

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN EDWARDS REYNOLDS,

Plaintiff,

-against-

UNITED STATES OF AMERICA, *et al.*,

Defendant.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 9/7/2021

No. 21-cv-4763 (NSR)

ORDER

NELSON S. ROMÁN, United States District Judge:

The Court is in receipt of several letter motions that Plaintiff submitted on August 30, 2021 seeking, (1) reconsideration of this Court's Order of Service (ECF No. 12) sua sponte dismissing claims against several defendants in this action (ECF No. 17); (2) an extension of time to file a Second Amended Complaint (ECF No. 15); and (3) appointment of pro bono counsel (ECF No. 18). As discussed further below, Plaintiff's motion for reconsideration is DENIED, Plaintiff's motion for appointment of counsel is DENIED, without prejudice to later renewal, and Plaintiff's motion for an extension of time to file a Second Amended Complaint is GRANTED. Plaintiff's deadline to file a Second Amended Complaint is extended until October 22, 2021.

A. Plaintiff's Request for Reconsideration of the August 9, 2021 Order of Service and Request for Pre-Service Order Compelling Discovery of Unspecified Parties

Plaintiff requests reconsideration of this Court's August 9, 2021 Order of Service because, in large part, he disagrees with the Court's characterization of his claims as arising under either the FTCA or Bivens. Instead, he believes that he asserted claims arising under 42 U.S.C. § 1983 ("Section 1983") and "cannot understand why the Court would place an action under designations (FTCA/Bivens) that would cause dismissal of the action." (ECF No. 17 at 5.)

Section 1983 does not apply in this case because the only Defendants named in this action are federal government officials – *i.e.*, officers, wardens, and health service providers working at Federal Correctional Institute Otisville. (*See* Am. Compl. at 3-4.) Section 1983 only confers a right to sue *state governmental employees* and others *acting under color of state law* and does not typically apply to federal officials like those named as defendants in this action. Bivens is essentially the federal version of Section 1983 and permits federal courts to hear suits for money damages against federal government officials accused of constitutional rights. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). So, while the Court appreciates that Plaintiff may have been confused by the Court’s description of his claim as arising under Bivens rather than Section 1983, the Court was not characterizing it as Bivens claim in order to blindsight him or make his ability to seek relief more difficult. To the contrary, the Court was liberally construing Plaintiff’s Amended Complaint and interpreted it as seeking relief under either the FTCA or Bivens because his assertion of constitutional violations against federal officials plainly does not fit within the scope of Section 1983.

Notwithstanding Plaintiff’s confusion and exasperation with the Court, he has given no basis for this Court to reconsider its previous Order of Service. As the Court previously observed, in order to state a Bivens claim Plaintiff needs to allege facts showing the personal involvement of the defendants in the action. He has not alleged how Defendants Petrucci, Pliler, LeMaster, Elmore, Walls, or Heuett were personally involved in this case. Plaintiff need not be excessively discouraged by the Court’s holding. The Court has not dismissed claims against those Defendants *with prejudice*. When a court dismisses a claim without prejudice that means the defendant can attempt to amend his complaint to cure any deficiencies identified by the court. Plaintiff can further amend his complaint to describe what conduct Defendants Petrucci, Pliler, LeMaster,

Elmore, Walls, and/or Heuett individually engaged in that he believes constituted a violation of his rights. Likewise, the Court did not dismiss claims against Defendants Grove, Linley, or Stewart at all. Accordingly, Plaintiff can simply proceed with his claims against those three individuals without amending his complaint any further if he so wishes.

Separately, Plaintiff asks that this case “proceed to a discovery and deposition process to assess the accusations of upper level administrators.” (ECF No. 17.) This request is premature and is based on a misunderstanding of the ordinary trajectory for litigation. Defendants have not yet been served or responded to Plaintiff’s Amended Complaint, accordingly, this Court does not yet have jurisdiction over those Defendants and cannot compel them to disclose anything to Plaintiff at this stage. Separately, the type of discovery requested by Plaintiff—*i.e.*, discovery in order to find out if he has a claim against unidentified upper level administrators—would be inappropriate at any stage because this Court has not been given the identity of the subjects of the requested discovery. Instead, the ordinary next steps in this case would be: (1) Plaintiff can either further amend his complaint or proceed on his Amended Complaint against Defendants Grove, Linley, and Stewart, then (2) defendants will either answer or file a motion to dismiss the complaint, and then (3) if no motion is filed by defendants, defendants instead choose to answer the complaint, or the Court denies defendants’ motions, then discovery will begin to take place, beginning with initial disclosures pursuant to Fed. R. Civ. P. 26(1). Accordingly, Plaintiff’s request to compel unspecified discovery is denied, without prejudice to renewal at a later point in this litigation.

B. Request for an Extension of Deadline to Amend Complaint

The Court grants Plaintiff an extension of 45 days to file a Second Amended Complaint. His deadline to submit a Second Amended Complaint is October 22, 2021. As Plaintiff discussed in his motion, he did not intend to bring a FTCA claim and disagrees with the Court’s

characterization of his complaint as arising under the FTCA. He does not need to bring a FTCA claim and need not assert one in his Second Amended Complaint. Separately, though Plaintiff believes that he should be able to bring a Section 1983 claim, he has not identified any defendants that are state officials or persons acting under state color, and accordingly does not have a cognizable Section 1983 claim. If he wishes to assert a Bivens claim against the federal officials he has identified as defendants (which, again, is functionally similar to a Section 1983 claim), then he can amend his complaint to cure deficiencies relating to those claims identified herein and in the Court's Order of Service.

C. Application for Pro Bono Counsel

Plaintiff applies for the Court to request pro bono counsel. (ECF No. 18.) The factors to be considered in ruling on an indigent litigant's request for counsel include the merits of the case, litigant's efforts to obtain a lawyer, and litigant's to gather the facts and present the case if unassisted by counsel. *See Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir. 1989); *Hodge v. Police Officers*, 802 F.2d 58, 60-62 (2d Cir. 1986). Of these, the merits are "[t]he factor which command[s] the most attention." *Cooper*, 877 F.2d at 172. At this stage of the litigation, the Court has assessed that Plaintiff has failed to plead certain claims and granted Plaintiff leave to file an amended complaint to cure those deficiencies. It is either too early in the proceedings for the Court to assess the merits of the action or the (lack of) merits weigh against Plaintiff's request for counsel. Accordingly, Plaintiff's motion for counsel is denied without prejudice to renewal at a later date.

CONCLUSION

The Court DENIES Plaintiff's motion for reconsideration of its Order of Service (ECF No. 17) and his motion for appointment of counsel (ECF No. 18), without prejudice. To the extent that Plaintiff seeks pre-service discovery of Defendants that request is also DENIED. Plaintiff's application for an extension of his deadline to file a Second Amended Complaint is GRANTED.

Plaintiff may file a Second Amended Complaint on or before October 22, 2021. A Second Amended Complaint form is attached to this Order.

The Clerk of the Court is kindly directed to terminate the Motions at ECF Nos. 15, 17, and 18. The Clerk of the Court is further directed to mail a copy of this Order to Plaintiff and show proof of service on the docket.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for the purpose of an appeal. *Cf. Coopedge v. United States*, 369 U.S. 438, 444-45 (1962).

Dated: September 7, 2021
White Plains, New York

SO ORDERED:

A handwritten signature in black ink, appearing to read 'Nelson S. Román', is written over a light blue horizontal line.

NELSON S. ROMÁN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Write the full name of each plaintiff.

_____ CV _____
(Include case number if one has been assigned)

-against-

**SECOND
AMENDED
COMPLAINT**

Do you want a jury trial?

Yes No

Write the full name of each defendant. If you need more space, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed above must be identical to those contained in Section II.

NOTICE

The public can access electronic court files. For privacy and security reasons, papers filed with the court should therefore *not* contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include *only*: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number. See Federal Rule of Civil Procedure 5.2.

I. BASIS FOR JURISDICTION

Federal courts are courts of limited jurisdiction (limited power). Generally, only two types of cases can be heard in federal court: cases involving a federal question and cases involving diversity of citizenship of the parties. Under 28 U.S.C. § 1331, a case arising under the United States Constitution or federal laws or treaties is a federal question case. Under 28 U.S.C. § 1332, a case in which a citizen of one State sues a citizen of another State or nation, and the amount in controversy is more than \$75,000, is a diversity case. In a diversity case, no defendant may be a citizen of the same State as any plaintiff.

What is the basis for federal-court jurisdiction in your case?

- Federal Question**
- Diversity of Citizenship**

A. If you checked Federal Question

Which of your federal constitutional or federal statutory rights have been violated?

B. If you checked Diversity of Citizenship

1. Citizenship of the parties

Of what State is each party a citizen?

The plaintiff, _____, is a citizen of the State of
(Plaintiff's name)

(State in which the person resides and intends to remain.)

or, if not lawfully admitted for permanent residence in the United States, a citizen or subject of the foreign state of

_____.

If more than one plaintiff is named in the complaint, attach additional pages providing information for each additional plaintiff.

If the defendant is an individual:

The defendant, _____, is a citizen of the State of
(Defendant's name)

or, if not lawfully admitted for permanent residence in the United States, a citizen or
subject of the foreign state of

If the defendant is a corporation:

The defendant, _____, is incorporated under the laws of
the State of _____

and has its principal place of business in the State of _____

or is incorporated under the laws of (foreign state) _____

and has its principal place of business in _____.

If more than one defendant is named in the complaint, attach additional pages providing
information for each additional defendant.

II. PARTIES

A. Plaintiff Information

Provide the following information for each plaintiff named in the complaint. Attach additional
pages if needed.

First Name Middle Initial Last Name

Street Address

County, City State Zip Code

Telephone Number Email Address (if available)

B. Defendant Information

To the best of your ability, provide addresses where each defendant may be served. If the correct information is not provided, it could delay or prevent service of the complaint on the defendant. Make sure that the defendants listed below are the same as those listed in the caption. Attach additional pages if needed.

Defendant 1:

First Name	Last Name	
Current Job Title (or other identifying information)		
Current Work Address (or other address where defendant may be served)		
County, City	State	Zip Code

Defendant 2:

First Name	Last Name	
Current Job Title (or other identifying information)		
Current Work Address (or other address where defendant may be served)		
County, City	State	Zip Code

Defendant 3:

First Name	Last Name	
Current Job Title (or other identifying information)		
Current Work Address (or other address where defendant may be served)		
County, City	State	Zip Code

V. PLAINTIFF'S CERTIFICATION AND WARNINGS

By signing below, I certify to the best of my knowledge, information, and belief that: (1) the complaint is not being presented for an improper purpose (such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation); (2) the claims are supported by existing law or by a nonfrivolous argument to change existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Federal Rule of Civil Procedure 11.

I agree to notify the Clerk's Office in writing of any changes to my mailing address. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Each Plaintiff must sign and date the complaint. Attach additional pages if necessary. If seeking to proceed without prepayment of fees, each plaintiff must also submit an IFP application.

_____		_____	
Dated		Plaintiff's Signature	

First Name	Middle Initial	Last Name	

Street Address			

County, City	State	Zip Code	

Telephone Number		Email Address (if available)	

I have read the Pro Se (Nonprisoner) Consent to Receive Documents Electronically:

Yes No

If you do consent to receive documents electronically, submit the completed form with your complaint. If you do not consent, please do not attach the form.