

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: December 11, 2007 Decided: February 21, 2008)

Docket No. 06-4698-cv

- - - - -x

JUNET CAIDOR,

Plaintiff-Appellant,

- v. -

ONONDAGA COUNTY, SHERYL KARPINSKI,
SHAUN MCCARTHY, JOHN BALLONI,
MAUREEN CRANER and TEDDY SPOONER,

Defendants-Appellees.

- - - - -x

Before: JACOBS, Chief Judge, POOLER and SACK,
 Circuit Judges.

Plaintiff-Appellant Junet Caidor appeals from an order entered in the Northern District of New York (Peebles, M.J.) on September 20, 2004, denying his motion to compel discovery and issuing a protective order on behalf of the defendants. For the following reasons, we conclude that Caidor waived his right to appeal the magistrate's order. Judge Pooler dissents in a separate opinion.

1 PHILLIP G. STECK, Cooper, Erving
2 & Savage LLP, Albany, NY, for
3 Plaintiff-Appellant.

4
5 KAREN A. BLESKOSKI (Anthony P.
6 Rivizzigno, County Attorney, of
7 counsel), Syracuse, NY, for
8 Defendants-Appellees.

9
10 DENNIS JACOBS, Circuit Judge:

11
12 Plaintiff-Appellant Junet Caidor challenges the grant
13 of summary judgment in favor of the defendants by the United
14 States District Court for the Northern District of New York
15 (McCurn, J.), and an order entered by Magistrate Judge
16 Peebles, denying Caidor's motion to compel discovery and
17 issuing a protective order for the defendants' benefit. In
18 a separate summary order filed today, we affirm the grant of
19 summary judgment dismissing the complaint. This opinion
20 concerns only the discovery order, which was entered while
21 Caidor was appearing pro se.

22 Caidor did not object to Magistrate Judge Peebles's
23 order in the district court. It is settled law that a pro
24 se litigant's failure to object to a magistrate judge's
25 decision on a dispositive matter does not effect a waiver of
26 appellate review absent an express warning from the
27 magistrate judge. Small v. Sec'y of Health & Human Servs.,
28 892 F.2d 15, 16 (2d Cir. 1989) (per curiam). For the
29 reasons stated below, we decline to extend that rule to a

1 magistrate judge's decision on a non-dispositive matter. We
2 therefore hold that Caidor waived his right to appeal
3 Magistrate Judge Peebles's order.

4 On appeal, Caidor argues that his lost opportunity for
5 discovery prevented him from resisting summary judgment.
6 Because Caidor did not press this argument in the district
7 court, ordinarily we would not consider it on appeal. See
8 Bogle-Assegai v. Connecticut, 470 F.3d 498, 504 (2d Cir.
9 2006) ("'[I]t is a well-established general rule that an
10 appellate court will not consider an issue raised for the
11 first time on appeal.'" (quoting Greene v. United States,
12 13 F.3d 577, 586 (2d Cir. 1994) (alteration in original)).
13 "However, because the rule is prudential, not
14 jurisdictional, we have discretion to consider waived
15 arguments." Sniado v. Bank Austria AG, 378 F.3d 210, 213
16 (2d Cir. 2004) (citation omitted), vacated on other grounds,
17 542 U.S. 917, 124 S. Ct. 2870 (2004). For instance, "[w]e
18 have exercised this discretion where necessary to avoid a
19 manifest injustice or where the argument presents a question
20 of law and there is no need for additional fact-finding."
21 Id. (citation omitted).

22 Caidor, who is not a lawyer, was appearing pro se when
23 he opposed the defendants' motion for summary judgment. On

1 appeal, the defendants argue waiver. But they do not rely
2 on Caidor's failure to oppose summary judgment on the ground
3 of outstanding discovery requests; instead, they rely on his
4 failure to object to Judge Peebles's discovery ruling in the
5 district court. The appellate issue framed by the parties
6 is one of pure law, and is fully briefed by counsel. For
7 these reasons, we exercise our discretion to consider this
8 issue.

10 **BACKGROUND**

11 Caidor began working at the Onondaga County Department
12 of Emergency Communications on March 11, 2002. Four days
13 later, he was fired after his supervisors learned that his
14 job application failed to disclose his criminal record. On
15 July 1, 2003, Caidor filed suit in the Northern District of
16 New York, alleging that his termination was based on race
17 discrimination, in violation of Title VII of the Civil
18 Rights Act of 1964, 42 U.S.C. § 2000e; 42 U.S.C. §§ 1981,
19 1983 and 1985; the Americans with Disabilities Act of 1990,
20 42 U.S.C. § 12101; and the New York State Human Rights Law,
21 N.Y. Exec. Law § 290.

22 Magistrate Judge Peebles, who oversaw pretrial
23 discovery in this matter pursuant to 28 U.S.C. § 636(b)(1),

1 set a discovery deadline of April 16, 2004. In May 2004
2 (after the deadline had passed) the parties reported that
3 they were close to settlement; but soon thereafter, Caidor's
4 lawyer withdrew from the representation. On July 29, 2004,
5 Judge Peebles entered an order (1) extending the discovery
6 deadline to August 13, 2004, (2) allowing Caidor to serve
7 three additional interrogatories on the defendants, and (3)
8 ordering Caidor to respond to the defendants' discovery
9 requests and appear for his deposition.

10 Caidor thereafter served on the defendants forty
11 document requests and six requests for admission. On August
12 26, 2004, Caidor moved to compel the defendants to respond.
13 On September 20, 2004, Judge Peebles entered an order
14 denying the motion to compel and issuing a protective order
15 for the benefit of the defendants. The order did not advise
16 that the failure of a party to file objections in the
17 district court within ten days would preclude appellate
18 review pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of
19 Civil Procedure 72(a). Caidor filed no objection to the
20 order in the district court. He challenges it now on
21 appeal.

1 context. Federal Rule of Civil Procedure 72(b), which
2 governs magistrates' decisions on dispositive matters, like
3 the one at issue in Small, contains no explicit waiver
4 language; but there is a warning as to waiver in Rule 72(a),
5 which governs non-dispositive matters like the one at issue
6 here. Compare Fed. R. Civ. P. 72(b)(2) ("Within 10 days
7 after being served with a copy of the recommended
8 disposition, a party may serve and file specific written
9 objections to the proposed findings and recommendations.")
10 with Fed R. Civ. P. 72(a) ("A party may serve and file
11 objections to the order within 10 days after being served
12 with a copy. A party may not assign as error a defect in
13 the order not timely objected to." (emphasis added)); see
14 also Marcella v. Capital Dist. Physicians' Health Plan,
15 Inc., 293 F.3d 42, 46 (2d Cir. 2002) (observing that unlike
16 Rule 72(a), "there is no similar [waiver] provision in Rule
17 72(b) for recommendations as to dispositive motions"). So,
18 where a magistrate's ruling on a dispositive matter is at
19 issue, "our waiver rule is set forth only in case law."
20 Small, 892 F.2d at 16.

21 The Court in Small reasoned that even if the pro se
22 plaintiff

23 had attempted to locate the specific Federal
24 Rules of Civil Procedure cited at the end of

1 the magistrate's report, none of those rules
2 would have informed her of the potential
3 waiver of appellate review . . . To require a
4 pro se plaintiff . . . to wade through the
5 case law of this Circuit in order to preserve
6 her right to appellate review would be an
7 unreasonable burden.

8
9 Small, 892 F.2d at 16. In other words, because Rule 72(b)
10 does not warn pro se litigants of appellate waiver, we
11 tasked magistrate judges with doing so. Small has been
12 applied consistently by this Circuit to pro se litigants'
13 appeals from magistrates' rulings on dispositive matters.
14 See, e.g., Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993)
15 (finding waiver where the magistrate's report and
16 recommendation proposing dismissal "plainly satisfie[d] the
17 Small requirements, and additionally referred to the Small
18 decision"); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.
19 1992) (finding waiver where pro se litigant "failed to
20 object to the Magistrate Judge's report after receiving
21 adequate notice of the consequences of a failure to object
22 in a timely manner").

23 Caidor asks us to extend Small to his appeal from the
24 magistrate's ruling on a non-dispositive discovery matter.
25 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Thomas E.
26 Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir.
27 1990) ("Matters concerning discovery generally are

1 considered nondispositive of the litigation.” (citation and
2 internal punctuation omitted)). This Circuit makes certain
3 allowances for pro se litigants. We recognize that the
4 right to appear pro se “should not be impaired by harsh
5 application of technical rules,” and therefore we “make
6 reasonable allowances to protect pro se litigants from
7 inadvertent forfeiture of important rights because of their
8 lack of legal training.” Traguth v. Zuck, 710 F.2d 90, 95
9 (2d Cir. 1983). Nonetheless, “pro se litigants generally
10 are required to inform themselves regarding procedural rules
11 and to comply with them.” Edwards v. INS, 59 F.3d 5, 8 (2d
12 Cir. 1995) (citation omitted); see also Lucas v. Miles, 84
13 F.3d 532, 538 (2d Cir. 1996) (Jacobs, J., dissenting) (“The
14 concept of ‘sixty days’ can be understood and appreciated
15 without a legal education. (One would have to be a lawyer
16 to believe that ‘sixty days’ is an elusive concept.)”).

17 “[T]his is not a case where a pro se litigant has
18 stumbled into a snare found only in our case law.” LoSacco
19 v. Middletown, 71 F.3d 88, 92 (2d Cir. 1995). If Caidor had
20 consulted the Federal Rule of Civil Procedure applicable to
21 Magistrate Judge Peebles’s order, it “would have informed
22 [him] of the potential waiver of appellate review.” Small,

1 892 F.2d at 16.¹ Where, as here, reading the applicable
2 rule will warn a pro se litigant of the consequences of
3 filing an untimely objection, we see no need to require that
4 the magistrate judge inform the litigant of an appeal waiver
5 provision. Accordingly, we hold that a pro se litigant who
6 fails to object timely to a magistrate's order on a non-
7 dispositive matter waives the right to appellate review of
8 that order, even absent express notice from the magistrate
9 judge that failure to object within ten days will preclude
10 appellate review.

11 **CONCLUSION**

12 The judgment is affirmed.

¹ In the Southern District of New York, pro se litigants are given a manual that advises, "If you do not object to the Magistrate Judge's order within that ten (10) day period, you may not later object to the order." Manual for Pro Se Litigants Appearing Before the United States District Court for the Southern District of New York, available at <http://ww1.nysd.uscourts.gov/cases/show.php?db=forms&id=71>. The Northern District of New York might consider supplementing its pro se manual with a similar express warning about the risk of appellate waiver.

POOLER, Circuit Judge, dissenting:

I respectfully dissent. It is not enough to repeat the language of solicitude for the rights of pro se litigants without giving meaning to those rights. Since we need not reach the issue of whether this plaintiff waived his discovery rights, in order to affirm the grant of summary judgment to the defendants in this discrimination action, we should not do so. This is especially so, since, as the majority opinion points out, the Northern District of New York does not separately inform litigants in its pro se manual of the risk of appellate waiver for failing to object within the required period. Plaintiff benefitted from some discovery while he was represented by counsel and he does not, on appeal, explain what additional information he sought. The key question of whether Onondaga County Department of Emergency Communications had ever employed anyone who had a discrepancy between their criminal background check and their responses to related questions on the application form had already been answered. Therefore, we need not decide whether Magistrate Peebles correctly denied plaintiff's motion to compel discovery because it would not alter the outcome of the motion for summary judgment. Apart from advising the Northern District of New

York that it "might consider" supplementing its pro se manual, I, respectfully, see no merit to this ungenerous little opinion.