UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FREDERICK DIAZ,

Plaintiff,

-vs-

COMMISSIONER GLEN S. GOORD, *et al.*,

Defendants.

DECISION and ORDER

04-CV-6094-CJS

APPEARANCES

For Plaintiff: Frederick Diaz, *pro se*
86-B-2129
Great Meadow Correctional Facility
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Comstock, NY 12821-0051

For Defendants: Gary M. Levine, A.A.G.
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INTRODUCTION

Siragusa, J. Before the Court are Plaintiff's two motions for reconsideration: Feb. 16, 2012, ECF No. 126 and Jun. 6, 2012, ECF No. 127. Defendants have not opposed either motion. For the reasons stated below, the Court grants, in part, the first application, and denies the second in its entirety.

Comment [USDC1]: Joe, what about No. 126?

BACKGROUND

Plaintiff Frederick Diaz ("Diaz) claims in his motion, ECF No. 126, that the Court misconstrued his complaint in its Decision and Order, Jan. 20, 2012, ECF No. 124, and that it has not yet issued a decision on Plaintiff's outstanding objections to a Report and Recommendation issued by U.S. Magistrate Judge Marian Payson on September 20,

2006, ECF No. 53. In order to understand the procedural setting for the two reconsideration motions, the Court will review the procedural history of this case to date.

Plaintiff's Complaint

Plaintiff filed his complaint on March 8, 2004, alleging in a First Claim that he was unlawfully assaulted on December 4, 2002, by defendants Pritchard and Pistner, both corrections officers, while defendant Sekuterski, a supervisor, did nothing to stop the assault. Compl. ¶¶ 20–61, Mar. 8, 2004, ECF No. 1. In a Second Claim, he alleges that on May 25, 2002, his atheist pendant and chain were not returned to him by defendants James and Conway. Compl. ¶¶ 62–81.

In addition to these two explicit claims, Plaintiff's complaint contained facts supporting allegations of retaliatory conduct by Defendants. For example, he alleges that it was a "foreseeable likelihood" that he would be assaulted in retaliation for his numerous complaints in the correctional facility. Compl. ¶ 47. He also alleges that Conway and James were negligent in their supervision of staff, which he alleges was "motivated by a desire to have their staff retaliate upon plaintiff for his participation in the Inmate Liaison Committee[1] and for his numerous complaints thereafter against the facility." *Id.* ¶ 53. He further alleges that Conway upheld a fabricated misbehavior report written by Sekuterski regarding an assault in Conway's desire to retaliation against Plaintiff. *Id.* ¶ 54. Additionally, he alleges:

> It is therefore no coincidence that, due to plaintiff's firm stance on his complaints, coupled with defendant Simmons' annoyance with plaintiff

[1] "The ILC was established pursuant to New York State Department of Correctional Services Directive No. 4002 ('the Directive'). The purpose of an ILC is to promote '[e]ffective communications between inmates and administration for accurate dissemination and exchange of information' and to 'facilitate consideration and analysis of suggestions from inmates relative to facility operations' (Directive [I][A],[B])." *Inmate Liaison Committee of Elmira Correctional Facility v. Fischer*, 20 Misc.3d 719, 720, 864 N.Y.S.2d 694, 695 (N.Y. Sup. Ct. 2008).

> over same, that defendant Simmons also had a hand in, or in fact was directly responsible for, creating an atmosphere of retaliation which led directly to plaintiff being assaulted by staff just two days after being summoned for an interview with him.

Id. ¶ 58. Later in his complaint, Plaintiff complained about the "arbitrary and capricious confiscation" of his pendant as an act of retaliation "for having filed complaints against the facility." *Id.* ¶ 74.

Plaintiff Sought Leave to File a Supplemental Complaint

On January 5, 2006, Plaintiff filed a motion seeking leave to file a supplemental complaint, ECF No. 24. In that motion, he sought permission to add defendants and file, "a supplemental complaint setting forth certain events that have occurred since the filing of the original complaint." *Id.* at 2. On September 20, 2006, ECF No. 53, Judge Payson issued a Report and Recommendation concerning Plaintiff's motion for leave to file a supplemental complaint. Judge Payson characterized Plaintiff's proposed supplemental complaint as alleging "that certain defendants at the Sullivan Correctional Facility violated his constitutional rights…by conspiring to retaliate and retaliating against him for initiating the pending lawsuit." *Id.* at 1. Defendants opposed the motion, arguing that Plaintiff should file a new action in the Southern District of New York where Sullivan Correctional Facility was located. In her Report and Recommendation, Judge Payson wrote that, "Diaz's original complaint alleges that defendants at the Attica Correctional Facility subjected him to excessive force and failed to protect him…while the proposed supplemental claims allege a pattern of retaliatory conduct by different defendants at the Sullivan Correctional Facility." *Id.* at 4–5. Consequently, Judge Payson recommended that Plaintiff's motion for leave to file a supplemental complaint be denied.

Plaintiff filed objections to Judge Payson's Report and Recommendation. Objections, Oct. 6, 2006, ECF No. 57. In his objections, Plaintiff argued that although Judge Payson acknowledged that Plaintiff made detailed claims against the Sullivan correctional officers, she wrongly concluded that those details were merely conclusory, "as if a conspiracy to retaliate against an individual needs to be proved concretely in order for one to make out such a case." Objections at 1. He contended that Judge Payson failed to liberally interpret Federal Rule of Civil Procedure 20 in his favor. *Id.* at 2.

On November 15, 2006, the undersigned issued a Decision and Order, ECF No. 65, adopting Judge Payson's Report and Recommendation. The Court examined Judge Payson's analysis *de novo* and applied the test from *Flaherty v. Coughlin*, 713 F.2d 10 (2d Cir. 1983) to conclude that his,

> pleading with respect to a connection between the acts at Attica and the acts at Sullivan, is conclusory. He sets forth detailed events that occurred at each correctional facility and concludes that the only answer is a conspiracy between corrections officers at Attica and Sullivan. The Court finds that the detailed facts do not support this conclusion, or give rise "to a colorable suspicion of retaliation." *Flaherty*, 713 F.2d at 13.

Decision and Order at 2–3.

Defendants' Second Motion for Summary Judgment

In its Decision and Order dated September 29, 2010, ECF No. 119, the Court addressed Defendants' second motion for summary judgment, filed on August 18, 2008, ECF No. 99, and Plaintiff's cross-motion, also seeking summary judgment, filed on August 25, 2008, ECF No. 106. The Court held that Plaintiff's First Amendment claim concerning the confiscation of his atheist pendant was barred by the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486

(1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

Defendants' First Motion for Summary Judgment

In a Decision and Order entered on January 25, 2012, ECF No. 124, the Court denied Defendants' motion for summary judgment, filed on February 9, 2007, ECF No. 71, with regard to defendant Jeffrey Sekuterski, but granted it with respect to defendants Glenn S. Goord, James Conway, Randy James, and Richard Simmons regarding Plaintiff's claim that those three defendants failed to adequately investigate and address Plaintiff's grievances. The Court determined that the case could go forward on Plaintiff's Eighth Amendment claim that on December 4, 2002, defendants Gary J. Pritchard and Richard Pistner assaulted him, and that defendant Jeffrey Sekuterski failed to stop them. Compl. ¶¶ 20–32.

Motion to Reconsider Filed February 16, 2012

In his first reconsideration motion, Plaintiff contended that the Court misconstrued his complaint. Plaintiff argues that not only did he allege that Defendants failed to conduct a proper investigation into his grievances about retaliation, "but that the evidence revealed that they were also active, behind the scenes participants in the retaliation against me *in order to have me removed from the Inmate Liaison Committee and to prevent me from rejoining such*." ECF No. 126, at 1–2 (emphasis added).

Motion to Reconsider Filed June 6, 2012

In a second motion seeking reconsideration, dated December 5, 2011, and filed on June 6, 2012, ECF No. 127, Plaintiff seeks review of this Court Decision and Order dated November 30, 2011, docketed on December 1, 2011, ECF No. 123. In that decision, the Court denied Plaintiff's letter motion, dated October 4, 2010, ECF No. 121,

seeking reconsideration of the Court's Decision and Order, dated September 29, 2010, ECF No. 119. In its September 29, 2010, decision, the Court granted Defendants' second motion for summary judgment, as discussed above. In his December 2011 letter motion, Plaintiff, brought to the Court's attention the outstanding first motion for summary judgment that Defendants' filed, and raised the objections he had filed to Judge Payson' rulings (1) that he was not entitled to a diagram of Attica Correctional Facility's B-Block yard and (2) that he was not entitled to a copy of Sergeant Wilson's report regarding the stabbing of his inmate assailant by other inmates. The Court has already remedied the first issue by rendering a decision on Defendants' first motion for summary judgment, as discussed above.

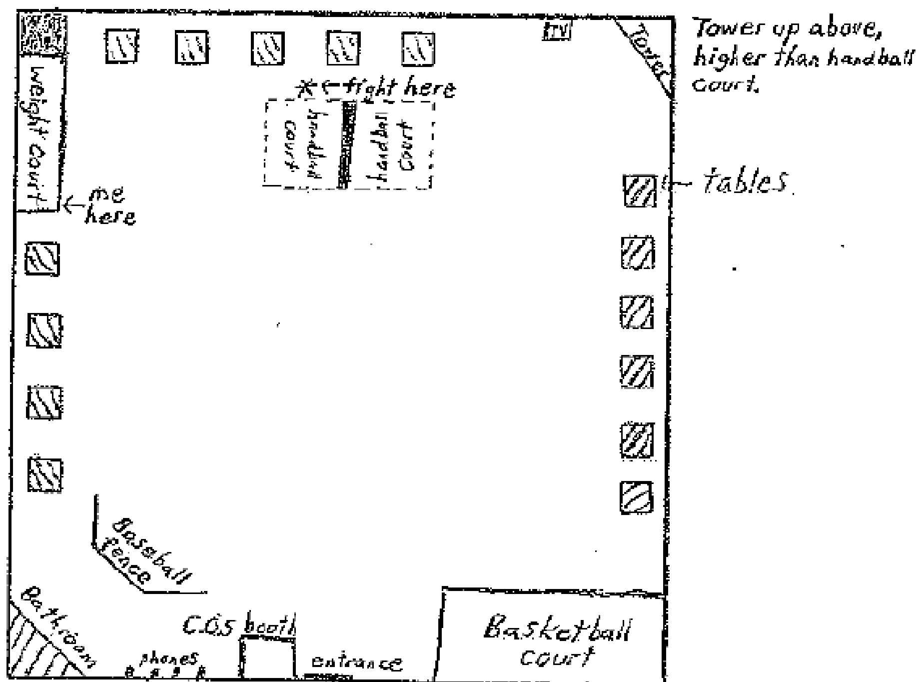
With regard to Judge Payson's ruling on Plaintiff's request for a diagram of the B-Block yard, Plaintiff is referring to her decision docketed on September 25, 2007, ECF No. 84, in which she ruled:

> Plaintiff's claims arise from, among other things, an alleged assault against him by corrections officers on January 31, 2002.[2] This challenged use of force allegedly occurred in a corridor inside the correctional facility, not in B-Block yard. That notwithstanding, plaintiff posits that defendants will argue that plaintiff's injuries resulted, not from any force used by the defendants in the inside corridor, but from his involvement in an inmate fight in B-Block yard that occurred earlier that same day. For this reason, he seeks diagrams of B-Block yard in order to demonstrate to the jury that "he was far away from the fight taking place." (Docket # 69 at ¶ 7). Because I believe that defendants' legitimate security concerns outweigh any possible relevance of the diagrams requested, I deny plaintiff's motion. Nothing prevents plaintiff from testifying as to the distance between the two locations or from offering his own diagram at trial. Should defendants offer contradictory evidence at trial regarding the physical layout of the yard, plaintiff may renew his request for production of the

[2] The Court notes that Plaintiff's complaint ¶ 20 alleges that the fight which preceded his alleged assault at the hands of corrections officers took place on December 4, 2002. Plaintiff's motion to compel ¶ 7, dated January 19, 2007, ECF No. 69, also states that the date of the fight was December 4, 2002. Plaintiff does mention a fight that took place on January 31, 2002, in his Motion to Compel Disclosure and Answers to Interrogatories at 7, Jan. 19, 2007, ECF No. 69. That fight was with "his assailant." *Id.*

diagrams at that time. Accordingly, I deny without prejudice plaintiff's motion for the production of diagrams of B-Block yard.

Decision and Order at 4, Sept. 25, 2007, ECF No. 84. Plaintiff filed a motion to reconsider that decision on July 1, 2010, ECF No. 114, and argued that the B-Block yard was not complex, but that he had no means by which to "get it to scale." Motion for Reconsideration at 3, ECF No. 114. He included with his motion a small diagram of the B-Block yard detailing the location of the guard tower, the weight court, handball court, baseball fence, basketball court, C.O.'s booth, phones, entrance, bathroom, and tables. *Id.* The Court includes that diagram, below:



On July 1, 2010, Judge Payson issued a Decision and Order, ECF No. 115. She denied his motion, writing the following:

> Plaintiff has not alleged any new facts or law regarding his request for a to-scale diagram of B-Block yard, but rather has repeated his argument that the diagram is needed in order for him to prove his whereabouts during a fight between inmates in the yard that preceded his alleged assault. As I explained in my previous decision, the plaintiff may prepare and offer his own diagram in order to illustrate where he was positioned at the time of the relevant events. In this case, I find that defendants' legitimate security needs outweigh plaintiff's need for an official to-scale diagram. Accordingly, I decline to reconsider that ruling.

Id. at 2.

The Court now turns to Plaintiff's request to be provided with,

> a report which pertains to the stabbing of his inmate assailant by a group of white inmates. This report is highly relevant to show the facility's malfeasance in having had an inmate set plaintiff's cell on fire. Although the defendants claim to have attached this report to their response, this is false. The defendants only attached the reports pertaining to plaintiff's fight with his assailant on January 31, 2002, reports which plaintiff already had. Plaintiff had specifically requested the report by Sgt. Wilson dated April 20, 2002.… Plaintiff's first set of interrogatories to defendant Conway (at paragraph 8) made it clear that Sgt. Wilson knew that the inmate was stabbed by other inmates for having worked with the facility's staff to set plaintiff's cell on fire in order to have plaintiff removed from the ILC. As such, this report must be provided to plaintiff for him to prove his allegations.

Pl.'s Mot. to Compel at 7, Jan. 19, 2007, ECF No. 69. In her Decision and Order, dated September 25, 2007, Judge Payson did not address a report by Sergeant Wilson, but, instead, discussed a report of Plaintiff's assault by a fellow inmate named Burns. However, in her decision on Plaintiff's motion for reconsideration, which she filed on July 1, 2010, ECF No. 115, she specifically addressed the Sergeant Wilson report, writing:

> Although plaintiff has offered a more detailed explanation for his request for Sergeant Wilson's report of the stabbing of an inmate named Burns by other inmates, I do not find that it justifies reconsideration of my earlier decision. Specifically, plaintiff seeks Wilson's report in order to contest defendant Conway's denial of knowledge that Burns set fire to plaintiff's prison cell at the behest of the Attica administration. Plaintiff contends that Wilson's report will show (1) a connection between the fire in plaintiff's cell

> and the stabbing of Burns and (2) Conway's knowledge of the cell fire. I find that plaintiff's contention as to what the report may show is too speculative to warrant its production. In this case, plaintiff has filed claims for excessive use of force regarding an alleged assault against him on December 4, 2002, and for retaliation for his participation on the inmate liaison committee. (Docket # 1). The complaint contains no allegations regarding the cell fire. Accordingly, I decline to reconsider my earlier decision.

Decision and Order at 3, Jul. 1, 2010, ECF No. 115.

In his motion for reconsideration before the Court, ECF No. 127, Plaintiff attached his objections to Judge Payson's decision denying him a diagram of Attica's B-Block yard and the report by Sergeant Wilson, claiming that her rulings were "hindering my filing of a summary judgment motion against staff members who maliciously assaulted me." Pl.'s Mot. at 2, Jun. 6, 2012, ECF No. 127. Attached to his motion papers are several letters, one of which is from Plaintiff to the Court dated July 6, 2010. The July 6 letter is an objection to Judge Payson's July 1, 2010, decision, ECF No. 115. In it, Plaintiff contends that the diagram and report are relevant, and her decision to provide him with another piece of evidence (a call out sheet) was inconsistent with her refusal to direct that he be given the diagram and report. Plaintiff also made the following argument with regard to his retaliation claim:

> I did not need to write out a 50 page complaint detailing every single act of retaliation the defendants inflicted upon me. I never mentioned in my complaint either about Burns having assaulted me in the hallway, yet [Judge] Payson approved my being given a copy of the callout sheet so that I could prove how I was set up over my ILC activities. So, considering that Burns set my cell on fire on behalf of the defendants in order to have me removed from the ILC (which worked, unbelievably so), and that despite defendant Conway's denial to the contrary Sgt. Wilson's report made it all too evident that the defendants knew exactly what was transpiring with me and why, it is simply ludicrous for [Judge] Payson to have stated that the report "is too speculative to warrant its production." At a bare minimum, as I stated to [her] in my 5/12/09 letter, she should have ordered it to be produced in camera for her inspection before deciding that the report was lacking in any probative value. This is what fairness

> requires.…
>
> I am therefore requesting that Your Honor grant me these requests as well as the other discovery material I requested in my 10/10/07 letter to Your Honor.

Letter from Plaintiff to the Court, July 6, 2010, at 2, attached to ECF No. 127. Also attached is Plaintiff's October 10, 2007, letter to the Court. First, he argues that Judge Payson erred in her September 25, 2007, ECF No. 84, decision when she denied his request for all grievances, complaints and lawsuits against defendants Pritchard, Pistner, Sekuterski and Simmons as overbroad and unduly burdensome. Pl.'s Oct. 10, 2007, letter at 1–2, ECF No. 127. Judge Payson's ruling on that issue included the following language:

> Counsel for the defendants has further explained that the Department of Correctional Services ("DOCS") does not index grievances, complaints and lawsuits according to the name of the corrections officer named, but does so by the name of the complaining inmate. (Docket # 69, Ex. A). Accepting the representations of counsel, I find that Diaz's request for all grievances, complaints and lawsuits – without reference to their subject matter or the date on which they were filed – is both overbroad and unduly burdensome. Plaintiff's motion to compel the production of all grievances, complaints and lawsuits filed against the defendants is therefore denied.

Decision and Order at 3, Sept. 25, 2007, ECF No. 84. Plaintiff argues in his October 10, 2007, letter that he "made clear reference to the subject matter: their [corrections officers'] unwarranted assaults on inmates." Pl.'s Oct. 10, 2007, letter at 2, ECF No. 127.

Also in Plaintiff's October 10, 2007, letter is his objection to Judge Payson's ruling on his request to be provided with the number of grievances and complaints filed at Attica during the last 15 years concerning staff assaults on inmates, and the number of those investigated by the Inspector General ("IG"), along with the results of any IG investigation. Pl.'s Oct. 10, 2007, letter at 3, ECF No. 127. In denying his request, Judge

Payson stated, "I do not see how evidence of the number of alleged staff assaults at Attica is reasonably calculated to lead to the discovery of admissible evidence relating to the claims in this case." Decision and Order at 4–5, Sept. 25, 2007, ECF No. 84. Plaintiff contends that,

> my reason for requesting this information was to show the jury just how pervasive unwarranted staff assaults on inmates are at Attica. Considering that Attica is arguably the worst in the state in this respect, this information will serve to educate the jury that my assault did not occur in an environment attentive to inmate's concerns and devoid of retaliation.
>
> Besides, I am only asking for numbers and results of investigations, something which DOCS no doubt has already tallied and logged in its computers. It is just a simple matter of printing out the information list-wise. The defendants should not be allowed to keep this incriminating information hidden from public scrutiny.

Pl.'s Oct. 10, 2007, letter at 3, ECF No. 127.

Plaintiff next addresses his request for the Correctional Association's report on Attica and the ILC's agenda of 2004, which he helped to prepare. On this request, Judge Payson wrote,

> Plaintiff maintains that these documents will show the jury that "an outside agency, as well as the ILC . . . , was concerned with the excessive number of staff abuses and assaults occurring at Attica." (Docket # 69 at ¶ 9). Even crediting plaintiff's characterization of the documents sought, such evidence is not relevant to the question whether the defendants named in this suit violated plaintiff's rights on the dates and in the manner he has alleged. Plaintiff's requests are therefore denied.

Decision and Order at 5, Sept. 25, 2007, ECF No. 84. In his October 10, 2007, letter, Plaintiff wrote,

> Although I agree that it is not directly relevant, its indirect relevancy is highly important to establish Attica's mindset when it comes to assaulting inmates, that despite the scrutiny the assaults entail, the staff feel free to disregard any complaints with impunity. Were it not for this punitive atmosphere endemic to Attica, the staff would not have felt free to abuse me in the egregious manner in which they did….

Pl.'s Oct. 10, 2007, letter at 3–4, ECF No. 127.

Also in his October 10, 2007, letter, Plaintiff objected to Judge Payson's ruling with regard to photographs that should have been taken of his cell fire pursuant to Directive # 4062. He related that defense counsel represented that no such photographs existed. Pl.'s Oct. 10, 2007, letter at 4, ECF No. 127. On this issue, Judge Payson wrote: "I agree with plaintiff that such photographs, if they existed, would be discoverable. Counsel for defendants has represented, however, that no such photographs exist. (Docket # 69 at ¶ 12). Accordingly, plaintiff's motion is denied." Decision and Order at 6, Sept. 25, 2007, ECF No. 84. In his objection, Plaintiff states that Judge Payson should have ordered defense counsel to make a diligent search for the photographs, and if still not found, that a negative inference "would be drawn against the defendants due to spoliation of evidence." Pl.'s Oct. 10, 2007, letter at 4, ECF No. 127.

In addition to his specific objections to Judge Payson's rulings on his motion to compel, Plaintiff also argued that her decision allowed Defendants to escape answering many of his interrogatory questions contrary to the requirements of the Federal Rules. Pl.'s Oct. 10, 2007, letter at 5, ECF No. 127. He asked the Court to review his questions, all of which he contends are relevant to his case, "to make sure the defendants comply with the law so that this lawsuit need not be dragged out any more than is necessary." *Id.*

Plaintiff also requested that the Court,

> order defendants' lawyer to produce [his third set of interrogatories] and state with specificity his objections to any questions therein. This will clearly expedite matters and will allow me to respond in a proper manner to the objections, as I would have done in my Motion to Compel had there

> been compliance with the Rules. Hon. Payson's proposed method for resolving this problem would put the burden on me to defend my interrogatories blindly without imposing on defendants' lawyer any such requirement for his specific objections.

Pl.'s Oct. 10, 2007, letter at 6, ECF No. 127. With regard to his interrogatories, Judge Payson ruled as follows:

> I have reviewed each of the challenged responses and find the responses to be adequate, other than as indicated herein: (1) defendant Conway shall provide a supplemental response to Interrogatory No. 5 of the First Set of Interrogatories explaining the reasons why he did not believe that an investigation was warranted; (2) defendant Conway shall answer Requests for Admissions Nos. 14a, 15a and 16a based upon his review of the letters identified in these requests1 and No. 23a, which does not appear to reflect his answer, but appears to reflect an answer suggested by counsel; (3) defendant Simmons shall provide a supplemental response to Interrogatory No. 3 of the Second Set of Interrogatories explaining whether he recalls the evidence supporting the administrative segregation report and, if so, describing it; (4) defendant Simmons shall answer Request for Admission No. 1c based upon a review of the records, if any, of his investigation of plaintiff's lost property claim and answer the request based upon such review2; and (5) defendant Sekuterski shall provide a supplemental response to Interrogatory No. 9 of the Second Set of Interrogatories explaining whether he observed any injuries to inmates Santiago or Rivera and, if so, what injuries he observed.

Decision and Order at 6–7, Sept. 25, 2007, ECF No. 84. In regard to Plaintiff's third set of interrogatories, Judge Payson wrote:

> I am unable to decide this issue because the interrogatories have not been submitted to the Court for review. Should plaintiff desire to pursue these interrogatories, he shall file a new motion to compel, accompanied by the proposed interrogatories and an explanation of their relevance to his claims. Accordingly, plaintiff's request to compel responses to the third sets of interrogatories served on defendants James, Sekuterski and Simmons is denied without prejudice.

Id. at 7.

STANDARDS OF LAW

As the Fifth Circuit has recognized, "[t]here is no motion for 'reconsideration' in the Federal Rules of Civil Procedure." *See Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n. 10 (5th Cir.1998). Since the Federal Rules of Civil Procedure do not expressly provide for motions for reconsideration, such a motion may be construed as a motion to alter or amend judgment under Rule 59(e)[3] or Rule 60(b). *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Further, "a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id.*

Comment [MWP2]: , 109 S.Ct. 987, 103 L.Ed.2d 146

ANALYSIS

Motion to Reconsider Filed February 16, 2012

Plaintiff's first motion for reconsideration, dated January 30, 2012, received by Chambers on February 6, 2012, and docketed on February 16, 2012, ECF No. 126, seeks reconsideration of the Court's Decision and Order filed on January 25, 2012, ECF No. 124. Plaintiff's motion was timely filed to be construed either under Rule 59, or Rule 60.

[3] A motion for reconsideration filed within ten days of the district court's judgment is construed as a Rule 59(e) motion that suspends the time for filing a notice of appeal. *Bass v. U.S. Dept. of Agriculture*, 211 F.3d 959, 962 (5th Cir. 2000). In 2009, Rule 59(e) was amended to set a 28-day limitation period. Fed. R. Civ. P. 59 advisory committee's note on 2009 amendments.

Plaintiff seeks to amend the Court's construction of his complaint and re-instate his First Amendment cause of action to allege retaliation claims against defendants Conway, James and Simmons. Plaintiff argues his complaint alleged that Conway, James and Simmons retaliated against him for filing numerous grievances and for being a member of the Inmate Liaison Committee ("ILC"). In support of his argument, Plaintiff cites to the "mountain of evidence" he presented in his opposition to Defendants' motion for summary judgment.

The Second Circuit, in *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471 (2d Cir. 2006), summarized the manner in which a district court should construe a *pro se* plaintiff's complaint, stating:

> It is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted "to raise the strongest arguments that they *suggest*." *Pabon*, 459 F.3d at 248 (emphasis added) (quoting *Burgos*, 14 F.3d at 790); *see also Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006); *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 569 (2d Cir. 2005); *Sharpe v. Conole*, 386 F.3d 482, 484 (2d Cir. 2004); *Wright v. Comm'r.*, 381 F.3d 41, 44 (2d Cir. 2004); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003); *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir. 2003); *Weixel v. New York City Bd of Educ.*, 287 F.3d 138, 145-46 (2d Cir. 2002); *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000); *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996).
>
> This policy of liberally construing *pro se* submissions is driven by the understanding that "[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983); *see also Ruotolo v. I.R.S.*, 28 F.3d 6, 8 (2d Cir. 1994) (recognizing that pro se litigants must be accorded "special solicitude"). *See generally* Jonathan D. Rosenbloom, Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York, 30 FORDHAM URB. L.J. 305, 380 (2002) ("In this time of ever increasing legal costs and complexity of litigation, the pro se litigant is at an insurmountable disadvantage.").

Triestman, 470 F.3d at 474–75. More recently, the Second Circuit cited to its language

quoted above, but added an admonishment concerning retaliation claims: “On the other hand, ‘because prisoner retaliation claims are easily fabricated, and accordingly pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration, we are careful to require non-conclusory allegations.’ *Bennett v. Goord,* 343 F.3d 133, 137 (2d Cir.2003) (quotation marks omitted).” *Smith v. Levine*, No. 11-1445-pr, 2013 WL 362905, *2 (2d Cir. Jan. 31, 2013).

As mentioned above, Plaintiff’s complaint raised the issue of retaliation in the following paragraphs:

> 52. Like defendant Goord, defendants Conway and James also minimized and disregarded plaintiff’s complaints of staff harassment, conducting only shoddy investigations into some of plaintiff's allegations despite the abundant evidence of harassment that plaintiff presented to them, including the foreseeable likelihood of an assault by the staff.
>
> 53. Indeed, given defendants Conway and James’ reluctance to implicate their staff in any wrongdoing, it is evident that their negligent supervision was motivated by a desire to have their staff retaliate upon plaintiff for his participation in the Inmate Liaison Committee and for his numerous complaints thereafter against the facility.
>
> 54. This desire for a retaliation against plaintiff would also explain why defendant Conway, in addition to ignoring all of the other instances of harassment that plaintiff endured, upheld the fabricated misbehavior report that defendant Sekuterski wrote against plaintiff (regarding the assault) despite the plethora of evidence plaintiff presented to defendant Conway, on appeal, attesting to the utter implausibility of the misbehavior report.
>
> 55. Lastly, two days prior to being assaulted by defendants Pritchard and Pistner, plaintiff was summoned for an interview by defendant Simmons. This interview had no purpose other than to let plaintiff know that defendant Simmons was highly annoyed at plaintiff for having submitted complaints regarding the substantial loss of property plaintiff suffered (in an act of retaliation by the staff) when plaintiff was sent to the Special Housing Unit on May 25, 2002.
>
> 56. Defendant Simmons was not only responsible for fabricating the Administrative Segregation ticket which sent plaintiff to the Special Housing Unit in the first place, he was also responsible for investigating

> one of plaintiff's loss of property claims.
>
> 57. Since defendant Simmons did a thoroughly inadequate job of investigating plaintiff's claim, this led plaintiff to file a grievance regarding the lack of a proper investigation into the claim and, soon thereafter, to complain to defendant Simmons' uppermost supervisor (defendant Conway) about the poor quality of his investigation.
>
> 58. It is therefore no coincidence that, due to plaintiff's firm stance on his complaints, coupled with defendant Simmons' annoyance with plaintiff over same, that defendant Simmons also had a hand in, or in fact was directly responsible for, creating an atmosphere of retaliation which led directly to plaintiff being assaulted by staff just two days after being summoned for an interview with him.

Compl. ¶¶ 52–58.

In its January 25, 2012, Decision and Order granting Defendants partial summary judgment, the Court summarized Plaintiff's two claims: "allegations that five Defendants failed to adequately investigate and address Plaintiff's grievances, and…Eighth Amendment allegations against Sergeant Sekuterski." Decision and Order at 1, Jan. 25, 2012, ECF No. 124. Also in that decision, the Court discussed its September 29, 2010, Decision and Order, ECF No. 119, which granted summary judgment to Defendants concerning Plaintiff's claim that his atheist pendant was unconstitutionally taken from him, finding that claim barred by the *Rooker-Feldman*[4] doctrine, and mentioned its March 21, 2006, Decision and Order, ECF No. 27, in which it dismissed claims against Pritchard and Pistner for allegedly filing false reports. *Id*. at 2.

The Court's January 25, 2012, decision analyzed the claims the Court construed against Goord, Conway and James, quoting from paragraphs 47 through 54 of Plaintiff's complaint. The Court's analysis of the claims Plaintiff made in those paragraphs of the complaint centered on his allegation that Defendants did not adequately investigate

[4] District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

Plaintiff's grievances, and Defendants' contention that Plaintiff failed to exhaust administrative remedies with respect to those same claims. Decision and Order at 8, Jan. 25, 2012, ECF No. 124. In deciding to dismiss Plaintiff's claims of inadequate investigations, the Court relied primarily on Plaintiff's failure to exhaust administrative remedies, a requirement of 42 U.S.C. § 1997e(a): "Consequently, because he failed to exhaust administrative remedies with respect to his claims against Goard, Conway and James of inadequate investigations, those claims must be dismissed." *Id.* at 9.[5]

The Court agrees that it should have more broadly construed Plaintiff's complaint to also allege a retaliation claim under the First Amendment, even though such a claim does not appear on the face of the complaint. Accordingly, it grants Plaintiff's first motion for reconsideration.

With respect to Plaintiff's First Amendment retaliation claim, the Court construes the claim as follows: Defendants Conway, James and Simmons retaliated against Plaintiff for his participation on the ILC and for his numerous complaints against the facility, and that the purpose of their retaliation was to have Plaintiff removed from his position on the ILC. *See* Pl.'s Mot. for Reconsideration at 1–2, Feb. 16, 2012, ECF No. 126; Pl.'s Mem. of Law in Opp'n to Def.s' Mot. for Summary Judgment, Mar. 21, 2007, ECF No. 80.[6] As this Court noted in *Alnutt v. Cleary*, 913 F. Supp. 160 (W.D.N.Y. 1996):

[5] The Court also determined that even if Plaintiff had exhausted administrative remedies, "he has failed to show a protected liberty interest in the type of thorough investigation he seeks." Decision and Order at 10, Jan. 25, 2012, ECF No. 124.

[6] In their Memorandum of Law in support of their motion for summary judgment at 8, Feb. 9, 2007, ECF No. 73, Defendants argued that the claims against Conway and James "relate to their alleged failure to adequately investigate and address his grievances…." In his responding memorandum, Plaintiff's argument centered on retaliation for his work on the Inmate Liaison Committee. *See* Pl's Mem. of Law at 7, Mar. 21, 2007, ECF No. 80 ("When plaintiff answered that he did not know at that point in time why his cell was set on fire, the officer strongly hinted that it was caused by plaintiff's ILC membership ('Are you sure it had nothing to do with you being on the ILC?' he said, among other things).").

> To establish a claim for retaliation under § 1983, [a plaintiff] must initially show that his conduct was protected by the First Amendment and that defendants' conduct was motivated by or substantially caused by an exercise of his First Amendment rights. *Gagliardi v. Village of Pawling,* 18 F.3d 188, 194 (2d Cir. 1994).

Id. at 168–69. "To survive summary dismissal, a plaintiff asserting First Amendment retaliation claims must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action. *See, e.g., Thaddeus-X v. Blatter,* 175 F.3d 378, 386-87 (6th Cir.1999) (en banc) (per curiam); *see also Diesel v. Town of Lewisboro,* 232 F.3d 92, 107 (2d Cir. 2000)." *Dawes v. Walker*, 239 F.3d 489, 491–92 (2d Cir. 2001), overruled on other grounds, *Phelps v. Kapnolas*, 308 F.3d 180, 187 n.6 (2d Cir. 2002).

Filing a grievance is protected conduct under the First Amendment, *Gayle v. Gonyea*, 313 F.3d 677 (2d Cir. 2002), and participation in the ILC is arguably also protected, *see Salahuddin v. Harris*, 657 F. Supp. 369 (S.D.N.Y. 1987) (inmate chairman of ILC denied First Am. rights when disciplined for writing memorandum to prison officials complaining about problem another inmate had with a female correction officer). Plaintiff has alleged adverse actions taken against him, and has alleged facts connecting his protected conduct and the adverse actions. Therefore, the Court determines that Plaintiff's First Amendment retaliation complaint plausibly alleges facts necessary "to raise a right to relief above the speculative level…." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In addition to the First Amendment retaliation claim, Plaintiff also argues in his motion for reconsideration that the Court erred in determining that his deposition transcript showed no evidence he exhausted administrative remedies against Simmons.

Plaintiff contends that,

> [i]n pages 33 and 35 of my Opposition I specifically mentioned having written grievances against the facility due to my having been falsely placed in Ad Seg by Simmons in order to retaliate against me for having been a member of the ILC and for trying to regain such position.

Pl.'s Mot. at 3, Feb. 16, 2012, ECF No. 126. Further, Plaintiff labeled as "essentially irrelevant" whether Simmons conducted poor investigations and that "[t]he issue, as I have fleshed out, is that he actively participated in the retaliation against me in order to prevent me twice from rejoining the ILC: once when he wrote the false Ad Seg ticket against me, and then when he had me assaulted by the staff." *Id.*

Showing exhaustion is Plaintiff's burden, but it does not need to be plead in the complaint. *Jones v. Bock*, 549 U.S. 199 (2007); *McCoy v. Goord*, 255 F. Supp. 2d 233, 248 (S.D.N.Y. 2003). Consequently, the Court needn't decide at this juncture whether Plaintiff's First Amendment retaliation claim complies with the exhaustion requirement with respect to Conway and James. However, since the issue was directly raised by Defendants with respect to Simmons, the Court will review it here.

Plaintiff's response to Defendants' motion to dismiss at 55, ECF No. 80 (Pl.'s Response) addressed exhaustion. Plaintiff stated that Defendants failed to raise the affirmative defense of exhaustion, and in any event, he did exhaust his claim against Simmons. Pl.'s Response at 55. The Court has already determined that Defendants did raise the affirmative defense with regard to Simmons, and in his response, Plaintiff conceded that he never appealed the grievance against Simmons to the Central Office Review Committee:

> Plaintiff originally filed griev. # 44340-02 on October 2, 2002, complaint about Simmons' poor investigation. This grievance, however, was never appealed to the CORC because, right after plaintiff received Conway's response, one mentioned claim was resolved by Sgt. Corcoran, and

> plaintiff received new information pertaining to another claim (the one Simmons had supposedly investigated); therefore, on October 31st, plaintiff submitted another grievance describing this new information, but the grievance supervisor deliberately refused to file it despite plaintiff's complaints to Conway about it (as the paperwork attached to Exhibit A will attest).

Id. Attached to Plaintiff's Response as Exhibit A is Inmate Grievance Complaint No. 44340-02 dated October 2, 2012, which reads as follows:

> Last week, on Sept. 24th, after the submission of a FOIL request, I received the investigation reports to three of my inmate claims which were denied outright. (Claims No. 02-053, 02-056, and 02-094.)
>
> After reviewing these reports, I discovered that they were entirely faulty. These investigations were so slipshod, in fact, that they might as well not be considered investigations at all.

Pl.'s Response Ex. A. The relief sought was, "[t]o have proper procedure followed, per Directive 2733, in conducting a thorough and accurate investigation of my inmate claims, especially with my input." *Id.* The grievance continues on a second and third page, but the information on those pages pertains only to the allegedly insufficient investigation, not to retaliation for Plaintiff's filing grievances or for his participation in the ILC. From the evidence presently in the record, the Court finds that the First Amendment retaliation claim against Simmons has not been exhausted, and is, therefore dismissed. Since this Decision and Order has reinstated, and dismissed, the First Amendment retaliation claim against Simmons, this dismissal is without prejudice to Plaintiff should he have additional evidence to rebut Defendants' exhaustion claim.

Motion to Reconsider Filed February 16, 2012

The Court now turns to Plaintiff's second motion for reconsideration, dated December 5, 2011 and filed on June 6, 2012, ECF No. 127. The Court, applying the prison mailbox rule, *See Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir. 1993), deems the

application timely under Rules 59 and 60.

As discussed in detail above, this application concerns Judge Payson's decision on several of Plaintiff's discovery requests. Judge Payson's rulings are governed by 28 U.S.C. § 636(b)(1)(A), which states as follows: "A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." The Court has reviewed Judge Payson's rulings in detail and concludes that since they are not clearly erroneous or contrary to law, there is no basis for overturning them. Accordingly, Plaintiff's second motion for reconsideration, ECF No. 127, is denied.

CONCLUSION

For the reasons stated above, the Court grants Plaintiff's motion for reconsideration filed on February 16, 2012, ECF No. 126. In that regard, the Court recognizes that Plaintiff has plead a cause of action for retaliation against defendants Conway, James and Simmons under the First Amendment. However, the Court dismisses without prejudice the retaliation claim against Simmons for failure to exhaust, 42 U.S.C. 1997e(a), and does not address whether the retaliation claim against Conway and James has been exhausted.

Further, the Court denies Plaintiff's motion for reconsideration filed on June 6, 2012, ECF No. 127, in its entirety, finding that Judge Payson's discovery rulings are neither clearly erroneous, nor contrary to law.

Comment [USDC3]: Joe, what about No. 126?

It appears to the Court that discovery has closed and this case is ready for trial. Both sides have demanded a jury trial. Accordingly, the Court will schedule a trial date and issue a separate pretrial order.

IT IS SO ORDERED.

Dated: June 25, 2013
Rochester, New York

ENTER. /s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge