

**Kiehm v Kim**

2023 NY Slip Op 34190(U)

December 1, 2023

Supreme Court, New York County

Docket Number: Index No. 156443/2020

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 02TR

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BRANDON KIEHM,

Plaintiff,

- v -

ALICE KIM,

Defendant.

INDEX NO. 156443/2020

MOTION DATE 05/12/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

In this action brought pursuant to 42 USC § 1983 alleging deliberate indifference in violation of the Eighth and Fourteenth Amendments, defendant Alice Kim (“Defendant”) moves to dismiss plaintiff Brandon Kiehm’s (“Plaintiff”) Verified Complaint pursuant to CPLR 3211(a)(7). Plaintiff opposes the motion.

Plaintiff was a pretrial detainee at the Manhattan Detention Center (“MDC”) under the care of the New York City Department of Corrections (“DOC”) when he injured his foot on August 13, 2017. He initially received treatment at MDC and was taken to Bellevue Hospital on August 16, 2017 for further treatment. There, he was treated by Defendant, a physician at Bellevue who had been contracted by the New York City Health and Hospitals Corporation to provide medical care to those in DOC custody.

Plaintiff claims that Defendant suspected a midfoot injury, specifically a Lisfranc ligamentous injury, during this first visit and ordered an X-ray of Plaintiff’s foot. However, she purportedly allowed Plaintiff to be removed from Bellevue that day without undergoing the X-

rays. Defendant prescribed Plaintiff a cam boot and ordered him to return in a week. Plaintiff returned to Bellevue on August 23, 2017, where Defendant again ordered a complete X-ray and again purportedly allowed Plaintiff to be returned to MDC without being X-rayed. Plaintiff had previously been X-rayed at the MDC clinic. Defendant allegedly requested these X-rays on both occasions but was denied access to them by certain nonparty doctors at MDC.

Plaintiff again visited Bellevue on September 6, 2017 and underwent a full X-ray of his injured foot. This X-ray was reviewed by another doctor at Bellevue who found evidence of a Lisfranc ligamentous injury. Plaintiff returned to Bellevue again on September 13, 2017 on Defendant's instruction. Defendant advised him about his injury and told him that surgery was required.

Plaintiff claims that he was supposed to return to Bellevue for the surgery on September 20 and that this did not occur. He alleges that he repeatedly inquired at the MDC clinic about when he would be taken to Bellevue for surgery and was finally brought back to Bellevue on October 4, where an open reduction internal fixation was scheduled for October 19. The surgery proceeded on October 19, 2017 and Plaintiff returned to MDC the following day. Plaintiff claims that he continued to suffer from pain in the injured foot and that the purported delay in his diagnosis and surgery exacerbated his condition, causing him to require additional surgery after being discharged from DOC's custody.

Plaintiff's sole cause of action under 42 USC § 1983 alleges Defendant's deliberate indifference to his medical condition in violation of the Eighth and Fourteenth Amendments of the United States Constitution. He claims that Defendant "exhibited deliberate indifference to [his] medical condition and his constant pain and suffering," namely that Defendant "displayed deliberate indifference to [his] medical needs when she allowed [him] to be removed from

Bellevue without undergoing the full x-rays that she had ordered” (NYSCEF Doc. No. 1, Verified Complaint ¶¶ 81-82). Plaintiff attributes the subsequent exacerbation of his foot injury to Defendant’s purported deliberate indifference.

