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# [***Amberslie v. Prisoner Transp. Serv. of Am., LLC***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCP-97F1-F04F-02V1-00000-00&context=)

United States District Court for the Northern District of New York

January 9, 2018, Decided; January 9, 2018, Filed

Civil Action No. 9:17-CV-0564 (TJM/DEP)

**Reporter**

2018 U.S. Dist. LEXIS 4654 \*

AKANNI AMBERSLIE, Plaintiff, v. PRISONER TRANSPORT SERVICE OF AMERICA, LLC, et al., Defendants.

**Subsequent History:** Adopted by, Motion granted by, Dismissed without prejudice by [*Amberslie v. Prisoner Transp. Serv. of Am., LLC, 2018 U.S. Dist. LEXIS 28435 (N.D.N.Y., Feb. 22, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPS-H0V1-F8KH-X4DN-00000-00&context=)

**Core Terms**

deprivation, allegations, transport, municipality, conditions, papers, rights, defense motion, employees, recommend, deliberate indifference, plaintiff's claim, pretrial detainee, alleged facts, pro se, custom, prong, report and recommendation, demonstrating, requirements, confinement, violations, entity, amend, train

**Counsel:** **[\*1]**AKANNI AMBERSLIE, PLAINTIFF, Pro se, Sonyea, NY.

For DEFENDANTS: JONATHAN M. BERNSTEIN, ESQ., SHANNON T. O'CONNOR, ESQ., OF COUNSEL, GOLDBERG SEGALLA LLP, Syracuse, NY.

**Judges:** David E. Peebles, Chief United States Magistrate Judge.

**Opinion by:** David E. Peebles

**Opinion**

REPORT AND RECOMMENDATION

This is a civil rights action brought by *pro se* plaintiff Akanni Amberslie, pursuant to *42 U.S.C. § 1983*. Although plaintiff's complaint originally named Prisoner Transport Service of America, LLC ("PTS"), the State of New York, and the County of Broome as defendants, plaintiff's claims against the two governmental defendants have since been dismissed, leaving only PTS as a defendant in the action. In his complaint, plaintiff alleges that PTS was engaged to transport him in custody from Fayetteville, Georgia to Broome County, apparently to face criminal charges there, and that during the course of the transport he was exposed to inhumane conditions arising to a level of constitutional significance.[[1]](#footnote-0)1

Currently pending before the court is a motion brought by defendant PTS seeking dismissal of plaintiff's claims on a variety of grounds. In that motion, defendant argues that (1) plaintiff has failed to allege that the actions**[\*2]** of the transport employees in question were taken pursuant to a policy or practice of defendant PTS, sufficient to give rise to *Monell*[[2]](#footnote-1)2 like liability; (2) plaintiff's complaint fails to set forth facts sufficient to demonstrate the existence of a plausible due process claim; and (3) the Northern District of New York is an improper venue for bringing this action. Alternatively, in the event plaintiff's complaint is not dismissed, defendants seek a transfer of the action to the Middle District of Tennessee, where defendant PTS is headquartered, pursuant to *28 U.S.C. § 1404(a)*. For the reasons set forth below, I recommend that defendant's motion be granted, and that plaintiff's complaint be dismissed, with leave to replead.

I. BACKGROUND[[3]](#footnote-2)3

On March 14, 2017, plaintiff was transferred into the custody of defendant PTS, a company based in Tennessee, to be transported from Fayetteville, Georgia to Broome County, New York.[[4]](#footnote-3)4 Dkt. No. 1 at 4. For the next seven days until his arrival in Broome County, plaintiff was confined in a van without windows or lights, while shackled, and was unable to move or stretch and placed near other individuals who were situated "like sardines in the back." *Id.* at 4-5. One of the**[\*3]** other individuals also being transported at the time was infected with AIDS and threatened to bite and spit on plaintiff if he was not released. *Id.* at 5.

During the trip, plaintiff was deprived of some meals, sleep, daily medication for his blood pressure, and rest room facilities, and was forced to urinate in empty bottles that remained in the van. Dkt. No. 1 at 4-5. Plaintiff claims that as a result of the events that occurred during his transport, he experienced residual pain in his knees, migraine headaches, anxiety, stress, nightmares, depression, and ongoing bladder issues. *Id.*

II. PROCEDURAL HISTORY

Plaintiff commenced this action on May 23, 2017. Dkt. No. 1. Plaintiff's complaint named PTS, the State of New York, and Broome County as defendants. *Id.* at 1-2. In his complaint, plaintiff claimed that (1) defendants PTS and Broome County were deliberately indifferent to his serious medical needs, in violation of his rights under the *Eighth Amendment*; (2) he was subjected to unconstitutional conditions of confinement, also in violation of the *Eighth Amendment*; (3) defendants State of New York and County of Broome failed to protect him from unconstitutional practices and conditions; and (4) defendants PTS and Broome County violated**[\*4]** his *Fourteenth Amendment* right to equal protection. *Id.* at 6-7. As relief, plaintiff's complaint demanded damages in the amount of $1,000,000. *Id.* at 6.

Following the grant of plaintiff's application for leave to proceed *in forma pauperis* and the court's review of plaintiff's complaint pursuant to *28 U.S.C. §§ 1915(e)*, [*1915A*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT31-NRF4-43X4-00000-00&context=), Senior District Judge Thomas J. McAvoy issued a decision on June 8, 2017, in which he (1) dismissed all claims against the State of New York, with prejudice; (2) dismissed plaintiff's claims against the County of Broome, without prejudice; (3) dismissed plaintiff's *Fourteenth Amendment* equal protection claim against defendant PTS, without prejudice; and (4) ordered that plaintiff's *Fourteenth Amendment* cruel and unusual punishment claims against defendant PTS survive the court's *sua sponte* review. Dkt. No. 4 at 12.

On August 31, 2017, defendant PTS moved to dismiss plaintiff's remaining claims for failure to state a claim upon which relief can be granted and claiming improper venue, or, in the alternative, for a transfer of the action to the United States District Court for the Middle District of Tennessee. Dkt. No. 23. Plaintiff has since filed papers in opposition to defendant's motion, Dkt. No. 26, and defendant has submitted papers in reply to plaintiff's opposition and**[\*5]** in further support of its motion.[[5]](#footnote-4)5 Dkt. Nos. 27, 28. Defendant's motion, which is now fully briefed, has been referred to me for the issuance of a report and recommendation, pursuant to *28 U.S.C. §§ 636(b)(1)(B)* and [*Northern District of New York Local Rule 72.3(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5RH1-0PC0-000B-W0HC-00000-00&context=). *See also* [*Fed. R. Civ. P. 72(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-25Y1-FG36-104X-00000-00&context=).

III. DISCUSSION

A. Standard of Review

A motion to dismiss a complaint, brought pursuant to [*Rule 12(b)(6) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), calls upon a court to gauge the facial sufficiency of that pleading using a standard which, though unexacting, "demands more than an unadorned, the-defendant-unlawfully-harmed me accusation" in order to withstand scrutiny. [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (citing [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). Under [*Rule 8(a)(2) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=), "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" [*Iqbal, 556 U.S. 677-78*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)). While modest in its requirements, that rule commands that a complaint contain more than mere legal conclusions. *See* [*Iqbal, 556 U.S. at 679*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

In deciding a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) dismissal motion, the court must accept the material facts alleged in the complaint as true and draw all inferences in favor of the non-moving party. [*Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NWM-S330-004B-Y00V-00000-00&context=) (citing [*Twombly, 550 U.S. at 555-56*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)); *see also* [*Cooper, 378 U.S. at 546*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GTD0-003B-S3TN-00000-00&context=); [*Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4816-F6M0-0038-X3H2-00000-00&context=); [*Burke v. Gregory, 356 F. Supp. 2d 179, 182 (N.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FGJ-R2S0-TVW3-P1Y7-00000-00&context=) (Kahn, J.). To withstand a motion to**[\*6]** dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Twombly, 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)); *see also* [*Ruotolo v. City of N.Y., 514 F.3d 184, 188 (2d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSC-8V50-TXFX-42PX-00000-00&context=). As the Second Circuit has observed, "[w]hile *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to 'nudge plaintiffs' claims across the line from conceivable to plausible.'" [*In re Elevator* ***Antitrust*** *Litig., 502 F.3d 47, 50 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-BY80-TXFX-423H-00000-00&context=) (quoting [*Twombly, 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)) (alterations omitted).

When assessing the sufficiency of a complaint against this backdrop, particular deference should be afforded to a *pro se* litigant, whose complaint merits a generous construction by the court when determining whether it states a cognizable cause of action. [*Erickson, 551 U.S. at 94*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NWM-S330-004B-Y00V-00000-00&context=) ("'[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (quoting [*Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9NJ0-003B-S50V-00000-00&context=) (citation omitted)); [*Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T6M-94J0-TX4N-G075-00000-00&context=) ("[W]hen a plaintiff proceeds *pro se*, a court is obliged to construe his pleadings liberally." (quotation marks and alterations omitted)); [*Kaminski v. Comm'r of Oneida Cnty. Dep't of Soc. Servs., 804 F. Supp. 2d 100, 104 (N.D.N.Y. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82X2-WF51-652J-D34N-00000-00&context=) (Hurd, J.) ("A pro se complaint must be read liberally.").

B. Plaintiff's Supervisory Claims Against Defendant PTS

Plaintiff's claims in this action are brought pursuant to *42 U.S.C. § 1983*. *Section 1983* "establishes a cause of action for 'the deprivation of any**[\*7]** rights, privileges, or immunities secured by the Constitution and laws' of the United States." [*German v. Fed. Home Loan Mortg. Corp., 885 F. Supp. 537, 573 (S.D.N.Y. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MCT0-001T-5222-00000-00&context=) (quoting [*Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6960-003B-442P-00000-00&context=) (quoting *42 U.S.C. § 1983*)). It "'is not itself a source of substantive rights'[,] . . . but merely provides 'a method for vindicating federal rights elsewhere conferred[.]'" [*Patterson v. Cnty. of Oneida, 375 F.3d 206, 225 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CVY-GPM0-0038-X12K-00000-00&context=) (quoting [*Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8110-003B-S11X-00000-00&context=). In order to state a claim pursuant to *section 1983*, a plaintiff must allege "(1) 'that some person has deprived him of a federal right,' and (2) 'that the person who has deprived him of that right acted under color of state . . . law.'" [*Velez v. Levy, 401 F.3d 75, 84 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FNX-HMK0-0038-X1MB-00000-00&context=) (quoting [*Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-77M0-003B-S1MG-00000-00&context=).

Although not a municipality, defendant PTS may nonetheless bear liability under *§ 1983* as a state actor in the event a sufficient nexus can be established between its challenged actions and a municipal entity. *See* [*Byng v. Delta Recovery Srvcs. LLC, 568 Fed. Appx. 65, 66 (2d Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CBX-SXR1-F04K-J004-00000-00&context=). Defendant notes that it is a private entity, but does not contend that it is not a state actor for purposes of *section 1983* in its motion. Dkt. No. 23-10 at 10-11.

Establishing state action alone, however, does not carry the day for plaintiff. Just as would be the case in attempting to hold a municipality liable for the constitutional torts of one of its employees, plaintiff in this case must also allege and prove facts to show that the actions of PTS employees were taken pursuant to some**[\*8]** policy of defendant that caused the constitutional tort to occur. *Rojas v. Alexander's Dep't Store, 924 F.2d 406, 408 (2d Cir. 1990)*; *see also* [*Bess v. City of New York, No. 11 Civ. 7604, 2013 U.S. Dist. LEXIS 39765, 2013 WL 1164919, at \*2 (S.D.N.Y. Mar. 19, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5813-P0T1-F04F-055B-00000-00&context=) ("Despite the fact that it is a private entity, [the private defendant] enjoys the benefit of the *Monell* requirements for the same reason it may be named as a defendant in a *§ 1983* suit.").[[6]](#footnote-5)6 Absent such a showing, a private employer cannot be held liable under *section 1983* for the constitutional torts of its employees; there is no *respondeat superior* liability under *section 1983*, whether on the part of a municipality or instead a non-municipal state actor. *Id.*; *see also* [*Whalen v. Allers, 302 F. Supp. 2d 194, 202-03 (S.D.N.Y. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BNP-0BJ0-0038-Y3KM-00000-00&context=).

Under the *Monell* theory of liability, which was developed in the context of civil rights violations allegedly committed by municipal employees, but which has been extended to private *section 1983* actors, an entity may be accountable for a constitution violation that has occurred pursuant to "a policy statement, ordinance, ***regulation***, or decision officially adopted and promulgated by [the municipality's] officers . . . [or] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." [*Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8SP0-003B-S1RH-00000-00&context=). Such liability can be established in various ways, including through "proof of an officially adopted rule or**[\*9]** widespread, informal custom[] [demonstrating] 'a deliberate government policy or failing to train or supervise its officers.'" [*Bruker v. City of N.Y. 337 F. Supp. 2d 539, 556 (S.D.N.Y. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DFC-8DG0-0038-Y3KY-00000-00&context=) (quoting [*Anthony v. City of N.Y., 339 F.3d 129, 140 (2d Cir. 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4981-D3N0-0038-X400-00000-00&context=). A plaintiff may also show that the allegedly unconstitutional action was "taken or caused by an official whose actions represent an official policy," [*Jeffes v. Barnes, 208 F.3d 49, 57 (2d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YX7-MYM0-0038-X21W-00000-00&context=), or when municipal officers have acquiesced in or condoned a known policy, custom, or practice that violates federal law. [*Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 126 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BXX-3C60-0038-X1GR-00000-00&context=); *see also* [*Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1F-VD80-TXFX-42K6-00000-00&context=) ("*Monell*'s policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions.").

A municipality's failure to act "satisfies the policy or custom requirement only where the need to act is so obvious, and the inadequacy of current practices [is] so likely to result in a deprivation of federal rights[] that the municipality . . . can be found deliberately indifferent to the need." [*Reynolds, 506 F.3d at 192*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1F-VD80-TXFX-42K6-00000-00&context=) (citing [*City of Canton, Ohio v. Harris, 489 U.S. 378, 390, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CB30-003B-43JN-00000-00&context=). Assuming a plaintiff can prove that a municipality has acquiesced to a pattern of conduct that may result in a violation of federal law, "for liability to attach . . .[,] the identified deficiency . .**[\*10]** . must be closely related to the ultimate injury." [*City of Canton, 489 U.S. 378, 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CB30-003B-43JN-00000-00&context=); *accord,* [*Amnesty Am., 361 F.3d at 130*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BXX-3C60-0038-X1GR-00000-00&context=) ("*City of Canton* requires that plaintiffs establish not only that the officials' purported failure to train occurred under circumstances that could constitute deliberate indifference, but also that plaintiffs identify a specific deficiency in the city's training program and establish that . . . it actually caused the constitutional deprivation." (quotation marks omitted)).

Plaintiff's complaint fails to allege facts that would plausibly establish *Monell* liability on the part of defendant. In order to satisfy the pleading requirements imposed under [*Twombly*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) and [*Iqbal*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=), to state a plausible claim under *Monell* "a plaintiff must give a factual description of such a policy, not just bald allegations that such a thing existed." [*Bess, 2013 U.S. Dist. LEXIS 39765, 2013 WL 1164919, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5813-P0T1-F04F-055B-00000-00&context=) (citing [*Davis v. City of New York, 07 Civ. 1395, 2008 U.S. Dist. LEXIS 47869, 2008 WL 2511734 (S.D.N.Y. June 19, 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SV0-PDC0-TXFR-J3B8-00000-00&context=). Plaintiff has not identified any written policy that would address the violations alleged in his complaint. Similiarly, he has failed to show that the challenged actions were undertaken as a result of an authorization by a final policy maker at PTS. *See* [*Dilworth v. Goldberg, 914 F. Supp. 2d 433, 454 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56JT-6D61-F04F-01GB-00000-00&context=). Although liability can be established by imputing constructive knowledge of the actions of the employees in question, plaintiff must establish**[\*11]** that the violations were so persistent and pervasive that they should have been obvious to policy makers at PTS. [*Id. at 454*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56JT-6D61-F04F-01GB-00000-00&context=).

To establish liability for failure to supervise or train, a plaintiff must allege and prove facts showing that the failure to supervisor or train amounted to deliberate indifference to the rights of others, and that "the need for more or better supervision to protect against to protect against constitutional violations was obvious." [*Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9970-001T-D30V-00000-00&context=) (citations omitted). Plaintiff's complaint in this action contains no such allegations.

Since plaintiff has failed to allege facts that would demonstrate a plausible basis to assign *Monell*-type liability to defendant PTS, I recommend a finding that his remaining claim is subject to dismissal on this basis.

C. Dismissal for Failure to State a Cognizable Substantive Due Process Claim

As an alternative basis for seeking dismissal, defendant argues that plaintiff's allegations, even if accepted as true, fail to rise to a level of constitutional significance.

As a pretrial detainee, plaintiff's conditions of confinement claims are subject to analysis under the *due process clause of the Fourteenth Amendment*, rather than under the *Eighth Amendment*, which prohibits cruel and unusual punishments. [*Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXP-7B41-F04K-J02K-00000-00&context=); [*Brown v. City of New York, No. 13-CV-06912, 2017 U.S. Dist. LEXIS 58283, 2017 WL 1390678, at \*10 (S.D.N.Y. Apr. 17, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NBF-BR01-F04F-04PC-00000-00&context=). To establish**[\*12]** this type of claim under the *Fourteenth Amendment*, a pretrial detainee must demonstrate that the defendant responsible for the allegedly unconstitutional conditions of confinement acted with deliberate indifference to the plaintiff's circumstances. [*Darnell, 849 F.3d 17 at 29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXP-7B41-F04K-J02K-00000-00&context=); [*Brown, 2017 U.S. Dist. LEXIS 58283, 2017 WL 1390678, at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NBF-BR01-F04F-04PC-00000-00&context=). The analysis devolves into a two prong inquiry whereby a pretrial detainee must satisfy both an objective prong, showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process, and a subjective prong, entailing examination of the mental state of the defendant accused of deliberate indifference. [*Darnell, 849 F.3d 17 at 29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXP-7B41-F04K-J02K-00000-00&context=); [*Brown, 2017 U.S. Dist. LEXIS 58283, 2017 WL 1390678, at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NBF-BR01-F04F-04PC-00000-00&context=). The subjective element of the controlling test is informed by whether the defendant acted with deliberate indifference, either because he or she knew but disregarded the deprivations alleged, or reasonably should have known, but nonetheless disregarded those conditions. [*Darnell, 849 F.3d at 29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXP-7B41-F04K-J02K-00000-00&context=).

To establish the objective prong of the test, the plaintiff must allege facts plausibly demonstrating, either alone or in combination, that the conditions he faced posed an unreasonable risk of serious damage to his health. [*Darnell, 849 F.3d 17 at 30*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXP-7B41-F04K-J02K-00000-00&context=). The objective test is evaluated in the context of contemporary standards of decency, and addresses, *inter****[\*13]*** *alia*, whether a plaintiff has been deprived of basic human needs including, for example, food, clothing, shelter medical care, and reasonable safety. *Id.* Under *Darnell*, however, the tests collapse into an objective one under which "the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate a risk that the condition imposed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk or safety. In other words 'the subjective prong' (or '*mens rea* prong' of a deliberate indifference claim is defined objectively)." [*Id. at 35*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXP-7B41-F04K-J02K-00000-00&context=).

In his complaint, plaintiff alleges that he was placed in restraints while transported, denied bathroom facilities and forced to urinate into used empty bottles, deprived of medication for high blood pressure, and on some occasions fed only twice rather than being provided three meals in a day. Dkt. No. 1 at 4-5. These allegations, which as they must at this procedural stage have been accepted as true, fail to rise to a level sufficient to sustain a due process violation under the *Fourteenth Amendment*.[[7]](#footnote-6)7 *See e.g.,****[\*14]***[*Walker v. Schriro, 2013 U.S. Dist. LEXIS 42551, 2013 WL 1234930, at \*12-\*13 (S.D.N.Y. Mar. 26, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5825-VB31-F04F-00FS-00000-00&context=) (finding that a two-day confinement without access to "access to food, shower, linens, running water, and a bathroom" did not amount to a constitutional deprivation); [*Dzwonczyk v. Syracuse City Police Dep't, 710 F. Supp. 2d 248, 269 (N.D.N.Y. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V6T-KBC0-TXFR-J2FV-00000-00&context=) (finding that an overnight deprivation of food and water did not amount to a constitutional deprivation). Accordingly, as an alternative basis for dismissal of plaintiff's remaining claims I recommend a finding that the conditions alleged in plaintiff's complaint fail to support a cognizable due process deprivation claim.

D. Whether to Permit Amendment

Ordinarily, a court should not dismiss a complaint filed by a *pro se* litigant without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." [*Branum v. Clark, 927 F.2d 698, 704-05 (2d Cir.1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FMC0-008H-V0D1-00000-00&context=); *see also* [*Fed. R. Civ. P. 15(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) ("The court should freely give leave when justice so requires."); *see also* [*Mathon v. Marine Midland Bank, N.A., 875 F. Supp. 986, 1003 (E.D.N.Y.1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-TV90-001T-53TR-00000-00&context=) (permitting leave to replead where court could "not determine that the plaintiffs would not, under any circumstances, be able to allege a civil RICO conspiracy"). An opportunity to amend is not required, however, where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." [*Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40WC-T9W0-0038-X057-00000-00&context=); *see also* [*Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7DB0-008H-V05V-00000-00&context=) ("Of course, where a plaintiff**[\*15]** is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice."). Stated differently, "[w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend." [*Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HH50-003B-P0KC-00000-00&context=); *accord,* [*Brown v. Peters, No. 95-CV-1641, 1997 U.S. Dist. LEXIS 14718, 1997 WL 599355, at \*1 (N.D.N.Y. Sept. 22, 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RSN-M9G0-00B1-F1XR-00000-00&context=) (Pooler, J.).

In this case, although somewhat skeptical, I am unable to conclude with certainty that with better pleading, plaintiff would nonetheless be unable to rectify the deficiencies noted above. Accordingly, I recommend that leave to amend be granted. If plaintiff chooses to file an amended complaint, he should note that the law in this circuit clearly provides that "'complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning.'" [*Hunt v. Budd, 895 F. Supp. 35, 38 (N.D.N.Y. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-G0R0-001T-51C0-00000-00&context=) (McAvoy, J.) (quoting [*Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CPS0-001B-K1S2-00000-00&context=); [*Pourzandvakil v. Humphry, No. 94-CV-1594, 1995 U.S. Dist. LEXIS 7136, 1995 WL 316935, at \*7 (N.D.N.Y. May 22, 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-KX70-001T-511X-00000-00&context=) (Pooler, J.). Therefore, in any amended complaint, plaintiff must clearly set forth the facts that give rise to the claims, including the dates, times, and places of the alleged underlying acts, and each individual who committed each alleged wrongful act. In addition, the revised pleading**[\*16]** should allege facts demonstrating the specific involvement of any of the named defendants in the constitutional deprivations alleged in sufficient detail to establish that they were tangibly connected to those deprivations. [*Bass v. Jackson, 790 F.2d 260, 263 (2d Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5YT0-0039-P2YN-00000-00&context=). Finally, plaintiff is informed that any such amended complaint will replace the existing complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the court. *See* [*Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5M50-003B-P1SM-00000-00&context=) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (quotation marks omitted)).

IV. SUMMARY AND RECOMMENDATION

While plaintiff's complaint may contain factual allegations sufficient to demonstrate that defendant PTS, although a private entity, was engaged in state action at the relevant times and is therefore subject to potential liability under *42 U.S.C. § 1983*, it does not allege facts plausibly demonstrating a basis for imposing *Monell-*like liability on defendant for the acts of its employees. In addition, plaintiff's complaint fails to allege facts demonstrating the existence of a plausible substantive due process deprivation under the *Fourteenth Amendment*. Accordingly,**[\*17]** I recommend that plaintiff's complaint be dismissed, and that the court not address defendant's alternative arguments concerning lack of venue or the motion to transfer the case to the Middle District of Tennessee.

Based upon the foregoing it is hereby respectfully

RECOMMENDED that defendant's motion to dismiss (Dkt. No. 23) be GRANTED, and that plaintiff's remaining claims in this action against defendant Prisoner Transport Service of America, LLC, be dismissed, with leave to replead.

NOTICE: Pursuant to *28 U.S.C. § 636(b)(1)*, the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report.[[8]](#footnote-7)8 FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. *28 U.S.C. § 636(b)(1)*; [*Fed. R. Civ. P. 6(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8K0V-7CS2-8T6X-7257-00000-00&context=), [*6(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8K0V-7CS2-8T6X-7257-00000-00&context=), [*72*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-25Y1-FG36-104X-00000-00&context=); [*Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J180-003B-P0D7-00000-00&context=).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

/s/ David E. Peebles

David E. Peebles

U.S. Magistrate Judge

Dated: January 9, 2018

Syracuse, New York

**End of Document**

1. 1While plaintiff alleges that defendant subjected him to cruel and unusual punishment, in violation of the ***Eighth Amendment***, and in his motion papers he persists in the belief that the ***Eighth Amendment*** controls, as was noted in the initial order issued by Senior District Judge Thomas J. McAvoy on June 8, 2017, after reviewing plaintiff's complaint, as a pretrial detainee his claims arise under the ***due process clause of the Fourteenth Amendment***. Dkt. No. 4 at 7-8; *see* [*Caiozzo v. Koreman, 581 F.3d 63, 69 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X92-CR60-TXFX-4394-00000-00&context=). [↑](#footnote-ref-0)
2. 2[*Monell v. Dep't of Soc. Srvcs. of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8SP0-003B-S1RH-00000-00&context=). [↑](#footnote-ref-1)
3. 3In light of the procedural posture of this case, the following recitation is drawn principally from plaintiff's complaint, the contents of which have been accepted as true for purposes of the pending motion. *See* [*Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NWM-S330-004B-Y00V-00000-00&context=) ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." (citing [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); *see also* [*Cooper v. Pate, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GTD0-003B-S3TN-00000-00&context=). [↑](#footnote-ref-2)
4. 4Defendant's transport of plaintiff from Georgia to New York was conducted pursuant to the ***Interstate Transportation of Dangerous Criminals Act of 2000, or "Jeanna's Act", Pub. L. 106-560***, S.18998 (Dec. 21, 2000), codified at [*34 U.S.C. § 60101 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-59R1-NRF4-4001-00000-00&context=), and the ***regulations*** promulgated under that Act and found at 28 C.F.R. Pt. 97. [↑](#footnote-ref-3)
5. 5In its reply, defendant argues that plaintiff's opposition papers were untimely and should be stricken. *See* Dkt. No. 28 at 4-5. The court issued a text notice on September 1, 2017, directing that any response to defendant's motion be filed on or before October 10, 2017. *See* Text Re-Notice dated September 1, 2017. Although plaintiff's opposition papers were not received and filed with the court until October 13, 2017, the record reflects that they were mailed by the Groveland Correctional Facility ("Groveland") on behalf of plaintiff to the court on October 10, 2017. Dkt. No. 26 at 3, 5. In addition, plaintiff's opposition papers include an affidavit of service reflecting that on October 8, 2017, he entrusted his motion papers to corrections officials at Groveland. *Id.* at 4. Plaintiff is therefore entitled to the benefit of the prison mailbox rule, under which his papers are deemed to have been "filed" when delivered to prison authorities for forwarding to the court. *See* [*Walker v. Jastremski, 430 F.3d 560, 562 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HK5-F3M0-0038-X2RM-00000-00&context=). [↑](#footnote-ref-4)
6. 6Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff. [↑](#footnote-ref-5)
7. 7Defendant has submitted extensive documents which, they claim, refute plaintiff's claims. *See* Dkt. No. 23-1 through 23-9. Those documents, however, have not been considered since defendant's motion to dismiss tests only the sufficiency of plaintiff's complaint together with any documents attached or referred to in that complaint. *See* p. 6-8, *ante*. [↑](#footnote-ref-6)
8. 8If you are proceeding *pro se* and are served with this report and recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the report and recommendation was mailed to you to serve and file objections. [*Fed. R. Civ. P. 6(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8K0V-7CS2-8T6X-7257-00000-00&context=). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. [*Fed. R. Civ. P. 6(a)(1)(C)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8K0V-7CS2-8T6X-7257-00000-00&context=). [↑](#footnote-ref-7)