

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

MICHAEL A. BURKE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 3:08CV641(RNC)
	:	
JAMES MIRON, ET AL.	:	
	:	
Defendants.	:	

RECOMMENDED RULING ON MOTION TO DISMISS

Pending before the court is the defendants' Motion to Dismiss (doc. #45). The defendants move to dismiss for lack of prosecution under Fed. R. Civ. P. 41(b) because the plaintiff did not cooperate in the preparation of a joint Rule 26(f) report and because he failed to pay sanctions in other cases.

I. Failure to File 26(f) Report

The defendants argue that the case should be dismissed for failure to prosecute because plaintiff did not cooperate in the preparation of a joint 26(f) report.

On August 6, 2008, the court issued an order noting that a joint 26(f) report had not been filed and ordered the plaintiff to initiate a conference and serve a joint report as required by Fed. R. Civ. P. 26(f) and Local Rule 26(f).<sup>1</sup> (Doc. #22.) Plaintiff did not comply. The defendants subsequently filed a 26(f) report indicating that they had attempted to confer with the plaintiff but

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<sup>1</sup>In May 2006, the plaintiff filed a document that appeared to be a 26(f) report but which was signed by him alone and was not prepared jointly with the defendants. (Doc. #13.)

had been unable to reach him. (Doc. #28.) The court entered a scheduling order on October 6, 2008. (Doc. #35.)

Under Fed. R. Civ. P. 41(b), a court deciding whether to dismiss a case for failure to prosecute should consider whether:

(1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; [and] (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court.

United States ex rel. Drake v. Norden Sys., 375 F.3d 248, 254 (2d Cir. 2004). The court should also consider whether the violation can be adequately addressed using lesser sanctions. Id.

Dismissal for failure to file the 26(f) report is not warranted on this record. First, although the case has been delayed, the delay cannot be attributed to the failure of the plaintiff to cooperate in preparing the 26(f) report. The court entered a scheduling order on October 6, 2008 so the lack of a 26(f) report did not prevent the parties from proceeding. Second, the *pro se* plaintiff was not warned by the court that his failure to comply with Rule 26(f) would result in dismissal of his case. See Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 764 (2d Cir. 1990). Finally, the defendants have not identified any prejudice suffered as a result of the plaintiff's failure to comply with Rule 26(f).

The plaintiff now is warned that failure to comply with the rules of this court or with any court order in the future may

result in the imposition of sanctions, including monetary sanctions, preclusion of evidence, dismissal with prejudice or contempt of court.

## II. Failure to Pay Sanctions

The defendants also contend that plaintiff's case should be dismissed for failure to prosecute because he did not pay sanctions in other cases. The plaintiff is a prolific *pro se* litigant.<sup>2</sup> In at least three cases, he has been ordered to pay monetary sanctions after refusing to attend depositions. See Burke v. Miron et al., 3:07-cv-01181-RNC, doc. #77 (ordering sanctions of \$2,055 on 4/7/09); Burke v. Also Cornerstone et al., 3:08-cv-00643-MRK, doc. #42 (granting motion for costs and fees in the amount of \$405.16 on

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<sup>2</sup>See Burke v. Mental Health & Addiction Svc et al., 3:07-cv-00756-MRK; Burke v. APT Foundation et al., 3:07-cv-00820-MRK; Burke v. Willinger, Willinger & Bucci PC, 3:07-cv-00842-JBA; Burke v. Also Cornerstone et al., 3:07-cv-00889-MRK; Burke v. Standard Oil of Connecticut, Inc. et al., 3:07-cv-00894-AVC; Burke v. Aniskovich et al., 3:07-cv-00900-JCH; Burke v. Barrister Law Group et al., 3:07-cv-00903-PCD; Burke v. Connecticut Renaissance, 3:07-cv-00906-JBA; Burke v. Miron et al., 3:07-cv-01181-RNC; Burke v. Kirk et al., 3:08-cv-00454-MRK; Burke v. State of CT et al., 3:08-cv-00639-MRK; Burke v. Weiner et al., 3:08-cv-00640-JCH; Burke v. State of CT Dept of Labor et al., 3:08-cv-00642-SRU; Burke v. Braron et al., 3:08-cv-00856-MRK; Burke v. APT Foundation Inc et al., 3:08-cv-00987-SRU; Burke v. Regional Network of Programs, Inc., et al., 3:08-cv-01059-CFD; Burke v. Connecticut Renaissance et al., 3:08-cv-01065-MRK; Burke v. Labor et al., 3:08-cv-01083-MRK; Burke v. Blumenthal et al., 3:07-cv-00645-MRK; Burke v. Mental Health & Addiction Svc et al., 3:08-cv-00658-MRK; Burke v. Also Cornerstone et al., 3:08-cv-00643-MRK; Burke v. Connecticut Renaissance et al., 3:08-cv-00659-MRK; Burke v. Also Cornerstone et al., 3:08-cv-01064-MRK. Notably, the plaintiff's Motion for Leave to Proceed *in forma pauperis*, doc. #1, disclosed only one of his many previously filed cases.

1/23/09); Burke v. Blumenthal et al., 3:07-cv-00645-MRK, doc. #39 (granting motion for sanctions in the amount of \$670 on 9/7/07).

On January 26, 2009, Judge Kravitz of this court, noting that the plaintiff had not paid the sanctions ordered in a previous case in 2007, entered an order pursuant to Local Rule 16(g)(2). Burke v. Also Cornerstone et al., 3:08-cv-643-MRK, doc. #48, citing sanctions order entered in Burke v. Blumenthal et al., 3:07-cv-645-MRK. Local Rule 16(g)(2) provides:

The Clerk shall not accept for filing any paper from an attorney or pro se litigant against whom a final order of monetary sanctions has been imposed until the sanctions have been paid in full. Pending payment, such attorney or pro se litigant also may be barred from appearing in court. An order imposing monetary sanctions becomes final for the purposes of this local rule when the Court of Appeals issues its mandate or the time for filing an appeal expires.

D. Conn. L. Civ. R. 16(g)(2).

Judge Kravitz's order instructed the Clerk of the Court "not to accept any filing from Mr. Burke, including any new complaints or *in forma pauperis* petitions, until he has paid this sanction and any other sanction that may become final against him in the future, or shows good cause to this Court why he has not paid the sanction(s)." Since that order was entered, plaintiff has been barred from filing anything in this or any other case and from commencing new litigation.<sup>3</sup> The Rule 16(g)(2) order remains in

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<sup>3</sup>The Second Circuit, noting that it had dismissed at least 18 frivolous appeals filed by the plaintiff since 2008, has entered an order directing its own clerk "to refuse to accept for filing any further submissions signed by Appellant [Burke] unless he first

place.

The plaintiff may not file papers with this court until he complies with Judge Kravitz's order. The plaintiff should be on notice that if he does not comply with Judge Kravitz's order on or before **April 1, 2010**, this action may be dismissed.

### III. Conclusion

For the reasons set forth above, the court recommends that the defendants' Motion to Dismiss, doc. #45, be denied.

Any party may seek the district court's review of this recommendation. See 28 U.S.C. § 636(b) (written objections to proposed findings and recommendations must be filed within fourteen days after service of same); Fed. R. Civ. P. 6 & 72; Rule 72.2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Thomas v. Arn, 474 U.S. 140, 155 (1985); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992). Failure to timely object to a magistrate judge's report will preclude appellate review. Small v. Sec'y of Health and Human Serv.s, 892 F.2d 15, 16 (2d Cir. 1989).

SO ORDERED at Hartford, Connecticut this 11<sup>th</sup> day of March, 2010.

\_\_\_\_\_/s/\_\_\_\_\_  
Donna F. Martinez  
United States Magistrate Judge

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obtains leave of the court to file such papers." See Mandate filed in Burke v. Also Cornerstone, 3:08cv643 (MRK), doc. #52.