

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA; et al.,

Defendants.

**GAWKER DEFENDANTS' REPLY TO PLAINTIFF'S
RESPONSE AND OBJECTION TO WITHDRAWAL OF CONSENT
TO PROCEEDING BEFORE SPECIAL DISCOVERY MAGISTRATE**

On August 11, 2015, Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, the "Gawker Defendants") filed a Notice of their Withdrawal of Consent to Proceeding Before Special Discovery Magistrate ("Notice") stating that they do not consent to further proceedings before a Special Discovery Magistrate and object to the Special Discovery Magistrate's considering any issues that might arise in the future. Three days later, plaintiff Terry Bollea, professionally known as Hulk Hogan, filed a Response purporting to object to that Notice and asking the Court to strike it. *See generally* Resp. and Objection of Terry Bollea to Gawker's Improper "Withdrawal of Consent" to Jurisdiction of Special Disc. Magistrate ("Pl.'s Resp."). Plaintiff's Response is not well-founded. Indeed, it runs directly counter to well-established Florida law.

Plaintiff's Response is based on the premise that once a party grants its "initial consent" to proceed before a magistrate, the magistrate's "jurisdiction continues until final resolution of [the] action." Pl.'s Resp. at 2. That premise is flatly wrong.

Florida Rule of Civil Procedure 1.490(c) provides that no matter can be referred to a magistrate “without the consent of the parties.” The Court of Appeal has held that this Rule means both that a party can withdraw its consent to proceed before a magistrate and that a party can object to the referral of any issue to the magistrate before the magistrate decides that issue.

Here, the Gawker Defendants have good cause for no longer consenting to proceed before the Special Discovery Magistrate. As explained in their Notice, proceeding before the Special Discovery Magistrate has resulted in, and likely will continue to result in, duplicative efforts, unnecessary delay, and undue expense. Indeed, to date, the Gawker Defendants have spent nearly \$50,000 on direct payments to the Special Discovery Magistrate, and nearly every one of his Reports and Recommendations has been the subject of exceptions briefed and argued to, and then decided by, the Court. The Gawker Defendants’ withdrawal of consent to further proceedings before the Special Discovery Magistrate is based on established Florida practice. In fact, it mirrors the withdrawal approved by the Court of Appeal in *Gielchinsky v. Vibo Corp.*, 5 So. 3d 785, 785 (Fla. 3d DCA 2009). In that case, a party had consented to proceed before a special discovery magistrate during discovery. But, “[a]fter a great deal of discovery,” the party “no longer sought, or agreed to the continuing special magistrate services” and “withdrew his consent to have a special magistrate.” *Id.* When the trial court continued the referral despite the party’s withdrawal of consent, the Court of Appeal granted the party’s writ of certiorari and/or mandamus. *Id.* As the Court of Appeal explained, “if a party withdraws his consent, as [the party] did here with good cause due to financial reasons, then it logically follows that the matter is no longer appropriate for a special magistrate.” *Id.* Here, like the party who withdrew its consent in *Gielchinsky*, the Gawker Defendants have good cause for withdrawing their consent to continuing to proceed before the Special Discovery Magistrate.

In addition, Florida law provides that a party's consent to a previous order referring issues to a magistrate does not waive an objection to subsequent orders referring issues to the magistrate or the magistrate's consideration of specific issues that arise during the litigation. For example:

In *Wilson v. McKay*, 568 So. 2d 102, 103 (Fla. 3d DCA 1990), after a general master considered several matters, the trial court "ordered that the general master retain jurisdiction to determine entitlement to attorney's fees." After that order was entered, one of the parties objected. *Id.* The Court of Appeal held that "'a 'timely objection' may come at any time before the hearing before the general master commences.'" *Id.* (quoting *Bathurst v. Turner*, 533 So. 2d 939, 941 n.4 (Fla. 3d DCA 1988)). Thus, the appellate court ruled that the trial court erred by disregarding that objection and concluded that, in light of the objection, the attorney's fees issue should not have been considered by the magistrate. *Id.*

