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September 19, 2018

United States Supreme Court
Office of the Clerk of the Court
First Street, North East
Washington, DC 20543

Re: No.: 18-5813 GREGORY KILPATRICK v. JENNIFER HENKIN, D.D.S.

**APPLICATION FOR EXTENSION OF TIME TO FILE OPPOSITION TO PETITIONERS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

Gentlemen:

I am an attorney at law duly admitted to the practice of law before the United States Supreme Court.

I submit this application on behalf of defendant-respondent Dr. Jennifer Henkin for an extension of time to file her Brief in Opposition to plaintiff-petitioner's Petition for a Writ of Certiorari to the Second Circuit Court of Appeals, of 20 days.

This case, advanced by plaintiff *pro se*, was dismissed pre-answer by Judge Colleen McMahon of the United States District Court for the Southern District of New York July 21, 2017 with such Order of Dismissal warning plaintiff that the commencement of further duplicative, frivolous or otherwise non-meritorious litigation in that Court would result in an Order barring plaintiff from filing new actions without first receiving the Court's permission. See 28 U.S.C. §1915(e(2)(b)(ii). A copy of Judge McMahon's decision is attached hereto.

Judge McMahon found that plaintiff, while alleging federal question jurisdiction, failed to allege factual support for the necessary elements of a 42 U.S.C. §1981 claim, in that he failed to allege that defendant discriminated against him on

the basis of race. Nor did plaintiff allege facts in support of a claim that he was engaged in any of the statutorily enumerated activities. Judge McMahon therefore found that plaintiff had failed to state a claim for relief under §1981.

Similarly, Judge McMahon found that plaintiff's 42 U.S.C. §1983 claim must be dismissed as he failed to provide any factual support for a claim that Dr. Jennifer Henkin, a private oral surgeon, was a State actor or engaged in a joint activity with the State or its agents.

Judge McMahon further found that even construing plaintiff's complaint as an attempt to invoke the Court's diversity jurisdiction that such would fail as well as the parties appeared to be citizens of the State of New York. Finding that an amendment of the complaint could not cure the defects in plaintiff's claims, the Court further declined to grant leave to plaintiff-petitioner to amend his complaint.

Following dismissal of his complaint, Petitioner filed an untimely Notice of Appeal on December 14, 2107 (copy attached) and thereafter a "Petition for Review of Order" construed by the District Court as a motion for relief under Rules 59 (which was untimely) and 60. In the January 5, 2018 Order (copy attached) denying plaintiff-petitioner's motion, Judge McMahon noted that plaintiff commenced six additional civil actions which were dismissed as frivolous and hence Plaintiff was Ordered to Show Cause why he should not be barred from filing any further actions absent prior leave of the Court. As of the date of the Order, plaintiff had not yet responded to such Order to Show Cause.

On May 21, 2018 the United States Circuit Court of Appeals for the Second Circuit dismissed plaintiff-petitioner's Appeal as untimely (copy attached). Accordingly, the United States Court of Appeals for the Second Circuit noted that it was without jurisdiction to hear petitioner-plaintiff's Appeal.

This Petition for a Writ of Certiorari followed and was filed in this Court July 28, 2018 and placed on the docket August 30, 2018. Accordingly, Respondent's Brief in Opposition is currently due September 30, 2018 (Rule 15(3)).

Respondent requests an additional 20 days to oppose plaintiff-petitioner's Petition for a Writ of Certiorari (Rule 30(4)) as the pleadings and motions herein are incredibly difficult to decipher (as noted in the January 5, 2018 Order denying Petitioner-Plaintiff's Rule 59 and 60 Motion).

Due to the handwritten pleadings and motions, which seemingly combine aspects of the claims and allegations raised by plaintiff in the thirteen or more lawsuits that he has filed, preparation of a Brief in Opposition to Petitioner's Petition

for a Writ of Certiorari has been difficult and time consuming. Simply sorting out the individual claims raised herein from the multitude of claims raised in his other lawsuits has been difficult.

Accordingly, we request that the Court permit an additional 20 days to oppose Petitioner's Petition for a Writ of Certiorari.

Very truly yours,

KENNETH J. BURFORD

cc:

Gregory Kilpatrick
3444 White Plains Road
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Bronx, New York 10467-5716

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

JENNIFER HENKIN, Dentist-DDS-DMD,

Defendant.

17-CV-5111 (CM)

ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff Gregory D. Kilpatrick, a Bronx resident appearing *pro se*, brings this action under the Court's federal-question jurisdiction, alleging that Defendant Jennifer Henkin, a dentist in Manhattan, assaulted him with a hypodermic needle. By order dated July 10, 2017, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*.

**STANDARD OF REVIEW**

The Court must dismiss an *in forma pauperis* complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on 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); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint when 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).

## BACKGROUND

Plaintiff uses the Court's general complaint form, invokes the Court's federal-question jurisdiction, and alleges the following: On November 5, 2015, at a dental office in Manhattan, Defendant "assaulted" Plaintiff with a "steel chrome hypodermic needle syringe." (Compl. at 5.) Specifically, Plaintiff contends that Defendant "fatally injected [him] four times[:] in the bone, gum, tooth, and lip." (*Id.*) Although the complaint is unclear, it appears to suggest that Plaintiff contracted herpes and HIV as a result of Defendant's conduct.[1] (*Id.*)

Plaintiff seeks $100 million in monetary damages. He also requests that the Court revoke Defendant's medical license and "incarcerate her so she doesn't infect deliberately another black peson due to retaliation." (*Id.* at 6.)

## DISCUSSION

### A. 42 U.S.C. §§ 1981 and 1983

Because Plaintiff invokes the Court's federal-question jurisdiction and suggests that Defendant's conduct was based on racial animus, the Court construes the complaint as asserting claims under 42 U.S.C. §§ 1981 and 1983.

First, 42 U.S.C. § 1981(a) provides that,

> All persons within the jurisdiction of the United States shall have 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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

To state a claim under § 1981, a plaintiff must allege: "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the

[1] Plaintiff also provides a list of eight nonparty medical professionals who "did not infect Plaintiff with any viral infections at all." (*Id.* at 6.) These persons allegedly "did their jobs the way that it is suppose[d] to be done." (*Id.*)

discrimination concerned one or more of the activities enumerated in the statute . . . ." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 1 F.3d 1085, 1087 (2d Cir. 1993) (per curiam). "[T]he Second Circuit has broadly construed § 1981's equal benefit clause as applying to 'racially motivated torts that deprive a plaintiff of the equal protection of laws or proceedings for the security of persons and property.'" *Jones v. J.C. Penney's Dep't Stores, Inc.*, No. 03-CV-920 (RJA), 2007 WL 1577758, at *18 (W.D.N.Y. May 31, 2007) (quoting *Phillip v. Univ. of Rochester*, 316 F.3d 291, 297-98 (2d Cir. 2003)).

Plaintiff has not satisfied the second or third elements of a § 1981 claim. He has not alleged facts, as opposed to legal conclusions, showing that Defendant discriminated against him on the basis of race. He has also not alleged that he was engaged in any of the activities enumerated in the statute. Plaintiff has therefore failed to state a claim for relief under § 1981. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

Second, 42 U.S.C. § 1983 allows an individual to bring suit against persons who, acting under color of state law, have caused him to be "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws of the United States." 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48 (1988). To state a claim for relief under § 1983, a plaintiff must allege both that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a "state actor." *West*, 487 U.S. at 48. Accordingly, private parties are generally not held liable under § 1983. *Sykes v. Bank of America*, 723 F.3d 399, 406 (2d Cir. 2013) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) ("[T]he United States Constitution regulates only the Government, not private parties.").

A private person *can* qualify as a state actor under § 1983 if the link between the state action and the private person's action is so close that the private person's action "may be fairly treated as that of the State itself." *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *see also Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 112 (2d Cir. 2003) (noting that a "private actor [who] operates as a willful participant in joint activity with the State or its agents" may be considered a state actor) (citation omitted); *Dahlberg v. Becker*, 748 F.2d 85, 93 (2d Cir. 1984) (to constitute joint participation in satisfaction of the state action requirement under § 1983, there must be a "meeting of the minds or intent to conspire" between a private defendant and a state actor).

Plaintiff's § 1983 claims fail because he provides no facts showing that Defendant is a "state actor." *See West*, 487 U.S. at 48. Plaintiff has not alleged that Defendant was a government agent or otherwise "operate[d] as a willful participant in joint activity with the State or its agents." *See Cranley*, 318 F.3d at 112. Plaintiff also fails to allege that Defendant conspired with any state actors in performing acts set forth in the complaint. *See Dahlberg*, 748 F.2d at 93. For these reasons, Plaintiff's § 1983 claims are dismissed for failure to state a claim on which relief can be granted. 28 U.S.C. § 1915(e)(2)(B)(ii).

**B. Subject-Matter Jurisdiction**

The subject-matter jurisdiction of the federal district courts is limited and is set forth generally in 28 U.S.C. §§ 1331 and 1332. Under these statutes, federal jurisdiction is available only when a "federal question" is presented or, as to state-law claims, when the plaintiff and the defendants are diverse and the amount in controversy exceeds the sum or value of $75,000. "'[I]t is common ground that in our federal system of limited jurisdiction any party or the court *sua sponte*, at any stage of the proceedings, may raise the question of whether the court has subject

matter jurisdiction.'" *United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Prop. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) (quoting *Manway Constr. Co., Inc. v. Hous. Auth. of the City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983)); *see* 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."); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative . . .").

Plaintiff's §§ 1981 and 1983 claims fail, but in an abundance of caution, the Court construes the balance of the complaint as attempting to invoke the Court's diversity jurisdiction to assert state-law claims. To establish diversity jurisdiction under 28 U.S.C. § 1332 to assert state-law claims, a plaintiff must first allege that he and the defendants are citizens of different states. *See* § 1332(a)(1); *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998) ("A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State."). In addition, a plaintiff must allege to a "reasonable probability" that his claims are in excess of the sum or value of $75,000, the statutory jurisdictional amount. *See* 28 U.S.C. § 1332(a); *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 221 (2d Cir. 2006). The sum claimed by the plaintiff will control if it is made in good faith. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). It is the Court's duty, however, to dismiss an action where it is "convinced to a legal certainty that the plaintiff cannot recover an amount in excess of the [minimum statutory jurisdictional amount.]" *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994) (quoting *Deutsch v. Hewes St. Realty Corp.*, 359 F.2d 96, 98 (2d Cir. 1966)) (alteration in original, internal quotation marks omitted). The

Second Circuit has cautioned that a party should be afforded an "appropriate and reasonable opportunity to show good faith in believing that a recovery in excess of [the jurisdictional amount] is reasonably possible." *Chase Manhattan Bank, N.A. v. Am. Nat'l Bank and Trust Co. of Chicago*, 93 F.3d 1064, 1070 (2d Cir. 1996) (quoting *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.3d 82, 88 (2d Cir. 1991)) (alteration in original, internal quotation marks omitted).

Both Plaintiff and Defendant appear to be citizens of the State of New York, thereby precluding diversity of citizenship. On this basis alone, the Court lacks diversity jurisdiction over any state-law claims that Plaintiff may intend to assert. *See Schacht*, 524 U.S. at 388. Because Plaintiff's complaint fails to state a claim over which this Court has subject-matter jurisdiction, the Court dismisses Plaintiff's claims under §§ 1981 and 1983, with prejudice, for failure to state a claim for relief, and dismisses all potential state-law claims, without prejudice.[2]

District courts generally grant a *pro se* plaintiff an opportunity to amend a complaint to cure its defects, but leave to amend is not required where it would be futile. *See Hill v. Curcione*, 657 F.3d 116, 123- 24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Because the defects in Plaintiff's complaint cannot be cured with an amendment, the Court declines to grant Plaintiff leave to amend his complaint.

**C. Litigation History**

Plaintiff has filed numerous other cases in this Court. *See Kilpatrick v. U.S. Dep't of Veterans' Affairs*, No. 06-CV-9907 (KMW) (S.D.N.Y. Mar. 26, 2007) (dismissed on immunity grounds and for failure to state a claim), *appeal dismissed*, No. 07-2040 (2d Cir. Nov. 1, 2007); *Kilpatrick v. Kamkar*, No. 17-CV-5013 (UA) (S.D.N.Y) (filed June 27, 2017; alleges that the

[2] Plaintiff is free to bring any state-law claims that he may wish to assert in the appropriate state court. This Court offers no opinion as to the merit of any such claims.

defendant, a dentist, stabbed him with a "steel chrome hypodermic needle" and infected him with herpes and HIV)[3]; *Kilpatrcik v. Volterra*, No. 17-CV-5109 (UA) (S.D.N.Y.) (filed July 6, 2017; alleging that the defendant, a New York doctor, failed to prescribe proper medications); *Kilpatrick v. Robinson*, No. 17-CV-5110 (S.D.N.Y.) (filed July 6, 2017; alleging that the defendant, a New York doctor, illegally withdrew Plaintiff's blood); *Kilpatrick v. Weiss*, No. 17-CV-5112 (UA) (S.D.N.Y.) (filed July 6, 2017; alleging that the defendant, a New York doctor, failed to prescribe proper medications); *Kilpatric v. Kondaveeti*, No. 17-CV-5113 (UA) (S.D.N.Y.) (same); *Kilpatrick v. Coffman*, No. 17-CV-5114 (UA) (S.D.N.Y) (same); *Kilpatrick v. Fields*, No. 17-CV-5115 (UA) (S.D.N.Y.) (same). Accordingly, Plaintiff is warned that further duplicative, frivolous, or otherwise nonmeritorious litigation in this Court will result in an order barring Plaintiff from filing new actions *in forma pauperis* without first receiving the Court's permission. *See* 28 U.S.C. § 1651.

## CONCLUSION

The Clerk of Court is directed to assign this matter to my docket, mail a copy of this order to Plaintiff, and note service on the docket. Plaintiff's complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed for failure to state a claim on which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

The Court denies as moot Plaintiff's application for the Court to request *pro bono* counsel. (ECF No. 3.)

[3] Plaintiff attached to the complaint in that action a newspaper article stating that he was arrested for sending a hypodermic needle to a federal agent, which allegedly injured the agent.

The Court certifies under 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 the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: July 21, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

# UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK
(List the full name(s) of the plaintiff(s)/petitioner(s).)

17 CV 5111 (CM)( )

-against-

JENNIFER HENKIN DENTIST - DDS-DMD
(List the full name(s) of the defendant(s)/respondent(s).)

**NOTICE OF APPEAL**

Notice is hereby given that the following parties: GREGORY D. KILPATRICK
(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit from the ☒ judgment ☒ order entered on: JULY 21, 2017
(date that judgment or order was entered on docket)

that: STANDARD OF REVIEW, BACKGROUND, DISCUSSION, CONCLUSION SUBJECT-MATTER JURISDICTION, LITIGATION, HISTORY.
(If the appeal is from an order, provide a brief description above of the decision in the order.)

August 15 2017
Dated

Gregory D. Kilpatrick
Signature

KILPATRICK GREGORY D
Name (Last, First, MI)

3444 WHITE PLAINS ROAD APT 2C BRONX N.Y.C. 10467-5716
Address City State Zip Code

(718)-9945347 ✓ APT. V.M. -0-
Telephone Number E-mail Address (If available)

(646) 6605201 CELL

Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK
(List the full name(s) of the plaintiff(s)/petitioner(s).)

17 CV 5111 (CM)( )

-against-

NOTICE OF APPEAL

JENNIFER HENRIN DENTIST - DDS-DMD
(List the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that the following parties: GREGORY D. KILPATRICK
(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit from the ☒ judgment ☒ order entered on: JULY 21, 2017
(date that judgment or order was entered on docket)

that: STANDARD OF REVIEW, BACKGROUND, DISCUSSION, CONCLUSION SUBJECT-MATTER JURISDICTION, LITIGATION, HISTORY.
(If the appeal is from an order, provide a brief description above of the decision in the order.)

August 15, 2017
Dated

Gregory D. Kilpatrick
Signature

KILPATRICK GREGORY D
Name (Last, First, MI)

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Rev. 12/23/13

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK

(List the full name(s) of the plaintiff(s)/petitioner(s).)

17 CV 5111 (CM)( )

-against-

JENNIFER HENKIN DENTIST DDS-DMD

(List the full name(s) of the defendant(s)/respondent(s).)

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

I move under Federal Rule of Appellate Procedure 24(a)(1) for leave to proceed *in forma pauperis* on appeal. This motion is supported by the attached affidavit.

August 15 2017
Dated

Gregory D. Kilpatrick
Signature

KILPATRICK GREGORY D
Name (Last, First, MI)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

JENNIFER HENKIN, Dentist-DDS-DMD,

Defendant.

17-CV-5111 (CM)

ORDER

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff filed this action *pro se* under the Court's federal-question jurisdiction, alleging that Defendant Jennifer Henkin, a dentist, assaulted him with a hypodermic needle. On July 21, 2017, the Court dismissed the complaint for lack of subject matter jurisdiction, and reiterated previous warnings that duplicative, frivolous, or otherwise nonmeritorious litigation would result in an order barring him from filing new civil actions in this Court *in forma pauperis* without the Court's leave.[1] On December 14, 2017, Plaintiff filed a notice of appeal, and that matter remains pending in the Second Circuit. *See Kilpatrick v. Henkin*, 17-4036 (2d Cir.). On the next day, Plaintiff filed in this Court a "Petition for Review of Order," in which Plaintiff appears to challenge the July 21, 2017 dismissal order. Plaintiff's motion, much like his complaint, is difficult to decipher.

[1] *See, e.g.*, *Kilpatrick v. Robinson*, No. 17-CV-5110 (CM) (S.D.N.Y. Oct. 13, 2017) (dismissing, as frivolous, Plaintiff's claims that medical professionals deliberately infected him with a disease); *Kilpatrick v. Volterra*, No. 17-CV-5109 (CM) (S.D.N.Y. Oct. 10, 2017) (same); *Kilpatrick v. Kamkar*, No. 17-CV-5013 (CM) (S.D.N.Y. Sept. 20, 2017) (dismissing, as frivolous, Plaintiff's claims that a dentist deliberately infected him with a disease).

## DISCUSSION

### A. Effect of Pending Appeal

Normally, "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Fed. R. App. P. 4(a)(4)(A) does provide that a district court has jurisdiction to rule on a motion under Fed. R. Civ. P. 59 or 60 after a notice of appeal has been filed, but only if the motion is filed within 28 days after the entry of judgment. As Plaintiff's motion was filed more than 28 days after the entry of judgment, and Plaintiff's appeal remains pending in the Second Circuit, the Court does not have jurisdiction under Fed. R. App. P. 4(a)(4)(A) to rule on Plaintiff's motion.

Fed. R. Civ. P. 62.1, however, permits the Court to treat Plaintiff's motion as a request for an indicative ruling. Rule 62.1 provides district courts with several options when "a *timely* motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed R. Civ. P. 62.1 (emphasis added); *see also Toliver v. Cnty. of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992). Under Rule. 62.1(a), a district court may defer consideration of or deny the motion, or it may indicate that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. Fed. R. Civ. P. 62.1(a). Here, to the extent allowed by Rule 62.1, the Court will consider Plaintiff's request for relief.

### B. Motion to Vacate

#### 1. Motion under Rule 59

The Court construes Plaintiff's submission as seeking relief under both Rules 59 and 60 of the Federal Rules of Civil Procedure. Because Plaintiff's motion under Rule 59 is untimely,

Rule 62.1 does not apply and the Court has no jurisdiction to rule on it. *See* Fed. R. App. 4(a)(4)(A); Fed. R. Civ. P. 62.1(a). A motion for relief under Rule 59 must be brought within 28 days of the date of the entry of the judgment being challenged. Fed. R. Civ. P. 59; *see also* Local Civil Rule 6.3. The applicable period for Plaintiff to seek relief under Rule 59 expired on or about August 18, 2017 – 28 days after the judgment dismissing this action was entered. As noted above, the Court received Plaintiff's motion on December 15, 2017, far more than 28 days after the entry of judgment. As Plaintiff filed his motion after the period to seek relief under Rule 59 had expired, the Court lacks jurisdiction to grant him the requested relief.

**2. Motion under Rule 60**

Plaintiff's request for relief under Rule 60, however, was timely filed. *See* Fed. R. Civ. P. 60(c)(1). Under Fed. R. Civ. P. 60(b), a party may seek relief from a district court's order or judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

The Court has considered Plaintiff's arguments, and even under a liberal interpretation of his motion, Plaintiff has failed to demonstrate that any of the grounds listed in Fed. R. Civ. P. 60(b) apply or that extraordinary circumstances exist to warrant relief. To the extent Plaintiff is

challenging the Court's dismissal of the complaint under Fed. R. Civ. P. 60(b), the motion is denied.[2]

## CONCLUSION

Accordingly, Plaintiff's motion for reconsideration (ECF No. 10) is denied, and the Clerk of Court is directed to terminate it.

The Clerk of Court is further directed to mail a copy of this order to Plaintiff and note service on the docket.

Plaintiff's case is closed, though the Court will accept for filing documents that are directed to the Second Circuit Court of Appeals.

The Court certifies under 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 the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: January 5, 2018
New York, New York

COLLEEN McMAHON
Chief United States District Judge

[2] The Court notes that on December 15, 2017, Plaintiff filed six civil actions *pro se*. On January 3, 2018, the Court dismissed those actions as frivolous and ordered Plaintiff to show cause why he should not be barred from filing any further actions in this Court IFP without first obtaining permission from this Court to file his complaint. *See In Re Gregory D. Kilpatrick*, Nos. 17-CV-9861, 17-CV-9862, 17-CV-9863, 17-CV-9864, 17-CV-9865, 17-CV-9866 (CM) (S.D.N.Y. Jan. 3, 2018). Plaintiff has not yet responded to that order to show cause.

S.D.N.Y. – N.Y.C.
17-cv-5111
McMahon, C.J.

# United States Court of Appeals
FOR THE
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of May, two thousand eighteen.

Present:

Rosemary S. Pooler,
Richard C. Wesley,
Denny Chin,
*Circuit Judges.*

---

Gregory D. Kilpatrick,

*Plaintiff-Appellant,*

v. 17-4036

Dentist-DDS-DMD Jennifer Henkin,

*Defendant-Appellee.*

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Appellant, pro se, moves for in forma pauperis status, appointment of counsel, and damages. However, this Court has determined sua sponte that the notice of appeal was untimely filed. Upon due consideration, it is hereby ORDERED that the appeal is DISMISSED for lack of jurisdiction. *See* Fed. R. App. P. 4(a)(1); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). It is further ORDERED that Appellant's motions are DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court