

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

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Lester Torres, )  
)  
Plaintiff, )  
v. ) Case No. 5:12-cv-63  
)  
Al Cormier, Fred Gorham, )  
Officer Dingham, and Officer Forrtier, )  
)  
Defendants. )

**OPINION AND ORDER ADOPTING MAGISTRATE JUDGE'S  
REPORT AND RECOMMENDATION**

(Docs. 10, 12)

This matter came before the court for a review of the Magistrate Judge's September 19, 2012 Report and Recommendation (R & R) in regards to a motion to dismiss filed by the Defendants. Defendants, who are officials at the Northeast Regional Correctional Facility, have moved to dismiss Plaintiff Lester Torres's claims for violations of the Fifth, Eighth and Fourteenth Amendments. Mr. Torres seeks one million dollars in monetary damages arising out of an incident involving an overflowing toilet in his prison cell which he claims Defendants forced him to clean and sanitize without appropriate protective gear. Mr. Torres did not oppose the motion to dismiss. Neither party has objected to the R & R, and the deadline for doing so has expired.

A district judge must make a *de novo* determination of those portions of a magistrate judge's report and recommendation to which an objection is made. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1); *Cullen v. United States*, 194 F.3d 401, 405 (2d Cir. 1999). The district judge 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); *accord Cullen*, 194 F.3d at 405. A district judge, however, is not required to review the factual


or legal conclusions of the magistrate judge as to those portions of a report and recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. *See Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974).

In his fourteen page R & R, the Magistrate Judge carefully reviewed the factual record and the motion before the court. He recommended that Defendants' motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6) should be granted and Mr. Torres's claims should be dismissed, with thirty days leave to file an Amended Complaint. Although Mr. Torres neither opposed the motion to dismiss nor objected to the Magistrate Judge's recommendation that dismissal be granted, a brief opportunity to file an Amended Complaint is nonetheless consistent with Second Circuit precedent. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (a district court should not dismiss a pro se filing "without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.") (internal quotation marks omitted); *see also Boykin v. KeyCorp.*, 521 F.3d 202, 216 (2d Cir. 2008) (ruling "even after *Twombly*, dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases.").

The court agrees with the Magistrate Judge's conclusions. For the foregoing reasons, the court hereby ADOPTS the Magistrate Judge's R & R as the court's Order and Opinion, GRANTS Defendants' motion to dismiss and that this case is DISMISSED with leave to amend. Mr. Torres is allowed thirty (30) days to file an Amended Complaint. Failure to do so shall result in the dismissal of all claims with prejudice.

SO ORDERED.

Dated at Rutland, in the District of Vermont, this 29<sup>th</sup> day of October, 2012.



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Christina Reiss, Chief Judge  
United States District Court