

April 8, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

BRENT G. POLL,

Plaintiff - Appellant,

v.

HENRY PAULSON, Secretary, United States Department of Treasury; JOHN W. SNOW, former Secretary, United States Department of Treasury; PAUL H. O'NEIL, former Secretary, United States Department of Treasury,

Defendants - Appellees.

No. 08-4046
(D.C. No. 1:06-CV-00144-TC)

ORDER

Before **MURPHY, TYMKOVICH** and **GORSUCH**, Circuit Judges.

Brent Poll is litigating his dismissal from a job with the Internal Revenue Service in 1983. In the case pending before us, the magistrate judge assigned to the case entered a Report and Recommendation (“R & R”) recommending that the defendants’ motion for summary judgment be granted and that Mr. Poll be enjoined from filing future claims based on the same material facts. The R & R also recommended that the defendants’ motion for monetary sanctions be denied.

The R & R, entered October 25, 2007, stated, “The parties must file any objection to the Report and Recommendation within ten days after receiving it. Failure to object may constitute a waiver of objections upon subsequent review.” R & R, p. 10.

Subsequent to the entry of the R & R, the district court received two documents from Mr. Poll. One was a letter dated October 25, 2007 (the same date that the magistrate judge entered his Report and Recommendation) acknowledging that he had received a copy of this court’s Order and Judgment in Poll v. O’Neill, Case No. 06-4177 (10th Cir., October 18, 2007) (unpublished), and stating that he intended to seek rehearing from that decision. That letter was received in the district court on October 29, 2008.

The second document sent to the district court was a copy of the petition for rehearing en banc that Mr. Poll filed with this court in Case No. 06-4177.

On January 8, 2008, the district court entered an order adopting the R & R of the magistrate judge and judgment was entered that same day. The district court noted that, “Neither party filed any objections to the R & R.” That sentence included a footnote stating, “Plaintiff mistakenly believed that he had 45 days from the R & R’s issue date to file objections. Even if correct, his self-imposed deadline has passed with no objection filed.” Order, p. 2.

Mr. Poll filed a “Request for Reconsideration” on January 17, 2008 that was denied January 25, 2008. Liberally construing the motion as one seeking relief pursuant to Fed. R. App. P. 59, the time for filing a notice of appeal was extended to February 25, 2008. See Fed. R. App. P. 4(a)(4). Mr. Poll filed a notice of appeal on

February 21, 2008, a preliminary record was sent to this court, and we opened Case No. 08-4046, the matter now pending before us.

Noting the lack of an objection to the R & R, our clerk's office entered an order affording the parties the opportunity to show cause why the appeal should not be dismissed based on the apparent waiver of appeal rights. Mr. Poll responded with his "Opposition Memorandum Appellant's Response to Court Order" and the defendants filed a "Memorandum Regarding Plaintiff/Appellant's Waiver of Appellate Review."

Mr. Poll argues that it was his intent that his letter to the court dated October 25, 2007 and the follow-up copy of his rehearing petition also sent to the district court constitute his objection. The objection he was articulating, according to Mr. Poll, was that the R & R relied too much on this court's opinion in Case No. 06-4177.

The October 25, 2007 letter says nothing about the R & R relying too heavily on this court's decision. In fact, it makes no reference to the R & R whatsoever. It simply is a notice to the district court that Mr. Poll's counsel in the Tenth Circuit case had died and that he was going to be seeking rehearing. As promised in the letter, a copy of the petition for rehearing filed with this court was later sent to the district court as well.

If a litigant fails to object to a judge magistrate's recommendation, that party waives his right to appellate review of the district court's factual and legal determinations under this circuit's "firm waiver rule." See In re: Key Energy Resources, Inc., 230 F.3d 1197, 1199-1200 (10th Cir. 2000); Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991). The waiver rule applies to a pro se party unless: (1) the party has not been

informed of the time period within which to file objections and the consequences for failing to do so, or (2) the “interests of justice” require review. Morales-Fernandez v. INS, 418 F.3d 1116, 1119 (10th Cir. 2005). “[O]nly an objection that is sufficiently specific to focus the district court’s attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate’s Act that led us to adopt a waiver rule in the first instance.” United States v. One Parcel of Real Prop., 73 F.3d 1057, 1060 (10th Cir.1996).

The judge magistrate’s R & R expressly advised Mr. Poll of the timetable within which to object and advised him that the failure to object “may constitute a waiver of objections upon subsequent review.” Therefore, Mr. Poll was advised of the timetable and possible consequences of failing to object.

Further, the documents to which Mr. Poll refers as constituting his objection to the R & R are not specific enough to preserve appellate review, and in fact constitute no real objection at all. As already noted, nowhere in the submissions to the district court received prior to the entry of judgment is there even any reference to the R & R.

While this court has not articulated a specific test for the “interests of justice” exception, it has provided several factors to consider, such as the pro se litigant’s effort to comply with the instruction, the strength and plausibility of the explanation for why he did not comply, and the importance of the issues raised on the merits. Morales-Fernandez at 1119-20 (citing Wirsching v. Colorado, 360 F.3d 1191, 1197-98 (10th Cir. 2004).

Although Mr. Poll argues that the interests of justice require that he be relieved of the obligation to object, we cannot agree. The magistrate judge's R & R is well-reasoned and actually had an aspect that was favorable to Mr. Poll in that it did not recommend the imposition of monetary sanctions, as this court imposed in Case No. 06-4177 (imposing a sanction of \$4,041.70).

Mr. Poll waived his right to appeal by failing to specifically object to the R & R issued by the magistrate judge, and the interests of justice do not require that the court ignore that waiver. This appeal is accordingly dismissed.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court



by:
Douglas E. Cressler
Chief Deputy Clerk