APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of May, two thousand twenty-two.

PRESENT: JOSÉ A. CABRANES,
JOSEPH F. BIANCO,
EUNICE C. LEE,
Circuit Judges.

JASON I. BAXTER,

Plaintiff-Appellant,

v.

21-1787-pr (L)
21-2204-pr (Con.)

JOSEPH E. BRADLEY,

Defendant-Appellee.

FOR PLAINTIFF-APPELLANT: Jason Baxter, *pro se*, Collins, NY

FOR DEFENDANT-APPELLANT: Barbara Underwood, Solicitor General, Victor Paladino, Senior Assistant Solicitor General, Sarah L. Rosenbluth, Assistant Solicitor General, *for* Letitia James, Attorney General of the State of New York, Albany, NY

Appeal from a July 13, 2021 order, September 7, 2021 order, and September 8, 2021 judgment entered by the United States District Court for the Western District of New York (David G. Larimer, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the July 13, 2021 order, September 7, 2021 order, and September 8, 2021 judgment of the District Court be and hereby are **AFFIRMED**.

Plaintiff Jason Baxter, who is incarcerated and proceeding *pro se*, filed this lawsuit in February 2019 pursuant to 42 U.S.C. § 1983 alleging that Defendant Joseph Bradley, a corrections captain, violated Baxter's due process rights by holding a deficient disciplinary hearing on February 5, 2018, at which Baxter was sentenced to a 120-day term in the Special Housing Unit ("SHU"). After Bradley failed to appear before the District Court and timely respond to Baxter's claims, the Clerk of the District Court entered a default as to Bradley. Less than one month later, Bradley then entered an appearance and moved to vacate the default; the District Court granted the motion on July 13, 2021, *see Baxter v. Bradley*, No. 19-CV-6105L, 2021 WL 2941131 (W.D.N.Y. July 13, 2021) ("*Baxter I*"). Baxter commenced this appeal by challenging the District Court's order vacating Bradley's default.

In the meantime, before the District Court, Bradley moved for summary judgment. Baxter failed to oppose that motion. On September 7, 2021, the District Court granted Bradley's motion for summary judgment, *see Baxter v. Bradley*, No. 19-CV-6105L, 2021 WL 4060412 (W.D.N.Y. Sept. 7, 2021) ("*Baxter II*"); judgment was formally entered in Bradley's favor the next day. Baxter now appeals the District Court's entry of summary judgment in Bradley's favor. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Vacatur of Default

The Federal Rules of Civil Procedure permit a district court to set aside an entry of default for "good cause." Fed. R. Civ. P. 55(c). In deciding a motion to vacate an entry of default, the district court is to be guided principally by three factors: "(1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993). We review a district court's decision on a motion to vacate the entry of a default for abuse of discretion, *id.* at 95, keeping in mind our Circuit's "strong preference for resolving disputes on the merits." *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005) (internal quotation marks omitted).

Here, through its July 13, 2021 order, the District Court concluded that vacatur of the previously entered default against Bradley was justified. *Baxter I*, 2021 WL 2941131, at *1. Upon review of the record, we find that the District Court acted well within its discretion in arriving at that conclusion. The record shows that Bradley's failure to respond to the complaint was not willful: he

attempted to secure counsel from the New York State Attorney General's Office when he received Baxter's complaint and mistakenly believed he had fulfilled his obligations. Nor was Baxter prejudiced by the delay. The approximately two months that lapsed between the deadline for Bradley to respond and his eventual appearance did not impair Baxter's ability to prosecute his claims; Baxter did not argue, for example, that witnesses or evidence were lost because of the delay. And "delay standing alone does not establish prejudice." *Enron Oil Corp.*, 10 F.3d at 98. Finally, Bradley offered a meritorious defense. "The test of such a defense is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." *Id.* Bradley offered evidence that Baxter could not establish a due process claim because he did not suffer any injury to his liberty interests. Because all of the factors weighed in favor of vacating the entry of default, the District Court did not abuse its discretion by doing so.

II. Summary Judgment

We review a grant of summary judgment *de novo*, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127 (2d Cir. 2013) (per curiam). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

We conclude that the District Court properly granted summary judgment in favor of Bradley. To succeed on a due process claim based on a prison disciplinary hearing, Baxter must establish (1) that he possessed a liberty interest and (2) that Bradley deprived him of that interest as a result of insufficient process. *See Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2004). Here, the evidence — even when construed in the light most favorable to Baxter — shows that he suffered no deprivation of a liberty interest. Even assuming that Bradley violated Baxter's due process rights during the February 5, 2018 hearing, the 120-day penalty imposed by Bradley as a result of that hearing was vacated on Baxter's administrative appeal, and thus Baxter "never served a single day in SHU as a result of the February 5[, 2018] hearing." *Baxter II*, 2021 WL 4060412, at *2.[1] At a rehearing on April 30, 2018, Baxter was again sentenced to 120 days in the SHU, and Baxter does not allege or offer any evidence to show that the April 30, 2018 rehearing violated his due process rights. We conclude, therefore, that the District Court properly granted summary judgment in favor of Bradley.

---

[1] At the time of the February 5, 2018 hearing, Baxter was already serving a SHU sentence for an unrelated November 2017 disciplinary charge.

APPENDIX B

(viii) Loss of a specified period of good behavior allowance ("good time"), subject to restoration as provided in Subchapter B of this directive;

(ix) The imposition of one work task per day, other than a regular work assignment for a maximum of seven days, excluding Sundays and public holidays, to be performed on the inmate's housing unit, or other designated area. Inmates given such disposition who are participating in a regular work assignment shall not be required to work more than eight hours per day. The eight-hour limitation excludes such non-work assignments as educational or vocational school programming; or

(x) Where applicable, removal from the elected Inmate Grievance Resolution Committee (IGRC) and/or loss of the privilege of participating as a voting member of the IGRC for a specified period of time.

(2) Any penalty imposed pursuant to this Section shall run consecutively to any other like penalty previously imposed.

(3) Whenever a confinement penalty is being served and a more restrictive confinement penalty is imposed as a result of another Hearing, the more restrictive penalty shall begin to be served immediately, and any time owed on the less restrictive penalty shall be served after completion of the more restrictive penalty period.

(4) The Hearing Officer may suspend imposition of any penalty for a period of up to 180 days. Any such suspended penalty may only be imposed by a subsequent Superintendent's Hearing Officer upon substantiating a charge of misbehavior or in a subsequent Hearing within a specific period.

(5) As soon as possible, but no later than 24 hours after the conclusion of the Hearing, the inmate shall be given a written statement of the disposition of the Hearing. This statement shall set forth the evidence relied upon by the Hearing Officer in reaching his or her decision and also set forth the reasons for any penalties imposed and, if applicable, pursuant to § 254.6(b) of this Part, reflect how the inmate's mental condition or intellectual capacity was considered; and, if applicable, pursuant to §254.6(h) of this part, how age affected the disposition.

(b) Mandatory disciplinary surcharge. Upon the conclusion of a Superintendent's Hearing wherein the inmate admits the charges, or where the Hearing Officer affirms one or more of the charges, a mandatory disciplinary surcharge in the amount of five dollars ($5.00) shall be assessed automatically against the inmate.

§ 254.8 Appeal Procedures.

Any inmate shall have the right to appeal the disposition of any Superintendent's Hearing to which he or she was a party, to the Commissioner within 30 days of receipt of the disposition. The Commissioner or designee shall issue a decision within 60 days of receipt of the appeal. The Commissioner or designee may:

(a) Affirm the Hearing disposition;

(b) Modify the Hearing disposition by dismissing certain charge(s) and/or reducing the penalty imposed;

(ii) Loss of one or more specified privileges, for a period of up to 30 days, however, Correspondence and visiting privileges may not be withheld;

(iii) Confinement to a cell or room continuously or to a special housing unit under keeplock admission or on certain days during certain hours for a period of up to 30 days;

(iv) Restitution for loss or intentional damage to property up to $100; or

(v) The imposition of one work task per day, other than a regular work assignment for a maximum of seven days, excluding Sundays and public holidays, to be performed on the inmate's housing unit, or other designated area. Inmates given such disposition who are participating in a regular work assignment shall not be required to work more than eight hours per day. The eight-hour limitation excludes such non-work assignments as educational or vocational school programming.

(2) Any penalty imposed pursuant to this section shall run consecutively to any other like penalty previously imposed.

(3) Whenever a confinement penalty is being served and a more restrictive confinement penalty is imposed as a result of another Hearing, the more restrictive penalty shall begin to be served immediately, and any time owed on the less restrictive penalty shall be served after completion of the more restrictive penalty period.

(4) The Disciplinary Hearing Officer may suspend imposition of any penalty for a period of up to 90 days. Any such suspended penalty, from a Disciplinary Hearing, may be imposed by a subsequent Disciplinary Hearing or Superintendent's Hearing Officer upon substantiating a charge of misbehavior in a subsequent Hearing within a specific period.

(5) As soon as possible, but no later than 24 hours after the conclusion of the Hearing, the inmate shall be given a written statement of the disposition of the Hearing. This statement shall set forth the evidence relied upon by the Hearing Officer in reaching his or her decision and also set forth the reasons for any penalties imposed.

(b) Mandatory disciplinary surcharge. Upon the conclusion of a Disciplinary Hearing wherein the inmate admits the charges, or where the Hearing Officer affirms one or more of the charges, a mandatory disciplinary surcharge in the amount of five dollars ($5.00) shall be assessed automatically against the inmate.

§ 253.8 Appeal Procedures.

The inmate shall be advised of his or her right to appeal the disposition of the Disciplinary Hearing to the facility Superintendent. Such appeal shall be submitted in writing to the Superintendent within 72 hours of the receipt of the disposition. The Superintendent or designee shall issue a decision within 15 days of receipt of the appeal.

§ 253.9 Discretionary Review by Superintendent.

At any time during which a penalty imposed pursuant to a Disciplinary Hearing is in effect, the Superintendent may reduce the penalty.

Part 254 Superintendent's Hearing

§ 254.1 Hearing Officer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JASON BAXTER,

Plaintiff,

v.

JOSEPH E. BRADLEY,

Defendant.

DECISION AND ORDER

19-CV-6105L

Plaintiff Jason Baxter, an inmate in the custody of the New York State Department of Corrections and Community Supervision, commenced this *pro se* civil rights action on February 6, 2019. The amended complaint asserts two claims under 42 U.S.C. § 1983 against a single defendant, Correction Captain Joseph E. Bradley.

On May 10, 2021, plaintiff requested the Clerk of the Court to enter default based on Bradley's failure to plead or otherwise defend as required by law. Default was entered on May 11, 2021. (Dkt. #23.)

On June 2, 2021, Bradley, through counsel, filed a motion to vacate the default. (Dkt. #25.) In support of the motion, Bradley's attorney, Assistant Attorney General Hillel Deutsch, has submitted a declaration (Dkt. #25-1) explaining that Bradley twice sent letters to the Office of the Attorney General ("AG") in Rochester, N.Y. requesting representation, but for unknown reasons the AG's office has no record of them being received. Deutsch has submitted copies of those letters, which were presumably obtained from Bradley. Deutsch Decl. Ex. A.

Deutsch goes on to explain that having mailed those letters, Bradley assumed that was represented by counsel and that he need do nothing further. It was only after receiving notice of the entry of default that Bradley realized something was amiss, whereupon he contacted the AG's office. It was soon discovered that Bradley's failure to respond was based on the mixup concerning his request for representation, and Deutsch was assigned to the case.

Plaintiff has filed a response to the motion to vacate (Dkt. #27), in which he asserts that Bradley did not request representation from the AG's office, and that the letters purporting to show that he did are fraudulent.

DISCUSSION

Under Rule 55(a) of the Federal Rules of Civil Procedure, "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend ..., the clerk must enter the party's default." Entry of default is mandatory, not discretionary. *See Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Const., LLC*, 779 F.3d 182, 186 (2d Cir. 2015).

Once default has been entered, Rule 55(c) provides that "[t]he court may set aside an entry of default for good cause." The standard for good cause "requires a court to weigh (1) the willfulness of default, (2) the existence of any meritorious defenses, and (3) prejudice to the non-defaulting party." *Guggenheim Capital, LLC v. Birnbaum*, 722 F.3d 444, 455 (2d Cir. 2013).

Having weighed those factors here, the Court finds that the default should be set aside. Although the facts surrounding Bradley's request for representation by the AG's office are not entirely clear, the default here does not appear to have been willful. In addition, as explained in

defendant's memorandum of law (Dkt. #25-2), there appears to be a meritorious defense to plaintiff's claims.[1] I also see no prejudice to plaintiff if the default is vacated. His claims relate to a hearing that was held in 2018. Bradley's responsive pleading was due on March 30, 2021. The relatively brief delay occasioned by the default will not significantly affect plaintiff's ability to prosecute this case. Setting aside the default is also in keeping with the Second Circuit's strong preference for deciding cases on the merits, rather than by default. *See New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005); *Powerserve Int'l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001).

CONCLUSION

Defendant's motion to vacate the Clerk's entry of default (Dkt. #25) is granted, and the Clerk is hereby directed to vacate the default entered on May 11, 2021 (Dkt. #23). Defendant is directed to file and serve his response to plaintiff's complaint within twenty (20) days of the date of entry of this order.

IT IS SO ORDERED.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
July 13, 2021.

[1] While the Court need not now delve into the details of the defense, defendant asserts that plaintiff suffered no adverse consequences as a result of the deprivations of due process alleged in the complaint.