

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**USDC SDNY
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ONDRE VERNON NELSON,

Plaintiff,

-v-

CITY OF NEW YORK,

Defendant.
-----X

16 Civ. 6354 (PAE) (JCF)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Pro se plaintiff Ondre Nelson brings this action under 42 U.S.C. § 1983 alleging that the mattress he was issued while incarcerated was in violation of his constitutional rights because it was mounted on a foundation, despite the mattress label’s warning that it should not be used with a foundation, and because defendants had allegedly earlier required him to sleep on the floor without a pillow or a blanket. Before the Court is the July 12, 2017 Report and Recommendation of the Hon. James C. Francis, United States Magistrate Judge, recommending that the Court dismiss this action with prejudice. Dkt. 19 (“Report”). For the following reasons, the Court adopts this recommendation in its entirety.

I. Background

The Court incorporates by reference the summary of the facts provided in the Report. *See* Report at 2–3.

On August 10, 2016, Nelson filed a Complaint. Dkt. 2. On January 31, 2017, Nelson filed an Amended Complaint. Dkt.8. On February 21, 2017, the Court accepted this case as related. On February 22, 2017, the Court referred this case to Magistrate Judge Francis for

Report & Recommendation. Dkt. 9. On May 22, 2017, defendant moved to dismiss Nelson's Complaint, Dkt. 13, and filed a memorandum of law in support, Dkt. 14.

On July 12, 2017, Judge Francis issued the Report, recommending that the Court dismiss the Complaint with prejudice. Objections were due by July 26, 2017. *See* Report at 9. 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 “[f]ailure to file timely objections will preclude appellate review,” Report at 9, 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 Francis's thorough and well-reasoned Report reveals no facial error in its conclusions; the Report is therefore adopted in its entirety. As Nelson has already had the opportunity to amend his Complaint, and indeed has done so, the Court agrees with Judge


Francis that this dismissal shall be with prejudice to Nelson's ability to file any further amendments.

CONCLUSION

For the foregoing reasons, the Court dismisses Nelson's Amended Complaint with prejudice. The Clerk of Court is directed to terminate the motion pending at docket number 13.

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: July 27, 2017
New York, New York