E.D.N.Y. – C. Islip
19-cv-5328
Kuntz, 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 18th day of March, two thousand twenty.

Present:

Robert A. Katzmann,
Chief Judge,
Richard C. Wesley,
Michael H. Park,
Circuit Judges.

Usman Oyibo,

Plaintiff-Appellant,

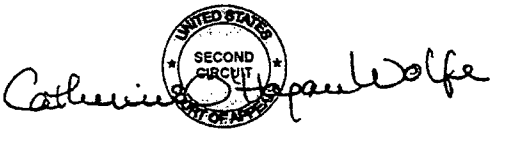
v. 19-3755

Huntington Hospital, et al.,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis. 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 DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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USMAN OYIBO,

Plaintiff,

v.

HUNTINGTON HOSPITAL MEDICAL CENTER; NORTH SHORE UNIVERSITY HOSPITAL; and MICHAEL REPICE, MD,

Defendants.
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MEMORANDUM AND ORDER

19-CV-5328 (WFK)

KUNTZ, II, United States District Judge:

The Court received this *pro se* complaint from plaintiff Usman Oyibo on September 18, 2019. Plaintiff's request to proceed without the prepayment of fees is granted for the limited purpose of this Order. For the reasons that follow, the action is dismissed.

BACKGROUND

The Complaint alleges the Court's jurisdiction under the United States Constitution, the Code of Federal Regulations, and the Social Security Act, but it appears to arise out of a claim for medical malpractice. The following factual allegations are taken from the Complaint, which incorporates Plaintiff's complaint filed in *Oyibo v. Huntington Hospital Medical Center, et al.*, Index No. 605438/2015E (New York Supreme Court, Nassau County). The Complaint also includes voluminous exhibits.

Plaintiff went to Huntington Hospital on February 22, 2013 and reported that he had gout in his toes and feet. Compl. ¶ 10. He remained in the hospital for 12 days. Compl. ¶ 13. The hospital conducted a "rheumatological workup" but did not conduct laboratory tests for gout, including the synovial joint fluid test or joint aspiration. Compl. ¶¶ 10-11, 13. "Huntington Hospital claim[ed] Plaintiff didn't have gout as well as the fraudulent psychiatric diagnosis." Compl. ¶ 30.

Plaintiff returned to Huntington Hospital on April 10, 2014. Plaintiff was "dumped out into the cold for over an hour." Compl. ¶ 16, 93. Plaintiff arrived at North Shore University Hospital that same day. Compl. ¶ 94. On April 14, 2014, after four days in the hospital, staff members at North Shore told plaintiff he was being given a "test," but then moved him into the operating room for a surgery to which Plaintiff had not consented. Compl. ¶¶ 55-64. Medical staff failed to answer Plaintiff's questions and refused to call his father. Compl. ¶¶ 58, 63-70. Plaintiff recorded this interaction and attempted to submit the recording as an exhibit to his Complaint. Compl. ¶ 54. Plaintiff was forcibly injected with a needle and rendered unconscious. Compl. ¶ 72. Medical staff, including Dr. Purtill, "viciously and fraudulently removed the plaintiff's toes to fraudulent conceal the plaintiff gout" [*sic*]. Compl. ¶ 72.

The Complaint makes multiple references to Plaintiff's father, Professor G.A. Oyibo, and a theory Professor Oyibo developed called "God Almighty's Grand Unified Theorem (GAGUT)." Compl. ¶ 1. Plaintiff's father participated in a May 23, 2014 telephone call with plaintiff and Dr. Purtill, in which they discussed GAGUT, Plaintiff's "genius IQ of 142," and "Plaintiff's horrible medical malpractice battery attack by the defendants" and "the fraud of the psychiatry department" in telling Dr. Purtill that Plaintiff was "a crazy child." Compl. ¶¶ 74-76. Plaintiff recorded this phone call and offered it as an exhibit to the Complaint. Compl. ¶ 74.

Plaintiff now asserts negligence and medical malpractice. Compl. ¶ 28. He alleges that Huntington Hospital and North Shore University Hospital staff "willfully, wantonly, knowingly and fraudulently lied outright repeatedly as well as deliberately to plaintiff." Compl. ¶ 21. Plaintiff states that the wounds on his feet were caused by gout and that the removal of his toes was both a "vicious medical malpractice battery" and part of a cover-up of the hospital Defendants' failure to properly diagnose the medical problem. Compl. ¶¶ 87, 91-92. Plaintiff likens his experience to the infamous Tuskegee syphilis study, because medical staff failed to get

his informed consent, communicate with him about diagnoses or treatment, or provide accurate reporting of test results. Compl. ¶¶ 18-21.

Plaintiff filed a claim for medical malpractice in the New York Supreme Court, Nassau County, under Index No. 605438/2015E. That court granted summary judgment to defendants by Decision and Order dated March 30, 2018. *See* https://iapps.courts.state.ny.us/webcivil/ (last visited 10/2/19). Plaintiff filed a motion to vacate, which was denied on August 10, 2018, and a notice of appeal, Index No. 2018-05514, which was dismissed on July 18, 2019. Plaintiff now seeks a "change of venue" in order "to get justice which was fraudulently denied by the State Courts..." Compl. ¶¶ 7, 50, 98. He alleges that state court justices refused to issue or enforce subpoenas *duces tecum* and other discovery requests Plaintiff made. Compl. ¶¶ 16, 29, 95, 100, 104. He states that the justices committed fraud and covered up Defendants' wrongdoing, ignored Plaintiff's evidence, were biased against him, and reached conclusions that were "obviously grossly fraudulent." Compl. ¶¶ 23-24, 26, 97, 100-06. He asserts that Justice Steinman had a conflict of interest because his daughter was employed at a medical facility affiliated with Defendants. Compl. ¶ 102. Plaintiff suggests that the Nassau County justices "collaborated" with the named Defendants to limit Plaintiff's discovery and ultimately caused him to lose his malpractice action. Compl. ¶¶ 104-05.

Plaintiff further alleges that the Appellate Division ignored his evidence and put procedural hurdles in his way. Compl. ¶¶ 32-33, 35. He claims that the Appellate Division's "fraudulent 'decisions'" and "clear history of Refusing to grant any relief that plaintiff has requested" denied his right to due process. Compl. ¶¶ 39-41.

Plaintiff asserts that these actions violated his rights to due process, which he argues is protected under the Fifth, Ninth, and Fourteenth Amendments. Compl. ¶ 107. He further asserts that the hospitals' actions constituted "cruel and unusual treatment," ostensibly in violation of the

Eighth Amendment. Compl. ¶ 107. He also alleges violations of Titles XVIII and XIX of the Social Security Act and Section 482 of Title 42 of the Code of Federal Regulations. Compl. ¶ 107. He seeks monetary damages of $181 million.

DISCUSSION

A. Standard of Review

The Court is mindful that "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted). If a liberal reading of the complaint "gives any indication that a valid claim might be stated," the Court must grant leave to amend the complaint. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). A federal statute, 28 U.S.C. § 1915(e)(2)(B), allows poor plaintiffs to file lawsuits without paying the usual filing fee. This statute requires a district court to dismiss a case if the complaint "is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

Moreover, a plaintiff seeking to bring a lawsuit in federal court must establish that the court has subject matter jurisdiction over the action. There are two types of federal subject matter jurisdiction. To establish the first type, federal question jurisdiction, the complaint must have a claim based on a federal law. *See* 28 U.S.C. § 1331; *New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F.3d 308, 315 (2d Cir. 2016) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005)). The second type of jurisdiction is called diversity jurisdiction, in which the plaintiff must show that plaintiff and defendants have complete diversity of citizenship, which means that the plaintiff must live in a different state than all the defendants, and the claim for money damages, which is called the amount in controversy,

must be for more than $75,000. *See* 28 U.S.C. § 1332; *Handelsman v. Bedford Vill. Assocs.*, 213 F.3d 48, 51 (2d Cir. 2000) ("Diversity jurisdiction requires that all of the adverse parties in a suit . . . be completely diverse with regard to citizenship.") (internal quotation marks and citations omitted). If the court "determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed.R.Civ.P. 12(h)(3); *see Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700-01 (2d Cir. 2000).

B. No Subject Matter Jurisdiction over Medical Malpractice Claims

Plaintiff fails to establish a basis for this Court's jurisdiction over his claims. The gravamen of his complaint is that two hospitals and a doctor committed medical malpractice. "Claims for negligence and medical malpractice arise under state law, and a federal court generally will not have original jurisdiction over the claims unless complete diversity exists." *Urena v. Wolfson*, No. 09-CV-1107 (KAM), 2010 WL 5057208, at *13 (E.D.N.Y. Dec. 6, 2010). Plaintiff and Defendants are all located in New York State, thus Plaintiff may not rely on diversity jurisdiction to provide a basis for federal court jurisdiction over his state medical malpractice claims. Accordingly, plaintiff's medical malpractice claims are dismissed for lack of subject matter jurisdiction.

Moreover, the Court would not consider Plaintiff's medical malpractice claims under its supplemental jurisdiction, because these claims have been fully litigated in state court and are thus barred by the doctrines of collateral estoppel (issue preclusion) and *res judicata* (claim preclusion), which "protect parties from having to relitigate identical claims or issues and . . . promote judicial economy." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998). "Collateral estoppel bars a party from raising a specific factual or legal issue in a second action when the party had a full and fair opportunity to litigate the issue in a prior proceeding." *Id. Res judicata* bars subsequent litigation if: "(1) the previous action involved an

adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y.C. Dep't of Corrs.*, 214 F.3d 275, 285 (2d Cir. 2000). "Even claims based upon different legal theories are barred provided they arise from the same transaction or occurrence." *L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc.*, 198 F.3d 85, 88 (2d Cir. 1999). Plaintiff's New York state lawsuit under Index No. 605438/2015E raised the same medical malpractice claims against the same defendants. He now raises the same factual allegations, even incorporating his state court complaint (ECF Docket Entry # 1 at 75), in a new forum and expects to get a different answer. The principles of *res judicata* and collateral estoppel are designed to prevent forum shopping and operate in this case to preclude Plaintiff from raising the same issues in a new court.

C. No Claims Under Medicaid Regulations

Plaintiff does assert claims under federal law. He alleges that Defendants violated 42 C.F.R. § 482, *et. seq.*, the regulations promulgated to administer the Medicaid Act, which is incorporated into Title XIX of the Social Security Act. The Medicaid Act is a federal program that gives funds to states to provide medical assistance to poor persons. *Himes v. Shalala*, 999 F.2d 684, 686 (2d Cir. 1993). The regulations contained in the C.F.R. set standards for states and participating hospitals to follow in order to participate in the Medicaid program, but are not designed to provide a private cause of action to enforce them. *See Estate of Savage v. St. Peter's Hosp. Ctr. of City of Albany, Inc.*, No. 17-CV-1363 (DJS), 2018 WL 3069199, at *5 (N.D.N.Y. June 21, 2018) ("[T]the federal Medicare and Medicaid regulations regarding standards for medical records and care create no explicit private right of action in favor of an individual patient, and leave the remedy for any deficiency in care or record keeping with the Secretary of HHS, who has sole responsibility for promulgating federal health, safety and quality standards

applicable to hospitals participating in Medicare/Medicaid programs."). The regulations contained in 42 C.F.R. § 482 related to patient care, informed consent, and patient privacy do not include a private right of action. *See Evelyn V. v. Kings Cty. Hosp. Ctr.*, 956 F. Supp. 288, 298 (E.D.N.Y. 1997) (no federal right to state enforcement of state standards of health care at hospitals participating in the Medicaid program); *Vinson v. Noele*, No. 19-CV-5788, 2019 WL 4858803, at *2 (W.D. Wash. Oct. 2, 2019) (no private cause of action to vindicate any violation of § 482.13); *Ogletree v. Vigil*, No. CV 17-3724, 2018 WL 582391, at *3 (E.D. La. Jan. 29, 2018) (no private right of action for a patient who claimed to have been restrained in violation of 42 C.F.R. § 482.13(e)); *Cornerstone Therapy Servs., Inc. v. Reliant Post Acute Care Sols., LLC*, No. 16-CV-0018, 2016 WL 6871440, at *8 (W.D. Va. Nov. 21, 2016) (No private right of action under 42 C.F.R. § 482.13(b)(1) and (2)); *Smith v. Univ. of Minn. Med. Ctr.-Fairview Riverside*, No. Civ. 09-293, 2010 WL 3893902, at *16 (D. Minn. July 14, 2010) (No private cause of action to enforce § 482.13), *report and recommendation adopted*, 2010 WL 3893849 (D. Minn. Sept. 30, 2010); *Abner v. Mobile Infirmary Hosp.*, 149 Fed. Appx. 857, 858 (11th Cir. 2005) (the Medicare Act does not create a private right of action for negligence). Accordingly, Plaintiff's reliance on 42 C.F.R. § 482 is misplaced, and these claims are dismissed.

D. Constitutional Claims

Plaintiff also asserts civil rights claims, which may be cognizable under 42 U.S.C. § 1983. In order to maintain a § 1983 action, a plaintiff must allege that "the conduct complained of [was] committed by a person acting under color of state law," and "deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir. 1994). Section 1983 does not extend to harms caused by private individuals or private organizations. As the Supreme Court has held, "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no

matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quotations omitted). Although the under-color-of-state-law requirement can be applied to private individuals and institutions in certain limited circumstances, such as where the private institution is engaged in a "public function" or performs conduct that is "fairly attributable to the state," *Id.*, 526 U.S. at 51, these exceptions are narrow. A private entity does not become a state actor merely by performing under a state contract, by accepting state or federal funds, or because it is subject to state regulation. *Cranley v. Nat'l Life Ins. Co. of Vermont*, 318 F.3d 105, 112 (2d Cir. 2003) ("A finding of state action may not be premised solely on the private entity's creation, funding, licensing, or regulation by the government."); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (finding that private nursing homes were not state actors, even though they accepted Medicaid funds and were subjected to Medicaid regulations); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State."). In this case, North Shore University Hospital and Huntington Hospital are both subsidiaries of Northwell Health, a private health care network. Their participation in and regulation by federal and state programs does not convert them into state actors subject to liability under 42 U.S.C. § 1983. Accordingly, Plaintiff's civil rights claims are dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Even if Defendants were state actors, Plaintiff has failed to allege a violation of his civil rights. He alleges that the Defendants violated his rights under the Eighth Amendment by subjecting him to "cruel and unusual treatment." The Eighth Amendment's prohibition against cruel and unusual *punishment* protects those who have been convicted of a crime. *Farmer v.*

Brennan, 511 U.S. 825 (1994). It does not appear that Plaintiff was arrested or convicted, and so the Eighth Amendment does not apply to the medical treatment he received in the non-custodial context of a private hospital in which he voluntarily sought treatment.

Plaintiff's purported claims under the Fifth, Ninth, and Fourteenth Amendments appear to relate to the state courts' dismissal of his medical malpractice action. He alleges that the Supreme Court justices and the judges on the Appellate Division panel, none of whom is named as a defendant, violated his right to due process by denying his discovery requests and failing to give him either the hearing or the outcome that he wanted. However, even if Plaintiff had named as defendants the courts or the judges who presided over his case and dismissed his appeal, these potential defendants would be immune from suit. The Eleventh Amendment bars suits against states, state agencies, and state officials acting in their official capacity, absent the state's consent to suit or an express or statutory waiver of immunity by Congress. *See Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001); *Gollomp v. Spitzer*, 568 F.3d 355, 368 (2d Cir. 2009) ("[T]he New York State Unified Court System is unquestionably an 'arm of the State, and is entitled to Eleventh Amendment sovereign immunity." (citation omitted)). Moreover, judges have absolute immunity from suits for damages arising out of judicial acts performed in their judicial capacities. *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Forrester v. White*, 484 U.S. 219, 225 (1988). The absolute judicial immunity of the court and its members "is not overcome by allegations of bad faith or malice," nor can a judge "be deprived of immunity because the action he took was in error . . . or was in excess of his authority." *Mireles*, 502 U.S. at 11, 13 (quotations and citations omitted). Judicial immunity may be overcome only if the court is alleged to have taken nonjudicial actions or if the judicial actions taken were "in the complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11-12.

Plaintiff's due process claim is centered on his disappointment with how the Nassau County Court and the Appellate Division handled his lawsuit and the appeal, actions squarely within the presiding judges' judicial capacity. Accordingly, even if the judges had been named as defendants, the civil rights claims against them would have been dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

CONCLUSION

For the reasons set forth above, the Complaint is dismissed pursuant to Fed. R. Civ. P. 12(h)(3) and 28 U.S.C. § 1915(e)(2)(B). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

s/WFK

WILLIAM F. KUNTZ, II
United States District Judge

Dated: Brooklyn, New York
October 9, 2019