UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BRADFORD APPLEGATE,
Plaintiff,

v.

ANTHONY J. ANNUCCI; TINA M. STANFORD; HEATHER RUBINSTEIN; MICHAEL G. HAYES; BRADFORD H. KENDALL; APRILANNE AGOSTINO,
Defendants.
--x

OPINION AND ORDER

16 CV 2187 (VB)

Briccetti, J.:

Plaintiff Bradford Applegate, proceeding pro se and in forma pauperis, brings this action under 42 U.S.C. §§ 1981, 1983, and 1985, and 28 U.S.C. § 2201, alleging he was denied parole in violation of his constitutional rights—because he is white, because he was convicted of "depraved indifference murder," and because he was subjected to vague or improperly applied state laws, regulations, and parole release criteria—then was unlawfully impeded in his attempts to obtain records pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. L. §§ 84-90 ("FOIL"), and was further unconstitutionally obstructed in challenging the denial of parole in New York State courts.

Now pending is (i) a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure filed by defendants, New York State officials, Anthony J. Annucci, Acting Commissioner of the Department of Corrections and Community Supervision ("DOCCS"); Tina Stanford, Chairwoman of the New York State Board of Parole ("Parole Board"); Heather Rubinstein, Assistant Attorney General in the Office of the Attorney General of the State of New York; Michael G. Hayes, Principal Court Attorney for Justice Peter M. Forman, Acting Justice of the Supreme Court of the State of New York, County of Dutchess;

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and Aprilanne Agostino, Clerk of Court for the Appellate Division of the Supreme Court of the State of New York, Second Department (collectively, "state defendants") (Doc. #45); and (ii) a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) filed by defendant Bradford H. Kendall, the Dutchess County Clerk (Doc. #39).

For the reasons set forth below, defendants' motions are GRANTED.

The Court has jurisdiction under 28 U.S.C. § 1331.

BACKGROUND

I. Factual Allegations

For purposes of ruling on a motion to dismiss, the Court accepts all factual allegations of the complaint as true, and draws all reasonable inferences in plaintiff's favor.[1]

Following a jury trial in 1989, plaintiff was convicted of murder in the second degree for beating a twenty-two year old woman to death and then disposing of her remains in the Hudson River. Plaintiff was also convicted of criminal mischief in the third degree for vandalizing a motel room, criminal impersonation in the second degree for using another person's Medicaid card to seek medical treatment, and forgery in the third degree for forging hospital records. Plaintiff was sentenced to twenty-five years to life imprisonment on the murder conviction; one and one-third to four years imprisonment on the criminal mischief conviction, to run consecutively to his sentence on the murder conviction; and concurrent one year periods of imprisonment on the criminal impersonation and forgery convictions.

[1] In addition to plaintiff's complaint (Doc. #2), the Court has reviewed and considered plaintiff's other voluminous submissions, including an application for an order to show cause for a preliminary injunction and a temporary restraining order (Doc. #4), a motion for class certification (Doc. #6), a motion for reconsideration of the Court's Order dated May 5, 2016 (Doc. #12), denying plaintiff's application for an order to show cause and motion for class certification (Docs. ##14, 15), plaintiff's opposition to defendant Kendall's motion to dismiss (Docs. ##55, 56), plaintiff's opposition to the state defendants' motion to dismiss (Docs. ##61, 62), and plaintiff's sur-reply in further opposition to the motions to dismiss (Doc. #68).

Plaintiff has been in DOCCS's custody since at least 1989, and has been serving his sentences since that time. At all times relevant to this action, plaintiff has been incarcerated at Fishkill Correctional Facility, which is located in Dutchess County.

On September 16, 2014, plaintiff had his first interview with the New York State Parole Board. Plaintiff claims the Parole Board rushed through the interview, deliberately failed to review plaintiff's sentencing minutes, and subsequently edited derogatory comments from the interview transcript. Plaintiff received a "boilerplate" parole denial two days later, citing, among other things, plaintiff's crimes of conviction, prior criminal record, COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) risks and needs assessment, rehabilitative efforts, parole plans, letters of support, poor disciplinary record, remorse, significant community opposition to plaintiff's release, "and all other factors required by law." (Pl. Decl. Ex. H (Doc. #61)).

Plaintiff then submitted a FOIL request to the Fishkill Parole Office requesting, among other things, the community opposition letters cited by the Parole Board, a purported prosecutor's opposition letter, and a redacted list of inmates whose parole proceedings had been postponed on the day of plaintiff's parole interview due to those inmates' sentencing minutes not being available. Plaintiff also submitted a FOIL request to obtain the "stenographic medium" from his Parole Board interview in order to have it "properly" transcribed. (Compl. ¶ 47). Both of plaintiff's FOIL requests were denied.

In October 2014, plaintiff filed an administrative appeal of the Parole Board's decision. Plaintiff's administrative appeal was not answered within the prescribed statutory time period, and, accordingly, plaintiff filed a N.Y. C.P.L.R. Article 78 petition in Supreme Court, Dutchess

County, in April 2015. See Applegate v. Annucci & Stanford, Index No. 1289/2015 (N.Y. Sup. Ct.).

According to a decision, order and judgment of Justice Peter M. Forman, dated September 18, 2015, on his Article 78 petition, plaintiff claimed the Parole Board's denial of his application for release to parole must be annulled because the Board failed to promulgate "written procedures" before rendering that determination, as required by a 2011 Amendment to N.Y. Executive Law Section 259-c(4). The state court rejected plaintiff's argument and found the Parole Board properly incorporated a COMPAS risks and needs assessment as required by N.Y. Executive Law Sections 259-c(4) and 259-i(2)(c)(A). The court also found the Board properly considered plaintiff's parole application in compliance with the written procedures set forth in the October 5, 2011, Memorandum from former Chairwoman Andrea Evans, as further required by N.Y. Executive Law Sections 259-c(4) and 259-i(2)(c)(A). The court rejected plaintiff's argument that the Board improperly denied his parole application based solely on the facts underlying his crime of conviction. Noting a "parole denial may be set aside only when the determination to deny the petitioner release on parole evinced irrationality bordering on impropriety," the court found the Parole Board's decision was neither arbitrary nor capricious, and there was no evidence the Board's determination was irrational to the point of bordering in impropriety. Applegate v. Annucci, Index No. 1289/2015 (N.Y. Sup. Ct. Sept. 21, 2015) (Keane Decl. Ex. A at 2) (internal quotation marks omitted).

Following the dismissal of his Article 78 petition, plaintiff filed a motion for reargument, contending Justice Forman had misconstrued the facts and misapplied the law. Plaintiff also sought Justice Forman's recusal, claiming he was biased against plaintiff, had colluded with the Office of the New York Attorney General, and was attempting to interfere with plaintiff's appeal

from the September 18, 2015, decision and order.[2] Noting there was no evidence of bias or misconduct, Justice Forman declined to recuse himself.

At some point after receiving Justice Forman's September 18, 2015, decision, plaintiff requested a copy of the "docket sheet" from his Article 78 proceedings from defendant Hayes. (Compl. ¶ 62). Hayes forwarded plaintiff's request to the Dutchess County Clerk, who provided plaintiff with an "abbreviated listing" of the docket. (Id. ¶ 63).

Plaintiff had moved to reargue Justice Forman's September 18, 2015, decision on various grounds, and was granted reargument based on the fact that the Board's decision referred to "significant community opposition" to plaintiff's release, which had not been made part of the record. (Keane Decl. Ex. D at 7).

On October 7, 2015, while his motion for reargument was still pending before Justice Forman, plaintiff filed a notice of appeal to the Appellate Division, Second Department, appealing Justice Forman's September 18, 2015, decision and order. Plaintiff's notice of appeal was addressed to the Chief Clerk of the Dutchess County Court, and sought to proceed by way of the appendix method. Plaintiff intended to argue on appeal, among other things, that Justice Forman failed to address a number of the issues plaintiff presented in his Article 78 petition.

Plaintiff sought to subpoena the record on appeal by mailing a subpoena to defendant "Michael G. Hayes, Esq., Chief Clerk," and sending a courtesy copy to the Appellate Division, Second Department. (Compl. ¶ 65).

Defendant Hayes, however, is not a "Chief Clerk," but rather is Justice Forman's principal court attorney. Accordingly, defendant Hayes returned plaintiff's subpoena to plaintiff.

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[2] Plaintiff sent a copy of his motion for reargument to the New York State Ninth Judicial District's Administrative Judge, requesting reassignment of such motion to another judge or judicial district, which request was denied, and another copy to the New York State Commission on Judicial Conduct.

Plaintiff wrote Hayes regarding the subpoena again on October 29, 2015, advising him "in the strongest possible terms to CEASE AND DESIST from interfering with [plaintiff's] perfection of [his] appeal." (Compl. ¶ 66).

Plaintiff received a letter dated October 20, 2015, from the Second Department Clerk's Office stating "our records indicate there is no appeal pending in this court under your name to date." (Compl. ¶ 66).

On November 6, 2015, plaintiff received a letter from "Chief Clerk Michael Thompson" advising plaintiff that "[t]he County Clerk is the office that maintains the 'docket' and is in possession of the physical file and all original papers." (Compl. ¶ 67). He also instructed plaintiff that "[a]ppeals should be filed at the County Clerk's office and should be filed with the appropriate fee. The Chief Clerk does not forward records on appeal or provide 'docket sheets.'" (Id.).

On November 9, 2015, plaintiff wrote "Principle Court Counsel/Clerk Michael G. Hayes," asking, "Where is my Notice of Appeal, and what have you done with it?" (Compl. ¶ 68). According to plaintiff, this letter detailed the "sordid litany of interference at the hands of Dutchess County Court and other clerks." (Id.). Plaintiff also sent similar letters to Dutchess County Clerk Bradford Kendall, Chief Clerk Michael Thompson, and the Chief Clerk of the Second Department. Six weeks later, defendant Hayes "assured" plaintiff that his notice of appeal was received by the County Clerk on October 21, 2015, and two copies were forwarded to the Appellate Division on that same day. (Id.).

On November 18, 2015, plaintiff again mailed his subpoena regarding the record on appeal to "Chief Clerk Michael Thompson" and "Dutchess County Clerk Bradford Kendall" and

provided a courtesy copy to the Appellate Division and the Attorney General of the State of New York.

In a letter postmarked November 2, 2015, defendant Hayes advised plaintiff that Hayes was "not the clerk of the court for the purposes of the Second Department's Rules." (Compl. ¶ 70). The letter also advised plaintiff that a subpoena for the record on appeal "must be directed to the Dutchess County Clerk, which is the clerk of the Supreme Court in this county, and the official repository of all documents and papers that were filed in this proceeding." (Id.). Because plaintiff had already served a subpoena on Dutchess County Clerk Kendall on November 11, 2015, plaintiff did not take any further action in response to Hayes' letter.

Around this same time period, plaintiff was advised his appeal in the Second Department was assigned index number 2015-11152.

On November 19, 2015, plaintiff was notified by the Second Department that if he believed he was indigent, he "may apply . . . to proceed on the appeal as a poor person, which would include using the original papers instead of a record or appendix, and a waiver of the payment of the filing fee." (Compl. ¶ 71). On or around December 5, 2015, plaintiff applied for such relief and included his November 2015 monthly statement from his inmate account with his application to demonstrate he did not possess the court's $315 filing fee. (Id.).

Near the end of 2015, plaintiff received a letter from defendant Kendall relating to the appeal of a different case: Earl Wright v. Annucci, 15/1289 and 15/3426. Plaintiff responded by writing "an extremely strong letter" to Kendall, accusing him, defendant Hayes, and Michael Thompson of interfering with his appeal "at the behest of and in collusion with" Justice Forman. (Compl. ¶ 73). Plaintiff's letter also inquired as to the status of his appeal and requested a listing of all correspondence regarding his case. Plaintiff sent copies of this letter to the New York

State Commission on Judicial Conduct, 9th Judicial District. Plaintiff also wrote Justice Forman demanding a ruling on his reargument motion, and "that he [c]ease and [d]esist from recruiting Dutchess County Court Clerks to interfere with the prosecution of his Second Department appeal." (Id. ¶ 73).

On January 7, 2016, plaintiff received a letter from the Dutchess County Clerk's Office acknowledging receipt of his December 23, 2015, letter. The letter enclosed a docket sheet for plaintiff's Article 78 proceeding, index number 15/1289, and a requisition slip indicating that on November 9, 2015, Justice Forman requested the 15/1289 case file and it was currently in his chambers. (Compl. ¶ 74). According to plaintiff, the docket sheet was incomplete and the fact that Justice Forman was holding his Article 78 proceeding file in his chambers provided evidence that Justice Forman was intentionally interfering with plaintiff's attempt to perfect his appeal, and that the "entire N.Y. State Government ha[d] BROKEN DOWN." (Id. ¶ 79).

By ruling dated January 22, 2016, Justice Forman adhered to his original decision that plaintiff's parole denial was not "irrational bordering on impropriety." Applegate v. Annucci, Index No. 1289/2015 (N.Y. Sup. Ct. Jan. 22, 2016) (Keane Decl. Ex. D at 7). According to plaintiff, Justice Forman's January 22, 2016, reconsideration decision was "more of the same" and did "not address ANY of Plaintiff's well-preserved issues proving such hearing's illegality." (Compl. ¶ 80). Plaintiff claims Justice Forman's reconsideration opinion demonstrates "he is obviously an advocate FOR not only DOCCS and BOP, but particularly the Attorney General's Office." (Id. ¶ 81).

By letter dated January 26, 2016, defendant Kendall informed plaintiff that in order to transmit the record on appeal to the Appellate Division, plaintiff must first pay a $20 fee and execute a subpoena duces tecum to the County Clerk as Clerk of the Court. The letter also

indicated if plaintiff could not afford the transfer fee, he must apply to the Appellate Division for "poor person status relieving [him] of the obligation to pay the fee." (Compl. ¶ 83).

Plaintiff responded to Kendall's January 26, 2016, letter, informing him that plaintiff would not pay a transfer fee, and that plaintiff had already served the subpoena.

By decision dated February 16, 2016, the Appellate Division granted plaintiff permission to proceed on the original record, but denied his poor person status request in all other respects, including a denial of a waiver of the court's $315 filing fee.

On February 17, 2016, plaintiff submitted a request to the Appellate Division, Second Department's Clerk of Court, defendant Aprilanne Agostino, requesting that the April 6, 2016, deadline to file his appellate brief be extended until the court granted his "soon-to-be-filed" motion for reargument seeking a waiver of the court's $315 filing fee, or until this Court issued an injunction ordering the Appellate Division to waive plaintiff's filing fee. (Compl. ¶ 92).

Simultaneously, plaintiff served Agostino with a FOIL request for (i) all records "revealing the criteria the Court uses in deciding Poor Person status generally;" (ii) "[t]he different criteria it uses in deciding Pro Se Prisoner Litigant Poor Person Status;" and (iii) "[t]he difference between the Second Department's evaluation of inmate Poor Person status, as compared to the other three (3) Appellate Divisions." (Compl. ¶ 93).

On February 24, 2016, plaintiff filed a motion for reargument of the Second Department's denial of his poor person status request.

On March 4, 2016, plaintiff received a letter from the Second Department's Clerk's Office in response to plaintiff's FOIL request, explaining that the judiciary is not subject to FOIL requests. The letter also explained that "civil appeals to [the Second Department] are a matter of statute and not a Constitutional right. The determination of any request [plaintiff] make[s] for

leave to prosecute the above-entitled appeal or any other civil appeal as a poor person is in the discretion of [the Second Department]." (Compl. ¶ 97).

On March 7, 2016, plaintiff wrote to Agostino, contending that the Second Department's Clerk's Office was an administrative office that served the judiciary, was not the judiciary itself, and, therefore, it was subject to FOIL. Plaintiff also argued that his pending civil appeals were appeals as of right, and that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees his equal access to courts.

On March 22, 2016, plaintiff commenced this action seeking an injunction ordering the Appellate Division to grant plaintiff poor person status in his Article 78 appeal, and in a previous case (Claim No. 120235, docket number 2012-08968). Plaintiff contends he is indigent and being required to pay a $315 filing fee before the Second Department will calendar his appeals deprives plaintiff of his constitutional right to access the courts. (Compl. ¶¶ 94, 95, 96).

Plaintiff also seeks a declaratory judgment that New York's parole statute, Executive Law Section 259, is unconstitutional. Plaintiff claims he was unlawfully denied parole because he is white and because he was convicted of "depraved indifference murder" pursuant to N.Y. Penal Law Section 125.25(2). Plaintiff also alleges the process of granting or denying parole is unconstitutionally vague, and that certain portions of the parole statute and regulations are unconstitutional.

On July 5, 2017, plaintiff's appeal to the Second Department relating to his Article 78 petition challenging his denial of parole was dismissed for failure to timely perfect pursuant to 22 N.Y. C.R.R. § 670.8[e]. In the Matter of Dismissal of Causes for Failure to Perfect, M230970 at *3 (N.Y. App. Div. 2d Dep't July 7, 2017).

DISCUSSION

I. Applicable Legal Standards

A. Rule 12(b)(1)

"'It is a fundamental precept that federal courts are courts of limited jurisdiction' and lack the power to disregard such limits as have been imposed by the Constitution or Congress." Durant, Nichols, Houston, Hodgson, & Cortese-Costa, P.C. v. Dupont, 565 F.3d 56, 62 (2d Cir. 2009) (quoting Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)). "A 'case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.'" Nike, Inc. v. Already, LLC, 663 F.3d 89, 94 (2d Cir. 2011) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)). The party invoking the Court's jurisdiction bears the burden of establishing that jurisdiction exists. Conyers v. Rossides, 558 F.3d 137, 143 (2d Cir. 2009).

When deciding whether subject matter jurisdiction exists at the pleading stage, the Court "must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." Conyers v. Rossides, 558 F.3d at 143. However, argumentative inferences favorable to the party asserting jurisdiction should not be drawn." Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992) (citing Norton v. Larney, 266 U.S. 511, 515 (1925)). When a factual challenge to the Court's jurisdiction has been raised, "the court may resolve [any] disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits." Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000); accord, Makarova v. United States, 201 F.3d at 113 ("In resolving a motion to dismiss for lack of subject matter jurisdiction . . . a district court . . . may refer to evidence outside the pleadings.").

B. Rule 12(b)(6)

In deciding a Rule 12(b)(6) motion, the Court evaluates the sufficiency of the operative complaint under the "two-pronged approach" articulated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). First, plaintiff's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." Id. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially 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." Ashcroft v. 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." Id.

The Court must liberally construe submissions of pro se litigants, and interpret them "to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks and citation omitted). Applying the pleading rules permissively is particularly appropriate when, as here, a pro se plaintiff alleges civil rights violations. See Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008). "Even in a pro se case, however . . . threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Chavis v. Chappius, 618 F.3d

162, 170 (2d Cir. 2010) (internal quotation marks and citation omitted). Nor may the Court "invent factual allegations" plaintiff has not pleaded. Id.

In reviewing a Rule 12(b)(6) motion, a court may also consider exhibits attached to the complaint or incorporated by reference; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. DiFulco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010); Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

II. Request for Declaratory Relief

Plaintiff seeks a declaratory judgment that New York's parole statute and regulations are unconstitutionally vague, that the nature of an inmate's crime(s) of conviction or prior criminal history may not be considered in parole release decisions because they are sentencing factors that have already been taken into account by the sentencing court; that inmates should be rewarded for completion of programs while in prison; that the Parole Board may not consider confidential community opposition to an inmate's release; that "boilerplate" parole decisions and use of pre-printed forms and worksheets are unconstitutional; that white parole applicants have been discriminated against due to their race and that such discrimination is unconstitutional; and that parole applicants convicted before 2003 of "depraved indifference murder" pursuant to N.Y. Penal Law Section 125.25(2) have been discriminated against because, "for the most part, they are NOT legally or factually guilty of murder." (Compl. at 35).

The state defendants argue, among other things, that plaintiff does not meet the requirements for a declaratory judgment action, and, regardless, this Court should abstain from entertaining plaintiff's claims in light of the ongoing proceedings in state court.

