

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-00826-LTB-MJW

COREY A. SHIVELY,

Plaintiffs,

v.

MATT ROCK, et al.,

Defendants.

**ORDER TO SHOW CAUSE
and
ORDER RESETTING RULE 16 SCHEDULING/PLANNING CONFERENCE**

MICHAEL J. WATANABE
United States Magistrate Judge

This case is before this court pursuant to an Order of Reference to United States Magistrate Judge issued by Judge Lewis T. Babcock on June 23, 2009. (Docket No. 10).

In an Order Setting Scheduling/Planning Conference filed on July 9, 2009, this court, *inter alia*, set a Rule 16 Scheduling/Planning Conference for September 3, 2009, at 9:00 a.m. in Courtroom A-502, Fifth Floor, Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado. (Docket No. 11). In that Order, plaintiff was directed to notify all parties who have not entered an appearance of the date and time of this conference. In addition, counsel and pro se parties were ordered to hold a pre-scheduling conference meeting and prepare a proposed scheduling order, which was to be submitted no later than five days prior to the Scheduling/Planning Conference. Also, at

least five days prior to the Scheduling/Planning Conference, counsel and pro se parties were to each submit a brief Confidential Settlement Statement to the undersigned. A copy of that Order was mailed to the plaintiff at his address of record. That copy was not returned to the court by the U.S. Postal Service.

Plaintiff appeared over one hour late for that conference. None of the defendants had been served at that time. Consequently, the Rule 16 Conference was reset to November 3, 2009, at 9:00 a.m., and the parties were directed to submit the proposed Scheduling Order and Confidential Settlement Statements on or before October 29, 2009. (Docket No. 14, Courtroom Minutes/Minute Order).

Plaintiff submitted a Proposed Scheduling Order as directed on October 29, 2009 (Docket No. 16), and appeared on November 3, 2009. All of the defendants, however, remain unserved.

Rule 4(m) of the Federal Rules of Civil Procedure provides in relevant part:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must 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 for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

Fed. R. Civ. P. 4(m). Furthermore, Rule 41(b) provides in pertinent part:

If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Fed. R. Civ. P. 41(b).

Based upon the foregoing, it is hereby

ORDERED that on **February 4, 2010, at 8:30 a.m.** in Courtroom A-502, Fifth Floor, Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado, a Show Cause Hearing will be held during which the **plaintiff shall appear in person** and show cause why this case should not be dismissed pursuant to Fed. R. Civ. P. 4(m) and/or 41(b) for failure to serve the defendants and failure to prosecute. It is further

ORDERED that the Rule 16 Scheduling/Planning Conference is reset to **February 4, 2010, at 8:30 a.m.** in Courtroom A-502, Fifth Floor, Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado. The parties shall submit their proposed Scheduling Order and brief Confidential Settlement Statements to the court on or before January 29, 2010. It is further

ORDERED that the plaintiff shall forthwith serve the defendants and shall provide a copy of this Order to each of the defendants or their counsel, if represented.

Dated: November 3, 2009 s/ Michael J. Watanabe
Denver, Colorado Michael J. Watanabe
United States Magistrate Judge