

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

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JOSEPH MCGRAW,

Plaintiff,

v.

TERRI MARCO and  
BRENDA CLARK,

Defendants.

OPINION & ORDER

14-cv-253-jdp

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Pro se plaintiff Joseph McGraw has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that defendants Terri Marco and Brenda Clark failed to provide him with a complaint and summons they received on his behalf while he was incarcerated. Plaintiff alleges that because he never received the complaint and summons, he never appeared in an action brought against him in Wisconsin state court. The state court eventually entered a default judgment against plaintiff and now he seeks damages from Marco and Clark for not forwarding him the service of process. Plaintiff has also filed a motion for assistance in recruiting counsel.

Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1). The next step in this case is for the court to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for monetary damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In screening any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After reviewing the complaint with this principle in mind, I conclude that plaintiff has stated a Fourteenth Amendment claim against Marco and Clark. I will therefore grant plaintiff leave to proceed with his complaint. I will deny plaintiff's motion for assistance in recruiting counsel, but do so without prejudice.

## ALLEGATIONS OF FACT

In his complaint, plaintiff alleges the following facts.

When he filed the complaint, and at all times relevant to this case, plaintiff was a prisoner at the Jackson Correctional Institution (JCI), located in Black River Falls, Wisconsin.<sup>1</sup> The defendants are both Wisconsin Department of Corrections employees who work in JCI's records department.

On May 5, 2008, Progressive Classic Insurance filed an action against plaintiff in the Wisconsin Circuit Court for Dane County, case number 2008-cv-001955. An agent for the law firm representing Progressive delivered service of process to JCI and left the documents with Marco and Clark. Under Wis. Stat. § 302.025(2), only a prison warden (or someone the warden appoints) may serve process on an inmate. Marco and Clark were the employees responsible for serving process on inmates at JCI. Plaintiff claims, however, that he never received the documents and that he had no knowledge of Progressive's suit against him.

A few months later, Progressive sought and obtained a default judgment in the amount of \$17,560.34.<sup>2</sup> Plaintiff claims that he never received notice of the default judgment order, but eventually came to learn of the case. Since then, plaintiff "has attempted, on numerous occasions, to get the default judgment rescinded . . . but to no avail." Dkt. 1, at 4. Plaintiff does not describe his post-judgment efforts in great detail, but suggests that he argued to the state court that he never received service of process. According to the complaint, "Judge Gaylord does not believe that defendants Marco and Clark failed and/or refused to serve plaintiff McGraw with a copy of the summons and complaint." *Id.*

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<sup>1</sup> On May 20, 2014, plaintiff was released from prison. He now resides in Omro, Wisconsin.

<sup>2</sup> Plaintiff alleges that the default judgment was for \$22,876.50, Dkt. 1, at 5, but the docket sheet from the state court case shows otherwise.

Plaintiff submitted two separate inmate grievances using JCI's administrative review procedures, but these apparently did not result in favorable determinations. On April 3, 2014, plaintiff filed a complaint in this court, alleging violations of his First and Fourteenth Amendment rights. Dkt. 1. Plaintiff has also filed a motion for assistance in recruiting counsel. Dkt. 8.

### OPINION

Under Fed. R. Civ. P. 8, a plaintiff must present “a short and plain statement of the claim showing that [he] is entitled to relief.” The purpose of the requirement is “to provide the defendant with ‘fair notice’ of the claim and its basis.” *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). Here, plaintiff grounds his claim in the First and Fourteenth Amendments, presumably attempting to assert that the defendants deprived him of access to the courts. I understand plaintiff's claim, however, to allege a violation of his Fourteenth Amendment right to due process. I conclude that plaintiff's allegations are sufficient to state such a claim and I will grant him leave to proceed.

In a § 1983 claim, “the procedural protections of the Due Process Clause will only be triggered if state action implicates a constitutionally protected interest in life, liberty, or property.” *Lekas v. Briley*, 405 F.3d 602, 607 (7th Cir. 2005) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-71 (1972)). Here, plaintiff has alleged state action that deprived him of such a right. Specifically, plaintiff contends that Marco and Clark were acting within the scope of their employment when they deprived him of the “elementary and fundamental requirement of due process [to receive] notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also*

*Robinson v. Turner*, 886 F. Supp. 1451, 1459 (S.D. Ind. 1995) (“The Due Process Clause requires an individual to have adequate notice of the lawsuit before a court will have personal jurisdiction over him.”). Wisconsin law restricts who may serve an inmate with process, but certainly does not alter the basic requirement of adequate notice for legal proceedings. *See Wis. Stat. § 302.025*.

In this case, plaintiff has alleged that Progressive’s agent complied with the statute’s requirements, that Marco and Clark were the warden’s appointees for purposes of serving inmates, and that they personally failed to forward the service of process to him. *See Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (“To recover damages under § 1983, a plaintiff must establish that a defendant was personally responsible for the deprivation of a constitutional right.”). Plaintiff also alleges that the entry of default judgment against him was a direct result of Marco’s and Clark’s collective failure. Taken as true for purposes of screening plaintiff’s complaint, these allegations are sufficient to provide a short and plain statement of a claim under the Fourteenth Amendment.

I note that although plaintiff may be able to proceed, his complaint suggests that this claim will eventually be barred by the doctrine of issue preclusion. Plaintiff affirmatively alleges that he raised the issue of service of process in the Wisconsin state court during his efforts to vacate the default judgment and that the trial court rejected his argument. The record does not contain plaintiff’s post-judgment filings in the state action nor the state court’s resolution of plaintiff’s argument. At this point, therefore, I am unable to determine whether issue preclusion applies in this case. Moreover, issue preclusion is an affirmative defense, subject to waiver if the defendants do not properly raise it. *Scarver v. Litscher*, 371 F. Supp. 2d 986, 997 (W.D. Wis. 2005). Given that this case is still in its early stages, I will leave the dispute for a later date and allow plaintiff to proceed with his claim.

With respect to plaintiff's request for assistance in recruiting counsel, I will deny his motion. Litigants in civil cases do not have a constitutional right to a lawyer and the court has discretion to determine whether assistance in the recruitment of counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007). To prove that assistance in recruiting counsel is necessary, plaintiff must: (1) give the court the names and addresses of at least three lawyers who declined to represent him in this case; and (2) demonstrate that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds plaintiff's demonstrated ability to prosecute it. *Id.* at 655; *see also Young v. Cramer*, No. 13-cv-077, 2013 WL 5504480, at \*2 (W.D. Wis. Oct. 3, 2013). Plaintiff has identified three firms who have declined to represent him; although I note that one firm did not refuse outright, it just refused to take plaintiff's case pro bono. Dkt. 8-1. Even if he satisfies the first requirement, plaintiff has not demonstrated that this case will present difficulties that are beyond his abilities. As I indicated, plaintiff's claim may well turn on whether he has already litigated the underlying factual dispute in Wisconsin state court, or, if he has not, whether the defendants can prove that plaintiff actually received service of process. These are factual issues, not legal ones, and "[p]laintiff has personal knowledge of the circumstances surrounding this claim." *Young*, 2013 WL 5504480, at \*2. Plaintiff's motion will therefore be denied. This denial will be without prejudice to plaintiff renewing his motion at a later stage should it become clear that he is unable to litigate this action himself.

## ORDER

IT IS ORDERED that:

- 1) Plaintiff Joseph McGraw is GRANTED leave to proceed on his Fourteenth Amendment claims against defendants Terri Marco and Brenda Clark for their failure to serve him with process they received on his behalf;
- 2) Plaintiff's motion for assistance in recruiting counsel, Dkt. 8, is DENIED without prejudice;
- 3) For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney;
- 4) Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents; and
- 5) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 25th day of July, 2014.

BY THE COURT:  
/s/  
JAMES D. PETERSON  
District Judge