

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SAMUEL K. LIPARI,)	
)	
	Plaintiff,)
)	
v.)	Case No. 07-CV-02146-CM-DJW
)	
U.S. BANCORP, and)	
)	
U.S. BANK NATIONAL ASSOCIATION,)	
)	
	Defendants.)

MOTION FOR ORDER TO SHOW CAUSE

Defendants, by and through counsel Shughart Thomson & Kilroy, P.C., move this Court for an Order requiring the plaintiff to show cause why this action should not be dismissed (or other sanctions levied) under Rule 37(b)(2)(A) for his failure to comply with the Court’s July 8, 2008 discovery Order. In support of this Motion, defendants state as follows:

1. On July 8, 2008, the Court ordered plaintiff, within 14 days of the Order, to serve supplemental responses to defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21; and to produce all documents responsive to defendants’ First Request for Production. The Court also ordered the plaintiff, within 21 days of the Order, to show cause why he should not be required to pay the reasonable fees and expenses the defendants incurred for their Motion to Compel. *See*, Memorandum and Order, Doc. # 96.

2. On July 10, 2008, plaintiff filed an Objection to Magistrate’s Order, asking for District Court review of the July 8, 2008 Order. *See*, Doc. # 97. But the plaintiff did not seek to stay the Order under D. Kan. Rule 72.1.4(d).

3. Simply filing an Objection to Magistrate’s Order does not relieve a party’s obligation to comply with the order, absent an Order to Stay under D. Kan. Rule 72. *See, Kelly*

v. Market USA, 2003 WL 21089075, *2 (D. Kan. 2003) (holding that *pro se* plaintiff's refusal to comply with the magistrate's order to produce discovery was unexcused even though the plaintiff had filed an objection to the order). A copy of the *Kelly* decision is attached as **Exhibit A**.

4. The plaintiff has not produced any documents or supplemental responses in accordance with the Court's Order, and has also failed to respond to the Court's Show Cause Order.

5. Rule 37(b)(2)(A) states that if a party fails to comply with a court's discovery order, the court may levy sanctions on the party, including dismissal of the action. Because the plaintiff has failed to comply with the July 8, 2008 Order, the defendants request the Court order the plaintiff to show cause why this matter should not be dismissed or other sanctions issued pursuant to Rule 37(b)(2)(A).

WHEREFORE, the above stated reasons, the defendants request the Court issue an Order requiring the plaintiff to show cause as to why this matter should not be dismissed or other sanctions issued against the plaintiff for his failure to comply with the Court's July 8, 2008 Order. Defendants also request all other relief to which they are justly entitled.

Respectfully submitted,

/s/ Jay E. Heidrick

ANDREW M. DeMAREA KS #16141

JAY E. HEIDRICK KS #20770

SHUGHART THOMSON & KILROY, P.C.

32 Corporate Woods, Suite 1100

9225 Indian Creek Parkway

Overland Park, Kansas 66210

(913) 451-3355

(913) 451-3361 (FAX)

MARK A. OLTHOFF KS # 70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP and U.S. BANK NATIONAL
ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be e-mailed to any individuals who do not receive electronic notice from the Clerk) this 20th day of August, 2008, to:

Mr. Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Jay E. Heidrick
Attorney for Defendants

Kelly v. Market USA

D.Kan.,2003.

Only the Westlaw citation is currently available.

United States District Court,D. Kansas.

Lawrence L. KELLY, Plaintiff,

v.

MARKET USA, Defendant.

No. 01-4169-SAC.

April 11, 2003.

[Laurie E. Leader](#), Chicago-Kent Law Offices,
Chicago, IL, Benoit M.J. Swinnen, Topeka, KS,
[James L. Wisler](#), James L. Wisler Law Offices,
Lawrence, KS, for Defendant.

MEMORANDUM AND ORDER

[SAM A. CROW](#), District Senior Judge.

*1 This case comes before the court on plaintiff's objections to a magistrate judge's order regarding discovery (Dk.59), a magistrate judge's subsequent report and recommendation (Dk.67) and plaintiff's objection to that report and recommendation. (Dk.70).

The factual background of this case is accurately set forth in the magistrate judge's subsequent report and recommendation (Dk.67), and will not be repeated herein. Suffice it to say that plaintiff, having been ordered to comply with outstanding discovery requests by defendant, refused to do so. Defendant then moved to dismiss the case as a sanction for plaintiff's discovery abuse. In his report and recommendation, the magistrate judge found the extreme sanction of dismissal warranted, in the event this court finds no error in the original order requiring plaintiff to comply with the outstanding discovery requests.

Standard of Review

"De novo review is statutorily and constitutionally required when written objections to a magistrate's report are timely filed with the district court."[Summers v. State of Utah, 927 F.2d 1165, 1167 \(10th Cir.1991\)](#) (citations omitted).[Rule 72\(b\)](#)

[of the Federal Rules of Civil Procedure](#) requires a district judge to "make a de novo determination upon the record, ..., of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule." Those parts of the report and recommendation to which there has been no objection are taken as true and judged on the applicable law. See [Campbell v. United States District Court for the Northern Dist. of California, 501 F.2d 196, 206 \(9th Cir.\)](#), cert. denied, [419 U.S. 879 \(1974\)](#); see also [Summers v. Utah, 927 F.2d at 1167](#) (holding that "[i]n the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate"). The district court has considerable judicial discretion in choosing what reliance to place on the magistrate judge's findings and recommendations. See [Andrews v. Deland, 943 F.2d 1162, 1170 \(10th Cir.1991\)](#) (citing [United States v. Raddatz, 447 U.S. 667 \(1980\)](#)), cert. denied, [502 U.S. 1110 \(1992\)](#). When review is de novo, the district court is "'free to follow ... or wholly ... ignore' " the magistrate judge's recommendation, but it "'should make an independent determination of the issues' " without giving "any special weight to the prior' " recommendation.[Andrews v. Deland, 943 F.2d at 1170](#) (quoting [Ocelot Oil Corp. v. Sparrow Industries, 847 F.2d 1458, 1464 \(10th Cir.1988\)](#)). In short, the district court may accept, reject, or modify the magistrate judge's findings, or recommit the matter to the magistrate with instructions. See [28 U.S.C. § 636\(b\)\(1\)\(C\) \(1994\)](#).

Analysis

Plaintiff's objections to the magistrate judge's report and recommendation are far from specific. See Dk. 70 (alleging that the court has been operating "fraudulently," that "defendant has no defense," citing the Tenth Amendment and the Civil Rights Act of 1964.) In fact, they fail to reference the magistrate judge's report and recommendation, or any portion of, whatsoever. Had plaintiff's pleading not been captioned "plaintiff's response to report and recommendation," the court would not have known that plaintiff's statements were in response to that document.

*2 The court has reviewed the facts regarding the October 17, 2002 order, granting in large part defendant's motion to compel, and finds no error in that ruling. The court has reviewed plaintiff's objections to that order (Dk.59), and finds them lacking in specificity. Plaintiff's complaints that the course of discovery is "fraud," that his "private matters are [his] private matters," and that defendant has no right to the discovery sought are meritless.

Plaintiff is a frequent litigant in this court, *see Kelly v. Rogers, et. al*, NO. 00-4175-RDR, Order of Dec. 11, 2001, at 1, n. 1, and is bound to abide by the same procedural rules as are litigants represented by counsel. As this court recently stated in another case, a *pro se* litigant is required to follow the same rules of procedure as any other litigant.

"A *pro se* litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). A *pro se* litigant, however, is not relieved from following the same rules of procedure as any other litigant. *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir.1994), *cert. denied*, 513 U.S. 1090 (1995). "At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the *pro se* litigant." *Hall v. Bellmon*, 935 F.2d at 1110; *see Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir.1991) ("Despite liberal construction afforded *pro se* pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). Nor is the court to "supply additional factual allegations to round out a plaintiff's complaint." *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir.1997).

McCormick v. Farrar, 2002 WL 31314681, *2 (D.Kan.2002).

Plaintiff was ordered to produce and respond to discovery, yet failed to do so. Plaintiff was not relieved from complying with the disputed order merely because he had filed an objection to it, *see Fed.R.Civ.P. 72*; D. Kan. R. 72.1.4, and made no application for a stay of the magistrate's non-dispositive order regarding discovery. Plaintiff's failure to comply with the terms of the order is unexcused. Accordingly, plaintiff's objections to the

magistrate judge's order of October 17, 2002 (Dk.59) are overruled. Plaintiff was properly ordered to respond to defendant's discovery requests, and has failed without good cause to do so.

The court thus addresses the issue whether the sanction of dismissal with prejudice is warranted, as addressed in the magistrate judge's report and recommendation (Dk.67), and plaintiff's objection to that document (Dk.70).

In all respects, the magistrate judge's report and recommendation fully, fairly and accurately sets forth the law, findings and facts relevant to this appeal. Plaintiff has intentionally chosen to ignore discovery requests and orders related to them, prejudicing the defendant and preventing the orderly administration of justice. For all the reasons set forth in detail in the report and recommendation, this court finds it appropriate to levy the most severe sanction of dismissal with prejudice, unless plaintiff provides to defendant within 15 days of this order all discovery which was the subject of the October 17, 2002 order. Accordingly, the court accepts and adopts the report and recommendation of the magistrate judge dated February 19, 2003.

*3 IT IS THEREFORE ORDERED that plaintiff's objections to a magistrate judge's order regarding discovery (Dk.59) are overruled, that plaintiff's objection (Dk.70) to the report and recommendation of Magistrate Judge Bostwick is overruled, that the report and recommendation (Dk.67) is accepted and adopted.

IT IS FURTHER ORDERED that plaintiff shall provide to defendant and to Magistrate Judge Sebelius, to whom this case has been transferred, within 15 days of this order all discovery which was the subject of the October 17, 2002 order. In the event plaintiff fails to do so in the determination of Magistrate Judge Sebelius, this case shall be dismissed, with prejudice, *instanter*, and without further notice or hearing.

D.Kan.,2003.
Kelly v. Market USA
Not Reported in F.Supp.2d, 2003 WL 21089075
(D.Kan.)

END OF DOCUMENT

