

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT L. SWINTON, JR.

Plaintiff,

v.

DECISION AND ORDER

15-CV-53-A

NURSE SCHINSKI,
NURSE YUNKER,
CHIEF DEPUTY YASSO,
CORPORAL SLOCUM,
DEPUTY FORRESTER,
CORRECTIONAL MEDICAL CARE, INC.,
DR. MAXIMILLIAN CHUNG, and
DR. CHARLES THOMAS,

Defendants.

This civil rights case filed by *pro se* plaintiff Robert L. Swinton, Jr., while he was a federal criminal pretrial detainee was referred to Magistrate Judge Leslie G. Foschio pursuant to 28 U.S.C. § 636(b)(1) for the conduct of pretrial proceedings. Plaintiff Swinton alleges access-to-courts and retaliation violations of the First Amendment and a medical indifference claim in violation of the Fifth and Fourteenth Amendments arising from allegedly deliberate neglect of his dental health.

Defendants Nurse Schinski, Nurse Yunker, Chief Deputy Yasso, Corporal Slocum, and Deputy Forrester moved for summary judgment pursuant to Fed. R. Civ. P. 56 (Dkt. No. 188), and on September 27, 2018, the Magistrate Judge filed a Report and Recommendation (Dkt. No. 237) concluding there are no material issues of fact with respect to the claims against these defendants and recommending that the Court grant summary judgment in their favor.

Plaintiff Swinton timely objected to the Report and Recommendation (Dkt. No. 240), the moving defendants responded (Dkt. No. 243), and plaintiff replied (Dkt. No. 248). The Court reviews the findings and conclusions of the Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1). To the extent that a party makes a timely and specific objection to a magistrate judge's report and recommendation, the standard of review is *de novo*. *Id.*

In addition, the 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). Accordingly, in order to address in the first instance potentially meritorious issues, the Court also reviews unobjected-to findings or recommendations in a report and recommendation by the clear error and manifest injustice standards of review, which are the standards that govern the Court of Appeals’ discretionary review of forfeited issues and legal issues that require no fact finding. *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 615 (2d Cir. 2016).

The Court has given plaintiff Swinton the benefit of every reasonable inference because of his status as a *pro se* litigant who is imprisoned¹. *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010) (collecting cases). Upon due consideration of plaintiff’s arguments, the Court adopts the conclusions of the Magistrate Judge and grants the moving defendants’ motion pursuant to Fed. R. Civ. P. 56 for summary judgement. The Court adopts the reasoning of the Magistrate Judge in the Report and

¹ Plaintiff Swinton is now serving a federal criminal sentence. *See U.S. v. Swinton*, 15-CR-6055-EAW (W.D.N.Y.), Dkt. No. 217, and Federal Bureau of Prisons Inmate Locator, available at <http://www.bop.gov/inmateloc/>.

Recommendation, and the Court also considered plaintiff's medical indifference claim as an equal-protection claim under the Fifth and Fourteenth Amendments, see *Ojo v. United States, et al.*, 364 F.Supp.3d 163 (E.D.N.Y 2019), and finds the Magistrate Judge's analysis under the Fourteenth Amendment dispositive. Accordingly, it is hereby

ORDERED, that pursuant to 28 U.S.C. § 636(b)(1), and for the reasons set forth in the Report and Recommendation (Dkt. No. 237) and this Decision and Order, the defendants' motion for summary judgment (Dkt. No. 188) pursuant to Fed. R. Civ. P. 56 is granted.

The Clerk shall amend the caption to reflect that Nurse Schinski, Nurse Yunker, Chief Deputy Yasso, Corporal Slocum, and Deputy Forrester are no longer parties to the action.

IT IS SO ORDERED.

s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: November 4, 2019