W.D.N.Y.
23-cv-6515
Wolford, C.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 26th day of June, two thousand twenty-four.

Present:

Joseph F. Bianco,
Sarah A. L. Merriam,
Circuit Judges,
Jane A. Restani,
Judge. *

David C. Lettieri,

Plaintiff-Appellant,

v.

24-47 (L),
24-1379 (Con)

Paul E. Bonanno, Hon. Lawrence Joseph Vilardo, District Judge,

Defendants-Appellees.

Appellant, proceeding pro se, moves for in forma pauperis status in the lead appeal. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeals are DISMISSED because they "lack[] an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see* 28 U.S.C. § 1915(e)(2)(B).

Appellant has filed a number of meritless matters in this and other Courts. Accordingly, Appellant is hereby warned that the continued filing of clearly meritless appeals, motions, or other papers could result in the imposition of a sanction that would require Appellant to obtain permission from this Court prior to filing further submissions in this Court (a "leave-to-file" sanction). *See In re Martin-Trigona*, 9 F.3d 226, 229 (2d Cir. 1993); *Sassower v. Sansverie*, 885

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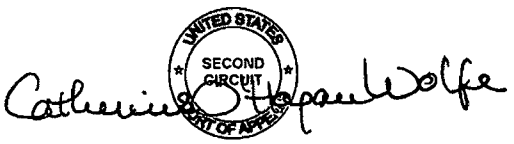
* Judge Jane A. Restani, of the United States Court of International Trade, sitting by designation.

F.2d 9, 11 (2d Cir. 1989). Appellant may also be subject to the "three strikes" bar of 28 U.S.C. § 1915(g), which would prevent him from filing further actions or appeals IFP, if he is incarcerated or detained.

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



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 15th day of August, two thousand twenty-four.

David C. Lettieri,

Plaintiff - Appellant,

v.

Paul E. Bonanno, Hon. Lawrence Joseph Vilardo, District Judge,

Defendants - Appellees.

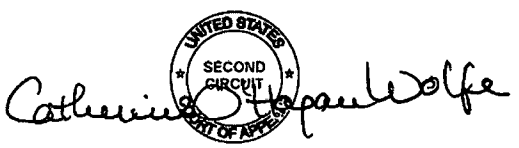
ORDER

Docket Nos: 24-47 (Lead)
24-1379 (Con)

Appellant, David C. Lettieri, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



DAVID C. LETTIERI, Plaintiff, -v- PAUL E. BONANNO, HON. LAWRENCE JOSEPH VILARDO, Defendants.1
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
2023 U.S. Dist. LEXIS 232895
6:23-CV-06515-EAW
December 18, 2023, Decided
December 18, 2023, Filed

Editorial Information: Prior History

United States v. **Lettieri**, 2023 U.S. Dist. LEXIS 96810 (W.D.N.Y., Feb. 27, 2023)

Counsel **{2023 U.S. Dist. LEXIS 1}**David C. **Lettieri**, Plaintiff, Pro se, Youngstown, OH.

Judges: Elizabeth A. Wofford, United States District Judge.

Opinion

Opinion by: Elizabeth A. Wofford

Opinion

ORDER

Pro se Plaintiff, David C. **Lettieri** ("Plaintiff"), is a prisoner who2 was found guilty by a jury on June 14, 2023, of one count of enticement of a minor in violation of 18 U.S.C. § 2422(b), *United States v. **Lettieri***, Case No. 1:21-cr-00020-LJV, Dkt. 146; Dkt. 150 (W.D.N.Y. June 14, 2023). He has not yet been sentenced.

In the present case, Plaintiff asserts claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) ("*Bivens*"),3 against one of the prosecutors in his criminal prosecution and Judge Vilardo, who is assigned to his criminal case and almost all the other 55 plus civil actions and habeas petitions Plaintiff has brought in this Court. (Dkt. 1 at 8-9). Plaintiff also seeks permission to proceed *in forma pauperis* ("IFP") (Dkt. 2), and has moved for order directing that Defendants undergo mental health examinations (Dkt. 6).

Because Plaintiff meets the statutory requirements of 28 U.S.C. § 1915(a) and has filed the required authorization and certification (Dkt. 2), the Court grants the IFP motion.4 Therefore, under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(a), the Court screens the complaint. For the reasons that follow, Plaintiff's complaint is dismissed with prejudice under §§ 1915(e)(2)(B) and 1915A(b).

DISCUSSION

Section 1915 "provide[s] an efficient means by which a court can screen for**{2023 U.S. Dist. LEXIS 2}** and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). The court shall dismiss a complaint in a civil action in which a prisoner seeks redress from a governmental entity, or an officer or employee of a governmental entity, if the court determines that the complaint (1) fails to state a claim upon which relief may be granted or (2) seeks monetary relief against a defendant who is immune from such

relief. *See* 28 U.S.C. § 1915A(b)(1)-(2).

Generally, the court will afford a *pro se* plaintiff an opportunity to amend or to be heard prior to dismissal "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Abbas*, 480 F.3d at 639; *see also Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) ("A *pro se* complaint is to be read liberally. Certainly the court should not dismiss 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." (quoting *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999))). But leave to amend pleadings may be denied when any amendment would be "futile." *Cuoco*, 222 F.3d at 112.

I. THE COMPLAINT

In evaluating a complaint, the court must accept all factual allegations as true and must draw all inferences in the plaintiff's favor. *See Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003) (per curiam); *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999). "Specific facts are not necessary,"**{2023 U.S. Dist. LEXIS 3}** and the plaintiff "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also Boykin v. Keycorp*, 521 F.3d 202, 216 (2d Cir. 2008) ("[E]ven after *Twombly*, dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases."). Although "a court is obliged to construe [*pro se*] pleadings liberally, particularly when they allege civil rights violations," *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004), even pleadings submitted *pro se* must meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure, *Wynder v. McMahon*, 360 F.3d 73, 79 n.11 (2d Cir. 2004).

Plaintiff has sued Assistant United States Attorney Paul Bonanno ("Bonanno") and Judge Vilardo. He alleges that, at a hearing in his criminal prosecution held on September 13, 2023, Bonanno "admitted" to United States Magistrate Judge Michael J. Roemerthat the online social media account of "Leaf Liate"5 was "fake[d]"... by the government" in order to obtain revocation of Plaintiff's bail. (Dkt. 1 at 8).6 Plaintiff further claims that Bonanno "may not be mental[ly] stable" because in his memorandum, Bonanno claimed "that the person still exists and it would ... be proven at trial in the evidence." (*Id.*). On the day of jury selection, Plaintiff finally saw the "Jen[c]k[s] 3500 material,"7 which showed "at five to**{2023 U.S. Dist. LEXIS 4}** ten documents [and a] government agent stat[ing]" that "there wasn't going to be any proof at trial in which there wasn't." (*Id.*).

Plaintiff also alleges that Judge Vilardo refused to convert a habeas corpus petition Plaintiff filed under 28 U.S.C. § 2241 to a civil action under 42 U.S.C. § 1983, *see* ***Lettieri*** *v. Reynolds*, Case No. 1:22-cv-00926-LJV, Dkt. 20 (W.D.N.Y. Aug. 2, 2023), and that Judge Vilardo has denied "every lawsuit" that Plaintiff has filed because Plaintiff has not complied with the statutory IFP "requirements," (Dkt. 1 at 8-9).

Plaintiff seeks monetary damages only. (*Id.* at 6).

II. ABSOLUTE JUDICIAL AND PROSECUTORIAL IMMUNITY

Plaintiff's claims are barred by the doctrines of absolute judicial and prosecutorial immunity.

1. Judicial Immunity

Judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. *See, e.g., Mireles v. Waco*, 502 U.S. 9, 12, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). "Such judicial immunity is conferred in order to insure 'that a judicial officer, in exercising the

authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347, 20 L. Ed. 646 (1871)). "Thus, even allegations of bad faith or malice cannot overcome judicial immunity." *Id.*

Indeed, a "judge will not be deprived of immunity because the action he took was in error,**{2023 U.S. Dist. LEXIS 5}** was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) (quotation omitted); *see also Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988) (finding no immunity where town justice issued arrest warrant for conduct which took place within neither his town nor an adjacent town, thereby acting in the absence of all jurisdiction). A judge is immune for actions performed in his judicial capacity. *C.f. Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (finding no immunity where judge assaulted litigant).

Here, Plaintiff alleges that Judge Vilardo refused to convert a habeas petition to a civil action under § 1983 and has denied "every" lawsuit he has filed because Plaintiff has not complied with the requirements for proceeding IFP. Judge Vilardo has administratively closed many of Plaintiff's civil actions because Plaintiff did not pay the filing and administrative fees or submit a complete IFP motion that included a prison certification, *see* 28 U.S.C. § 1915(a)(2), and a prison authorization, *see* 28 U.S.C. § 1915(b)(1)-(4). *See* 23-mc-32 (ordering Plaintiff to show cause why he should not be prohibited from filing cases in this District without prepaying the filing and administrative fees ($402.00), *see* 28 U.S.C. § 1914(a), or submitting a complete IFP motion).**{2023 U.S. Dist. LEXIS 6}**8

Plaintiff makes no allegation that Judge Vilardo acted in the clear absence of all jurisdiction. He complains precisely of actions Judge Vilardo performed in his judicial capacity. Therefore, absolute judicial immunity bars Plaintiff's claims against Judge Vilardo and Plaintiff claims against Judge Vilardo are dismissed with prejudice.

2. Absolute Prosecutorial Immunity

In addition to judges, prosecutors performing traditional prosecutorial activities are given absolute immunity in § 1983 suits and *Bivens* suits. *See Imbler v. Pachtman*, 424 U.S. 409, 427-28, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). "The absolute immunity accorded to government prosecutors encompasses not only their conduct of trials but all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation. . . ." *Barrett v. United States*, 798 F.2d 565, 571-72 (2d Cir. 1986); *see also Bouchard v. Olmsted*, 775 F. App'x 701, 703-04 (2d Cir. 2019) (summary order) (determining that federal prosecutors were immune from *Bivens* claims); *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) ("[A]bsolute immunity protects a prosecutor from [civil] liability for virtually all acts, regardless of motivation, associated with his function as an advocate.").

As best the Court can discern, Plaintiff claims that Bonanno made certain arguments or statements at a hearing in Plaintiff's criminal prosecution regarding the existence of an individual's**{2023 U.S. Dist. LEXIS 7}** online account and later presented a memorandum to the Court contradicting those arguments or statements. (Dkt. 1 at 8). Bonanno's actions were performed within his role as an advocate and were clearly associated within the conduct of litigation or potential litigation of Plaintiff's criminal charges. Therefore, Bonanno is entitled to absolute prosecutorial immunity from Plaintiff's claims and Plaintiff's claims against Bonanno are dismissed with prejudice.

III. LEAVE TO AMEND

The Second Circuit has advised that a *pro se* complaint should not be dismissed without an opportunity to amend unless such amendment would be futile. *Cuoco v. Moritsugu*, 222 F.3d 99, 122 (2d Cir. 2000). The Court has considered whether to grant Plaintiff leave to amend but finds that because the defects in Plaintiff's complaint are substantive, "better pleading will not cure [them]." *Id.* (affirming denial of leave to amend because claims futile).

Accordingly, Plaintiff's complaint is dismissed with prejudice.9

CONCLUSION

For the reasons set forth above, the Court grants Plaintiff's IFP Motion (Dkt. 2), and dismisses Plaintiff's complaint with prejudice under 28 U.S.C. §§ 1915(e)(2)(B)(iii) and 1915A(b)(2). Plaintiff's motion for an order directing that Defendants undergo mental health examinations (Dkt.**{2023 U.S. Dist. LEXIS 8}** 6) is denied as moot.

The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a), that any appeal from this Order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962). Any request to proceed on appeal in forma pauperis should be directed on motion to the United States Court of Appeals for the Second Circuity in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

SO ORDERED.

/s/ Elizabeth A. Wofford

Elizabeth A. Wofford

Chief Judge

United States District Court

DATED: December 18, 2023

Footnotes

1 The Clerk of Court is directed to amend the caption of this action as set forth herein.

2

Since November 2022, Plaintiff has filed approximately 60 civil actions and petitions in this Court. Judge Vilardo recently found that Plaintiff has engaged in a pattern of abuse of the judicial process, *In re: David C. **Lettieri***, Case No. 1:23-mc-32, Dkt. 1 (W.D.N.Y. Sept. 5, 2023) ("23-mc-32"), and should be sanctioned based on his vexatious litigation history, *id.* at Dkt. 11. Plaintiff was directed to show cause why he should not be precluded from filing any further actions in this Court for one year without first obtaining permission from the Court. *Id.* at Dkt. 11.

3

Because Plaintiff brings constitutional claims against a federal official, the Court construes his claims as brought under *Bivens*. *See Tavarez v. Reno*, 54 F.3d 109, 109-10 (2d Cir. 1995) ("Although Tavarez brought the action under § 1983, the district court properly construed the complaint as an action under" *Bivens*.).

4

Following the filing of this action, this Court found that Plaintiff had garnered three strikes under 28

U.S.C. § 1915(g) and, therefore, could not proceed IFP without showing that he is under "imminent danger of serious physical injury." *See* ***Lettieri*** *v. Vilardo*, Case No. 6:23-cv-06563-EAW, Dkt. 3 (W.D.N.Y. Oct. 10, 2023).

5

The spelling of this name is not clear.

6

Because the complaint is confusing, the Court quotes directly from it where appropriate.

7

See Jencks Act, 18 U.S.C. § 3500 (addressing timing of disclosure of statements of government witnesses).

8

See Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998) ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." (internal quotation marks omitted)).

9

The Supreme Court has cautioned that the *Bivens* remedy should rarely be extended to new contexts. *See Ziglar v. Abbasi*, 582 U.S. 120, 135-40, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017). In light of Defendants' immunity, the Court finds that a *Bivens* analysis is unnecessary but notes that it would be highly unlikely that it would extend to the context at issue here.

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