

W.D.N.Y.
23-cv-487
Vilardo, 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 24th day of October, two thousand twenty-four.

Present:

Pierre N. Leval,
Denny Chin,
Raymond J. Lohier, Jr.,
Circuit Judges.

David C. Lettieri,

Plaintiff-Appellant,

v.

Joel L. Daniels, Cheryl Meyers Buth,

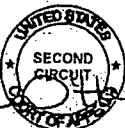
Defendants-Appellees.

24-740 (L),
24-1369 (Con)

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

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID C. LETTIERI,

Plaintiff,

v.

23-CV-487-LJV
ORDER

JOEL L. DANIELS, *et al.*,

Defendants.

The *pro se* plaintiff, David C. Lettieri, was a prisoner confined at the Niagara County Jail when he commenced this action under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).¹ He alleges that during his criminal case, his attorneys, Joel L. Daniels and Cheryl Meyers Buth, provided ineffective assistance of counsel, violated his right to due process, and subjected him to cruel and unusual punishment.² Docket Item 1. He also has moved to have Daniels's and

¹ Lettieri filed the complaint using a form for prisoner civil rights actions under 42 U.S.C. § 1983. Docket Item 1. Because the complaint asserts claims arising from Lettieri's federal criminal prosecution, the Court construes those claims as brought under *Bivens*. See *Tavarez v. Reno*, 54 F.3d 109, 109-10 (2d Cir. 1995) ("Although Tavarez brought the action under [section] 1983, the district court properly construed the complaint as an action under *Bivens* . . .").

But regardless of whether the claims are properly construed as *Bivens* or section 1983 claims, the analysis and result are the same: Because section 1983 requires a defendant to act under color of state law, see 42 U.S.C. § 1983, and *Bivens* requires the same under federal law, this action's outcome does not change based on its cause of action. See *Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987) ("Courts of Appeals have held that section 1983 concepts of state action apply in determining whether action was taken 'under color of federal law' for *Bivens* purposes . . ." (citation omitted)).

² On June 14, 2023, a jury found Lettieri guilty of one count of enticement of a minor in violation of 18 U.S.C. § 2422(b). See *United States v. Lettieri*, Case No. 21-cr-20, Docket Items 146, 150 (W.D.N.Y. June 14, 2023). For several reasons, including his retention of new counsel, he has not yet been sentenced.

Meyers Buth's law licenses "suspended," Docket Item 8, and for sanctions against Meyers Buth, Docket Item 16.

The Court previously granted Lettieri's motion to proceed *in forma pauperis*, see Docket Item 12, and it now screens the complaint under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(a). For the reasons that follow, Lettieri's complaint is dismissed and his motions are denied as moot.

DISCUSSION

Section 1915 "provide[s] an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). The court shall dismiss a complaint in a civil action in which a prisoner seeks redress from a governmental entity, or an officer or employee of a governmental entity, if the court determines that the complaint (1) fails to state a claim upon which relief may be granted or (2) seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1)-(2).

Generally, the court will afford a *pro se* plaintiff an opportunity to amend or to be heard prior to dismissal "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Abbas*, 480 F.3d at 639; see also *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) ("A *pro se* complaint is to be read liberally. Certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." (quoting *Gomez v. USAA Fed. Sav. Bank*,

171 F.3d 794, 795 (2d Cir. 1999))). But leave to amend pleadings may be denied when any amendment would be “futile.” *Cuoco*, 222 F.3d at 112.

I. SCREENING THE COMPLAINT

In evaluating the complaint, the court accepts all factual allegations as true and draws all inferences in the plaintiff's favor. See *Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003) (per curiam); *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999). Although “a court is obliged to construe [*pro se*] pleadings liberally, particularly when they allege civil rights violations,” *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004), even a *pro se* complaint “must plead ‘enough facts to state a claim to relief that is plausible on its face,’” *Shibeshi v. City of New York*, 475 F. App’x 807, 808 (2d Cir. 2012) (summary order) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim will have ‘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.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In other words, although a *pro se* complaint need not provide every last detail in support of a claim, it must allege some facts that support the claim. See *id.* (concluding that district court properly dismissed *pro se* complaint under section 1915(e)(2) because complaint did not meet pleading standard in *Twombly* and *Iqbal*). And even *pro se* pleadings must meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure, see *Wynder v. McMahon*, 360 F.3d 73, 76 (2d Cir. 2004), and “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (alteration in original) (quoting *Twombly*, 550 U.S. at 555).

Lettieri has sued Daniels and Meyers Buth in connection with their roles as his defense counsel. Docket Item 1. A liberal reading of the complaint tells the following story.

At Lettieri's detention hearing on December 18, 2020, Daniels "didn't do much of an argu[ment] of the probation offi[c]ers['] report." *Id.* at 8. And after a status conference on September 13, 2022, Daniels and Meyers Buth refused to appeal the magistrate judge's "unjust findings" because Assistant United States Attorney Meghan A. Tokash "didn't want such [a] thing done." *Id.* at 9.

II. **BIVENS CLAIMS**

To state a *Bivens* claim, a plaintiff must allege (1) "that a defendant acted under color of federal law" to (2) "deprive [the] plaintiff of a constitutional right." *Tavarez*, 54 F.3d at 109-10.

Criminal defense attorneys—whether public defenders, court-appointed attorneys, or privately retained counsel—are not persons acting under color of federal or state law "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); see *O'Donoghue v. Soc. Sec. Admin.*, 828 F. App'x 784, 787 (2d Cir. 2020) (summary order) (noting that private attorneys are neither state actors for purposes of section 1983 nor federal actors for purposes of *Bivens*); *Yancey v. City of Buffalo*, 2012 WL 6016890, at *2 (W.D.N.Y. Nov. 30, 2012) (assistant public defender not federal actor for purposes of *Bivens*).

Lettieri asserts claims against Daniels and Meyers Buth only for actions they allegedly took—or failed to take—during his criminal case. See Docket Item 1. He

therefore has not plausibly alleged that they were federal actors. See *Polk County*, 454 U.S. at 325. Accordingly, Lettieri's complaint is dismissed without leave to amend because better pleading would not cure that deficiency. See *Cuoco*, 222 F.3d at 112.

ORDER

In light of the above, IT IS HEREBY

ORDERED that Lettieri's complaint is dismissed with prejudice for failure to state a claim, and the Clerk of the Court shall close this case; and it is further

ORDERED that Lettieri's motions, Docket Items 8 and 16, are DENIED as moot; and it is further

ORDERED that this Court hereby certifies, under 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith, and leave to appeal to the Court of Appeals *in forma pauperis* is denied. *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). Further requests to proceed on appeal *in forma pauperis* should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with Rule 24 of the Federal Rules of Appellate Procedure; and it is further

ORDERED that Lettieri is cautioned that the continued filing of meritless pleadings and motions will lead to further sanctions,³ including, but not limited to, an

³ Since November 2022, Lettieri has filed more than 70 civil complaints and habeas petitions in this District, as well as more than 50 notices of appeal and more than 80 motions. See *In re: David C. Lettieri*, Case No. 23-mc-32, Docket Item 18 (W.D.N.Y. Jan. 19, 2024). "[N]ot one of his cases appears to have any merit." *Id.* What is more, Lettieri "has tried to circumvent . . . this Court's orders at every opportunity." *Id.* As a result, this Court recently imposed a filing injunction to address Lettieri's pattern of abuse of the judicial process, which has "unduly burden[ed] this Court and its staff." *Id.*

injunction against the filing of any future motions in his cases, an extension of the one-year filing injunction, and monetary fines.

SO ORDERED.

Dated: March 5, 2024
Buffalo, New York

/s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

DAVID C. LETTIERI

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 23-CV-487

v.

JOEL L. DANIELS, ET AL.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that Plaintiff's Complaint is Dismissed with Prejudice for failure to state a claim; the Court certifies that any appeal would not be taken in good faith and, therefore leave to appeal to the Court of Appeals as a poor person is denied.

Date: March 8, 2024

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/ Jennifer
Deputy Clerk