UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FABIO KRISHNA PERIERA,

Plaintiff,

-against-

CREATIVE ARTISTS AGENCY; ICM PARTNERS; WME-IMG; UNITED TALENT AGENCY; NEW YORK CITY POLICE DEPARTMENT,

Defendants.

17-CV-2426 (CM)

ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, appearing *pro se*, brings this action by order to show cause alleging that Defendants are torturing him, violating his constitutional rights, and unlawfully accessing his computer. By order dated April 4, 2017, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*. Plaintiff has moved for appointment of *pro bono* counsel.

STANDARD OF REVIEW

The Court must dismiss an *in forma pauperis* complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint when the Court lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470

F.3d 471, 474-75 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original).

A claim is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (holding that "finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible"); *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) ("[A]n action is 'frivolous' when either: (1) the factual contentions are clearly baseless . . . ; or (2) the claim is based on an indisputably meritless legal theory.") (internal quotation marks and citation omitted).

BACKGROUND

The complaint names as Defendants United Talent Agency (UTA), Creative Artists Agency (CAA), ICM Partners, WME-IMG, and the New York City Police Department (NYPD), and sets forth the following facts. Beginning in or about 2009, Plaintiff entered into informal agreements with "Hollywood talent agencies" to help Plaintiff promote his screenplay and find employment in the entertainment industry. According to Plaintiff, a CAA executive "made overtures of friendship that codified the foundation of the overall conspiracy." (ECF No. 2 at 5.) Plaintiff's agreements with Defendants ended in or about 2012, and Plaintiff pursued other opportunities; he enrolled in a graduate program at Columbia University, and he obtained employment with the World Bank and Empire Wealth Strategies.

According to Plaintiff, Defendants have since engaged in "violent and highly racialized harassment" in order to steal Plaintiff's intellectual property. Plaintiff alleges that Defendants have conspired to "regularly and repeatedly trespass[]" onto Plaintiff's "computer system(s) with the further intent to cause the Plaintiff's death at maximum and intentional infliction of

emotional distress at minimum," violate his constitutional rights, undermine his employment and educational opportunities, and bring him to the brink of suicide. (Compl. at 4-7.) Plaintiff asserts that Defendants "inspire[ed] a cab driver to rob and assault the Plaintiff in a Citibank ATM vestibule in Harlem," and that he "attempted" to make a police report with the NYPD about that incident. (ECF No. 3 at 4.) Attached to Plaintiff's unsigned order to show cause is a "harassment journal" purporting to show Defendants and the FBI communicating with Plaintiff through unlawful surveillance.

Plaintiff asserts claims under the First, Fourth, and Thirteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983 and 1985, the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; the Electronic Communications Privacy Act, 18 U.S.C. § 2511; and the Stored Communications Act, 18 U.S.C. § 2701. Plaintiff also invokes state and federal criminal statutes, and state tort law. Plaintiff seeks an order enjoining Defendants' conduct.

DISCUSSION

A. Rule 8

Rule 8 of the Federal Rules of Civil Procedure requires a complaint to make a short and plain statement showing that the pleader is entitled to relief. A complaint states a claim for relief if the claim is plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To review a complaint for plausibility, the Court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in the pleader's favor. *Iqbal*, 556 U.S. at 678-79 (citing *Twombly*, 550 U.S. at 555). But the Court need not accept "[t]hreadbare recitals of the elements of a cause of action," which are essentially legal conclusions. *Id*. at 678 (citing *Twombly*, 550 U.S. at 555). After separating legal conclusions

from well-pleaded factual allegations, the court must determine whether those facts make it plausible – not merely possible – that the pleader is entitled to relief. *Id.*

Even when read with the "special solicitude" due pro se pleadings, *Triestman*, 470 F.3d at 474-75, Plaintiff's complaint does not comply with Rule 8, and must be dismissed as frivolous. Plaintiff's allegations that Defendants have conspired to harass him, drive him to suicide, and torture and murder him rise to the level of the irrational, and there is no legal theory on which he can rely. *See Denton*, 504 U.S. at 33; *Livingston*, 141 F.3d at 437. In the context of such allegations, Plaintiff's claims regarding unlawful surveillance and monitoring of his digital activities are not plausible.

B. Constitutional Claims

1. Claims Against the NYPD

In any event, Plaintiff's claims against the New York City Police Department must be dismissed because city agencies or departments do not have the capacity to be sued under New York law. *See Omnipoint Commc'ns, Inc. v. Town of LaGrange*, 658 F. Supp. 2d 539, 552 (S.D.N.Y. 2009) ("In New York, agencies of a municipality are not suable entities."); *Hall v. City of White Plains*, 185 F. Supp. 2d 293, 303 (S.D.N.Y. 2002) ("Under New York law, departments which are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and cannot sue or be sued."); *see also* N.Y. Gen. Municipal Law Sec. 2 ("The term 'municipal corporation,' as used in this chapter, includes only a county, town, city and village.").

Moreover, to the extent Plaintiff is asserting that the NYPD declined to take a police report from him or investigate the assault, the government generally has no duty under the Fourteenth Amendment to protect an individual against harm from other private citizens. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). The Second

Circuit has recognized two exceptions to the general rule that the State has no duty to investigate or protect individuals: First, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 200. Second, the government may assume some obligation when it affirmatively creates or increases the danger. *See Dwares v. City of N.Y.*, 985 F.2d 94, 98-99 (2d Cir. 1993).

Because Plaintiff does not allege that he was assaulted in police custody or that police officers created the danger that he faced from a private individual, he has not alleged that the New York City Police Department had any duty to protect him or investigate his claims. *See DeShaney*, 489 U.S. at 195-96.

2. Private Defendants

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege both that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a "state actor." *West v. Atkins*, 487 U.S. 42, 48-49 (1988). Private parties are therefore not generally liable under the statute. *Sykes v. Bank of America*, 723 F.3d 399, 406 (2d Cir. 2013) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) ("[T]he United States Constitution regulates only the Government, not private parties."). The Court may dismiss a complaint that fails to allege state action. *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 311 (2d Cir.) (affirming dismissal of complaint where plaintiff failed to include allegations of state action in complaint), *modified on other grounds*, 520 F.2d 409 (2d Cir. 1975). The private defendants do not work for any state or other government body, and thus they do not qualify as state actors.

C. Conspiracy Claims

To state a § 1983 conspiracy claim, a plaintiff must allege facts showing: (1) an agreement between state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002) (citing *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999)). To state a § 1985 conspiracy claim, a plaintiff must allege facts that plausibly show that there exists: (1) a conspiracy; (2) for the purpose of depriving the plaintiff of the equal protection of the laws, or the equal privileges or 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 his right or privilege as a citizen of the United States. *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999). "[T]he conspiracy must also be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Id.* (internal quotation marks and citation omitted). Vague and conclusory allegations of a conspiracy, under either § 1983 or under § 1985, will not suffice. *See, e.g., Wang v. Miller*, 356 F. App' x 516, 517 (2d Cir. 2009) (summary order); *Webb v. Goord*, 340 F.3d 105, 110-111 (2d Cir. 2003); *Parker v. DeBuono*, 242 F.3d 366 (2d Cir. 2000) (summary order); *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997); *Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir. 1990).

Plaintiff's allegations that Defendants conspired to violate his federally protected rights are vague and conclusory. Plaintiff does not identify any overt act in furtherance of the alleged conspiracy, and his conspiracy claims are therefore dismissed for failure to state a claim on which relief may be granted. *See* § 1915(e)(2)(B)(ii).

D. Claims Arising Under Criminal Statutes

Plaintiff purports to assert claims criminal statutes. A private citizen cannot prosecute a criminal action in federal court. *See Leeke v. Timmerman*, 454 U.S. 83 (1981) (prisoners lack standing to seek the issuance of an arrest warrant); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (" [A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *United States ex rel. Farmer v. Kaufman*, 750 F. Supp. 106, 108 (S.D.N.Y. 1990); *New York v. Muka*, 440 F. Supp. 33, 36 (N.D.N.Y. 1977). Furthermore, because federal prosecutors possess discretionary authority to bring criminal actions, they are "immune from control or interference by citizen or court . . . ." *Conn. Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 87 (2d Cir. 1972); *Muka*, 440 F. Supp. at 36. The Court therefore dismisses, for failure to state a claim on which relief may be granted, Plaintiff's claims seeking the criminal prosecution of any Defendant. *See* § 1915(e)(2)(B)(ii).

E. Leave to Amend

District courts generally grant a *pro se* plaintiff an opportunity to amend a complaint to cure its defects, but leave to amend is not required where it would be futile. *See Hill v. Curcione*, 657 F.3d 116, 123–24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Because the defects in Plaintiff's complaint cannot be cured with an amendment, the Court declines to grant Plaintiff leave to amend his complaint.

CONCLUSION

The Clerk of Court is directed to assign this matter to my docket, mail a copy to Plaintiff, and note service on the docket. Plaintiff's complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Denied as moot are the application for an order to show cause and the motion for counsel.

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 *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: April 18, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge