UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KEVIN FISHER,

Plaintiff,

v.

9:16-CV-1175
(GTS/ATB)

MILLER, Superintendent, Great Meadow Corr. Facility; and EASTMAN, Superintendent for Security, Great Meadow Corr. Facility,

Defendants.

APPEARANCES: OF COUNSEL:

KEVIN FISHER, 08-A-2636
Plaintiff, *Pro Se*
Green Haven Correctional Facility
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Stormville, New York 12582

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GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this *pro se* prisoner civil rights action filed by Kevin Fisher ("Plaintiff") against the two above-captioned employees of the New York State Department of Corrections and Community Supervision ("Defendants") pursuant to 42 U.S.C. § 1983, are (1) Defendants' motion to dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6), and (2) United States Magistrate Judge Baxter's Report-Recommendation recommending that Defendants' motion be granted in part and

denied in part. (Dkt. Nos. 10, 15.) For the reasons set forth below, Magistrate Judge Baxter's Report-Recommendation is accepted and adopted; Defendants' motion is granted to the extent that it requests the dismissal of Plaintiff's claim of negligence in his Complaint; and Defendants' motion is otherwise denied.

Generally, in his "Objection" to the Report-Recommendation, Plaintiff sets forth certain discovery demands of Defendants, and requests that the Court issue an Order directing Defendants to comply with those discovery demands. (Dkt. No. 16.)[1] Plaintiff's "Objection" does not contain a specific challenge to any portion of the Report-Recommendation. (*Id*.)

When a specific objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to a *de novo* review. Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). To be "specific," the objection must, with particularity, "identify [1] the portions of the proposed findings, recommendations, or report to which it has an objection and [2] the basis for the objection." N.D.N.Y. L.R. 72.1(c).[2]

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[1] Plaintiff's request is unsupported by a showing of cause. However, because the request is non-dispositive in nature, the undersigned will deny it only without prejudice (so that he may renew it before Magistrate Judge Baxter, should he choose to do so). Plaintiff is advised that any renewed request must be supported by an affidavit pursuant to Local Rule 7.1. In addition, the Clerk of the Court is directed to provide Plaintiff with a courtesy copy of the District's Local Rules of Practice, and the District's *Pro Se* Handbook, if it has not already done so.

[2] *See also Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Although Mario filed objections to the magistrate's report and recommendation, the statement with respect to his Title VII claim was not specific enough to preserve this claim for review. The only reference made to the Title VII claim was one sentence on the last page of his objections, where he stated that it was error to deny his motion on the Title VII claim '[f]or the reasons set forth in Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment.' This bare statement, devoid of any reference to specific findings or recommendations to which he objected and why, and unsupported by legal authority, was not sufficient to preserve the Title VII claim.").

When no objection is made to a report-recommendation, the Court subjects that report-recommendation to only a clear error review. Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a "clear error" review, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Id*.; *see also Batista v. Walker*, 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) ("I am permitted to adopt those sections of [a magistrate judge's] report to which no specific objection is made, so long as those sections are not facially erroneous.") (internal quotation marks omitted).

After carefully reviewing the relevant papers herein, including Magistrate Judge Baxter's thorough Report-Recommendation, the Court can find no clear-error in the Report-Recommendation. Magistrate Judge Baxter employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. As a result, the Report-Recommendation is accepted and adopted for the reasons set forth therein. To those reasons, the Court adds the following two points.

First, to the extent note 2 of the Report-Recommendation may be read to suggest that the integrality exception to the "four corners" rule is an alternative to the knowledge-or-possession exception to that rule, the Court construes the latter (i.e., knowledge or possession) to be a requirement of the former (i.e., integrality).[3] This is because, to be "integral" to a complaint, a

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[3] *See Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir. 2000) ("For purposes of a motion to dismiss, we have deemed a complaint to include . . . documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit . . . .") (citation omitted); *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.").

document's terms and effect must be relied on heavily by the complaint.[4] Setting aside the fact that a plaintiff's heavy reliance on a document implies his possession or at the very least knowledge of the document, the Second Circuit has explained that "mere notice or possession is not enough" to constitute an exception to the "four corners" rule.[5] However, here, this point of clarification is of little significance, because the Court finds that both requirements (i.e., knowledge / possession and heavy reliance) have been met with regard to Plaintiff's grievance and appeal therefrom. While the mere mention of Plaintiff's grievance and appeal in Paragraph 4 of the form Complaint is not enough to render the documents heavily relied upon (because alleging successful exhaustion is not necessary to state a claim), Plaintiff also alleges, in his "Fourth Cause of Action" and "Fifth Cause of Action," that Defendants *knowingly* "continue" to fail to properly screen inmates. (Dkt. No. 1, at 6.)

Second, to the extent that pages 14 through 16 of the Report-Recommendation rely on the difference between the standard under Fed. R. Civ. P. 56 and the standard under Fed. R. Civ. P. 12(b)(6), the Court construes that difference to be minimal. This is because the former turns on whether a finding of liability on a claim would be *rational* based on material facts that are undisputed in a record while the latter turns on whether a claim has been *plausibly* suggested by factual allegations that are assumed to be true. In short, the standards are analogous in that "both

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[4] *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) ("Where a document is not incorporated by reference, the court may neverless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document 'integral' to the complaint.") [internal quotation marks and citations omitted].

[5] *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2009) ("Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough.").

rationality and plausiblity share the characteristic of reasonableness." *See, e.g., Morgan v. Luft*, 15-CV-0024, 2016 WL 1118452, at *4 (N.D.N.Y. March 22, 2016) (Suddaby, C.J.). However, again, this point of clarification is of little significance, because the Court finds that facts have been alleged in the Complaint plausibly suggesting that Defendants acted with a mental state greater than carelessness.

ACCORDINGLY, it is

ORDERED that Magistrate Judge Baxter's Report-Recommendation (Dkt. No. 15) is **ACCEPTED** and **ADOPTED**; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. No. 10) is **GRANTED in part** in that Plaintiff's Complaint (Dkt. No. 1) is **DISMISSED** to the extent that it asserts a claim of negligence; and it is further

ORDERED that Defendants' motion to dismiss (Dkt. No. 10) is **otherwise DENIED;**

ORDERED that Defendants file an answer to the Plaintiff's Complaint within 14 days of the date of this Decision & Order pursuant to Fed.R.Civ.P. Rule 12(a)(4)(a) and this case is referred back to Magistrate Judge Baxter for the setting of pretrial scheduling deadlines.

Dated: February 9, 2017
Syracuse, New York

HON. GLENN T. SUDDABY
Chief United States District Judge