IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MELVIN E. BOARDLEY, Plaintiff, v. FIRST CORRECTIONAL MEDICAL, DR. HOFFERMAN, JOHN DOE, NURSE KIM, and NURSE ASHTON Defendants.	)	Civil Action No. 03-343-KAJ

MEMORANDUM ORDER

I. INTRODUCTION

Before me is a Motion to Dismiss (Docket item ["D.I."] 17) filed by First Correctional Medical, Dr. Hofferman, John Doe, Nurse Kim, and Nurse Ashton (collectively "Defendants"). For the reasons that follow, Defendants' Motion is granted.

II. BACKGROUND

Melvin E. Boardley ("Plaintiff") is a *pro se* litigant incarcerated at the Delaware Correctional Center ("DCC") in Smyrna, Delaware. (D.I. 2 at 3.) On March 18, 2003, Plaintiff commenced this action by filing a Complaint under 42 U.S.C. §1983, alleging that First Correctional Medical ("FCM"), the healthcare provider for DCC, and certain FCM employees[1] (collectively "Defendants") were negligent and violated Plaintiff's rights. (D.I. 2; D.I. 22.) Specifically, Plaintiff alleges that Defendants violated his 8th Amendment right to be free of cruel and unusual punishment, and that they are liable for

[1] Dr. Hofferman is apparently Dr. Hoffman, a former employee or agent of FCM. (D.I. 2; D.I. 22.) Nurse Kim is apparently Kim Brown, an FCM employee, and Nurse Ashton is apparently Ashton Pyne, also an FCM employee. (*Id.*) It is assumed that John Doe is an employee or agent of FCM. (D.I. 22.)

medical malpractice in connection with treatment of his two ingrown toenails. (D.I. 2.) Plaintiff alleges that he developed complications after undergoing surgery on his right toe on August 27, 2002, and his left toe on September 9, 2002, and that Defendants' continually failed to give Plaintiff the proper medical care to correct the complications. (*Id.*) As a result, Plaintiff alleges, he lacked mobility and suffered from severe pain and discomfort. (*Id.*)

II. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the factual allegations contained in the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (*per curiam*). A *pro se* complaint can only be dismissed for failure to state a claim if it appears "beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

A. Exhaustion of Administrative Remedies

The Prison Litigation Reform Act of 1996, codified at 42 U.S.C. § 1997e, provides:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

The Supreme Court has held that an "inmate seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money." *Booth v. Churner*, 532 U.S. 731, 733-734 (2001).

> The Delaware Department of Correction administrative procedure provide that medical grievances be submitted to the [Inmate Grievance Chair], who will forward the grievance to the medical service contractual staff for review. The medical service contractual staff will attempt informal resolution fo the matter. If such resolution fails, a Medical Grievance Committee ("MGC") hearing will be conducted, which hearing will be attended by the grievant and the [Inmate Grievance Chair]. If the matter is resolved at that stage, the case is closed; otherwise, the grievant is directed to complete the MGC Appeal Statement section of the written grievance and forward it to the [Inmate Grievance Chair] ... .

Smullen v. Kearney, C.A. No. 02-082-SLR, 2003 U.S. Dist. LEXIS 10097, at *9 (D. Del. April 19, 2003) (quoting Department of Correction Policy 4.4).[2]

According to Plaintiff's Complaint, on September 27, 2002, he filled an initial grievance with the Inmate Grievance Office (the "IGO").[3] (D.I. 2 at 2; D.I. 26 at 2.) In the IGO's response, Plaintiff was ordered to seek an evaluation from a medical doctor. (*Id*.) Plaintiff did in fact seek and receive an evaluation, but complains that a doctor was unavailable to perform the necessary surgery. (D.I. 2, Attch. at 4.) Plaintiff is now demanding $2 million in money damages. (*Id*.) He also is seeking further medical treatment on his toes. (*Id*.)

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[2]Neither party has submitted the exact appeal procedure used by the DCC; however, the above procedure is taken from Judge Robinson's opinion dealing with a similar motion to dismiss.

[3]Plaintiff also states that he filed a grievance with F.C.D. (D.I. 2 at 2.) It appears that F.C.D. refers to Federal Correction Medical, as Plaintiff states in his Opposition to the Motion to Dismiss that he filed a grievance with Federal Correction Medical. (D.I. 26 at 2.)

As Plaintiff is seeking further medical treatment, in addition to money damages, there is an administrative process available to him that "could provide some sort of relief on the complaint stated." *Booth*, 532 U.S. at 733-734. For example, Plaintiff could request further surgery through an MGC hearing and an MGC Appeal Statement. *Smullen*, 2003 U.S. Dist. LEXIS 10097, at *9. Consequently, Plaintiff has failed to exhaust the administrative process available to him, and, therefore, he is bared from bringing suit under § 1983. *See* 42 U.S.C. § 1997e; *Smullen*, 2003 U.S. Dist. LEXIS 10097, at *9; *Booth*, 532 U.S. at 733-734.

B. 42 U.S.C. § 1983

Beyond Plaintiff's procedural failure in this case, Plaintiff's legal contentions are without merit. In the instant case, Plaintiff appears to allege that Defendants are liable for the medical treatment performed on two ingrown toenails on August 27 and September 9, 2002, and for failing to perform surgery to correct the problem that resulted from that surgery. (D.I. 2 at 5-8.)

The Supreme Court has held that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). However, allegations of medical malpractice do not alone state a claim under § 1983, because mere negligence does not amount to a violation of the Constitution, *id*. at 106, and such a violation is required to establish a § 1983 claim.

Plaintiff alleges that Dr. Hoffman did not have Plaintiff sign a consent form before performing the surgery, as he had on prior surgeries, and after the surgery the toenail grew back into the skin, as it had after previous surgeries. (D.I. 2 at 5.) As to the surgery performed by Dr. Hoffman, Plaintiff has alleged no facts that could amount to

more than simple negligence. Consequently, Plaintiff's § 1983 must fail with respect to the ingrown toenail surgeries performed on August 27 and September 9, 2002.

Plaintiff has admitted that he has a problem with reoccurring ingrown toenails and that he has had surgery performed on the toes four times. Now Plaintiff argues that further delay on a fifth surgery to his toe or toes is a violation of his constitutional rights and a violation of § 1983. Plaintiff alleges that the delay in performing the required surgery is hindering his mobility, but this does not amount to a serious injury as required under § 1983. *See Estelle*, 429 U.S. at 106; *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) ("where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious"). Consequently, Plaintiff has failed to plead facts that would support his allegations that Defendants were deliberately indifferent to a serious injury.

C. The State Negligence Claims

The Plaintiff has also alleged state claims for negligence (the "State Claims"). (D.I. 2 at 4.) The only basis to consider those claims in this court is the supplemental jurisdiction provided in 28 U.S.C. § 1367. Since I have decided that the Plaintiff's Federal Claims must be dismissed, it is within my discretion whether to retain jurisdiction over the State Claims. See 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction ... ."); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 444 (3d Cir. 1997) (decision to exercise supplemental jurisdiction "is committed to the sound discretion of the district court"). The parties have not invested significant resources in litigating the State Claims in this

forum. It is therefore neither wasteful nor unfair to decline to exercise supplemental jurisdiction in this matter. *Queen City Pizza*, 124 F.3d at 444 (district court's decision to decline the exercise of supplemental jurisdiction was proper since it "would not be unfair to the litigants or result in waste of judicial resources"). Accordingly, the State Claims will be dismissed without prejudice.

IV. CONCLUSION

Accordingly, it is hereby ORDERED that Defendants' Motion to Dismiss (D.I. 17) is GRANTED with prejudice.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

December 21, 2004
Wilmington, Delaware