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United States District Court, D. Kansas.

Saul ZAPATA, et al., Plaintiffs,
v.
IBP, INC., Defendant.

No. Civ. A. 93–2366–EEO.
|
Nov. 3, 1997.

MEMORANDUM AND ORDER

OCONNOR, J.

***1** This matter is before the court on defendant IBP, Inc.'s Objections to the Magistrate Judge's Report and Recommendation (Doc. # 602). By Minute Order of April 1, 1997, this court referred the Motion of Defendant to Dismiss the Complaints of Certain Plaintiffs (Doc. # 464) to Magistrate Judge Rushfelt for report and recommendation. On September 22, 1997, the magistrate judge submitted his report and recommendation to the district court. No objections have been filed to the report and recommendation regarding plaintiffs Enrique Molina and Antonio Ponce; therefore, the court adopts in its entirety the magistrate judge's proposed findings and recommended disposition as to Molina and Ponce.

IBP, Inc. ("IBP") has timely filed written objections solely with respect to plaintiff Gustavo Vasquez. Plaintiffs have filed a response. The matter is now ready for ruling. For the reasons set forth below, the court affirms and adopts in its entirety the report and recommendation of the magistrate judge.

I. *Standard of Review.*
De novo review is required after a party makes timely written objections to a magistrate's report. *Northington v. Marin,* 102 F.3d 1564, 1570 (10th Cir.1996). A district court judge is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The judge may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.* The judge is afforded considerable discretion in determining what reliance he may place upon the magistrate judge's findings and recommendations. *See Andrews v. Deland,* 943 F.2d 1162, 1170 (10th Cir.1991). *See also United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) ("in providing for a 'de novo determination' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.").

The district court must consider the evidence in the record and not merely review the magistrate's report and recommendations. *Northington,* 102 F.3d at 1570. Where circumstances indicate the district court did not conduct de novo review, the case must be remanded. *Id.* (citing *In re Griego,* 64 F.3d 580, 583–84 (10th Cir.1995); *Bratcher v. Bray–Doyle Independent School District,* 8 F.3d 722, 724 (10th Cir.1993)). However, the district court is presumed to know that de novo review is required. "[E]xpress references to de novo review in [the district court's] order must be taken to mean it properly considered the pertinent portions of the record, absent some clear indication otherwise." *Bratcher,* 8 F.3d at 724. Consequently, a brief order expressly stating the court conducted de novo review is sufficient. *Northington,* 102 F.3d at 1570 (citing *Griego,* 64 F.3d at 583–84; *Bratcher,* 8 F.3d at 724).

II. *Discussion.*
***2** IBP objects to selected excerpts of the magistrate judge's report and recommendation regarding IBP's motion to dismiss the complaint of Vasquez with prejudice for his failure to appear at properly noticed depositions. The magistrate judge, in a thoughtful and well-reasoned report, concluded that lesser sanctions than the drastic sanction of dismissal should be imposed, and recommended that this court impose a monetary sanction of $200 against Vasquez personally for his failure to appear at the scheduled deposition. In imposing this sanction, Magistrate Judge Rushfelt stated:

> Such amount does not completely reimburse defendant for time and expenses incurred as a result of the failure, but it appears sufficient to deter similar conduct by Mr. Vasquez in the future. A sanction of $200 appears to be the least severe to deter him. A greater sanction would perhaps be warranted had Vasquez not presented himself in person and tried to reschedule his deposition during the time allotted by the court and the parties for the depositions.

Zapata, et al. v. IBP, Inc., No. 93–2366, slip op. at 17 (D.Kan. Sept. 22, 1997) (hereinafter "Report and Recommendation"). In reaching this conclusion, the magistrate judge undertook a thorough analysis of each of the five factors, articulated in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir.1992), which courts must consider prior to dismissing an action under Rule 37(b)(2)(C). Those factors are:

> (1) the degree of actual prejudice to the defendant, (2) the amount of interference with the judicial process, (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions.

Id. at 921. *See also Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir.1993). "These factors do not constitute a rigid test; rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Ehrenhaus*, 965 F.2d at 921. "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction." *Meade v. Grubbs*, 841 F.2d 1512, 1521 n. 7 (10th Cir.1988) (citations omitted).

As its first objection, IBP takes issue with the court's analysis of the first *Ehrenhaus* factor, "degree of prejudice to defendant." The magistrate judge recommended that this court should find financial prejudice to defendant "to the extent of the cost for attendance of a court reporter and defense counsel for ninety minutes." Report and Recommendation at 7. The magistrate judge reasoned, however, that the prejudice should not include the cost of reassembling counsel in Kansas or re-noticing the deposition, because the facts reflected that after completing Sigala's deposition on February 27, 1997, defense counsel rejected an offer to depose Vasquez the next day prior to returning to their office in Dallas, Texas. *Id.* In support of this determination, the magistrate judge noted: "Defendant has presented no reason or need for rejecting the offer.... Defendant has not demonstrated any prejudice from the failure of plaintiff Vasquez to appear, except for the expense caused by his aborted deposition." *Id.* at 7–8.

***3** As the basis for IBP's objection on this point, IBP states that it "did not reject Vasquez' last minute offer to depose him on a whim," and further states that

> [p]laintiffs' counsel only raised the offer to depose Vasquez late in the day at the conclusion of the last plaintiffs' deposition, knowing that IBP's attorney was preparing to return home to Dallas, Texas after two weeks of depositions in three cities in Kansas. IBP should not be expected to subject itself to such gamesmanship.

IBP's Brief at 2. IBP's argument is conspicuously silent as to any reason for rejecting the offer to depose Vasquez the day after completing the deposition of Sigala. IBP's argument simply does not refute the factual finding of the magistrate judge. We find no basis for rejecting the magistrate judge's analysis as to this *Ehrenhaus* factor.

IBP next objects to the magistrate judge's finding regarding the second *Ehrenhaus* factor, interference with the judicial process. The magistrate judge recommended that we should find no disruption of consequence to the judicial process caused by Vasquez' failure to appear for his deposition. In support of its objection, IBP observes that discovery closed months ago, that the court has entered its pretrial order, and that IBP filed its summary judgment motion based on facts available to it in April. The court finds that IBP could have stemmed any interference with the judicial process resulting from the foregoing facts by deposing Vasquez in late February, when Vasquez offered to be produced. hat date was still within the discovery cutoff and the period of he deposition notice. IBP has not provided any explanation

for failing to agree to Vasquez' offer. Moreover, IBP has not shown how the re-scheduling of Vasquez' deposition would have any material affect on the scheduling ordered in this case. The court has yet to place this case on its trial calendar. The magistrate judge was correct in finding that Vasquez' failure to appear did not disrupt the judicial process.

IBP next addresses the "culpability" factor. The exact nature of IBP's objection regarding this factor is difficult to discern, given that its argument consists of a mere four sentences. IBP takes two sentences from the magistrate judge's report and recommendation out of context, and then asserts "it is clear that Vasquez is culpable for his failure to appear." Indeed, the magistrate judge recommended that "the court should not find [Vasquez] blameless ." Report and Recommendation at 11. The magistrate judge also recommended assessing monetary sanctions against Vasquez himself, instead of against his counsel, because Vasquez "appears to be solely at fault for [his failure to appear]." *Id.* at 16. We find the magistrate judge properly applied the culpability factor in assessing sanctions against Vasquez.

IBP next disputes the magistrate's finding that monetary sanctions should be sufficient to deter future misconduct by Vasquez. IBP argues that dismissal is the appropriate sanction for plaintiff with a history of non-cooperation in discovery. The magistrate judge's recommendation of monetary sanctions instead of dismissal was based on the fact that no sanction had yet been imposed on Vasquez, *id.* at 13, and based on the law that "dismissal of an action with prejudice or its equivalent should be a last resort." *Id.* at 6. The magistrate properly evaluated this *Ehrenhaus* factor.

***4** In sum, we find, for the reasons well-stated in Magistrate Judge Rushfelt's opinion, that imposing monetary sanctions against Vasquez personally in the amount of $200 is adequate to deter and punish Vasquez for his failure to appear. We find that Magistrate Judge Rushfelt dealt with the issues fully and accurately, and conclude that we could add little of value to his analysis.

IT IS THEREFORE ORDERED that defendant IBP's Motion to Dismiss the Complaints of Certain Plaintiffs (Doc. # 464) is overruled. Plaintiffs are hereby directed to pay sanctions to defendant, in the amounts set forth in Magistrate Judge Rushfelt's Report and Recommendation, within thirty (30) days of the date of his order. Plaintiffs are further directed to file a receipt or certificate of payment with this court within thirty (30) days of the date of this order. Plaintiffs are further ordered to make themselves available for deposition within thirty (30) days of the date of this order. Plaintiffs are also warned that any further failure to appear or to comply with the orders of this court, or with discovery, may result in imposition of harsher, sanctions, including the dismissal of their action.

All Citations

Not Reported in F.Supp., 1997 WL 764513