

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

KENNETH GOMEZ,

Plaintiff,

vs.

CV. No. 10-594 JAP/LFG

ELEVENTH JUDICIAL DISTRICT COURT,

Defendant.

**ORDER DENYING OBJECTION TO THE PREJUDICIAL ORDER ENTERED, THE
UNTRUSTWORTHINESS OF ASSIGNED JUDGES,
AND THE ERRONEOUS CAPTION OF CASE**

On July 7, 2010, Magistrate Judge Garcia entered the Order Assigning Administrative Track (Doc. No. 17) (the “Order”) in which he assigned this case to the administrative case management track and temporarily stayed discovery because it appeared that some or all of the claims involved are subject to resolution by motion. *Id.* On July 8, 2010, Plaintiff Kenneth Gomez (“Plaintiff”) *pro se*, filed his Objection To The Prejudicial Order Entered, The Untrustworthiness Of Assigned Judges, And The Erroneous Caption Of Case (Doc. No. 18) (the “Objection”). On July 19, 2010, Defendant Eleventh Judicial District Court (“Defendant”), through its attorney Luis E. Robles, filed Defendant’s Response To Objection To The Prejudicial Order Entered, The Untrustworthiness Of Assigned Judges, And The Erroneous Caption Of Case (Doc. No. 29) (“Response”). On July 20, 2010, Plaintiff filed his Reply To Documents Number 29, 30 and 31 (Doc. No. 36) (“Reply”).

Background

On June 21, 2010, Defendant removed this case to this Court from the Eleventh Judicial District Court, San Juan County, New Mexico. *See* Notice of Removal (Doc. No. 1). In his Second Amended Complaint (Doc. No. 8), Plaintiff has alleged that Defendant violated his federal and state civil and constitutional rights in several decisions rendered against him, “from the year 1963 to the present[.]” *Id.* at 6. In the Order, Magistrate Judge Garcia temporarily stayed discovery pending the Court’s rulings on the following potentially dispositive motions filed by Defendant: 1) Motion to Dismiss No. I: Dismissal of Gomez’s Fourteenth Amendment Equal Protection and Procedural and Substantive Due Process Claims (Doc. No. 11) filed on July 1, 2010; and 2) Motion For Partial Summary Judgment No. I: Dismissal of Plaintiff’s Quo Warranto Action And Claims Brought under 42 U.S.C. §§ 1983, 1985, and 1986 (Doc. No. 14) filed on July 8, 2010.

Discussion

Under Fed. R. Civ. P. 26, a Magistrate Judge may limit discovery. Fed. R. Civ. P. 26(b)(2)(C)(iii). Under Fed. R. Civ. P. 72, this Court must consider timely objections to a Magistrate Judge’s nondispositive discovery order, and the Court may “modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). To find that a Magistrate Judge’s nondispositive order clearly erroneous, it is not enough that a decision come across as “maybe” or even “probably wrong.” *Air Liquide America v. M.G. Nitrogen Services, Inc.*, 1999 WL 1072701, at *1 (D.N.M. July 20, 1999) (Hansen, J.) (quoting *Parks & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Rather, the error must be so unequivocal as to appear “dead wrong.” *Parks & Elec. Motors*, 866 F.2d at 233.

“Discovery and scheduling are matters within the district court’s broad discretion,”

Abdulhaseeb v. Calbone, 600 F.3d 1301, 1310 (10th Cir. 2010), and the “clear and erroneous” standard extends such deference to the magistrate judges effectively charged with managing discovery, *Air Liquide America*, 1999 WL 1072701, at *1 (quoting R. Marcus & E. Sherman, *Complex Litigation* at 643 (1985)). Where outstanding motions in a lawsuit carry the potential for dismissal (even partial dismissal), courts have consistently held that a temporary stay of discovery is appropriate. See *Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 674 (10th Cir. 2002) (finding no abuse of discretion in district court’s stay of discovery pending resolution of summary judgment motion).

Despite Plaintiff’s assertion that he represents the State of New Mexico and that he does not appear *pro se*, the Court has liberally construed his pleadings and the Court has held Plaintiff to “a less stringent standard than formal pleadings drafted by lawyers.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, “pro se parties [are required to] follow the same rules of procedure that govern other litigants.” *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (internal quotation marks omitted). Consequently, Plaintiff must show that Magistrate Judge Garcia’s Order is clearly erroneous or is contrary to law. Fed. R. Civ. P. 72(a).

In the Objection, Plaintiff asserts that the decision to place this case on an administrative track prevents him from investigating certain criminal and fraudulent activities that are the basis of Plaintiff’s Second Amended Complaint. However, neither of the dispositive motions addresses the factual basis of Plaintiff’s assertion of criminal activities or fraud. Hence, if any of Plaintiff’s claims remain after the Court decides the motion to dismiss and the motion for partial summary judgment, those claims will go forward on a normal discovery schedule.

Plaintiff next argues that under 28 U.S.C. § 1446(c), the Court should have immediately ordered summary remand, and since the Court failed to so order, the Court must hold an

evidentiary hearing on the issue of remand under 28 U.S.C. § 1446(c)(5).¹ Plaintiff maintains that the Order prevents this evidentiary hearing because he is unable to acquire evidence under the stay of discovery. However, Plaintiff misinterprets the reach of § 1446(c)(5), which governs removal and remand of criminal prosecutions. Because this is a civil case alleging violations of Plaintiff's civil and constitutional rights, the procedure governing removal and remand of criminal prosecutions provided in 28 U.S.C. § 1446(c) does not apply.

Plaintiff next argues that the caption used by Magistrate Judge Garcia is incorrect because Plaintiff represents the State of New Mexico under NMSA 1978 § 44-3-4, the statute authorizing quo warranto actions. Plaintiff asserts that the caption should read "State of New Mexico, ex rel. Kenneth Gomez."

Section 44-3-4 provides,

When the attorney general or district attorney refuses to act [in bringing a quo warranto action], . . . such action may be brought in the name of the state by a private person on his own complaint.

NMSA 1978 § 44-3-4. Before an individual may bring a quo warranto action, he must first apply to the Attorney General for his or her concurrence, and the Attorney General must refuse to prosecute the case. *See State ex rel. Hannett v. Dist. Court of First Judicial Dist. In and For Santa Fe County*, 233 P. 1002, 1004 (N.M. 1925). Upon refusal, the party must demonstrate that an application was actually made and failure to make such a showing precludes use of the writ. *See State ex rel. Huning v. Los Chavez Zoning Comm'n*, 93 N.M. 655, 657, 604 P.2d 121, 123

¹ Section 1446(c)(5) provides,
If the United States district court does not order the summary remand of such [removed criminal] prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. . . .
28 U.S.C. § 1446(c)(5).

(1979). Plaintiff has presented no evidence that he has applied to the New Mexico Attorney General for his concurrence. But, even if Plaintiff had proven that he submitted an application to the Attorney General, this would not justify changing the caption because Plaintiff has failed to demonstrate how he has been or would be prejudiced under the current caption in this case. In addition, it is the potentially dispositive motions, not the caption in this case, that provide the basis of the decision to place this case on an administrative track. The caption has no effect on the Court's decision to uphold Magistrate Judge Garcia's decision reflected in the Order.

Finally, Plaintiff contends that the federal judges assigned to this case are involved in a "criminal insurgency" due to their failure to post penal bonds under NMSA § 34-6-22 (1968); and NMSA § 10-2-9 (1978). However, Magistrate Judge Garcia and Senior District Judge Parker, the judges assigned to this case, are not employed by the State of New Mexico and they do not receive money, disburse money, or have custody of property; thus, they are not required to post a bond under those statutes. *See* NMSA § 34-6-22 (1968); NMSA § 10-2-9 (1978). Moreover, the judges presiding over this case are not "officers elected" in New Mexico and are not required to "give bond" as required by the New Mexico Constitution. N.M. Const. art. XXII § 19; *see Stockton v. N.M. Taxation & Revenue Dept.*, 141 N.M. 860, 864, 161 P.3d 905, 909 (2007) (stating that article XXII § 19 of the New Mexico Constitution applies to the first election of officers after New Mexico's admission into the Union).

In sum, the Order Assigning Administrative Track, in which Magistrate Judge Garcia temporarily stayed discovery until the Court decides the two potentially dispositive motions is not "clearly erroneous or contrary to law," and the Court will overrule Plaintiff's Objection.

IT IS ORDERED that the Plaintiff's Objection To The Prejudicial Order Entered, The Untrustworthiness Of Assigned Judges, And The Erroneous Caption Of Case (Doc. No. 18) is overruled.



UNITED STATES SENIOR DISTRICT JUDGE