

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

MICHAEL KELLY,
Plaintiff,

v.

C.A. No. 12-929L

U.S. DEPARTMENT OF HOMELAND
SECURITY, by and through the
Secretary of Homeland Security,
JEH JOHNSON,
Defendants.

Memorandum and Order

Ronald R. Lagueux, Senior United States District Judge.

This matter is before the Court on the objection of Plaintiff Michael Kelly to the Report and Recommendation issued by Magistrate Judge Patricia Sullivan on January 20, 2015. The Report and Recommendation ("R & R") attempted to sort out a dispute between the parties over the thoroughness and timeliness of Plaintiff's discovery. The R & R concluded with some orders and some recommendations, including a recommendation to dismiss Plaintiff's complaint in its entirety if certain material was not produced by January 30, 2015. Threat of a monetary sanction on Plaintiff's counsel would have sufficed. This Court has reviewed the R & R and the submissions of the parties, and, pursuant to Fed. R. Civ. P. 72(b)(3), returns the matter to the Magistrate Judge with the following observations and instructions.

Ordinarily, discovery orders of a magistrate judge are reviewed only for clearly erroneous factual findings or conclusions that are contrary to law. Fed. R. Civ. P. 72(a);

Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 4 (1st Cir. 1999). However, because of the hybrid dispositive/non-dispositive nature of the R & R, this Court has given the matter a more extensive review. Support for the Court's less deferential standard of review is found in Yang v. Brown University, 149 F.R.D. 440 (D.R.I. 1993). In Yang, the court vacated the magistrate's order precluding the plaintiff's expert from testifying at trial, which the magistrate had imposed to punish the plaintiff for a delay in producing the expert's report. The court held that the magistrate's order so vitiated the plaintiff's case that it "crosses the line from non-dispositive to dispositive decision-making." Id. at 442. Determining that the sanction was "tantamount to an involuntary dismissal," the court concluded that it was "obliged to treat the Magistrate's sanction as a recommendation to this Court and to review the record *de novo*." Id. at 443; see also Phinney, 199 F.3d at 6.

In this R & R, the Magistrate Judge has denied Plaintiff's motion to extend the discovery deadline in order to permit him to conduct depositions, a sanction that Plaintiff asserts will make it impossible for him to present his case. This is a harsh result. The Court recognizes that Plaintiff was slow to get going with discovery, particularly during the summer of 2014, during which time he was responding to Defendant's Motion to

Dismiss. However, since September 2014, it appears that Plaintiff has propounded his initial disclosures; produced answers to interrogatories and supplemented those answers; produced approximately 250 pages of requested documents; provided Defendant with executed medical releases (after some skirmishing); provided Defendant with other medical records; and served Defendant with his own interrogatories and document requests. While the Court cannot be sure that the discovery produced contains everything Defendant seeks, the Court nonetheless is convinced that Plaintiff's conduct falls somewhere short of "extremely protracted inaction (measured in years), disobedience of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance," that might warrant actual or *de facto* dismissal of his case. Pomales v. Celulares Telefonica, Inc., 342 F.3d 44, 48 (1st Cir. 2003). Furthermore, as the First Circuit wrote in Pomales, "[W]here the case is close, courts should prefer less severe sanctions that preserve the possibility of disposition on the merits." Id.; see also Benitez-Garcia v. Gonzalez-Vega, 468 F.3d 1, 5-6 (1st Cir. 2006); Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66-7 (1st Cir. 1999)(..."disposition on the merits is favored and we repeatedly have held that a case should not be dismissed with prejudice except when a plaintiff's misconduct is particularly egregious or extreme.").

For these reasons, the Court returns the matter to the Magistrate Judge with the directive that the scheduling order be amended in order to provide both sides with a reasonable extension of time to complete discovery, submit pretrial memorandums, and complete preparations for a trial to be held in late September 2015.

So ordered.

/s/Ronald R. Laqueux
Ronald R. Laqueux
Senior U.S. District Judge
May 14 , 2015