

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT HEIBEL,

Plaintiff,

CIVIL ACTION NO. 08-CV-13078-DT

vs.

DISTRICT JUDGE MARIANNE O. BATTANI

DIRECTOR PATRICIA
CARUSO, et al.,

MAGISTRATE JUDGE MONA K. MAJZOUB

Defendants.
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REPORT AND RECOMMENDATION

I. **RECOMMENDATION:** Plaintiff's Motion for Default Judgment (docket no. 12) should be **DENIED**.

II. **REPORT:**

A. **Factual Background**

Plaintiff, a Michigan state prisoner proceeding *pro se*, filed a Motion for Default Judgment on October 15, 2008 as to Defendants Brady and Prasad, the only remaining Defendants. (Docket no. 12). No response has yet been filed. The Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(e). This matter is now ready for ruling.

B. **Standard**

The plaintiff bears the burden of showing that the defendant against whom the plaintiff is seeking default has been effectively served with process. Fed. R. Civ. P. 55(a); *Maryland State Firemen's Ass'n v. Chaves*, 166 F.R.D. 353, 354 (D. Md. 1996); 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2682, p. 14 (3d ed. 1998).

C. Analysis

Plaintiff has failed to carry his burden of showing that the named Defendants have been properly served. Plaintiff states that the court files and record show that the U.S. Marshal served Defendants with a copy of the summons and complaint on August 22, 2008. (Docket no. 12 at 1). However, the only docket entry on the docket sheet for that date is the Marshal's acknowledgment of receipt of process from the Clerk. Presumably, after receipt the Marshal served the summons and complaint. Yet this entry does not show that service was effected upon Defendants. No docket entry shows that Defendants were properly served with process. Counsel entered an appearance for these two Defendants on October 22, 2008 and filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on their behalf. (Docket nos. 13, 14, 15). Such a motion delays the running of the deadline for the filing of a responsive pleading. Fed. R. Civ. P. 12(a)(4). Accordingly, the record fails to support Plaintiff's argument that these Defendants have been properly served and failed to respond appropriately. His Motion for Default Judgment should be denied.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n Of Teachers Local 231*,

829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Any objections must be labeled as “Objection #1,” “Objection #2,” etc. Any objection must recite *precisely* the provision of this Report and Recommendation to which it pertains. Not later than ten days after service of an objection, the opposing party must file a concise response proportionate to the objections in length and complexity. The response must specifically address each issue raised in the objections, in the same order and labeled as “Response to Objection #1,” “Response to Objection #2,” etc.

Dated: October 30, 2008

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Report and Recommendation was served upon Robert Heibel and Counsel of Record on this date.

Dated: October 30, 2008

s/ Lisa C. Bartlett
Courtroom Deputy