Likewise, in *Rosenberg v. Morales*, 804 So. 2d 622, 623 (Fla. 3d DCA 2002), the parties initially agreed to proceed before a magistrate, who resolved discovery disputes. The trial court then "referred . . . evidentiary hearings concerning valuation to the" magistrate. *Id.* Despite having "previously consented to the special discovery master overseeing discovery," one of the parties objected to the referral on valuation. *Id.* The appeals court held that the trial court erred by referring the valuation issue to the magistrate over the party's objection because "Florida Rule of Civil Procedure 1.490(c) is very clear that the trial court cannot refer matters to a special master without the consent of both parties." *Id.*

Here, the initial appointment of the Special Discovery Magistrate already expired, and his involvement in this litigation already concluded, as both the Magistrate and this Court previously recognized. *See* Notice at 1-2 & Ex. A. Nevertheless, at the July 30, 2015 hearing, the Court

stated that it intended to refer additional issues to the Special Discovery Magistrate, and plaintiff has filed a motion requesting that still more issues be referred to the Magistrate as well. The Gawker Defendants timely filed their Notice, notifying the Court that they no longer consented to proceed before the Magistrate on those issues and objecting to any future proceedings before the Magistrate. That Notice was proper under Florida law. *See Gielchinsky*, 5 So. 3d at 785; *Wilson*, 568 So. 2d at 103; *Rosenberg*, 804 So. 2d at 623; *see also Joara Freight Lines, Inc. v. Perez*, 160 So. 3d 114, 117 n.1 (Fla. 3d DCA 2015) (explaining that objection to magistrate is timely as long as it is made before the hearing in front of the magistrate begins); *Washington Park Props., LLC v. Estrada*, 996 So. 2d 892, 894 (Fla. 4th DCA 2009) (granting writ of prohibition barring referral to magistrate because motions being referred “had not been filed at the time the order [referring issues to magistrate] was entered”); *Rosen v. Solomon*, 586 So. 2d 1348, 1348 (Fla. 3d DCA 1991) (granting mandamus where trial court appointed master “in the face of the specific pre-hearing objections filed by the defendants-petitioners”).¹

¹ Plaintiff suggests that the Gawker Defendants have withdrawn their consent to proceeding before the Special Discovery Magistrate because they have “disagreed” with his prior rulings. Pl.’s Resp. at 2. That suggestion is simply incorrect, including because he has frequently ruled in defendants’ favor. The withdrawal stems from the inefficiency, duplication, and expense associated with proceeding before the Magistrate. To be sure, the Gawker Defendants have disagreed with several of the Magistrate’s Reports and Recommendations, but they are confident that if he were to rule on future issues, he would address those issues fairly and in the Gawker Defendants’ favor. Indeed, the issues that plaintiff has asked the Court to refer to the Magistrate underscore that some of the prior rulings adverse to the Gawker Defendants were based on plaintiff’s material factual misrepresentations to the Special Discovery Magistrate. *Compare, e.g., Ex. 22-C to Joint Opp. to Pl.’s Emergency Mot. to Conduct Disc. Concerning Potential Violation of Protective Order at 816:5 – 832:6* (arguments by plaintiff’s counsel and rulings in his favor during plaintiff’s deposition), *and Opp. to Mot. for Sanctions at 7* (plaintiff’s arguments against the Gawker Defendants’ motion for sanctions, which was denied by the Special Discovery Magistrate), *with Conf. Decl. of G. Thomas*, filed July 30, 2015 at ¶¶ 19-22, 49-56 (discussing and providing documents produced by FBI showing plaintiff’s arguments were based on misstatements of fact), *and Ex. 18-C to Joint Opposition to Pl.’s Emergency Mot. to Conduct Discovery Concerning Potential Violation of Protective Order* (audio footage demonstrating same).

In light of the Gawker Defendants' Notice, no further proceedings can be held before the Special Discovery Magistrate, and the Gawker Defendants object to any such proceedings. *See, e.g., Gielchinsky*, 5 So. 3d at 785 (granting petition for writ of certiorari and/or mandamus and quashing trial court order denying motion to dispense with magistrate's services); *Novartis Pharm. Corp. v. Carnoto*, 798 So. 2d 22 (Fla. 4th DCA 2001) (granting mandamus because party had not consented to allow magistrate to resolve specific issue, even though party had previously consented to magistrate's consideration of other issues).

August 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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