IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WAYLAND DEE KIRKLAND,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**Case No.11-2347-JAR**
	)	
DIANE ZADRA DRAKE, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM AND ORDER

Plaintiff Wayland Dee Kirkland, proceeding *pro se* and *in forma pauperis*, brings this action against present and former employees of the Elizabeth Layton Center ("ELC") alleging a conspiracy to violate his civil rights under 42 U.S.C. § 1983 by depriving him of funds received as part of a grant from Mental Health America of the Heartland ("MHAH"). Plaintiff sued Diane Drake, the director of ELC, and ELC employees Jessica Slocum, Donna Johnson, Robin Burgess, Jennifer Stanley, Zack Cyphers and Kevin Kastler (collectively the "ELC Defendants") involved in the services he received in connection with the grant. Plaintiff's conspiracy claim was dismissed pursuant to the Memorandum and Order issued by this Court on May 23, 2012 (Doc. 60); the Court declined to dismiss Plaintiff's § 1983 claims on a motion pursuant to Fed. R. Civ. P. 12(b)(6) because of inadequate information regarding the structure and function of ELC. This matter is before the Court on Defendants' Motion for Summary Judgment (Doc. 61). Plaintiff has not filed a response and the time to do so has expired.[1] As explained more fully below, the ELC Defendants' motion is granted. Plaintiff is also directed to show cause why this

[1]*See* D. Kan. R. 6.1(d)(2) (requiring a response to a dispositive motion to be filed within 21 days).

action should not be dismissed as to the remaining defendants for failure to obtain service.

I. Summary Judgment Standard

Under D. Kan. Rule 7.4, a "failure to file a brief or response within the time specified . . . shall constitute a waiver of the right thereafter to file such brief or response. . . ."[2] Furthermore, if a "respondent fails to file a response within the time required . . . the motion will be considered and decided as an uncontested motion and ordinarily will be granted without further notice."[3] Nevertheless, "[i]t is improper to grant a motion for summary judgment simply because it is unopposed."[4] This will be the case where the movant fails to make out a prima facie case for summary judgment.[5] It is the role of the court to ascertain whether the moving party has sufficient basis for judgment as a matter of law.[6] In so doing, the court must be certain that no undisclosed factual dispute would undermine the uncontroverted facts.[7]

Summary judgment is appropriate if the moving party "show[s] that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law."[8] A fact is

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[2]D. Kan. R. 7.4.

[3]*Id*.

[4]*Thomas v. Bruce*, 428 F. Supp. 2d 1161, 1163 (D. Kan. 2006) (quoting *E.E.O.C. v. Lady Baltimore Foods, Inc.*, 643 F. Supp. 406, 407 (D. Kan. 1986) (citing *Hibernia Nat'l Bank v. Administracion Ctl. Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985))). The Court notes, however, that failing to file a timely response to a motion for summary judgment still waives the right to thereafter respond or otherwise controvert the facts alleged in the motion. D. Kan. R. 7.4.

[5]*Id*. (citations omitted).

[6]*Id*. (citing *Lady Baltimore Foods*, 643 F. Supp. at 407).

[7]*Id*.

[8]Fed. R. Civ. P. 56(a).

can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[31] Under the joint action test, state action exists if a private party willfully participates in joint action with the state by acting in concert to effect a deprivation of constitutional rights.[32] Last, under the symbiotic relationship test, a private party may be considered a state actor "if the state 'has so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.'"[33] This last test has been read narrowly, and requires more than "extensive state regulation, the receipt of substantial state funds, and the performance of important public functions."[34]

The Supreme Court supplemented and clarified that these tests are entwined in the sense that all four "are, for all intents and purposes, tools for factual analysis that 'bear on the fairness of . . . an attribution [of state action].'"[35] Under *Brentwood*, courts are to "apply the tests only so far as they force courts to zero in on the fact-intensive character of a state action determination."[36]

The ELC Defendants argue that providing services described by Plaintiff, such as assisting mental health grant recipients with their funds from agencies like MHAH, does not

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[31]*Id*. (quotations omitted).

[32]*Id*. (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

[33]*Id*. (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

[34]*Id*. (quotation omitted).

[35]*Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc*., 531 U.S. 288, 296 (2001).

[36]*Id.*

make an organization a state actor, citing *Dow v. Terramara, Inc.*[37] In that case, a non-profit organization contracted with three counties to provide facilities and services for mentally handicapped adults.[38] The court held that although the non-profit organization "performs a public function, it cannot be said that providing services and housing to mentally handicapped adults has been 'traditionally the *exclusive* prerogative of the State.'"[39] Thus, the court held the non-profit organization in *Dow* was not a state actor under the public function test. The court further held that simply because the organization in *Dow* was subject to extensive state regulation "does not make . . . the defendants state actors unless the regulation compelled or influenced" the action that resulted in the alleged violation of the plaintiff's rights.[40] ELC Defendants argue that because they perform similar functions to those in *Dow*, they likewise do not exercise powers traditionally and exclusively reserved to the State and are thus not public actors. Moreover, because Plaintiff does not allege any facts suggesting that state regulations governing the ELC Defendants compelled or influenced their actions in any way, the public function test does not demonstrate state action.

Judge Lungstrum addressed the issue of whether an entity similar to ELC was a state actor for §1983 liability purposes in *Rosewood Services, Inc. v. Sunflower Diversified Services, Inc.*,[41] explaining that in 1995 the Kansas legislature enacted the Developmental Disabilities Reform Act ("the DD Reform Act"), which provided that any community mental disability

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[37]835 F. Supp. 1299, 1303 (D. Kan. 1993).

[38]*Id*. at1303.

[39]*Id*. (emphasis in the original).

[40]*Id*.

[41]No. 02-2140-JWL, 2003 WL 22090897 (D. Kan. Sept. 8, 2003).

facility would become the new community developmental disability organization ("CDDO") for its existing service area and, by virtue of its designation as a CDDO, would be imbued with certain statutory authorities and responsibilities, including disbursing funds.[42] In denying summary judgment, the court held that there was a material issue of fact regarding whether the non-profit organization and its director engaged in conduct that can fairly be attributed to the state and county governments because the organization administered components of the developmental disabilities program, which serves a public purpose, and SRS and county governments remained entwined in the organization's administration of that program.[43] In so ruling, the court noted that although *Dow* involved a similar entity, that case was decided in 1993, before the DD Reform Act that created the CDDO structure was enacted.

The Court concludes that ELC is more like Terramara in *Dow* than the state actor Sunflower in *Rosewood*. ELC is not a CDDO, but rather, a CMHC. As ELC Defendants point out, although formed under the same statute, the organizations are distinct. K.S.A. § 19-4001 states "the board of county commissioners of any county or the boards of county commissioners of two (2) or more counties jointly may establish a community mental health center, and/or community facility for the mentally retarded." In creating CDDO's, the DD Reform Act defines CDDO's as "any community facility for people with intellectual disability that is organized pursuant to K.S.A. 19-4001 through 19-4015 and amendments thereto."[44] ELC is not designated as a facility for people with an intellectual disability, but a community health center, so it cannot

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[42]*Id*. at *1 (citing K.S.A. §§ 39-1801 to -1811).

[43]*Id*. at *20 (citing *Brentwood*, 531 U.S. at 296).

[44]K.S.A. § 39-1803(d). The statute was amended effective July 1, 2012, to reflect State policy to use "intellectual disability" in place of "mental retardation."

be a CDDO. Moreover, by statute, a county can only have one CDDO.[45] The designated CDDOs for Miami and Franklin Counties are Tri-Ko, Inc. and COF Training Services, Inc., respectively, and ELC is not a CDDO for any county.

In addition, ELC does not exhibit any of the qualities of a CDDO that would suggest state action, nor is it entwined with state or local government. ELC's board is self-selected and not appointed by the county commission. ELC does not control whether other organizations receive state funds or how they are used, nor does it control how the Blaylock grant funds that Plaintiff received are disbursed. Instead, MHAH is solely responsible for determining who receives the grant and what restrictions and requirements are placed on how the funds are spent. And, although ELC has a contract with SRS, ELC is merely a regulated entity that receives government funding. As the court noted in *Dow*, "state regulation . . . does not make Terramara and the other defendants state actors unless the regulation compelled or influenced the decision."[46] There is nothing in the record that shows state regulation compelled or influenced the interactions of which Plaintiff complains. Accordingly, the Court concludes that ELC is not a state actor and consequently, its employees are not subject to liability under § 1983 as they are not persons acting under the color of state law.

B. Failure to Obtain Service

Fed. R. Civ. P. 4(m) states,

> 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.

[45]K.S.A. § 19-4001.

[46]*Dow*, 835 F. Supp. at 1303.

> But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

On December 19, 2011, Plaintiff was granted additional time to obtain service on Defendants Whitmore and Coffman within 45 days of the date of the Order, or February 2, 2012, and was further ordered to provide the Clerk's Office with the current location and address for Defendants or obtain summons from the Clerk's Office with the updated addresses and return for service within twenty (20) days of the date of the Order.[47] To date, neither Defendant has been served.

Plaintiff is hereby required to show good cause in writing to this Court on or before **October 5, 2012**, why service of summons and complaint was not made in this case upon Defendants Jason Whitmore and Colt Coffman by February 2, 2012, and shall further show good cause in writing to this Court why this action should not be dismissed as to those Defendants in its entirety without prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the ELC Defendants' Motion for Summary Judgment (Doc. 61) is GRANTED;

IT IS FURTHER ORDERED that Plaintiff is ordered to show good cause in writing to this Court on or before **October 5, 2012**, why service of summons and complaint was not made in this case upon Defendants Jason Whitmore and Colt Coffman by February 2, 2012, and shall further show good cause in writing to this Court why this action should not be dismissed as to those Defendants in its entirety without prejudice. The failure to file a timely response may result in the Complaint being summarily dismissed without further prior notice to Plaintiff.

IT IS SO ORDERED.

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[47]Doc. 38.

Dated: September 18, 2012

S/ Julie A. Robinson

JULIE A. ROBINSON

UNITED STATES DISTRICT JUDGE