

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BLAKE BEST,
Plaintiff,

v.

MOBILE STREAMS, INC., *et al.*,
Defendants.

Case No. 1:12-cv-564

Barrett, J.
Litkovitz, M.J.

**ORDER AND REPORT
AND RECOMMENDATION**

On December 17, 2013, this Court ordered plaintiff to show cause why his claims against defendants Mobile Streams, PLC, Christian Kwok-Leun Yau Heilesen, and John Does 1-50 should not be dismissed for failure of timely service. (Doc. 129). This matter is before the Court on plaintiff's response to the Show Cause Order (Doc. 130) and on plaintiff's motion to join parties as defendants. (Doc. 121).

Plaintiff initiated this pro se action on August 16, 2013, bringing copyright infringement claims against Mobile Streams, Inc., Mobile Streams, PLC, Mobilefunster Inc., Funmobile Ltd. and John Does 1-8. (Doc. 6). Mobile Streams, Inc., Mobilefunster Inc., and Funmobile Ltd. were eventually served and these entities filed responsive pleadings. *See* Docs. 24, 28, 41, 57, 58, 59. Plaintiff filed an amended complaint on November 30, 2012, naming Christian Kwok-Leun Yau Heilesen (Heilesen) as an additional defendant. (Doc. 46). As of the date of filing his amended complaint, plaintiff had not yet successfully served defendant Mobile Streams, PLC. *See* Doc. 30 (noting that Mobile Streams, PLC was a foreign entity and could not be served via U.S. mail). On December 18, 2012, a summons for Mobile Streams, PLC was re-issued (Doc. 63) and plaintiff attempted to serve this entity with the assistance of the Ohio Secretary of State. *See* Doc. 65). This summons, issued to Mobile Streams, PLC at Abacus House 33 Gutter Lane, London, EC2V 8AR, United Kingdom, was returned unexecuted on January 23, 2013, with a

notation that the company name was not known. (Doc. 87). Review of the record reflects that plaintiff has made no effort since December 2012 to effect service on defendant Mobile Streams, PLC.

With respect to defendant Heilesen, an initial summons was issued on December 20, 2012, listing a Delaware address. (Doc. 67). On December 28, 2012, the certified mail voucher accompanying the summons to defendant Heilesen was returned executed by a Salli Saunders. (Doc. 77). However, to date, no attorney has appeared on behalf of defendant Heilesen and plaintiff has not sought default judgment against this individual. On March 12, 2013, plaintiff filed a second amended complaint adding defendants John Does 1-50. (Doc. 94). Plaintiff alleged in his second amended complaint that defendant Heilesen resided in Hong Kong; thus, it appears that the summons received by Salli Saunders in Delaware (Doc. 77) was not served on defendant Heilesen. There is no evidence in the record reflecting any attempts to serve defendant Heilesen at his Hong Kong address.

In response to the December 17, 2013 show cause order, plaintiff asserts that both Mobile Streams, PLC and defendant Heilesen were served. (Doc. 130). As for Mobile Streams, PLC, plaintiff maintains that his application to the Ohio Secretary of State seeking their assistance in serving this entity suffices as proof of service. (Doc. 130, citing Doc. 72). However, plaintiff does not address the fact that the summons issued to Mobile Streams, PLC in the United Kingdom was returned unexecuted. *See* Doc. 87.

As for defendant Heilesen, plaintiff maintains that the executed summons signed by Salli Saunders suffices as proof of service. (Doc. 130 at 5). For the following reasons, the Court finds that plaintiff has failed to show good cause for his failure to timely serve Mobile Streams, PLC and Heilsen and recommends that his claims against them be dismissed.

Federal Rule of Civil Procedure 4(m) provides that where a plaintiff fails to serve a defendant within 120 days of filing the complaint, the court – on its own after plaintiff has received notice or on motion – must dismiss the claims against the unserved defendant unless plaintiff shows good cause for the failure to timely serve. Fed. R. Civ. P. 4(m). Courts have discretion in determining whether to provide an extension of time for service in the absence of a showing of “good cause.” *Henderson v. U.S.*, 517 U.S. 654, 662 (1996) (citing Advisory Committee's Notes on Fed. R. Civ. P. 4(m) (1993)). *See also Wise v. Dept. of Defense*, 196 F.R.D. 52, 56 (S.D. Ohio 1999) (“[T]his Court concludes that it may, in its discretion, extend the 120-day period for [plaintiffs] to effect service on the [d]efendants, pursuant to the first clause of Rule 4(m), even absent a showing of good cause.”). Where, as here, the plaintiff is proceeding pro se and *in forma pauperis*, “the court is obligated to issue plaintiff’s process to a United States Marshal who must in turn effectuate service upon the defendants, thereby relieving a plaintiff of the burden to serve process once reasonable steps have been taken to identify for the court the defendants named in the complaint.” *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996). In light of plaintiff’s lessened burden, the pertinent inquiry is whether plaintiff has taken “reasonable steps” to identify the defendants for the Court to facilitate service.

As discussed above, plaintiff has taken no action since December 18, 2012, to identify a proper address at which to serve defendant Mobile Streams, PLC. The record demonstrates that there is no known entity by the name of Mobile Streams, PLC at the United Kingdom address identified by plaintiff. *See* Doc. 87. As plaintiff has made no effort in over a year to locate a proper address for defendant Mobile Streams, PLC to allow the Court to facilitate service, the undersigned finds that he has failed to show good cause for not serving this defendant within the time period allotted by Rule 4(m).


Likewise, plaintiff has made no demonstrative effort to assist the Court in serving defendant Heilesen. Plaintiff instead submits that service upon Ms. Salli Saunders in Delaware is sufficient under the Federal Rules despite listing a Hong Kong address for defendant Heilesen. *See* Doc. 130 at 5. Plaintiff has submitted no evidence supporting his assertion that Ms. Saunders is an agent of defendant Heilesen such that this service was proper under Fed. R. Civ. P. 4(m). Further, plaintiff has offered no explanation for his failure to otherwise attempt to serve defendant Heilesen in Hong Kong. Accordingly, the undersigned recommends that plaintiff's claims against defendants Mobile Streams, PLC and defendant Heilesen be dismissed for failure of timely service under Fed. R. Civ. P. 4(m).

Regarding the John Doe defendants, plaintiff has a pending motion to join John Does 1 and 2, whom he now identifies as AT&T, Inc. and AT&T Mobility (collectively referred to as AT&T). (Doc. 130 at 1, citing Doc. 121). Plaintiff filed his proposed third amended complaint in conjunction with this motion. *See* Doc. 121, Ex. A. Plaintiff alleges that AT&T introduced plaintiff to the Mobile Streams defendants and are liable for damages because they were made aware that Mobile Streams was infringing upon plaintiff's copyrights and because they received financial benefit from said infringement. (Doc. 121, Ex. A at 11). Plaintiff further alleges that AT&T in connection with the other defendants have reaped significant financial rewards from the unlawful sales of plaintiff's copyrighted material. (*Id.* at 19). As for the remaining John Doe defendants, John Does 3-50, plaintiff contends that these individuals may later be identified in the course of discovery. (Doc. 130 at 1-2). Given the significant factual allegations regarding AT&T's involvement in the purported infringement of plaintiff's copyrights and in the absence of any opposition, plaintiff's motion to join the AT&T defendants (Doc. 121) is **GRANTED**.

In Conclusion, **IT IS HEREBY RECOMMENDED THAT** plaintiff's claims against defendants Mobile Streams, PLC and Christian Kwok-Leun Yau Heilesen be **DISMISSED** for failure to show good cause for not timely serving these defendants as required by Federal Rule of Civil Procedure 4(m).

Further, it is **ORDERED** that plaintiff's motion to substitute AT&T, Inc. and AT&T Mobility in place of John Does 1 and 2 (Doc. 121) is **GRANTED**. Given plaintiff's representations that the identities of John Does 3-50 will be discovered in the course of this litigation, plaintiff's claims against these individuals may proceed at this time. However, in light of the above recommendation that defendants Mobile Streams, PLC and Christian Kwok-Leun Yau Heilesen be dismissed from this action and the Court's earlier recommendations that default judgment be entered against defendants Mobilefunster, Inc., Funmobile Ltd., and Mobile Streams, Inc. (Docs. 133, 134), plaintiff's third amended complaint shall proceed against the AT&T defendants only. Plaintiff is **ORDERED** to submit a revised third amended complaint reflecting these changes and listing only the AT&T entities as defendants within **thirty (30) days** of the entry of this Order. Before the Court may order service of process of the revised third amended complaint on the newly named AT&T defendants, plaintiff must provide a copy of his revised third amended complaint, a summons form, and a United States Marshall form for each of the AT&T defendants named in the third amended complaint. Plaintiff shall submit these documents upon the filing of the amended third amended complaint. Upon receipt of these documents, the Court shall order service of process on the new defendants.

Date: 1/10/14


Karen L. Litkovitz
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BLAKE BEST,
Plaintiff,

Case No. 1:12-cv-564

v.

Barrett, J.
Litkovitz, M.J.

MOBILE STREAMS, INC., *et al.*,
Defendants.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Blake Best
5392 Northbend Rd.
Cinti, OH 45247

2. Article Number
(Transfer from service label)

7011 3500 0001 5345 9886

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

- Agent
 Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type

- Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mobile Streams, Inc.
247 W. 36th St., 301
New York, NY 10018

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
X Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label)

7011 3500 0001 5345 9893