

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 10-214-DLB

MARK J. KLEIMAN

PLAINTIFF

vs.

ORDER ADOPTING REPORT AND RECOMMENDATION

JOHN HURLEY, et al.

DEFENDANTS

** ** * ** *

This matter is before the Court on the Report and Recommendation (R&R) of the Honorable Candace J. Smith, Magistrate Judge for the Eastern District of Kentucky, wherein she recommends that Plaintiff’s claims be dismissed without prejudice under Federal Rule of Civil Procedure 41(b) for failure to prosecute. (Doc. # 9). No objections having been filed, the Court will **adopt** the R&R, except that dismissal shall be **with prejudice**.

Shortly after this *pro se* proceeding was referred to Magistrate Judge Smith (Doc. # 6), she issued an Order (Doc. # 8) informing Plaintiff that the time set by Local Rule 7.1 for opposing Defendants’ Motion to Dismiss (Doc. # 3) had expired. The Magistrate Judge nevertheless provided a fifteen (15) day extension from the date of the Order for Plaintiff to file a memorandum opposing Defendants’ Motion to Dismiss. Her Order also warned Plaintiff that “[f]ailure to file a Response may be viewed by the Court as a tacit acceptance by Plaintiff of the law and arguments contained in Defendants’ motion filing.” (Doc. # 8). Plaintiff took no action.

Nearly two months later, the Magistrate Judge issued an R&R wherein she observed that Plaintiff had not yet filed a Response to Defendants' Motion to Dismiss—or, it appears, taken any action to advance his case—and recommended that this Court dismiss Plaintiff's claims without prejudice pursuant to Rule 41(b) for failure to prosecute.¹ (Doc. # 9). In the R&R, the Magistrate Judge concluded that Plaintiff's failure to respond was a "conscious choice" and that he "knowingly abandoned any opposition to Defendants' Motion to Dismiss." She applied the factors to be considered prior to issuing a Rule 41(b) dismissal, considering whether: (1) the failure to cooperate was willful or in bad faith; (2) the opposing party was prejudiced; (3) the party was warned of the sanction; and (4) less severe sanctions were considered. *Palasty v. Hawk*, 15 F.App'x 197, 199 (6th Cir. 2001). The Magistrate Judge concluded that Plaintiff's inaction appeared willful, that Plaintiff was warned of the potential consequences of his continued inaction, and that Defendants would be prejudiced if they had to continue their defense where Plaintiff willfully declined to respond to their Motion to Dismiss.

The R&R expressly notified Plaintiff that he had fourteen (14) days to file objections. More than fourteen days have expired and Plaintiff has not filed objections. In total, it appears from the docket that Plaintiff has taken no action to advance his claim since filing his Complaint in state court on September 1, 2010. (Doc. # 2-3). Plaintiff has not responded to Defendants' Motion to Dismiss, the Magistrate Judge's warning that failure to respond could result in an adverse decision, the Magistrate Judge's recommendation of

¹ Though Rule 41(b) does not expressly permit sua sponte dismissal, in a recent unpublished decision, the Sixth Circuit observed that "it is well-settled that the district court can enter a sua sponte order of dismissal under Rule 41(b)." *Rogers v. City of Warren*, 302 F.App'x. 371, 375 n.4 (6th Cir. 2008) (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962)).

dismissal, and the opportunity to object to the Magistrate Judge's conclusion that the four factors of Rule 41(b) favored dismissal. Having considered the less-severe option of dismissal without prejudice, the Court finds dismissal with prejudice appropriate in light of Plaintiff's continued and apparently willful decision to ignore the action he instituted against Defendants. Accordingly, it is **ORDERED** that:

1. The Magistrate Judge's Report and Recommendation (Doc. # 9) is hereby **ADOPTED** as the findings of fact and conclusions of law of this Court, except that the dismissal shall be **with prejudice**;
2. Defendants' Motion to Dismiss (Doc. # 3) is **DENIED**;
3. Plaintiff's claims against Defendants for breach of the duty of fair representation are **DISMISSED with prejudice**, pursuant to Federal Rule of Civil Procedure 41(b), for failure to prosecute; and
4. This matter is **STRICKEN** from the active docket of the Court.

This 19th day of January, 2011.



Signed By:

David L. Bunning

DB

United States District Judge