Toxey v City of New York
2014 NY Slip Op 30723(U)
March 20, 2014
Sup Ct, New York County
Docket Number: 400844/10
Judge: Kathryn E. Freed

[* 1]
SCANNED ON 3/25/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Index Number : 400844/2010

TOXEY, ANTHONY

VS

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

Cal: #76

PART 5

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

NON-FINAL DISPOSITION

DO NOT POST

FINAL DISPOSITION

SUBMITTED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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ANTHONY TOXEY,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

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DECISION/ORDER
Index No. 400844/10
Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1-2(Exs.A-T)
NOTICE OF CROSS-MOTION AND AFFIDAVITS ANNEXED.....	.3-4(Exs.A-F)
AFFIRMATIONS IN OPPOSITION.....	..5..(Ex.A).....
REPLYING AFFIRMATION.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff pro se Anthony Toxey moves, pursuant to CPLR 3212, for an Order granting him summary judgment as to liability and defendant The City of New York ("the City") cross-moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. After reviewing the motion papers, the applicable statutes and case law, this Court **denies** plaintiff's motion and the City's cross-motion.

Factual and Procedural Background:

In a notice of claim dated March 17, 2009, plaintiff Anthony Toxey alleged that, in 2006, he was diagnosed with a condition which required him to wear supportive footwear. He further claimed that, on December 2, 2008, after he became incarcerated at Rikers Island Correctional Facility, a prison operated by the New York City Department of Corrections ("DOC"), his supportive footwear was confiscated and he was provided with "defective slip-on non-supportive footwear" which caused him to suffer "excruciating pain." He claimed that the confiscation of his shoes re-injured his feet, constituted cruel and unusual punishment which violated his Constitutional rights, and that the DOC repeatedly failed "to provide [him] with adequate, supportive footwear with included orthotics." In the notice of claim, which was mailed to, and received by, the City on March 21 and 23, 2009, respectively, plaintiff demanded $6 million in damages.

On or about March 29, 2010, plaintiff commenced an action in this Court alleging negligence and gross negligence by the City in its treatment of his feet while he was an inmate at Rikers Island from December of 2008 until June of 2009, when he was transferred to the custody of New York State. He claimed that he had a "pre-existing condition that required medical supportive footwear, which had been prescribed prior to his incarceration", and that when he attempted to obtain such footwear from the DOC he was told that "due to the recession, no supportive footwear will be administered." He alleged that the City's failure to provide him with supportive footwear caused him pain and suffering.

On or about March 31, 2010, the City joined issue by service of its answer, in which it

denied all allegations of wrongdoing and asserted as an affirmative defense, inter alia, failure to state a cause of action.

By notice of motion dated July 25, 2013, plaintiff moves, pursuant to CPLR 3212, for summary judgment on liability. In support of the motion, the plaintiff submits an affidavit, medical records purporting to establish that he suffered from pre-existing foot problems, and numerous letters and grievance forms which, he asserts, represented his efforts to obtain supportive footwear from the City's DOC.

Plaintiff annexes to his motion a prescription, written by Foot Clinics of New York and dated March 13, 2007, for a pair of orthopedic shoes due to pes planus (flat feet or fallen arches) in both feet. Ex. "B".[1] A record from that provider dated July 23, 2007 indicates that plaintiff had osteoarthritis in both feet and was wearing orthopedic shoes. Ex. "B". Also submitted with the motion is a letter from Ortho-Medical Products, Inc., dated October 28, 2008, reflecting that plaintiff needed to wear orthopedic shoes due to a condition in his feet. Ex. "A".

A"New York City Department of Health and Mental Hygiene Consultation Request" ("MHCR"), dated December 16, 2008 indicates that a Dr. Dejoie stated that plaintiff "needs supportive footwear." Ex. "D". A MHCR dated January 28, 2009 is only partially legible but appears to state that plaintiff was to "continue with cane and supportive footwear". A MHCR dated February 11, 2009, also partially legible, contains a notation that "supportive footwear [was] issued to [plaintiff] on 3/9/09." *See* Plaintiff's Ex. "G".

