UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLTON WALKER,

Plaintiff,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTION AND COMMUNITY SUPERVISION, *ET AL.*,

Defendants.

No. 18-cv-6082 (NSR)

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff Carlton Walker initiated this matter against above named Defendants for recovery under 42 U.S.C. § 1983 for Defendants' alleged constitutional violations.[1] ("Complaint" ECF No. 3.) On February 13, 2019, the Court issued an Order of Service, directing Plaintiff to serve Defendants within ninety days. (ECF No. 2.) Currently before the Court is Plaintiff's Federal Rules of Civil Procedure Rule 4(c)(3) motion for an order instructing the Marshals to effectuate service on Plaintiff's behalf. (ECF No. 17.) For the reasons stated below, the motion is GRANTED.

Before deciding whether an order of service by Marshal is appropriate, the Court must first decide whether to grant Plaintiff an extension of time to effectuate service because more than ninety days passed between the filing of the Order of Service on February 13, 2019 and Plaintiff's motion filed on May 15, 2019. Federal Rules of Civil Procedure Rule 4(m) provides in relevant part:

[1] Initially, this matter was part of an action brought with other plaintiffs. The Court severed the action into separate actions by an order issued on June 19, 2018. (ECF No. 1.)

> If a defendant is not served within 90 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.

Fed. R. Civ. P. 4(m). A district court may, in its discretion, grant an extension even in the absence of good cause. Zapata v. City of New York, 502 F.3d 192, 196 (2d Cir. 2007). Further, the Second Circuit has consistently held that Rule 4 should be construed liberally and that "incomplete or improper service will lead the court to dismiss the action unless it appears that proper service may still be obtained." Romandette v. Weetabix Co., Inc., 807 F.2d 309, 311 (2d Cir. 1986). In its discretion, the Court grants Plaintiff an extension of time to effectuate service.

The Court also orders the Marshals to effectuate service. Had Plaintiff been granted permission to proceed in forma pauperis ("IFP"), the Marshals would have served Defendants on his behalf. 28 U.S.C. § 1915(d). However, Plaintiff was denied IFP status pursuant to the statute's three-strikes' rule. (ECF No. 14.) That rule "bars prisoners from proceeding IFP if they have a history of filing frivolous or malicious lawsuits, with an exception provided for a prisoner who is in imminent danger of serious physical injury." Akassy v. Hardy, 887 F.3d 91, 93 (2d Cir. 2018) (quoting Pettus v. Morgenthau, 554 F.3d 293, 296 (2d Cir. 2009)) (internal quotation mark omitted). The three-strikes rule is as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Plaintiff has filed at least three frivolous or malicious lawsuits. See Walker v. Cuomo, No. 17-CV-0650, 2017 WL 3475061, at *1 – 2 (N.D.N.Y. Aug. 11, 2017) (denying Plaintiff IFP status due to the three-strikes rule and identifying seven cases dismissed against Plaintiff as frivolous). He has also failed to allege any facts showing that he is in imminent danger of serious physical injury. Therefore, the Court properly denied him the benefit of IFP status, which would include service by the Marshals.

The Court is only required to order service by a Marshall under Rule 4(c)(3) if the plaintiff is authorized to proceed IFP or as a seaman. Fed. R. Civ. P. 4(c)(3). As Plaintiff has been granted neither IFP nor seaman status, the Court may, but is not required to, order that service be made by a Marshal or by another person specially appointed by the court.[2] Considering that Plaintiff is currently incarcerated and that it is therefore difficult for Plaintiff to effectuate service himself, the Court in its discretion grants Plaintiff's Rule 4(c)(3) motion. See Flemming v. Moulton, No. 13-CV-1324(MAD)(DJS), 2016 WL 11478226, at *1, 3 n.1 (N.D.N.Y. May 5, 2016) (granting a plaintiff's Rule 4(c)(3) motion even though the plaintiff's IFP application had been denied pursuant to 28 U.S.C. § 1915(g)).

Plaintiff is advised that before the Marshals will undertake service on his behalf, he must provide the service fee in full in advance of service by money order or certified check. Plaintiff is responsible for keeping track of the deadline for service.

[2] See Koger v. Bryan, 523 F. 3d 789, 803 (7th Cir. 2008) (holding that a plaintiff's payment of a filing fee alone, meaning that the plaintiff is not proceeding with IFP status, is not sufficient reason to deny her Rule 4(c)(3) request).

The Clerk of the Court is directed to terminate the motion at ECF No. 17, mail a copy of this Opinion to Plaintiff at his address on the docket, and show proof of service on the docket.

Dated: May 29, 2019
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge