UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NICHOLAS OUDEKERK,

Plaintiff,

5:23-cv-00288
(BKS/TWD)

v.

GLENS FALLS POLICE OFFICER DOE 1;
GLENS FALLS POLICE OFFICER DOE 2; and
WARREN PROSECUTOR DOE,

Defendants.

APPEARANCES: OF COUNSEL:

NICHOLAS OUDEKERK
21-A-1295
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021
Plaintiff, pro se

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER AND REPORT-RECOMMENDATION

The Clerk has sent to the Court a civil complaint filed by *pro se* plaintiff Nicholas Oudekerk ("Plaintiff") pursuant to 42 U.S.C. § 1983. (Dkt. No. 1.) Plaintiff, who is currently incarcerated at the Auburn Correctional Facility, has not paid the filing fee for this action and seeks leave to proceed *in forma pauperis* ("IFP"). (Dkt. No. 2.) He also requests the appointment of counsel. (Dkt. No. 5.) For the reasons discussed below, the Court grants Plaintiff's IFP application and recommends that Plaintiff's complaint be accepted in part for filing.

I. IFP APPLICATION

"28 U.S.C. § 1915 permits an indigent litigant to commence an action in a federal court without prepayment of the filing fee that would ordinarily be charged." *Cash v. Bernstein*, No. 09-CV-1922, 2010 WL 5185047, at *1 (S.D.N.Y. Oct. 26, 2010).[1] "Although an indigent, incarcerated individual need not prepay the filing fee at the time of filing, he must subsequently pay the fee, to the extent he is able to do so, through periodic withdrawals from his inmate accounts." *Id*. (citing 28 U.S.C. § 1915(b) and *Harris v. City of New York*, 607 F.3d 18, 21 (2d Cir. 2010)).

Because Plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a), and has filed the inmate authorization form required in this District, he is granted permission to proceed IFP. (Dkt. Nos. 2, 3.[2])

II. SUFFICIENCY OF THE COMPLAINT

Having found Plaintiff meets the financial criteria for commencing this action IFP, and because he seeks relief from an officer or employee of a governmental entity, the Court must consider the sufficiency of the allegations set forth in the complaint in light of 28 U.S.C. §§ 1915(e) and 1915A.

A. Standard of Review

Sections 1915 and 1915A "provide an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007)

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[1] The Court has reviewed Plaintiff's litigation history on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") Service. *See* http://pacer.uspci.uscourts.gov. It does not appear Plaintiff had accumulated three strikes for purposes of 28 U.S.C. § 1915(g) as of the date this action was commenced.

[2] Plaintiff should note that, although the Court has granted his application to proceed IFP, he will still be required to pay fees that he may incur in this action, including copying and/or witness fees.

(citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). The Court shall dismiss a complaint in a civil action if the Court determines it is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i)-(iii); 28 U.S.C. § 1915A(b)(1)-(2).

A claim is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (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, 33 (1992) (holding that "a 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.").

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This short and plain statement of the claim must be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The statement of the claim must do more than present "an unadorned, the-defendant-harmed-me accusation." *Id*. It must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555; *see also* Fed. R. Civ. P. 8(a)(2).

In determining whether a complaint states a claim upon which relief may be granted, "the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994).

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

In reviewing a *pro se* complaint, the court has a duty to show liberality toward *pro se* litigants. *See Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990). The court should exercise "extreme caution . . . in ordering sua sponte dismissal of a pro se complaint *before* the adverse party has been served and both parties (but particularly the plaintiff) have had an opportunity to respond." *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983) (emphasis in original) (citations omitted). While the Court will generally afford a *pro se* plaintiff an opportunity to amend or to be heard prior to dismissal, leave to amend pleadings may be denied when any amendment would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

B. Summary of the Complaint

Plaintiff utilized the Court's form complaint for civil rights actions under Section 1983 and attached additional pages to elaborate upon his claims against defendants Glens Falls Police Officer Doe 1, Glens Falls Police Officer Doe 2, and Warren Prosecutor Doe[3] (together "Defendants"). (*See* Dkt. No. 1.) Defendants are sued individually and in their official capacities. *Id*. at 1. Plaintiff asserts allegations of wrongdoing related to his arrest on February 18, 2020. *Id*. at 4.

On February 18, 2020, Plaintiff was arrested at his home by Glens Falld Police Officers Doe 1 and Doe 2. *Id*. at 2. "This arrest was for crimes [Plaintiff] did not commit" including "obstruction of breathing [and] blood flow" and "false imprisonment" of another individual. *Id*.

[3] Plaintiff also refers to Warren Prosecutor Doe as the Assistant Prosecutor for Warren County Prosecutor's Office and the Warren County Prosecutor.

Plaintiff alleges the arrest was made in violation of his rights under the Fourth, Eighth, and Fourteenth Amendments because (1) Plaintiff did not commit the crimes, and (2) the alleged victim told the police she did not call 911, no crime was committed against her, and she wanted the police to leave. *Id*. Further, the police did not have a warrant or consent to enter Plaintiff's home. *Id*. Plaintiff alleges the police were "deliberately indifferent" because there was "no ground[s] for an arrest." *Id*. Warren Prosecutor Doe also "motioned" the Court for an order of protection, which prevented Plaintiff from being around the alleged victim. *Id*. at 7.

In March of 2020, Plaintiff "was informed by the public defender that the charges/order of protection would be dismissed" stemming from the February 18, 2020, arrest. *Id*. However, the charges and order of protection were not dismissed until October of 2020. *Id*. at 8-9.

Through his first cause of action, Plaintiff alleges Glens Falls Police Officers Doe 1 and Doe 2 entered his home "without probable cause" and "arrested" him for "charges that were dismissed later" in violation of the Fourth Amendment. *Id*. at 10. In his second cause of action, Plaintiff claims Glens Falls Police Officers Doe 1 and Doe 2 "punished" him "with a false arrest" based on charges he did not commit in violation of the Eighth Amendment. *Id*. Through his third cause of action, Plaintiff alleges the Warren County Prosecutor violated his "due process" rights and his "rights to life, liberty, [and] property when they took 7 months to dismiss the charges [and] order of [protection]." *Id*. In his fourth cause of action, Plaintiff references the Eighth Amendment and claims the Warren County Prosecutor violated his rights against "cruel [and] unusual punishment" by "taking 7 months" to dismiss the charges and order of protection. *Id*. at 11. Plaintiff alleges the delay, allegedly due to Covid-19 related issues, "was a tactic used to punish" him for crimes he did not commit. *Id*.

Liberally construed, Plaintiff alleges (1) Glens Falls Police Officers Doe 1 and Doe 2 falsely arrested, falsely imprisoned, and maliciously prosecuted[4] him; and (2) Warren Prosecutor Doe denied Plaintiff due process and acted with deliberate indifference.[5] Plaintiff seeks significant monetary damages. *See id*. at 10-11. For a complete statement of Plaintiff's claims, reference is made to the complaint.

C. Analysis

Plaintiff brings this action pursuant to 42 U.S.C. § 1983, which establishes a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990).

To state a valid claim under 42 U.S.C. § 1983, a plaintiff must allege that the challenged conduct: (1) was attributable to a person acting under color of state law; and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Whalen v. Cty. of Fulton*, 126 F.3d 400, 405 (2d Cir. 1997). To establish liability under the statute, a plaintiff must plead that each government official defendant violated the Constitution through that official's own individual actions. *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020). An official may not be held liable for constitutional violations simply

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[4] Because Plaintiff alleges he was arrested but never convicted, the Court construes the complaint as asserting a malicious prosecution claim under the Fourth Amendment. *See Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018) ("A § 1983 claim for malicious prosecution essentially alleges a violation of the plaintiff's right under the Fourth Amendment to be free from unreasonable seizure."). Courts have consistently recognized that "the Eighth Amendment does not apply 'until after conviction and sentence.'" *Wright v. New York City*, No. 09-cv-2452, 2012 WL 4057958, at *3 (E.D.N.Y. Sept. 14, 2012) (quoting *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999)); *see also Lindsey v. Butler*, 43 F. Supp. 3d 317, 325 (S.D.N.Y. 2014) ("the Eighth Amendment attaches only after conviction"). Plaintiff's allegations against the arresting police officers, therefore, do not implicate the Eighth Amendment.

[5] Similarly, because Plaintiff claims the false charges were eventually dismissed, Plaintiff's allegations against the prosecutor do not implicate the Eighth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989).

because he held a high position of authority. *Victory v. Pataki*, 814 F.3d 47, 67 (2d Cir. 2016). "Section 1983 claims against municipal employees sued in their official capacity are treated as claims against the municipality itself." *Ortiz v. Wagstaff*, 523 F. Supp. 3d 347, 361 (W.D.N.Y. 2021). A municipality cannot be held liable under Section 1983 unless the challenged action was undertaken pursuant to a municipal policy, custom, or practice. *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978).

1. Defendant Warren Prosecutor Doe

The Court liberally construes Plaintiff's complaint as alleging due process and deliberate indifference claims against Warren Prosecutor Doe. Prosecutors enjoy "absolute immunity from § 1983 liability for those prosecutorial activities intimately associated with the judicial phase of the criminal process." *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987). The immunity covers "virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir. 1995). This includes such functions as "deciding whether to bring charges and presenting a case to a grand jury or a court, along with the tasks generally considered adjunct to those functions, such as witness preparation, witness selection, and issuing subpoenas," *Simon v. City of New York*, 727 F.3d 167, 171 (2d Cir. 2013), and whether and when to drop charges. *Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981). "This immunity attaches to conduct in court, as well as conduct 'preliminary to the initiation of a prosecution and actions apart from the courtroom.'" *Giraldo v. Kessler*, 694 F.3d 161, 165 (2d Cir. 2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976)).

"[O]nce a court determines that challenged conduct involves a function covered by absolute immunity, the actor is shielded from liability for damages regardless of the wrongfulness of his motive or the degree of injury caused." *Bernard v. Cty. of Suffolk*, 356 F.3d

495, 503 (2d Cir. 2004) (citing *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985)). Absolute immunity extends even to a prosecutor who "conspir[es] to present false evidence at a criminal trial. The fact that such a conspiracy is certainly not something that is properly within the role of a prosecutor is immaterial, because the immunity attaches to his function, not to the manner in which he performed it." *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (cleaned up). Immunity even extends to "the falsification of evidence and the coercion of witnesses," *Taylor*, 640 F.2d at 452, "the knowing use of perjured testimony," "the deliberate withholding of exculpatory information," *Imbler*, 424 U.S. at 431 n.34, the "making [of] false or defamatory statements in judicial proceedings," *Burns v. Reed*, 500 U.S. 478, 490 (1991), and "conspiring to present false evidence at a criminal trial," *Dory*, 25 F.3d at 83.

Here, the only conduct Plaintiff alleges against Warren Prosecutor Doe is in connection with her prosecution of Plaintiff. Her decision to continue to prosecute him, notwithstanding his claims of innocence or any other misconduct related to the prosecution, does not deprive Warren Prosecutor Doe of absolute prosecutorial immunity. As stated above, the decision whether to prosecute regardless of the motivation for that decision, along with the decision whether and when to drop charges are protected by absolute immunity. Thus, Warren Prosecutor Doe is immune from suit and liability based on absolute prosecutorial immunity.

Moreover, "[w]hen prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State not the county.'" *Ying Jing Gan v. City of New York*, 996 F.2d 522, 536 (2d Cir. 1993) (quoting *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989)); *see also Rich v. New York*, No. 21-CV-3835, 2022 WL 992885, at *5 n.4 (S.D.N.Y. Mar. 31, 2021) ("[A]ny claims Plaintiff may raise against the [District Attorney] Defendants in their 'official capacity' would be precluded by immunity under

the Eleventh Amendment."); *Gentry v. New York*, No. 21-CV-0319, 2021 WL 3037709 (GTS/ML), at *6 (N.D.N.Y. June 14, 2021) (recommending dismissal of the plaintiff's claims against the defendant assistant district attorneys in their official capacities—which were effectively claims against the State of New York—as barred by the Eleventh Amendment), *report-recommendation adopted*, 2021 WL 3032691 (N.D.N.Y. July 19, 2021).

For these reasons, the Court recommends dismissing Plaintiff's claims against Warren Prosecutor Doe with prejudice pursuant to 28 U.S.C. §§ 1915(e)(i)-(iii) and 1915A(b)(1)-(2). *See Collazo v. Pagano*, 656 F. 3d 131, 134 (2d Cir. 2011) (holding that claim against prosecutor is frivolous if it arises from conduct that is "intimately associated with the judicial phase of the criminal process").

2. Defendants Glens Falls Police Officers Doe 1 and Doe 2

The Court liberally construes Plaintiff's complaint as alleging false arrest, false imprisonment, and malicious prosecution claims against the officers. "A Section 1983 claim for false arrest [or false imprisonment] rest[s] on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause." *Cea v. Ulster Cty.*, 309 F. Supp. 2d 321, 329 (N.D.N.Y. 2004) (quoting (quoting *Sulkowska v. City of N.Y.*, 129 F. Supp. 2d 274, 287 (S.D.N.Y. 2001)). Such claims are one and the same because "[f]alse arrest and false imprisonment overlap; the former is a species of the latter." *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

The elements of a claim for false arrest under § 1983 are the same elements as a claim for false arrest under New York law. *Lewis v. City of New York*, 18 F. Supp. 3d 229, 235 (E.D.N.Y. 2014) (citing *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996)). "Under New York law, the elements of a false arrest and false imprisonment claim are: '(1) the defendant intended to

confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged.'" *Hernandez v. United States*, 939 F.3d 191, 199 (2d Cir. 2019) (quoting *McGowan v. United States*, 825 F.3d 118, 126 (2d Cir. 2016)). "For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause." *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 759 (N.Y. 2016); *accord Ackerson v. City of White Plains*, 702 F.3d 15, 19 (2d Cir. 2012) ("Probable cause is a complete defense to an action for false arrest.") (citation and internal quotation marks omitted).

"To prevail on a Section 1983 claim for malicious prosecution, 'a plaintiff must show a violation of his rights under the Fourth Amendment . . . and must establish the elements of a malicious prosecution claim under state law.'" *Butler v. Hesch*, 286 F. Supp. 3d 337, 355 (N.D.N.Y. Feb. 15, 2018) (quoting *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010) (citations omitted)). "The elements of a malicious prosecution claim under § 1983 are substantially the same as the elements under New York law." *Kelly v. Guzy*, No. 8:20-cv-721 (GTS/CFH), 2021 WL 5232749, at *4 (N.D.N.Y. Nov. 10, 2021), *report-recommendation adopted*, 2022 WL 160305 (N.D.N.Y. Jan. 18, 2022).

To state a malicious prosecution claim under New York law, the plaintiff must allege facts plausibly showing: (1) the initiation of a criminal proceeding; (2) its termination favorably to plaintiff; (3) lack of probable cause; and (4) malice. *Manganiello v. City of N.Y.*, 612 F.3d 149, 161 (2d Cir. 2010). "Under New York law, police officers 'initiate' prosecution by filing charges or other accusatory instruments." *Cameron v. City of New York*, 598 F.3d 50, 63 (2d Cir. 2010). A police officer may also be liable for malicious prosecution when he provides false information. *Watkins v. Town of Webster*, 592 F. Supp. 3d 96, 113 (W.D.N.Y. 2022).

Out of an abundance of caution, and mindful of the Second Circuit's instruction that a *pro se* plaintiff's pleadings must be liberally construed, *Sealed Plaintiff*, 537 F.3d at 191, the Court recommends that Plaintiff's Fourth Amendment false arrest, false imprisonment, and malicious prosecution claims against defendants Glens Falls Police Officers Doe 1 and Doe 2 in their individual capacities survive initial review and require a response.[6] The Court expresses no opinion concerning whether these claims can survive a properly filed motion to dismiss or motion for summary judgment, or whether he may prevail at trial.[7]

However, insofar as the complaint asserts claims against defendants Glens Falls Police Officers Doe 1 and Doe 2 in their official capacities, the Court recommends that such claims be dismissed as Plaintiff has alleged no facts suggesting the existence of a municipal policy, custom, or practice. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (requiring

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[6] If Plaintiff wishes to pursue his claims against either of the unknown Glens Falls Police Officers, he must take reasonable steps to ascertain through discovery the identity of that individual. Upon learning the identity of an unnamed defendant, Plaintiff must amend the operative complaint to properly name that person as a party. If plaintiff fails to ascertain the identity of the Doe defendant so as to permit timely service of process, all claims against that individual will be dismissed. Rule 4 of the Federal Rules of Civil Procedure require that a party be served within 90 days of issuance of the summons, absent a court order extending that period. Fed. R. Civ. P. 4(m). The Local Rules shorten the time for service from 90 days under Rule 4(m) to 60 days. L.R. 4.1(b).

[7] Because the failure to file an action within the limitations period is an affirmative defense, a plaintiff is generally not required to plead that the action is timely filed. *See Abbas*, 480 F.3d at 640. *Sua sponte* dismissal is appropriate, however, where the existence of an affirmative defense, such as the statute of limitations, is plain from the face of the pleading. *See Walters v. Indus. and Commercial Bank of China, Ltd.*, 651 F.3d 280, 293 (2d Cir. 2011). Although the complaint was received for filing on March 3, 2023, it is dated December 27, 2022. (Dkt. No. 1.) Following the prison mailbox rule and applying the presumption that Plaintiff delivered the complaint to a prison official on the date it was signed, Plaintiff filed his complaint in this action for statute of limitations purposes on December 27, 2022. *See Houston v. Lack*, 487 U.S. 266, 271 (1988) (a *pro se* litigant's papers are deemed to have been filed when they are placed in the hands of a prison official for mailing); *Johnson v. Coombe*, 156 F. Supp. 2d 273, 277 (S.D.N.Y. 2001) (where it is unclear when the complaint was given to prison officials, absent evidence to the contrary, the court assumes the complaint was given to prison officials the date it was signed). Accordingly, the Court assumes, for purposes of this Report-Recommendation only, that Plaintiff's Section 1983 claims are timely.

allegations of "a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation" in a claim against a municipal employee in his official capacity).

D. Service of Process

The Court notes that if the above recommendations are adopted, only Glens Falls Police Officers Doe 1 and Doe 2 remain as defendants. The U.S. Marshals, however, cannot effect service on a "Doe" defendant. The Second Circuit has instructed that district courts should assist incarcerated *pro se* plaintiffs in identifying Doe defendants. *See Valentin v. Dinkins*, 121 F.3d 72, 76 (2d Cir. 1997) (explaining that a "district court may pursue any course that it deems appropriate to a further inquiry into the identity" of a Doe defendant in assisting a *pro se* plaintiff). In this case, Plaintiff has identified the date and location of the alleged incident.

Accordingly, in deference to Plaintiff's status as an incarcerated, *pro se* litigant, and mindful of the Court's obligation to assist such litigants in identifying unknown defendants, the Court recommends that City of Glens Falls Chief of Police, Jarred M. Smith, be named as a defendant in the action solely so that service may proceed and issue may be joined. Once issued is joined, Plaintiff must seek, through discovery, the identity of the Doe defendants. *See, e.g.*, *Paralta v. Doe*, No. 04-CV-6559, 2005 WL 357358, at *2 (W.D.N.Y. Jan. 24, 2005) (permitting the addition of the superintendent to facilitate service and discovery to uncover the identities of the unknown defendants). By recommending this measure, the Court does not suggest in any way that the City of Glens Falls Chief of Police was personally involved in the constitutional deprivations alleged in Plaintiff's complaint or is otherwise subject to liability for the acts giving rise to Plaintiff's claims.

III. APPOINTMENT OF COUNSEL

Plaintiff requests the appointment of counsel. (Dkt. No. 5.) Plaintiff states that as of May 25, 2023, he will no longer be incarcerated and will be without a residence, income, and access to a law library. *Id*. at 1. He is disabled and uneducated. *Id*. at 2.

There is no right to appointment of counsel in civil matters. *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994). Title 28 of United States Code Section 1915 specifically provides that a court may request an attorney to represent any person "unable to afford counsel." 28 U.S.C. § 1915(e)(1). Appointment of counsel must be done carefully in order to preserve the "precious commodity" of volunteer lawyers for those litigants who truly need a lawyer's assistance. *Cooper v. A. Sargenti, Inc.*, 877 F.2d 170, 172-73 (2d Cir. 1989).

In *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335 (2d Cir. 1994), the Second Circuit reiterated the factors that a court must consider in ruling upon such a motion. In deciding whether to appoint counsel, the court should first determine whether the indigent's position seems likely to be of substance. If the claim meets this threshold requirement, the court should then consider a number of other factors in making its determination. *Id*. at 1341 (quoting *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986)). However, prior to evaluating a request for an appointment of counsel, the plaintiff must make a threshold showing that he is unable to obtain counsel through the private sector or public interest firms. *See Cooper*, 877 F.2d at 173-74.

Here, Plaintiff has not set forth any information detailing his attempts to find an attorney. (*See* Dkt. No. 5.) Moreover, before counsel is assigned, it must be determined whether Plaintiff's claims are likely to be of substance. *See Terminate Control Corp.*, 28 F.3d at 1341. This action was only recently commenced. Because it is too early in the proceedings for the

Court to assess the merits of the action, Plaintiff's motion for counsel (Dkt. No. 5) is denied without prejudice and with leave to renew.[8]

IV. SWORN STATEMENT OF FACTS

The Court has reviewed the "Sworn Statement of Facts" filed December 8, 2023. (Dkt. No. 6.) The Court does not construe this document as amending the complaint. To the extent Plaintiff raises new issues and/or complaints about Auburn Correctional Facility, these new complaints are not part of the present action. Plaintiff should address any new complaints through the facility's grievance or other complaint process.

V. CONCLUSION

WHEREFORE, it is hereby

ORDERED that Plaintiff's application to proceed IFP (Dkt. No. 2) is **GRANTED**; and it is further

RECOMMENDED that the Clerk provide the superintendent of the facility designated by Plaintiff as his current location with a copy of Plaintiff's Inmate Authorization (Dkt. No. 3), and notify the official that this action has been filed and that Plaintiff is required to pay to the Northern District of New York the statutory filing fee of $350, over time, pursuant to 28 U.S.C. § 1915; and it is further

RECOMMENDED that the Clerk provide a copy of Plaintiff's Inmate Authorization (Dkt. No. 3) to the Financial Deputy of the Clerk's Office; and it is further

RECOMMENDED that the complaint (Dkt. No. 1) be accepted for filing in part; and it is further

[8] Any future motion for counsel must be accompanied by evidence of the efforts that Plaintiff has taken to retain counsel on his own, either in the public or private sector.

RECOMMENDED that Plaintiff's claims against Warren Prosecutor Doe be **DISMISSED WITH PREJUDICE** and that Warren Prosecutor Doe be **TERMINATED** as a defendant; and it is further

RECOMMENDED that Plaintiff's Fourth Amendment false arrest/false imprisonment and malicious prosecution claims against Glens Falls Police Officers Doe 1 and Doe 2, in their individual capacities, survive initial review and require a response; and it further

RECOMMENDED that Plaintiff's Fourth Amendment false arrest/false imprisonment and malicious prosecution claims against Glens Falls Police Officers Doe 1 and Doe 2, in their official capacities, be **DISMISSED**; and it is further

RECOMMENDED the Clerk **ADD** the City of Glens Falls Chief of Police, Jarred M. Smith, as a defendant **FOR PURPOSES OF SERVICE AND DISCOVERY ONLY**; and it is further

RECOMMENDED that the Clerk be directed to issue a summons and forward it, along with a copy of the complaint to the United States Marshal for service upon City of Glens Falls Chief of Police, Jarred M. Smith, as set forth herein; and it is further

ORDERED that Plaintiff's motion for appointment of counsel (Dkt. No. 5) is **DENIED WITHOUT PREJUDICE WITH LEAVE TO RENEW**; and it is further

ORDERED that the Clerk provide Plaintiff with a copy of this Order and Report-Recommendation, along with copies of the unpublished decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.[9] Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW**. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs*., 892 F.2d 15 (2d Cir. 1989)).

IT IS SO ORDERED.

Dated: May 5, 2023
Syracuse, New York

Therèse Wiley Dancks
United States Magistrate Judge

[9] If you are proceeding *pro se* and are served with this Order and Report-Recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. 6(a)(1)(C).