

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

ROGER DEAN GILLISPIE,

Plaintiff,

:

Case No. 3:13-cv-416

- vs -

District Judge Thomas M. Rose

Magistrate Judge Michael R. Merz

CITY OF MIAMI TOWNSHIP, et al.,

Defendants.

:

DECISION AND ORDER

This case is before the Court on Motions to Quash Service of Defendants Tim Wilson (Doc. No. 29), Matthew Scott Moore (Doc. No. 30), and Marvin Scothorn (Doc. No. 31). All were filed and served March 20, 2014. Under S. D. Ohio Civ. R. 7.2, Plaintiff's opposition, if any, was due April 14, 2014, but no opposition has been filed.

A motion to quash service of process is a non-dispositive pretrial motion within the decisional competence of a Magistrate Judge. 28 U.S.C. § 636(b)(1)(A).

Matthew Scott Moore filed what was docketed as a Waiver of Service on March 31, 2014 (Doc. No. 41). Although the form docketed at Doc. No. 41 is a Notice of Lawsuit and Request to Waive Service of a Summons (AO Form 398¹), it is signed by Todd Raskibn, one of Moore's

¹ The actual waiver form is AO 399.

attorneys, rather than by one of Plaintiff's attorneys. The Court takes it to be intended by Mr. Raskin as a waiver and finds his Motion to Quash (Doc. No. 30) to be MOOT.

On March 24, 2014, Plaintiff's counsel filed a Return of Service on Marvin Scothorn which recites that the Summons was personally served on him on March 3, 2014, at his place of employment (Doc. No. 39, PageID 338). The service of which Scothorn complained in his Motion to Quash was made on February 10, 2014, by leaving a copy of the Summons with Miami Township Police Department Chief Ron Hess (Doc. No. 21, PageID 188). Defendants Scothorn and Wilson filed a joint Answer on March 31, 2014 (Doc. No. 40), but did not plead either a defense of insufficiency of process or insufficiency of service of process.² In the absence of any renewal of the Motion to Quash, the Court finds the filing of an Answer without pleading the defense of insufficiency of service waives that defense. Fed. R. Civ. P. 12(h). Defendant Scothorn's Motion to Quash is also MOOT.

Defendant Wilson also complains of the service purportedly made on him on February 10, 2014, by leaving a copy with Chief Hess (Doc. No. 29, PageID 254). Unlike the situation with Defendant Scothorn, Plaintiff has filed no alias Return of Service as to Defendant Wilson. Although Wilson has not pled insufficiency of service in his Answer, he did raise the defense by the Motion to Quash. In that circumstance, the defense is not waived by failure to include it in the Answer. For the reasons set forth in Defendant Wilson's Motion, which Plaintiff has not opposed, the February 10, 2014, purported service by leaving the Summons and a copy of the

^{2 2} Actually, the three Motions repetitively say they are challenging "sufficiency of service and the sufficiency of service of process." (Doc. Nos. 29 at PageID 252, No. 30 at pid259, and No. 31 at PageID 266. Defendants aver that their Motions are brought under Fed. R. Civ. P. 12(b)(4) and (5), insufficient process and insufficient service of process, the body of the Motions complains only about service and not about the form of the Summons.

Complaint at Chief Hess' office is not good service under Fed. R. Civ. P. 4. Defendant Wilson's Motion to Quash is GRANTED.

May 1, 2014.

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