

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER A. HENRY,

Plaintiff,

-v-

C.O. MILLER, C.O. JOSEPH GRASSO, and
C.O. LORENZO COLANGELO,

Defendants.

11 Civ. 1273 (PAE) (HBP)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Pro se plaintiff Christopher Henry brings this action under 42 U.S.C. § 1983 alleging that several correctional officers at Rikers Island (“C.O. Miller, C.O. Grasso, and C.O. Colangelo”) physically assaulted and injured him. Defendants have moved to dismiss Henry’s Amended Complaint for failure to prosecute, failure to comply with a discovery order, and for improperly alleging the location of the alleged altercation that gave rise to Henry’s lawsuit. Before the Court is the August 26, 2016 Report and Recommendation of the Hon. Henry Pitman, United States Magistrate Judge, recommending that the Court deny defendants’ motion to dismiss. Dkt. 97 (“Report”). For the following reasons, the Court adopts this recommendation.

I. Background

The Court incorporates by reference the summary of the facts provided in the Report. *See* Report at 2-6.

On February 17, 2011, Henry filed a Complaint. Dkt. 2. On October 11, 2012, Henry filed an Amended Complaint. Dkt. 28. On January 30, 2013, defendant C.O. Miller filed an answer to the Amended Complaint. Dkt. 35. On March 5, 2013, the Court referred this case to

Judge Pitman for general pretrial supervision and for a report and recommendation. Dkt. 38. On November 13, 2013, Henry filed a Second Amended Complaint, adding defendants C.O. Grasso and C.O. Colangelo. Dkt. 51. On November 18, 2014, defendants Grasso and Colangelo filed an answer to the Second Amended Complaint. Dkt. 69. On November 24, 2015, defendants filed a motion to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 41(b), 37(b), and 9(f) for failure to prosecute, failure to comply with a discovery order, and for improperly alleging the location of the alleged assault that have rise to Henry's action, Dkt. 83, along with a supporting memorandum of law. Dkt. 84. On January, 14, 2016, Judge Pitman issued an order directing defendants to provide additional information in support of their motion, Dkt. 89, which defendants complied with on January 26, 2016 in the form of a declaration, Dkt. 90, and a reply memorandum of law. Dkt. 91.

On August 26, 2016, Judge Pitman issued the Report, recommending that the Court deny defendants' motion to dismiss the Second Amended Complaint, and that the Court impose a sanction against Henry in the amount of \$1,000. The Report further recommends that the Court direct defendants to re-serve their discovery requests and release for medical records on Henry, with the understanding that Henry's failure to respond in a timely manner would result in the dismissal of his claims with prejudice. To date, the Court has received no objections.

II. Discussion

In reviewing a Report and Recommendation, 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)(C). "To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF), 2014 WL 4635575, at *2 (S.D.N.Y.

Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009)); *see also, e.g., Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

As neither party has submitted objections to the Report, review for clear error is appropriate. Because the Report explicitly states that “failure to object within fourteen (14) days will result in a waiver of objections and will preclude appellate review,” Report at 16–17, both parties’ failure to object operates as a waiver of appellate review. *See Caidor v. Onondaga Cty.*, 517 F.3d 601, 604 (2d Cir. 2008) (citing *Small v. Sec’y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam)).

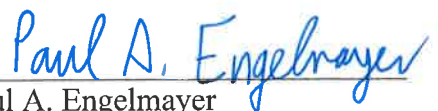
Careful review of Judge Pitman’s thorough and well-reasoned Report reveals no facial error in its conclusions; the Report is therefore adopted in its entirety.

CONCLUSION

For the foregoing reasons, the Court denies defendants’ motion to dismiss Henry’s Second Amended Complaint. The Court hereby imposes a sanction on Henry, in the amount of \$1,000, payable to defendants’ counsel, and to be offset from any recovery that Henry might achieve in this action in the event that he is unable to pay. The Court further directs defendants to re-serve their discovery requests and release for medical records on Henry by certified mail, return receipt requested, with the understanding that Henry’s failure to respond within thirty days of receipt will result in the dismissal of his claims with prejudice.

The Court directs the Clerk to mail a copy of this decision to plaintiff at the address on file.

SO ORDERED.


Paul A. Engelmayer
United States District Judge

Dated: September 15, 2016
New York, New York