

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

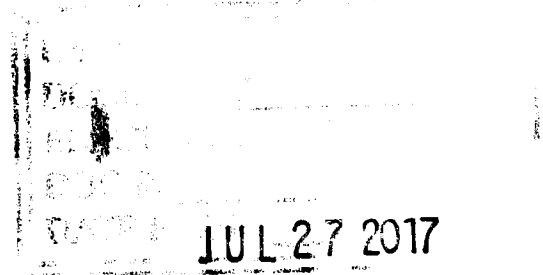
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THEODORE O. WILSON III,

Plaintiff,

-v.-

C.O. FERNANDO CALDERON et al.,

Defendants.
----- X



MEMORANDUM DECISION

AND ORDER

14 Civ. 6209 (GBD) (GWG)

GEORGE B. DANIELS, United States District Judge:

Pro se Plaintiff Theodore O. Wilson III filed this action under 42 U.S.C. § 1983 against Correction Officers (“C.O.”) Fernando Calderon, Rosa Elliot, Christopher Kinlock, Dale Moore, and John Doe, and Captains France and Bramwell alleging deprivation of his constitutional rights at Rikers Island while he was a pretrial detainee. (Compl., ECF No. 1.) Defendants moved for summary judgment. (Defs.’ Mot. for Summ. J. (“Mot.”), ECF No. 128.)

This matter was referred to Magistrate Judge Gabriel Gorenstein. (ECF No. 8.) Before this Court is Magistrate Judge Gorenstein’s Report and Recommendation (“Report,” ECF No. 153), recommending that this Court grant Defendants’ motion for summary judgment on all claims except Plaintiff’s due process claim and excessive force claim against C.O.s Calderon, Elliot, Kinloch, and Moore, and Captain France.¹ (*Id.* at 34.)

In his Report, Magistrate Judge Gorenstein advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal. *Id.*; *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Plaintiff filed timely objections to the Report (Pl. Obj.

¹ The relevant procedural and factual background is set forth in detail in the Report and is incorporated herein.

to Report (“Pl. Obj.”), ECF No. 154) and Defendants did not respond. This Court overrules Plaintiff’s objections and fully adopts Magistrate Judge Gorenstein’s recommendation.

I. LEGAL STANDARD

A district court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. *See* 28 U.S.C. § 636(b)(1)(C). When no objections to the Report are made, the Court may adopt the Report if “there is no clear error on the face of the record.” *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005) (citation omitted).

When there are objections to the Report, this Court must make a *de novo* determination as to the objected-to portions of the Report. 28 U.S.C. § 636(b)(1)(C); *see also Rivera v. Barnhart*, 423 F. Supp. 2d 271, 273 (S.D.N.Y. 2006). It is sufficient that this Court “arrive at its own, independent conclusions” regarding those portions to which objections were made. *Nelson v. Smith*, 618 F. Supp. 1186, 1189–90 (S.D.N.Y. 1985) (internal citation omitted); *see United States v. Raddatz*, 447 U.S. 667, 675–76 (1980). However, where a litigant’s objections are conclusory, repetitious, or perfunctory, the standard of review is clear error. *McDonough v. Astrue*, 672 F. Supp. 2d 542, 547–48 (S.D.N.Y. 2009).

On July 6, 2017, Plaintiff submitted a letter “objecting entirely” to Magistrate Judge Gorenstein’s recommendation to grant summary judgment on Plaintiff’s false arrest, conspiracy, First Amendment, and defamation claims. In addition to this conclusory objection, Plaintiff repeated allegations previously submitted and considered by Judge Gorenstein. (Pl. Obj. at 2–3.) Because Plaintiff’s objections are conclusory and repetitious, the standard of review is clear error.²

² Although this Court affords *pro se* litigants leniency, even a *pro se* party’s objections must be specific and clearly aimed at particular findings in the Report. *Pinkney v. Progressive Home Health Servs.*, No. 06 Civ. 5023, 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008) (internal citation and quotation marks omitted).

II. THE REPORT IS ADOPTED IN FULL

The Report properly held that Defendants' motion for summary judgment should be granted as to Plaintiff's false arrest, malicious prosecution, conspiracy, First Amendment, and defamation claims, and denied as to Plaintiff's due process and excessive force claims. (Report at 30–33.) There was no clear error in Magistrate Judge Gorenstein's findings. This Court has considered the issues raised in Plaintiff's objections and adopts Judge Gorenstein's Report in full.

A. Summary Judgment is GRANTED as to Plaintiff's False Arrest, Malicious Prosecution, Conspiracy, First Amendment, and Defamation Claims

The Report properly found that “[b]ecause Wilson pled guilty to aggravated harassment . . . probable cause existed for his arrest” and Plaintiff's false arrest claim is therefore barred. (*Id.* at 30.) The Report also properly found that “[b]ecause Wilson was convicted by his plea of guilty [and] the case against him in state court did not terminate in his favor,” Plaintiff's malicious prosecution claim is properly dismissed. (*Id.* at 31.) Magistrate Judge Gorenstein also properly found that because all Defendants were employed by the New York City Department of Correction, and acting within the scope of their employment, “a conspiracy to commit an action compensable under Section § 1983 could not exist between them.” (*Id.* at 32.) Further, Judge Gorenstein properly found that no reasonable jury could conclude that Defendants' use of force in the incident was in pursuit of some personal interest separate from their interest in acting as corrections officers. The Report also properly concluded that Plaintiff's First Amendment claim should be dismissed, as the claim more appropriately “arise[s] under the Due Process protections of the Fifth and Fourteenth Amendment,” which survive in the remaining due process claim. (*Id.* at 33.) Lastly, the Report properly found that Plaintiff failed to satisfy the elements of a defamation claim under New York law. (*Id.*)

B. Summary Judgment is DENIED as to Plaintiff's Due Process and Excessive Force Claims

The Report properly found that “issues of material fact exist regarding the reasonableness of the officers’ use of force” and therefore summary judgment on Plaintiff’s excessive force claim should be denied. (*Id.* at 21.) The Report also properly found that Defendants failed to meet their “burden of demonstrating that Wilson failed to exhaust his available administrative remedies” and therefore summary judgment on Plaintiff’s due process claim should be denied. (*Id.* at 25.) No objection was made to this portion of the Report and there is no clear error in Magistrate Judge Gorenstein’s findings.


III. CONCLUSION

Having reviewed Magistrate Judge Gorenstein’s Report and Recommendation, this Court overrules Plaintiff’s objection and adopts the Report in full. Defendants’ motion for summary judgment is GRANTED as to Plaintiff’s false arrest, malicious prosecution, conspiracy, First Amendment, and defamation claims. Defendants’ motion for summary judgment is DENIED as to Plaintiff’s due process and excessive force claims.

Dated: New York, New York

July __, 2017. JUL 27 2017

SO ORDERED.


GEORGE B. DANIELS
United States District Judge