

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM A. CLUMM,

Plaintiff,

vs.

Civil Action 2:08-CV-366
Judge Smith
Magistrate Judge King

JANNA MANES, et al.,

Defendants.

WILLIAM A. CLUMM,

Plaintiff,

vs.

Civil Action 2:08-CV-567
Judge Smith
Magistrate Judge King

JANNA MANES, et al.,

Defendants.

ORDER and
REPORT AND RECOMMENDATION

Plaintiff, a state prisoner, filed these two civil actions without prepayment of fees or costs. The cases were thereafter ordered consolidated. This matter is now before the Court on the motions filed by the parties in the two cases.

The *Amended Complaint* filed on April 29, 2008, in C-2-08-366, Doc. No. 6, names as defendants two residents of New York: plaintiff's step-daughter and the New York law firm in which she is a partner. Plaintiff alleges that defendants defamed plaintiff and provided or procured false testimony in connection with the decision of the Ohio Adult Parole Authority to rescind plaintiff's parole. The *Amended*

Complaint expressly invokes only the Court's diversity jurisdiction, 28 U.S.C. §1932, asserts only claims under Ohio law and seeks monetary damages.

The *Complaint* filed on October 22, 2008, in C-2-08-567, Doc. No. 8, is substantively identical to the *Amended Complaint* in C-2-08-366, except that, in addition to the two defendants named in C-2-08-366, plaintiff also includes as a defendant an individual referred to only by a first and middle name and whose address is an unspecified location in West Virginia.

On October 22, 2008, the Court issued an order in both cases.¹ In C-2-08-366, the Court, *inter alia*, performed the initial screen of the *Amended Complaint* required by 28 U.S.C. §1915(e) and directed the United States Marshal Service to effect service of process on defendants in that case upon plaintiff's submission of a Marshal service form, a summons and a copy of the *Amended Complaint* for each defendant. *Order*, Doc. No. 13, C-2-08-366. In C-2-08-567, the Court granted plaintiff's motion for leave under 28 U.S.C. §1915(a) to proceed *in forma pauperis* and indicated that the Court would enter an order directing service of process after conducting an initial screen of the *Complaint*. *Order*, Doc. No. 7, C-2-08-567. The Court has not yet conducted that initial screen of the *Complaint* in C-2-08-567, but will do so *infra*.

Thereafter, in C-2-08-366, the record reflects the filing of a second amended complaint. *Second Amended Complaint*, Doc. No. 22. The Court, acting *sua sponte*, ordered that pleading stricken because it had not been authorized by the Court or agreed to by defendants. *Order*, Doc. No. 23. See F.R. Civ. P. 15(a)(2). On December 1, 2008, plaintiff filed

¹On that same date, the Court also ordered the consolidation of the two cases. *Order*, Doc. No. 14, C-2-08-366; *Order*, Doc. No. 9, C-2-08-567.

a praecipe directing the Clerk to serve that same pleading on the defendants. *Praecipe*, Doc. No. 25. The Court ordered that the Clerk not serve that pleading as directed by plaintiff. *Order*, Doc. No. 26. Finally, plaintiff provided the documentation necessary for service of process by the United States Marshal Service and the docket reflects that service of process was executed on the two defendants named in C-2-08-366 on January 12, 2009. *Summons Returned Executed*, Doc. No. 30.

Plaintiff's Rule 60 Motion

Plaintiff has filed a motion invoking F.R. Civ. P. 60 and asking that the Court correct the Clerk's "clerical mistake" regarding the submission of the *Second Amended Complaint* in C-2-08-366 and that "any and all judgments" relating to that filing be declared "null." Doc. No. 28, C-2-08-366; Doc. No. 17, C-2-08-567. Underlying this motion is plaintiff's assertion that he never intended to file a second amended complaint and that the submission reflected efforts on his part to effect service of process as authorized by the Court's October 22, 2008, *Order*.

Plaintiff's Rule 60 motion is without merit. The document submitted by plaintiff to the Clerk and reflected on the docket as Doc. No. 22 was not a duplicate of the *Amended Complaint* because the subsequent filing included an affidavit not attached to the *Amended Complaint*.² The Clerk did not act unreasonably in receiving plaintiff's submission as a second amended complaint. Plaintiff's Rule 60 motion, Doc. No. 28, C-2-08-366; Doc. No. 17, C-2-08-567, is therefore **DENIED**.

²The affidavit appears to be a duplicate of the affidavit attached to the original complaint which was, of course, superseded by the filing of the *Amended Complaint*.

Defendants' Motion to Dismiss

Defendants Manes and Stroock, Stroock & Lavan, LLP, have filed motions to dismiss the action for failure to timely effect service of process. Doc. Nos. 11, 12, 31, 32, C-2-08-366; Doc. Nos. 5, 6, 18, 19, 20, C-2-08-567. Rule 4(m) of the Federal Rules of Civil Procedure requires the dismissal, without prejudice, of all claims against any defendant not served "within 120 days after the complaint is filed." The rule also requires that the court extend the time for service "if the plaintiff shows good cause for the failure." *Id.* Because service of process was not completed within 120 days after the *Complaint* was filed, *i.e.*, on April 23, 2008, in C-2-08-366 and on October 22, 2008, in C-2-08-567, the moving defendants ask that the claims against them be dismissed.

The requirements and sanctions set out in Rule 4(m) must be read in conjunction with Rule 4(c)(3), which requires that, where the plaintiff is proceeding *in forma pauperis*, the Court must order that service of process be made by the United States Marshal or by a person specially appointed by the court. *Id.* In C-2-08-366, the Court issued such an order on October 22, 2008, *Order*, Doc. No. 13, and plaintiff acted expeditiously thereafter to effect service of process, which was in fact completed within 120 days after that date. In C-2-08-567, the Court, as previously noted, has not yet performed the initial screen of the *Complaint* pursuant to 28 U.S.C. §1915(e) and has expressly withheld authorization of service of process. *See Order*, Doc. No. 7, C-2-08-567. Plaintiff cannot be held accountable for that delay.

Under these circumstances, it is **RECOMMENDED** that the motions to dismiss be **DENIED**.

Plaintiff's Motion to Strike

Plaintiff moved to strike any response made by defendants to a motion for default judgment, arguing that he has not filed a motion for default judgment. *Motion to Strike*, Doc. No. 18, C-2-08-366, Doc. No. 11, C-2-08-567. Plaintiff did, however, file a document captioned *Notice of Motion for Default Judgment*. Doc. No. 7, C-2-08-366. The responses made by the defendants, which included these defendants' motions to dismiss, were therefore not improper. Plaintiff's motion to strike is therefore **DENIED**.

INITIAL SCREEN OF COMPLAINT IN C-2-08-567

Having now performed the initial screen of the *Complaint* in C-2-08-567, see 28 U.S.C. §1915(e), the Court concludes that the action may go forward on plaintiff's state law claims. Plaintiff is **ORDERED** to promptly provide a copy of the *Complaint* in that action, a summons and a Marshal service form for each of the three named defendants. The United States Marshal Service is **DIRECTED** to effect service of process on those defendants, who shall have forty-five (45) days after service of process to respond to the *Complaint* in C-2-08-567.

WHEREUPON Plaintiff's *Motion under Rule 60*, Doc. No. 28, C-2-08-366; Doc. No. 17, C-2-08-567, is **DENIED**.

Plaintiff's *Motion to Strike*, Doc. No. 18, C-2-08-366; Doc. No. 11, C-2-08-567, is **DENIED**.

It is **ORDERED** that the *Complaint* in C-2-08-567 proceed on plaintiff's state law claims. The United States Marshal Service is **DIRECTED** to effect service of process on each of the defendants named in that action, upon submission by plaintiff of the appropriate service documents. The defendants in that action may have forty-five (45) days

after service to respond to the *Complaint*.

It is **RECOMMENDED** that the motions to dismiss filed by defendants Manes and Stroock, Stroock & Lavan, LLP, Doc. Nos. 11, 12, 31, 32, C-2-08-366; Doc. Nos. 5, 6, 18, 19, 20, C-2-08-567, be **DENIED**.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within ten (10) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

June 25, 2009

s/Norah McCann King
Norah M^cCann King
United States Magistrate Judge