S.D.N.Y.-N.Y.C.
17-cv-5112
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 2nd day of January, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Gregory D. Kilpatrick,

Plaintiff-Appellant,

v. 17-2831

David Weiss, M.D.,

Defendant-Appellee.

Appellant, pro se, moves for the appointment of counsel and an extension of time to file a notice of appeal. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED 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).

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

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 15th day of March, two thousand and eighteen

Present: Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,

Circuit Judges.

Gregory D. Kilpatrick,

Plaintiff - Appellant,

v.

David Weiss, M.D.,

Defendant - Appellee.

ORDER
Docket No. 17-2831

Appellant, Gregory D. Kilpatrick, filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY D. KILPATRICK,

Plaintiff,

-against-

M.D. DAVID WEISS,

Defendant.

17-CV-5112 (CM)

CIVIL JUDGMENT

Pursuant to the order issued August 21, 2017, dismissing the complaint,

IT IS ORDERED, ADJUDGED AND DECREED that the complaint is dismissed under 28 U.S.C. § 1915(e)(2)(B)(ii).

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: August 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,

Plaintiff,

-against-

M.D. DAVID WEISS,

Defendant.

17-CV-5112 (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, asserting negligence claims against Dr. David Weiss. By order dated July 21, 2017, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*. Plaintiff has also applied for *pro bono* counsel.

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: In November 2015, at the Stevenson Family Health Center in the Bronx, Plaintiff sought treatment for a virus that two "female, Caucasian" dentists had previously injected into his mouth. According to Plaintiff, he gave a blood and urine sample, but Dr. Weiss refused to provide him a prescription for the "known liquid vial medicine disposable hypodermic needle syringes" he needed to "rid" himself of this virus "immediately." Instead, Dr. Weiss gave Plaintiff a prescription for Benzonatate to "cure a sore throat from food poisoning," which cost $50.99 and was not covered by Plaintiff's insurance plan. Plaintiff seeks "negligence money damages."

DISCUSSION

A. 42 U.S.C. § 1983

Because Plaintiff invokes the Court's federal-question jurisdiction, the Court construes the complaint as asserting claims under 42 U.S.C. § 1983. Under § 1983, an individual may 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 § 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 § 1983, with prejudice, for failure to state a claim for relief, and dismisses all potential state-law claims, without prejudice.[1]

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 many 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 defendant, a

[1] 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.

dentist, stabbed him with a "steel chrome hypodermic needle" and infected him with herpes and HIV); *Kilpatrick 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. Henkin*, No. 17-CV-5111 (UA) (S.D.N.Y. July 21, 2017) (alleging that a New York dentist assaulted Plaintiff with a hypodermic needle; dismissed for failure to state a claim and for lack of subject matter jurisdiction); *Kilpatrick v. Kondaveeti*, No. 17-CV-5113 (UA) (S.D.N.Y. filed July 6, 2017) (alleging that the defendant, a New York doctor, failed to prescribe proper medications); *Kilpatrick v. Coffman*, No. 17-CV-5114 (UA) (S.D.N.Y. filed July 6, 2017) (same); *Kilpatrick v. Fields*, No. 17-CV-5115 (UA) (S.D.N.Y. filed July 6, 2017) (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.)

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: August 21, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge