

BACKGROUND

After the conclusion of fact discovery in this matter, Judge Fox directed the parties to submit on or before December 29, 2015 their pretrial order. According to the Plaintiff's Objections, Plaintiff's counsel had forwarded to Defendants' counsel Plaintiff's portion of the joint proposed order. ¶ 2. However, the parties failed to file the pretrial order in advance of the December 29 deadline. Afterwards, Judge Fox directed the parties to submit on or before May 2, 2016 their joint pretrial order and warned the parties "that failure to comply with an order of the court may result in sanctions." Order, ECF No. 23. Judge Fox noted in his R. & R. that as of the date of the report, no joint pretrial order had been filed. In his Objections, Plaintiff writes that the joint pretrial order "should have been submitted to the orders and judgments clerks . . . prior to the deadline . . . but because the Court does not have it, it seems a mistake was made." ¶ 4.

DISCUSSION

The Court may accept, reject, or modify, in whole or part, the findings and recommendations set forth within the Report. 28 U.S.C. § 636(b)(1). When there are objections to the R. & R., the Court must make a *de novo* determination of those portions of the R. & R. to which objections are made, but may accept uncontested portions so long as those portions are not "clearly erroneous." *Id.*; *see also Gomez v. Brown*, 655 F. Supp. 2d 332, 341 (S.D.N.Y. 2009).

As an initial matter, the district court has discretion in determining whether a plaintiff's claims should be dismissed for failure to prosecute or failure to comply with a court's order. *Colon v. Mack*, 56 F.3d 5, 7 (2d Cir. 1995) (failure to prosecute under Fed. R. Civ. P. 41(b)); *Neufeld v. Neufeld*, 172 F.R.D. 115, 116, 118 (S.D.N.Y. 1997) (failure to comply with court order to submit portion of pretrial order under Fed. R. Civ. P. 16(f)). The Second Circuit has "repeatedly emphasized" that "dismissal is a harsh remedy to be utilized only in extreme

situations.” *Minnette v. Time Warner*, 997 F.2d 1023, 1027 (2d Cir. 1993). Where the dismissal is with prejudice, it should be used only upon a finding “of willfulness, bad faith, or reasonably serious fault.” *Mitchell v. Lyons Prof'l Servs. Inc.*, 708 F.3d 463, 467 (2d Cir. 2013) (citation omitted). Indeed, the dismissal “must be supported by clear evidence of misconduct.” *Id.*

In reviewing the correctness of a district court’s dismissal of an action under Rule 41(b), the Second Circuit considers: “(1) the duration of the plaintiff’s failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court’s interest in managing its docket with the plaintiff’s interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal.” *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996).

Here, Plaintiff’s conduct does not rise to the level of willfulness or bad faith. Plaintiff explained that he believed he submitted the Pretrial Order by the deadline and was waiting on instructions from the Court. *See* Objections to R. & R. ¶ 4. In *Neufeld*, the District Court dismissed the action because plaintiffs did not explain why they failed to submit and file a pretrial memorandum and joint pretrial order and also engaged in a pattern of failing to comply with court orders. 172 F.R.D. at 116. Here, Plaintiff has provided an explanation for his failure to file the order. Moreover, there has been one instance of Plaintiff knowingly missing a court ordered deadline, but one instance does not constitute a pattern of willful intransigence. *Id.* at 119.

Although Plaintiff was warned that sanctions could result from the missed deadline, there was no notice that the sanction would be dismissal. *See Minnette*, 997 F.2d at 1027 (reversing district court’s *sua sponte* dismissal of action where plaintiff did not have notice that her action

would be dismissed). In addition, Defendants would suffer no prejudice from the delay and may have actually contributed to it. Finally, Plaintiff promptly responded to the R. & R. a day after it was issued and submitted his Objections within the deadline, which reveals an intent to continue litigating the matter. *See Town Plaza of Poughquag, LLC. v. Hartford Ins. Co.*, 12-cv-7823 (ALC), 2016 WL 6905945, at *2 (S.D.N.Y. Oct. 3, 2016).

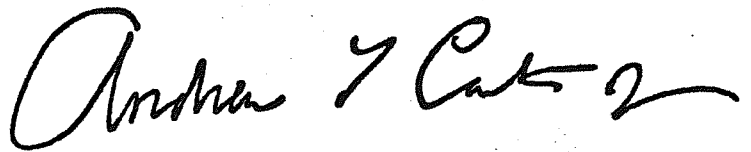
In reaching this conclusion, the Court notes that Judge Fox was not aware that Plaintiff mistakenly believed he had filed the Pretrial Order prior to the deadline, and thus his R. & R. fairly evaluated the situation before him. Plaintiff presented new information to the Court immediately after the Report was filed and hence a different outcome was warranted. Fortunately for Plaintiff, dismissal is not an appropriate remedy for his lack of diligence in prosecuting this action.

CONCLUSION

For the reasons outlined above, the Report and Recommendation is rejected. The parties are directed to file their Pretrial Order anew via ECF by August 1, 2017 and follow up with Judge Fox's chambers to inquire about next steps.

SO ORDERED.

Dated: July 14, 2017
New York, New York



ANDREW L. CARTER, JR.
United States District Judge