The Court agrees.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a "case of actual controversy within its jurisdiction" a court of the United States may "declare the rights and other legal relations" of an interested party "whether or not further relief is or could be sought." See Beacon Const. Co. v. Matco Elec. Co., 521 F.2d 392, 397 (2d Cir. 1975).

Even when jurisdiction exists, federal courts have "unique and substantial discretion" to decline to hear a declaratory judgment action. Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995). Before entertaining a declaratory judgment action, courts consider:

> (i) 'whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved'; (ii) 'whether a judgment would finalize the controversy and offer relief from uncertainty'; (iii) 'whether the proposed remedy is being used merely for procedural fencing or a race to res judicata'; (iv) 'whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court'; and (v) 'whether there is a better or more effective remedy.'

N.Y. Times Co. v. Gonzales, 459 F.3d 160, 167 (2d Cir. 2006) (quoting Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359–60 (2d Cir. 2003)).

Particular discretion is warranted when there is a proceeding pending in another forum that will resolve the controversies between the parties. See ED Capital, LLC v. Bloomfield Investment Resources Corp., 155 F. Supp. 434, 444 (S.D.N.Y. 2016), aff'd in part and vacated in part on other grounds, 660 Fed. App'x 27 (2d Cir. 2016) (summary order).[3]

Upon consideration of the N.Y. Times Co. v. Gonzales factors, the Court declines to grant plaintiff the declaratory relief he seeks here.

First, plaintiff seeks a declaration regarding a case or controversy that has already been decided by another court. If this Court were to address the issues that have already been decided

[3] Plaintiff will be provided with copies of all unpublished opinions cited in this decision. See Lebron v. Sanders, 557 F.3d 76, 79 (2d Cir. 2009).

in plaintiff's Article 78 proceeding, it would be "improperly encroach[ing] on the domain of a state . . . court." N.Y. Times Co. v. Gonzales, 459 F.3d at 167.

In his opposition to the state defendants' motion to dismiss, plaintiff avers that he does not challenge here any prior denial of his parole or the outcome of his Article 78 proceeding. Thus, it appears plaintiff's application for prospective declaratory relief ahead of his next Parole Board interview, set for September 2018, is essentially a request for an advisory opinion as to the constitutionality of New York's parole scheme. However, such relief is not properly sought in this Court.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance." Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n, 747 F.3d 44, 48 (2d Cir. 2014). To establish standing in federal court, a litigant must allege an actual case or controversy. Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998). "Specifically, a plaintiff must demonstrate that (1) he or she has suffered an injury; (2) the injury is traceable to the defendants' conduct; and (3) a federal court decision is likely to redress the injury." Id. Moreover, "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." Peck v. Baldwinsville Cent. Sch. Dist., 351 Fed. App'x 477, 479 (2d Cir. 2009) (summary order) (quoting Deshawn E. by Charlotte E. v. Safir, 156 F.3d at 344); see also Golden v. Zwickler, 394 U.S. 103, 109–10 (1969).

Here, plaintiff fails to allege he has suffered an actual injury. Moreover, plaintiff's conclusory claims of a future unconstitutional denial of parole are speculative and thus are not entitled to declaratory relief.

Accordingly, plaintiff's request for declaratory relief is denied.

III. Application for an Injunction Ordering the Appellate Division to Grant Plaintiff Poor Person Status in His Article 78 Appeal

Plaintiff also seeks an injunction instructing the Appellate Division to waive the $315 filing fee for plaintiff's appeal of his Article 78 petition. The Court previously denied plaintiff's initial application for an injunction, concluding that plaintiff had failed to demonstrate a likelihood of success on the merits. (Doc. #12)

The Court adheres to its initial ruling and denies plaintiff's request for injunctive relief.

As an initial matter, federal courts have no general power to interfere in state court proceedings or to compel action by state officials. Davis v. Lansing, 851 F.2d 72, 74 (2d Cir. 1988); see also Fullan v. Comm'r of Corr. of N.Y., 891 F.2d 1007, 1009-10 (2d Cir. 1989).

However, plaintiff does have a constitutional right to access courts in order to adjudicate "nonfrivolous" claims. Christopher v. Harbury, 536 U.S. 403, 415–16 (2002). In order to state a claim, plaintiff must allege that defendants "took or w[ere] responsible for actions that hindered plaintiff's efforts to pursue a legal claim." Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) (internal quotation marks omitted). Moreover, "plaintiff must allege not only that the defendant[s'] alleged conduct was deliberate and malicious, but also that the defendant[s'] actions resulted in actual injury to the plaintiff such as the dismissal of an otherwise meritorious legal claim." Id.

Plaintiff alleges defendant Hayes did not comply with plaintiff's request to produce a "docket sheet" or the record of the Article 78 proceeding (i.e., the "record on appeal"). (See Compl. ¶¶ 62–70). Plaintiff further alleges defendant Agostino improperly denied plaintiff's request to waive the $315 statutory filing fee and failed to disclose court records plaintiff requested under FOIL.

These allegations, even liberally construed, fail to state an access to courts claim. The Court will address plaintiff's claims against defendants Hayes, Kendall, and Agostino in turn.

A. Defendant Hayes

Defendant Hayes is not the "clerk of court" and, accordingly, plaintiff cannot plausibly allege Hayes had any responsibility for producing either the record on appeal or a docket sheet.

Plaintiff sought to appeal Justice Forman's decision on his Article 78 petition by using the appendix method. Applicable court rules governing appeals perfected by way of the appendix method require the appellant to "subpoena from the clerk of the court from which the appeal is taken all the papers constituting the record on appeal and cause them to be filed with the clerk" of the Second Department. 22 N.Y. C.R.R. § 670.9(b)(1). The "county clerk" is the "clerk of the supreme court . . . in his county." N.Y. COUNTY LAW § 525. Accordingly, the appellant must subpoena the county clerk for the record on appeal.

Hayes is not the Dutchess County Clerk. Rather, he is the principal court attorney to Justice Forman. Hayes informed plaintiff by letter dated November 2, 2015, that he was "not the clerk of the court for purposes of the Second Department's Rules," and that the record on appeal must be obtained by subpoena "directed to the Dutchess County Clerk." (Compl. ¶ 70; Berg Decl. Ex. C).

Because plaintiff has not alleged Hayes failed to perform his duties under state law or engage in any "deliberate or malicious" conduct that "hindered plaintiff's efforts to pursue a legal claim," Davis v. Goord, 320 F.3d at 351, plaintiff's access to courts claim against defendant Hayes must be dismissed.

B. Defendant Kendall

As to defendant Kendall, who is the Dutchess County Clerk, plaintiff seeks no relief from him, nor does he seek a declaration from the Court concerning Kendall's duties. Moreover, correspondence between plaintiff and Kendall demonstrates Kendall was aware of his duties under state law and advised plaintiff how to properly subpoena his Article 78 record for transmission to the Second Department. State law requires a party serving a subpoena for court records to pay a $20 fee. N.Y. C.P.L.R. § 8020(h). Kendall advised plaintiff of the fee, noting that Justice Forman's order granting plaintiff poor person status only reduced the filing fee to $15. (Posner Decl. Exs. D, J).

Thus, plaintiff also fails to state an access to courts claim against defendant Kendall.

C. Defendant Agostino

Civil litigants are generally not entitled to poor person status. Carolina v. Rubino, 644 F. App'x 68, 72 (2d Cir. 2016) (summary order) (quoting M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) ("the general rule in civil cases . . . [is] that 'indigent persons have no constitutional right to proceed in forma pauperis.'").

Moreover, defendant Agostino does not have the power to grant such status. The order denying plaintiff's fee waiver request was made by a panel of Second Department justices, not Agostino. (See Berg Decl. Ex. A). This comports with applicable state law, which requires "the clerk" to collect filing fees, while only "the court" may waive such fees. 22 N.Y.C.R.R. §§ 670.22(a)(1), 670.23. Accordingly, plaintiff fails to allege plausibly defendant Agostino's personal involvement in the alleged violation of plaintiff's constitutional rights stemming from the denial of plaintiff's poor person status, which is required to state a claim against her. See

Ashcroft v. Iqbal, 556 U.S. at 676 (plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

Additionally, this Court "is without jurisdiction to consider [p]laintiff's FOIL-related claims." Posr v. City of N.Y., 2013 WL 2419142, at *14 (S.D.N.Y. June 4, 2013), aff'd sub nom. Posr v. Ueberbacher, 569 Fed. App'x 32 (2d Cir. 2014) (summary order).

Moreover, assuming arguendo that plaintiff could bring a FOIL-related claim in this Court, "FOIL specifically exempts the state judiciary from its definition of covered 'agencies.'" See N.Y. Pub. Off. L. § 86(3); see also Newsday, Inc. v. Empire State Dev. Corp., 98 N.Y.2d 359, 363 (2002) ("no information in any physical form held or kept by a court . . . is subject at all to FOIL"). Accordingly, plaintiff is not entitled under FOIL to receipt of records related to the Appellate Division's consideration of applications to proceed as a "poor person."

Thus, plaintiff fails to state an access to courts claim against defendant Agostino.

D. Conspiracy Claim Against Defendants Hayes, Kendall, and Agostino

To plead a Section 1985(3) conspiracy claim, plaintiff must allege "(1) a conspiracy; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999). "Furthermore, the conspiracy must also be motivated by 'some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action.'" Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1088 (2d Cir. 1993) (quoting United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 829 (1983)).

According to plaintiff, the fact that Kendall sent plaintiff a letter dated four days after Justice Forman's reargument decision—January 26, 2016—instructing plaintiff how to transmit the record on appeal to the Appellate Division, indicates defendants Kendall and Hayes "were dancing to Judge Forman's tune" (Compl. ¶ 85) engaging in an "interference-with-litigation conspiracy . . . implemented by clerks, who shield judges." (Id. ¶ 87). Moreover, plaintiff claims this "parole-litigation interference policy" is "compounded by the Second Department's poor person [status] denials." (Id.).

Plaintiff's conclusory allegations that defendants conspired to interfere with his Article 78 appeal fail to state a claim as a matter of law. Moreover, these allegations are belied by the extensive correspondence the parties have submitted to this Court relating to plaintiff's Article 78 proceeding and appeal.

Thus, plaintiff fails to state a claim against defendants Hayes, Kendall, and Agostino. In addition, plaintiff's application for an injunction ordering the Appellate Division to waive the $315 filing fee for plaintiff's appeal of his Article 78 petition is denied.

IV. Defendant Rubinstein

Even liberally construed, plaintiff's submissions plainly do not state a claim against, nor seek any relief from, defendant Rubinstein, a New York State Assistant Attorney General who represents the Board of Parole in plaintiff's Article 78 proceeding.

Accordingly, any claim against defendant Rubinstein is dismissed.

V. Section 1981 Claim

To state a Section 1981 claim, plaintiff must allege facts that demonstrate "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the

statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)." Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993).

Plaintiff, who is white, has failed to plead any basis for a Section 1981 claim and, accordingly, such claim is dismissed.

VI. Leave to Amend

A district court ordinarily should not dismiss a pro se complaint for failure to state a claim "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." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (internal quotation marks omitted). A court generally must grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999).

Here, the complaint and plaintiff's other detailed and voluminous submissions, even liberally construed, do not contain allegations suggesting plaintiff has valid claims that he has merely "inadequately or inartfully pleaded" and therefore should "be given a chance to reframe." Cuoco v. Moritsugu, 222 F.3d at 112. On the contrary, the Court finds that further repleading would be futile because the problems with plaintiff's claims are substantive, and supplementary or improved pleading will not cure the deficiencies of the amended complaint. See id.

Accordingly, the Court declines to grant plaintiff leave to amend.

CONCLUSION

The state defendants' motion to dismiss is GRANTED.

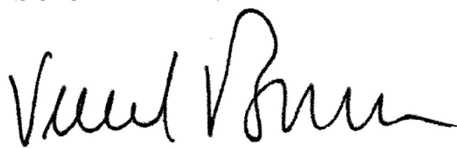
Defendant Kendall's motion to dismiss is GRANTED.

The Clerk is instructed to terminate the motions (Docs. ##39, 45) and close this case.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444–45 (1962).

Dated: July 17, 2017
White Plains, NY

SO ORDERED:



Vincent L. Briccetti
United States District Judge