

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

EUGENE L. CHERRY,

Plaintiff,

v.

GERALD BERGE, CINDY SAWINSKI,
JOLENE MILLER, JOLINDA WATERMAN,

Defendants.

ORDER

02-C-544-C

EUGENE L. CHERRY,

Plaintiff,

v.

JON LITSCHER, GERALD BERGE,
JIM PARISI, TIMOTHY MASON,
PAM BARTELS, KATHRYN McQUILLAN,
JOHN SHARPE,

Defendants.

02-C-394-C

At a preliminary pretrial conference held on January 23, 2003 in case no. 02-C-544-C, Magistrate Judge Stephen Crocker noted that plaintiff had filed virtually identical claims

in case no. 02-C-544-C and another of Cherry's cases, case no. 02-C-394-C. For the purpose of economy of effort and time, the magistrate judge scheduled all deadlines in case no. 02-C-544-C to coincide with the deadlines set in case no. 02-C-394-C. In addition, he invited the parties to address no later than February 7, 2003, the question whether the cases should be consolidated.

On February 5, 2003, the state defendants in both cases moved for consolidation of the actions. The remaining defendants, health services employees at the Wisconsin Secure Program Facility, wrote in a letter dated February 6, 2003 that in their view, consolidation would be efficient and appropriate. However, plaintiff has objected to defendants' motion for consolidation.

I conclude that the motion to consolidate should be granted. There are common questions of law and fact in each of the cases, and the savings of time and effort for the parties and the court in administering the cases, developing and resolving the defendants' dispositive motions and trying the cases if the actions survive summary judgment, outweighs any inconvenience or delay that might result from the consolidation. In objection to consolidation, plaintiff points out that he has filed a motion for summary judgment in case no. 02-C-394-C and that briefing has been set. It concerns him that because he was not aware that the cases would be consolidated, he did not cover all the facts necessary to support his claims in both cases. The simple solution to this problem is to suspend the

schedule for briefing plaintiff's motion for summary judgment in case no. 02-C-394-C until plaintiff has had an opportunity to conduct additional discovery and supplement his evidentiary materials and proposed findings of fact so as to cover the medical care claims in both cases. The magistrate judge set April 28, 2003 as the deadline for filing dispositive motions in each of these cases. It will not prejudice plaintiff or the defendants if briefing on plaintiff's motion is delayed until closer to April 28, after the parties have had adequate time to conduct discovery and gather evidence to support their positions.

Plaintiff states also that he is asking for a protective order in case no. 02-C-544-C against the request of counsel for the health services employee defendants for plaintiff's signature on a release that would allow counsel to obtain certain medical information relating to plaintiff. Plaintiff appears to be arguing that if the magistrate judge denies the request for a protective order, information obtained for case no. 02-C-544-C should not be available for use in case no. 02-C-394-C. He is mistaken. Whatever the ruling on the motion for a protective order, plaintiff's claim of denial of medical care is the same in both cases. If the magistrate judge finds the information sought through the release relevant to plaintiff's claim in case no. 02-C-544-C, it will be relevant to plaintiff's claim in case no. 02-C-394-C.

Accordingly, defendants' motion for consolidation will be granted for all purposes.

One further matter requires attention. In late December 2002, the United States

Marshals Service notified the court that it had been unable to serve plaintiff's complaint on Dr. Safari, who was named as a defendant in plaintiff's complaint in case no. 02-C-544-C. According to the marshal, Dr. Safari is no longer employed at the Wisconsin Secure Program Facility and the facility does not have a forwarding address for her. In an order dated December 27, 2002, I gave plaintiff until January 17, 2003, in which to complete a marshals service form showing an address at which Safari could be served. I advised plaintiff that if he could not locate Safari, she would be dismissed from the case without prejudice to plaintiff's suing her at some later time. On January 1, 2003, plaintiff wrote to the court asking to dismiss Safari voluntarily. I accepted plaintiff's notice of voluntary dismissal in an order dated January 6, 2003, and dismissed Safari from the case.

On January 10, 2003, defendants Sawinski, Waterman, Millins and Yusuf-Safavi filed an answer in case no. 02-C-544-C. In the first paragraph of the answer, Yusuf-Safavi asserts that she was improperly identified in the caption of plaintiff's complaint as Dr. Safari. The answer includes an affirmative defense requesting dismissal on the ground that the defendants have not been served properly with plaintiff's complaint. Shortly after the answer was filed, plaintiff filed a motion to add Yusuf-Safavi back into the case. Counsel for defendant Yusuf-Safavi has now made it clear in his February 6, 2003 letter to the court that he does not intend to pursue the affirmative defense as it relates to defendants Sawinski, Waterman and Millins, but that he does intend to pursue it as it relates to defendant Yusuf-

Safavi.

Given the ample time the parties have in these cases to collect evidence and prepare dispositive motions, no undue delay will result if I grant plaintiff's request to withdraw his motion for voluntary dismissal of defendant Yusuf-Safavi.

However, as the parties are aware, the United States Marshals Service had notified the court that it cannot serve defendant Yusuf-Safavi with plaintiff's complaint because Yusuf-Safavi is no longer employed at the Wisconsin Secure Prison Facility. It is not clear from the deputy marshal's notation on the relevant service form whether the marshal took reasonable steps to obtain the defendant's current address. The remarks section of the form reads as follows: "12/27/02 JP END Subj no longer employed at Correctional Ctr - No forwarding address."

The Court of Appeals for the Seventh Circuit has ruled that a prisoner is required to furnish the United States Marshals Service with no more than the information necessary to identify prison employee defendants and that once the employee is properly identified, it is up to the marshal to make a reasonable effort to obtain a former prison employee's current address and effect service on the basis of that information. Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990). In Graham v. Satkowski, 51 F.3d 710 (7th Cir. 1995), the court of appeals reiterated this holding, finding that it was improper for a district court to dismiss a prisoner's claims against a former Department of Corrections employee who no longer

worked at the prison address provided by the prisoner because there was nothing in the record to show that the marshal had made an effort to learn the defendant's new location.

Citing its holding in Sellers, the court noted that

the use of marshals to effect service alleviates two concerns that pervade prisoner litigation, state or federal: 1) the security risks inherent in providing the addresses of prison employees to prisoners; and 2) the reality that prisoners often get the "runaround" when they attempt to obtain information through governmental channels and needless attendant delays in litigating a case result.

Graham, 51 F.3d at 713. The court of appeals directed the district court on remand to "evaluate the Marshals Service's efforts and the adequacy of the state disclosure procedures in light of Sellers." Id.

Although plaintiff did not provide the marshal with an accurate or full name for the defendant he identified originally as "Dr. Safari," it appears that the marshal learned Yusuf-Safavi's true identity at the time he attempted service, given his notation on the service and process form that she was no longer employed at the prison. In any event, the defendant's full name has been revealed in her answer. Therefore, it will be necessary for the marshal to submit additional information about his efforts to locate her and, if those efforts did not include an Internet search of public records for her current address or contact with her former employer or both, I will require the marshal to pursue these avenues and advise the court of the results of his efforts in the remarks section of the process receipt and return the

form.

As the marshal is now aware from other proceedings in this court, health services employees at the Wisconsin Secure Prison Facility are employed by a private corporation, Prison Health Services, Inc., and not the prison or the Wisconsin Department of Corrections. Therefore, it is unlikely that the prison or the Department of Corrections would have personnel records relating to health services employees. Thus, if the marshal made no effort to learn Yusuf-Safavi's whereabouts except to ask prison or Department of Corrections employees whether they knew her forwarding address, that would not be enough. Instead, reasonable efforts to locate Yusuf-Safavi would require the deputy to contact the private employer or conduct a public records search on the Internet or do both in an attempt to learn the former employee's address.

In requiring the United States Marshals Service to conduct its own investigation of a former prison or contract employee's whereabouts, I am mindful of the limited resources available to the service. The steps I am asking the marshal to take are not unduly time consuming. Indeed, I do *not* understand the court of appeals to suggest, nor do I suggest, that the marshal is to be a private investigator for civil litigants or that he is to use software available only to law enforcement officers to discover addresses for defendants whose whereabouts are not discoverable through public records. Reasonable efforts require only that the marshals service use a public Internet website to search for a defendant's address

and, if possible, contact the former employee's employer to obtain a forwarding address if the employer is willing to give it. Because it is not clear from the court's records that the marshal took these reasonable steps in its attempt to serve defendant Yusuf-Safavi, I will direct the marshal to either amend the service process receipt and return form to show clearly what steps were taken before he determined that no forwarding address could be found or take the steps explained above and advise the court no later than February 27, 2003, of the results of that effort.

One more comment on the subject of service of process under these circumstances is warranted. In Sellers, the Court of Appeals for the Seventh Circuit recognized the serious security concerns that arise when prisoners have access to the personal addresses of former or current prison employees. Sellers v. United States, 902 F.2d at 602. The concerns are no less serious when the employees are contract employees. For this reason many, if not all, prison or prison contract employees may take steps to insure that their personal addresses are not available in public records accessible through the Internet. If the marshal is successful in obtaining Yusuf-Safavi's personal address, it should take great care to maintain that address in confidence rather than reveal it on the marshals service form, copies of which are filed in the court's public file and mailed to the prisoner.

ORDER

IT IS ORDERED that defendants' motion to consolidate these cases is GRANTED. The cases are consolidated for all purposes. The caption of future filings shall show both case captions in the manner the caption of this order shows them. The parties need not duplicate their filings in these consolidated cases. The clerk of court is to file all orders, motions, evidentiary matter, and other communications in the file identified as case no. 02-C-394-C.

Further, IT IS ORDERED that plaintiff's motion to withdraw his motion for voluntary dismissal of defendant Yasmin Yusuf-Safavi is GRANTED.

Finally, IT IS ORDERED that the United States Marshal may have until February 27, 2003, in which to submit additional information to the court about his efforts to locate defendant Yusuf-Safavi to serve her with plaintiff's complaint. If those efforts did not include an Internet search of public records for Yusuf-Safavi's current address or contact with her former employer, the marshal is to pursue these avenues and advise the court in the

remarks section of the process receipt and return form if those efforts are unsuccessful.

Entered this 13th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge