

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

BILLY M. SMITH,

Plaintiff,

:

Case No. 3:10-cv-448

-vs-

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

:

MONTGOMERY COUNTY
SHERIFF'S OFFICE, et al.,

Defendants.

DECISION AND ORDER

This case is before the Court on Plaintiff's Motion for extension of time to serve Defendants Steven Gardiner and Michael Hild (Doc. No. 28). Plaintiff seeks an extension of 120 days or, in the alternative, permission to serve these Defendants by publication.

The docket reflects Defendant Montgomery County has filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) (Doc. No. 23), asserting that the claims against it are barred by the statute of limitations. Because no claim of lack of service of process or lack of personal jurisdiction has been joined with that Motion, any such defense has been waived by this Defendant. Defendants' Montgomery County Sheriff's Office and Paul Henson have answered the Amended Complaint and have also not claimed lack of service of process or lack of personal jurisdiction and have thus waived any such defense (Doc. No. 25).

Defendant Kowalski has answered and pled as a Thirteenth Affirmative Defense insufficiency of process and an insufficiency of service of process (Doc. No. 26, PageID 284). Those issues will be discussed at the preliminary pretrial conference now set for July 28, 2011. Because it appears Plaintiff has made a good faith effort to serve Defendant Kowalski, if it turns out that service is not complete, the Court will consider an extension as to him at that time.

As to Defendants Gardiner and Hild, Plaintiff claims that proof of service on them has somehow been manipulated (Motion, Doc. No. 28, PageID 289). The docket reflects that Plaintiff's selected process server attempted to effect service by delivering copies of the Amended Complaint and Summons to a clerk at the Montgomery County Sheriff's Office. This purported service was not good since the Return recites the

documents were left “at the individual’s residence” which the Sheriff’s Office is not. Thus it was proper for the Sheriff’s Office to return those two Summonses to the Court indicating that Hild and Gardiner are no longer employed with the Sheriff.

Since filing the Motion, Plaintiff has had alias process issued by the Clerk for service (See Doc. No. 29). Given that these new Summonses state new addresses for service and assuming Plaintiff has again engaged the assistance of a process server, service should be effected shortly.

Accordingly, Plaintiff’s time to make service of process on these two Defendants is extended to and including July 10, 2011.

June 23, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge