941 F.3d 618
United States Court of Appeals, Second Circuit.

Michael Anthony DEEM, Plaintiff-Appellant,

v.

Lorna DIMELLA-DEEM, Robert J. Filewich, PhD, Angelina Young, Rollin Aurelien, Robin D. Carton, Esq., Faith G. Miller, Angela DiMella, Jane Doe, Hon. Arlene Gordon-Oliver, F.C.J., Defendants-Appellees.

Docket No. 18-2266August Term, 2019

Argued: August 26, 2019Decided: October 30, 2019

Appeal from the United States District Court for the Southern District of New York, No. 18-cv-6186, Román, *Judge*.

Attorneys and Law Firms

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Lorna DiMella-Deem, pro se, Briarcliff Manor, NY.

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Before: Winter, Pooler, and Sullivan, Circuit Judges.

Opinion

Richard J. Sullivan, Circuit Judge:

In November 2017, Plaintiff-Appellant Michael Anthony Deem filed for divorce from Defendant-Appellee Lorna DiMella-Deem in New York State Supreme Court, Westchester County, seeking joint custody of their two children. The divorce gave rise to family court proceedings over which Family Court Judge Arlene Gordon-Oliver presided. In the course of those proceedings, Judge Gordon-Oliver granted an application filed by Defendant-Appellee Faith Miller,

who had been appointed to represent the children during the family court proceedings, for a temporary protection order requiring Deem to refrain from any contact with the children.

Deem, a licensed attorney, responded by filing this suit in the Southern District of New York against his wife, their marriage counselor, Judge Gordon-Oliver, and other individuals (collectively, "Defendants") involved in the family court proceedings. In particular, Deem asserted claims under 42 U.S.C. §§ 1983, 1985, and New York state law, alleging, *inter alia*, that Defendants conspired to maliciously prosecute him and to violate his right to intimate association with his children. Upon the filing of Deem's complaint, Judge Gordon-Oliver recused herself, adjourned an upcoming hearing to a date two months out, and transferred the case to a different judge. Judge Gordon-Oliver also extended the temporary order of protection until the next court date. One week later, Deem filed an amended complaint seeking damages against Judge Gordon-Oliver.

On July 24, 2018, the district court (Nelson S. Román, *Judge*) *sua sponte* dismissed the case. Specifically, the district court concluded that Judge Gordon-Oliver was entitled to judicial immunity and that Deem's claims against her were therefore frivolous. With respect to Deem's federal claims against the remaining defendants, the district court declined to exercise subject matter jurisdiction, ruling that abstention was warranted under our holding in *American Airlines, Inc. v. Block*, since Deem's claims "are, or are on the verge of being, about child custody," and Deem had "alleged no facts indicating that there is any 'obstacle to [a] full and fair determination [of his child custody issues] in state

courts.' " App'x at 44 (alterations in original) (quoting *Am. Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990)). After dismissing all of Deem's federal claims, the district court declined to exercise supplemental jurisdiction over his state law claims. Deem timely appealed the dismissal of his federal claims.

I. Judicial Immunity

We affirm the dismissal of Deem's claims against Judge Gordon-Oliver substantially for the reasons set forth in the district court's well-reasoned decision. *See* App'x 40–42. In particular, the district court correctly determined that, at all relevant times, Judge Gordon-Oliver acted in her judicial capacity. *See Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). Furthermore, even assuming that Judge Gordon-Oliver erred in extending the temporary protection order against Deem shortly after recusing herself, any such error falls far short of an act "taken in the complete absence of all jurisdiction." *Id.* at 12, 112 S.Ct. 286; *see also, e.g.*, *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995) (holding that judicial immunity barred suit against a state court judge who set an execution date after recusing himself), *abrogated on other grounds by Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). Because Judge Gordon-Oliver was thus clearly entitled to judicial immunity, the district court did not err in *sua sponte* dismissing the claims against her as frivolous. *See Mills v. Fischer*, 645 F.3d 176, 177 (2d Cir. 2011) ("Any claim dismissed on the ground of absolute judicial immunity is 'frivolous' for purposes of 28 U.S.C. § 1915(g).").

II. Domestic Relations Exception and Abstention

With respect to Deem's remaining federal claims, the district court abstained from exercising subject matter jurisdiction under *American Airlines*. On appeal, Deem argues that, under our subsequent decision in *Williams v. Lambert*, 46 F.3d 1275 (2d Cir. 1995), the domestic relations abstention doctrine does not apply in federal-question cases. We disagree. Although the domestic relations "*exception*" to subject matter jurisdiction recognized by the Supreme Court in *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992), does not apply in federal-question cases, the domestic relations *abstention* doctrine articulated in *American Airlines* does. And since *American Airlines* remains good law in this Circuit, we affirm the district court's dismissal of Deem's federal claims on abstention grounds.

A. Background: *American Airlines* (1990), *Ankenbrandt* (1992), and *Williams* (1995)

In *American Airlines*, a federal-question interpleader case, we held that the district court erred in not abstaining from adjudicating the parties' dispute over the distribution of certain funds — specifically, funds corresponding to an ex-spouse's maintenance obligations that had not yet been reduced to a final judgment in state court. 905 F.2d at 15. Before reaching the question of abstention, we first concluded that the case did not fall within the exception to subject matter jurisdiction recognized in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584, 16 L.Ed. 226 (1858). *Id.* at 14. That was so, we explained, because the *Barber* exception applied "only where a federal court is asked to grant a divorce

or annulment, determine support payments, or award custody of a child" — in other words, a "rather narrowly confined" set of disputes not present in *American Airlines*. *Id.* (internal quotation marks and citation omitted). We also noted that the exception might not apply in federal-question cases, but declined to resolve that issue. *Id.* at 14 n.1. Proceeding to the question of *abstention*, we then explained:

> Nevertheless, even if subject matter jurisdiction lies over a particular matrimonial action, federal courts may properly abstain from adjudicating such actions in view of the greater interest and expertise of state courts in this field. A federal court presented with matrimonial issues or issues "on the verge" of being matrimonial in nature should abstain from exercising jurisdiction so long as there is no obstacle to their full and fair determination in state courts.

Id. at 14 (quoting *Bossom v. Bossom*, 551 F.2d 474, 475 (2d Cir. 1976) (per curiam); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 516 (2d Cir. 1973)). Because the parties' dispute over certain maintenance funds was, at a minimum, on the verge of being matrimonial in nature, and since there was no obstacle to the full and fair determination of that dispute in state court, we concluded that the district court should have abstained from exercising jurisdiction over it. *See id.* at 14–15.

Two years later, in *Ankenbrandt*, the Supreme Court reaffirmed the existence of the jurisdictional exception recognized in *Barber*. 504 U.S. at 699–704, 112 S.Ct. 2206. The Court first held that the domestic relations exception was not of constitutional dimension,

but rather was an implied exception to Congress's grant of diversity jurisdiction in 28 U.S.C. § 1332. *Id.* at 696, 700–03, 112 S.Ct. 2206. The Court further held, consistent with *American Airlines*, that the exception did not apply because the plaintiff's tort suit for damages, alleging child abuse against her ex-husband and his female companion, did not "involv[e] the issuance of a divorce, alimony, or child custody decree." *Id.* at 704, 112 S.Ct. 2206. Finally, the Court concluded that abstention was not appropriate under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), because there were no pending state court proceedings, or under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), because the "status of the domestic relationship ha[d] been determined as a matter of state law, and in any event ha[d] no bearing on the underlying torts alleged." *Id.* at 705–06, 112 S.Ct. 2206.

The following year, in *Williams*, we considered an Equal Protection Clause challenge to a New York law that allegedly discriminated against children born out of wedlock. 46 F.3d at 1277. After concluding that various other abstention doctrines did not apply, we stated, without elaboration, that "the general policy that federal courts should abstain from deciding cases that involve matrimonial and domestic relations issues" likewise did not apply. *Id.* at 1281–83. The *Williams* decision did not mention abstention again, but rather proceeded to discuss the "matrimonial exception" articulated in *Barber* and reaffirmed in *Ankenbrandt*. *Id.* at 1283–84. In the course of that discussion, *Williams* cited *American Airlines* in passing, together with other cases, when recognizing the existence of the matrimonial exception; however, *Williams* did not address or even acknowledge

American Airlines's abstention holding. *Id.* at 1283. Ultimately, the *Williams* Court held that "the matrimonial exception d[id] not apply" because the case did not involve a decree for divorce, alimony, or child custody, and was "before this Court on federal question jurisdiction, not diversity." *Id.* at 1284.

B. Discussion

Here, as in *American Airlines*, we first consider whether the domestic relations exception to federal jurisdiction applies — that is, whether the district court lacks subject matter jurisdiction as a threshold matter — and then, if the answer is no, we proceed to consider whether the district court properly abstained from exercising its jurisdiction. *See Am. Airlines*, 905 F.2d at 15; *see also In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 708 (2d Cir. 1995) ("[T]he abstention provisions implicate the question whether the bankruptcy court should exercise jurisdiction, not whether the court has jurisdiction in the first instance. ... The act of abstaining ***623** presumes that proper jurisdiction otherwise exists.").

With respect to the first question, the domestic relations exception clearly does not apply to this case because it is "before this Court on federal question jurisdiction, not diversity." *Williams*, 46 F.3d at 1284. Even if that answer were not compelled by our holding in *Williams*, we would find no basis for inferring a domestic relations exception to the federal-question jurisdiction statute, 28 U.S.C. § 1331. That the Court in *Ankenbrandt* recognized a domestic relations exception to the diversity jurisdiction statute (based mainly on the statute's pre-1948 text, the Court's longstanding interpretation, and *stare decisis*) has no

bearing on whether such an exception applies in non-diversity cases. *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008) (holding that the domestic relations exception does not apply in non-diversity cases); *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997) (same); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) (same). Nor are we persuaded by the Seventh Circuit's view that "the domestic-relations exception ... appl[ies] to both federal-question and diversity suits." *Kowalski v. Boliker*, 893 F.3d 987, 995 (7th Cir. 2018) (citing *Allen v. Allen*, 48 F.3d 259, 262 n.3 (7th Cir. 1995)). In *Allen*, the court recognized that the "domestic relations exception is statutorily carved out from diversity jurisdiction," but reasoned that "its goal of leaving family disputes to the courts best suited to deal with them [was] equally strong, if not stronger, in the instant, non-diversity dispute." 48 F.3d at 262 n.3. But the exception's "goal" is not enough to broaden its scope beyond the diversity jurisdiction context, since the exception "exists as a matter of statutory construction." *Ankenbrandt*, 504 U.S. at 700, 112 S.Ct. 2206. Thus, in the federal-question context, the policies animating the outcome in *Allen* are appropriately considered as a basis for domestic-relations *abstention*, not the domestic relations *exception*.

With respect to abstention, we agree with the district court that Deem's claims are, at a minimum, "on the verge of being matrimonial in nature" and that "there is no obstacle to their full and fair determination in state courts." *Am. Airlines*, 905 F.2d at 14 (internal quotation marks omitted). Accordingly, this case is squarely governed by our holding in *American Airlines*, unless that holding is no longer good law.

Turning then to the question of *American Airlines*'s validity, we begin by recognizing the basic rule that a published panel decision is binding on future panels "unless and until it is overruled by the Court *en banc* or by the Supreme Court." *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) (per curiam). Of course, "[w]e have recognized ... that there is an exception to this general rule when an intervening Supreme Court decision ... casts doubt on our controlling precedent." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 154 (2d Cir. 2015) *as amended* (Dec. 17, 2015) (internal quotation marks and citation omitted), *aff'd sub nom. Jesner v. Arab Bank, PLC*, —— U.S. ——, 138 S. Ct. 1386, 200 L.Ed.2d 612 (2018). In those circumstances, "the intervening decision need not address the precise issue already decided by our Court," though there must still be a "conflict, incompatibility, or inconsistency" between the intervening decision and our precedent. *Id.* at 154–55 (brackets, internal quotation marks, and citations omitted).

Ankenbrandt, the intervening Supreme Court decision most relevant to *American Airlines*'s abstention holding, neither overruled that holding nor cast doubt on it to ***624** the extent that we are free to chart a new course here. As we have explained, *Ankenbrandt* was not a federal-question case and thus did not squarely address the issue presented in *American Airlines* or this case. And while *Ankenbrandt* could be read to suggest that abstention based on domestic relations concerns is merely a variant of *Younger* or *Burford* abstention, *see Ankenbrandt*, 504 U.S. at 705–06, 706 n.8, 112 S.Ct. 2206, the existence of a distinct abstention doctrine for certain domestic relations disputes is supported by the

Supreme Court's longstanding recognition — in a non-diversity case involving a child custody dispute — that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–94, 10 S.Ct. 850, 34 L.Ed. 500 (1890); *see also Ankenbrandt*, 504 U.S. at 703, 112 S.Ct. 2206 (citing *In re Burrus* with approval while noting that it "technically did not involve a construction of the diversity statute"); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (reiterating, in the context of prudential standing, that "in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts"), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). Consistent with these statements, several of our sister circuits have continued to recognize a distinct domestic relations abstention doctrine in one form or another post-*Ankenbrandt*. *See supra* pp. 621–22 (discussing the Seventh Circuit's abstention-like approach to federal-question domestic relations cases); *Chambers v. Michigan*, 473 F. App'x 477, 479 (6th Cir. 2012) (unpublished) ("Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in a federal court." (citing *Firestone v. Cleveland Tr. Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981))); *DeMauro v. DeMauro*, 115 F.3d 94, 99 (1st Cir. 1997) ("[A]bstention by use of a stay may be permissible where a RICO action is directed against concealment or transfer of property that is the very subject of a pending divorce proceeding."); *see also Pennzoil Co. v. Texaco, Inc.*, 481

U.S. 1, 11 n.9, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases."). Therefore, in the absence of a clear statement from the Supreme Court precluding an abstention doctrine like the one in *American Airlines*, we discern no conflict, incompatibility, or inconsistency between that case and intervening Supreme Court law that would render prior Circuit precedent not binding on us. *See In re Arab Bank*, 808 F.3d at 153 ("Whatever the tension between [our precedent and Supreme Court precedent], the decisions are not logically inconsistent.").

Finally, there is no merit to the argument that the abstention issue presented here is governed by *Williams* rather than *American Airlines*. Admittedly, certain language in *Williams* is, at first glance, suggestive of a ruling on abstention. Nevertheless, *Williams* did not squarely address whether abstention under *American Airlines* was appropriate, let alone whether its abstention holding had been abrogated by *Ankenbrandt*. *See* 46 F.3d at 1283–84. Rather, *Williams* ultimately relied on *Ankenbrandt* to conclude that "the matrimonial *exception* does not apply." *Id.* at 1284 (emphasis added). In these circumstances, we will not read *Williams* to be in conflict with *American Airlines*, much less a binding holding that *American Airlines* is no longer good law. *See Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 153 (2d Cir. 2016) ("[A] *sub silentio* holding is not binding precedent." (internal quotation marks and citation omitted)). Furthermore, "even if the [*Williams*] Court had wanted to overrule [*American Airlines*], it could not have done so." *Tanasi v. New All. Bank*, 786

F.3d 195, 200 n.6 (2d Cir. 2015) *as amended* (May 21, 2015). Thus, even assuming the two cases were in direct conflict, we would "have no choice but to follow" *American Airlines*, and we do so here.[1] *Id.*

Accordingly, since *American Airlines* continues to be the law of this Circuit, and since Deem's claims are at least "on the verge of being matrimonial in nature" and are capable of being fairly resolved in state court, we affirm the district court's dismissal of Deem's federal claims on abstention grounds.

III.

We have considered Deem's remaining arguments and find them without merit. For the reasons stated above, we **AFFIRM** the judgment of the district court.

Footnote

1Our decision today is consistent with our unbroken practice of citing *American Airlines* when upholding, in unpublished decisions, the dismissal of both federal-question and diversity cases involving domestic relations disputes. *See, e.g.*, *Martinez v. Queens Cty. Dist. Att'y*, 596 F. App'x 10, 12 (2d Cir. 2015); *Keane v. Keane*, 549 F. App'x 54, 55 (2d Cir. 2014); *Hamilton v. Hamilton-Grinols*, 363 F. App'x 767, 769 (2d Cir. 2010); *Schottel v. Kutyba*, No. 06-1577, 2009 WL 230106, at *1 (2d Cir. Feb. 2, 2009); *Mitchell-Angel v. Cronin*, 101 F.3d 108, 1996 WL 107300, at *2 (2d Cir. Mar. 8, 1996).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL DEEM,
Plaintiff,

-against-

LORNA DiMELLA-DEEM; ROBERT J. FILEWICH, PhD; ANGELINA YOUNG; ROLLIN AURELIEN; ROBIN D. CARTON, ESQ.; FAITH G. MILLER, ESQ.; ANGELACRV DiMELLA; JANE DOE; HON. ARLENE GORDON-OLIVER, F.C.J.,
Defendants.

18-CV-6186 (NSR)

ORDER OF DISMISSAL

NELSON S. ROMAN, United States District Judge:

Plaintiff, an attorney who is proceeding *pro se*,' brings this action asserting federal constitutional claims under 42 U.S.C. § 1983, conspiracy claims under 42 U.S.C. § 1985, as well as supplemental state-law claims.fn1 Plaintiff has paid the relevant fees to commence this action and the Clerk of Court has issued a summons.

Plaintiff sues: (1) Lorna DiMella-Deem, his wife, (2) Robert J. Filewich, PhD, his and his wife's marriage counselor and mental health practitioner, (3) Angelina Young, a caseworker employed by the Westchester County Department of Social Services, (4) Rollin Aurelien, a senior caseworker employed by the Rockland County Department of Social Services, (5) Robin D. Carton, Esq., his wife's attorney, (6) Faith G.

Miller, Esq., an attorney appointed by the Family Court, Westchester County, to represent his and his wife's children ("the children") during a proceeding in that court, (7) Angela DiMella, his sister-in-law, (8) an unidentified "Jane Doe" defendant who allegedly filed a child neglect report regarding the children (ECF No. 15, Par. 40) at the behest of DiMella-Deem *(id.* T 41), and has been allegedly "acting in concert with the other defendants and in furtherance of the conspiracy against Plaintiff' *(id. Par. 12)*, and (9) Arlene Gordon-Oliver, a Westchester County Family Court Judge who, at one point, presided over a proceeding regarding the children and has made interim decisions regarding them, Plaintiff, and DiMella-Deem.

In his amended complaint, Plaintiff seeks damages, as well as unspecified declaratory and injunctive relief. Plaintiff has also filed an "Emergency *ex pane* order to show cause" in which he asks the Court to direct Filewich (the marriage counselor and mental health practitioner) to "surrender any individual or joint document regarding marriage counseling or mental health treatment for Plaintiff [and his wife]" to the United States Marshals Service. (ECF No. 4.) For the reasons discussed below, the Court dismisses this action.

STANDARD OF REVIEW

The Court has the authority to dismiss a complaint, or portion thereof, even when the plaintiff has paid the relevant fees, if it determines that the action is frivolous, *Fitzgerald v. First E. Seventh Tenants Corp.*, 221 F.3d 362, 363-64 (2d Cir. 2000) (per curiam), or that the Court lacks subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3); *Ruhrgas AG v.*

Marathon Oil Co., 526 U.S. 574, 583 (1999). Normally, a district court must afford special solicitude to a *pro se* litigant; this special solicitude includes "liberal construction of pleadings, motion papers, and appellate briefs," as well as "relaxation of the limitations on the amendment of pleadings." *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010). But "the degree of solicitude may be lessened where the particular *pro se* litigant is experienced in litigation and familiar with the procedural setting presented. The ultimate extension of this reasoning is that a lawyer representing himself ordinarily receives no such solicitude at all." Id. (citation omitted).

BACKGROUND

Plaintiff alleges that in 2017, he came to believe that his wife, DiMella-Deem, was having sex with many other people. He alleges that despite her initial denials of his accusations and her claims that he was mentally ill, she eventually admitted to such behavior. Plaintiff's claims arise from the marriage counseling sessions, child neglect investigations, as well as Family Court and divorce proceedings that have allegedly followed.

Plaintiff asserts that all of the defendants have violated his "right to intimate association with his children" and "maliciously abused process against" him. (ECF No. 15, Pars. 136, 143.) He also asserts that Judge Gordon-Oliver has violated his right to keep and bear arms. (Id. Par. 138.) He further asserts that all of the defendants have maliciously prosecuted him, as well as violated his rights to (1) due process, (2) a "fair trial/hearing," (3) "parental relations," (4) custody of the children, and (5) equal protection. (Id. Pars. 140,

145-146, 148-150.) In addition, he alleges that all of the defendants, with the exception of Judge Gordon-Oliver, have illegally seized and detained him, as well as violated his right "to not have false evidence levied against him." (Id. Pars. 141, 147.) Plaintiff further alleges that all of the defendants conspired against him to violate his federal constitutional rights. (Id. Par. 153.)

DISCUSSION

A. Judge Gordon-Oliver

The Court must dismiss Plaintiff's claims against Judge Gordon-Oliver. Judges are absolutely immune from suit for damages with respect to claims under 42 U.S.C. §§ 1983 and 1985 for any actions taken within the scope of their judicial responsibilities. *See Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (§ 1983); *Turner v. Boyle*, 116 F. Supp. 3d 58, 82 (D. Conn. 2015) ("[A]bsolute immunity extends to all civil suits, including suits brought under Section 1983 and [S]ection 1985."). Generally, "acts arising out of, or related to, individual cases before [a] judge are considered judicial in nature." *Bliven v. Hunt*, 579 F.3d 204, 210 (2d Cir. 2009). "[E]ven allegations of bad faith or malice cannot overcome judicial immunity." Id. at 209. This is because "[w]ithout insulation from liability, judges would be subject to harassment and intimidation. . . ." *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994). In addition, as amended in 1996, § 1983 provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted

unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

Judicial immunity does not apply when a judge takes action outside her judicial capacity, or when a judge takes action that, although judicial in nature, is taken "in the complete absence of all jurisdiction." *Mireles* 502 U.S. at 11 -12; *see also Bliven*, 579 F.3d at 209-10 (describing actions that are judicial in nature). But "the scope of [a] judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Slump v. Sparkman*, 435 U.S. 349, 356 (1978). Courts have specifically applied this immunity to Family Court judges. *See Parent v. New York*, 485 F. App'x 500, 504 (2d Cir. 2012) (summary order); *Wrobleski v. Bellevue Hosp.*, No. 13-CV-8736 (WHP), 2015 WL 585817, at *3 (S.D.N.Y. Jan. 30,2015); *Koger v. New York*, No. 13-CV-7969 (PAE), 2014 WL 3767008, at *6 (S.D.N.Y. July 31, 2014), *appeal dismissed*, No. 15-092 (2d Cir. June 23, 2015); *Pollack r. Nash*, 58 F. Supp. 2d 294, 303 (S.D.N.Y. 1999). Plaintiff alleges that an application drafted by Young was submitted to Westchester County Family Court Judge H. Greenwald, who held an *ex parse* proceeding resulting in an interim order directing Plaintiff to vacate his home and cease all contact with the children. (ECF No. 15, Pars. 72, 74.) Plaintiff asserts that "Judge Gordon-Oliver was present during [the proceeding before Judge Greenwald] and spoke to [him] about how the matter would be handled for future court dates." (Id. Par. 75.) Plaintiff also asserts that Judge Gordon-Oliver "failed or refused to inform [him] of her *ex parse* communications in contravention [of] state law." (Id. 76.) The remainder of Plaintiff's claims against Judge Gordon-Oliver are about her interim decisions to (1) restrict Plaintiff, and later

prohibit him, with respect to having contact with the children, (2) appoint Miller as "Attorney for the Children," (3) hear arguments from an Assistant County Attorney who had an admitted conflict of interest with Plaintiff, (4) order an investigation at the suggestion of that Assistant County Attorney, (5) condone a Court Officer's order to Plaintiff to sit while Plaintiff was addressing the Family Court, while allowing other parties to stand when doing so, (6) order Plaintiff to surrender all of his firearms to the police, (7) vacate an order of protection against DiMella-Deem, (8) transfer the "family offense proceedings" to the New York Supreme Court, Westchester County, where Plaintiff's divorce proceeding is apparently pending, (9) "put words in the mouth of Miller "to justify" why Miller argued against allowing the children to have contact with Plaintiff, (10) deny Plaintiff a hearing with respect to a previously issued temporary order of protection barring Plaintiff from having contact with the children, and (11) upon being served with Plaintiff's original complaint in this action and having recused herself, to extend the abovementioned temporary order of protection until another Family Court Judge holds a hearing on September 13, 2018. *(See id. Pars.* 84, 99, 106110, 112, 119-121, 127-31.)

It is clear, however, that Judge Gordon-Oliver was well within her authority to make those decisions.[3] Judge Gordon-Oliver is thus immune from suit with respect to Plaintiff's §§ 1983 and 1985 claims against her. The Court therefore dismisses those claims under the doctrine of judicial immunity and because they are frivolous. *See Mills v. Fischer*, 645 F.3d 176, 177 (2d Cir. 2011) ("Any claim dismissed on the ground of absolute judicial immunity is `frivolous' for purposes of

[the *in forma pauperis* statute]."); *Montero v. Travis*, 171 F.3d 757, 760 (2d Cit. 1999) ("A complaint will be dismissed as `frivolous' when `it is clear that the defendants are immune from suit."' (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989))).[4]

B. Domestic relations abstention doctrine

Under the domestic relations exception, federal courts sitting in diversity do not have jurisdiction "to issue divorce, alimony and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). The exception is narrow, but even in cases where the Court may properly exercise original subject matter jurisdiction, "[a] federal court presented with matrimonial issues or issues `on the verge' of being matrimonial in nature should abstain from exercising jurisdiction so long as there is no obstacle to their full and fair determination in state courts." *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) (per curiam); *see Ranney v. Bauza*, No. 10-CV-7519 (RJS), 2011 WL 4056896, at *3 (S.D.N.Y. Aug. 31, 2011) (distinguishing the narrow domestic relations exception from the broader "*American Airlines* abstention doctrine" upon which courts in the Second Circuit routinely rely). Applying these principles, courts in this Circuit have abstained from controversies that, regardless of how a plaintiff characterizes them, "`begin and end in a domestic dispute."' Tail v. *Powell*, 241 F. Supp. 3d 372, 377 (E.D.N.Y. 2017) (quoting *Schottel v. Kutyba*, No. 06-1577-cv, 2009 WL 230106, at * 1 (2d Cir. Feb. 2, 2009) (unpublished summary order)).

The Second Circuit has issued nonprecedential decisions that consider the exception in several contexts. *See Martinez v. Queens Cnty. Dist. Atty.*, 596

F. App'x 10, 12 (2d Cir. 2015) (summary order) (reasoning that "subject matter jurisdiction may be lacking in actions directed at challenging the results of domestic relations proceedings," even if parties are not seeking a custody decree); *Schottel*, 2009 WL 230106, at * 1 ("Although we recognize that the domestic relations `exception is very narrow,' a plaintiff cannot obtain federal jurisdiction merely by rewriting a domestic dispute as a tort claim for monetary damages.") (citation omitted); *Mitchell Angel v. Cronin*, *101* F.3d 108 (2d Cir. 1996) (unpublished opinion) ("While the domestic relation exception itself is narrow, it applies generally to issues relating to the custody of minors.") (citation omitted). *But see King v. Comm'r & New York City Police Dept*, *60* F. App'x 873, 875 (2d Cir. 2003) (unpublished summary order) (reasoning that "even under the broadest interpretation of the [domestic relations] exception, it applies only to cases that seek issuance or modification of divorce, alimony, or child custody decrees").

The Court must abstain from exercising jurisdiction over the remainder of Plaintiff's federal claims because Plaintiff presents issues that are, or are on the verge of being, about child custody. Plaintiff's claims arise from the defendants' alleged actions that are associated with, led to, and involve Plaintiffs child neglect, child custody, and divorce proceedings that are apparently pending in a state court. Plaintiff seeks unspecified permanent declaratory and injunctive relief, as well as damages, from Judge Gordon-Oliver, the Family Court Judge who has made interim decisions regarding the children, Plaintiff, and his wife; DiMella-Deem, his wife; Filewich, his and his wife's marriage counselor and mental health practitioner; DiMella, his sister-in-law; Young and

Aurelien, the caseworkers assigned to the child neglect and custody dispute; Carton, his wife's attorney; Miller, the attorney assigned by the Family Court to represent the children in the Family Court proceeding; and an unidentified "Jane Doe" defendant who allegedly reported child neglect regarding the children. Thus, it is clear that Plaintiff presents issues that either are, or are on the verge of being, about child custody. And Plaintiff has alleged no facts indicating that there is any "obstacle to [a] full and fair determination [of his child custody issues] in state courts." *American Airlines, Inc*, 905 F.2d at 14. Accordingly, the Court dismisses the remainder of Plaintiff's federal claims under the abstention doctrine articulated in American Airlines.

C. State-law claims

A district court may decline to exercise supplemental jurisdiction over state-law claims when it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Having dismissed the claims over which the Court has original jurisdiction, the Court declines to exercise its supplemental jurisdiction over the state-law claims that Plaintiff is asserting. See Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006) ("Subsection (c) of § 1367 `confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise.'" (quoting City of Chicago v. Int'l Coll. Of Surgeons, 522 U.S. 156, 173 (1997))).

CONCLUSION

The Clerk of Court is directed to note service of this order on the docket. The Court dismisses this action. The Court dismisses Plaintiffs federal claims against Judge Gordon-Oliver under the doctrine of judicial immunity and as frivolous. The Court dismisses the remainder of Plaintiffs federal claims under the abstention doctrine articulated by the Second Circuit in American Airlines, Inc. v. Block, 905 F.2d 12, 14 (2d Cir. 1990) (per curiam). The Court declines to exercise supplemental jurisdiction with respect to Plaintiffs state-law claims. 28 U.S.C. § 1367(c)(3). The Court denies all applications and motions as moot. (ECF Nos. 4 & 7.)

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: July 24, 2018
White Plains, New York

NELSON S. ROMAN
District Judge

Footnotes

[1] The Court notes that Plaintiff is suspended from practicing law in this Court. In *re: Michael Deem*, No. M-2-238 (S.D.N.Y. June 17, 2016). The Court further notes that Plaintiff does not mention anywhere in his original complaint or amended complaint that he is an attorney or that he is suspended from practicing law in

this Court. Plaintiff's amended complaint (ECF No. 15) is the operative pleading for this action.

[2] Plaintiff has consented to electronic set-vice of Court documents. (ECF No. 3.) He has also filed a motion for electronic filing privileges. (ECF No. 7.)

[3] Plaintiff specifically asserts that Judge Gordon-Oliver granted a petition to transfer the "family offense proceedings" to the New York Supreme Court, Westchester County, "in excess of her jurisdiction." (ECF No. 15, Par. 112.) He also asserts that Judge Gordon-Oliver was either "in clear absence or in excess of all jurisdiction" when, upon recusing herself, she extended a previously issued temporary order of protection, which prohibited him from having contact with the children, until September 13, 2018, when a hearing is to be held by another Family Court Judge. (Id. Pars. 129-130.) Judges are immune from claims arising from decisions made in excess of their jurisdiction, as opposed to decisions made in the clear absence of their jurisdiction. *See Stump*, 435 U.S. at 355-57 (quoting *Bradley v. Fisher*, 80 U.S. 335, 351 (1871)) (footnote omitted). Thus, this Court will not decide whether these decisions were made in error. *See id.* And Plaintiff has alleged no facts showing that Judge Gordon-Oliver was in clear absence in her jurisdiction when she made these decisions. *See Bradley*, 80 U.S. at 351-52 (explaining the difference between being "in excess of jurisdiction and being "in clear absence of 'jurisdiction).

[4] The amendment to § 1983, allowing for injunctive relief against a judge only if a state-court declaratory decree was violated or state-court declaratory relief is unavailable, precludes Plaintiff from seeking injunctive and declaratory relief against Judge Gordon-Oliver. This is so because Plaintiff can always

appeal Judge Gordon-Oliver's rulings in the state appellate courts. *See, e.g.*, *Berlin v. Meijia*, No. 15-CV-5308, 2017 WL 4402457, at *4 (E.D.N.Y. Sept. 30, 2017), *appeal dismissed*, No. 17-3589 (2d Cit. Apr. 18, 2018). Federal district courts do not supervise the state courts.

Indeed, to the extent that Plaintiff seeks injunctive and declaratory relief that would cause this Court to intervene in what appear to be Plaintiff's pending state-court child neglect, child custody, and divorce proceedings, this Court is additionally precluded from doing so under the *Younger* abstention doctrine. *See Falco v. Justices of the Matrimonial Parts of the Supreme Court of Suffolk Cnty.*, 805 F.3d 425, 427-28 (2d Cir. 2015); *Black v. Roney*, No. 14-CV-9026 (KPF), 2018 WL 2766138, at * 13 (S.D.N.Y. June 7, 2018); *see also Bukowski v. Spinner*, 709 F. App'x 87, 88 (2d Cir. 2018) (summary order) (applying *Younger* abstention doctrine to claims that a parent "suffered various constitutional injuries arising from temporary state-court orders related to her custody and visitation rights").

Docket No. 18-2266

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 11th day of December, two thousand and nineteen.

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ORDER

Michael Anthony Deem,
Plaintiff - Appellant,
v.
Lorna DiMella-Deem, Robert J. Filewich, PhD, Angelina Young, Rollin Aurelien, Robin D. Carton, Esq., Faith G. Miller, Angela DiMella, Jane Doe, Hon. Arlene Gordon-Oliver, F.C.J.,
Defendants - Appellees.

Appellant, Michael Anthony Deem, has filed a petition for rehearing en banc. The active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Docket No. 18-2266

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 16th day of December, two thousand and nineteen.

STATEMENT OF COSTS

Michael Anthony Deem,
Plaintiff - Appellant,
v.
Lorna DiMella-Deem, Robert J. Filewich, PhD, Angelina Young, Rollin Aurelien, Robin D. Carton, Esq., Faith G. Miller, Angela DiMella, Jane Doe, Hon. Arlene Gordon-Oliver, F.C.J.,
Defendants - Appellees.

IT IS HEREBY ORDERED that costs are taxed in favor of the appellees in the following amounts:

Arlene Gordon-Oliver	$112.80
Angelina Young	$319.00
Rollin Aurelien	$192.20
Robert J. Filewich	$190.00

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