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

Larry Dubose,	)	
	)	
Plaintiff,	)	No. 19-cv-8255
	)	
-vs-	)	*(Judge Aspen)*
	)	
John Hallinan, Dr. David Kelner, and Cook County, Illinois,	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPPOSITION TO MOTION TO DISMISS

Plaintiff Larry Dubose entered the Cook County Jail with his health dependent on receiving daily medication that had been prescribed for a serious medical need. Plaintiff was denied that medication for seven days and suffered personal injuries.

Before it entered into a consent decree with the federal government in *United States v. Cook County*, 10-cv-2946, the Jail had a widespread problem of interrupting essential prescription medication of persons entering the Jail. The Jail corrected this problem in compliance with the consent decree but reverted to its past unconstitutional practices after the decree was vacated, thereby harming plaintiff.

Plaintiff brings state and federal claims under 42 U.S.C. § 1983 seeking redress for his injuries. Defendants have moved to dismiss under Rule 12(b)(6). The Court should deny the motion for the reasons set out below.

I. Factual Background

Plaintiff Larry Dubose entered the Cook County Jail as a pretrial detainee on January 11, 2018. (Second Amended Complaint ¶ 7, ECF No. 34 at 2.)[1] When he entered the Jail, plaintiff was suffering from serious medical conditions for which he was taking prescription medications. (*Id.* ¶ 8, ECF No. 34 at 2.)

Defendant John Hallinan, a Mental Health Specialist employed by defendant Cook County at the Cook County Jail, interviewed plaintiff at about 5:50 p.m. on January 11, 2018 during the intake process at the Jail. (Second Amended Complaint ¶ 12, ECF No. 34 at 3.) Defendant Hallinan learned the following during this interview:

> (a) Plaintiff had been detained at the Cook County Jail in July of 2015 and had been prescribed medication for a serious health need;
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> (b) Plaintiff continued to receive prescription medication for the same serious health need following his release from the Cook County Jail in 2015;
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> (c) Plaintiff was being treated by a physician, whose name and organization affiliation plaintiff related to Hallinan, for the same serious health need when he entered the Jail;
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> (d) Plaintiff was admitted to a hospital two weeks before his admission to the Cook County Jail for treatment of the same serious health need; and
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> (e) Plaintiff was treated in a hospital emergency room the day before his admission to the Cook County Jail to obtain medication for his serious health need.

(Second Amended Complaint ¶ 13, ECF No. 34 at 3-4.)

[1] Plaintiff cites to the Second Amended Complaint (ECF No. 34), which is the operative complaint. Defendants' motion to dismiss refers to the Amended Complaint (ECF No. 28). Plaintiff filed the Second Amended Complaint to correct a typographical error in paragraph 26, and the parties stipulated that the motion to dismiss shall stand against plaintiff's Second Amended Complaint. (ECF No. 35.)

Defendant Hallinan could not prescribe medication; his responsibility was to refer plaintiff to a higher-level practitioner, with appropriate prescribing authority, who would decide whether to continue plaintiff's medications. (Second Amended Complaint ¶ 14, ECF No. 34 at 4.) Without such a referral, plaintiff would not receive his previously prescribed medication. Defendant Hallinan knew that his failure to make the referral would cause plaintiff's medication to be discontinued and would harm plaintiff.[2]

Defendant Hallinan chose not to refer plaintiff; he turned a blind eye to the information he had obtained about plaintiff and failed to do anything that could have caused plaintiff to receive his previously prescribed medication. (Second Amended Complaint ¶ 15, ECF No. 34 at 4.) Hallinan thereby caused plaintiff to experience pain and suffering until January 18, 2018, when he was seen by a physician at the Jail who prescribed the medication plaintiff required. (Second Amended Complaint ¶ 26, ECF No. 34 at 6.)

Defendant Hallinan violated the Jail's official policy ("medication policy") for new detainees who need prescription medication. Under the official policy, within 24 hours of booking, a "Qualified Medical Professional" or a "Qualified Mental Health Professional," with appropriate prescribing authority, must decide whether to continue the same or comparable medication that the detainee reports had been prescribed for a serious medical need. (Second Amended Complaint ¶ 9, ECF No. 34 at 2-3.)

[2] Plaintiff includes these and other facts under the Seventh Circuit's rule that a plaintiff opposing a motion to dismiss may suggest "to the court a set of facts, consistent with the well-pleaded complaint, that shows that the complaint should not be dismissed." *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1147 (7th Cir. 2010).

The Jail adopted the medication policy as part of the Agreed Order in *United States v. Cook County*, 10-cv-2946. (Agreed Order ¶ 45(i), Case No. 10-cv-2946 ECF No. 3-1 at 26-27.) The Jail's widespread practice before it implemented the medication policy was the subject of a class action lawsuit, *Parish v. Sheriff of Cook County*, No. 07 C 4369, 2019 WL 2297464 (N.D. Ill. May 30, 2019) (ruling on cross-motions for summary judgment). *Parish* was recently resolved by payment to the class of $7,500,000. (Motion for Preliminary Approval of Class Action Settlement, Case No. 07-cv-4369 ECF No. 385; Order Approving Class Action Settlement, Case No. 07-cv-4369 ECF No. 421.)

The Jail stopped implementing its written medication policy at some time after August 31, 2013, when the Medical Monitor in *United States v. Cook County*, 10-cv-2946 found that the Jail was in substantial compliance with the medication policy. (Second Amended Complaint ¶ 11, ECF No. 34 at 3.) Thus, when plaintiff entered the Jail on January 11, 2018, the widespread practice at the Cook County Jail was to disregard the written medication policy. (Second Amended Complaint ¶ 16, ECF No. 34 at 4.) Defendant Hallinan acted pursuant to this widespread practice. (Second Amended Complaint ¶ 16, ECF No. 34 at 4.)

Defendant David Kelner, a physician employed by defendant Cook County as the Chief of Psychiatry at Cermak Health Services, was responsible for implementing the written medication policy. (Second Amended Complaint ¶¶ 5, 17, ECF No. 34 at 2, 5.) Defendant Dr. Kelner knew that the Jail could not implement the medication policy unless a psychiatrist was assigned to work in the intake process. (Second Amended

Complaint ¶ 18, ECF No. 34 at 5.) A psychiatrist was not assigned to work in the intake process when plaintiff entered the Jail on January 11, 2018. (Second Amended Complaint ¶ 18, ECF No. 34 at 5.) Dr. Kelner also knew that a psychiatrist was not assigned to the intake process on January 11, 2018 and other days, and Dr. Kelner knew that the Jail was not implementing its written medication policy. (Second Amended Complaint ¶ 21, ECF No. 34 at 5.)

Defendant Dr. Kelner could, in his capacity as Chief of Psychiatry, have assigned a psychiatrist to the intake procedure on January 11, 2018 and other days. (Second Amended Complaint ¶ 22, ECF No. 34 at 5.) Instead, defendant Dr. Kelner turned a blind eye to the widespread practice of disregarding the written medication policy. (Second Amended Complaint ¶ 23, ECF No. 34 at 6.) Dr. Kelner sought to conceal the widespread practice of disregarding the official policy by permitting defendant Hallinan and other non-physicians to enter in the electronic medical records orders purportedly issued by Dr. Kelner that made it falsely appear that plaintiff and other similarly situated incoming detainees had been examined by a psychiatrist. (Second Amended Complaint ¶ 24, ECF No. 34 at 6.)

The widespread practice of disregarding the written medication policy was another cause of the pain and suffering that plaintiff experienced until January 18, 2018, when he was seen by a physician at the Jail who prescribed plaintiff the medication he required. (Second Amended Complaint ¶ 26, ECF No. 34 at 6.)

II. Plaintiff's Claims

Plaintiff brings constitutional claims against defendants for unreasonably depriving him of his previously prescribed medication. "[A]n objective standard applies to medical-needs claims brought by pretrial detainees." *Pittman v. County of Madison*, — F.3d —, No. 19-2956, 2020 WL 4727347, at *2 (7th Cir. Aug. 14, 2020). Plaintiff must show (1) "defendants acted purposefully, knowingly, or perhaps even recklessly" and (2) defendants' actions were not "objectively reasonable." *Miranda v. County of Lake*, 900 F.3d 335, 354 (7th Cir. 2018).

Plaintiff seeks to hold defendant Dr. Kelner liable as a policymaker because he knew of the "deficiencies and failed to take reasonable corrective action." *Daniel v. Cook County*, 833 F.3d 728, 735 (7th Cir. 2016). And plaintiff seeks to hold the County liable pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978) for the widespread practice and for the inaction of Kelner, a policymaker. *J.K.J. v. Polk County*, 960 F.3d 367, 377 (7th Cir. 2020).

Finally, plaintiff brings a state law claim against defendant Cook County for the healing arts malpractice of its employees. (Second Amended Complaint ¶ 28, ECF No. 34 at 7.)

III. Claim Against Defendant Hallinan

Defendant Hallinan argues that plaintiff has not alleged sufficient facts to show his personal involvement in denying plaintiff his medication. (ECF No. 31 at 4-6.) This is incorrect. For plaintiff to receive his medication, defendant Hallinan needed to exercise his power to refer plaintiff to a Qualified Medical Professional or a Qualified

Mental Health Professional. (Second Amended Complaint ¶ 14, ECF No. 34 at 4.) Defendant Hallinan failed to exercise that power.

Defendant Hallinan points out that he could not make the ultimate determination whether to prescribe plaintiff his medication because he is not a doctor. (ECF No. 31 at 5.) This argument ignores Hallinan's role as a gatekeeper in the process of continuing plaintiff's medications at the Jail. Plaintiff could not see a doctor at intake without Hallinan's referral. Plaintiff's theory of liability against defendant Hallinan is no different than that applied in cases holding correctional officers liable for medical claims when they refuse to take a detainee to the doctor. *E.g.*, *Dobbey v. Mitchell-Lawshea*, 806 F.3d 938, 941 (7th Cir. 2015).

Defendant Hallinan mistakenly seeks to rely on *Johansen v. Curran*, No. 15 C 2376, 2019 WL 861373 (N.D. Ill. Feb. 22, 2019), *reconsideration denied*, No. 15 CV 02376, 2020 WL 419411 (N.D. Ill. Jan. 27, 2020), where the Court granted summary judgment to a defendant, Marie Townsend, who reviewed the intake assessment of a new jail detainee but never interacted with the detainee and was unaware that the detainee was not receiving his medication. *Johansen*, 2019 WL 861373 at *9. The Court should not rely on a summary judgment order in ruling on a Rule 12(b)(6) motion to dismiss.

In any event, the Court's ruling in *Johansen* about defendant Townsend is distinguishable. Plaintiff here alleges that Hallinan *did* interact with plaintiff and that Hallinan knew that plaintiff would not receive his medication if Hallinan failed to refer

plaintiff to a doctor. The Court must accept these allegations as true at the motion to dismiss stage.

Defendant Hallinan's conduct is identical to that of another defendant in *Johansen*, Katie Johnson. Johnson learned from Mr. Johansen that he took prescription medications and that he was not receiving them, but she failed to ensure that he received his medications "despite it being her duty to do so." *Johansen v. Curran*, No. 15 C 2376, 2019 WL 861373 at *11 (N.D. Ill. Feb. 22, 2019). On these facts, the Court in *Johansen* granted summary judgment for plaintiff: "There is no excuse for Johnson not to have reasonably acted towards verifying and providing Johansen's medications." *Id.*

Plaintiff's allegations against Hallinan, which must be accepted as true on defendants' Rule 12(b)(6) motion to dismiss, are no different: it was Hallinan's duty as part of the intake process to make a prompt referral to a doctor for detainees who need prescription medication, Hallinan knew that plaintiff needed the referral, and there is no excuse for his failure to act.

There is no merit in defendant Hallinan's attempt to rely (ECF No. 31 at 4) on the ruling of the magistrate judge in *Manney v. Monroe*, 151 F. Supp. 2d 976 (N.D. Ill. 2001).[3] Hallinan cannot be fairly compared to the jail official in *Manney* who reviewed grievances about medical care and did "all that he could do within his authority with respect to the grievances." *Id.* at 986. As plaintiff alleges, Hallinan had the power and the duty to refer plaintiff for continuation of his medication.

[3] Defendants mistakenly refer to this ruling as a holding of the Seventh Circuit. (ECF No. 31 at 4.)

Hallinan's conduct in this case is indistinguishable from another defendant in *Manney*, dental hygienist Denise Monroe. The Court denied Monroe's summary judgment motion because a jury could find that she had the ability to schedule the dental appointment that Mr. Manney needed and that she "repeatedly ignored Mr. Manney's requests to see a dentist, or ensure that he received adequate dental care from a dentist." *Manney v. Monroe*, 151 F. Supp. 2d 976, 993 (N.D. Ill. 2001).

It is of no consequence that defendant Hallinan did not interact with plaintiff after intake. (ECF No. 31 at 6-7.) Hallinan's failure to refer plaintiff to a doctor at intake caused the harm that followed; no additional interaction is relevant to plaintiff's claim about Hallinan's conduct.

Defendant Hallinan's final argument is that the information he learned from plaintiff at intake was not enough for a referral to a medical professional with prescribing authority. (ECF No. 31 at 6.) A defendant may not hypothesize facts to support a Rule 12(b)(6) motion to dismiss; on the contrary, the Court must accept the allegations of the complaint and draw all inferences in plaintiff's favor. *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016).

IV. Claim Against Defendant Dr. Kelner

Defendant Dr. Kellner misreads the complaint and contends that plaintiff seeks to hold him liable under *respondeat superior*. (ECF No. 31 at 6-7.) This is incorrect. The complaint leaves no doubt that plaintiff seeks to hold Kelner liable for his personal involvement as a policymaker:

> 17. At all relevant times, defendant Kelner was the person to whom defendant Cook County had delegated the duty of implementing the official policy described in Paragraph 9.
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> 18. At all relevant times, defendant Kelner knew that the Jail could not implement the official policy described in Paragraph 9 unless a psychiatrist was assigned to work in the intake process.
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> * * *
>
> 21. Defendant Kelner knew that a psychiatrist was not assigned to the intake procedure on January 11, 2018 and other days, and defendant Kelner knew that the Jail was not implementing the official policy described in Paragraph 9.

(Third Amended Complaint ¶¶ 17, 18, 21 ECF No. 34 at 5.) A policy maker is liable under § 1983 if he knew of "deficiencies and failed to take reasonable corrective action" *Daniel v. Cook County*, 833 F.3d 728, 735 (7th Cir. 2016). The allegations of the amended complaint meet this standard.

Plaintiff alleges that the Jail had a widespread practice of failing to follow its written medication policy on continuing the medication of newly admitted detainees. The written policy required, within 24 hours of booking, that a Qualified Medical Professional or a Qualified Mental Health Professional, with appropriate prescribing authority, decide whether to continue the same or comparable medication that the detainee reports having been prescribed for a serious medical and mental health need. Defendant Dr. Kelner acquiesced in the widespread practice of failing to follow the written policy; he could have taken action to correct this deficiency, but he did not.

Defendant Dr. Kelner appears to concede that plaintiff has fairly alleged that Dr. Kelner turned a blind eye to the widespread practice. Instead, relying on a

typographical error that plaintiff has now corrected,[4] Dr. Kelner argues plaintiff has not alleged that he was harmed by the practice. (ECF No. 31 at 7-8.) The Court should reject this argument.

Plaintiff alleges in his Second Amended Complaint that he experienced pain and suffering from discontinuation for seven days of the previously prescribed medication because of the widespread practice. Plaintiff finally received his medication on January 18, 2018, when he was seen by a Jail physician who prescribed the required medication. (Second Amended Complaint ¶ 26, ECF No. 34 at 6.) This seven-day delay in receiving medication, caused by a widespread practice of ignoring a policy requiring a professional to consider continuation within 24 hours, is quite unlike the two-day delay the Seventh Circuit considered in *Burton v. Downey*, 805 F.3d 776, 785 (7th Cir. 2015). (ECF No. 31 at 7-8.)

The claim in *Burton* was decided at summary judgment because the plaintiff lacked evidence of any deliberate conduct by the defendants. Plaintiff is not required to present evidence to defeat a Rule 12(b)(6) motion to dismiss. Here, plaintiff has alleged that defendants' acts that caused his seven-day delay were intentional.

Plaintiff's theory of liability against Dr. Kelner for acquiescing in the widespread practice of ignoring the Jail's official policy is supported by the Seventh Circuit's *en banc* decision *in Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 380 (7th Cir. 2017). In *Glisson*, the Indiana Department of Corrections had adopted

[4] The Amended Complaint incorrectly states that plaintiff started to receive his medication on November 18, 2019. (ECF No. 28 ¶ 26.) Plaintiff corrected the date to January 18, 2018 in his Second Amended Complaint. (ECF No. 34 ¶ 26.)

"Chronic Disease Intervention Guidelines, which explain what policies its health-care providers are required to implement." *Id.* at 380. The health care provider in *Glisson* "consciously chose not to adopt the recommended policies" *Id.* The *en banc* Seventh Circuit held this failure to implement the state guidelines "would be a deliberate policy choice," for which the health care provider could be liable under 42 U.S.C. § 1983 if the failure to adopt the policy caused constitutional harm. *Id.*

Glisson requires the Court to reject defendants' contention that plaintiff has failed to plead a constitutional violation by defendant Dr. Kelner. (ECF No. 31 at 8-9.) Defendant's argument to the contrary is that plaintiff's claim of a seven day delay in receiving his necessary prescription medications in violation of an official policy at the Jail is nothing more than a demand for "specific care" or "the best care possible." *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). This argument is contrary to the long line of authority that "hours of needless suffering" for a prisoner deprived of medical care is actionable under 42 U.S.C. § 1983. *See, e.g., Gil v. Reed*, 381 F.3d 649, 662 (7th Cir. 2004); *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010) ("significant delay in effective medical treatment"); *Petties v. Carter*, 836 F.3d 722, 730 (7th Cir. 2016) (en banc) (same).

V. *Monell* Claim against Defendant Cook County

Plaintiff's *Monell* claim against defendant Cook County rests on the theory of liability recognized by the *en banc* Seventh Circuit in *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 380 (7th Cir. 2017), discussed above. Defendant Cook County does not challenge the legal basis of this claim, arguing instead that plaintiff's

Monell claim is "inadequate without factual support." (ECF No. 31 at 10.) The Seventh Circuit recently rejected this argument in *Williams v. Dart*, 967 F.3d 625 (7th Cir. 2020) when, in the course of reversing the dismissal of a complaint at the pleading stage, it reitereated: "Supporting 'each evidentiary element of a legal theory' is for summary judgment or trial, not a test of the pleadings under Rule 12(b)(6) or 12(c)." *Id.* at 638-39 (quoting *Freeman v. Metro. Water Reclamation Dist. of Greater Chicago*, 927 F.3d 961, 965 (7th Cir. 2019)).

At the pleading stage, a plaintiff asserting a *Monell* claim is "not required to identify every other or even one other individual" harmed by the alleged widespread practice. *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016). This Court applied this rule in *Hallom v. City of Chicago*, No. 18-cv-4856, 2019 WL 1762912 (N.D. Ill. Apr. 22, 2019), explaining that the plaintiff opposing a motion to dismiss "need not provide 'evidentiary support' at this stage of his lawsuit." *Id.* at *4. The Court should therefore reject the County's pleading argument.

VI. Medical Malpractice Claim Against Cook County

Defendant Cook County offers a conclusory argument that plaintiff has failed to plead sufficient facts on his medical malpractice claim. (ECF No. 31 at 13.) The Court should reject this argument; plaintiff's complaint alleges that he did not receive his previously prescribed medications for seven days because of the conduct of employees of Cook County acting pursuant to a defective system for continuing prescription medication. This alleged shortcoming falls far short of the standard of care.

The County also argues for dismissal based on 735 ILCS 5/2-622, which requires a state law medical malpractice claim be supported with a physician's report and affidavit. (ECF No. 31 at 13-15.) The Seventh Circuit has squarely held that "a complaint in federal court cannot properly be dismissed because it lacks an affidavit and report under § 5/2-622" *Young v. United States*, 942 F.3d 349, 351 (7th Cir. 2019), *petition for writ of certiorari filed* May 30, 2020, No. 19-8587.

Defendant asks the Court to not follow *Young* because the plaintiff in that case was *pro se*. (ECF No. 31 at 14-15.) But the holding of *Young* has nothing to do with whether a plaintiff is proceeding *pro se*. Instead, *Young* turns on the Seventh Circuit's attempt to harmonize a conflict between state and federal pleading rules. *Young v. United States*, 942 F.3d 349, 352 (7th Cir. 2019). The Court squarely held that the requirement of Section 5/2-622 to attach an affidavit and report to a complaint was a procedural rule that does not apply in federal court because "Rule 8 of the Federal Rules of Civil Procedure specifies what a complaint must contain. It does not require attachments." *Id.* at 351. The Seventh Circuit fashioned a new procedure, which plaintiff follows in this case.

Defendant Cook County also argues against respondeat superior liability for the state law torts of its employees under the Illinois Tort Immunity Act, asserting that the conduct of its employees was not willful and wanton. (ECF No. 31 at 11-12.) As this Court recently held, however, "Whether the conduct is sufficiently willful and wanton is ordinarily a question of fact for the jury and rarely should be ruled upon as

a matter of law." *Chavez Garcia v. Arona*, No. 17 C 6136, 2020 WL 902827, at *6 (N.D. Ill. Feb. 25, 2020) (citing *Liska v. Dart*, 60 F. Supp.3d 889, 906–07 (N.D. Ill. 2014).)

Whether the immunity statute applies also requires a factual determination, *Aikens v. Morris*, 583 N.E.2d 487, 493 (1991), meaning this question cannot be resolved on a motion to dismiss. Plaintiff's only state law claim is for medical malpractice, but the "willful and wanton" immunity on which defendants seek to rely applies to acts or omissions done "in the execution or enforcement of any law." 745 ILCS 10/2-202. Failing to provide plaintiff with his medication was not done in the execution or enforcement of any law. *See Aikens*, 583 N.E.2d at 487 (Tort Immunity Act did not apply where police officer's squad car struck car during transport of a prisoner); *Simpson v. City of Chicago*, 599 N.E.2d 1043 (Ill. App. Ct. 1992) (Tort Immunity Act did not apply where police officer collided with a bicycle while driving to a non-emergency call).

VII. Conclusion

The Court should therefore deny defendants' motion to dismiss.

Respectfully submitted,

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