

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**FILED
CLERK**

9:32 am, Sep 11, 2017

-----X
BRYAN HENRY,

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

Plaintiff,

ORDER

-against-

13-CV-7427 (SJF)(ARL)

COUNTY OF NASSAU, et al.,

Defendants.
-----X

FEUERSTEIN, District Judge:

Pending before the Court is the Report and Recommendation of the Honorable Arlene R. Lindsay, United States Magistrate Judge, dated August 7, 2017 (“the Report”), (1) recommending that defendants’ motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure be granted; (2) advising, *inter alia*, (a) that “[p]ursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of th[e] Report . . . to file written objections[,]” (Report at 18), (b) that “[a]ny requests for an extension of time for filing objections must be directed to Judge Feuerstein prior to the expiration of the fourteen (14) day period for filing objections[,]” (*id.*); and (c) that “[f]ailure to file objections will result in a waiver of those objections for purposes of appeal[,]” (*id.*) (citing *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Beverly v. Walker*, 118 F.3d 900, 901 (2d Cir. 1997); and *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996)); and (3) directing counsel for defendants to serve a copy thereof upon *pro se* plaintiff Bryan Henry (“plaintiff”) and file proof of such service on ECF. The certificate of service filed by defendants in accordance with the Report indicates that a copy of the Report was served upon plaintiff via first class mail to his address of record on August 8, 2017. (*See* Docket Entry

["DE"] 109). Plaintiff has not timely filed any objections to the Report, nor sought an extension of time to do so. For the reasons stated herein, Magistrate Judge Lindsay's Report is accepted in its entirety.

I. DISCUSSION

A. Standard of Review

Any party may serve and file written objections to a report and recommendation of a magistrate judge on a dispositive matter within fourteen (14) days after being served with a copy thereof. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Any portion of such a report and recommendation to which a timely objection has been made is reviewed *de novo*. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The court, however, is not required to review the factual findings or legal conclusions of the magistrate judge as to which no proper objections are interposed. *See Thomas*, 474 U.S. at 150, 106 S. Ct. 466. Where a party "received clear notice of the consequences of the failure to object" to a report and recommendation on a dispositive matter, *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992) (quotations and citation omitted); *accord Small v. Secretary of Health and Human Svcs.*, 892 F.2d 15, 16 (2d Cir. 1989), his "failure to object timely to [that] report waives any further judicial review of the report." *Frank*, 968 F.2d at 16; *see also Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015); *Caidor v. Onondago County*, 517 F.3d 601, 604 (2d Cir. 2008).

Nonetheless, the waiver rule is "nonjurisdictional" and, thus, the Court may excuse a violation thereof "in the interests of justice." *King v. City of New York, Dep't of Corr.*, 419 F. App'x 25, 27 (2d Cir. Apr. 4, 2011) (summary order) (quoting *Roldan v. Racette*, 984 F.2d 85, 89

(2d Cir. 1993)); *see also DeLeon v. Strack*, 234 F.3d 84, 86 (2d Cir. 2000). “Such discretion is exercised based on, among other factors, whether the defaulted argument has substantial merit or, put otherwise, whether the magistrate judge committed plain error in ruling against the defaulting party.” *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000); *accord King*, 419 F. App’x at 27.

B Review of Report

Since plaintiff has not timely filed any objections to Magistrate Judge Lindsay’s Report, nor sought an extension of time to do so, he has “waive[d] any further judicial review of the findings contained in the [R]eport.” *Spence*, 219 F.3d at 174. Moreover, as the Report is not plainly erroneous, the Court will not exercise its discretion to excuse plaintiff’s default in filing timely objections to the Report in the interests of justice. Accordingly, the Report is accepted in its entirety and, for the reasons set forth therein, defendants’ motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is granted to the extent set forth in the Report and defendants are granted judgment dismissing plaintiff’s claims in their entirety with prejudice for failure to exhaust administrative remedies.

II. CONCLUSION

For the reasons set forth herein, Magistrate Judge Lindsay’s Report is accepted in its entirety and, for the reasons set forth therein, defendants’ motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is granted to the extent set forth in the Report and defendants are granted judgment dismissing plaintiff’s claims in their entirety with prejudice

for failure to exhaust administrative remedies. The Clerk of the Court shall enter judgment in favor of defendants, close this case and, pursuant to Rule 77(d)(1) of the Federal Rules of Civil Procedure, serve notice of entry of this order upon all parties as provided by Rule 5(b) of the Federal Rules of Civil Procedure and record such service on the docket.

The Court certifies pursuant to 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 any appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

SO ORDERED.

/s/

SANDRA J. FEUERSTEIN
United States District Judge

Dated: September 11, 2017
Central Islip, New York