

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

JASON SMITH,

Plaintiff,

v.

9:15 -CV-0496 (BKS/ATB)

**A. RUFA, *Educational Director; Riverview
Correctional Facility, et al.,***

Defendants.

Appearances:

Jason Smith

New York, NY 10027

Plaintiff, pro se

Katie E. Valder, Esq.

Hon. Eric T. Schneiderman

Office of New York State Attorney General

The Capitol

Albany, NY 12224

Attorney for Defendants

Hon. Brenda K. Sannes, U. S. District Judge

MEMORANDUM-DECISION AND ORDER

Plaintiff pro se Jason Smith brought this action against defendants under 42 U.S.C. § 1983 asserting First Amendment retaliation and Fourteenth Amendment due process claims arising out of his confinement at Riverview Correctional Facility. Dkt. No. 1. Presently before the Court is Defendants' motion to dismiss the complaint for lack of prosecution and/or sanctions under Fed. R. Civ. P. 37(d) and 41(b). Dkt. No. 47. Plaintiff failed to respond to Defendants' motion. This matter was referred to United States Magistrate Judge Andrew T. Baxter who, on

October 2, 2017, issued a Report-Recommendation recommending that Defendants' motion to dismiss be granted, and that the complaint be dismissed with prejudice unless Plaintiff files timely meritorious objections. Magistrate Judge Baxter recommended that if Plaintiff files timely meritorious objections, and the Court deems it appropriate, that the case be referred back to Judge Baxter to determine whether a lesser sanction under Rule 37 would be appropriate. Dkt. No. 48, at 9. Magistrate Judge Baxter advised the parties that, under 28 U.S.C. § 636(b)(1), they had fourteen days within which to file written objections to the report, and that the failure to object to the report within fourteen days would preclude appellate review. Dkt. No. 48, at 9-10.

Plaintiff filed a timely objection to the Report-Recommendation. Dkt. No. 49. In his objection Plaintiff repeats excuses he previously provided regarding his failures to appear for his deposition. *Id.* Plaintiff claims that he "has made several attempts to communicate" with defense counsel by correspondence and telephone. *Id.* Plaintiff asserts that he "is declaring his undivided attention to this matter and also pursuing this matter/civil action," and that he "has now arranged a more effective way of receiving his correspondence" with this Court and defense counsel, "and is more than willing to comply and go forward with this matter." *Id.*

This Court reviews *de novo* those portions of the Magistrate Judge's findings and recommendations that have been properly preserved with a specific objection. *Petersen v. Astrue*, 2 F. Supp. 3d 223, 228-29 (N.D.N.Y. 2012); 28 U.S.C. § 636(b)(1)(C). Findings and recommendations as to which there was no properly preserved objection are reviewed for clear error. *Id.* Plaintiff has not objected to the facts set forth in the Procedural History of the Report-Recommendation, and the Court adopts those facts in their entirety. In light of Plaintiff's timely objection and asserted interest in pursuing this litigation, the Court adopts Magistrate Baxter's

recommendation that this matter be referred back to Magistrate Judge Baxter to determine whether a lesser sanction under Fed. R. Civ. P. 37 would be appropriate.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the facts set forth in the Procedural History of Magistrate Judge Baxter's Report-Recommendation (Dkt. No. 48) are adopted in their entirety; and it is further

ORDERED that the recommendation in the Report-Recommendation (Dkt. No. 48) that this matter be referred back to Magistrate Judge Baxter to determine whether a lesser sanction under Fed. R. Civ. P. 37 would be appropriate is **ADOPTED**; and it is further

ORDERED that this matter is referred back to Magistrate Judge Baxter to determine whether a lesser sanction under Fed. R. Civ. P. 37 would be appropriate.

IT IS SO ORDERED.

Dated: November 29, 2017



Brenda K. Sannes
U.S. District Judge