S.D.N.Y. – N.Y.C.
18-cv-7806
Stanton, 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 4th day of April, two thousand nineteen.

Present:

Robert A. Katzmann,
Chief Judge,
John M. Walker, Jr.,
José A. Cabranes,
Circuit Judges.

Xuejie He,

Plaintiff-Appellant,

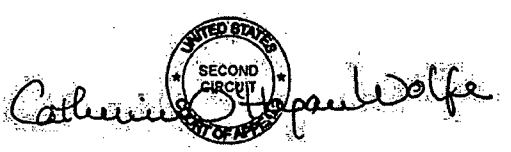
v. 18-3572

Office of the New York City Comptroller,

Defendant-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motion is GRANTED for the purposes of this order. It is further ORDERED that the case be REMANDED for consideration of whether the parties are diverse and whether the amount in controversy requirement was satisfied.

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

XUEJIE HE,

Plaintiff,

-against-

OFFICE OF THE NEW YORK CITY COMPTROLLER,

Defendant.

18-CV-7806 (LLS)

CIVIL JUDGMENT

Pursuant to the order issued November 6, 2018, dismissing the complaint,

IT IS ORDERED, ADJUDGED AND DECREED that the complaint is dismissed under Rule 12(h)(3) of the Federal Rules of Civil Procedure.

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 6, 2018
New York, New York

Louis L. Stanton

Louis L. Stanton
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

XUEJIE HE,

Plaintiff,

-against-

OFFICE OF THE NEW YORK CITY COMPTROLLER,

Defendant.

18-CV-7806 (LLS)

ORDER OF DISMISSAL

LOUIS L. STANTON, United States District Judge:

Plaintiff, appearing *pro se*, brings this action purportedly under the Court's federal question and diversity jurisdiction, alleging that Defendant discriminated against her and violated her civil rights by dismissing her untimely notice of claim. By order dated November 1, 2018, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*. For the reasons set forth below, the Court dismisses the action.

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, 474-75 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original).

BACKGROUND

Plaintiff brings this complaint using the Court's general complaint form and checking the boxes indicating her intent to invoke the Court's federal question and diversity jurisdiction. Plaintiff alleges that on March 23, 2018, she slipped and fell on a frozen sidewalk and sustained a concussion and fractured her wrist. She claims that on the evening of June 21, 2018,[1] the last day to submit her notice of claim, she attempted to submit an electronic claim through the Office of the New York City Comptroller's eClaim system on the website, but could not because of a technical system failure. The next morning, Plaintiff contacted the Comptroller's office and explained the situation to two male clerks, who confirmed the eClaim system's failure. Plaintiff alleges that another clerk gave her a "personal delivery from," which she completed immediately, and the clerk assured her that she would be able to "explain [her] special situation to the relevant department." (Compl. at 5.) But on July 3, 2018, she received notice that her claim was denied as untimely. Plaintiff asserts that "[d]ue to office discrimination and civil rights violation, [she] was unable to obtain the claims [she] deserved." (*Id.*) Plaintiff seeks monetary compensation in the amount of $58,009.456.

DISCUSSION

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 when plaintiff and defendant are citizens of different states and the amount in controversy exceeds the sum or value of $75,000. "'[I]t is

[1] New York's General Municipal Law requires as a condition precedent to filing state-law tort claims against a public corporation or any of its employees that a notice of claim be filed with the New York City Comptroller "within ninety days after the claim arises." N.Y. Gen. Mun. Law § 50-e. The purpose of a notice of claim is to "enable authorities to investigate, collect evidence and evaluate the merit of a claim." *Brown v. City of N.Y.*, 95 N.Y.2d 389, 392 (2000).

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 . . . .").

A. Federal Question Jurisdiction

To invoke federal question jurisdiction, a plaintiff's claims must arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case arises under federal law if the complaint "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 734-35 (2d Cir. 2007) (quoting *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 690 (2006)). Mere invocation of federal jurisdiction, without any facts demonstrating a federal law claim, does not create federal subject matter jurisdiction. *See Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188-89 (2d Cir. 1996).

Even though Plaintiff attempts to invoke the Court's federal question jurisdiction by checking the box on the complaint form and alleging that Defendant discriminated against her and violated her civil rights, it is clear that the complaint does not present an issue of federal law. Plaintiff does not allege any facts suggesting discrimination on any bases of that any federal rights were violated. Her allegation that her state-law tort claim was dismissed as untimely

because of the Comptroller Office's eClaim system's technical failure does not implicate federal law. Because Plaintiff invokes the Court' s federal question jurisdiction without alleging any facts suggesting that federal question jurisdiction is proper, *see Nowak*, 81 F.3d at 1188-89, the Court dismisses Plaintiff' s purported federal question claims for lack of subject matter jurisdiction, *see* Fed. R. Civ. P. 12(h)(3).

B. Diversity Jurisdiction

Plaintiff also does not allege facts demonstrating that the Court has diversity jurisdiction over this action. To establish jurisdiction under 28 U.S.C. § 1332, a plaintiff must first allege that he or she and the defendant are citizens of different states. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). In addition, the plaintiff must allege to a "reasonable probability" that the claim is in excess of the sum or value of $75,000.00, 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) (citation and internal quotation marks omitted).

Plaintiff alleges that she is a citizen of China who currently resides in New York. Under § 1332(a)(2), diversity of citizenship exists between "citizens of a State and citizens or subjects of a foreign state." But "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." § 1332(a)(2). Thus, under § 1332(a)(2), an alien who has been formally granted permanent residence in the United States is a citizen of the State where the alien is domiciled.[2] *See, e.g., Mejia v. Barile*, 485 F. Supp. 2d 364, 367 (S.D.N.Y. 2007); *Mor v. Royal Caribbean Cruises Ltd.*, No. 12-CV-3845 (JGK), 2012 WL 2333730, at *1-2 (S.D.N.Y. June 19, 2012) (noting that "the language of § 1332(a)(2) refers

[2] Domicile is defined as the place where a person "has his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Palazzo ex rel. Delmage v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000).

"to an alien litigant's official immigration status."); *see also Kato v. Cnty. of Westchester*, 927 F. Supp. 2d 714, 716 (S.D.N.Y. 1996) (explaining that one plaintiff was an Israeli citizen admitted as a permanent resident but the other plaintiff was "plainly an alien for the purpose of assessing diversity jurisdiction, because he is in the United States pursuant to a temporary, nonimmigrant visa.").

If Plaintiff has been lawfully granted permanent residence in the United States, then under § 1332(a)(2), she qualifies as a citizen of the State where she resides for purposes of the Court's diversity jurisdiction. Because Plaintiff fails to plead facts regarding her immigration status, she fails to establish that complete diversity exists between her and Defendant.

Plaintiff also fails to allege facts showing that the amount in controversy exceeds the jurisdictional amount of $75,000. "A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount." *Chase*, 93 F.3d at 1070 (quoting *Tongkook Ame., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994)). It is well settled that the sum claimed by the plaintiff will control if the claim is apparently made in good faith. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). It is the Court's duty, however, to dismiss actions where "the court is convinced to a legal certainty that the plaintiff cannot recover an amount in excess of the minimum statutory jurisdictional amount." *Tongkook Ame.*, 14 F.3d at 784.

Here, Plaintiff seeks $58,008.456 in damages, which includes compensation for her medical treatment, loss of wages, and pain and suffering. It is clear that the amount Plaintiff seeks is well below the statutory jurisdictional amount for diversity jurisdiction.

The Court of Appeals for the Second Circuit has directed district courts to provide a plaintiff an opportunity to amend the complaint unless it would be futile to do so. *See Hill v.*

Curcione, 657 F.3d 116, 123–24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Here, despite the lack of clarity on plaintiff's immigration status, it would be futile to grant her leave to amend as she fails to meet the statutory amount for diversity jurisdiction.[3]

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 lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3). The clerk of Court is also directed to terminate any other pending matter.

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 6, 2018
New York, New York

Louis L. Stanton
Louis L. Stanton
U.S.D.J.

[3] The Court notes that N.Y. Gen. Mun. Law § 50-e(5) allows a claimant to submit to the state courts an application for leave to serve a late notice of claim. Plaintiff is free to bring her claims in the appropriate state court, but the Court offers no opinion as to the merits of any claims she may choose to pursue.