S.D.N.Y. – N.Y.C.
17-cv-5115
McMahon, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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. 17-4031

M.D Jessie Fields,

Defendant-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis, appointment of counsel, damages, and for the Court to reconsider the district court's sua sponte dismissal of his action. We construe Appellant's motion to reconsider as a motion for summary reversal. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED as frivolous because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

Appellant has filed a number of frivolous matters in this court, including the appeals docketed under 17-2831, 17-3128, 17-3533, 17-3547, 18-287, 18-291, 18-295, 18-304, 18-306, and 18-308. Accordingly, Appellant is hereby warned that the continued filing of duplicative, vexatious, or clearly meritless appeals, motions, or other papers, will result in the imposition of a sanction, which may require Appellant to obtain permission from this Court prior to filing any further submissions in this Court (a "leave-to-file" sanction). *See In re Martin-Trigona*, 9 F.3d 226, 229 (2d Cir. 1993); *Sassower v. Sansverie*, 885 F.2d 9, 11 (2d Cir. 1989).

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

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

M.D. JESSIE FIELDS,

Defendant.

17-CV-5115 (CM)

ORDER

COLLEEN MCMAHON, Chief United States District Judge:

Plaintiff filed this action *pro se*. On November 27, 2017, the Court dismissed the complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). The Court also reiterated previous warnings that further duplicative, frivolous, or otherwise nonmeritorious litigation in this Court will result in an order barring him from filing new civil actions in this Court *in forma pauperis* without the Court's leave. *See 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); *Kilpatrick v. Weiss*, No. 17-CV-5112 (CM) (S.D.N.Y. Aug. 21, 2017) (dismissing, for failure to state a claim, Plaintiff's claims that medical professionals deliberately infected him with a disease); *Kilpatrick v. Kondaveeti*, No. 17-CV-5113 (CM) (S.D.N.Y. July 31, 2017) (same); *Kilpatrick v. Henkin*, No. 17-CV-5111 (CM) (S.D.N.Y. July 21, 2017) (dismissing, for failure to state a claim, Plaintiff's claims that a dentist deliberately infected him with a disease).

On December 15, 2017, Plaintiff filed a "Petition for Review of Order," challenging the November 27, 2017 dismissal order. Plaintiff's motion, much like his original submission, is not the model of clarity.

The Court liberally construes this submission as a motion under Fed. R. Civ. P. 59(e) to alter or amend judgment and a motion under Local Civil Rule 6.3 for reconsideration, and, in the alternative, as a motion under Fed. R. Civ. P. 60(b) for relief from a judgment or order. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006); *see also Tracy v. Freshwater*, 623 F.3d 90, 10[illegible] (2d Cir. 2010) (The solicitude afforded to *pro se* litigants takes a variety of forms, including liberal construction of papers, "relaxation of the limitations on the amendment of pleadings," leniency in the enforcement of other procedural rules, and "deliberate, continuing efforts to ensure that a *pro se* litigant understands what is required of him") (citations omitted). After reviewing the arguments in Plaintiff's submission, the Court denies the motion.

DISCUSSION

The standards governing Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 are the same. *R.F.M.A.S., Inc. v. Mimi So*, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009). The movant must demonstrate that the Court overlooked "controlling law or factual matters" that had been previously put before it. *Id.* at 509 (discussion in the context of both Local Civil Rule 6.3 and Fed. R. Civ. P. 59(e)); *see Padilla v. Maersk Line, Ltd.*, 636 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2009). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206, 210 (S.D.N.Y. 2009) ("A motion for reconsideration is not an invitation to parties to 'treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to

advance new theories or adduce new evidence in response to the court's ruling.'") (internal quotation and citations omitted).

Plaintiff has failed to demonstrate in his motion that the Court overlooked any controlling decisions or factual matters with respect to the dismissed action. Plaintiff's motion under Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 is therefore denied.

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 allege facts demonstrating that any of the grounds listed in the first five clauses of Fed. R. Civ. P. 60(b) apply. Therefore, the motion under any of these clauses is denied.

To the extent that Plaintiff seeks relief under Fed. R. Civ. P. 60(b)(6), the motion is also denied. "[A] Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1)-(5)." *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009) (quoting *Smith v. Sec'y of HHS*, 776 F.2d 1330, 1333 (6th Cir. 1985)). A party moving under Rule 60(b)(6) cannot circumvent the one-year limitation applicable to claims under clauses (1)-(3) by invoking the residual clause (6) of Rule 60(b). *Id.* A Rule 60(b)(6) motion must show both that the motion was filed within a "reasonable time" and that "'extraordinary circumstances' [exist] to warrant relief."

Old Republic Ins. Co. v. Pac. Fin. Servs. of America, Inc., 301 F.3d 54, 59 (2d Cir. 2002) (per curiam) (citation omitted). Plaintiff has failed to allege any facts demonstrating that extraordinary circumstances exist to warrant relief under Fed. R. Civ. P. 60(b)(6). *See Ackermann v. United States*, 340 U.S. 193, 199-202 (1950).

CONCLUSION

Accordingly, Plaintiff's motion for reconsideration (ECF No. 6) is denied. Plaintiff's request for counsel and all other requests are denied as moot.

