

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

VINCENT L. AMMONS,

Plaintiff,

v.

DR. DEBB LEMKE,
DR. BRUCE GERLINGER,
RENEE ANDERSON,
BECKY DRESSLER and
RITA ERICSON,

Defendants.

ORDER

06-C-20-C

This case has been pending against defendant Debb Lemke since March 31, 2006, when I allowed plaintiff leave to proceed against her on two claims that she was deliberately indifferent to plaintiff's alleged serious medical needs. The case has been pending against defendants Anderson, Dressler, Ericson and Gerlinger since August 9, 2006, when I granted plaintiff's motion to reconsider and allowed him to proceed on his claim of deliberate indifference to a serious medical need against them. In the August 9 order, I noted that plaintiff had not filed proof of service of his complaint on defendant Lemke. I advised him that because he is ineligible for pauper status under § 1915(g), he would have to arrange

immediately for service of process of his complaint on the defendant Lemke and the newly named defendants. I told him that if, by October 6, 2006, he failed to submit proof of service of his complaint on the defendants, I would dismiss his action for his failure to prosecute it unless he could show good cause for his failure to accomplish service. Subsequently, plaintiff submitted copies of postal receipts as purported proof of service of his complaint on defendants Lemke, Anderson, Dressler and Ericson. In addition, he moved for a sixty-day enlargement of time in which to submit proof of service of his complaint on defendant Gerlinger.

In an order entered on October 12, 2006, I concluded that plaintiff's postal receipts were insufficient to show that service of process was complete with respect to any defendant. Therefore, I granted him an enlargement of time to December 7, 2006, in which to submit proof that the defendants either waived service of a summons as required by Fed. R. Civ. P. 4(d)(4) or were served with a summons and complaint in compliance with Fed. R. Civ. P. 4(e).

Now plaintiff has submitted proof of service of his complaint on defendants Dressler, Anderson, Erickson and Gerlinger. However, he has moved for an enlargement of time in which to submit proof of service of his complaint on defendant Lemke until he can learn from the existing defendants where she might be. That request will be denied, and defendant Lemke will be dismissed from this lawsuit without prejudice to plaintiff's suing

her at another time.

It has been nine months since plaintiff was allowed to proceed against defendant Lemke. Fed. R. Civ. P. 4(m) contemplates that a plaintiff acting with due diligence should be able to serve a complaint on a defendant within 120 days of the date his or her complaint is filed.

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. . . .

Fed. R. Civ. P. 4(m). Plaintiff was given notice in mid-October that he was running out of time to serve the defendants with his complaint. It is true that plaintiff did not disregard this caution. He states in his motion that a “state-wide Internet search” and a “county-by-county Internet search” turned up two names and addresses for a Debb Lemke. On October 26, 2006, he asked the Lincoln County Sheriff’s Department whether it would serve Lemke with his complaint. The sheriff responded to plaintiff’s inquiry on October 30, providing plaintiff with information about its service practice. On November 5, 2006, plaintiff sent the Lincoln County Sheriff’s Department a summons and his complaint for service on defendant Lemke and provided the department with the address at which he believed Lemke was residing. On December 1, 2006, the department returned plaintiff’s documents to him,

with correspondence indicating that the address plaintiff had provided was for “the wrong Debb Lemke.” The Debb Lemke residing at the address plaintiff provided was not and never has been a doctor. The Debb Lemke plaintiff is suing in this lawsuit is a doctor. Although plaintiff’s efforts to serve defendant Lemke with his complaint have been diligent since at least October, 2006, he was already beyond his limit under Rule 4(m) with respect to Lemke when I gave him until December 7 to accomplish service upon her. Plaintiff asks now that the court delay her dismissal and order either that the served defendants turn over to plaintiff or to the Lincoln County Sheriff’s Department Lemke’s home or employment address or ask the Wisconsin Attorney General to accept informal service of process on defendant Lemke.

At the time he filed his complaint, plaintiff alleged that defendant Lemke was a “physician employed by the Department of Corrections’ Bureau of Health Services” and that she was working as a “visiting primary care physician at the Stanley Correctional Institution.” The remaining defendants are physicians and nurses who also worked at the institution. Plaintiff does not suggest any reason to believe that the defendants remaining in this lawsuit have maintained contacts with defendant Lemke, that they know her current home address or that they would be allowed to divulge Lemke’s home address to plaintiff even if they did know it.

Furthermore, this court has no authority to direct state process servers to exceed their

established procedures for serving process for prisoners or any other individuals who hire them to serve process on their behalf. If plaintiff believes that the sheriff's department or another process server should have done a better job of determining defendant Lemke's current whereabouts, for example by speaking with her former employee to learn whether it has such information, he was free to pay for that service.

Finally, it would be futile to ask the Department of Justice to accept informal service of plaintiff's complaint on defendant, because the informal service agreement does not apply to persons who are no longer employed by the Department of Corrections.

In summary, although it is unfortunate that plaintiff has been unable to effect service of process on defendant Lemke despite his best efforts, I have no choice but to dismiss her from this lawsuit without prejudice to plaintiff's filing a new lawsuit against her if he succeeds at some future time in locating her.

ORDER

IT IS ORDERED that plaintiff's motion for an enlargement of time in which to effect service of process on defendant Debb Lemke is DENIED, as are plaintiff's requests that the court order the existing defendants to disclose defendant Lemke's address or direct the office of the Attorney General to accept informal service of process for defendant Lemke.

Further, IT IS ORDERED that defendant Lemke is DISMISSED from this lawsuit

without prejudice to plaintiff's filing his claim against her at some future time.

Entered this 14th day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge