

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-01094-PAB-KLM

KEVIN D. GUARNEROS, and
SHERRON LEWIS,

Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS,
AURORA LOAN SERVICES, LLC,
KATHERINE E. FISHER Atty # 39230,
LAUREN R. SMITH Atty Reg. # 39316,
CASTLE MEINHOLD & STAWIARSKI, LLC,
STEPHANIE O'MALLEY, and
DIANE BAILEY,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on an Order to Show Cause [Docket No. 58]. Pursuant to 28 U.S.C. § 636(b)(1)(A) and D.C.Colo.LCivR 72.1.C, the matter has been referred to this Court for recommendation.

The Court issued the Order to Show Cause because Defendants Deutsche Bank Trust Company Americas, Stephanie O'Malley and Diane Bailey have not been served with a copy of the Summons and Complaint in this action.¹ The Amended Complaint was filed on November 5, 2008 [Docket No. 14]. Defendants Aurora Loan Services, LLC, Katherine E. Fisher, Lauren R. Smith, and Castle Meinhold & Stawiarski have been dismissed for

¹ The Court does not credit the reliability of the proofs of service filed by the Plaintiffs [Docket No. 40] for the reasons stated in the Court's Recommendation dated June 1, 2009 [Docket No. 59].

insufficiency of service of process [Docket No. 62].

Plaintiffs were ordered to show cause why this Court should not recommend that the case against Defendants Deutsche Bank Trust Company Americas, Stephanie O'Malley and Diane Bailey be dismissed pursuant to Fed. R. Civ. P. 4(m) & 41(b). Plaintiffs were directed to respond to the Order to Show Cause on or before June 15, 2009. Plaintiffs were advised that failure to respond would result in this Court issuing a recommendation to dismiss Plaintiffs' action as to Defendants Deutsche Bank Trust Company Americas, Stephanie O'Malley and Diane Bailey.

Plaintiffs failed to respond to the Order to Show Cause.² Fed. R. Civ. P. 4(m) authorizes the Court to dismiss a party's case for his failure to timely serve a summons and complaint unless the party can show good cause for his failure. In this case, Plaintiffs failed to provide good cause for their failure to timely serve the Defendants. 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 is not inclined to do so here. The case has been pending since May 22, 2008. Plaintiffs have had over a year to effect service. Accordingly,

I **RECOMMEND** that the claims against Defendants Deutsche Bank Trust Company, Americas, Stephanie O'Malley and Diane Bailey be **DISMISSED**, and that this action be dismissed with prejudice.

IT IS **ORDERED** that pursuant to Fed. R. Civ. P. 72, the parties shall have ten (10) days after service of this Recommendation to serve and file any written objections in order

² Court documents mailed to Plaintiff Guarneros at his last known address have been returned as undeliverable since September 2008. Plaintiff Guarneros has not informed the Court of his current address. He is responsible for the fact that the Order to Show Cause was returned to the Court as undeliverable [Docket No. 60].

to obtain reconsideration by the District Judge to whom this case is assigned. A party's failure to serve and file specific, written objections waives *de novo* review of the Recommendation by the district judge, Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996). A party's objections to this Recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Dated: July 8, 2009

BY THE COURT:
s/ Kristen L. Mix
U.S. Magistrate Judge
Kristen L. Mix