

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANTHONY L. WILSON,	:	Case No. 3:12-cv-337
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	Magistrate Judge Michael J. Newman
vs.	:	
	:	
PHIL PLUMMER, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**DECISION AND ENTRY ADOPTING IN PART AND NOT ADOPTING IN PART
THE REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE (Doc. 36)**

This case is before the Court pursuant to the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to United States Magistrate Judge Michael J. Newman. Pursuant to such reference, the Magistrate Judge reviewed the pleadings filed with this Court, and, on September 13, 2013 submitted a Report and Recommendation. (Doc. 36). Plaintiff filed objections (Doc. 37), but Defendants did not respond.

Plaintiff objects to the Magistrate Judge's recommendation that his access-to-the-courts claim be dismissed. The Magistrate Judge premised his recommendation to dismiss this claim on the fact that Plaintiff was represented by counsel. *See Holt v. Pitts*, 702 F.2d 639, 640-41 (6th Cir. 1983) (holding that an inmate's constitutional right of access to the courts was not violated when he was represented by appointed counsel). In his objections, for the first time, Plaintiff maintains that although he had counsel of record throughout his state court case, he effectively proceeded *pro se* for a portion of

that litigation. (Doc. 37 at 2). Specifically, Plaintiff's court appointed counsel petitioned the court to withdraw his representation. (*Id.*) The court overruled the motion to withdraw, citing Plaintiff's right to counsel, but explicitly provided that counsel was *not* required to file written closing arguments. (Doc. 29-4 at PageID 263). Plaintiff was permitted to submit the written closing argument on his own behalf. (*Id.*) Accordingly, based on these new facts, the Court finds that Plaintiff has alleged sufficient facts to survive the motion to dismiss.¹

As required by 29 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), the Court has reviewed the comprehensive findings of the Magistrate Judge and considered *de novo* all of the filings in this case. Upon consideration of the foregoing, the Court does determine that:

1. The Report and Recommendation (Doc. 36) is **ADOPTED IN PART** and **NOT ADOPTED IN PART**. Specifically, Defendants' motion to dismiss (Doc. 26) is **DENIED** in its entirety;
2. Plaintiff is hereby **ORDERED** to file a Second Amended Complaint with his newly alleged facts within 21 days of the date of this Order;² and
3. The Order staying discovery pending the Court's ruling on the motion to dismiss is **LIFTED**.

IT IS SO ORDERED.

Date: 10/18/13

s/ Timothy S. Black
Timothy S. Black
United States District Judge

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¹ Plaintiff makes two additional objections which the Court finds are without merit for the reasons articulated in the Report and Recommendation. (Doc. 36).

² If Plaintiff fails to timely file his Second Amended Complaint, the Court shall *sua sponte* dismiss his access-to-the-courts claim.