UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HOWARD GRIFFITH; and
REBECCA SKLANEY,

Plaintiffs,

v.

5:20-CV-1312
(GLS/ML)

NEW YORK STATE, Attorney General; and
JAN NASTRI, Lessor, Realtor,

Defendants.

APPEARANCES: OF COUNSEL:

HOWARD GRIFFITH
Plaintiff, *Pro Se*
2903 James Street, #1R
Syracuse, New York 13206

REBECCA SKLANEY
Plaintiff, *Pro Se*
2903 James Street, #1R
Syracuse, New York 13206

MIROSLAV LOVRIC, United States Magistrate Judge

ORDER and REPORT-RECOMMENDATION

I. INTRODUCTION

The Clerk has sent this *pro se* complaint (Dkt. No. 4) together with an amended application to proceed *in forma pauperis* (Dkt. No. 5) and a petition for writ of habeas corpus (Dkt. No. 13) filed by Howard Griffith and Rebecca Sklaney ("Plaintiffs") to the Court for review. For the reasons discussed below, I grant Plaintiffs' amended *in forma pauperis* application (Dkt. No. 5) and recommend that Plaintiffs' (1) Complaint (Dkt. No. 4) be dismissed with leave to amend, and (2) petition for writ of habeas corpus (Dkt. No. 13) be dismissed without prejudice.

II. BACKGROUND

On October 22, 2020, Plaintiffs (who are roommates) attempted to commence this action by filing a motion for a temporary restraining order (Dkt. No. 1) and a motion for leave to proceed *in forma pauperis* (Dkt. No. 2). On October 27, 2020, Senior United States District Judge Gary L. Sharpe issued an order directing that the case be administratively closed for failure to comply with Fed. R. Civ. P. 3. (Dkt. No. 3.)

On November 9, 2020, Plaintiffs filed the Complaint (Dkt. No. 4) and an amended motion to proceed *in forma pauperis* (Dkt. No. 5). The Complaint asserts causes of action against the New York State Attorney General and Jan Nastri, Lessor, Realtor (collectively "Defendants"). (*See generally* Dkt. No. 4.)

While the Complaint is extraordinarily difficult to decipher, Plaintiffs appear to allege that, because of Plaintiff Griffith's sex offender status, incorrect census information will somehow impinge upon their voting and housing rights. (*Id.*) The Complaint appears to assert causes of action pursuant to: (1) 52 U.S.C. § 10303, (2) 13 U.S.C. § 223, (3) 34 U.S.C. § 30505, (4) the Fifth Amendment and 42 U.S.C. § 1983, (5) the Ninth Amendment and 42 U.S.C. § 1983, (6) the Tenth Amendment and 42 U.S.C. § 1983, and (7) the Fourteenth Amendment and 42 U.S.C. § 1983. (Dkt. No. 4 at 3.) As relief, Plaintiffs seek "injunctive relief for a restraining order . . . against Jan Nastri[,] [i]njunctive relief with [d]eclaratory [j]udgment, providing this to the United States Attorney General is this is substantive to the unprecedented procedures to complete the 2020 election." (Dkt. No. 4 at 4.)

On December 15, 2020, Plaintiffs filed a petition for a writ of habeas corpus (Dkt. No. 13, Attach. 1), along with a memorandum of law in support (Dkt. No. 13). This filing seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254 and challenges Plaintiff Griffith's 2002 conviction, upon a guilty plea, in Onondaga County for first degree rape. (Dkt. No. 13, Attach. 1 at 1-2.) Plaintiff Griffith appears to argue that his plea was invalid and that his counsel was constitutionally ineffective during his plea and subsequent sex offender registration modification hearings. (Dkt. No. 8 at 49-61.)

III. PLAINTIFFS' AMENDED APPLICATION TO PROCEED *IN FORMA PAUPERIS*

When a civil action is commenced in a federal district court, the statutory filing fee, currently set at $402, must ordinarily be paid. 28 U.S.C. § 1914(a). A court is authorized, however, to permit a litigant to proceed *in forma pauperis* status if a party "is unable to pay" the standard fee for commencing an action. 28 U.S.C. § 1915(a)(1).[1] After reviewing Plaintiffs'

[1] The language of that section is ambiguous because it suggests an intent to limit availability of IFP status to prison inmates. *See* 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). The courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. *Hayes v. United States*, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); *Fridman v. City of N.Y.*, 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002).

amended *in forma pauperis* application (Dkt. No. 5), the Court finds that Plaintiffs meet this standard.[2] Therefore, Plaintiffs' amended application to proceed *in forma pauperis* is granted.[3]

IV. LEGAL STANDARD FOR INITIAL REVIEW OF COMPLAINT

"Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).

In order to state a claim upon which relief can be granted, a complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The requirement that a plaintiff "show" that he or she is entitled to relief means that a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief . . . requires the . . . court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to

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[2] The United States Department of Health and Human Services publishes yearly Poverty Guidelines. Those guidelines reflect that, for 2020, the poverty threshold for a family/household of one is $12,760. *See* United States Dep't of Health & Human Servs., https://aspe.hhs.gov/poverty-guidelines (last visited December 22, 2020). Individually, Plaintiffs are below this threshold amount. (Dkt. No. 5 at 2-3.) The guidelines also reflect that the poverty threshold for a family/household of two is $17,240. When the incomes of Plaintiffs are combined and considered as one household—because they live together—Plaintiffs are above the threshold for a household of two. However, because it is not clear whether Plaintiffs are financially co-dependent or independent, the Court grants their motion for to proceed *in forma pauperis*.

[3] Plaintiffs are reminded that, although the amended application to proceed *in forma pauperis* has been granted, they will still be required to pay fees that they may incur in this action, including copying and/or witness fees.

infer more than the mere possibility of misconduct, the complaint has alleged–but it has not shown–that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (internal citation and punctuation omitted).

"In reviewing a complaint . . . the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

Courts are "obligated to construe a pro se complaint liberally." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009); *see also Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (reading the plaintiff's *pro se* complaint "broadly, as we must" and holding that the complaint sufficiently raised a cognizable claim). "[E]xtreme caution should be exercised in ordering sua sponte dismissal of a pro se complaint before the adverse party has been served and [the] parties . . . have had an opportunity to respond." *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). The Court, however, also has an overarching obligation to determine that a claim is not legally frivolous before permitting a *pro se* plaintiff's complaint to proceed. *See, e.g.*, *Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000) (holding that a district court may *sua sponte* dismiss a frivolous complaint, notwithstanding the fact that the plaintiff paid the statutory filing fee). "Legal frivolity . . . occurs where 'the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint." *Aguilar v. United States*, 99-MC-0304, 99-MC-0408, 1999 WL 1067841, at *2 (D. Conn. Nov. 8, 1999) (quoting *Livingston* *v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998)); *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[D]ismissal is proper only if the legal theory . . . or factual contentions lack an arguable basis."); *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995) ("[T]he decision that a complaint is based on an indisputably meritless legal theory for purposes of dismissal under section 1915(d), may be based upon a defense that appears on the face of the complaint.").

V. ANALYSIS

In addressing the sufficiency of a plaintiff's complaint, the court must construe his pleadings liberally. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008). Having reviewed Plaintiffs' Complaint with this principle in mind, I recommend that all causes of action be dismissed.

Plaintiffs' Complaint is comprised of twelve pages of incoherent text, written on a form-complaint from the Clerk's office with orders from this Court and New York State Supreme Court, attached to it. (*See generally* Dkt. No. 4.) By way of example, in the "Statement of Claim" portion of the Complaint, Plaintiffs allege as follows:

> The People of the State of New York (10/01/19) and the mayor of Syracuse (04/13/2020) authorized Plaintiff to contact authorities. Governor Cuomo's signed bill, (06/12/2020) interferes as was the remedy provided on 07/27/2020, when the Onondaga County Sheriff ignored the complaint of dangerous activity on the premises of his landlord, Jan Nastri. Plaintiff addressed this to lessor with documents to provide behavior of Perpetrators would be enforced. (08/24/2020)

(Dkt. No. 4 at 4.) Plaintiffs further allege that:

> Lessor's negligence or willfulness to improperly handle the Census construed additional perpetration developing errors with regard to identifying a proper address or household, (09/16/2020) Plaintiff attempted to address all necessary causes or concerns with regard to failure to enforce the law on the property of his proprietor (via state, special proceeding) with regard to both New York State's and Lessor's

> failure to enforce this, as Plaintiff's latest concern was that the census could interfere with his sex offender registry, causing him to be punished.

(Dkt. No. 4 at 5.)

As the Complaint is currently drafted, the Court is unable to meaningfully analyze, whether, and to what extent, Plaintiffs have pleaded any colorable claim against Defendants. (*See generally* Dkt. No. 4.)[4] Plaintiffs' Complaint places an unjustified burden on the Court and, ultimately, on Defendants "'to select the relevant material from a mass of verbiage.'" *Salahuddin v. Cuomo*, 861 F.2d 40, 41-42 (2d Cir. 1988) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1281, at 365 (1969)).

As a result, I recommend the Complaint be dismissed as frivolous. *See, e.g., Gillich v. Shields*, 18-CV-0486, 2018 WL 2926299 (N.D.N.Y. Apr. 30, 2018) (Peebles, M.J.), *report and recommendation adopted by* 2018 WL 2926302, at *3 (N.D.N.Y. Jun. 8, 2018) (D'Agostino, J.); *Canning v. Hofmann*, 15-CV-0493, 2015 WL 6690170, at *5 (N.D.N.Y. Nov. 2, 2015) (Hurd, J.) ("Under these circumstances, having found that none of the allegations in Plaintiff's meandering and indecipherable Complaint raise a cognizable cause of action, the Court concludes that the Complaint fails to state a claim upon which relief may be granted and is subject to dismissal."); *see also Salahuddin*, 861 F.2d at 42 ("Dismissal [for failure to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure] . . . is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised."). [5]

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[4] The Court also notes that, despite there being two Plaintiffs in this action, the statement of claims portion of the Complaint repeatedly refers to a single Plaintiff. It is unclear whether Plaintiffs' singular use of the word "Plaintiff" was an oversight, and intended to refer to both Plaintiffs, or whether the alleged facts relate only to one of the two Plaintiffs.

[5] In the alternative, the Court recommends that to the extent Plaintiffs seek to assert any causes of action pursuant to 13 U.S.C. § 223, those causes of action be dismissed for failure to

VI. OPPORTUNITY TO AMEND

Generally, a court should not dismiss claims contained in 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); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."). 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); *see also Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff 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); *accord*, *Brown v. Peters*, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.).[6]

In this case, it is not clear whether better pleading would permit Plaintiffs to assert a cognizable cause of action against Defendants. Out of deference to Plaintiffs' *pro se* status, however, I recommend that they be granted leave to amend the Complaint.

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state a claim. "There is no private right of action to enforce either state or federal criminal statutes." *George v. Progressive Ins. Agency, Inc.*, 18-CV-1138, 2018 WL 4660379, at *3 (N.D.N.Y. Sept. 28, 2018) (Baxter, M.J) (citing *Carvel v. Ross*, 09-CV-0722, 2011 WL 856285, at *11-12 (S.D.N.Y. Feb. 6, 2011)).

[6] *See also Carris v. First Student, Inc.*, 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.) (explaining that the standard set forth in *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999)—that the Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)), *rev'd on other grounds*, 682 F. App'x 30.

If Plaintiffs choose to avail themselves of an opportunity to amend, such amended pleading must set forth a short and plain statement of the facts on which they rely to support any legal claims asserted. Fed. R. Civ. P. 8(a). In addition, the amended complaint must include allegations reflecting how the individuals named as Defendants are involved in the allegedly unlawful activity. Finally, Plaintiffs are 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) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (internal quotation marks omitted)).

VII. PLAINTIFFS' PETITION FOR HABEAS CORPUS

Whether an individual can seek habeas relief as an additional method of recovery after a civil complaint has been filed need not be answered because, even assuming that was possible, there are too many deficiencies in Plaintiff Griffith's habeas petition for it to continue in this action.

An individual may only challenge the fact or duration of his confinement through a habeas corpus petition. *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973) (explaining that "the traditional purpose of habeas corpus" is to "attack[] . . . the fact or length of . . . confinement," and if an individual is "seeking something other than immediate or more speedy release," the remedy lies in a different type of action)). A habeas petition requires that "a person [be] in custody pursuant to the judgment of a State Court[.]" 28 U.S.C. § 2254(a).

Further, an application for a writ of habeas corpus may not be granted until a petitioner has exhausted all remedies available in state court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(A), (B)(i), (ii). "A [petitioner] may not circumvent the exhaustion requirement for habeas corpus relief by [attacking a conviction] in a civil action." *Crocker v. Bedford Hills Corr. Facility*, 19-CV-11401, 2020 WL 626374, at *4 (S.D.N.Y. Oct. 23, 2020) (citing *Preiser*, 411 U.S. at 489-90).

Here, there are several problems with Plaintiff Griffith's attempt to seek habeas relief during the course of his civil action. First, federal law provides that a habeas corpus petition "shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. "When the motion is brought by a person other than the prisoner, that 'next friend' must demonstrate that he or she has standing to act on the prisoner's behalf." *Nelson v. Thompson*, 14-CV-3414, 2014 WL 3882322, at *2 (E.D.N.Y. Aug. 7, 2014). Here, the civil action includes two plaintiffs and the habeas petition was signed by Plaintiff Sklaney, despite purporting to challenge Plaintiff Griffith's conviction. (*See* Dkt. No. 13, Attach. 1 at 1, 15.) However, the habeas petition can only concern one individual unless it is being brought by a "next friend" on the petitioner's behalf. Nothing in the pleading indicates that Plaintiff Griffith is incapable of asserting his own rights or advocating for himself. Therefore, there is no reason that Plaintiff Sklaney should have signed the petition on his behalf since it is clear Plaintiff Griffith is the individual who is seeking relief through the petition. Thus, I recommend that the habeas petition be dismissed as deficient.

Second, the habeas statute requires an individual to meet the "in custody" requirement for this Court to have jurisdiction over the petition. *See Hurdle v. Sheehan*, 13-CV-6837, 2016 WL

4773130, at *2 (S.D.N.Y. Sept. 12, 2016) (quoting 28 U.S.C. § 2254(a)) ("A district court has subject matter jurisdiction to consider a state prisoner's petition for habeas relief 'only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States' at the time he files the petition."). It is not clear whether Plaintiff Griffith meets this threshold requirement from these submissions.[7]

Third, Plaintiff Griffith has failed to exhaust his state court remedies with respect to his conviction. To satisfy the exhaustion requirement, a petitioner must do so both procedurally and substantively. Procedural exhaustion requires that a petitioner raise all claims in state court prior to raising them in a federal habeas corpus petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Substantive exhaustion requires that a petitioner "fairly present" each claim for habeas relief in "each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted). In other words, petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.

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[7] The Court notes that on February 13, 2015, Plaintiff Griffith commenced a *pro se* civil rights action in the Northern District of New York, Civil Action No. 5:15-CV-0168 (MAD/ATB) ("*Griffith I*") against New York State Court/Onondaga County and New York State Division of Criminal Justice Services. (*Griffith I*, Dkt. No. 1.) On February 23, 2015, United States Magistrate Judge Andrew T. Baxter issued an order and report-recommendation, that granted Plaintiff Griffith's amended motion to proceed IFP and recommended that the action be dismissed with prejudice for failure to state a claim. (*Griffith I*, Dkt. No. 6.) Judge Baxter concluded that "the plaintiff is requesting relief available only in a habeas corpus application" and "such application is unavailable to him" because his "sentence expired in 2011, so he is not in custody for purposes of a petition for habeas corpus." (*Id*. at 6.) On March 13, 2015, Plaintiff Griffith filed a letter motion requesting that *Griffith I* be dismissed. (*Griffith I*, Dkt. No. 7.) On August 7, 2015, United States District Judge Mae A. D'Agostino granted Plaintiff's notice to withdraw the complaint without ruling on Judge Baxter's report and recommendation. (*Griffith I*, Dkt. No. 8.)

While Plaintiff Griffith includes an Appellate Division decision in support of his filings, it concerns a "modification of his previously-imposed classification as a level three risk pursuant to the Sex Offender Registration Act [("SORA")]." *People v. Griffith*, 166 A.D.3d 1518 (4th Dep't 2018).[8] This decision affirmed Plaintiff Griffith's argument that "he was denied effective assistance of counsel [during his SORA hearing] . . . and . . . reinstate[d] the petition, and remit[ted] the matter to County Court for a new hearing on the [modification] petition." *Griffith*, 166 A.D.3d at 1519. However, the Fourth Department was careful to point out to Plaintiff Griffith that he was not able "to challenge his plea or other aspects of his underlying conviction [because i]t is well settled that a SORA hearing may not be used to challenge the underlying conviction." *Id.* at 1520 (citing cases).

It appears that Plaintiff Griffith mistakenly believes he has exhausted his state law remedies, (Dkt. No. 13, Attach. 1 at 2-3); however, Plaintiff Griffith never raised the issue of the validness of his plea nor the quality of his representation during his underlying criminal proceedings to the state courts. As explained to Plaintiff Griffith in correspondence from Onondaga County Court Judge Thomas J. Miller,

> [T]here is no legal basis for [the court] to order the expungement of any records because the Appellate Division, Fourth Department has not reversed [Plaintiff Griffith's] conviction . . . . Rather, the Fourth Department held that [Plaintiff Griffith] had been deprived of the effective assistance of counsel with regard to [his] prior application for a downward modification of [his] classification as a level three risk under the Sex Offender Registration Act[.]

(Dkt. No. 8 at 70; *accord id.* at 72.) Accordingly, his claims challenging his plea and conviction remain unexhausted.

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[8] Plaintiffs include a copy of the Fourth Department's Decision. (Dkt. No. 8 at 64-66.)

Finally, the petition appears untimely. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year statute of limitations for prisoners to seek federal review of their state court criminal convictions. 28 U.S.C. § 2244(d)(1). The one-year period generally begins to run from the date on which the state criminal conviction became final by the conclusion of direct review or by the expiration of the time to seek direct review. 28 U.S.C. § 2244(d)(1)(A); *Gonzalez v. Thaler*, 565 U.S. 134, 149-50 & n.9 (2012).[9]

The one-year limitation period under AEDPA is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *Saunders v. Senkowski*, 587 F.3d 543, 548 (2d Cir. 2009). The tolling provision "excludes time during which properly filed state relief applications are pending, but does not reset the date from which the one-year statute of limitations begins to run." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam). The tolling provision excludes from the limitations period only the time that the state relief application remained undecided, including the time during which an appeal from the denial of the motion was taken. *Saunders*, 587 F.3d at 548; *Smith*, 208 F.2d at 16.

Here, it does not appear that Plaintiff Griffith filed a direct appeal challenging his conviction. Therefore, because Plaintiff Griffith failed to file a notice of appeal, his conviction became final thirty days after he was sentenced. *See Bethea v. Girdich*, 293 F.3d 577, 578 (2d

9 Other dates from which the limitations period may start running are the date on which an unconstitutional, state-created impediment to filing a habeas petition is removed, the date on which the constitutional right on which the petitioner bases his habeas application was initially recognized by the Supreme Court, if the right was newly recognized and made retroactively applicable, or the date on which the factual predicate for the claim or claims presented could have been discovered through the exercise of due diligence (newly discovered evidence). 28 U.S.C. § 2244(d)(1)(B)-(D). None of the bases for a later date upon which the statute of limitations could have begun to run appear to apply in this case.

Cir. 2002) (per curiam) (explaining that the one-year statute of limitations began to run when the petitioner's time for filing a notice of appeal from the judgment of conviction expired); *Vaughan v. Lape*, 05-CV-1323, 2007 WL 2042471, *4 (N.D.N.Y. July 12, 2007) (Hurd, J.) (quoting CPL § 460.10(1)(a)) ("In New York, a defendant has thirty days after the 'imposition of the sentence' to notify the court that he will appeal."); *Gonzalez*, 565 U.S. at 150; *Saunders v. Senkowski*, 587 F.3d 543, 547-49 (2d Cir. 2009). Accordingly, Plaintiff Griffith's conviction became final on February 28, 2002. Therefore, Plaintiff Griffith had until February 28, 2003, to timely file his habeas petition. 28 U.S.C. § 2244(d)(1). The present petition, signed December 14, 2020, is over seventeen years past the termination of the statute of limitations.

Further, based on the information presented in the petition, it does not appear that the statute of limitations should be statutorily or equitably tolled. First, it does not appear that any of Plaintiff Griffith's state-court challenges regarding his SORA modification are properly filed collateral challenges to his underlying conviction. *See Griffith*, 166 A.D.3d at 1520 (citing cases). Second, Plaintiff Griffith's Article 78 petition, assuming it was a proper collateral challenge, was not filed until 2020. This is seventeen and a half years after the statute of limitations expired. Therefore, the Article 78 motion would have no bearing on the present analysis because an application for collateral relief cannot serve to "revive [an] expired statute of limitations." *Gillard v. Sticht*, 16-CV-0513, 2017 WL 318848, at *3 (N.D.N.Y. Jan. 23, 2017) (D'Agostino, J.) (citations omitted); *accord, Roberts v. Artus*, 16-CV-2055, 2016 WL 2727112, at *2 (E.D.N.Y. May 5, 2016) ("If the 440 motion was filed after the one-year statute of limitations period expired, it cannot be counted for purposes of statutory tolling."). Moreover, nothing in Plaintiff Griffith's filings indicate equitable tolling applies to excuse any delays.

Accordingly, at a minimum, I recommend that the habeas petition be dismissed because it is unexhausted. To the extent that this recommendation is accepted by the Court, Plaintiff Griffith may individually file a petition for a writ of habeas corpus; however, any such motion must be filed after all available state remedies have been exhausted, or should explain why such remedies were unavailable to Plaintiff Griffith, as well as address why any such petition should not be dismissed as untimely.

ACCORDINGLY, it is

ORDERED that Plaintiffs' amended IFP application (Dkt. No. 5) is **GRANTED**; and it is further respectfully

RECOMMENDED that the Court **DISMISS WITH LEAVE TO REPLEAD** Plaintiffs' Complaint (Dkt. No. 4) for frivolousness, pursuant to 28 U.S.C. § 1915(e)(2)(B); and it is further respectfully

RECOMMENDED that the Court **DISMISS WITHOUT PREJUDICE** Plaintiffs' petition for habeas corpus (Dkt. No. 13), for failure to exhaust available state court remedies; and it is further

ORDERED that the Clerk of the Court shall file a copy of this Order and Report-Recommendation on Plaintiffs, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit's decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.[10] Such objections shall be filed with the

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[10] If you are proceeding *pro se* and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to

Clerk of the Court. **<u>FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW</u>**. 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)).

Dated: December 28, 2020
Binghamton, New York

Miroslav Lovric
U.S. Magistrate Judge

serve and file objections. Fed. R. Civ. P. 6(d). 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).

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1999 WL 1067841
Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

Francisco AGUILAR, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.

Nos. 3:99–MC–304 (EBB), 3:99–MC–408 (EBB).
|
Nov. 8, 1999.

Dismissal of Plaintiff's Complaints

BURNS, Senior J.

***1** Francisco Aguilar, pro se, seeks leave to proceed in forma pauperis ("IFP") to press two meritless complaints against the government, which is prosecuting related civil forfeiture actions against his properties. Although Aguilar is otherwise financially eligible, the court dismisses these complaints sua sponte pursuant to 28 U.S.C. § 1915(e)(2)(B) because the purported claims are frivolous, baseless and irremediable.

Background
Would-be plaintiff Aguilar is no stranger to this court. He is currently serving a forty-year sentence for drug trafficking at the federal penitentiary in Leavenworth, Kansas. *See* *United States v. Tracy,* 12 F.3d 1186, 1189 (2d Cir.1993) (affirming conviction and sentence). In connection with his conviction for narcotics offenses, the government filed civil forfeiture actions pursuant to 21 U.S.C. § 881(a) in 1990 and 1991 against four of Aguilar's Connecticut properties, which have since been sold. With the help of CJA-appointed counsel, Aguilar has vigorously defended each of these four actions, three of which remain pending before this court, and are scheduled for trial in January 2000. [1]

Now Aguilar seeks to take the offensive by filing these purported claims against the government, and serving the current property owners as well as the Assistant United States Attorney who is prosecuting the related forfeiture cases. This court denied without prejudice Aguilar's initial complaint, which was erroneously captioned "United States v. One Parcel Of Property Located At 414 Kings Hwy.," one of the cases already docketed and then pending. *See* Order of June 15, 1999. Upon refiling an amended complaint (the "Amended Complaint") with the appropriate caption, Aguilar also filed a second complaint (the "Second Complaint"), seeking the same relief and asserting essentially the same claims against the government for bringing the other three forfeiture cases. The clerk returned these pleadings because Aguilar failed to complete the IFP forms. *See* Order of August 25, 1999. After Aguilar cured these pleading deficiencies, miscellaneous docket numbers were assigned to the complaints.

In Aguilar's Amended Complaint—the one originally filed against his own property at 414 Kings Highway—Aguilar seeks return of the property, compensatory damages and $100,000,000 in punitive damages "to deter the United States of America from committing a similar Abuse of Power." Aguilar pleads his case in four "Articles," asserting sundry state and federal "constitutional" claims, including conversion, false pretenses, mail fraud, and breach of fiduciary duty. The Amended Complaint also suggests an allegation that the government falsified and deliberately omitted known material facts from its probable cause affidavit in "disregard" of 19 U.S.C. § 1615, the statute outlining the burden of proof in administrative forfeiture proceedings.

The Second Complaint—the one related to the government's seizure of the other three properties—seeks similar equitable and monetary relief, including return of the properties, compensation for "suffering," "usurpation," denial of his use and enjoyment of the properties and lost rents, and one billion dollars in punitive damages. Liberally construed, the Second Complaint simply repeats the claims of the Amended Complaint except for one additional allegation: that Aguilar was entitled to, and did not receive, a hearing prior to the seizure and sale of his properties.

Discussion

A. *§ 1915(e)(2)(B) Standards*
***2** The Prisoner Litigation Reform Act ("PLRA") mandates dismissal of an IFP action if it: "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune

from such relief." 28 U.S.C. § 1915(e)(2)(B) (as amended in 1996). Prior to the adoption of the PLRA, district courts had discretion to dismiss frivolous actions; now they are required to do so. *See* Pub.L. 104–134, 110 Stat. 1321 (1996) (making dismissal of frivolous actions mandatory, and also requiring dismissal for failing to state a claim or seeking damages from an immune defendant). Because Aguilar's claims qualify for dismissal under all three of these prongs, the standards for each are set out in turn.

1. *Frivolous or Malicious*

A complaint is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S.Ct. 1827, 1831–32, 104 L.Ed.2d 338 (1989) (interpreting § 1915(d), later redesignated as § 1915(e)(2)(B)(i), to preclude "not only the inarguable legal conclusion, but also the fanciful factual allegation"). Factual frivolity occurs where "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy." *Livingston v. Adirondack Beverage Co.,* 141 F.3d 434, 437 (2d Cir.1998) (quoting *Neitzke,* 490 U.S. at 327, 109 S.Ct. at 1833). Legal frivolity, by contrast, occurs where "the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint." *Livingston,* 141 F.3d at 327 (internal quotes and citation omitted); *see also Tapia–Ortiz v. Winter,* 185 F.3d 8, 11 (2d Cir.1999) (upholding dismissal as frivolous where "[t]he complaint's conclusory, vague, and general allegations ... d[id] not [ ] suffice to establish" plaintiff's claims).

In addition to frivolous claims, the court must also dismiss any malicious claims, i.e., where "[t]he manifest purpose of appellant's complaint [i]s not to rectify any cognizable harm, but only to harass and disparage." *Tapia–Ortiz,* 185 F.3d at 11.

2. *Failure To State A Claim*

An IFP action must also be dismissed sua sponte if it fails to state a claim on which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *see also Star v. Burlington Police Dep't,* 189 F.3d 462, 1999 WL 710235 (2d Cir.1999) (summarily affirming dismissal made pursuant to § 1915(e)(2)(B)(ii) of purported due process challenge that failed to state a claim). As in a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a § 1915(e)(2)(B)(ii) dismissal is warranted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d. 59 (1984).

***3** Pro se complaints, such as these, however, must be read broadly, *see* *Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 595–96, 30 L.Ed.2d 652 (1972) (per curiam), and may not be dismissed "simply because the court finds the plaintiff's allegations unlikely." *Denton v. Hernandez,* 504 U.S. 25, 33, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1982) (construing pre-PLRA complaint as frivolous). Therefore,

> a pro se plaintiff who is proceeding in forma pauperis should be afforded the same opportunity as a pro se fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim [under § 1915(e)(2)(B)(ii)], unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.

Gomez v. USAA Federal Sav. Bank, 171 F.3d 794, 796 (2d Cir.1999) (per curiam) (vacating § 1915(e)(2)(B)(ii) dismissal where "the district court did not give th[e] pro se litigant an opportunity to amend his complaint, and because [the court] cannot rule out the possibility that such an amendment will result in a claim being successfully pleaded").

3. *Relief Against An Immune Defendant*

Dismissal of an IFP case is also required where plaintiff seeks monetary damages against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B)(iii); *see also,* *Spencer v. Doe,* 139 F.3d 107, 111 (2d Cir.1998) (affirming dismissal pursuant to § 1915(e)(2)(B)(iii) of official-capacity claims in § 1983 civil rights action because "the Eleventh Amendment immunizes state officials sued for

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damages in their official capacity"). Here, even if Aguilar's claims had any merit, the complaints must be dismissed nevertheless because each seeks monetary damages from the United States, which is immune from such relief. *See* *Presidential Gardens Assocs. v. United States,* 175 F.3d 132, 139 (2d Cir.1999) (noting "[t]he sovereign immunity of the United States may only be waived by federal statute").

B. *Dismissal Standards Applied*

Aguilar's complaints are devoid of any arguable basis in law or fact. Most of his factual allegations—to the extent they are even comprehensible—are conclusory, vague and baseless. For example, he purports to allege: "The United States of America has misused its power against the Francisco Aguilar's Intangible Rights." (Amended Complaint at 2); and "The United States of America overpassed its bound of its authority and make a tyrannic use of its powers." (Second Complaint at 4). Even the Second Circuit has recognized Aguilar's prior handiwork to be "so indisputably lacking in merit as to be frivolous within the meaning of 28 U.S.C. § 1915(e)." *See United States v. One Parcel Of Property Located At 414 Kings Hwy.,* No. 97–6004 (2d Cir. April 23, 1997) (mandate [Doc. No. 167] dismissing appeal of Aguilar's motion to enjoin state default proceedings).

Only two allegations asserted by Aguilar are even arguably actionable: the lack-of-probable-cause argument in the Amended Complaint and the due process claim in the Second Complaint. Both of these, however, must be dismissed because each fails to state a claim for which relief may be granted.

1. *Probable Cause*

***4** The one potentially cogent legal claim that can be derived from a liberal reading of the Amended Complaint has already been conclusively decided by the court and is therefore barred from relitigation. *See United States v. One Parcel Of Property Located At 414 Kings Hwy.,* No. 5:91–cv–158 (denying lack-of-probable-cause argument in motion to dismiss [Doc. No. 64] in 1993, and in motions for summary judgment [Doc. Nos. 55, 96] in 1996). Here again, Aguilar reiterates his allegation that the government's affidavit in support of probable cause was tainted because it failed to disclose that the 414 Kings Highway property was subject to a mortgage held by People's Bank, and therefore could not have been purchased with funds traceable to drug sales.

After the government voluntarily dismissed that forfeiture action, this court initially ordered the sale proceeds of the property disbursed to Aguilar. *See id.,* Order of Oct. 25, 1996 [Doc. No. 151]. The bank appealed the order and, during the pendency of the appeal, secured a default judgment in state court against Aguilar. *See People's Bank v. Aguilar,* No. CV–96–0337761–S (Conn.Super.Ct.1997). On the Bank's appeal from this court's disbursal of proceeds to Aguilar, the Second Circuit reversed and remanded. *See* *United States v. One Parcel Of Property Located At 414 Kings Hwy.,* 128 F.3d 125, 128 (2d Cir.1997). On remand, in accordance with the Second Circuit mandate, this court disbursed the proceeds from the sale of 414 Kings Highway to the bank in partial satisfaction of Aguilar's debt owed on the defaulted mortgage. *See* *United States v. One Parcel Of Property Located At 414 Kings Hwy.,* No. 5:91–cv–158, 1999 WL 301704 (D.Conn. May 11, 1999).

Because the lack-of-probable-cause claim, perfunctorily adverted to in Aguilar's otherwise meritless Amended Complaint, has already been addressed in the *414 Kings Highway* forfeiture case, the court will not consider it again. As such, it must be dismissed because it fails to state a claim for which this court could grant further relief.

2. *Due Process*

In addition to his now-stale probable cause allegation about 414 Kings Highway, Aguilar claims in the Second Complaint that he was wrongfully denied a hearing prior to the seizure and sale of the other three properties. However, the constitutional right to a preseizure hearing in civil forfeiture proceedings was not recognized until 1993, two years after the seizure in this case. *See* *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (holding that Fifth Amendment Due Process protections apply to civil forfeiture proceedings against real property). Even if such due process protections applied retroactively, Aguilar's challenge to the sale of the properties would lack merit because exigent circumstances required their interlocutory sale.

In civil forfeiture proceedings "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 62, 114 S.Ct. at 505; *see also* *United States v. One Parcel Of Property Located At 194 Quaker Farms Rd.,* 85 F.3d 985, 988 (2d Cir.1996) ("[a]bsent exigent

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circumstances, a hearing, with notice to record owners, is held before seizure."). "To establish exigent circumstances, the Government must show that less restrictive measures—i.e., a lis pendens, restraining order, or bond—would not suffice to protect the Government's interest in preventing the sale, destruction, or continued unlawful use of the real property." *Id.* at 62, 114 S.Ct. at 505.

***5** Aguilar's properties addressed in the Second Complaint were seized because there was probable cause that each had been used to facilitate the offenses for which he was convicted. *See* 21 U.S.C. § 881(a)(7) (1999). This civil forfeiture statute authorizes interlocutory sale of seized properties by two methods, which are incorporated by reference into the statute. *See* 21 U.S.C. § 881(b) (authorizing seizure of property subject to civil forfeiture upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims; 21 U.S.C. § 881(d) (authorizing seizure and summary sale governed by the customs laws codified in the Tariff Act of 1930, 19 U.S.C. §§ 1602–1619). Though the source of authority differs, the standards for sale under each are virtually indistinguishable.

Rule E(9)(b) of the Maritime Rules permits the interlocutory sale of seized property if such property

> is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expenses of keeping the property is [sic] excessive or disproportionate, or if there is unreasonable delay in securing the release of property....

Supplemental Rule for Certain Admiralty and Maritime Claims E(9)(b). Section 1612(a) of the customs laws, by contrast, provides for seizure and summary sale whenever it appears that such property

> is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof....

19 U.S.C. § 1612(a) (1999).

Here, the Chief Deputy United States Marshal certified that the properties located at both 2030–32 Main St., Bridgeport (No. 5:90–cv–544), and 8 Drumlin Rd., Westport (No. 5:90–cv–545), were abandoned and therefore subject to vandalism, deterioration and depreciation. *See* 2/20/91 Declaration in Support of Motion for Interlocutory Sale [Doc. Nos. 28 (5:90–cv–544), 31 (5:90–cv–545)] at ¶¶ 4, 5. The marshal also certified that the mortgage obligations exceeded by over $ 1,000 per month the rental income of the 2034–38 Main St., Bridgeport (No. 5:90–cv–546), property, which was several months in arrears and had little or no equity. *See* 2/21/90 Declaration in Support of Motion for Interlocutory Sale [Doc. No. 27 (5:90–cv–546)] at ¶ 4. This court found these reasons sufficiently exigent to order the interlocutory sales. *See* 8/1/90 Order for an Interlocutory Sale [Doc. Nos. 34 (5:90–cv–544), 50 (5:90–cv–545), 31 (5:90–cv–546)]. Interlocutory sale was thus warranted under both Rule E(9)(b) and § 1612(a) because the two abandoned properties were liable to deteriorate or lose value and the mortgage liabilities of the rented property were disproportionate in comparison to its value. *Cf. United States v. Esposito,* 970 F.2d 1156, 1161 (2d Cir.1992) (vacating order of interlocutory sale of forfeited home where "there was no finding that t[he amount expended for maintenance and repairs] was excessive or disproportionate").

***6** Aguilar's claim that he was wrongfully denied an opportunity to be heard prior to the sale of his properties is therefore not a cognizable due process challenge because the exigency of the properties' abandonment and disproportionate cost of upkeep required their interlocutory sale. Thus, sua sponte dismissal is warranted because Aguilar's due process claim fails to state a remediable cause of action.

3. *Other Claims*

The remainder of Aguilar's claims are frivolous and can be disposed of readily. To the extent Aguilar's claim invoking 19 U.S.C. § 1615 can be construed as challenging the constitutionality of shifting the burden to the claimant upon the government's showing of probable cause, the Second Circuit has "h[e]ld that it does not violate due process to place the burden of proving an innocent owner affirmative defense on the claimant." *194 Quaker Farms Rd.,* 85 F.3d at 987. In addition, the tort claims for false pretenses and conversion are not actionable as these are intentional torts to which the limited waiver of sovereign immunity of the Federal Tort Claims Act ("FTCA") is inapplicable. *See* 28 U.S.C. § 2680(h); *see also* *Bernard v. United States,* 25 F.3d 98, 104 (2d Cir.1994) ("the FTCA does not authorize suits for intentional torts based on the actions of Government prosecutors"). Furthermore, because the United States government is not a fiduciary and owes no associated duties to Aguilar, his breach of fiduciary duty allegation against the government fails to state a claim. Finally, Aguilar also fails to state a valid mail fraud claim as that criminal code provision, 18 U.S.C. § 1341, may only be prosecuted by the government, not against it.

Conclusion

For the foregoing reasons, Aguilar's complaints [Nos. 3:99–mc–304 and 3:99–mc–408] are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) because they present frivolous allegations, none of which state a cognizable claim, and seek monetary relief from an immune defendant. Because the court cannot definitively rule out the possibility that amendment to the pleadings might result in an actionable claim, *see* *Gomez,* 171 F.3d at 796, these dismissals are made without prejudice and may be replead after the conclusion of the related forfeiture proceedings.

All Citations

Not Reported in F.Supp.2d, 1999 WL 1067841

Footnotes

1 *See United States v. One Parcel Of Property Located At 2030–32 Main St.,* No. 5:90–cv–544(EBB) (pending); *United States v. One Parcel Of Property Located At 8 Drumlin Rd.,* No. 5:90–cv–545 (EBB) (pending); *United States v. One Parcel Of Property Located At 2034–38 Main St.,* No. 5:90–cv–546(EBB) (pending); *see also United States v. One Parcel Of Property Located At 414 Kings Hwy.,* No. 5:91–cv–158(EBB) (closed).

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United States District Court, N.D. New York.

Richard GILLICH, Plaintiff,
v.
Beverly J. SHIELDS, Delaware County Treasurer, et al., Defendants.

Civil Action No. 3:18-CV-0486 (MAD/DEP)
|
Signed 04/30/2018

Attorneys and Law Firms

RICHARD GILLICH, 22 Gregory Street, Danbury, CT 06811, pro se.

ORDER, REPORT, AND RECOMMENDATION

David E. Peebles, U.S. Magistrate Judge

***1** This is an action brought by *pro se* plaintiff Richard Gillich against the State of New York, Delaware County, the Delaware County Treasurer, the Delaware County Attorney, and two Assistant Delaware County Attorneys. Accompanying plaintiff's complaint is a motion requesting permission to proceed in the action *in forma pauperis* ("IFP"). Those documents have been forwarded to me for review. For the reasons set forth below, plaintiff's IFP application is denied, and I recommend that his complaint be dismissed, with leave to replead.

I. BACKGROUND

Plaintiff commenced this action on April 9, 2018 in the United States District Court for the Eastern District of New York. Dkt. No. 1. His complaint, which is entitled "Constitutional Tort, and Common-Law Torts Complaint," is exceedingly difficult to construe and is rife with nonsensical rhetoric. *See generally id.* Nonetheless, it appears—though it is far from clear—that plaintiff's claims stem from defendants' efforts to foreclose upon a property in which he has an interest for the non-payment of taxes. *Id.* Based upon the fact that the property in question is located in Delaware County, which lies within the Northern District of New York, the matter was subsequently transferred to this court by order issued by United States District Judge Pamela K. Chen on April 18, 2018. Dkt. No. 4.

II. DISCUSSION

A. Plaintiff's IFP Application

Filed together with plaintiff's complaint is a motion for leave to proceed IFP. Dkt. No. 2. In support of his request, plaintiff asserts that he is unable to pay the required fees, and claims that, in any event, as a *pro se* plaintiff he cannot be forced to pay a fee for commencing an action in a federal district court. [1] Dkt. No. 2. Plaintiff's naked claim that he is unable to pay the required filing fee is unsupported by any affidavit or other reliable information concerning his finances.

When a civil action is commenced in a federal district court, the statutory filing fee, currently set at $400, must ordinarily be paid. 28 U.S.C. §§ 1914(a). A court is authorized, however, to grant IFP status if it determines that the plaintiff is unable to pay the required filing fee. [2] 28 U.S.C. § 1915(a)(1). Pursuant to section 1915, where a plaintiff seeks leave to proceed IFP, the court must determine whether the plaintiff has demonstrated sufficient economic need to proceed without prepaying the required filing fee. 28 U.S.C. § 1915(a)(1).

***2** The decision of whether to grant an application to proceed IFP rests within the sound discretion of the court. *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983). Section 1915 only provides that a court must be satisfied "that the person is unable to pay such fees or give security therefor" prior to granting IFP status. 28 U.S.C. § 1915(a)(1). To make this threshold showing, a plaintiff must demonstrate "that paying such fees would constitute a serious hardship on the plaintiff, not that such payment would render plaintiff destitute." *Fiebelkorn v. United States,* 77 Fed. Cl. 59, 62 (Fed. Cl. 2007) (citing *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948)); *see also* *Potnick v. E. State Hosp.*, 701 F.2d 243, 244 (2d Cir. 1983) ("Section 1915(a) does not require a litigant to demonstrate absolute destitution[.]"); *accord,* *Lee v. McDonald's Corp.*, 231 F.3d 456, 459 (8th Cir. 2000). As the Second Circuit has noted, "no party must be made to choose between abandoning a potential meritorious claim or foregoing the necessities of life." *Potnick*, 701 F.2d at 244 (citing *Adkins*, 335 U.S. at 339).

In support of an IFP application, section 1915 requires that a plaintiff submit an affidavit reflecting all of his assets. 28 U.S.C. § 1915(a)(1). Without the submission of a completed financial affidavit, a plaintiff's application is incomplete, and this defect alone warrants denial of the IFP application. *See, e.g., U.S. v. Copen*, 378 F. Supp. 99, 103 (S.D.N.Y. 1974) ("Leave to proceed in forma pauperis may be obtainable only upon submission by the party of an affidavit made as required by [28 U.S.C. § 1915]."); *accord, Bey v. Syracuse Univ.*, 155 F.R.D. 413, 414 (N.D.N.Y. May 1994) (Scullin, J.).

In this case, without an affidavit detailing the basis for plaintiff's claim that he is unable to pay the applicable filing fee, the court is unable to make a meaningful assessment of whether he should be granted IFP status. Accordingly, his IFP motion is denied without leave to refile with the requisite supporting documentation.

B. Plaintiff's Complaint

1. Standard of Review

Ordinarily, the denial of plaintiff's IFP application would end the court's discussion. Section 1915, however, authorizes the dismissal of the action *sua sponte*, "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid[.]" 28 U.S.C. § 1915(e).

Section 1915(e) directs that, when a plaintiff seeks to proceed IFP, "the court shall dismiss the case at any time if the court determines that ... the action ... (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

In deciding whether a complaint states a colorable claim, a court must extend a certain measure of deference in favor of *pro se* litigants, *Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam), and extreme caution should be exercised in ordering *sua sponte* dismissal of a *pro se* complaint before the adverse party has been served and the parties have had an opportunity to address the sufficiency of plaintiff's allegations, *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). The court, however, also has an overarching obligation to determine that a claim is not legally frivolous before permitting a *pro se* plaintiff's complaint to proceed. *See, e.g., Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000) (holding that a district court may *sua sponte* dismiss a frivolous complaint, notwithstanding the fact that the plaintiff paid the statutory filing fee). "Legal frivolity ... occurs where 'the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint.' " *Aguilar v. United States*, Nos. 99-MC-0304, 99-MC-0408, 1999 WL 1067841, at *2 (D. Conn. Nov. 8, 1999) (quoting *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998)); *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[D]ismissal is proper only if the legal theory ... or factual contentions lack an arguable basis."); *Pino v. Ryan*, 49 F.3d. 51, 53 (2d Cir. 1995) ("[T]he decision that a complaint is based on an indisputably meritless legal theory, for purposes of dismissal under section 1915(d), may be based upon a defense that appears on the face of the complaint.").

***3** When reviewing a complaint under section 1915(e), the court is guided by applicable requirements of the Federal Rules of Civil Procedure. Specifically, Rule 8 of the Federal Rules of Civil Procedure provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8 "is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata is applicable." *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y. 1995) (McAvoy, J.) (quotation marks and italics omitted).

A court should not dismiss a complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the court should construe the factual

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allegations of a complaint in a light most favorable to the plaintiff, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not 'show[n]'–'that the pleader is entitled to relief.' " *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

2. Analysis

As was noted above in part I. of this report, plaintiff's complaint is comprised of forty-one pages of incoherent prose. By way of one small example, in the section of the complaint intended to describe the "nature of the case," plaintiff alleges as follows:

> 14. Notice to the Court: My complaint against these Defendants as listed above hereafter tortfeasors:
>
> 15. For high crimes and Violation of U.S. Constitution and the Bill of rights the police officer tortfeasor a/k/a DELAWARE COUNTY TREASURER officer's order, and Illegal Tax Codes under color of law and the trespass on the holder in due course unalienable rights and private property ancestral land in the name Forfeiture of land under Tax Codes (18 U.S. Code § 242—Deprivation of rights under color of law)[.]

Dkt. No. 1 at 6 (errors in original). While the court has no reason to doubt that plaintiff's intentions in commencing this action are sincere, his complaint is nevertheless nonsensical by any objective measure and is not drafted in a manner that allows the court to meaningfully analyze any purported cause of action in accordance with 28 U.S.C. § 1915(e). Accordingly, I recommend the complaint be dismissed as frivolous. *See Canning v. Hofmann*, No. 15-CV-0493, 2015 WL 6690170, at *5 (N.D.N.Y. Nov. 2, 2015) (Hurd, J.) ("Under these circumstances, having found that none of the allegations in Plaintiff's meandering and indecipherable Complaint raise a cognizable cause of action, the Court concludes that the Complaint fails to state a claim upon which relief may be granted and is subject to dismissal."); *see also* *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) ("Dismissal [for failure to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure] ... is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.").

C. Whether to Permit Amendment

***4** 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. d1991); *see also* Fed. R. Civ. P. 15(a) ("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) (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); *see also* *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff 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); *accord*, *Brown v. Peters*, No. 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.).

In this case, due to the incomprehensible allegations in plaintiff's complaint, it is not clear whether better pleading would permit plaintiff to assert a cognizable cause of action. Nevertheless, out of deference to his *pro se* status, I recommend plaintiff be granted leave to amend his complaint.

If plaintiff chooses to avail himself of an opportunity to amend, such amended pleading must set forth a short and plain statement of the facts on which he relies to support any legal claims asserted. Fed. R. Civ. P. 8(a). In addition, the amended complaint must include allegations reflecting how the individuals named as defendants are involved in the allegedly unlawful activity. 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) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (quotation marks omitted)).

III. SUMMARY, ORDER, AND RECOMMENDATION

For the reasons set forth above, it is hereby

ORDERED that plaintiff's *in forma pauperis* application (Dkt. No. 2) is DENIED without prejudice. In the event this report is adopted and plaintiff is granted leave to amend his complaint, any amended complaint must be accompanied by either (1) the full filing fee or (2) a new request to proceed in this action without prepayment of the filing fees. Any new IFP application must be supported by appropriate documentation as described above in this report; and it is further respectfully

***5** RECOMMENDED that plaintiff's complaint (Dkt. No. 1) 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.[3] FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993).

The clerk is respectfully directed to serve a copy of this order, report, and recommendation on the *pro se* plaintiff in accordance with the court's local rules.

All Citations

Not Reported in Fed. Supp., 2018 WL 2926299

Footnotes

1 Despite plaintiff's claim to the contrary, only in a narrow set of civil cases (which are not applicable here) must litigants be permitted to access the court without prepayment of filing fees. *See, e.g.,* *M.L.B. V. S.L.J.*, 519 U.S. 102, 113 (1996).

2 The language of that section is ambiguous because it suggests an intent to limit availability of IFP status to prison inmates. *See* 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). The courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. *Hayes v. United States*, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); *see also* *Fridman v. City of N.Y.*, 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002).

3 If you are proceeding pro se and are served with this order, 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 order, report, and recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). 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).

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United States District Court,
N.D. New York.

Erin CANNING, Plaintiff,
v.
Bruno HOFMANN and
Bonnie Hofmann, Defendants.
Erin Canning, Plaintiff,
v.
John Canning and Judy Canning, Defendants.

Nos. 1:15–CV–0493, 1:15–CV–0895.
|
Signed Nov. 2, 2015.

Attorneys and Law Firms

Erin Canning, Saratoga Springs, NY, pro se. [1]

Hodgson, Russ Law Firm, Jeffrey T. Fiut, Esq., Michelle L. Merola, Esq., of Counsel, Buffalo, NY, for Defendants Bruno & Bonnie Hofmann.

No Appearances, [1] for Defendants John and Judy Canning.

DECISION and ORDER

DAVID N. HURD, District Judge.

***1** *Pro se* plaintiff Erin Canning brought an action against defendants Bruno and Bonnie Hofmann in case number 1:15–CV–0493 seeking relief pursuant to five separate federal statutes (the "Lead Case Complaint"). On May 29, 2015, defendants in the Lead Case filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* ECF No. 12. On July 22, 2015, plaintiff filed a separate action against John and Judy Canning in case number 1:15–CV0895 (the "Member Case Complaint"). On September 16, 2015, the Honorable Randolph F. Treece, United States Magistrate Judge, advised by Report–Recommendation that: (i) defendants' motion to dismiss the Lead Case Complaint be granted and (ii) plaintiffs member case complaint be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). While plaintiff did not submit objections to the Report–Recommendation, on September 21, 2015, she filed a 112 page document entitled "Evidence Documents Enclosed and Update", which has been reviewed and considered for the purposes of this Decision & Order. *See* ECF No. 37.

Based upon a de novo review of the portions of the Report–Recommendation to which plaintiff objected, the Report–Recommendation is accepted in whole. *See* 28 U.S.C. § 636(b)(1).

Therefore, it is ORDERED that:

1. Defendants' Motion to Dismiss the Lead Case Complaint (ECF No. 12) is **GRANTED;** and

2. Plaintiff's Member Case Complaint is **DISMISSED** without leave to amend forfailure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and for lack of subject matter jurisdiction; and

3. The consolidated action is hereby closed without consideration of plaintiff's pending motion for injunctive relief (ECF No. 34), motion to expedite relief (ECF No. 39), motion to serve court marshall papers (ECF No. 40) and motion for bill payment (ECF No. 41), as such motions are moot and unnecessary; and it is further ordered that

4. The Clerk serve a copy of this Decision and Order upon plaintiff in accordance with the Local Rules.

The Clerk of the Court shall enter judgment and close this case.

IT IS SO ORDERED.

REPORT–RECOMMENDATION and ORDER

RANDOLPH F. TREECE, United States Magistrate Judge.

I. BACKGROUND

Pro se Plaintiff Erin Canning initially brought this action in the Southern District of New York. Dkt. No. 2, Compl. However, in reviewing the "difficult to understand" pleading, the Honorable Loretta A. Preska, Chief United States District Judge, *sua sponte* transferred the matter to this District, noting that none of the named Defendants are alleged to reside in the

Southern District of New York and that the events purportedly giving rise to Plaintiff's claims occurred in Saratoga County, which is located in the Northern District of New York. Dkt. No. 4. Subsequent to the transfer to this District, Defendants Bruno and Bonnie Hofmann waived service of the Complaint and, on May 29, 2015, filed a Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. Nos. 6 & 12. Plaintiff opposes that Motion, [2] Dkt. No. 15, and Defendants submitted a Reply thereto, Dkt. No. 17. Following these filings, the undersigned granted Plaintiff's request to proceed with this matter *in forma pauperis,* but, because Defendants had waived service, the Court did not direct the Marshal to effect service of process upon them. Dkt. No. 14, Text Order, dated June 3, 2015.

***2** Thereafter, on July 22, 2015, Plaintiff filed a separate action against John and Judy Canning; Plaintiff also sought permission to proceed with that matter *in forma pauperis.* Civ. No. 1:15–CV895 (DNH/RFT), Dkt. Nos. 1, Compl., & 2, Mot. Upon reviewing the pleading, the undersigned found that Plaintiff's two actions were sufficiently related, as defined by the District's General Order 12, and in the interest of judicial economy, consolidated the two cases. *Id.* at Dkt. No. 3. Because Plaintiff had already been granted permission to proceed *in forma pauperis* in the initial action, now deemed the Lead Case, the Court found Plaintiff's subsequent *in forma pauperis* motion to be unnecessary. On August 19, 2015, the Honorable David N. Hurd, United States District Judge, referred the case to this Court for an initial review and Report–Recommendation on the pending Motion to Dismiss, which the Court performs below. Dkt. No. 33.

II. DISCUSSION

A. Lead Case Against Bruno and Bonnie Hofmann

As noted above, Defendants Bruno and Bonnie Hofmann have moved to dismiss the Lead Complaint. Dkt. No. 12.

1. Motion to Dismiss Standard of Review

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See* *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). The trial court's function "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir.1980). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (*overruled on other grounds by* *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)).

"Generally, in determining a 12(b)(6) motion, the court may only consider those matters alleged in the complaint, documents attached to the complaint, ... matters to which the court may take judicial notice[,]" as well as documents incorporated by reference in the complaint. *Spence v. Senkowski,* 1997 WL 394667, at *2 (N.D.N.Y. July 3, 1997) (citing *Kramer v. Time Warner Inc.,* 937 F.2d 767, 773 (2d Cir.1991)); *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir.1991) (citing FED. R. CIV. P. 10(c)). Moreover, "even if not attached or incorporated by reference, a document 'upon which [the complaint] *solely* relies and which is *integral to the complaint* may be considered by the court in ruling on such a motion." *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir.2007) (quoting *Cortec Indus. ., Inc. v. Sum Holding L.P.,* 949 F.2d at 47). However, "even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Faulkner v. Beer,* 463 F.3d 130, 134 (2d Cir.2006). "It must also be clear that there exists no material disputed issues of fact regarding the relevance of the document." *Id.*

***3** The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *See* *Retail Clerks Intern. Ass'n, Local 1625, AFL–CIO v. Schermerhorn,* 373 U.S. 746, 754, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963); *see also* *Arar v. Ashcroft,* 532 F.3d 157, 168 (2d Cir.2008). Nevertheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

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A motion to dismiss pursuant to Rule 12(b)(6) may not be granted so long as the plaintiff's complaint includes "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcroft v. Iqbal,* 556 U.S. at 697 (citing *Twombly*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. at 678. This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* In this respect, to survive dismissal, a plaintiff "must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' " *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir.2007) (quoting *Bed All. Corp. v. Twombly,* 440 U.S. at 555). Thus, in spite of the deference the court is bound to give to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts [which he or she] has not alleged, or that the defendants have violated the ... laws in ways that have not been alleged." *Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). The process of determining whether a plaintiff has "nudged [his] claims ... across the line from conceivable to plausible," entails a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. at 679–80.

With this standard in tow, we consider the plausibility of Plaintiff s Complaint.

2. Analysis

The Complaint against the Hofmanns in the Lead Case is, as Chief Judge Preska pointed out, difficult to understand. Canning's Complaint spans eighty-six pages. Dkt. No. 2, Lead Compl. The initial four pages consist of a *pro forma* complaint ostensibly used by the Southern District of New York for litigants seeking to bring a civil action. From there, the Complaint veers wildly with pages upon pages of medical records, financial account statements, invoices, and other documentation. Apparently, and as best as the Court can surmise, Plaintiff had resided in the Wellington Tower Condominiums, but after circulating a letter to the residents complaining of being harassed by the building superintendent she was removed from the residence. It appears that the residence was owned by Mr. Hofmann, who is possibly Plaintiff s step-father, yet, it is unclear the precise contours of the personal and/or business relationship between Plaintiff and Defendants. Following Plaintiff s "eviction" from the Wellington Tower Condominiums, she was placed in her the care of her father, John Canning, in the Capital District area.

***4** By her Complaint, Plaintiff seeks to bring the following five causes of action against the Defendants, for which she seeks compensatory damages and other forms of relief: (1) 42 U.S.C. § 1985(2); (2) 42 U.S.C. § 1985(3); (3) 42 U.S.C. § 2000aa–6; (4) 18 U .S.C. § 1201; and (5) 18 U.S.C. § 1503. As explained below, none of these purported causes of action are cognizable here.

a. Section 1985 Claims

Section 1985 claims concern conspiracies to interfere with an individual's civil rights. The portions of the statute raised by Plaintiff are Sections 1985(2) and 1985(3); the former deals with a conspiracy to obstruct justice, while the latter concerns conspiracies to deprive persons of rights or privileges, neither of which are applicable in the instant case.

By its very terms, Section 1985(2) seeks to prevent instances where justice is obstructed in a federal court proceeding by way of witness or juror intimidation. *Haddle v. Garrison,* 525 U.S. 121, 125, 119 S.Ct. 489, 142 L.Ed.2d 502 (1998) ("The gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings"). There are no allegations in the Complaint that lead the Court to infer that there was any pending federal court proceeding, that any witness or juror was intimidated, or that Plaintiff was in any way affected or injured. Thus, clearly there is no claim set forth in the Complaint for a violation of Section 1985(2).

To recover under Section 1985(3), a plaintiff must show the existence of (1) a conspiracy (2) meant to deprive a person or persons of the equal protection of the laws or privileges and immunities under the laws with (3) "an overt

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act in furtherance of the conspiracy[,] (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States[,]" and (5) "some racial or perhaps otherwise class-based, invidious discriminatory animus[.]" *Thomas v. Roach,* 165 F.3d 137, 146 (2d Cir.1999) (citations omitted). "In this context, 'classbased animus' encompasses only those groups with discrete and immutable characteristics such as race, national origin, and sex." *Martin v. New York State Dept. of Corr. Serv's.,* 115 F.Supp.2d 307, 316 (N.D.N.Y.2000) (citations omitted). Thus, to recover damages under § 1985, Plaintiff must allege facts from which purposeful discriminatory intent can be inferred. *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375, 390–91, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) (cited in *Hill v. Philip Morris USA,* 2004 WL 1065548, at *4 (S.D.N.Y. May 11, 2004)).

Again, there are no allegations in the Complaint which indicate that Plaintiff was the victim of such discrimination nor that the named Defendants conspired with the aim of discrimination.

Accordingly, the Court recommends that Defendants' Motion to Dismiss be **granted** as to Plaintiff's claims pursuant to 42 U.S.C. §§ 1985(2) and (3).

b. 42 U.S.C. § 2000aa–6

***5** Next, Plaintiff asserts that she brings a cause of action pursuant to 42 U.S.C. § 2000aa–6, which is a part of the Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa–2000aa–12 ("PPA"). The PPA pertains to conduct by governmental employees in connection with the investigation or prosecution of criminal offenses. *See* 42 U.S.C. § 2000aa. "The PPA specifically provides that persons aggrieved under the PPA shall have a civil cause[ ] of action against the United States, against a State which has waived its sovereign immunity, or against any other governmental unit." *Makas v. New York State Dep't of Motor Vehicles,* 1998 WL 146251, at *3 (N.D.N.Y. Mar.23, 1998) (citing 42 U.S.C. § 2000aa–6(a)(1)). Because this statue authorizes a claim against government officials, Plaintiff could not maintain a claim against the Hofmanns, who are private citizens. No where has Plaintiff alleged that she was the subject of a government search/seizure in connection with an investigation or prosecution of a criminal defense, nor how the Hofmanns participated in any way. Accordingly, we recommend that Defendants' Motion be **granted** and such claims be dismissed.

c. Title 18 Claims

Turning next to Plaintiff's claims purportedly brought pursuant to 18 U.S.C. §§ 1201 and 1503, the Court notes that such Title concerns "Crimes and Criminal Procedure" and Plaintiff cannot bring a civil action to enforce criminal statutes. *See* *Leeke v. Timmerman,* 454 U.S. 83, 85, 102 S.Ct. 69, 70 L.Ed.2d 65 (1981) (noting that a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another); *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 511 (2d Cir.1994) (noting that criminal statutes do not provide private causes of action). The two sections raised by Plaintiff concern the crimes of kidnapping and obstruction of justice, neither of which allow for private causes of action. Accordingly, we recommend **granting** Defendants' Motion and dismissing such claims.

3. Conclusion on Lead Complaint

While the Court recognizes that Plaintiff is proceeding *pro se* and that this requires the Court to treat her pleadings with a certain degree of liberality, *Sealed Plaintiff v. Sealed Defendant,* 537 F.3d 185, 191 (2d Cir.2008), we nevertheless find, as explained above, that the Lead Complaint is wholly insufficient to state any plausible claim for relief or to allow any named Defendant to make a reasonable response. Under these circumstances, having found that none of the allegations in Plaintiff's meandering and indecipherable Complaint raise a cognizable cause of action, the Court concludes that the Complaint fails to state a claim upon which relief may be granted and is subject to dismissal. *See* *Ashcroft v. Iqbal,* 556 U.S. at 678 ("[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' ") (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. at 557).

B. Member Case Against John and Judy Canning

***6** Next we turn to the civil action initiated by Plaintiff against John and Judy Canning. For this Member case, the

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Court has allowed Plaintiff to proceed *in forma pauperis* but has not yet reviewed the Complaint to ensure that a proper cause of action is stated. The Court engages in that *sua sponte* review below.

1. Section 1915(e) Standard of Review

Section 1915(e) of Title 28 of the United States Code directs that, when a plaintiff seeks to proceed *in forma pauperis,* "the court shall dismiss the case at any time if the court determines that ... the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Thus, it is a court's responsibility to determine that a plaintiff may properly maintain his complaint before permitting him to proceed with his action.

In reviewing a *pro se* complaint, this Court has a duty to show liberality toward *pro se* litigants, *see Nance v. Kelly,* 912 F.2d 605, 606 (2d Cir.1990), and should exercise "extreme caution ... in ordering sua sponte dismissal of a pro se complaint *before* the adverse party has been served and both parties (but particularly the plaintiff) have had an opportunity to respond." *Anderson v. Coughlin,* 700 F.2d 37, 41 (2d Cir.1983) (emphasis in original) (citations omitted). Therefore, a court should not dismiss a complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. at 556). Although the court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' " *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)). Furthermore, Federal Rule of Civil Procedure 8 "demands more than an unadorned, the-defendantunlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. at 555). Thus, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Id.* (internal quotation marks and alterations omitted). Allegations that "are so vague as to fail to give the defendants adequate notice of the claims against them" are subject to dismissal. *Sheehy v. Brown,* 335 F. App'x 102, 104 (2d Cir.2009).

***7** Furthermore, Rule 8 of the Federal Rules of Civil Procedure provides that a pleading which sets forth a clam for relief shall contain, *inter alia,* "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* FED. R. CIV. P. 8(a)(2). The purpose of this Rule "is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer [and] prepare an adequate defense." *Hudson v. Artuz,* 1998 WL 832708, at *1 (S.D.N.Y. Nov.30, 1998) (quoting *Powell v. Marine Midland Bank,* 162 F.R.D. 15, 16(N.D.N.Y.1995) (McAvoy) (other citations omitted)). Rule 8 also provides that a pleading must contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction ...;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

FED. R. CIV. P. 8(a).

Moreover, Rule 10 of the Federal Rules of Civil Procedure provides, in part:

> **(b) Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence-and each defense other than a denial-must be stated in a separate count or defense.

FED. R. CIV. P. 10(b).

The purpose of Rule 10 is to "provide an easy mode of identification for referring to a particular paragraph in a prior pleading[.]" *Sandler v. Capanna,* 1992 WL 392597, at *3 (E.D. Pa. Dec. 17, 1992 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure,* § 1323 at 735 (1990)). A complaint that fails to comply with these Rules presents too heavy a burden for the defendant in shaping a comprehensive defense, provides no meaningful basis for a court to assess the sufficiency of a plaintiff's claims, and may properly be dismissed by the court. *Gonzales v. Wing,* 167 F.R.D. 352, 355 (N.D.N.Y.1996) (McAvoy). As the Second Circuit has stated, "[w]hen a complaint does not comply with the requirement that it be short and plain, the Court has the power, on its own initiative, ... to dismiss the complaint." *Salhuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir.1988). "Dismissal, however, is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligble that its true substance, if any, is well disguised." *Hudson v. Artuz,* 1998 WL 832708, at *2 (internal quotation marks and citation omitted). In those cases in which the court dismisses a *pro se* complaint for failure to comply with these Rules, it should afford the plaintiff leave to amend the complaint to state a claim that is on its face nonfrivolous. *See Simmons v. Abruzzo,* 49 F.3d 83, 86–87 (2d Cir.1995).

2. Analysis

***8** The Court first notes that Plaintiff's Complaint in the Member action is not in any acceptable form as proscribed by the Federal Rules of Civil Procedure and this District's Local Rules of Practice. *See* Member Case, 1:15–CV–895, Dkt. No. 1, Compl. The Complaint consists of thirteen typed pages of disjointed narrative and conclusory accusations. Therein, Plaintiff recounts a history of her dealings with her mother and stepfather (Hofmann Defendants) and with her father and stepmother (Canning Defendants). Plaintiff recounts the confrontation with the Hofmann Defendants wherein she was evicted from her residence in Wellington Tower, but this time accuses the Canning Defendants of colluding with the Hofmann Defendants in order to intimidate Plaintiff and gain control of her possessions. It seems that for much of the pleading, Plaintiff is airing her personal family gripes as to the Cannings and the Hofmanns.

According to the Member Complaint, Plaintiff brings forth claims against the Cannings for violations of various criminal statutes under Title 18 of the United States Code, New York State Penal Code, as well as for violations of her rights guaranteed by the First and Fourteenth Amendment, and by the Disability Civil Rights Act of 1964. In terms of relief, Plaintiff seeks a slew of injunctive relief, and has also filed a separate Motion in the Lead case seeking injunctive relief.

a. Criminal Statutes

As with her claims in the Lead action, Plaintiff cannot maintain any civil cause of action pursuant to the criminal statutes listed in Title 18 of the United States Code. Thus, for the reasons stated above (*see supra* Part II.A.2.c), the Court recommends dismissing that portion of the Member Complaint that purports to bring a civil action under the United States criminal statutes: 18 U.S.C. §§ 241, 249, and 2261 A. Similarly, there is no civil cause of action recognized in 19 U.S.C. § 1592, which deals with penalties for fraud, gross negligence, and negligence in the context of customs duties and smuggling goods into the United States. By its very terms, the statute authorizes, *inter alia,* the United States Custom Service to pursue violations of the statute and assess any penalties. 19 U.S.C. § 1592(b) (1) & (2). It is entirely unclear why Plaintiff is seeking to invoke this statute and what, if any, facts alleged would give rise to the involvement of the Customs Service, thus this claim should be dismissed. And lastly, the Court notes that Plaintiff cannot pursue a civil action against private individuals under New York's Penal Law § 135.65, entitled Coercion in the First Degree, nor under § 135.00, entitled Unlawful Imprisonment, Kidnapping, and Custodial Interference; Definitions of Terms. As with the United States criminal statutes, State criminal statutes cannot be enforced by private citizens through a civil action, thus we would recommend dismissal of such claim.

b. Constitutional Violations

Plaintiff asserts that the Canning Defendants violated her rights secured by the United States Constitution under Amendments One and Fourteen. Presumably the, Plaintiff seeks to bring a cause of action pursuant to 42 U.S.C. §

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1983, which establishes a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States **by a person acting under color of state law.** *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (quoting 42 U.S.C. § 1983); *see also Myers v. Wollowitz,* 1995 WL 236245, at *2 (N.D.N.Y. Apr.10, 1995) (Section 1983 "is the vehicle by which individuals may seek redress for alleged violations of their constitutional rights"). State action is an essential element of any § 1983 claim. *See Gentile v. Republic Tobacco Co.,* 1995 WL 743719, at *2 (N.D.N.Y. Dec.6, 1995) (citing *Velaire v. City of Schenectady,* 862 F.Supp. 774, 776 (N.D.N.Y.1994) (citation omitted). Traditionally, the definition of acting under color of state law requires that the Section 1983 defendant "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Kern v. City of Rochester,* 93 F.3d 38, 43 (2d Cir.1996) (quoting *West v. Atkins,* 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (internal quotation marks and citation omitted)).

***9** There are no allegations in the Member Complaint which would allow this Court to reasonably infer that the Canning Defendants acted, if at all, under the authority of state law. Thus, to the extent Plaintiff is attempting to assert constitutional violations against the Canning Defendants, such claim must fail.

c. Disability Civil Rights Act of 1964

And, finally, with regard to Plaintiff's passing reference to violations under the "Disability Civil Rights Act of 1964 Disability Act of 1990", it appears to the Court that Plaintiff may be attempting to bring a claim under the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.,* although it is entirely unclear to the Court under which section of that Act she seeks to pursue. Title II of the ADA provides, in pertinent part, that

> [n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The term "public entity" is defined to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]" 42 U.S.C. § 12131(1)(B). To state a claim under Title II of the ADA, a plaintiff must allege "that (1) he or she is a qualified individual with a disability; (2) ... the defendants are subject to the ADA; and (3) ... plaintiff was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of plaintiff's disabilities." *Shomo v. City of New York,* 579 F.3d 176, 185 (2d Cir.2009) (internal quotation marks and alterations omitted).
No where in the Complaint can the Court find any allegations indicating that Plaintiff suffers from a disability, as defined by that Act, or that Defendants were subject to the Act. Indeed, Plaintiff spends a considerable amount of time decrying Defendant John Canning for suggesting that she is mentally infirm. Accordingly, the Court recommends that such claim also be dismissed.

3. Diversity Jurisdiction

Plaintiff alleges certain factual allegations that suggest that she is suing the Canning Defendants for State law torts, such as fraud or defamation. Having reviewed Plaintiff's Member Complaint and finding that it fails to raise any federal question causes of action, the Court, in consideration of Plaintiff's *pro se* status, will assess whether there is an additional basis for the Court's jurisdiction over this matter, namely-diversity jurisdiction. *See City of Kenosha, Wisconsin v. Bruno,* 412 U.S. 507, 512, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973) (noting that a federal court, whether trial or appellate, is obligated to notice on its own motion the basis for its own jurisdiction) *see also Alliance of Am. Ins. v. Cuomo,* 854 F.2d 591, 605 (2d Cir.1988) (challenge to subject matter jurisdiction cannot be waived); FED.R.CIV.P. 12(h)(3) (court may raisebasis of its jurisdiction *sua sponte*). When subject

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matter jurisdiction is lacking, dismissal is mandatory. *United States v. Griffin,* 303 U.S. 226, 229, 58 S.Ct. 601, 82 L.Ed. 764 (1938); FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). The party seeking to invoke the court's jurisdiction bears the burden of "demonstrating that the grounds for diversity exist and that diversity is complete." *Herrick Co., Inc. v. SCS Commc'n, Inc.,* 251 F.3d 315, 322–23 (2d Cir.2001) (citations omitted).

***10** For diversity jurisdiction to exist, the matter in controversy must exceed $75,000 and must be between

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a).

For diversity jurisdiction purposes, an individual's citizenship is the individual's domicile, which is determined on the basis of two elements: "(1) physical presence in a state and (2) the intent to make the state a home." *See Zimak Co. v. Kaplan,* 1999 WL 38256, at *2 (S.D.N.Y. Jan.28, 1999) (quoting 15 James Wm. Moore et al., Moore's Federal Practice ¶ 102.34[2] (3d ed.1998)).
It appears that the Plaintiff, Defendant John Canning, and Defendant Judy Canning all reside in New York State. As such, we do not have complete diversity because the Defendants are citizens of the same State as Plaintiff. *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 68, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (noting that the diversity statute "applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant"). Because Plaintiff has failed to establish the basis for the Court's subject matter jurisdiction, dismissal is mandated.

III. CONCLUSION

As explained above, the Court has reviewed both the Lead and Member Complaints and find that Plaintiff has failed to state a claim upon which relief could be granted and is subject to dismissal. *See* *Ashcroft v. Iqbal,* 556 U.S. at 678 ("[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' ") (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. at 557). Under such circumstances, the Court would normally grant a *pro se* litigant, such as Plaintiff, an opportunity to amend the Complaint in order to avoid dismissal. *Thompson v. Carter,* 284 F.3d 411, 416 (2d Cir.2002). However, such measures are not warranted here because, as explained above, any amendment would be futile. *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000) (dismissal is appropriate where leave to amend would be futile).

Because the Court recommends dismissal of the entire action, consideration of Plaintiff's Motion for Injunctive Relief (Dkt. No. 34) is unnecessary.

For the reasons stated herein, it is hereby

RECOMMENDED, that Defendants' Motion to Dismiss the Lead Complaint (Dkt. No. 12) be **GRANTED** and the matter be dismissed; and it is further

RECOMMENDED, that Plaintiff's Member Complaint be dismissed for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2) (B)(ii) and for lack of subject matter jurisdiction; and it is further

RECOMMENDED, that if the District Court adopts the above recommendations, the entire consolidated action be closed without consideration of Plaintiff's pending Motion for Injunctive Relief (Dkt. No. 34); and it is further

***11 ORDERED,** that the Clerk of the Court serve a copy of this Report–Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such obj ections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WTTHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.*** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of*

Health and Human Serv's., 892 F.2d 15 (2d Cir.1989)); *see also* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72 & 6(a).

Filed Sept. 16, 2015.

All Citations

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Footnotes

1 Defendants John and Judy Canning have not yet been served in this matter and, therefore, have not appeared.

1 Defendants John and Judy Canning have not yet been served in this matter.

2 Plaintiff submitted multiple filings seemingly in support of her opposition to the Hofmanns' dispositive motion. *See* Dkt. Nos. 15, Pl.'s Resp., dated June 5, 2015; 18, Lt., dated June 25, 2015; 23, Supp. Resp., undated, unsigned; & 32, Supp. Resp., undated. The Court has taken into consideration Plaintiff's *pro se* status, and has reviewed all the submissions provided by Plaintiff. The Court notes, however, that in accordance with the standard applicable when reviewing a Motion to Dismiss, the Court will not consider any document that was not originally included nor referenced in the original complaint. Nor, in light of its incognizable format, will the Court construe any subsequent filing to be an amended complaint nor an attempt to amend the operative pleading.

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1997 WL 599355
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Kenneth BROWN, Plaintiff,
v.
Andrew PETERS, Warden, Watertown Correctional Facility; Joseph Williams, Warden, Lincoln Work–Release Center; Francis J. Herman, Senior Parole Officer Interstate Bureau; T. Stanford, Senior Parole Officer; Deborah Stewart, Parole Officer; John Doe # 1, Parole Agent, Watertown Correctional Facility; John Doe # 2, Parole Agent, Lincoln Work Release Center; Susan Bishop, Director of Interstate Compact, South Carolina; Cecil Magee, Parole Officer, South Carolina; Frank Barton, Parole Officer, South Carolina; John McMahan, Parole Officer, South Carolina, Defendants.

No. Civ.A. 95CV1641RSPDS.
|
Sept. 22, 1997.

Attorneys and Law Firms

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Dennis C. Vacco, New York State Attorney General, The Capitol Albany, NY, for defendants Peters, Herman Stewart, Doe # 1, Doe # 2, and Williams, Jeffrey M. Dvorin, Assistant Attorney General, Carl N. Lundberg, Chief Legal Counsel, South Carolina Department of Probation, Columbia, SC, for defendants Bishop, Magee, Barton, McMahan, and Stanford, Carl N. Lundberg, of Counsel.

DECISION AND ORDER

POOLER, J.

***1** The above matter comes to me following a Report–Recommendation by Magistrate Judge Daniel Scanlon, Jr., duly filed on April 17, 1997. Following ten days from the service thereof, the Clerk has sent me the entire file, including any and all objections filed by the parties herein.

Plaintiff Kenneth Brown commenced this Section 1983 civil rights action on November 17, 1995. On February 12, 1996, Magistrate Judge Scanlon ordered Brown to submit an amended complaint alleging the specific acts committed by the individuals named as defendants which Brown claimed violated his constitutional rights. Brown filed an amended complaint on March 21, 1996. In his amended complaint, Brown alleged that defendants violated his rights under the Eighth and Fourteenth Amendments by failing to process properly his interstate compact paperwork, resulting in Brown being imprisoned pursuant to a parole hold when in fact he had never violated the conditions of his parole. For a more complete statement of Brown's claims, see his amended complaint. Dkt. No. 5.

On August 5, 1996, defendants Peters and Williams made a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). Dkt. No. 13; Dkt. No. 14, at 2. On August 19, 1996, defendants Bishop, Magee, Barton, and McMahan made a motion to dismiss the complaint against them or, in the alternative, for summary judgment. Dkt. No. 20. On October 17, 1996, defendants Herman, Stewart, and Stanford made a motion to dismiss for failure to state a claim. Dkt. No 34. On April 17, 1996, Magistrate Judge Scanlon recommended that all defendants' motions to dismiss be granted and that the complaint be dismissed. Dkt. No. 50.

On June 9, 1997, Brown filed objections to the magistrate judge's report-recommendation, having been granted additional time in which to do so. Dkt. No. 52. In addition, Brown filed on June 9, 1997, a motion for leave to file a second amended complaint and a copy of his proposed amended complaint. Dkt. No. 53. I turn first to the last motion filed, Brown's motion for leave to amend his complaint a second time.

Brown seeks to file a second amended complaint "setting forth in detail the personal involvement of each defendant and how their acts of commission and omission served to deprive plaintiff of Constitutionally secured rights." Dkt. No. 53. The district court has discretion whether to grant leave to amend. *Ruffolo v. Oppenheimer & Co.,* 987 F.2d 129, 131 (2d Cir.1993). In exercising that discretion, the court should freely grant leave to amend when justice so requires. Fed.R.Civ.P. 15(a). However, the court need not grant leave to amend where it appears that amendment would prove to be unproductive or futile. *Ruffolo,* 987 F.2d at 131.

Here, Brown moved to amend his complaint to add additional allegations against the named defendants. However, the additional allegations fail to cure the deficiency which forms the basis of defendants' motion to dismiss—the absence of defendants' personal involvement in a constitutional deprivation. Section 1983 imposes liability upon an individual only when personal involvement of that individual subjects a person to deprivation of a federal right. *See* *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A complaint is fatally defective if it fails to allege personal involvement sufficient to establish that a supervisor was "directly and personally responsible for the purported unlawful conduct." *Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 886 (2d Cir.1987).

***2** Brown's proposed amended complaint alleges in conclusory fashion that defendants acted "in a grossly negligent and concerted manner which breached their duties owed to Plaintiff and is the proximate cause of [the violation of plaintiff's constitutional rights]." Proposed Am. Compl., at 3. Brown continues in the same vein, stating that defendants owed duties to plaintiff to carry out their jobs in a professional manner and they failed to carry out those duties appropriately. The complaint states that defendants held specific responsibilities, such as checking for outstanding warrants, which if performed properly should have alerted them to a problem. However, nowhere does the complaint set forth allegations that these defendants either participated directly in any constitutional infraction or that they were even aware of such an infraction. The proposed amended complaint merely alleges that these defendants failed in performing their supervisory and ministerial functions. "These bare assertions do not state a claim under 42 U.S.C. § 1983." *Smiley v. Davis,* 1988 WL 78306, *2 (S.D.N.Y.).

This plaintiff previously has had the opportunity to amend his complaint for the same reason asserted here, to allege personal involvement on the part of defendants. Brown's first amended complaint failed to accomplish that task, and it appears that even if allowed to amend again Brown would be unable to make the requisite allegations with sufficient specificity to sustain his complaint. Consequently, I find that amendment would be futile, and I deny Brown's motion for leave to amend his complaint.

I turn now to the magistrate judge's report-recommendation and defendants' motions. The magistrate judge recommends that I grant defendants' motions and dismiss the complaint as to all defendants. The report-recommendation clearly describes the grounds on which the magistrate judge recommends dismissal as to each defendant. Fed.R.Civ.P. 72(b) requires the district judge to make a *de novo* determination on "any portion of the magistrate's disposition to which specific, written objection has been made." Brown's objections fail to address directly any of the analysis. Brown's objections state (1) that he has been deprived of his constitutional rights; (2) that he has stated a cause of action; (3) that the court wrongly refused to appoint an attorney for him and wrongly stayed discovery pending the outcome of these motions; (4) that he seeks to file an amended complaint; (5) the standard of review for a Fed.R.Civ.P. 12(b)(6) motion; (6) that he disagrees with the magistrate judge's recommendation to grant defendants' motions because the allegations in his complaint, which he repeats, show that his rights were violated; and (7) the text of the Fourteenth and Eighth Amendments.

Even affording the objections the liberal reading required for *pro se* pleadings, I find that these objections fail to state any basis whatsoever, much less a specific one, for the court not to adopt the magistrate judge's rulings. They simply re-state the relief sought and the facts on which Brown grounds his complaint and conclude that the magistrate judge's conclusions are wrong. When the parties make only frivolous, conclusive, or general objections, the court reviews the report-recommendation for clear error. *See* *Camardo v. General Motors Hourly–Rate Employees Pension Plan,* 806 F.Supp. 380, 382 (W.D.N.Y.1992) (court need not consider objections which are frivolous, conclusive, or general and constitute a rehashing of the same arguments and positions taken in original pleadings); *Chambrier v. Leonardo,* 1991 WL 44838, *1 (S.D.N.Y.) (restatement of allegations already before the court and assertion that valid constitutional claim exists insufficient to form specific objections); *Schoolfield v. Dep't of Correction,* 1994 WL 119740, *2 (S.D.N.Y.) (objections stating that magistrate judge's decisions are wrong and unjust, and restating relief sought and facts upon which complaint grounded, are conclusory and do not form specific basis for not adopting report-recommendation); *Vargas v. Keane,* 1994 WL 693885, *1 (S.D.N.Y.) (general objection that report does not address violation of petitioner's constitutional rights is a general plea that report not be adopted and cannot be treated as objection within the meaning of 28 U.S.C. § 636), *aff'd,* 86 F.3d 1273 (2d Cir.), *cert. denied,* 519 U.S. 895, 117 S.Ct. 240, 136 L.Ed.2d 169 (U.S.1996). *See also* *Scipio v. Keane,* 1997 WL 375601, *1

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(1997) (when objections fail to address analysis directly, court reviews report-recommendation for clear error); Fed.R.Civ.P. 72(b), Advisory Comm. Note (when no specific, written objections filed, "court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation").

***3** Because Brown fails to make specific objections or provide any basis for his general objections, I review the report-recommendation for clear error. After careful review, I conclude that the magistrate judge's report-recommendation is well-reasoned and is not clearly erroneous.[1] The magistrate judge employed the proper standard, accurately recited the facts, and reasonably applied the law to those facts. Consequently, I adopt the report-recommendation.

CONCLUSION

Because plaintiff's proposed amendment demonstrates that amendment would be futile, I deny plaintiff's motion for leave to amend his complaint. I approve the magistrate judge's recommendation and grant defendants' motions to dismiss. Plaintiff's complaint is dismissed in its entirety.

IT IS SO ORDERED.

ORDER and REPORT–RECOMMENDATION

This matter was referred to the undersigned for report and recommendation by the Hon. Rosemary S. Pooler, United States District Judge, by Standing Order dated November 12, 1986. Currently before this Court are a number of motions. Defendants Peters and Williams have filed a motion to dismiss (dkt.13); defendants Bishop, Magee, Barton and McMahan have filed a motion for summary judgment, or in the alternative to dismiss (dkt.20); and defendants Herman, Stewart and Stanford also have filed a motion to dismiss (dkt.34). Plaintiff opposes these three motions (dkts.27, 29, 33, 38). Defendants Bishop, Magee and McMahan have filed a motion to stay discovery (dkt.41) and plaintiff has filed a motion to extend time (dkt.44) in which to file opposition to the latter motion for a stay of discovery.

The Court addresses these issues *seriatim.*

BACKGROUND

Plaintiff's amended complaint, which he has brought pursuant to 42 U.S.C. § 1983, alleges the following facts. In October, 1991, plaintiff was incarcerated in the Watertown Correctional Facility in Watertown, New York. He applied for an interstate compact because he wanted to return to South Carolina to live with his common law wife, Pamela Reid. During the application process, he was interviewed by the facility's parole officer, identified only as defendant John Doe # 1. After signing the necessary papers, his application was forwarded to defendant Andrew Peters, the facility's superintendent, who reviewed, signed and forwarded the papers to the Interstate Bureau. Amend. Compl. at ¶¶ 1–2; Exs. A, B.

On or about January 15, 1992, while his compact was waiting for review at the Interstate Bureau, plaintiff was approved for work release and sent to the Lincoln Work Release Center in New York City. While at the center, plaintiff spoke to a parole officer, defendant John Doe # 2, and told him that he was seeking a compact that would return him to South Carolina upon his conditional release. Plaintiff claims the parole officer told him that he would handle the necessary paperwork, although the officer had had no experience with an interstate compact. Amend. Compl. at ¶¶ 3, 4.

***4** Plaintiff, meanwhile, asked Reid whether any officials had contacted her in South Carolina regarding his prospective residence in that state. Upon discovering no one had contacted her, plaintiff asked a lawyer he knew, Navron Ponds, to inquire as to his compact status. In March, 1992, the lawyer spoke with defendant Susan Bishop, who is the director of the interstate compact program in South Carolina. Bishop allegedly told Ponds that plaintiff "was disapproved because there was a discrepancy about approving plaintiff['s] compact." The "discrepancy" was the fact that plaintiff owed the state of South Carolina eighty-six days of confinement from a previous sentence. Plaintiff claims Bishop told Ponds to contact defendants Cecil Magee and Frank Barton, who worked for the South Carolina Parole Department. Sometime in March, 1992, Ponds made some calls to Barton and Magee. A verbal agreement was reached, and plaintiff, upon speaking with Barton and Magee was told that his compact had been approved. He also was told that he should report to the South Carolina Department of Parole upon being released. Amend. Compl. at ¶¶ 5–7.

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Prior to leaving the Lincoln Work Release Center, plaintiff processed paperwork related to his interstate compact. His paperwork was sent by Doe # 2 to defendant Joseph Williams, the superintendent of the center. Williams reviewed, signed and returned the paperwork to plaintiff. On May 1, 1992, upon his release from the center, plaintiff traveled to South Carolina. Three days later, he entered a South Carolina parole office and promptly was arrested because of the eighty-six days of confinement that he owed the state. Plaintiff's paperwork was given to defendant John McMahan, a parole officer. Plaintiff claims that McMahan never returned this paperwork to him. On May 20, 1992, the state of South Carolina revoked plaintiff's parole and plaintiff was returned to prison to serve the eighty-six days that he owed. When he asked McMahan what would happen to his one year of parole from New York, the officer allegedly told him that his New York parole would run concurrently with his South Carolina parole, and that when he finished his South Carolina parole, he would not owe any parole whatsoever. Plaintiff served the eighty-six days he owed and was released on July 31, 1992. Amend. Compl. at ¶¶ 8–10.

In February, 1993, plaintiff was arrested on robbery charges in South Carolina. The charges ultimately were dropped, but he apparently encountered some difficulties regarding this arrest as a result of a parole hold that New York state had placed upon him. Bishop's office told him that it had nothing to do with his parole hold and that any problem that he had was between him and the state of New York. He talked to authorities in Albany, New York regarding the parole hold, but was not successful in his efforts to have the hold removed. On September 30, 1993, after had been extradited to New York as a fugitive from justice, plaintiff was given a preliminary hearing at Riker's Island, New York. The hearing officer found no probable cause that plaintiff had violated any condition of parole. He was released. Amend. Compl. at ¶¶ 11–14; Exs. C–J.

***5** Plaintiff claims that he would not have suffered hardships if his interstate compact had been handled correctly. He alleges that defendant Deborah Stewart failed to follow up and see whether plaintiff had arrived in South Carolina. If she had, he argues, she would have discovered that he had been arrested upon his arrival. He alleges that defendant Francis Herman, a parole officer at the Interstate Bureau failed to do his job by not investigating plaintiff's violation reports. Amend. Compl. at ¶¶ 15–17; Exs. F–I.

Plaintiff asserts that the foregoing amounts violations of his Eighth and Fourteenth Amendment rights, wherefore he both compensatory and declaratory relief.

DISCUSSION

A. Motion to Dismiss by Williams and Peters.

Williams and Peters have filed a motion to dismiss plaintiff's complaint pursuant to FED.R.CIV.P. 12(b)(6) on the grounds that it fails to state a claim upon which relief may be granted. In a Rule 12(b)(6) motion, all factual allegations in the complaint must be taken and construed in plaintiff's favor. *See* *LaBounty v. Adler,* 933 F.2d 121, 122 (2d Cir.1991) (citing *Ortiz v. Cornette,* 867 F.2d 146, 149 (1989)). The Court's role is not to assess whether plaintiffs have raised questions of fact or demonstrated an entitlement to a judgment as a matter of law, as in a motion made pursuant to FED.R.CIV.P. 56 for summary judgment, but rather to determine whether plaintiff's complaint sufficiently alleges all of the necessary legal elements to state a claim under the law. *See* *Christopher v. Laidlaw Transit, Inc.* 899 F.Supp. 1224, 1226 (S.D.N.Y.1995), (citing *Ricciuti v. New York City Transit Authority,* 941 F.2d 119, 124 (2d Cir.1991)). Factual allegations in brief or memoranda may not be considered. *Fonte v. Board of Managers of Continental Towers Condominium,* 848 F.2d 24, 25 (2d Cir.1988). The Court now turns to the issues presented.

Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994). As superintendents at New York State Correctional facilities, Williams and Peter may be found personally involved in the alleged deprivation of plaintiff's constitutionally protected rights by a showing that they: (1) directly participated in the infraction; (2) knew of the infraction, but failed to remedy the wrong; (3) created or continued a policy or custom under which unconstitutional practices occurred; or (4) were grossly negligent in managing subordinates who caused unlawful conditions or events. *Id.,* (quoting *Williams v. Smith,* 781 F.2d 319, 323–24 (2d Cir.1986)). Supervisory liability also may be imposed against Williams or Peters with a showing of gross negligence or deliberate indifference to plaintiff's constitutional rights. *Id.* Absent some personal involvement by Williams or Peters in the allegedly constitutionally infirm conduct of their subordinates, neither can be held liable under § 1983. *Gill v. Mooney,* 824 F.2d 192, 196 (2d Cir.1987).

***6** Plaintiff has not provided any evidence linking either Williams or Peters to his alleged constitutional deprivations. All that plaintiff has alleged is that Williams and Peters, as superintendents, have reviewed and signed paperwork relating to plaintiff's compact. Though it has long been held that *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers" for the purpose of a motion to dismiss under Rule 12(b)(6), *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595–96, 30 L.Ed.2d 652 (1972), plaintiff has not explained how the ministerial conduct of these two defendants was violative of the Constitution. Their motion to dimiss should be granted.

B. Motion for Summary Judgment or to Dismiss by Bishop, Magee, Barton and McMahan.

Bishop, Magee, Barton and McMahan have filed a motion for summary judgment, or in the alternative a motion to dismiss. The Court will treat their motion as a motion to dismiss. "[C]omplaints 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." *Barr v. Adams,* 810 F.2d 358, 363 (2d Cir.1987). Plaintiff has not alleged specifically how the conduct of these four defendants infringed upon his constitutional rights. In his amended complaint, he contends that defendants violated the Constitution by "continuously breaching [[[their] duty" to him. This language underscores the defect with the complaint: if it alleges anything at all, it alleges that defendants were negligent in handling plaintiff's interstate compact and parole. To state a cognizable § 1983 claim, the prisoner must allege actions or omissions sufficient to demonstrate deliberate indifference; mere negligence will not suffice. *Hayes v. New York City Dept. of Corrections,* 84 F.3d 614, 620 (2d Cir.1996); *Morales v. New York State Dep't of Corrections,* 842 F.2d 27, 30 (2d Cir.1988) (section 1983 does not encompass a cause of action sounding in negligence).

The Court finds that the claims against Bishop, Magee, Barton and McMahan should be dismissed.

C. Motion to Dismiss by Herman, Stewart and Stanford.

Plaintiff's claim against Stewart is that she failed to follow up and see whether plaintiff had arrived in South Carolina. Herman, he likewise asserts, failed to do his job because he did not investigate plaintiff's violation reports. Plaintiff has not alleged how these actions run afoul of the Constitution; and again, these claims seem to be grounded in negligence, which is not actionable under § 1983. *Hayes,* 84 F.3d at 620.

Plaintiff's claim against Stanford must fail because his complaint literally fails to state a claim against that defendant. Aside from naming Stanford as a defendant, and alleging that he was the appointed Senior Parole Officer at plaintiff's September 30, 1993 revocation hearing at Riker's Island, plaintiff does not detail how Stanford violated his constitutional rights. Absent some personal involvement by Stanford in the allegedly constitutionally infirm conduct of his subordinates, he cannot be held liable under § 1983. *Gill,* 824 F.2d at 196.

***7** Accordingly, the Court finds that Stanford, Stewart and Herman's motion to dismiss should be granted.

D. Plaintiff's "John Doe" Claims.

In so far as neither John Doe # 1 nor John Doe # 2 have been identified and served in this matter, the Court does not have jurisdiction over these parties and does not reach the merits of plaintiff's claims against them.

E. Discovery Motions.

Defendants Bishop, Magee and McMahan have filed a motion to stay discovery until the Court has made a ruling on their motion to dismiss. Plaintiff has filed a motion to extend the time in which he may file opposition to defendants' motion. Plaintiff, however, has filed his opposing response (dkt.47), therefore his instant discovery motion is denied as moot. In that the Court recommends granting defendants' motion to dismiss, discovery in this matter would be fruitless. Accordingly, defendants' motion for a stay of discovery pending the resolution of their motion to dismiss is granted.

CONCLUSION

WHEREFORE, based upon the foregoing analysis, it is hereby

ORDERED, that plaintiff's motion to extend the time to file an opposing reply (dkt.44) is denied as moot; and it is further

ORDERED, that defendants Bishop, Magee and McMahan's motion to stay discovery until their motion to dismiss is decided (dkt.41) is granted; and it is further

RECOMMENDED, that defendants Peters and Williams' motion to dismiss (dkt.13) be granted; and it is further

RECOMMENDED, that defendants Bishop, Magee, Barton and McMahan's motion to dismiss (dkt.20) be granted; and it is further

RECOMMENDED, that defendants Herman, Stewart and Stanford's motion to dismiss (dkt.34) be granted.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten (10) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW.*** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); FED.R.CIV.P. 6(a), 6(e) and 72.

All Citations

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Footnotes

1 I note, however, that the report-recommendation would survive even *de novo* review.

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2020 WL 6263734
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United States District Court, S.D. New York.

Latrina CROCKER, Plaintiff,
v.
BEDFORD HILLS CORRECTIONAL FACILITY, Defendant.

19-CV-11401 (LLS)
|
Signed 10/22/2020
|
Filed 10/23/2020

Attorneys and Law Firms

Latrina Crocker, Bedford Hills, NY, pro se.

ORDER OF DISMISSAL

LOUIS L. STANTON, United States District Judge:

***1** Plaintiff Latrina Crocker, currently incarcerated in Bedford Hills Correctional Facility, is proceeding *pro se* and *in forma pauperis* (IFP). Plaintiff filed this complaint under 42 U.S.C. § 1983, alleging that Defendants violated her constitutional rights. By order dated January 17, 2020, the Court directed Plaintiff to amend her complaint to address deficiencies in her original pleading. Plaintiff filed an amended complaint on February 18, 2020, and the Court has reviewed it. The action is dismissed for the reasons set forth below.

STANDARD OF REVIEW

The Prison Litigation Reform Act requires that federal courts screen complaints brought by prisoners who seek relief against a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The Court must dismiss a prisoner's IFP complaint, or any portion of the complaint, that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b); *see* *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007). The Court must also dismiss a complaint if the court lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original). But the "special solicitude" in *pro se* cases, *id.* at 475 (citation omitted), has its limits – to state a claim, *pro se* pleadings still must comply with Rule 8 of the Federal Rules of Civil Procedure, which requires a complaint to make a short and plain statement showing that the pleader is entitled to relief.

The Supreme Court has held that under Rule 8, a complaint must include enough facts to state a claim for relief "that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if the plaintiff pleads enough factual detail to allow the Court to draw the inference that the defendant is liable for the alleged misconduct. In reviewing the complaint, the Court must accept all well-pleaded factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). But it does not have to accept as true "[t]hreadbare recitals of the elements of a cause of action," which are essentially just legal conclusions. *Twombly*, 550 U.S. at 555. After separating legal conclusions from well-pleaded factual allegations, the Court must determine whether those facts make it plausible – not merely possible – that the pleader is entitled to relief. *Id.*

BACKGROUND

By order dated January 17, 2020, the Court dismissed Plaintiff's claims against Bedford Hills Correctional Facility because the facility is not a "person" within the meaning of § 1983. (ECF No. 7.) Because Plaintiff's complaint was not the model of clarity, the Court ordered Plaintiff to amend her complaint to show that she is entitled to relief. (*Id.*) Plaintiff filed her amended complaint on February 18, 2020. (ECF No. 8.)

***2** Plaintiff again names Bedford Hills Correctional Facility, and much like her original pleading, Plaintiff's amended complaint is also not the model of clarity. Plaintiff attaches to her amended complaint a copy of the Court's January 17, 2020 order and two additional handwritten pages. In addition to writing in the designated areas on the Court's amended complaint form, Plaintiff also writes in the margins of the amended complaint form and on the attached copy of the Court's order and on two additional pages. This submission still does not make clear that Plaintiff is entitled to relief. Plaintiff again appears to assert a conditions of confinement claim, alleging that her dorm is infested with mice, rats, roaches, and spiders. Plaintiff also alleges that her legal mail was stolen; that her money and property were stolen; and that she was wrongfully convicted. She seeks monetary damages.

DISCUSSION

A. Bedford Hills Correctional Facility

As noted in the Court's January 17, 2020 order, Bedford Hills Correctional Facility is not a "person" within the meaning of § 1983. *See generally* *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989) (state is not a "person" for the purpose of § 1983 claims); *Zuckerman v. Appellate Div., Second Dep't Supreme Court*, 421 F.2d 625, 626 (2d Cir. 1970) (court not a "person" within the meaning of 42 U.S.C. § 1983); *Whitley v. Westchester Cnty. Corr. Fac. Admin.*, ECF 1:97-CV-420, 1997 WL 659100, at *7 (S.D.N.Y. Oct. 22, 1997) (correctional facility or jail not a "person" within the meaning of § 1983). Therefore, Plaintiff's claim against Bedford Hills Correctional Facility remain dismissed. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

B. Deliberate Indifference

The Court again construes Plaintiff's allegations as asserting a § 1983 claim that correction officers were deliberately indifferent to conditions of Plaintiff's confinement that posed a serious threat to her health or safety. Because Plaintiff is a convicted prisoner, her claims arise under the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979), *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017).

To state such a claim, a plaintiff must allege "that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health" or safety, which "includes the risk of serious damage to 'physical and mental soundness.' " *Id.* at 30 (citing *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013), and quoting *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972)); *see also* *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."). "[P]rison officials violate the Constitution when they deprive an inmate of his basic human needs such as food, clothing, medical care, and safe and sanitary living conditions." *Walker*, 717 F.3d at 125 (internal quotation marks omitted).

A convicted prisoner must also show that a correction official "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both [have been] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also [have] draw[n] the inference." *Darnell*, 849 F.3d at 32 (quoting *Farmer*, 511 U.S. at 837). The mere negligence of a correctional official is not a basis for a claim of a federal constitutional violation under § 1983. *See* *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).

Plaintiff again fails to allege facts suggesting that prison officials were deliberately indifferent to her conditions of confinement. Plaintiff does not plead any facts showing that any official at Bedford Hills Correctional Facility knew or should have known of the conditions and that the official was deliberately indifferent to those conditions. Plaintiff thus fails to state a claim that Defendants were deliberately indifference to her conditions of confinement, and this claim must be dismissed. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

C. Access to Courts

***3** The Court construes Plaintiff's allegations that Defendants are tampering with her mail as a claim that she was denied access to the courts. Individuals have a constitutional right of access to the courts under the First Amendment to the United States Constitution. *See* *Christopher v. Harbury*, 536 U.S. 403, 414-16 (2002); *Lewis v. Casey*, 518 U.S. 343, 346 (1996). To state a claim for denial of access to the courts, a plaintiff must allege facts showing that the defendant's conduct (1) "was deliberate and

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malicious," and (2) "resulted in actual injury to the plaintiff such as the dismissal of an otherwise meritorious legal claim." *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) (internal quotation marks omitted); *see also* *Collins v. Goord*, 581 F. Supp. 2d 563, 573 (S.D.N.Y. 2008) (explaining that "plaintiff must demonstrate that the defendant's conduct frustrated the plaintiff's efforts to pursue a nonfrivolous claim.").

To state a claim of actual injury, Plaintiff must allege facts demonstrating that she was prejudiced in ongoing legal proceedings. A mere "delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation." *Jermosen v. Coughlin,* 877 F. Supp. 864, 871 (S.D.N.Y. 1995) (citing *Jones v. Smith,* 784 F.2d 149, 151–52 (2d Cir. 1986)); *see also* *Sheppard v. Lee,* No. 10-CV-6696, 2011 WL 6399516, at *2 (S.D.N.Y. Dec. 20, 2011) (holding that, because plaintiff's motion in his other proceedings was dismissed on other grounds, missing a court deadline due to delayed outgoing legal mail did not constitute actual injury).

Because Plaintiff does not describe any prejudice to an ongoing legal proceeding, her allegations are insufficient to state a claim that her right to access the courts has been violated. She also does not detail the nature of her mail or the harm caused by Defendants' alleged actions. Plaintiff's claim must therefore be dismissed for failure to state a claim. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

D. Deprivation of Property

Plaintiff's claim that Defendants at Bedford Hills Correctional Facility destroyed, discarded, or stole her property must also be dismissed. A claim for deprivation of property is not recognized by law in federal court if the state courts provide a remedy for the deprivation of that property. *See* *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Marino v. Ameruso*, 837 F.2d 45, 47 (2d Cir. 1988) (citations omitted). New York provides such a remedy in § 9 of the New York Court of Claims Act. *See* *Jenkins v. McMickens*, 618 F. Supp. 1472, 1474 (S.D.N.Y. 1985) (state tort action available to compensate detainee for alleged loss of property by city prison officials); *Cook v. City of New York*, 607 F. Supp. 702, 704 (S.D.N.Y. 1985) (detainee had meaningful post-deprivation remedy for loss of book through state action for negligence, replevin or conversion); *Boyle v. Kelley*, 42 N.Y.2d 88, 90-91, 396 N.Y.S.2d 834, 835-36 (1977) (property wrongfully seized by officials during a search recoverable by replevin action or Article 78 proceeding); *Moreno v. New York*, 69 N.Y.2d 432, 515 N.Y.S.2d 733 (1987) (alternative state remedies to recover seized property discussed). Plaintiff has not alleged facts that would demonstrate that her state remedies are in any way inadequate or inappropriate. *See* *Butler v. Castro*, 896 F.2d 698, 700-04 (2d Cir. 1990).

Because New York provides an adequate post-deprivation remedy, Plaintiff cannot state a claim that she has been deprived of property without due process of law. *Love v. Coughlin*, 714 F.2d 207, 208-09 (2d Cir. 1983). This claim is therefore dismissed. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

E. Heck v. Humphrey

Because Plaintiff was convicted and because she does not allege that the conviction was reversed, expunged, or otherwise declared invalid, the Court must dismiss Plaintiff's § 1983 claim that she was wrongfully convicted. Plaintiff's claim is barred by the favorable termination rule set forth in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). The United States Supreme Court has explained:

> ***4** that a state prisoner's § 1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (italics in original); *see* *Heck*, 512 U.S. at 486-87 ("[I]n order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of *habeas corpus*.").

Because success on Plaintiff's § 1983 claims would necessarily imply the invalidity of her conviction, and because Plaintiff has not alleged that her conviction was overturned or otherwise invalidated, *Heck*'s favorable termination rule bars her claim for money damages. *See* *Perez v. Cuomo*, No. 09-CV-1109 (SLT), 2009 WL 1046137, at *7 (E.D.N.Y. Apr. 17, 2009) ("Since plaintiff's conviction remains valid, plaintiff's claim for violation of his right to a fair trial is not cognizable under § 1983."). The Court must therefore dismiss Plaintiff's § 1983 claim that she was wrongfully convicted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

Plaintiff may not obtain release from custody in a § 1983 action; she can only obtain such relief by bringing a petition for a writ of *habeas corpus* under 28 U.S.C. § 2254. *See* *Wilkinson v. Dotson*, 544 U.S. 74, 78-82 (2005) (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)) (noting that writ of *habeas corpus* is sole remedy for prisoner seeking to challenge the fact or duration of his confinement). A state prisoner may not circumvent the exhaustion requirement for *habeas corpus* relief by requesting release from custody in a civil action. *Preiser*, 411 U.S. at 489-90.

To the extent that this submission can be construed as a § 2254 petition, the petition must be dismissed because it does not demonstrate that plaintiff has exhausted her available state remedies in accordance with 28 U.S.C. § 2254(b) and (c).[1] *See* *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("[A] state prisoner's federal *habeas* petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."). Plaintiff may file a petition for a writ of *habeas corpus* once all available state remedies have been exhausted.

***5** District courts generally grant a *pro se* plaintiff leave to amend a complaint to cure its defects but leave to amend may be denied if the plaintiff has already been given an opportunity to amend but has failed to cure the complaint's deficiencies. *See* *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Because the defects in Plaintiff's amended complaint cannot be cured with a further amendment, the Court declines to grant Plaintiff another opportunity to amend.

CONCLUSION

Plaintiff's amended complaint, filed IFP under 28 U.S.C. § 1915(a)(1), is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

SO ORDERED.

All Citations

Slip Copy, 2020 WL 6263734

Footnotes

1 Plaintiff should note that under the Antiterrorism and Effective Death Penalty Act of 1996, which modified the *habeas corpus* statutes, a person in state custody must generally file a § 2254 petition within one year from the latest of four benchmark dates: (1) when the judgment of conviction becomes final; (2) when a government-created impediment to making such a motion is removed; (3) when the constitutional right asserted is initially recognized by the Supreme Court, if it has been made retroactively available to cases on collateral review; or (4) when the facts supporting the claim(s) could have been discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d).

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2014 WL 3882322
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United States District Court,
E.D. New York.

Deric NELSON, Petitioner,
v.
Kenneth P. THOMPSON, District Attorney's Office of New York City; Dora B. Schriro, Commissioner of Corrections Department of New York City; and Thomas Hall, Warden of Otis Bantum Correctional Center, Respondents.

No. 14–CV–3414 (KAM).
|
Signed Aug. 7, 2014.

Attorneys and Law Firms

Deric Nelson, Hicksville, NY, pro se.

MEMORANDUM AND ORDER

MATSUMOTO, District Judge.

***1** On May 30, 2014, Margo Nelson, proceeding *pro se,* filed a petition for a writ of habeas corpus (the "petition") on behalf of her son, Deric Nelson ("petitioner"), who is currently detained at the Anna M. Cross Center on Rikers Island. (ECF No. 1, Petition for Writ of Habeas Corpus dated 5/29/14 and received 5/30/14 ("Pet.").) The $5 filing fee was paid. For the reasons set forth below, the petition is dismissed without prejudice.

BACKGROUND

At the time the instant petition was filed, petitioner was in pre-trial detention on a pending criminal case in the State of New York, Kings County, under indictment and docket number 00046–2010, charging him with attempted grand larceny in the first degree, offering a false instrument for filing in the first degree, and falsifying business records in the first degree. *See* http://iapps.courts.state.ny.us/webcrim_attorney, Case Number 00046–2010 (last visited 7/8/14). Petitioner, or his family members, have previously filed, and the court has previously dismissed, three prior petitions challenging his pre-trial detention on the same indictment in *Nelson v. Hynes, et al.,* No. 12–CV–4913 (KAM), *Nelson v. Hynes, et al.,* No. 13–CV–3447 (KAM), and *Nelson v. Hynes, et al.,* No. 14–CV–603 (KAM). The three prior petitions were each dismissed for failure to exhaust state court remedies. *Nelson v. Hynes,* No. 12–CV–4913 (KAM), 2013 WL 182793, at *1 (E.D.N.Y. Jan.17, 2013); *Nelson v. Hynes, et al.,* No. 13–CV–3447 (KAM), 2013 WL 5502901 (E.D.N.Y. Oct.2, 2013); *Nelson v. Hynes, et al.,* No. 14–CV–603 (KAM), 2014 WL 652419 (E.D.N.Y. Feb.19, 2014). Petitioner has also filed two civil actions against his former attorneys in the pending criminal proceeding, *Nelson v. Brown,* 13–CV–3446 (KAM), and *Nelson v. Stella,* 13–CV–6812 (KAM). The two civil actions remain pending in this court. The history of petitioner's arrest and pending prosecution was summarized in this court's January 17, 2013, Order in No. 12–CV–4913 (KAM). *See Nelson,* 2013 WL 182793, at *1.

The instant petition appears to renew petitioner's challenge to his custody and pending prosecution in the 00046–2010 indictment. It purports to be filed "pursuant to the provisions of 28 U.S.C. § 2241–2255," and under 42 U.S.C. §§ 1981, 1983 and 1985. (*See* Pet., preliminary statement and ¶¶ 7, 21–30, 47.) It states that "petitioner brings this action on the grounds of the violation of his rights afforded to him by New York State Constitution Articles 1 § 11, and 12, in conjunction with United States Constitution Bill Of Rights 1 st, 4th, 5th, 6th, 8th, and 14th Amendments, 15 U.S.C. § 77aaa through § 77bbbb, Title 42 Section 1981, 1983, and 1985." (Pet.¶ 7.) The only specific request for relief "seeks that justice be served by way of a fair hearing and the production of the body of the petitioner before the court." (Pet., preliminary statement.)

The civil rights claims include the allegation that petitioner was denied the right to *Mapp/Dunaway, Huntley, Miranda, Clayton,* and *Sandoval* hearings and other alleged rights in the pending criminal prosecution. (Pet.¶¶ 9–12.) The petition also states: "[b]ased upon the petitioner being an African American male[,] the respondents have violated his right not to be forced into contracts with parties who may have a different religious belief and further have used classes of citizenship to bar him from asserting contractual agreements that may protect his interest." (Pet.¶ 21.) The petition asserts that the "respondents have used race and religious diversity to subject the petitioner to cruel and unusual punishment as retaliation for his pleading his rights were violated via various writs submitted to the court on his behalf ." (Pet.¶ 25.) The petition further alleges that petitioner was required to undergo competency examinations pursuant to New York Criminal Procedure Law § 730, and that he was sent to Mid Hudson Psychiatric Center and Kirby Psychiatric Center. (Pet.¶¶ 26–29.) In addition to demanding petitioner's liberty, the petition also appears to seek the release of a seized "security interest" located at 467–469 Vanderbilt Ave. in Brooklyn, New York. (Pet.¶ 11.)

***2** The petition also includes an alleged cause of action pursuant to the Trust Indenture Act of 1939, codified at 15 U.S.C. § 77aaa through § 77bbbb. (Pet.¶¶ 13–20.) The petition mentions "mortgage backed securities fraud," false filings with the Internal Revenue Service and the Securities and Exchange Commission, and a "fraudulent bond transaction." (Pet.¶¶ 14, 16, 20.) It states: "Based on the Indentured Trust Act of 1939 [*sic*] the petitioners [*sic*] had an equitable liability if they believed the petitioner was guilty of the charges to honor a Motion to a Federal Jurisdiction and or contact a higher Federal Authority of potential acts of fraud being committed against the I.R.S." (Pet.¶ 18.)

The petition states that "petitioner exhausted his State remedy in the form a conflict of interest amongst the People of the State of New York in regards to these matters and the denial of a petition for Writ of Habeus [*sic*] Corpus filed in SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS; CRIMINAL TERM; PART." (Pet.¶ 6.)

The petition also avers that "Margo Nelson, the natural mother of the petitioner has been granted the right by way of the petitioner before a Notary to be the Attorney in fact." (Pet.¶ 37.) Among the voluminous exhibits attached to the petition is a partial New York Statutory Short Form for appointing Power of Attorney, which includes the signatures of Margo Nelson and Burley Nelson, but no signature by Deric Nelson. (Pet. at 121–23.)

DISCUSSION

I. *Application by Petitioner's Mother*

As in petitioner's prior petitions, the nature of the claims and desired relief is unclear. In any case, whether the instant submission is intended as a motion for writ of habeas corpus, "pursuant to the provisions of 28 U.S.C. § 2241–2255," or as a civil action, pursuant to 42 U.S.C. §§ 1981, 1983 and 1985, Margo Nelson may not file it on behalf of her son. A habeas corpus petition may be brought either "by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. When the motion is brought by a person other than the prisoner, that "next friend" must demonstrate that he or she has standing to act on the prisoner's behalf. "First a 'next friend' must provide an adequate explanation-such as inaccessibility, mental incompetence, or other disability-why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore v. Arkansas,* 495 U.S. 149, 163–64, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (internal citations omitted). The requirement that the "next friend" act in the prisoner's best interests is critical: because the opportunity to seek habeas corpus relief is limited, the "next friend," in aiding the prisoner, may also be exhausting the prisoner's rights. Accordingly, "[t]he burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." *Id.* at 164.

***3** In this case, Margo Nelson fails to demonstrate that Deric Nelson is incapable of asserting his own rights. Indeed, Deric Nelson recently filed a similar petition apparently signed by him, which suggests that he is perfectly capable of asserting his own rights in this matter. *See Nelson v. Hynes,* No. 14–CV–603 (KAM). Under these circumstances, the court finds that Margo Nelson has not met her burden to appear as "next friend," and therefore lacks standing to bring a habeas petition on behalf of petitioner.

Nor can Margo Nelson file a civil action on her son's behalf. A non-attorney appearing *pro se* may not represent another *pro se* litigant in a civil action. *See* *Iannaccone v. Law,* 142 F.3d 553, 558 (2d Cir.1998) ("[B]ecause *pro se* means to appear for one's self, a person may not appear on another person's behalf in the other's cause"); *see also* *Guest v. Hansen,* 603 F.3d 15, 20 (2d Cir.2010).

II. *Exhaustion*

Even if Margo Nelson had standing to file a habeas petition as "next friend" to Deric Nelson, the petition would be dismissed in any case, because petitioner has failed to first exhaust the remedies available through state court procedures. As this court has previously explained to petitioner on multiple occasions, petitioner must "present the federal constitutional claim asserted in the petition to the highest state court (after preserving it as required by state law in lower courts) and inform that court (and lower courts) about both the factual and legal bases for the federal claim." *Nelson,* 2014 WL 652419, at *3 (quoting *Ramirez v. Att'y Gen. of State of N.Y.,* 280 F.3d 87, 94 (2d Cir.2001) (internal quotation marks and deletions omitted)). A petitioner who has not exhausted available state court remedies may only seek a writ of habeas corpus if: "(1) he establishes cause for his failure to exhaust and prejudice as a result of the alleged violation of federal law ... or (2) he demonstrates that the failure to consider his claims will result in a fundamental miscarriage of justice." *Robinson v. Sposato,* No. 11–CV–191, 2012 WL 1965631, at *2 (E.D.N.Y. May 29, 2012) (citing *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). In the three prior petitions, the court found that petitioner had failed to fully exhaust the procedures available in state court and dismissed them without prejudice. *Nelson,* 2013 WL 182793; *Nelson,* 2013 WL 5502901; *Nelson,* 2014 WL 652419.

The instant petition asserts that petitioner has exhausted his state remedies, through the alleged denial of a habeas corpus petition in the criminal part of the Kings County Court. (Pet.¶ 6.) However, petitioner has not established that he presented his federal constitutional claims to the highest state court, and he still has an open avenue for doing so, through the pending criminal prosecution and the possibility of subsequent appellate review. He has also failed to establish any cause for his failure to exhaust his state court remedies or any prejudice resulting from the alleged violation of his federal constitutional rights. Accordingly, this petition, were it properly filed, would also be dismissed without prejudice.

III. *Other Claims*

***4** The instant submission alleges violations of petitioner's constitutional rights under 42 U.S.C. §§ 1981, 1983 and 1985. Even if petitioner were to bring these claims as a civil action and on his own behalf, these claims would be dismissed. To the extent that the petition demands certain pre-trial hearings in petitioner's criminal case or challenges the competency evaluations and determinations made by the state court, these claims are precluded by *Younger v. Harris,* 401 U.S. 37 (1971). Under the *Younger* abstention doctrine, federal courts may not interfere with pending state court criminal prosecutions, absent some extraordinary circumstance such as bad faith prosecution, patently unconstitutional laws, or the lack of an adequate process in state court for protecting the rights of the accused. *Younger v. Harris,* 401 U.S. 37, 53–54 (1971). The Second Circuit has held that *"Younger* abstention is appropriate when: 1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has an avenue open for review of constitutional claims in the state court." *Hansel v. Springfield,* 56 F.3d 391, 393 (2d Cir.1995), *cert. denied,* 516 U.S. 1012, 116 S.Ct. 572, 133 L.Ed.2d 496 (1995).

Here, the criminal case against petitioner is still pending, New York has an important state interest in enforcing its criminal laws, and petitioner is free to raise his constitutional claims in the pending criminal proceedings. Accordingly, to the extent that petitioner asks this court to interfere in the state criminal proceedings, all of these claims are dismissed pursuant to *Younger* .

Finally, the petition asserts a cause of action under 15 U.S.C. § 77aaa through § 77bbbb, which are the statutory provisions of the Trust Indenture Act of 1939 ("TIA"). Although the TIA creates a federal civil cause of action for misleading statements filed with the Securities and Exchange Commission, the instant petition, like a previous petition asserting this same claim, does not assert any basis for such a claim. *See Nelson,* 2013 WL 5502901, at *5. The TIA also provides for criminal penalties and criminal prosecutions to be brought in federal district court. 15 U.S.C. §§ 77vvv(b). Whether petitioner could also be subject to federal criminal prosecution under the TIA is not relevant to his ongoing prosecution under New York State's criminal laws. Even if petitioner had brought his claims on his own behalf, the instant submission has not asserted a valid civil claim pursuant to the TIA, and accordingly, these claims are dismissed.

CONCLUSION

For the reasons set forth above, the petition for a writ of habeas corpus is dismissed without prejudice. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability shall not issue. *See* 28 U.S.C. § 2253(c)(2). The court certifies pursuant to 28 U.S.C. § 1915(a) (3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for purpose of an appeal. *Coppedge v. United States,* 369 U.S. 438, 444–45, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). The Clerk of Court is respectfully requested to enter judgment, serve a copy of this Memorandum and Order on petitioner, and note service on the docket.

All Citations

Not Reported in F.Supp.3d, 2014 WL 3882322

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United States District Court, S.D. New York.

Walter HURDLE, Petitioner,
v.
Mike SHEEHAN, Superintendent, Five Points Correctional Facility, Respondent.

No. 13-cv-6837 (RJS) (HBP)
|
Signed 09/12/2016

Attorneys and Law Firms

Walter Hurdle, Romulus, NY, pro se.

Nancy Darragh Killian, Bronx District Attorney, Bronx, NY, for Respondent.

OPINION AND ORDER

RICHARD J. SULLIVAN, District Judge

***1** Walter Hurdle ("Petitioner"), proceeding *pro se*, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his 2010 conviction for one count of criminal possession of stolen property in the fourth degree, in violation of New York Penal Law § 165.45(2). (Doc. No. 1 ("Petition").) Now before the Court is the Report and Recommendation of the Honorable Henry B. Pitman, Magistrate Judge, recommending that the Court (1) find that Petitioner was "in custody" at the time he filed the Petition, as required by Section 2254, but (2) deny the Petition on the merits. (Doc. No. 14 ("R&R" or "Report").) For the reasons set forth below, the Court concludes that Petitioner was not in custody at the time he filed the Petition and that the Court therefore lacks subject matter jurisdiction to consider the Petition. Accordingly, the Petition is dismissed.

I. BACKGROUND

On September 8, 2009, Petitioner was convicted in New York State Supreme Court, Queens County, on four counts – (1) assault in the first degree, (2) assault on a police officer, (3) assault in the second degree, and (4) reckless driving. Although the convictions on the first two counts were ultimately reversed, Petitioner was sentenced to a determinate term of seven years on the second degree assault count and to a determinate term of one year on the reckless driving count, with the sentences to run concurrently (the "Queens Sentence"). *See Hurdle v. Sheahan*, No. 13-cv-6862 (BMC), 2013 WL 6859866, at *1-2 (E.D.N.Y. Dec. 20, 2013) (setting forth the details of the Queens Sentence and denying a habeas petition challenging that sentence). Several months later, on December 9, 2009, Petitioner pleaded guilty pursuant to a plea agreement in New York State Supreme Court, Bronx County, to a separate indictment charging him with one count of criminal possession of stolen property in the fourth degree. (Doc. No. 8-7 at 33:1-8.) On January 15, 2010, the Honorable Albert Lorenzo sentenced Petitioner to an indeterminate sentence of one-and-one-half to three years (the "Bronx Sentence"), to be served concurrently with the Queens Sentence. (*Id.* at 43:1-45:13.) On March 1, 2012, the Appellate Division, First Judicial Department, affirmed Petitioner's Bronx Sentence, *People v. Hurdle*, 93 A.D.3d 419, 938 N.Y.S.2d 889 (N.Y. App. Div. 2012), and on June 21, 2012, Chief Judge Jonathan Lippman denied leave to appeal to the New York Court of Appeals, *People v. Hurdle*, 19 N.Y.3d 962 (2012). According to the New York Department of Corrections and Community Supervision ("DOCCS"), Petitioner has been released from prison and is currently serving parole supervision based on the Queens Sentence until January 2017. (*See* DOCCS, Inmate Population Information Service, http://www.doccs.ny.gov.) [1]

***2** On September 19, 2013, Petitioner filed the instant Petition (Doc. No. 1), and on November 7, 2013, Respondent filed its answer (Doc. No. 8). On November 15, 2013, this matter was referred to Magistrate Judge Pitman (Doc. No. 13), who filed the Report with this Court on May 16, 2016 (Doc. No. 14). Magistrate Judge Pitman informed the parties that, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, they had fourteen (14) days from receipt of the Report to file written objections. (*Id.* at 21.) Neither party has filed an objection, and the deadline to do so has long since expired.

II. LEGAL STANDARD

A district court may accept, reject, or modify, in whole or in part, the findings or recommendations made by a magistrate judge. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b);

Grassia v. Scully, 892 F.2d 16, 19 (2d Cir. 1989). A court may accept those portions of a report to which no specific, written objection is made, as long as the factual and legal bases supporting the findings are not clearly erroneous. *See* *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997) (citing Fed. R. Civ. P. 72(b) and *Thomas v. Arn*, 474 U.S. 140, 149 (1985)). When a party makes specific objections to a magistrate judge's findings or legal conclusions, the court must undertake a *de novo* review of the objections. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). However, "to the extent ... that the party makes only conclusory or general arguments, or simply reiterates the original arguments, the Court will review the Report strictly for clear error." *DiPilato v. 7-Eleven, Inc.*, 662 F. Supp. 2d 333, 339 (S.D.N.Y. 2009). A magistrate judge's decision is clearly erroneous only if the district court is "left with the definite and firm conviction that a mistake has been committed." *SEC v. Cobalt Multifamily Investors I, Inc.*, 542 F. Supp. 2d 277, 279 (S.D.N.Y. 2008) (quoting *Chen v. Bd. of Immigration Appeals*, 435 F.3d 141, 145–-46 (2d Cir. 2006)).

III. DISCUSSION

Because the parties did not submit timely written objections to the Report, the Court reviews the Report for clear error. *See, e.g., Boyd v. City of New York*, No. 12-cv-3385 (PAE) (JCF), 2013 WL 452313, at *1 (S.D.N.Y. Feb. 6, 2013); *Lang ex rel. Morgan v. Astrue*, No. 05-cv-7263 (KMK) (PED), 2009 WL 3747169, at *1 (S.D.N.Y. Nov. 6, 2009). However, for the reasons set forth below, the Court is left with the definite and firm conviction that it lacks subject matter jurisdiction to consider the Petition.

A district court has subject matter jurisdiction to consider a state prisoner's petition for habeas relief "only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States" at the time he files the petition. 28 U.S.C. § 2254(a) (emphasis added); *Ogunwomoju v. United States*, 512 F.3d 69, 73-75 (2d Cir. 2008); *see also* *Nowakowski v. New York*, No. 14-1964, 2016 WL 4487985, at *3 (2d Cir. Aug. 26, 2016) ("In order for a federal court to have jurisdiction over a habeas petition, the petitioner must be 'in custody pursuant to the judgment of a State court' at the time the petition is filed.") (quoting 28 U.S.C. § 2254(a)). A habeas petitioner is no longer " 'in custody' under a conviction after the sentence imposed for it has fully expired." *Maleng v. Cook*, 490 U.S. 488, 492 (1989). Although "[c]ourts have construed the term 'in custody' liberally to extend beyond physical incarceration" and "to include individuals who, at the time of the filing of the petition, were on parole, supervised release, and bail," nonetheless, "once a sentence has been completely served and thus expired, an individual is no longer 'in custody' under that conviction," even if he remains "in custody" on a separate conviction. *Valdez v. Hulihan*, 640 F. Supp. 2d 514, 515 (S.D.N.Y. 2009) (citations omitted); *see also Whaley v. Graham*, No. 06-cv-3021 (JFB), 2007 WL 708796, at *2 (E.D.N.Y. Mar. 6, 2007) ("[E]ven where the petitioner continues to be incarcerated on an unrelated conviction at the time of filing, the 'in custody' requirement is not satisfied where the sentence for the challenged conviction has been fully served.").

***3** Courts recognize an exception to this rule "when a *pro se* petition, liberally constructed," can be interpreted to challenge "a current sentence, as enhanced by an allegedly invalid prior conviction" that has since expired. *Williams v. Edwards*, 195 F.3d 95, 96 (2d Cir. 1999) (brackets omitted). The Supreme Court has also instructed that when "a prisoner serving *consecutive* sentences is 'in custody' under any one of them," the "consecutive sentences [are to be viewed] in the aggregate, not as discrete segments." *Garlotte v. Fordice*, 515 U.S. 39, 45-47 (1995) (emphasis added) (quoting *Peyton v. Rowe*, 391 U.S. 54, 67 (1968)). Therefore, even if a prisoner has already completed the first in a series of consecutive sentences, the Court nonetheless has jurisdiction to hear a challenge to the validity of that first sentence. The Supreme Court's decisions in *Garlotte* and *Peyton* are premised on the fact that shortening even an expired conviction that is part of a "continuous stream" of consecutive sentences "would advance the date" of a prisoner's "eligibility for release from present incarceration." *Id.* at 47.

Where, however, a prisoner serving a series of *concurrent* sentences challenges a shorter sentence that has already expired, the prisoner is no longer "in custody" on the shorter sentence, even if he remains in custody under a longer sentence, since "a successful habeas action resulting in a vacated concurrent sentence would have no effect on [the state prisoner's] release date from his other conviction and sentence." *Sweet v. McNeil*, 345 Fed.Appx. 480, 482 (11th

Cir. 2009); *accord* *Mays v. Dinwiddie*, 580 F.3d 1136, 1137 (10th Cir. 2009); *Clark v. Russell*, 1992 WL 259355, at *1 (6th Cir. 1992); *Mendiola v. Stephens*, No.14-cv-261 (RGM) (ASH), 2016 WL 1104854, at *3 (Feb. 23, 2016), *adopted by* 2016 WL 1090238 (S.D. Tex. Mar. 21, 2016); *Inman v. Landry*, No. 2:15-cv-243 (GZS), 2015 WL 8093864, at *2 (Oct. 22, 2015), *adopted by* 2015 WL 8125604 (D. Me. Dec. 7, 2015); *Freeman v. Pate*, No. 9:11-cv-01421 (DCN) (BM), 2011 WL 3420451, at *3 (July 19, 2011), *adopted by* 2011 WL 3420442 (D.S.C. Aug. 3, 2011); *Siarkiewicz v. McNeil*, No. 4:07-cv-383 (SPM) (MD), 2009 WL 399430, at *10 (Feb. 18, 2009), *adopted by* 2009 WL 903384 (N.D. Fla. Mar. 30, 2009); *Simpson v. Artuz*, 860 F. Supp. 156, 156-57 (S.D.N.Y. 1994). These courts' distinction between consecutive and concurrent sentences makes sense: a prisoner who attacks an earlier-imposed consecutive sentence may obtain relief through a recalculated aggregate term. By contrast, even if a prisoner serving a concurrent sentence were to obtain relief in vacating a shorter, expired sentence, it would have no effect on the prison term he is still serving.

Here, Petitioner began serving the indeterminate one-and-one-half-to-three-year Bronx Sentence in January 2010. (Doc. No. 8-7 at 41-45.) Even if Petitioner served the maximum three years on the Bronx Sentence, the sentence would have expired in January 2013. However, Petitioner did not file the Petition until September 19, 2013. Furthermore, Petitioner has not alleged that the Queens Sentence was in any way enhanced by the Bronx Sentence, such that his *pro se* Petition can be construed to challenge a "current sentence, as enhanced by an allegedly invalid prior conviction." *Williams*, 195 F.3d at 96 (brackets omitted).[2] To the contrary, Petitioner pleaded guilty in the Bronx several months *after* the Queens Sentence was imposed. Furthermore, the Bronx Sentence did not impose additional conditions of post-release supervision on Defendant beyond those already imposed in Queens; consequently, Petitioner's Bronx Sentence cannot be construed to "extend beyond" his one-and-a-half-to-three-year term of incarceration. *See* *Valdez*, 640 F. Supp. 2d at 515; (*see generally* Doc. No. 8-7 at 29-41 (plea hearing transcript), 42-45 (sentencing hearing transcript)). As a result, the Court concludes that Petitioner was not "in custody" for his Bronx Sentence when he filed the Petition in this action, and the Court therefore lacks subject matter jurisdiction to consider Petitioner's challenge to that sentence.

***4** In determining that Petitioner was, in fact, in custody at the time he filed the Petition, the Report did not address the many federal authorities that support Respondent's argument in support of dismissal for lack of subject matter jurisdiction, even though Respondent referenced the Tenth Circuit's decision in *Mays* in its opposition brief. (Doc. No. 8 at 8-9.) Rather, the Report concluded that Petitioner was in custody because the Bronx Sentence "merge[d] into the longer, seven-year" Queens Sentence and "is not satisfied until that longer sentence expires." (Report 12.) Tellingly, the Report relied entirely on state-court decisions outside of the habeas context for this conclusion, which the Report itself characterized as "somewhat discomfiting because it effectively lengthens the maximum term of an indeterminate sentence." (*Id.*) Specifically, the Report relied on the New York Court of Appeals decision in *People v. Ramirez*, which concluded that, pursuant to New York Penal Law § 70.30, "concurrent sentences represent a single punishment measured by the sentence for the highest grade offense into which all concurrent sentences merge." 89 N.Y.2d 444, 449, 677 N.E.2d 722 (1996). However, the provision addressed by *Ramirez*, Section 70.30, involves the "calculation of terms of imprisonment" by the New York State Department of Corrections and Community Supervision. Naturally, for the purpose of calculating the length of time the State of New York retains a prisoner in custody, it is hardly surprising that all other sentences merge into the sentence for the highest grade offense in the context of concurrent sentences. But neither *Ramirez* nor any other authorities relied on by the Report speak to when a person is "in custody" within the meaning of that term under the federal habeas statute, the "core purpose" of which is to "shorten [a] term of incarceration" in the event a petitioner "proves unconstitutionality." *Garlotte*, 515 U.S. at 47. The Court finds that interpreting the phrase "in custody" to encompass challenges brought by a prisoner who has served the duration of a shorter concurrent sentence would not advance this core purpose. To the contrary, it would "have no effect on [the state prisoner's] release date from his other conviction and sentence." *Sweet*, 345 Fed.Appx. at 482; *see also* *United States v. Al Kassar*, 660 F.3d 108, 125 (2d Cir. 2011) (instructing courts to "interpret statutes" in ways that "give effect to congressional purpose" (internal quotation marks omitted)).

Accordingly, the Court concludes that Petitioner, who had already served his entire Bronx Sentence at the time he filed the Petition, was no longer "in custody" on that sentence when he petitioned the Court for habeas relief. Because the Court lacks jurisdiction to entertain Petitioner's challenge to the Bronx Sentence, the Court dismisses the Petition. [3]

IV. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that the Petition is DISMISSED because the Court lacks subject matter jurisdiction to consider it. Because Petitioner has "not made a substantial showing that he was in custody by reason of the denial of a constitutional right," the Court will not issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c). *Finkelstein v. Spitzer*, 455 F.3d 131, 133 (2d Cir. 2006). The Clerk is respectfully directed to mail a copy of this order to Petitioner and to close this case.

SO ORDERED.

Dated: September 12, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4773130

Footnotes

1 Petitioner was also convicted in the New York Supreme Court, Nassau County, of attempted possession of a forged instrument in the second degree, for which he was sentenced to an indeterminate term of one-and-one-half to three years (the "Nassau Sentence"). (Doc. No. 8-7 at 43:1-7, 44:4-12.) Petitioner's Nassau Sentence was also to be served concurrently with his Queens County and Bronx County Sentences. (*Id.*) The record does not indicate when the Nassau Sentence was imposed, though the transcript from the Bronx Sentence reveals that Petitioner was apparently aware of its terms at his January 15, 2010 sentencing. (*Id.*)

2 In fact, this narrow exception applies only if a petitioner alleges that his current sentence was enhanced based on a prior conviction that is invalid for one of the following three reasons:"(1) there was a failure to appoint counsel; (2) a state court unjustifiably refused to rule on a constitutional claim that had been properly presented; or (3) the petitioner presents compelling evidence of actual innocence." *Valdez*, 640 F. Supp. 2d at 516; *accord* *Harrison v. Griffin*, No. 13-cv-4641 (NGG), 2014 WL 3490917, at *4 (E.D.N.Y. July 11, 2014). Since Petitioner makes no such allegation regarding the Bronx Sentence, this narrow exception does not apply here.

3 Even assuming the Court had jurisdiction to consider the Petition, the Court would still deny the Petition on the merits. While the Court rejects the Report's analysis with respect to subject matter jurisdiction, the Court finds no error in the Report's well-reasoned conclusion that Petitioner's Fourth Amendment claim is barred by *Stone v. Powell*, 428 U.S. 465 (1976), and its progeny. (Report 13-19.) In fact, even if the Court were to review the Report *de novo*, it would reach the same conclusion.

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United States District Court,
N.D. New York.

Stephen VAUGHAN, Petitioner,
v.
William LAPE, Superintendent, Marcy Correctional Facility, Respondent.

No. 9:05-CV-1323.
|
July 12, 2007.

Attorneys and Law Firms

Stephen Vaughan, Minoa, NY, pro se.

Luke Martland, Assistant Attorney General of the State of New York, Malancha Chanda, Esq., Asst. Attorney General, of Counsel, Hon. Andrew M. Cuomo, Attorney General of the State of New York, Department of Law, New York, NY, for Respondent.

DECISION and ORDER

Hon. DAVID N. HURD, United States District Judge.

***1** Petitioner, Stephen Vaughan, brought a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondent made a motion to dismiss the petition. By Report-Recommendation dated March 2, 2007, the Honorable Gustave J. DiBianco, United States Magistrate Judge, recommended that the motion to dismiss be granted and that the petition be denied and dismissed. There have been no objections made to the Report-Recommendation.

Accordingly, it is

ORDERED that

1. Respondent's motion to dismiss is GRANTED; and

2. The petition for a writ of habeas corpus is DENIED and DISMISSED in its entirety.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

REPORT-RECOMMENDATION

GUSTAVE J. DIBIANCO, Magistrate Judge.

This matter has been referred to me for Report and Recommendation by the Honorable David N. Hurd, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

Petitioner brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In this application, petitioner is challenging the sentence he received on June 20, 2000, after entering a plea of guilty to Burglary, First Degree in Onondaga County Supreme Court. Petitioner was sentenced to a determinate term of seven and one-half years, together with five years of supervised release.

Petitioner did not file a direct appeal from his sentence and conviction because he waived his right to appeal as part of his plea agreement. However, on February 12, 2003, petitioner made a motion to set aside his sentence in Onondaga County Supreme Court pursuant to N.Y. CRIM. PROC. LAW Section 440.20, claiming that his pre-sentence report contained inaccurate information. This motion was denied on April 3, 2003.

Petitioner appealed the denial of his Section 440.20 motion to the Appellate Division, Fourth Department. Although the Appellate Division granted petitioner leave to appeal, his appeal was subsequently denied on July 1, 2005. *People v. Vaughan,* 20 A.D.3d 940, 798 N.Y.S.2d 289 (4th Dept.2005). On September 30, 2005, petitioner's motion for reargument in the Fourth Department was denied, and the Court of Appeals denied petitioner's motion for leave to appeal on October 3, 2005. *People v. Vaughan,* 21 A.D.3d 1442, 801 N.Y.S.2d 555 (4th Dept.2005); *People v. Vaughan,* 5 N.Y.3d 857, 840 N.E.2d 146 (2005).

Petitioner raises a single ground in support of his petition:

> 1. The prosecution's failure to provide petitioner or his counsel with the pre-sentence report at least one

> day prior to sentencing constitutes a violation of the Fourteenth Amendment.

Respondent has filed a motion to dismiss the petition, with a memorandum of law and the pertinent state court records. (Dkt. No. 6). For the following reasons, the court recommends granting respondent's motion to dismiss the petition.

DISCUSSION

1. *Facts*

On January 23, 2000, petitioner went to his ex-girlfriend's house in Minoa, New York. The ex-girlfriend was not at home, and petitioner entered the house over the objection of her roommate. The roommate explained that the ex-girlfriend was at work. Petitioner entered the house, removed a twelve-gauge shotgun from a gun cabinet, loaded the gun with shotgun shells from his coat pocket, and sat down. Petitioner stated that he would shoot his ex-girlfriend, and then kill himself. The roommate alerted the police, and petitioner was arrested. The roommate gave a statement to police shortly after the January 2000 incident in which she said that "[h]e did not point the gun at me, but I felt threatened when he said that I could not leave." (Exhibit C to Petitioner's Memorandum of Law, included at Dkt. No. 1). During the incident, "[t]he shotgun was on his lap and was pointing right at me." *Id* .

***2** Petitioner was charged by Superior Court Information with Burglary, First Degree; Criminal Use of a Firearm, First Degree; Criminal Possession of a Weapon, Second Degree; Unlawful Imprisonment, First Degree; Reckless Endangerment, First Degree; and Criminal Contempt, Second Degree. Petitioner pleaded guilty to Burglary, First Degree in Onondaga County Supreme Court on June 2, 2000. At his plea, petitioner was represented by Attorney Kenneth Moynihan from the Hiscock Legal Aid Society. At the plea hearing, during a discussion of the negotiated seven and one-half years determinate sentence, defense counsel argued that the period of petitioner's post-release supervision should be shortened, and the judge should "... rely on the presentence report and the CCA report ....“ (p. 3 of Transcript Plea Hearing, included as Exhibit A to Petitioner's Memorandum of Law, Dkt. No. 1 ("Plea Transcript")). Attorney Moynihan characterized the length of time of post-incarceration supervised release as "the major issue." (p. 2, Plea Transcript). The judge stated that he did not anticipate shortening the period of supervised release, but that he would consider the request. *Id.*

During the plea colloquy, petitioner waived a number of rights, including the right to have his case presented to a grand jury, as well as his right to appear and testify in front of the grand jury. He agreed to be charged with Burglary, First Degree, and waived his right to a jury trial, his right to confront, cross examine, and question witnesses on his behalf, and his right to testify. Petitioner acknowledged that he understood he was pleading guilty to a felony, and waived his right to appeal "any mistakes or errors or omissions made in this court." *Id.* at 3. Petitioner admitted that he

> knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein. And when in effecting entry or while in the dwelling or immediate flight therefrom, [he] or another participant in the crime was armed with an explosive or a deadly weapon, to wit: a loaded 12 gauge shotgun.

Id. at 9. He then pleaded guilty to Burglary, First Degree. *Id.*

In the two weeks between petitioner's plea and sentencing, the Onondaga County Probation Department prepared a pre-sentence report for petitioner's sentencing.[1] At the sentencing on June 20, 2000, petitioner was represented by Attorney Robert Wells, who was substituting for Attorney Moynihan. Petitioner claims that neither he nor Attorney Wells were provided with the report prior to sentencing. Respondent admits that "[t]he presentence report contains a factual inaccuracy." (Dkt. No. 6, p. 2, fn 2).

The pre-sentence report indicates that when the roommate told petitioner that she needed to go to work, "he pointed the gun at her and told her she could not leave yet .... He then sat in a rocking chair nearby, holding the gun, and point[ed] it at [the roommate]." (Exhibit B to Petitioner's Memorandum of Law, p. 2, included at Dkt. No. 1). The roommate's actual statement was that petitioner did ***not*** point the gun at her, but that she felt threatened when he told her she could not leave. ***After*** he sat down, the gun was on petitioner's lap and was "pointing right at [her]." (Exhibit C to Petitioner's Memorandum of Law, included at Dkt. No. 1).

***3** Petitioner did not object to the factual inconsistency in the pre-sentence report at the time of sentencing. At the sentencing hearing, the judge stated, "I've ordered a presentence investigation. I've reviewed it." (p. 2 of Sentencing Hearing Transcript, included as Exhibit I to Petitioner's Memorandum of Law ("Sentencing Transcript")). That single statement was the only mention of the pre-sentence report at the sentencing hearing. It is unclear whether the pre-sentence report was given to Attorney Moynihan before the sentencing. At sentencing, petitioner did not ask for the pre-sentence report.

Attorney Wells renewed the request that the court consider a shorter period of supervised release. The judge denied the request, and stated, "given the nature of the offense and history of the defendant, I see no reason to shorten up supervised release." (Sentencing Transcript, p. 3).

Petitioner states that in March of 2002 he was involved in family court proceedings in the State of Washington.[2] At that time, petitioner claims that he became aware, for the first time, of the factual inconsistencies in the pre-sentence report when it was provided to him at that time. Petitioner states that he attempted to have the mistake corrected in the months following his discovery of the factual inconsistencies, but was unsuccessful.[3]

In February 2003, petitioner filed a motion seeking resentencing in Onondaga County Supreme Court pursuant to N.Y. CRIM. PROC. § 440.20. The motion was denied on April 3, 2003. Later that month, petitioner sought leave to appeal to the Appellate Division, Fourth Department, and in July 2003 he was granted leave to appeal. (Order of July 17, 2003, KA 03-01065, included as Exhibit F in the State Records). The Appellate Division denied petitioner's appeal on July 1, 2005. *People v. Vaughan,* 20 A.D.3d 940, 798 N.Y.S.2d 289 (4th Dept.2005). Petitioner filed a motion for reargument in the Appellate Division in July of 2005 (Exhibit L in the State Records), and one week later filed a motion for leave to appeal to the New York Court of Appeals, requesting a stay until the motion for reargument was resolved in the Appellate Division (Exhibit K in the State Records). The Appellate Division denied petitioner's motion for reargument on September 30, 2005, and the Court of Appeals denied his motion for leave to appeal on October 3, 2005. *People v.. Vaughan,* 21 A.D.3d 1442, 801 N.Y.S.2d 555 (4th Dept.2005); *People v. Vaughan,* 5 N.Y.3d 857, 840 N.E.2d 146 (2005). Petitioner filed this petition for a writ of habeas corpus on October 21, 2005.

2. *AEDPA Statute of Limitations*

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one year period of limitation on habeas corpus petitions that runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> ***4** (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The statute provides for tolling of the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

In certain exceptional circumstances, equitable tolling is also available. *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000). With this standard in mind, this court will proceed to consider when this petitioner's one year statute of limitations began to run, whether the statute had run at the time he filed his habeas petition, and whether petitioner was entitled to any type of statutory or equitable tolling of the statute.

A. Commencement of the one year period pursuant to 28 U.S.C. § 2244(d)(1)(A).

The first question that the court must answer is when did the one year statute begin to run. Section 2244(d)(1)(A) requires the court to examine when petitioner's judgment became "final." Petitioner in this case did ***not*** file a direct appeal of his sentence and conviction because he waived his right to do so. Thus, rather than examining the case from the "conclusion of direct review," the court will consider that the statute of limitations began to run from the "expiration of the time for seeking such review."

In New York, a defendant has thirty days after the "imposition of the sentence" to notify the court that he will appeal. N.Y. C.P .L. § 460.10(1)(a). Generally, the one year limitations period begins to run when the defendant's "time for filing a notice of appeal from his judgment of conviction expire[s]." *Bethea v. Girdich,* 293 F.3d 577, 578 (2d Cir.2002). *See also, Allen v. Hardy,* 478 U.S. 255, 258 n. 1 (1986) (decision becomes final "where the availability of appeal [is] exhausted ...."). Petitioner was sentenced on June 20, 2000. Thus, petitioner's conviction became final on July 20, 2000, and the one year statute of limitations began to run at that time. The statute of limitations under Subsection (A) of the AEDPA ***expired July 20, 2001.***

Petitioner's N.Y. CRIM. PROC. LAW Section 440 motion was not filed until February 12, 2003, almost ***twenty months*** after the expiration of the statute of limitations; thus this collateral motion would not act to toll the statute. The petition in this action was filed with the court on October 21, 2005, over four years after the expiration of the statute of limitations. Thus, if the statute of limitations began to run under Section 2244(d)(1)(A), this petition is untimely. Subsections (B) and (C) of Section 2244 are plainly inapplicable, and need not be addressed. Petitioner argues, however, that his petition is timely because his one year statute of limitations began to run later, under subsection (D). (Dkt. No. 1, Petitioner's Memorandum of Law, at p. 4).

B. Commencement of the one year period under 28 U.S.C. § 2244(d)(1)(D)

***5** The statute allows the limitations period to begin running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Petitioner argues that because the pre-sentence report allegedly was not disclosed to him at sentencing, the statute of limitations should not begin to run until petitioner became aware of the factual inconsistencies in the pre-sentence report in March 2002, pursuant to 28 U.S.C. § 2244(d) (1)(D). (Dkt. No. 1, Petitioner's Memorandum of Law at p. 5). Petitioner states that because he waived his right to appeal, and because he "did not possess a factual basis for the need of the pre-sentence report as required for release under state law," he did not attempt to obtain the pre-sentence report prior to March 2002. In March 2002, the family court proceedings in Washington concluded, at which time petitioner claims he was first provided with a copy of the pre-sentence report, and discovered the errors in the report.

The Second Circuit has emphasized that the standard is when the relevant facts ***could have*** been discovered, "regardless of whether petitioner actually discovers the relevant facts at a later date."[4] *Wims v. United States,* 225 F.3d 186, 188 (2d Cir.2000). "In other words, 'when evidence is newly obtained, but could have been obtained earlier [through the exercise of due diligence], the date when the evidence was actually obtained has no effect on the AEDPA limitation period." *Adams v. Greiner,* 272 F.Supp.2d 269, 274 (S.D.N.Y.2003), *quoting Duamutef v. Mazzuca,* 2002 U.S. Dist. LEXIS 4213, at *9 (S.D.N.Y.2002). While "the statute does not require the maximum feasible diligence, but, rather, only reasonable diligence," the petitioner must "reasonably pursu[e] discovering all relevant evidence concerning his defense." *Perez v. United States,* 2006 U.S. Dist. LEXIS 60111, *8-*9 (N.D.N.Y. August 15, 2006), *citing Wims v. United States,* 225 F.3d 186 at 190.

Here, the factual inconsistencies had been present in the pre-sentence report since its completion in June 2000. Due diligence required that petitioner or his counsel take notice of the Probation Department's mistakes at that time, and if they were not provided with a copy of the pre-sentence report, to request that it be provided for review. That petitioner allegedly did not believe that he could obtain the report in the nearly two years after he was convicted before he "discovered" the inconsistencies is irrelevant; he had a right to review it, and should have reviewed it, at sentencing.[5] The sentencing judge clearly stated that was taking into consideration the defendant's ***history.*** This information came from the pre-sentence report.

Due diligence required petitioner to "pursue all relevant evidence concerning his defense." *Perez,* 2006 U.S. Dist. LEXIS 60111, *9. If petitioner is correct that he was, in fact, not provided with the pre-sentence report prior to sentencing, petitioner essentially missed the window of time during which the report was available to him for review and correction.

Because the factual predicate for petitioner's claim could have been discovered prior to March 2002 (when he claims to have actually discovered the mistakes), the exception provided by 28 U.S.C. § 2244(d)(1)(D) is not available to petitioner.

3. *Equitable Tolling*

***6** Petitioner also seeks equitable tolling of two time periods within the months intervening between his discovery of the factual inconsistencies and his eventual motion for resentencing in Onondaga County Supreme Court. It is unclear exactly which time periods petitioner refers to in his Memorandum of Law. The first time period petitioner requests be equitably tolled is "for approximately thirty days" around July 2002, during the time period when petitioner attempted to correct the pre-sentence report with the Inmate Records Coordinator where he was incarcerated. (Petitioner's Memorandum of Law, at p. 5, Dkt. No. 1). It is the court's understanding that the second time period that petitioner requests be equitably tolled is from August 2002, when petitioner contacted the sentencing court to request his plea and sentencing transcripts, until December 2002, when petitioner eventually received the requested transcripts. (Memo of Law, at p. 6).

In *Smith v. McGinnis,* the Second Circuit held that AEDPA's one year statute of limitations is not a jurisdictional bar, and may, therefore, be equitably tolled. *Smith,* 208 F.3d at 17. However, "equitable tolling applies only in the 'rare and exceptional circumstance.' " *Smith,* 208 F.3d at 17 (*internal citations omitted*). Additionally, "the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll." *Id.* In another case, the Second Circuit noted the very limited contexts in which it had found "rare and exceptional" circumstances, such as "where an attorney's conduct is so outrageous and incompetent that it is truly extraordinary," and "where prison officials intentionally obstruct a petitioner's ability to file his petition by confiscating his legal papers." *Doe v. Menefee,* 391 F.3d 147 (2d Cir.2004), *referring to* *Baldayaque v. United States,* 338 F.3d 145 (2d Cir.2003) and *Valverde v. Stinson,* 224 F.3d 129 (2d Cir.2000).

In this case, both of the time periods that petitioner requests be equitably tolled occurred ***after*** the statute of limitations period had run. Petitioner took no action during the limitations period. It is therefore irrelevant whether there are additional periods of time ***after the limitations period*** that could be equitably tolled. Thus, no period of equitable tolling applies, and this petition may be dismissed as time barred.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that respondent's motion to dismiss (Dkt. No. 6) be **GRANTED,** and **RECOMMENDED,** that the petition be **DENIED and DISMISSED.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(e), 72.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2042471

Footnotes

1 Probation Officer Marylou Goudy and Probation Officer Donald R. Anguish signed the report on June 15, 2000.

2 No documents have been included in the record that relate to the family court proceedings in Washington. It is not clear what kind of proceeding occurred, if petitioner was physically present for any part of it, or why the pre-sentence report was relevant.

3 Petitioner's alleged attempts to correct the information included contacting the sentencing judge and the Inmate Records Coordinator at his facility. When he was unable to correct the pre-sentence report through those channels, he claims that he advised the sentencing court in August 2002 that he would file a N.Y. CRIM. PROC. LAW Section 440 motion, but needed the transcripts of his plea and sentencing hearings. Between August and December 15, 2002, petitioner states that he wrote to the Court Reporter and the sentencing court several times to request the transcripts, and received them on December 15, 2002.

4 *Wims v. United States* was a habeas corpus case brought under 28 U.S.C. § 2255. The statute of limitations appears in the statute itself, and has exactly the same language as the language of 28 U.S.C. § 2244(d)(1)(D).

5 Although unnecessary to the decision in this case, the court notes that it is unclear what relevance the factual inconsistences bring to bear on petitioner's sentence. Presumably, because petitioner had a negotiated determinate sentence (negotiated before the preparation of the pre-sentence report), the inconsistencies could only impact the period of post-incarceration supervised release. Here, the judge stated his disinclination for shortening that period at the plea hearing, ***before*** the preparation of the report, at petitioner's plea hearing. It is unclear whether the pre-sentence report had any impact on the sentence other than to confirm the trial judge's original belief about the period of supervised release. That the incarceration portion and the post-incarceration portions of the sentence remained the same before and after the preparation of the pre-sentence report indicates that the sentencing judge, while relying on the pre-sentence report, did not find any information in the report that would lead him to change his consideration of the factors in making his sentencing determination in the two weeks between the plea and sentencing hearings. Furthermore, in light of the factual inconsistency, the sentencing judge denied petitioner's motion for resentencing.

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2017 WL 318848
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Jerry GILLARD, Petitioner,
v.
Thomas J. STICHT, Superintendent, Respondent.

9:16-CV-513 (MAD/ATB)
|
Signed 01/23/2017

Attorneys and Law Firms

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MEMORANDUM-DECISION AND ORDER

Mae A. D'Agostino, U.S. District Judge:

I. INTRODUCTION

***1** Petitioner, an inmate currently incarcerated at Wyoming Correctional Facility, filed this petition on April 14, 2016 seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, as a *pro se* litigant. *See* Dkt. No. 1. In his petition for writ of habeas corpus, Petitioner argues that his sentence imposed by the Onondaga County Court in 2006 was illegal, that the State of New York miscalculated his aggregate prison term, and that the state courts have violated his right against double jeopardy by refusing to correct the sentence. *See id.* at 5-6.

On September 29, 2016, Magistrate Judge Baxter issued a Report-Recommendation, recommending that the petition be denied and dismissed on the grounds that the petition was filed outside of the one-year statute of limitation period as required under 28 U.S.C. § 2244(d)(1). *See* Dkt. No. 16. On October 13, 2016, Petitioner filed his objections to Magistrate Judge Baxter's Report-Recommendation. *See* Dkt. No. 17. In his objections, Petitioner contends that his petition is not time-barred because "the State's recent miscalculation that the sentence had fully expired did not exist when the Petitioner could have brought an earlier Petition." *See id.* at 2.

II. BACKGROUND

Please refer to the Report-Recommendation issued by Magistrate Judge Baxter on September 29, 2016 for the relevant facts and procedural history. *See* Dkt. No. 16 at 3-7.

III. DISCUSSION

A. Statute of Limitations

The enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") brought about significant new limitations on the power of a federal court to grant habeas relief to a state prisoner under 28 U.S.C. § 2254. One of the most significant changes to a prisoner's litigation landscape under the AEDPA was the institution of a one-year statute of limitations applicable to habeas petitions filed after April 24, 1996. *See* 28 U.S.C. § 2244(d). The law now provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *Cook v. New York State Div. of Parole*, 321 F.3d 274, 279-80 (2d Cir. 2003). As the Supreme Court observed in *Duncan v. Walker*, 533 U.S. 167 (2001), this statute of limitation "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179; *see also Strauss v. Yelich*, No. 09-CV-0341, 2010 WL 1972781, *3 (N.D.N.Y. May 17, 2010)(citing *Duncan,* 533 U.S. at 179).

***2** The one year period generally begins to run from the date on which the state criminal conviction became final by the conclusion of direct review or by the expiration of the time to seek direct review. 28 U.S.C. § 2244(d)(1)(A). If a direct appeal is filed, the judgment of conviction becomes final ninety days after the date that the New York Court of Appeals denies leave to appeal. *Williams v. Artuz*, 237 F.3d 147, 150-51 (2d Cir. 2001).

The AEDPA's statute of limitations contains a tolling provision which can serve to mitigate the potential harshness of the one-year filing requirement. *See* 28 U.S.C. § 2244(d)(2). This provision "balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect only to properly filed application[s] ..." *Pace v. Diguglielmo*, 544 U.S. 408, 427 (2005) (quoting *Duncan*, 533 U.S. at 179-80). It is well-settled that this savings provision only tolls the statute of limitations during the pendency of a properly-filed state court proceeding; it does not "reset" the one-year limitation period. *See* *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Duell v. Conway*, No. 9:07-CV-1321, 2010 WL 2695641, *4 (N.D.N.Y. May 6, 2010) (citation omitted).

The AEDPA provides that the one year limitations period will be tolled while a "properly filed" state court post-conviction motion is pending and only if it was filed within the one-year limitations period. 28 U.S.C. § 2244(d)(2). The tolling provision excludes from the limitations period only the time that the motion remained undecided, including the time during which an appeal from the denial of the motion was taken. *See* *Bennett v. Artuz*, 199 F.3d 116, 120-21 (2d Cir. 1999), *aff'd*, 531 U.S. 4 (2000).

Although the AEDPA does not provide that the statute of limitations may be tolled for any reasons other than the pendency of a state post-conviction motion, in "extraordinary circumstances" the court may equitably toll the limitations period. *Holland v. Florida*, 560 U.S. 631, 649 (2010). In order to warrant equitable tolling, the petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Id.* (quoting *DiGuglielmo*, 544 U.S. 408, 418 (2005)) (internal quotation marks omitted). The Second Circuit has also determined that courts should consider a claim of "actual innocence" as a basis for excusing late filing under the AEDPA. *See* *Rivas v. Fischer*, 687 F.3d 514, 548 (2d Cir. 2012).

B. Application

In his objections to Magistrate Judge Baxter's Report-Recommendation, Petitioner contends that his petition is not time-barred and that he has complied with the one-year statute of limitations period imposed by the AEDPA. *See* Dkt. No. 17 at 2. Petitioner seeks to have this Court declare that his 2006 sentence was illegal, his plea was involuntary, and his 2006 conviction should be vacated. Respondent argues that the statute of limitations has run.

In the present case, Petitioner was sentenced for the 2006 conviction on March 1, 2006. *See* Dkt. No. 14 at 8. Petitioner did not file a direct appeal, so his conviction became final on March 31, 2006, thirty days after the expiration of the opportunity to file a direct appeal. N.Y. Crim. Proc. Law § 460.10(1)(a). Thus, the statute of limitations started running on March 31, 2006 and expired one year later on March 31, 2007. Giving Petitioner the benefit of the prison mailbox rule, this petition was "filed" on April 8, 2016, more than nine years after the statute of limitations expired.

***3** The law is clear that Petitioner's 2013 section 440.10 motion does not revive the expired statute of limitations. *See*

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Robert v. Artus, No. 16-CV-2055, 2016 WL 2727112, *2 (E.D.N.Y. May 5, 2016) (citing *Smith v. McGinnis*, 208 F.3d 13, 16 (2d Cir. 2000); *Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999)). Since Petitioner's section 440 motion did not revive the statute of limitations, which expired on March 31, 2007, the petition is untimely.

In his reply, Petitioner appears to argue that the statute of limitations has not run because "the factual basis for the Petitioner's present claim that his sentence has yet to expire under New York law ... did not EXIST until the State's miscalculation of the Petitioner's aggregate prison sentence...." Dkt. No. 15 at 2. Petitioner appears to be arguing that a different date should be used for the commencement of the running of the statute of limitations on this case. Petitioner may be trying to argue that the Court should use the date on which the factual predicate for the claim or claims presented could have been discovered through the exercise of due diligence because his claim did not "exist" until the State "miscalculated" his sentence. 28 U.S.C. § 2244(d)(1)(D).

Additionally, in Petitioner's objections to Magistrate Judge Baxter's Report-Recommendation, Petitioner seems to argue that the statute of limitations has not run because "[t]he Petitioner's 2006 sentence has yet to expire under New York law because all of the Petitioner's sentences aggregate into one term of imprisonment therewith a maximum term of LIFE pursuant to the Petitioner's 2003 indeterminate sentence of 3 years to LIFE ... [and] [a]ll of the Petitioner's sentences (2003, 2006 & 2013) are consecutive by operation of law ..." Dkt. No. 17 at 2.

As Magistrate Judge Baxter correctly determined, Petitioner's arguments have no merit. Petitioner does not include the date that he believes the "State miscalculated" his sentence. Petitioner was well aware when he was sentenced on the 2006 conviction that he had a prior felony and should have received a greater period of post-release supervision. He was also well aware of any claim that he was "coerced" into pleading guilty by his wife's threat of a divorce. The fact that Petitioner's current "sentence" for his 2013 conviction has not expired does not change the fact that the statute of limitations has expired with respect to this petition.

Petitioner cites *James v. Walsh*, 308 F.3d 162 (2d Cir. 2002) and *Cimino v. Conway*, No. 6:08-CV-6318, 2016 WL 1085546 (W.D.N.Y. Mar. 21, 2016) in support of his argument. In both *James* and *Cimino*, the issue was whether the petition was "second or successive." *Id.* In *James*, the court found that the petition was not second or successive because he was arguing that a current incorrect application of credit for time served violated his constitutional rights, and that the claim did not exist when he brought his previous petition because "James could not have argued that he was in custody in violation of laws of the United States before the time when, according to his calculations, he could have been released." *James,* 308 F.3d at 168. The issue in *James* was not whether the statute of limitations had run. [1] In this case, Petitioner is challenging his 2006 conviction for reasons that existed in 2006 and that he could have raised within the statute of limitations, regardless of how he believes the 2006 conviction is currently affecting his sentence.

***4** In *Cimino*, the court found that the petitioner's new claim could not have been raised in his prior petition because it did not "exist" until one of his prior convictions had been reversed. *Cimino*, 2016 WL 1085546, at *3. *Cimino* is inapplicable to this case because Petitioner's claim that his 2006 conviction was illegal existed prior to 2013 when he brought his section 440.10 motion.

Petitioner also cites *Smalls v. Batista*, 22 F. Supp. 2d 230 (S.D.N.Y. 1998). In *Smalls*, the court found that the petitioner was still "in custody" for purposes of habeas jurisdiction when the petitioner was serving consecutive sentences. *Id.* The court held that when a petitioner was serving "consecutive sentences," he was in custody under any one of them. The issue was not the statute of limitations. In this case, Petitioner was released in 2010 and he completely finished serving his sentence in 2012 upon the expiration of his term of post-release supervision. Therefore, as Magistrate Judge Baxter correctly determined, Petitioner's sentence from his 2013 conviction is not "consecutive" to his 2006 sentence.

The Court has considered whether the statute should be equitably tolled and finds that there is no basis in the record for such tolling. Under 28 U.S.C. § 2244(d), a petitioner is allowed equitable tolling where it can be shown that (1) he has been diligently pursuing his rights; and (2) that some extraordinary circumstance prohibited him from filing his petition in a timely manner. *See* *Holland v. Florida*, 560 U.S. 631 (2010). As Magistrate Judge Baxter correctly determined, Petitioner has not shown that he was pursuing his rights diligently or that any extraordinary circumstances stood in his way. [2]

As Magistrate Judge Baxter correctly determined, Petitioner's conviction became final on March 31, 2006 and the AEDPA's one-year statute of limitations expired on March 31, 2007. Further, the Report-Recommendation correctly determined that Petitioner has failed to present any reason why the statute of limitations should be tolled. As such, the Court grants Respondent's motion and dismisses the petition as untimely.

C. Certificate of Appealability

The Court notes that 28 U.S.C. § 2253(c)(1) provides in relevant part that, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" [3] 28 U.S.C. § 2553(c)(1). A court may only issue a Certificate of Appealability "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Since Petitioner has failed to make such a showing with regard to any of his claims, the Court declines to issue a Certificate of Appealability in this matter. *See* *Hohn v. United States*, 524 U.S. 236, 239-40 (1998) (quotation omitted).

IV. CONCLUSION

***5** Accordingly, the Court hereby

ORDERS that Magistrate Judge Baxter's September 29, 2016 Report-Recommendation is **ADOPTED in its entirety** for the reasons set forth herein; and the Court further

ORDERS that the petition for a writ of habeas corpus is **DENIED and DISMISSED**; and the Court further

ORDERS that no Certificate of Appealability shall be issued with respect to any of Petitioner's claims; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Respondent's favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 318848

Footnotes

1 Petitioner also cites *McCullough v. Fischer*, No. 13-CV-1176, 2014 WL 576260 (W.D.N.Y. Feb. 10, 2014). The court in *McCullough* discusses *James* to determine whether the petition was second or successive. *Id.* at *5. The issue was whether the petitioner's claim "existed" when he filed his first petition. *Id.* Even assuming that these cases apply in this Petitioner's case, it is clear that Petitioner's "claim" that his 2006 sentence was invalid, "existed" at the time he was sentenced in 2006, and the statute of limitations would have started running when the conviction became final, not at some later time.

2 As noted in the Report-Recommendation, Petitioner has withdrawn any reliance on "actual innocence" and he does not raise that basis for his late filing. *See* Dkt. No. 15 at 1.

3 Rule 22 of the Federal Rules of Appellate Procedure also provides that an appeal may not proceed in such actions "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1).

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NOT FOR PUBLICATION
United States District Court, E.D. New York.

Rico ROBERTS, Petitioner,
v.
Superintendent ARTUS, Respondent.

16-CV-2055 (AMD)
|
Signed May 4, 2016
|
Filed 05/05/2016

Attorneys and Law Firms

Rico Roberts, Attica, NY, pro se.

MEMORANDUM AND ORDER

***1** DONNELLY, United States District Judge

Petitioner Rico Roberts, appearing *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Court has conducted an initial consideration of this petition and, for the reasons set forth below, determined that the petition appears to be time-barred by the one year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Court directs the petitioner to show cause within 30 days of the entry of this Memorandum and Order why the petition should not be dismissed as time-barred.

BACKGROUND

The petitioner was convicted on July 25, 2007, in the Supreme Court of the State of New York, Kings County, of murder in the second degree and attempted robbery in the first degree and he was sentenced to sixteen years to life imprisonment upon a jury verdict. (Pet. at ¶¶ 1-6.) On July 28, 2009, the Appellate Division affirmed the conviction. *People v. Roberts*, 64 A.D.3d 796 (2d Dep't 2009). The petitioner states that he sought further review by the State of New York Court of Appeals, but he does not provide the date he filed for leave to appeal or the date of the New York Court of Appeals decision. (*See* Pet. at ¶ 9(g).) The petitioner did not file a writ of *certiorari* to the United States Supreme Court. (Pet. at ¶ 9(h).)

DISCUSSION

With the passage of the AEDPA on April 24, 1996, Congress set a one-year statute of limitations for the filing of a petition for a writ of habeas corpus by a person in custody pursuant to a state court conviction. 28 U.S.C. § 2244(d)(1). The one-year period runs from the date on which one of the following four events occurs, whichever is latest:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(l)(A)-(D). Under subsection (A),[1] the instant petition may be untimely. A conviction becomes final upon expiration of the 90-day period for seeking a writ of *certiorari*. *Saunders v. Senkowski*, 587 F.3d 543, 549 (2d Cir. 2009); *Williams v. Artuz*, 237 F.3d 147, 150-51 (2d Cir. 2001). In order to be timely, this petition must be filed in this Court on or before the one year limitations period expires. Because the petitioner does not provide the date that the State of New York Court of Appeals denied his application for leave to appeal, *see* Pet. at ¶ 9(g), the Court cannot determine when the petitioner's conviction became final. Therefore, unless the petitioner can show that the one-year statute of limitations period has not expired or should be tolled, the petition is barred by 28 U.S.C. § 2244(d) as untimely.

Tolling

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A. Statutory Tolling

***2** In calculating the one-year statute of limitations period, "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted." 28 U.S.C. § 2244(d)(2). The post-conviction proceeding, however, does not start the one-year period to run anew. Section 2244(d)(2) merely excludes the time a post-conviction motion is under submission from the calculation of the one-year period of limitation. *Smith v. McGinnis*, 208 F.3d 13, 16 (2d Cir. 2000) (*per curiam*); *see also* *Evans v. Senkowski*, 228 F.Supp.2d 254, 260 (E.D.N.Y. 2002) (explaining that the AEDPA's tolling provision "stops, but does not reset, the clock from ticking on the time in which to file a habeas petition. It cannot revive a time period that has already expired.") (citing *Smith*, 208 F.3d at 17). "[A] state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999); *see also* *Carey v. Saffold*, 536 U.S. 214, 219-21 (2002).

Here, the petitioner filed a post-conviction motion under N.Y. Crim. Proc. Law 440 ("440 motion") on January 22, 2014 which appears to have been denied on December 4, 2014 by the trial court, affirmed by the appellate court on April 8, 2015, and leave denied by the court of appeals on July 29, 2015. (*See* Pet. at ¶ 11(a); Unmarked Exs.) Because it is unclear when the conviction became final, the Court cannot determine whether the 440 motion can be counted for statutory tolling purposes under § 2244(d)(2). If the 440 motion was filed after the one-year statute of limitations period expired, it cannot be counted for purposes of statutory tolling. *See* *Doe v. Menefee*, 391 F.3d 147, 154 (2d Cir. 2004) (a state collateral proceeding commenced after the statute of limitations has run does not reset the limitations period); *see also* *Diaz v. Kelly*, 515 F.3d 149, 152 (2d Cir. 2008) (finding that where the petitioner filed a 440 motion after the one-year limitations period had already expired, the "subsequent state court collateral attack [did] not toll the federal limitations period").

B. Equitable Tolling

The limitations period may also be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 649 (2010) ("[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." (internal quotations and citations omitted)); *Harper v. Ercole*, 648 F.3d 132, 136-38 (2d Cir. 2011). The Second Circuit has established a "high bar to deem circumstances sufficiently 'extraordinary' to warrant equitable tolling." *Dillon v. Conway*, 642 F.3d 358, 363 (2d Cir. 2011). Situations that might justify equitable tolling include confiscation of a petition, an appeals court failure to inform a petitioner that his appeal was denied, or a lawyer's failure to file a habeas petition when explicitly directed to do so. *Dillon*, 642 F.3d at 363 (citations omitted). The petitioner is responsible for showing that such circumstances exist. *Muller v. Greiner*, 139 Fed.Appx. 344, 345 (2d Cir. 2005) (citing *Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001)).

CONCLUSION

Accordingly, the Court directs the petitioner to show cause by written affirmation,[2] within 30 days from entry of this Memorandum and Order, why the petition should not be dismissed as time-barred by the AEDPA's one year statute of limitations. *Day v. McDonough*, 547 U.S. 198, 209 (2006); *Acosta v. Artuz*, 221 F.3d 117, 124 (2d Cir. 2000).

In the affirmation, the petitioner must provide the date he sought review from the State of New York Court of Appeals of the Appellate Division's decision affirming his conviction on July 28, 2009 and the date of the State of New York Court of Appeals decision. The petitioner's current exhibits only relate to his post-conviction motion and do not relate to the direct appeal of his conviction.

***3** If available, the petitioner may include as exhibits any decisions he has related to his direct appeal. If the 440 motion was filed after the statute of limitations expired and statutory does not apply, the petitioner may also include any facts to support equitable tolling of the limitations period.

No response or answer shall be required at this time from respondent and all further proceedings shall be stayed for 30

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days or until the petitioner has complied with this Order. If the petitioner fails to comply with this Order within the time allowed, the instant petition shall be dismissed as time-barred under 28 U.S.C. § 2244(d).

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 2727112

Footnotes

1 The petitioner does not state any facts to conclude that subsections (B)-(D) are applicable.
2 An affirmation form is attached to this order for the petitioner's convenience.

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2018 WL 4660379
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Francine J. GEORGE, Plaintiff,
v.
PROGRESSIVE INS. AGENCY, INC., et al., Defendants.

5:18-CV-1138 (DHN/ATB)
|
Signed 09/28/2018

Attorneys and Law Firms

FRANCINE J. GEORGE, Plaintiff pro se.

ORDER and REPORT-RECOMMENDATION

Hon. Andrew T. Baxter, U.S. Magistrate Judge

***1** The Clerk has sent to the court for review a complaint, together with an application to proceed in forma pauperis ("IFP"), filed by pro se plaintiff Francine J. George. (Dkt. Nos. 1, 2).

I. IFP Application

Plaintiff declares in her IFP application that she is unable to pay the filing fee. (Dkt. No. 2). Although plaintiff has indicated that she has no money at all from any sources, it is unclear how plaintiff can have absolutely no money. Plaintiff may not have understood that she was required to list money from any sources, including public assistance or other funds. In any event, the court finds for purposes of this Order and Report-Recommendation that plaintiff is financially eligible for IFP status.

However, in addition to determining whether plaintiff meets the financial criteria to proceed IFP, the court must also consider the sufficiency of the allegations set forth in the complaint in light of 28 U.S.C. § 1915, which provides that the court shall dismiss the case at any time if the court determines that the action is (i) frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915 (e)(2)(B)(i)-(iii).

In determining whether an action is frivolous, the court must consider whether the complaint lacks an arguable basis in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Dismissal of frivolous actions is appropriate to prevent abuses of court process as well as to discourage the waste of judicial resources. *Neitzke*, 490 U.S. at 327; *Harkins v. Eldridge*, 505 F.2d 802, 804 (8th Cir. 1974). Although the court has a duty to show liberality toward *pro se* litigants, and must use extreme caution in ordering *sua sponte* dismissal of a *pro se* complaint before the adverse party has been served and has had an opportunity to respond, the court still has a responsibility to determine that a claim is not frivolous before permitting a plaintiff to proceed. *Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000) (finding that a district court may dismiss a frivolous complaint *sua sponte* even when plaintiff has paid the filing fee).

To survive dismissal for failure to state a claim, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 555). The court will now turn to a consideration of the plaintiffs' complaint under the above standards, keeping in mind that pro se pleadings are interpreted to raise the strongest arguments they suggest. *See* *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007).

II. Facts

Plaintiff has sued Progressive Insurance Agency, Inc. ("Progressive"), Attorney Neil Gingold, a "John Doe" attorney, and two other "John Doe" defendants. (Complaint ("Compl.")) (Dkt. No. 1). Plaintiff states that Progressive Insurance Agency, Inc.'s "insurer" [1] put his camper on plaintiff's property and started a fire, apparently causing the destruction of plaintiff's home. (Compl. ¶ 8). Plaintiff states that defendants John Doe 2 and John Doe 3 retained defendant Attorney Gingold and defendant Attorney John Doe, without plaintiff's knowledge or consent. (Compl. ¶ 8).

***2** Plaintiff claims that defendant Gingold and defendant Attorney Doe each contacted defendant Progressive "on behalf of plaintiff" without her knowledge and consent, and they "falsely misrepresented plaintiff."[2] Plaintiff claims that all the defendants made "false representations." (Compl. ¶ 13). Plaintiff alleges that when defendant Gingold contacted Progressive on June 3, 2015, he spoke to the Fire Supervisor about the "above incident" and stated that he was the "legal representative for Plaintiff." (Compl. ¶ 13(a)). Plaintiff claims that on June 4, 2015, defendant Attorney Doe did the same thing. These representations were "false." (Compl. ¶¶ 13(a), 13(b)). Plaintiff alleges that "at that time," Progressive told plaintiff that the company "failed to attain a formal document of retainer from Attorney Neil Gingold and Attorney John Doe." (Compl. ¶ 13(c)). Plaintiff states that she never retained either of the attorneys. (Compl. ¶ 13(d)).

Plaintiff states that Progressive told both attorneys that "insurer Mauri George did not possess a policy providing for damages to property." (Compl. ¶ 13(f)). Plaintiff claims that she discovered this "misrepresentation" in August of 2018, and she called defendant Gingold, who "became extremely defensive and stated he never represented Plaintiff Francine J. George." (Compl. ¶ 13(g)). Plaintiff states that she has never been able to locate Attorney Doe. (Compl. ¶ 13(h)).

Plaintiff states that she informed the Attorney Grievance Committee for the Fifth Judicial District that defendant Gingold falsely misrepresented plaintiff in "this matter," but that the Committee declined to investigate her complaint "in violation of applicable law. (Compl. ¶ 13(i)-13(k)). Plaintiff alleges that the Grievance Committee delayed the matter, causing plaintiff great stress, and "as a proximate result" of all the defendants' conduct, plaintiff has suffered damages in an amount to be determined at trial. (Compl. ¶ 13(m)). Plaintiff claims that John Does 2 and 3 retained defendant Gingold and Attorney Doe without plaintiff's knowledge and consent and states that all the defendants attempted to obtain property and money in excess of one million dollars from plaintiff.

III. Jurisdiction

A. Legal Standards

Subject matter jurisdiction can never be waived or forfeited. *ACCD Global Agriculture, Inc. v. Perry*, No. 12 Civ. 6286, 2013 WL 840706, at *1 (S.D.N.Y. March 1, 2013) (quoting *Dumann Realty, LLC v. Faust,* No. 09 Civ. 7651, 2013 WL 30672, at *1 (S.D.N.Y. Jan. 3, 2013)) (citing *Gonzalez v. Thaler*, ––– U.S. ––––, 132 S. Ct. 641, 648 (2012); *Henderson ex rel. Henderson v. Shinseki*, ––– U.S. ––––, 131 S. Ct. 1197, 1202 (2011)). Federal courts are mandated to examine their own jurisdiction sua sponte at every stage of the litigation. *Id. See* *In re Tronox, Inc.*, 855 F,3d 84, 85 (2d Cir. 2017) (federal courts have an independent obligation to consider the presence or absence of subject matter jurisdiction sua sponte).

> A federal court exercises limited jurisdiction pursuant to Article III of the Constitution. It has subject matter jurisdiction over claims in which: (1) there is a 'federal question' in that a colorable claim arises under the 'Constitution, laws or treaties of the United States,' 28 U.S.C. § 1331; and/or if (2) there is complete "diversity of citizenship" between each plaintiff and all defendants and a minimum of $75,000 in controversy, 28 U.S.C. § 1332.

Gonzalez v. Ocwen Home Loan Servicing, 74 F. Supp. 3d 504, 511-12 (D. Conn. 2015) (quoting *Da Silva v. Kinsho International Corp.*, 229 F.3d 358, 363 (2d Cir. 2000) (delineating two categories of subject matter jurisdiction) (footnote omitted)), *reconsideration denied*, No. 3:14-CV-53, 2015 WL 2124365 (D. Conn. May 6, 2015).

B. Application

In this case, plaintiff alleges that she is bringing this action "pursuant to 176.30 Insurance Fraud in the First Degree. (Compl. ¶ 2). Plaintiff is referring to a New York State Penal Law statute. N.Y. Penal Law § 176.30. Plaintiff has not stated any other basis for federal question jurisdiction. Thus, she has not alleged jurisdiction under 28 U.S.C. § 1331 because she has not stated a claim based on the Constitution, laws, or treaties of the United States.

***3** With respect to diversity, plaintiff alleges that she and all the defendants are citizens of New York State. Although she refers to Progressive as a "foreign" corporation, she then states that Progressive is "incorporated in the State of New York." A corporation is a citizen of, inter alia, the state in which it is incorporated. 28 U.S.C. § 1332(e)(1). Thus, as described in the complaint, Progressive is a citizen of New York. Even if Progressive were not a citizen of New York State, diversity jurisdiction would not exist because all the other defendants are citizens of New York, and thus, there would not be "complete diversity" as required under section 1332. Thus, this court has no diversity jurisdiction to adjudicate plaintiff's claims. There is no other basis upon

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which plaintiff may bring her claims, and thus, this court has no subject matter jurisdiction to adjudicate plaintiff's case.

IV. Criminal Law Offenses

A. Legal Standards

There is no private right of action to enforce either state or federal criminal statutes. *Carvel v. Ross*, No. 09-Civ. 722, 2011 WL 856283, at *11-12 (S.D.N.Y. Feb. 6, 2011) (citing *inter alia* *Abrahams v. Incorporated Village of Hempstead*, No. 08-CV-2584, 2009 WL 1560164, at *8 (E.D.N.Y. June 2, 2009) (dismissing civil suit for perjury because there is no private right of action for perjury under New York Law)).

B. Application

In addition to the lack of jurisdiction noted above, the court must point out that plaintiff asserts that she is bringing this action "pursuant to 176.30 Insurance Fraud in the First Degree." (Compl. ¶ 2). Section 176.30 is a section of the New York Penal Law which describes criminal insurance fraud. There is no private right of action under the New York State Penal Law. [3] Thus, plaintiff may not bring an action for "Insurance Fraud in the First Degree."

V. Opportunity to Amend

A. Legal Standard

Generally, when the court dismisses a pro se complaint *sua sponte*, the court should afford the plaintiff the opportunity to amend at least once, however, leave to re-plead may be denied where any amendment would be futile. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993).

B. Application

Because this court has no subject matter jurisdiction, the court must recommend dismissing the action without prejudice. *Hollander v. Garrett*, 710 F. App'x 35, 36 (2d Cir. 2018). This court has serious doubts about whether plaintiff can amend to assert any form of federal jurisdiction over the situation that plaintiff describes in her complaint. However, because the court must recommend dismissal without prejudice, plaintiff may be given an opportunity to amend her complaint. Any amended complaint should be a complete pleading, must supercede the original, and must not incorporate any facts from the original complaint. In addition, any amended complaint must assert a proper basis for jurisdiction in federal court. Plaintiff is also free to bring her claims in New York State Court.

The court must also note that if plaintiff chooses to file an amended complaint, she should properly complete a new motion to proceed IFP, in which she should include information regarding any income that she might have, including any public assistance benefits or money that she receives from private individuals for her living expenses. Finally, as plaintiff was informed by Text Notice, dated September 21, 2018, the Clerk's Office cannot issue summonses for "John Doe" parties. If plaintiff chooses to amend her complaint, she should attempt to ascertain their identities.

***4**

WHEREFORE, based on the findings above, it is

ORDERED, that plaintiff's motion to proceed IFP (Dkt. No. 2) is **GRANTED FOR PURPOSES OF FILING ONLY**, and it is

RECOMMENDED, that this action be **DISMISSED SUA SPONTE WITHOUT PREJUDICE** for lack of subject matter jurisdiction, and it is

RECOMMENDED, that if the District Court adopts this recommendation, plaintiff be given **FORTY-FIVE (45) DAYS** to file an amended complaint, and if plaintiff files an amended complaint, the court may direct the Clerk to return the proposed amended complaint to me for my review, and it is

RECOMMENDED, that if plaintiff fails to file an amended complaint within the time allotted by the District Judge or request an extension of time to do so, the action be dismissed without prejudice without further order of the court, and it is

ORDERED, that the Clerk of the Court serve a copy of this Order and Report-Recommendation on plaintiff by regular mail.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE**

REVIEW. *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993)(citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72.

All Citations

Not Reported in Fed. Supp., 2018 WL 4660379

Footnotes

1 The court assumes that plaintiff means the "insured" because the "insurer" would be Progressive.

2 Defendant Gingold allegedly contacted defendant Progressive on June 3, 2015 and defendant Attorney Doe allegedly contacted defendant Progressive on June 4, 2015. (Compl. ¶¶ 10, 11).

3 To the extent that the court could interpret plaintiff's action as a civil action based on common law fraud, there is still no jurisdiction to adjudicate plaintiff's claims. Common law fraud is a New York State Law claim. *See* *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (describing the elements of fraud under New York Law). Without a basis for diversity jurisdiction, this court would be unable to consider such a claim. If plaintiff had alleged a basis for federal question jurisdiction, the court could entertain a supplemental state law claim in certain circumstances. 28 U.S.C. § 1367. However, as discussed above, there is no federal question jurisdiction in the first instance.

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2011 WL 856283
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Pamela CARVEL, Plaintiff,
v.
Leonard ROSS, Ross & Matza, Eve Markewich, Markewich & Rosenstock, Blank Rome, Frank Streng, McCarthy Fingar, Joel Arnou, Anthony Scarpino, John/Jane Doe 1–20, Doe Co. 1–20, Defendants.

No. 09 Civ. 0722(LAK)(JCF).
|
Feb. 16, 2011.

REPORT AND RECOMMENDATION

JAMES C. FRANCIS IV, United States Magistrate Judge.

***1** TO THE HONORABLE LEWIS A. KAPLAN, U.S.D.J.: Pamela Carvel brings this action against four attorneys, their current and former firms, and the Westchester County Surrogate, alleging that they acted, both alone and in concert, to violate her constitutional rights and deprive her of monies that she is owed. Ms. Carvel seeks substantial monetary damages, along with costs, attorneys' fees, and declaratory relief. Three separate groups of defendants have filed motions to dismiss the plaintiff's claims pursuant to Rules 8(a)(2), 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, I recommend that these motions be denied with respect to the plaintiff's claim for breach of contract against Joel Aurnou, Frank Streng, and McCarthy Fingar LLP; otherwise, I recommend that the motions be granted and the remainder of the plaintiff's claims be dismissed.

Background

This lawsuit is the latest sally in a long-fought battle between Ms. Carvel and various other individuals and entities for control of the assets left by Thomas Carvel, the late ice cream magnate, and his wife, Agnes. For the sake of brevity, I will summarize here only those facts most relevant to the instant proceeding. A more detailed history of Ms. Carvel's involvement with the estates of Thomas and Agnes Carvel can be found in Judge Michael H. Dolinger's Report and Recommendation of May 7, 2010, adopted at *Thomas and Agnes Carvel Foundation v. Carvel,* ––– F.Supp.2d ––––, No. 09 Civ. 5083, 2010 WL 3303777 (S.D.N.Y. Aug. 20, 2010).

A. *Thomas and Agnes Carvel*

Pamela Carvel is the niece of Thomas and Agnes Carvel. (Amended Complaint and Demand for Jury Trial ("Am.Compl."), ¶¶ 3, 45). In 1988, Thomas and Agnes Carvel executed mirror-image wills along with a contract binding the surviving spouse to place his or her assets in trust for life, with the remainder to be left to the Thomas and Agnes Carvel Foundation (the "Foundation"), a charitable organization. (Approved Judgment of the High Court of Justice, Chancery Division dated June 11, 2007 ("6/11/07 Judgment"), attached as Exh. F to Affidavit of Joseph J. Brophy dated Oct. 12, 2009 ("Brophy 10/12/09 Aff."), ¶ 4). Thomas Carvel died in 1990, and in April 1991 Agnes Carvel established the Agnes Carvel 1991 Trust (the "1991 Trust"). (Am. Compl., ¶ 46; The Agnes Carvel 1991 Trust Agreement dated April 22, 1991 ("1991 Trust Agreement"), attached as Exh. V to Affidavit of Leonard M. Ross dated Sept. 27, 2010 ("Ross 9/27/10 Aff.")). The 1991 Trust had two enumerated purposes: first, to pay Agnes Carvel an income for the remainder of her life; and second, to pay for the "funeral expenses, debts and the expenses of administering [Agnes Carvel's] estate" upon her death. (1991 Trust Agreement at 1). The remainder of the 1991 Trust was to be left either to the Foundation or to another charitable organization chosen by its trustees. (1991 Trust Agreement at 2).

***2** Following disputes over the proper disposal of Thomas Carvel's estate, Agnes Carvel executed a new will in 1995, naming the plaintiff, Pamela Carvel, as her personal representative and leaving her residuary estate to a Florida charitable foundation cofounded and led by Ms. Carvel. (Last Will and Testament of Agnes Carvel dated July 7, 1995 ("Agnes Carvel Will"), attached as Exh. Q to Ross 9/27/10 Aff.; 6/11/07 Judgment, ¶ 6). On August 4, 1998, Agnes Carvel died in the United Kingdom. (Am.Compl., ¶ 71).

B. *The Ross Defendants*

The plaintiff first retained Leonard Ross, principal of the firm of Ross & Matza (collectively, the "Ross defendants"), in 1990 or 1991. (Am. Compl., ¶ 32; Supplemental Pleading for a More Definite Statement ("Supp.Pleading"), ¶ 14; Memorandum of Law of Leonard Ross and Ross & Matza in

Support of Their Motion to Dismiss the Amended Complaint ("Ross Memo.") at 8). At that time, the Ross defendants represented Ms. Carvel in estate matters arising out of the death of Thomas Carvel. (Am. Compl., ¶ 32; Ross Memo. at 8). Ms. Carvel states that she later retained the Ross defendants to represent her, both individually and on Agnes Carvel's behalf, in charity fraud investigations and estate litigation. (Supp.Pleading, ¶¶ 14, 81, 82, 85, 87). The Ross defendants allege that their representation of the plaintiff terminated entirely in March of 1999, when Mr. Ross was appointed the New York ancillary administrator of Agnes Carvel's estate. (Ross Memo. at 10; Supplemental Memorandum of Law of Leonard Ross and Ross & Matza in Support of Their Motion to Dismiss the Amended Complaint and Supplemental Pleading for More Definite Statement at 4). However, Ms. Carvel claims that their representation continued in all matters through at least July of 2010, because "Ross and Ross & Matza never have withdrawn from representation, or given notice of the intention to withdraw." (Supp.Pleading, ¶ 17).

C. *The Blank Rome Defendants*

Ms. Carvel claims to have retained the firm of Blank Rome LLP ("Blank Rome") to represent her on multiple matters in various locations over the past ten years, including "in Florida Trust litigation, Delaware trust litigation, New York estate and trust litigation, and New York charity fraud litigation." (Am.Compl., ¶ 34). With respect to the litigation that underlies this complaint—the adjudication of Agnes Carvel's estate in Westchester Surrogate's Court—the plaintiff states that she retained Eve Markewich, Peter Valente, and Herbert Bockstein of Blank Rome (together with Markewich and Rosenstock LLP, the "Blank Rome defendants") to "represent the ancillary administration" of Agnes Carvel's estate in New York. (Plaintiff Pamela Carvel's Request for Judicial Notice ("Carvel 1/7/11 Request"), ¶ 21; Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. G to Declaration of Philip Touitou dated Nov. 24, 2009 ("Touitou 11/24/09 Decl."), at 1). However, the retainer letter signed by Ms. Carvel clearly states that Blank Rome was "retained by Leonard Ross" in his capacity as the New York ancillary administrator of Agnes Carvel's estate; another letter sent the same day to Mr. Ross by Mr. Camerik confirmed Blank Rome's representation of Mr. Ross alone. (Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. B to Carvel 1/7/11 Request; Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. G to Touitou 11/24/09 Decl.). The letter retainer signed by the plaintiff did require her to "personally guarantee and agree to be personally liable for" Blank Rome's fees and costs in connection with its representation of Mr. Ross, and it further stated the Blank Rome defendants' intention to "dutifully apply to any appropriate Court to seek reimbursement to the Estate, you, or any other appropriate party, of the fees and costs we are paid." (Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. B to Carvel 1/7/11 Request, at 1).

***3** Ms. Carvel notes that in February of 2005, Ms. Markewich published an article in the New York Law Journal entitled, "Getting Grounded in Ethical Dilemmas," in which she detailed "[t]he unethical, if not illegal, tactics used by Plaintiff's adversaries against" Agnes Carvel during the last years of her life. (Am. Compl., ¶ 73; Eve Rachel Markewich, "Getting Grounded On Ethical Dilemmas," NYLJ, Feb. 14, 2005, attached as part of Exh. D to Touitou 11/24/09 Decl.). Five months later, the plaintiff sent Ms. Markewich an angry letter, accusing her of acting against the interests of Agnes Carvel's estate and committing related ethical violations. (Letter of Pamela Carvel dated July 11, 2005, attached as Exh. S to Touitou 11/24/09 Decl.). Ms. Markewich responded by letter, defending her representation of the estate's interests and clarifying that Blank Rome was "retained to represent Leonard Ross, as Ancillary Administrator c.t.a. of the Estate of Agnes Carvel" not Ms. Carvel, and therefore that she was not obliged to proceed as Ms. Carvel directed. (Letter of Eve Rachel Markewich dated July 20, 2005, attached as Exh. H to Touitou 11/24/09 Decl.). When Ms. Markewich left Blank Rome in 2007 and established the firm of Markewich and Rosenstock LLP ("M & R"), Mr. Ross retained M & R to represent him in his capacity as the New York ancillary administrator of Agnes Carvel's estate. (Ross Memo. at 11; Retainer Agreement for Estate of Agnes Carvel dated April 18, 2007, attached as Exh. E to Affidavit of Leonard M. Ross dated Oct. 8, 2009 ("Ross 10/8/09 Aff.")). Ms. Carvel professes confusion regarding her relationship with M & R, stating that "[a]t some unknown date, Markewich & Rosenstock appear to have acquired financial interest in and control over *Carvel* litigation from Blank Rome," thus establishing a relationship with Ms. Carvel. (Supp.Pleading, ¶ 23). Ms. Carvel maintains that Blank Rome continues to represent her and that none of the Blank Rome defendants ever withdrew from representation of her. (Supp.Pleading, ¶¶ 22, 24).

D. *The McCarthy Fingar Defendants*

Ms. Carvel hired Joel Aurnou in 1999 or 2000 to seek reimbursement of legal fees she had advanced in connection with litigation related to Thomas and Agnes Carvel's estates.

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(Am. Compl ., ¶ 37; Supp. Pleading, ¶¶ 29–30). Shortly after she retained him, Mr. Aurnou affiliated with the firm of McCarthy Fingar LLP ("McCarthy Fingar"), which began representing Ms. Carvel in 2000. (Am. Compl., ¶ 38; Supp. Pleading, ¶ 25; Brophy 10/12/09 Aff., ¶ 9; Letter of Philip T. Temple dated Oct. 13, 2000, attached as Exh. F to Declaration of Philip Touitou dated Sept. 30, 2010 ("Touitou 9/30/10 Aff.")). McCarthy Fingar and Frank Streng (together with Joel Aurnou, collectively, the "McCarthy Fingar defendants"), one of its attorneys, represented Ms. Carvel in proceedings related to both Thomas and Agnes Carvel's estates in New York. (Supp.Pleading, ¶¶ 10(h), 182; Brophy 10/12/09 Aff., ¶ 9). The firm was awarded at least $900,000 in fees out of the estates for their work on these representations. (Decision dated June 30, 2003 ("6/30/03 Decision"), attached as Exh. L to Touitou 11/24/09 Decl., at 7; Order dated July 30, 2003 ("7/30/03 Order"), attached as Exh. M to Touitou 11/24/09 Decl., at 3; Decision dated Dec. 29, 2004 ("12/29/04 Decision"), attached as Exh. N to Touitou 11/24/09 Decl., at 4).

***4** On June 30, 2005, Ms. Carvel sent Mr. Streng a letter in which she accused him of acting against her interests and those of Agnes Carvel's estate. (Letter of Pamela Carvel dated June 30, 2005, attached as Exh. I to Affidavit of Joseph J. Brophy in Further Support of Motion to Dismiss and in Response to Supplemental Pleading dated Sept. 30, 2010 ("Brophy 9/30/10 Aff.")). She followed that with a second letter on July 15, 2005, in which she asserted that Mr. Streng had "acquired loyalty to others," including Ms. Markewich and Mr. Ross, at the expense of the interests of Agnes Carvel's estate and of Ms. Carvel as its executor; she also accused Mr. Streng of failing to seek reimbursement of monies advanced to him and to Blank Rome by Ms. Carvel for legal fees. (Letter of Pamela Carvel dated July 15, 2005, attached as Exh. J to Brophy 9/30/10 Aff.). Mr. Streng responded by letter on July 15, 2005, defending his and his firm's representation of Ms. Carvel and Agnes Carvel's estate, and terminating McCarthy Fingar's representation of Ms. Carvel in the proceedings related to Agnes Carvel's estate. (Letter of Frank W. Streng dated July 15, 2005, attached as Exh. K to Brophy 9/30/10 Aff .). In a decision dated March 3, 2006, Justice Anthony A. Scarpino, Jr., of Westchester County Surrogate's Court, granted Mr. Streng's motion to withdraw McCarthy Fingar as counsel to Ms. Carvel in the proceedings related to Thomas Carvel's estate. (Decision dated Dec. 6, 2005, attached as part of Exh. E to Brophy 10/12/09 Aff.; Order dated March 3, 2006, attached as part of Exh. E to Brophy 10/12/09 Aff.). Although the plaintiff admits that Mr. Streng and McCarthy Fingar withdrew from representation of her in proceedings related to Thomas Carvel's estate, she maintains that they did not withdraw from representation in proceedings related to Agnes Carvel's estate and so continued to have an attorney-client relationship with her through at least July of 2010. (Supp.Pleading, ¶ 28). Ms. Carvel also maintains that Joel Aurnou never withdrew from representation of her in any matter. (Supp.Pleading, ¶ 34).

E. *Justice Anthony Scarpino*

Justice Scarpino has been the Surrogate of Westchester County since 2001 and has presided over proceedings related to both Thomas and Agnes Carvel's estates. (Am. Compl., ¶ 39; *see also, e.g.,* Decision and Order dated Dec. 24, 2001, attached as Exh. J to Toitou 11/24/09 Decl.; 6/30/03 Decision). He was named as a defendant in Ms. Carvel's original Complaint in this action, which was filed on January 26, 2009. (Complaint). On May 28, 2009, the Complaint was dismissed with respect to Justice Scarpino due to the plaintiff's failure to serve him or to show cause for her failure. (Order dated May 28, 2009). By subsequent order, the plaintiff was prohibited from serving Justice Scarpino with further process in this action. (Order dated Oct. 16, 2009). As a result, Justice Scarpino is no longer a defendant in this lawsuit and any claims asserted by Ms. Carvel against him should be dismissed with prejudice. [1]

F. *Procedural History*

1. *Westchester Surrogate's Court Proceedings*

***5** The allegations in this action focus primarily on proceedings conducted by Justice Scarpino during the administration of Agnes Carvel's estate in New York. Those proceedings began immediately following Agnes Carvel's death in 1998, when the Foundation filed suit in Westchester Surrogate's Court to enforce the reciprocal will contract signed by Thomas and Agnes Carvel. (6/11/07 Judgment, ¶ 9). A contest then ensued between the Foundation and Ms. Carvel, who had submitted Agnes Carvel's 1995 will for probate in the United Kingdom. (6/11/07 Judgment, ¶ 7). Following a trial, Justice Scarpino invalidated the 1995 will as violative of the contract between Agnes and Thomas Carvel and named the Foundation as the proper remainder beneficiary of Agnes Carvel's estate. *In re The Thomas and Agnes Carvel Foundation,* 8 Misc.3d 1025(4), 806 N.Y.S.2d 449 (West.Sur.Ct.2002).

Significant legal fees were incurred by all parties involved in the Westchester Surrogate's Court proceedings. In October and December of 2001, Mr. Ross, Blank Rome, and representatives of the 1991 Trust and the Foundation entered into stipulations for the ongoing payment of administrative costs to Mr. Ross as the New York ancillary administrator of Agnes Carvel's estate and attorneys' fees to Blank Rome as Mr. Ross' attorney. (Transcript of Proceedings in Westchester County Surrogate's Court dated Oct. 23, 2001, attached as Exh. E to Carvel 1/7/11 Request, at 5–7; Stipulation dated Dec. 17, 2001 (the "2001 Stipulation"), attached as Exh. G to Touitou 9/30/10 Aff.). These payments were to be made out of the 1991 Trust, which was intended to cover the expenses of administering Agnes Carvel's estate, and were subject to the approval of the Foundation, the 1991 Trust's remainder beneficiary. (1991 Trust Agreement at 1, 2; 2001 Stipulation at 2–3).

In 2003, Justice Scarpino awarded McCarthy Fingar $400,000 in legal fees out of the 1991 Trust as payment for its representation of Ms. Carvel in proceedings related to Agnes Carvel's estate. (6/30/03 Decision at 7; 7/30/03 Order at 3). However, in 2004 Justice Scarpino denied an application made by Ms. Carvel for the advance payment of legal fees to her out of Agnes Carvel's New York ancillary estate so that Ms. Carvel could pursue litigation in Delaware on behalf of Agnes Carvel's United Kingdom estate. (Decision dated June 30, 2004 ("6/30/04 Decision"), attached as Exh. F to Ross 10/8/09 Aff., at 1). Justice Scarpino found, among other reasons, that Ms. Carvel's request was premature due to a 2002 order in which he had frozen distribution of the New York ancillary estate's assets until its final settlement. (6/30/04 Decision at 3). That final settlement was made in 2010 following a second trial and significant motion practice. (Decision After Trial dated June 30, 2010 ("6/30/10 Decision"), attached as Exh. S to Ross 9/27/10 Aff., at 5, 17). Although Ms. Carvel had initially challenged Mr. Ross' final accounting and petitioned for the reimbursement of $167,270 in legal fees that she had advanced to Blank Rome on Mr. Ross' behalf, she later abandoned those claims by failing both to show up at the trial and to provide Mr. Ross with required documentation. (6/30/10 Decision at 5–6, 10–11).

2. *The Instant Action*

***6** The complaint in this action was filed on January 26, 2009. Due to Ms. Carvel's failure to perfect service on Mr. Ross, Ms. Markewich, and Justice Scarpino, the action was dismissed as to those three defendants on May 28, 2009. (Order dated May 28, 2009). Ms. Carvel subsequently served all of the defendants except Justice Scarpino with an Amended Complaint, which she had filed on May 24, 2009. (Am. Compl.; Order dated Oct. 16, 2009). The Ross defendants, the Blank Rome defendants, and the McCarthy Fingar defendants each filed a motion to dismiss the Amended Complaint. (Notice of Motion dated Oct. 8, 2009; Notice of Motion dated Oct. 13, 2009; Notice of Motion dated Nov. 24, 2009). The defendants raised various defenses, including res judicata, lack of standing, and expiration of the statute of limitations, and they ask that the complaint to be dismissed pursuant to Rules 8(a)(2), 9(b), 12(b) (1), and 12(b)(6) of the Federal Rules of Civil Procedure. (Ross Memo. at 2; Memorandum of Law in Support of Defendants Eve Rachel Markewich, Blank Rome LLP and Markewich & Rosenstock LLP's Motion to Dismiss the Complaint ("Blank Rome Memo.") at i; Defendants' (McCarthy Fingar LLP, Frank Streng, and Joel Aurnou) Memorandum of Law in Support of Motion to Dismiss ("McCarthy Fingar Memo.") at i-ii).

I held a hearing on March 17, 2010, to determine whether there was an appropriate basis for diversity jurisdiction in this action; the outcome of that inquiry is discussed below. (Order dated March 3, 2010; Hearing Transcript dated March 17, 2010 ("Tr.")). Following the hearing, the plaintiff filed a motion for an order dismissing Blank Rome and adding Mr. Bockstein and Mr. Valente as defendants. (Plaintiff's Motion to Dismiss and Join Defendants). I denied her motion "without prejudice to being resubmitted together with a copy of the proposed amended complaint" and subsequently ordered her to file a supplemental pleading. (Order dated April 27, 2010; Order dated July 2, 2010). Ms. Carvel filed a supplemental pleading on July 20, 2010, retaining Blank Rome as a defendant and adding Mr. Bockstein and Mr. Valente. (Supp. Pleading at 1).

Discussion

A. *Legal Standards*

1. *Rule 8(a)(2)*

Rule 8(a) (2) of the Federal Rules of Civil Procedure provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The pleading must be sufficient to " 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (alteration in original) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* ––– U.S. ––––, ––––, 129 S.Ct. 1937, 1949 (2009). However, "Rule 8(a) sets a lower bar than Rule 12(b)(6) or Rule 9(b)," *In re Allou Distributors, Inc.,* 395 B.R. 246, 258 (Bankr.E.D.N.Y.2008), and dismissal under Rule 8(a) "is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised," *Shomo v. New York,* 374 Fed. Appx. 180, 182 (2d Cir.2010) (quoting *Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir.1988)). In applying Rule 8(a) to a *pro se* complaint, the pleading must be construed liberally, *id.* at 183, and with sufficient sensitivity "so as to do justice" as required by Rule 8(e) of the Federal Rules of Civil Procedure, Fed.R.Civ.P. 8(e).

2. *Rule 9(b)*

***7** Rule 9(b) of the Federal Rules of Civil Procedure establishes a heightened pleading standard for complaints alleging fraud or mistake; such pleadings must "state with particularity the circumstances constituting" the violation. Fed.R.Civ.P. 9(b).

To meet this standard, a complaint must " '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.' " *Wood ex rel. United States v. Applied Research Associates, Inc.,* 328 Fed. Appx. 744, 747 (2d Cir.2009) (quoting *Shields v. Citytrust Bancorp, Inc .,* 25 F.3d 1124, 1128 (2d Cir.1994). Therefore, " 'conclusory allegations that [a] defendant's conduct was fraudulent or deceptive are not enough.' " *CreditSights, Inc. v. Ciasullo,* No. 05 Civ. 9345, 2008 WL 4185737, at *9 (S.D.N.Y. Sept. 5, 2008) (quoting *Decker v. Massey–Ferguson, Ltd.,* 681 F.2d 111, 114 (2d Cir.1982)). Although *pro se* pleadings are construed liberally, *pro* se petitioners are nevertheless required to comport with Rule 9(b)'s particularity requirements when alleging fraud or mistake. *See, e.g., Rafter v. Liddle,* 704 F.Supp.2d 370, 377–78 (S.D.N.Y.2010) ("Given that [the plaintiff] is proceeding *pro se,* the Court considers her pleadings leniently, but nonetheless finds that [she] has not alleged [her claims] with any particularity."); *Houraney v. Burton & Associates, P.C.,* 701 F.Supp.2d 258, 262–63 (E.D.N.Y.2010) (dismissing *pro se* complaint for failure to meet 9(b) standard).

3. *Rule 12(b)(1)*

Rule 12(b) (1) of the Federal Rules of Civil Procedure requires that a claim be dismissed for lack of subject matter jurisdiction " 'when the district court lacks the statutory or constitutional power to adjudicate it.' " *Qader v. Cohen & Slamowitz,* No. 10 Civ. 1664, 2011 WL 102752, at *2 (S.D.N.Y. Jan. 10, 2011) (quoting *Morrison v. National Australia Bank Ltd.,* 547 F.3d 167, 170 (2d Cir.2008)). Subject matter jurisdiction is a " 'threshold inquiry' " that must be addressed before reaching the merits of a claim. *Dominguez ex rel. Dominguez v. Verna,* No. 10 Civ. 4296, 2010 WL 4942225, at *3 (S.D.N.Y. Dec. 3, 2010) (quoting *Arar v. Ashcroft,* 532 F.3d 157, 168 (2d Cir.2008), *vacated on other grounds,* 585 F.3d 559 (2d Cir.2009)). The party asserting subject matter jurisdiction bears the burden of proving it by a preponderance of the evidence. *Lunney v. United States,* 319 F.3d 550, 554 (2d Cir.2003) (citing *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000)).

There are three bases for federal subject matter jurisdiction: (1) arising under jurisdiction, for civil actions "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331; (2) diversity jurisdiction, for civil actions arising under state law between citizens of different states where the amount in controversy exceeds $75,000, 28 U.S.C. § 1332(a)(1); and (3) supplemental jurisdiction, for civil actions arising under state law that are nonetheless part of the same case or controversy as a properly filed claim over which the court has original jurisdiction, 28 U.S.C. § 1367(a).

***8** For purposes of diversity jurisdiction, the citizenship of an individual is determined by her domicile; an individual can have only one domicile, which in turn is defined as the location of her " 'true fixed home ... to which, whenever [she] is absent, [she] has the intention of returning.' " *Palazzo ex rel. Delmage v. Corio,* 232 F.3d 38, 42 (2d Cir.2000) (quoting *Linardos v. Fortuna,* 157 F.3d 945, 948 (2d Cir.1998)). In contrast, the citizenship of a partnership includes every state in which any member of the partnership is a citizen. *See Herrick Co. v. SCS Communications, Inc.,* 251 F.3d 315, 322

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(2d Cir.2001) (citing *Carden v. Arkoma Associates,* 494 U.S. 185, 192–95 (1990)). To sustain diversity jurisdiction, complete diversity between opposing parties is required. *See, e.g., In re Methyl Tertiary Butyl Ether Products Liability Litigation,* 674 F.Supp.2d 494, 500 (S.D.N.Y.2009) (citing *State Farm Fire and Casualty Co. v. Tashire,* 386 U .S. 523, 530–31 (1967)). Where a non-essential, non-diverse party stands in the way of complete diversity, the court can dismiss that party so as to cure the jurisdictional defect. *See Grupo Dataflux v. Atlas Global Group, L.P.,* 541 U.S. 567, 572–73 (2004).

4. *Rule 12(b)(6)*

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Erickson v. Pardus,* 551 U .S. 89, 90, 94 (2007) (per curiam); *DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 110–11 (2d Cir.2010). A complaint need not make "detailed factual allegations," but it must contain more than mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action." *Iqbal,* 129 S.Ct. at 1949–50 (citing *Twombly,* 550 U.S. at 555). Where the complaint's factual allegations permit the court to infer only that it is possible, but not plausible, that misconduct occurred, the complaint fails to meet the minimum standard. *Id.* at 1950. "The task of the court in ruling on a Rule 12(b)(6) motion is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.' " *In re Initial Public Offering Securities Litigation,* 383 F.Supp.2d 566, 574 (S.D.N.Y.2005) (quoting *Levitt v. Bear Stearns & Co.,* 340 F.3d 94, 101 (2d Cir.2003)).

Pro se complaints are held to less stringent standards than those drafted by lawyers. *Erickson,* 551 U.S. at 94; *see also McKeown v. New York State Commission on Judicial Conduct,* 377 Fed. Appx. 121, 122 (2d Cir.2010). In fact, pleadings of a *pro se* party should be read " 'to raise the strongest arguments that they suggest.' " *Kevilly v. New York,* No. 09–4635, 2010 WL 5156766, at *1 (2d Cir. Dec. 21, 2010) (quoting *Brownell v. Krom,* 446 F.3d 305, 310 (2d Cir.2006)). Even after *Iqbal,* which imposed heightened pleading standards for all complaints, *pro se* complaints are to be liberally construed. *See Harris v. Mills,* 572 F.3d 66, 71–72 (2d Cir.2009). Dismissal of a *pro se* complaint is nevertheless appropriate where a plaintiff has clearly failed to meet minimum pleading requirements. *See, e.g., Paul v. Bailey,* No. 09 Civ. 5784, 2010 WL 3292673, at *4 (S.D.N.Y. July 21, 2010) (citing *Rodriguez v. Weprin,* 116 F.3d 62, 65 (2d Cir.1997)).

5. *Conversion into Motion for Summary Judgment*

***9** The plaintiff asserts that, by relying on documents outside of the pleadings, the defendants have converted their motions to dismiss into motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Plaintiff Pamela Carvel's Affidavit on Personal Knowledge & Memorandum of Law in Opposition to Defendants Leonard Ross/Ross and Matza's Motion to Dismiss ("Pl. Ross Opp. Memo."), ¶¶ 8–10; Plaintiff Pamela Carvel's Memorandum of Law in Opposition to Defendants Eve Markewich, Markewich & Rosenstock, Blank Rome Motion to Dismiss ("Pl. Blank Rome Opp. Memo."), ¶ 2; Plaintiff Pamela Carvel's Affidavit on Personal Knowledge & Memorandum of Law in Opposition to Defendants Frank Streng, McCarthy Fingar LLP, Joel Aurnou's Motion to Dismiss ("Pl. McCarthy Fingar Opp. Memo."), ¶¶ 9–10).

This characterization is incorrect. On a motion to dismiss, the court is generally limited to reviewing the allegations in the complaint and documents attached to it or incorporated by reference. *See Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152–54 (2d Cir.2002). However, the court may also consider documents " 'integral to the complaint' " or those that were necessarily relied on by the plaintiff in drafting the complaint. *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir.2007) (quoting *Cortec Industries, Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir.1991)). Such documents are particularly relevant where the complaint alleges fraud. *Id.* Furthermore, federal courts are empowered to take judicial notice of facts "not subject to reasonable dispute," including public records and the decisions of other courts. Fed.R.Evid. 201(b); *see United States v. Miller,* 626 F.3d 682, 687 n. 3 (2d Cir.2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.,* 596 F .3d 112, 124 n. 12 (2d Cir.2010). However, a court can only take judicial notice of a decision filed by another court "to establish the existence of the opinion, not for the truth of the facts asserted in the opinion." *Global Network Communications, Inc. v. City of New York,* 458 F.3d

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150, 157 (2d Cir.2006) (quoting *Lum v. Bank of America,* 361 F.3d 217, 222 n. 3 (3d Cir.2004)).

Ms. Carvel does not challenge the authenticity of any of the documents submitted by the defendants; indeed, she has attached a number of the same documents to her own submissions and to her requests for judicial notice. (*E.g.,* Stipulation, attached as Exh. G to Touitou 9/30/10 Aff. and Exh. F to Carvel 1/7/11 Request). Moreover, the documents submitted by the parties fall within the enumerated categories of documents that a court can properly consider when deciding a motion to dismiss. The majority of the submissions are judicial opinions from other courts, including the Westchester Surrogate's Court, the Florida Fourth District Court of Appeal, the United States District Court for the District of Delaware, and the United Kingdom's High Court of Justice. (Decision and Order dated Feb. 27, 2009, attached as Exh. R to Ross 9/27/10 Aff.; Decision of the Fourth District Court of Appeal of the State of Florida dated Oct. 11, 2006, attached as Exh. D to Carvel 1/7/11 Request; Memorandum Opinion dated July 17, 2008, attached as Exh. H of Ross 10/8/09 Aff.; 6/11/07 Judgment). While all of these decisions are subject to judicial notice, the contents of some of them underlie the plaintiff's allegations of bribery and conspiracy and thus are also integral to her complaint. (Am. Compl., ¶¶ 148, 153; Supp. Pleading, ¶ 40(e); Reply for Supplemental Pleading for More Definite Statement (“Supp. Pleading Reply”), ¶ 10). Other submissions are documents already in the public record, including Agnes Carvel's 1995 will, which was submitted to probate in the United Kingdom, and documents related to the 1991 Trust. (Agnes Carvel Will; 1991 Trust Agreement). Finally, both the defendants and the plaintiff have submitted various letters exchanged among the parties. (*E.g.,* Letter of Howard M. Camerik dated March 13, 2000, attached as Exh. C to Carvel 1/7/11 Request; Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. D to Ross 10/8/09 Aff.). These letters are properly considered here because they establish the dates on which the attorney-client relationships between Ms. Carvel and the defendants were established and terminated and thus are integral to the allegations of legal malpractice and breach of contract, among others, contained in the plaintiff's complaint.

B. *Subject Matter Jurisdiction*

***10** The plaintiff alleges a variety of state and federal causes of action, grounding jurisdiction for her state law claims in diversity. (Am.Compl., ¶ 25). She states that she is a citizen of Florida while “[a]ll named Defendants are citizens of New York.” (Am.Compl., ¶ 25). In their moving papers, the Blank Rome defendants challenge the plaintiff's assertion of diversity jurisdiction, suggesting that although Ms. Carvel was a United States citizen and had claimed a Florida residence, she was actually domiciled in the United Kingdom and therefore could not properly bring a diversity action against a United States citizen defendant. (Reply Memorandum of Law in Further Support of Defendants Eve Rachel Markewich, Blank Rome LLP and Markewich and Rosenstock LLP's Motion to Dismiss the Complaint at 6–7); *see also Johnson v. Smithsonian Institution,* 4 Fed. Appx. 69, 71 (2d Cir.2001) (“ ‘[A] suit by or against United States citizens domiciled abroad may not be premised on diversity.’ ” (quoting *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 68 (2d Cir.1990). On March 17, 2010, I held a hearing on this matter at which Ms. Carvel and Mr. Ross testified. (Order dated March 3, 2010; Tr. at 3–55).

On the basis of the evidence presented at the hearing, along with documents submitted by the parties, I recommend the Court find that Ms. Carvel is domiciled in Florida and therefore a citizen of Florida for diversity purposes. Ms. Carvel states that she has lived in Florida since 1970 or 1980—in Hollywood, Florida until 1995, and since then in a home she purchased in Fort Lauderdale, Florida. (Tr. at 4, 5; Plaintiff Pamela Carvel's Affirmation on Personal Knowledge Evidenced by Certified Business Records in the Public Record dated March 12, 2010 (“Carvel 3/12/10 Aff.”), ¶¶ 7–9, 13–14; Warranty Deed dated June 22, 1995, attached as Exh. D to Carvel 3/12/10 Aff.). She testified that her “only domicile is Florida” and that she has never resided in the United Kingdom. (Tr. at 7, 10). She is registered to vote in Florida and voted there in 2009, carries a Florida driver's license and a United States passport, files her tax returns from her home in Fort Lauderdale, and maintains her primary bank account in Fort Lauderdale. (Tr. at 5–6, 16, 17; Voter Information Card, attached as Exh. E to Carvel 3/12/10 Aff.; Florida Driver License, attached as Exh. G to Carvel 3/12/10 Aff.; United States of America Passport Card, attached as Exh. H to Carvel 3/12/10 Aff.). Although the defendants rightly note that the plaintiff uses addresses in the United Kingdom and Delaware in her litigation documents, Ms. Carvel explained that she uses these addresses only for mail forwarding purposes and does not reside or own residences in either of these locations. (Tr. at 6–7, 12–13, 31). Ms. Carvel claims not to maintain a mailbox at her home in Florida; instead, she receives mail through mail forwarding services located in Delaware and the United Kingdom because she has been unable to find a reliable service in Florida. (Tr. at 12–

13). While Ms. Carvel admitted to regularly spending time in New Jersey with her mother, she states that she does not own any property there and does not reside there. (Tr. at 15–16, 34–36). She also claimed not to have lived in New York City since the 1960s or 1970s, despite being a stock holder in five co-operative apartments located there; the defendants did not challenge this contention. (Tr. at 27–31). Ms. Carvel has thus sustained her burden of demonstrating that she is a citizen of Florida for diversity purposes.

***11** Blank Rome is also a citizen of Florida. Michael Leeds, a general partner at Blank Rome since 2001, states that he has lived and worked in Boca Raton, Florida, since 1997. (Affirmation of Michael H. Leeds dated March 26, 2010 ("Leeds Aff."), ¶¶ 1, 4, 9; Blank Rome LLP Amended and Restated Partnership Agreement dated Nov. 3, 2001, attached as Exh. 1 to Leeds Aff.). His domicile and citizenship are therefore also located in Florida. (Leeds Aff., ¶ 9). Furthermore, Blank Rome itself is registered as a limited partnership with the Florida Department of State and maintains an office in Boca Raton, Florida, in which Mr. Leeds works. (Leeds Aff., ¶¶ 4–5; Statement of Registration–Domestic Registered Limited Liability Partnership dated Jan. 2, 1998, attached as Exh. 2 to Leeds Aff.; Partnership Registration Statement dated April 7, 2000, attached as part of Exh. 5 to Leeds Aff.).

Because Mr. Leeds is a citizen of Florida, Blank Rome is also a citizen of Florida and therefore is not diverse from Ms. Carvel for jurisdictional purposes. As a result, Blank Rome must be dismissed from the case to preserve diversity jurisdiction as to the remaining defendants. Although it would be possible for the Court to retain jurisdiction over the plaintiff's action even in the absence of complete diversity through the exercise of arising under and supplemental jurisdiction, this would not be appropriate given my recommendation below that all of Ms. Carvel's federal claims be dismissed as to all of the defendants. *See Jenkins v. St. Luke's–Roosevelt Hospital Center,* No. 09 Civ. 12, 2009 WL 3682458, at *11 (S.D.N.Y. Oct. 29, 2009) (" 'Certainly, if the federal claims are dismissed before trial ... the state claims should be dismissed as well.' " (alteration in original) (quoting *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966))); *see also* 28 U.S.C. § 1367(a), (c) ("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.").

C. *The Merits*

I will address the plaintiff's remaining claims in four groups: (1) claims that are not causes of action or do not carry a private right of action, (2) common law claims, (3) federal law claims, and (4) state statutory claims. [2]

1. *Invalid Claims*

Among her allegations, the plaintiff claims a number of violations that either are not causes of action or are based on statutes that do not provide for a private right of action. I therefore recommend that these claims should be dismissed.

a. *Not a Cause of Action*

In her pleadings, Ms. Carvel asserts claims for harassment, intimidation, and "failure to assert a claim for elder abuse." (Am. Compl. at 53 & ¶¶ 178, 180–81; Supp. Pleading, ¶ 47). None of these are cognizable as civil causes of action under federal or New York law. *See Pandozy v. Tobey,* 335 Fed. Appx. 89, 91 (2d Cir.2009) ("New York law does not recognize a claim for civil harassment."); *Bradt v. White,* 190 Misc.2d 526, 535, 740 N.Y.S.2d 777, 784 (Greene Sup.Ct.2002) ("[T]he Court notes that there is no common law cause of action for harassment, annoyance, [or] intimidation." (internal citation omitted)); *Gilbert v. Gilbert,* No. 02 Civ. 3728, 2003 WL 22790940, at *2 (S.D.N.Y. Nov. 25, 2003) ("[N]either federal nor New York law recognizes a cause of action for 'elder abuse.' "). Therefore, I recommend that these claims be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

b. *No Private Right of Action*

***12** The plaintiff also asserts a number of causes of action for which there are no private rights of action, including violations of 18 U.S.C. § 4 (misprision of felony), 18 U.S.C. § 2382 (misprision of treason), 18 U.S.C. § 1346 (honest services fraud), and New York Penal Law § 210.10 (perjury); extortion; tax fraud; and violations of federal and state attorney disciplinary rules. (Am. Compl. at 53 & ¶¶ 75, 96–97, 138, 175, 176, 178; Supp. Pleading, ¶¶ 39(d), 40(e), 49–76, 118, 130; Pl. Ross Opp. Memo., ¶ 88; Pl. Blank Rome Opp. Memo., ¶¶ 14, 18, 86, 106; Pl. McCarthy Fingar Opp. Memo., ¶¶ 18, 21); *see Chen ex rel. V.D. v. Lester,* 364 Fed. Appx. 531, 536 (11th Cir.2010) (affirming dismissal of civil suit under 18 U.S.C. § 2382 because statute does not provide a private right of action); *In re Phillips,* 510 F.2d 126, 126

(2d Cir.1975) (holding that private citizens lack standing to participate in attorney disciplinary proceedings); *Carvel v. Franchise Stores Realty Corp.,* No. 08 Civ. 8938, 2009 WL 4333652, at *8 (S.D.N.Y. Dec. 1, 2009) ("The federal statute for misprision of felony is a criminal statute that does not create a private cause of action."); *Abrahams v. Incorporated Village of Hempstead,* No. 08 CV 2584, 2009 WL 1560164, at *8 (E.D.N.Y. June 2, 2009) (dismissing civil suit for perjury because "there is no private right of action for perjury" under New York law); *Williams v. Jurow,* No. 05 Civ. 6949, 2007 WL 5463418, at *13 (S.D.N.Y. June 29, 2007) ("[T]here is no private right of action under the federal extortion statute."), *report and recommendation adopted in relevant part,* 2008 WL 4054421 (S.D.N.Y. Aug. 28, 2008); *Seabury v. City of New York,* No. 06 CV 1477, 2006 WL 1367396, at *5 (E.D.N .Y. May 18, 2006) ("Private citizens cannot enforce the provisions of the Tax Code."); *Gaind v. Pierot,* No. 04 Civ. 9407, 2006 WL 846268, at *4–5 (S.D.N.Y. March 31, 2006) (noting that 18 U.S.C. § 1346 does not have private right of action), *aff'd,* 282 Fed. Appx. 946 (2d Cir.2008); *Minnelli v. Soumayah,* 41 A.D.3d 388, 389, 839 N.Y.S.2d 727, 728 (1st Dep't 2007) ("[E]xtortion and attempted extortion are criminal offenses that do not imply a private right of action." (internal citation omitted)).

It is axiomatic that " 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' " *Riegel Textile Corp. v. Celanese Corp.,* 649 F.2d 894, 897 (2d Cir.1981) (quoting *Cannon v. University of Chicago,* 441 U.S. 677, 688 (1979)). It follows that where courts have already determined that a private right of action does not exist for a particular law, an individual cannot bring a civil suit for monetary damages based on a violation of that law. Therefore, Ms. Carvel's attempt to civilly enforce the above-mentioned statutes fails, and these claims should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. *Common Law Claims*

***13** The plaintiff alleges twelve common law causes of action in her Amended Complaint: (1) legal malpractice, (2) breach of fiduciary duty, (3) breach of contract, (4) common law fraud, (5) fraudulent and negligent misrepresentation, (6) conversion, (7) unjust enrichment, (8) attorney liability in negligence to third parties, (9) aiding breach of fiduciary duty and conversion, (10) tortious interference with business relations, (11) fraudulent conveyance, and (12) intentional infliction of emotional distress. I will discuss each of them in turn.

a. *Legal Malpractice*

There are three elements to a claim of legal malpractice in New York: " '(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages.' " *Baker v. Dorfman,* 239 F.3d 415, 420 (2d Cir.2000) (quoting *Davis v. Klein,* 224 A.D.2d 196, 198–99, 637 N.Y.S.2d 137, 139 (1st Dep't 1996), *aff'd,* 88 N.Y.2d 1008, 648 N.Y.S.2d 871 (1996)). There is a three-year statute of limitations for legal malpractice, which begins running on the date of the alleged malpractice unless it is tolled by the continuous representation doctrine until the date that the representation "in the specific matter at issue" was terminated. *Nobile v. Schwartz,* 56 Fed. Appx. 525, 526 (2d Cir.2000) (citing *Shumsky v. Eisenstein,* 96 N.Y.2d 164, 167–68, 726 N.Y.S.2d 365, 368–69 (2001)); *see also* N.Y. CPLR § 214(6). For a representation to be continuous, "the parties [must] possess a mutual understanding of the need for further representation [and] ... explicitly contemplate that the professional relationship continue." *Arnold v. KPMG LLP,* 543 F.Supp.2d 230, 236 (S.D.N.Y.2008) (internal quotation marks and citations omitted), *aff'd,* 334 Fed. Appx. 349 (2d Cir.2009), *cert. denied,* 130 S.Ct. 503 (2009).

Although Ms. Carvel does not describe her claim as one for legal malpractice, she clearly alleges the elements of this cause of action with respect to all of the defendants —she claims that, while working as her attorneys, they refused to provide representation, respond to her instructions, give her detailed invoices, make promised applications for reimbursement of funds, return her legal files, or give her notice of proceedings that affected her rights and interests. (Am. Compl., ¶¶ 13–14, 33, 34, 36, 38, 129, 159, 161, 165; Supp. Pleading, ¶¶ 10, 14, 18, 20, 25–27, 29–30, 32, 40(b), 52, 61, 131–32, 136–37, 166–70, 176, 183–89, 191, 211–12). As a direct result of these failures, Ms. Carvel alleges that she was damaged in the amount of $100,000,000. (Am.Compl., ¶¶ 163–66). However, the plaintiff's claims of legal malpractice fail with respect to all three groups of defendants, both because the statute of limitations has run and because her claims are not plausible.

i. *The Ross Defendants*

Although the plaintiff has alleged acts of malpractice by Mr. Ross, none of those acts are within the three-year period immediately preceding the filing of this action; as a result, they fall outside the applicable statute of limitations and should be dismissed. First, Ms. Carvel alleges that Mr. Ross violated the terms of his representation by "accept[ing] paid employment" from Betty Godley, "an adverse litigant" in a proceeding related to Agnes Carvel's estate assets, and by refusing to assert Ms. Carvel's interest in the same assets. (Supp.Pleading, ¶¶ 116–17, 119). However, Ms. Carvel defines the time period during which this behavior took place as 2000–2005; because this action was not filed until January 2009, these allegations fall outside the applicable statute of limitations. (Supp. Pleading, ¶¶ 113, 115, 116, 118; Complaint). Second, to the extent that the plaintiff is attempting to assert violations of Agnes Carvel's rights that were assigned to her prior to Agnes Carvel's death, the statute of limitations on those claims began running, at the latest, upon Agnes Carvel's death in 1998 and thus also expired before the filing of this action. (Supp. Pleading, ¶¶ 119, 121; Pl. Ross Opp. Memo., ¶¶ 3, 37; Complaint); *Trans–Resources, Inc. v. Nausch Hogan and Murray,* 298 A.D.2d 27, 30, 746 N.Y.S.2d 701, 704 (1st Dep't 2002) (holding that assignee of claim is subject to defenses that could have been asserted against assignor). Similarly, the plaintiff's allegations that Mr. Ross failed to respond to her directions and refused to turn over evidence that he had collected at her behest and for which she had paid also fall outside of the statute of limitations, having occurred between 2000 and 2004, and therefore should be dismissed. (Supp.Pleading, ¶¶ 125–26, 132, 144).

***14** Ms. Carvel argues that the continuous representation doctrine tolls the statute of limitations because Mr. Ross continued to represent her through at least July of 2010. (Supp.Pleading, ¶ 17). However, all of the tasks the Ross defendants performed for her terminated many years ago, and thus the continuous representation doctrine does not toll the statute of limitations for her legal malpractice allegations for a sufficient period of time to render them timely. First, Ms. Carvel states that she retained Mr. Ross to represent her as a named executor to Thomas Carvel's estate in 1990. (Supp.Pleading, ¶ 78). Any representation for that purpose would have terminated when Ms. Carvel resigned from this position in 2000. (Decision dated Feb. 17, 2000, attached as Exh. J to Ross 10/8/09 Aff.). Second, any representation by Mr. Ross of Agnes Carvel, or of Pamela Carvel as Agnes Carvel's guardian, terminated with Agnes Carvel's death in 1998. (Supp.Pleading, ¶¶ 14, 83, 84, 86). Third, any role Ms. Carvel played in having Mr. Ross appointed the New York ancillary administrator to Agnes Carvel's estate did not create an attorney-client relationship between them and so cannot be the basis for a legal malpractice claim. (Am. Compl., ¶ 32; Supp. Pleading, ¶¶ 15, 88). Finally, Ms. Carvel states that she retained Mr. Ross to represent her in litigation related to the ownership of Agnes Carvel's shares in "Chain Locations of America, Inc. and Andreas Holdings Corp." and to "assist" her in investigating various charity fraud allegations. (Supp.Pleading, ¶¶ 81, 82, 85, 87). However, the facts alleged in Ms. Carvel's supplemental pleading indicate that these engagements occurred beginning in the 1990s and continued through 2005 at the latest—she does not identify any act of legal representation or legal malpractice by the Ross defendants related to either of these engagements after 2005. (Supp.Pleading, ¶¶ 111–34). Because all of the various engagements that Ms. Carvel claims the Ross defendants performed for her terminated over three years before she asserted any claim of legal malpractice, Ms. Carvel's allegations of ongoing legal malpractice against the Ross defendants also fail on statute of limitations grounds. (Am. Compl., ¶¶ 13–14, 129, 159, 161, 165; Supp. Pleading ¶¶ 40(b), 52, 147, 208). Therefore, her legal malpractice claim against the Ross Defendants should be dismissed.

ii. *The Blank Rome Defendants*

Ms. Carvel's sole legal malpractice allegation against the Blank Rome defendants is that they failed to seek reimbursement for legal fees she had advanced to them for representation in proceedings related to Agnes Carvel's estate. (Am. Compl., ¶¶ 33, 129, 161; Supp. Pleading, ¶¶ 136–38). However, Ms. Carvel has not plausibly alleged that any of the Blank Rome defendants represented her in that litigation. In her Amended Complaint, the plaintiff states that she retained Ms. Markewich to "immediately seek reimbursement" for sums she had advanced, and in her supplemental pleading she identifies the date of that retainer as February of 2000. (Am. Compl., ¶ 33; Supp. Pleading, ¶¶ 18–19). However, the retainer letter memorializing that agreement, which Ms. Carvel submitted, clearly states that Blank Rome was "retained by Leonard Ross" in his position "as New York Ancillary Administrator of the Estate of Agnes Carvel." (Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. B to Carvel 1/7/11 Request, at 1). In light of this letter, the plaintiff's allegations of an attorney-client relationship between herself and the Blank Rome defendants with respect to litigation involving Agnes Carvel's estate are not plausible. Although she does plausibly plead an attorney-client relationship between herself and Blank Rome covering litigation between her and the Foundation, Ms. Carvel's claims regarding the Blank Rome defendants' failure to obtain reimbursement of her legal expenses do not relate to that representation. (Supp. Pleading, ¶ 135; Letter of Howard M. Camerik dated March 13, 2000, attached as Exh. C to Carvel 1/7/11 Request). The plaintiff's legal malpractice claim against the Blank Rome defendants should therefore be dismissed.

iii. *The McCarthy Fingar Defendants*

***15** The plaintiff alleges that the McCarthy Fingar defendants committed various acts of legal malpractice, including billing for tasks not performed, failing to provide invoices, breaching the terms of their retainer agreement, and refusing to provide representation. (Am. Compl., ¶¶ 36, 38, 165; Supp. Pleading, ¶¶ 25–27, 29–30, 32, 167–71, 176, 183–89, 211). Yet the pleadings and incorporated documents show that the attorney-client relationship between Ms. Carvel and the McCarthy Fingar defendants terminated in 2005; therefore, the statute of limitations defeats her claim for legal malpractice against them.

Ms. Carvel claims that the McCarthy Fingar defendants represented her beginning in 1999 or 2000 in two capacities relevant to this lawsuit—in litigation related Agnes Carvel's estate and litigation related to Thomas Carvel's estate. (Supp.Pleading, ¶¶ 25, 28, 166). She maintains that Mr. Aurnou has never withdrawn from either of these representations, by letter or otherwise. (Supp.Pleading, ¶¶ 34, 171, 197). Although the plaintiff admits that Mr. Streng and McCarthy Fingar withdrew from representing her in proceedings related to Thomas Carvel's estate in 2005, she maintains that they continued representing her in proceedings related to Agnes Carvel's estate through at least July of 2010 because they had not explicitly "withdr[awn] representation" as of that date. (Supp.Pleading, ¶¶ 28, 190). However, Mr. Streng wrote to Ms. Carvel in July 2005 withdrawing himself and McCarthy Fingar from representation in proceedings related to Agnes Carvel's estate and asking her to obtain new counsel in those proceedings. (Letter of Frank W. Streng dated July 15, 2005, attached as Exh. K to Brophy 9/30/10 Aff., at 2). This letter was sufficient to terminate his and McCarthy Fingar's representation in those proceedings because, at the very least, it undermined the "mutual understanding," *Arnold,* 543 F.Supp.2d at 236, necessary for a finding of continuous representation. Similarly, Ms. Carvel has failed to allege any independent act of legal representation or malpractice by Mr. Aurnou since 2000, aside from his ongoing failure to contact her or respond to her inquiries. (Supp.Pleading, ¶¶ 171, 176). The attorney-client relationship between Ms. Carvel and Mr. Aurnou therefore terminated, at the latest, with McCarthy Fingar's 2005 withdrawal. Because there was no attorney-client relationship between Ms. Carvel and the McCarthy Fingar defendants during the three-year period immediately prior to the institution of this lawsuit, the plaintiff's legal malpractice claim against the McCarthy Fingar defendants should be dismissed.

b. *Breach of Fiduciary Duty*

A breach of fiduciary duty occurs where (1) a fiduciary duty exists between the plaintiff and the defendant, (2) the defendant breaches the duty, and (3) damages result to the plaintiff from the breach. *Meisel v. Grunberg,* No. 07 Civ. 11610, 2010 WL 4966443, at *2 (S.D.N.Y. Nov. 30, 2010) (citing *Whitney v. Citibank, N.A.,* 782 F.2d 1106, 1115 (2d Cir.1986)). The statute of limitations for a fiduciary duty claim under New York law depends on the nature of the relief sought. For complaints seeking monetary relief, the statute of limitations is three years; for those seeking equitable relief, it is six years. *Malmsteen v. Berdon, LLP,* 369 Fed. Appx. 248, 249 (2d Cir.2010) (citing *Weiss v. T.D. Waterhouse,* 45 A.D.3d 763, 764, 847 N.Y.S.2d 94, 95 (2d Dep't 2007)). Ms. Carvel's Amended Complaint seeks both monetary and declaratory relief. (Am. Compl., at 58–60). Declaratory relief is not inherently legal or equitable; rather, its character depends on that of the underlying action; "[t]he test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action." 22A Am.Jur.2d *Declaratory Judgments* § 2; *see also Yoon v. Fordham University Faculty and Administration Retirement Plan,* No. 99 Civ. 11042, 2004 WL 3019500, at *12 (S.D.N.Y. Dec. 29, 2004) (noting declaratory judgment suits neither inherently legal nor inherently equitable, but dependent upon nature of issues presented). Because the sole relief sought here aside from a declaratory judgment is monetary, the action is legal, and thus a three-year statute of limitations applies.[3] (Am. Compl., ¶¶ 58–60; *see also Kermanshah v. Kermanshah,* 580 F.Supp.2d 247, 268 (S.D.N.Y.2008) ("The statute of limitations period for a declaratory judgment action is based on the underlying substantive claims upon which it is premised.").

***16** Ms. Carvel argues for the application of equitable tolling to stay the statute of limitations until the point at which she discovered the relevant conduct by the defendants. (Pl.

Ross Opp. Memo., ¶ 93; Pl. Blank Rome Opp. Memo., ¶¶ 90–91; Pl. McCarthy Fingar Opp. Memo., ¶ 98). “Equitable tolling applies where a plaintiff has been prevented in some extraordinary way from exercising [her] rights.” *Hogan v. J.P. Morgan Chase Bank,* No. 09–3048, 2010 WL 4847032, at *1 (2d Cir. Nov. 30, 2010) (internal quotation marks omitted). To be eligible for equitable tolling, the burden is on the plaintiff to show that she “acted with reasonable diligence during the time period she seeks to have tolled.” *Paneccasio v. Unisource Worldwide, Inc.,* 532 F.3d 101, 112 (2d Cir.2008) (internal quotation marks omitted). Only “where a defendant's fraudulent or deceptive actions prevented [the] plaintiff from discovering the fraudulent scheme and/or filing a claim within the statutory period” will equitable tolling be appropriate. *Scherer v. Gaildon Medical Systems, Inc.,* No. 02 Civ. 8847, 2004 WL 2884312, at *4 (S.D.N.Y. Dec. 10, 2004) (citing *Simcuski v. Saeli,* 44 N.Y.2d 442, 448–49, 406 N.Y.S.2d 259, 262 (1978)).

Even giving the plaintiff the benefit of equitable tolling until the time when she became aware of each alleged breach of fiduciary duty, and even assuming that fiduciary relationships existed between her and each of the defendants, she has failed to allege any acts within the applicable tolled statute of limitations period that could plausibly constitute a breach of fiduciary duty by any of the defendants. In Count Five of her Amended Complaint, Ms. Carvel alleges that the defendants breached their fiduciary duty to her by (1) entering into “agreements against their own client Pamela Carvel” and (2) “engag[ing] in deceptive business practices when they delivered ... signed letter agreements making promises to Pamela Carvel so as to induce her to pay them, but these were false promises Defendants never intended to keep.” (Am.Compl., ¶ 170).

With respect to the first allegation, the plaintiff points to the 2001 stipulation, which was entered into by Mr. Ross, Ms. Markewich, and representatives of the 1991 Trust and the Foundation. (2001 Stipulation). She asserts that, following the signing of the 2001 stipulation, the Ross defendants and the Blank Rome defendants ceased representing her interests and began purposely withholding or obstructing the delivery of monies owed to her. (Supp.Pleading, ¶¶ 21, 48, 101, 144, 152). However, the plaintiff admits that she was made aware of the existence of the 2001 stipulation in 2003. (Supp.Pleading, ¶ 148). Thus, even assuming her interpretation of the 2001 stipulation and giving her the benefit of equitable tolling until 2003, any cause of action for breach of fiduciary duty based on the signing of the 2001 stipulation had to be asserted by 2006 at the latest, three years before the complaint in this action was filed. Therefore, the signing of the 2001 stipulation cannot sustain the plaintiff's claim for breach of fiduciary duty.

***17** With respect to the letter agreements that form the second basis for Ms. Carvel's breach of fiduciary duty allegations, none of these agreements are sufficiently recent to fall within the statute of limitations period. The plaintiff has failed to allege the existence of any “signed letter agreements” between herself and Mr. Ross; in any case, all of the allegations against Mr. Ross that could constitute a breach of fiduciary duty occurred before 2006. (Supp.Pleading, ¶¶ 90, 115, 116, 118, 125, 131). Ms. Carvel accuses both the Blank Rome defendants and the McCarthy Fingar defendants of promising to seek reimbursement of legal fees she had advanced to them but then failing to do so. (Am. Compl., ¶¶ 33, 36; Supp. Pleading, ¶ 184). However, there is abundant evidence that she was aware of this alleged behavior on the part of both groups of defendants well before 2006, and at the latest by 2005, when she sent angry letters to both Mr. Streng and Ms. Markewich accusing them of precisely these acts. (Letter of Pamela Carvel dated July 11, 2005, attached as Exh. S to Touitou 11/24/09 Decl., at 2; Letter of Pamela Carvel dated June 30, 2005, attached as Exh. I to Brophy 9/30/10 Aff., at 1–2). Therefore, none of these allegations can form the basis of a timely breach of fiduciary duty claim, even tolling the statute of limitations until 2005.

The only act alleged by Ms. Carvel that could constitute a breach of fiduciary duty within the limitations period is a hearsay statement allegedly made by Mr. Ross and communicated to Ms. Carvel by Ms. Markewich in 2009 to the effect that Mr. Ross “would take no steps to protect any interests of any beneficiaries or creditors of Agnes Carvel.” (Pl. Ross Opp. Memo., ¶ 87; Pl. Blank Rome Opp. Memo., ¶ 85). The plaintiff claims to be both a beneficiary and a creditor of Agnes Carvel's estate. (Am. Compl., ¶ 40; Supp. Pleading, ¶¶ 149, 216; Pl. Ross Opp. Memo., ¶ 85; Pl. Blank Rome Opp. Memo., ¶¶ 58, 83, 87; Plaintiff Pamela Carvel's Affidavit on Personal Knowledge in Opposition to Defendants Eve Markewich, Markewich & Rosenstock, Blank Rome Motion to Dismiss, ¶ 20). However, the documentary evidence shows that she cannot be a beneficiary of Agnes Carvel's estate in New York, the only portion of the estate under Mr. Ross' protection, since Justice Scarpino found in 2002 that the sole beneficiary of that estate was the Foundation. *In re The Thomas and*

Agnes Carvel Foundation, 2002 WL 32872391, at *10. To the extent that Ms. Carvel was a creditor of Agnes Carvel's New York estate, Mr. Ross not only acknowledged that fact, he attempted to obtain reimbursement for Ms. Carvel in the amount of $167,270 for the legal fees she had advanced to Blank Rome. (Reply Memorandum of Law of Leonard Ross and Ross & Matza in Support of Their Motion to Dismiss the Amended Complaint at 4–5; Decision and Order dated Feb. 27, 2009, attached as Exh. R to Ross 9/27/10 Aff., at 1). Ultimately, Justice Scarpino decided not to award those fees to the plaintiff, but his decision was not predicated on Mr. Ross' failure to seek them. (6/30/10 Decision at 10–11). As a result, it is not plausible that Mr. Ross' hearsay statement could have comprised a breach of the fiduciary duty he may have owed to Ms. Carvel as a creditor of Agnes Carvel's estate in New York; the plaintiff's claims for breach of fiduciary duty should therefore be dismissed in their entirety.

c. *Breach of Contract*

***18** The elements of a breach of contract claim in New York are: "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co.,* 375 F.3d 168, 177 (2d Cir.2004). The statute of limitations for a breach of contract claim is six years, and it begins running on the date of breach. N.Y. CPLR § 213(2); *John J. Kassner & Co. v. City of New York,* 46 N.Y.2d 544, 550, 415 N.Y.S.2d 785, 788 (1979) ("In contract cases, the cause of action accrues and the Statute of Limitations begins to run from the time of the breach."). A breach of contract claim that is " 'premised on the same facts and seeking the identical relief' " as a claim for legal malpractice " 'is redundant and should be dismissed.' " *Nordwind v. Rowland,* No. 04 Civ. 9725, 2007 WL 2962350, at *4–5 (S.D.N.Y. Oct. 10, 2007), *aff'd,* 584 F.3d 420 (2d Cir.2009); *see also InKine Pharmaceutical Co. v. Coleman,* 305 A.D.2d 151, 152, 759 N.Y.S.2d 62, 63 (1st Dep't 2003) ("The breach of contract and breach of fiduciary duty claims were properly dismissed as duplicative, since they arose from the same facts as the legal malpractice claim and allege similar damages.").

The plaintiff states that all of the defendants breached contracts with her, alleging that they "misrepresented their intentions and their services in written and verbal contracts and agreements—all of which were breached to the detriment of Pamela Carvel." (Am. Compl. at 49 & ¶ 163). In particular:

> Defendants acting individually and as managing partners in their firms, breached their promised conditions of employment and verbal agreements to represent Pamela Carvel and immediately seek reimbursement or indemnification to Pamela Carvel .... The specific conditions of employment to provide legal representation to Pamela Carvel required Defendant lawyers to seek payment for all sums advance [sic] to them by Pamela Carvel. Not one Defendant did so, and refused to do so when asked in a timely fashion as promised.

(Am.Compl., ¶ 165). For the reasons discussed below, this claim should be dismissed with respect to the Ross and Blank Rome defendants; however, because the plaintiff has stated a claim for breach of contract against the McCarthy Fingar defendants, their motion to dismiss should be denied with respect to this cause of action.

i. *The Ross and Blank Rome Defendants*

Ms. Carvel does not specify when or under what circumstances the Ross defendants promised to seek reimbursement of legal fees she had advanced to them or to other attorneys on their behalf; however, she clearly alleges the existence of an agreement between herself and the Ross defendants to seek reimbursement of such monies. (Am. Compl., ¶ 13; Supp. Pleading, ¶ 120). With respect to the Blank Rome defendants, the plaintiff points to a letter agreement sent to her by Mr. Camerik regarding the terms of Blank Rome's representation of Mr. Ross as New York ancillary administrator of Agnes Carvel's estate, which states:

> ***19** As you have done previously, it is my understanding that you will be advancing or loaning funds to the Estate of Agnes Carvel in order to satisfy the firm's fees and costs. While our payment of fees and costs will not be contingent upon an award of

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> any court, we will of course dutifully apply to any appropriate Court to seek reimbursement to the Estate, you, or any other appropriate party, of the fees and costs we are paid.

(Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. B to Carvel 1/7/11 Request, at 1). Ms. Carvel also alleges that Ms. Markewich verbally represented that she would seek "immediate reimbursement for all advances made by Pamela on behalf of the estate" upon Blank Rome's retainer in 2000. (Supp.Pleading, ¶ 174).

The plaintiff identifies the Ross and Blank Rome defendants' act of breach of these alleged agreements as their signing of the 2001 stipulation in December of 2001; she alleges that this document excluded her "as equal fiduciary entitled to indemnification, in violation of the letter contract retaining Blank Rome." (Pl. Blank Rome Opp. Memo., ¶ 99; *see also* Am. Compl., ¶¶ 5, 57; Supp. Pleading, ¶¶ 101, 144). Even assuming Ms. Carvel's interpretation of the 2001 stipulation is correct, this document was executed over seven years before the complaint in this action was filed, and thus it falls outside the applicable statute of limitations period. (2001 Stipulation). Because the statute of limitations begins running at the time of breach, this claim is not subject to equitable tolling. Further, although the plaintiff states that she did not discover the stipulation itself until 2003, she claims that the parties began breaching their agreement with her earlier than that. (Am. Compl., ¶ 21; Supp. Pleading, ¶¶ 39(c), 101, 144, 148). Therefore, Ms. Carvel's claims for breach of contract should be dismissed with respect to the Ross and Blank Rome defendants. To the extent that other allegations made by Ms. Carvel against Mr. Ross and discussed above in the section on legal malpractice can also be construed as claims for breach of contract, those claims should be dismissed as duplicative of the plaintiff's legal malpractice claim. *Nordwind,* 2007 WL 2962350, at *4–5.

ii. *The McCarthy Fingar Defendants*

The plaintiff alleges that the McCarthy Fingar defendants promised to seek reimbursement of all legal fees she had advanced for litigation related to Agnes Carvel's estate as a condition of their retention in 1999 and 2000. (Am. Compl., ¶¶ 13, 36–37; Supp. Pleading, ¶¶ 25, 29, 170). She claims that they subsequently breached that agreement by failing to recover advances she had made to other attorneys, including the Blank Rome defendants. (Am. Compl., ¶ 38; Supp. Pleading, ¶¶ 27, 32, 170). Furthermore, she alleges that despite McCarthy Fingar's having been awarded $400,000 in attorneys' fees by Justice Scarpino in June of 2003, the firm did not reimburse her for the legal costs she had advanced them in anticipation of that award, thereby taking payment twice over for the same services. (Supp. Pleading, ¶¶ 27, 184, 194; 6/30/03 Decision at 7; 7/30/03 Order at 3).

***20** Because Ms. Carvel alleges that the McCarthy Fingar defendants' breach occurred in 2003, following Justice Scarpino's decision, that act falls within the six-year statute of limitations since this action was filed in January of 2009. (Supp.Pleading, ¶ 27). Ms. Carvel's claim is therefore timely.

Her claim is also plausible. She alleges an agreement between herself and the McCarthy Fingar defendants pursuant to which she retained them and advanced their legal fees, but which they breached by failing to seek or obtain reimbursements of those fees and other monies she claimed entitlement to; as a result, Ms. Carvel claims damages in the amount of $800,000 to $1,000,000. (Supp.Pleading, ¶¶ 184, 196). The existence of such a retainer agreement is plausible, and Ms. Carvel's recitation of events is supported by the documentary evidence, including a 2000 retainer letter between her and McCarthy Fingar and Justice Scarpino's 2003 decision and order awarding McCarthy Fingar significant legal fees for its representation of Ms. Carvel. (Letter of Philip T. Temple dated Oct. 13, 2000 ("McCarthy Fingar Letter"), attached as Exh. F to Touitou 9/30/10 Aff.; 6/30/03 Decision at 7; 7/30/03 Order at 3). The McCarthy Fingar defendants have failed to address Ms. Carvel's breach of contract allegations, asserting only that she failed to properly plead the elements of this claim in her Amended Complaint. (McCarthy Fingar Memo. at 12–13). This assertion is incorrect, especially in light of the more lenient standard applied to *pro se* pleadings under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Erickson,* 551 U.S. at 94. The plaintiff has therefore stated a claim for breach of contract against the McCarthy Fingar defendants, and I recommend that their motion to dismiss be denied with respect to this claim.

d. *Common Law Fraud*

Common law fraud under New York law is comprised of four elements: (1) a "material, false representation," (2) made with the intent to defraud, (3) that is reasonably relied on by the plaintiff, (4) thereby causing her damage. *Chanayil v.*

Gulati, 169 F.3d 168, 171 (2d Cir.1999) (internal quotation marks omitted). The statute of limitations is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it." N.Y. CPLR § 213(8). A claim for common law fraud is subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). In her Amended Complaint, Ms. Carvel claims that each of the defendants "made false representation to [her] regarding services to be rendered" and that she relied on those representations to her financial detriment. (Am.Compl., ¶¶ 159, 161). Her claims of fraud nevertheless fail because they are either untimely or insufficiently pled.

***21** The key act of fraud alleged by Ms. Carvel against the defendants is their false promise to obtain reimbursement of the legal fees she advanced in connection with litigation related to Agnes Carvel's estate. (Am. Compl., ¶¶ 13–14, 129; Supp. Pleading, ¶¶ 29, 32, 136–37, 174–75). She states that each of the defendants "made false representations to [her] about steps they would take to seek reimbursement for cash advances [she] made to them." (Am.Compl., ¶ 159). In reliance on these promises, Ms. Carvel claims to have continued paying cash advances to the defendants. (Am.Compl., ¶ 13). This claim founders, however, because the plaintiff alleges that these promises were made in 1999 or 2000, eight years or more before the complaint in this action was filed and thus outside the statute of limitations period. (Am. Compl., ¶ 129; Supp. Pleading, ¶¶ 25, 27, 29, 174; Letter of Howard M. Camerik dated Feb. 22, 2000, attached as Exh. B to Carvel 1/7/11 Request, at 1; McCarthy Fingar Letter). Furthermore, the plaintiff's pleadings make clear that she was aware of the defendants' alleged misrepresentations by either 2003, when she learned of the 2001 stipulation, or 2005 at the latest, when she wrote letters to Ms. Markewich and Mr. Streng accusing them and their firms of violating their promise to seek reimbursement of fee advances. (Supp. Pleading, ¶ 148; Letter of Pamela Carvel dated July 11, 2005, attached as Exh. S to Touitou 11/24/09 Decl., at 2; Letter of Pamela Carvel dated June 30, 2005, attached as Exh. I to Brophy 9/30/10 Aff ., at 1–2). She therefore waited far longer than the two years allowed her under the statute of limitations from the time she discovered this alleged fraud until the date she filed her complaint.

The plaintiff additionally alleges that all of the defendants fraudulently promised to work on her behalf "against the unlawful actions by the foundation fraudsters" but then failed to do so, thereby causing her financial harm. (Am. Compl., ¶ 161; Supp. Pleading, ¶ 41(e)). This allegation also fails on statute of limitations grounds. Ms. Carvel states that the defendants first refused to oppose the "foundation fraudsters" in 2000, a refusal that she was no doubt aware of at the time since she was actively involved in litigation against the Foundation. Therefore, these claims necessarily accrued years before the complaint was filed in 2009. (Supp.Pleading, ¶ 41(e)).

The only series of facts alleged by the plaintiff that could come within the statute of limitations for common law fraud is her claim to have first learned in 2009 that Mr. Ross was not going to take any "steps to protect any interests of any beneficiaries or creditors of Agnes Carvel." (Pl. Ross Opp. Memo., ¶ 87; Pl. Blank Rome Opp. Memo., ¶ 85). Although the plaintiff does not state when Mr. Ross initially promised her that he would protect her interests as a beneficiary or creditor of Agnes Carvel's estate, any such promise took place prior to his appointment as the New York ancillary administrator of the estate, since Ms. Carvel approved of and promoted his taking on that position. (Am. Compl., ¶ 32; Supp. Pleading, ¶¶ 15, 88). That places his statement in 1998 or 1999, far more than six years before the filing of the complaint in this action and therefore outside the applicable statute of limitations. (Am. Compl., ¶ 32; Supp. Pleading, ¶¶ 15, 88; Ross Memo. at 10).

***22** Yet to the extent that Ms. Carvel reasonably continued to rely on any intentional misrepresentation by Mr. Ross until her conversation with Ms. Markewich in 2009, her claim for common law fraud could still be timely. However, the plaintiff has not plausibly alleged such reliance. First, she states at various points in her pleadings that she was aware long before 2009 that Mr. Ross had already abandoned his purported obligation to protect her as a beneficiary and creditor of Agnes Carvel's estate, primarily as a result of his decision to sign the 2001 stipulation, which she learned of in 2003, but also as a result of other acts of which she was aware by 2005. (Am. Compl., ¶ 40 (referring to the 2001 stipulation); Supp. Pleading, ¶¶ 144, 148, 153, 216). As a result, her claim to have been surprised or materially affected by again receiving this information in 2009 is not plausible. Second, Ms. Carvel has failed to allege the circumstances of this misrepresentation with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. She has not identified when or where Mr. Ross promised to protect her as a beneficiary or creditor of Agnes Carvel's estate, *Wood,* 328 Fed. Appx. at 747; she also has not explained why this statement was fraudulent, especially in light of Mr. Ross' attempt to obtain reimbursement of her legal fees as part of the settlement of Agnes Carvel's estate. (Decision and Order dated Feb. 27, 2009, attached as Exh. R to Ross 9/27/10 Aff., at 1).

Thus, the plaintiff's allegations of common law fraud are both untimely and insufficiently pled to sustain her burden under Rule 9(b) of the Federal Rules of Civil Procedure, and I recommend that they be dismissed.

e. *Fraudulent or Negligent Misrepresentation*

Fraudulent misrepresentation has four elements under New York Law: " '(1) the defendant made a material false representation; (2) the defendant intended to defraud the plaintiff thereby; (3) the plaintiff reasonably relied upon the representation; and (4) the plaintiff suffered damage as a result of such reliance.' " *Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.,* No. 05 CV 6734T, 2007 WL 162763, at *6 (W.D.N.Y. Jan. 18, 2007) (quoting *Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc.,* 157 F.3d 933, 940 (2d Cir.1998)). Negligent misrepresentation is also comprised of four elements: (1) the defendant was "careless[ ] in imparting words," (2) on which listeners could reasonably be expected to rely, (3) and based upon which they acted or failed to act, (4) resulting in damage. *Dallas Aerospace, Inc. v. CIS Air Corp.,* 352 F.3d 775, 788 (2d Cir.2003). The statute of limitations for fraudulent misrepresentation is the same as that for common law fraud—the greater of six years from the date the fraud was perpetrated or two years from the date of the plaintiff's actual or reasonably possible discovery of the fraud. N.Y. CPLR § 213(8). Although claims sounding in negligence typically carry a three-year statute of limitations under New York law, claims of negligent misrepresentation based on the commission of a fraud carry the same statute of limitations as for fraudulent misrepresentation. *Federal Insurance Co. v. Distinguished Properties Umbrella Managers Inc.,* 721 F.Supp.2d 293, 297 & n. 1 (S.D.N.Y.2010). Claims for both fraudulent misrepresentation and negligent misrepresentation based on fraud are subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which requires a party to "state with particularity the circumstances constituting fraud." Fed.R.Civ.P. 9(b).

***23** The plaintiff's claims for fraudulent and negligent misrepresentation are based on the same factual allegations that underlie her claim for common law fraud. Because the same statute of limitations also applies, the majority of the plaintiffs' allegations of fraudulent and negligent misrepresentation are untimely, as discussed above. With respect to her allegations regarding her conversation with Ms. Markewich in 2009 in which the latter allegedly communicated, for the first time, Mr. Ross' intention not to fulfill "any legal obligations to ... named beneficiaries and to known creditors of Agnes Carvel," this claim again fails as untimely and insufficiently pled. (Pl. Ross Opp. Memo., ¶ 87; Pl. Blank Rome Opp. Memo., ¶ 85). As discussed above, the underlying misrepresentation must have occurred on or before 1999, placing it far outside the applicable statute of limitations for this claim. Because the pleadings state that Ms. Carvel was aware as early as 2003 that Mr. Ross had abandoned any obligation he might have to her as a beneficiary or creditor of Agnes Carvel's estate, her alleged "discovery" of the misrepresentation in 2009 is not plausible and thus places these allegations entirely outside the statute of limitations. Finally, this allegation fails to meet the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure since Ms. Carvel has failed to identify facts regarding the underlying misrepresentation or how she was injured by it. Therefore, the plaintiff's claims for fraudulent and negligent misrepresentation should be dismissed.

f. *Conversion*

Under New York law, conversion is " 'the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.' " *Thyroff v. Nationwide Mutual Insurance Co.,* 460 F.3d 400, 403–04 (2d Cir.2006) (quoting *Vigilant Insurance Co. of America v. Housing Authority,* 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342, 347 (1995)). Conversion does not apply to sums of money unless the money sought is a "determinate sum [ ]" that is "specific and capable of identification." 90 C.J.S. *Trover and Conversion* § 16; *see also* *LoPresti v. Terwilliger,* 126 F.3d 34, 41–42 (2d Cir.1997) (" '[I]t is well-settled that an action will lie under New York law for conversion of money where there is an obligation to return or otherwise treat in a particular manner the specific money in question." (alteration in the original) (quoting *Vanderbilt University v. Dipsters Corp.,* No. 84 Civ. 7215, 1986 WL 10471, at *3 (S.D.N.Y. Sept. 17, 1986))). The statute of limitations for a claim of conversion is three years, and it accrues on the date that the conversion occurs. N.Y. CPLR § 214(3); *Daisley v. FedEx Ground Package System, Inc.,* 376 Fed. Appx. 80, 81 (2d Cir.2010).

The plaintiff's claim for conversion relies on two incidents. The first, which Ms. Carvel terms "Fraudulent Conversion of Real Estate," allegedly occurred when "Plaintiff's adversaries conspired to fraudulently transfer real estate once owned by Thomas and Agnes Carvel for less than fair market value, to insiders, in a self-dealing scheme with Hudson Valley Bank." (Am. Compl. at 31 & ¶ 93). Although she alleges that the defendants here were tangentially involved in this scheme in that they failed "to stop or recover the illegally transferred assets because of the agreements for these same adversaries to pay [the] Defendants for their collusion," Ms. Carvel nowhere alleges any damage to herself as a result of this transfer. (Am.Compl., ¶ 93). Therefore, this claim fails to meet the requirements of Rule 12(b)(6) of the Federal Rules of Civil Procedure.

***24** The second incident involves Mr. Ross' acquisition and withholding of a quantity of United States savings bonds allegedly belonging to Ms. Carvel. (Am. Compl., ¶¶ 122–23; Supp. Pleading, ¶¶ 95–110). The plaintiff claims that these bonds were left to her as a specific bequest in Agnes Carvel's will but remained in the possession of a lawyer in Tennessee until 2003. (Supp.Pleading, ¶¶ 95–97, 99). At that point, Mr. Ross was contacted by that attorney regarding the appropriate disposition of the bonds, and Mr. Ross directed that they be forwarded to him for delivery to Ms. Carvel; yet when the bonds arrived in New York, he did not notify her. (Supp.Pleading, ¶¶ 99, 102–03). The primary flaw in this allegation its timing: the plaintiff states that all of these events occurred in January of 2003 and that she was made aware of them "[a]t some time around 2003" when Mr. Ross "verbally admitted to [her] that he had directed delivery of the bonds to himself" and was retaining them as part of his role as the New York ancillary administrator of Agnes Carvel's estate. (Supp.Pleading, ¶¶ 99, 102, 104). Because the alleged conversion occurred in 2003, the statute of limitations accrued at that time and expired in 2006. Moreover, Ms. Carvel cannot claim the benefit of equitable tolling because she admits that she was informed of these activities in 2003.

Because the plaintiff's conversion claims are untimely and insufficiently pled, they should be dismissed.

g. *Unjust Enrichment*

In Count Four of her complaint, Ms. Carvel claims that the defendants have been unjustly enriched at her expense and asks for compensatory damages in the amount of $100,000,000. (Am. Compl. at 49 & ¶ 166). However, a cause of action for unjust enrichment under New York law is only available where a valid, enforceable contract does not already exist between the parties. *Rabin v. Mony Life Insurance Co.,* 387 Fed. Appx. 36, 42 (2d Cir.2010). Where a plaintiff brings claims for both breach of contract and unjust enrichment but fails to allege any duty owed to her outside that specified in the contract, her claim for unjust enrichment should be dismissed as duplicative. *See Hoeffner v. Orrick, Herrington & Sutcliffe LLP,* 61 A.D.3d 614, 615, 878 N.Y.S.2d 717, 719 (1st Dep't 2009) (finding plaintiff's unjust enrichment claim "duplicative of his breach of contract claim, since he alleges no duty owed him by defendants independent of the contract").

Here, the plaintiff's unjust enrichment claim is entirely duplicative of her breach of contract claims—the claims are pled under the same heading, rely on the same underlying facts, and lead to the same prayer for relief. (Am. Compl. at 49 & ¶¶ 163, 165, 166). Therefore, I recommend that the plaintiff's unjust enrichment claim be dismissed.

h. *Attorney Liability in Negligence to Third Parties*

In her motion papers, Ms. Carvel cites *Schwartz v. Greenfield Stein & Weisinger,* 90 Misc.2d 882, 396 N.Y.S.2d 582 (Queens Sup.Ct.1977), for the proposition that an attorney can be liable in tort to an individual not her client but for whom she promises to perform a legal task. (Pl. Ross Opp. Memo., ¶ 83; Pl. Blank Rome Opp. Memo., ¶ 79; Pl. McCarthy Fingar Opp. Memo., ¶ 90). In that case, the plaintiff made a secured loan to a borrower and relied on the borrower's attorney to perfect the security agreement. *Id.* at 882–83, 396 N.Y.S.2d at 582. The attorney failed to do so and the borrower subsequently went into bankruptcy, leaving the plaintiff without recourse for his loan. *Id.* at 883, 396 N.Y.S.2d at 582–83. The plaintiff then sued the borrower's attorney, claiming that the latter owed a duty to the plaintiff to perfect the security agreement and that, as a result of the attorney's negligence, the plaintiff had suffered the loss of the monies he loaned to the borrower. *Id.* at 883, 396 N.Y.S.2d at 583. The Queens County Supreme Court agreed with the plaintiff, finding that privity of contract between the plaintiff and the attorney was not necessary because the attorney owed an independent duty to the plaintiff as a result of his promise to perfect the security agreement. *Id.* at 886–87, 396 N.Y.S.2d at 584–85.

***25** It is not clear that this case has any application in the instant matter. The plaintiff alleges privity of contract between herself and all of the defendants; there is thus no reason why she would need to rely on this theory in order to sustain claims against the defendants for violations of their agreements. She offers no additional facts in support of this claim aside from the ones that underlie her breach of contract and negligent misrepresentation claims. This claim therefore has no basis in the plaintiff's complaint, and I recommend that it be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

i. *Aiding Breach of Fiduciary Duty and Conversion*

The plaintiff asserts that the defendants "could be held liable" for having aided other defendants in their breaches of fiduciary duty and acts of conversion. (Pl. Ross Opp. Memo., ¶ 81; Pl. Blank Rome Opp. Memo., ¶ 77; Pl. McCarthy Fingar Opp. Memo ., ¶ 88). She relies on *Joel v. Weber,* 197 A.D.2d 396, 602 N.Y .S.2d 383 (1st Dep't 1993), which holds that "under New York law, an attorney may be liable to third parties for actions taken in furtherance of his role as counsel upon proof ... of the existence of fraud, collusion, malice or bad faith." *Id.* at 396–97, 602 N.Y.S.2d at 384 (internal quotation marks omitted). Such actions sound in malpractice and therefore carry a three-year statute of limitations. N.Y. CPLR § 214(6).

This claim runs aground because it is untimely and because the plaintiff has failed to plead sufficient facts to sustain it. Ms. Carvel's pleadings indicate that this cause of action arises out of four different representations undertaken by the Ross and Blank Rome defendants. First, she refers to Mr. Ross' role as "both client-fiduciary and lawyer for the estates, trusts and corporations ." (Pl. Ross Opp. Memo., ¶ 80; Pl. Blank Rome Opp. Memo., ¶ 76). However, she does not identify the specific "estates," "trusts," or "corporations" to which she is referring; nor does she explain how these entities have violated her rights, let alone how they have done so based on the Ross defendants' advice. Her pleading is therefore insufficient to fulfill the requirements of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Second, Ms. Carvel refers to Blank Rome's representation of Mr. Ross as the New York ancillary administrator of Agnes Carvel's estate. (Pl. Blank Rome Opp. Memo., ¶ 76). The plaintiff does separately allege that at least one of the Ross defendants' violations of her rights occurred as a result of the Blank Rome defendants' influence over him. (Supp.Pleading, ¶¶ 16, 90). However, that violation—the signing of the 2001 stipulation—occurred in December of 2001 and was discovered by the plaintiff in 2003; as a result, this allegation is untimely. (Supp.Pleading, ¶¶ 101, 144, 148). Third, Ms. Carvel refers to Blank Rome's representation of Agnes Carvel's estate in Florida and New York. (Pl. Blank Rome Opp. Memo., ¶ 76). But she fails to specify what advice the Blank Rome defendants gave to the estate's representatives or how the estate acted to harm her, and thus this claim fails for insufficient pleading pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Finally, Ms. Carvel claims, "[o]n information and belief," that M & R "advised Leonard Ross to engage[ ] in fraud across state lines" when he allegedly converted her savings bonds. (Pl. Blank Rome Opp. Memo., ¶ 86). Because this alleged conversion occurred in 2003, the statute of limitations for this claim expired in 2006; furthermore, the plaintiff does not plead the facts underlying her "belief" that M & R had given Mr. Ross such advice and therefore has not alleged sufficient facts to sustain this claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

***26** Because Ms. Carvel's allegations are either untimely or insufficiently pled, I recommend that her claim for aiding breach of fiduciary duty and conversion should be dismissed.

j. *Tortious Interference with Business Relations*

To state a claim for tortious interference with business relations under New York law, the plaintiff must show: "(1) [she] had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship." *Catskill Development, L.L.C. v. Park Place Entertainment Corp.,* 547 F.3d 115, 132 (2d Cir.2008). The statute of limitations is three years and " 'accrues at the time the injury is sustained, rather than the date of defendant's alleged wrongful act or the date of discovery of the injury by the plaintiff.' " *Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.,* No. 02 Civ. 6438, 2003 WL 21507529, at *3 (S.D.N.Y. June 30, 2003) (quoting *Rosemeier v. Schenker International, Inc.,* 895 F.Supp. 65, 66 (S.D.N.Y.1995).

The plaintiff briefly mentions this cause of action in her Amended Complaint, stating that the "Defendants conspired to tortiously interfere with Pamela Carvel's business expectations, from contracts, agreements, assignments, and promises valued at over $15 million." (Am.Compl., ¶ 92). This statement is insufficient to plead a claim for tortious interference with business relations. Even considering the entirety of the plaintiff's pleadings, it is impossible to discern which defendants are alleged to have participated in this conspiracy or what potential business expectations or relations were interfered with. I therefore recommend that this cause of action be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

k. *Fraudulent Conveyance*

"[T]he general goal of fraudulent conveyance laws is to prevent valuable assets from being transferred away from a debtor in exchange for less than fair value, thus leaving insufficient funds or assets to compensate honest creditors." 37 Am.Jur.2d *Fraudulent Conveyances and Transfers* § 1. To prove that a fraudulent conveyance occurred under New York law, " 'a creditor must show intent to defraud on the part of the transferor.' " *In re Sharp International Corp.,* 403 F.3d 43, 56 (2d Cir.2005) (quoting *HBE Leasing Corp. v. Frank,* 61 F.3d 1054, 1059 n. 5 (2d Cir.1995)). Because such intent constitutes fraud, it must be pled with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. *Id.*

Ms. Carvel's sole reference to any alleged fraudulent conveyances appears in Count Six of her Amended Complaint, where she claims that the defendants "engaged in fraudulent transfers to themselves and their agents to defraud Pamela Carvel's claims." (Am.Compl., ¶ 177). However, this allegation is insufficiently specific to meet Rule 9(b)'s threshold—it does not identify who possessed the transferred assets, explain how that individual or entity was in the plaintiff's debt, describe when or where the defendants executed these transfers, state how the plaintiff was defrauded by them, or claim any damages. Therefore, this cause of action should be dismissed pursuant to Rule 9(b) of the Federal Rules of Civil Procedure.

l. *Intentional Infliction of Emotional Distress*

***27** Under New York law, the tort of intentional infliction of emotional distress has four elements: "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." *Bender v. City of New York,* 78 F.3d 787, 790 (2d Cir.1996). For conduct to be considered "extreme and outrageous," it must be " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.' " *Stuto v. Fleishman,* 164 F.3d 820, 827 (2d Cir.1999) (quoting *Howell v. New York Post Co.,* 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 353 (1993)). The statute of limitations for a claim of intentional infliction of emotional distress is one year, accruing on the date the tort was committed. *Zaltz v. Wells Fargo Home Mortgage,* No. 08 Civ. 11225, 2010 WL 3026536, at *4 (S.D.N.Y. Aug. 2, 2010).

In Count Six of her Amended Complaint, the plaintiff identifies various of the defendants' acts that underlie her claim for intentional infliction of emotional distress, including "financial extortion, personal threats amounting to criminal coercion, and harassment" of both Agnes Carvel and herself. (Am.Compl., ¶¶ 178–80). To the extent that these threats were actually made against Agnes Carvel, they clearly fall outside the statute of limitations, since Agnes Carvel died in 1998. [4] (Am.Compl., ¶¶ 24, 71, 178, 180).

Of the remaining acts, the plaintiff alleges only one that falls within the statute of limitations applicable to her claim for intentional infliction of emotional distress. Ms. Carvel states that she was informed in 2009 by Ms. Markewich that Mr. Ross "would take no steps to protect any interests of any beneficiaries or creditors of Agnes Carvel because those matters would be left to the estate in England." (Pl. Ross Opp. Memo., ¶ 87). As described, this act falls far short of the "atrocious" and "utterly intolerable" behavior required to meet the standard for "extreme and outrageous" conduct under New York law. *Stuto,* 164 F.3d at 827. Therefore, the plaintiff has failed to sufficiently plead the elements of a claim for intentional infliction of emotional distress, and this cause of action should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

3. *Federal Claims*

In addition to her common law claims, the plaintiff has pled five causes of action based in federal law: (1) a violation of her rights as protected by 42 U.S.C. § 1981, (2) a conspiracy to violate her constitutional rights pursuant to 42 U.S.C. § 1983, (3) a conspiracy to violate her constitutional rights pursuant to 42 U.S.C. § 1985(2), (4) a violation of her

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rights as protected by 42 U.S.C. § 1988, and (5) a civil RICO claim. I will address each of these claims in turn.

a. *42 U.S.C. § 1981*

***28** Section 1981 confers on

> [a]ll persons within the jurisdiction of the United States ... the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

42 U.S.C. § 1981(a). To state a claim pursuant to § 1981, the plaintiff must show that she "is a member of a racial minority group and the defendants intended to discriminate against her based on her race." *White v. St. Joseph's Hospital,* 369 Fed. Appx. 225, 226–27 (2d Cir.2010). Although Ms. Carvel claims the protection of § 1981, she has failed to plead that she is a member of a racial minority or that the defendants took adverse actions against her based on her race. (Am. Compl. at 42). Therefore, she has failed to state a claim for a violation of 42 U.S.C. § 1981, and this cause of action should be dismissed.

b. *42 U.S.C. § 1983*

"To state a claim for relief in an action brought under § 1983, [the plaintiff] must establish that [she was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Manufacturers Mutual Insurance Co. v. Sullivan,* 526 U.S. 40, 49–50 (1999). Acting "under color of state law" requires a defendant to "exercise[ ] power possessed by virtue of state law and made possible only because [she] is clothed with the authority of state law." *Arar v. Ashcroft,* 585 F.3d 559, 568 (2d Cir.2009) (quoting *West v. Atkins,* 487 U.S. 42, 49 (1988)) (internal quotation marks omitted). A private individual can also be subject to suit under § 1983, but only if she is "a willful participant in a joint activity with the State or its agents." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 947 (1982). The statute of limitations for a claim under § 1983 in New York is three years, *Harrison v. Harlem Hospital,* 364 Fed. Appx. 686, 688 (2d Cir.2010), and it accrues when the plaintiff learns, or reasonably should have learned, of the injury on which the claim is based, *De Carlo v. Ratner,* 204 F.Supp.2d 630, 638 (S.D.N.Y.2002), *aff'd,* 53 Fed. Appx. 161 (2d Cir.2002).

" 'To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act in furtherance of that goal causing damages.' " *AK Tournament Play, Inc. v. Town of Wallkill,* No. 09 Civ. 10579, 2011 WL 197216, at *3 (S.D.N.Y. Jan. 19, 2011) (quoting *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir.1999)). Although a plaintiff cannot simply set forth conclusory allegations of a § 1983 conspiracy, *Ciambriello v. County of Nassau,* 292 F.3d 307, 324 (2d Cir.2002), the Second Circuit has acknowledged that "conspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn,* 200 F .3d at 72 (internal quotation marks omitted).

***29** Ms. Carvel claims that all of the defendants here, along with other individuals not named, participated in a conspiracy to deprive her of various constitutional rights, including: (1) "equal treatment as that given other *Carvel* fiduciaries, beneficiaries, and creditors who aligned with [the Foundation]" pursuant to the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (2) "due process to recover stolen and wrongfully diverted property" pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (3) "the right to assist law enforcement without personal and financial threats, harassment, and intimidation" pursuant to the First Amendment to the United States Constitution; and (4) the right to a jury trial pursuant to the Seventh Amendment to the United States Constitution. (Am. Compl., ¶¶ 79, 146; Supp. Pleading, ¶¶ 42(c), 75(d)). She alleges that this conspiracy had two purposes: to maintain the Foundation's control over Agnes Carvel's estate assets and to prevent Ms. Carvel from investigating acts of fraud and wrongdoing by the defendants,

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Justice Scarpino, and the individuals running the Foundation. She further alleges that it was accomplished in two ways: by naming the Foundation as the remainder beneficiary of Agnes Carvel's estate and by causing the plaintiff financial hardship by denying her reimbursement of her legal fees. (Am. Compl., ¶¶ 10–11, 16, 40, 63, 87, 98, 146, 148, 153, 187; Supp. Pleading, ¶¶ 38(b), 55–58, 153).

Ms. Carvel alleges that these actions were perpetrated "under color ... of state law" because the defendants were joined in this conspiracy by Justice Scarpino, a state employee acting in his official capacity. (Am.Compl., ¶¶ 5, 16, 40, 59). She states that both Juustice Scarpino and the defendants agreed to participate in the conspiracy after accepting payment from the "foundation fraudsters," the individuals running the Foundation and the 1991 Trust. (Am. Compl., ¶ 66; Supp. Pleading, ¶ 140; Supp. Pleading Reply, ¶¶ 7, 9). In particular, the plaintiff alleges that William Griffin, the President of the Foundation and also the purported owner of Hudson Valley Bank, bribed Justice Scarpino with three home equity lines of credit totaling $400,000 that Justice Scarpino took out in 2000, 2001, and 2004. (Am. Compl., ¶¶ 77–78; Supp. Pleading, ¶ 40(e); Supp. Pleading Reply, ¶¶ 7, 9). She also claims that the same "foundation fraudsters" gave money to the Ross and Blank Rome defendants to induce them to abandon her interests by failing to seek reimbursement for her and "throwing" the trial that ended with the Foundation being named as the remainder beneficiary of Agnes Carvel's estate. (Am. Compl., ¶¶ 63, 66; Supp. Pleading at 18 & ¶¶ 55–58). She states that the "foundation fraudsters" paid off the Ross and Blank Rome defendants through the 2001 stipulation, in which the Foundation and the 1991 Trust agreed to pay the Ross and Blank Rome defendants on an ongoing basis for their legal work on behalf of Agnes Carvel's ancillary estate in New York. (Supp.Pleading, ¶ 48(a); Stipulation). With respect to the McCarthy Fingar defendants, Ms. Carvel alleges that Mr. Streng had a personal relationship with Justice Scarpino that enabled him to deny Ms. Carvel reimbursement of the legal fees she had advanced to McCarthy Fingar despite having been awarded $900,000 in fees by Justice Scarpino for his representation of the plaintiff. (Am. Compl., ¶ 83; Supp. Pleading, ¶¶ 193–94).

***30** Even if these allegations were true, the plaintiff's claim is time-barred. The injuries underlying her conspiracy claim —the failure to reimburse her legal fees, the denial of her right to a jury trial, and the selection of the Foundation as the remainder beneficiary of Agnes Carvel's estate—were all apparent to the plaintiff by 2005 at the latest, and thus the statute of limitations for this claim expired in 2008. (Am. Compl., ¶ 2; Supp. Pleading, ¶ ¶ 56–57, 153, 210–11, 216; Letter of Pamela Carvel dated July 11, 2005, attached as Exh. S to Touitou 11/24/09 Decl., at 2; Letter of Pamela Carvel dated June 30, 2005, attached as Exh. I to Brophy 9/30/10 Aff., at 1–2); *In re The Thomas and Agnes Carvel Foundation,* 2002 WL 32872391, at *10. Therefore, this claim should be dismissed.

c. *42 U.S.C. § 1985(2)*

To state a claim for conspiracy pursuant to § 1985(2), the plaintiff must allege that (1) she is a member of a protected class, (2) the defendants conspired to deprive her of her constitutional rights, (3) the defendants "acted with class-based, invidiously discriminatory animus," and (4) the plaintiff suffered damage. *Simpson ex rel. Simpson v. Uniondale Union Free School District,* 702 F.Supp.2d 122, 133 (E.D.N.Y.2010) (citing *Griffin v. Breckenridge,* 403 U.S. 88, 102–03 (1971)). Ms. Carvel references a claim for conspiracy pursuant to 42 U.S.C. § 1985(2) in both her Amended Complaint and her motion papers. (Am. Compl. at 42; Pl. Blank Rome Opp. Memo., ¶ 64). However, nowhere does she allege either that she is a member of a protected class or that the defendants' conspiratorial actions were motivated by her membership in that class. This cause of action should therefore be dismissed for failure to state a claim.

d. *42 U.S.C. § 1988(a)*

In her motion papers, Ms. Carvel implies that the defendants have violated her rights as protected by § 1988(a). (Pl. Blank Rome Opp. Memo., ¶ 65). This claim fails for a variety of reasons. In the first instance, § 1988(a) does not give individuals a substantive right but rather provides a mechanism for filling procedural gaps that might hinder the enforcement of federal civil rights laws. *See, e.g., Wallace v. Kato,* 549 U.S. 384, 402 (2007); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 725 (1999). The plaintiff has stated no facts relevant to the application of this procedural mechanism; she has also failed to explain how § 1988(a) protects her, how the defendants violated it, or what damages she has sustained as a result. Therefore, her claim should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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5. *Civil RICO*

The Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") authorizes the filing of private civil suits by "any person injured in his business or property by reason of a violation" of its provisions. 18 U.S.C. § 1964(c). A person bringing a RICO claim must first plead the elements of a RICO violation, which include "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity," followed by an "injury to [her] business or property as a result of the RICO violation." *Terrell v. Eisner,* 104 Fed. Appx. 210, 212 (2d Cir.2004) (internal quotation marks omitted). To show a "pattern of racketeering activity," the plaintiff must allege at least two acts among those enumerated in 18 U.S.C. § 1961(1), which include bribery, obstruction of justice, obstruction of criminal investigations, tampering with a witness or victim, and retaliating against a witness or victim. 18 U.S.C. § 1961(1), (5). The statute of limitations for a civil RICO claim is four years, and it accrues " 'when the plaintiff discovers or should have discovered the RICO injury.' " *Gilmore v. Gilmore,* No. 09 Civ. 6230, 2010 WL 4910211, at *3 (S.D.N.Y. Nov. 15, 2010) (quoting *National Group for Communications and Computers Ltd. v. Lucent Technologies Inc.,* 420 F.Supp.2d 253, 264 (S.D.N.Y.2006)).

***31** In her Amended Complaint, Ms. Carvel alleges "[o]n information and belief" that the defendants "entered into an enterprise of corruption," which she refers to as a RICO violation. (Am.Compl., ¶¶ 68, 106–07, 183). Of the various acts allegedly committed by the defendants, there are four that could qualify as racketeering activity as defined by 18 U.S.C. § 1961(1). The first is bribery—the plaintiff states that the defendants here participated in a scheme whereby Mr. Griffin bribed Justice Scarpino to make rulings favorable to the Foundation. (Am. Compl., ¶¶ 77–78; Supp. Pleading, ¶ 40(e)). However, any injury arising from these alleged bribes would have been known to Ms. Carvel by 2002, when Justice Scarpino found that the Foundation was the rightful remainder beneficiary of Agnes Carvel's estate. *In re The Thomas and Agnes Carvel Foundation,* 2002 WL 32872391. This injury therefore falls outside the four-year statute of limitations for a civil RICO claim. Next, Ms. Carvel claims that the defendants, in particular the Ross defendants, obstructed criminal investigations into fraud related to Thomas and Agnes Carvel's estates by refusing to turn over evidence or properly pay expert witnesses. (Supp.Pleading, ¶¶ 124–26, 128–29, 131). According to the pleadings, however, these activities occurred and were immediately known to the plaintiff by November of 2004 at the latest; any injury resulting from them thus fall outside the statute of limitations for her civil RICO claim. Third, Ms. Carvel accuses the defendants of acquiescing in behavior intended to intimidate and harass Agnes Carvel and thereby tampering with a victim. (Am.Compl., ¶¶ 178, 180). Any such acts were necessarily both performed and known to the plaintiff by the time of Agnes Carvel's death in 1998; they therefore fall outside the statute of limitations for this claim. Finally, the plaintiff accuses the defendants of refusing to reimburse her legal fees in retaliation for her investigations into their participation in criminal fraud and ethical violations. (Am. Compl., ¶ 153; Supp. Pleading, ¶ 38(b); Supp. Pleading Reply, ¶ 9). This claim also falls outside the statute of limitations. With respect to the Ross and Blank Rome defendants, Ms. Carvel states that they accomplished their diversion of monies owed to her by entering into the 2001 stipulation, which she was informed of in 2003. (Am. Compl., ¶¶ 21, 148; Supp. Pleading Reply, ¶ 9). The McCarthy Fingar defendants were awarded legal fees by Justice Scarpino in 2003 and 2004; their failure to reimburse Ms. Carvel for those fees would have been apparent to her at that time, if not before. (6/30/03 Decision at 7; 7/30/03 Order at 3; 12/29/04 Decision at 4).

Because none of Ms. Carvel's allegations of racketeering behavior are timely, her civil RICO claim should be dismissed.

4. *State Statutory Claims*

Finally, the plaintiff pleads two claims pursuant to New York statutory law: embezzlement and violations of New York State Judiciary Law § 487.

a. *Embezzlement*

***32** The plaintiff alleges that she was damaged in the amount of $18,000,000 by Mr. Ross' "collusion to embezzle corporate assets." (Supp.Pleading, ¶¶ 58, 118, 121). Embezzlement is prohibited by New York Penal Law § 155.05(2)(a); however, the plaintiff's claim fails for insufficient pleading. She has not stated any facts regarding the alleged embezzlement aside from her conclusory allegation that Mr. Ross "engaged" in "collusion" to commit it. Therefore, this cause of action should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

b. *New York State Judiciary Law § 487*

New York State Judiciary Law § 487 (" § 487") creates a private right of action for any individual harmed by an attorney's act of "deceit or collusion," where that act was committed "with intent to deceive the court or any party." N.Y. Jud. Law § 487(1). For the attorney's misconduct to be actionable, her acts must have occurred during the pendency of a court action while she was acting in her capacity as an attorney. *See* *O'Brien v. Alexander,* 898 F.Supp. 162, 168–69 (S.D.N.Y.1995) ("Since no lawsuit was pending when the alleged representations in question were made ... plaintiff's claim must be dismissed, for section 487 by its terms applies only to statements made to the court or any party to a lawsuit."), *aff'd,* 101 F.3d 1479 (2d Cir.1996); *Northern Trust Bank of Florida/Sarasota, N.A. v. Coleman,* 632 F.Supp. 648, 650 (S.D.N.Y.1986) ("Section 487 is aimed at actions by an attorney in his or her role *as an attorney.* The mere fact that a wrongdoer is an attorney is insufficient to impose liability for treble damages under section 487." (emphasis in the original)); *Nardella v. Braff,* 621 F.Supp. 1170, 1172 (S.D.N.Y.1985) ("For a civil action to lie for violation of § 487 the deceit complained of must occur during the pendency of a court action."). Because this cause of action sounds in malpractice, its statute of limitations is three years, accruing on the date of the alleged malpractice. N.Y. CPLR § 214(6); *Rafter v. Liddle,* No. 05 Civ. 4296, 2006 WL 2255093, at *7, *11 (S.D.N.Y. Aug. 4, 2006), *aff'd,* 288 Fed. Appx. 768 (2d Cir.2008).

In her motion papers, the plaintiff accuses all of the defendants of numerous violations of § 478; however, these allegations are both untimely and insufficiently pled. The plaintiff first alleges that the defendants have lied to this Court in their motions to dismiss. (Pl. Ross Opp. Memo., ¶¶ 102(4), 107; Pl. Blank Rome Opp. Memo., ¶ 100(4); Pl. McCarthy Fingar Opp. Memo., ¶ 85). This accusation is insufficiently pled—Ms. Carvel fails to state which of the many statements made in defendants' various motions are false or what damage has been done to her as a result of those false statements. Some of the plaintiff's other allegations are based on events outside the statute of limitations for this action; for example, she alleges deceit by the Ross and Blank Rome defendants in signing the 2001 stipulation and in transferring savings bonds from Tennessee to New York in 2003. (Pl. Ross Opp. Memo., ¶¶ 101, 102(1); Pl. Blank Rome Opp. Memo., ¶¶ 99, 100(1)). Although the plaintiff provides a further laundry list of examples of the defendants' "deceit [and] collusion resulting in financial damages," no dates are ascribed to the acts, and the allegations are largely incoherent. (Pl. Ross Opp. Memo., ¶ 102; Pl. Blank Rome Opp. Memo., ¶ 100). To the extent that these accusations are duplicative of the plaintiff's legal malpractice and breach of fiduciary duty allegations, discussed above, they are untimely. To the extent that some of them may relate to events that occurred on or after January 2006, they are insufficiently pled and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

D. *Leave to Amend*

***33** A *pro se* complaint "should not be dismissed '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.' " *Wilson v. Wilson–Polson,* No. 09 Civ. 9810, 2010 WL 3733935, at *10 (S.D.N.Y. Sept. 23, 2010) (quoting *Branum v. Clark,* 927 F .2d 698, 705 (2d Cir.1991)). " 'Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend.' " *Lucente v. International Business Machines Corp.,* 310 F.3d 243, 258 (2d Cir.2002) (quoting *Ruffolo v. Oppenheimer & Co.,* 987 F.2d 129, 131 (2d Cir.1993)). Here, the plaintiff has already been given two opportunities to amend and supplement her pleadings so as to state cognizable causes of action. With the exception of one claim, she has failed to do so. Therefore, where the Court dismisses the plaintiff's claims, it should do so with prejudice.

E. *Filing Injunction*

Where appropriate, " '[a] district court not only may but should protect its ability to carry out its constitutional functions against the threat of onerous, multiplicitous, and baseless litigation.' " *Safir v. United States Lines, Inc.,* 792 F.2d 19, 24 (2d Cir.1986) (quoting *Abdullah v. Gatto,* 773 F.2d 487, 488 (2d Cir.1985)). One common way for courts to fulfill this obligation is by issuing filing injunctions, which forbid individuals from filing lawsuits on particular topics or against particular defendants without the court's prior approval. *See, e.g.,* *Iwachiw v. New York State Department of Motor Vehicles,* 396 F.3d 525, 528–29 (2d Cir.2005). The Second Circuit has established five factors for courts to consider when determining whether to issue a filing injunction:

> (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

Id. at 528 (quoting *Safir,* 792 F.2d at 24).

In their motion papers, the Blank Rome defendants ask the Court to "impose an injunction ... to prevent further litigation against the Markewich Firms" by the plaintiff. (Supplemental Reply Memorandum of Law in Support of Defendants Eve Rachel Markewich, Blank Rome LLP and Markewich & Rosenstock LLP's Motion to Dismiss the Complaint at 10). Similar injunctions have already been entered against Ms. Carvel by the Honorable Shira A. Scheindlin and the Honorable Jed S. Rakoff of this Court. *See Carvel v. Scarpino,* No. 08 Civ. 3305, 2010 WL 5174392, at *10 (S.D.N.Y. Dec. 16, 2010); *Thomas and Agnes Carvel Foundation,* 2010 WL 3303777, at *1. Judge Scheindlin's injunction applies to some of the defendants here, namely, Eve Markewich, Frank Streng, and Joel Aurnou. *Carvel,* 2010 WL 5174392, at *10. The reason for these injunctions is clear: Ms. Carvel has demonstrated a preference for filing repetitive, meritless *pro se* lawsuits against the Blank Rome defendants, undoubtedly at great expense to them and with no consideration for the Court's time and resources. Taking her motives at their most innocent, she appears to be driven by her conviction that the Blank Rome defendants are somehow responsible for losses of money and property that she believes are rightfully hers; however, Ms. Carvel has failed to successfully channel this belief into any semblance of a viable lawsuit despite numerous attempts. Her repeated insistence on filing lawsuits against the Blank Rome defendants has thus crossed the line into harassment and raises the inference "that she seeks to appropriate property to which she is not entitled and, in the alternative, to impose unjustified litigation burdens on those whom she deems responsible for the frustration of her efforts in this regard." *Thomas and Agnes Carvel Foundation,* 2010 WL 3303777, at *34. Therefore, to the extent that the Blank Rome defendants are not already protected by this district's prior filing injunctions, an injunction should be entered prohibiting Ms. Carvel from filing further complaints in this district against Ms. Markewich, Mr. Bockstein, Mr. Valente, Blank Rome, or M & R, without the prior approval of the Court.

Conclusion

***34** For the reasons set forth above, I recommend that the defendants' motions to dismiss be denied with respect to the plaintiff's claim for breach of contract against Joel Aurnou, Frank Streng, and McCarthy Fingar LLPi otherwise, I recommend that the motions be granted and the remainder of the plaintiff's claims be dismissed with prejudice. I also recommend the entry of a filing injunction against Ms. Carvel with respect to the Blank Rome defendants. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Lewis A. Kaplan, Room 1310 and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

All Citations

Not Reported in F.Supp.2d, 2011 WL 856283

Footnotes

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Carvel v. Ross, Not Reported in F.Supp.2d (2011)

1 Ms. Carvel's claims against Justice Scarpino should be barred in any case by the doctrine of absolute judicial immunity. *See* *Carvel v. New York,* 369 Fed. Appx. 269, 270 (2d Cir.2010).

2 I note that the plaintiff does not organize her causes of action in this manner but instead groups them under six headings: (1) "Civil Conspiracy for Deprivation of Rights"; (2) "Conspiracy for Deprivation of Rights Secured by U.S. Constitution"; (3) "Reprehensibility Misconduct by Lawyers"; (4) "Bad Faith, Breaches of Contract, Unjust Enrichment"; (5) "Breach of Fiduciary Duty, Duty of Loyalty, Duty of Care"; and (6) "Harassment; Intimidation; Extortion." (Am. Compl. at 42, 45, 47, 49, 52, 53). However, her allegations have a wider scope than these six headings allow and thus are more appropriately addressed on an individual basis.

3 To the extent that Ms. Carvel is claiming actual fraud, a six-year statute of limitations applies, regardless of the nature of the relief requested. *Scantek Medical, Inc. v. Sabella,* 583 F.Supp.2d 477, 490 (S.D.N.Y.2008). But, as will be discussed below, the plaintiff's fraud claims all fail.

4 Ms. Carvel would not have direct standing to enforce any tort committed against Agnes Carvel; however, she claims standing as an assignee because "in 1994 Agnes Carvel assigned her causes of action[ ] in claims to Pamela Carvel." (Pl. Ross Opp. Memo., ¶ 37).

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United States District Court,
N.D. New York.

Stephen VAUGHAN, Petitioner,
v.
William LAPE, Superintendent, Marcy Correctional Facility, Respondent.

No. 9:05-CV-1323.
|
July 12, 2007.

Attorneys and Law Firms

Stephen Vaughan, Minoa, NY, pro se.

Luke Martland, Assistant Attorney General of the State of New York, Malancha Chanda, Esq., Asst. Attorney General, of Counsel, Hon. Andrew M. Cuomo, Attorney General of the State of New York, Department of Law, New York, NY, for Respondent.

DECISION and ORDER

Hon. DAVID N. HURD, United States District Judge.

***1** Petitioner, Stephen Vaughan, brought a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondent made a motion to dismiss the petition. By Report-Recommendation dated March 2, 2007, the Honorable Gustave J. DiBianco, United States Magistrate Judge, recommended that the motion to dismiss be granted and that the petition be denied and dismissed. There have been no objections made to the Report-Recommendation.

Accordingly, it is

ORDERED that

1. Respondent's motion to dismiss is GRANTED; and

2. The petition for a writ of habeas corpus is DENIED and DISMISSED in its entirety.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

REPORT-RECOMMENDATION

GUSTAVE J. DIBIANCO, Magistrate Judge.

This matter has been referred to me for Report and Recommendation by the Honorable David N. Hurd, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

Petitioner brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In this application, petitioner is challenging the sentence he received on June 20, 2000, after entering a plea of guilty to Burglary, First Degree in Onondaga County Supreme Court. Petitioner was sentenced to a determinate term of seven and one-half years, together with five years of supervised release.

Petitioner did not file a direct appeal from his sentence and conviction because he waived his right to appeal as part of his plea agreement. However, on February 12, 2003, petitioner made a motion to set aside his sentence in Onondaga County Supreme Court pursuant to N.Y. CRIM. PROC. LAW Section 440.20, claiming that his pre-sentence report contained inaccurate information. This motion was denied on April 3, 2003.

Petitioner appealed the denial of his Section 440.20 motion to the Appellate Division, Fourth Department. Although the Appellate Division granted petitioner leave to appeal, his appeal was subsequently denied on July 1, 2005. *People v. Vaughan,* 20 A.D.3d 940, 798 N.Y.S.2d 289 (4th Dept.2005). On September 30, 2005, petitioner's motion for reargument in the Fourth Department was denied, and the Court of Appeals denied petitioner's motion for leave to appeal on October 3, 2005. *People v. Vaughan,* 21 A.D.3d 1442, 801 N.Y.S.2d 555 (4th Dept.2005); *People v. Vaughan,* 5 N.Y.3d 857, 840 N.E.2d 146 (2005).

Petitioner raises a single ground in support of his petition:

1. The prosecution's failure to provide petitioner or his counsel with the pre-sentence report at least one

> day prior to sentencing constitutes a violation of the Fourteenth Amendment.

Respondent has filed a motion to dismiss the petition, with a memorandum of law and the pertinent state court records. (Dkt. No. 6). For the following reasons, the court recommends granting respondent's motion to dismiss the petition.

DISCUSSION

1. *Facts*

On January 23, 2000, petitioner went to his ex-girlfriend's house in Minoa, New York. The ex-girlfriend was not at home, and petitioner entered the house over the objection of her roommate. The roommate explained that the ex-girlfriend was at work. Petitioner entered the house, removed a twelve-gauge shotgun from a gun cabinet, loaded the gun with shotgun shells from his coat pocket, and sat down. Petitioner stated that he would shoot his ex-girlfriend, and then kill himself. The roommate alerted the police, and petitioner was arrested. The roommate gave a statement to police shortly after the January 2000 incident in which she said that "[h]e did not point the gun at me, but I felt threatened when he said that I could not leave." (Exhibit C to Petitioner's Memorandum of Law, included at Dkt. No. 1). During the incident, "[t]he shotgun was on his lap and was pointing right at me." *Id* .

***2** Petitioner was charged by Superior Court Information with Burglary, First Degree; Criminal Use of a Firearm, First Degree; Criminal Possession of a Weapon, Second Degree; Unlawful Imprisonment, First Degree; Reckless Endangerment, First Degree; and Criminal Contempt, Second Degree. Petitioner pleaded guilty to Burglary, First Degree in Onondaga County Supreme Court on June 2, 2000. At his plea, petitioner was represented by Attorney Kenneth Moynihan from the Hiscock Legal Aid Society. At the plea hearing, during a discussion of the negotiated seven and one-half years determinate sentence, defense counsel argued that the period of petitioner's post-release supervision should be shortened, and the judge should "... rely on the presentence report and the CCA report ...." (p. 3 of Transcript Plea Hearing, included as Exhibit A to Petitioner's Memorandum of Law, Dkt. No. 1 ("Plea Transcript")). Attorney Moynihan characterized the length of time of post-incarceration supervised release as "the major issue." (p. 2, Plea Transcript). The judge stated that he did not anticipate shortening the period of supervised release, but that he would consider the request. *Id.*

During the plea colloquy, petitioner waived a number of rights, including the right to have his case presented to a grand jury, as well as his right to appear and testify in front of the grand jury. He agreed to be charged with Burglary, First Degree, and waived his right to a jury trial, his right to confront, cross examine, and question witnesses on his behalf, and his right to testify. Petitioner acknowledged that he understood he was pleading guilty to a felony, and waived his right to appeal "any mistakes or errors or omissions made in this court." *Id.* at 3. Petitioner admitted that he

> knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein. And when in effecting entry or while in the dwelling or immediate flight therefrom, [he] or another participant in the crime was armed with an explosive or a deadly weapon, to wit: a loaded 12 gauge shotgun.

Id. at 9. He then pleaded guilty to Burglary, First Degree. *Id.*

In the two weeks between petitioner's plea and sentencing, the Onondaga County Probation Department prepared a pre-sentence report for petitioner's sentencing.[1] At the sentencing on June 20, 2000, petitioner was represented by Attorney Robert Wells, who was substituting for Attorney Moynihan. Petitioner claims that neither he nor Attorney Wells were provided with the report prior to sentencing. Respondent admits that "[t]he presentence report contains a factual inaccuracy." (Dkt. No. 6, p. 2, fn 2).

The pre-sentence report indicates that when the roommate told petitioner that she needed to go to work, "he pointed the gun at her and told her she could not leave yet .... He then sat in a rocking chair nearby, holding the gun, and point[ed] it at [the roommate]." (Exhibit B to Petitioner's Memorandum of Law, p. 2, included at Dkt. No. 1). The roommate's actual statement was that petitioner did ***not*** point the gun at her, but that she felt threatened when he told her she could not leave. ***After*** he sat down, the gun was on petitioner's lap and was "pointing right at [her]." (Exhibit C to Petitioner's Memorandum of Law, included at Dkt. No. 1).

***3** Petitioner did not object to the factual inconsistency in the pre-sentence report at the time of sentencing. At the sentencing hearing, the judge stated, "I've ordered a presentence investigation. I've reviewed it." (p. 2 of Sentencing Hearing Transcript, included as Exhibit I to Petitioner's Memorandum of Law ("Sentencing Transcript")). That single statement was the only mention of the pre-sentence report at the sentencing hearing. It is unclear whether the pre-sentence report was given to Attorney Moynihan before the sentencing. At sentencing, petitioner did not ask for the pre-sentence report.

Attorney Wells renewed the request that the court consider a shorter period of supervised release. The judge denied the request, and stated, "given the nature of the offense and history of the defendant, I see no reason to shorten up supervised release." (Sentencing Transcript, p. 3).

Petitioner states that in March of 2002 he was involved in family court proceedings in the State of Washington. [2] At that time, petitioner claims that he became aware, for the first time, of the factual inconsistencies in the pre-sentence report when it was provided to him at that time. Petitioner states that he attempted to have the mistake corrected in the months following his discovery of the factual inconsistencies, but was unsuccessful. [3]

In February 2003, petitioner filed a motion seeking resentencing in Onondaga County Supreme Court pursuant to N.Y. CRIM. PROC. § 440.20. The motion was denied on April 3, 2003. Later that month, petitioner sought leave to appeal to the Appellate Division, Fourth Department, and in July 2003 he was granted leave to appeal. (Order of July 17, 2003, KA 03-01065, included as Exhibit F in the State Records). The Appellate Division denied petitioner's appeal on July 1, 2005. *People v. Vaughan,* 20 A.D.3d 940, 798 N.Y.S.2d 289 (4th Dept.2005). Petitioner filed a motion for reargument in the Appellate Division in July of 2005 (Exhibit L in the State Records), and one week later filed a motion for leave to appeal to the New York Court of Appeals, requesting a stay until the motion for reargument was resolved in the Appellate Division (Exhibit K in the State Records). The Appellate Division denied petitioner's motion for reargument on September 30, 2005, and the Court of Appeals denied his motion for leave to appeal on October 3, 2005. *People v.. Vaughan,* 21 A.D.3d 1442, 801 N.Y.S.2d 555 (4th Dept.2005); *People v. Vaughan,* 5 N.Y.3d 857, 840 N.E.2d 146 (2005). Petitioner filed this petition for a writ of habeas corpus on October 21, 2005.

2. *AEDPA Statute of Limitations*

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one year period of limitation on habeas corpus petitions that runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> ***4** (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The statute provides for tolling of the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

In certain exceptional circumstances, equitable tolling is also available. *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000). With this standard in mind, this court will proceed to consider when this petitioner's one year statute of limitations began to run, whether the statute had run at the time he filed his habeas petition, and whether petitioner was entitled to any type of statutory or equitable tolling of the statute.

A. Commencement of the one year period pursuant to 28 U.S.C. § 2244(d)(1)(A).

The first question that the court must answer is when did the one year statute begin to run. Section 2244(d)(1)(A) requires the court to examine when petitioner's judgment became "final." Petitioner in this case did ***not*** file a direct appeal of his sentence and conviction because he waived his right to do so. Thus, rather than examining the case from the "conclusion of direct review," the court will consider that the statute of limitations began to run from the "expiration of the time for seeking such review."

In New York, a defendant has thirty days after the "imposition of the sentence" to notify the court that he will appeal. N.Y. C.P .L. § 460.10(1)(a). Generally, the one year limitations period begins to run when the defendant's "time for filing a notice of appeal from his judgment of conviction expire[s]." *Bethea v. Girdich,* 293 F.3d 577, 578 (2d Cir.2002). *See also,* *Allen v. Hardy,* 478 U.S. 255, 258 n. 1 (1986) (decision becomes final "where the availability of appeal [is] exhausted ...."). Petitioner was sentenced on June 20, 2000. Thus, petitioner's conviction became final on July 20, 2000, and the one year statute of limitations began to run at that time. The statute of limitations under Subsection (A) of the AEDPA ***expired July 20, 2001.***

Petitioner's N.Y. CRIM. PROC. LAW Section 440 motion was not filed until February 12, 2003, almost ***twenty months*** after the expiration of the statute of limitations; thus this collateral motion would not act to toll the statute. The petition in this action was filed with the court on October 21, 2005, over four years after the expiration of the statute of limitations. Thus, if the statute of limitations began to run under Section 2244(d)(1)(A), this petition is untimely. Subsections (B) and (C) of Section 2244 are plainly inapplicable, and need not be addressed. Petitioner argues, however, that his petition is timely because his one year statute of limitations began to run later, under subsection (D). (Dkt. No. 1, Petitioner's Memorandum of Law, at p. 4).

B. Commencement of the one year period under 28 U.S.C. § 2244(d)(1)(D)

***5** The statute allows the limitations period to begin running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Petitioner argues that because the pre-sentence report allegedly was not disclosed to him at sentencing, the statute of limitations should not begin to run until petitioner became aware of the factual inconsistencies in the pre-sentence report in March 2002, pursuant to 28 U.S.C. § 2244(d) (1)(D). (Dkt. No. 1, Petitioner's Memorandum of Law at p. 5). Petitioner states that because he waived his right to appeal, and because he "did not possess a factual basis for the need of the pre-sentence report as required for release under state law," he did not attempt to obtain the pre-sentence report prior to March 2002. In March 2002, the family court proceedings in Washington concluded, at which time petitioner claims he was first provided with a copy of the pre-sentence report, and discovered the errors in the report.

The Second Circuit has emphasized that the standard is when the relevant facts ***could have*** been discovered, "regardless of whether petitioner actually discovers the relevant facts at a later date."[4] *Wims v. United States,* 225 F.3d 186, 188 (2d Cir.2000). "In other words, 'when evidence is newly obtained, but could have been obtained earlier [through the exercise of due diligence], the date when the evidence was actually obtained has no effect on the AEDPA limitation period." *Adams v. Greiner,* 272 F.Supp.2d 269, 274 (S.D.N.Y.2003), *quoting Duamutef v. Mazzuca,* 2002 U.S. Dist. LEXIS 4213, at *9 (S.D.N.Y.2002). While "the statute does not require the maximum feasible diligence, but, rather, only reasonable diligence," the petitioner must "reasonably pursu[e] discovering all relevant evidence concerning his defense." *Perez v. United States,* 2006 U.S. Dist. LEXIS 60111, *8-*9 (N.D.N.Y. August 15, 2006), *citing* *Wims v. United States,* 225 F.3d 186 at 190.

Here, the factual inconsistencies had been present in the pre-sentence report since its completion in June 2000. Due diligence required that petitioner or his counsel take notice of the Probation Department's mistakes at that time, and if they were not provided with a copy of the pre-sentence report, to request that it be provided for review. That petitioner allegedly did not believe that he could obtain the report in the nearly two years after he was convicted before he "discovered" the inconsistencies is irrelevant; he had a right to review it, and should have reviewed it, at sentencing.[5] The sentencing judge clearly stated that was taking into consideration the defendant's ***history.*** This information came from the pre-sentence report.

Due diligence required petitioner to "pursue all relevant evidence concerning his defense." *Perez,* 2006 U.S. Dist. LEXIS 60111, *9. If petitioner is correct that he was, in fact, not provided with the pre-sentence report prior to sentencing, petitioner essentially missed the window of time during which the report was available to him for review and correction.

Because the factual predicate for petitioner's claim could have been discovered prior to March 2002 (when he claims to have actually discovered the mistakes), the exception provided by 28 U.S.C. § 2244(d)(1)(D) is not available to petitioner.

3. ***Equitable Tolling***

***6** Petitioner also seeks equitable tolling of two time periods within the months intervening between his discovery of the factual inconsistencies and his eventual motion for resentencing in Onondaga County Supreme Court. It is unclear exactly which time periods petitioner refers to in his Memorandum of Law. The first time period petitioner requests be equitably tolled is "for approximately thirty days" around July 2002, during the time period when petitioner attempted to correct the pre-sentence report with the Inmate Records Coordinator where he was incarcerated. (Petitioner's Memorandum of Law, at p. 5, Dkt. No. 1). It is the court's understanding that the second time period that petitioner requests be equitably tolled is from August 2002, when petitioner contacted the sentencing court to request his plea and sentencing transcripts, until December 2002, when petitioner eventually received the requested transcripts. (Memo of Law, at p. 6).

In *Smith v. McGinnis,* the Second Circuit held that AEDPA's one year statute of limitations is not a jurisdictional bar, and may, therefore, be equitably tolled. *Smith,* 208 F.3d at 17. However, "equitable tolling applies only in the 'rare and exceptional circumstance.' " *Smith,* 208 F.3d at 17 (*internal citations omitted*). Additionally, "the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll." *Id.* In another case, the Second Circuit noted the very limited contexts in which it had found "rare and exceptional" circumstances, such as "where an attorney's conduct is so outrageous and incompetent that it is truly extraordinary," and "where prison officials intentionally obstruct a petitioner's ability to file his petition by confiscating his legal papers." *Doe v. Menefee,* 391 F.3d 147 (2d Cir.2004), *referring to* *Baldayaque v. United States,* 338 F.3d 145 (2d Cir.2003) and *Valverde v. Stinson,* 224 F.3d 129 (2d Cir.2000).

In this case, both of the time periods that petitioner requests be equitably tolled occurred ***after*** the statute of limitations period had run. Petitioner took no action during the limitations period. It is therefore irrelevant whether there are additional periods of time ***after the limitations period*** that could be equitably tolled. Thus, no period of equitable tolling applies, and this petition may be dismissed as time barred.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that respondent's motion to dismiss (Dkt. No. 6) be **GRANTED,** and **RECOMMENDED,** that the petition be **DENIED and DISMISSED.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(e), 72.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2042471

Footnotes

1 Probation Officer Marylou Goudy and Probation Officer Donald R. Anguish signed the report on June 15, 2000.

2 No documents have been included in the record that relate to the family court proceedings in Washington. It is not clear what kind of proceeding occurred, if petitioner was physically present for any part of it, or why the pre-sentence report was relevant.

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3 Petitioner's alleged attempts to correct the information included contacting the sentencing judge and the Inmate Records Coordinator at his facility. When he was unable to correct the pre-sentence report through those channels, he claims that he advised the sentencing court in August 2002 that he would file a N.Y. CRIM. PROC. LAW Section 440 motion, but needed the transcripts of his plea and sentencing hearings. Between August and December 15, 2002, petitioner states that he wrote to the Court Reporter and the sentencing court several times to request the transcripts, and received them on December 15, 2002.

4 *Wims v. United States* was a habeas corpus case brought under 28 U.S.C. § 2255. The statute of limitations appears in the statute itself, and has exactly the same language as the language of 28 U.S.C. § 2244(d)(1)(D).

5 Although unnecessary to the decision in this case, the court notes that it is unclear what relevance the factual inconsistences bring to bear on petitioner's sentence. Presumably, because petitioner had a negotiated determinate sentence (negotiated before the preparation of the pre-sentence report), the inconsistencies could only impact the period of post-incarceration supervised release. Here, the judge stated his disinclination for shortening that period at the plea hearing, ***before*** the preparation of the report, at petitioner's plea hearing. It is unclear whether the pre-sentence report had any impact on the sentence other than to confirm the trial judge's original belief about the period of supervised release. That the incarceration portion and the post-incarceration portions of the sentence remained the same before and after the preparation of the pre-sentence report indicates that the sentencing judge, while relying on the pre-sentence report, did not find any information in the report that would lead him to change his consideration of the factors in making his sentencing determination in the two weeks between the plea and sentencing hearings. Furthermore, in light of the factual inconsistency, the sentencing judge denied petitioner's motion for resentencing.

End of Document

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