21-1824-cv
*Marvin v. Orange Cnty. Dep't of Soc. Servs. et al.*

# 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 14th day of June, two thousand twenty-two.

PRESENT:

GERARD E. LYNCH,
JOSEPH F. BIANCO,
WILLIAM J. NARDINI,

*Circuit Judges.*

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Mark Marvin,

*Plaintiff-Appellant,*

v. 21-1824-cv

Martha Peldunas, Darcie M. Miller, Commissioner, County of Orange,

*Defendants-Appellees,*

Orange County Department of Social Services,

*Defendant.*

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FOR PLAINTIFF-APPELLANT: Mark Marvin, *pro se*, Walden, NY.

FOR DEFENDANTS-APPELLEES: Matthew J. Nothnagle, Orange County Attorney's Office, Goshen, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Román, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Appellant Mark Marvin, proceeding *pro se*, appeals the district court's judgment dismissing his complaint brought pursuant to 42 U.S.C. § 1983 for alleged violations of his Fourth, Fifth, and Fourteenth Amendment rights in connection with his attempt to renew his Medicaid medical coverage. In particular, he claims that he was deprived of due process when an Administrative Law Judge ("ALJ") denied renewal of Medicaid Medical Coverage because he had not applied for Social Security payments for which he was eligible. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.

"We review the grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013) (per curiam). 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). However, as here, we review a *pro se* complaint with "special solicitude," interpreting it "to raise the strongest claims that it suggests." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (internal alterations adopted and quotation marks omitted).

The Fifth Amendment's Due Process Clause states that no person shall "be deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment's Due Process Clause mirrors this language. U.S. Const. amends. V, XIV § 1. Procedural due process

requires "that a deprivation of life, liberty, or property be preceded by notice and opportunity for [a] hearing appropriate to the nature of the case." *Chase Grp. All. LLC v. City of N.Y. Dep't of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). To state a claim based on a procedural due process violation, Marvin must first establish that he enjoyed a protected property interest. *See Harrington v. County of Suffolk*, 607 F.3d 31, 34 (2d Cir. 2010).

Assuming, as the district court did, that Marvin had a property interest in his Medicaid benefits, *see Bellin v. Zucker*, 6 F.4th 463, 474–82 (2d Cir. 2021), his due process claim nevertheless fails because he received adequate process to protect his rights. "[I]n evaluating what process satisfies the Due Process Clause, the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees." *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006) (internal quotation marks omitted). Marvin's claim likely falls into the former category, since the denial of his Medicaid benefits was based on the application of a state regulation that required Medicaid applicants to pursue all potentially available resources, and Marvin had not sought Social Security retirement benefits for which he was eligible. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 360-2.3(c)(1) (2022) (outlining financial eligibility requirements); *see also* 42 C.F.R. § 435.608(a) (outlining a similar requirement under federal regulations). However, we need not resolve that issue because no matter how Marvin's claim is characterized, the process he received was adequate. *See Rivera-Powell*, 470 F.3d at 466 (declining to decide whether defendant's conduct was pursuant to established procedures or random because, regardless, it provided adequate process).

Marvin was afforded an opportunity to challenge the denial of Medicaid benefits through a fair hearing held before an ALJ. He could have sought review of the ALJ's unfavorable decision in an Article 78 proceeding, but ultimately did not do so. *See* N.Y. C.P.L.R. §§ 7803, 7804; N.Y. Soc. Serv. Law § 22(9)(b). An Article 78 proceeding was sufficient process to protect Marvin's rights. *See Harris v. Mills*, 572 F.3d 66, 76 (2d Cir. 2009) (holding that, however a due process claim is characterized, "notice and an opportunity to be heard" before the alleged deprivation, "coupled with the Article 78 post-deprivation remedy, is enough to satisfy due process"). Because Marvin failed to avail himself of an Article 78 proceeding, his due process claim fails.[1]

Marvin also suggests that the denial of Medicaid benefits has deprived him of his ability to receive Social Security payments at the time of his choosing. We disagree. There is no guaranteed right to receive Medicaid benefits while also delaying receipt of Social Security benefits. As noted above, the relevant rules and regulations explicitly condition Medicaid eligibility on the applicant pursuing "any potential income and resources that may be available." N.Y. Comp. Codes R. & Regs. tit. 18 § 360-2.3(c)(1); *see also* 42 C.F.R. § 435.608(a) (conditioning eligibility on applicants taking "all necessary steps to obtain any annuities, pensions, retirement, and disability benefits to which they are entitled . . ."). Those rules may present Marvin with a difficult choice between maintaining his Medicaid eligibility and continuing to delay receipt of his Social Security benefits—but he still retained the right, if he so chose, to delay receipt of those benefits. But Medicaid benefits are not available to persons who have access to

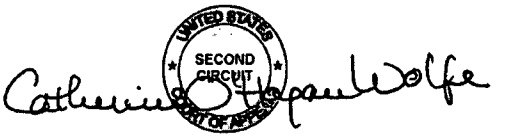
[1] To the extent Marvin challenges dismissal of his *Monell* claim against the Orange County Department of Social Services, there is no municipal liability where, as here, there is no underlying violation. *See Matican v. City of New York*, 524 F.3d 151, 154 (2d. Cir. 2008). As to Marvin's assertion that denial of his Medicaid benefits constituted an unconstitutional seizure, the district court properly determined that denial of his government benefit did not implicate the Fourth Amendment.

Social Security benefits to pay potential medical expenses, but choose not to take advantage of those benefits.

* * *

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

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK MARVIN,

Plaintiff,

-against-

MARTHA PELDUNAS, DARCIE M. MILLER, COUNTY OF ORANGE,

Defendants.

16-cv-1456 (NSR)
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff Mark Marvin ("Plaintiff") brings this *pro se* action against Martha Peldunas ("Peldunas"), Darcie M. Miller ("Miller"), and the County of Orange (the "County", collectively "Defendants"). On September 16, 2020, this Court issued an Opinion & Order dismissing the Complaint without prejudice for failure to state a claim pursuant to Rule 12(b)(6). (ECF No. 29.) On October 1, 2020, Plaintiff filed an Amended Complaint. (ECF No. 30.) Before the Court is Defendants' motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6). For the following reasons, the motion to dismiss is GRANTED, with prejudice.

## BACKGROUND

### I. Original Complaint

The following facts are taken from Plaintiff's *original* complaint, dated February 23, 2016, and the attached exhibits. On July 15, 2015, Plaintiff, aged 66, applied to the Orange County Department of Social Services ("DSS") for renewal of his Medicaid medical coverage. On August 12, 2015, DSS advised Plaintiff to submit verification that he had applied for Social

Security retirement benefits by August 24, 2015. On October 13, 2015, Plaintiff advised DSS of his refusal to apply for Social Security retirement benefits. Plaintiff planned to wait to apply for Social Security retirement benefits until age 70. Applying for benefits at age 66—which Plaintiff defines as "prematurely"—results in a lower monthly benefit than applying at age 70.[1] On October 20, 2015, DSS issued a letter denying Plaintiff's application for renewal of Medicaid coverage.

On October 26, 2015, Plaintiff requested a fair hearing to appeal DSS's decision. On October 30, 2015, Plaintiff spoke with an employee of the Fair Hearing Unit. That employee informed Plaintiff that his application was denied due to 18 N.Y.C.R.R. 360-2.3(c)(1). The regulation provides that "social services district[s] must review all sources of income and resources available or potentially available to the applicant" when determining Medicaid eligibility. On November 1, 2015, Plaintiff submitted a letter ("Application to Reverse Denial of Medicaid Coverage") to the Fair Hearing Unit, explaining why his denial should be reversed. In his letter, Plaintiff argued that the requirement that he apply for "premature" Social Security retirement benefits is a violation of federal law. Plaintiff also argued that Social Security benefits do not qualify as potential income or resources "available" to him because he cannot afford to take "reduced" Social Security benefits. On November 24, 2015 a fair hearing was held in Orange County before Administrative Law Judge ("ALJ") Joel Dulberg. Defendant Peldunas, an Orange County DSS Fair Hearing Supervisor, appeared on behalf of DSS. ALJ Dulberg denied

[1] For individuals born between the years 1943 and 1954, the Social Security Administration considers 66 the "full" or "normal" retirement age. Individuals may elect to receive Social Security benefits as early as age 62, in which case the benefits will be "reduced." Individuals may also elect to "delay" Social Security benefits up to age 70, in which case benefits will be "increased." SSA, Starting Your Retirement Benefits Early, https://www.ssa.gov/benefits/retirement/planner/agereduction.html (all Internet materials as last visited Sept. 11, 2020).

Plaintiff's appeal, finding no factual disputes and determining that DSS's denial was consistent with state law and regulations.

Plaintiff alleges that Defendant Miller, Orange County Commissioner of Social Services, failed to "properly train and supervise subordinates that Social Security benefits are elective and cannot be made obligatory by a law which is unconstitutionally vague and overreaching."

