

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X		:	
JAMELLE W. KINSEY,		:	
	Plaintiff,	:	
-v-		:	12 Civ. 8936 (PAE) (JCF)
		:	
		:	<u>OPINION &amp; ORDER</u>
MAYOR MICHAEL BLOOMBERG; WARDEN		:	
EDMOND DUFFY; WARDEN LUIS RIVERA;		:	
DR. DORA SCHIRO; DR. MARIE GEORGES;		:	
DR. BAHSHI; DR. L. LIEBERMAN;		:	
DR. TOSIF SHPITS; CAPTAIN JAMES MOSES;		:	
OFFICER M. JEFFERSON; OFFICER HARRIET		:	
AYCOCK; and THE CITY OF NEW YORK,		:	
	Defendants.	:	
		:	
-----X		:	

PAUL A. ENGELMAYER, District Judge:

Before the Court is the January 27, 2014 Report and Recommendation of Magistrate Judge James C. Francis IV. Dkt. 24 (the “Report”). The Report makes two recommendations: that (1) as to defendants City of New York, Duffy, Rivera, Schiro, Moses, and Aycock, the Court dismiss plaintiff Jamelle Kinsey’s complaint with leave to amend; and (2) as to defendants Bloomberg, Georges, Bahshi, Lieberman, Shpits, and Jefferson, the Court dismiss plaintiff Kinsey’s complaint without prejudice, pursuant to Rule 4(m), for failure to serve. *Id.* For the reasons that follow, the Court adopts the Report in full.

**I. Background**

This case is one of more than 100 civil actions filed in this District concerning the adequacy of beds within the New York City Department of Corrections. Kinsey, an inmate housed at the George R. Vierno Center (“GRVC”), the Anna M. Cross Center (“AMKC”) on

Rikers Island, and the Brooklyn Detention Complex (“BKDC”), brings a claim under the Eighth Amendment to the U.S. Constitution, alleging that his conditions of confinement—specifically, the alleged inadequacy of his bed—constituted cruel and unusual punishment and that defendants were deliberately indifferent to his serious medical needs.

On June 14, 2013, defendants filed a motion to dismiss Kinsey’s Complaint under Federal Rule of Civil Procedure 12(b)(6), Dkt. 18, and an accompanying memorandum of law, Dkt. 19. On July 25, 2013, defendants filed a supplemental memorandum of law in support of their motion to dismiss. Dkt. 22. The original motion to dismiss and memorandum of law, as well as the supplemental memorandum of law, were served on Kinsey by mail. Dkt. 20, 23. Despite the passage of more than seven months, Kinsey did not file an opposition to defendants’ motion to dismiss, nor did he effect service on defendants Bloomberg, Georges, Bahshi, Lieberman, Shpits, and Jefferson.

On January 27, 2014, Magistrate Judge Francis issued his Report & Recommendation to this Court. The Report stated that the parties were required to file any objections within 14 days of the date of the Report’s issuance. *See* Report at 12. To date, the Court has not received any 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). When specific objections are made, “[t]he district judge must determine *de novo* any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). 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.” *Carlson v. Dep’t of Justice*, No. 10 Civ. 5149 (PAE) (KNF), 2012 WL 928124, at \*1 (S.D.N.Y. Mar. 19, 2012) (citation omitted); *see also Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

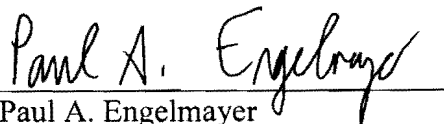
Careful review of the well-reasoned Report reveals no clear error. On the contrary, the Court agrees with the Report’s conclusion that Kinsey’s Complaint does not state a plausible claim under the Eighth Amendment. Specifically, Kinsey has failed to allege with particularity that the failure to provide longer beds posed an excessive risk to his health, or that any of the defendants knew of and deliberately disregarded an excessive risk to his health. Report at 7–11 (citing cases). The Court also agrees with Magistrate Judge Francis that Kinsey’s failure to serve certain defendants should result in the dismissal of his Complaint as to those defendants without prejudice. The Report, which is incorporated by reference herein, is adopted without modification.

### **CONCLUSION**

For the reasons articulated in Magistrate Judge Francis’ Report, Kinsey’s Complaint is dismissed with leave to file an amended complaint. The Clerk of Court is respectfully directed to terminate the motion pending at docket number 18, to serve this Opinion and Order on Kinsey at his address of record, and to close this case. The case may be reopened without prejudice in the event that Kinsey files an amended complaint by March 31, 2014. Failure to file an amended complaint by that date, absent leave of the Court, will result in dismissal with prejudice. In his amended complaint, Kinsey may add any appropriate individual defendants, including those defendants whom Kinsey failed to serve with his original Complaint.

The parties' failure to file written objections precludes appellate review of this decision. *See Caidor v. Onondaga County*, 517 F.3d 601, 604 (2d Cir. 2008); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam). The Court therefore certifies that any appeal from this order would not be taken in good faith and *in forma pauperis* status is denied for the purpose of an appeal. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

SO ORDERED.

  
Paul A. Engelmayer  
United States District Judge

Dated: February 18, 2014  
New York, New York