

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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JESSE D. WEST,

Plaintiff,

v.

9:17-CV-0621  
(GTS/DJS)

JOHN HARKNESS, #0304, Police Officer; and  
JOHN HARRIMAN, #0463, Police Officer,

Defendants.

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APPEARANCES:

OF COUNSEL:

JESSE D. WEST, 17-B-3123  
Plaintiff, *Pro Se*  
Altona Correctional Facility  
555 Devils Den Road  
Altona, New York 12910

HON. KRISTEN E. SMITH  
Corporation Counsel for the City of Syracuse  
Counsel for Defendants  
233 East Washington Street  
300 City Hall  
Syracuse, New York 13202

TODD M. LONG, ESQ.  
Assistant Corporation Counsel

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 Jesse D. West (“Plaintiff”) against the two above-captioned police officers employed in the City of Syracuse (“Defendants”), are the following: (1) Defendants’ motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c); (2) United States Magistrate Judge Daniel J. Stewart’s Report-Recommendation recommending that Defendants’ motion be denied, and (3) Plaintiff’s affidavit regarding the Report-Recommendation. (Dkt. Nos. 19, 39, 40.)

After carefully reviewing the relevant papers herein, including Magistrate Judge Stewart's thorough Report-Recommendation, the Court can find no error in the Report-Recommendation, clear or otherwise: Magistrate Judge Stewart employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. (Dkt. No. 39.) As a result, the Report-Recommendation is accepted and adopted in its entirety for the reasons set forth therein. To those reasons, the Court adds the following analysis.

In his Amended Complaint, Plaintiff asserts three claims: (1) a claim of excessive force under the Fourth Amendment; (2) a claim of failure to protect under the Fourth Amendment; and (3) a claim of sexual assault under the Fourth Amendment. (Dkt. No. 8.) In his Report-Recommendation, Magistrate Judge Stewart recommends that Defendants' motion be denied with regard to all three claims, which should be permitted to proceed. (Dkt. No. 39.) Although Plaintiff's Objection to the Report-Recommendation was due on June 15, 2018, he did not file an Objection within that time period. Rather, in a submission entitled "Affidavit of Service" dated July 9, 2018 (and thus deemed "filed" on that date pursuant to the Prison Mailbox Rule), Plaintiff stated as follows:

[Although] U.S. Magistrate Judge Daniel J. Stewart . . . recommends that Defendants['] motion regarding Plaintiff['] claim for sexual assault be denied, and that Plaintiff's Fourth Amendment claim of sexual assault be permitted to proceed . . . [,] I'm not seeking to file charges against . . . [Defendants] for sexual assault and related charges . . . .

(Dkt. No. 40.)

Under the circumstances, the Court liberally construes this submission as either (1) a belated Objection to that portion of the Report-Recommendation recommending that Plaintiff's Fourth Amendment sexual assault claim be permitted to proceed (apparently because he mistakenly intended that claim to arise under New York common law, and now understands that

the claim cannot do so, and that any Fourth Amendment sexual assault claim would be redundant of his Fourth Amendment excessive force claim), or (2) a request to voluntarily discontinue his Fourth Amendment sexual assault claim pursuant to Fed. R. Civ. P. 41(a)(2) (for the same reason). Regardless of the construction, the result would be the same: the Court finds that cause has been shown for the dismissal of Plaintiff's Fourth Amendment sexual assault claim.

**ACCORDINGLY**, it is

**ORDERED** that Magistrate Judge Stewart's Report-Recommendation (Dkt. No. 39) is **ACCEPTED** and **ADOPTED** in its entirety; and it is further

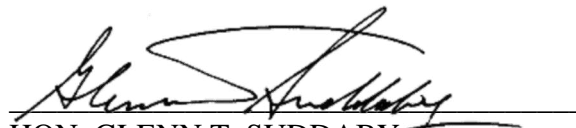
**ORDERED** that Defendants' motion for judgment on the pleadings (Dkt. No. 19) is **DENIED**; and it is further

**ORDERED** that Plaintiff's Fourth Amendment sexual assault claim is **DISMISSED**; and it is further

**ORDERED** that **SURVIVING** this Decision and Order are Plaintiff's Fourth Amendment excessive force claim and his Fourth Amendment failure-to-protect claim; and it is further

**ORDERED** that this case is referred back to Magistrate Judge Stewart for the resetting of pretrial scheduling deadlines.

Dated: August 7, 2018  
Syracuse, New York

  
HON. GLENN T. SUDDABY  
Chief United States District Judge