

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

TROY MCRAE,

Plaintiff,

v.

9:17-CV-0146 (BKS/CFH)

BRIAN FISCHER, *Commissioner, et al.,*

Defendants.

Appearances:

Troy McRae
A-046-109-695
Buffalo Federal Detention Facility
4250 Federal Drive
Batavia, NY 14020
Plaintiff, pro se

Aimee M. Paquette, Esq.
Hon. Eric T. Schneiderman
Office of New York State Attorney General
615 Erie Boulevard West, Suite 102
Syracuse, NY 13204
Attorney for Defendants

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff Troy McRae commenced this pro se action alleging violations of his constitutional rights arising out of his incarceration at Cayuga Correctional Facility. Dkt. No. 2. On February 17, 2017, Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(5) and 12(b)(6). Dkt. No. 3. Plaintiff filed a letter stating that he would not file a response to the motion. Dkt. No. 5. Defendants filed a reply on March 21, 2017. Dkt. No. 6. This matter was referred to United States Magistrate Judge Christian F. Hummel who, on July 14, 2017, issued a

Report-Recommendation and Order. Dkt. No. 7. Magistrate Judge Hummel recommended that Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(5) be denied; that Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) be granted; and that Plaintiff's complaint be dismissed in its entirety, without prejudice. Dkt. No. 7, p. 23. Magistrate Judge Hummel 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. 7, pp. 23-24. No objections to the Report-Recommendation have been filed.

As no objections to the Report-Recommendation have been filed, and the time for filing objections has expired, the Court reviews the Report-Recommendation for clear error. *See Petersen v. Astrue*, 2 F. Supp. 3d 223, 228-29 (N.D.N.Y. 2012); Fed. R. Civ. P. 72(b) advisory committee's note to 1983 amendment. Having reviewed the Report-Recommendation for clear error and found none, the Report-Recommendation is adopted in its entirety.

Further, in recognition of Plaintiff's status as a pro se litigant and because it seems possible that Plaintiff may be able to assert cognizable claims with better pleading, leave to file an amended complaint within thirty (30) days of the date of this Order is granted. In any amended complaint, Plaintiff must clearly set forth the facts that give rise to the claims, including the dates, times, and places of the alleged underlying acts, and each individual who committed each alleged wrongful act. In addition, the revised pleading should allege facts demonstrating the specific involvement of any of the named defendants in the constitutional deprivations alleged in sufficient detail to establish that they were tangibly connected to those deprivations. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). Any such amended complaint will replace the existing complaint, and must be a wholly integrated and complete pleading that

does not rely upon or incorporate by reference any pleading or document previously filed with the court. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (“It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect.” (quotation marks omitted)). If Plaintiff fails to file an amended complaint within thirty days, this case will be closed.

For these reasons, it is

ORDERED that the Report-Recommendation (Dkt. No. 7) is **ADOPTED** in its entirety; and it is further

ORDERED that Defendants’ motion to dismiss under Fed. R. Civ. P. 12(b)(5) (Dkt. No. 3) is **DENIED**; and it is further

ORDERED that Defendants’ motion to dismiss under Fed. R. Civ. P. 12(b)(6) (Dkt. No. 3) is **GRANTED**, and Plaintiff’s complaint is **DISMISSED** in its entirety, without prejudice; and it is further

ORDERED that Plaintiff is granted leave to file an amended complaint within thirty (30) days of the date of this Order; and it is further

ORDERED that if Plaintiff fails to file an amended complaint within thirty (30) days of the date of this Order, the Clerk is directed to close this case; and it is further

ORDERED that the Clerk serve a copy of this Order upon the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: August 16, 2017


Brenda K. Sannes
U.S. District Judge