

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS SMYTHE,

Plaintiff,

-against-

9:13-CV-1288 (LEK/ATB)

JOHN BISH, *et al.*,

Defendants.

DECISION AND ORDER

I. INTRODUCTION

This matter comes before the Court following an Order and Report-Recommendation filed on May 16, 2017, by the Honorable Andrew T. Baxter, U.S. Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Dkt. No. 105 (“Report-Recommendation”). Pro se plaintiff Francis Smythe filed Objections. Dkt. No. 106 (“Objections”).

II. LEGAL STANDARD

Within fourteen days after a party has been served with a copy of a magistrate judge’s report-recommendation, the party “may serve and file specific, written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b); L.R. 72.1(c). If no objections are made, or if an objection is general, conclusory, perfunctory, or a mere reiteration of an argument made to the magistrate judge, a district court need review that aspect of a report-recommendation only for clear error. *Barnes v. Prack*, No. 11-CV-0857, 2013 WL 1121353, at *1 (N.D.N.Y. Mar. 18, 2013); *Farid v. Bouey*, 554 F. Supp. 2d 301, 306–07, 306 n.2 (N.D.N.Y. 2008), overruled on other grounds by *Widomski v. State Univ. of N.Y. (SUNY) at Orange*, 748 F.3d 471 (2d Cir. 2014); see also *Machicote v. Ercole*, No. 06-CV-13320, 2011 WL 3809920, at *2 (S.D.N.Y.

Aug. 25, 2011) (“[E]ven a *pro se* party’s objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate’s proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument.”). “A [district] judge . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). Otherwise, a court “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.*

III. DISCUSSION

Smythe makes one specific objection to the Report-Recommendation: Judge Baxter improperly shifted the burden of proof onto Smythe in finding that any mistakes made by Defendant McLoughlin were harmless. *Objs.* at 7. Smythe claims that Judge Baxter “acknowledge[d] that Defendant McLoughlin lied about interviewing Bish,” *id.*, but that is false. In his Report-Recommendation, Judge Baxter explicitly declined to decide whether McLoughlin lied. *Rep.-Rec.* at 8. Instead, Judge Baxter found that even if McLoughlin had lied and provided inadequate assistance, these errors were harmless because of the “subsequent efforts to find Mr. Bish by hearing officer Wolczyk,” *id.* at 12, and because the hearing officer attempted to obtain all of the witnesses Smythe requested, *id.* at 10. As Judge Baxter correctly applied the harmless error doctrine here, *Pilgrim v. Luther*, 571 F.3d 201, 206 (2d Cir. 2009), Smythe’s claim that a finding of harmless error improperly shifts the burden of proof onto him lacks merit.

The Court has reviewed the remainder of the Report-Recommendation for clear error and has found none.

IV. CONCLUSION

Accordingly, it is hereby:

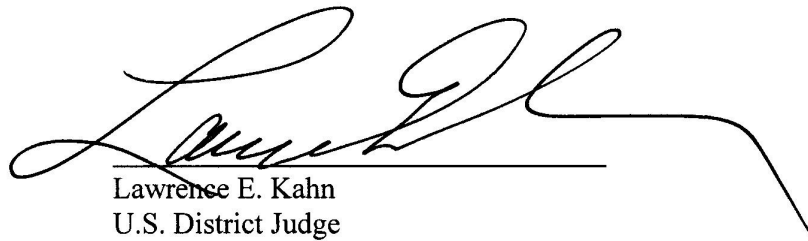
ORDERED, that the Report-Recommendation (Dkt. No. 105) is **APPROVED and ADOPTED in its entirety**; and it is further

ORDERED, that Defendants' motion for summary judgment (Dkt. No. 93) is **GRANTED**, and Plaintiff's second amended complaint (Dkt. No. 38) is **DISMISSED in its entirety**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: June 30, 2017
Albany, New York



Lawrence E. Kahn
U.S. District Judge