

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



REGAL COAL, INC, and  
VIRGIL D. LAROSA,

Plaintiff,

v.

CIVIL ACTION NO. 2:03CV90

DOMINICK LAROSA, and  
RESEARCH FUELS, INC.,

Defendant.

**Report and Recommendation**

Pending is Defendants' Dominick LaRosa and Research Fuels, Inc, *Motion For To (sic) Enjoin the Plaintiffs From The Continued Occupation Of Real Property And Utilization Of Coal Mining Permits Issued By The West Virginia Division Of Environmental Protection And Incorporated Memorandum Of Law* (Docket Entry No. 38). On June 8, 2004 at a hearing on Defendants' motion came Plaintiffs by Attorney Robert L. Greer and Defendants by Attorney Gregory H. Schillace. By separate order, Courtney F. Foos Coal Co., Inc., was permitted to intervene and appeared by Attorney W. Henry Lawrence.

**I. PROCEDURAL HISTORY**

On October 16, 2003, Plaintiffs Regal Coal, Inc. and Virgil D. LaRosa (hereinafter "Plaintiffs") filed a two count complaint with this Court seeking declaratory and injunctive relief (Docket Entry No. 1). On November 17, 2003, Plaintiffs filed a Motion for Preliminary Injunction and Memorandum in Support of Motion (Docket Entry No. 3). Plaintiffs' filed an Amended Complaint with the Court on November 20, 2003 seeking declaratory relief, injunctive

relief, relief for breach of contract/unjust enrichment, relief for tortious interference with the right to contract, relief for intentional infliction of emotional distress, relief for fraud and relief for quantum meruit. On December 5, 2003, Defendants filed their answer.

On February 26, 2004, by Order of the United States District Judge, all pre-trial development of this matter was referred to the undersigned United States Magistrate Judge. (Docket Entry No. 14). Between April 21 to 26, 2004 Plaintiffs elected to not then pursue their request for a preliminary injunction. Thereafter, Plaintiffs did not pursue their original request for a preliminary injunction.

On May 4, 2004, Defendants Dominick LaRosa and Research Fuels, Inc, filed their *Motion For [sic] To Enjoin the Plaintiffs From The Continued Occupation Of Real Property And Utilization Of Coal Mining Permits Issued By The West Virginia Division Of Environmental Protection And Incorporated Memorandum Of Law* (Docket Entry No. 38). On May 21, 2004, Plaintiffs' filed with the Court their *Memorandum in Response to Motion for to Enjoin the Plaintiffs from the Continued Occupation of Real Property and Utilization of Coal Mining Permits Issued By The West Virginia Division Of Environmental Protection And Incorporated Memorandum Of Law* (Docket Entry No. 40).

The Court heard testimony, received exhibits and heard oral arguments on June 8, 2004. Near the conclusion of the June 8, 2004

hearing, the Court was, for the first time, advised that the lease rights in question were held by Energy Marketing Inc. and Credible, Inc., corporations who were not parties to the within civil action. R-179.<sup>1</sup> As a result of this revelation of counsel for Defendants of record and through the testimony Gary Steven Begley, a mining engineer employed by Penn Virginia, the Court advised the parties there appeared to be a real and threshold issue of whether the defendants, Dominick LaRosa and/or Research Fuels, Inc., had any standing to request a preliminary injunction to expel plaintiffs from property of which the defendants did not hold leases and thereby had no legal interest or title or right.<sup>2</sup> (R.179).

On June 21, 2004 the undersigned held a telephonic conference with all counsel of record during which the undersigned advised the parties that it would be his report and recommendation to the District Judge that Defendants' motion for preliminary injunction should be denied for lack of standing unless the parties sooner resolved their differences.

Not having been advised of any resolution of the dispute

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<sup>1</sup>Mr. Schillace: "Your Honor, I think that brings up another – another problem that we have. The lease rights are held by Energy Marketing and Credible, Inc., which are not parties to this case. Other property is owned, 108-I mine is owned by Credible, Inc., was owned at the time of these issues by Energy Marketing Company. Again, Your Honor, companies which are not parties of this litigation. The operating of the mines is done by Cherokee Processing. Again, an entity which is not a party to this litigation." R. 179

<sup>2</sup>The Court: "Well, what standing then does Mr. LaRosa have, those companies aren't before the Court?" R.179.

between the parties, the matter is now ripe for this report and recommendation.

## II. FACTUAL BACKGROUND

The Plaintiffs in this action are Regal Coal, Inc. ("Regal"), a West Virginia Corporation conducting business in Upshur County, West Virginia, and Virgil D. LaRosa, a resident of Upshur County, West Virginia and the president and majority shareholder of Regal Coal, Inc. In January of 2001, Defendants Dominick LaRosa and Research Fuels, Inc. ("Research" or "Defendants") entered into negotiations with Plaintiffs for the purpose of securing an agreement by which coal would be processed and supplied to third party purchasers. Sometime thereafter in January of 2001, Plaintiffs believed verbal agreement was reached. Defendant, Dominick LaRosa, also thought verbal agreement was reached and had a law firm, Kirkpatrick & Lockhart of Pittsburgh, Pennsylvania, prepare a written form of the verbal agreement. Plaintiffs refused to sign the written agreement and Defendant, Dominick LaRosa, refused to remove terms therefrom which were objectionable to Plaintiffs. No written agreement memorializing the terms of the alleged verbal agreement was ever signed.

Plaintiffs operated the coal properties of Penn Virginia for approximately two years without incident.

Foos communicated with Dominick LaRosa and brokered coal sales to eastern utilities for the coal Dominick LaRosa was anticipating

being mined by Plaintiffs at the mines owned or controlled by Penn Virginia. These were long term supply contracts with substantial amounts of coal involved. Failure to meet the demands of these supply contracts could result in severe shortages of coal at the power plants and possible rolling electric blackouts or interruptions. (R. 38-72).

Penn Virginia became dissatisfied with the mining methods being used by Plaintiffs and demanded that Energy Marketing Company, a corporation owned by Dominick LaRosa, correct the problems or vacate the properties. Penn Virginia notified Plaintiffs of its dissatisfaction through a Notice of Default mailed to Energy Marketing Company on May 26, 2004. (Plaintiff's Exhibit 11, R. 195). Steven Begley, mining engineer for Penn Virginia, testified that one of the defaults was an unauthorized verbal assignment of leases from Energy Marketing Company to Credible, Inc., another company owned by Dominick LaRosa. (R. 188-189 and 207). Mr. Begley also testified that Energy Research Company's failure to actively mine the Isaac's Run and 105-A mines and the failure to maintain liability insurance were defaults necessitating the Notice. (R. 189-191). Plaintiffs assert and the evidence supports a finding that Dominick LaRosa withheld or manipulating the payment for coal mined by Plaintiffs. With respect to the 106-A mine, Mr. Begley testified the default was declared because Energy Marketing failed to apply for required

authorizations relative to "some minor Article 3 on the MPDS permits" thereby subjecting Penn Virginia to a potential loss of 348,500 tons of coal. (R. 193). Mr. Begley, on cross-examination, clearly stated that Penn Virginia would look to Energy Marketing Company as being responsible for all of the problems at the three mines even though it was known that Energy Marketing Company did not actually mine any coal because it was "the only company we have an agreement with." (R. 201-202).

Plaintiff testified that the material terms of the oral agreement were:

- (1) Research would seek third parties to purchase coal, negotiate the terms of the purchase, and then present the contracts for sales of coal to Regal;
- (2) Regal would review the third party contracts and if feasible would enter into contracts with Research to perform Regal's obligations, which consisted of mining, washing, cleaning, processing and shipping coal to the third parties, through third party contracts;
- (3) In accord with the agreement, Regal, through its affiliate Cherokee Processing, Inc. ("Cherokee"), mined the coal and through Cheyenne Sales Company, Inc. ("Cheyenne"), a company owned and operated by Virgil LaRosa, cleaned, processed, and shipped the coal in accordance with the mining permits owned by Energy Marketing Co.

("EMC"), a West Virginia corporation owned and operated by Dominick LaRosa.

(4) There is no evidence that Plaintiffs made any effort to determine who owned or controlled leased mineral rights to coal. The actual coal or lease rights were owned by Penn VA, and were located at sites known as "108I, Isaac Run, 106A, and 105A". The mining permits were assigned to Cherokee and to Cheyenne pursuant to MR-19s. The assignment is registered with the West Virginia DEP as required by law;

(5) Under the agreement, Regal was responsible for maintaining the permits by complying with all the rules and regulations established by the West Virginia DEP and attending to and fixing any violations arising under the permits;

(6) Once Cherokee had cleaned, processed, and shipped the coal to the third-party purchaser, Regal would send an invoice to Research;

(7) Upon receipt of the invoice, Research would collect the monies owing under the third-party contract purchasers, arranged by brokers of the coal such as Foos; and

(8) Research would review the invoices and remit to Regal the amount owed from the proceeds collected from the third parties.