Defendant now moves to dismiss the Verified Complaint, arguing the Plaintiff fails to state a cause of action for deliberate indifference to serious medical needs. On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), “the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory” (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). “A motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law” (*id.*). However, “factual allegations which fail to state a viable cause of action” or “that consist of bare legal conclusions . . . are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

A plaintiff states a cause of action for deliberate indifference to serious medical needs in violation of the Eighth and Fourteenth Amendments by alleging two prongs, one objective and another subjective: first, the plaintiff must allege they suffered an objectively serious deprivation of medical care and, second, that the defendant acted with a sufficiently culpable state of mind (*Wooley v New York State Dept. of Corr. Servs.*, 15 NY3d 275, 282 [2010], citing *Farmer v Brennan*, 511 US 825, 832 [1994], *Salahuddin v Goord*, 467 F3d 263, 279-280 [2d Cir 2006]).<sup>1</sup> A deprivation is objectively serious where a plaintiff is actually deprived of adequate medical

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<sup>1</sup> Here, Plaintiff’s right against mistreatment as a pretrial detainee arises under the Fourteenth Amendment Due Process Clause. The deliberate indifference analysis remains the same (*Weyant v Okst*, 101 F3d 845 [2d Cir 1996]; *Cuoco v Moritsugu*, 222 F3d 99 [2d Cir 2000]).

care and “the inadequacy in medical care is sufficiently serious” (*Wooley*, 15 NY3d at 282 [internal citations omitted]). “Deliberate indifference is a mental state equivalent to subjective recklessness . . . . This mental state requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result” (*id.*, quoting *Salahuddin*, 467 F3d at 280).

Here, Plaintiff’s sole cause of action is premised on the allegation that the diagnosis of his midfoot injury and corrective surgery were delayed because of Defendant’s deliberate indifference to his condition. Specifically, he cites Defendant’s allowing his removal from Bellevue on August 16 and 23, 2017 before he could be X-rayed as the basis of his allegedly serious deprivation of medical care.

The Court finds that the allegations in the Verified Complaint fail to support the subjective prong of Plaintiff’s cause of action that Defendant’s state of mind was one of deliberate indifference. Aside from the entirely conclusory statements that Defendant acted with deliberate indifference (*see* Verified Complaint at ¶¶ 81-82, 87-88), none of the facts alleged in the Verified Complaint indicate that Defendant recklessly or intentionally withheld care from Plaintiff. Specifically, there is no indication that Defendant ordered Plaintiff removed from Bellevue on August 16 or 23, 2017 before he could be X-rayed or that she had authority to prevent his removal. There is also no indication that Defendant withheld or instructed others to withhold care from Plaintiff, as the Verified Complaint alleges that Defendant ordered X-rays of Plaintiff, sought his previous X-rays from MDC, prescribed him a cam boot, and scheduled surgery to correct Plaintiff’s condition. It is well-established that “a delay in treatment does not violate the constitution unless it involves an act or failure to act that evinces a conscious disregard of a substantial risk of serious harm” (*Pabon v Wright*, 2004 US Dist LEXIS 5565 at

\*21 [SD NY 2004], aff'd 459 F3d 241 [2d Cir 2006]). Here, despite the purported delay in Plaintiff's treatment, the facts alleged within the four corners of the Verified Complaint do not rise to the level of conscious disregard, as Plaintiff alleges that Defendant took steps to try to diagnose his foot condition and rendered other treatment to him in the interim. Having failed to adduce facts that could support an inference as to Defendant's subjective mental state at the time his treatment was allegedly delayed, Plaintiff fails to state a cause of action for deliberate indifference.

Plaintiff also fails to set forth sufficient factual allegations to support the objective prong of his cause of action that he suffered a sufficiently severe deprivation of medical care. The purported deprivation is Defendant's delay in diagnosing Plaintiff's midfoot injury because of the failure to administer X-rays to Plaintiff on August 16 and 23 and resulting alleged delay of Plaintiff's surgery. However, Plaintiff did receive care from Defendant for his condition in the form of the October 19, 2017 surgery, in addition to the treatment that was rendered to him before and after the surgery. The facts pled in the Verified Complaint therefore fail to allege a sufficiently serious denial of Plaintiff's medical care that would rise to the level of a constitutional violation.

Accordingly, it is hereby:

ORDERED that the motion is granted and the action is dismissed.



12/1/2023  
DATE

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LORI S. SATTLER, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

CHECK IF APPROPRIATE: