

16.

D/LS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



GARY IVAN TERRY,)
)
 Plaintiff,)
)
 v.)
)
 LINDA PARKER MARSHALL, et al.,)
)
 Defendants.)

1:03CV00741

ORDER

BEATY, District Judge.

Before the Court is the Recommendation of United States Magistrate Judge P. Trevor Sharp [Document #8] with respect to Plaintiff's Motion For "Good Cause" to Extend Time for Service of Process Pursuant to Federal Rule of Civil Procedure 4(m) [Document #3] which was filed on January 30, 2004. On February 20, 2004, Federal Defendant John W. Stone, Jr. (hereafter referred to as "Defendant Stone") filed a Motion to Dismiss [Document #4] Plaintiff's Complaint for several reasons, in particular, pursuant to Fed. R. Civ. P. 12(b)(1), (4), (5), and (6). Relying upon Fed. R. Civ. P. 4(m) and the case of Mendez v. Elliot, 45 F.3d 75, 78-79 (4th Cir. 1995) in which the United States Court of Appeals for the Fourth Circuit has interpreted Rule 4(m), Defendant Stone argued that Plaintiff's Complaint should be dismissed for insufficiency of process and insufficiency of service of process pursuant to Rule 12(b)(4) and (5) because Plaintiff's Motion to Extend Time for Service of Process failed to demonstrate good cause to justify his failure to properly prosecute his action before the Court. The Magistrate Judge's Recommendation agreed with the position presented by Defendant Stone in all respects and noted that

Plaintiff filed this action on August 6, 2003. He took no action whatsoever until after expiration of the four-month period for service of process that is allowed under

Rule 4(m). On January 22, 2004, the Clerk notified Plaintiff of his failure to effect service of process. On January 30, 2004, Plaintiff filed a motion for “good cause” to extend the time for service.

On review, the Court finds that Plaintiff has not shown good cause under Rule 4(m) for an extension of time to serve process. Plaintiff, in his motion, shows nothing that could amount to “good cause” for his failure to properly prosecute this action, but merely revisits what he believes to be the merits of his case.

Since Plaintiff makes absolutely no showing that could constitute good cause under Rule 4(m), this action should be dismissed without prejudice. See generally Mendez v. Elliot, 45 F.3d 75, 78-79 (4th Cir. 1995).

(Magis. Judge’s Recomm.)

On March 10, 2004, Plaintiff filed what purports to be a Motion in Support of Terry’s Objections to the Recommendation [Document #10]. Plaintiff’s document is more appropriately viewed as a brief in support of Plaintiff’s objections to the Recommendation. On March 19, 2004, Defendant Stone filed a Response [Document #11] to Plaintiff’s brief or “motion” in support of Plaintiff’s objections to the Magistrate Judge’s Recommendation. Defendant Stone notes in his Response that “[a]gain, Plaintiff failed to provide any evidence of good cause for extension of time to serve the Complaint.” (Def. Stone’s Resp. at 3.) More specifically, Defendant Stone asserts that

Plaintiff again makes no showing that could amount to good cause but merely rehashes what he believes to be the merits of his case. Instead of showing good cause, Plaintiff makes conclusory statements asserting that he has shown good cause; however, when examined, Plaintiff’s conclusory statements lack both factual and legal support. Inexplicably, Plaintiff argues that a motion to dismiss apparently in a bankruptcy case, filed on June 15, 2001, two years before he filed his civil complaint, relates somehow to Plaintiff’s failure to serve process within 120 days of service of his complaint. Objection, p. 21. Plaintiff, however, fails to make any arguable connection between a motion to dismiss filed two years prior to the time he filed his civil complaint and his failure to serve his complaint within 120 days.

(Def. Stone’s Resp. at 4-5.)

Having reviewed the Magistrate Judge's Recommendation, Plaintiff's Objections, and Defendant Stone's Response to Plaintiff's Objections, the Court upon de novo review, finds that Plaintiff indeed has failed to show good cause that prevented him from properly serving Defendant Stone within 120 days of filing his civil action on August 6, 2003. In his pleadings, Plaintiff consistently makes references to other legal proceedings, both civil and criminal, that he has been engaged in with Defendant Stone and others. Plaintiff contends that Defendant Stone and others in the other legal proceeding

have presented a series of advancing flawed legal arguments, of which, they attempt to obfuscate the material evidence of their deceitful and oppressive conduct in prosecuting Terry. Defendants claim that Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), (4), (5) and (6) for failure to show "*Good Cause*" and tries to steer this Court away from its judicial duty to guard against the corruption that justice will be dispensed on an act of deceit. Regardless of the dubious validity of those contentions, Defendants' continue[s] to intentionally violate Plaintiff's constitutional rights by knowingly depriving him of his vested liberty and property interests without due process of law within the meaning of the Fifth Amendment of the United States Constitution.

(Pl.'s Mot. Support Terry's Objections at 18.)

However, after reviewing the entirety of Plaintiff's pleadings, the Court finds that Plaintiff points to no action taken by Defendant Stone in the present case between the filing of Plaintiff's Complaint on August 6, 2003 and the end of the filing period 120 days later which prevented or hindered Plaintiff from making service upon Defendant Stone. The Court, therefore, adopts the Magistrate Judge's Recommendation.

The Court notes further that the Magistrate Judge's Recommendation was specifically based on the Fourth Circuit case of Mendez v. Elliot, which interpreted Rule 4(m) as mandating that "if the complaint is not served within 120 days after it is filed, the complaint must be dismissed absent a showing of good cause." See Hammad v. Tate Access Floors, Inc., 31 F.Supp. 2d 524, 526

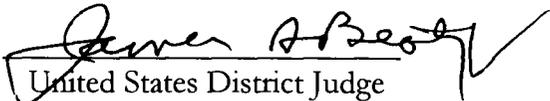
(quoting Mendez v. Elliot.) Plaintiff and Defendant Stone both point out to the Court that there is some controversy within and without the Fourth Circuit as to whether Mendez v. Elliot is still good law in holding that if a plaintiff does not establish good cause, then the district court would have no discretion to grant a plaintiff's request for extension of time of service. This Court need not engage in that discussion because Mendez v. Elliot is still the law of the Fourth Circuit, although it stands alone among the circuits. Id. However, even if the Court elected to exercise its discretion to consider Plaintiff's Motion for Extension of Time to Serve Process in the absence of Plaintiff demonstrating good cause for failure to serve Defendant with process within 120 days of filing his Complaint, as the Court has found that Plaintiff failed to do, the Court would not grant Plaintiff any relief based upon his present motion before the Court. The Court would especially deny Plaintiff any relief based upon the Court's additional findings that Plaintiff took no action to obtain an extension of time before the 120 days service period expired, Plaintiff failed to either prepare or obtain a summons to accompany his Complaint, Plaintiff at no time within the 120 days period took any steps to serve with Defendant Stone or any of the other named Defendants, and Plaintiff's proffer of a good cause showing on the basis of conduct by Defendant Stone and others in prior legal proceedings relates to matters that occurred well before Plaintiff filed his Complaint in this case and had absolutely nothing to do with preventing or hindering Plaintiff from effecting service upon Defendant Stone or any of the other named Defendants. The Court therefore finds that Plaintiff's complete failure to diligently pursue service of Defendant Stone and others in the present matter would not warrant the Court granting discretionary relief to Plaintiff.

IT IS THEREFORE ORDERED that the Magistrate Judge's Recommendation [Document #8] is hereby AFFIRMED and ADOPTED. Furthermore for the reasons stated herein, IT IS

FURTHER ORDERED that Plaintiff's Motion For "Good Cause" to Extend Time for Service of Process Pursuant to Federal Rule of Civil Procedure 4(m) [Document #3] is hereby DENIED and this action is DISMISSED without prejudice. To the extent that the Court has decided this matter on the basis of Plaintiff's Motion for Extension of Time, IT IS FURTHERED ORDERED that Defendant's Motion to Dismiss [Document #4] is hereby DISMISSED as being moot.

A Judgment dismissing this action will be entered contemporaneously with this ORDER.

This, the 7th day of June, 2004.


United States District Judge