

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TIMOTHY MEL ABUIZ,	:	
	:	
Plaintiff,	:	No. 4:06-CV-01603
	:	
v.	:	(Judge McClure)
	:	
WARDEN WILLIAM BRENNAN,	:	
et. al.	:	(Magistrate Judge Smyser)
	:	
Defendants.	:	

**ORDER**

August 28, 2009

**BACKGROUND:**

On August 16, 2006, plaintiff Timothy Mel Abuiz, a state prisoner currently residing at the Cape Vincent Correctional Facility in Cape Vincent, NY, proceeding pro se, commenced this action by filing a complaint under 28 U.S.C. § 1331 based on events that took place while he was located at the Susquehanna County Correctional Facility (hereinafter “SCCF”) in Montrose, PA. Plaintiff filed a second amended complaint on June 22, 2007. (Rec. Doc. No. 73).

The case was initially referred to United States Magistrate Judge J. Andrew Smyser. Although plaintiff filed the complaint under 28 U.S.C. §1331, the magistrate judge construed the complaint as if it had been brought under 42 U.S.C.

§ 1983, as the parties involved are state actors. The defendants are William Brennan, Nicholas Conigliaro, Susquehanna County Correctional Facility, and Susquehanna County. Plaintiff asserts that his constitutional rights were violated by the conditions of his cell (Count I), withheld legal mail (Count II), racial segregation (Count III), and denial of access to legal materials (Count IV).

On May 28, 2009, this court dismissed Susquehanna County Correctional Facility from the action, granted Susquehanna County summary judgment on all counts, granted Brennan and Conigliaro summary judgment on counts II and IV, denied Brennan and Conigliaro summary judgment on counts I and III, and remanded the case to the magistrate judge for further proceedings. (Rec. Doc. No. 202).

On June 8, 2009, plaintiff filed his Motion for Relief from the Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(2) and (3). (Rec. Doc. No. 204). In this motion, plaintiff sought relief from this court's order, dated May 28, 2009, which granted summary judgment to Brennan and Conigliaro on counts II and IV and to Susquehanna County on all counts. On June 15, 2009, plaintiff filed his supporting brief. (Rec. Doc. No. 205). No defendant filed an opposing brief and, on July 30, 2009, this court denied plaintiff's motion. (Rec. Doc. No. 206) On August 14, 2009, plaintiff filed with the United States Court of Appeals for the Third Circuit a

Notice of Appeal relating to this court's denial of plaintiff's Motion for Relief from the Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(2) and (3). (Rec. Doc. No. 208).

On August 4, 2009, the magistrate judge filed a report and recommendation. (Rec. Doc. No. 207). The magistrate judge recommended that the case be listed for trial on the remaining claims: counts I and III against Brennan and Conigliaro. Plaintiff was required to file any objections to the magistrate judge's report and recommendation by August 21, 2009, but has failed to do so. The matter, then, is ripe for disposition.

Now, therefore, this court will adopt the magistrate judge's report and recommendation.

#### **DISCUSSION:**

A district court reviews de novo those portions of a magistrate judge's report and recommendation to which a party objects. L.R. 72.3. The district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

We will adopt the magistrate judge's report and recommendation in full. Although plaintiff has filed an interlocutory appeal to this court's denial of plaintiff's Motion for Relief from the Judgment or Order Pursuant to Fed. R. Civ.

P. 60(b)(2) and (3), plaintiff has filed no objections to the magistrate judge's report and recommendation of August 4, 2009. As noted by the magistrate judge, discovery has been completed and the deadline for filing dispositive motions has passed. (Rec. Doc. No. 138). In our order dated May 28, 2009, this court also agreed with the magistrate judge's recommendation that summary judgment was improper as to Brennan and Conigliaro on counts I and III. This court also agreed with the magistrate judge that summary judgment was proper as to Brennan and Conigliaro on counts II and IV and to Susquehanna County on all counts. In addition, this court has dismissed SCCF from the action. (Rec. Doc. No. 202).

In light of this court's order accepting in full the magistrate judge's recommendations and the closing of the discovery period and the time for filing dispositive motions, it is proper for this matter to be listed for trial on the remaining claims. Therefore, we adopt the magistrate judge's report and recommendation in its entirety.

As no jury demand has been filed, the case will be listed for a non-jury trial.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. United States Magistrate J. Andrew Smyser's Report and Recommendation is adopted in full. (Rec. Doc. No. 207).

2. A non-jury trial will be scheduled at the convenience of the court.

s/ James F. McClure, Jr.  
James F. McClure, Jr.  
United States District Judge