UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN CORBETT,

Plaintiff,

- against -

CITY OF NEW YORK,

Defendant.

ORDER

13 Civ. 602 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

In this action, pro se Plaintiff Jonathan Corbett seeks injunctive and declaratory relief to prevent the New York City Police Department ("NYPD") from using "terahertz imagining devices" to conduct "virtual stop-and-frisks" in violation of the Fourth Amendment. Defendant City of New York has moved to dismiss, arguing that Plaintiff lacks standing and that, as a result, his request for injunctive relief must also be denied.[1] For the reasons stated below, Defendant's motion will be granted.

BACKGROUND

Plaintiff alleges that "[t]he City of New York, through [the NYPD], is in the process of rolling out 'terahertz imaging devices' . . . which measure electromagnetic radiation to peer under the clothing of individuals, allegedly for the purpose of detecting unlawful concealed weapons." (Cmplt. (Dkt. No. 1) ¶ 1) According to the Complaint, in January 2012, NYPD Commissioner Raymond Kelly "announced that he was working with the Defense Department to develop [this] technology. . . ." (Id. ¶ 8 (internal quotation omitted)) Citing a Wall Street

[1] In support of its motion to dismiss, Defendant also contends that this action is not ripe for adjudication. (See Def. Br. 10-12) Because the Court concludes that Plaintiff lacks standing, it need not reach this argument.

Journal article, which is appended to the Complaint, Plaintiff further alleges that in January 2013, Kelly "announced that development has been successful thus far and that the NYPD had obtained the technology – the Scanners – he discussed a year prior." (Id. ¶ 9) The devices will purportedly allow the operator to "peer through clothing" and "detect small items . . . on the body at medium-range[,]" including weapons as well as "objects lawfully kept in pockets[,]" such as tools and cell phones. (Id. ¶¶ 15-17) According to the Complaint, "[i]t is not possible to 'feel' a scan[, so] an individual being searched by the [device] would have no way to know that they were being scanned." (Id. ¶ 18)

The Complaint further alleges – based on the same Wall Street Journal article – that "[t]he NYPD either has or immediately intends for the scanners to be mounted on a truck and deployed to sites identified as prone to gun violence." (Id. ¶ 19 (internal quotation omitted)) Plaintiff contends that "[b]ased on it being absurdly impractical to find a crime suspect, obtain a sufficient basis to form reasonable suspicion, then drive a truck to within 25 yards of the individual to conduct a scan – hoping all along that the individual does not leave or notice the police presence in the meantime – it can only be concluded that the NYPD intends to use this device to scan random passersby [– including innocent bystanders –] in these sites identified as prone to gun violence." (Id. ¶¶ 20-21 (internal quotation omitted)) According to the Complaint, "[t]he NYPD has never articulated any intent to notify those who have been searched [with] the [s]canners[,]" and "[a]bsent a showing of the creation of forms [and] policies . . . dictating notification requirements, it is beyond mere speculation that the intent of the NYPD is to use the scanners to conduct secret searches." (Id. ¶¶ 30-31)

The Complaint alleges that "[i]n a well-trafficked area, a single [s]canner could search thousands of individuals per day or millions of individuals per year." (Id. ¶ 22 (emphasis

omitted)) "If the NYPD were to implement a dozen of these [s]canners, placed in the right locations, [it] could potentially scan virtually every New Yorker within a year." (Id. ¶ 23)

Plaintiff states that he "resid[es] in Miami-Dade County, Florida," but has "significant connections to the State and City of New York. . . ." (Id. ¶ 4) He "conducts occasional business within city limits and maintains personal relationships with city residents, resulting in his presence within the [C]ity for no less than several weeks per year for each of the previous 5 years." (Id.) Plaintiff alleges that "[c]onsidering together the impracticality of using . . . [the scanning] device[s] in a manner that respects Fourth Amendment rights, the ease of annually searching millions of individuals with even a single device and the resultant high probability of being searched, and the history of NYPD abuse of stop-and-frisk, [he] has a reasonable fear of being violated by NYPD [s]canners unless the NYPD is ordered to cease and desist." (Id. ¶ 29)

The Complaint further alleges that Defendant "has begun, or will immediately begin, implementation of" "unlawful searches" conducted without "reasonable suspicion," in violation of the Fourth Amendment and 42 U.S.C. § 1983. (Id. ¶ 32-38) Plaintiff seeks a declaration that "use of the [s]canners in public places throughout the city, absent reasonable suspicion or probable cause, as determined by the Court, is unlawful." (Id. ad damnum clause ¶ (a)) In the Complaint and a simultaneously filed motion for a temporary restraining order and preliminary injunction, Plaintiff seeks to enjoin Defendant from "using [the] [s]canners in any public location and on any individual who has not given their explicit consent absent . . . reasonable suspicion that the subject being searched is committing an articulable crime, . . . reasonable fear that [the] suspect may be armed and dangerous, . . . [protection of] innocent bystanders . . . and . . . [a requirement that] [a]ny individual who is searched will be handed a

written form indicating the time, location, and reason for the search. . . ." (Pltf. TRO Br. (Dkt. No. 3) at 3; Cmplt. ad damnum clause ¶ (c))

Plaintiff filed the Complaint and motion for a temporary restraining order and preliminary injunction on January 28, 2013. Defendant's motion to dismiss and opposition to Plaintiff's request for injunctive relief was filed on February 27, 2013. (Dkt. Nos. 7-9) Plaintiff filed an opposition to Defendant's motion on March 29, 2013. (Dkt. No. 12) Defendant filed a reply brief on April 12, 2013. (Dkt. No. 13)

DISCUSSION

I. LEGAL STANDARD

The City moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. A claim 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." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). When jurisdiction is challenged, the plaintiff "bear[s] the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists.'" APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003) (internal quotation omitted)). "In reviewing a motion to dismiss under Rule 12(b)(1), the court 'must accept as true all material factual allegations in the complaint, but [it is] not to draw inferences from the complaint favorable to [the] plaintiff[].'" Toomer v. City of Nassau, 07 Civ. 01495 (JFB) (ETB), 2009 WL 1269946, at *3 (E.D.N.Y. May 5, 2009) (quoting J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004)). In other words, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." Shipping Fin. Servs. Corp v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998). "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule

12(b)(1), a district court . . . may refer to evidence outside the pleadings." Makarova, 201 F.3d at 113.

Because Plaintiff is proceeding pro se, the Court construes the complaint liberally, Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009), "interpret[ing] it to raise the strongest arguments that it suggests." Harris v. Westchester Cnty. Dep't of Corr., No. 06 Civ. 2011 (RJS), 2008 WL 953616, at *2 (S.D.N.Y. Apr. 3, 2008) (internal quotation omitted). As in any other case, however, the Court accepts as true only factual allegations, and does not accept as true allegations stating only legal conclusions. Harris, 572 F.3d at 72 ("'[T]hreadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice [to establish entitlement to relief].'") (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

II. PLAINTIFF LACKS STANDING BECAUSE HE HAS NOT SUFFICIENTLY PLED AN INJURY IN FACT

A. Applicable Law

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). "As [the Supreme Court] ha[s] explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" Id. (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006)).

"'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" Id. (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)) "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Id. at 1147 (quoting Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752 (2010)).

"'Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending.'" Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992) (internal quotation marks omitted)). "Thus, [the Supreme Court] ha[s] repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." Id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

Here, Plaintiff asserts that he has demonstrated "a reasonable fear of being violated by [the] NYPD [s]canners." (Cmplt. ¶ 29) Plaintiff's claim is, however, akin to an argument recently rejected by the Supreme Court in Clapper. In Clapper, plaintiffs alleged that their work required them to exchange sensitive information with "likely targets of surveillance" under the Foreign Intelligence Surveillance Act ("FISA") Amendments Act and that, as a result, there was an "objectively reasonable likelihood" that their communications would be intercepted under the FISA Amendments Act "at some point in the future." Id. at 1145-46.

The Supreme Court held, as an initial matter, that standing cannot be based on an "objectively reasonable likelihood" of injury. Instead, the "'threatened injury must be certainly impending to constitute injury in fact.'"[2] Id. at 1147 (quoting Whitmore, 495 U.S. at 158). The Court then found that the plaintiffs' argument rested on a "highly speculative fear" that

> (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under [50 U.S.C.] § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will

[2] The Supreme Court recognized that, "[i]n some instances, . . . standing [may be] based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." Clapper, 133 S. Ct. at 1150 n.5. This alternative standard is not applicable here, however, because the Complaint contains no allegations that Plaintiff incurred any costs or has sought to mitigate or avoid the alleged harm.

> conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.

Id. at 1148. The Court held that this "theory of standing, which relied on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." Id. (finding insufficient plaintiffs' allegation that they had "to assume that every one of [their] international communications may be monitored by the government") (emphasis in original)).

B. Analysis

Here, Plaintiff's alleged injury is equally conjectural. His injury is based on a "highly speculative fear" that (1) the NYPD will decide to conduct unconstitutional "virtual stop-and-frisks"; (2) the NYPD will use the "terahertz imaging devices" to do so; (3) the devices will be successful in scanning individuals; and (4) Plaintiff will be among the individuals scanned. Plaintiff's attempt to show that this chain of events is "not at all 'speculative'" is unavailing. (See Pltf. Opp. Br. 8)

First, Plaintiff argues that "it is not mere speculation that the NYPD intends to use a machine that it spent millions of dollars to develop." (Id.) He further argues that "lawful use [of the scanners] is so impractical as to be fanciful." (Id.; see also id. 3; Cmplt. ¶ 20-21, 30-31) Plaintiff has not pleaded any concrete facts to support these conclusions, however. Assuming arguendo that the NYPD "obtained the technology" and "received its machine last week" (Cmplt. ¶ 9, Ex. A at 1; see also Pltf. Opp. Br. 5), Plaintiff has not pleaded facts plausibly suggesting that the NYPD's use of the technology and "the machine" is imminent. Indeed, the Wall Street Journal article Plaintiff relies on states that Commissioner Kelly is "hopeful" about the scanners, but that the NYPD has "no timetable for when any version of the device would be

deployed."[3] (Cmplt. ¶ 9, Ex. A at 1-2) The article's comment that the scanners "could be mounted on a truck and deployed to sites identified as prone to gun violence" (id., Ex. A at 1 (emphasis added)) does not support the Complaint's assertion that "[t]he NYPD either has or immediately intends" to carry out such a plan. (Id. ¶ 19) The article likewise undermines Plaintiff's claim that the NYPD intends to use the scanners in violation of the Constitution. To the contrary, the article reports that the NYPD is "working with its lawyers" to assess how it could utilize the scanners in light of constitutional due-process concerns. (Cmplt., Ex. A at 2) In sum, the Complaint does not plead facts demonstrating that the NYPD's use of scanners is imminent or that scanners will be used in an unconstitutional manner.[4]

In an effort to distinguish Clapper, Plaintiff argues that "a [s]canner has a certainty that it will work, barring malfunction, while communications interception is a highly uncertain process. . . ." (Pltf. Opp. Br. 9) Again, Plaintiff provides no facts to substantiate this allegation, and the article he relies on undermines any suggestion that the scanning technology at issue is now functional. (See Cmplt., Ex. A at 1 (stating that the NYPD "is testing a new device") (emphasis added))[5]

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[3] While Plaintiff represents that Commissioner Kelly has stated that the NYPD is "in the process of rolling out" the scanners (Pltf. Opp. Br. 5-6), there are no facts pleaded in the Complaint, nor statements in the appended articles, that support this contention.

[4] Plaintiff faults the Defendant for "offer[ing] no explanation as to what potential lawful use[s] . . . the City has in mind, detailing how the City could possibly work around the legal impracticality inherent in the use of these [s]canners." (Pltf. Opp. Br. 4; see also Cmplt. ¶ 30 ("The NYPD had never articulated any intent to notify those who have been searched [with] the [s]canners.") However, it is Plaintiff's burden to show by a preponderance of evidence that he has standing such that subject matter jurisdiction exists. APWU, 343 F.3d at 623; see also Clapper, 133 S.Ct. at 1149 n 4 ("[I]t is [plaintiffs'] burden to prove their standing by pointing to specific facts, not the Government's burden to disprove standing by revealing details of its surveillance priorities." (citation omitted)).

[5] There are no facts pleaded in the Complaint to support Plaintiff's contention that tests will be conducted "on citizens and visitors doing nothing more than walking on public sidewalks. . . ." (Pltf. Opp. Br. 1)

Finally, Plaintiff contends that he has established standing based on his allegations that "he is regularly within the City" and that "the odds of anyone who finds themselves in New York encountering this odious police practice are several orders of magnitude greater than the odds rejected [by the Supreme Court in Clapper]." (Pltf. Opp. Br. 7-8) This argument fails for two reasons. First, the Complaint pleads only that Plaintiff has business and personal relationships that have "result[ed] in his presence within the [C]ity for no less than several weeks per year for each of the previous 5 years." (Cmplt. ¶ 4; see also Pltf. Opp. Br. 7 n.5 (arguing that Plaintiff's past visits to New York City, including to file this action, demonstrate that his "presence in the City is not a 'some day intention,' but rather a continuing occurrence"))

Plaintiff's "profession of an 'inten[t]' to return to [a] place[] [he] ha[s] visited before . . . is simply not enough. Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of . . . 'actual or imminent' injury." Lujan, 504 U.S. at 564; see also Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("Accepting an intention to visit [a location] as adequate to confer standing to challenge any Government action affecting any portion of [that place] would be tantamount to eliminating the requirement of concrete, particularized injury in fact.").

Moreover, Plaintiff's estimate of the probability that he will be scanned is based on numerous assumed variables, including that the NYPD will embark on a program of using scanners, the number of scanners used, the number of individuals each scanner is capable of scanning during a given time period, the amount of time the scanners will be actively conducting scans, the locations where the scanners will be deployed, and the number of people who will pass by that area. (See Cmplt. ¶ 22 ("In a well-trafficked area, a single [s]canner could search

thousands of individuals per day or millions of individuals per year." (emphasis added); id. ¶ 23 ("If the NYPD were to implement a dozen of these [s]canners, placed in the right locations, [it] could potentially scan virtually every New Yorker within a year." (emphasis added); Pltf. Opp. Br. 6-7 nn.3-4 (setting forth assumptions about the number of people who would be scanned by one scanner in a year, and the number of scanners to be deployed)). Plaintiff has not pleaded any facts to substantiate the assumptions underpinning his calculations about how the NYPD would deploy the scanners.

Standing does not exist where it is "wholly contingent on independent and unpredictable events that [do] not stem from an established government policy." Baur v. Veneman, 352 F.3d 625, 641 (2d Cir. 2003); see also Clapper, 133 S. Ct. at 1148 ("[Plaintiffs] have no actual knowledge of the Government's . . . targeting practices. Instead, [plaintiffs] merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired. . . ."); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-581 (1985) (standing is lacking where claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all") (internal quotation omitted).

For all of these reasons, Plaintiff has failed to allege a "certainly impending [injury sufficient] to constitute [an] injury in fact." Clapper, 133 S. Ct. at 1147. Accordingly, Plaintiff lacks standing, and the Complaint must be dismissed for lack of subject matter jurisdiction.[6]

[6] Defendant also argues that Plaintiff lacks standing because he has not demonstrated (1) a causal connection between his injury and Defendant's actions; or (2) that his injury is redressable by a favorable judicial decision. (Def. Br. 9-10) Having concluded that Plaintiff lacks standing because he has not demonstrated an actual or imminent injury in fact, the Court does not reach these arguments.

III. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S APPLICATION FOR INJUNCTIVE RELIEF

Where a court lacks subject matter jurisdiction over a plaintiff's claims, it may not consider plaintiff's related application for injunctive relief. See, e.g., Borden, Inc. v. Meiji Milk Products Co., Ltd., 919 F.2d 822, 825-26 (2d Cir. 1990) ("As a threshold matter, we address the question of the court's subject matter jurisdiction to entertain the application for preliminary injunctive relief. . . ."); Bey v. Jamaica Realty, No. 12 Civ. 2141 (ENV), 2012 WL 1634161, at *1 (E.D.N.Y. May 9, 2012) ("[T]he [pro se] complaint is dismissed and the Court cannot consider plaintiff's request for a temporary restraining order as this Court lacks subject matter jurisdiction over this action."); Hamblet v. Brownlee, 319 F. Supp. 2d 422, 430 (S.D.N.Y. 2004) ("Having found that this Court lacks subject matter jurisdiction and that the Defendants' Motion should be granted, this Court need not address the Plaintiff's Motion for a preliminary injunction.") Accordingly, Plaintiff's motion for a temporary restraining order and preliminary injunction will be denied.

IV. LEAVE TO AMEND

The Second Circuit has admonished that courts "should not dismiss [a pro se complaint] 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 and citation omitted). However, a court may decline an opportunity to re-plead "when amendment would be futile." Tocker v. Philip Morris Cos., Inc., 470 F.3d 481, 491 (2d Cir. 2006) (citing Ellis v. Chao, 336 F.3d 114, 127 (2d Cir. 2003)).

Here, the Court finds that amendment would be futile because, under present circumstances, Plaintiff cannot allege any set of facts sufficient "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); see also Bey,

2012 WL 1634161, at *2 ("Ordinarily, the Court would allow a plaintiff confronting threshold dismissal an opportunity to amend his pleading. The Court, however, need not afford that opportunity here where it is clear from the face of the petition that the Court lacks subject matter jurisdiction.") (internal quotation omitted); Berrian v. Pataki, 510 F. Supp. 2d 348, 356 (S.D.N.Y. 2007) (declining to grant pro se plaintiff leave to amend where amendment would be futile because plaintiff "can articulate no set of facts that would confer standing").

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is GRANTED (Dkt. No. 7), and Plaintiff's motion for a temporary restraining order and preliminary injunction is DENIED. (Dkt. No. 3) The Clerk of Court is respectfully requested to terminate the motions and to close this case.

Dated: New York, New York
September 17, 2013

SO ORDERED.

Paul G. Gardephe
United States District Judge