The Clerk of Court is 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 Clerk of Court is therefore directed to docket separately, and process, Plaintiff's notice of appeal, contained on pages 7 & 8 of the "Petition for Review of Order" (ECF No. 7).

If Plaintiff files a future reconsideration motion that repeats the same arguments or is also meritless, the Court will direct that no further documents be accepted for filing in this action, unless Plaintiff shows cause why such an order would be inappropriate. *See Viola v. United States*, No, 07-2245-cv, 2009 WL 137029, at *1 (2d Cir. Jan. 21, 2009) (holding that district courts must provide "notice and an opportunity to be heard prior to issuing [a] filing injunction"). Plaintiff remains warned that further duplicative or nonmeritorious litigation in this Court will result in an order barring Plaintiff from filing new actions *in forma pauperis* without prior permission. *See* 28 U.S.C. § 1651.

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: December 19, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

M.D. JESSIE FIELDS,

Defendant.

17-CV-5115 (CM)

ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, appearing *pro se*, brings this action alleging that medical personnel at Mt. Sinai St. Luke's Medical Group in Manhattan were negligent when they provided him care. By order dated November 17, 2017, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*. The Court dismisses the complaint for the reasons set forth below.

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).

A claim is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (holding that "finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible"); *Livingston*, 141 F.3d at 437 ("[A]n action is 'frivolous' when either: (1) the factual contentions are clearly baseless . . . ; or (2) the claim is based on an indisputably meritless legal theory.") (internal quotation marks and citation omitted).

BACKGROUND

On July 6, 2017, Plaintiff filed this action and six others that all contain similar allegations against various medical professionals. As in the six other actions, Plaintiff drafted this complaint using the general complaint form provided by this Court. After checking a box on the form to indicate that he invokes the Court's federal question jurisdiction, he states the following in the section in which he is asked to indicate which of his federal constitutional or federal statutory rights have been violated:

> (1) Federal defendants (former employers) – 28 U.S.C. §-1391(E) and (3) Employee, (2) Previous actions for job discrimination (retaliation) 42 U.S.C. § 2000-5(F) (3) Federal Tort Claims Act action-former 06cv9907-072040cv N.Y.C. Bronx V.A. Hosp. (4) Medical malpractice – present N.Y.S.D.O.H. – O.P.D./O.P.M.C. (5) Honorably Retired Veteran U.S. Army, (6) Federal and state prescribed medicines "tainted"

(Compl. at 2.)

Plaintiff alleges that Defendant negligently provided him care at Mt. Sinai St. Luke's Medical Group in Manhattan from December 28, 2015 – January 5, 2016. Plaintiff further alleges, *inter alia*, that he:

> submitted urine, blood for the viral infection (non hepatitis c) germs, and contamination injected into [his] mouth from the two female (Caucasian) dentists. Dr. Fields refused to give [him] the prescriptions for 'known liquid vial medicine'

and disposable hypodermic needle syringes to rid this 'temporary – permanent' virus altogether.

(*Id.* at 5.) Plaintiff seeks "the maximum amount of negligence money damages. . ." (*Id.* at 6.)

DISCUSSION

I. Frivolousness

Even when read with the "special solicitude" due *pro se* pleadings, *Triestman*, 470 F.3d at 474-75, Plaintiff's complaint must be dismissed as frivolous. Plaintiff's allegations rise to the level of the irrational, and there is no legal theory on which he can rely. *See Denton*, 504 U.S. at 33; *Livingston*, 141 F.3d at 437.

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.

II. Plaintiff's Litigation History

The Court has recently recounted Plaintiff's litigation history, and has warned him that further duplicative, frivolous, or otherwise nonmeritorious litigation in this Court will result in an order barring him from filing new civil actions in this Court *in forma pauperis* without the Court's leave. *See 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); *Kilpatrick v. Weiss*, No. 17-CV-5112 (CM) (S.D.N.Y. Aug. 21, 2017) (dismissing, for failure to state a claim, Plaintiff's

claims that medical professionals deliberately infected him with a disease); *Kilpatrick v. Kondaveeti*, No. 17-CV-5113 (CM) (S.D.N.Y. July 31, 2017) (same); *Kilpatrick v. Henkin*, No. 17-CV-5111 (CM) (S.D.N.Y. July 21, 2017) (dismissing, for failure to state a claim, Plaintiff's claims that a dentist deliberately infected him with a disease). In light of Plaintiff's frivolous claims in this action, the Court reiterates its previous warnings.

CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Plaintiff and note service on the docket. The Court dismisses Plaintiff's claims as frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

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: November 27, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

M.D. JESSIE FIELDS,

Defendant.

17-CV-5115 (CM)

CIVIL JUDGMENT

Pursuant to the order issued November 27, 2017, dismissing the complaint,

IT IS ORDERED, ADJUDGED AND DECREED that the complaint is dismissed under 28 U.S.C. § 1915(e)(2)(B)(i). The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from the Court's judgment would not be taken in good faith.

IT IS FURTHER ORDERED that the Clerk of Court mail a copy of this judgment to Plaintiff and note service on the docket.

SO ORDERED.

Dated: November 27, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

Additional material from this filing is available in the Clerk's Office.