

**IN THE UNITED STATES COURT
DISTRICT OF KANSAS**

SAMUEL K. LIPARI,

Plaintiff,

v.

U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION,

Defendants.

Case No. 2:07-cv-021-t6-CIVI-D.JW

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION UNDER FED. R. CIV. P. 59(e),
TO ALTER OR AMEND JUDGMENT, AND TO STAY
FURTHER PRETRIAL PROCEEDINGS**

Plaintiffs two-fold motion should be denied in its entirety. First, plaintiffs request to stay all future actions in this case due to a pending appeal in another matter is without legal or factual basis and has already been rejected by this Court. Second, the plaintiffs motion is improper in that there is no "judgment" to alter or amend under Rule 59. But even on its merits, both the Magistrate and this Court have recently denied plaintiffs request to extend the pretrial deadlines in this matter. Nothing has changed since those rulings and the Court should deny plaintiffs motion.

First, plaintiff suggests that an appeal he is pursuing in *another* matter, *Medica! Services Chain, Inc. v. Neofornia, et al.*, Case No. 05-2299, somehow requires a stay of all further proceedings in *this* case. The two cases are different and the rulings made in them are not inconsistent. See Document No. 135 in Case No. 05-2299 (July 8, 2008), at pp. 4-5 (Exhibit C hereto). Because the two cases are separate, the notice of appeal has no effect on this case and

Plaintiff pursued this same "strategy" in January 2007 when he filed a motion to stay this case at the time it was pending in the Western District of Missouri federal court. See Exhibit D to plaintiff's motion. His position was incorrect then, see Exhibit A hereto, just as it is now. The Missouri federal court denied remand and transferred the case here. Exhibit B hereto.

this Court has already rejected plaintiffs argument that an appeal in another Medical Supply case should stay this litigation.² In any event, the appeal is meritless and defendants have sought its dismissal. See Exhibit D hereto.

Next, there is no "judgment" to alter or amend. Pursuant to Fed. R. Civ. P. 54(b), a judgment is defined as any order or decree "from which an appeal lies." It is well established that rulings on discovery issues are not immediately appealable. See e.g., *Bouglu on v' Cone: Corp.*, 10 F.3d 746, 748 (10th Cir. 1993). The Court's order denying an extension of discovery is not an appealable order and there is no "judgment" to alter or amend under 10(b)(5)(e). Therefore, the Court should deny plaintiffs motion.

But even on its merits, plaintiffs motion fails. The plaintiff suggests that the Court should reconsider its July 11, 2008 Order based upon a standard of correcting clear error or preventing manifest injustice. But the Magistrate's June 3, 2008 Order, like this Court's July 11, 2008 Order, are sound. Further review is unnecessary because the decisions are not manifestly unjust, clearly erroneous or contrary to law. *Davis v. Bruce*, 215 F.R.I. (12) 15 (D. Kan. 2003). Plaintiff may not continue simply to reargue his disappointment with reasoned decisions that are based upon the record in the case. While plaintiff complains (again) that he has not been afforded the opportunity for any discovery, the record indicates otherwise in that defendants have supplied Rule 26(a) disclosures, produced documents, and filed a preliminary exhibit list.³ Plaintiffs request for the Court to reconsider its July 11, 2008 Order is without merit.

² See Doc. No. 35.

³ See Doc. Nos. 62, 81; Exhibit E. On the other hand, plaintiff failed to file a preliminary witness and exhibit list as required by the Court's schedule. Plaintiff has also been ordered to comply with defendants' written discovery requests and his obligations under Rule 26(a). See Doc. Nos. 96, 103.

For these reasons, plaintiff's motion under Fed. R. Civ. P. 5J(e) and to s-l) further pretrial proceedings should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was filed on Jul. 28, 2008 and served via United States mail, postage prepaid, on the **nth** day Of July, 2008 to:

Mr. Samuel K. Lipari
297 NI: Bayview
Lee's Summit, I'v10 MOM

Plaintiff

Isi Mark J. Olthoff
Auornc. for Defendants

this Court has already rejected plaintiff's argument that an appeal in another Medical Supply case should stay this litigation.² In any event, the appeal is meritless and defendants have sought its dismissal. *See* Exhibit D hereto.

Next, there is no "judgment" to alter or amend. Pursuant to Fed. R. Civ. P. 54(a), a judgment is defined as any order or decree "from which an appeal lies." It is well established that rulings on discovery issues are not immediately appealable. *See e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 748 (10th Cir. 1993). The Court's order denying an extension of discovery is not an appealable order and there is no "judgment" to alter or amend under Rule 59(e). Therefore, the Court should deny plaintiff's motion.

But even on its merits, plaintiff's motion fails. The plaintiff suggests that the Court should reconsider its July 11, 2008 Order based upon a standard of correcting clear error or preventing manifest injustice. But the Magistrate's June 3, 2008 Order, like this Court's July 11, 2008 Order, are sound. Further review is unnecessary because the decisions are not manifestly unjust, clearly erroneous or contrary to law. *Davis v. Bruce*, 215 F.R.D. 612, 615 (D. Kan. 2003). Plaintiff may not continue simply to reargue his disappointment with reasoned decisions that are based upon the record in the case. While plaintiff complains (again) that he has not been afforded the opportunity for any discovery, the record indicates otherwise in that defendants have supplied Rule 26(a) disclosures, produced documents, and filed a preliminary witness and exhibit list.³ Plaintiff's request for the Court to reconsider its July 11, 2008 Order is without merit.

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