

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER J. ZEBROWSKI,

Defendant.

DECISION AND ORDER
12-CV-509-A

The above-referenced case was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. § 636(b)(1) for pretrial proceedings. On November 18, 2013, Magistrate Judge McCarthy filed a Report and Recommendation (Dkt. No. 58), recommending that the government's motion (Dkt. No. 43) to treat defendant's counterclaim as an affirmative defense, or for an extension of time to respond be denied, and that the government's motion to dismiss the counterclaim for lack of subject matter jurisdiction (Dkt. No. 50) also be denied.

The standard of review of a magistrate judge's report and recommendation is *de novo* for any findings to which a party specifically objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); see *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). The Court reviews unobjected-to findings for clear error. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

The parties attempted to negotiate resolution of objections to the Report and Recommendation filed by the government, but failed to do so. The Court has carefully reviewed the Report and Recommendation, the objections of the government, the

pleadings and materials submitted by the parties, and it is hereby

ORDERED, pursuant to 28 U.S.C. § 636(b)(1), and for the reasons set forth in the Report and Recommendation, the government's motion to treat defendant's counterclaim as an affirmative defense (Dkt. No. 43) and its motion to dismiss the counterclaim for lack of subject matter jurisdiction (Dkt. No. 50) are denied. However, the government's motion for additional time to respond to the so-called counterclaim is granted. Other proceedings were pending, and the government's counsel lacked the bad faith *mens rea* necessary for denial of even a short extension of time to file a response to the counterclaim. The government's response to the counterclaim is due in two weeks.

Accordingly, the Report and Recommendation (Dkt. No. 58) is adopted as modified in this Decision and Order. The case is recommitted to the Magistrate Judge pursuant to the terms of the Court's prior referral order.

IT IS SO ORDERED.

Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: September 23, 2014