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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 David DeGroot,
10 Plaintiff,

) No. CV 07-1969-PHX-MHM
) CV 07-2123-PHX-LOA
) (Consolidated)

11 vs.

ORDER

12 City of Mesa, et al.,
13 Defendants.

14 _____
15 Terry DeGroot,
16 Plaintiff,

17 vs.

18 City of Mesa, et al.,
19 Defendants

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21 Currently before the Court is Plaintiff Terry DeGroot’s Motion for Default Judgment
22 (Dkt. #40). Defendants filed a Response (Dkt. #41), and no Reply has been filed by Plaintiff
23 Terry DeGroot. Also before the Court are Defendants Rex Griswold, David Ashe, and
24 David Heckel’s (collectively “David DeGroot Defendants”) Motion to Dismiss Plaintiff
25 David DeGroot’s Complaint for Insufficient Service of Process (Dkt. #24). Plaintiff David
26 DeGroot filed a Response (Dkt. #29), and the David DeGroot Defendants filed a Reply
27 (Dkt. #31). Similarly, Defendants Rex Griswold, David Ashe, and Mark Ishikawa
28 (collectively “Terry DeGroot Defendants”) filed a Motion to Dismiss Plaintiff Terry

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1 DeGroote's Complaint for Insufficient Service of Process (Dkt. # 24). Plaintiff Terry
2 DeGroote filed a Response (Dkt. #29), and the Terry DeGroote Defendants filed a Reply
3 (Dkt. #31). After reviewing the pleadings, the Court issues the following Order.

4 **I. BACKGROUND**

5 On October 12, 2007, Plaintiff David DeGroote, *pro se*, commenced this 42 U.S.C. §
6 1983 action against the City of Mesa, five Mesa City Council members, the Mesa City
7 Manager, and six Mesa police officers alleging violations of Plaintiff David DeGroote's
8 constitutional rights (denial of equal protection, due process and the right to life, liberty and
9 pursuit of happiness) and state tort claims of invasion of privacy, intentional infliction of
10 emotional distress, and intentional interference with prospective advantage. (Dkt. #1). Three
11 weeks later, on October 31, 2007, Plaintiff Terry DeGroote, *pro se*, David DeGroote's wife,
12 filed a nearly identical Complaint in CV 07-1969-PHX-MHM against essentially the same
13 Defendants¹ involving the same events alleged in Plaintiff David DeGroote's Complaint in
14 CV 07-2123-PHX-LOA.

15 On November 26, 2007, pursuant to L.R.Civ. 42.1, this Court *sua sponte* consolidated
16 DeGroote v. City of Mesa, CV 07-1969-PHX-MHM with Degroote v. City of Mesa, CV 07-
17 2123-PHX-LOA. (Dkt. #16). On December 10, 2007, Plaintiff Terry DeGroote filed a
18 Motion for Reconsideration of Consolidation. (Dkt. #19). On January 18, 2008, Defendants
19 filed a Response (Dkt. #20), and no Reply was filed by Plaintiff Terry DeGroote. On April
20 23, 2008, this Court denied Plaintiff Terry DeGroote's Motion for Reconsideration. (Dkt.
21 #33).

22 On March 11, 2008, the David and Terry DeGroote Defendants jointly filed a Motion
23 to Dismiss Plaintiffs David and Terry DeGroote's (collectively "Plaintiffs") Complaints for
24 Insufficient Service of Process. (Dkt. #24). Plaintiffs jointly filed a Response on March 24,
25 2008. (Dkt. #29). Defendants jointly filed a Reply on March 27, 2008. (Dkt. #32).

27 ¹ Plaintiff Terry DeGroote sued Mesa City Attorney Ishikawa, but not the City of
28 Mesa's Vice-Mayor, Claudia Walters.

1 On May 19, 2008, Plaintiff Terry DeGrootte filed a Motion for Default Judgment as
2 to all Defendants for failure to answer the Complaint filed by Plaintiff Terry DeGrootte. (Dkt.
3 40). Defendants filed a Response on May 22, 2008, arguing that on March 11, 2006, they
4 filed a Motion to Dismiss for failure to state a claim in lieu of filing an answer. (Dkt. #41).
5 No Reply has been filed by Plaintiff Terry DeGrootte.

6 **II. MOTION FOR DEFAULT JUDGMENT**

7 Rule 12 of the Federal Rules of Civil Procedure (“FRCP”) provides, in pertinent part:
8 “Unless another time is specified by this rule or a federal statute, the time for serving a
9 responsive pleading is as follows: (A) a defendant must serve an answer: (I) within 20 days
10 after being served with the summons and complaint” Fed.R.Civ.P. 12(a)(1)(A)(I).
11 Further, the rule provides in subsection (a)(4) that

12 “[u]nless the court sets a different time, serving a motion under
13 this rule alters these periods as follows:

14 (A) if the court denies the motion or postpones its disposition
15 until trial, the responsive pleading must be served within 10
16 days after notice of the court’s action”

17 Fed.R.Civ.P. 12(a)(4). Thus, when a motion is filed under FRCP 12, the time for serving an
18 answer is tolled until after the Court has issued a ruling on the motion.

19 Here, pursuant to FRCP 12(b)(5) and (6), Defendants filed separate Motions to
20 Dismiss for insufficient service of process and for failure to state a claim on March 11, 2008.
21 (Dkt. ## 23,24). The time for serving an answer is tolled until this Court issues a ruling on
22 the motions to dismiss. See Fed.R.Civ.P. 12(a)(4). As such, Plaintiff Terry DeGrootte’s
23 Motion for Default Judgment is denied.

24 **III. MOTIONS TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS**

25 FRCP 4 provides that if

26 a defendant is not served within [the time allowed], the court--
27 on motion or on its own after notice to the plaintiff--must
28 dismiss the action without prejudice against that defendant or
order that service be made within a specified time. But if the
plaintiff shows good cause for the failure, the court must extend
the time period for an appropriate period.

1 Fed.R.Civ.P. 4(m). Dismissal of a party is appropriate where a plaintiff fails to show good
2 cause for delays in service. See Walker v. Sumner, 14 F.3d 1415, 1421-22 (9th Cir. 1994).
3 Good cause only exists in rare circumstances. See generally Fimbres v. United States, 833
4 F.2d 138, 139 (9th Cir. 1987) (strategic reasons do not constitute good cause); Townsel v.
5 County of Contra Costa, California, 820 F.2d 319, 320 (9th Cir. 1987) (inadvertence or
6 negligence does not constitute good cause).

7 Here, Plaintiff David DeGroote filed his Complaint on October 12, 2007. Pursuant to
8 FRCP 4(c) and (m), he was required to serve all Defendants with a copy of the Summons and
9 Complaint within 120 days of filing the Complaint—on or before February 11, 2008.
10 Fed.R.Civ.P. 4(c), (m). To date, Plaintiff David DeGroote has not served the David
11 DeGroote Defendants. Similarly, Plaintiff Terry DeGroote filed her Complaint on October
12 31, 2007. Thus, she was required to serve all Defendants with a copy of the Summons and
13 Complaint on or before February 28, 2008. Id. To date, Plaintiff Terry DeGroote has not
14 served the Terry DeGroote Defendants. Therefore, absent a showing of good cause,
15 Defendants must be dismissed. See Fed.R.Civ.P. 4(m); Walker, 14 F.3d at 1421-22.

16 As an initial matter, Plaintiff David DeGroote points to no factors that constitute good
17 cause for his delay in effecting service on Defendant Heckel. Notably, Plaintiff Terry
18 DeGroote served Defendant Heckel on February 28, 2008; her husband provides no
19 justification for his failure to also serve Defendant Heckel. As such, Plaintiff David
20 DeGroote fails to show good cause for his delay in effecting service on Defendant Heckel.

21 In addition, Plaintiff Terry DeGroote argues that she was confused as to whether she
22 should continue to attempt to effect service on the unserved Defendants while her Motion for
23 Reconsideration of Consolidation was pending before the Court. However, in that motion,
24 Plaintiff Terry DeGroote stated that she was holding back service of process to “determine
25 what her best options [were] in handling her individual case.” (Dkt. #19). Further, Plaintiff
26 Terry DeGroote served multiple other Defendants in the instant action on February 28 and
27 29, 2008. (Dkt. ## 34-36). Thus, it appears that her failure to effect service on the Terry
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1 DeGroot Defendants was not due to any confusion resulting from her pending Motion for
2 Reconsideration; rather, it appears to have been a strategic decision.

3 Both Plaintiffs argue that Defendant City of Mesa's failure to cooperate in providing
4 the correct addresses of the David and Terry DeGroot Defendants constitutes good cause
5 for their failure to effect service. However, Plaintiffs provide no evidence whatsoever of any
6 reasonable efforts they undertook to ascertain the addresses of the David and Terry DeGroot
7 Defendants. Defendant City of Mesa's failure, if any, to cooperate in providing the correct
8 addresses does not constitute good cause given Plaintiffs failure to provide any evidence of
9 *any* reasonable efforts to ascertain the addresses of the David and Terry DeGroot
10 Defendants. Therefore, Plaintiffs fail to show good cause for their delay in effecting service
11 on the David and Terry DeGroot Defendants.

12 The Court notes that it retains discretion to grant a permissive extension of time to
13 serve, even in the absence of good cause, where there is no statute of limitations bar, lack of
14 prejudice to the defendant,² or where the defendant was eventually, although not timely,
15 served. See Efav v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2007). However, the Court
16 finds no compelling basis to permissively extend the time allotted for service under FRCP
17 4(m). As such, the Court will not grant an extension of time to serve in the instant case.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiff Terry DeGroot's Motion for Default Judgment
20 is denied. Further, David DeGroot Defendants' Motion to Dismiss Plaintiff David
21 DeGroot's Complaint is granted. Similarly, Terry DeGroot Defendants' Motion to Dismiss
22 Plaintiff Terry DeGroot's Complaint is granted. Defendants' Motion to Dismiss Terry
23 DeGroot's Complaint and Motion for Judgment on Plaintiff David DeGroot's Pleadings
24 is addressed in a separate order.

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26 ² Defendants cite to McWherter v. CBI Services, Inc., 153 F.R.D. 161 (D. Haw. 1994)
27 for the proposition that lack of prejudice to Defendants is not sufficient to grant an extension
28 of time to serve. However, McWherter was decided under the previous version of FRCP
4(m), which did not permit discretionary extensions of time to serve.

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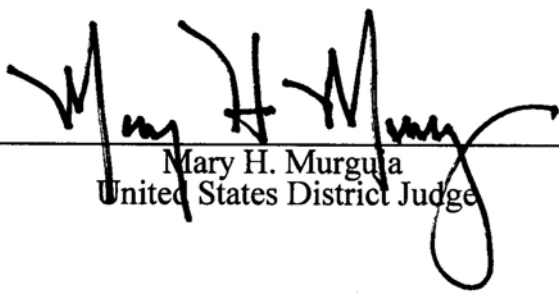
Accordingly,

IT IS HEREBY ORDERED that Plaintiff Terry DeGroote's Motion for Default Judgment is **DENIED**. (Dkt. #40).

IT IS FURTHER ORDERED that Defendants Rex Griswold, David Ashe, and David Heckel's Motion to Dismiss Plaintiff David DeGroote's Complaint for Insufficient Service of Process is **GRANTED**. (Dkt. #24).

IT IS FURTHER ORDERED that Defendants Rex Griswold, David Ashe, and Mark Ishikawa's Motion to Dismiss Plaintiff Terry Degroote's Complaint for Insufficient Service of Process is **GRANTED**. (Dkt. #24).

DATED this 25th day of February, 2009.



Mary H. Murgula
United States District Judge