

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01297-PAB-KLM

MALACHI Z. YORK, a/k/a Dwight York,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,  
MAUREEN CRUZ, former Associate Warden,  
JACK FOX, Associate Warden,  
BRIAN A. BLEDSOE, Warden,  
L. MCDERMOTT, Health Services Specialist,  
S. SMITH, SIS Technician,  
S. NAFZIGER, MD, Clinical Director,  
C.W. WELCH, Physician Assistant,  
MICHAEL NALLEY, Regional Director,  
D. SHIEFELBEIN, Physician's Assistant,  
J.T. SHARTLE, former Associate Warden,  
RON WILEY, Warden,  
HERMAN O. LYLE, MD, Consultant Internist,  
IVAN NEGRON, MD, Medical Director,  
RATAEL ROMAN, MD, Clinical Director,  
RAIEZ, Health Physician Assistant,  
G. HICKS, Physician Assistant,  
J.F. CASTILLO, Physician Assistant,  
RICK STALLKAMP, Pharmacist,  
LAWRENCE LEYBA, DO, Clinical Director,  
M. MILLER, Physician Assistant,  
A. VINYARD, Physician Assistant,  
Y. FETTERHOFF, Imaging Techniques Specialist,  
M. SWANN, Practitioner Assistant, each in his/her individual and official capacity,

Defendants.

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**ORDER**

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**ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX**

This matter is before the Court on **Defendant's Motion to Withdraw Docket No. 223** [Docket No. 225; Filed April 22, 2009] ("Motion to Withdraw") and **Defendant's Motion**

**to Strike Docket Nos. 215, 216, 217 and 218** [Docket No. 227; Filed April 22, 2009] (“Motion to Strike”).

IT IS HEREBY **ORDERED** that the Motion to Withdraw [#225] is **GRANTED**. The Court deems the Motion to Dismiss for Failure to Prosecute [Docket No. 223] to be WITHDRAWN.

IT IS HEREBY **ORDERED** that the Motion is Strike [#227] is **GRANTED**. On January 22, 2009, I issued a Recommendation [Docket No. 151] that the individual Defendants be dismissed due to Plaintiff’s failure to serve them with the Summons and Second Amended Complaint, despite two extensions of the Court’s deadline for service [Docket Nos. 70, 81 & 85]. I found that the individual Defendants had not been made parties to this lawsuit and that the time for Plaintiff to do so had expired. *Recommendation* [#151] at 2-3, 8-9. My Recommendation remains pending. In April 2009, more than three months after I recommended that the individual Defendants be dismissed, Plaintiff docketed pleadings purporting to indicate that several of the individual Defendants and other nonparties to this action had been served [Docket Nos. 215, 216, 217 & 218]. Because I have recommended dismissal of the individual Defendants pursuant to Fed. R. Civ. P. 4(m), and good cause has not been shown for Plaintiff’s failure to timely serve them, these attempts to effect service and file service pleadings on the docket are inappropriate, immaterial, and impertinent.

As explained in my Recommendation, I have previously found that Plaintiff failed to provide good cause (or excusable neglect) for his failure to timely serve the individual Defendants [Docket Nos. 85 & 93]. Although the Court may extend the time for a plaintiff

to serve a defendant even without a showing of good cause, *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995), the Court was not and is not inclined to do so here because it is undisputed that Plaintiff failed to exhaust his administrative remedies. See *Recommendation* [#151] at 5-8. In addition, the case against the individual Defendants has been pending since May 8, 2008, Plaintiff failed to comply with any of the three deadlines set by the Court to effect service, and Plaintiff was represented by counsel who is presumed to know the penalty for failing to timely serve the individual Defendants. See *generally Raeth v. Bank One*, 05-cv-02644-WDM-BNB, 2008 WL 410596, at \*3 & n.4 (D. Colo. Feb. 13, 2008) (unpublished decision). Plaintiff's eleventh-hour attempt to serve a handful of the individual Defendants more than three months after I recommended that they be dismissed, and without leave of Court, is unavailing.

IT IS FURTHER **ORDERED** that Docket Nos. 215, 216, 217 & 218 are **STRICKEN** pursuant to Fed. R. Civ. P. 12(f).

IT IS FURTHER **ORDERED** that future attempts by Plaintiff to file documents which purport to effect service on the individual Defendants or other nonparties while my Recommendation is pending will be summarily stricken.

Dated: April 22, 2009

BY THE COURT:

s/ Kristen L. Mix  
U.S. Magistrate Judge  
Kristen L. Mix