

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGENE F. MCNETT,

Plaintiff,

v.

VA MEDICAL CENTER,

Defendant.

CIVIL ACTION NO. 08-10674

DISTRICT JUDGE MARIANNE O. BATTANI

MAGISTRATE JUDGE DONALD A. SCHEER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: This tort action against a federal agency should be DISMISSED for want of prosecution.

* * *

This matter is before the magistrate judge on Order of Reference for all pretrial matters. The Complaint, filed on February 15, 2008, asserts a tort claim against an agency of the United States. The Complaint reflects that Plaintiff's administrative tort claim was denied in its entirety on March 7, 2007. Pursuant to the terms of the Federal Tort Claims Act (FTCA), a tort claim against the United States is barred unless an action is begun within six (6) months after the date of mailing, by certified or registered mail, of Notice of Final Denial of the claim by the agency to which it is presented. 28 U.S.C. §2401(b). The Complaint in this action was not filed until February 15, 2008. Based upon Plaintiff's allegations, his claim appears to be untimely.

Moreover, 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. Fed.R.Civ.P. 4(m). The defendant remain unserved more than 120 days after this case was filed on February 15, 2008.

On June 25, 2008, Plaintiff was ordered to Show Cause in writing within thirty (30) days: (1) why his Complaint should not be dismissed pursuant to Fed.R.Civ.P. 4(m) for failure to service Summons and Complaint in accordance with Fed.R.Civ.P. 4(l); and (2) why his Complaint should not be dismissed as untimely for failure to file this action within six (6) months of the denial of his administrative claim, as required by 28 U.S.C. §2401(b)(Docket #7). Plaintiff has not filed a response to the show cause order.

Plaintiff bears the burdens of asserting a timely, comprehensible claim for relief, 8(a), and providing the court with information necessary to effect service of the Complaint and summons on each defendant. See Byrd v. Stone, 94 F.3d 217, 219 (6th Cir. 1996). Plaintiff has not satisfied those burdens. The defendants remain unserved more than 120 days after this case was filed on February 15, 2008. Pursuant to Fed.R.Civ.P. Rule 4(m), this action should be dismissed for want of prosecution.

Any objections to this Report and Recommendation must be filed with the Court within ten (10) days after it is served, or further appeal from Judge Battani's acceptance thereof is waived.

s/Donald A. Scheer
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: September 4, 2008

CERTIFICATE OF SERVICE

I hereby certify on September 4, 2008 that I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this paper was mailed to the following non-registered ECF participants on September 4, 2008. **Eugene McNett**.

s/Michael E. Lang
Deputy Clerk to
Magistrate Judge Donald A. Scheer
(313) 234-5217