, United States District Judge, dismissed that complaint based on the plaintiff's failure to exhaust inmate grievance procedures and the plaintiff's failure to state a claim. Cepeda v. Bloomberg, 11 Civ. 2914 (WHP), 2012 WL 75424 (S.D.N.Y. Jan. 4, 2012).

Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (quoting Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991)). The Court also may consider "matters of which judicial notice may be taken." Leonard T. v. Israel Discount Bank of New York, 199 F.3d 99, 107 (2d Cir. 1999) (citing Allen v. WestPoint-Pepperill, Inc., 945 F.2d 40, 44 (2d Cir. 1991)). In order to avoid dismissal, a plaintiff must do more than plead mere "[c]onclusory allegations or legal conclusions masquerading as factual conclusions." Gebhardt v. Allspect, Inc., 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) (quoting 2 James Wm. Moore, Moore's Federal Practice ¶ 12.34[a][b] (3d ed. 1997)).

Hoffenberg v. Bodell, 01 Civ. 9729 (LAP), 2002 WL 31163871 at \*3 (S.D.N.Y. Sept. 30, 2002) (Preska, D.J.); see also In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007); Johnson & Johnson v. Guidant Corp., 525 F. Supp. 2d 336, 345-46 (S.D.N.Y. 2007) (Lynch, then D.J., now Cir. J.).

The Supreme Court has clarified the proper mode of inquiry for evaluating a motion to dismiss pursuant to Rule 12(b)(6), which uses as its starting point the principle that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

[I]n Bell Atl[antic] Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Court disavowed the well-known statement in Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 550 U.S. at 562. Instead, to survive a motion to dismiss under

Twombly, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." Id. at 570.

Talley v. Brentwood Union Free Sch. Dist., No. 08-790 (DRH), 2009 WL 1797627 at \*4 (E.D.N.Y. June 24, 2009).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations, internal quotations and alterations omitted).

In evaluating a motion under Rule 12(b)(6), the court must determine whether the plaintiff has alleged any facially plausible claims. See Smith v. NYCHA, 410 F. App'x 404, 405-06 (2d Cir. 2011). A claim is plausible when its factual content "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, 556 U.S. 662, 678, (2009) (citations omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of

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