UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

LARRY DUBOSE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 19 cv 8255
	)	
COOK COUNTY, JOHN HALLINAN DR. DAVID KELNER,	)	Judge Marvin E. Aspen
	)	
	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

NOW COME Defendants, Cook County, John Hallinan and Dr. David Kelner ("Defendants"), by their attorney KIMBERLY M. FOXX, State's Attorney of Cook County, through her Assistant State's Attorneys, Rachael D. Wilson and Cory J. Cassis, and moves this honorable court to enter an order dismissing Plaintiff's Amended Complaint pursuant to 12(b)(6) and 735 ILCS 5/2-622. In support of Defendant's Motion to Dismiss, Defendants state as follows:

INTRODUCTION

Plaintiff Larry Dubose, a former detainee at the Cook County Jail, filed his Amended Complaint alleging that Defendants failed to provide him with prescribed medication upon arrival at the Cook County Jail in violation of Section 1983. Although Plaintiff does not state that he did not receive his medication at all while in custody, Plaintiff claims that as a result of Defendants' conduct, Plaintiff experienced pain and suffering. Looking past Plaintiff's conclusions, Plaintiff asserts that Defendants acted contrary to a policy which required an inmate be evaluated by a medical or mental health professional within 24 hours of intake that was discontinued in 2013.

Plaintiff's Amended Complaint fails to remedy his original Complaint's insufficiencies.

Specifically, (1) Plaintiff fails to allege personal involvement of Defendants; (2) Plaintiff makes no allegation that Defendant Kelner was objectively unreasonable; (3) Plaintiff fails to assert a *Monell* claim; (4) the Illinois Local Government and Government Employee Tort Immunity Act bars *respondeat superior* claim; and (5) failed to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute or provide the affidavits required under § 2-622. Thus, the Court should dismiss Plaintiff's Amended Complaint with prejudice.

FACTUAL BACKGROUND

The following facts are taken from Plaintiff's Complaint and presumed true solely for the consideration of this Motion to Dismiss. In January 2018, Plaintiff was taking prescription medication. (Dkt. 28, ¶8.) On January 11, 2018, Plaintiff entered the Cook County Jail ("CCJ"). (*Id.* at ¶7.) Defendant Hallinan, a mental health specialist, interviewed Plaintiff during the intake process. (*Id.* at ¶¶4, 12.) Plaintiff's responses informed Defendant Hallinan that Plaintiff had been detained at CCJ in July of 2015; Plaintiff received prescription medication at that time; Plaintiff continued to receive such medication; Plaintiff's physician's name; and Plaintiff's previous hospital visits. (*Id.* at ¶14.) Defendant Hallinan had the power to refer Plaintiff to a qualified medical professional or mental health professional but did not make a referral. (*Id.* at ¶14-15.)

On January 11, 2018, CCJ had in place a policy that required a qualified medical professional or qualified mental health professional with prescribing authority to see a detainee within 24 hours of booking ("24 Hour Policy"). (*Id.* at ¶9.) At that appointment, the professional would determine whether to continue the medication that the detainee reports having a prescription for. (*Id.*) On August 31, 2013, CCJ stopped using the 24 Hour Policy. (*Id.* at ¶11.)

In order to implement the 24 Hour Policy, Defendant Kelner needed to and had the power to assign a psychiatrist to work in the intake process. (*Id.* at ¶¶18, 22.) No psychiatrist was assigned

to work in the intake process on January 11, 2018. (*Id.* at 19.)

On January 12 and January 15, 2018, Plaintiff submitted a grievance concerning the discontinuation of his medication. (*Id.* at ¶25.) Plaintiff continued to experience pain and suffering until November 18, 2019, when he saw his original prescribing physician. (*Id.* at ¶26.)[1]

STANDARD OF REVIEW

A court may dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff fails "to state a claim upon which relief can be granted." When considering a motion to dismiss, the Court must assume as true all well-pled allegations in the complaint and construe all reasonable inferences in favor of the plaintiff. *See, e.g., Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990). "[T]he liberal notice pleading allowed by the federal rules requires the complaint to include the operative facts upon which a [P]laintiff bases his claim." *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 198 (7th Cir. 1985) (citations omitted). While a complaint attacked by a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) does not need detailed factual allegations, Plaintiff has an obligation to provide grounds for his alleged entitlement to relief with more than labels, conclusions, or a formulaic recitation of the elements. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Courts are not bound to accept as true a legal conclusion posing as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

ARGUMENT

I. Plaintiff has failed to allege facts of individual involvement against Defendants Kelner and Hallinan to make them liable under 42 U.S.C. §1983.

Although the notice pleading standard is liberally construed, Plaintiff fails to allege

[1]As pointed out in Defendants' Motion to Dismiss the original Complaint, the November 18, 2018 date provided by Plaintiff is erroroneous, as Plaintiff left the CCDOC on January 24, 2018, just 13 days after his arrival at the jail.

operative facts that Defendants Hallinan and Kelner were personally involved in any constitutional violation. Liability under the Civil Rights Act requires a defendant's personal involvement in the alleged constitutional violation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003). Section 1983 creates a cause of action based on personal liability and is predicated upon fault; thus, "to be liable under § 1983, an individual defendant must have caused or participated in a constitutional deprivation." *Pepper v. Village of Oak Park*, 430 F.3d 809, 810 (7th Cir. 2005) (citations omitted). As such, a defendant is not liable unless he or she "actually caused or participated in a constitutional deprivation." *Taylor v. Cook County*, 2013 U.S. Dist. LEXIS 72890, *15 (N.D. Ill. 2013) (internal quotations omitted).

Accordingly, Plaintiff has failed to allege personal involvement of either Defendant Kelner or Defendant Hallinan under the pleading standards.

A. Plaintiff has failed to allege facts showing personal involvement of Defendant Hallinan.

The Seventh Circuit has found that jail administrators who only processed inmate grievances cannot be found liable for the conduct complained of in the plaintiff's complaint. *Manney v. Monroe*, 151 F. Supp. 2d 976, 985-86 (7th Cir. 2001). In *Manney*, plaintiff, alleging deliberate indifference to his dental condition, named as defendants various administrators who played no role in his medical care, but who instead merely processed inmate grievances. *Id.* After first discussing the need for personal involvement in the alleged deprivation to establish individual liability for §1983 actions, the *Manney* court found that those administrators merely processed the plaintiff's grievances, but had no role in plaintiff's dental care. *Id*. at 985-986.

Similarly, a defendant's review of the plaintiff's intake materials is insufficient to establish liability. *Johansen v. Curran*, 2019 U.S. Dist. LEXIS 28281, at *25-*26 (N.D. Ill. 2019). In *Johansen*, the plaintiff complained of inadequate medical care against multiple defendants. *Id.* The

Johansen plaintiff named a defendant Townsend who reviewed his intake materials and was unaware that the plaintiff was not receiving his medication as prescribed. *Id.* at *26. The *Johansen* court held that no reasonable jury could find Townsend's conduct was objectively unreasonable because she was unaware that he was not receiving his medication and a review of intake materials is insufficient to establish liability. *Id.* at *27.

Here, Plaintiff alleges that Defendant Hallinan interviewed Plaintiff at intake, and "learned" information about Plaintiff's medical needs, including that Plaintiff had been treated in the emergency room the day before his entry to CCJ. (Dkt. 28 at ¶¶12-13.) However, Plaintiff does not allege that Hallinan, who is not a doctor, played any role in deciding what to prescribe or not prescribe; when Plaintiff would receive his medication; when and for what he should be seen; or knew that Plaintiff was not seen or given medication. Rather, Plaintiff pleads that he learned that Plaintiff was seen at the emergency room prior to entering CCJ custody. (*Id.* at ¶13e.) Just like in *Johansen*, this Court should also view the entering of information at intake, without more, is equally insufficient to support liability. *Johansen*, 2019 U.S. Dist. LEXIS 28281 at *26-27.

