UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHNNY MCCRAY,

Plaintiff,

- against -

DETECTIVE RICHARD CASTELHANO, et al.,

Defendant.

---

10 Civ. 6198 (PAC) (GWG)

ORDER ADOPTING R&R

HONORABLE PAUL A. CROTTY, United States District Judge:

Johnny McCray ("McCray") instituted this action, pro se, pursuant to 42 U.S.C. § 1983, against Detective Richard J. Castelhano, Detective Vincent Soreca, the Mount Vernon Police Department, the Westchester County Department of Corrections, and Police Officer Gregory Addison (collectively "Defendants") on August 18, 2010. On August 31, 2010, this Court referred the case to Magistrate Judge Gorenstein for all pretrial matters and dispositive motions. On March 24, 2011, Magistrate Judge Gorenstein issued a Report and Recommendation ("R&R") concluding that this Court should dismiss McCray's Complaint without prejudice under Federal Rule of Civil Procedure 41(b) because McCray failed to prosecute his case.

This Court has reviewed the R&R in its entirety. For the reasons that follow, the Court adopts Magistrate Judge Gorenstein's Report and Recommendation. McCray's case is, therefore, DISMISSED without prejudice.

BACKGROUND[1]

McCray filed his Complaint pro se on August 18, 2010, pursuant to 42 U.S.C. § 1983 alleging that he was unlawfully detained by police officers without a proper investigation. On November 7, 2010, McCray requested that the Court extend the 120-day period in which he had to serve the summons and complaint to the Defendants, as required by Federal Rule of Civil Procedure 4(m). (See Memorandum Endorsement, dated Jan. 16, 2011 (Docket # 8).) Magistrate Judge Gorenstein granted McCray's request and extended time for service until February 28, 2011. (See id.) McCray, however, failed to effect service through the Marshal's Service or file proof of service by that date.

On January 11, 2011, McCray was discharged from his last residence—Five Points Correctional Facility—and did not update his address with the Court. Magistrate Judge Gorenstein issued an Order on March 8, 2011, directing McCray to inform the Court of his new address. (See Order dated March 8, 2011 (Docket # 9).) To date, McCray has not responded to that Order. The Marshals Service has not received any request from McCray to effect service on Defendants, nor has the Court received additional applications from McCray to extend time for service.

On March 24, 2011, Magistrate Judge Gorenstein issued an R&R concluding that McCray's case should be dismissed for failure to prosecute under Fed. R. Civ. P. 41(b). (See Docket # 10.) Written objections to the R&R were due within 14 days pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. No objections were filed and no requests for extensions of time to file objections were received.

[1] Facts are taken from the R&R unless otherwise noted.

DISCUSSION

In reviewing a report and recommendation, a 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)(C). "The district court may adopt those portions of the report to which no timely objection has been made, so long as there is no clear error on the face of the record." Feehan v. Feehan, No. 09 Civ. 7016 (DAB), 2011 WL 497776, at *1 (S.D.N.Y. Feb. 10, 2011).

Federal Rule of Civil Procedure 4(m) provides that "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).

Magistrate Judge Gorenstein found that McCray failed to effect service after receiving an extension of the 120-day limit under Rule 4(m), and that McCray made no showing of good cause for that failure. Accordingly, Magistrate Judge Gorenstein concluded that McCray failed to prosecute his case, and recommended that the Complaint should be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b). This Court agrees.

Having considered Magistrate Judge Gorenstein's Report and Recommendation and finding no clear error in its analysis, McCray's Complaint is DISMISSED without prejudice.

CONCLUSION

For the foregoing reasons, the Court adopts Magistrate Judge Gorenstein's R&R in its entirety. McCray's Complaint is, therefore, dismissed without prejudice. The Clerk of Court is directed to enter judgment and close this case.

Pursuant to 28 U.S.C § 1915(a), this Court finds that any appeal from this Order would not be taken in good faith.

Dated: New York, New York
November 3, 2011

SO ORDERED

PAUL A. CROTTY
United States District Judge

Copy Mailed To:

Johnny McCray
(# 07-A-0804)
Five Points Correctional facility
State Route 96
Romulus, NY 14541