IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RUBY PRICE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 97-716-GMS
	:	
KENT GENERAL HOSPITAL a/k/a Bayhealth, JOANNE T. BIRCH, as Kent General Nursing Vice President and Individually, DR. ROBERT FRIEDMAN, as Kent General Doctor and Individually, JOHN DOE, Officially and Individually, and JANE DOE, Officially and Individually,	:	
	:	
Defendants.	:	

ORDER

At Wilmington this **3rd** day of **December, 1999**,

On November 15, 1999, this court received a correspondence from Lorraine Harris, Esq., entitled, "Response to Court's Report and Recommendation of November 2, 1999." The "response" from Ms. Harris was directed to the Magistrate Judge with a copy to the Honorable Gregory M. Sleet.[1] The Report and Recommendation ("R & R") recommended that the sanction against Ms. Harris take the form of the reasonable costs and fees of opposing counsel and deponent pursuant to the "aborted" September 15,

[1] It is unclear whether by copying Judge Sleet, Ms. Harris was expressing her objections to this court's Report and Recommendation. In any event, by directing her "objections" to the Magistrate Judge, Ms. Harris' response would appear to be a motion for reargument. Further, the court has since learned that beyond the faxed copy of Ms. Harris' response to the Magistrate Judge, no original copy of her November 15, 1999 letter has been provided to Judge Sleet, filed with the clerk's office or provided to the Magistrate Judge. At present, the only document of record is a faxed copy of said letter.

1999 deposition of Mrs. Mary Casson in the Price v. Kent General Hospital Case, C.A. No. 97-716-GMS.[2] (D.I. 87.)

I. Facts and Background

On September 29, 1999, this court conducted a hearing to discuss various issues related to the Price v. Kent General Hospital case. (D.I. 69.) One issue was raised by Michael Broadhurst, Esq., counsel for Kent General Hospital, regarding a deposition, scheduled by Ms. Harris for September 15, 1999, which did not occur. Following lengthy arguments by both counsel, the court determined that the deposition was "aborted" due to Ms. Harris' tardiness in attending the same. The court assessed the costs and fees of deponent and opposing counsel attributable to their attendance at the deposition against Ms. Harris, solely. The costs and fees were, however, subject to the court's determination of reasonableness, pursuant to an affidavit filed by Mr. Broadhurst.[3] Id.

Then the court, specifically addressing Ms. Harris, indicated that she would have an opportunity to argue the reasonableness of the costs and fees following the submission of the affidavit with the court.[4] Ms. Harris' response to the court's ruling and

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[2] As the court will explain, Ms. Harris' current challenge of the court's September 29, 1999 order assessing costs and fees is moot pursuant to Fed. R. Civ. P. 72.

[3] "In light of the prior experience that this Court has had with Ms. Harris concerning some degree of tardiness, and in light of the fact that this confusion could potentially have been avoided if a notice of deposition had been filed or provided, I am finding that, Ms. Harris **you** are going to be responsible for **reasonable** costs incurred for the benefit of Ms. Casson coming here and traveling expenses for September 15th." (D.I. 69 at 46 (emphasis added).)

[4] "After you see the affidavit, Ms. Harris, you will have a right to indicate anything that you consider appropriate argument as to their **reasonableness or unreasonableness**."

her argument as to the reasonableness of the fees, if any, was required "within three business days" of the receipt of defense counsel's affidavit.[5] Id. Ms. Harris indicated that she understood the ruling of the court. (D.I. 69.) Mr. Broadhurst filed his affidavit with the court on October 22, 1999. (D.I. 88.)

Ms. Harris' first "objections" to this court's ruling and order were filed on November 15, 1999. (D.I. 95.) As noted above, this submission was entitled: "Response to Court's Report and Recommendation of November 2, 1999." Id.

II. Law

Pursuant to 28 U.S.C. § 636(b)(1)(A), a district court judge may designate to the magistrate judge to hear and determine any pretrial matter pending before the district court. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72; D. Del. R. 72.1.[6] The rules authorizing jurisdiction are the same under the Federal and Local Rules. The instant matter is governed by Federal Rule of Civil Procedure 72(a), entitled: *Nondispositive Matters*. In pertinent part, it reads:

(D.I. 69 at 47 (emphasis added).)

[5] THE COURT: "So I will reserve as to the amount of the expenses right now and the amount of counsel fees, once and until I have the affidavit, and, Ms. Harris, within three business days after receiving that from the defendants, please file a response with the Court. You may fax it to me, if your fax machine is okay. And you know the fax number for the Court."

MS. HARRIS: "Yes, Your Honor."

(D.I. 69 at 47-48.)

[6] RULE 72.1 **United States Magistrate Judge; Pretrial Orders.**

(a) *Duties in Civil Matters*.

(2) *Nondispostitive Motions*. Hear and determine any pretrial motion or other pretrial matter, other than those motions specified in subsection (a)(3) below, in accordance with 28 U.S.C. § 636 (b)(1)(A) and Fed. R. Civ. P. 72.

D. Del. R. 72.1.

> (a) **Within 10 days** after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party **may not thereafter** assign as error a defect in the magistrate judge's order to which objection **was not timely made**.

Fed. R. Civ. P. 72(a) (emphasis added).[7]

As this court noted in its Report and Recommendation, "[a] court order for sanctions in the form of attorney's fees and costs is an appropriate remedy for a noticed deposition which is not attended by . . . a party's counsel." (D.I. 89 (Magistrate Judge's Report and Recommendation, Price v. Kent General Hospital, C.A. No. 97-716-GMS (Nov. 2, 1999) (construing Fed. R. Civ. P. 37(d)).)[8] The Third Circuit Court of Appeals has recently reaffirmed that a party's failure to appeal the order of a magistrate judge to the district court waives that right of appeal. Continental Casualty Co. v. Dominick D'Andrea, Inc., 150 F.3d 245 (3d Cir. 1998). "In addition, other circuits considering the issue also have decided that a failure to appeal a magistrate judge's subsection (A) order waives the right to challenge it on appeal." Id. at 252 (referring to 28 U.S.C. § 636(b)(1)(A)) (citations omitted).

III. Discussion

In her November 15, 1999 submission, Ms. Harris "submits her opposition to the recommendation" of the court assessing reasonable costs and fees "solely against" her.

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[7] "The rule calls for a written order of the magistrate's disposition to preserve the record and facilitate review. An oral order read into the record by the magistrate will satisfy this requirement." Fed. R. Civ. P. 72 advisory committee's notes.

[8] "If a party or an officer, director, or managing agent of a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . . ." Fed. R. Civ. P. 37(d).

(D.I. 95.) As the court noted earlier, Ms. Harris' objections to the court's previous order are now moot. Citing Rule 72, the court notes that Ms. Harris never contended that she had insufficient time or opportunity to file her appeal or objections, if any, to the court's September 29, 1999 verbal order on the record.[9]

a. Ms. Harris' Untimely Appeal / Objection

As this court has indicated *supra*, Rule 72(a) dictates the time for appealing or otherwise objecting to an order of the Magistrate Judge. In particular, "**[w]ithin 10 days** after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party **may not thereafter** assign as error a defect in the magistrate judge's order to which objection **was not timely made**." Fed. R. Civ. P. 72 (emphasis added).[10]

The court notes that at no time during the applicable ten day period, excluding Saturdays, Sundays and holidays, between September 30 and October 13, 1999, did Ms. Harris or any party representing her submit an appeal or objections to the court's September 29, 1999, order. The court, by finding Ms. Harris "solely" responsible for reasonable costs and attorney fees, allowed Ms. Harris, in her individual capacity and not as an attorney representing a client, the opportunity to appeal or object to this

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[9] See *supra* note 7 (regarding "oral orders" as indicated in Fed. R. Civ. P. 72 advisory committee's note).

[10] The 1991 amendment to Rule 72, which sought to make uniform the service and filing of objections under subparagraphs (a) and (b), also notes that "the amendment [was] also intended to assure that objections to magistrate's orders that are not timely made **shall not be considered**." Fed. R. Civ. P. 72 advisory committee's note (emphasis added).

court's ruling.[11] Ms. Harris chose not to respond until November 15, 1999, nearly thirty days after her opportunity to do so had lapsed.

The Third Circuit has looked unfavorably upon a party's failure to appeal an order of a magistrate judge within the requisite time period. In Continental Casualty Co. v. Dominick D'Andrea, Inc., the Third Circuit affirmed a magistrate judge's sanction of $38,000 against a defendant for the reasonable attorney fees and costs associated with additional, and previously unnecessary, discovery. 150 F.3d 245 (3d Cir. 1998). The court found that because "appellant did not object to the condition at the time it was imposed . . . and did not appeal to the district court within 10 days" as required by the Federal Rules of Civil Procedure and an applicable local district court rule, it could not obtain the appellate review of the circuit court. Continental Cas. Co., 150 F.3d at 246. The court noted that the sanction seemed inappropriate in the absence of supporting evidence of defendant's "bad faith." Id. at 254. However, excepting exceptional circumstances not present therein, the court again recited that because the defendant "voluntarily decided to accept this condition without objection," the decision of the magistrate would stand.[12] Id.

Similarly, when a magistrate's order is not appealed to the district court within the

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[11] "Ms. Harris, you are going to be responsible for reasonable costs incurred for the benefit of Ms. Casson coming here and traveling expenses for September 15th . . . I am also going to be ordering reasonable attorneys' fees too, as well, incurred by the defense." (D.I. 69.)

[12] "In sum, we affirm our holding in New Jersey Zinc that a party that does not appeal a magistrate judge's nondispositive order to the district court waives its right to review the order in appellate court. Only when exceptional circumstances are present will we review such an order." Continental Cas. Co., v. Dominick D'Andrea, Inc., 150 F.3d 245, 254 (3d Cir. 1998).

applicable time, a waiver of that right results. "[P]arties that litigate before a Magistrate Judge must raise any and all arguments before the Magistrate Judge, or waive their right to assert the arguments before the district court on appeal." Cooper Hospital/University Medical Ctr. v. Sullivan, 183 F.R.D. 135, 142 (D.N.J. 1998). See also Lithuanian Commerce Corp. Ltd. v. Sara Lee Hosiery, 177 F.R.D. 205 (D.N.J. 1997) (finding party's failure to raise a timely objection prior to magistrate judge's ruling on nondispositve issue resulted in a waiver of right to present objections before the district court); Jordan v. Tapper, 143 F.R.D. 567, 570 (D.N.J. 1992) ("[B]ecause plaintiff did not raise this [ ] objection before the magistrate judge, he has waived the right to assert it [in district court]."); McDonough v. Blue Cross of Northeastern Pennsylvania, 131 F.R.D. 467 (W.D. Pa. 1990) (noting that a party's failure to file a timely appeal of a magistrate's order to a district judge constitutes a waiver of that party's right of review).

These parallel circumstances cause the court to reflect upon the principle behind equitable doctrine of laches, and would remind Ms. Harris of the maxim that "equity aids the vigilant, not one who slumbers on their rights." This court will not reverse itself on a ruling that seeks to remedy the very pattern of behavior – tardiness – that presents itself again in the latest actions of counsel, absent compelling circumstances not present in this case.

Therefore, since the time for appealing this court's order elapsed prior to counsel's filing and consistent with the precedent of this circuit, Ms. Harris' objections to the original September 29, 1999 order are of no moment here, and this court will not

entertain an appeal or review of its prior determination.[13]

b. Objections to the Affidavit Regarding Costs and Fees

In the September 29, 1999 order, this court indicated to Ms. Harris that it would not rule on the reasonableness of the assessed costs and fees until it had received Mr. Broadhurst's affidavit regarding the same.[14] (D.I. 69.) The court then informed Ms. Harris that it was going to give her an opportunity to respond to the affidavit, and requested that she specifically address the "reasonableness or unreasonableness" of the figures asserted.[15] As noted above, this court delineated the time Ms. Harris had to respond to the affidavit, indicating that, "Ms. Harris, **within three business days** after receiving [the affidavit] from the defendants, please file a response with the Court." (D.I. 69 (emphasis added).) Ms. Harris then indicated that she understood the court's request stating, "Yes, Your Honor." Id.

The court notes that Ms. Harris opted not to respond in any way to Mr. Broadhurst's affidavit "within [the] three business days" required by the court. This court

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[13] Motions for reargument, like review of the Magistrate Judge's decision, are also subject to a ten day filing limitation. D. Del. R. 7.1.5. No request for reargument or review of this decision occurred within the required time period by Ms. Harris.

[14] THE COURT: "I am finding that, Ms. Harris, you will be responsible for reasonable costs incurred for the benefit of Ms. Casson coming here and traveling expenses for September 15th. I don't necessarily agree those reasonable costs are $165.47, because I haven't yet received the basis for that.

Regarding the appropriate costs relating to her cost for attorneys' fees, I want to see -- I am going to be ordering reasonable attorneys' fees, too, as well, incurred by the defense. **I want to see an affidavit, though, and this court will make a determination."** (D.I. 69 at 46-47 (emphasis added).)

[15] THE COURT: "After you see the affidavit, Ms. Harris, you will have a right to indicate anything you consider appropriate argument as to their reasonableness or unreasonableness." (D.I. 69 at 47.)

also notes that at no time prior to Ms. Harris' recent submission, nor within the submission itself does Ms. Harris contend that the costs and fees asserted in the affidavit are unreasonable. Ms. Harris does "respectfully submit her opposition to the recommendation" and "believes the proposal is unjust," but does not challenge the reasonableness of these costs and fees. Ms. Harris also goes so far as to say that she believes "it is unfair and retaliatory" for Mr. Broadhurst to seek reimbursement for the same.[16] Yet again, Ms. Harris chose not to address the reasonableness of the costs and fees asserted.

This court carefully considers the language and purpose behind the orders it issues. It certainly expects counsel to abide by the terms of those orders, particularly when counsel acknowledges her understanding of the same. Thus, this court interprets the absence of a response from Ms. Harris directly on this issue to be a tacit acceptance of the reasonableness of the costs and fees imposed. The court also notes that Ms. Harris, in her submission, indicated that she would "abide by any order of the court." Therefore, the court again finds the costs and fees as asserted in the affidavit to be reasonable.

III. Conclusion

This court takes no pleasure in sanctioning any party in any proceeding, whether they be litigant or counsel. However, as the Third Circuit noted in Republic of the Philippines v. Westinghouse Electric Corp., "the Federal Rules of Civil Procedure allow [ ] courts to sanction parties who fail to meet minimum standards of conduct in many

[16] As noted above, the time for arguing the merits of the court's order has passed.

different contexts. E.g., Fed. R. Civ. P. 37(d) and 37(g) (discovery abuses)." 43 F.3d 65, 73 (3d Cir. 1995). This court has found, as noted in its order and Report and Recommendation, and still finds that such standards have not been met.[17] The Westinghouse court also noted that "[i]f an attorney rather than a client is at fault, the sanction should ordinarily target the culpable attorney." 43 F.3d at 74. This court finds the reasoning of the Third Circuit both reasonable and persuasive.

Therefore, in light of all the foregoing, this court finds that the sanction assessed against Ms. Harris to be reasonable, and in the absence of a properly filed motion for reargument,[18] the Report and Recommendation of this court stands as issued. Therefore, IT IS ORDERED that:

1. Ms. Harris' motion for review by the Magistrate Judge of the order of September 29, 1999 is DENIED.

2. As a result of Ms. Harris' failure to address the merits of the Report and Recommendation order of November 2, 1999, no timely review has been requested or filed. Therefore, the time for appeal or review by the District Court has expired. Further, the time for review pursuant to a motion for reargument has also expired.

3. Ms. Harris' objections to this order of December 2, 1999 shall be made in

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[17] THE COURT: "Common courtesies, as I said before, need to be exchanged and maintained by both sides in this litigation." D.I. 69 at 47.

[18] Rule 7.1.5. **Reargruments.**
A motion for reargument shall be served and filed **within 10 days** after the filing of the Court's opinion or decision. The motion shall **briefly and distinctly state the grounds therefor**. Within 10 days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The Court will determine from the motion and answer whether reargument will be granted. D. Del. R. 7.1.5. (emphasis added).

accordance with the requirements of 28 U.S.C. § 636 and Fed. R. Civ. P. 72.

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UNITED STATES MAGISTRATE JUDGE