

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

---

**DAVID CALDWELL,**

**Plaintiff,**

**v.**

**9:19-CV-673**

**C.O. KUSMINSKY, et al.,**

**Defendants.**

---

**THOMAS J. McAVOY,  
Senior United States District Judge**

**DECISION and ORDER**

**I. INTRODUCTION**

This pro se action brought pursuant to 42 U.S.C. § 1983 was referred to the Hon. Andrew T. Baxter, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Presently before the court is defendant Corrections Officer (“C.O.”) Kusminsky’s motion for summary judgment pursuant to Fed. R. Civ. P. 56. (Dkt. No. 14). C.O. Kusminsky filed the instant summary judgment motion in lieu of answering the complaint, contending that plaintiff failed to exhaust his administrative remedies. In his April 1, 2020 Report-Recommendation (Dkt. No. 22), Magistrate Judge Baxter recommends that C.O. Kusminsky’s motion for summary judgment be denied without prejudice to renewal after the parties have had an opportunity to conduct discovery. No objections to the Report-Recommendation have been filed, and the time to do so has expired.

## II. DISCUSSION

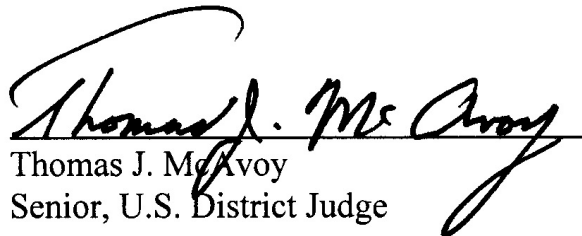
After examining the record, this Court has determined that the Report-Recommendation is not subject to attack for plain error or manifest injustice.

## III. CONCLUSION

Accordingly, the Court **ACCEPTS** and **ADOPTS** the Report-Recommendation (Dkt. No. 22) for the reasons stated therein. Defendant Kusminsky's motion for summary judgment (Dkt. No. 14) is **DENIED WITHOUT PREJUDICE** to renewal after the parties have had an opportunity to conduct discovery.

**IT IS SO ORDERED.**

Dated: October 20, 2020

  
Thomas J. McAvoy  
Senior, U.S. District Judge