

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GEOFF GALLAS	:	CIVIL ACTION
	:	
v.	:	
	:	
THE SUPREME COURT OF	:	
PENNSYLVANIA, et al.	:	NO. 96-6450

MEMORANDUM AND ORDER

Yohn, J.

September , 1998

Plaintiff Geoff Gallas seeks the depositions of the Honorable Alex Bonavitacola ("Bonavitacola"), the Honorable Esther Sylvester ("Sylvester"), the Honorable Thomas Watkins ("Watkins"), the Honorable Alan Silberstein ("Silberstein"), Court Administrator Joseph DiPrimio, Prothonotary Joseph Evers, Clerk Mark Alleva, General Tipstaff Joan Loudenslager, Councilman Frank DiCicco, and Councilman James Kenney to develop the claims listed in Counts I - IV and Count VI of his amended complaint. The plaintiff also hopes to use these depositions to identify the still unnamed "John Doe" defendants in this action. The prospective deponents have filed a Rule 26(c) motion to preclude the depositions and to quash any subpoenas issued to them. For the reasons that follow, the court will grant in part and deny in part the instant discovery motion.

BACKGROUND

This action has had a long and complex history. In his amended complaint, Gallas has basically alleged that the defendants violated his state and federal rights by engaging in a campaign of harassment culminating with his termination as Executive

Court Administrator of the First Judicial District. According to the amended complaint, this alleged effort began publicly on September 22, 1995, when the plaintiff's wife filed a Protection from Abuse ("PFA") petition against him. (Am. Compl. at ¶ 37). That same day, he alleges several individuals released the contents of this petition and the plaintiff's response to it to the Democratic City Committee ("DCC") (Id. at ¶ 40) which then released it to the public. This series of events makes up Count I, which states a cause of action for invasion of privacy under § 1983, of the amended complaint. (Id. ¶¶ 48-54).

On September 26, 1995, a reporter from the Philadelphia Daily News received official access to the PFA petition and everything related to it. (Id. ¶ 39). The reporter allegedly accessed this information pursuant to a judicial order entered by Judge Sylvester and then published the material in the Daily News. (Id. ¶ 40). These events make up Count II of the amended complaint.

The plaintiff then alleges that on March 23, 1996 certain named defendants and other unknown individuals allegedly disclosed the contents of the plaintiff's divorce file. (Id. ¶¶ 60-65). The details of this claim, such as what information was disclosed and to whom it was released, are somewhat vague. Nevertheless, these events make up Count III of the plaintiff's amended complaint.

According to the amended complaint, the final actionable event occurred on March 26, 1996. On that date, pursuant to a reorganization of the First Judicial District of Pennsylvania ("FJD"), the Supreme Court of Pennsylvania ("Supreme Court")

eliminated the plaintiff's position as the Executive Court Administrator of the FJD. (Id. ¶¶ 61-69). Gallas was then essentially transferred to the position of the Budget Administrator. These events make up Counts IV-VI of the plaintiff's amended complaint.

The plaintiff instituted this civil rights action on September 23, 1996. He filed an amended complaint on November 7, 1996. (See id.)

Thereafter, the various defendants filed a series of motions, resulting in the issuance of several opinions by this court. Gallas v. Supreme Court of Pennsylvania, NO. CIV. A. 96-6450, 1997 WL 256972 (E.D. Pa. May 15, 1997) ("Gallas I"); Gallas v. Supreme Court of Pennsylvania, NO. CIV. A. 96-6450, 1998 WL 22081 (E.D. Pa. Jan. 22, 1998) ("Gallas II"); Gallas v. Supreme Court of Pennsylvania, NO. CIV. A. 96-6450, 1998 WL 352584 (E.D. Pa. June 15, 1998) ("Gallas III") and Gallas v. Supreme Court of Pennsylvania, NO. CIV. A. 96-6450 WL (E.D. Pa. August 25, 1998) ("Gallas IV"). These decisions dismissed not only many of the plaintiff's claims, but also most of the identified defendants, leaving the plaintiff with federal claims for invasion of privacy and wrongful termination in violation of the First Amendment under 42 U.S.C. §1983 (Counts I-IV). These claims, however, survive only against the as-yet unidentified defendants, Does 1-80. The plaintiff also has a state law cause of action for interference with a contract against the following defendants, Senator Vincent J. Fumo, Congressman Robert Brady, the DCC and Does 81-100. (Count VI).

On October 29, 1997, thirteen months after filing his complaint, the plaintiff

served subpoenas on most of the instant movants, seeking their depositions in order to develop the above-mentioned claims. Those depositions were not held and all of the movants were reserved with subpoenas for depositions on or about March 27, 1998. Those subpoenas generated the instant motion to preclude the depositions and to quash the subpoenas. A decision on this motion was withheld (although oral argument was held on June 17, 1998) pending disposition of the defendants' most recent round of motions to dismiss and motions for summary judgment (Gallas III and Gallas IV). It is now ripe for disposition.

In order for Counts I-IV and the "Doe" portion of Count VI to survive, the plaintiff must identify the Doe defendants¹, a task he seeks to achieve pursuant to the proposed depositions. In the instant motion, the proposed deponents claim that these depositions would be irrelevant because, even if the plaintiff identified the Does, the applicable limitation periods would bar the plaintiff from adding them as parties. Moreover, the movants argue that, as to the plaintiff's remaining state law claim, the proposed depositions are not reasonably calculated to lead to admissible evidence. For the reasons that follow, I will grant in part and deny in part the motion to preclude the depositions and quash the subpoenas.

DISCUSSION

At this time, the plaintiff has three surviving causes of action embodied in Counts I-IV and Count VI. The first cause of action is for invasion of privacy (Counts I-III); the

¹ John Doe defendants are not specifically authorized under federal practice and are generally disfavored. However, no party to this action has moved to dismiss them.

second is for wrongful termination in violation of the First Amendment (Count IV); and the third is for interference with a contract (Count VI). With this motion the movants seek to preclude the plaintiff from deposing them on all of these claims and to quash any subpoenas for such depositions. The court will address each cause of action individually.

Invasion of Privacy (Counts I-III)

The plaintiff's remaining cause of action for invasion of privacy under 42 U.S.C. §1983, as stated in Counts I-III of the amended complaint, involves three distinct claims. All of these claims have been dismissed against the named defendants. See Gallas I; Gallas II. The plaintiff, however, seeks to depose the instant movants in order to identify the unknown defendants (Does 1-60), the only parties against whom these claims remain.

(a) Release of the PFA petition (Count I)

The plaintiff maintains a claim for the alleged release of the contents of the Protection from Abuse petition filed against Gallas and his response to it. (Am. Compl. ¶ 40.) At oral argument on June 17, 1998, however, the plaintiff conceded that this release occurred on September 22, 1995, that the plaintiff filed his original complaint in this court one year and one day later, on September 23, 1996, and, therefore, that the one year statute of limitations for invasion of privacy claims bars this claim against the Doe defendants. See 42 PA. C.S.A. § 5523.²

² Invasion of privacy claims, when brought under the guise of §1983 actions, may actually be governed by Pennsylvania's two-year statute of limitations for personal

(b) Release pursuant to Judicial Order (Count II)

The amended complaint asserts a claim for the release of the PFA petition which resulted in the publication of its contents in the Philadelphia Daily News. (Am. Compl. ¶ 40). At oral argument, however, the plaintiff conceded that, based on the court’s prior opinion dismissing this count against Judge Sylvester, DiPrimio and the FJD under the doctrine of judicial immunity, see Gallas I, any Doe defendants would likewise be immune. Thus, Count II is no longer a valid claim as to the Doe defendants.

(c) Release of the contents of the plaintiff’s divorce file on March 23, 1996 and wrongful termination in violation of the First Amendment on March 26, 1996 (Counts III & IV)

(i) Statute of Limitations

The applicable statute of limitations, whether it is one year or two years, bars the plaintiff’s invasion of privacy and wrongful termination claims against the Doe defendants since more than two years have elapsed since the events in question. The plaintiff attempts to avoid the limitations period by arguing that Rule 15(c) of the Federal Rules of Civil Procedure would permit any amendment to the complaint naming the actual defendants to relate back to the date of the original complaint. The court disagrees.

This rule permits an amendment of a pleading, in this context the changing of a

injury actions. See Owen v. Okure, 488 U.S. 235 (1987) (for purposes of consistency and predictability, the state’s residual statute of limitation provision for personal injury actions should be applied to § 1983 actions even if the state has a different limitations period for the specific action in question). Nevertheless, even if the plaintiff had not conceded this point, his claim would still fail for the reasons stated hereafter.

party, to relate back to the date of the original pleading when:

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party

FED. R. CIV. P. 15(c)(3) (emphasis supplied).

Replacing a "John Doe" caption with a party's actual name amounts to "chang[ing] a party" within the meaning of Rule 15(c) and, thus, the amendment will only relate back in that instance if the rule's requirements are met. Nelson v. County of Allegheny, 60 F.3d 1010, 1014 n.6 (3d Cir. 1995) (quoting Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977)). Among the several conditions that must be satisfied for an amendment to relate back is that the party to be brought in by amendment knew or should have known that, "but for a mistake concerning the identity of the proper party," the action would have been brought against the party. FED. R. CIV. P. 15(c) (emphasis supplied).

The parties do not cite and this court has not found any Third Circuit decision addressing the meaning of mistake in this context. However, the First, Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have held "that designating a 'John Doe' in an original pleading is not a 'mistake concerning the identity' within the meaning of Rule 15 and, therefore, an amendment containing a party's true name cannot relate back to the original pleading which only identified the party with a fictitious name."

Frazier v. City of Philadelphia, 927 F. Supp. 881, 884 (E.D. Pa. 1996). See also Wilson v. United States, 23 F.3d 559, 563 (1st Cir.1994); Barrow v. Wethersfield Police Dept., 66 F.3d 466, 468 (2nd Cir.1995); Western Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir.1989); Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998); Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996); Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993); Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984); Powers v. Graff, 1998 WL 436362, at *2 (11th Cir. Aug. 3, 1998). This court will follow the lead of these circuits and finds that the plaintiff's addition of these defendants would not meet the rule's requirements in order to relate back to the original complaint.

Thus, I will prohibit discovery to identify Does 1-80 because, even if identified, an attempt by plaintiff to amend the complaint to name them as defendants would be futile as the amendment would not relate back and the action would thus not be commenced as to these newly named defendants within the period permitted by the statute of limitations.

(ii) The Doe Defendants were not served in accordance with Rule 4(m) of the Federal Rules of Civil Procedure

Plaintiff's original complaint was filed on September 23, 1996. It named as potential defendants John Does 1-80.

Rule (4)(m) of the Federal Rules of Civil Procedure provides:

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that

defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Obviously, the Doe defendants were not served within 120 days since even now, almost two years later, they have not yet been identified. Plaintiff first attempted to identify, let alone serve, the Doe defendants when he subpoenaed some of the movants for depositions on October 29, 1997, more than one year after filing the complaint. Defense counsel wrote to plaintiff's counsel on November 5, 1997 pointing out several conflicts as to the dates of the depositions and requesting alternate dates. Plaintiff's counsel did not respond and the depositions did not take place.

Thereafter, as a result of motions for summary judgment filed by some of the defendants which raised immunity issues, the court stayed discovery from December 11, 1997 until those motions were disposed of on January 22, 1998. Again, plaintiff did nothing further with reference to the identity of the Doe defendants until he served new subpoenas on the movants on March 27, 1998. Opposing counsel raised questions by letter as to the purpose of the depositions. Plaintiff's counsel responded by letter of April 3, 1998 and for the first time identified the purpose of taking the deposition of some of the movants to be the identification of the John Doe defendants with reference to Counts I - IV of the complaint.

This disclosure resulted in the filing of the instant motion to preclude and quash on April 7, 1998.

There are two components to Rule 4(m).

First, the Rule "require(s)" a court to extend time if good cause is shown. Second, it allow(s) a court discretion to extend time absent a showing of good cause. Petrucelli v. Bohringer and Ratzinger GmbH Ausdereitungsanlagen, 46 F.3d 1298, 1306 (3d Cir. 1995). The burden of showing good cause lies on the plaintiff. See Grand Entertainment Group Limited v. Star Media Sales Inc., 988 F.2d 476 (3d Cir. 1993). In Petrucelli the Third Circuit directed district courts to first determine whether good cause exists for an extension of time. If good cause is present, the district court must extend time for service and the inquiry is ended. If however, good cause does not exist, the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service.

Because Rule 4 does not define good cause, the Third Circuit has noted that the "good cause" standard is at least as stringent as the "excusable neglect" standard under Rule 6(b). Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir.1988). Excusable neglect "require[s] a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." Id. (quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1165 (1987)). Using this standard, courts have found that a plaintiff's failure to serve will not be excused when the omission was due to the attorney's lack of diligence in effectuating the requirements of the rule. See Momah v. Albert Einstein Medical Center, 158 F.R.D. 66, 69 (E.D. Pa. 1994). In fact, even diligent, but ineffective, efforts to serve the defendants will not constitute "good cause." See Addanke v. Defense

Logistics Agency, No. CIV.A. 95-656, 1996 WL 635590, at *5 (E.D. Pa. Oct. 31, 1996).

In sum, in determining whether good cause exists, a court's primary focus is on the plaintiff's reasons for not complying with the time limit in the first place. See Boley v. Kaymark, 123 F.3d 756 (3d Cir. 1997). The court may also consider prejudice to the defendant by lack of timely service and whether plaintiff moved for an enlargement of time to serve. See MCI Telecommunications Corp. v. Teleconcepts, Inc. 71 F.3d 1086 (3d Cir. 1995).

The plaintiff has not met his burden of showing good cause for his failure to serve the Doe defendants. Even to this date he has not filed a petition seeking an extension of time in which to serve the defendants. Moreover, beyond what amounts to an assertion that he was busy doing other tasks, he does not provide any explanation as to why he waited over a year to serve the subpoenas in the first place.³ (See Pl.'s Response to Rule 26(c) Motion at 6) (claiming that plaintiff did not serve subpoenas or conduct depositions over a period of months because he was busy gathering other evidence). Universal constraints such as having other tasks to complete do not amount to "good cause" under Rule 4(m).

As noted, if the court finds "good cause", it must grant an extension. However, if it does not find "good cause", as I have not, the court may still exercise its discretion

³ He argues that the delay is attributable to the defendants because they received orders staying discovery for brief periods following both rounds of subpoenas. While these brief stays may excuse his failure to identify the defendants after he had served them, they do not account for the almost one year delay it took him to serve the subpoenas on the instant movants.

and determine whether to dismiss or extend time for service. See Fed. R. Civ. P. 4(m).

Several factors have been identified which impact on the decision of the court to exercise its discretion in this regard. In Petrucelli, the Third Circuit noted that if the applicable statute of limitations would bar a refiled action or if the defendant is evading service or conceals a defect in attempted service, these factors may be considered. It also pointed out that other factors listed in the Advisory Committee note to Rule 4(m) can also be considered.

After careful review of the factors to be considered and the facts of this case, the court with considerable ease will decide not to exercise its discretion to extend the period of time within which to make service. Never to this day, almost two years after the filing of the complaint, has the plaintiff filed a petition requesting an extension of time. Plaintiff did absolutely nothing to learn the identity of the John Doe defendants during the first year after filing the complaint and has given no explanation for that delay. In addition, nothing has been filed in court seeking to obtain the identity of the Doe defendants for 18 months from the filing of the complaint, and even then it was filed by the movants, not by the plaintiff. There has been no suggestion that any of the Doe defendants made any effort to conceal their identity, conceal their involvement in the events that are the basis of this lawsuit, evade service or conceal any defects in attempted service. Nor is there any allegation that any of the other factors identified in Petrucelli, Boley or the Advisory Committee note are present.⁴ Even the statute of

⁴ There are two other relevant factors: One is whether the defendant has suffered any prejudice. See Boley v. Kaymark, 123 F.3d 756, 759-60 (3d Cir. 1997). The

limitations, which would normally weigh in favor of the plaintiff, does not do so here because the statute of limitations will prevent the plaintiff from going forward with this claim against the Doe defendants both in this action and in any separate action that might be filed in the event that this action were dismissed as to those defendants.

Perhaps if the time period were not so great, the outcome would be different, but in light of the plaintiff's blatant disregard of the Rule it would be both unfair and unproductive to allow him to subvert its requirements merely because he states that he was busy with "other tasks" without identifying any specifics. See JUDGE WILLIAM SCHWARZER, ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 5:283 ("the greater the delay [in service], the greater likelihood a court will be unwilling to excuse the failure to serve"). Thus, even if the unidentified defendants were named in the proposed round of depositions, the court would dismiss these claims against these defendants because the plaintiff did not serve them within the appropriate time period.⁵

I will, therefore, prohibit discovery to identify Does 1-80 because the depositions of the movants for the purposes of identifying the Doe defendants under these causes

second is whether the plaintiff's claims are objectively reasonable or frivolous. Id. Given the fact that the defendants here remain unidentified, it is not possible for the court to engage in this analysis.

⁵ Because plaintiff's counsel cited absolutely no case law in his response to the motion, the court concludes that he did not research the legal standards that apply to these issues. As a result, and also because he has not filed a motion to extend so that the procedural status is therefore somewhat confused, plaintiff has not addressed specifically the issue of the factors to be considered in exercising the court's discretion to extend the time for service. If the plaintiff desires to do so, he may present further argument on this in a motion for reconsideration within 7 calendar days of the date hereof; however, he should also be mindful that he would still have to meet the statute of limitations problem.

of action would no longer be relevant, as well as futile. See Fed. R. Civ. P. 26(b)(1) (discovery limited to obtaining information relevant to the subject matter). I will therefore issue a protective order and quash the subpoenas to the extent that plaintiff seeks these depositions for purposes of identifying the Doe defendants on Counts I - IV.

The Interference with a Contract Claim (Count VI)

The plaintiff's claim against Senator Fumo, Congressman Brady and the DCC for interference with a contract (Count VI of the amended complaint) remains viable. See Gallas IV. At oral argument, plaintiff's counsel identified President Judge Bonavita and President Judge Silberstein as individuals who had information concerning communications by the defendants named in Count VI and Justices of the Pennsylvania Supreme Court concerning hiring, firing and promoting employees in the First Judicial District and Councilmen DiCicco and Kenney as individuals who had information concerning communications by Senator Fumo about his intention and actions to have plaintiff fired. Testimony of this nature would be relevant to the Count VI claim or be reasonably calculated to lead to admissible evidence concerning that claim. Therefore, the plaintiff may proceed to depose the instant movants in connection with plaintiff's Count VI claims against the named defendants.⁶

⁶ Count VI also identifies Does 81 - 100 as defendants. For the same reasons as were set forth as to Does 1 - 80, I will not allow discovery intended to identify Does 81 - 100 as parties to this action.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GEOFF GALLAS	:	CIVIL ACTION
	:	
v.	:	
	:	
THE SUPREME COURT OF	:	
PENNSYLVANIA, et al.	:	NO. 96-6450

ORDER

AND NOW, this day of September, 1998, after consideration of the Rule 26(c) Motion to Preclude the Plaintiff from Deposing the Honorable Alex Bonavitacola, the Honorable Esther Sylvester, the Honorable Thomas Watkins, the Honorable Alan Silberstein, Joseph DiPrimio, Joseph Evers, Mark Alleva, Joan Loudenslager, Frank DiCicco, and James Kenney and to Quash any Subpoenas for such depositions, and the plaintiff's response thereto, and oral argument it is hereby ORDERED as follows:

- (1) the plaintiff is precluded from deposing the abovementioned movants for the purpose of identifying "Does 1-100" and the subpoenas are quashed to the extent they seek such information;
- (2) the plaintiff may depose the abovementioned movants for the purpose of developing his remaining claim for interference with a contract (Count VI) as to the named defendants.

William H. Yohn, Jr., J.