In a letter to the DOC's social service coordinator dated February 26, 2009 (*see* Plaintiff's Ex. "E"), plaintiff stated "I truly believe that both my feet have been reinjured [sic] since the [DOC]

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[1]All references are to exhibits annexed to plaintiff's motion.

confiscated all of [my] footwear here at [Rikers Island] on December 2 & 3, 2008." That same day, plaintiff sent the DOC an "Inmate Reasonable Accommodation Request Form" asking for supportive footwear. Ex. "E".

In an "Accomodation Determination Acknowledgment for Inmates" ("ADA") dated March 9, 2009, the DOC acknowledged that its "Disability Rights Coordinator" had received plaintiff's request for supportive footwear and directed that plaintiff submit his request to the medical staff at sick call. Ex. "F".

In a "Correctional Health Services Request for a Second Opinion" ("RSO") dated March 13, 2009, plaintiff stated that he had been examined by a prison podiatrist who said he needed supportive footwear. However, the podiatrist refused to take X-rays of his feet, which, plaintiff maintained, were necessary due to his excruciating pain." Ex. "H".

In an undated letter to the DOC (Ex. "I"), plaintiff stated that "[since] the (DOC) has confiscated my personal shoes which had my orthopedic innersoles inserted my feet have been in constant and consistent pain."

In a "Grievant's Statement Form" dated March 18, 2009 (Ex. "J"), plaintiff objected to the direction in the ADA that he report his problem to the medical staff at sick call. He claimed that he had sustained "injuries that resurfaced due to [his] having to wear" shoes without proper support, that Dr. Dejoie had found that he needed such footwear, and that he had submitted medical records to the DOC establishing that he needed the footwear. He further stated that the footwear given to him by the DOC on March 9, 2009 was a pair of "non supportive non orthopedic" workboots. He requested X-rays of his feet and supportive footwear.

In an ADA dated March 19, 2009, the DOC advised plaintiff that "facility and health affairs

staff have been alerted of [his] second correspondence for appropriate follow-up." Ex. "K".

Dr. Dejoie wrote in a MHCR dated March 23, 2009 "please allow [plaintiff]/inmate supportive footwear and arches" or [plaintiff's] orthotic shoes." Ex. "D".

A "Correctional Health Services Response to Complaint" dated March 23, 2009 reflects that plaintiff was on pain medication but the remainder of the record is illegible. Ex. "L".

In a grievance dated March 26, 2009, plaintiff stated that he was "still having a problem with his feet after receipt of sneakers and boots." Ex. "M".

In a "Correctional Health Services Complaint" dated March 28, 2009, plaintiff stated that the Grievance Office advised him on March 27, 2009 that he was required to submit a second opinion form, which he had "already done [more than once]." Thus, he stated, he intended to contact the Warden. Ex. "N". In a letter to the Warden written the previous day, the plaintiff stated, inter alia, that despite recommendations by DOC physicians, he had yet to be provided with supportive footwear. He stated that he had followed all necessary procedures in requesting the footwear and asked that the Warden intervene so as to avoid permanent damage to his feet. Ex. "N".

In a letter to the DOC dated April 30, 2009 appealing the denial of his grievance, plaintiff alleged "a deliberate indifference to medical treatment which [caused] a delay in procuring this treatment," a "lack of concern [regarding his] medical needs" and that his feet were re-injured "due to DOC's confiscation of [his supportive] shoes." Ex. "P". Plaintiff noted in the appeal that, prior to the confiscation of his footwear on December 2, 2008, he provided the DOC with medical records showing that it was necessary for him to wear such footwear. Ex. "P". He further alleged that he had been in "excruciating pain" for five months while the DOC did "nothing more than procrastinate."

Ex. "P".

On May 6 and 21, 2009, plaintiff filed grievance appeals to the DOC based on the fact that neither the Warden nor the DOC had followed the recommendation of the DOC's own medical staff that plaintiff's feet be treated. Ex. "R".

In a RSO dated May 8, 2009, plaintiff again asked that his "excruciating" foot pain be treated. Ex. "Q".

Finally, plaintiff submits letters requesting that counsel for the City re-send him document discovery which had been sent to him by the City and which he had lost.

By notice of cross-motion dated September 11, 2013, the City seeks dismissal of the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. In support of the motion, the City submits the notice of claim, the complaint, its answer and discovery demands, the DOC's procedures regarding inmate grievances, and a letter sending plaintiff blank medical record authorizations and a courtesy copy of the City's discovery demands.

Contentions of the Parties:

In his affidavit in support of his motion for summary judgment, plaintiff chronicles his repeated attempts to obtain proper footwear from the DOC. He asserts that his supportive footwear and orthotics were confiscated by the DOC on December 2, 2013, an apparent typographical error. Plaintiff maintains that the DOC "said [it] would resolve [his] medical issues, and [did not do so]." He further stated that, on June 2, 2009, he was transferred to state custody without ever having been "provided the treatment he requested from [the DOC]."

Plaintiff also submits a memorandum of law in which he asserts that he is entitled to summary judgment because the DOC's failure to provide him with adequate medical care was the proximate cause of his pain. He further asserts that the DOC was negligent insofar as it failed to follow the recommendations of its own medical staff that he needed supportive footwear.

In support of its motion to dismiss, the City argues that, since plaintiff failed to file a timely notice of claim, and failed to seek leave to file a late notice of claim within one year and ninety days, the action must be dismissed. The City also asserts that plaintiff's challenge to the DOC's failure to provide him with proper footwear should have been made in a proceeding pursuant to CPLR Article 78 and that, since plaintiff failed to exhaust his administrative remedies, he was not entitled to commence an Article 78 proceeding and his complaint should be dismissed as moot.

Alternatively, the City asserts that, if the complaint is not dismissed, plaintiff's motion for summary judgment must be denied on the grounds that he has failed to establish his prima facie entitlement to such relief and that granting summary judgment would be premature due to the fact that discovery is outstanding.

In his reply affirmation in further support of his motion and in opposition to the City's cross-motion, plaintiff asserts that he is entitled to summary judgment because the DOC failed to treat him in the manner recommended by its own doctors. In opposition to the City's motion, he asserts that the City's argument regarding the exhaustion of administrative remedies is without merit since it failed to plead this as an affirmative defense. He also maintains that he could not have filed an Article 78 petition since the DOC never issued a final determination in connection with his grievances.

Conclusions of Law:

Plaintiff's Motion for Summary Judgment

Initially, plaintiff's motion for summary judgment must be denied as procedurally defective since it fails to annex a complete set of pleadings for this Court's consideration. *See* CPLR 3212(b); *Washington Realty Owners, LLC v 260 Washington Street, LLC*, 105 AD3d 675 (1st Dept 2013).

In any event, plaintiff's motion must be denied on the merits. In support of the motion, plaintiff submitted an affidavit which was "wholly conclusory as to [the City's] negligence and failed to meet [his] prima facie burden establishing negligence on the part of the [City] (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980])." *Coleman v Maclas*, 61 AD3d 569 (1st Dept 2009). Nor does plaintiff submit any expert medical opinion establishing that the confiscation of his supportive footwear caused the alleged re-injury of his feet. Further, the uncertified medical records submitted by plaintiff constitute inadmissible hearsay and cannot be considered on the motion. *See Raposo v Robinson,* 106 AD3d 593 (1st Dept 2013); *Coleman, supra*, at 569.

Assuming, arguendo, that the records submitted by plaintiff were admissible, his contention that the DOC failed to provide him with adequate footwear is belied by Exhibit "G" to his own motion, which reflects that he was provided with supportive footwear on March 9, 2009. Although plaintiff claims that the footwear provided on that date was insufficient, this creates an issue of fact warranting the denial of his motion.

Finally, as the City asserts, summary judgment would be premature at this juncture given that discovery is in its nascent stage. *See* CPLR 3212(f); *Blech v West Park Presbyterian Church*, 97

AD3d 443 (1st Dept 2012).

The City's Motion to Dismiss

The City incorrectly asserts that plaintiff's remedy against the DOC for its failure to provide treatment was an article 78 proceeding and, since plaintiff could not commence such a proceeding because he failed to exhaust his administrative remedies before his transfer to state custody, the complaint must be dismissed as moot.

It is well settled that the standard for judicial review of an administrative determination pursuant to CPLR article 78 is limited to inquiry into whether an agency acted arbitrarily or capriciously. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). One who seeks article 78 review of a determination must commence the proceeding "within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). "An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." *Walton v New York State Dep't of Correctional Services*, 8 NY3d 186, 194 (2007).

Here, it is undisputed that plaintiff's appeals relating to his grievance were not resolved prior to the time he entered custody of the state on June 2, 2009. Since the administrative determination never became "final and binding" on the plaintiff, he was unable, as a matter of law, to commence an article 78 proceeding. *See* CPLR 217(1). Therefore, the complaint cannot be dismissed as moot on the ground that plaintiff was transferred to state custody before he exhausted his administrative

remedies and obtained a final determination regarding his grievance. The cases cited by the City are inapposite insofar as they involve dismissal of article 78 proceedings, not negligence actions, on mootness grounds. This Court finds disingenuous the DOC's argument that plaintiff failed to exhaust his administrative remedies where the documents submitted in support of his motion clearly reveal that he tenaciously attempted to comply with DOC policy in order to obtain proper treatment and that his efforts were virtually ignored. To allow dismissal of the complaint under these circumstances would be grossly unjust.

Even assuming, arguendo, that an article 78 proceeding had been brought by plaintiff and that it became moot due to plaintiff's transfer to state custody, the DOC does not set forth any ground, other than plaintiff's alleged failure to file a timely notice of claim and complaint, which would bar his negligence action. However, this Court finds that, because the notice of claim and complaint were filed in a timely fashion, plaintiff's negligence claim is not subject to dismissal.

The DOC asserts that the March 17, 2009 notice of claim was untimely because it was filed more than 90 days after December 2, 2008, the date on which plaintiff's supportive footwear was confiscated. However, because the DOC repeatedly refused to provide plaintiff with supportive footwear from December of 2008 through June of 2009, the notice of claim filed in March of 2009 was timely. *See* GML § 50-e (1)(a). Even assuming that the 90-day period in which to serve the notice of claim began on December 2, 2008, such period was extended by the "continuing violation" doctrine, "which serves to toll the running of the limitations period to the date of the last wrongful act." *See Bullard v State of New York*, 307 AD2d 6786, 678 (2003); *Selkirk v State of New York*, 249 AD2d 818, 819 (1998). Finally, the Court notes that plaintiff's action, filed on March 29, 2010, was

commenced within one year and 90 days after the accrual of his claim given that the alleged wrongs continued until June of 2009. *See* GML § 50-i (1).

Finally, given plaintiff's incessant efforts to obtain medical treatment which the DOC's own physician acknowledged was necessary, this Court finds that plaintiff has sufficiently alleged a Constitutional claim of cruel and unusual punishment. *See* CPLR 3211(a)(7).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further,

ORDERED that the defendant's motion to dismiss the complaint is denied; and it is further,

ORDERED that the Trial Support Office is to provide plaintiff, inmate #09A2865 at the Woodbourne Correctional Facility, 99 Prison Road, Woodbourne, New York 12788, and defendant The City of New York with a Case Scheduling Order; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: March 20, 2014

ENTER:

MAR 20 2014

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT