

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

RICHARD E. ENYART, JR.,

Plaintiff,

vs.

Civil Action 2:09-CV-687
Judge Smith
Magistrate Judge King

SHERIFF JIM KARNES, et al.,

Defendants.

ORDER and
REPORT AND RECOMMENDATION

Plaintiff, a state inmate proceeding without the assistance of counsel, brings this action under 42 U.S.C. § 1983, alleging that he was not protected from attack by other inmates and was denied dental care in contravention of his right to due process while detained in the Franklin County jail. This matter is before the Court on several pending motions.

I. BACKGROUND

Plaintiff initiated this action on August 6, 2009, by the filing of the original *Complaint*, which named as defendants Sheriff Jim Karnes and two "John Does." *Complaint*, Doc. No. 2. Thereafter, plaintiff moved for leave to amend, seeking to identify Deputy Dan Waldren as the "John Doe 1" referred to in the *Complaint*. Doc. No. 10. Because no answer had yet been filed, plaintiff's motion was granted. *Order*, Doc. No. 13. Plaintiff did not thereafter actually file an amended complaint asserting claims against Deputy Waldren; however, his motion for leave to amend, Doc. No. 10, specifically stated that he intended that paragraphs in the original *Complaint*

relating to defendant "John Doe 1" be asserted against defendant Waldren. *Id.*

On November 3, 2009, plaintiff filed a second motion for leave to amend the *Complaint*, seeking to add "Franklin County" as a party defendant. Doc. No. 16. The Court granted that motion as unopposed. *Order*, Doc. No. 25. Again, plaintiff did not file an actual amended complaint identifying Franklin County as a defendant. However, in his motion, Doc. No. 16, plaintiff noted that he had identified Franklin County in the *Complaint's* caption, but had neglected to specifically identify it as a party defendant in the text of the *Complaint*.

The docket reflects that Franklin County was served by the United States Marshal Service with a copy of the original *Complaint*, a summons and a copy of the order granting leave to join it as a defendant on March 16, 2010. *See Clerk's Notation of March 4, 2010*; Doc. No. 40. Deputy Waldren was served by the United States Marshal Service with a copy of the original *Complaint*, a summons and a copy of the order granting leave to join him as a defendant on March 31, 2010. *See Clerk's Notation of February 25, 2010*; Doc. No. 41. However, no answer or other response on behalf of these defendants has been filed.

Thereafter, plaintiff filed a third motion for leave to amend the complaint, seeking to add as defendants four additional individuals. Doc. No. 42. Notwithstanding defendant Karnes's opposition to this motion, Doc. No. 47, plaintiff filed, without leave of Court, an amended complaint effecting these additions. *Amended Complaint*, Doc. No. 57.

Through a series of motions pending before this Court, the parties address, *inter alia*, whether plaintiff's original *Complaint*

was ever properly amended and whether plaintiff should be permitted to join the four additional defendants; indeed, the parties disagree on the identities of the defendants actually joined in the action. These matters are addressed *infra*.

II. *Motion for Leave to File an Amended Complaint, Doc. No. 42, and Motion to Strike Plaintiff's Amended Complaint Filed August 16, 2010, Doc. No. 60*

The record in this action is unclear whether Deputy Waldren and Franklin County have been properly joined as defendants. Although plaintiff did not file an actual amended complaint after having been granted leave to join these persons, the Court observes that plaintiff's motions for leave to amend made clear that plaintiff intended to name these persons as defendants to the allegations asserted in the original *Complaint*. Under the particular circumstances of this case and construing plaintiff's filings liberally, see *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), the Court concludes that Deputy Waldren and Franklin County are proper defendants to this litigation.

The Court now considers whether plaintiff's third and most recent motion for leave to amend, Doc. No. 42, should be granted. Plaintiff seeks to add as defendants four additional individuals: Deputy Daniel Thacker, Corporal Mandy Miller, Nurse Kathy Hartlaub and Chief Deputy Mark J. Barrett. *Id.* Defendant Karnes opposes plaintiff's motion. Doc. No. 47. See also *Motion to Strike Plaintiff's Amended Complaint Filed August 16, 2010, Doc. No. 60*.

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "[T]he thrust of Rule 15 is to

reinforce the principle that cases 'should be tried on their merits rather than the technicalities of pleadings.'" *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)). However, a court "may deny a plaintiff leave to amend his or her complaint. . . when the proposed amendment would be futile." *Kottmyer v. Maas*, 436 F.3d 684, 692 (6th Cir. 2006). "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (citing *Thiokol Corp. v. Department of Treasury, Revenue Div.*, 987 F.2d 376, 382-83 (6th Cir. 1993)).

Plaintiff explains that Deputy Daniel Thacker is the "John Doe 2" identified in several paragraphs in the original *Complaint*. Doc. No. 68, p. 6. After reviewing these allegations, the Court cannot say that a claim against Deputy Daniel Thacker would not survive a motion to dismiss. Therefore, plaintiff's claim against Deputy Daniel Thacker may proceed.

Plaintiff also seeks to join Corporal Mandy Miller as the "female officer" referenced in paragraph 13 of the original *Complaint*. Doc. No. 68, p. 6; *Complaint*. That paragraph alleges that the "female officer in the infirmary" conditioned plaintiff's request for protective custody on his release of liability, which plaintiff characterizes as a "coercive tactic." *Complaint*, ¶13. At this juncture, the Court cannot conclude that the proposed amendment in this regard would be futile. Therefore, plaintiff will be permitted to amend the *Complaint* to join Corporal Mandy Miller as a defendant.

However, plaintiff does not assert any allegation of wrongdoing

by proposed defendant Nurse Kathy Hartlaub, whom plaintiff identifies as the nurse who first treated plaintiff after the alleged assault. The original *Complaint* makes no reference to such an individual and neither plaintiff's motion for leave to amend nor plaintiff's *Amended Complaint*, Doc. No. 57, even suggests a colorable claim against Nurse Kathy Hartlaub. Therefore, an amendment to assert a claim against Nurse Kathy Hartlaub would be futile; plaintiff's request to add her as a defendant is denied.

Finally, plaintiff seeks to add Chief Deputy Mark J. Barrett as a defendant, but does not allege that Deputy Barrett was personally involved in any of the events giving rise to this litigation. Doc. No. 68, p. 6. Instead, plaintiff seeks to add Deputy Barrett because he "was discovered to be in charge of the day to day operations at" Franklin County Corrections Center. *Id.* See also *Amended Complaint*. However, "[b]ecause § 1983 liability cannot be imposed under a theory of *respondeat superior*, proof of personal involvement is required for a supervisor to incur personal liability." *Grinter v. Knight*, 532 F.3d 567, 575 (6th Cir. 2008) (quoting *Miller v. Calhoun County*, 408 F.3d 803, 817 n.3 (6th Cir. 2005) (internal quotation marks omitted)). See also *Jackson v. Gill*, 92 Fed. Appx. 171, 173 (6th Cir. 2004) (stating that supervisory liability under 42 U.S.C. § 1983 "must be based on something more than the right to control the actions and conduct of subordinate employees") (citing *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984)). Accordingly, any claim against Deputy Mark J. Barrett would be futile; plaintiff's request to add him as a defendant is denied.

Turning to defendant Karnes's motion to strike the *Amended*

Complaint, Doc. No. 60, the Court notes that the unauthorized *Amended Complaint* names as defendants, *inter alios*, Nurse Kathy Hartlaub and Chief Deputy Mark J. Barrett. See Doc. No. 57, p. 2. Because these two individuals are not proper defendants for the reasons discussed *supra*, the *Motion to Strike Plaintiff's Amended Complaint Filed August 16, 2010*, Doc. No. 60, is **GRANTED**. Accordingly, Doc. No. 57 is **ORDERED STRICKEN** from the record.

In light of the above, *Plaintiff's Motion for Leave to File an Amended Complaint*, Doc. No. 42, is **GRANTED in part and DENIED in part**. The motion is **GRANTED** as to Deputy Daniel Thacker and Corporal Mandy Miller, but **DENIED** as to Nurse Kathy Hartlaub and Chief Deputy Mark J. Barrett.

In order to clarify the present record, plaintiff is **ORDERED** to file, within fourteen (14) days, a new amended complaint that expressly identifies Sheriff Karnes, Deputy Waldren, Deputy Thacker, Corporal Miller and Franklin County as defendants and which asserts all of plaintiff's claims and allegations against each of these defendants. Plaintiff must also submit a copy of this anticipated amended complaint, a completed summons and a Marshal service form for all defendants except defendant Karnes. Upon plaintiff's submission of those documents, the United States Marshal Service is **DIRECTED** to effect service of process upon all defendants except defendant Karnes. These defendants may have forty-five (45) days after service of process to respond to the anticipated amended complaint.

III. Plaintiff's Declaration for Entry of Default, Doc. No. 54

Plaintiff has moved for an entry of default against defendant

Franklin County. Doc. No. 54. Defendant Karnes opposes plaintiff's motion, arguing that Franklin County was never properly joined as a defendant because, *inter alia*, plaintiff never filed an amended complaint naming it as a defendant. Doc. No. 56.

Default judgment "is a drastic step which should be resorted to only in the most extreme cases." *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). Federal courts instead favor trials on the merits. See *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990). The United States Court of Appeals for the Sixth Circuit has counseled that a trial court's discretion should be shaped by consideration of possible prejudice to the plaintiff, the existence of a meritorious defense and an articulation of a "credible explanation for the delay [in answering] that does not exhibit disregard for the judicial proceedings." *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 194 (6th Cir. 1986).

It is evident from the procedural history recounted *supra* that the record in this case was ambiguous and the identity and status of the defendants properly joined in the action is unclear. Moreover, there is no indication that a delay in filing an answer resulted "in the loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion." *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 398 (6th Cir. 1987). Therefore, this Court concludes that defendant Franklin County's failure to file an answer does not warrant entry of default and default judgment.

IV. Plaintiff's Motion for Enlargement of Time, Doc. No.51

Plaintiff asks to extend the discovery deadline and the date for

filing dispositive motions. Doc. No. 51. Defendant Karnes has not opposed plaintiff's motion.

In light of the anticipated filing of an amended complaint, which will clarify and add additional parties as defendants, plaintiff's motion to extend these case deadlines, Doc. No. 51, is **GRANTED**. The Court will establish new deadlines once all defendants have been served with the anticipated amended complaint.¹

WHEREUPON plaintiff's *Motion for Leave to File an Amended Complaint*, Doc. No. 42, is **GRANTED in part and DENIED in part**. The *Motion to Strike Plaintiff's Amended Complaint filed August 16, 2010*, Doc. No. 60, is **GRANTED**. The *Amended Complaint*, Doc. No. 57, is **ORDERED STRICKEN**. Plaintiff is **ORDERED** to file, within fourteen (14) days, a new amended complaint that expressly identifies Sheriff Karnes, Deputy Waldren, Deputy Thacker, Corporal Miller and Franklin County as defendants and which asserts all of plaintiff's claims and allegations against each of these defendants. Plaintiff must also submit a copy of this anticipated amended complaint, a completed summons and a Marshal service form for all defendants except defendant Karnes. Upon plaintiff's submission of those documents, the United States Marshal Service is **DIRECTED** to effect service of process upon all defendants except defendant Karnes. These defendants may have forty-five (45) days after service of process to respond to the anticipated amended complaint.

¹In granting this request to extend the discovery deadline, the Court expresses no opinion as to the merits of plaintiff's separate discovery motion based on Fed. R. Civ. P. 56(f), Doc. No. 61. That motion will be addressed in a separate order.

Plaintiff's *Motion for Enlargement of Time*, Doc. No. 51, is **GRANTED**. The Court will establish new discovery completion and dispositive motions filing dates after the newly joined defendants have been served with process.

It is **RECOMMENDED** that plaintiff's motion for entry of default, Doc. No. 54, be **DENIED**.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) 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); Fed. R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. Fed. 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).

November 9, 2010

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