Furthermore, Plaintiff alleges he told Defendant Hallinan that he was at the hospital prior to his arrival at the Cook County Jail. (Dkt. 28 at ¶13e.) Like in *Johansen*, who had received his medication the morning prior to his booking, Plaintiff self-reported that he was in the emergency room the day prior to his booking. *Johansen*, 2019 U.S. Dist. LEXIS 28281 at *26. By self-reporting, Plaintiff informed Hallinan that he was treated within 24 hours prior to booking. Not receiving medication for a few hours or a day is insufficient "to constitute awareness or inadequate medical care." *Id.* at *27. Plaintiff pled that he only interacted with Hallinan at intake and that the policy of CCJ was to have the detainee seen within 24 hours of booking. (Dkt. 28 at ¶¶9, 12-13.) Plaintiff does not plead that Defendant Hallinan interacted with Plaintiff after the fact, was

not seen by a medical or mental health professional while at CCJ, or had knowledge that Plaintiff was not receiving any medication during his stay at CCJ. Without more, Plaintiff fails to plead personal involvement of Defendant Hallinan.

On the other hand, although for purposes of this motion we take Plaintiff's recounting as true, Defendant Hallinan did not have to take Plaintiff at his word during the intake interview and could request further investigation into Plaintiff's claims, as it is no secret that a detainee may lie. Therefore, Plaintiff has pled that Defendant Hallinan received information that required further investigation. Plaintiff does not plead that Defendant Hallinan omitted or ignored Plaintiff's comments at intake. Rather, Plaintiff pleads that Defendant Hallinan did not have the power to prescribe Plaintiff medication or give Plaintiff medication he self-reported at the intake interview. (Dkt. 28 at ¶12-14.) Without more, Plaintiff fails to allege personal involvement of Defendant Hallinan in the alleged constitutional violation. Therefore, the Court should dismiss all claims against Defendant Hallinan with prejudice.

B. Plaintiff has failed to allege personal involvement of Defendant Kelner.

Plaintiff's only claim against Dr. Kelner is that Dr. Kelner did not assign a psychiatrist to the intake process the day Plaintiff entered CCJ. (Dkt. 28 at ¶17-19.) Plaintiff attempts to create a favorable inference of neglect by claiming that "Defendant Kelner sought to hide an alleged widespread practice of disregarding the official policy described in Paragraph 9 by permitting defendant Hallinan and other non-physicians to enter, in the electronic medical records, orders purportedly issued by Dr. Kelner that made it appear that Plaintiff and other similarly situated incoming detainees had been examined by a psychiatrist." (Dkt. 28 at ¶24.) However, Plaintiff attempts to use a conclusion to attribute knowledge and the conduct of other individuals to Defendant Kelner. In other words, Plaintiff asserts that Defendant Dr. Kelner is liable under the

theory of *respondeat superior* liability. However, Plaintiff brings this lawsuit under 42 U.S.C. §1983 which requires personal involvement and does not allow for *respondeat superior*. *Perkins v. Lawson*, 312 F.3d 872, 875 (7th Cir. 2002). Plaintiff has not sufficiently pled that Dr. Kelner was personally involved in any alleged constitutional violation, and Section 1983 does not permit "suits against parties merely for their supervision of others." *Green v. Beth*, 770 Fed. App'x 273, 276 (7th Cir. 2019).

Furthermore, according to Plaintiff's Amended Complaint, Defendant Kelner never interacted with Plaintiff. Plaintiff cannot hold Defendant Kelner liable for the conduct of others he supervises. According to the 24-Hour Policy, Plaintiff was to be seen by a prescribing medical or mental health professional within 24 hours of booking. (Dkt. 28 at ¶9.) Plaintiff asserts that Defendant Kelner did not have a psychiatrist assigned to the intake process and that such an assignment was the only way to accomplish the 24-Hour Policy. (*Id.* at ¶18.) However, Plaintiff does not claim that he was not seen within 24 hours of booking or that he never received his medication during his custody at CCJ. Rather, Plaintiff alleges that he entered CCJ on January 11, 2018 and submitted grievances on January 12, 2018, and January 15, 2018, complaining of pain and suffering he was experiencing from the discontinuation of his medication. (*Id.* at ¶25.) Grievances stating that Plaintiff was experiencing pain and suffering from a discontinuation of medication does not equate to Plaintiff not receiving medication. Even if such a grievances creates an inference that Plaintiff was not receiving medication, such grievances do not create an inference that Plaintiff had not been seen by a psychiatrist or that his medication was not in the process of being filled. A two-day delay in receiving medication, alone, is insufficient to implicate the Constitution. *Burton v. Downey*, 805 F.3d 776, 785 (7th Cir. 2015). Without more, Plaintiff has failed to assert that the 24-Hour Policy was not followed or that Defendant Kelner not having a

psychiatrist assigned at 5:50pm on a Thursday was objectively unreasonable. As such, the Court should dismiss Dr. Kelner from Plaintiff's Amended Complaint with prejudice.

Moreover, Plaintiff does not claim that he was never seen by a psychiatrist or that he never received medication during his time in CCJ. Plaintiff does, however, assert that, after release from CCJ, Plaintiff waited nearly a year and a half to see his physician concerning his mental health needs, despite only being at the CCJ for 13 days. Plaintiff now seeks to hold Defendants liable for Plaintiff's own neglect of his health conditions. Therefore, the Court should dismiss Plaintiff's Amended Complaint with prejudice.

II. Plaintiff Makes No Allegations that Dr. Kelner's actions were Objectively Unreasonable.

In the alternative, should the Court find that Plaintiff pled personal involvement of Dr. Kelner, Plaintiff's Amended Complaint still fails to plead that Dr. Kelner's actions were objectively unreasonable. Courts must focus on the totality of the facts and circumstances faced by the individual to "gauge objectively - without regard to any subjective belief held by the individual-whether the response was reasonable. *McCann v. Ogle Cty*., 909 F.3d 881, 886 (7th Cir. 2018). A *mens rea* greater than mere negligence is required. *Id*.

A medical professional's discretion on how to treat a patient is a well settled principle of deliberate indifference under the Eight Amendment and should similarly be applied to that of objective reasonableness under the Fourteenth Amendment. *See Cashner v. Widup*, 2017 U.S. App. LEXIS 24191, at *10 (7th Cir. 2017) (As it pertains to pretrial detainees, "a disagreement between doctors over a treatment plain does not establish that one has diverged from the standard of care."); *Burton v. Downey*, 805 F. 3d 776, 786 (7th Cir. 2015) (As it pertains to pretrial detainees, "evidence that another doctor would have followed a different course of treatment is insufficient to sustain a deliberate indifference claim."). *See also, Estate of Cole v. Fromm*, 94

F.3d 254, 261 (7th Cir. 1996) ("Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference.").

According to Plaintiff's Amended Complaint, CCJ stopped implementing the 24-Hour Policy in 2013. (Dkt. 28 at ¶11.) Plaintiff concludes that removing the 24-Hour Policy deprived Plaintiff of health care while incarcerated. However, Defendant Kelner, as the Chief of Psychiatry at Cermak, has the discretion to change policy. Plaintiff claims that CCJ stopped using the 24-Hour Policy and attempts to allege that Defendant Kelner did not implement a different policy. Plaintiff failed to allege that he was never seen while at CCJ or that he never received his medication while at CCJ. According to the 7th Circuit, inmates, including detainees, cannot select the type of medical care they receive. *Livergood v. Quality Corr. Care*, LLC., 2019 U.S. Dist. LEXIS 195746, *4 (N.D. Ind. 2019) (*citing Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) (inmate not entitled to demand either specific care or the best care possible)).

As pled, Plaintiff alleges that he did not receive medication at the exact time he wanted or the exact type of treatment he wanted at intake, which is not actionable. Indeed, Plaintiff alleges no more than in Defendant Kelner's discretion, he changed CCJ psychiatric policy and course of treatment that Plaintiff did not agree with. Such an allegation is not actionable. The Court does not have to accept Plaintiff's legal conclusions as fact, and without more information to support the conclusion, it alone is not sufficient to withstand 12(b)(6) scrutiny. Accordingly, the Court should dismiss all of Plaintiff's claims against Dr. Kelner with prejudice.

III. The Court should dismiss Plaintiff's claims against Cook County because Plaintiff failed to sufficiently plead a *Monell* claim against Cook County.

"As a general rule, a county is not vicariously responsible for the alleged misdeeds of its employees." *Manney v. Monroe,* 151 F. Supp. 2d 976, 1000 (7th Cir. 2001) (internal quotations omitted). When suing a government entity or official in his official capacity, "a plaintiff must

allege that a policy, custom, or practice of the government entity deprived the plaintiff of a constitutionally protected interest." *Id.* Unconstitutional policies or customs generally take one or more of three forms: (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a usage or custom with the force of law; or (3) a constitutional injury was caused by a person with final policy-making authority. *Brokaw v. Mercer County*, 235 F.3d 1000, 1013 (7th Cir. 2000). To state a *Monell* claim, "the plaintiff must allege that an official policy or custom not only caused the constitutional violation but was the moving force behind it." *Shultz v. Dart*, 2013 U.S. Dist. LEXIS 156546 *11 (N.D. Ill. 2013).

Plaintiff alleges that CCJ implemented the 24 Hour Policy which required "that within 24 hours of a detainee's booking at the Jail, a Qualified Medical Professional or Qualified Mental Health Professional, with appropriate prescribing authority, shall decide whether to continue the same or comparable medication that the detainee reports having been prescribed for a serious medical and mental health need." (Dkt. 28 at ¶9.) Then Plaintiff alleges that "on or after August 31, 2013, the Jail stopped implementing the official policy described in Paragraph 9 and thereby deprived plaintiff and others similarly situated of their constitutional right to health care while in custody as a pretrial detainee." (*Id.* at ¶11.) It is simply insufficient for Plaintiff to conclude that he has been harmed in 2018 by a policy that he then alleges was changed in 2013. The Court need not take Plaintiff's belief that an allegedly changed policy is inadequate without factual support.

Furthermore, Plaintiff jumps to the conclusion that Defendants do not have a policy or ignore a policy simply by alleging that Plaintiff did not receive a psychiatric interview at intake. Plaintiff makes no allegation that he was not seen while at CCJ or that he never received medication while at CCJ. He simply states that between January 11, 2018, and January 15, 2018,

he experienced pain and suffering from a discontinuation of his medication. (*See* Dkt. 28 at ¶¶7, 25.) Without an allegation to support a favorable inference that Plaintiff never received medication or treatment at CCJ, Plaintiff fails to show how the policy Plaintiff claims was not in effect at the time he entered CCJ violated his constitutional rights. As such, the Court should dismiss Defendant Kelner and Cook County from Plaintiff's Amended Complaint.

Therefore, because Plaintiff failed to allege a policy that put in motion his alleged constitutional violation, the Court should dismiss Plaintiff's Amended Complaint with prejudice.

IV. Cook County cannot be held liable under the doctrine of *respondeat superior* under the Illinois Local Government and Government Employee Tort Immunity Act.

Cook County should be dismissed from Plaintiff's Amended Complaint because Cook County cannot be held liable under a theory of *respondeat superior*. Under the Illinois Local Government and Government Employees Tort Immunity Act (the "Tort Immunity Act"), "a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109. In order for a government entity or employee to be liable in Tort, the Tort Immunity Act requires that the employee or entity acted at a minimum willfully and wantonly. 745 ILCS 10/1-101 *et seq.* The Tort Immunity Act exists to "protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101(a). The term "'Public Employee' means an employee of a local public entity". 745 ILCS 10/1-207; 745 ILCS 10/1-202; *Moy v. County of Cook*, 159 Ill. 519, 530-32 (1994). Defendants are public employees and entities within the Tort Immunity Act.

Plaintiff uses the magic words attributed to willful and wanton, such as "turned a blind eye" and "disregarding" but fails to allege any actual facts of willful and wanton conduct. (Dkt, 28 at ¶¶16, 23.) Plaintiff concludes that Defendants use of the 24-Hour Policy and Plaintiff not being seen by a psychiatrist on the day of intake satisfy the requirement for wanton conduct.

However, as discussed above, the law is clear that such conduct is reasonable and accepted. Furthermore, other than interviewing Plaintiff and taking his information as well as having a policy to see newly booked inmates within 24 hours, Plaintiff does not plead any other facts to suggest that willful and wanton conduct occurred. The Tort Immunity Act does not create a "willful and wanton cause of action" even though the act allows plaintiffs to bring a cause of action against a public official once the defendant's conduct reaches willful and wanton. *Sparks v. Starks*, 367 Ill. App. 3d 834, 838 (Ill. App. Ct. 2006).

Although Plaintiff argues that Defendants do not follow the 24-Hour Policy, Plaintiff fails to offer any support or even suggested support for his argument. Therefore, without more, the Court should dismiss Plaintiff's *respondeat superior* claim against Cook County with prejudice because the Tort Immunity Act requires that Defendants' conduct rise to a level of willful and wanton to attribute liability for Defendants alleged conduct.

V. The Court should Dismiss Plaintiff's Claims Against Defendant Cook County Pursuant to 12(b)(6) and 735 ILCS 5/2-622.

In his Complaint, Plaintiff states he is bringing a supplemental state law claim against Cook County based upon Healing Arts Malpractice, 735 ILCS 5/2-622, of the Illinois Civil Code of Procedure ("the Act"). Plaintiff's allegations against Cook County are found in only two paragraphs which read as follows:

> 6. Defendant Cook County is an Illinois municipal corporation. Plaintiff seeks to impose liability on the County under 42 U.S.C. § 1983 for injuries he incurred because of a widespread practice described below and under the doctrine of *respondeat superior* for a state law tort committed by employees of Cook County.
>
> 28. As a supplemental state law claim against defendant Cook County only: as a result of the foregoing, plaintiff was subjected to healing arts malpractice under Illinois Law.
> (Dkt. 28, ¶¶6, 28)

A. Plaintiff Fails to Plead Sufficient Facts Against Cook County

A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), in order to put the defendant on fair notice of the claim and its basis. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although detailed factual allegations are not required in Federal Court, mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. The complaint must contain sufficient factual matter to state a claim of relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim for healing arts malpractice lies only "when a professional applies his expert knowledge or skill in an unreasonably deficient way resulting in injury." *Hales v. Timeberline Knolls, LLC* 2017 U.S. Dist. LEXIS 11 at *17 (ND Ill. 2017) (citing *Awalt v. Marketti*, 2012 U.S. Dist. LEXIS 49182 at *4 (ND Ill. 2012)). The nature of the act alleged determines whether there has been healing art malpractice and falls within the scope of Section 2-622. *Id.*

Plaintiff completely fails to identify any facts which would indicate how Cook County is liable for healing arts malpractice within the scope of the Act. Even under the most liberal of notice pleading standards, Plaintiff's threadbare complaint and catch-all "as a result of the foregoing," is simply insufficient to identify how Cook County has committed healing arts malpractice.

B. Plaintiff Lacks the Requisite Affidavit Required by §2-622

Even if Plaintiff were able to plead enough facts that would sufficiently put Defendant Cook County on notice of their role in his cause of action, Cook County must still be dismissed under Plaintiff's state law Healing Arts Malpractice theory. Section 5/2-622 of the Illinois Code of Civil Procedure prescribes the procedure that must be followed by a plaintiff when filing a complaint alleging damages for injuries or death by reason of medical, hospital, or other healing art. *McAlister v. Schick*, 147 Ill. 2d 84, 88 (1990). Section 2-622 states that a plaintiff is required

to attach to their complaint, an affidavit stating that they have consulted with a qualified healthcare professional. 735 ILCS 5/2-622(a)(1). The plaintiff must also attach a report from a reviewing healthcare professional setting forth why they believe that there exists a reasonable and meritorious cause for the filing of the complaint. *Id*. In cases where the defendant is a "physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery," including "a psychologist," the written report must be from a professional holding the same class of license in that profession. *Id*. A health professional's report and attorney affidavit must accompany complaints brought against health care providers. *McCastle v. Mitchell B. Sheinkop, M.D., Ltd., 121 Ill. 2d 188, 190 (1987).* A failure to attach such an affidavit or the physicians report shall be grounds for dismissal pursuant to 735 ILCS 5/2-622(g).

In his Complaint, Plaintiff alleges that he will supplement his 2-622 affidavit "as required by *Young v. United States*, 942 F.3d 349 (7th Cir. 2019)."[2] But in *Young*, a *pro se* federal inmate in Illinois filed a suit alleging malpractice because the prison in which he was housed failed to perform or authorize cataract surgery where two physicians recommended surgical intervention. *Id*. at 350. The *Young* plaintiff failed to request or provide a § 2-622 report or accompanying affidavit, arguing that the two recommendations were sufficient. *Id.* The District Court granted the "motion by the United States to dismiss the complaint or for summary judgment." *Id*. On appeal, the appellate court stated that the difference between the two was important, as a motion to dismiss addresses whether a complaint is defective, while summary judgment asserts a conclusion based on the evidence. *Id*. 350-351. In considering the facts, the court reasoned that:

> **"[a] prisoner may have insuperable difficulty obtaining a favorable physician's report before filing a complaint**, so if a complaint not accompanied by a §5/2-622 affidavit is defective, many a prisoner will be unable to litigate a

[2] Plaintiff's original Complaint and Amended Complaint erroneously cite to 942 F.3d 347, presumably intending to cite 942 F.3d 349.

> malpractice claim. But **if a prisoner or other *pro se* plaintiff** has until the summary judgment stage to comply with the state law, information obtained in discovery may allow a physician to evaluate the medical records and decide whether there is reasonable cause for liability."
> *Id*. at 351 **(emphasis added).**

The court considered that 5-2/622(a)(2) and (3) allowed for extensions of time in which a litigant may supplement their report, and determined that the Plaintiff, a *pro se* detainee, could similarly have extensions when responding to a motion for summary judgment in order to "gather essential evidence." *Id*. 351. They concluded that the *Young* plaintiff did not need to have his 2-622 affidavit at the pleading stage but affirmed summary judgment after his failure to provide the requisite documents. *Id*. 352.

Young is not the general dispensation from the requirements of §2-622 upon which Plaintiff relies. Rather, *Young* recognizes the limitations of *pro se* litigants. (See *Parker v. Four Seasons Hotels, Ltd*., 845 F.3d 807, 811 (7th Cir. 2017) "pleadings filed by *pro se* litigants are not held to the same stringent standards as those filed by trained attorneys; and *Omar v. O'Leary*, 1991 U.S. Dist. LEXIS 10118 (ND Ill. 1991) giving "the benefit of the doubt to which pro se litigants –and perhaps especially prisoners- are entitled"). Plaintiff is not a *pro se* litigant. In fact, Plaintiff has retained legal counsel who hold themselves out as specializing in Civil Rights and Jail/Prison litigation. Plaintiff has provided no justification for why they are not able to provide the documents required under the Act, and attempts to use the holding in *Young* to sidestep the requirements of 2-622 and avoid providing the requisite documents identified by Illinois law. Because Plaintiff is not a *pro se* litigant, there is nothing impeding his ability to comply with Illinois law and provide a 2-622 report and affidavit confirming that his claim is in fact meritorious. At minimum, there is no reason why Plaintiff's counsel, cannot include the attorney affidavit required under 2-622 confirming the merit of the claim after consultation with a medical provider.

CONCLUSION

WHEREFORE Defendants respectfully request that Plaintiff's Amended Complaint be dismissed with prejudice for failure to state a claim upon which relief may be granted because (1) Plaintiff's Amended Complaint fails to allege personal involvement of Defendants; (2) Plaintiff's Amended Complaint makes no allegation that Defendant Kelner's actions were unreasonable; (3) Plaintiff fails to assert a *Monell* claim; (4) *respondeat superior* claim is barred by the Illinois Local Government and Government Employee Tort Immunity Act; and (5) failed to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute, or provide the affidavits required under § 2-622. In the alternative, the Court should dismiss Defendant Kelner because Plaintiff failed to allege any personal involvement or objective unreasonableness as well as require Plaintiff to submit the attorney affidavit under 2-622. Moreover, Defendants request that the Court stay any responsive pleadings in this matter until the Court rules of this motion and grant any other relief this Court deems fair and just.

Respectfully submitted,

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