

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**FILED
CLERK**

4:00 pm, Feb 09, 2018

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TRUSTEES OF THE NORTHEAST CARPENTERS
HEALTH, PENSION, ANNUITY, APPRENTICESHIP,
AND LABOR MANAGEMENT COOPERATION FUNDS,

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

Plaintiffs,

ORDER

-against-

16-CV-6225 (SJF)(ARL)

ENERGY SMART INSULATION, INC. and A TO Z
COATINGS, INC.,

Defendants.

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FEUERSTEIN, District Judge:

Pending before the Court is the Report and Recommendation of the Honorable Arlene R. Lindsay, United States Magistrate Judge, dated January 23, 2018 (“the Report”), (1) recommending that the motion of plaintiffs Trustees of the Northeast Carpenters Health, Pension, Annuity, Apprenticeship, and Labor Management Cooperation Funds (“plaintiffs”) seeking to dismiss plaintiffs’ claims against them in their entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be denied; and (2) advising, *inter alia*, (a) that “[a]ny objections to th[e] Report . . . must be filed with the Clerk of the Court . . . within fourteen (14) days of service[.]” (Report at 11), (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 a “[f]ailure to file objections within this period waives the right to appeal the District Court’s Order.” (*Id.*) (citing 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); and *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996)). A copy of the Report was served upon counsel for all parties via ECF on January 23, 2018. (*See* Docket Entry [“DE”] 23). No party has filed any

timely objections to the Report, nor sought an extension of time to do so. For the reasons set forth below, 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 v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). 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 no party has filed any timely objections to Magistrate Judge Lindsay’s Report, nor sought an extension of time to do so, they have “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 the parties’ 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 to dismiss plaintiffs’ claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is denied.

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 to dismiss plaintiffs’ claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is denied.

SO ORDERED.

/s/
SANDRA J. FEUERSTEIN
United States District Judge

Dated: February 9, 2018
Central Islip, New York