UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUSTIN MARCEL JIMENEZ,

Plaintiff,

-against-

JUNIUS REAL ESTATE, JOHN FRASER, and RICH GOMEL,

Defendants.

16-CV-7483 (VEC) (JLC)

ORDER

VALERIE CAPRONI, United States District Judge:

Pro se plaintiff Justin Marcel Jimenez ("Jimenez") brought this action against Junius Real Estate, a subsidiary of JP Morgan Chase Bank, N.A., and two of its officers, John Fraser and Rich Gomel (together with JP Morgan Chase Bank, N.A., and Junius Real Estate, the "Defendants"). Jimenez asserts a claim for discrimination under the "Civil Rights Act of 1960" and a claim for violations of the "Sherman Antitrust Act of 1890." Compl. ¶¶ 4-5. The Court referred this action to Magistrate Judge Cott for general pretrial supervision and preparation of a report and recommendation pursuant to 28 U.S.C. § 636(b) for all substantive motions. Dkt. 7. Defendants moved to dismiss, and, on June 7, 2017, Judge Cott issued a report recommending that Defendants' motion be granted (the "R&R"). Dkt. 54. Jimenez objected to the R&R on June 19, 2017. Dkt. 57.[1] Upon careful review of the R&R, Jimenez's objection, and the record, the R&R is ADOPTED IN FULL, and Defendants' motion to dismiss is GRANTED.

[1] Jimenez filed an "Opposition" and a "Memorandum of Law," both under docket entry 57. The Court refers to the Opposition as "Obj." and the Memorandum of Law as "Obj. Mem."

BACKGROUND

Jimenez filed this action in the Bronx County Supreme Court on August 8, 2016. Not. of Removal (Dkt. 1) ¶ 1. The Complaint alleges that Jimenez approached Defendants with a "proposal" for a real estate venture, "including explanations of [his] Judeo-Christian intents to create a charitable sector . . . ." Compl. ¶¶ 2-3. Defendants declined Jimenez's proposal and "banned" him from their offices. Compl. ¶ 3. According to Jimenez, he "could not help but feel racially discriminated against in this demeaning, segregating act." Compl. ¶ 3. He alleges that Defendants discriminated against him for his "religious ideals, race, and disability . . . in violation of the Civil Rights Act of 1960." Compl. ¶ 4. Jimenez also alleges that Defendants' "exponential access to capital . . . gives them an unfair advantage in the real estate market." Compl. ¶ 5. According to the Complaint, the Defendants' aversion to "fostering partnerships" and its tendency to "keep[] down less-wealthy individuals" is evidence of their wielding monopoly power. Compl. ¶ 5. Based on these allegations, Jimenez asserts a claim for violations of the "Sherman Antitrust Act of 1890." Compl. ¶ 5.

Defendants removed Jimenez's complaint to this Court on September 26, 2016, Dkt. 1, and promptly moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), Dkt. 8. Defendants argue that there is no private right of action under the Civil Rights Act of 1960, and that, even construed liberally, the Complaint does not plausibly allege discrimination under any other federal statute. Mem. (Dkt. 9) at 7. Defendants argue that Jimenez's antitrust claim fails because the Complaint does not plausibly allege monopoly power or willful maintenance of that power. Mem. at 11. Jimenez opposed Defendants' motion to dismiss, Pl.'s Opp. (Dkt. 14), and

cross-moved for summary judgment, Pl.'s Mot. (Dkt. 13).[2]

On June 7, 2017, Judge Cott issued a report recommending that the Court grant Defendants' motion to dismiss. Recognizing that the only provision of the Civil Rights Act of 1960 that mentions discrimination applies to voting rights, R&R at 11, Judge Cott construed the Complaint to assert a claim under 42 U.S.C. § 1981(a). Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Because the Complaint offers no factual basis from which to infer that Defendants intentionally discriminated against Jimenez on the basis of race, Judge Cott concluded that the Complaint failed to state a claim under Section 1981. R&R at 14. As to Jimenez's antitrust claim, Judge Cott explained that market power alone, even overwhelming market power, is not sufficient to state a claim under the Sherman Act, and that Jimenez had not alleged plausibly Defendants' "willful acquisition or maintenance of [monopoly] power." R&R at 18-19.

Jimenez objected to the R&R on June 19, 2017, Dkt. 57,[3] and Defendants replied on June 27, 2017, Dkt. 58.

