

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

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GARRY A. BORZYCH,

Plaintiff,

v.

MATTHEW J. FRANK, STEVEN B.
CASPERSON, RICK RAEMISCH, PHILLIP
KINGSTON, STEVEN SCHUELER, MIKE
THURMER, JAMYI WITCH and
SGT. McCARTHY,

Defendants.

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ORDER

06-C-475-C

In an order dated November 9, 2006, I allowed plaintiff Garry Borzych to proceed on a claim that defendants deprived him of a religious emblem in violation of his rights under the free exercise and establishment clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act. Now before the court is plaintiff's motion for leave to amend his complaint.

Accompanying plaintiff's motion is a copy of his proposed amended complaint. The new complaint appears to be identical to the old one except that it adds four new defendants and a claim that he was denied rune cards in violation of his religious rights.

Unfortunately, I cannot consider plaintiff's motion because he has not served it on the existing defendants. In the November 9 order, I advised plaintiff:

For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

See also Fed. R. Civ. P. 5(a) (all court filings "shall be served upon each of the parties").

In his motion, plaintiff says that he did not serve the defendants because at the time they had not yet answered his complaint or filed a waiver of service of summons. As a result, no lawyer had made an appearance for defendants and he did not know to whom he should send his new filings. However, the answer to this is provided in the federal rules themselves: plaintiff should continue serving court filings directly on each defendant until that defendant's lawyer makes an appearance. Fed. R. Civ. P. 5(b)(1).

This brings up another issue. Plaintiff filed waiver of service of summons forms from defendants Matthew Frank, Steven Casperson, Rick Raemisch, Phillip Kingston, Steven Schueler and Mike Thurmer, who have now filed an answer. However, plaintiff has not filed waiver forms or any other proof of service with respect to defendants Jamyi Witch and Sgt. McCarthy.

Under Fed. R. Civ. P. 4(m), plaintiff has 120 days from the time he files his

complaint in which to accomplish service. Plaintiff filed his complaint on August 29, 2006, so the time for serving his complaint expired on December 27, 2006. Plaintiff has neither filed proof of service nor requested an enlargement of time in which to do so. If plaintiff has accomplished service on defendants Witch and McCarthy, he must file proof of service with the court immediately. 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).

Thus, plaintiff now has two pressing tasks before him:

(1) Provide proof of service of his original complaint on defendants Witch and McCarthy or face dismissal of these defendants.

(2) Serve his motion for leave to amend his complaint and the proposed amended complaint on all of the original defendants. Plaintiff need not serve these new materials in accordance with Fed. R. Civ. P. 4; service by United States mail is sufficient. Fed. R. Civ.

P. 5(b)(2). Further, because defendants Frank, Casperson, Raemisch, Kingston, Schueler and Thurmer are now represented by assistant attorney general David Hoel, plaintiff may send the proposed amended complaint to Hoel to accomplish service on those defendants.

Once plaintiff has served his proposed amended complaint on Mr. Hoel, I may screen it under 28 U.S.C. § 1915 to determine whether it states a claim upon which relief may be granted. If the proposed amended complaint survives screening, plaintiff will be required to serve it on the any new defendants against whom he may be allowed to proceed in accordance with Rule 4.

ORDER

IT IS ORDERED that

1. Plaintiff Garry Borzych may have until January 31, 2007, in which to file proof or service of his original complaint on defendants Jamyi Witch and Sgt. McCarthy. If, by January 31, 2007, plaintiff fails to file proof of service or show cause for his failure to do so, defendants Witch and McCarthy will be dismissed.

2. Plaintiff's motion for leave to amend his complaint is DENIED WITHOUT PREJUDICE to his renewing the motion after he has served the motion and proposed amended complaint on assistant attorney general Hoel and defendants Witch and

McCarthy, if plaintiff has already served these defendants with his original complaint.

Entered this 22d day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge