UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHAWN THOMAS,

Plaintiff,

v.

Civil Action 2:10-cv-152
Judge James L. Graham
Magistrate Judge E.A. Preston Deavers

MR. McDOWELL, *et al.*,

Defendants.

ORDER AND REPORT AND RECOMMENDATION

Plaintiff, Shawn Thomas, an Ohio inmate proceeding without the assistance of counsel, brings this civil rights action under 42 U.S.C. § 1983 against Defendants, employees and former employees of the Ohio Department of Rehabilitation and Correction ("ODRC"), alleging that Defendants violated his Eighth Amendment rights. This matter is before the undersigned for consideration of the Ohio Attorney General's ("OAG") Motion to Dismiss Defendant Mr. Spohn for Failure of Service, which the OAG filed as an interested party on behalf of ODRC (ECF No. 25), and for a report and recommendation relating to Plaintiff's failure to amend his Complaint to substitute in the real names for his unnamed defendants pursuant to the Court's May 23, 2011 Show Cause Order (ECF No. 35). For the reasons that follow, the OAG's Motion to Dismiss is **DENIED WITHOUT PREJUDICE** and it is **RECOMMENDED** that the Court **DISMISS** the unnamed defendants from this action **WITHOUT PREJUDICE** pursuant to Federal Rule of Civil Procedure 4(m).

I.

Plaintiff commenced this action on February 19, 2010, moving for *in forma pauperis* status. After Plaintiff corrected the deficiencies in his *in forma pauperis* application, the Court granted Plaintiff's motion, causing his Complaint to be filed on April 14, 2010. The Court directed the United States Marshal to serve Defendants with the summons and a copy of the Complaint. In his Complaint, in addition to naming Defendants McDowell, Eitell, Young, and Spohn, Plaintiff listed "Unnamed Madison Correctional Institution Medical Staff Members" as defendants. (Compl., ECF No. 7.) Service was effected on Defendants Eitell, McDowell, and Young, but the summons was returned unexecuted as to Defendant Spohn.

After the summons was returned unexecuted as to Mr. Spohn, Plaintiff to filed a "Motion to Find Mr. Spohn." (ECF No. 18.) The Court denied Plaintiff's motion on the condition that the OAG or ODRC agreed to accept service at Defendant Spohn's former place of employment or to waive service. (ECF No. 19.) The Court instructed that "[i]n the event that [the OAG or ODRC] does not accept or waive service on behalf of Defendant Spohn, Plaintiff may re-file his Motion to Find." (*Id.*) The OAG declined to accept service because Defendant Spohn was no longer employed with ODRC.

Plaintiff did not re-file his motion to find. Instead, he filed a motion seeking a Court order requiring the OAG to provide him with the Mr. Spohn's current address so that he could effect service on him. (ECF No. 21.) The Court interpreted that motion as a Federal Rule of Civil Procedure 26(d) motion for leave to conduct discovery. Before ruling on the motion, the Court issued its Scheduling Order, which permitted the parties to proceed with discovery. (ECF No. 23.) In granting Plaintiff's motion to conduct discovery to obtain Defendant's Spohn's address, the Court explained that:

> Plaintiff is entitled to "obtain discovery regarding any nonprivileged matter that is relevant" to his claims or Defendants' defenses. Fed. R. Civ. P. 26(b)(1). Because Defendant Spohn's address or last known address is both relevant and discoverable, Plaintiff is entitled to discover this information from the Defendants who have appeared, if these Defendants have such information available to them. If these Defendants do not have such information available to them, Plaintiff may request that the Clerk issue a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Form AO 88B, Revised 06/09) to Plaintiff for completion and return for service. Fed. R. Civ. P. 45.

(Nov. 19, 2010 Order 2, ECF No. 24.)

The OAG subsequently filed the subject Motion to Dismiss. (ECF No. 25.) The OAG asks the Court to dismiss Defendant Spohn under Federal Rule of Civil Procedure 12(b)(5) for failure to timely effect service under Rule 4(m). In his response, Plaintiff references *Haines v. Kerner*, 404 U.S. 519 (1972), and urges the Court to hold him to less stringent standards because he is proceeding without counsel. He also indicates that the OAG has witheld the forwarding address of Mr. Spohn. It appears that after Plaintiff filed his opposition, on May 16, 2011, he propounded discovery upon Defendants in attempt to obtain Defendant Spohn's address. (ECF No. 33.) Plaintiff has not filed a motion to compel or otherwise indicated that he has been unable to ascertain Defendant Spohn's address through his discovery efforts.

Finally, on May 24, 2011, the Court ordered Plaintiff to amend his Complaint to substitute in the real names for the "Unnamed Madison Correctional Institution Medical Staff Members" and to perfect service on those named parties as required by Rule 4(m) or to show cause why the Court should not dismiss the unnamed defendants pursuant to Rule 4(m) and why the Court should allow an extension of time to effect service with regard to these defendants. (ECF No. 35.) To date, Plaintiff has not amended his Complaint or otherwise attempted to show cause why the Court should not dismiss the unnamed defendant.

II.

Rule 12(b)(5) provides that insufficient service of process is a "defense to a claim for relief in any pleading" that may be asserted by motion. Fed. R. Civ. P. 12(b)(5). Rule 4(c)(1) indicates that a plaintiff is responsible for serving the defendant with both a summons and the complaint within the time permitted under Rule 4(m). Fed. R. Civ. P. 4(c)(1). Under Rule 4(m), a plaintiff must serve defendants within 120 days of the filing of the complaint. Fed. R. Civ. P. 4(m). If a plaintiff does not complete service within this time, he or she may show good cause for failure to effect service. *Id.* "The determination of whether good cause has been shown is left to the sound discretion of the district court . . . ." (citations omitted). *Williams v. Smith*, No. 98-1700, 1999 WL 777654, at *1 (6th Cir. Sept. 17, 1999). Upon a showing of good cause "the court must extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m). Even if a plaintiff lacks good cause, it is within the court's discretion to decide whether to dismiss that plaintiff's suit or to grant an extension. *Id.*; *Henderson v. U.S.*, 517 U.S. 654, 662 (1996) (noting that the current version of Rule 4(m) vests courts with "discretion to enlarge the 120-day period even if there is no good cause shown") (internal quotation marks and citation omitted).

Federal Rule of Civil Procedure 10(a) requires a plaintiff to "name all the parties" in the Complaint. Fed. R. Civ. P. 10(a). Though the naming of pseudonymous defendants is permissible where the party requires discovery to identify the true identity of the defendants, the party must subsequently amend the complaint to reflect the discovered identities and effect service over those named parties within Rule 4(m)'s 120-day window. *See Petty v. Cty. of Franklin*, 478 F.3d 341, 345–46 (6th Cir. 2007) (affirming district court's dismissal of unnamed John Doe defendants pursuant to Rule 4(m) where the plaintiff failed to substitute the real names for his John Does and had failed to serve them within Rule 4(m)'s 120-day window).

III.

The Court first considers whether to grant a discretionary extension to Plaintiff with regards to Mr. Spohn before turning to Plaintiff's failure to amend his Complaint to substitute the real names for the "Unnamed Madison Correctional Institution Medical Staff Members."

A. Defendant Spohn

The Court declines, at this juncture, to grant the OAG's Motion and dismiss Defendant Spohn. Instead, the Court elects to grant Plaintiff a Rule 4(m) discretionary extension to effect service on Defendant Spohn.[1] This Court has set forth factors it considers in exercising its discretion under 4(m), which include:

> (1) whether a significant extension of time was required; (2) whether an extension of time would prejudice the defendant other than the inherent 'prejudice' in having to defend the suit; (3) whether the defendant had actual notice of the lawsuit; (4) whether a dismissal without prejudice would substantially prejudice the plaintiff . . . and (5) whether the plaintiff had made any good faith efforts at effecting proper service of process.

Stafford v. Franklin Cnty, Ohio, No. 2:04-CV-178, 2005 WL 1523369, at *3 (S.D. Ohio June 28, 2005) (quoting *Nehls v. Hillsdale Coll.*, No. 1:03-CV-140, 2004 LEXIS 8588, at *15 (W.D. Mich. Feb. 20, 2004)); *see also Becker v. Warden Ross Corr. Inst.*, No. 2:05-CV-908, 2006 WL 2869567, at *4 (S.D. Ohio Oct. 5, 2006) (applying the same factors).

Consideration of the foregoing factors prompts the Court the grant an extension. First, a significant extension is not required here. Second, the OAG, in its Motion, does not suggest that

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[1]Plaintiff's *pro se* status does not relieve him of his responsibility of effecting service. Although Plaintiff is correct, that the Court holds *pro se* pleadings to a less standard stringent standard than pleadings drafted by attorneys, *see Haines*, 404 U.S. at 520, his *pro se* status generally will not excuse mistakes he makes regarding procedural rules. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) (explaining that the Court had "never suggested that procedural rules in ordinary civil litigation shall be interpreted so as to excuse mistakes by those who proceed without counsel").

it or Defendant Spohn would be prejudiced by an extension. Finally and most significantly, Plaintiff has not been dilatory in his efforts, most recently attempting to ascertain Defendant Spohn's address through written discovery.

As a *pro se* prisoner proceeding *in forma pauperis*, Plaintiff is limited in his ability to obtain the current address of a former prison employee. Other courts, too, have acknowledged that this is an issue, especially in light of prison officials' reluctance to provide inmates with the home address of current or former employees. *See, e.g.*, *Ely v. Smith*, No. 1:07-cv-261, 2008 WL 2076651, at *2 (E.D. Tenn. May 15, 2008) (noting that "[i]t would be virtually impossible for [the plaintiff] to obtain [the officer's] current address since prison guards typically do not want prisoners to have their home addresses, and it is often very difficult, if not impossible, for prisoners to learn the current address of such employees"); *Richardson v. Johnson*, 598 F.3d 734, 739–40 (11th Cir. 2010) ("It is unreasonable to expect incarcerated and unrepresented prisoner-litigants to provide the current addresses of prison-guard defendants who no longer work at the prison."). Some Courts have responded to this issue by placing the burden on the Marshal's Service to obtain the current address. *See, e.g.*, *Ely*, 2008 WL 2076651, at *2; *Sellers v. U.S.*, 902 F.2d 598, 602 (7th Cir. 1990); *Richardson* 598 F.3d at 739–40; *Murray v. Pataki*, 378 F. App'x 50, 52 (2nd Cir. 2010). Other courts, in contrast, have directed the prison which formerly employed the defendant to file under seal the last known address, suggesting that requiring the Marshal's Service to obtain the address is burdensome. *See e.g.*, *Allen v. Siddiqui*, No. 3:07CV-P261-H, 2008 WL 2217363, at *1 (W.D. Ky. May 27, 2008); *Mingus v. Butler*, No. 05-73842, 2007 WL 925685, at *1 (E.D. Mich. Mar. 28, 2007).

In this case, as the Court has noted previously, Plaintiff has discovery tools available to him through which he may attempt to obtain an address at which to serve Defendant Spohn.

Thus, at this juncture, in lieu of directing the ODRC to submit Defendant Spohn's address to the Court, the Court will grant Plaintiff an additional sixty days to use the discovery process in an effort to obtain an address for service. To the extent Plaintiff has already done so but has not received a timely response, he may move to compel a response. Should Defendants opt to respond by requesting permission to file such information with the Court under seal, the Court would grant such a request, recognizing the privacy interests of Defendant Spohn. If, despite using due diligence through the discovery process, Plaintiff is unable to obtain Defendant Spohn's address, he may again file a motion requesting the Marshal's Service to find and serve Defendant Spohn.

B. The Unnamed Madison Correctional Institution Medical Staff Members

Because Plaintiff has not amended his Complaint or otherwise attempted to show cause why the Court should not dismiss the unnamed defendants within the time prescribed in this Court's May 24, 2011 Order, it is **RECOMMENDED** that the Court **DISMISS WITHOUT PREJUDICE** the "Unnamed Madison Correctional Institution Medical Staff Members" pursuant to Rule 4(m).

IV.

At this juncture, the OAG's Motion to Dismiss is **DENIED WITHOUT PREJUDICE**. (ECF No. 25.) Instead, the Court **GRANTS** Plaintiff a Rule 4(m) discretionary extension to effect service. Plaintiff must use due diligence to attempt to obtain Defendant Spohn's address through the discovery process and must submit an address for service **WITHIN SIXTY DAYS OF THE DATE OF THIS ORDER**. If Plaintiff is unable to obtain an address despite exercising due diligence, he may move for the Marshal's Service to find and serve Defendant

Spohn.

Additionally, it is **RECOMMENDED** that the Court **DISMISS WITHOUT PREJUDICE** the "Unnamed Madison Correctional Institution Medical Staff Members" pursuant to Rule 4(m).

V.

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 in question, as well as the basis for objection. 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. Fed. R. Civ. P. 72(b).

The parties are specifically advised that the 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 waiver of the right to appeal the judgment of the District Court. *See, e.g.*, *Pfahler v. Nat'l Latex Prod. Co.*, 517 F.3d 816, 829 (6th Cir. 2007) (holding that "failure to object to the magistrate judge's recommendations constituted a waiver of [the defendant's] ability to appeal the district court's ruling"); *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005) (holding that defendant waived appeal of district court's denial of pretrial motion by failing to timely object to magistrate judge's report and recommendation). Even when timely objections are filed, appellate review of issues not raised in those objections is waived. *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) ("[A] general objection to a magistrate judge's report, which fails to specify the issues of contention, does not suffice to preserve an issue for appeal . . . .") (citation omitted)).

IT IS SO ORDERED.

Date: August 5, 2011

/s/ *Elizabeth A. Preston Deavers*
Elizabeth A. Preston Deavers
United States Magistrate Judge