

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VINCENT L. AMMONS,

Plaintiff,

v.

DR. DEBB LEMKE,

Defendant.

ORDER

06-C-20-C

Plaintiff Vincent Ammons is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin. A long-time litigant, plaintiff has filed three previous lawsuits that were dismissed as legally frivolous under 28 U.S.C. § 1915(e). For that reason, despite his indigence, he is barred (with one exception not applicable here) from proceeding in forma pauperis in any federal lawsuit. 28 U.S.C. § 1915(g).

On February 23, 2006, plaintiff arranged to have members of his family prepay the \$350 filing fee for his present lawsuit. On March 31, 2006, I screened his complaint pursuant to 28 U.S.C. § 1915A and allowed him to proceed on his claim that defendant Debb Lemke, a former prison doctor, violated his Eighth Amendment rights when she failed to examine his fractured wrist and failed to treat his protruding colon and rectal bleeding.

In the same order, I concluded that plaintiff had not stated a claim against former defendants Renee Anderson, Becky Dressler, Rita Ericson and Bruce Gerlinger, all of whom provided plaintiff with medical care at the Stanley Correctional Institution or responded to his requests for medical treatment.

Now before the court are plaintiff's "Motion to Alter or Amend Judgment," which I construe as a motion for reconsideration of the March 31, 2006 screening order and "Motion for Service of Process," in which plaintiff asks the court to order the Wisconsin Attorney General's Office to accept informal service of his complaint on behalf of defendant Lemke (and on behalf of the other defendants, if the motion for reconsideration is granted). As explanation for his four-month delay in moving for reconsideration and for service, plaintiff alleges that he placed a copy of his motions in the prison mailbox in early April, but that the mail was lost, either in the prison or in the postal system. In an effort to cover his bases, he has filed two motions requesting the court to accept his untimely motion for reconsideration and motion for service. Plaintiff's motions for leave to file his untimely substantive motions will be granted, as will his motion for reconsideration. Plaintiff's motion for "service of process" will be denied.

A. Motion for Reconsideration

In his motion for reconsideration of the March 31, 2006 screening order, plaintiff

contends that the court erred by holding him to “heightened pleading standards” and by misconstruing his claims against former defendants Anderson, Dressler, Ericson and Gerlinger. Having considered the arguments contained in plaintiff’s motion for reconsideration, I agree that there is a possibility (tenuous though it may be) that plaintiff may be able to adduce facts showing that former defendants Anderson and Dressler exhibited deliberate indifference to his serious medical needs when they allegedly concealed his requests for medical help from defendant Lemke and failed to arrange for plaintiff to see a doctor for his medical problems. Similarly, there is a remote possibility that plaintiff will be able to prove that former defendant Gerlinger exhibited deliberate indifference by failing to prescribe pain medication for plaintiff’s fractured wrist for a period of several months and that defendant Ericson exhibited deliberate indifference when she failed to adequately examine and treat plaintiff’s rectal bleeding (assuming that she was qualified to do these things in the first place). Therefore, plaintiff will be granted leave to proceed against former defendants Anderson, Dressler, Ericson and Gerlinger.

B. Motion for Informal Service of Process

Although plaintiff was granted leave to proceed against defendant Lemke on March 31, he has not yet served her with a copy of his complaint. Normally, a plaintiff’s failure to serve a complaint within 120 days of being given leave to do so would constitute grounds

for dismissal under Fed. R. Civ. P. 4(m). However, plaintiff contends that his failure to serve the complaint is justified because, despite his diligent efforts, he has been unable to obtain defendant Lemke's current business address from any of the prison officials to whom he has written requesting the information. As plaintiff realizes, legitimate security concerns are likely to prevent the prison from providing him with defendant Lemke's contact information. See Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990) (noting hesitancy of prisons to disclose addresses of former employees to prisoner-litigants). Therefore, he asks this court to arrange for "informal service" of his complaint on defendant Lemke, and on defendants Anderson, Dressler, Ericson and Gerlinger, as well.

When a litigant is a proceeding as a pauper, this court will arrange for his complaint to be served by the United States Marshal and, where the defendants are state officials, for the Wisconsin Attorney General's Office to accept informal service of the complaint. The authority for these practices lies in 28 U.S.C. § 1915(d), which authorizes court officers to "issue and serve all process and perform all duties" in cases in which litigants are proceeding in forma pauperis under § 1915. Plaintiff's motion presents the novel question whether an indigent prisoner who has "struck out" under 28 U.S.C. § 1915(g) may nevertheless seek the court's assistance in serving his complaint under § 1915(d).

Section 1915(g) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil

action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Because plaintiff has brought three prior frivolous lawsuits in federal court, the statute bars him from proceeding under any provision of § 1915—including section § 1915(d). Section § 1915(d) is the only law that permits courts to order complaints to be served without cost to indigent plaintiffs. This court lacks authority to arrange for free service of plaintiff's complaint on defendants; therefore, plaintiff must bear full responsibility for arranging for his complaint to be served.

But how? Plaintiff has several options. With respect to the defendants whose whereabouts are known to him, plaintiff may obtain voluntary waivers of service of a summons. As discussed in a memorandum attached to this court's March 31 order titled "Procedure for Serving a Complaint on Individuals in a Federal Lawsuit" (an extra copy of which is enclosed with this order), plaintiff may send to each defendant a copy of his complaint, the necessary waiver forms and a self-addressed, stamped envelope for defendants' use in returning the waiver form. This packet of materials is to be inserted in a large envelope and mailed to each defendant "through first-class mail or other reliable means." Fed. R. Civ. P. 4(d)(2)(B). (Should defendants fail without good cause to waive

service of a properly served request for waiver of service of a summons, plaintiff could later recoup the costs of formal service under Fed. R. Civ. P. 4(d)(2)(G)).

With respect to defendant Lemke, however, and to any defendant whom plaintiff is unable to locate on his own, two options are available. First, plaintiff could hire a private process server to locate the defendants by contacting the Department of Corrections or conducting an Internet search of public records for each defendant's current address or both. If plaintiff chooses this option and the process server plaintiff hires is successful in obtaining the defendant's address, the server is to maintain the addresses in confidence rather than reveal them on the service form, because the form will be filed in the court's public file and mailed to the plaintiff after service is effected. (To insure that any process server plaintiff hires is aware of these restrictions, I will order plaintiff to provide a copy of this order to any process server he hires.)

Second, plaintiff may ask the court to request the United States Marshals Service to locate and serve the defendants with his complaint. Rule 4(c)(2) of the Federal Rules of Civil Procedure authorizes courts to "direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose." Because of the security concerns that are preventing plaintiff from locating defendant Lemke, I would be willing to grant such a request upon plaintiff's assurance that he is prepared to give the United States Marshal a check or money order in

an amount sufficient to cover the cost of service, which I have been advised is calculated at \$45 an hour plus 44.5¢ per mile for each attempt at service (often more than one). If plaintiff is interested in pursuing this option, he should write directly to the United States Marshal's Service at 120 N. Henry Street, P. O. Box 432, Madison, Wisconsin 53701, to request a total estimated cost of service.

Finally, plaintiff should be aware that whether he obtains the agreement of the defendants to waive service of a summons or serves them personally with a summons and complaint, he must act with diligence to serve his complaint on defendants. If he cannot submit proof of service of his complaint by October 6, 2006, I will dismiss this action for his failure to prosecute it unless he can show good cause for his failure to accomplish service.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion to Resubmit Motion to Alter or Amend Judgment" and "Motion to Resubmit Motion for Service of Process" are GRANTED.

2. Plaintiff's motion for reconsideration is GRANTED. Plaintiff is GRANTED leave to proceed against defendants Anderson, Dressler and Ericson on his claim that they exhibited deliberate indifference to his serious medical needs.

3. Plaintiff's "Motion for Service of Process" is DENIED. Plaintiff may have until

October 6, 2006, in which to submit proof of service of his complaint on all of the defendants.

4. Should plaintiff hire a private process server, he must provide a copy of this order to whomever he hires. The process server is to keep confidential the addresses of all defendants.

Entered this 9th day of August, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge