

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 1/17/2018
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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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JAMIE PORTILLO,	:	
	:	
Plaintiff,	:	16-CV-4731 (VEC)(GWG)
	:	
-against-	:	<u>ORDER ADOPTING REPORT &amp;</u>
	:	<u>RECOMMENDATION</u>
JENNIFER WEBB, MANUEL ALDIR, and	:	
LYCHA GASANOV,	:	
	:	
Defendants.	:	
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VALERIE CAPRONI, United States District Judge:		

Plaintiff Jamie Portillo, proceeding *pro se*, alleges that excessive force was used against him while he was incarcerated at the Anna M. Kross facility on Rikers Island in October 2015. Am. Compl. (Dkt. 17) at 4. Plaintiff alleges that he suffered a “minor stroke” on October 13, 2015. Am. Compl. at 4. The Defendants, corrections officers at the Kross facility, responded to Plaintiff and escorted him to the Kross medical clinic and then to the East Elmhurst Hospital. Am. Compl. at 4. Plaintiff alleges that defendant Webb twice forced him to stand and attempt to walk, causing him to fall and injure himself. Am. Compl. at 4. Seeking redress for injuries sustained in his falls, Plaintiff alleges claims for excessive force against Webb and failure to intervene against defendants Aldir and Gasanov.

The Defendants moved to dismiss on the grounds that Portillo’s amended complaint does not plausibly allege that excessive force was used by Webb or that the other defendants had a duty to intervene and failed to do so. Dkts. 23, 24. The Court referred this case to Magistrate Judge Gorenstein for general pretrial and for preparation of a report and recommendation on any dispositive motions. Dkt. 10; *see also* Dkt. 27 (amended order of referral). The Defendants filed

their motion to dismiss on March 3, 2017. Dkts. 23, 24. Portillo opposed the motion on May 11, 2017. Dkt. 29. Defendants replied on June 1, 2017. Dkt. 32.

On October 12, 2017, Magistrate Judge Gorenstein issued a report and recommendation (the “R&R”). Dkt. 34. Judge Gorenstein concluded that the Amended Complaint did not sufficiently allege facts from which the Court could infer that it was objectively unreasonable for defendant Webb to force Portillo to stand and walk. R&R at 10-11. Judge Gorenstein also found that the Amended Complaint did not allege that defendants Aldir and Gasanov had a realistic opportunity to intervene and prevent excessive force from being used. R&R at 12. Judge Gorenstein recommended that the Court grant Portillo leave to amend. R&R at 12-13. In lieu of filing objections to the R&R, Plaintiff filed a second amended complaint.<sup>1</sup> Dkt. 37.

## 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 no objections are made to a magistrate judge’s report, a district court may adopt the report so long as “there is no clear error on the face of the record.” *Phillips v. Reed Grp., Ltd.*, 955 F. Supp. 2d 201, 211 (S.D.N.Y. 2013) (citing *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)). Failure to file timely objections to the magistrate judge’s report constitutes a waiver of those objections in the district court and on later appeal to the United States Court of Appeals. *See Small v. Sec’y of Health & Human Servs.*, 892 F. 2d 15, 16 (2d Cir.

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<sup>1</sup> On November 13, 2017, in response to Plaintiff’s request for more time to object to the R&R, the Court extended until November 27, 2017, Plaintiff’s deadline to file objections. Dkt. 36. Because Plaintiff’s amended complaint had not yet been dismissed, the Court did not set a deadline for Plaintiff to file a second amended complaint. Nonetheless, Plaintiff filed his second amended complaint on November 28, 2017, and did not file any objections to the R&R.

1989) (*per curiam*); *see also Thomas v. Arn*, 474 U.S. 140, 149–50 (1985) (holding that Section 636 does not require review of a magistrate’s findings if no party objects).

Because no objections to the R&R were filed, the Court reviews for “clear error.” *Phillips*, 955 F. Supp. 2d at 211. Upon careful review, the Court finds no clear error in Magistrate Judge Gorenstein’s well-reasoned decision. Accordingly, the Court adopts the R&R in full.

### CONCLUSION

Defendants’ motion to dismiss is GRANTED and Plaintiff is given leave to file a second amended complaint. As noted above, Plaintiff has already filed a second amended complaint. The Court will issue a new referral to Magistrate Judge Gorenstein relative to Plaintiff’s second amended complaint.

The Clerk of Court is respectfully requested to close the open motion at docket entry 23. The Clerk of Court is further requested to mail a copy of this Order and the R&R to Plaintiff and to note mailing on the docket.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purposes of an appeal. *Cf. Coppedge v. United States*, 369 U.S. 438, 444-45 (1962) (holding that appellant demonstrates good faith when seeking review of a non-frivolous issue).

**SO ORDERED.**

**Date: January 17, 2018**  
**New York, New York**



**VALERIE CAPRONI**  
**United States District Judge**