



Brizuela v. Johnson

2023 | Cited 0 times | N.D. West Virginia | June 13, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FELIX BRIZUELA, Plaintiff, v. CIVIL NO. 1:22-CV-105 (KLEEH) DR. MARK JOHNSON, Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION [ECF NO. 18] IN PART

AND DISMISSING ACTION WITH PREJUDICE On August 19, 2022, the pro se Plaintiff, Felix Brizuela, filed a Complaint against Dr. Mark Johnson. Pursuant to 28 U.S.C. § 636 and the local rules, the Court referred the action to United States Magistrate Judge Michael J. Aloï (the “Magistrate Judge”) for initial review. On December 12, 2022, the Magistrate Judge entered a Report and Recommendation (“R&R”), recommending that the Court dismiss the action without prejudice for failure to state a claim. Plaintiff also filed an Amended Complaint [ECF No. 12]. Defendant moved to dismiss the Amended Complaint [ECF No. 15], and the Magistrate Judge held the motion in abeyance [ECF No. 17]. The Magistrate Judge entered a second R&R on December 22, 2022, recommending dismissal of the Amended Complaint [ECF No. 18]. The second R&R informed Plaintiff that he had fourteen (14) days from the date of service of the R&R to file “specific written objections identifying the portions of the Report and BRIZUELA V. JOHNSON 1:22-CV-105

ORDER ADOPTING REPORT AND RECOMMENDATION [ECF NO. 18] IN PART

AND DISMISSING ACTION WITH PREJUDICE

2 Recommendation to which objection is made, and the basis for such objection.” It further warned him that the “[f]ailure to timely file written objections . . . shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals.” Plaintiff filed objections to the second R&R on January 3, 2023 [ECF No. 20]. In his objections, however, he does not object to any specific portion of the Magistrate Judge’s findings. He objects generally to the initial review process. Defendant filed a response to the objections [ECF No. 21]. When reviewing a magistrate judge’s R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). Otherwise, “the Court may adopt, without explanation, any of the magistrate judge’s recommendations” to which there are no objections. *Dellarciprete v. Gutierrez*, 479 F. Supp. 2d 600, 603–04 (N.D.W. Va. 2007) (citing *Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold portions of a recommendation to which no objection has been made unless they are clearly erroneous. See *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315



Brizuela v. Johnson

2023 | Cited 0 times | N.D. West Virginia | June 13, 2023

(4th Cir. 2005). Here, again, Plaintiff does not object to any of the Magistrate Judge's findings. As such, the Court is under no obligation to conduct a de novo review. Accordingly, the R&R was
BRIZUELA V. JOHNSON 1:22-CV-105

ORDER ADOPTING REPORT AND RECOMMENDATION [ECF NO. 18] IN PART

AND DISMISSING ACTION WITH PREJUDICE

3 reviewed for clear error. Upon careful review, and finding no clear error, the Court ADOPTS IN PART the second R&R [ECF No. 18]. Rather than dismissing without prejudice as recommended, the Court finds that the action shall be DISMISSED WITH PREJUDICE and STRICKEN from the Court's active docket. The motion to proceed in forma pauperis is DENIED [ECF No. 2]. The original R&R and the motion to dismiss are DENIED AS MOOT [ECF Nos. 13, 15]. It is so ORDERED. The Clerk is directed to transmit copies of this Order to counsel of record via email and the pro se Plaintiff via certified mail, return receipt requested. DATED: June 13, 2023

THOMAS S. KLEEH, CHIEF JUDGE NORTHERN DISTRICT OF
WEST VIRGINIA

