S.D.N.Y. – N.Y.C.
17-cv-5109
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. 17-3547

Fabio Volterra, Medical Doctor, Medical Oncology & Hematology "Negligence",

Defendant.

Appellant, pro se, moves for appointment of counsel 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, 17-3133, 17-4031, 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 SECOND CIRCUIT

Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

M.D. FABIO VOLTERRA-MEDICAL ONCOLOGY & HEMATOLOGY "NEGLIGENCE",

Defendant.

17-CV-5109 (CM)

ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, a Bronx resident appearing *pro se*, brings this action under the Court's federal question jurisdiction. He sues Fabio Volterra, M.D., a private doctor, in connection with events that allegedly took place at the Eastchester Center for Cancer Care, a private health care facility in New York, where Dr. Volterra practices. Plaintiff also submits a request to proceed without prepayment of fees, that is, *in forma pauperis* (IFP). (ECF No. 1.) The Court grants Plaintiff's request to proceed IFP, but 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, 325 (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, 33 (1992) (holding that "a 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 ("An 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 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 discriminations (retaliation) 06cv9907-072040-Federal Tort Claims Act Action-42 U.S.C. § 2000-(5)(F)(3) 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"? [sic]

(Compl. ¶ I(A).)

Plaintiff alleges that he "submitted urine, blood for the viral infection (non hepatitis) germs, and contamination injected into [his] mouth from the two female (Caucasian) dentists. Dr. Volterra refused to give [Plaintiff] the prescriptions (necessary) for 'known liquid vial medicine

and disposable hypodermic needle syringes, to rid this virus. [sic]" (*Id.* ¶ III.) Plaintiff contends that Defendant "falsified [his] medical diagnosis," told Plaintiff that there was nothing wrong with him, and "made an attempt to grab Plaintiff[']s rear end[.]" (*Id.*) And Plaintiff states that "Racism should not play a role in depriving Plaintiff the needed medicine to cure a blood viral infection." (*Id.*) Plaintiff seeks "the maximum amount of negligence money damages." (*Id.*)

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. 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 assign this matter to my docket, mail a copy of this order to Plaintiff, and note service on the docket. The Court grants Plaintiff's request to proceed IFP (ECF No. 1), and 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: October 10, 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. FABIO VOLTERRA-MEDICAL ONCOLOGY & HEMATOLOGY "NEGLIGENCE"

Defendant.

17-CV-5109 (CM)

CIVIL JUDGMENT

Pursuant to the order issued October 10, 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: October 10, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

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