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U.S. DISTRICT COURT E.D.N.Y.

★ **FEB 26 2018** ★

LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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SABAS MARTINEZ, :

Plaintiff, :

-against- :

VINCENT F. DEMARCO, Suffolk County Sheriff, :  
CHARLES EWALD, Warden, LIEUTENANT :  
ROLLINS OTTEN, SERGEANT ROBERT :  
PERAINO, SERGEANT KEVIN KELLEY, :  
and SERGEANT DENNIS HORL, :

Defendants. :

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**ORDER**  
13-CV-4209 (JFB)(AKT)

JOSEPH F. BIANCO, District Judge:

On February 5, 2018, Magistrate Judge A. Kathleen Tomlinson issued a Report and Recommendation (the "R&R," ECF No. 56) recommending that the Court grant the motion to dismiss filed by defendants David Martin and Gregory Schaffer ("defendants"). The R&R was served on plaintiff by UPS overnight delivery on February 6, 2018. (ECF No. 57.) The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R. (R&R at 23.) The date for filing any objections has thus expired, and plaintiff has not filed any objection to the R&R. For the reasons set forth below, the Court adopts the thorough and well-reasoned R&R in its entirety and grants the motion to dismiss as to defendants.

Where there are no objections to a report and recommendation issued by a magistrate judge, the Court may adopt the report and recommendation without *de novo* review. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *see also Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure

timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision."); *cf.* 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. *See Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) ("[B]ecause the waiver rule is non jurisdictional, we 'may excuse the default in the interests of justice.'" (quoting *Thomas*, 474 U.S. at 155)).

Although plaintiff has waived any objection to the R&R and thus *de novo* review is not required, the Court has conducted a *de novo* review of the R&R in an abundance of caution. Having conducted a review of the Complaint, the motion papers, and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the findings and recommendations contained in the well-reasoned and thorough R&R in their entirety. Accordingly,

IT IS HEREBY ORDERED that the motion to dismiss (ECF No. 46) is granted as to all defendants.

IT IS FURTHER ORDERED that defendants serve a copy of this Order on plaintiff.

SO ORDERED. ✓

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JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

Dated: February 26, 2018  
Central Islip, New York