IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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VINCENT L. AMMONS,

ORDER

Plaintiff,

06-C-20-C

v.

BRUCE GERLINGER, RENEE ANDERSON, BECKY DRESSLER and RITA ERICSON,

Defendants.

- -

Plaintiff Vincent Ammons has struck out under the "three-strikes" provision in 28 U.S.C. § 1915(g). For that reason, although he is proceeding pro se, he is not eligible for appointed counsel or for the United States Marshal's assistance in serving his complaint on the defendants. Unfortunately, more often than not, problems occur when a pro se litigant attempts to arrange for service of process on his own. One of those problems is evident in this case, which is before the court on plaintiff's motion pursuant to Fed. R. Civ. P. 4(d)(5) for an award of the costs he incurred in serving the defendants personally with a summons and his complaint. From the court's record and the parties' submissions, it appears that the

following events have occurred, prompting plaintiff's motion.

On August 9, 2006, I allowed plaintiff to proceed on his claims against defendants Gerlinger, Anderson, Dressler and Ericson. At that time, I sent plaintiff a memorandum explaining how to serve the defendants informally through requests for waiver of service of a summons. I provided him with the necessary request for waiver forms. I directed him to submit proof of service of his complaint on the defendants no later than October 6, 2006.

On October 5, 2006, plaintiff filed a motion for an enlargement of time in which to submit proof of service of his complaint on defendant Gerlinger. In support of his motion, plaintiff filed an affidavit in which he averred that on August 17, 2006, he mailed to a Karen Lynne Taylor in Phoenix, Arizona, a packet containing envelopes addressed to defendants Anderson, Dressler and Ericson that contained a cover letter, a complaint, a notice of lawsuit, a waiver of summons form and a self-addressed stamped envelope. He averred also that two days later, on approximately August 19, 2006, he mailed Ms. Taylor another packet containing envelopes addressed to defendant Gerlinger and Deb Lemke containing the same items. (Lemke has since been dismissed from this lawsuit, so I will make no further reference to her.) Plaintiff attached to his motion a copy of certified mail receipts he said that Ms. Taylor had sent him, showing that she had placed items in the mail addressed to the defendants on September 6, 2006. Plaintiff noted, however, that although he had received

from the post office "certified mailing cards" (return receipts) confirming that an agent at the Stanley Correctional Institution had signed on September 8 for delivery of the packets to defendants Anderson, Dressler and Ericson, he had not received a return receipt showing that Gerlinger had received the envelope addressed to him.

In an order entered on October 12, 2006, I granted plaintiff's motion for more time to submit proof of service of his complaint on defendant Gerlinger. In that order, I pointed out that plaintiff's certified mail receipts showing that Ms. Taylor had mailed something to defendants Anderson, Dressler and Ericson on September 6 was inadequate to constitute proof of service of his complaint on these defendants. I explained that even if plaintiff had submitted to the court the return receipts issued by the post office showing that someone had signed for mail addressed to the defendants, proof of service requires more. In particular, I stated,

> Although plaintiff contends that he presently possesses postal return receipts showing that on September 8, an Officer Richards signed for the mail addressed to defendants Anderson, Dressler and Ericson and that on September 30, 2006, defendant Lemke signed for the mail addressed to her, plaintiff has not submitted copies of those receipts. Even if he had, the postal receipts by themselves do not constitute proof of service.
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> Ordinarily, when a plaintiff utilizes the services of someone other than the United States marshal or a deputy marshal to effect service of process, proof of service is made by submitting the affidavit of the person making service in which the affiant either 1) attaches a receipt signed by the defendant or the defendant's authorized representative showing that the addressee received the

> summons and complaint (in this event, the affiant must also attest to the receipt's authenticity); or 2) avers that on a particular date at a particular time and place, he or she delivered a summons and complaint into the hands of the defendant or someone authorized by law to accept service on behalf of the defendant. Fed. R. Civ. P. 4(*l*). In the event that the defendant waives service of a summons, Rule 4(d)(4) allows the plaintiff to submit a copy of the signed waiver of service form to the court instead of the proof of service required under Rule 4(*l*).

Finally, I noted in the October 12 order that if plaintiff had properly sought signed waiver forms from each of the defendants by mailing each one a service packet conforming to the requirements of Rule 4(d) on September 6, 2006, he should have expected that signed waiver forms would be returned to him no earlier than 30 days following the date on which he sent the requests for waiver, which would have been October 6, 2006. Fed. R. Civ. P. 4(d)(1)(F). I said as well that if any defendant did not receive a service packet until even later, that defendant would have at least 30 days from the date the later packet was sent within which to sign and return the waiver form. I then gave plaintiff a generous amount of time, that is, until November 6, 2006, in which to submit a copy of any waiver form he received from the defendants and, if no defendant had returned a waiver form by that date, until December 7, 2006 in which to file proof of personal service of process upon them.

As it turned out, none of the defendants signed and returned waiver forms. Instead, on December 4, 2006, plaintiff filed proof that in late November, he had arranged with the Chippewa County sheriff to personally serve defendants Anderson, Dressler and Ericson and

had arranged with an Eau Claire County deputy sheriff to serve defendant Gerlinger. In particular, plaintiff submitted the certified statement of Deputy Sheriff Donald Tollefson of the Chippewa County sheriff's office showing that on November 29, 2006, Tollefson served defendants Anderson, Dressler and Ericson with a summons and complaint and that the cost of service was $12.50 for defendant Dressler, $45 for defendant Anderson and $12.50 for defendant Ericson. Plaintiff also submitted the certification of Deputy Sheriff Ron Cramer of the Eau Claire County sheriff, indicating that on November 29, 2006, Cramer served defendant Gerlinger with a summons and complaint and that the cost of service was $70. In addition, plaintiff avers that he spent $.22 for the envelopes he addressed to the Chippewa County and Eau County Sheriff's departments, and a total of $6.75 on certified mail postage necessary to mail the packets to the two sheriff's departments. Finally, plaintiff avers that he spent another $7.20 in copying and mailing costs relating to this motion.

Under Fed. R. Civ. P. 4(d)(2)(G), plaintiff is entitled to recover the costs of serving the defendants with a summons and complaint and the costs of bringing a motion such as this unless the defendant shows good cause for his or her failure to comply with a properly served request for waiver of service of a summons. In this case, plaintiff has made the required showing that he complied with the requirements for obtaining a signed waiver form

from the defendants. He mailed to each defendant "through first-class mail or other reliable means" a copy of his complaint, the necessary waiver forms and a self-addressed, stamped envelope for the defendants' use in returning the waiver form. Fed. R. Civ. P. 4(d)(2)(B). Although it is perplexing why plaintiff chose to send the packets to Ms. Tayler to post instead of posting the packets himself, nothing in Rule 4 forbids a plaintiff from asking someone else to post his mail.

Defendants contend that there is good cause why they refused to sign and return the waiver forms. Specifically, they argue that their non-compliance is attributable to plaintiff, who failed to comply precisely with Fed. R. Civ. P. 4(d)(2)(E). Rule 4(d)(2)(E) requires that the waiver form "set forth the date on which the request is sent. . . ." Defendants have submitted copies of the waiver forms prepared by plaintiff for defendants Ericson, Anderson and Dressler, which reveal that plaintiff affirmed on the forms that he was sending the waiver requests to defendants on "this 27th day of August, 2006." Although they do not have in their possession a copy of the waiver request plaintiff sent to defendant Gerlinger, defendants presume the request sent to him is identical to the requests sent to the other defendants. In any event, no one disputes that Ms. Tayler mailed the waiver packets on September 6, ten days later. Defendants argue that putting the incorrect date on the waiver form was a critical mistake, because the date on the form "is the benchmark by which a

defendant's deadline to waive service and answer the complaint is calculated." Apparently, defendants believe that the failure of a plaintiff to correctly state the date on which the waiver form is being mailed absolves them of the duty to sign the form. I disagree.

Defendants concede that even if plaintiff were to have mailed the service packets directly to defendants from the Stanley Correctional Institution where he is incarcerated, the date on the form might not accurately reflect the actual date the mail was posted. This is because there are inherent delays in prison mail handing procedures. Here, however, they argue they were "misled" by the inaccurate date. They say that if they had used August 27 as the date the clock began to tick, Rule 4 would have required them to return the waiver forms by September 26 and to answer the complaint by October 26, 2006. But I do not understand Rule 4 to speak with such rigidity.

Rule 4 expressly provides that a defendant must be allowed "a reasonable time to return the waiver, which shall be at least 30 days *from the date on which the request is sent*. . . ." Rule 4(d)(2)(F). Likewise, Fed. R. Civ. P. 4(d)(3) provides that a defendant "is not required to serve an answer to the complaint *until 60 days after the date on which the request for waiver of service was sent*. . . ." Thus, a plaintiff seeking reimbursement for the costs of personal service of process on a defendant can recover those costs only if he can prove that he waited to arrange personal service of process until after at least 30 days had passed from the date

on which he sent the request for waiver forms. Here, had plaintiff jumped the gun and arranged for personal service of a summons and complaint without allowing for the delay that occurred between the time he completed the form and the date the waiver packet was posted on September 6, he would not be entitled to recover the costs of service. But that is not what he did. He waited until nearly *60* days from the posted date of September 6 before arranging for personal service of process. If defendants were confused by the August 27 date on the waiver request form about how long they had to agree to a waiver, they had ample time to move the court for clarification. Instead, they chose simply to ignore the requests. Under these circumstances, I do not find good cause for defendants' failure to perform their duty to avoid the costs of service of a summons. This is not to say that a prisoner in plaintiff's position need not take pains to calculate as nearly as possible the date on which the waiver packet will be mailed to a defendant and enter that date on the request for waiver form. However, I am not prepared to hold as defendants would have it that an imprecise date on the request for waiver form constitutes good cause for a defendant's refusal to sign and return the form.

One last matter requires attention. As noted above, plaintiff has submitted proof that he incurred recoverable costs in the total amount of $154.17. (Plaintiff is not entitled to recover the costs of mailing to defendants his initial complaint packets containing the waiver

forms, which I have subtracted from plaintiff's calculations.) However, he has not submitted a trust fund account statement or an affidavit showing that he has paid the Eau Claire County sheriff's department the $70 he owes it or the Chippewa County sheriff's department the $70 he owes it. Therefore, plaintiff may have until May 15, 2007, in which to serve and file an affidavit or a certified copy of his trust fund account statement to prove that he has paid the $70 debt he owes to each sheriff's department. If plaintiff makes such a showing, defendants will be required to issue a check or money order made payable to plaintiff in the full amount of $154.17. Alternatively, plaintiff may have until May 15, 2007, in which to advise the court that the sheriff's department bills remain outstanding. If he does that, then defendants are to send a check in the amount of $70 to the Eau Claire County sheriff's department, a check in the amount of $70 to the Chippewa County sheriff's department and a check in the amount of $14.17 to plaintiff.

ORDER

IT IS ORDERED that plaintiff's motion pursuant to Fed. R. Civ. P. 4(d)(5) for an award of costs he incurred in serving defendants Bruce Gerlinger, Renee Anderson, Becky Dressler and Rita Ericson personally with a summons and complaint is GRANTED. Dendants Bruce Gerlinger, Renee Anderson, Becky Dressler and Rita Ericson are required to reimburse plaintiff for the cost of service pursuant to Fed. R. Civ. P. 4(d)(5).

Further, IT IS ORDERED that no later than May 15, 2007, plaintiff is to serve and file either 1) documentation that he has already paid the Eau Claire and Chippewa county sheriff's departments the amounts he owes; or 2) a statement advising the court and defendants that the bills remain to be paid. Depending on plaintiff's response, defendants are to issue the reimbursement checks in the manner described above.

Entered this 1st day of May, 2007.

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