UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES G. AVERY III,

Plaintiff,

-against-

PAULO BAGNATO; WELLS FARGO ADVISORS, LLC,

Defendants.

16-CV-0161 (LAP)

ORDER OF DISMISSAL

LORETTA A. PRESKA, Chief United States District Judge:

Plaintiff, appearing *pro se*, brings this action under the Court's federal question jurisdiction seeking unspecified relief. Plaintiff asserts claims against his former financial advisor, Defendant Paulo Bagnato, and Bagnato's former employer, Defendant Wells Fargo Advisors, LLC ("Wells Fargo"). He seems to challenge a September 2012 Financial Industry Regulatory Authority ("FINRA") arbitration award arising from a dispute between him, Bagnato, and Wells Fargo. The Court construes Plaintiff's complaint as a motion, under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*., to vacate the September 2012 FINRA arbitration award. By order dated May 4, 2016, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*. For the following reasons, the Court dismisses this action but grants Plaintiff leave to replead his claims in an amended complaint.

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, or portion thereof, when the Court lacks subject matter jurisdiction. *See*

Fed. R. Civ. P. 12(h)(3). In addition, the Court "may dismiss an action *sua sponte* on limitations grounds in certain circumstances where 'the facts supporting the statute of limitations defense are set forth in the papers plaintiff himself submitted' . . . ." *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 293 (2d Cir. 2011) (citation omitted). But the Court may not dismiss a *pro se* complaint *sua sponte* for untimeliness without granting the plaintiff notice and an opportunity to be heard. *See Abbas v. Dixon*, 480 F.3d 636, 639-40 (2d Cir. 2007). 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 (2d Cir. 2006) (internal quotation marks and citations omitted, emphasis in original).

BACKGROUND

Plaintiff is a resident of Pawling, Dutchess County, New York. Before the financial collapse of 2008, Plaintiff gave $300,000 dollars that he had inherited to Bagnato to invest on his behalf. As a result of the 2008 financial collapse, however, Plaintiff lost one third of the value of his investment. He recovered some of it as the market recovered, but Bagnato advised him to liquidate his investment assets "because the market might go the way of Greece or Portugal." Plaintiff alleges that Bagnato used "fear to [coerce Plaintiff] to liquidate when [Plaintiff's] money was coming back." During this undisclosed period, Plaintiff required open heart surgery and abdominal hernia surgery. Bagnato "then changed his story to say [that Plaintiff] wasn't physically or mentally able to be invest[ing]." Plaintiff states that he "proved [Bagnato] wrong [with] letters from all of [Plaintiff's] doctors." On or about August 15, 2012, in Pleasantville, Westchester County, New York, Bagnato liquidated Plaintiff's investment assets. Plaintiff states that "if [his] money was left in the mutual fund that it was in, . . . even with [him] taking

[$30,000] per year for [his] expenses, [he] would have $75,000 more than [his] account had at the time of filing."

At some undisclosed point after the August 15, 2012 liquidation, Plaintiff sought FINRA arbitration to resolve his dispute with Bagnato and possibly with Bagnato's then-employer, Wells Fargo. Plaintiff seems to state that in September 2012, a FINRA arbitrator found in favor of him and against Bagnato. But Plaintiff does not specify the particulars of the arbitration award. He claims that the FINRA arbitrator was "blatantly biased . . . ." He states that the arbitrator "had an account" with Wells Fargo and "knew [its] only outside witness . . . ." Plaintiff also states that during a break in the arbitration, the arbitrator spoke to Wells Fargo's legal counsel, who stated that she used to work for the federal government and that her husband is a federal prosecutor. Plaintiff asserts that the arbitrator's experience in "expungement" resulted from training the arbitrator received in a one-hour "expungement" course.

After the September 2012 arbitration award was issued, Bagnato left Wells Fargo and joined Morgan Stanley. Plaintiff states that Morgan Stanley does "not take smaller accounts under [$1,000,000]." He alleges that when Bagnato moved to Morgan Stanley, "he dumped [Plaintiff] off with another of his banker friends and said 'You're in good hands.'" Plaintiff states that "[e]veryone [that Bagnato] sent [him] to told [him] that they were Sicilian." He alleges that Bagnato is now a Morgan Stanley senior vice president of wealth management, working at Morgan Stanley's office in Mount Kisco, Westchester County, New York.

DISCUSSION

A. Subject matter jurisdiction

The FAA does not independently grant subject matter jurisdiction to a federal district court. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 571-72 (2d Cir. 2005) (citations omitted). A

party seeking FAA relief must establish an independent basis for subject matter jurisdiction. *Stolt-Nielsen SA*, 430 F.3d at 572.

The subject matter jurisdiction of the federal district courts is limited and is set forth generally in 28 U.S.C. §§ 1331 and 1332. Under these statutes, federal jurisdiction is available only when a "federal question" is presented or when the plaintiff and the defendants are citizens of different states and the amount in controversy exceeds the sum or value of $75,000. "'[I]t is common ground that in our federal system of limited jurisdiction any party or the court *sua sponte*, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction.'" *United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Prop. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) (quoting *Manway Constr. Co., Inc. v. Hous. Auth. of the City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983)); *see* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative . . . .").

1. Federal question jurisdiction

To invoke federal question jurisdiction, a plaintiff's claims must arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case arises under federal law if the complaint "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 734-35 (2d Cir. 2007) (quoting *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 690 (2006) (internal quotation marks omitted)). Mere invocation of federal question jurisdiction, without any facts demonstrating a

federal claim, does not create federal question jurisdiction. *See Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188-89 (2d Cir. 1996); *cf. Shapiro v. McManus*, 136 S.Ct. 450, 455 (2015) ("We have long distinguished between failing to raise a substantial federal question for jurisdictional purposes . . . and failing to state a claim for relief on the merits; only 'wholly insubstantial and frivolous' claims implicate the former.").

Plaintiff states that he asserts claims under the Court's federal question jurisdiction, but he alleges no facts showing why his claims fall under federal law. Plaintiff has therefore failed to demonstrate that the Court has federal question jurisdiction to consider his claims under the FAA.

2. Diversity jurisdiction

While Plaintiff has not invoked the Court's diversity jurisdiction, because Plaintiff appears *pro se*, the Court will consider whether his FAA claims can be considered by the Court under the Court's diversity jurisdiction. To establish diversity jurisdiction under 28 U.S.C. § 1332, a plaintiff must first allege that he and the defendants are citizens of different states. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998) ("A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.,* only if there is no plaintiff and no defendant who are citizens of the same State."). In addition, the plaintiff must allege to a "reasonable probability" that his claims are in excess of the sum or value of $75,000.00, the statutory jurisdictional amount. *See* 28 U.S.C. § 1332(a); *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 221 (2d Cir. 2006).

Plaintiff is a citizen of Pawling, New York. He does not mention Wells Fargo's state citizenship, but he seems to state that Bagnato is a citizen of Mount Kisco, New York. In

addition, because he does not specify the relief he seeks, the Court cannot determine whether Plaintiff has satisfied the jurisdictional amount for diversity claims.

Plaintiff has thus failed to allege facts showing an independent jurisdictional basis for his FAA claims. The Court therefore dismisses Plaintiff's FAA claims for lack of subject matter jurisdiction, *see* Fed. R. Civ. P. 12(h)(3), but grants Plaintiff leave to replead those claims in an amended complaint in which Plaintiff alleges any facts that show an independent jurisdictional basis for those claims.

B. FAA limitation period

Section 12 of the FAA provides that "[n]otice of a motion to vacate . . . an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. The Second Circuit has made clear that there is no exception to this three-month limitation period: "a party may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run . . . ." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). "Although it is important to the fair administration of arbitration that a party have the means to vacate an unjustly procured award, there is also good reason for the Act's three month limitation on this right." *Id.* at 176. The review of arbitration awards is "very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

Here, Plaintiff alleges that the arbitration award he challenges was issued in September 2012, but he did not file his complaint in this Court until January 6, 2016, years later. Plaintiff's FAA claims are therefore untimely, and the Court alternatively dismisses them for failure to state a claim on which relief may be granted, *see* 28 U.S.C. § 1915(e)(2)(B)(ii), but grants Plaintiff

leave to replead those claims in an amended complaint in which Plaintiff includes any facts showing that his FAA claims are timely.

CONCLUSION

The Clerk of Court is directed to assign this matter to my docket, mail a copy of this order to Plaintiff, and note service on the docket. The Court dismisses Plaintiff's claims for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3), and alternatively, for failure to state a claim on which relief may be granted, 28 U.S.C. § 1915(e)(2)(B)(ii). The Court grants Plaintiff leave to replead his claims in an amended complaint, to be filed within thirty days of the date of this order.

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: May 23, 2016
New York, New York

LORETTA A. PRESKA
Chief United States District Judge