

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

LARRY GEORGE,

Plaintiff,

v.

JUDY SMITH, RUTH TRITT,
MARTY SCHROEDER, OFFICER VILSKI,
TIM PIERCE and NURSE CARIVOU,

Defendants.

ORDER

05-C-403-C

Having been unsuccessful in obtaining waivers of service of the summons from defendants by attempting to serve them through the prison mail system, plaintiff has moved for leave to proceed in forma pauperis for the purpose of having the court arrange service of his complaint on the defendants personally. His request is supported by a six-month trust fund account statement showing he has about \$150 in his regular account, which is not enough to cover the costs of personal service. Nevertheless, plaintiff's request will be denied, because he still has not shown that he complied strictly with Fed. R. Civ. P. 4 to obtain waivers of service of summonses from the defendants. Moreover, although the 120-day period for serving his complaint has now passed, in the interests of justice and judicial

economy, I am extending the deadline and directing plaintiff to seek waivers of service of summonses from the defendants through first-class mail.

Plaintiff filed this action on July 11, 2005, when he paid the filing fee. On August 2, 2005, I screened his complaint and allowed him to proceed on several of his claims. At that time, I made copies of plaintiff's complaint and sent them to him with instructions to serve the defendants. In October 2005, plaintiff moved for an order directing the United States Marshal to serve the defendants with his complaint at government expense, because plaintiff had been unsuccessful in obtaining waivers from the defendants after serving them with such requests through the prison's internal mail system. On October 24, 2005, I denied plaintiff's motion. I concluded that plaintiff had not shown that he had complied strictly with the procedures for obtaining waivers of service of summonses from the defendants and that he had made no showing that he was qualified for indigent status for the purpose of having service of his complaint arranged by the court. At that time, I questioned whether plaintiff's use of the internal mail routing procedures at the prison would satisfy Rule 4(d)(2)(B)'s requirement that complaints accompanied by requests for waiver be "dispatched through first-class mail or other reliable means."

Now another month has passed and the 120-day limit for serving plaintiff's complaint under Fed. R. Civ. P. 4(m) has expired. In support of his present motion, plaintiff still has not submitted proof that he sought waivers of service of summonses from defendants in the

manner Rule 4(d) prescribes. He argues only that the internal mail system is a “reliable means” of serving his complaint because confidential medical records and documents relating to the inmate complaint review system are sent and received through it. This argument, standing alone, misses the mark.

First, I am not convinced that a prison’s internal mail system constitutes a “reliable” alternative to the United States mail through which a litigant may serve a request for waiver of service of a summons. The Advisory Committee notes explaining amendments to the Federal Rules of Civil Procedure reflect that when Rule 4(d)(3)(B) was adopted in 1993, it was intended to permit alternatives to the United States mail for sending the notice and request for waivers. However, the committee’s description of the kinds of alternatives it anticipates reads as follows:

. . . While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

Advisory Committee Notes, 1993 Amendments. Nothing in these notes suggests that internal mail procedures in state institutions, private businesses, or government offices

constitute reliable alternatives to first-class mail. Of particular interest is the committee's suggestion that if a person chooses to request waiver of service of a summons by facsimile, for example, the sender maintain a record of the transmission to assure proof of transmission if receipt is denied. Here, plaintiff chose an alternative to the United States mail that affords him no ability to document his purported compliance with Fed. R. Civ. P. 4(d). This inability to prove that he offered defendants a chance to waive service under the rules prevents him (and the federal government, should the Marshal be required to serve the complaint) from recovering any of the costs of serving defendants personally which otherwise would have been available under Fed. R. Civ. P. 4(d)(5).

Second, plaintiff has filed no proof that he complied in other respects with Fed. R. Civ. P. 4(d) when he attempted to obtain waivers from the defendants. Proof of compliance would include not only documentation showing when plaintiff mailed his complaint to the defendants, but an affidavit in which plaintiff avers under penalty of perjury that his complaint was accompanied by all of the documents required by Fed. R. Civ. P. 4(d)(2), including envelopes bearing postage for defendants' use in returning the waiver forms to him.

In sum, I will not consider whether plaintiff is too destitute to pay the costs of personal service of his complaint on the defendants when it is clear he can afford to pay the costs of obtaining waivers from defendants by serving them with requests for waivers through the United States mail.

The question is what happens next? Fed. R. Civ. P. 4(m) allows me to extend the time for service of a complaint when a plaintiff has shown good cause for his failure to complete service within the time allowed. It is a bit of a stretch to find good cause when plaintiff persisted for 120 days in using a method of service that was not sanctioned by this court or approved under existing law. However, dismissal of this action without prejudice under Rule 4(m) would only delay movement of this case toward resolution, given the fact that plaintiff would be free to refile his complaint immediately, starting the 120-day clock ticking again. In addition, requiring plaintiff to pay a second filing fee seems an unduly harsh penalty for his poor judgment to try to utilize the internal mail procedures in place of the United States mail. Finally, a dismissal of this action and a subsequent refiling will create unnecessary work for this court. Plaintiff's trust fund account statement reveals he does not have the money to pay the full filing fee for a second lawsuit. Therefore, he would have to request pauper status and the court would have to calculate his initial partial payment, wait for it to arrive, and then re-screen his newly filed complaint under 28 U.S.C. § 1915 to verify that all issues were covered. This added expenditure of judicial time would serve no legitimate purpose. Therefore, I will find good cause for plaintiff's failure to serve his complaint within the 120-day time limit and extend the time within which he must do so.

Plaintiff is directed to have copies of his complaint made promptly and to use the

United States mail to send the complaint and requests for waivers to the defendants. The necessary waiver forms are enclosed to plaintiff with this order.

ORDER

IT IS ORDERED that plaintiff's motion for a finding that he cannot afford to pay the costs of serving defendants in this case is DENIED.

Further, IT IS ORDERED that

1. The deadline within which plaintiff is to serve his complaint on defendants is extended to December 19, 2005. No later than that date, plaintiff is to have prepared copies of his complaint for the defendants and mailed the complaint, together with the additional materials required by Fed. R. Civ. P. 4(d) to the defendants by United States mail. In order to insure that plaintiff has complied with this directive, he is to submit to the court a copy of his trust fund account statement showing that he has paid the postage for mailing his complaint to the defendants and providing the defendants with postage paid return envelopes.

2. If, by December 19, 2005, plaintiff fails to show that he has requested waivers from defendants in accordance with the above, the clerk of court is directed to enter

judgment dismissing this case without prejudice to plaintiff's filing a new complaint at a later time.

Entered this 1st day of December, 2005.

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