D. Vt.
20-cv-214
Reiss, 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 20th day of December, two thousand twenty-three.

Present:

Raymond J. Lohier, Jr.,
Richard J. Sullivan,
Maria Arúju Kahn,
Circuit Judges.

Abdullah Sall,

Plaintiff-Appellant,

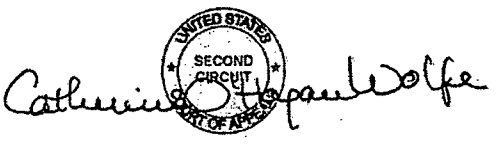
v. 23-1188

Sarah Fair George, et al.,

Defendants-Appellees.

Appellees move to dismiss this appeal as untimely filed. Appellant, pro se, moves for appointment of counsel and to reverse the district court judgment. Upon due consideration, it is hereby ORDERED that Appellees' motions are GRANTED and the appeal is DISMISSED for lack of jurisdiction. *See* 28 U.S.C. § 2107; *Bowles v. Russell*, 551 U.S. 205, 214 (2007). It is further ORDERED that Appellant's motions are DENIED as moot.

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



UNITED STATES DISTRICT COURT

for the
District of Vermont

ABDULLAH SALL

Plaintiff(s)

v.

SARAH FAIR GEORGE et al

Defendant(s)

Civil Action No. 2:20-cv-214

JUDGMENT IN A CIVIL ACTION

☐ **Jury Verdict.**

☐ **Decision by Court.**

IT IS ORDERED AND ADJUDGED that pursuant to the court's Opinions and Orders (Documents 240 and 241) filed February 16, 2023: defendant Chittenden County Sheriff's Department Motion for Judgment on the Pleadings (Document 178) and defendants City of Burlington, Burlington Police Department and City of South Burlington's Motion to Dismiss Plaintiff's Second Amended Complaint (Document 183) are GRANTED, respectively; defendants Town of Colchester, Town of Essex, Town of Richmond, Town of Shelburne, Town of Williston and City of Winooski's Joint Motion to Dismiss (Document 204) is GRANTED; defendants Town of Bolton, Town of Charlotte, Town of Huntington, Town of Jericho, Town of St. George, Town of Underhill and Town of Westford's Joint Motion to Dismiss (Document 205) is GRANTED; defendants Town of Hinesburg and Town of Milton's Joint Motion to Dismiss (Document 206) is GRANTED; and defendants Sarah Fair George and Chittenden County State's Attorney's Office's Motion to Dismiss Plaintiff's Second Amended Complaint for Insufficient Service of Process (Document 190) is GRANTED.

Also, pursuant to the court's Opinion and Order (Document 245) filed March 17, 2023, defendant Local Motion Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint (Document 186) is GRANTED. And pursuant to the court's Opinions and Orders (Documents 246 and 247) filed March 20, 2023, defendant Seven Days Inc.'s Motion to Dismiss (Document 182) and defendant Greater Burlington YMCA's Motion to Dismiss the Second Amended Complaint (Document 189) are GRANTED, respectively.

Plaintiff's Second Amended Complaints (Documents 171, 172, 173, 174 and 175) are DISMISSED.

Date: April 10, 2023

JEFFREY S. EATON
CLERK OF COURT

JUDGMENT ENTERED ON DOCKET
DATE ENTERED: 4/10/2023

/s/ Lisa Wright
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ABDULLAH SALL,)
)
Plaintiff,)
)
v.) Case No. 2:20-cv-00214
)
CITY OF BURLINGTON POLICE)
DEPARTMENT, CITY OF BURLINGTON,)
CITY OF SOUTH BURLINGTON,)
CHITTENDEN COUNTY TOWNSHIPS, et al.,)
)
Defendants.)

OPINION AND ORDER
GRANTING PLAINTIFF'S MOTION FOR LEAVE
TO FILE A SUR-REPLY AND GRANTING DEFENDANTS'
MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT
(Docs. 183, 204, 205, 206, 225)

Plaintiff Abdullah Sall, representing himself, has filed a Second Amended Complaint ("SAC") against "State Defendants, Municipal Defendants, the City of Burlington[,] the City of South Burlington[,] and the Burlington Police Department, Vermont State[.]" (Doc. 172 at 2, ¶ 3.)

The City of Burlington and Burlington Police Department (the "BPD") (collectively, the "Burlington Defendants"), represented by Pietro J. Lynn, Esq., and Christopher H. Boyle, Esq., move to dismiss the SAC under Federal Rule of Civil Procedure 12(b)(6), as does the City of South Burlington, also represented by Attorney Lynn. (Doc. 183.) The Towns of Bolton, Charlotte, Colchester, Essex, Hinesburg, Huntington, Jericho, Milton, Richmond, Shelburne, St. George, Underhill, Westford, Williston, and the City of Winooski (collectively, the "Moving Municipal Defendants"), represented by Michael J. Leddy, Esq., move to dismiss the SAC under Rule 12(b)(6). (Docs. 204-206.)

Plaintiff filed an opposition to the Moving Municipal Defendants' motions to dismiss to which Attorney Leddy filed a joint reply. Thereafter, Plaintiff moved for leave to file a sur-reply which the Moving Municipal Defendants opposed. Plaintiff's motion to file a sur-reply (Doc. 225) is GRANTED, however, Plaintiff is cautioned that a sur-reply is generally not permitted as a matter of course. *See* D. Vt. L.R. 7(a).

I. Relevant Procedural History.

On November 12, 2020, Plaintiff filed this action in the United States District Court for the District of Massachusetts. Following transfer of the case to this district, Plaintiff paid the civil case filing fee and on January 4, 2021, summonses were issued. On January 19, 2021, Plaintiff filed an Amended Complaint and the Clerk of Court issued further summonses.

On March 1, 2021, the State of Vermont and Vermont State Police moved to dismiss Plaintiff's Amended Complaint. On March 2, 2021, the Towns of Bolton, Charlotte, Colchester, Essex, Hinesburg, Huntington, Jericho, Milton, Richmond, Shelburne, Underhill, Westford, Williston, and the City of Winooski filed a joint motion to dismiss which was joined by the Town of St. George. On March 5, 2021, the City of Burlington moved to dismiss the Amended Complaint. On March 10, 2021, the City of South Burlington and the BPD each moved to dismiss the Amended Complaint.

On January 14, 2022, Magistrate Judge Kevin J. Doyle issued a Report & Recommendation (the "R & R") recommending that each of the motions to dismiss be granted without leave to amend and Plaintiff's claims be dismissed with prejudice. The Magistrate Judge concluded that the "Amended Complaint fails to plead a viable discrimination claim . . . under [42 U.S.C.] § 1983 and the Fourteenth Amendment's Equal Protection Clause[;]" that "municipal police departments . . . are not subject to suit under § 1983[;]" and that the "Amended Complaint does not allege any deliberate conduct on the part of any of the Municipal Defendants,[1] or of any policy, regulation, or

[1] The "Municipal Defendants," as discussed in the R & R, were the Towns of Bolton, Charlotte, Colchester, Essex, Hinesburg, Huntington, Jericho, Milton, Richmond, Shelburne, Underhill, Westford, Williston, St. George, and the City of Winooski. *See* Doc. 150 at 6-7. The Cities of

custom of those Municipalities that caused Sall to be deprived of a constitutional right." (Doc. 150 at 25-26.) Plaintiff timely objected to the R & R.

On March 21, 2022, the court adopted in part the Magistrate Judge's January 14, 2022 R & R, granted defendants' motions to dismiss the Amended Complaint, and granted in part leave to amend. The court agreed that Plaintiff had not plausibly alleged the essential elements of a § 1983 Equal Protection claim, that the BPD is not considered a "person" for purposes of § 1983, and that Plaintiff had not plausibly alleged any deliberate conduct or any custom, policy, or practice that would have caused a deprivation of his constitutional rights for his claims against the Municipal Defendants. Finding "leave to amend would be futile against Defendants . . . such as the BPD . . . or Defendants such as the State Defendants[,]" the court granted "Plaintiff leave to amend his claims against the Municipal Defendants." (Doc. 168 at 6-7.) Plaintiff was granted until April 14, 2022 to file his SAC.

II. The SAC's Allegations.

On April 18, 2022,[2] Plaintiff filed the sixty-page SAC including "States and Municipals" in the caption and "State Defendants, Municipal Defendants, the City of Burlington[,] the City of South Burlington[,] and the Burlington Police Department, Vermont State" in the section titled "Parties[.]" (Doc. 172 at 1; *id.* at 2, ¶ 3) (capitalization omitted). The SAC asserts claims under "the Civil Rights Act of 1871, 42 U.S.C. § 1983[,] 34 U.S.C. § 12601[,] Section 1981[,] Section 1985[,] Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq[.][,] Fourth Amendment[, and] Equal Protection." *Id.* at 3, ¶ 6.

Plaintiff alleges he is a "black man, an African immigrant, a Muslim, and an American citizen" who is "ethnically Jewish or Semitic." *Id.* at 1, ¶ 2; *id.* at 3, ¶ 1. He alleges that, under color of law, that:

Burlington and South Burlington were addressed separately. The R & R referred to both groups of Defendants as the "Moving Defendants." *Id.* at 2, n.2.

[2] In light of Plaintiff's self-represented status and in the absence of an objection from any defendant, the court accepts the SAC as timely filed.

> Chittenden County Municipal Defendants' policy-maker in a longstanding failed practices of vetting and properly training uniform officers; and their policies of using their law enforcement agency to extort money from motorists under the false guise of "public safety" . . . and their desire to keep black people out of their township, I and similarly situated persons of race, religion, and national origin were subjected to pretext stops, unlawful searches, unlawful temporary detention, discriminatory harassment, and false reporting. . . . [W]henever I was spotted by police officers it immediately triggered "reasonable suspicions" or "probable cause."

Id. at 5, ¶ 6, *id.* at 6, ¶ 8.

The SAC identifies sixteen "incidents" and seventeen separate "claims." *See* Doc. 172. As relief, Plaintiff seeks $800,000,000 for "emotional pain, suffering, mental anguish, loss of enjoyment of life, dignitary injury and other non-pecuniary losses" from the Municipal and State Defendants. *Id.* at 59. He further asks the court to "abolish the predatory policing techniques; order a review of the State Speed limit; assess the appropriate Speed limit for each township[;] and prevent the defendant from flickering the Speed limit." *Id.* at 60.

III. Conclusions of Law and Analysis.

A. Standard of Review.

"To survive a motion to dismiss, a complaint must contain 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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To determine whether this standard is satisfied, the court employs a "two-pronged approach[.]" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted). First, the court "must accept as true all of the [factual] allegations contained in a complaint" but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Second, the court analyzes whether the complaint's "'well-pleaded factual allegations'

. . . 'plausibly give rise to an entitlement to relief.'" *Hayden*, 594 F.3d at 161 (quoting *Iqbal*, 556 U.S. at 679). The court does not "weigh the evidence" or "evaluate the likelihood" that a plaintiff will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

Courts afford pleadings filed by self-represented parties "special solicitude." *Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks omitted). The court is therefore required to read the SAC liberally and to hold it "to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). All complaints, however, must contain "sufficient factual matter[] . . . to state a claim" for relief. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted); Fed. R. Civ. P. 8, 12.

B. The Burlington Defendants' and the City of South Burlington's Motion to Dismiss.

The Burlington Defendants and the City of South Burlington move to dismiss the SAC, arguing that Plaintiff's claims against them were previously dismissed with prejudice and without leave to amend. Plaintiff has not responded to the motion.

In the March 21, 2022 Opinion and Order ("O & O"), the court denied leave to amend for "Defendants who either cannot be sued, such as the BPD, the SBPD, and other municipal police departments, or Defendants such as the State Defendants from whom sovereign immunity bars an award of monetary damages[,]" because "[b]etter pleading will not cure these deficiencies." (Doc. 168 at 6-7.) Plaintiff's claims against the BPD were therefore dismissed with prejudice and without leave to amend. *See id.* at 6 ("[T]he Magistrate Judge properly concluded[] leave to amend would be futile against . . . the BPD[.]"). Accordingly, any claims purportedly asserted against the BPD in the SAC are again DISMISSED WITH PREJUDICE. *See Palm Beach Strategic Income, LP v. Salzman*, 457 F. App'x 40, 43 (2d Cir. 2012) ("District courts in this Circuit have routinely dismissed claims in amended complaints where the court granted leave to amend for a limited purpose and the plaintiff filed an amended complaint exceeding the scope of the permission granted.").

The SAC does not include any specific allegations concerning a policy, regulation, or custom of either the City of Burlington or the City of South Burlington that gave rise to a violation of Plaintiff's constitutional rights which, in turn, may give rise to a plausible claim for relief. Plaintiff states that he "was looking for a community to belong to when I arrived over a decade ago, a place to call home. I found Vermont; I found Burlington." (Doc. 172 at 3, ¶ 1.) He alleges that:

> I have been subjected to unlawful searches, unlawful temporary detention, discriminatory harassment, and discriminatory stops. . . . [T]hese behaviors happen at the heart of the city government. They will find any reason to pull you over, even if they did not have a reason to follow you or stop you. It is the modus operandi of Chittenden County Municipal law enforcement agencies. Regardless whether I was in Winooski, Richmond, Burlington, Essex, Shelburne, or Milton.

Id. at 6, ¶ 9. Plaintiff describes an alleged occasion outside a grocery store when a "Burlington Police officer was heading out of the store, and he rushed toward me . . . [and] asked me if he could take a look inside, and I said yes. I opened the driver's side door[] so he could see inside." *Id.* at 11, ¶¶ 25-26. He asserts that "if I drive through Riverside Ave[nue], Burlington Police Officers will get me[.]" *Id.* ¶ 27. He further contends that on June 29, 2012, in Burlington, he was "severely beaten by a group of white men," was "denied medical attention because I was only bruised and not bleeding[,]" and "[t]he first question I was asked when [responding officers] arrived[] was what I do for work and where do I work. Then he proceeded to ask me to show him proof of my immigration status." *Id.* at 27, ¶ 69; *see also id.* at 45, ¶ 114 ("I was denied medical care on grounds of my race, religion, ancestry, and national origin. The officers were more interested in knowing my immigration status than caring for me.").

To state a claim against a municipality, Plaintiff must plausibly allege a custom, policy, or practice that caused a deprivation of his constitutional rights. *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690-91 (1978). Because the SAC does not do so, Plaintiff has failed to allege an essential element of a claim for municipal liability under § 1983 against either the City of Burlington or the City of South

Burlington. For this reason, the City of Burlington's and City of South Burlington's motion to dismiss (Doc. 183) is GRANTED.

C. Moving Municipal Defendants' Motions to Dismiss.

1. The Towns of Bolton, Charlotte, Hinesburg, Huntington, Jericho, Milton, St. George, Underhill, and Westford.

The Towns of Bolton, Charlotte, Hinesburg, Huntington, Jericho, Milton, St. George, Underhill, and Westford argue that the SAC must be dismissed under Rule 12(b)(6) because it does not include factual allegations to support a plausible claim against them. The court agrees.

In order to state a claim under § 1983, a plaintiff must allege "that some person has deprived him of a federal right" and "that the person . . . acted under color of state . . . law." *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005) (second omission in original). The SAC does not contain factual allegations regarding constitutional violations by these municipalities. *See, e.g.*, Doc. 172 at 39, ¶ 95 ("One of my friends live[s] in Bolton part time[.]"); *id.* at 23, ¶ 59 ("I was driving from Middlebury at night on U.S. Route 7 from the Charlotte/Shelburne Town Line . . . I saw a vehicle with a bright light driving on Snowdrift L[a]n[e], Charlotte[.]"); *id.* at 11, ¶ 26 ("I was spotted by . . . Hinesburg Police officers, . . . Milton Police officers[.]"); *id.* at 39, ¶ 95 ("I was living in Huntington before I found my apartment in Richmond. I . . . used to go to the Huntington Gorge[.]"); *id.* at 35, ¶ 85 (alleging a Vermont State Police Officer "told me[] he was dispatched to Jericho[.]"); *id.* at 25, ¶ 64 ("I was driving from Burlington to Milton on Route 2[.]"). A stray reference to a municipality will not suffice. *See Terry v. N.Y.C. Dep't of Corr.*, 2012 WL 718555, at *2 (S.D.N.Y. Mar. 6, 2012) ("It is well-settled that where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint" should be granted) (internal quotation marks omitted). A stray reference to an entity or an individual does not satisfy the pleading requirements of Fed. R. Civ. P. 8 and fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6).

For the reasons stated above, the motions to dismiss filed by the Towns of Bolton, Charlotte, Hinesburg, Huntington, Jericho, Milton, St. George, Underhill, and Westford (Docs. 205, 206) are GRANTED.

2. The Towns of Colchester, Essex, Richmond, Shelburne, Williston, and City of Winooski.

The Towns of Colchester, Essex, Richmond, Shelburne, Williston, and the City of Winooski argue that the SAC must be dismissed under Rule 12(b)(6) because it fails to state any plausible claims against them. In opposition, Plaintiff seeks to include "correction[s]" to certain allegations in the SAC. *See* Doc. 217 at 3-8. He does not, however, seek further leave to amend the SAC. Plaintiff argues that:

> Municipal Defendants follow the same training guideline; with similar age standard requirements, education standard requirements, medical standard requirements, and physical fitness test standard requirements, Moreover, they have the same techniques of policing. . . . The only difference is that I ventured out and spent less time in some townships than others. It is fair to say they are the same. It does not matter who got me first or last; they are one and the same. Defendants' unlawful actions were intentional, wanton, malicious, callously indifferent, oppressive and/or done with reckless disregard to my civil rights[.]

(Doc. 217 at 10.)

In "Incident #1," he alleges that a Shelburne law enforcement officer who is "well-known for his illegal methods" issued Plaintiff "a bogus speeding ticket." (Doc. 172 at 23-24, ¶¶ 59-61.) He asserts the Town of Shelburne "has accepted this kind of practice because it is a source of revenue for their township" and it "flicker[s] with the speed limit under 'public safety' pretense just so [it] can trap motorists and extort money from them." *Id.* at 24-25, ¶ 62.

Plaintiff alleges in "Incident #2" that a Colchester law enforcement officer stopped him for speeding. He contends that he believed he "was within the speed limit [but the officer] told [him] the township had changed the speed limit a week prior." *Id.* at 26, ¶ 66. Plaintiff asserts the officer issued him a ticket because his license was suspended but that he "didn't know because [he] didn't get a letter in the mail[.]" *Id.* ¶ 67.

Plaintiff alleges in "Incident 4" that he called the Winooski police to lodge a complaint against a neighbor who damaged his car but he "never received a police report and no follow-up by the Winooski John Doe Police Officer." *Id.* at 29, ¶ 73. In a separate incident, Plaintiff was asked for identification while walking in a parking lot at the O'Brien Community Center in Winooski by a law enforcement officer who allegedly "spotted a black man [and] it triggered 'reasonable suspicion' and activated a 'probable cause.'" *Id.* at 8, ¶ 14.

Plaintiff alleges in "Incident #7" that he was "pulled over for color lights but issued two tickets for driving without insurance by Essex Police Department." (Doc. 172 at 33, ¶ 82.) He asserts he had insurance but could not find proof of his insurance because of the "tension and nervousness with the cop[.]" *Id.* Later that same night, Plaintiff "was spotted by Officer Young #3779 of the Williston Police Department" and stopped. *Id.* at 34, ¶ 83. Officer Young issued him "tickets." *Id.*

Plaintiff alleges in "Incident 14" that the morning after going swimming, he found "a ticket on [his] windshield that was not there the night before. It says [he] was illegally parked at Huntington gorge." *Id.* at 40, ¶ 97. Plaintiff asserts that "[t]he fact that they followed me to my apartment to issue me a ticket was really upsetting to me." *Id.*

In its March 21, 2022 O & O, the court explained that to state a claim of race-based discrimination under the Equal Protection Clause, Plaintiff must allege facts explaining the causal link between a defendant's conduct, Plaintiff's race, and Plaintiff's injury. In addition, to state a claim against a municipality, Plaintiff must plausibly allege a custom, policy, or practice that caused a deprivation of his constitutional rights. Plaintiff was further advised that if he filed a SAC, he "must set forth the claims he alleges against each defendant[.]" (Doc. 168 at 7.)

Despite Plaintiff's inclusion of allegations regarding separate incidents involving Colchester, Essex, Richmond, Shelburne, Williston, and Winooski, the SAC fails to allege a constitutional violation or any specific policy, regulation, or custom that caused Plaintiff to be deprived of a constitutional right. *See Nagle v. Marron*, 663 F.3d 100, 116 (2d Cir. 2011) (explaining a municipality may be held liable only where the action of the

municipality itself caused the harm, not "simply because a[] [municipal] employee committed a tort"). Plaintiff's claims under 42 U.S.C. § 1983 must therefore be DISMISSED.

Plaintiff's claim under 42 U.S.C. § 1981 fails for a similar reason. Section 1981 prohibits, among other things, race-based interference with a plaintiff's right "to the full and equal benefit of all laws and proceedings for the security of persons and property[.]" 42 U.S.C. § 1981(a). "[P]laintiffs must meet the same pleading standard for their § 1981 claims as for their § 1983 claims under the Equal Protection Clause." *Hu v. City of New York*, 927 F.3d 81, 101 (2d Cir. 2019) (internal quotation marks omitted).

The SAC, liberally construed, seeks to allege claims under 42 U.S.C. § 1985 for conspiracy and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[3] For example, in his claim titled "Conspiracy Against Rights," Plaintiff asserts that:

> After the termination of my employment at the Chittenden County State Attorney's Office and . . . Seven Days' hit piece publication that allows the meeting of the minds among the Chittenden County legal Community, . . . Chittenden County Municipal defendants conspired with the prosecutor's office to deprive me of my constitutional rights.

(Doc. 172 at 52, ¶ 140.) These allegations are insufficient to establish a claim under § 1985(3) which "imposes liability on two or more persons who 'conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting 42 U.S.C. § 1985(3)) (omissions in original). As the Second Circuit has explained:

> A conspiracy claim under Section 1985(3) requires a plaintiff to allege: 1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or

[3] Plaintiff also cites statutes such as 18 U.S.C. § 242 and 34 U.S.C. § 12601. These statutes, however, do not authorize a private right of action. *See Robinson v. Overseas Mil. Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994) (holding that § 242 does not provide a private cause of action to enforce that criminal statute); 34 U.S.C. § 12601(b) (authorizing only the United States Attorney General to obtain relief under that civil statute).

> property or deprived of any right or privilege of a citizen of the United States.

Dolan v. Connolly, 794 F.3d 290, 296 (2d Cir. 2015) (internal quotation marks omitted). Plaintiff fails to allege facts sufficient to establish a "conspiracy" as he does not "provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003); *see also Gyadu v. Hartford Ins. Co.*, 197 F.3d 590, 591 (2d Cir. 1999) (explaining "conclusory, vague, or general allegations of conspiracy" must be dismissed) (internal quotation marks omitted).

Section 2000d provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI affords a private right of action only for intentional discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). It requires a plaintiff to "plausibly . . . allege that (1) the action was discriminatory based on race, color, or national origin; (2) such discrimination was intentional; and (3) the discrimination was a 'substantial or motivating factor' for defendants' actions." *Moore v. Bitca*, 2020 WL 5821378, at *22 (D. Vt. Sept. 30, 2020) (internal quotation marks omitted). "Liability under Title VI . . . cannot be imputed to institutions based on the actions of their employees." *Goonewardena v. New York*, 475 F. Supp. 2d 310, 328 (S.D.N.Y. 2007); *see also Foster v. Mich.*, 573 F. App'x 377, 389 (6th Cir. 2014) (holding "there is no vicarious liability under Title VI" and dismissing complaint against employees that did "not contain any fact-based allegations that either [defendant employees or State employers] participated in, was aware of, or was deliberately indifferent to any discriminatory acts"). As a result, to the extent Plaintiff grounds his Title VI claim on a theory of *respondeat superior*, that claim fails as a matter of law.

To the extent that Plaintiff seeks to ground a Title VI claim on an alleged *de facto* policy of discrimination, he must assert "(1) substantial control, (2) severe and discriminatory harassment, (3) actual knowledge, and (4) deliberate indifference." *Zeno*

v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 665 (2d Cir. 2012). "[O]nly deliberate indifference" by municipal officials "can be viewed as discrimination by" the municipality itself. *Id.* at 666 (internal quotation marks omitted). The SAC contains no factual allegations describing the knowledge of or the response to the alleged incidents by the municipal officials that allegedly constitutes deliberate indifference.

Because the SAC fails to allege the essential elements of a claim under 18 U.S.C. § 242, 34 U.S.C. § 12601, or 42 U.S.C. §§ 1981, 1983, 1985, 2000d, the motion to dismiss filed by the Towns of Colchester, Essex, Richmond, Shelburne, Williston, and the City of Winooski (Doc. 204) must be GRANTED.

II. Leave to Amend.

The Second Circuit has cautioned that a court "should not dismiss a pro se complaint without granting leave to amend at least once[.]" *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (internal quotation marks omitted). However, "[l]eave may be denied 'for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014).

As the court has previously determined, leave to amend would be futile against the BPD. Plaintiff has not explicitly requested a further opportunity to amend his pleading with regard to any other defendants. Because Plaintiff has already had multiple opportunities to state a plausible claim and Defendants have twice responded, the court declines to grant leave to amend sua sponte. *See Horoshko v. Citibank, N.A.*, 373 F.3d 248, 250 (2d Cir. 2004) (noting a district court does not "abuse[] its discretion in not permitting an amendment that was never requested").

CONCLUSION

For the reasons set forth above, Plaintiff's motion for leave to file a sur-reply (Doc. 225) is GRANTED; the Burlington Defendants' and the City of South Burlington's motion to dismiss (Doc. 183) is GRANTED; the Moving Municipal Defendants' motions to dismiss (Docs. 204-206) are GRANTED; and Plaintiff's Second Amended Complaint (Doc. 172) is DISMISSED.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 16th day of February, 2023.

Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ABDULLAH SALL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:20-cv-00214
	)	
SARAH FAIR GEORGE, THE CHITTENDEN COUNTY STATE'S ATTORNEY'S OFFICE, AND THE CHITTENDEN COUNTY SHERIFF'S DEPARTMENT,	)	
	)	
Defendants.	)	

OPINION AND ORDER
GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS AND DISMISSING SECOND AMENDED COMPLAINT
(Docs. 178 & 190)

On April 18, 2022, Plaintiff Abdullah Sall, representing himself, filed a Second Amended Complaint ("SAC") against Chittenden County State's Attorney Sarah Fair George ("SA George"), the Chittenden County State's Attorney's Office, and the Chittenden County Sheriff's Department. Plaintiff alleges claims of racial discrimination in employment. Defendant Chittenden County Sheriff's Department moves for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) or, in the alterative, for summary judgment under Rule 56. (Doc. 178.) Defendants SA George and the Chittenden County State's Attorney's Office (collectively, the "State's Attorney Defendants") move to dismiss the SAC for insufficient service of process under Rule 12(b)(5). (Doc. 190.)

I. Procedural History and Allegations of the SAC.

On November 12, 2020, Plaintiff filed this action in the United States District Court for the District of Massachusetts. Following transfer of the case to this district, Plaintiff paid the civil case filing fee and on January 4, 2021, summonses were issued.

On January 19, 2021, Plaintiff filed an Amended Complaint and the Clerk of Court issued additional summonses. To the Amended Complaint, Plaintiff attached a "Final Determination" of the Vermont Human Rights Commission, dated June 25, 2020, finding that the "Department of State's Attorneys and Sheriffs [and] the Chittenden County State's Attorneys' Office . . . illegally discriminated against . . . Sall . . . on the basis of national origin, race, and skin color, in violation of Vermont's Fair Employment Practices Act." (Doc. 7-1 at 2.)

On February 15, 2021, the Chittenden County Sheriff Kevin McLaughlin filed an Answer and a motion for summary judgment. On February 19, 2021, Plaintiff's process server returned twenty-five proofs of service. On February 26, 2021, the State's Attorney Defendants moved to dismiss the Amended Complaint for insufficient service of process.

On January 27, 2022, Magistrate Judge Kevin J. Doyle issued a Report & Recommendation ("R & R") recommending that Sheriff McLaughlin's motion be granted and Plaintiff's claims against him be dismissed with prejudice. (Doc. 154.) On February 4, 2022, the Magistrate Judge issued an R & R recommending that the State's Attorney Defendants' motion to dismiss be denied and Plaintiff be ordered to obtain proper service of the State's Attorney Defendants. (Doc. 157.)

On March 8, 2022, the court adopted the Magistrate Judge's February 4, 2022 R & R, denied the State's Attorney Defendants' motion, and ordered Plaintiff to properly serve these Defendants within sixty days. Plaintiff was warned in bolded, all-capital letters that his "failure to effectuate proper service of process by this deadline shall result in the dismissal of Plaintiff's claims." (Doc. 165 at 2-3) (emphasis omitted). In light of his self-represented status, among other reasons, Plaintiff was allowed additional time to effect service notwithstanding his failure to show good cause.

On March 14, 2022, over Plaintiff's objection, the court adopted the Magistrate Judge's January 27, 2022 R & R and granted Sheriff McLaughlin's motion for summary judgment. The court determined that there was no genuine dispute of material fact whether Sheriff McLaughlin was Plaintiff's employer. He was not and he also had no involvement in or control over Plaintiff's termination. For this reason, the court

determined that: "Defendant was 'entitled to judgment as a matter of law' and to dismissal of Plaintiff's claims for unlawful discrimination against Defendant relating to Plaintiff's allegedly unlawful termination." (Doc. 167 at 2.) Accordingly, Plaintiff's claims against Sheriff McLaughlin in his official capacity were dismissed with prejudice.

On April 18, 2022, Plaintiff filed the twenty-nine page SAC in which he alleges that he is a "Black, Muslim, . . . African immigrant to the United States of America, . . . [and is] ethnically Jewish[.]" *Id.* at 1-2, ¶ 2. He asserts he "was hired by Defendant Chittenden County State Attorney's Office by the former Chittenden County State Attorney Thomas James Donovan . . . as [an] employee of the Chittenden County State Attorney's Office and Chittenden County Sheriff[.]" *Id.* at 2, ¶ 4. He contends that he was "subjected to an abusive working condition, treated with hostilities, and discriminated at the hands of [D]efendant Chittenden County State Attorney Sarah Fair George, [D]efendant Chittenden State Attorney's Office, [D]efendant Sheriff Department and its employees[.]" *Id.* at 4, ¶ 7. Plaintiff states that although he completed a six-month probationary period, he was terminated two days after SA George was appointed to complete the remainder of SA Donovan's term. At the time, Plaintiff was campaigning for a City Council position. Under several federal statutes, Plaintiff seeks "relief for a hostile work environment, race, religion, ancestry, national origin discrimination, defamation [of] [c]haracter, and deprivation of rights under color of law." *Id.* at 3, ¶ 5. He requests $500,000,000 in damages for "emotional pain, suffering, mental anguish, loss of enjoyment of life, dignitary injury and other non-pecuniary losses[.]" *Id.* at 28.

On April 20, 2022, a summons was issued for SA George. On April 21, 2022, a proof of service was returned stating the process server "served the summons to Katie Markert at the office of Paul Frank and Collins P.C. The sum[m]ons is for Sarah George et[] al[.] to be given to Kerin St[a]ckpole Attn to Sarah George[.]" (Doc. 177 at 1.) Attorney Stackpole represents the State's Attorney Defendants and has filed an affidavit stating that "[n]either I nor [Paul Frank + Collins P.C.] is authorized to accept service of a summons or complaint on behalf of Sarah Fair George," (Doc. 190-3 at 1, ¶ 3), and "[n]either I nor [Paul Frank + Collins P.C.] has informed th[e] [c]ourt or Plaintiff that I

would accept service of the summonses or complaint in this matter on behalf of Attorney George[.]" *Id.* at 2, ¶ 4. She further averred that the process server "did not leave a summons or complaint with myself or any other attorneys . . . and Ms. Markert is not authorized to accept summonses on [Paul Frank + Collins P.C.'s] behalf." *Id.* at 1, ¶ 2.

II. Conclusions of Law and Analysis.

A. Defendant Chittenden County Sheriff's Department's Motion for Judgment on the Pleadings.

Defendant Chittenden County Sheriff's Department moves for judgment on the pleadings under Fed. R. Civ. P. 12(c) arguing that the SAC fails to allege any specific act or failure to act by the Sheriff or any agent or employee of the Sheriff's Department that could constitute a civil rights violation. Plaintiff opposes the motion asserting that the Sheriff's Department "is both joint employer-defendant and defendant law enforcement agency." (Doc. 193 at 1-2.) After the Sheriff's Department filed a reply and Plaintiff a sur-reply,[1] the court took the motion under advisement on June 6, 2022.

Rule 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that for granting a Rule 12(b)(6) motion for failure to state a claim." *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020) (internal quotation marks and brackets omitted). "To survive a Rule 12(c) motion, [the plaintiff's] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) (internal quotation marks omitted). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[1] Although the court's Local Rules do not allow a sur-reply as a matter of course, in light of Plaintiff's self-represented status and because no defendant has moved to strike it, the court considers Plaintiff's filing.

On a Rule 12(c) motion, "the court's task is to assess the legal feasibility of the complaint; it is not to assess the weight of the evidence that might be offered on either side[,]" *Lynch*, 952 F.3d at 75, although it must "draw all reasonable inferences in the non-movant's favor." *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 304 (2d Cir. 2021).

Courts afford pleadings filed by self-represented parties "special solicitude." *Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks omitted). The court is therefore required to read the SAC liberally and to hold Plaintiff "to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). All complaints, however, must contain "sufficient factual matter[] . . . to state a claim" for relief. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

The SAC alleges that the former Chittenden County State's Attorney hired Plaintiff as an employee of both his office as well as the Chittenden County Sheriff's Department. To hold an employer liable for a hostile work environment, "federal law requires the plaintiff to show a specific basis for imputing the conduct creating the hostile work environment to the employer." *Bentley v. AutoZoners, LLC*, 935 F.3d 76, 90 (2d Cir. 2019) (internal quotation marks omitted). Even if Plaintiff's allegation of employment by the Sheriff's Department was credited as true,[2] the SAC alleges no discriminatory acts by the Sheriff or the Sheriff's Department. In the absence of factual allegations of discrimination, the SAC fails to state a plausible claim for which relief may be granted against this defendant. *See Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."); *see also Terry v. N.Y. City Dep't of Corr.*, 2012 WL 718555, at *2 (S.D.N.Y. Mar. 6, 2012) ("It is well-settled that where the complaint . . .

[2] The court has previously determined that Plaintiff was not employed by the Chittenden County Sheriff's Department. *See* Doc. 167 at 1-2 (concluding that Chittenden County Sheriff's Department "was not Plaintiff's employer and had no control over or involvement in his termination").

contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint" should be granted) (internal quotation marks omitted).

In his sur-reply, Plaintiff argues that:

> Even if my claim rests only on the fact that the Sheriff's Department communicated a negative Criminal Background Check to a potential employer which deprived me of employment that in itself is sufficient of a claim upon which relief can be granted. . . . It is unlawful to communicate negative criminal background check against anyone.

(Doc. 208 at 2.) The SAC, however, contains no allegations regarding a criminal background check. Even a self-represented plaintiff must adhere to the well-established rule that a party cannot amend his or her claim through a brief. *See Palm Beach Mar. Museum, Inc. v. Hapoalim Sec. USA, Inc.*, 810 F. App'x 17, 20 (2d Cir. 2020) (stating a plaintiff may not amend his claims by "advocating a different theory of liability in an opposition brief wholly unsupported by factual allegations in the complaint[]").

Because Plaintiff's SAC does not state a plausible claim for relief against the Chittenden County Sheriff's Department, the motion for judgment on the pleadings (Doc. 178) must be GRANTED. *See Felder v. U.S. Tennis Ass'n*, 27 F.4th 834, 841 (2d Cir. 2022) ("[E]ven 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.") (internal quotation marks omitted). Because Plaintiff has had three opportunities to sufficiently plead his claims against the Sheriff's Department and because he did not request additional leave to amend, dismissal of Plaintiff's claims against the Chittenden County Sheriff's Department is WITH PREJUDICE. *See Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) ("[N]o court can be said to have erred in failing to grant a request that was not made.").

B. State's Attorney Defendants' Motion to Dismiss.

The State's Attorney Defendants move to dismiss the SAC under Rule 12(b)(5) asserting that Plaintiff's attempted service of process on SA George was insufficient and that Plaintiff failed to serve process on the Chittenden County State's Attorney's Office.

Plaintiff filed an opposition to the motion as well as three supplemental documents. After the State's Attorney Defendants filed a reply, Plaintiff filed an exhibit to his opposition and a sur-reply.[3]

Fed. R. Civ. P. 12(b)(5) provides for dismissal of a complaint if it has not been properly served. On a Rule 12(b)(5) motion to dismiss, the plaintiff bears the burden of establishing that service was sufficient. *See Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010) (observing that "the plaintiff bears the burden of proving adequate service" when a defendant "moves to dismiss under Rule 12(b)(5)") (internal quotation marks omitted). "In deciding a Rule 12(b)(5) motion, a [c]ourt must look to Rule 4, which governs the content, issuance, and service of a summons." *Felton v. Monroe Cmty. Coll.*, 528 F. Supp. 3d 122, 132 (W.D.N.Y. 2021) (internal quotation marks omitted). "[T]he [c]ourt may look beyond the pleadings, including to affidavits and supporting materials, to determine whether service was proper." *Vega v. Hastens Beds, Inc.*, 339 F.R.D. 210, 215 (S.D.N.Y. 2021).

If a plaintiff fails to serve a defendant in accordance with Rule 4 "within 90 days after the complaint is filed," the court "must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). In this case, following the State's Attorney Defendants' first motion to dismiss, the court determined Plaintiff's prior attempts to serve SA George and the Chittenden County State's Attorney's Office were inadequate and ordered that he properly serve these Defendants within sixty days of the court's February 4, 2022 Order. It then extended this deadline at Plaintiff's request.

In response to the State's Attorney Defendants' pending motion to dismiss, Plaintiff argues that he properly served process on both SA George and the Chittenden County State's Attorney's Office. With regard to SA George, he asserts that delivering a

[3] In light of Plaintiff's self-represented status and because no defendant moved to strike it, the court considers Plaintiff's filing. The court, however, cautions Plaintiff that filings that do not comply with the Federal Rules of Civil Procedure may be stricken by the court. *See* Fed. R. Civ. P. 12(f).

summons and copy of the SAC to an individual in Attorney Stackpole's office was valid service of process as Attorney Stackpole "is an authorized agent because she is the Attorney on the docket." (Doc. 201 at 8.) With regard to the Chittenden County State's Attorney's Office, he asserts that service on the Vermont Attorney General's Office and directed to "Vermont State or State of Vermont" means the "State of Vermont and its agencies listed in this case as defendants." (Doc. 203 at 1) (emphasis omitted); *see also id.* at 2 ("A complaint and Summons was served to the Attorney General's Office that clearly says Sarah George et al."). Plaintiff requests the court, "[i]n the interest of justice, . . . accept my service as valid service in good faith." (Doc. 198 at 2.)

Plaintiff's argument with regard to service upon SA George fails for two reasons. First, Attorney Stackpole avers that she was not authorized to accept service on SA George's behalf. *See Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1094 (2d Cir. 1990) (stating "service of process on an attorney not authorized to accept service for his client is ineffective"); *see also Macon v. Corr. Med. Care, Inc.*, 2015 WL 4604018, at *3 (W.D.N.Y. July 30, 2015) ("[S]imply serving in the capacity of attorney . . . does not render the attorney an agent for service of process.") (internal quotation marks omitted). Second, even if Attorney Stackpole was so authorized, she was not served with the SAC. Instead, it was left with an assistant employed by her law firm. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 353 (1999) (discussing "the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant").

With regard to the Chittenden County State's Attorney's Office, the court has already determined that Plaintiff's prior service attempts failed to comply with Fed. R. Civ. P. 4. As the Magistrate Judge explained, none of the proofs of service referenced the Chittenden County State's Attorney's Office. *See* Fed. R. Civ. P. 4(b) ("A summons . . . must be issued for each defendant to be served."); *see also Harper v. City of New York*, 424 F. App'x 36, 40 (2d Cir. 2011) (affirming dismissal of claims where, in multiple defendant case, a summons was not issued to each defendant). Although the court extended Plaintiff's time for service and explained the ways in which he could properly

effect service, Plaintiff did not attempt any further service on the Chittenden County State's Attorney's Office.

Because Plaintiff did not "effectuate proper service of process" by the extended deadline, his claims against State's Attorney Defendants must be dismissed. *See* Doc. 165 at 2-3 (capitalization and emphasis omitted). The court is cognizant that Plaintiff's claims have not been heard on the merits, however, he has had ample opportunity to serve process on the defendants including a court-extended deadline and an additional ninety-day period following his filing of the SAC. The State's Attorney Defendants' motion to dismiss (Doc. 190) is therefore GRANTED and Plaintiff's claims against the State's Attorney Defendants are DISMISSED WITHOUT PREJUDICE.

CONCLUSION

For the reasons set forth above, the Chittenden County Sheriff's Department's motion for judgment on the pleadings is GRANTED and the alternative motion for summary judgment is DENIED AS MOOT. (Doc. 178.) Plaintiff's claims against the Chittenden County Sheriff's Department asserted in the Second Amended Complaint are DISMISSED WITH PREJUDICE.

The State's Attorney Defendants' motion to dismiss the SAC for insufficient service of process under Rule 12(b)(5) is GRANTED. (Doc. 190.) As Plaintiff was warned that his failure to effectuate proper service of process on the State's Attorney Defendants would result in dismissal, his claims against the State's Attorney Defendants asserted in the Second Amended Complaint are DISMISSED WITHOUT PREDJUDICE. SO ORDERED.

Dated at Burlington, in the District of Vermont, this 16th day of February, 2023.

Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ABDULLAH SALL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:20-cv-00214
	)	
LOCAL MOTION INC., et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER
GRANTING DEFENDANT LOCAL MOTION INC.'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S SUR-REPLY
(Docs. 186 & 220)

On April 18, 2022, Plaintiff Abdullah Sall, representing himself, filed a Second Amended Complaint ("SAC") against Defendant Local Motion Inc. ("Local Motion"). (Doc. 174.) Plaintiff alleges claims of employment discrimination and retaliation on the basis of race, national origin, religion, and sex in violation of 42 U.S.C. § 1981 and Titles VI and VII of the Civil Rights Act of 1964 and a claim of defamation under 28 U.S.C. § 4101. Local Motion moves to dismiss the SAC under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. 186.) Plaintiff opposes the motion and, following Local Motion's reply, filed a "response" to the reply. *See* Doc. 216. Local Motion has moved to strike that sur-reply. (Doc. 220.)

I. Relevant Procedural History.

On November 12, 2020, Plaintiff filed this action in the United States District Court for the District of Massachusetts. Following transfer of the case to this district, on January 19, 2021, Plaintiff filed an Amended Complaint which named Local Motion as a defendant. On March 15, 2021, Local Motion filed an Answer to the Amended Complaint. On April 18, 2022, Plaintiff filed the SAC against Local Motion.

II. Whether the Amended Complaint or the SAC is the Operative Complaint.

Pursuant to Federal Rule of Civil Procedure 15:

> [a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), . . . whichever is earlier.

Fed. R. Civ. P. 15(a)(1). Plaintiff filed his SAC over a year after Local Motion's responsive pleading was filed. Because his filing was outside of the time period for amendments as a matter of course, he was required to obtain the opposing party's written consent or leave of the court. *See* Fed. R. Civ. P. 15(a)(2) ("In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave.").

In this case, Plaintiff obtained neither Local Motion's consent nor the court's leave. The Federal Rules, however, counsel courts to "freely give leave [to amend] when justice so requires." *Id.* Because Local Motion has not objected on the basis that Plaintiff failed to comply with Rule 15 and has responded to the SAC, the court accepts the SAC as the operative pleading in this case. *See Hancock v. Cnty. of Rensselaer*, 882 F.3d 58, 63 (2d Cir. 2018) ("[I]t is well settled that an amended pleading ordinarily supersedes the original and renders it of no legal effect[.]") (internal quotation marks omitted).

III. The SAC's Allegations.

In the thirty-nine-page SAC against Local Motion, Plaintiff alleges that he is "Black, Muslim, and an African immigrant to the United States of America[.]" (Doc. 174 at 2, ¶ 1.) He describes Local Motion as "Vermont's statewide sustainability nonprofit organization advocate group for active transportation, vibrant communities, and safe streets that encourage walking and biking within reach for all Vermonters." *Id.* at ¶ 2. Plaintiff asserts that he "was employed as a Cultural Liaison by Defendant Local Motion through the AmeriCorp[] We all belong Program[.]" *Id.* He contends that "[f]rom the day I started my position I was under never ending race, religion, ethnic, and national origin interrogation." *Id.* at 4, ¶ 2; *see also id.* at 7, ¶ 9 ("[E]very day I went to work, I had to listen to their bashing of my race, religion, ethnicity, and nationality."). He alleges that "Local Motion was used to actively ferry my name as a sexist, misogynist, and pedophile

around the state of Vermont, maintaining a vibrant hatred of me among the communities, and thereby, making my life unsafe on the streets of Vermont." *Id.* at 6, ¶ 5. He further alleges that he was "taunted daily" for his religion and culture, *id.* at 16, ¶ 38, and that, as a result of his race, religion, and ethnicity, he was treated differently or less favorably than other employees.

Plaintiff contends that he "was doing [his] work perfectly as a Cultural Liaison[,]" but "[a]fter they made up their minds to terminate [his] employment, they began to spread rumors in the office" and to "mak[e] unprovoked criticism of [his] performance." (Doc. 174 at 13, ¶ 28.) Plaintiff "left Defendant Local Motion in 2012[.]" *Id.* at 11, ¶ 22. His employment was terminated because "it was 'not a fit.'" *Id.* at 30, ¶ 28. Plaintiff asserts that the "hostilities against [him] did not stop with [his] firing . . . . They circulated my name as a sexist, misogynist, and a pedophile among their LGBTQ." *Id.* at 17, ¶ 42.

Plaintiff asserts claims of race-based discrimination based on both a hostile work environment and disparate treatment, retaliation, constructive discharge, national origin, religious, and sex-based hostile work environment, and defamation. He seeks $300 million in damages.

IV. Conclusions of Law and Analysis.

A. Local Motion's Motion to Strike Plaintiff's Sur-Reply.

As a threshold matter, Local Motion moves to strike Plaintiff's sur-reply. As Plaintiff has been informed, this court's Local Rules do not provide for the filing of a sur-reply in response to a reply memorandum. *See* Docs. 122, 134; *see also* D. Vt. L.R. 7(a). Although the court "may in its discretion permit the filing of a surreply after the requesting party timely files a motion seeking leave to do so[,]" (Doc. 134 at 2), Plaintiff did not move for leave to file his "response" to Local Motion's reply. Because Plaintiff has been warned that the rules do not allow a sur-reply as a matter of course, failed to request leave, and could have advanced the arguments of his sur-reply in his filing in opposition, Local Motion's motion to strike (Doc. 220) is GRANTED.

B. Local Motion's Motion to Dismiss.

Local Motion moves to dismiss the SAC, arguing that Plaintiff's claims of employment discrimination and retaliation are barred by the statute of limitations and his failure to exhaust his administrative remedies, and because the SAC fails to state a claim for defamation.

1. Standard of Review.

"To survive a motion to dismiss, a complaint must contain 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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To determine whether this standard is satisfied, the court employs a "two-pronged approach[.]" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted). First, the court "must accept as true all of the [factual] allegations contained in a complaint" but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Second, the court analyzes whether the complaint's "'well-pleaded factual allegations' . . . 'plausibly give rise to an entitlement to relief.'" *Hayden*, 594 F.3d at 161 (quoting *Iqbal*, 556 U.S. at 679). The court does not "weigh the evidence" or "evaluate the likelihood" that a plaintiff will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017). Although the statute of limitations is ordinarily an affirmative defense that must be raised in an answer, the issue may be decided at the motion to dismiss stage if it appears on the face of the complaint. *See Ellul v. Congregation of Christian Brothers*, 774 F.3d 791, 798 n.12 (2d Cir. 2014).

Courts afford pleadings filed by self-represented parties "special solicitude." *Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks omitted). The court is therefore required to read the SAC liberally and to hold it "to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89,

94 (2007) (internal quotation marks omitted). All complaints, however, must contain "sufficient factual matter[] . . . to state a claim" for relief. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted); Fed. R. Civ. P. 8, 12.

2. Plaintiff's Employment-Related Claims.

Plaintiff alleges that Local Motion discriminated against him on the basis of his race, national origin, and religion, retaliated against him, and constructively discharged him in violation of 42 U.S.C. § 1981 and Titles VI and VII of the Civil Rights Act of 1964. Section 1981 prohibits, among other things, race-based interference with a plaintiff's right "to make and enforce contracts," which includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a), (b). The Supreme Court has instructed that § 1981 claims arising out of the employment relationship are subject to a four-year statute of limitations. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004); *see also Brown v. Castleton State Coll.*, 663 F. Supp. 2d 392, 396 (D. Vt. 2009) (applying four-year federal statute of limitations to plaintiff's § 1981 racial discrimination claim).

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI affords a private right of action for intentional discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Because Title VI does not contain an express statute of limitations, the court must select the "'the most appropriate' or 'the most analogous' state statute of limitations[.]" *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996). The Second Circuit has held that discrimination actions "are most analogous to personal injury actions under state law; hence, the corresponding state statute of limitations has been deemed controlling." *Morse v. Univ. of Vt.*, 973 F.2d 122, 126 (2d Cir. 1992). Vermont's statute of limitations for personal injuries is three years. *See* 12 V.S.A. § 512(4) ("Actions for the following causes

shall be commenced within three years after the cause of action accrues . . . injuries to the person suffered by the act or default of another person[.]").

Title VII prohibits employers from "discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1).

> [A] Title VII claimant may establish an employer's liability under the statute by showing either (1) that he has suffered an adverse job action under circumstances giving rise to an inference of discrimination on the basis of [his] race, color, religion, sex, or national origin (*i.e.*, a discrete act claim), or (2) that he was subjected to harassment on account of one or more of the above bases that amounted to a hostile work environment (*i.e.*, a hostile work environment claim).

Tassy v. Buttigieg, 51 F.4th 521, 529 (2d Cir. 2022) (second alteration in original and internal quotation marks omitted). "As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC." *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2d Cir. 2018). In Vermont, a Title VII plaintiff must file a charge of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice occurred," 42 U.S.C. § 2000-5(e)(1),[1] and must then file his or her action in federal court within ninety days of receiving a right-to-sue letter from the agency, *id.* § 2000e-5(f)(1). "Title VII provides no alternative statute of limitations[.]" *Duplan v. City of New York*, 888 F.3d 612, 624 (2d Cir. 2018).

As the Second Circuit has explained, "[a] cause of action for employment discrimination accrues from the moment of the discrete act constituting an unlawful employment practice[.]" *Seck v. Info. Mgmt. Network*, 697 F. App'x 33, 34 (2d Cir. 2017). The Supreme Court has recognized the important policy considerations

[1] Ordinarily, discrimination claims under Title VII must be filed with the EEOC within 180 days of the date on which the "alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1). However, if the alleged discrimination occurred in a state, such as Vermont, that has its own antidiscrimination laws and an agency to enforce those laws, then the time period for filing claims with the EEOC is extended to 300 days. *See id.*

underpinning statutes of limitations. As the Court explained, a "statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). This court therefore is required to apply statutes of limitations notwithstanding any unfairness Plaintiff may perceive in its application. *See, e.g.*, *Converse v. Gen. Motors Corp.*, 893 F.2d 513, 514 (2d Cir. 1990) (affirming dismissal of action filed by father of children killed in an accident that was served five days beyond the expiration of the applicable statute of limitations).

Accepting as true Plaintiff's allegations that he suffered unlawful discrimination and that he was unlawfully terminated by Local Motion, his claims accrued, at the latest, at his termination. *See Seck*, 697 F. App'x at 34 (holding plaintiff's employment discrimination "claims accrued, at the latest, . . . when he was terminated"). Plaintiff alleges that his employment at Local Motion ended in 2012. However, he did not commence his action against Local Motion until 2021. As a result, Plaintiff's employment discrimination claims are time-barred because they were filed more than eight years after accrual, which is well outside the applicable statute of limitation.[2]

Although Plaintiff further argues that the court should apply equitable estoppel to excuse his failure to comply with the applicable statute of limitations, he provides no grounds for doing so. He states: "Even if I knew or sensed I was the victim of racial discrimination or hostile work environment, I did not know how to find a lawyer or bring this case before the [c]ourt on my own." (Doc. 192 at 5.) The court construes his argument as requesting the court apply equitable tolling.

Under Vermont law, "[e]quitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from

[2] With respect to Plaintiff's Title VII claims, his failure to allege that he filed a claim with the EEOC also provides an alternative ground for dismissal of his claims. *See Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2d Cir. 2018) (observing that exhaustion "is an essential element of Title VII's statutory scheme") (internal quotation marks omitted).

discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum." *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 11, 186 Vt. 605, 610, 987 A.2d 258, 264. The Second Circuit has held that "[s]tatutes of limitations are generally subject to equitable tolling where necessary to prevent unfairness to a plaintiff who is not at fault for [his] lateness in filing." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004).

In the absence of allegations that Local Motion actively misled or prevented Plaintiff in some extraordinary way from discovering the facts essential to the timely filing of his lawsuit, the statute of limitations is not tolled with regard to his employment discrimination claims. *See Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) ("An 'extraordinary' circumstance permitting tolling of the time bar on equitable grounds might exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory.").[3]

For the reasons stated above, Local Motion's motion to dismiss Plaintiff's employment discrimination claims is GRANTED.

3. Plaintiff's Defamation Claim.

Plaintiff asserts a claim of defamation of character under 28 U.S.C. § 4101. Section 4101, however, does not provide a cause of action for defamation and pertains only to foreign defamation judgments. *See Thomas v. Brasher-Cunningham*, 2020 WL 4284564, at *10 (D. Conn. July 27, 2020) (recognizing § 4101 does not create a cause of action for defamation but instead defines defamation "in the context of a statute that allows for actions recognizing foreign defamation judgments"). As Plaintiff concedes, § 4101 has no applicability to his case as there is no allegation of a foreign defamation judgment. *See* Doc. 192 at 3 ("I want the Defendant to know I now know defamation is a common law case and does not have statutory code[.]"). Plaintiff's unintended mistake is

[3] Plaintiff asserts that Local Motion's "abuses did not stop when they terminated my employment but continued until I left Vermont in 2019" and the "last time I was in Vermont was 2019 and the last time someone made the allegation was 2019." (Doc. 192 at 2, 4.) These additional allegations appear to pertain to his defamation claim. He does not claim he was employed by Local Motion in 2019.

excused. *See McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 158 (2d Cir. 2017) (internal quotation marks and citations omitted) ("[T]he failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Rather, factual allegations alone are what matters. That principle carries particular force where a [self-represented] litigant is involved.").

In Vermont, the elements of a defamation claim are: (1) a false and defamatory statement; (2) negligence; (3) publication; (4) lack of privilege; (5) special damages, unless the statement is actionable per se; and (6) actual harm to warrant compensatory damages. *See Stone v. Town of Irasburg*, 2014 VT 43, ¶ 61, 196 Vt. 356, 380-81, 98 A.3d 769, 785.

It is Plaintiff's obligation to identify the particular statements alleged to be false as well as who made them. *See Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 251 (2d Cir. 2017) ("Vagueness as to the complained-of conduct is particularly inappropriate when pleading a defamation claim" because "the complaint must afford defendant sufficient notice of the communications complained of to enable him to defend himself.") (internal quotation marks and brackets omitted). The SAC fails to identify the specific false and defamatory language at issue. Because Plaintiff has not recited a specific statement made by Local Motion or why that statement was allegedly false and defamatory, he has failed to properly plead a defamation claim under Vermont law.

Because the SAC fails to allege the essential elements of a defamation claim, Local Motion's motion to dismiss this claim must be GRANTED.

C. Leave to Amend.

The Second Circuit has cautioned that a court "should not dismiss a pro se complaint without granting leave to amend at least once[.]" *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (internal quotation marks omitted). However, "[l]eave may be denied 'for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014). "[T]he standard for denying leave to amend based on futility is the same as the standard for granting a motion to dismiss."

IBEW Loc. Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC, 783 F.3d 383, 389 (2d Cir. 2015). Amendment is futile where there is a substantive problem with a cause of action that cannot be cured by better pleading. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

Plaintiff has not requested a further opportunity to amend his pleading against Local Motion. In addition, leave to amend would be futile with respect to Plaintiff's employment discrimination and retaliation claims because they are barred by the applicable statute of limitations. Because Plaintiff has already had multiple opportunities to state a plausible claim and Local Motion has twice responded, the court declines to grant leave to amend sua sponte. *See Horoshko v. Citibank, N.A.*, 373 F.3d 248, 250 (2d Cir. 2004) (noting a district court does not "abuse[] its discretion in not permitting an amendment that was never requested").

CONCLUSION

For the reasons set forth above, Local Motion's motion to strike Plaintiff's sur-reply (Doc. 220) is GRANTED and its motion to dismiss (Doc. 186) is GRANTED. Plaintiff's Second Amended Complaint (Doc. 174) is DISMISSED.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 17th day of March, 2023.

Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ABDULLAH SALL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:20-cv-00214
	)	
SEVEN DAYS, INC. et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER
DENYING DEFENDANT SEVEN DAYS, INC.'S SPECIAL MOTION TO STRIKE AND GRANTING DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT
(Docs. 181 & 182)

On April 18, 2022, Plaintiff Abdullah Sall, a Missouri resident representing himself, filed a Second Amended Complaint ("SAC") against Defendant Seven Days, Inc. ("Seven Days"). Plaintiff alleges claims of defamation in violation of 28 U.S.C. § 4101, retaliation in violation of 42 U.S.C. § 1985(3), and conspiracy in violation of 42 U.S.C. § 1985. Seven Days filed a special motion to strike the SAC under 12 V.S.A. § 1041 (Doc. 181) and also moves to dismiss the SAC for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (Doc. 182.)

I. Relevant Procedural History.

On November 12, 2020, Plaintiff filed this action in the United States District Court for the District of Massachusetts. Following transfer of the case to this district, on January 19, 2021, Plaintiff filed an Amended Complaint. On February 23, 2021, Seven Days filed motions to dismiss and to strike the Amended Complaint.

On January 11, 2022, the Magistrate Judge issued a Report & Recommendation ("R & R") recommending that the court grant Seven Days' motion to dismiss without leave to amend and deny as moot the special motion to strike. (Doc. 149.) On January 24, 2022, both parties timely filed objections to the R & R. Plaintiff objected to the

Magistrate Judge's conclusions regarding the alleged role of Seven Days in harming his reputation by publishing "a hit-piece article on behalf of Defendant Chittenden County State Attorney's office to enhance[] Defendant Chittenden State Attorney Sarah George's public image and to damage[] [his] public image and destroy any job prospect." (Doc. 152 at 1-2) (emphasis omitted). He argued that equitable tolling should apply to prevent dismissal on statute of limitations grounds. Seven Days objected to the Magistrate Judge's recommendation that its special motion to strike be denied as moot.

On March 4, 2022, the court adopted in part the R & R. The court held Plaintiff's § 1983 claims failed because there was no factual or legal basis to conclude Seven Days is a state actor and that the applicable statute of limitations barred Plaintiff's defamation claims arising from the article. The court further determined a reporter's allegedly defamatory question was based on a true factual predicate and an additional allegedly defamatory statement made by Seven Days' "founder" was a non-actionable opinion. *See* Doc. 164 at 6-7. As a result, leave to amend was granted "solely for the purpose of asserting a claim of equitable tolling with regard to [Plaintiff's] defamation claim" based on the February 28, 2017 article. *Id.* at 8. Plaintiff was warned in bold letters that his SAC must be filed "by March 22, 2022 or [his] case will be dismissed." *Id.* at 9 (emphasis omitted).

Citing the Vermont Supreme Court, the court ruled that: "[G]ranting a motion to dismiss does not moot the motion to strike because the issue of attorney's fees remains a live controversy . . . [because] the plain language 'shall award' [in § 1041(f)(1)] indicates that the award of fees is mandatory when a motion to strike is granted." (Doc. 164 at 9-10) (first and third alterations in original) (internal quotation marks and citations omitted). The court therefore declined to adopt the R&R's recommendation to deny Seven Days' special motion to strike as moot and indicated that if Plaintiff filed a SAC, Seven Days could renew its special motion to strike.

II. The SAC's Allegations.

On April 18, 2022,[1] Plaintiff filed the thirty-two-page SAC against Seven Days, alleging that he is "Black, Muslim, and an African immigrant to the United States of America." (Doc. 173 at 2, ¶ 1.) Defendant Seven Days is alleged to be a digital and print newspaper distributed weekly and based in Burlington, Vermont. Plaintiff asserts the court "has jurisdiction of Plaintiff's 28 U.S.[C.] § 4101 federal law claims pursuant to 28 U.S.C. § 1331, and [§] 1343(a)(4) as this case involves questions of federal law." *Id.* at 3.

Plaintiff alleges that on February 28, 2017, Seven Days, in collaboration with the Chittenden County State Attorney's Office, and "with reckless disregard for the truth, and [Plaintiff's] safety[,] published an article that exposed [Plaintiff] to public anger, hatred, contempt, scorn, and obloquy."[2] *Id.* at 4, ¶ 1. He asserts that "Seven Days recklessly dramatized [his] firing and negatively attracted public attention on [him], and destroyed [his] public dignity in violation of 28 U.S.[C.] § 4101." *Id.* at 5, ¶ 2. Plaintiff states the article was published four weeks and four days "after the 'Muslim travel ban' went into effect[.]" *Id.* at 8, ¶ 9. He asserts he was "mocked, ridiculed, vilified, harassed, intimidated, and shunned in clear breach[] of the First Amendment[.]" *Id.* at 9, ¶ 12.

Plaintiff alleges the article was a "hit-piece" designed to "ruin" his life and that it "used isolated and misplaced quotes to damage [his] public dignity." (Doc. 173 at 11, ¶ 14.) He defines "hit-piece" as a "published article or post aiming to sway public opinion by presenting false or biased information in a way that appears objective and truthful." *Id.* n.2. He contends Seven Days published the article with ill will and actual malice during Plaintiff's campaign for a City Council position. Plaintiff asserts Seven Days approached him seeking to write an article to introduce him to the community to be published in early January of 2017 but Seven Days then purposefully delayed the article until after his

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[1] In light of Plaintiff's self-represented status and in the absence of an objection from Seven Days, the court accepts the SAC as timely filed.

[2] Although Plaintiff did not attach the February 28, 2017 Seven Days' article to the SAC, the court considers it to be incorporated by reference in the SAC "given Sall's identification of the relevant article and his substantial reliance on it[.]" *See* Doc. 149 at 4 & n.6 (adopted in part by Doc. 164). Seven Days attached the article to its motion to dismiss the SAC. *See* Doc. 182-1.

employment at the Chittenden County State's Attorney's Office was terminated. He contends Seven Days had "insider information" and "wait[ed] for [Chittenden County State's Attorney] Sarah George to . . . terminate[] [Plaintiff's] employment." *Id.* at 16, ¶ 23. Plaintiff asserts "Seven Days simply provided a platform to the Chittenden County State Attorney's Office and Chittenden County State Attorney Sarah George to distort [his] character." *Id.* at 25, ¶ 41.

Following publication of the Seven Days article, Plaintiff asserts he was "subjected to dirty looks, hateful stares, rolling eyes, and curled-up lips by the white population. It felt like I was living during the days of Jim Crow. I was so devastated, I was contemplating suicide[.]" *Id.* at 13, ¶ 18. He contends he could not obtain employment in Vermont.

Plaintiff alleges a claim of defamation of character under 28 U.S.C. § 4101 and contends that "[a]ny reasonable person" who reads the February 28, 2017 Seven Days' article "understand[s] the statement to be defamatory." (Doc. 173 at 27, ¶ 2.) He asserts the "[s]tatements published by the Defendant Seven Days were false because I completed a six-month probationary period and had not been written up for poor work performance." *Id.* ¶ 5.

Plaintiff also claims retaliation under 42 U.S.C. § 1985(3) and alleges that Seven Days and the Chittenden County State's Attorney's office "launched a campaign of intimidation and harassment" against Plaintiff's former Attorney John Franco to force him to withdraw from Plaintiff's case and to scare Plaintiff. *Id.* at 30, ¶ 11.

Finally, Plaintiff alleges a claim of "conspiracy to incite hostilities/deprive[] rights" under 42 U.S.C. § 1985 asserting that "Seven Days conspired with defendant Chittenden County State [Attorney] Sarah George, defendant Chittenden County State Attorney's Office, and defendant [D]epartment of Sheriff to write[] a hit-piece to injure [Plaintiff's] reputation; deny [Plaintiff] privileges and immunities; and sabotage [Plaintiff's] election." *Id.* at 31, ¶ 15 (capitalization omitted). As relief, Plaintiff seeks $500 million dollars.

III. Conclusions of Law and Analysis.

A. The Court's Subject Matter Jurisdiction.

Federal courts "have an independent obligation to consider the presence or absence of subject matter jurisdiction[.]" *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006). "[S]ubject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*." *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000). "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). "[T]he party asserting federal jurisdiction bears the burden of establishing jurisdiction" exists. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 57 (2d Cir. 2006). Generally, "federal courts have subject matter jurisdiction either on the basis of substance, where there is a federal question, or on the basis of citizenship, where the requirements for diversity jurisdiction are satisfied." *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 n.3 (2d Cir. 2006).

Plaintiff contends the court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4). "A plaintiff properly invokes § 1331 [federal question] jurisdiction when [he] pleads a colorable claim 'arising under' the Constitution or laws of the United States." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006). Section 1343(a)(4) confers jurisdiction on federal courts to hear claims "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights[.]" 28 U.S.C. § 1343(a)(4). Although not mentioned by Plaintiff, § 1343(a)(1) provides for federal jurisdiction over claims "[t]o recover damages for . . . any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42[.]" *Id.* § 1343(a)(1).

In this case, Plaintiff was granted leave to amend his complaint to assert a claim of equitable tolling with regard to his defamation claim. Plaintiff's attempt to assert new claims under 42 U.S.C. § 1985 in the SAC is improper and those claims are DISMISSED. *See Palm Beach Strategic Income, LP v. Salzman*, 457 F. App'x 40, 43 (2d Cir. 2012) ("District courts in this Circuit have routinely dismissed claims in amended complaints where the court granted leave to amend for limited purpose and the plaintiff

filed an amended complaint exceeding the scope of the permission granted."). As a result, § 1343(a)(4) does not provide a basis for the court to exercise subject matter jurisdiction.

28 U.S.C. § 4101 also does not provide a cause of action for defamation and pertains only to foreign defamation judgments. *See Thomas v. Brasher-Cunningham*, 2020 WL 4284564, at *10 (D. Conn. July 27, 2020) (explaining § 4101 does not create a cause of action for defamation but instead defines defamation "in the context of a statute that allows for actions recognizing foreign defamation judgments"). Plaintiff's remaining claim of defamation is a state-law claim that does not raise a federal question. *See Steffens v. Kaminsky*, 2020 WL 2850605, at *2 (D. Conn. June 2, 2020) ("Although the tort of defamation is a well-recognized cause of action under state common law, federal law does not create a general cause of action or provide a basis for federal question jurisdiction for defamation."). Thus, § 1331 does not provide a basis for the court to exercise subject matter jurisdiction.

To raise a claim under diversity jurisdiction, 28 U.S.C. § 1332 requires that the amount in controversy in the case exceeds $75,000, exclusive of interest and costs, and that the matter is "between . . . citizens of different States[.]" 28 U.S.C. § 1332(a)(1). In other words, the plaintiff must be from a different state than every defendant. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996); *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 118 (2d Cir. 2014) (explaining complete diversity requires that "all plaintiffs . . . be citizens of states diverse from those of all defendants"). Because Plaintiff is a Missouri resident and Seven Days is based in Vermont, and the SAC seeks $500 million dollars in damages, the court may exercise diversity jurisdiction over Plaintiff's remaining state-law defamation claim.

B. Seven Days' Special Motion to Strike.

In response to the SAC, Seven Days has renewed its special motion to strike. Under Vermont law, "[a] defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution may file a special motion to strike[.]" 12 V.S.A. § 1041(a); *see also Country Home Prods., Inc. v.*

Banjo, 2015 WL 13505447, at *7 (D. Vt. Oct. 14, 2015) (acknowledging the "purpose of § 1041 is to discourage litigants from filing baseless lawsuits known as Strategic Lawsuits Against Public Participation (SLAPP)" and encourage free speech and public participation by "allowing speedy dismissal of meritless lawsuits") (citation and internal quotation marks omitted). The "exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution" is defined as:

> (1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
>
> (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
>
> (3) any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public; or
>
> (4) any other statement or conduct concerning a public issue or an issue of public interest which furthers the exercise of the constitutional right of freedom of speech or the constitutional right to petition the government for redress of grievances.

Id. § 1041(i)(1)-(4).

Under Vermont law, filing a special motion to strike stays all but "limited discovery" which a court may order to assist in its decision-making, and a hearing must be held within thirty days. *Id.* § 1041(c)(1)-(2), (d). The court "shall grant" the motion "unless the plaintiff shows that: (A) the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and (B) the defendant's acts caused actual injury to the plaintiff." *Id.* § 1041(e)(1). "In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Id.* § 1041(e)(2). If the motion is granted, "the court shall award costs and reasonable attorney's fees to the defendant." *Id.* § 1041(f)(1).

Although this court has previously held that special motions to strike under 12 V.S.A. § 1041 can be brought in federal court,[3] these decisions predate the Second Circuit's decision in *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020). In that case, the Second Circuit held that California's anti-SLAPP law, which "requires outright dismissal unless the plaintiff can establish a probability that he or she will prevail on the claim" conflicted with Fed. R. Civ. P. 12 and 56 and was therefore "inapplicable in federal court." *Id.* at 86-87 (quoting Cal. Civ. Pro. Code § 425.16(b)(3)) (internal quotation marks and brackets omitted). The relevant test is "whether a Federal Rule of Civil Procedure answers the same question as the special motion to strike." *Id.* at 87 (alterations adopted) (internal quotation marks and backets omitted). "If so, the Federal Rule governs[.]" *Id.* Because California's statute "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial, a question that is already answered (differently) by Federal Rules 12 and 56[,]" California's anti-SLAPP law "abrogates" Rule 12(b)(6)'s plausibility standard and "nullifies" Rule 56's requirement that a case proceed to trial if a party can "identify[] any genuine dispute of material fact[.]" *Id.* (internal quotation marks and brackets omitted); *see also CoreCivic Inc. v. Candide Grp. LLC*, 2021 WL 1267259, at *5 (N.D. Cal. Apr. 6, 2021) (recognizing that "the Second Circuit's opinion . . . invalidated the entirety of the California anti-SLAPP statute in federal court").

Although Seven Days concedes that the Second Circuit has held that California's anti-SLAPP statute is inapplicable in federal court, it argues that under Second Circuit precedent, the Vermont anti-SLAPP statute may be applied in federal court. The court disagrees.

Vermont's anti-SLAPP statute permits a judge at the pleading stage to weigh

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[3] *See, e.g., Soojung Jang v. Trs. of St. Johnsbury Acad.*, 331 F. Supp. 3d 312, 333-337 (D. Vt. 2018); *Country Home Prods., Inc. v. Banjo*, 2015 WL 13505447, at *7 (D. Vt. Oct. 14, 2015); *Ernst v. Kauffman*, 50 F. Supp. 3d 553, 563 (D. Vt. 2014); *Bible & Gospel Tr. v. Twinam*, 2008 WL 5245644, at *1 (D. Vt. Dec. 12, 2008), *modifying report & recommendation*, 2008 WL 5216845 (D. Vt. July 18, 2008).

evidence and resolve disputed issues of fact. It does not require the judge to construe evidence in the light most favorable to a plaintiff; it does not require the court to accept well-pleaded factual allegations as true; and it allows—and may even require—a plaintiff to present evidence beyond the pleadings to sustain the plaintiff's burden of proof. *See Chandler v. Rutland Herald Publ'g*, 2015 WL 7628687, at *3 (Vt. Nov. 19, 2015) ("[Plaintiff] provided no affidavits (nor any specific information) in support of his assertions. His generalized contentions are insufficient to meet his burden on the statute."); *Ernst v. Kauffman*, 50 F. Supp. 3d 553, 563 (D. Vt. 2014) (holding "unsworn pleading . . . fails to meet plaintiffs' burden"). In these respects, Vermont's anti-SLAPP statute directly conflicts with Fed. R. Civ. P. 8[4] and 12(b)(6)[5] and seeks to import elements of Fed. R. Civ. P. 56 into the pleading process. Because Vermont's anti-SLAPP statute "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial, a question that is already answered (differently) by Federal Rules 12 and 56[,]" it does not apply in federal court.[6] *La Liberte*, 966 F.3d at 87 (internal quotation marks and citation omitted).

Seven Days nonetheless urges the court to rely on *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014), wherein the Second Circuit concluded that the immunity and fee-shifting provisions of Nevada's anti-SLAPP law did not "squarely conflict with a valid federal

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[4] Rule 8 requires "[a] pleading that states a claim for relief [to] contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). "Each allegation [in a pleading] must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).

[5] Under Rule 12(b)(6), dismissal is only appropriate when "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000). In reviewing a complaint, a court must "accept as true the material facts alleged in the complaint and draw all reasonable inferences in plaintiffs' favor." *Garcia v. Does*, 779 F.3d 84, 97 (2d Cir. 2015) (alterations adopted) (internal quotation marks and brackets omitted). A court cannot "weigh the evidence[,]" *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017), or assess credibility. *See Proctor v. LeClaire*, 846 F.3d 597, 608 (2d Cir. 2017).

[6] The Federal Rules "govern in diversity cases in federal court[] unless [they] violate the Rules Enabling Act." *La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020) (internal quotation marks omitted). The Second Circuit has determined that "Rules 12 and 56 comply with the Rules Enabling Act[.]" *Id.* (internal quotation marks omitted).

rule." 774 F.3d at 809. *Adelson* is inapposite because the competing rules were not in conflict.

Acknowledging that this court applied Vermont's anti-SLAPP statute in cases prior to *La Liberte*, the Second Circuit has now more recently instructed "federal courts must apply Rules 12 and 56 instead of" a special motion to strike. *La Liberte*, 966 F.3d at 88. Accordingly, Vermont's anti-SLAPP statute does not apply in federal court as it abrogates Fed. R. Civ. P. 12(b)(6) and 56. For this reason, Seven Days' special motion to strike (Doc. 181) is DENIED.

C. Seven Days' Motion to Dismiss.

1. Standard of Review.

"To survive a motion to dismiss, a complaint must contain 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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To determine whether this standard is satisfied, the court employs a "two-pronged approach[.]" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted). First, the court "must accept as true all of the [factual] allegations contained in a complaint" but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Second, the court analyzes whether the complaint's "'well-pleaded factual allegations' . . . 'plausibly give rise to an entitlement to relief.'" *Hayden*, 594 F.3d at 161 (quoting *Iqbal*, 556 U.S. at 679). The court does not "weigh the evidence" or "evaluate the likelihood" that a plaintiff will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

Courts afford pleadings filed by self-represented parties "special solicitude." *Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks omitted). The court is therefore required to read the SAC liberally and to hold it "to less stringent

standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). All complaints, however, must contain "sufficient factual matter[] . . . to state a claim" for relief. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted); Fed. R. Civ. P. 8, 12.

2. Plaintiff's Defamation Claim Arising out of the February 28, 2017 Article is Barred.

In its March 4, 2022 Opinion & Order, the court explained the requirements of the doctrine of equitable tolling and granted Plaintiff leave to amend "solely for the purpose of asserting a claim of equitable tolling" with regard to his defamation claim based on the February 28, 2017 article. (Doc. 164 at 8.) Seven Days moves to dismiss Plaintiff's SAC and argues, among other things, that Plaintiff fails to allege any facts that support the application of equitable tolling to excuse his failure to comply with the three-year statute of limitations. *See* 12 V.S.A. § 512(3) (requiring claims for "slander and libel[]" be filed "within three years after the cause of action accrues[]").

Under Vermont law, "[e]quitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum." *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 11, 186 Vt. 605, 610, 987 A.2d 258, 264. The Second Circuit has held that "[s]tatutes of limitations are generally subject to equitable tolling where necessary to prevent unfairness to a plaintiff who is not at fault for [his] lateness in filing." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004).

The application of this doctrine is not, however, without limits. "Equitable tolling is an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances." *Id.* If a plaintiff could have filed in a timely manner through the exercise of due diligence, equitable tolling does not apply even if there are extraordinary circumstances. *See Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990) ("We have generally been much less forgiving in receiving late filings where the claimant failed to

exercise due diligence in preserving his legal rights."); *see also Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) ("The word 'prevent' requires the petitioner to demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances.").

Like the Amended Complaint, the SAC does not contain a claim for the application of equitable tolling. In the absence of allegations that Seven Days actively misled or prevented Plaintiff in some extraordinary way from discovering the facts essential to the timely filing of his lawsuit, the statute of limitations is not tolled with regard to his defamation claim. Because under Vermont law Plaintiff's action was required to be filed by February 28, 2020, but Plaintiff did not file his initial Complaint until November 12, 2020, Seven Days' motion to dismiss must be GRANTED.

IV. Leave to Amend.

The Second Circuit has cautioned that a court "should not dismiss a pro se complaint without granting leave to amend at least once[.]" *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (internal quotation marks omitted). However, "[l]eave may be denied 'for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014).

As the court has previously determined, leave to amend would be futile for all but Plaintiff's defamation claim based on the February 28, 2017 article. Plaintiff has not requested a further opportunity to amend his pleading. Because Plaintiff has already had multiple opportunities to amend his complaint and Seven Days has twice responded, the court declines to grant leave to amend sua sponte. *See Horoshko v. Citibank, N.A.*, 373 F.3d 248, 250 (2d Cir. 2004) (noting a district court does not "abuse[] its discretion in not permitting an amendment that was never requested").

CONCLUSION

For the reasons set forth above, Seven Days' special motion to strike (Doc. 181) is DENIED and its motion to dismiss (Doc. 182) is GRANTED. Plaintiff's Second Amended Complaint (Doc. 173) is DISMISSED.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 20th day of March, 2023.

Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ABDULLAH SALL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:20-cv-00214
	)	
GREATER BURLINGTON YMCA, et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER
GRANTING DEFENDANT GREATER BURLINGTON YMCA'S
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT
(Doc. 189)

On April 18, 2022, Plaintiff Abdullah Sall, representing himself, filed a Second Amended Complaint ("SAC") against Defendant Greater Burlington YMCA (the "YMCA"). (Doc. 175.) Plaintiff alleges claims of employment discrimination and retaliation on the basis of race, national origin, religion, and sex in violation of 42 U.S.C. § 1981 and Titles VI and VII of the Civil Rights Act of 1964 and a claim of defamation under 28 U.S.C. § 4101. The YMCA moves to dismiss the SAC under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. 189.) Plaintiff opposes the motion.

I. Relevant Procedural History.

On November 12, 2020, Plaintiff filed this action in the United States District Court for the District of Massachusetts. Following transfer of the case to this district, on January 19, 2021, Plaintiff filed an Amended Complaint which named the YMCA as a defendant. On March 26, 2021, the YMCA moved to dismiss the Amended Complaint.

On January 26, 2022, Magistrate Judge Kevin J. Doyle issued a Report and Recommendation ("R & R"). He recommended that the YMCA's motion to dismiss be denied with respect to the statute of limitations and exhaustion arguments, granted with

respect to any 42 U.S.C. § 1983 claims for lack of state action, and granted on the ground of failure to plausibly allege claims of hostile work environment, failure to promote, and retaliation under Title VII. He further recommended that Plaintiff be granted leave to file a Second Amended Complaint. In connection with this recommendation, the Magistrate Judge emphasized that Plaintiff "should . . . plead—with specificity—the dates of [his] employment with the YMCA, whether and when he filed a charge with the EEOC or HRC regarding his Title VII allegations against the YMCA, and whether and when he received a right-to-sue letter[.]" (Doc. 153 at 33.) Neither party filed objections.

On March 9, 2022, the court adopted in part the R & R. The court held Plaintiff's § 1983 claims failed because there was no factual or legal basis to conclude the YMCA was a state actor and dismissed those claims with prejudice. The court determined the Magistrate Judge further correctly concluded Plaintiff's Title VII claims failed to plausibly state a claim upon which relief could be granted because the Amended Complaint failed to allege the essential elements of a Title VII claim.[1] The court granted leave to amend "solely for Plaintiff's Title VII claims." (Doc. 166 at 4.) Plaintiff was warned in bold letters that his SAC must be filed "by March 31, 2022 or [his] case will be dismissed." *Id.* at 5 (emphasis omitted).

II. The SAC's Allegations.

On April 18, 2022, Plaintiff filed the thirty-nine-page SAC against the YMCA,[2] alleging that he is "Black, Muslim, and an African immigrant to the United States of America[.]" (Doc. 175 at 1, ¶ 1.) Plaintiff states that he was employed as a clerical assistant and front desk attendant by the YMCA. Plaintiff states that the YMCA "had five to six thousand members and twenty-thousand visitors every year" and that he "was the first point of contact" with people entering the facility. *Id.* at 3, ¶ 6. Plaintiff alleges that

[1] Because the Magistrate Judge's analysis of Plaintiff's Title VII failure to promote and retaliation claims was based on facts alleged for the first time in Plaintiff's opposition to the motion to dismiss, the court did not adopt that portion of the R & R. *See* Doc. 166 at 3 n.3.

[2] In light of Plaintiff's self-represented status and in the absence of an objection from the YMCA, the court accepts the SAC as timely filed.

the YMCA discriminated against him based on his race, religion, and national origin and defamed and retaliated against him. He contends the YMCA "subjected [him] to slurs, insults, jokes, comments, character smears, harassment, and intimidation." *Id.* at 4, ¶ 10. Specifically, the YMCA allegedly told Plaintiff that "African men are sexist, aggressive, hyper sexual, and they do not know how to control themselves around women." *Id.* at 5, ¶ 10, In addition, the YMCA allegedly stated that "Muslim men are sexists[,] . . . hate women[,] and . . . are likely to commit an act of terrorism[,]" *id.* at 9, ¶ 22, and that "if [he] was a Christian from the Caribbean[,] [he] would have fit[]in." *Id.* at 11, ¶ 30.

Plaintiff alleges that he "began to experience harsh[,] unprovoked, and unjustified criticism the first week [he] started . . . employment." (Doc. 175 at 6, ¶ 14.) He asserts that he was "subjected to verbal assaults by guests, co-workers, and community members because of [his] religion, race, and national origin that created [a] hostile work environment[.]" *Id.* at 16, ¶ 43. He states that the "YMCA staff accused [him] of fraternizing with white girls or women, which they find offensive and threatening because of [his] race, religion, culture, and national origin[.]" *Id.* at 10, ¶ 26. Plaintiff contends that the YMCA staff "developed a sexual harassment scheme to entrap [him] and . . . used that to get rid of [him]. They encouraged new female co-workers to flirt with [him] and build a trust with [him] and then rescind consent." *Id.* at 14 ¶ 38.

Plaintiff also alleges that the YMCA "was used as a venue to spread lies about their perceived sexist and misogynistic assessment of [his] character[.]" *Id.* at 15, ¶ 41. He asserts that the YMCA staff falsely accused him of "shouting Allahu Akbar and chanting, 'Death to America[,]'" *id.* at 24, ¶ 60, and "sent [a] false tip to law enforcement to make a terrorist out of [him]." (Doc. 175 at 27, ¶ 66.) He alleges that the YMCA "failed . . . to stop the false and malicious portrayal of [his] character." *Id.* at 24, ¶ 61. Plaintiff alleges that he was eventually terminated.

Plaintiff asserts claims of race-based discrimination based on both a hostile work environment and disparate treatment; retaliation; constructive discharge; national origin, religious, and ancestry-based hostile work environment; and defamation. He seeks $300 million in damages.

III. Conclusions of Law and Analysis.

A. The YMCA's Motion to Dismiss.

The YMCA moves to dismiss Plaintiff's SAC arguing that the claims of employment discrimination and retaliation are barred by the applicable statute of limitations and Plaintiff's failure to exhaust his administrative remedies and because the SAC fails to state a claim for defamation.

1. Standard of Review.

"To survive a motion to dismiss, a complaint must contain 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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To determine whether this standard is satisfied, the court employs a "two-pronged approach[.]" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted). First, the court "must accept as true all of the [factual] allegations contained in a complaint" but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Second, the court analyzes whether the complaint's "'well-pleaded factual allegations' . . . 'plausibly give rise to an entitlement to relief.'" *Hayden*, 594 F.3d at 161 (quoting *Iqbal*, 556 U.S. at 679). The court does not "weigh the evidence" or "evaluate the likelihood" that a plaintiff will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017). Although the statute of limitations is ordinarily an affirmative defense that must be raised in an answer, the issue may be decided at the motion to dismiss stage if it appears on the face of the complaint. *See Ellul v. Congregation of Christian Brothers*, 774 F.3d 791, 798 n.12 (2d Cir. 2014).

Courts afford pleadings filed by self-represented parties "special solicitude." *Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks omitted). The court is therefore required to read the SAC liberally and to hold it "to less stringent

standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). All complaints, however, must contain "sufficient factual matter[] . . . to state a claim" for relief. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted); Fed. R. Civ. P. 8, 12.

2. Plaintiff's Defamation Claim.

Plaintiff asserts a claim of defamation of character under 28 U.S.C. § 4101, however, Plaintiff was granted leave to amend his complaint with regard to his Title VII claims only. For this reason, Plaintiff's attempt to assert a new legal basis for a defamation claim is improper. *See Palm Beach Strategic Income, LP v. Salzman*, 457 F. App'x 40, 43 (2d Cir. 2012) ("District courts in this Circuit have routinely dismissed claims in amended complaints where the court granted leave to amend for limited purpose and the plaintiff filed an amended complaint exceeding the scope of the permission granted."). Given Plaintiff's self-represented status and because the defamation claim is distinct from his employment discrimination claims, the court will nonetheless consider whether Plaintiff states a defamation claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

Section 4101 does not provide a cause of action for defamation and pertains only to foreign defamation judgments. *See Thomas v. Brasher-Cunningham*, 2020 WL 4284564, at *10 (D. Conn. July 27, 2020) (recognizing § 4101 does not create a cause of action for defamation but instead defines defamation "in the context of a statute that allows for actions recognizing foreign defamation judgments"). As Plaintiff concedes, § 4101 has no applicability to his case as there is no allegation of a foreign defamation judgment. *See* Doc. 194 at 3 ("I would like to correct the confusion with regard to the statutory title for the defamation of character. I did not know defamation of character was based on a common law until now."). Plaintiff's unintended mistake is excused. *See McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 158 (2d Cir. 2017) (internal quotation marks and citations omitted) ("The failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Rather, factual allegations

alone are what matters. That principle carries particular force where a [self-represented] litigant is involved.").

Under Vermont law, the elements of a defamation claim are: (1) a false and defamatory statement; (2) negligence; (3) publication; (4) lack of privilege; (5) special damages, unless the statement is actionable per se; and (6) actual harm to warrant compensatory damages. *See Stone v. Town of Irasburg*, 2014 VT 43, ¶ 61, 196 Vt. 356, 380-81, 98 A.3d 769, 785. "A defamatory statement is one that tends to tarnish a plaintiff's reputation and 'expose [him] to public hatred, contempt or ridicule.'" *Hoyt v. Klar*, 2021 WL 841059, at *1 (Vt. Mar. 5, 2021) (quoting *Davis v. Am. Legion*, 2014 VT 134, ¶ 22, 198 Vt. 204, 213, 114 A.3d 99, 106). A three-year statute of limitations applies to a defamation claim in Vermont. *See* 12 V.S.A. § 512(3) (establishing that an action for slander and libel "shall be commenced within three years after the cause of action accrues, and not after").

In order to state a claim for defamation, Plaintiff must identify the particular statement or statements alleged to be false. General and conclusory statements will not suffice. *See Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 251 (2d Cir. 2017) ("Vagueness as to the complained-of conduct is particularly inappropriate when pleading a defamation claim" because "the complaint must afford defendant sufficient notice of the communications complained of to enable him to defend himself.") (internal quotation marks and brackets omitted). The SAC identifies dozens of individuals who made allegedly defamatory statements but only one of the allegations contains a date, which is a claim that "in or around 2013, Graham Gowen called [Plaintiff the n-word] and asked [him] if [he found] it offensive because [he] was born in Africa." (Doc. 175 at 22, ¶ 53.) This allegation is well outside the statute of limitations. Because Plaintiff has not identified a specific false and defamatory statement made by the YMCA within the limitations period but has instead pled an array of statements at unidentified times and places, his defamation claim is subject to dismissal. *See Dasler v. Knapp*, 2021 WL 4134398, at *11 (D. Vt. Sept. 10, 2021).

Because Plaintiff was granted leave to allege equitable tolling not an undated defamation claim and because the SAC fails to allege the essential elements of a defamation claim within the limitations period, the YMCA's motion to dismiss this claim is GRANTED.

3. Plaintiff's Employment-Related Claims.

Plaintiff alleges that the YMCA discriminated against him on the basis of his race, national origin, religion, and ancestry, retaliated against him, and constructively discharged him in violation of 42 U.S.C. § 1981 and Titles VI and VII of the Civil Rights Act of 1964. As the YMCA points out, Plaintiff's claims alleged under § 1981 and Title VI exceed the scope of the permission granted to him in connection with filing a SAC. Plaintiff's attempt to assert these new claims is improper and any employment discrimination claims other than those under Title VII are DISMISSED. *See Palm Beach Strategic Income, LP*, 457 F. App'x at 23. Even were the court to consider these claims, they are subject to dismissal.

Title VII prohibits employers from "discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1).

> [A] Title VII claimant may establish an employer's liability under the statute by showing either (1) that he has suffered an adverse job action under circumstances giving rise to an inference of discrimination on the basis of [his] race, color, religion, sex, or national origin (*i.e.*, a discrete act claim), or (2) that he was subjected to harassment on account of one or more of the above bases that amounted to a hostile work environment (*i.e.*, a hostile work environment claim).

Tassy v. Buttigieg, 51 F.4th 521, 529 (2d Cir. 2022) (second alteration in original and internal quotation marks omitted). "As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC." *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2d Cir. 2018). In Vermont, a Title VII plaintiff must file a charge of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice

occurred," 42 U.S.C. § 2000-5(e)(1),[3] and must then file his or her action in federal court within ninety days of receiving a right-to-sue letter from the agency, *id.* § 2000e-5(f)(1). "Title VII provides no alternative statute of limitations[.]" *Duplan v. City of New York*, 888 F.3d 612, 624 (2d Cir. 2018).

Here, the SAC fails to plead that Plaintiff exhausted his administrative remedies by filing a timely complaint with the EEOC or that he received a right to sue letter. These are "preconditions" to filing his Title VII claims in this court. *See Hardaway*, 879 F.3d at 489. Although the court noted that "a Title VII complaint should not be dismissed for failure to plead the dates of the alleged discrimination[,]" (Doc. 153 at 11) (internal quotation marks omitted), Plaintiff was specifically instructed that, if he filed a SAC, he must include the date he was terminated by the YMCA as well as "whether and when he filed a charge with the EEOC or HRC regarding his Title VII allegations against the YMCA, and whether and when he received a right-to-sue letter[.]"[4] *Id.* at 33. In the absence of an exhaustion of administrative remedies and more precise allegations, Plaintiff's SAC fails to state a Title VII claim upon which relief can be granted. *See Alarcon v. Nassau Cnty. Parks*, 2013 WL 685891, at *2 (E.D.N.Y. Feb. 24, 2013) (dismissing a Title VII action where "[i]t appears from the face of plaintiff's complaint that he has not obtained a right-to-sue letter [as] it is neither referenced nor attached").

The YMCA's motion to dismiss Plaintiff's Title VII claims is GRANTED.

B. Leave to Amend.

The Second Circuit has cautioned that a court "should not dismiss a pro se complaint without granting leave to amend at least once[.]" *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (internal

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[3] Ordinarily, discrimination claims under Title VII must be filed with the EEOC within 180 days of the date on which the "alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1). However, if the alleged discrimination occurred in a state, such as Vermont, that has its own antidiscrimination laws and an agency to enforce those laws, then the time period for filing claims with the EEOC is extended to 300 days. *See id.*

[4] In his opposition, Plaintiff states that: "Since 2017, I have been exhausting remedies in another case. I spoke to [a] Vermont Human Right investigator . . . about adding the YMCA[.]" (Doc. 194 at 7.)

quotation marks omitted). However, "[l]eave may be denied 'for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014). "[T]he standard for denying leave to amend based on futility is the same as the standard for granting a motion to dismiss." *IBEW Loc. Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 389 (2d Cir. 2015). Amendment is futile where there is a substantive problem with a cause of action that cannot be cured by better pleading. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

Plaintiff has not requested a further opportunity to amend his pleading against the YMCA. Because Plaintiff has already had multiple opportunities to state a plausible claim and the YMCA has twice responded, the court declines to grant leave to amend sua sponte. *See Horoshko v. Citibank, N.A.*, 373 F.3d 248, 250 (2d Cir. 2004) (noting a district court does not "abuse[] its discretion in not permitting an amendment that was never requested").

CONCLUSION

For the reasons set forth above, the YMCA's motion to dismiss (Doc. 189) is GRANTED. Plaintiff's Second Amended Complaint (Doc. 175) is DISMISSED.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 20th day of March, 2023.

Christina Reiss, District Judge
United States District 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 22nd day of February, two thousand twenty-four.

Abdullah Sall,

Plaintiff - Appellant,

v.

Sarah Fair George, Da Capo Publishing, Inc., et al.,

Defendants - Appellees.

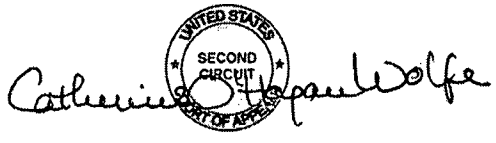
ORDER

Docket No: 23-1188

Appellant, Abdullah Sall, 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



MANDATE

D. Vt.
20-cv-214
Reiss, 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 20th day of December, two thousand twenty-three.

Present:

Raymond J. Lohier, Jr.,
Richard J. Sullivan,
Maria Arújo Kahn,
Circuit Judges.

Abdullah Sall,

Plaintiff-Appellant,

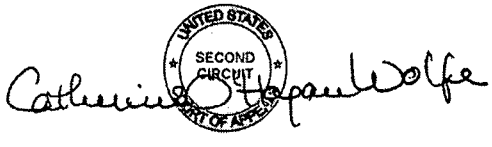
v. 23-1188

Sarah Fair George, et al.,

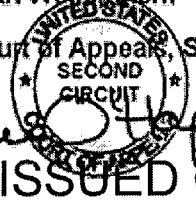
Defendants-Appellees.

Appellees move to dismiss this appeal as untimely filed. Appellant, pro se, moves for appointment of counsel and to reverse the district court judgment. Upon due consideration, it is hereby ORDERED that Appellees' motions are GRANTED and the appeal is DISMISSED for lack of jurisdiction. *See* 28 U.S.C. § 2107; *Bowles v. Russell*, 551 U.S. 205, 214 (2007). It is further ORDERED that Appellant's motions are DENIED as moot.

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



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



MANDATE ISSUED ON 03/04/2024

VT Human Rights Commission
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Bor Yang
Executive Director
[Direct Line]: (802) 828-2493
[Email]: bor.yang @vermont.gov

Sent via email to <pullofuta1@gmail.com>

June 29, 2020

Re: VHRC Case No. E17-0007
Sall v. Department of State's Attorneys and Sheriffs & the Chittenden County State's Attorneys' Office

Dear Mr. Sall,

Enclosed are signed copies of the Final Determinations in the above-entitled matter. On June 25, 2020, the Vermont Human Rights Commissioners found **reasonable grounds** to believe that the Respondent discriminated against the Complainant with respect to race, color, or national origin and the Commissioners found **no reasonable grounds** to believe that the Respondent discriminated against the Complainant with respect to ancestry or religion.

Since the Commissioners determined that there are reasonable grounds to believe that illegal discrimination occurred, the Commission will offer the parties another chance to discuss the possibility of settlement. If no settlement can be reached by the parties, the Commission will determine whether to take this case to court.

Please contact me at (802) 828-2493, or via e-mail at bor.yang@vermont.gov by **July 7, 2020**, to discuss the terms you might consider to settle the case.

Our determination is not binding on you and does not prevent you from bringing suit under Vermont law. You retain the right to bring a private lawsuit in court at any time within the applicable statute of limitations. Under Vermont's statute of limitations, you may have 3 or 6 years after the date of the violation to bring a lawsuit. You should consult with an attorney for specific advice about the limitations period applicable to your claim.

Please call me if you have any questions. Thank you.

Sincerely,
/s/ Bor Yang
Bor Yang
Executive Director and Legal Counsel

Enclosures (2)