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). The standard of review employed by the district court depends on

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[2] Jimenez also moved for a preliminary injunction to freeze Defendants' assets. Dkt. 19. On April 21, 2017, the Court adopted in full Judge Cott's recommendation and denied that motion. Dkt. 35, 52.

[3] Since filing his Objection, Jimenez has made additional submissions to the Court recounting his heart pain, providing scholarly articles on asthma, and providing a "Memo on Fraud and Torts." Dkts. 59-61. These filings were not made within 14 days of the issuance of the R&R as mandated by 28 U.S.C. § 636(b)(1)(C). Further, even were the Court to accept these filings as objections and construe them liberally, they do not raise any specific objections to the R&R and are thus irrelevant.

whether timely and specific objections to the report have been made. *Williams v. Phillips*, No. 03-CV-3319 (KMW) (FM), 2007 WL 2710416, at *1 (S.D.N.Y. Sept. 17, 2007). 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." *King v. Greiner*, No. 02-CV-5810 (DLC) (AJP), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009) (quoting *Wilds v. United Parcel Serv., Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003)). "The court reviews *de novo* any specific written objections." *Artis v. Hulihan*, No. 09-CV-9893 (BSJ) (JCF), 2012 WL 555699, at *1 (S.D.N.Y. Feb. 21, 2012) (citing *Andino v. Fischer*, 698 F. Supp. 2d 362, 368 (S.D.N.Y. 2010)). To the extent that a party's objections "are conclusory or general, or simply reiterate original arguments, the district court reviews the [report] for clear error." *Pineda v. Masonry Constr., Inc.*, 831 F. Supp. 2d 666, 671 (S.D.N.Y. 2011). To establish clear error, a court "must, upon review of the entire record, be left with the definite and firm conviction that a mistake has been committed." *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (citations and internal quotation marks omitted).

In general, the objections of *pro se* parties are construed liberally and are "read to raise the strongest arguments that they suggest." *Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001) (quoting *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996)). "Nonetheless, even a *pro se* party's objections to a [r]eport and [r]ecommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument." *Machicote v. Ercole*, No. 06-CV-13320 (DAB) (JCF), 2011 WL 3809920, at *2 (S.D.N.Y. Aug. 25, 2011) (quoting *Howell v. Port Chester Police Station*, No. 09-CV-1651 (CS) (LMS), 2010 WL 930981, at *1 (S.D.N.Y. Mar. 10,

2010)).

Construing Jimenez's objection liberally, as the Court must, Jimenez's primary contention appears to be that Judge Cott was biased and misapplied the relevant pleading standard. *See* Obj. ¶¶ 3 ("[Judge Cott] showed a bit of bias . . . [and his] recommendation was slightly skewed in favor of the Defendants."), 6 ("Judge Cott's argumentation is too partial in support of the Defense with regards to the Plaintiff's monopoly claim."); Obj. Mem. at 1 ("the Plaintiff's supporting papers should be read to raise the strongest arguments they suggest.") (citations and internal quotation marks omitted), 2 ("the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the Plaintiff.") (citations and internal quotation marks omitted). While Jimenez's objections are so general that the Court could apply a "clear error" standard of review, the Court has nonetheless independently reviewed the Complaint and finds that Judge Cott correctly dismissed Jimenez's claims for failure to state a claim.

Judge Cott construed Jimenez's many submissions "liberally and interpreted [them] to raise the strongest arguments that they suggest." R&R at 9 (citations and internal quotation marks omitted). In order to state a claim under Section 1981, a plaintiff must plausibly allege facts that provide "at least minimal support for the proposition that the [defendant] was motivated by discriminatory intent." R&R at 14 (quoting *Littlejohn v. City of N.Y.*, 795 F.3d 297, 311 (2d Cir. 2015)). As Judge Cott explained, the Complaint includes no non-conclusory allegations of discriminatory animus. R&R at 15. Standing alone, the fact that the Defendants were aware that Jimenez is a minority and turned down his business proposal does not give rise to a plausible inference that Defendants were motivated by discriminatory animus. *See, e.g.*,

Yusuf v. Vassar College, 35 F.3d 709, 714 (2d Cir. 1994) (the fact that plaintiff is a minority and suffered an adverse action is not sufficient, standing alone, plausibly to allege discriminatory animus). Jimenez's allegation that he subjectively felt discriminated against is also inadequate plausibly to allege that Defendants acted with discriminatory intent. *See, e.g.*, *Smith v. Bronx Cmty. College Ass'n*, No. 16-CV-3779 (JMF), 2017 WL 727546, at *2 (S.D.N.Y. 2017) ("It is well established, however, that a plaintiff's subjective belief that she was the victim of discrimination, no matter how strongly felt, is insufficient to satisfy the burden to plead facts that could plausibly support an inference of discrimination.").

Likewise, while Jimenez contends in general terms that he plausibly alleged the elements of a claim under the Sherman Act, Obj. ¶ 6, Judge Cott correctly concluded that the Complaint does not plausibly allege either element of a claim for monopolization. Under Section 2 of the Sherman Act, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The Complaint does not include any non-conclusory allegations of monopoly power or that Defendants willfully acquired or maintained such power. R&R at 18-19. Jimenez's allegation that Defendants have "exponential access to capital" that "gives them an unfair advantage in the real estate market," Compl. ¶ 5, is too general and conclusory to constitute an allegation of monopoly power. But even if the Complaint did allege that Defendants possess monopoly power, Jimenez makes no allegations from which it can be inferred that Defendants willfully acquired or maintained such power. The

second element of a Section 2 claim requires factual allegations from which can be inferred "willful intent and unreasonable exclusionary or anticompetitive effects . . . that not only (1) tend[] to impair the opportunities of rivals, but also (2) either do[] not further competition on the merits or do[] so in an unnecessarily restrictive way." *Am. Banana Co. v. J. Bonafede Co.*, 407 F. App'x 520, 522 (2d Cir. 2010) (quoting *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188–89 (2d Cir. 1992)) (internal quotation marks omitted). In this case, Jimenez asserts that "[t]he Defendants' denial and rejection of the Plaintiff was a *specific example* of 'defeating competition,' and is therefore evident[sic] of their *anticompetitiveness*, or their 'business practice [of][sic] preventing or reducing competition in a market.'" Obj. ¶ 6. But, without more, misuse of monopoly power cannot be inferred from a single refusal to enter into a contract with a single person. *Cf. In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 134 (2d Cir. 2014) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . .") (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

Jimenez's more specific objections re-raise arguments that were rejected by Judge Cott or are legally irrelevant. The Court has reviewed these objections and finds no error. Judge Cott properly considered Jimenez's argument that Defendants were aware of his race because he has an Hispanic or Spanish surname, Obj. ¶ 4, and assumed for purposes of his decision that Defendants were aware of Jimenez's ethnicity. R&R at 15. Judge Cott considered Jimenez's argument that Junius Real Estate failed to register with the IRS or pay taxes and explained that Junius' tax status is irrelevant because there is no private right of action for the collection of

taxes. R&R at 16 n.9.[4] Jimenez's discussion of 42 U.S.C. § 1985, Obj. Mem. at 2, is also immaterial. As the R&R notes, Jimenez raised this claim in his motion for summary judgment. R&R at 6 (citing Dkt. 13, Ex. 9). Because the Defendants' motion to dismiss is to be granted, Jimenez's motion for summary judgment is, as Judge Cott noted, moot. R&R at 20. But even if it were not, because this claim was not raised in the pleadings (even if liberally construed), Judge Cott correctly did not address it. *See, e.g., Evans-Gadsden v. Bernstein Litowitz Berger & Grossman, LLP*, 491 F. Supp. 2d 386, 402 (S.D.N.Y. 2007) ("Even given the considerable leeway in pleadings afforded to *pro se* litigants, Plaintiff here cannot raise a new claim for the first time in a cross-motion for summary judgment.").

Finally, the Court has also considered whether Jimenez should be granted leave to amend his complaint. For the reasons ably discussed by Judge Cott, the Court agrees that amendment would be futile and therefore leave to amend will not be granted. R&R at 21-22.

CONCLUSION

The R&R is ADOPTED IN FULL. Defendants' motion to dismiss is GRANTED, and Plaintiff's motion for summary judgment is DENIED AS MOOT. The Clerk of the Court is respectfully directed to mail a copy of this order to Plaintiff, note service on the docket, and terminate the case.

SO ORDERED.

Date: July 20, 2017
New York, New York

VALERIE CAPRONI
United States District Judge

[4] Jimenez notes that "on a number of occasions," his name was spelled wrong and incorrect dates were used on filed documents and attaches photo submissions documenting these errors. Obj. ¶ 2, Obj. Exs. 1 & 2. These typographical errors do not call into question any aspect of the R&R.