APPENDIX

APPENDIX A

18-905
UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT

Matthew J. Rosenwasser,
Plaintiff-Appellant,
v.
Fordham University, John Carroll, Head of Security, Joseph McShane, President
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

Brief of Appellant Matthew J. Rosenwasser

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER").
A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 7th day of May, two thousand nineteen.

PRESENT: BARRINGTON D. PARKER,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

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MATTHEW J. ROSENWASSER,
Plaintiff-Appellant,
v. 18-905-cv
FORDHAM UNIVERSITY, JOHN CARROLL,
Head of Security, JOSEPH MCSHANE,
President,
Defendants-Appellees.

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FOR PLAINTIFF-APPELLANT:
Matthew J. Rosenwasser, pro se, New York,
New York.
FOR DEFENDANTS-APPELLEES:
James Gerard Ryan, Cullen and Dykman LLP,
Garden City, New York.

Appeal from the United States District Court for the Southern District of New York (Sullivan, J.).
UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-appellant Matthew Rosenwasser, proceeding pro se, appeals the district court's judgment entered March 15, 2018, dismissing his claims under 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., against defendants-appellees Fordham University and its head of security and president (collectively, "Fordham"). Rosenwasser's claims arise from events that occurred in May 2010 when Fordham banned Rosenwasser from its campus after a security guard complained that he had harassed her.

1 On June 11, 2011, Rosenwasser commenced an action in state court against Fordham based on the May 2010 events. The state court dismissed all but one of Rosenwasser's claims on Fordham's motion to dismiss and dismissed the final claim on summary judgment on May 12, 2017. Two months after the state court's May 2017 decision, Rosenwasser filed the current action below, alleging similar, if not identical, claims to those raised in the state court. By order entered March 14, 2018, the district court granted Fordham's motion to dismiss, holding that Rosenwasser's federal claims were untimely. We assume the parties familiarity with the underlying facts, procedural history of the case, and issues on appeal.

We review de novo the dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Chambers, 282 F.3d at 152; see also City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 173 (2d Cir. 2011) (reviewing district court's interpretation and application of statute of limitations at pleadings stage de novo). The complaint must plead "enough facts to state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). We construe pro se complaints liberally to raise the strongest claims they suggest, Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam), but we "cannot read into pro se submissions claims that are not consistent with the pro se litigant's allegations, or arguments that the submissions themselves do not suggest," id. at 477 (internal quotation marks and citation omitted). As an initial matter, Rosenwasser does not raise on appeal his primary argument in the district court that the three-year statute of limitations on his federal

claims was tolled while he litigated in state court from June 2011 to May 2017.2

Therefore, we deem the argument abandoned. See LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995) (noting that, despite the special solicitude afforded to them, pro se appellants abandon issues not presented in their appellate briefs, especially when they raised them below and elected not to pursue them on appeal).

Instead, Rosenwasser argues that the statute of limitations was equitably tolled based on three additional grounds. These grounds, however, were neither alleged in his pleadings nor raised in the district court, and therefore they are waived and cannot be raised at this juncture for the first time. See Morse v. Univ. of Vt., 973 F.2d 122, 125 (2d Cir. 1992) (declining to address appellant's equitable tolling argument that was not raised in the district court); Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.").

Even assuming Rosenwasser did not waive these arguments, we conclude that he failed to present "rare and exceptional circumstances" warranting equitable tolling. Walker v. Jastremski, 430 F.3d 560, 564 (2d Cir. 2005) (noting that we will apply equitable tolling where "extraordinary circumstances prevented a party from timely

performing a required act, and . . . the party acted with reasonable diligence throughout the period he sought to toll" (internal quotation marks and alterations omitted)). First, Rosenwasser argues that Fordham misled him as to the proper cause of action by labeling the security guard's complaint as "harassment" -- instead of "sexual harassment" -- to avoid triggering Title IX. This assertion is unavailing because, even if the allegations were mislabeled, Rosenwasser was aware of the facts underlying the security guard's complaint. Second, Rosenwasser contends that Fordham prevented him from exercising his rights by refusing to conduct a Title IX investigation. The fact that Rosenwasser did not "discover[] the existence of Title IX" until "after years of legal research," Appellant's Reply Br. at 8, however, is of no moment because ignorance of the law is not sufficient to justify equitable tolling. See Ormiston v. Nelson, 117 F.3d 69, 72 n.5 (2d Cir. 1997). Finally, Rosenwasser's claim that he timely filed his complaint but in the wrong forum is similarly meritless because New York state courts have concurrent jurisdiction with federal courts over Title IX and § 1983 claims and thus these claims could have been brought in his state court action. See Town of Orangetown v. Magee, 88 N.Y.2d 41 (1996) (adjudicating § 1983 claim in state court);

In re Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458 (2d Dep't 1980) (adjudicating Title IX claim in state court). Therefore, Rossenwasser's reasons for delay do not support equitable Tolling.

We have considered Rosenwasser's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

s/ Catherine O'Hagan Wolfe

Catherine O'Hagan Wolfe,

Clerk of Court

APPENDIX C

No. 17-cv-5191 (RJS)

ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Matthew J. Rosenwasser,
Plaintiff-Appellant,
v.
Fordham University, *et al.*
Defendants

RICHARD J. SULLIVAN, District Judge

Plaintiff Matthew Rosenwasser, proceeding pro se, brings this action against Fordham University, that institution's head of security, John Carroll and its President, Joesph McShane, alleging violations of 20 U.S.C. § 1681 and his due process rights under the Fifth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 ("Section 1983"). (Doc. No 1 ("Compl.").) Now before the Court is Defendants' motion to dismiss the complaint on a variety of grounds. (Doc. No 14.) For the reasons set forth below, Defendants' motion is granted.

I. BACKGROUND

This dispute arises from Fordham University's decision to bar Plaintiff from its premises for an indefinite period of time after a university security guard complained that Plaintiff engaged in harassing behavior towards her when he visited campus. (Compl. At 5; Doc. No 15-1 at 26-27.) Specifically, Plaintiff alleges that on or about May 17, 2010, while he was using a computer in the Fordham University library, he was approached by a security supervisor and two security guards who demanded that he leave the premises. (Doc. No. 15-1 at 14.) Plaintiff further alleges that he was forcibly removed to the supervisor's office, was "interrogated" by the security staff without having received a list of the allegations levied against him by the complaining security guard, and that, on May 21, 2010, he was permanently

Banned from Fordham University's campus. (*Id.* at 15.)

On June 11, 2011, Plaintiff commenced an action in state court alleging a slew of claims against Fordham University and other individual defendants. (*Id.* At 23.) All but one of Plaintiff's claims were dismissed upon the University's pre-answer motion to dismiss. (Doc. No. 15 at 3.) On May 12, 2017, after years of protracted discovery, the state court granted summary judgement to the University on Plaintiff's single remaining claim. (*Id.;* Doc. No 15-1 at 25.) This case, which appears to be identical in almost every respect to Plaintiff's state-court action, was filed two months after the state court's decision to grant summary judgement to the defendants in that action.

II. DISCUSSION

Defendants advance a host of reasons why this case must be dismissed, including that Plaintiff's claims are time-barred by the applicable statute of limitations; that the complaint fails to state a claim under Fed. R Civ. P. 12(b)(6); that Plaintiff's Title IX claims are barred by *res judicata* because they were already litigated in New York State court; that Plaintiff's claims against the individual defendants must be dismissed because there is no individual liability under Title IX; and that Plaintiff is a non-student who lacks standing to assert Title IX claims against Fordham. (Doc. No. 15 at 4.) Although several of these theories would justify dismissal of Plaintiff's complaint, the Court

Need only to refer to the applicable statute of limitations to conclude that Plaintiff's claims must be dismissed because they are all time-barred.

Although time bar is ordinarily an affirmative defense that must be asserted and demonstrated by the defendants, dismissal is appropriate on a motion to dismiss "if a complaint clearly shows the claim is out of time." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). When a federal law lacks a statute of limitations, courts "borrow" a limitation period from an analogous state statute. *See Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 483-484 (1980). Applying that logic, courts have long held that both Section 1983 and Title IX claims are subject to New York State's three-year statute of limitations for personal injury actions. *See, e.g., Ortega v. Arnold,* No. 13-cv-9155 (RJS), 2016 WL 1117585, at *3 (S.D.N.Y. Mar 21, 2016) (§ 1983 claims); *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2D 429, 437 (S.D.N.Y. 2014) (Title IX claims); *see also* N.Y.C.P.L.R § 214(5). As for when the statute of limitations begins to run, the law likewise clear that courts must look "to federal common law to determine the time at which [a] plaintiff's federal claim accrues." *Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir. 2007). "Under federal law, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action."

Morse v. Univ. of Vt., 973 F.2d 122, 125 (2d Cir. 1992) (quoting *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987)).

Here, all of the allegedly injurious conduct set forth in the complaint occurred in May 2010, more than seven years before Plaintiff filed hi complaint in this case. (Doc. Nos. 1, 15-1.) Since there is no suggestion that Plaintiff was unaware of the alleged injuries when they occurred, his claims all accrued at that time. In addition, the statute of limitations for this action was not tolled while Plaintiff litigated in state court. *See Bd. Of Regents of Univ. State of N.Y. v. Tomanio*, 446 U.S. 478, 486-87 (1980) ("No section of [New York tolling] law provides...that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action.") ; *see also Tuckett v. Police Dep't of City of New York*, 708 F. Supp. 77, 78 (S.D.N.Y. 1989). Accordingly, the Court grants Defendants' motion to dismiss in light of its conclusions that (1) all of Plaintiff's claims are subject to a three-year statute of limitations, and (2) all of the conduct alleged to support Plaintiff's claims occurred in May 2010.

Finally, although Plaintiff has not yet requested leave to amend his complaint, the Court nevertheless finds that leave to amend would be inappropriate in this case. To be sure, the Second Circuit has cautioned district courts not to "dimiss [a *pro se* complaint] without granting

Leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (citation omitted). Even so, a court may dismiss a *pro se* complaint without leave to re-plead "when amendment would be futile." *Tocker v. Philip Morris Cos., Inc.*, 470 F.3d 481, 491 (2d Cir. 2006) (citing *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003)). In this case, the Court concludes that any attempt at amendment would be futile in light of the applicable statutes of limitations, which expired nearly five years ago.

III. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED. Accordingly, the Clerk of the Court is respectfully directed to mail a copy of this Order to Plaintiff, to terminate the motion pending at docket number 15, and to close this case.

SO ORDERED.

Dated: March 13, 2018
New York, New York

/s Richard J. Sullivan
RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UINTED 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 19th the 19th day of June, two thousand and nineteen,

Before: BARRINGTON D. PARKER,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

Matthew J. Rosenwasser,
Plaintiff – Appellant,

ORDER
Docket No 18-905

v.

Fordham University, John Carroll, Head of Security,
Joseph McShane, President,
Defendants - Appellees.

Appellant, Matthew J. Rosenwasser, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

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