

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get **Booked Up** on Justice!

© TBD Corporation. All Rights Reserved.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Judge McCarthy^y
JUDGE ARCARA

RICHARD MILLS, 02B0778,
-against-
SUPERINTENDENT T. POOLE, et-al.,
Defendants.

Affidavit in opposition to
defendants motion to dismiss and
Memorandum of law pursuant to rule 8
Opposition to Amended Motion to
Civil 03-cv-842(A)
Dismiss, Dkt 10

#62

State of New York)
County of Seneca)SS.:

I, Richard Mills, under the penalty of perjury, pursuant to Title 28 U.S.C. section 1746, State:

- 1.) I am the pro se plaintiff in the above entitled matter at bar with the current address of Five Points Corr. Fac., State Route 96, Box 119, Romulus, N.Y. 14541, and as such I am fully familiar with the facts and proceedings of the above matter at bar.
- 2.) I file this declaration in opposition and memorandum of Law pursuant to Local Rule 7.1(c) & (f) and in opposition to the defendants "motion to dismiss" and "memorandum of Law in support of motion to dismiss", dated November 1, 2007.
- 3.) The applicable state set forth in Title 42 §1983 is under the jurisdiction statement, pursuant to F.R.Civ.P. 8(a), this is specifically stated on the cover page of the First Amended complaint as in the same format used plus accepted in this Court under civil 03-cv-00196, 04-cv-0005, 06-cv-6001, and 07-cv-6352(Fe).
- 4.) Counsel argues the claim is too long but yet wants an explanation of how

the Law applies to the causes of action. First this will legthen the complaint extensively; Second the same format is used in 04-cv-0005, 06-cv-6001, 07-cv-6352

and an claim in the Northern District as well as one in the Southern District.

5.) Counsels remark the claim does not identify the correct statutory violations is a subject for either motion for failure to state an claim, summary judgment or trial order of dismissal.

6.) As to the length: there is numerous defendants and causes of action. Pursuant to F.R.Civ.P. 8(e)(2) "a party may state as many separate claims as the party has regardless of consistency". there are 12 causes of action starting on page 15 through 47, thats 32 pages on average of two and one half pages per cause. the causes are detailed, factually alleged, paragraphs short and concise F.R.Civ.P. 10(b) this is also the reason for the excessive paragrtaph numbers as well as the numerous defendants and two diffrent statement of facts, one for medical and the rest in grievance and mail.

7.) There is numerous causes and defendants as such the causes and defendants are broke up into each defendant by rank, title, conduct, or respondent superior. Such was done in good faith to defendants so as not to lump all together and cause confusion at trial or a guilty verdict on several defendants in one act or series of acts whcih in all reality only one person may ultimately be found guilty at an trial. It is up to the jury to determine the facts. Pursuant to F.R.Civ.P. 10(b) "each claim on seperate occurrence or transection, (covers 2005 to 2007 in ongoing).

8.) Counsel does not challenge the "orginal complaint" which is included in

the first amended complaint.

- 9.) An Second Amended Complaint will be needed once discovery is commenced for the Jana/John Doe's, some parties may be added while some Doe's may be removed or consolidated.
- 10.) The paragraphs in the causes are short and concise, counsel contest such because under F.R.Civ.P. 11(b)(3) the basis and factual contentions are from defendants own paper work signed by defendants which counsel will have to admit or deny pursuant to F.R.Civ.P. 8(b) & 11(b)(4), alot of the allegations are uncontrovertible factual paragraphs in the First Amended Complaint.
- 11.) The "request to deny defenses" does not allege that defendants can not ascertain certian defenses. Fact the defendants must allege their defenses Rule 8(c) and plaintiff may request to deny such based on capacity to be sued under F.R.Civ.P. 10(b) and 9(a), claims in 4-cv-5, 06-cv-6001, and 07-cv-6352 are accepted and under litigation.
- 12.) Counsels allegation of this complaint being; prolix, replete with vague, immaterial, evidentiary allegations, and mere surplusage is improperly labled and presented to the Court as an "Rule 9 Motion to dismiss". Such motion must be brought under F.R.Civ.P. 12(f) and labled as an motion to strike.
- 13.) The Court can also hold the amended complaint decision to allow plaintiff Mills to submit an appendix of exhibits which proves the portions of the amended complaint which are new causes are factual out of defendant Zenzen's own memorandums (important to note is defendants do not challenge the orginal complaint draftings). This will take up to January 30th 2007 as the mail five page limit imposed on Mills hinders incoming mail from nonlegal addresses to wit

Mills original documents are on file at an non-legal address and the first waiver of the five page limit is not due untill January 1, 2007 as per defendant Zenzen and newly joinable defendant superintendent L. Lempke).

14.) As final note: Defendants do not point or argue to which cause of actions or paragraphs, (counsel says such is so many paragraphs long), are claimed to be redundant, prolix, vauge, immaterial, or evidentiary allegations or mere suplusage. Counsel leaves this up to the Courts own interpatation.

WHEREFORE, plaintiff Mills respectfully request the Court deny the defendants request to dismiss the first amended complaint based upon the orginal motion being denied with prejudice, and direct the defendants to answer the complaint upon direction that the clerk of the Court have the U.S. Marshal Service serve the First amended complaint or the orginal complaint which ever the Court deems just and proper.

Dated: November 5, 2007

Respectfully submitted



Richard Mills

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD MILLS, 02B0778,

-verses-

SUPERINTENDENT T. POOLE,

Defendant.

X

I Richard Mills, declare under the penalty of perjury, pursuant to 28 U.S.C. section 1746 that on the 9 day of NOVEMBER, 2007, I mailed the below listed papers to the below listed parties via the U.S. Mail for service upon them via the U.S. Postal Service.

Papers were: Reply DKT 0110

Parties were:

U.S. District Court
Western District of New York
C/O Rodney Early, Chief Clerk
68 Court Street
304 U.S. Courthouse
Buffalo, N.Y. 14202

N.Y.S. Assistant Attorney General
Kim Murphy
107 Delaware Avenue, 4th flr
Buffalo, N.Y. 14202

I declare that such was mailed on an Facility Disbursement form from the Five Points Correctional Facility on the above said date.

Richard Mills

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD MILLS, 02B0778,
Plaintiff,

-VS-

07-cr-0351

SUPERINTENDENT T. POOLE, et-al.,
Defendants.

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF AFFIDAVIT IN
OPPOSITION TO DEFENDANTS
MOTION TO DISMISS PURSUANT TO RULE 8

RICHARD MILLS
Pro se Plaintiff
Five Points Corr. Fac.
State Route 96, Box 119
Romeus, N.Y. 14541

PRELIMINARY STATEMENT

The defendants of Lisa Lauber, New York State Department of Corrections, Sheryl Zenzen, Anthony Annucci, and the State of New York were served by substituted service under "waiver of Service" Fed.R.Civ.P. 4(d). As of November 3, 2007 no waiver forms were returned to plaintiff, proof of the service was filed with the Court on September 18, 2007. Given problems with the waiver of service and the Five Points Mail room an cover letter was submitted to the court and clerk Robert Clump replied on October 10, 2007. Mr. Clump Indicated the Court was busy with claims and defendants, plaintiff was entitled to review and service as indigent and pro-se under 28 U.S.C. 1915. Plaintiff was also served notice and manual on mandatory arbitration enacted in 2007 and thus did request waiver of service in this action thereafter. The mail issue in Five points is ongoing since late 2005 or early 2006, plaintiff has sought numerous times to address this with out the Court's judicial intervention, Chief Clerk Carra also has tried to assist plaintiff to an extent with no results. Plaintiff has not attempted waiver of service on any other defendants as they either no longer work at Five Points Facility or are not identified to date (F.C.R.P. 26). An new Deputy Superintendent of Programs took over in late 2006 or early 2007 (Sheryl Zenzen) and the action was commenced and filed then amended. Currently the Mail issue is still an ongoing dispute, numerous causes of action have risen since the First Amended complaint was filed. The mail issue to an extent has been addressed in civil 4-cv-5 conference's now as of September 2007. Plaintiff has been diligent about resolution of the mail issue without intervention by jurisdiction from the Court, such has failed repeatedly.

ARGUMENT

In evaluating an complaint, the Court must accept as true all factual all-

egations and must draw all inferences in plaintiff's favor, see kings vs. Simpson 189 F.3d. 284, 287 (2nd Cir. 1999). Dismissal is not appropriate 'unless it appears beyond doubt that the palintiff can prove no set of facts in support of his claim which would entitle him to relief, Conley vs. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99. "This rule applies with particular force where the plaintiff alleges civil rights violations or where the complaint is submitted pro-se, Chavez vs. Armstrong, 143 F.3d 698, 701 (2nd Cir. 1998). Where an court can not say at the stage of litigation that it appears beyond doubt that the plaintiff can prove no set of facts supporting the claims that wntitle them to relief, see Conley vs. Gibson, 355 U.S. 41, 45-46; Dahlberg v. Becker, 748 F.2d 85,88 (2nd Cir. 1984) also McEachin v. McGuinness, 357 F.3d 197,200(2nd Cir. 2004) ("We have frequently reiterated that '[s]ua sponte dismissals of pro-se prisoner petitions which contain non-frivolous claims without requiring service upon respondents or granting leave to amend is disfavored by this court.") (quoting Moorish Sci. Temple of Am. Inc. vs. Smith 693 F.2d 987,990 (2nd Cir. 1982); Banitez v. Wolff, 907 F.2d 1293,1295 (2nd Cir. 1990)(*per curiam*)(*Sua Sponte dismissal of a pro se complaint prior to service of process is a draconian device device, which is warranted only when the complaint lacks an arguable basis in law or fact. Where a colorable claim is made out, dismissal is improper prior to service of process and the defendants answer.*")(citations and internal quotations omitted)).

An pro-se plaintiff/petitioner submissions should be held to less stringent standards than a formal pleadings drafted by lawyers, see Hugh v. Rowe, 499 U.S. 5,9 (1980), *per curiam* Haines vs. Kerner, 404 U.S. 519; Ferran v. Town of Nassau, 11 F.3d 21 (2nd Cir. 1993), see also Elliot v. Bronson, 872 F.2d. @ 21(2nd Cir. 1989)... "While the inmates pro se complaint failed to make short and plain state-

and it clearly pleads at least some claims that cannot be termed frivolous on their face". The court went on to state "These allegations are sufficiently clear and specific to give the defendants notice of ways in which they are claimed to have violated Salahuddin's rights"..."dismissal for noncompliance with rule 8 without leave to amend was an abuse of discretion". The Court also made note, "Finally, we note that, in reviewing any amended complaint filed by Salahuddin, the court should bear in mind that we have required pleadings under 1983 to contain more than mere conclusory allegations, citing Ostrer and Albany Welfare" (cite omitted). As to defendants "redundant or immaterial" remarks, such are under Rule 12(f) as cited in Salahuddin, "If the amended complaint does not, in the view of the district court, satisfactorily condense the pleadings, the court remains free, in accordance with rule 12(f), simply to strike so much of the amended complaint as it deems redundant or immaterial". Thus it appears the crux of the rule 8 violation to complain about in Salahuddin was the fact such was typed in "single space lines", not that the complaint was specifically clear on the ways the defendants violated the rights.

As for redundant, pursuant to Rule 8(e)(2): pursuant to G-I Holdings, Inc., v. Baron & Budd, 238 F.S.2d 512 (SDNY 2002) @ pg. 535 this rule permits alternative claims. Further pursuant to Aiken vs. Nixon, 236 F.S.2d 211 (NDNY 2002) @ pg. 223 "authorizes alternative and hypothetical pleadings and eliminates any requirement of consistency of statement". Aiken similar to Mills deals with an policy or procedure issue on numerous defendants of such some may be ultimately found not liable and some may be found liable. Mills complaint deals with policies and defendants broke into different claims for each party on how and by what acts were committed in an repeated pattern over years. Rule 8(e)(2) states " A party may also state as many separate claims as the party has..."

As to length of the complaint, in Mills vs. Dwyssen, et-al., civil 03-cv-00196 (WNY Judge Arcara, Schroeder), the complaint is filed as an Second Amended Complaint of 30 pages for only "6" causes of action. The complaint only cites 42§1983 as jurisdiction (same as case at bar), and the number of parties are close to the same. The causes of action average two and one half pages (same as case at bar). Distinguished is in the case at bar there is 12 causes of action, if we add six causes of action to Mills v. Dwyssen at average of two and one half pages each were around 44 pages. Further to note is civil Mills, Haskins v. Laplow, et-al., civil 04-cv-0005 which is amended at least three times by Mills and is plead in the exact same manner as the instant matter at bar. The Court has approved amended complaints with close scrutiny to this matter and such has not been undertaken lightly by the Court. In fact the defendants in 04-cv-0005 even opposed the amended complaints with out copy to Mills on the motion and the court still allowed such amendment after careful consideration.

Defendants use a foot note #1 to their preliminary statement citing the State of New York cannot be sued in Federal Court. Mills claims as to the State of New York Law of Title 7 NYCRR and Directive 4422, 4421 are either unconstitutional or inconsistent with the constitution and U.S. Postage regulations Title 18 U.S. Code may fall under the Supremacy Clause where federal preemption of state or local law maybe either express or implied, and is compiled whether congress command is explicitly states in the Federal Statutes language or implicitly contained in it's structure and purpose, United States Constitution Art. 6 clause 2, see Hard v. New York, 291 F.S.2d 188 (WNY 2003) Keys [27-28]. Further Mills contends that the opening and inspection of any medical documents of Mills fal squarely under 45 C.F.R., Title 28 U.S. Code 290-dd and Title 28

C.F.R. subpart A-E, such also preempt state Law.

In Ex. Party Young, 209 U.S. 123, 28 S.Ct. 441 the Eleventh Amendment did not bar an action in federal court seeking to enjoin a state official from enforcing a statute claimed to violate the constitutional Fourteenth Amendment. Thus allowing federal courts to order prospective equitable relief when state officials failed to conform their conduct to the strictures of the substantive provisions of the Fourteenth Amendment, Edelman v. Jordan, 415 U.S. at 664 (claims inofficial capacity for prospective relief).

WHEREFORE, this plaintiff will rely on the expertise of the Court with the denial of defendants request and addressing the issue with the State of New York claims and for such further relief as the Court deems just and proper.

Dated: November 6, 2007

Respectfully submitted

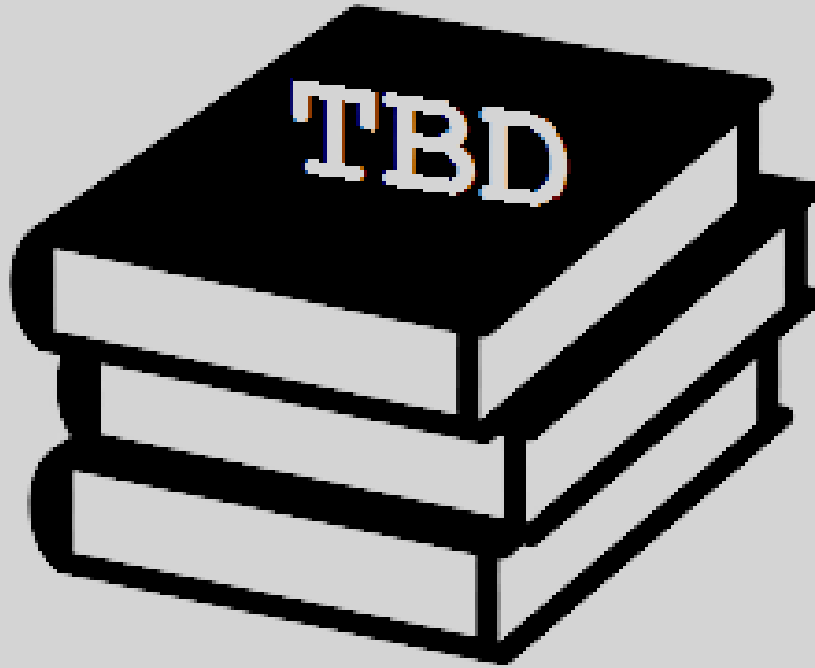


Richard Mills, 0280778
Five Points Corr. Fac.
State Route 96, Box 119
Rosilus, N.Y. 14541

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get **Booked Up** on Justice!

© TBD Corporation. All Rights Reserved.