The purpose of the Agreement was to make money generally and to earn monies to assist Virgil D. LaRosa in reducing an \$800,000 debt to Dominick LaRosa that was incurred by his father Virgil B. LaRosa. After Virgil B. LaRosa failed to pay the debt, Dominick LaRosa obtained a judgment in the amount of \$2,844,612.87 against Virgil B. LaRosa. Plaintiff believed the agreement was to last until the coal was "mined out".

During the course of the on-going work pursuant to the oral agreement, Dominick LaRosa, on behalf of Research, worked with Courtney Foos, the owner of the Courtney F. Foos Coal Company, Inc., an agent for various third-party companies seeking to procure the purchase of coal. When a contract for the sale of coal was entered, the contract would be signed by Dominick LaRosa, on behalf of Research and Courtney Foos, as agent for the third party and the third party. One such third party was First Energy Generation Corp. ("First Energy").

Approximately one and a half years into the oral agreement, during the summer of 2002, Defendants unilaterally attempted to revoke the contract (arrangement) between the parties which ultimately resulted in the filing of the present litigation. Shortly after filing of the lawsuit, Defendants sent correspondence to Plaintiffs in which they sought to revoke the authority transferred to Virgil and Cherokee in the Operator's Agreement.

Plaintiffs initially sought injunctive relief seeking to

prevent Defendants from taking any adverse action against the mining permits before the matter could be properly adjudicated. Upon understanding and belief from the Defendants that they would not take any adverse action prior to a ruling from the Court, Plaintiffs did not pursue their motion for injunctive relief.

On May 4, 2004, Defendants filed their *Motion For [sic] To Enjoin the Plaintiffs From The Continued Occupation Of Real Property And Utilization Of Coal Mining Permits Issued By The West Virginia Division Of Environmental Protection And Incorporated Memorandum Of Law* (Docket Entry No. 38) presently before the Court. In their motion, Defendants allege that there is no written agreement between the parties and that they have been harmed due to the failure of the Plaintiffs to mine a particular seam of coal to its fullest potential. Plaintiffs, in response, maintain that Defendants have intentionally interfered with the rights of the Plaintiffs under the terms of the Agreement and Operator's Agreement. Plaintiffs argue that if Defendants' motion is granted, Plaintiffs and the Courtney F. Foos Coal, Co. will be forced into bankruptcy and the third party purchasers of coal will be without a source of coal resulting in rolling blackouts and disruption of service to the general public.

### **III. ISSUES PRESENTED**

The issue before the Court is whether Defendants named in the pending litigation are entitled to injunctive relief.

The underlying or core issue is whether Defendants named in the pending litigation have standing to seek injunctive relief.

#### IV. APPLICABLE LAW

The Fourth Circuit has recognized that "preliminary injunctions are extraordinary remedies involving the exercise of a very far-reaching power to be granted only sparingly and in limited circumstances." *Microstrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4<sup>th</sup> Cir. 200) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4<sup>th</sup> Cir. 1992) (internal quotation marks omitted).

In *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 802 (4<sup>th</sup> Cir. 1977), *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4<sup>th</sup> Cir. 1991) and *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4<sup>th</sup> Cir. 1991), the Fourth Circuit established four factors which courts must consider in granting a preliminary injunction. Those factors are:

- (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
- (2) the likelihood of harm to the defendant if the requested relief is granted;
- (3) the likelihood that the plaintiff will succeed on the merits, and
- (4) the public interest.

*Direx Israel*, 952 F.2d at 812 (citing *Rum Creek*, 926 F.2d at 359). Additionally, the "[p]laintiff bears the burden of establishing that each of these factors supports granting the injunction." *Id.*, (quoting *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7<sup>th</sup> Cir. 1984).

In evaluating the relative importance of each of the factors, the *Direx Israel* court held that, "[t]he 'likelihood of irreparable harm to the plaintiff' is the first factor to be considered in this connection." *Id.* The *Direx Israel* court continued that if the plaintiff makes 'a clear showing' of irreparable injury absent preliminary injunctive relief," a district court must then balance the likelihood of irreparable harm to the plaintiff without an injunction against the likelihood of harm to the defendant with an injunction. *Id.*; see also *Blackweilder*, 550 F.2d at 195. Then, if after weighing the respective harms, the balance weighs in plaintiff's favor, the plaintiff need not show a likelihood of success; plaintiff need only show that grave or serious questions are presented by plaintiff's claim. *Id.* at 195-196; see also *James Merritt & Sons v. Marsh*, 791 F.2d 328, 330 (4<sup>th</sup> Cir. 1986). Although particular attention appears to be given to the first of the three factors, the Fourth Circuit has also made clear that, "[a]lways, of course, the public interest should be considered." *Blackweilder*, 550 F.2d at 196. However, as the *Blackweilder* court continued, "[t]he two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with the decree." *Id.*

The issuance of a preliminary injunction is committed to the sound discretion of the district court. *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 502 (4<sup>th</sup> Cir. 1974).

Pursuant to the Federal Magistrates Act, the majority of federal courts have taken the position that the Act authorizes the reference of a pretrial motion seeking injunctive relief to a magistrate judge to conduct hearings, and submit to the district judge a report containing proposed findings of fact and recommendations for disposition, but not a determination or entering of judgment. See *Jeffrey v. State Board of Education*, 896 F.2d 507 (Ga, 1990) (holding that a federal magistrate judge had properly conducted a pretrial hearing regarding the request for preliminary injunction within his jurisdiction under § 636(b)(1)(B) of the Federal Magistrates Act); *Fink v. Ylst*, 1995 US App LEXIS 20575 (9<sup>th</sup> Cir., 1995) (unpublished) (attached); *Berry v. McBride*, 86 Fed. Appx. 620 (4<sup>th</sup> Cir. 2004) (unpublished) (attached).

If a preliminary injunction is granted, the order granting the same must "set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts to be restrained. See Fed.R.Civ.P. 65(d).

The Supreme Court has held that "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 96 S. Ct. 2868, 2874 (1976). The reasons for this, the Court explains, are two. First, courts should refrain from adjudicating matters unnecessarily, and it may be that the actual holder of the

right at issue does not wish to assert it. Id. Second, the party that in fact holds the right will likely be the best proponent for it. Id.

The Court does go on to recognize this proposition as a general rule and notes that exceptions may be warranted in some cases based upon the relationship between the party attempting to assert the right and the non-party who holds the right. "If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." Id. Furthermore, the relationship between the litigant and the third party may be such that the litigant would be an equally effective advocate for the right. Id.

The principle outlined in *Singleton* has been used in other Courts as a basis to deny an injunction sought by a litigant on behalf of a non-party. See e.g. *Wheelock v. State of Rhode Island*, 2000 WL 192000 (D.R.I. 2000).

#### V. DISCUSSION

In the instant case, the moving parties are Defendants Dominick LaRosa and Research Fuels, Inc. Neither Dominick LaRosa or Research Fuels, Inc., owns or controls any of the coal properties that are affected by the motion for injunctive relief. Those coal properties are owned and/or controlled by Penn Virginia. As of the date of this Report and Recommendation, Penn Virginia has

not filed for injunctive relief.

Penn Virginia entered into agreements with Energy Marketing Company (EMC) to operate its mining properties. Penn Virginia knew EMC would not mine the coal itself. Instead, Penn Virginia expected EMC would use contract miners to operate the mines. Penn Virginia did not contract with Dominick LaRosa individually or with Research Fuels, Inc. Nor did Penn Virginia contract with Credible, Inc. Neither Credible, Inc. or Energy Marketing Corporation are parties to the pending litigation. Credible, Inc. is a Maryland corporation. Energy Marketing Corporation is a West Virginia corporation. Defendants' (Dominick LaRosa and Research Fuels, Inc.) counsel, Mr. Schillace, insisted during the hearing that Energy Marketing Corporation and Credible, Inc. "are individual corporations" or rather, stand alone corporations:

My client has gone to some expense in setting up different entities to do different things. Just because the Plaintiffs refuse to recognize that, doesn't diminish the importance of that to my client. You know we've gone through those in the briefs how these companies work together, Research Fuels was engaged in brokering coal. Energy Marketing now holds coal mining permits. Credible, Inc., is a lessee and owns coal producing properties. My client treats those separately. He does not intermingle those. ... he goes to great lengths to keep those corporations separate. And if he didn't intend them to be distinct, then he would just operate under his name and he has chosen not to do that. I don't think that the Plaintiffs can simply avoid all the efforts my clients have made and just slump it off say, it's all Dominick LaRosa when that is not the evidence on how these transactions occurred or how it happened. (R. 184, 221).

Mr. Schillace further represented there was nothing in writing such as an assignment or contract which connect Dominick LaRosa

or Research Fuels, Inc. to either Credible, Inc. or Energy Marketing Corporation with respect to the coal owned or controlled by Penn Virginia. (R. 184).

Addressing the merits of the motion without consideration of standing, Defendants fail to meet three of the four factors required by Fourth Circuit Law for the granting of injunctive relief: (1) the likelihood of irreparable harm to the movants (Defendants in this action) if the preliminary injunction is denied; (2) the likelihood of harm to the respondents (Plaintiffs in this action) if the requested relief is granted; and (4) the public interest.

The preponderance of the evidence at the time Defendants rested their case at the conclusion of the hearing of June 8, 2004 established that if the injunction were to be granted, Plaintiffs' mining operations would be brought to a halt and the miners employed by Plaintiffs' would be out of work all to the detriment of the Plaintiffs and non-movants in this civil action.

The preponderance of the evidence also established that there would not be irreparable harm to the Defendants - Movants by denial of the requested injunctive relief because movant Dominick LaRosa, if he truly is the sole owner and controls EMC, had it within his control and power to execute the required MR 19s and correct other violations as required by DEP and obtain written assignments in the form required by Penn Virginia in order to the mines operational. (R. 189-195).

If the requested injunctive relief were granted, the prepon-

derance of the evidence clearly establishes that Dominick LaRosa and Research Fuels, Inc. would continue to not pay Plaintiffs for coal produced which in turn would result in shut down of Plaintiffs' coal mining operations and Foos and others would default on coal supply contracts in place with utilities thereby unnecessarily endangering the public's supply of electric power. (R. 38-72).

#### VI . RECOMMENDATION

Based on the foregoing findings of fact, the undersigned recommends that Defendants' *Motion For To (sic) Enjoin the Plaintiffs From The Continued Occupation Of Real Property And Utilization Of Coal Mining Permits Issued By The West Virginia Division Of Environmental Protection And Incorporated Memorandum Of Law* (Docket Entry No. 38) be **DENIED**.

The undersigned finds that Defendants Dominick LaRosa and Research Fuels, Inc. do not have standing to raise the issues as movants for injunctive relief relative to operations on properties they neither own or control.

The undersigned further finds that the Defendants have failed to meet their burden in establishing three of the four factors which courts must consider in granting a preliminary injunction. *Direx Israel*, 952 F.2d at 812 (citing *Rum Creek*, 926 F.2d at 359; quoting *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7<sup>th</sup> Cir. 1984).

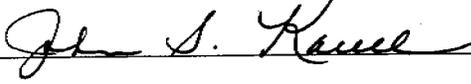
Additionally, the undersigned finds that in balancing the likelihood of irreparable harm to the Defendants without an injunction against the likelihood of harm to the Plaintiffs with an

injunction the balance weighs in favor of the Plaintiffs. *Id*; see also *Blackwelder*, 550 F.2d at 195.

Any party may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of the Court is directed to mail an authenticated copy of this Report and Recommendation to counsel of record.

DATED: August 27, 2004.

  
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JOHN S. KAULL  
UNITED STATES MAGISTRATE JUDGE

LEXSEE 1995 US APP LEXIS 20575

**DAVID M. FINK, Plaintiff-Appellant, v. EDDIE YLST, Warden, Defendant-Appellee.**

No. 94-56730

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

*1995 U.S. App. LEXIS 20575*

**July 17, 1995, \*\* Submitted**

**\*\* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. Ap. P. 34(a); 9th Cir. R. 34-4.**

**July 20, 1995, FILED**

**NOTICE:** [\*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *61 F.3d 910, 1995 U.S. App. LEXIS 27468.*

**PRIOR HISTORY:** Appeal from the United States District Court for the Central District of California. D.C. No. CV-94-00590-JSL. J. Spencer Letts, District Judge, Presiding.

**DISPOSITION:** TRANSFERRED.

**JUDGES:** Before: FLETCHER, KOZINSKI and THOMPSON, Circuit Judges.

**OPINION:**

MEMORANDUM \*

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

David M. Fink, a California state prisoner, appeals pro se the magistrate judge's order denying his motion for

reasonable law library access. In his underlying 42 U.S.C. § 1983 action, Fink alleges that his civil rights were violated following an incident in which a correctional officer was injured. We dismiss this appeal for lack of jurisdiction.

The power of federal magistrate judges is limited by 28 U.S.C. § 636. A district judge may [\*2] authorize a magistrate judge to decide nondispositive pretrial matters and to prepare findings and recommendations on dispositive matters. See 28 U.S.C. § 636(b)(1); *Estate of Conners v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993). However, a magistrate judge lacks the authority to issue a dispositive order, including an order denying injunctive relief, unless the parties consent to a decision by a magistrate judge. See 28 U.S.C. § 636(c)(1); *Reynaga v. Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992).

Here, the parties did not consent to the magistrate judge's exercise of plenary authority. The magistrate judge therefore lacked the authority to decide Fink's motion for an injunction requiring prison officials to afford him increased library access. See *Reynaga*, 971 F.2d at 416. Because the magistrate judge did not have the authority to enter a final order, Fink's notice of appeal from that order "was a nullity and did not divest the district court of jurisdiction." See *Estate of Conners*, 6 F.3d at 659. In the interest of justice, we transfer this appeal to the district court for further action.

**TRANSFERRED.**

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*86 Fed. Appx. 620, \*; 2004 U.S. App. LEXIS 1869, \*\**

JAMES WILLIAM BERRY, SR., Plaintiff - Appellant, versus THOMAS MCBRIDE, Warden, "Newly Appointed"; JAMES RUBENSTEIN, Commissioner of Corrections; MICHAEL COLEMAN, Deputy Warden; BETTY SLAYTON, Magistrate of M.O.C.C.; CARL SHELLINGS, Unit Manager; WILLIAM KINCAID, Unit Manager; PETRISHA HENDSHEW, Postal Sup.; BRIAN STUMP, Correctional Officer; CORRECTIONAL MEDICAL SERVICES, Defendants - Appellees.

No. 03-7567

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

86 Fed. Appx. 620; 2004 U.S. App. LEXIS 1869

January 29, 2004, Submitted

February 6, 2004, Decided

**NOTICE: [\*\*1]** RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:** Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. (CA-02-856). David A. Faber, Chief District Judge.

**DISPOSITION:** Affirmed in part, appeal dismissed in part.

**COUNSEL:** James William Berry, Sr., Appellant Pro se.

Charles Patrick Houdyschell, Jr., WEST VIRGINIA DIVISION OF CORRECTIONS, Charleston, West Virginia, for Appellees.

**JUDGES:** Before WILKINSON, MICHAEL, and KING, Circuit Judges.

**OPINION:**

**[\*621]** PER CURIAM:

James W. Berry, Sr., seeks to appeal from the district court's order adopting the magistrate judge's recommendation and (1) denying Berry's motion for a temporary restraining order or a preliminary injunction, (2) granting the motion to dismiss filed by Correctional Medical Services, and (3) granting in part the remaining Defendants' motion to dismiss. The district court denied the motion to dismiss this 42 U.S.C. § 1983 (2000) action as to Berry's discrimination, retaliation, and Eighth Amendment claims. We affirm in part and dismiss in part.

This court **[\*\*2]** may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2000), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2000). Fed. R. Civ. P. 54 (b); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). Except to the extent that Berry appeals from the denial of his motion for a preliminary injunction, the order Berry seeks to appeal is neither a final order nor an

appealable interlocutory or collateral order. Accordingly, we dismiss this portion of the appeal for lack of jurisdiction.

With respect to the appeal from the district court's denial of Berry's motion for a preliminary injunction, we have reviewed the record and find no reversible error. Accordingly, we affirm this portion of the appeal for the reasons stated by the district court. See *Berry v. McBride*, No. CA-02-856 (S.D.W. Va. Sept. 25, 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART; DISMISSED **[\*\*3]** IN PART

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Date/Time: Friday, August 27, 2004 - 9:02 AM EDT

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