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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**

7 Ivan Jay Linebarger,
8Plaintiff,
9vs.
10Herb Haley,
11Defendant.
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No. CV 07-0496-PHX-SMM (JCG)

MEMORANDUM OF DECISION AND ORDER

13 Plaintiff Ivan Jay Linebarger, who is currently confined in Cellblock Six of the
14 Arizona State Prison Complex, in Florence, Arizona, commenced this civil rights action *pro*
15 *se* pursuant to 42 U.S.C. § 1983 (Doc. #1). In his First Amended Complaint, Plaintiff sues
16 Herb Haley, the Protective Segregation Administrator for the Arizona Department of
17 Corrections (ADC) for threats to his safety based on Haley's alleged failure to assign
18 Plaintiff to protective custody. (Doc.# 5.)¹ Plaintiff solely seeks injunctive relief, i.e.,
19 placement in protective segregation. (*Id.* at 6.) Before the Court is Defendant's motion for
20 summary judgment, which was filed under seal and not served on Plaintiff. (Docs.# 32, 33.)
21 Plaintiff has opposed the motion (Docs. #43-45) and Defendant has filed a reply under seal.
22 (Docs.# 54-55.) Defendant's motion will be summarily denied for failure to serve the motion
23 on Plaintiff.

24 **I. Procedural Background**

25 Defendant lodged his motion for summary judgment (MSJ) and statement of facts
26 (SOF) with a motion to seal the MSJ and SOF. (Doc.# 28.) Defendant included a certificate
27 of service reflecting that copies of the MSJ/SOF had been served by mail on Plaintiff. See
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¹ "Doc.#" refers to the docket number of documents filed in this case.

1 Doc.# 32 at 11; 33 at 11. The magistrate judge granted the motion to seal four days later.
2 (Doc.# 31.) Although leave to file the MSJ/SOF *ex parte* had neither been sought, nor
3 granted, subsequent filings make clear that the MSJ/SOF was not in fact served on Plaintiff.
4 See Doc.# 55 at 2-3. Rather, as discussed below, Defendant's counsel worked out a system
5 with prison officials whereby Plaintiff could purportedly submit requests to his CO III
6 counselor to review the MSJ/SOF.

7 Plaintiff requested an extension of time to respond to Defendant's MSJ stating that
8 he had "still not been able to view the sealed motion for summary judgment filed by
9 Defendant Herb Hailey [sic]," although he had been assured by Defendant's attorney, A.J.
10 Rogers, that he would be afforded adequate time to review the motion and statement of facts.
11 (Doc.# 37 at 1.) Plaintiff expressly requested an extension until he had an opportunity to
12 review the MSJ/SOF in order to adequately respond to the motion. (Id.) On May 13, 2008,
13 Plaintiff was granted an extension until June 23, 2008 in which to file his response to the
14 MSJ.² (Doc.# 40.) Nevertheless, on May 27, 2008 and well before the June 23, 2008
15 deadline, Plaintiff filed a response to the motion for summary judgment, a memorandum of
16 law, and a declaration signed under penalty of perjury in opposition to the motion. (Docs.
17 # 43-45.) In his response and his supporting Declaration, Plaintiff stated that he had only
18 been afforded 30 minutes to read the MSJ/SOF and that he had not been permitted to make
19 notes.

20 On June 16, 2008, Plaintiff filed a motion for sanctions against Defendant's attorney
21 Rogers. (Doc.# 49.) In it, Plaintiff stated that Rogers contacted Plaintiff on June 3, 2008,
22 and accused Plaintiff of lying about not being given time to review Defendant's MSJ/SOF

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24 ² Two days later, and almost certainly before he received a copy of the order granting
25 him his first extension, Plaintiff filed a second motion for a 45-day extension of time to file
26 a response, again stating that he sought the extension due to sealing of the Defendant's MSJ
27 and delays in Plaintiff's opportunity to review that motion. (Doc.# 41 at 1.) Plaintiff further
28 stated that he had only been allowed 30 minutes to read the motion and required more time.
(Id.) Plaintiff's second motion for extension of time was denied by the magistrate judge as
moot after he filed his response to the MSJ. (Doc.# 46.)

1 in his response to that motion. (Id. at 1.) According to Plaintiff, he told Rogers that he
2 needed a copy of the MSJ/SOF to provide to an inmate who was assisting Plaintiff with his
3 response, to which Rogers stated Plaintiff was not entitled to the assistance of a jailhouse
4 lawyer. (Id.) According to Plaintiff, the inmate who had been assisting him thereafter
5 stopped doing so under threat of disciplinary sanctions. (Id.) For that reason, Plaintiff
6 requested sanctions against Rogers for interfering with his access to the court. (Id. at 2-3.)
7 Plaintiff in part stated that “[w]ithout assistance from a ‘writ-writer’ trained in the law, I
8 never would have been able to respond to the Defendant’s motion for summary judgment,
9 as I was never given a copy, which did violate the rules of civil procedure.” (Id. at 2.)

10 Defendant filed a combined response to the motion for sanctions and reply to
11 Plaintiff’s response to the MSJ (combined response/reply) under seal.³ (Doc.# 55.)
12 According to Defendant’s counsel in the combined response/reply:

13 When [Plaintiff] made a request for production for his protective segregation
14 (“PS”) file, Haley, Arizona Department of Corrections (“ADC”) staff, and
15 undersigned counsel were placed in a conundrum. [Plaintiff] clearly felt he
16 needed those documents to pursue his lawsuit. There were, however, serious
17 security concerns about allowing him possession of such documents because
18 they contained information about other inmates and because they contained
19 information that [Plaintiff] had provided a statement against his criminal
20 codefendant which, if released, could jeopardize his safety. In order to balance
21 those competing concerns, we worked out a system that allowed [Plaintiff]
22 access to a redacted PS file in order to pursue his suit, but did not allow him
23 to keep the documents in his physical possession to address the security
24 concerns. (Exhibit A, Response to Request for Production of Documents at 2,
25 (“Because of serious security concerns related to your possession of your
26 Protective Segregation file, you will be allowed access to a redacted copy of
27 that file by contacting CO IV Espinoza.”), Exhibit B, Memo to Attorney
28 General Liaison Kelly Dudley from undersigned counsel, (“Please forward the
[redacted PS file] to the appropriate COIV so [Linebarger] can have access to
the documents on a request basis. He also needs the ability to make copies to
support any documents he files with the Court.”).) [Plaintiff] did not object to
this procedure or contact undersigned counsel.

When undersigned counsel filed [Defendant’s] summary judgment
motion and statement of facts, she moved to file it under seal to prevent the
public from accessing the confidential information contained in those
documents. (Dkt. 28) The Court ordered the documents filed under seal (dkt.

³ Although a mailing certificate was included with the combined response/reply, it
appears doubtful that Defendant in fact served Plaintiff with it because the response/reply
was filed under seal.

31), and undersigned counsel employed the same procedure to allow [Plaintiff] to have access to the summary judgment motion and statement of facts (which included many attached documents from [Plaintiff's] PS file), without allowing him to keep the documents in his physical possession. Undersigned counsel again sent the documents to the Attorney General Liaison Dudley requesting that [Plaintiff] be allowed to access them on a request basis and that he be allowed to make copies to support any documents he files with the Court. (Exhibit C, Memo to Attorney General Liaison Dudley from undersigned counsel.) Undersigned counsel also wrote [Plaintiff] that he would be provided access to the document via an inmate letter to his CO III. (Exhibit D.) [Plaintiff] again did not object to this procedure or contact undersigned counsel.

(Doc.# 55 at 2-3.) According to Rogers, Corrections Officer III Kraicinski informed Rogers that Plaintiff had not requested access to the MSJ/SOF, which Kraicinski would have provided if he had requested access. (*Id.* at 3.) Rogers claims that she offered to stipulate to an enlargement of time to allow Plaintiff to amend his response to the summary judgment, after a further opportunity to review the MSJ/SOF, but Plaintiff refused because he wanted his "jailhouse lawyer" to be able to access the documents. (*Id.*) Rogers denies that she contacted ADC personnel about another inmate assisting Plaintiff. (*Id.*) Defendant argues, on this basis, that Plaintiff's contentions regarding denial of access to Defendant's MSJ/SOF should be disregarded. (*Id.*) Defendant did not file affidavits to support the representations of counsel in the combined response/reply.

II. Discussion

Rule 5(a)(1)(D) of the Federal Rules of Civil Procedure requires that a written motion, except one that may be heard *ex parte*, must be served on every party. Service on a party may be accomplished by mailing it to the party's last known address, among other means, in which case service is complete upon mailing. Fed. R. Civ. P. 5(b)(2)(C). Motions for summary judgment must be served on an opposing party. Fed. R. Civ. P. 56(c).

Defendant included a certificate of mailing reflecting service by mail of the MSJ/SOF on Plaintiff. However, Defendant's combined response/reply makes clear that Plaintiff was, in fact, never served with the MSJ/SOF. Plaintiff repeatedly raised the issue that he had not been served with the MSJ/SOF and that he had not been afforded adequate time to review

1 copies of the MSJ/SOF. Plaintiff states under penalty of perjury that he only had 30 minutes
2 to review the MSJ/SOF. (Doc.# 45 at ¶ 31.) Defendant's assertion that Plaintiff declined
3 additional opportunities for review with the opportunity to supplement his response is
4 unsupported by affidavit. Further, in light of the unreliability of Defendant's certificates of
5 mailing of sealed documents, it appears doubtful that Plaintiff was served with a copy of
6 Defendant's combined response/reply, despite a certificate of mailing, because it was also
7 filed under seal. (Doc.# 55.)

8 Under the circumstances, the Court concludes that Defendant's motion for summary
9 judgment must be denied based on the Defendant's failure to serve the MSJ/SOF on Plaintiff.
10 Defendant could have, but failed either to obtain a stipulation with Plaintiff excusing service
11 and setting forth procedures to afford him adequate opportunity to review the MSJ/SOF or
12 a court order excusing service and establishing procedures to ensure Plaintiff was afforded
13 an adequate opportunity to review the MSJ/SOF. The Court will grant the parties until April
14 17, 2009 in which to file any further dispositive motions. Any such dispositive motion must
15 be served on the other party absent a stipulation, or Court order, excusing such service and
16 establishing procedures to ensure an adequate opportunity to review the motion and
17 supporting documents.

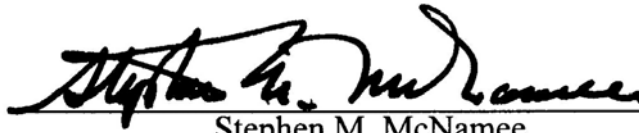
18 Accordingly,

19 **IT IS HEREBY ORDERED:**

20 (1) Defendant's Motion for Summary Judgment is **DENIED** without prejudice.
21 (Doc.# 32.)

22 (2) The dispositive motion deadline is extended until **April 17, 2009**. Any
23 dispositive motion must be served on the other party absent a stipulation, or Court order,
24 excusing such service and establishing procedures to ensure an adequate opportunity to
25 review the motion and supporting documents.

1 DATED this 19th day of February, 2009.

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4 Stephen M. McNamee
5 United States District Judge
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