

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

RIKISHA S. SMITH,

Plaintiff,

v.

**5:20-CV-0748
(TJM/ML)**

RIKITA SMITH, et al.,

Defendants.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Plaintiff commenced this action *pro se* and moved for leave to proceed *in forma pauperis*, for appointment of counsel, and for a refund of the filing fee. The Hon. Miroslav Lovric, United States Magistrate Judge, recommended that Plaintiff's Complaint (Dkt. No. 1) be dismissed in its entirety with leave to replead, denied as moot Plaintiff's *in forma pauperis* application, denied Plaintiff's motion for appointment of counsel, and denied Plaintiff's motion for a refund of the filing fee. See 08/21/20 Order & Report and Recommendation, Dkt. 10. On August 27, 2020, Plaintiff filed, *inter alia*, an Amended Complaint, Dkt. No. 11, and a letter to Magistrate Judge Lovric that the Court Clerk's Office properly interpreted as an objection to Magistrate Judge Lovric's dismissal recommendation. See Dkt. 14. Plaintiff's letter can also be interpreted as an appeal of Magistrate Judge Lovric's decisions denying Plaintiff the appointment of counsel and a refund of the filing fee. See Dkt. 14.

II. DISCUSSION

a. Objection to Dismissal Recommendation

Plaintiff's objection to Magistrate Judge Lovric's dismissal recommendation is rendered moot by the filing of an amended complaint. Moreover, on *de novo* review the Court agrees with Magistrate Judge Lovric that the Complaint must be dismissed as frivolous because, as drafted, the Court is unable to meaningfully analyze whether, and to what extent, Plaintiff has pleaded any colorable claims against the defendants. Accordingly, Plaintiff's objection is overruled.

b. Appeal of Denial of Attorney Appointment

To the extent Plaintiff appeals Magistrate Judge Lovric's denial of the motion for appointment of counsel, the appeal is denied. In light of the recommendation that the Complaint be dismissed as frivolous, it was entirely proper for Magistrate Judge Lovric to conclude that Plaintiff was not entitled to the appointment of counsel. Based on Plaintiff's Complaint, it was unclear whether any of the claims therein were "of substance," a requisite threshold finding for the appointment of counsel. See Ord. & Rep. Rec. at 7-8. This decision does not preclude Plaintiff from bringing a new motion for the appointment of counsel in connection with the Amended Complaint.

c. Appeal of Denial of Filing Fee Refund

To the extent Plaintiff appeals Magistrate Judge Lovric's denial of the motion for a refund of the filing fee, the appeal is denied. Magistrate Judge Lovric's decision in this regard is not clearly erroneous or contrary to law. See *Ball v. Goldfar*, 19-CV-0908, 2020 WL 474448, at *2, n.2 (N.D.N.Y. Jan. 28, 2020) (Sharpe, J.)("The law is well-settled

that once payment of the filing fee has been collected, it cannot be waived or refunded, regardless of the outcome of the action.”).

III. CONCLUSION

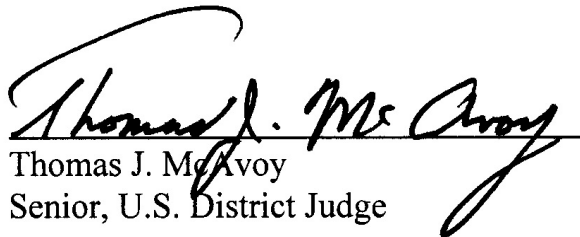
For the reasons discussed above, Plaintiff's objection, Dkt. 14, is **OVERRULED**, and the Court **ACCEPTS AND ADOPTS** Magistrate Judge Lovric's recommendation in the August 20, 2020 Order and Report-Recommendation, Dkt. 10, to dismiss the Complaint with leave to replead. Accordingly, it is hereby **ORDERED** that Plaintiff's Complaint, Dkt. 1, is **DISMISSED** with leave to replead. The Amended Complaint filed by Plaintiff, Dkt. 11, is referred to Magistrate Judge Lovric for an initial review.

To the extent Plaintiff appeals Magistrate Judge Lovric's denial of the motion for appointment of counsel, Dkt. 14, the appeal is **DENIED**. This denial does not preclude Plaintiff from bringing a new motion for appointment of counsel in connection with the Amended Complaint.

To the extent Plaintiff appeals Magistrate Judge Lovric's denial of the motion for a refund of the filing fee, Dkt. 14, the appeal is **DENIED**.

IT IS SO ORDERED.

Dated: September 2, 2020


Thomas J. McAvoy
Senior, U.S. District Judge