Plaintiff alleges that, as a result of the denial, he was denied affordable healthcare, specifically follow-up evaluations and cataract surgery. He requests declaratory and injunctive relief, monetary damages for loss of vision and cataract treatment, punitive damages, and reasonable legal costs.

## II. Amended Complaint

Plaintiff's Amended Complaint is two pages long and reiterates the arguments Plaintiff presented in his opposition to Defendants' original motion to dismiss. (ECF No. 30.) Plaintiff fails to re-plead any of the facts underlying his original Complaint and the only "amendment" Plaintiff provides is:

> The defendants acting under color of law did, unlawfully and in violation of his due process liberty interest, and in violation of the protections of 42 USC 407, demand that his benefits be transferred and assigned at law or in equity and that they did subject his Social Security benefits to executive, levy, attachment, garnishment and/or other legal process, etc. in that premature receipt of benefits denied him full benefits which constitutes an unlawful seizure of those benefits under the Fourth Amendment, and as a result suffered denial of his federal statutory rights, his constitutional rights and privileges.

**STANDARD ON A MOTION TO DIMISS** TYPE

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), dismissal is proper unless the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*

*Twombly*, 550 U.S. 544, 570 (2007)). When there are well-pleaded factual allegations in the complaint, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. "Although for the purpose of a motion to dismiss [a court] must take all of the factual allegations in the complaint as true, [it is] 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). It is not necessary for the complaint to assert "detailed factual allegations," but must allege "more than labels and conclusions." *Twombly*, 550 U.S at 555. The facts in the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.*

"*Pro se* complaints are held to less stringent standards than those drafted by lawyers, even following *Twombly* and *Iqbal*." *Thomas v. Westchester*, No. 12–CV–6718 (CS), 2013 WL 3357171, at *2 (S.D.N.Y. July 3, 2013). The court should read *pro se* complaints " 'to raise the strongest arguments that they suggest,'" *Kevilly v. New York*, 410 F. App'x 371, 374 (2d Cir. 2010) (summary order) (quoting *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) ); see also *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) ("even after *Twombly*, though, we remain obligated to construe *a pro se* complaint liberally"). "However, even *pro se* plaintiffs asserting civil rights claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a right to relief above the speculative level." *Jackson v. N.Y.S. Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (quoting *Twombly*, 550 U.S. at 555) (internal quotations omitted). Dismissal is justified, therefore, where "the complaint lacks an allegation regarding an element necessary to obtain relief," and therefore, the "duty to liberally construe a plaintiff's complaint [is not] the equivalent of a duty to re-write it." *Geldzahler v. New York Medical College*, 663 F. Supp. 2d 379, 387 (S.D.N.Y. 2009) (internal citations and

alterations omitted).

In ruling on a motion to dismiss, a "court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (internal quotation marks and citation omitted). Courts also may consider "matters of which judicial notice may be taken" and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

## DISCUSSION

In the Amended Complaint, Plaintiff fails to replead any of the facts in his original Complaint and fails to allege any new facts. Instead alleges one new legal cause of action,[2] an unconstitutional seizure in violation of the Fourth Amendment.[3]

### I. Factual Allegations

As an initial matter, the Court granted Plaintiff leave to cure *factual* defects within his original Complaint, not to assert new claims. This alone is sufficient reason to dismiss the

[2] Plaintiff also attempts to add additional claims in his opposition memo including (1) a violation of the Contracts Clause, (2) a violation of the Supremacy Clause, and (3) a violation of the Due Process clause. The Court is not obligated to address arguments raised in Plaintiff's opposition. Nonetheless, Plaintiff's arguments fail on the merits. First, there is no Contracts Clause violation here because there is no interference with a contract. Defendants did not require Plaintiff to take any actions with respect to his social security benefits; rather, Defendants conditioned the continued grant of Medicaid benefits on Plaintiff utilizing all available resources, including his social security benefits. Second, there is no Supremacy Clause violation here because federal law explicitly authorizes officials to promulgate Medicaid regulations. Finally, the Court already addressed and rejected Plaintiff's Due Process arguments in its September 16, 2020 Opinion & Order.

[3] Plaintiff includes in his Amended Complaint a claim regarding U.S.C. § 407. However, this Court already addressed this potential claim in its Opinion. (ECF No. 29 at 7, FN. 4) ("To the extent Plaintiff is arguing DSS is somehow requiring an 'assignment' of his Social Security retirement benefits in violation of 41 U.S.C. § 407(a), Plaintiff's argument fails. Requiring Plaintiff to obtain all sources of income available to him and assessing that income to determine eligibility is distinguishable from assigning Plaintiff's income. Further, in other circumstances, courts have determined that Social Security retirement benefits can be used to reduce Medicaid support without running afoul of § 407(a). *See Wojchowski v. Daines*, 498 F.3d 99 (2d Cir. 2007) (finding that New York's attribution of an institutionalized spouse's Social Security benefits to a non-institutionalized spouse for the purpose of Medicaid budgeting does not violate § 407(a)).")

Amended Complaint. Further, Plaintiff failed to plea *any* facts in his Amended Complaint, which consists only of two pages of legal arguments. Because Plaintiff is proceeding *pro se*, the Court will address Plaintiff's new legal claim, liberally applying the facts from Plaintiff's original Complaint. However, because Plaintiff has failed to plead additional facts as to the claims alleged in the original Complaint, the Court will not re-address those claims and now dismisses those claims with prejudice.

**II. Unconstitutional Seizure**

The Fourth Amendment to the United States Constitution protects citizens' "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The general contours of a search and seizure under the Fourth Amendment are well-defined. A "seizure" of property, occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Plaintiff seemingly argues that by requiring Plaintiff to elect to receive his Social Security benefits in order to determine Medicaid eligibility, Defendants "seized" the difference in Social Security benefit amount that Plaintiff might have been awarded had he prolonged election of Social Security benefits.

The Court disagrees. First, it is unclear that Plaintiff has a possessory interest in his *delayed-election* Social Security benefits. Plaintiff cites to no authority supporting such an interest and the Court can find none. Second, even assuming Plaintiff has a possessory interest in his Social Security benefits, Plaintiff fails to allege meaningful interference. As an initial matter, Plaintiff chose not to elect to receive Social Security benefits. Further, such an election would be performed for the purpose of securing Medicaid benefits, benefits which Plaintiff is not automatically entitled to and which would have the net effect of increasing Plaintiff's total

benefits. It is also unclear that Plaintiff's total social security benefits would be higher if he postponed election because by electing to receive benefits sooner, Plaintiff may receive a lower benefit amount, but for a longer period of time. Accordingly, the Court finds that Plaintiff fails to plead facts supporting a Fourth Amendment violation.

**CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss is GRANTED and Plaintiff's claims are DISMISSED with prejudice. The Court respectfully directs the Clerk to terminate the motion at ECF No. 36, to terminate the action, to mail a copy of this Opinion and Order to Plaintiff, and to make an entry on the docket reflecting service of the Opinion and Order upon Plaintiff.

Dated: July 2, 2021
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK MARVIN,

Plaintiff,

-against-

MARTHA PELDUNAS, DARCIE M. MILLER, COUNTY OF ORANGE,

Defendants.

Medicaid

16-cv-1456 (NSR)
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff Mark Marvin ("Plaintiff") brings this *pro se* action against Martha Peldunas ("Peldunas"), Darcie M. Miller ("Miller"), and the County of Orange (the "County", collectively "Defendants"). Defendants move pursuant to Rule 12(b)(6) to dismiss on the basis that Plaintiff's complaint fails to state a claim upon which relief can be granted. For the following reasons, the motion to dismiss is GRANTED, without prejudice.

**BACKGROUND**

The following facts are taken from Plaintiff's complaint, dated February 23, 2016, and the attached exhibits. On July 15, 2015, Plaintiff, aged 66, applied to the Orange County Department of Social Services ("DSS") for renewal of his Medicaid medical coverage. On August 12, 2015, DSS advised Plaintiff to submit verification that he had applied for Social Security retirement benefits by August 24, 2015. On October 13, 2015, Plaintiff advised DSS of his refusal to apply for Social Security retirement benefits. Plaintiff planned to wait to apply for Social Security retirement benefits until age 70. Applying for benefits at age 66—which Plaintiff

defines as "prematurely"—results in a lower monthly benefit than applying at age 70.[1] On October 20, 2015, DSS issued a letter denying Plaintiff's application for renewal of Medicaid coverage.

On October 26, 2015, Plaintiff requested a fair hearing to appeal DSS's decision. On October 30, 2015, Plaintiff spoke with an employee of the Fair Hearing Unit. That employee informed Plaintiff that his application was denied due to 18 N.Y.C.R.R. 360-2.3(c)(1). The regulation provides that "social services district[s] must review all sources of income and resources available or potentially available to the applicant" when determining Medicaid eligibility. On November 1, 2015, Plaintiff submitted a letter ("Application to Reverse Denial of Medicaid Coverage") to the Fair Hearing Unit, explaining why his denial should be reversed. In his letter, Plaintiff argued that the requirement that he apply for "premature" Social Security retirement benefits is a violation of federal law. He also argued that Social Security benefits do not qualify as potential income or resources "available" to him because he cannot afford to take "reduced" Social Security benefits. On November 24, 2015 a fair hearing was held in Orange County before Administrative Law Judge ("ALJ") Joel Dulberg. Defendant Peldunas, an Orange County DSS Fair Hearing Supervisor, appeared on behalf of DSS. ALJ Dulberg denied Plaintiff's appeal, finding no factual disputes and determining that DSS's denial was consistent with state law and regulations.

[1] For individuals born between the years 1943 and 1954, the Social Security Administration considers 66 the "full" or "normal" retirement age. Individuals may elect to receive Social Security retirement benefits as early as age 62, in which case the benefits are "reduced." Individuals may also elect to "delay" Social Security retirement benefits up to age 70, in which case benefits are "increased." SSA, Starting Your Retirement Benefits Early, https://www.ssa.gov/benefits/retirement/planner/agereduction.html (all Internet materials as last visited Sept. 11, 2020).

Plaintiff alleges that Defendant Miller, Orange County Commissioner of Social Services, failed to "properly train and supervise subordinates that Social Security benefits are elective and cannot be made obligatory by a law which is unconstitutionally vague and overreaching."

Plaintiff alleges that, as a result of the denial, he was denied affordable healthcare, specifically follow-up evaluations and cataract surgery. He requests declaratory and injunctive relief, monetary damages for loss of vision and cataract treatment, punitive damages, and reasonable legal costs.

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strongest arguments that they suggest,'" *Kevilly v. New York*, 410 F. App'x 371, 374 (2d Cir. 2010) (summary order) (quoting *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) ); see also *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) ("even after *Twombly*, though, we remain obligated to construe *a pro se* complaint liberally"). "However, even *pro se* plaintiffs asserting civil rights claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a right to relief above the speculative level." *Jackson v. N.Y.S. Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (quoting *Twombly*, 550 U.S. at 555) (internal quotations omitted). Dismissal is justified, therefore, where "the complaint lacks an allegation regarding an element necessary to obtain relief," and therefore, the "duty to liberally construe a plaintiff's complaint [is not] the equivalent of a duty to re-write it." *Geldzahler v. New York Medical College*, 663 F. Supp. 2d 379, 387 (S.D.N.Y. 2009) (internal citations and alterations omitted).

In ruling on a motion to dismiss, a "court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (internal quotation marks and citation omitted). Courts also may consider "matters of which judicial notice may be taken" and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

**DISCUSSION**

## I. 42 USC § 1983 Claims

Plaintiff does not clearly state his claims. After careful analysis of the complaint and attached materials, this Court finds Plaintiff to be asserting two claims under 42 U.S.C. Section 1983.[2]

Section 1983 provides, in relevant part, that: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); see *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004). To state a claim under § 1983, a plaintiff must allege "(1) the challenged conduct was attributable to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed by the U.S. Constitution." *Castilla v. City of New York*, No. 09 Civ. 5446, 2013 WL 1803896, at *2 (S.D.N.Y. April 25, 2013); see *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010). Therefore, a Section 1983 claim has two essential elements: (1) the defendant acted under color of state law, and (2) as a result of the defendant's actions, the plaintiff suffered a denial of his federal statutory rights, or his constitutional rights or privileges. See *Annis v. Cnty. of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998); *Quinn v. Nassau Cnty. Police Dep't*, 53 F. Supp. 2d 347, 354

[2] This interpretation is consistent with Plaintiff's July 14, 2016 letter in which he refers to the Complaint as "my civil rights complaint."

(E.D.N.Y. 1999) (noting that Section 1983 "furnishes a cause of action for the violation of federal rights created by the Constitution") (citation omitted).

*A. Federal Right to Elect to Receive Social Security Benefits*

Plaintiff alleges he has a federal right to decide when and whether to elect to receive Social Security retirement benefits and that his denial of Medicaid coverage violated that right. Plaintiff points to various case law to prove the existence of this federal right. However, even assuming that these cases support the existence of a federal right,[3] Plaintiff fails to assert any facts demonstrating the relevance of these cases to this scenario. For instance, Plaintiff cites to *United States v. Lee*, a case which concerns whether certain Amish employers and employees are exempt from paying social security taxes due to their religious beliefs. *United States v. Lee*, 455 U.S. 252 (1982). The Supreme Court found that payment of Social Security taxes and receipt of Social Security retirement benefits interferes with Amish religious beliefs. *Id.* at 257. However, it also found that the government's interest in mandatory and continuous participation in the Social Security program is so strong that it justifies the religious burden. *Id.* at 258-59. The only pertinent finding from this case is the Court's recognition of an Amish religious interest in not electing to receive Social Security retirement benefits. However, Plaintiff does not assert a similar religious belief; far from that, Plaintiff indicates he plans to elect to receive Social Security retirement benefits at age 70. Similarly, Plaintiff cites to *Ellender v. Schweiker*, which addresses the legality of "cross-program recovery", i.e., recovering overpayments from one social security program (SSI) by withholding payments from another social security program

[3] Under Section 1983, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). In order for a particular statutory provision to be enforceable through § 1983, the statutory provision at issue must "give[ ] rise to a federal right," and Congress must not have "specifically foreclosed a remedy under § 1983." *Davis v. New York City Housing Authority*, 379 F. Supp. 3d 237, 245 (S.D.N.Y. 2019) (citing *Blessing v. Freestone*, 520 U.S. 329 at 340-41).

(OASDI). *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983). However, there is no overpayment or "cross-program recovery" alleged here.[4]

Plaintiff supports his arguments with quotes from decisions taken out of context. For example, Plaintiff quotes *Crouch v. United States*: "the social security statute compels contributions to the system by way of taxes, it does not compel any one to accept benefits." *Crouch v. United States*, 665 F. Supp. 813, 815 (N.D. Cal. 1987) (quoting *United States v. Lee*, 455 U.S. at 258-59 (1982)). It appears Plaintiff takes this quote to imply that, because Medicaid is established within the Social Security Act, the Medicaid eligibility process cannot compel anyone to elect to receive Social Security retirement benefits. However, this misunderstands the context of the quote. The courts were merely indicating that the obligation to continue to pay Social Security taxes is separate from the ability or decision to elect to receive Social Security benefits.

Because Plaintiff is *pro se*, this Court has a "duty to liberally construe a plaintiff's complaint." *Geldzahler v. New York Medical College*, 663 F. Supp. 2d 379, 387 (S.D.N.Y. 2009) (internal citations and alterations omitted). However, this duty [is not] the equivalent of a duty to re-write it." *Id.* The Court is unaware of any law supporting the existence of the federal right that Plaintiff asserts and the sources that Plaintiff relies on to support his arguments are inapplicable to the facts set forth by the Plaintiff. As such, this claim is dismissed, without prejudice.

[4] To the extent Plaintiff is arguing DSS is somehow requiring an "assignment" of his Social Security retirement benefits in violation of 41 U.S.C. § 407(a), Plaintiff's argument fails. Requiring Plaintiff to obtain all sources of income available to him and assessing that income to determine eligibility is distinguishable from assigning Plaintiff's income. Further, in other circumstances, courts have determined that Social Security retirement benefits can be used to reduce Medicaid support without running afoul of § 407(a). *See Wojchowski v. Daines*, 498 F.3d 99 (2d Cir. 2007) (finding that New York's attribution of an institutionalized spouse's Social Security benefits to a non-institutionalized spouse for the purpose of Medicaid budgeting does not violate § 407(a)).

*B. Due Process Claim*

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. To state a procedural due process claim, Plaintiff must show "(1) that Defendants deprived him of a cognizable interest in life, liberty, or property, (2) without affording him constitutionally sufficient process." *Proctor v. LeClaire*, 846 F.3d 597, 608 (2d Cir. 2017) (internal quotation marks omitted).

Recipients of public assistance benefits, such as Medicaid, have a property interest in those benefits that is protected by the Fourteenth Amendment. *See Mayer v. Wing*, 922 F. Supp. 902, 910 (S.D.N.Y. 1996) ("Medicaid benefits are a protectable 'property interest' under the Fourteenth Amendment"); *Richardson v. Kelaher*, 1998 WL 812042, *4 (S.D.N.Y. 1998). *See also Goldberg v. Kelly*, 397 U.S. 254 (1970); *Flemming v. Nestor*, 363 U.S. 603 (1960).

The Supreme Court has determined that due process requires an "adequate hearing" for which there is adequate notice and an opportunity to be heard before benefits are terminated. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). The Due Process Clause also requires "that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (citing *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007). A statute can be impermissibly vague for either of two reasons: (1) it fails to provide people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) it authorizes or even encourages arbitrary and discriminatory enforcement. *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

**Plaintiff's Fair Hearing**

Plaintiff does not assert that he was denied access to the fair hearing process. Plaintiff chose not to avail himself of an Article 78 proceeding to challenge the determination of ALJ Dulberg. *See Harris v. Yonkers Department of Social Service*, 2019 WL 2287715 (S.D.N.Y. 2019); *Banks v. HRA*, 2013 WL 142374, at *3 (E.D.N.Y. 2013). As such, this court does not see any facts to support a due process claim.[5]

**Vagueness Claims**

Plaintiff asserts that "Social Security benefits are elective and cannot be made obligatory by a law which is unconstitutionally vague and overreaching." Although the Complaint does not specify, the Court assumes Plaintiff is referring to 18 N.Y.C.R.R. 360-2.3(c)(1), which is the regulation Plaintiff identified as justifying the denial of his Medicaid renewal application. It provides:

> Evaluation of financial circumstances. In determining whether an applicant/recipient is financially eligible for MA under section 360-3.3(b) or 360-3.3(c) of this Part, the social services district must review all sources of income and resources available or potentially available to the applicant/recipient. The district must consider the income and resources of all legally responsible relatives. The review will be based on information in the application and from a personal interview with the applicant/recipient or the person applying on his/her behalf. The district must consider only available income and resources, as defined in Subpart 360-4 of this Part. To be eligible for MA, the applicant must pursue any potential income and resources that may be available. As soon as income or resources become

[5] As indicated in Section II, *infra*, Plaintiff asserted new arguments in his response to Defendant's motion to dismiss. The Court is not obligated to consider these new arguments and declines to do so because Plaintiff's claims would be properly dismissed on other grounds.

available, the applicant must report them to the district. The district must reevaluate the applicant's eligibility for MA based on the new financial information.

This Court fails to see how this regulation is unclear or authorizes or encourages arbitrary and discriminatory enforcement. Plaintiff's due process claims are therefore dismissed, without prejudice.

*C. Defendant Liability*

Because this Court will grant Plaintiff leave to amend, it will address defendant liability. In their motion to dismiss, Defendants argue they are precluded from liability under Section 1983. First, Defendants argue Miller is precluded from liability due to Plaintiff's failure to plead personal involvement. Second, Defendants argue Miller and Peldunas are protected by qualified immunity. Third, defendants argue the County is protected by municipal liability. Plaintiff failed to address any of these arguments in his response to Defendants' motion to dismiss. As such, Defendants further argue Plaintiff has abandoned his claims against Defendants altogether. For the reasons detailed below, this court agrees that Defendants cannot be held liable for damages under the facts asserted.

**Personal Involvement**

"[A] defendant in a § 1983 action may not be held liable for damages for constitutional violations merely because [s]he held a high position of authority." *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *see also Grullon v. City of New Haven*, 720 F.3d 133, 138–39 (2d Cir. 2013). Instead, "[i]t is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (*quoting Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991)). To make a finding of personal involvement, a plaintiff must

demonstrate that the defendant: (1) participated directly in the alleged constitutional violation, (2) after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

In his complaint, Plaintiff makes the conclusory allegation that Miller failed to "properly train and supervise subordinates that Social Security benefits are elective and cannot be made obligatory by a law which is unconstitutionally vague and overreaching." Plaintiff does not provide any facts that suggest Miller was personally involved in the denial of his application, that she was aware of his denial, that she created the policy under which his application was denied, that she was grossly negligent in supervising subordinates who committed wrongful acts, or that she exhibited deliberate indifference. Therefore, as the facts are currently plead, Miller cannot be held liable for damages.

**Qualified Immunity**

Qualified immunity shields government officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The scope of qualified immunity is broad, and it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "Defendants bear the burden of establishing qualified immunity." *Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015). "The issues on qualified immunity are: (1) whether plaintiff has shown facts making out violation of a constitutional right; (2) if so,

whether that right was 'clearly established'; and (3) even if the right was 'clearly established,' whether it was 'objectively reasonable' for the officer to believe the conduct at issue was lawful." *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013). Qualified immunity does not shield a public official against a claim for declaratory or injunctive relief. *Vincent v. Yelich*, 718 F.3d 157, 177 (2d Cir. 2013).

This court agrees that Miller and Peldunas are entitled to qualified immunity in this matter. Defendants were following clearly establish state and federal laws and regulations. This court cannot identify a right—let alone a clearly established right—that Defendants have violated. Therefore, as the facts are currently plead, Miller and Peldunas do not qualify as government officials who knowingly violated the law and they cannot be held liable for damages.[6]

**Municipal Liability**

In order to hold a municipality liable, a plaintiff must demonstrate "that the municipality itself caused or is implicated in the constitutional violation." *Monell v. Department of Social Services*, 436 U.S. 659, 690 (1978); *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 125 (2d Cir. 2004).To allege a plausible *Monell* claim, a plaintiff must plead the existence of an official custom or policy which subjected him to a denial of a constitutional right. See *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008) ("In order to prevail on a claim against a municipality under [S]ection 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury.").

[6] Note that neither a lack of personal involvement nor qualified immunity shields against declaratory or injunctive relief.

To establish an official custom or policy, a plaintiff must allege (1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees. *White v. Westchester Cty.*, 2018 WL 6726555, at *10 (S.D.N.Y. Dec. 21, 2018) (quoting *Brandon v. City of New York*, 705 F. Supp. 2d 261, 276-77 (S.D.N.Y. 2010)).

"[A] municipality cannot be held liable under *Monell* if it merely carries out a state law without any 'meaningful' or 'conscious' choice, because the municipality does not act pursuant to its own policy." *Vaher v. Town of Orangetown, N.Y.*, 133 F. Supp. 3d 574, 605-06 (S.D.N.Y. 2015) (citing *Vives v. City of New York*, 524 F.3d 346, 351-53 (2d Cir. 2008)).

In this case, the County was merely following state law and regulations in its decision to deny Plaintiff's application for renewal of Medicaid benefits. Therefore, as the facts are currently plead, the municipality cannot be held liable.

**Abandonment**

"The failure to oppose a motion to dismiss a claim is deemed abandonment of the claim." *Johnson v. City of New York*, 2017 WL 2312924, at *18 (S.D.N.Y. May 26, 2017) (holding that the plaintiff abandoned her claim because her opposition did not address the defendants' arguments, including their argument that they lacked personal involvement); *Barmore v. Aidala*, 419 F. Supp. 2d 193, 201 (N.D.N.Y. 2005) (dismissing the plaintiff's claims against the defendants because the plaintiff did not address the defendants' personal involvement arguments

in its opposition to the defendants' motion to dismiss). *See also Rodriguez v. Vill. of Ossining*, 918 F. Supp. 2d 230, 239 (S.D.N.Y. 2013); *Davis v. City of N.Y. Health & Hosps. Corp.*, 2011 WL 4526135, at *6 (S.D.N.Y. Sept. 29, 2011) *Boykins v. Cmty. Dev. Corp. of Long Island*, 2011 WL 1059183, at *7 (E.D.N.Y. Mar. 21, 2011)). Therefore, Plaintiff's claims are also properly dismissed under a theory of abandonment.

*D. Conclusion*

Plaintiff's Section 1983 claims are hereby dismissed, without prejudice. There is no "federal right" to decline to receive Social Security retirement benefits in this context. Plaintiff also failed to plead facts sufficient to support a due process violation. Plaintiff's claims are also properly dismissed because the Defendants cannot be held liable.

## II. Additional Arguments

Plaintiff advances additional arguments in his response to Defendants' motion to dismiss. "[P]laintiffs cannot use their opposition to the motion to dismiss to raise new claims or arguments." *Louis v. N.Y.C. Hous. Auth.*, 152 F. Supp. 3d 143, 158 (S.D.N.Y. 2016) (citing *Kiryas Joel Alliance v. Vill. of Kiryas Joel*, 2011 WL 5995075, at *10 n.9 (S.D.N.Y. Nov. 29 2011). Most, if not all, of Plaintiff's new arguments would be properly dismissed by the above analysis. To the extent that Plaintiff would like to advance these arguments, in a manner consistent with the above analysis, he may do so in an amended complaint.

## III. Leave to Amend

"Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend 'shall be freely given when justice so requires,' it is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d

184, 200 (2d Cir. 2007) (citations omitted). When exercising this discretion, courts consider many factors, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility. *Local 802, Associated Musicians of Greater N.Y. v. Parker Meridien Hotel*, 145 F.3d 85, 89 (2d Cir. 1998) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

The Court will grant Plaintiff leave to file an amended complaint. Notwithstanding the above explained deficiencies, Plaintiff could potentially plead facts that cure his Complaint's various defects. Although Plaintiff certainly has high hurdles to overcome, leave to amend in this case would not necessarily be futile at this juncture. Furthermore, as this case is still in its infancy, there would be minimal prejudice to Defendants in permitting Plaintiff to amend.

**CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss is GRANTED and Plaintiff's claims are DISMISSED in accordance with this Opinion. Plaintiff shall have until 30 days from the date of this Order to amend the Complaint. If Plaintiff elects to file an amended complaint, Defendants shall have until 30 days from the date of Plaintiff's filing to move or file responsive pleadings. The Court respectfully directs the Clerk to terminate the motion at ECF 21, to terminate the action, to mail a copy of this Opinion and Order to Plaintiff, and to make an entry on the docket reflecting service of the Opinion and Order upon Plaintiff.

Dated: September 16, 2020
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

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