APPENDIX

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APPENDIX A

24-1399-cv

Uzoigwe v. Charter Commc'ns, LLC

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of May, two thousand twenty-five.

PRESENT: DENNIS JACOBS, DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

ONWY UZOIGWE,

Plaintiff-Appellant,

v.

CHARTER COMMUNICATIONS, LLC,

Defendant-Appellee.

No. 24-1399-cv

FOR APPELLANT:
ONWY UZOIGWE, *pro se*,
Baltimore, MD

FOR APPELLEE:
Michael D. Kabat, Shawna M.
Miller, Kabat Chapman &
Ozmer LLP, Atlanta, GA

Appeal from a judgment of the United States District Court for the Eastern District of New York (Hector Gonzalez, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff Onwy Uzoigwe, proceeding *pro se*, appeals from a judgment of the United States District Court for the Eastern District of New York (Gonzalez, *J.*) dismissing his breach of contract and negligence claims against Charter Communications, LLC ("Charter"), his former employer. Uzoigwe filed this lawsuit in New York State court on August 23, 2023, Charter removed the case to federal court under diversity jurisdiction on September 27, 2023, and the District Court denied Uzoigwe's subsequent motions to remand the case to state court. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

As a threshold matter, we decline Charter's invitation to dismiss the appeal because of Uzoigwe's failure to comply with various procedural requirements in his submissions on appeal. "[W]e liberally construe pleadings and briefs submitted by *pro se* litigants," *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (quotation marks omitted), and we "generally do not hold *pro se* litigants rigidly to the formal briefing standards set forth in" the Federal Rules of Appellate Procedure, *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995).

I. Motions Seeking Remand

Uzoigwe challenges the District Court's denial of his motion to remand this case to state court and his subsequent motions for reconsideration of its denial. Charter counters that we lack jurisdiction to consider these arguments because Uzoigwe's notice of appeal identified only the District Court's order granting

Charter's motion to dismiss and was filed before the entry of judgment. Uzoigwe's notice of appeal was premature because the District Court's order dismissing his claims granted him leave to amend. *See Slayton v. Am. Exp. Co.*, 460 F.3d 215, 223–24 (2d Cir. 2006). But because "the judgment was entered before the appeal was heard" and "the appellee suffered no prejudice," the entry of final judgment shortly after Uzoigwe's notice of appeal was filed cured that defect. *Sahu v. Union Carbide Corp.*, 475 F.3d 465, 468 (2d Cir. 2007). Uzoigwe's notice of appeal "designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties." *Collymore v. Krystal Myers, RN*, 74 F.4th 22, 27 (2023) (quoting Fed. R. App. P. 3(c)(5)(A)). We therefore construe the notice of appeal as "encompass[ing] the final judgment," *id.* (quotation marks omitted), permitting us to consider the merits of Uzoigwe's

challenge to the District Court's denial of remand, *see* Fed. R. App. P. 3(c)(4).

On the merits, we affirm. Uzoigwe argues that removal was improper because of the forum defendant rule. "Under that rule, . . . a suit that is 'otherwise removable solely on the basis of . . . [diversity of citizenship] may not be removed if any of the parties in interest *properly* joined and *served* as defendants is a citizen of the State in which such action is brought.'" *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 704-05 (2d Cir. 2019) (quoting 28 U.S.C. § 1441(b)(2)) (emphasis added). Thus, the forum defendant rule "is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable." *Id.* at 705.

Uzoigwe properly attempted service on Charter by first class mail pursuant to section 312-a of New York's Civil Practice Law and Rules. But section 312-

a empowers defendants to defeat service through intransigency. Section 312-a(b) provides that defendants must return a signed acknowledgement of receipt, and that "[s]ervice is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender." N.Y. C.P.L.R. § 312-a(b). New York courts have interpreted this requirement to mean that a plaintiff has "failed to effectuate proper service of process" where the defendant refuses to sign the acknowledgment required of it. *See Wells Fargo Bank, N.A. v. Wine*, 935 N.Y.S.2d 664, 666 (3d Dep't 2011); *accord Cordero v. Barreiro-Cordero*, 10 N.Y.S.3d 454, 455 (2d Dep't 2015) (mem.); *Dominguez v. Stimpson Mfg. Corp.*, 616 N.Y.S.2d 221, 222 (2d Dep't 1994) (mem.); *Shenko Elec., Inc. v. Hartnett*, 558 N.Y.S.2d 859, 859 (4th Dep't 1990) (mem.).

There is no dispute that Charter, a New York resident, filed its notice of removal from New York

State court before returning the required acknowledgment of service to Uzoigwe. The only question is whether Charter's statutory non-compliance means that it was not properly served and therefore that it can escape Uzoigwe's choice of forum, the answer to which is — perhaps unfairly — yes. Even though Uzoigwe did all that was required of him, and even if he is correct that Charter's "delay in returning the Acknowledgement" was unjustified, Appellant's Br. 26, Charter's delay nevertheless suffices to defeat the applicability of the forum defendant rule. Uzoigwe's "lawsuit [was] removable" because Charter had not yet been properly "served in

accordance with state law" at the time the case was removed.[1] *See Gibbons*, 919 F.3d at 705.

We accordingly affirm the District Court's denial of Uzoigwe's motions to remand and for reconsideration.

II. Motion to Dismiss

We next review the District Court's dismissal of Uzoigwe's claims for breach of contract and negligence under Federal Rule of Civil Procedure 12(b)(6). *See Vaughn v. Phoenix House N.Y. Inc.*, 957 F.3d 141, 145 (2d Cir. 2020). According to Uzoigwe's complaint, Charter breached his employment contract by terminating him without adequate cause. Under New York law, "[a]bsent an agreement establishing a fixed

[1] Uzoigwe also argues that service pursuant to § 312-a was completed *after* Charter removed the case. Even if that were true, however, it would not affect the applicability of the forum defendant rule, which concerns removal *before* a defendant is properly served. *See Gibbons*, 919 F.3d at 705. And what Uzoigwe referred to at argument and in his briefing as "personal service" was in fact another unsuccessful attempt at mailed service.

duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party." *Oliner v. Sovereign Bank*, 999 N.Y.S.2d 856, 857 (2d Dep't 2014) (quotation marks omitted); *see Brown v. Daikin Am. Inc.*, 756 F.3d 219, 231 (2d Cir. 2014). Uzoigwe claims that a November 17, 2017 letter he received from Charter after initially participating in a strike rebutted the presumption that he was an at-will employee. The letter states: "Your assignment is permanent so that you will continue in that assignment through and after the end of the strike." Appellee's App'x 38. We conclude that the letter does not rebut the presumption of at-will employment under New York law. "Such temporally amorphous terms as 'permanent' or 'long term' are not definite as to duration." *Devany v. Brockway Dev., LLC*, 900 N.Y.S.2d 329, 330 (2d Dep't 2010) (quotation marks omitted). Uzoigwe also points to a Charter

representative's assertion that there was a "six step process prior to termination" as evidence that his employment was not at-will. Appellant's Br. 13 (quotation marks omitted). But such an assertion without further detail or memorialization does not create "an express written policy limiting the right of discharge" under New York law. *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001); *see Baron v. Port Auth. of N.Y. & N.J.*, 271 F.3d 81, 85 (2d Cir. 2001). We therefore affirm the District Court's dismissal of Uzoigwe's breach of contract claim.[2]

We also affirm the dismissal of Uzoigwe's negligence claim, which he acknowledges is premised entirely on the claim that Charter "[b]reached the

[2] Uzoigwe's argument that earlier administrative proceedings regarding his entitlement to unemployment benefits has *res judicata* effect fails because those proceedings did not address whether Charter breached any contract when it terminated Uzoigwe. *See Whitfield v. City of New York*, 96 F.4th 504, 523 (2d Cir. 2024).

[c]ontract by terminating him without just or proper cause." Reply Br. 16. Because Uzoigwe fails to allege that Charter breached any "legal duty independent of the contract," his negligence claim is thus duplicative and "must be dismissed." *IKB Int'l, S.A. v. Wells Fargo Bank, N.A.*, 40 N.Y.3d 277, 290–91 (2023) (quotation marks omitted); *see Bayerische Landesbank v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 58 (2d Cir. 2012).

We have considered Uzoigwe's remaining arguments and conclude that they are without merit.[3] For the foregoing reasons, the judgment of the District Court is AFFIRMED.

[3] Uzoigwe asks us to take "judicial notice" of various matters related to the merits, Dkt. Nos. 58 & 60, and also moves to supplement the record with additional proof of service, Dkt. No. 75. Both pending motions are denied.

s/

Catherine O'Hagan Wolfe, Clerk of Court
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT (Seal)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of October, two thousand twenty-four.

Before: Myrna Perez
Circuit Judge.

ONWY UZOIGWE,

Plaintiff-Appellant,

v.

CHARTER COMMUNICATIONS, LLC,

Defendant-Appellee.

ORDER

Docket No. 24-1399
Docket Entry 41

Appellant, pro se, moves for leave to file the transcript of an audio recording which was submitted in the district court. Appellee takes no position on the motion.

IT IS HEREBY ORDERED that the motion is GRANTED. Appellant is directed to file the transcript in a supplemental appendix.

For the Court:

s/
Catherine O'Hagan Wolfe,
Clerk of Court
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT (Seal)

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 5th day of May, two thousand twenty-five.

ONWY UZOIGWE,

Plaintiff-Appellant,

v.

CHARTER COMMUNICATIONS, LLC,

Defendant-Appellee.

ORDER

No. 24-1399-cv

FOR APPELLANT:
ONWY UZOIGWE, *pro se*,
Baltimore, MD

FOR APPELLEE:
Michael D. Kabat, Shawna M. Miller, Kabat Chapman & Ozmer LLP, Atlanta, GA

Appellant, Onwy Uzoigwe, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

s/
Catherine O'Hagan Wolfe, Clerk of Court
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT (Seal)

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ONWY UZOIGWE,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, LLC,

Defendant.

JUDGMENT
23-CV-07383 (HG) (LB)

An Order of the Honorable Hector Gonzalez, United States District Judge, having been filed on April 24, 2024, adopting the Report and Recommendation of Magistrate Lois Bloom, dated March 18, 2024, granting defendant's motion to dismiss; granting plaintiff leave to file an amended complaint by May 24, 2024, and an Order having been

filed on May 31, 2024, dismissing Plaintiff's complaint with prejudice; it is

ORDERED and ADJUDGED that Defendant's motion to dismiss is granted; and that Plaintiff's complaint is dismissed with prejudice.

Dated: Brooklyn, New York
May 31, 2024

Brenna B. Mahoney
Clerk of Court

s/
Jalitza Poveda
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ONWY UZOIGWE,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, LLC,

Defendant.

ORDER
23-CV-07383 (HG) (LB)

HECTOR GONZALEZ, United States District Judge:

On April 24, 2024, the Court adopted the well-reasoned Report and Recommendation of Judge Lois Bloom and granted Defendant's motion to dismiss. *See* ECF No. 53. However, the Court granted Plaintiff leave to file an amended complaint as it pertains to his breach of contract claim on or before May 24, 2024. The Court explicitly warned that "[i]f Plaintiff fails to file an amended complaint on or before May 24, 2024,

judgment shall enter, and this case shall be closed." *See id.* Plaintiff has not filed an amended complaint. Therefore, the Court dismisses Plaintiff's complaint with prejudice.

The Court notes that Plaintiff filed a notice of appeal prior to the entry of a final judgment. *See* ECF No. 55. Typically, the filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). "The divestiture of jurisdiction rule is, however, not a per se rule. It is a judicially crafted rule rooted in the interest of judicial economy, designed to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *United States v. Rogers*, 101 F.3d 247, 251 (2d Cir. 1996) (internal citation and quotation omitted). Here, the

Court finds the interests of judicial economy are fostered by finality in this case and therefore finds it proper to dismiss this case where Plaintiff has not filed an amended complaint. *Cf. Motley v. Motley Estate*, No. 23-cv-10268, 2024 WL 1118225 (S.D.N.Y. Mar. 11, 2024) (dismissing *pro se* plaintiff's complaint where plaintiff appealed a non-final order directing her to pay the filing fee or comply with *in forma pauperis* requirements).

The Clerk of Court is respectfully directed to enter judgment and close this case.

Ordered by

s/
HECTOR GONZALEZ
United States District Judge

Dated: Brooklyn, New York
May 31, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ONWY UZOIGWE,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, LLC,

Defendant.

MEMORANDUM & ORDER
23-CV-07383 (HG) (LB)

HECTOR GONZALEZ, United States District Judge:

This employment-related action was commenced *pro se* by Plaintiff Onwy Uzoigwe in Queens County Supreme Court on August 23, 2023. ECF No. 1-1 (Complaint). Defendant Charter Communications, LLC (hereinafter "Charter" or "Defendant") removed the case to federal court on September 23, 2023, invoking diversity jurisdiction. ECF No. 1 (Notice of Removal). In the Complaint, Plaintiff alleges that Defendant

wrongfully terminated his employment as a field technician with Charter. *Id.* ¶¶ 4, 6. Plaintiff asserts New York law-based causes of action for breach of contract and negligence and a retaliation claim under the New York City Administrative Code ("N.Y.C. Admin. Code"). *Id.* ¶¶ 32–40. On November 22, 2023, Defendant moved to dismiss the Complaint. ECF Nos. 24, 25 (Defendant's Motion to Dismiss and Supporting Memorandum of Law). Plaintiff opposed, *see* ECF Nos. 38, 39 (Plaintiff's Opposition and Supporting Memorandum of Law), and Defendant filed a reply, *see* ECF No. 41 (Defendant's Reply).

I referred Defendant's motion to Magistrate Judge Lois Bloom for a report and recommendation (the "R&R") as to her findings. *See* January 8, 2024, Text Order Referring Motion. Judge Bloom issued her R&R on March 18, 2024. ECF No. 47 (R&R). On March 27, 2024, Plaintiff filed a motion to vacate the R&R due to a clerical mistake, namely that Plaintiff's exhibits

filed alongside his Opposition were uploaded out of order or not uploaded at all. ECF No. 48 (Motion to Vacate). Judge Bloom denied the motion and directed Plaintiff to file any exhibits that were not uploaded with his objections to the R&R. ECF No. 49 (Order on Motion to Vacate). On April 3, 2024, Plaintiff filed his objections to the R&R. ECF Nos. 50, 51 (Plaintiff's Objections and Additional Exhibits). On April 18, 2024, Defendant filed a response to Plaintiff's objections. ECF No. 52 (Defendant's Response to Plaintiff's Objections). For the reasons set forth below, the Court adopts the R&R in full, grants Defendant's motion to dismiss, and grants Plaintiff leave to amend the Complaint only as it pertains to his breach of contract claim.

BACKGROUND

The Court assumes the parties' familiarity with the underlying facts and analysis set forth in the R&R. ECF No. 47. Defendant moves to dismiss the Complaint for

failure to state a claim upon which relief can be granted pursuant to Rule 12(b). Fed R. Civ. P. 12(b)(6); ECF No. 24. On March 18, 2024, Judge Bloom recommended that Defendant's motion be granted because (1) Plaintiff's retaliation and negligence claims are time barred, and the statute of limitations for these claims was not equitably tolled, and (2) Plaintiff's allegations and attached filings in support of his breach of contract claim, liberally construed, fail to state a claim because they fail to rebut the presumption that Plaintiff was an at-will employee. ECF No. 47 at 1–13.[1] Judge Bloom recommended that leave to amend be denied as to Plaintiff's retaliation and negligence claims and that leave to amend be granted as to Plaintiff's breach of contract claim. *Id.* at 14.

[1] The Court refers to the pages assigned by the Electronic Case Files system ("ECF").

On April 3, 2024, Plaintiff timely filed his objections to the R&R. ECF Nos. 50, 51. On that same date, Plaintiff also filed additional exhibits he claims were not included in his original Opposition to Defendant's motion to dismiss. *Id.*; *see also* ECF No. 49. Plaintiff does not object to Judge Bloom's recommendation that Defendant's motion be granted as to Plaintiff's retaliation claim, and therefore the Court adopts that portion of Judge Bloom's report. ECF No. 50 at 24. However, Plaintiff objects to Judge Bloom's recommendation that Defendant's motion be granted as to Plaintiff's negligence and breach of contract claims. ECF No. 50 at 7–23. Defendant counters that Plaintiff's objection to the dismissal of his negligence claim is meritless and Plaintiff's objections to the dismissal of his breach of contract claim further support that he was an at-will employee. ECF No. 52 (Defendant's Response to Plaintiff's Objections).

LEGAL STANDARD

A. District Court's Review of an R&R

The Court must review *de novo* the portions of the R&R to which any party has objected. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C). For any portions of the report "to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record in order to accept it." *Logan v. World Luxury Cars, Inc.*, No. 15-cv- 248, 2023 WL 156878, at *1 (E.D.N.Y. Jan. 11, 2023).[2] In considering objections to an R&R, the Court "will not consider new arguments raised in objections . . . that could have been raised before the magistrate but were not." *Liu v. Millenium Motors Sports, LLC*, No. 17-cv-6438, 2021 WL 3463193, at *2 (E.D.N.Y. Aug. 6, 2021); *see also Fischer v. Forrest*, 968

[2] Unless noted, case law quotations in this Order accept all alterations and omit internal quotation marks, citations, and footnotes.

F.3d 216, 221 (2d Cir. 2020) (affirming district court's holding that a party could not raise an argument for the first time in his objections to an R&R). "Further, courts generally do not consider new evidence raised in objections to a magistrate judge's report and recommendation." *Lesser v. TD Bank, N.A.*, 463 F. Supp. 3d 438, 445 (S.D.N.Y. 2020).

B. Motion to Dismiss Standard

A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim is plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Matson v. Bd. of Educ.*, 631 F.3d 57, 63 (2d Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although all allegations contained in a complaint are assumed to be true, this tenet is

"inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. A *pro se* complaint "must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Court's obligation "to construe a *pro se* complaint liberally" continues to apply "[e]ven after *Twombly*" established the plausibility standard for assessing pleadings. *Newsome v. Bogan*, 795 F. App'x 72, 72 (2d Cir. 2020).

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint," along with any document for which "the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the

complaint." *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021).

DISCUSSION

The Court adopts Judge Bloom's R&R in full. The Court finds no clear error in the portions of the R&R as to which no party has objected, and rejects Plaintiff's objections to Judge Bloom's findings regarding Plaintiff's negligence and breach of contract claims.[3]

I. Negligence Claim

Plaintiff objects to the dismissal of his negligence claim. ECF No. 50 at 19–23. Plaintiff does not refute

[3] Plaintiff also objects to the Court's jurisdiction in this case and claims "jurisdiction lies with the State Court." ECF No. 50 at 11. This issue has already been decided by this Court and it was not an issue as to which Judge Bloom provided a recommendation because it does not relate to Defendant's motion to dismiss. *See* ECF No. 26 (Order on Motion for Remand); December 4, 2023, Text Order (Order on Motion for Reconsideration); December 8, 2024, Text Order (Order on Second Motion for Reconsideration). Because this issue has already been decided, the Court does not address it here.

that he filed his Complaint outside of the three-year statute of limitations period as prescribed by CPLR § 214, as his claim began to accrue on the date he was terminated by Defendant, January 18, 2020, and he filed the Complaint on August 23, 2023. *See* ECF No. 1-1 (Complaint). Rather, Plaintiff claims the statute of limitations was equitably tolled for a period of 228 days under New York Executive Order ("EO") 202.8, rendering his Complaint timely. ECF No. 50 at 19–23. EO 202.8 suspended "any specific time limit for the commencement, filing, or service of any legal action, notice, motion or other process or proceeding, as prescribed by the procedural laws of the state[.]" N.Y. Exec. Order 202.8 (Mar. 20, 2020). The period was extended until November 3, 2020, for a total of 228 days. N.Y. Exec. Order 202.67 (Oct. 4, 2020).

As Judge Bloom noted, some courts in this Circuit interpret EO 202.8 as providing for a tolling extension

for all claims. ECF No. 47 at 7; *see also Johnson v. New York State Police*, 659 F. Supp. 3d 237, 263 (N.D.N.Y. 2023) (finding statute of limitations on a wrongful death claim was "paused" on March 20, 2020 due to EO 202.8). However, this Court has already opined, like other courts in this Circuit, that EO 202.8 *suspended* rather than *tolled* the time period. *See Loeb v. Cnty. of Suffolk,* No. 22-cv-6410, 2023 WL 4163117, at *3 (E.D.N.Y. June 23, 2023); *see also Weingot v. Unison Agreement Corp.*, No. 21-cv-4542, 2023 WL 5152478, at *4 (E.D.N.Y. July 20, 2023) (recommending dismissal of claims as time-barred where EO 202.8 suspended rather than tolled statute of limitations), *report and recommendation adopted as modified on other grounds*, 2024 WL 1191106 (E.D.N.Y. Mar. 20, 2024); *Barry v. Royal Air Maroc*, No. 21-cv-848, 2022 WL 3215050, at *4 (S.D.N.Y. July 8, 2022), *report and recommendation adopted*, 2022

WL 3214928 (S.D.N.Y. Aug. 9, 2022) ("A number of New York courts have held that EO 202.8 "suspended" rather than "tolled" the time periods to which it applied."). This means that EO 202.8 only applies to claims that would have otherwise expired between March 20, 2020 and November 3, 2020. Although EO 202.8 uses the word "toll" in its operative language, the Governor's authority to modify the statute of limitations was derived from the authority vested in him by Section 29-a of New York's Executive Law. Executive Law Section 29-a provides that the Governor has the authority to "temporarily suspend" statutes of limitation during a state disaster emergency. *See* N.Y. Exec. Law § 29-a(1). Section 29-a(2)(d) further provides that, "the [Governor's] order may provide for such *suspension* only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local

law, ordinance, order, rule or regulation suspended, and may include other terms and conditions." *Id.* (emphasis added). As this Court concluded in *Loeb*, COVID-19 presented a "particular circumstance" warranting *suspension* under Section 29-a(2)(d). 2023 WL 4163117, at *3. Because the Court finds that EO 202.8 acted as a suspension rather than a toll of the statute of limitations, the Court overrules Plaintiff's objection and adopts this portion of Judge Bloom's R&R.

II. Breach of Contract Claim

Plaintiff also objects to Judge Bloom's recommendation that the Court dismiss Plaintiff's breach of contract claim. First, Plaintiff objects on the basis that the Unemployment Insurance Appeal Board ("UIAB") already decided that Plaintiff was not an at-will employee, and therefore Defendant is

collaterally estopped from arguing otherwise under the doctrine of *res judicata.*

ECF No. 50 at 11–14. Second, Plaintiff argues that a letter provided by Defendant in 2017 demonstrates that Plaintiff had an employment contract with Defendant and that Plaintiff was not an at-will employee. *Id.* at 16–17. Finally, Plaintiff argues that Defendant had a six-step pre- termination process that prevented Defendant from terminating him at-will. *Id.* at 18–19.[4]

As Judge Bloom noted, to state a breach of contract under New York law, Plaintiff must allege: "(1) the existence of a contract; (2) performance by the plaintiff; (3) defendant's breach; and (4) damages resulting from the breach." *Radar Sports Mgmt., LLC v. Legacy*

[4] Plaintiff also objects to any further mentioning of the alleged "stolen meter" as it related to his retaliation claim. ECF No. 50 at 14–15, 24. As Plaintiff does not object to the dismissal of his retaliation claim, the Court does not address this issue. *Id.*

Lacrosse, LI Inc., No. 21-cv-5749, 2023 WL 7222736, at *5 (E.D.N.Y. Nov. 2, 2023) (citing *Dee v. Rakower*, 976 N.Y.S.2d 470, 474 (N.Y. App. Div. 2013)). Under New York law, there is a presumption that an employee is hired "at-will," and the employer-employee relationship may be terminated at any time. *Baron v. Port Auth. of New York & New Jersey*, 271 F.3d 81, 85 (2d Cir. 2001) ("In New York, it has long been settled that an employment relationship is presumed to be a hiring at will, terminable at any time by either party."). Nevertheless, the presumption may be rebutted by an employee's showing that: "(1) an express written policy limiting the employer's right of discharge exists, (2) the employer (or one of its authorized representatives) made the employee aware of this policy, and (3) the employee detrimentally relied on the policy in accepting or continuing employment." *Id.* The New York Court of Appeals has warned that "this is a difficult pleading burden, and that routinely issued employee manuals,

handbooks and policy statements should not *lightly* be converted into binding employment agreements." *Id.* (quoting *Sebetay v. Sterling Drug, Inc.*, 506 N.E. 919, 922 (N.Y. 1987) and *Lobosco v. New York Tel. Co./NYNEX*, 751 N.E.2d 462, 465 (N.Y. 2001)).

A. The UIAB Decision and Res Judicata

Plaintiff claims that Defendant is barred from relitigating the breach of contract claim under the theory of *res judicata*. "*Res judicata* applies when: (1) the previous action involved an adjudication on the merits; (2) the previous action involved the same parties or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Hudson v. Universal Studios Inc.*, 235 F. App'x 788, 790 (2d Cir. 2007). Here, an Administrative Law Judge ("ALJ") overruled the UIAB's decision that Plaintiff was disqualified from receiving unemployment

benefits because "[t]he credible evidence establishes the claimant's actions [of going home to use the bathroom] did not rise to the level of disqualifying misconduct" under New York Labor Law ("NYLL") § 593(3). ECF No. 1-1 at 20. Because the ALJ's decision was focused on whether Plaintiff was entitled to unemployment benefits, the Court cannot find that there was a prior adjudication on the merits of the instant case, namely, regarding Plaintiff's breach of contract claim. Furthermore, New York law provides that such determinations are not to be preclusive in subsequent proceedings. NYLL § 623(2) ("No finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding."); *see also Pollard v. New York Methodist Hosp.*, 861 F.3d 374, 382 (2d Cir. 2017) ("New York State Labor Law

section 623(2) provides that unemployment insurance decisions do not have preclusive effect in subsequent litigation (subject to certain exceptions that are not applicable here)."). Because the previous determination by the ALJ was not a determination on the merits of the instant action and because the ALJ's determination has no preclusive effect on Plaintiff's breach of contract claim in this action, Defendant is not collaterally estopped from litigating this claim.

B. Plaintiff's At-Will Status

Plaintiff argues that a letter he received in 2017 rebuts the presumption that he was hired as an at-will employee. ECF No. 50 at 16. Plaintiff points to the language "Your assignment is permanent so that you will continue in that assignment through and after the end of the strike by Local 3[.]" *Id.; see also* ECF No. 1-1 at 16. The Court disagrees that this wording explicitly limited Defendant's ability to terminate

Plaintiff after the strike ended. The 2017 Letter was provided to Plaintiff in the midst of a strike that Plaintiff initially participated in, but later decided not to engage in, and instead returned to work. ECF No. 1-1 at 6–7. The phrase that Plaintiff's assignment was "permanent . . . through and after the end of the strike by Local 3," indicates that Plaintiff's assignment was permanent through the duration of the strike, after which time Plaintiff's assignment returned to an at-will status. The Court thus agrees with Judge Bloom's finding that the 2017 Letter indicates that "plaintiff's employment after the strike was for an indefinite or unspecified term and thus presumably at-will," and therefore the 2017 Letter alone does not rebut the presumption that plaintiff's employment was at-will. ECF No. 47 at 11; *see also Cruz v. HSBC Bank, USA, N.A.*, 5 F. Supp. 3d 253, 256 (E.D.N.Y. 2014) ("New York law has long held that an individual employed

for an indefinite period of time is presumed to be at-will, and the employment can be terminated at any time by either party."), *aff'd*, 586 F. App'x 723 (2d Cir. 2014).

The remaining documents submitted by Plaintiff also do not rebut this presumption. To the contrary, the documents further support the presumption that Plaintiff was an at-will employee. First, the 2019 letter Plaintiff received from Defendant explicitly states "[Defendant] may terminate your employment at any time for any reason not prohibited by law or the collective bargaining agreement between [Defendant] and the union, with or without prior notice." ECF No. 39-3 at 8 (February 6, 2019, Letter). Plaintiff does not allege how any collective bargaining agreement he may have entered into would have altered Plaintiff's at-will employment, and therefore none of Plaintiff's allegations support a conclusion that this 2019 Letter

modified Plaintiff's at-will employment status in any way. Second, Defendant's Employee Handbook states that "[a]n employment-at-will relationship exists between [Defendant] and its employees, meaning both parties have the right to end the employment relationship at any time, for any reason, with or without cause or notice," which also supports that Plaintiff was an at-will employee. ECF No. 50-1 at 19 (Defendant Employee Handbook). Therefore, even construing Plaintiff's Complaint and his supporting papers liberally, the Court cannot find that Plaintiff has met the "difficult pleading burden" necessary to rebut the presumption that he was an at-will employee. Quite the opposite—Plaintiff's Complaint and supporting papers actually strengthen the conclusion that Plaintiff's employment was at-will.

Accordingly, the Court adopts this portion of Judge Bloom's R&R.

C. Defendant's Termination Process

Plaintiff finally asserts that a November 2017 statement by Defendant's Area Vice President, Ms. Waajeha Aziz, and the "Corrective Action Report" that described the incidents that resulted in Plaintiff's termination, rebut the presumption that Plaintiff was employed at will. ECF No. 50 at 18–19. With respect to Ms. Aziz's oral statement, Plaintiff claims that she explained that there was a six-step process that had to be followed before an employee could be terminated. ECF No. 1-1 ¶ 10; ECF No. 50 at 18. Even accepting Plaintiff's allegations as true, oral assurances do not alter an employee's at-will employment status. *See Wood v. Mike Bloomberg 2020, Inc.*, No. 20-cv-2489, 2022 WL 891052, at *7 (S.D.N.Y. Mar. 25, 2022) (citing cases and holding "under New York law, at-will employees cannot reasonably rely on oral promises of continued employment"), *aff'd sub nom. Cordova v.*

Mike Bloomberg 2020, Inc., No. 22-1023, 2023 WL 6119448 (2d Cir. Sept. 19, 2023). Additionally, although the "Corrective Action Report" lists a number of "Level[s] of Action," Defendant may take to address an employee's conduct, *see* ECF No. 50-2 (Corrective Action report), the document does not indicate that any of the actions are compulsory or must be completed in a required order. As a result, "none of the writings identified by [Plaintiff] . . . constitutes a written express limitation on [Defendant's] right to hire, fire, promote, demote, transfer or take any other employment action it deems otherwise appropriate." *Baron*, 271 F. 3d at 85. The Court therefore cannot find that there was an express written policy, or oral assurance incorporated into a written policy, that would have altered Plaintiff's at-will employment. *See Hunter v. Kaufman Enterprises, Inc.*, No. 09-cv-5540, 2011 WL 3555809, at *4

(E.D.N.Y. Aug. 8, 2011) ("Since the Plaintiff fails to plead the existence of any express written policy which limits McDonald's right to discharge an employee, the Court declines to create an exception to New York's at-will employment doctrine and further declines to recognize an action for breach of contract in this instance."). The Court therefore adopts this portion of Judge Bloom's R&R.

III. Leave to Amend

"*A pro se* complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Nielsen v. Rabin,* 746 F.3d 58, 62 (2d Cir. 2014). Nevertheless, leave to amend may be denied where the Court finds that amendment would be futile. *See, e.g., Huan v. Fauci*, No.

22-cv-07392, 2024 WL 1174538, at *1 (E.D.N.Y. Mar. 19, 2024) (citing cases). Here, the Court agrees with Judge Bloom's finding that granting leave to amend Plaintiff's negligence claim would be futile as the claim is time barred. *See, e.g.*, *Berlin v. Jetblue Airways Corp.*, 436 F. Supp. 3d 550, 567 (E.D.N.Y. 2020) (denying leave to amend common-law tort claims as they were time-barred). The Court additionally agrees that it is "a very unlikely long-shot" that Plaintiff's breach of contract claim can be amended to state a viable claim, but nonetheless the Court adopts Judge Bloom's recommendation that Plaintiff be granted leave to amend his breach of contract claim. ECF No. 47 at 14. Plaintiff shall file an amended complaint regarding his breach of contract claim on or before May 24, 2024.

CONCLUSION

The Court adopts Judge Bloom's R&R in full. Defendant's motion to dismiss is granted. *See* ECF

Nos. 24, 25. Plaintiff is granted leave to amend his complaint as it pertains to his breach of contract claim only. Plaintiff shall file his amended complaint on or before May 24, 2024. If Plaintiff fails to file an amended complaint on or before May 24, 2024, judgment shall enter, and this case shall be closed.

SO ORDERED.

Dated: Brooklyn, New York
April 24, 2024

s/
HECTOR GONZALEZ
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ONWY UZOIGWE,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, LLC,

Defendant.

ORDER
23 CV 7383 (HG)(LB)

BLOOM, United States Magistrate Judge:

Plaintiff moves to vacate the Report the Recommendation ("R&R") entered on March 18, 2024 pursuant to Federal Rules of Civil Procedure 60(a) and 60(b) ("Fed R. Civ. P."). ECF No. 48.

Plaintiff maintains the exhibits attached to his opposition papers were not correctly docketed. Id. at 1–2 ("For instance, Exhibit H is attachment #3 but should be attachment #10."). Plaintiff notes the R&R refers to various exhibits in his opposition, and thus

he seeks an "opportunity to present the correct documentation which is missing." Id. at 2.

Under Rule 60(a), the Court may "correct a clerical mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). However, the purpose of Rule 60(a) is "not to reflect a new and subsequent intent of the Court, but to conform the order to the contemporaneous intent of the Court." Wang v. Int'l Bus. Machines Corp., 839 F. App'x 643, 645–46 (2d Cir. 2021) (summary order) (citation and internal quotation marks omitted). The R&R is neither a judgment nor an order: it is a recommendation for Judge Gonzalez's consideration. As plaintiff may file his objections to the R&R, plaintiff's motion to vacate the R&R under Rule 60(a) is denied as without basis.

Plaintiff's motion under Rule 60(b) is likewise denied. Rule 60(b) only applies to "judgments that are

final." Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 541 (2d Cir. 1996). As the R&R is not a final judgment, Rule 60(b) does not apply.

To the extent that plaintiff believes certain exhibits are "missing" from the docket— specifically, the alleged "written policy [that] was supposed to be uploaded as Exhibit E"— plaintiff shall include that exhibit with his objections to the R&R. Plaintiff shall not include materials that were simply docketed out of order. The Court extends the time for plaintiff to file his objections to the R&R to April 5, 2024.

SO ORDERED.

Dated: March 27, 2024
Brooklyn, New York

s/
LOIS BLOOM
United States Magistrate Judge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ONWY UZOIGWE,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, LLC,

Defendant.

REPORT AND RECOMMENDATION
23 CV 7383 (HG)(LB)

BLOOM, United States Magistrate Judge:

Plaintiff Onwy Uzoigwe, proceeding *pro se*, commenced this employment-related action in New York Supreme Court, County of Queens on August 23, 2023. Defendant Charter Communications, LLC d/b/a Spectrum (hereinafter "Charter") thereafter removed the action invoking the Court's diversity jurisdiction.[1] ECF No. 1. Plaintiff alleges defendant wrongfully terminated his employment with

[1] The case was initially removed to the Southern District of New York, which transferred the action to this District.

Charter and brings New York State law claims for breach of contract and negligence, and a retaliation claim under the New York City Administrative Code ("N.Y.C. Admin. Code"). Compl. ¶¶ 32–40 [ECF No. 1-1]. Defendant now moves to dismiss the claims against it pursuant to Federal Rule of Civil Procedure 12(b)(6). The Honorable Hector Gonzalez referred defendant's motion to me for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). For the reasons set forth below, it is respectfully recommended that defendant's motion to dismiss the complaint should be granted.

BACKGROUND

For the purposes of defendant's motion to dismiss, all well-pleaded allegations in plaintiff's complaint are taken as true and all inferences are drawn in his favor.[2] ECF No. 1-1.

[2] The Court also considers documents "attached to the complaint," "incorporated by reference in the complaint," or "integral to the complaint[,]" United States ex rel. Foreman v.

Plaintiff was employed as a field technician by Charter from November 15, 2015, to on or around January 18, 2020. Compl. ¶¶ 1, 16, 21.[3] During his employment, plaintiff was a member of Local Union No. 3 IBEW (hereinafter "Local 3"). Id. ¶ 2. On March 28, 2017, Local 3 went on strike. Id. ¶ 5. Plaintiff initially took part in the strike but returned to work on a full-time basis on November 17, 2017. Id. ¶¶ 6–9.

Upon his return to work, Charter provided plaintiff a letter confirming his "permanent assignment" as a field technician. Id. ¶ 10. The letter states, "Your assignment is permanent so that you will continue in that assignment through and after

AECOM, 19 F.4th 85, 106 (2d Cir. 2021) (citations and internal quotation marks omitted), as well as factual allegations made in plaintiff's papers opposing the motion to dismiss, Walker v. Schult, 717 F.3d 119, 122 n.1 (2d Cir. 2013) (considering "further" allegations made in *pro se* plaintiff's affidavit opposing defendants' motion to dismiss).

[3] Unless noted otherwise, the paragraph numbers cited herein refer to the numbered paragraphs in the complaint's "Background" section, beginning at ECF No. 1-1 at 5.

the end of the strike by Local 3, and you will not be displaced by the returning strikers at the end of the strike." Letter dated November 17, 2017 ("2017 letter"), Ex. A [ECF No. 1-1 at 15–16]. Plaintiff signed the letter. Compl. ¶ 10. At the onboarding meeting that same day, plaintiff alleges he asked Charter's Area Vice President and head of onboarding, Wajeeha Aziz, a question about "job security," to which Aziz stated, "there is a six-step process before termination." Id.; see also Plf.'s Aff. ¶ 3 [ECF No. 39-1].

Plaintiff continued to work for defendant for over two years. Compl. ¶¶ 11–15. Plaintiff alleges that throughout that time, he maintained the requisite skills and experience to qualify him for his position and received no written warnings or discipline. Id. ¶ 4 ("Statement of Facts" section), ¶ 34 ("Background" section). Nevertheless, on January 7, 2020, Charter called plaintiff into a meeting and

questioned him about allegedly stealing a meter and going to his home "while on the clock during his scheduled shift." Def.'s Mem. of Law at 4 [ECF No. 25]; see also Compl. ¶¶ 16–18. Plaintiff stated that he went to his home "to use the bathroom," which Charter stated violated company policy. Compl. ¶¶ 18, 21. Charter terminated plaintiff on January 18, 2020. Id.¶ 21; see also Def.'s Mem. of Law at 4.

Plaintiff applied for New York State Unemployment Benefits ("UB"), which were initially denied but awarded on plaintiff's appeal. Compl. ¶¶ 26, 28. At his UB appeal hearing, plaintiff testified that Charter had a "six-step process" for terminations and that in terminating plaintiff, defendant had "jumped" from step one to step six. Id. ¶ 27. The UB decision entered on June 15, 2020 found that plaintiff "was advised he was discharged because he had gone home to use the bathroom[,]" and that plaintiff's

conduct did "not establish disqualifying misconduct" for purposes of denying him unemployment benefits. UB Decision, Ex. C [ECF no. 1-1 at 20].

In May 2023, plaintiff decided to bring a wrongful termination lawsuit after "scrolling through pictures on his phone and [finding] a picture [he had taken] of the contract he [had] signed" with Charter.[4] Compl. ¶ 30. On August 23, 2023, plaintiff filed the instant complaint. ECF No. 1. Plaintiff seeks back pay and other compensatory damages, as well as injunctive relief. Compl. ¶ 40.

PROCEDURAL HISTORY

Plaintiff filed his complaint in New York Supreme Court, Queens County. ECF No. 1. Defendant removed the action to the Southern District of New York on diversity grounds. Id. The case was transferred to this District on October 3, 2023. Plaintiff moved to remand the case to state

[4] Plaintiff refers to the 2017 letter as the contract.

court on October 6, 2023. ECF No. 10. The Court denied the motion. ECF No. 26; see also ECF Order dated December 4, 2023 (denying plaintiff's motion for reconsideration at ECF No. 29); ECF Order dated December 8, 2023 (denying plaintiff's motion for reconsideration at ECF No. 32).

Defendant now moves to dismiss the complaint. Def.'s Mot. [ECF No. 24]. Plaintiff opposes the motion, Plf.'s Opp. [ECF Nos. 38–39], and defendant has replied. Def.'s Reply [ECF No. 41].

LEGAL STANDARD

Defendant moves to dismiss the claims against it pursuant to Rule 12(b) of the Federal Rules of Civil Procedure "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); Def.'s Mem. of Law at 12. On a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all factual allegations in the complaint as

true and draw all reasonable inferences in the plaintiff's favor. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). However, "the 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). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A plaintiff must allege facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). If a plaintiff does not "nudge[] their claims across the line from conceivable to plausible, [the] complaint must be dismissed." Twombly, 550 U.S. at 570.

In deciding a motion to dismiss, the Court has the "obligation to construe *pro se* complaints

liberally, even as [it] examine[s] such complaints for factual allegations sufficient to meet the plausibility requirement." Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011) (citation omitted): "It is well-established that the submissions of a *pro se* litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest." Meadows v. United Servs., Inc., 963 F.3d 240, 243 (2d Cir. 2020) (citation omitted); see also Littlejohn v. City of New York, 795 F.3d 297, 306 (2d Cir. 2015) ("On a motion to dismiss, all factual allegations in the complaint are accepted as true and all inferences are drawn in the plaintiff's favor." (citation omitted)). In addition to the complaint, the Court may consider documents attached to the complaint, incorporated by reference therein, or that the complaint "relies heavily upon" and are "integral" to the complaint. Foreman, 19 F.4th at 106 (quoting DiFolco v.

MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010). The Court may also consider "factual allegations made by a *pro se* party in his papers opposing the motion" to dismiss. Antrobus v. City of New York, No. 19-CV-6277, 2021 WL 848786, at *3 (E.D.N.Y. Mar. 5, 2021)[5] (citing Walker, 717 F.3d at 122 n.1).

DISCUSSION

I. Retaliation and Negligence Claims

Defendant seeks to dismiss plaintiff's retaliation and negligence claims, arguing that these claims are time barred. "Where jurisdiction rests upon diversity of citizenship, a federal court" must apply the statutes of limitations of the forum state. Stuart v. Am. Cyanamid Co., 158 F.3d 622, 626 (2d Cir. 1998) (citing Guar. Tr. Co. v. York, 326 U.S. 99, 108–09 (1945)). New York State's statutes of limitations apply for both plaintiff's

[5] The Clerk of Court is respectfully directed to send plaintiff the attached copies of all the unreported cases cited herein.

retaliation and negligence claims.

Plaintiff brings his negligence claim "on grounds of personal injury due to defendant's unjust termination" of his employment.[6] Compl. ¶ 40. Under New York State law, a personal injury claim based on negligence is subject to a three-year statute of limitations. New York Civil Practice Law and Rules ("CPLR") § 214(4); see also Spinnato v. Unity of Omaha Life Ins. Co., 322 F. Supp. 3d 377, 391 (E.D.N.Y. 2018) ("According to section 214 of the [CPLR], the statute of limitations for a negligence claim is three years."). Such a claim "accrues upon the date of injury...even if the plaintiff is unaware that he or she has a cause of action at the time of injury[.]" Kampuries v. Am. Honda Motor Co., 204 F. Supp. 3d 484, 490–91

[6] Plaintiff cites to New York's comparative negligence statute, CPLR § 1411, which pertains to "recovery of damages when contributory negligence or assumption of risk is established." Compl. ¶ 40. This statute is inapposite to plaintiff's claims. The Court therefore construes plaintiff's negligence claim as arising under New York common law.

(E.D.N.Y. 2016) (citations, internal quotation marks, and alterations omitted). Here, plaintiff's claim accrued on January 18, 2020, the date plaintiff was terminated by defendant.[7] Thus, plaintiff had until January 18, 2023 to file his claim. As plaintiff did not commence this action until August 23, 2023, his negligence claim is time barred.

Plaintiff's retaliation claim is also time barred. Plaintiff brings his retaliation claim pursuant to New York City's Temporary Schedule Change Law, N.Y.C. Admin. Code § 20-1262. Under New York City law, the statute of limitations for a retaliation claim is two years from the date plaintiff "knew or should have known of the alleged violation." Compl.

[7] The injury alleged in this action is plaintiff's wrongful termination, and thus the date of accrual is the date plaintiff's employment ended, not the date he stopped receiving unemployment benefits, as plaintiff incorrectly states. See Plf.'s Mem. of Law at 10 [ECF No. 39]; see also Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994) (("[T]he proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act becomes painful.") (quoting Chardon v. Fernandez, 454 U.S. 6, 8 (1981)) (emphasis in original)).

¶ 37; N.Y.C. Admin. Code § 20-1211. Again, plaintiff's claim accrued on the date of his termination, January 18, 2020. On that date, he knew or should have known that his termination may have been retaliatory. Accordingly, the statute of limitations for plaintiff's retaliation claim expired on January 18, 2022, and his retaliation claim is time barred.

Plaintiff argues that his negligence and retaliation claims were equitably tolled. This Court disagrees. Plaintiff alleges that he "forgot all about" the 2017 letter[8] and only "checked to see" if he could bring this action after finding a photo of the letter on his phone in May 2023. Compl. ¶¶ 30–31. However, plaintiff's alleged discovery of the 2017 letter on his phone does not toll the accrual of

[8] Plaintiff also alleges that the 2017 letter was a "contract giving [plaintiff] a permanent assignment" with defendant and thus forms the basis for his claims. Compl. ¶¶ 10 n.1, 30; see also Plf.'s Mem. of Law. at 15.

either of plaintiff's claim. Keitt v. N.Y.C., 882 F. Supp. 2d 412, 437 (S.D.N.Y. 2011) (rejecting plaintiff's argument that his claims accrued at the time of "discovery that he had grounds for such a suit" because accrual "does not depend on plaintiff's knowledge of the law, but rather on a plaintiff's knowledge of the injury." (citation, internal quotation marks, and alterations omitted)); see also Kantor-Hopkins v. Cyberzone Health Club, No. 06-CV-643, 2007 WL 2687665, at *7 (E.D.N.Y. Sep. 10, 2007) ("*[P]ro se* status and ignorance of the law do not merit equitable tolling" of the statute of limitations (citation and internal quotation marks omitted)).

The Court is likewise unpersuaded by plaintiff's argument that various New York State Executive Orders ("EOs")[9] enacted during the

[9] Plaintiff cites "Exhibit F" as the EO supporting his argument. Plf.'s Mem. of Law at 10. However, Exhibit F is a memorandum and order from March 2016, which does not include or refer to any EO issued by New York State in 2020. See Plf.'s Opp, Ex. F [ECF No. 39-9].

COVID-19 pandemic "added 228 days" to the applicable statutes of limitations here. Plf.'s Mem. of Law at 10 [ECF No. 39]. On March 7, 2020, Governor Cuomo issued Executive Order 202.8 declaring that, "[i]n accordance with the directive...to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement...of any legal action...is hereby tolled from the date of this executive order until April 19, 2020." New York State Executive Order 202.8. This EO was extended by "a series of nine subsequent [EOs]," with the last extension ending on November 3, 2020, for a total period of 228 days. Barry v. Royal Air Maroc, No. 21-CV-8481, 2022 WL 3215050, at *4 (S.D.N.Y. July 8, 2022), report and recommendation adopted, No. 21-CV-8481, 2022 WL 3214928 (S.D.N.Y. Aug. 9, 2022) (citation and internal quotation marks omitted).

While some courts strictly interpret the word 'toll' in EO 202.8 to mean a 228-day extension on limitations periods for *all* claims, see, e.g., Bell v. Saunders, No. 20-CV-256, 2022 WL 2064872, at *5 (N.D.N.Y. June 8, 2022) (finding the plaintiff's claim was tolled for 228 days), most courts, including in this District, have found that EO 202.8 and subsequent EOs *only* applied to limitations periods for claims that would have otherwise expired during the time when these EOs were in effect, between March 20, 2020 and November 3, 2020 (the "emergency period").[10] See Loeb v. Cnty. of

[10] Some courts define this distinction as a 'suspension' rather than a 'toll' of the limitations period. Barry, 2022 WL 3215050, at *4 ("A number of New York courts have held that EO 202.8 'suspended' rather than 'tolled' the time period to which it applied, and thus extended limitations periods that would otherwise have expired *between* March 3, 2020 and November 3, 2020, but did not lengthen periods that expired *after* November 3, 2020." (citation omitted)). Other courts define 'suspension' as a "delay" of the "expiration of the time period *until* the end date of the suspension[,]" such that any claims expiring during the suspension must be filed immediately after the end of the suspension period. Brash v. Richards, 195 A.D.3d 582, 582–83, 585 (2d Dep't 2021) (finding that the appellant's appeal was timely, as New York's EOs *tolled* rather than *suspended* "filing deadlines...until November 3, 2020."). Whether 'suspension' or 'toll' or 'extension' is the more appropriate term for defining the effect of these EOs, the result here is the same: plaintiff's claims were untimely filed. The EOs "merely

Suffolk, No. 22-CV-6410, 2023 WL 4163117, at *3 (E.D.N.Y. June 23, 2023) (finding plaintiff's claims did not expire during the emergency period and thus his claims were time barred); see also Barry, 2022 WL 3215050, at *4 (("A number of New York courts have held that [EO] 202.8...extended limitations periods that would otherwise have expired *between* March 3 and November 3, 2020, but did not lengthen periods that expired *after* November 3, 2020.") (emphasis in original)). This Court adopts the majority view of these EOs and their effect on limitations periods that expired during the emergency period.

Accordingly, because plaintiff's retaliation and negligence claims did not expire during the emergency period, any tolling under EO 202.8 and subsequent EOs does not apply. While the Court

stopped the running of any applicable period of limitations for the 228 day period of time between March 3, 2020 and November 3, 2020. Contrary to plaintiff's claims, the executive orders did not extend everyone's statute of limitations period for an additional 228 days." Cruz v. Guaba, 74 Misc. 3d 1207(A) (N.Y. Sup. Ct. 2022).

acknowledges the "difficulty that Covid caused" for plaintiff, Plf.'s Mem. of Law at 9, the purpose of these EOs was to "preserve litigants' rights" during a time when courthouses were closed to all but essential matters, and litigants faced "extraordinary difficulties" in accessing the courthouse and "utilizing courthouse services" as a result. Loeb, 2023 WL 4163117, at *3. The EOs did not "provide an unwarranted windfall to [all] litigants." Id.

In sum, because plaintiff did not file the instant complaint until August 23, 2023, defendant's motion to dismiss plaintiff's retaliation and negligence claims should be granted, as these claims are time barred.

II. Breach of Contract Claim

Defendant seeks to dismiss plaintiff's breach of contract claim, arguing that the 2017 letter that plaintiff signed and the "verbal assurances" he

received from Area Vice President Aziz do not, taken together, constitute a valid employment contract. Defendant further argues that even if plaintiff could allege the existence of a contract, plaintiff remained an at-will employee. Def.'s Mem. of Law at 1–2, 7. Plaintiff alleges that he "had a contract with [defendant] that stated his position was permanent" and that defendant breached the alleged contract by terminating him without "good cause." Compl. ¶ 35.

To allege a breach of contract claim under New York Law, plaintiff must demonstrate "(1) the existence of a contract, (2) performance by [plaintiff as] the party seeking recovery, (3) nonperformance by [defendant], and (4) damages attributable to the breach." Kramer v. N.Y.C. Bd. of Educ., 715 F. Supp. 2d 335, 356 (E.D.N.Y. 2010) (quoting RCN Telecom Servs., Inc. v. 202 Centre St. Realty LLC, 156 F. App'x 349, 350–51 (2d Cir. 2005) (summary

order)). New York is an "employment-at-will" state,[11] and thus employees hired for an indefinite or unspecified term are "presumed to be at will" and their employment "freely terminable by either party at any time without cause or notice." Brown v. Daikin America Inc., 756 F.3d 219, 231 (2d Cir. 2014) (citation omitted). An at-will-employment relationship is "indisputably...contractual in nature" in that the employee agrees to perform services for the employer in exchange for compensation. Pierre v. Cap. One Fin. Corp., No. 21-CV-30, 2022 WL 801321, at *5 (E.D.N.Y. Mar. 16, 2022), appeal dismissed sub nom. Pierre v. Fairbank, No. 22-794, 2022 WL 2677364 (2d Cir.

[11] Plaintiff states in a footnote that "permanent employment" is employment that continues "indefinitely and until either party wishes to sever relation for some good reason." Compl. ¶ 35 n.4. In support of this statement, plaintiff cites a decision from a state court in California. California case law is irrelevant to this Court's analysis. Furthermore, while New York City recently enacted a "Wrongful Discharge Law" protecting "employees of large fast-food chains in New York City from arbitrary terminations and reductions in hours," New York State is otherwise an "at-will employment" state. Rest. L. Ctr. v. City of New York, 90 F.4th 101, 105 (2d Cir. 2024) (upholding the City law as constitutional).

July 6, 2022) (quoting Hartzog v. Reebok Int'l Ltd., 77 F. Supp. 2d 478, 479 (S.D.N.Y. 1999)).

Here, plaintiff alleges that Charter employed him to work as a field technician in November 2015. Compl. ¶ 1. He alleges that after participating in Local 3's strike from March 2017 to November 2017, he resumed working for Charter on a full-time basis from November 17, 2017 until his termination in January 2020. Id. ¶¶ 1, 5–6, 9, 21. Taking plaintiff's allegations as true, as the Court must on a motion to dismiss, the question is not whether a valid employment contract existed between the parties, but whether there were terms included in the contract that "establish[ed] an express limitation" on defendant's "right to terminate at will." Hodge v. Abaco, LLC, 825 F. App'x 46, 47 (2d Cir. 2020) (summary order) (citation and internal quotation marks omitted).

To rebut the presumption of at-will

employment at the motion to dismiss stage, a breach of contract claim[12] must allege that "(1) an express written policy limiting the employer's rights of discharge exists, (2) the employer (or one of its authorized representatives) made the employee aware of this policy, and (3) the employee detrimentally relied on the policy in accepting or continuing employment." Baron v. Port Auth. of New York & New Jersey, 271 F.3d 81, 85 (2d Cir. 2001) (citation omitted); cf. Stamelman v. Fleishman-Hillard, Inc., No. 02-CV-8318, 2003 WL 21782645, at *4 (S.D.N.Y. July 31, 2003) (stating that to rebut the presumption of at-will employment, an employee must show they "(1) [were] orally assured that the prospective employer

[12] In addition to a wrongful termination claim based on a breach of contract, an at-will employee may bring a claim for wrongful termination if they can show there was "a constitutionally impermissible purpose" or "a statutory proscription" regarding their termination. Lauture v. Int'l Bus. Machines Corp., 216 F.3d 258, 262 (2d Cir. 2000). Plaintiff's complaint does not allege that his termination was unconstitutional or that there was a statute limiting his termination by defendant.

only fired for just cause; (2) signed an employment application that incorporated the oral assurance; (3) rejected other offers of employment in reliance on the assurance; and (4) [were] instructed to proceed in strict compliance with the express employer policy...that employees be discharged only for just cause." (citing Weiner v. McGraw-Hill Inc., 57 N.Y. 2d 458, 465–66 (1982))). "[T]his is a difficult pleading burden[,]" and the "mere existence of a written policy" or "oral assurances with only general provisions" in the written policy do not give rise to a breach of contract claim. Baron, 271 F.3d at 85 n.2 (citations and internal quotation marks omitted).

Here, the 2017 letter does not constitute a written express policy limiting plaintiff's at-will employment status. The letter states that plaintiff's assignment was "permanent...through and after the end of the strike by Local 3." 2017 Letter [ECF No.

1-1 at 16]. This wording suggests that plaintiff's employment after the strike was for "an indefinite or unspecified term" and thus presumably at-will. Brown, 756 F.3d at 231. Moreover, given plaintiff signed the letter in the middle of a union strike, it is worth noting that an offer of "permanent" employment during a strike has been interpreted by the Supreme Court as "permit[ting] the employer who prevails in [the] strike to keep replacements [it] has hired" *at the strike's conclusion.* Belknap, Inc. v. Hale, 463 U.S. 491, 492–93 (1983) ("Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally."). Nothing in the caselaw suggests that replacement workers hired during a strike maintain their employment for a "lifetime indefinite duration." Plf.'s Mem. of Law at 6.

Thus, the 2017 letter, standing alone, does not rebut the presumption that plaintiff's employment was at-will. Plaintiff does not identify any other written express policy rebutting this at-will presumption. Indeed, plaintiff's opposition includes an "offer of employment" letter from defendant, dated February 15, 2019, that more clearly states, "[Charter] may terminate your employment at any time for any reason not prohibited by law or the collective bargaining agreement between [Charter] and the union, with or without notice." Plf.'s Opp, Ex. H [ECF No. 39-3 at 8]. Plaintiff also includes pages from a collective bargaining agreement ("CBA") between defendant and Local 3, though the CBA appears to have been in effect from 2009 to 2013 and likely not relevant to plaintiff's claim.[13]

[13] The CBA states, *inter alia*, that "nothing contained in this [CBA] shall be construed as a limitation of the Company's right to discharge immediately any employee for inefficiency, insubordination or any other just cause, subject to the right of the Union to demand arbitration as provided for herein" and that "in the event of the discharge... of any employee, the Company will notify the Business Representative of the

Plf.'s Opp., Ex. A [ECF No. 39-4 at 18–51]. Even if a CBA were in effect at the time of plaintiff's termination, plaintiff does not allege how the CBA's provisions might have applied to the terms of his individual employment.[14] Plaintiff's complaint fails to allege that the CBA or some other express writing limited Charter's right to discharge an employee, such that plaintiff could only be terminated for good cause.

Similarly, the oral assurance of a "six-step process" by Vice President Aziz, standing alone, does not modify plaintiff's at-will status. Plaintiff does not point to any express written policy

Union or the Shop Steward for the purpose of holding a hearing." Plf's Opp., Ex A [ECF No. 39-4 at 30].

[14] "[C]laims that require interpretation of the CBA are preempted by federal labor law and treated as § 301 claims" under the Labor Management Relations Act ("LMRA"). Lever v. Entergy Nuclear Operations Inc., No. 15-CV-3327, 2016 WL 1627619, at *2–3 (E.D.N.Y. Apr. 22, 2016) (finding plaintiff's breach of contract claim involved "interpretation of rights and responsibilities" under a CBA and thus was preempted by the LMRA). If plaintiff's breach of contract claims were subject to interpretation of the CBA, it would likely be preempted by Section 301 of the LMRA and thus subject to Section 301's six-month statute of limitations. Id. at *4 (dismissing with prejudice plaintiff's LMRA § 301 claim as time barred).

incorporating Aziz's assurance into plaintiff's employment contract. See Stamelman, 2003 WL 21782645, at *4 (S.D.N.Y. July 31, 2003) (finding employer's general assurances insufficient to "transform an employment at will to a contract of permanent employment."). Furthermore, plaintiff's testimony at his UB appeal hearing about "a six-step process" is irrelevant. The hearing was limited to the question of whether plaintiff was entitled to *unemployment benefits* and has no bearing on whether plaintiff has sufficiently alleged a breach of contract claim in this case.[15] See N.L.R.B. v.

[15] The Court understands plaintiff's misunderstanding regarding the significance of the UB decision. Plaintiff was initially denied unemployment benefits at a clearly terrible time for him, and in his words, based on a "pretext[:]" because he was suspected of stealing a meter. Compl. ¶ 38. It does not appear that defendant gave plaintiff a hearing or an opportunity to be heard regarding its suspicion of the stolen meter. Instead, eleven days later, defendant summarily terminated plaintiff for going home during his shift to use the bathroom. Compl. ¶ 21. Plaintiff had already "made a manager [] aware" of stomach issues he was having in November 2019, and the time he spent "going home to use the bathroom" from November to January 2020. Id. ¶ 38. Nevertheless, when plaintiff applied for UB, defendant "tri[ed not] to allow his unemployment claim." Id. ¶ 29. Only on appeal six months later did the administrative judge find that plaintiff's "actions did not rise to the level of a qualifying misconduct." Id. ¶ 34. Plaintiff thus had to wait more than six months during a global pandemic to receive

Kathleen's Bakeshop, LLC, No. 02-4673, 2003 WL 22221353, at *1 (2d Cir. Sept. 26, 2003) (summary order) (holding that a determination by New York's unemployment appeals board was irrelevant to the court's decision of whether plaintiff was wrongfully discharged).

It is not for the Court to decide whether on this record, defendant's purported reason for plaintiff's termination was justified or appropriate. Plaintiff's complaint fails to identify any express written policy, or oral assurance incorporated into a written policy, that would create an "implied-in-fact agreement" altering plaintiff's at-will employment status. See Hunter v. Kaufman Enterprises, Inc., No. 09-CV-5540, 2011 WL 3555809, at *5 (E.D.N.Y. Aug. 8, 2011) (finding plaintiff was an at-will employee and dismissing his breach of contract claim). Without any express contractual limitation

unemployment benefits.

altering plaintiff's at-will employment status, plaintiff cannot state a breach of contract claim. Plaintiff's allegations and attached filings, even considered together and liberally construed, fail to rebut the presumption of employment-at-will. Plaintiff therefore fails to state a plausible claim for breach of contract. Accordingly, the Court should grant defendant's motion to dismiss.

III. Leave to Amend

The Court is mindful that although leave to amend a complaint should be "freely given when justice so requires" under Rule 15(a), it is not always appropriate. Williams v. Citigroup, Inc., 659 F.3d 208, 213–14 (2d Cir. 2011) (per curiam). Specifically, the Court should deny leave to amend when it would be, among other reasons, futile. See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002) (noting that leave to amend may be denied for undue delay, bad

faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of amendment). Leave to amend is futile where a plaintiff cannot, in good faith, "address the deficiencies identified by the court and allege facts sufficient to support the claim." Panther Partners Inc. v. Ikanos Commc'ns, Inc., 347 F. App'x 617, 622 (2d Cir. 2009) (summary order) (citing Joblove v. Barr Labs., Inc., 466 F.3d 187, 220 (2d Cir. 2006)).

Because plaintiff's retaliation and negligence claims are time barred, any amendment to those claims would be futile. Therefore, I respectfully recommend that leave to amend should be denied as to those claims. Although it seems like a very unlikely long-shot, I recommend that plaintiff's breach of contract claim should be dismissed without prejudice with leave to amend. See Ahlers v. Rabinowitz, 684 F.3d 53, 66 (2d Cir. 2012) (noting that a *pro se* plaintiff should be granted

"leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." (citation and internal quotation marks omitted)). If this Report is adopted, plaintiff should be given thirty (30) days to file an amended complaint regarding his breach of contract claim.

CONCLUSION

Accordingly, I respectfully recommend that defendant's motion to dismiss plaintiff's complaint should be granted for the reasons stated above.

FILING OF OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file

objections must be made within the fourteen-day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physician's Health Plan, Inc., 293 F.3d 42 (2d Cir. 2002); Small v. Sec'y of Health & Human Servs., 892 F.2d 15 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED.

s/
LOIS BLOOM
United States Magistrate Judge

Dated: March 18, 2024
Brooklyn, New York

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