

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

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MARCUSS CHILDS,

Plaintiff,

v.

DAVID BURNETT, in his official capacity,  
DALIA SULIENE, CARLO GAANAN,  
W. BRAD MARTIN, PAUL SUMNIGHT  
and THOMAS WILLIAMS,

Defendants.  
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ORDER

11-cv-500-bbc

In an order entered on August 20, 2012, I granted in part and denied in part defendants' motion for summary judgment, leaving only plaintiff Marcuss Childs's claims under the Eighth Amendment against defendants Suliene, Gaanan, Martin, Sumnicht, Williams and Burnett. Also in the August 20 order, I concluded that appointment of counsel was necessary to assist plaintiff in preparing this case for trial. Eric Baker and Richard Bolton were appointed to represent plaintiff on November 14, 2012. On March 12, 2013, the clerk of court was notified of plaintiff's death by his brother and the Waupun Correctional Institution. On April 9, 2013, defendants filed a notice advising the court of plaintiff's death. Also before the court are defendants' motion to stay proceedings and plaintiff's attorneys' request to withdraw as counsel.

Under Rule 25(a)(1) of the Federal Rules of Civil Procedure, when a party dies, the

court may order the substitution of the proper party, ordinarily the personal representative of the deceased party. However, the suit must be dismissed if the motion for substitution is filed more than 90 days “after service of a statement noting the death.” The party putting the “suggestion of death” on the record must serve the decedent’s representative or successor in order to start the 90-day clock running. This requirement is waived when the party filing the suggestion of death does not know who the representative is. George v. United States, 208 F.R.D. 29, 32 (D. Conn. 2001); see also Atkins v. City of Chicago, 547 F.3d 869, 873-74 (7th Cir. 2008) (noting George exception to case law stating decedent’s representative must be served).

To start the 90-day clock running, defendants must serve plaintiff’s representative or successor with the suggestion of death if they know who that person is. I note that in plaintiff’s submissions, they indicate that plaintiff’s next of kin has been notified about the status of this case, but the record does not show whether plaintiff’s representative or successor has been served. Therefore, I will direct defendants to serve the plaintiff’s representative or successor in the manner described in Fed. R. Civ. P. 25(a)(3), if they have not done so already, or to notify the court no later than June 7, 2013 if there is no discernible successor or representative. If plaintiff’s representative or successor does not move for substitution within 90 days from the date of service, this action will be dismissed under Rule 25(a)(1).

In the meantime, I will grant defendants’ motion to stay proceedings and allow plaintiff’s attorneys to withdraw as counsel in this matter.

## ORDER

IT IS ORDERED that

1. Defendants are to serve either plaintiff Marcuss Childs's representative or successor in the manner described in Fed. R. Civ. P. 25(a)(3) or notify the court no later than June 7, 2013 if there is no discernible successor or representative.

2. The motion of Eric Baker and Richard Bolton for leave to withdraw as counsel for plaintiff, dkt. #80, is GRANTED.

3. Defendants' motion to stay proceedings, dkt. #77, is GRANTED. The current schedule in this case is STRICKEN and further proceedings are STAYED.

Entered this 24th day of May, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge