

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

EDWARD LEE GILLIAM,

Plaintiff,

v.

Case No: 2:16-cv-255-FtM-99CM

U.S. DEPARTMENT OF VETERANS
AFFAIRS,

Defendant.

OPINION AND ORDER

This matter is before the Court on consideration of the Magistrate Judge's Report and Recommendation (Doc. #9), filed November 8, 2016, recommending that plaintiff's Motion to Proceed *In Forma Pauperis* and Financial Affidavit (Doc. #2) be denied, the Motion for Appointment of Counsel (Doc. #3) be denied, and plaintiff be directed to file an amended complaint. Plaintiff filed Response To: Report and Recommendation (Doc. #10) on November 21, 2016, which was construed as an objection but appears to be a proposed Amended Complaint¹.

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. §

¹ The first line is "Amended complaint: The Preliminary Eight Essentials of This Case in Paragraph Form. With all due respect the following has been written to be brief and in great plainness of speech." (Doc. #10, p. 1.)

636(b)(1); United States v. Powell, 628 F.3d 1254, 1256 (11th Cir. 2010). A district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). See also United States v. Farias-Gonzalez, 556 F.3d 1181, 1184 n.1 (11th Cir. 2009). The district judge reviews legal conclusions *de novo*, even in the absence of an objection. See Cooper-Houston v. Southern Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994).

The Magistrate Judge found that plaintiff is currently employed with cash on hand; that he owns real property with equity; and that he is not a recipient of assistance and without dependents. Based on these findings, and other facts presented by plaintiff's Financial Affidavit, the Magistrate Judge found that plaintiff did not qualify to proceed without prepayment of costs. Plaintiff's response contains no objection to this finding, and the Court will accept the recommendation and deny leave to proceed *in forma pauperis*.

The Magistrate Judge further found that plaintiff was not entitled to an appointment of counsel, nor was it warranted under the circumstances of the case. The Magistrate Judge further found that plaintiff has in fact demonstrated an ability to represent himself, and recommended that an appointment of counsel be denied.

Plaintiff's response does not contain an objection to this finding, and the Court agrees with the recommendation to deny the motion.

Plaintiff's response appears to be an attempt to amend his Complaint by providing additional factual support pursuant to the recommendation that plaintiff be required to replead his claims. However, the proposed amended complaint fails to include, expand on, or incorporate any of the original allegations. "An amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary." Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V OLYMPIA VOYAGER, 463 F.3d 1210, 1215 (11th Cir. 2006) (citation omitted). It is clear that it was not plaintiff's intent to supersede the original document in its entirety. Therefore, the Court will permit plaintiff to file a Second Amended Complaint in compliance with the Magistrate Judge's recommendation.²

After a careful and complete review of the findings and recommendations, as well as the record in this case, the Court will adopt the Report and Recommendation.

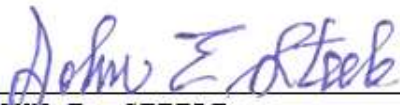
² For additional resources and assistance, plaintiff may wish to consult the "Proceeding Without a Lawyer" resources on filing a *pro se* complaint that are provided on the Court's website, at http://www.flmd.uscourts.gov/pro_se/default.htm. The website has tips, answers to frequently-asked questions, and sample forms. There is also a link that may help plaintiff generate the second amended complaint.

Accordingly, it is now

ORDERED:

1. The Report and Recommendation (Doc. #9) is hereby **adopted** and the findings incorporated herein.
2. Plaintiff's Motion to Proceed *In Forma Pauperis* (Doc. #2) is **DENIED** and plaintiff shall pay the filing fee in the amount of \$400.00 to the Clerk of Court within **THIRTY (30) DAYS** of this Opinion and Order. **The failure to pay the filing fee will result in dismissal without prejudice of this case.**
3. Plaintiff's Motion for Appointment of Counsel (Doc. #3) is **DENIED.**
4. Plaintiff shall file a "Second Amended Complaint" within **FORTY-FIVE (45) DAYS** of this Opinion and Order that incorporates all allegations and facts within a single document.

DONE and ORDERED at Fort Myers, Florida, this 12th day of December, 2016.



JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
All Parties of Record