UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KHALIL H. COTTMAN,

Plaintiff,

v.

ERIE COUNTY BOARD OF ELECTIONS,

Defendant.

Case # 17-CV-756-FPG

DECISION AND ORDER

INTRODUCTION

On August 4, 2017, *pro se* Plaintiff Khalil H. Cottman filed a Complaint against Defendant Erie County Board of Elections and moved to proceed *in forma pauperis*. ECF Nos. 1, 2. The Court finds that Plaintiff meets the statutory requirements of 28 U.S.C. § 1915(a), and therefore his *in forma pauperis* motion (ECF No. 2) is GRANTED. The Court also screened Plaintiff's Complaint under the 28 U.S.C. §1915(e) criteria. For the reasons that follow, Plaintiff's Complaint is DISMISSED for failure to state a claim upon which relief may be granted.

DISCUSSION

I. Legal Standard

Section 1915 "provide[s] an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). Pursuant to Section 1915(e), the Court must dismiss a complaint in a civil action if it determines at any time that the action (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

Generally, the Court will afford a *pro se* plaintiff an opportunity to amend or be heard before dismissal "unless the court can rule out any possibility, however unlikely it might be, that

an amended complaint would succeed in stating a claim." *Abbas*, 480 F.3d at 639 (internal quotation marks omitted). However, leave to amend pleadings is properly denied where amendment would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *see also Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) ("Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.").

II. Plaintiff's Complaint

Plaintiff asserts that he submitted a petition to Defendant with over 850 signatures to run for Erie County Legislator of the 1st Legislative District. ECF No. 1 at 1. On August 1, 2017, Defendant allegedly "held an impromptu Petition Objection hearing to decide the validity of objected petitions, without timely notice." *Id.* Defendant determined that Plaintiff was "129 valid signatures short of the minimum threshold of 500." *Id.* Plaintiff also alleges that Defendant "claimed over 200 Election Designating [signatures] as invalid" because they violated Board of Election requirements. *Id.* Plaintiff indicates, for example, that the Board of Elections requires that signatures are "identifiable," are not "hand printed," are "identified by correct city, town, or county," and are "witness[ed] . . . on [the] date claimed." *Id.* Plaintiff alleges that he did not violate these rules and that Defendant improperly invalidated many of his collected signatures. *Id.*

Plaintiff alleges that "before or on or soon after August 1, 2017," [Defendant] intends to render a Determination indicating [Plaintiff] failed to meet the minimum threshold of required signatures." *Id.*

Plaintiff maintains that "the removal of the valid designated petition signatures constitutes a blatant attempt to deprive voter rights" and that "the action of removing senior and disabled citizens signatures constitutes a violation of the Americans with Disabilities Act." *Id.* at 2. He

requests the "immediate revocation of the unfavorable and unlawful determination of [Defendant] and validat[ion] of the signatures thus allowing [Plaintiff] the opportunity to lawfully ballot on the September 12, 2012[1] Election Primary" and "an immediate Article 78 Judicial injunction[2] and determination." *Id.* at 2-3.

III. Analysis

After reviewing Plaintiff's Complaint, the Court finds that it must be dismissed for failure to state a claim upon which relief may be granted.

A. Standing

Standing "requires a plaintiff to demonstrate a "personal stake in the outcome of the litigation." *MacIssac v. Town of Poughkeepsie*, 770 F. Supp. 2d 587, 593 (S.D.N.Y. 2011) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 (1986)). To establish standing, a plaintiff must show that "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

Plaintiff lacks standing to bring this case. First, Plaintiff does not allege any injury. Although he asserts that Defendant invalidated numerous signatures on his candidacy petition, he alleges that it is his "understanding" that "before or on or soon after August 1, 2017, [Defendant] *intends to render* a Determination indicating [Plaintiff] failed to meet the minimum threshold of

[1] This is the date provided in Plaintiff's Complaint. ECF No. 1 at 2. Documents attached to the Complaint, however, indicate that the correct date is September 12, 2017. *See, e.g.*, ECF No. 1-2 at 3.

[2] "The overwhelming majority of district courts confronted with the question of whether to exercise supplemental jurisdiction over Article 78 claims have found that they are without power to do so or have declined to do so." *Coastal Commc'ns Serv., Inc. v. City of New York*, 658 F. Supp. 2d 425, 459 (E.D.N.Y. 2009). Accordingly, the Court declines to exercise jurisdiction over Plaintiff's purported Article 78 claim.

required signatures." ECF No. 1 at 1 (emphasis added). Thus, based on the allegations before the Court, Plaintiff's injury is "merely possible" and not "imminent or actual," which is insufficient to establish standing. *See Waxman v. Cliffs Natural Res. Inc.*, 222 F. Supp. 3d 281, 287-88 (S.D.N.Y. 2016) (citations omitted). The Court has no information about what, if anything, happened between Plaintiff and Defendant since August 1, 2017.

Second, Plaintiff cannot establish redressability. When a plaintiff seeks prospective relief like an injunction, he "must show that he can reasonably expect to encounter the same injury again in the future—otherwise there is no remedial benefit that he can derive from such judicial decree." *MacIssac*, 770 F. Supp. 2d. at 593-94 (citation omitted). "Past injury alone does not establish a present case or controversy for injunctive relief." *Id.* at 594 (citations omitted). "Rather, the injury alleged must be capable of being redressed through injunctive relief at that moment." *Id.* (citations and quotation marks omitted).

Plaintiff asks the Court to reverse Defendant's decision to exclude certain signatures from his ballot petition so that he may participate in a September 12, 2017 election, which occurred nearly five months ago. The Court cannot grant injunctive relief for a past event that Plaintiff has no foreseeable likelihood of encountering again.

If Plaintiff can allege that he suffered an injury in fact that the Court can redress with a favorable decision, he may file an amended complaint that contains the necessary information.

B. Constitutional Rights

The right to vote is a "fundamental interest protected by the Constitution." *Green Party of State of New York v. Weiner*, 216 F. Supp. 2d 176, 186 (S.D.N.Y. 2002) (citation omitted). However, "[p]rinciples of federalism limit the power of federal courts to intervene in state elections." *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (citation omitted). "The

Constitution leaves the conduct of state elections to the states, and the Supreme Court has recognized that the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Id.* (citations and quotation marks omitted). "Only in extraordinary circumstances will a challenge to a state [or local] election rise to the level of a constitutional deprivation." *Id.* (citation omitted) (alteration in original).

Here, Plaintiff merely states in a conclusory fashion that "the removal of the valid designated petition signatures constitutes a blatant attempt to deprive voter rights." ECF No. 1 at 2. Plaintiff does not allege that Defendant prevented him from voting in an election or interfered with his ability to vote in any way. Based on the stringent standard set forth above, Plaintiff fails to state a claim on this basis. However, he may amend his complaint to include additional allegations, if they exist, to further support his assertion that Defendant "deprived voter rights."

Upon a liberal reading of Plaintiff's Complaint, it is possible that he may state a claim under 42 U.S.C. § 1983. "To state a valid claim under 42 U.S.C. § 1983, the plaintiff must allege that the challenged conduct (1) was attributable to a person acting under color of state law, and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Whalen v. Cnty. of Fulton*, 126 F.3d 400, 405 (2d Cir. 1997). Accordingly, Plaintiff may file an amended complaint that alleges the necessary facts, if they exist, to state a Section 1983 claim.

C. Americans with Disabilities Act

Plaintiff asserts that Defendant violated the Americans with Disabilities Act ("ADA") when it removed the signatures of "senior and disabled" citizens from his ballot petition and "discriminat[ed] against the elderly and inflicted disabled." ECF No. 1 at 2-3. However, Plaintiff's Complaint fails to state a claim under the ADA upon which relief may be granted.

"To establish a prima facie case under the ADA, a plaintiff must show by a preponderance of the evidence that: (1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability." *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d Cir. 2006) (internal quotation marks and citation omitted).

Based on the alleged facts, this case has nothing to do with Plaintiff's employer or any type of workplace discrimination. Plaintiff has not alleged that he suffers from a disability, only that Defendant removed the signatures of "senior and disabled" citizens from his ballot petition and discriminated against elderly and disabled individuals. ECF No. 1 at 2-3. Accordingly, Plaintiff's ADA claim is DISMISSED WITH PREJUDICE and Plaintiff may not amend this claim, because the conduct he complains of is not actionable under the ADA and therefore amendment would be futile. *See Ruffolo*, 987 F.2d at 131 ("Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.").

Accordingly, for the reasons stated, Plaintiff has until March 2, 2018 to file an amended complaint that alleges the necessary facts, if they exist, to state a viable cause of action against Defendant. An amended complaint completely replaces the original Complaint, and therefore all of Plaintiff's allegations must be set forth in his amended complaint, if he chooses to file one. If Plaintiff does not file an amended complaint by March 2, 2018, his Complaint will be dismissed for failure to state a claim upon which relief may be granted under 28 U.S.C. § 1915(e)(2)(b)(ii).

CONCLUSION

Plaintiff's *in forma pauperis* motion (ECF No. 2) is GRANTED, however, unless he files an amended complaint by March 2, 2018, the Clerk of Court is directed to dismiss the Complaint with prejudice without further order.

If Plaintiff does not file an amended complaint and the Complaint is therefore dismissed as of March 2, 2018, the Court hereby certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith and that leave to appeal to the Court of Appeals as a poor person is denied. *See Coppedge v. United States*, 369 U.S. 438 (1962). Requests to proceed on appeal as a poor person should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

Dated: February 1, 2018
Rochester, New York

HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court