UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASHLEY AUTUMN KOVALCHIK,

Plaintiff,

v.

THE CITY OF NEW YORK and TONY SIMMONS, *individually and in his official capacity*,

Defendants.

No. 09-CV-4546 (RA)

OPINION & ORDER ADOPTING REPORT & RECOMMENDATION

RONNIE ABRAMS, United States District Judge:

Plaintiff Ashley Autumn Kovalchik brings this action against Defendant Tony Simmons, a former employee of the City of New York's Department of Juvenile Justice, under 42 U.S.C. § 1983. Before the Court is the March 21, 2016 Report and Recommendation of Magistrate Judge Frank Maas (the "Report"), which recommends that the Court award Kovalchik $300,000 in compensatory damages, $300,000 in punitive damages, $4,040 in attorney's fees, and $350 in costs. Also before the Court is Simmons' request that the Court set aside the entry of default. For the reasons set forth below, the Court denies Simmons' request to set aside the default and adopts the Report in its entirety.

BACKGROUND

In September 2005, Kovalchik was a fifteen-year-old resident of a youth detention facility in New York. On or about September 12, 2005, Kovalchik was scheduled to appear before the New York County Family Court. *See* Compl. ¶ 13 (Dkt. 1). Simmons, then a sworn officer and an official of the Department of Juvenile Justice, escorted Kovalchik from a holding center to an

elevator. *See id.* ¶ 16. Once in the elevator, Simmons allegedly raped Kovalchik. *See id.* ¶¶ 20–21. Simmons was arrested and charged with sexually assaulting Kovalchik and other female juvenile detainees in the custody of the Department of Juvenile Services. *See id.* ¶¶ 25, 28.[1]

On May 13, 2009, Kovalchik brought this action against Simmons and the City of New York under 42 U.S.C. § 1983, alleging violations of her constitutional rights. On May 28, 2009, Simmons was served with the summons and complaint. *See* Dkt. 6. Although he was deposed at least twice over the next three years, *see* Decl. of David M. Pollack in Supp. of Def.'s Mot. for Summ. J. ("Pollack Decl.") Ex. B at 1 (Dkt. 50); Decl. of Arkady Frekhtman in Supp. of Def.'s Mot. for Summ. J. ("Frekhtman Decl.") Ex. C at 1 (Dkt. 61), Simmons did not answer or otherwise respond to the complaint. The City, however, answered the complaint and, after four years of discovery, moved for summary judgment. *See* Answer (Dkt. 4); Def.'s Mot. for Summ. J. (Dkt. 48). Kovalchik cross-moved for summary judgment against the City and Simmons. *See* Pl.'s Mot. for Summ. J. (Dkt. 55). Simmons did not respond to Kovalchik's motion. On September 18, 2014, the Court granted the City's motion for summary judgment and denied Kovalchik's cross-motion for summary judgment. *See* Opinion & Order (Dkt. 64).

On October 15, 2014, upon Kovalchik's request, the Clerk of Court entered a certificate of default against Simmons. *See* Clerk's Certificate (Dkt. 67). On November 4, 2014, Kovalchik moved for default judgment against Simmons. *See* Mot. for Default J. (Dkt. 69). On November 21, 2014, the Court held an order to show cause hearing on Kovalchik's motion; Simmons did not appear. The same day, the Court granted Kovalchik's motion and referred the case to Judge Maas

[1] Simmons was convicted of sexually assaulting two other female juveniles in his care but was found not guilty of sexually assaulting Kovalchik. *See* Pollack Decl. Ex. L. The First Department affirmed those convictions on March 6, 2014. *See People v. Simmons*, 981 N.Y.S.2d 523 (1st Dep't 2014). On May 30, 2014, the New York Court of Appeals denied leave to appeal. *See People v. Simmons*, 11 N.E.3d 725 (N.Y. 2014).

for a damages inquest. *See* Order (Dkt. 71).

On March 21, 2016, Judge Maas issued the Report. *See* Dkt. 82. Judge Maas noted that although Kovalchik had submitted her inquest papers on March 19, 2015, Simmons had not responded to the inquest order and had not made any contact with the Court. *See* Report at 2. After reviewing Kovalchik's evidence, Judge Maas recommended that the Court award Kovalchik $604,390, consisting of $300,000 in compensatory damages, $300,000 in punitive damages, $4,040 in attorney's fees, and $350 in costs. *See id.* at 2, 20. Judge Maas advised the parties that any written objections to the Report must be filed within fourteen days of service. *See id.* at 21.

On March 30, 2016, Simmons submitted a letter to the Court—his first correspondence with the Court in the nearly seven years that the case had been pending. *See* Pl.'s Letter to Ct. (Mar. 30, 2016) (Dkt. 84). Simmons wrote that he "came home from prison [on] Feb. 25, 2015 and only ha[s] a temporary job as a helper on a food truck," that he did "not understand anything about a report and recommendation," and that he had "no clue what to do." *Id.* Over the next eight months, the Court granted Simmons six extensions of time to file objections to the Report. *See* Dkts. 85, 88, 91, 94, 95, 96. Simmons' current counsel represents that, during this period, Simmons was arrested for a parole violation, entered a drug-treatment facility, and lost contact with his attorney. *See* Pl.'s Letter to Ct. at 1–2 (Oct. 28, 2016) (Dkt. 96).

On December 30, 2016, Simmons filed a response to the Report. *See* Def.'s Obj. to the Report & Recommendation (Dkt. 97); Tony Simmons Aff. in Supp. of Mot. to Set Aside Default J. & Obj. to the R. & R. ("Simmons Aff.") (Dkt. 97-2). According to his affidavit, Simmons was incarcerated from January 25, 2011 to February 25, 2015. *See* Simmons Aff. ¶ 2. Simmons claims that, while he was in custody, his former attorney "counseled [him] to disregard all communications regarding [this] case," advising Simmons that he "would take care of this civil

matter . . . by obtaining a 'stay.'" *Id.* ¶ 3. Simmons claims that he "believed that [he] was excused from making any appearance or filing any responses" in this case. *Id.* Simmons notes that he "was found not guilty in the criminal trial of Ms. Kovalchik's allegations in this case" and asserts that he has a "meritorious defense that [he] did not commit any of the torts Ms. Kovalchik alleges." *Id.* ¶ 7. While Simmons did not file a formal motion to set aside the default, he submitted his affidavit "in support of motion to set aside default judgment."

LEGAL STANDARD

Rule 55(c) of the Federal Rules of Civil Procedure provides that a court "may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c).[2] "Because Rule 55(c) does not define the term 'good cause,' the Second Circuit has established three criteria that must be assessed in order to decide whether to relieve a party from default or from a default judgment." *Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 186 (2d Cir. 2015) (per curiam) (alterations omitted) (quoting *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993)). "These criteria are: '(1) the willfulness of default, (2) the existence of any meritorious defenses, and (3) prejudice to the non-defaulting party.'" *Id.* (quoting *Guggenheim Capital, LLC v. Birnbaum*, 722 F.3d 444, 455 (2d Cir. 2013)). A motion to set aside a default is "addressed to the sound discretion of the district court." *SEC v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998).

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[2] Federal Rule of Civil Procedure 60(b) provides the standard under which a party may seek relief from a final default judgment. *See* Fed. R. Civ. P. 55(c) ("The court . . . may set aside a final default judgment under Rule 60(b)."). Because the Court's order granting Kovalchik's motion for default judgment did not specify an amount of damages to be awarded, however, this order does not constitute a final default judgment. *See, e.g.*, *Swarna v. Al-Awadi*, 622 F.3d 123, 140 (2d Cir. 2010) ("Because the inquest on damages was pending, the District Court's order, though styled a default judgment, was a non-final order."); *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 97 (2d Cir. 1993) ("[D]efault judgment cannot be entered until the amount of damages has been ascertained."). Accordingly, the "good cause" standard of Rule 55(c), rather than the standards of Rule 60(b), governs Simmons' request to set aside the default.

The Second Circuit has "expressed a strong 'preference for resolving disputes on the merits.'" *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005) (quoting *Powerserve Int'l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001)); *see also* 10 James W. Moore et al., *Moore's Federal Practice* § 55.81 (3d ed. 2015) ("Courts have traditionally disfavored default judgments."). "[A]n understandable zeal for a tidy, reduced calendar of cases should not overcome a court's duty to do justice in the particular case." *Enron Oil Corp.*, 10 F.3d at 96. "Accordingly, in ruling on a motion to vacate a default judgment, all doubts must be resolved in favor of the party seeking relief from the judgment in order to ensure that to the extent possible, disputes are resolved on their merits." *Green*, 420 F.3d at 104.

DISCUSSION

A. Motion to Set Aside Default

The Court must first determine whether Simmons has demonstrated "good cause" for setting aside the entry of default. Fed. R. Civ. P. 55(c).

1. Willfulness

The Second Circuit has interpreted "'willfulness,' in the context of a default, to refer to conduct that is more than merely negligent or careless,' but is instead 'egregious and not satisfactorily explained.'" *Bricklayers*, 779 F.3d at 186 (alteration omitted) (quoting *McNulty*, 137 F.3d at 738). "[W]hile a determination that the defendant acted in bad faith would certainly support a finding of 'willfulness,' it is sufficient that the defendant defaulted deliberately." *Gucci Am., Inc. v. Gold Ctr. Jewelry*, 158 F.3d 631, 635 (2d Cir. 1998).

For several reasons, the Court concludes that Simmons' default was willful. First, the duration of Simmons' default is significant: Simmons did not appear in this action until nearly seven years after service of the complaint and eighteen months after the Clerk entered a certificate

of default. *See, e.g.*, *Bricklayers*, 779 F.3d at 186 (finding a default willful where "defendants failed to file a responsive pleading for over nine months after the receipt of the summons and complaint [and] nearly eight months after the defendants were informed that the plaintiffs had requested an entry for default"); *United States v. Chesir*, 526 F. App'x 60, 63 (2d Cir. 2013) (summary order) (finding a default willful where the defendant "indisputably waited to appear in these proceedings until 42 months after service of the complaint, 26 months after the clerk entered his default, and 8 months after entry of the default judgment"); *Todtman, Nachamie, Spizz & Johns, P.C. v. Ashraf*, 241 F.R.D. 451, 454 (S.D.N.Y. 2007) (finding a default willful where "the defendants purposely ignored the summons and complaint for over seven months after they were served"). Second, Simmons knew that Kovalchik was actively litigating this case: Kovalchik moved for summary judgment against him, *see* Dkt. 55, and he was twice deposed—while in prison—as a defendant in the case, *see* Pollack Decl. Ex. B at 1; Frekhtman Decl. Ex. C at 1. *See, e.g.*, *United States v. Cirami*, 535 F.2d 736, 739 (2d Cir. 1976) (finding a default willful where the defendant inexplicably failed to respond to a motion for summary judgment). Finally, by Simmons' own admission, his default was a strategic decision: on the advice of his former attorney, Simmons chose "to disregard all communications regarding [this] case," apparently believing that participation in this action could "threaten [his] criminal appeal." Simmons Aff. ¶ 3; *Am. All. Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 60 (2d Cir. 1996) ("[W]e have refused to vacate a judgment where the moving party had apparently made a strategic decision to default."). Under these circumstances, the Court has little difficulty in finding Simmons' default willful.

Simmons argues, however, that his conduct was not willful because he was relying on the advice of his former attorney. *See* Simmons Aff. ¶ 3. The Second Circuit has "rather consistently refused to relieve a client of the burdens of a final judgment entered against him due to the mistake

or omission of his attorney." *Cirami*, 535 F.2d at 739. "[W]here the attorney's conduct has been found to be willful, the willfulness will be imputed to the party himself where he makes no showing that he has made any attempt to monitor counsel's handling of the lawsuit." *McNulty*, 137 F.3d at 740. Here, Simmons does not argue that he made any effort to monitor this case in the nearly seven years that it was pending against him. The failure to exercise any diligence in addressing this case with his counsel is particularly inexplicable here because, as Simmons does not dispute, he appeared for at least two depositions as a defendant in the case. In addition, even if Simmons were relying on his former counsel's advice that "it would threaten [his] criminal appeal if [he] were to make any response in this civil case," Simmons Aff. ¶ 3, this reliance would not excuse Simmons' decision to wait until March 30, 2016—approximately two years the First Department affirmed his convictions and the Court of Appeals denied leave to appeal—to take any action in this case. *See People v. Simmons*, 981 N.Y.S.2d 523 (1st Dep't 2014); *People v. Simmons*, 11 N.E.3d 725 (N.Y. 2014). Thus, Simmons' alleged reliance upon the misguided advice of his former attorney does not undermine the Court's conclusion that his default was willful. *See, e.g.*, *McNulty*, 137 F.3d at 739 ("[A]llowing a party to evade the consequences of the acts or omissions of his freely selected agent would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent." (alterations omitted) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633–34 (1962)); *Dominguez v. United States*, 583 F.2d 615, 618 (2d Cir. 1978) (per curiam) (upholding refusal to vacate default judgment where there was "no particularized showing of exceptional circumstances explaining [counsel's] gross negligence and no indication of diligent efforts by appellant to induce him to fulfill his duty"); *Belizaire v. RAV Investigative & Sec. Servs., Ltd.*, 310 F.R.D. 100, 104 (S.D.N.Y. 2015) (finding a default willful where the defendant "fail[ed] to offer evidence of its own diligence in

from delivering the initial Complaint to its counsel").[3]

The Court recognizes that, for four of the seven years in which he was in default, Simmons was incarcerated. *See* Simmons Aff. ¶ 2. Under the circumstances of this case, however, Simmons' detention does not preclude a finding that his default was willful. While in detention, Simmons was plainly capable of participating in this action—indeed, as Simmons does not dispute, he sat for two depositions in the case from prison. Moreover, Simmons defaulted more a year before he entered prison, and once he was released, he waited more than a year to appear. Thus, Simmons' status as a prisoner does not excuse his failure to take any action in this case. *See United States v. Goist*, 378 F. App'x 517, 519 (6th Cir. 2010) (unpublished) (affirming the district court's refusal to set aside default entered against a federal prisoner, who was proceeding *pro se*); *United States v. Lawrence*, 90 F. App'x 954, 955 (7th Cir. 2004) (unpublished) (upholding refusal to set aside the entry of default against a prisoner).

2. Meritorious Defense

Simmons has also failed to demonstrate the existence of any meritorious defense. "In order to make a sufficient showing of a meritorious defense[,] the defendant need not establish his defense conclusively, but he must present evidence of facts that, if proven at trial, would constitute a complete defense." *Green*, 420 F.3d at 109 (alteration omitted) (quoting *McNulty*, 137 F.3d at 740). "A defendant seeking to vacate an entry of default must present some evidence beyond conclusory denials to support his defense." *Enron Oil Corp.*, 10 F.3d at 98. In support of his

[3] It is unpersuasive for Simmons to claim that he has been "sincerely concerned about this case" since Judge Maas issued the Report, *see* Pl.'s Letter to Ct. at 2 (Oct. 28, 2016) (Dkt. 96), as Simmons does not claim that he exercised any diligence in monitoring this case from the time it was commenced in May 2009 to the time that Judge Maas issued the Report in March 2016. *See McNulty*, 137 F.3d at 740 ("[A]lthough [the defendant] stated in his affidavit that he had placed some 20 calls to [his attorney] in the wake of the default judgment, he did not suggest that he had discussed the case with [his attorney] at all from the time the case was commenced in October 1994 until the default was entered in September 1995, or that he had made any effort to reach [his attorney] during that nearly one-year period.").

motion, Simmons offers just such a "conclusory denial": he asserts that he "did not commit any of the torts Ms. Kovalchik alleges." Simmons Aff. ¶ 7. Simmons also notes that he "was found not guilty of the criminal trial of Ms. Kovalchik's allegations in this case." *Id.* Simmons' criminal acquittal, however, does not itself constitute a defense in this civil action, as "[e]vidence of acquittal in a criminal action is generally irrelevant and inadmissible in a civil case involving the same incident." *Estate of Moreland v. Dieter*, 395 F.3d 747, 755 (7th Cir. 2005); *accord Borunda v. Richmond*, 885 F.2d 1384, 1387 (9th Cir. 1988) ("Evidence of an acquittal is not generally admissible in a subsequent civil action between the same parties since it constitutes a negative sort of conclusion lodged in a finding of failure of the prosecution to sustain the burden of proof beyond a reasonable doubt." (internal quotation marks omitted)); *McSweeney v. Utica Fire Ins. Co. of Oneida Cty.*, 224 F.2d 327, 328 (4th Cir. 1955) ("Since the burden of proof on the moving party to establish the crucial facts is heavier in a criminal than in a civil case, and there is a dissimilarity of parties, it has generally been held that an acquittal in a criminal case is not admissible in a civil action as evidence of the innocence of the accused."); *see also United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979) ("[A] judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted."). Simmons has not submitted any other evidence in support of his motion. Accordingly, Simmons has not carried his burden of showing that he has any meritorious defense to Kovalchik's claims. *See, e.g.*, *Bricklayers*, 779 F.3d at 187 (concluding that a defendant failed to show a meritorious defense with a "conclusory assertion" that "merely offer[ed] excuses for failing to file a responsive pleading and dispute the amount of damages"); *DIRECTV, Inc. v. Rosenberg*, No. 02-CV-2241 (RCC), 2004 WL 345523, at *3 (S.D.N.Y. Feb. 24, 2004) (finding that a defendant failed to show a meritorious defense where, "[a]t the hearing, his defense amounted to, 'I didn't do it'").

3. Prejudice

Finally, it appears likely that vacating the default would result in prejudice to Kovalchik. "Some delay is inevitable when a motion to vacate a default judgment is granted; thus, 'delay alone is not a sufficient basis for establishing prejudice.'" *Green*, 420 F.3d at 110 (quoting *Davis v. Musler*, 713 F.2d 907, 916 (2d Cir. 1983)). "Rather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.'" *Davis*, 713 F.2d at 916 (quoting Charles Wright et al., *Federal Practice and Procedure: Civil* § 2699 at 536–37 (1983)). However, an "absence of prejudice to the nondefaulting party would not in itself entitle the defaulting party to relief from the judgment." *McNulty*, 137 F.3d at 738. In this case, loss of evidence is a serious concern: as the Court explained in its prior opinion, Kovalchik's case against Simmons may well turn on the recollections of Simmons, Kovalchik, and Simmons' coworkers regarding the alleged rape in 2005. Today, nearly twelve years after this incident and seven years after Simmons defaulted, witnesses whose testimony could have supported Kovalchik's case may already be unable to recall the relevant events, and their ability to do so would likely worsen over time. Thus, given the length of Simmons' delay in appearing this action, vacating the default may result in prejudice to Kovalchik. In any event, in light of the willfulness of his default and his failure to present any evidence that would support a meritorious defense, Simmons has not shown good cause for setting aside the entry of default. *See McNulty*, 137 F.3d at 738.

B. Damages Inquest

The Court next addresses the merits of Judge Maas' damages inquest. A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Under Federal Rule of Civil Procedure 72(b), a party

may make "specific written objections to the proposed findings and recommendations" within fourteen days of being served with a copy of a magistrate judge's recommended disposition. Fed. R. Civ. P. 72(b)(2). A district court must review de novo "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "However, when the objections simply reiterate previous arguments or make only conclusory statements, the Court should review the report for clear error." *George v. Prof'l Disposables Int'l, Inc.*, No. 15-CV-3385 (RA), 2016 WL 6779957, at *1 (S.D.N.Y. Nov. 16, 2016) (quoting *Brown v. Colvin*, 73 F. Supp. 3d 193, 197 (S.D.N.Y. 2014)). Here, Simmons has made no "specific written" objections to the Report; instead, he has argued that the Court should set aside the entry of default. *See* Def.'s Obj. to the R. & R. Accordingly, the Court reviews the Report for clear error.

The Court has carefully reviewed the Report and finds no clear error in its conclusions. The Court therefore adopts Judge Maas' thorough and well-reasoned Report in its entirety.

CONCLUSION

For the foregoing reasons, Simmons' motion to set aside the entry of default is denied. The Court adopts the Report in full. Kovalchik is hereby awarded $604,390, which includes $300,000 in compensatory damages, $300,000 in punitive damages, $4,040 in attorney's fees, and $350 in costs. The Clerk of Court is respectfully directed to terminate all pending motions and to close this case.

SO ORDERED.

Dated: July 21, 2017
New York, New York

Ronnie Abrams
United States District Judge