S.D.N.Y. – N.Y.C.
17-cv-9861
17-cv-9862
17-cv-9863
17-cv-9864
17-cv-9865
17-cv-9866
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. 18-287

Howard A. Zucker, M.D. J.D., Commissioner of New York State Department of Health Office of Professional Medical Conduct,

Defendant-Appellee.

Gregory D. Kilpatrick,

Plaintiff-Appellant,

v. 18-291

R.N. Sally Dreslin, M.S., Office of Professional Medical Conduct,

Defendant-Appellee.

Gregory D. Kilpatrick,

Plaintiff-Appellant,

v.

18-295

Mary Ellen Elia, Commissioner O.P.D., Board of Regents, Education,

Defendant-Appellee.

Gregory D. Kilpatrick,

Plaintiff-Appellant,

v.

18-304

Leslie M. Arp, Chief Investigating Unit,

Defendant-Appellee.

Gregory D. Kilpatrick,

Plaintiff-Appellant,

v.

18-306

Catherine Leahy Scott, Inspector General,

Defendant-Appellee.

Gregory D. Kilpatrick,

Plaintiff-Appellant,

v.

18-308

Governor Andrew Cuomo, New York State, Albany,

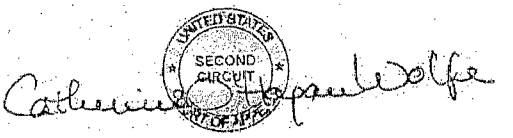
Defendant-Appellee.

The proceedings docketed under 18-287, 18-291, 18-295, 18-304, 18-306, and 18-308 are consolidated for purposes of this order.

Appellant, pro se, moves for in forma pauperis status, appointment of counsel, damages, and a "bar order" in these six appeals from sua sponte dismissals of his actions. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeals are DISMISSED as frivolous because they "lack[] 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. This Court already held that the appeals docketed under 17-2831 and 17-3128 were frivolous. Appellant has the following frivolous appeals pending: 17-3533, 17-3547, 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 DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GREGORY D. KILPATRICK.

17-CV-9861; 17-CV-9862;
17-CV-9863; 17-CV-9864;
17-CV-9865; 17-CV-9866 (CM)

BAR ORDER UNDER
28 U.S.C. § 1651

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff filed these six actions *pro se*. On January 3, 2018, the Court dismissed them as frivolous, noted that Plaintiff had filed ten other cases that were dismissed as frivolous, and ordered Plaintiff to show cause within thirty days why he should not be barred from filing further actions *in forma pauperis* (IFP) in this Court without prior permission.[1] On January 30, 2018, Plaintiff filed a notice of appeal in every case, and he has filed eight new complaints, but he has not responded to the order to show cause.

A. Defective Appeal

As a general rule, "[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). "The divestiture of jurisdiction rule is, however, not a per se rule. It is a judicially crafted rule rooted in the interest of judicial economy . . . ." *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996). For example, the rule "does not apply where an appeal is frivolous[,][n]or does it apply to untimely or otherwise defective appeals." *China Nat. Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F. Supp. 2d 579, 595 (S.D.N.Y. 2012) (citation omitted).

[1] Plaintiff did not submit the $400.00 in fees required to commence a civil action in this Court. The Court proceeded on the assumption that Plaintiff sought to proceed without the prepayment of fees (IFP).

Because Plaintiff is attempting to appeal from a nonfinal order that has not been certified for interlocutory appeal, the notice of appeal is plainly defective, and this Court retains jurisdiction over this action. *See, e.g., United States v. Rodgers*, 101 F.3d 247, 252 (2d Cir. 1996) (deeming a notice of appeal from a nonfinal order to be "premature" and a "nullity," and holding that the notice of appeal did not divest the district court of jurisdiction); *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629 (ILG), 2008 WL 5273960, at *1 (E.D.N.Y. Dec. 18, 2008) ("An exception . . . [to the general rule that an appeal deprives a district court of jurisdiction] applies where it is clear that the appeal is defective, for example, because the order appealed from is not final and has not been certified for an interlocutory appeal."). Accordingly, the Court retains jurisdiction over these cases.

B. Certification for Interlocutory Appeal

Certification of an interlocutory order for immediate appeal is governed by 28 U.S.C. § 1292(b). Under that statute, certification is only appropriate if the district court determines: "(1) that such order involves a controlling question of law; (2) as to which there is a substantial ground for difference of opinion; and (3) that an immediate appeal from [that] order may materially advance the ultimate termination of the litigation." *In re Facebook, Inc., IPO Sec. and Derivative Litg.*, 986 F. Supp. 2d 524, 529 (S.D.N.Y. 2014) (quoting 28 U.S.C. § 1292(b)). Because "interlocutory appeals are strongly disfavored in federal practice," *In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 282 (S.D.N.Y. 2010), the requirements of § 1292(b) must be strictly construed, and "only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Alphonse Hotel Corp. v. Tran*, No. 13-CV-7859 (DLC), 2014 WL 516642, at *3 (S.D.N.Y. Feb. 10, 2014) (quoting *Flor v. BOT Fin. Corp.*, 79 F.3d 281, 284 (2d Cir. 1996)). The proponent of an

interlocutory appeal bears the burden of showing that these strict requirements are satisfied. *See Casey v. Long Island R.R.*, 406 F.3d 142, 146 (2d Cir. 2005).

The Court finds that the requirements of § 1292(b) are not met. To the extent Plaintiff seeks certification of the January 3, 2018 order dismissing his case as frivolous and ordering him to show cause why a filing injunction should not be imposed, the motion for certification is denied.

CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Plaintiff, noting service on the docket. The Court bars Plaintiff from filing future civil actions IFP in this Court without first obtaining from the Court leave to file. *See* 28 U.S.C. § 1651. Plaintiff must attach a copy of his proposed complaint and a copy of this order to any motion seeking leave to file. The motion must be filed with the Pro Se Intake Unit of this Court. If Plaintiff violates this order and files an action without first filing a motion for leave to file, the Court will dismiss the action for failure to comply with this order. Plaintiff is further warned that the continued submission of frivolous documents may result in the imposition of additional sanctions, including monetary penalties. *See id.*

No further documents will be accepted in these cases other than those directed to the United States Court of Appeals for the Second Circuit. The Clerk is directed to close this action.

The Court certifies, pursuant to 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: February 23, 2018
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GREGORY D. KILPATRICK.

17-CV-9861; 17-CV-9862;
17-CV-9863; 17-CV-9864;
17-CV-9865; 17-CV-9866 (CM)

CIVIL JUDGMENT

Pursuant to the order issued February 23, 2018, dismissing the complaints,

IT IS ORDERED, ADJUDGED AND DECREED that the complaints are 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: February 23, 2018
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GREGORY D. KILPATRICK.

17-CV-9861; 17-CV-9862;
17-CV-9863; 17-CV-9864;
17-CV-9865; 17-CV-9866 (CM)

ORDER OF DISMISSAL AND
TO SHOW CAUSE UNDER
28 U.S.C. § 1651

COLLEEN McMAHON, Chief United States District Judge:

On December 15, 2017, Plaintiff filed these six actions *pro se*.[1] The complaints are dismissed 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). 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).

BACKGROUND

Plaintiff filed these complaints alleging that state actors and private physicians have violated his rights under the Fourteenth Amendment to the United States Constitution. The named Defendants are Howard Zucker, New York State Department of Health Commissioner

[1] Plaintiff did not submit the $400.00 in fees required to commence a civil action in this Court. The Court therefore proceeds on the assumption that Plaintiff seeks to proceed without the prepayment of fees ("*in forma pauperis*," or "IFP").

(No. 17-CV-9861); Sally Dreslin, Office of Professional Medical Conduct (No. 17-CV-9862); MaryEllen Elia, Commissioner O.P.D., Board of Regents, Education (No. 17-CV-9863); Leslie M. Arp, Chief Investigating Unit (No. 17-CV-9864); Inspector General Catherine Leahy Scott (No. 17-CV-9865); and Governor Andrew Cuomo (No. 17-CV-9866).

According to Plaintiff, doctors and dentists have either negligently or intentionally infected him with HIV, HSV-1, and HSV-2, and state officials have failed to investigate his allegations or take action against the doctors. By way of example, Plaintiff asserts in the complaint docketed in case number 17-CV-9861 that Dr. Kondaveeti refused to give him the "liquid vial medicine" he needed to rid himself of viruses, and that Defendant Zucker "needs to mind his business when plaintiff has civil and criminal issues with other Jewish, Irish, Italian criminal civil issues. Zucker doesn't respect Black patients [sic] rights and responsibilities regarding medical complaints, investigations, fact findings, final determinations and decisions from lower and higher subordinates." (Doc. 1 at ¶ III.) In case number 17-CV-9865, Plaintiff alleges that two dentists, Kamkar and Henkin, deliberately infected him with viruses, that Inspector General Scott "refused to commence an investigation, and that Governor Cuomo declined to "arrest the two Caucasian Jewish dentists." (Doc. No. 1 at ¶ III.) In case number 17-CV-9866, Plaintiff makes similar allegations against Doctors Fields, Volterra, and Robinson, and claims that Cuomo and Elia are racists, have obstructed justice, and should be removed from office. (Doc. No. 1 at 1.)

DISCUSSION

Under the *in forma pauperis* statute, a court must dismiss a case if it determines that the action is frivolous or malicious. 28 U.S.C. §1915(e)(2)(B)(i). A claim is "frivolous when either: (1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the claim is based on an indisputably meritless legal theory."

Livingston, 141 F.3d at 437 (internal quotation marks and citation omitted). Moreover, a court has "no obligation to entertain pure speculation and conjecture." *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) (finding as frivolous and baseless allegations that set forth a fantastical alternative history of the September 11, 2001 terrorist attacks).

The Court, after reviewing Plaintiff's complaints, finds that they lack any arguable basis in law or in fact. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Plaintiff's factual allegations rise to the level of the irrational, and there is no legal theory on which he may rely. *See Livingston*, 141 F.3d at 437. Plaintiff's complaints must therefore be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). In deference to Plaintiff's *pro se* status, the Court would normally direct Plaintiff to amend his complaint, but the Court finds that the complaints cannot be cured with an amendment. Where an amendment would be futile, leave to amend is not required. *Hill v. Curcione*, 657 F.3d 116, 123-24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) (court may dismiss complaint *sua sponte* and without providing leave to amend "where the substance of the claim pleaded is frivolous on its face").

LITIGATION HISTORY

Plaintiff has previously filed ten other cases that the Court dismissed as frivolous and for failure to state a claim. With one exception, those cases set forth similar claims against medical providers for infecting him with viruses and state officials for failing to act, and the Court has repeatedly warned Plaintiff against filing such complaints. *See e.g. Kilpatrick v. Fields*, No. 17-CV-5115 (CM) (S.D.N.Y. Nov. 27, 2017); *Kilpatrick v. Coffman*, No. 17-CV-5114 (CM) (S.D.N.Y Oct. 4, 2017); *Kilpatrick v. Kondaveeti*, No. 17-CV-5113 (CM) (S.D.N.Y. July 31, 2017); *Kilpatrick v. Weiss*, No. 17-CV-5112 (CM) (S.D.N.Y. Aug. 21, 2017); *Kilpatrick v. Henkin*, No. 17-CV-5111 (CM) (S.D.N.Y. July 21, 2017); *Kilpatrick v. Robinson*, No. 17-CV-5110 (CM) (S.D.N.Y. Oct. 13, 2017); *Kilpatrcik v. Volterra*, No. 17-CV-5109 (CM) (S.D.N.Y.

Oct. 10, 2017); *Kilpatrick v. Kamkar*, No. 17-CV-5013 (CM) (S.D.N.Y. Sept. 20, 2017); *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).[2]

The Court will not tolerate the abuse of its limited resources. Plaintiff is ordered 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 Moates v. Barkley*, 147 F.3d 207, 208 (2d Cir. 1998) (per curiam) ("The unequivocal rule in this circuit is that the district court may not impose a filing injunction on a litigant *sua sponte* without providing the litigant with notice and an opportunity to be heard."). Within thirty days of the date of this order, Plaintiff must submit to this Court a written declaration setting forth good cause why the Court should not impose this injunction upon him. If Plaintiff fails to submit a declaration within the time directed, or if Plaintiff's declaration does not set forth good cause why this injunction should not be entered, he will be barred from filing any further actions IFP in this Court unless he first obtains permission from this Court to do so.

CONCLUSION

The Clerk is directed to assign these matters to my docket, mail a copy of this order to Plaintiff, and note service on the docket. The complaints, filed *in forma pauperis* under 28 U.S.C. § 1915(a), are dismissed as frivolous and for failure to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(i), (ii). Plaintiff shall have thirty days to show cause by written declaration why an order should not be entered barring Plaintiff from filing any

[2] Plaintiff has recently filed notices of appeal in a number of these cases.

future action *in forma pauperis* in this Court without prior permission. A Declaration form is attached to this order for Plaintiff's convenience.

The Court certifies, pursuant to 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 3, 2018
New York, New York

COLLEEN McMAHON
Chief United States District Judge

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