

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 25, 2021

527150

JOHNATHAN JOHNSON,
Appellant,

v

MEMORANDUM AND ORDER

BRANDI COLLYER et al.,
Respondents.

Calendar Date: January 6, 2021

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald
and Colangelo, JJ.

Johnathan Johnson, Malone, appellant pro se.

Letitia James, Attorney General, Albany (Jonathan Hitsous
of counsel), for respondents.

Reynolds Fitzgerald, J.

Appeal from an order of the Supreme Court (Ellis, J.),
entered July 31, 2018 in Franklin County, which granted
defendants' motion for summary judgment dismissing the
complaint.

Plaintiff is an inmate confined at Upstate Correctional
Facility in Franklin County and defendants are inmate grievance
counselors who work at that facility. Plaintiff, acting pro se,
commenced this action alleging that defendants failed to submit
his grievance complaints to the Central Office Review Committee
and thereby deprived him of access to the courts under the First
Amendment of the US Constitution and his right to due process

under the Fourteenth Amendment of the US Constitution, and also that defendants violated 42 USC § 1983. He further alleged that defendants' actions violated the NY Constitution and Correction Law § 139. Following joinder of issue, defendants moved for summary judgment dismissing the complaint for failure to state a cause of action. In opposition, plaintiff cross-moved for summary judgment. Supreme Court treated defendants' motion as a motion to dismiss, granted the motion and dismissed the complaint.¹ Plaintiff appeals.

Initially, plaintiff contends that the motion for summary judgment should have been denied for failure to submit copies of the pleadings with the motion (see CPLR 3212 [b]). Ordinarily, the failure to submit copies of the pleadings would mandate the denial of the motion. "[S]uch a procedural defect may be overlooked if the record is sufficiently complete" (Welch v Hauck, 18 AD3d 1096, 1098 [2005] [internal quotation marks and citations omitted], lv denied 5 NY3d 708 [2005]). A motion seeking dismissal of a complaint for failure to state a claim focuses on the allegations of the complaint. The complaint was available to Supreme Court, as noted in its order, since it was filed in the Franklin County Clerk's office in June 2015 (see Studio A Showroom, LLC v Yoon, 99 AD3d 632, 632 [2012]). As such, Supreme Court had a sufficient record to address the motion based upon the complaint and affidavits submitted, and the failure to attach the pleading was properly overlooked.

On a motion seeking dismissal for failure to state a claim, "the complaint is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (State of New York v Jeda Capital-Lenox, LLC, 176 AD3d 1443, 1445 [2019] [internal quotation marks, brackets and citation omitted]). In order to state a claim for denial of access to the courts, "a

¹ As defendants' motion was made after joinder of issue, it was properly a motion for summary judgment that was based on a CPLR 3211 (a) ground asserted in their answer (see State of New York v Konikov, 182 AD3d 750, 751 n 1 [2020], lv denied ___ NY3d ___ [Feb. 11, 2021]; DelVecchio v Collins, 178 AD3d 1336, 1336 n [2019]).

plaintiff must demonstrate that a defendant caused actual injury, i.e., took or was responsible for actions that hindered [a plaintiff's] efforts to pursue a legal claim" (Johnson v Bernier, 186 AD3d 1765, 1767-1768 [2020] [internal quotation marks, ellipsis and citations omitted]; see Johnson v Bruen, 187 AD3d 1294, 1294-1295 [2020]). "To establish an actual injury, a plaintiff must state in his or her complaint a nonfrivolous legal claim that had been frustrated or impeded by the defendant, and the complaint should state the underlying legal claims with the same degree of specificity as if they were being independently pursued" (Johnson v Bruen, 187 AD3d at 1295 [internal quotation marks, brackets and citations omitted]). The verified complaint here alleged only that defendants' handling of plaintiff's grievance complaints prejudiced his ability to seek redress via a CPLR article 78 proceeding. Even affording plaintiff every favorable inference, such vague and conclusory allegations are insufficient to support his claim for denial of access to the courts (see id.), nor do they support his claim that his due process rights were violated.

Moreover, in order to state a claim "under 42 USC § 1983 against an official in his or her individual capacity, the plaintiff must demonstrate that such person was personally involved in the alleged deprivation of the plaintiff's constitutional rights" (Lewis v Annucci, 154 AD3d 1025, 1026 [2017] [internal quotation markets and citations omitted]; see Williams v Rodriquez, 184 AD3d 699, 700-701 [2020]). Indeed, "it [is] incumbent upon [the] plaintiff to allege particular facts indicating that each of the individual defendants was personally involved in the deprivation of the plaintiff's constitutional rights; mere bald assertions and conclusions of law do not suffice" (Lewis v Annucci, 154 AD3d at 1026 [internal quotation marks and citations omitted]; see Williams v Rodriquez, 184 AD3d at 701). Here, the allegations of the verified complaint do not contain any specificity with respect to the actions of the individual defendants. In any event, the actions of prison officials in violating prison grievance procedures does not give rise to a cognizable claim under 42 USC § 1983, as such procedures are a creation of state law (see Shell v Brzezniak, 365 F Supp 2d 362, 370 [WD NY 2005]).

Furthermore, the verified complaint does not set forth the provisions of the NY Constitution that were allegedly violated. To the extent that plaintiff seeks monetary damages against defendants for their alleged violation of Correction Law § 139, Supreme Court lacks jurisdiction, as such claim must be brought in the Court of Claims (see Correction Law § 24; Rothschild v Braselmann, 157 AD3d 1027, 1028 [2018]). In view of the foregoing, Supreme Court properly dismissed the complaint. We have considered plaintiff's remaining contentions and find them to be unavailing.

Egan Jr., J.P., Aarons, Pritzker and Colangelo, JJ.,
concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court