

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

MICHELLE NICOLE EVANS,

Plaintiff,

v.

**CIVIL ACTION NO. 3:13-CV-11
(JUDGE GROH)**

CPL. ADAM ALBAUGH, et al.,

Defendants.

**ORDER ADOPTING REPORT AND RECOMMENDATION DISMISSING THE CITY OF
MARTINSBURG AS DEFENDANT**

On this day, the above-styled matter came before the Court for consideration of the Report and Recommendation of United States Magistrate Judge David J. Joel. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Joel for submission of a proposed report and a recommendation. Magistrate Judge Joel filed his report and recommendation on May 23, 2013 [Doc. 15]. In that filing, the magistrate judge recommended that this Court dismiss with prejudice the City of Martinsburg from Plaintiff's Complaint in accordance with 28 U.S.C. §§ 1915A and 1915(e) for failure to state a claim upon which relief can be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140,

150, 160 S.Ct. 466 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the parties' right to appeal this Court's Order. **28 U.S.C. § 636(b)(1)**; ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91, 94 (4th Cir. 1984). Objections to Magistrate Judge Joel's report and recommendation were due within fourteen (14) days of being served with a copy of the same, pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b). The docket reflects that service was accepted by May 25, 2013. See [Doc. 32]. Defendants did not file an objection to the report and recommendation.

Plaintiff also did not file an objection to the report and recommendation. However, Plaintiff submitted a "Response to Magistrate's Report and Recommendation." Plaintiff acknowledged and agreed with the report and recommendation, but she requested the Court incorporate language from the Fourth Circuit Court of Appeals' opinion in ***Preval v. Reno***, 203 F.3d 821 (4th Cir. 2000). Plaintiff argued that the language would permit Plaintiff to amend her Complaint. Upon a review of Plaintiff's cited language from ***Preval***, the Court finds it is inapplicable as the Fourth Circuit concluded that the plaintiff's complaint, alleging a claim that he was not adequately protected against an assault, was prematurely dismissed. In ***Preval***, the Fourth Circuit remanded to the district court to allow plaintiff to particularize his allegations to state a claim and name defendants who were specifically responsible for failing to protect him.

In this case, the report and recommendation did not recommend the dismissal of Plaintiff's claims. Instead, it recommended the dismissal of the City of Martinsburg, and Plaintiff has no objection to that recommendation. Plaintiff essentially seeks to amend her

Complaint by requesting the Court add certain language from the *Preval* opinion. This Court finds the language quoted by Plaintiff from *Preval* is inapplicable. Plaintiff is not an INS detainee, as was the case in *Preval*. Also, Plaintiff is not a prisoner. Instead, Plaintiff is representing herself *pro se*. If Plaintiff desires to amend her Complaint, she must comply with Federal Rule of Civil Procedure 15. To any extent Plaintiff's response is construed as an objection, it is **OVERRULED**.

Upon careful review of the report and recommendation, it is the opinion of this Court that the magistrate judge's **Report and Recommendation [Doc. 15]** should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. Accordingly, the Court hereby orders that the defendant City of Martinsburg is **DISMISSED WITH PREJUDICE**. The Clerk is **DIRECTED** to terminate the City of Martinsburg as a defendant.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record and to mail a copy to the *pro se* Plaintiff by certified mail, return receipt requested.

DATED: June 13, 2013


GINA M. GROH
UNITED STATES DISTRICT JUDGE