

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

LOUIS TROVARELLO and  
MARY LACHICK

v.

WILLIAM J. MCMONAGLE and  
SEAN MCALEER

CIVIL ACTION

NO. 97-7369

M E M O R A N D U M

Broderick, J.

November 16, 1998

Plaintiffs Louis Trovarello and Mary Lachick bring this action against Defendants William J. McMonagle, the Director of Field Operations of the Writ and Bench Warrant Unit of the First Judicial District of Pennsylvania, and against Defendant Sean McAleer, whom Plaintiffs allege was employed by the Writ and Bench Warrant Unit of the First Judicial District of Pennsylvania. Plaintiffs bring claims against both Defendants pursuant to 42 U.S.C. § 1983, alleging violations of their civil rights and conspiracy to violate their civil rights, as well as a state law claim of conspiracy to commit assault and battery.

Presently before the Court is a motion to dismiss Plaintiffs' Complaint, brought by Defendant Sean McAleer who is proceeding pro se. Defendant McAleer moves to dismiss pursuant to Fed.R.Civ.P. 12(b)(5) on the ground that the Complaint was not properly served on the Defendant, and pursuant to Fed.R.Civ.P. 12(b)(6) on the ground that the Complaint fails to state a claim

upon which relief can be granted. For the following reasons, the Court will deny Defendant's motion to dismiss, but will quash service and direct that service be properly effected on or before December 16, 1998.

Rule 4(e)(2) of the Federal Rules of Civil Procedure provides that service of process may be effected as follows:

by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein ....

Numerous cases make clear that when service is made by leaving copies of the summons and complaint "with some person of suitable age and discretion then residing therein," the person with whom the papers are left must actually be a resident of defendant's home, and not merely present at the time of service. E.g., Hardy v. Kaszycki & Sons Contractors, Inc., 842 F.Supp. 713, 717 (S.D.N.Y. 1993); Franklin America, Inc. v. Franklin Cast Prods., Inc., 94 F.R.D. 645, 647 (E.D.Mich. 1982); Barclays Bank of New York v. Goldman, 517 F.Supp. 403 (D.C.N.Y. 1981); Wright and Miller, Federal Practice and Procedure: Civil 2d § 1096, p. 81 ("'Residing therein' has long been held to require the recipient of the papers to be actually living in the same place as defendant.")

Rule 4(e)(1) of the Federal Rules of Civil Procedure also provides that original service may be effected "pursuant to the law of the state in which the district court is located, or in

which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State..." This Court is located in the Commonwealth of Pennsylvania, and Rule 402 of the Pennsylvania Rules of Civil Procedure provides that original process may be served as follows:

- (1) by handing a copy to the defendant; or
- (2) by handing a copy
  - (i) at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult persons in charge of such residence....

Once sufficiency of service of process is challenged, the party on whose behalf service was made bears the burden of establishing the validity of service. Villanova v. Solow, 1998 WL 643686, \*1 (E.D.Pa.); Bolivar v. Director of the FBI, 846 F.Supp. 163, 166 (D.P.R. 1994), aff'd, 45 F.3d 423 (1st Cir. 1995); Adams v. American Bar Assoc., 400 F.Supp. 219, 221-22 (E.D.Pa. 1975). Factual contentions regarding the manner in which service was executed may be made through affidavits, depositions, and oral testimony. Villanova, 1998 WL 643686, \*1; Williams v. Claims Overload Sys., Inc., 1998 WL 104476, \*1 (E.D.Pa. 1998).

Plaintiffs have come forward with no affidavits or depositions in response to Defendant McAleer's challenge to the sufficiency of their service of process. The affidavit of service filed of record in this case specifies only that "Adult female, Maureen, accepted the Summons and Complaint." The

affidavit does not state where service was made, who Maureen is, and what her relationship is with Defendant McAleer. Plaintiffs have presented no evidence that Maureen was a resident of Defendant McAleer's home or an adult person in charge who could accept service of process on his behalf. Therefore, Plaintiffs have failed to meet their burden of establishing that sufficient service of process was made on Defendant McAleer in this case.

Furthermore, the affidavit of service shows that Plaintiffs attempted to serve Defendant McAleer on April 7, 1998, more than 120 days from the time the Complaint in this case was filed on December 4, 1997. Rule 4(m) of the Federal Rules of Civil Procedure provides as follows:

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.

When service of process is insufficient, as here, "the courts have broad discretion to dismiss the action or to retain the case but quash the service that has been made on the defendant." Wright and Miller, Federal Practice and Procedure: Civil 2nd § 1354, p. 288. Therefore, the Court will deny Defendant McAleer's 12(b)(5) motion to dismiss the Complaint for insufficiency of service of process, but the Court will quash the service that has been made on Defendant McAleer, and direct Plaintiffs to effect service of the summons and Complaint on Defendant McAleer no later than December 16, 1998.

Defendant McAleer also moves the Court to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. In determining a 12(b)(6) motion the Court must accept as true all factual allegations contained in the complaint as well as the reasonable inferences that may be drawn from those allegations and view them in the light most favorable to the non-moving party. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989); Zlotnick v. TIE Communications, 836 F.2d 818, 819 (3d Cir. 1988). The Court must deny a 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court having determined that Plaintiffs' Complaint adequately states a cause of action, Defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) will be denied.

An appropriate Order follows.

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O R D E R

**AND NOW**, this 16th day of November, 1998; for the reasons set forth in the Court's Memorandum of this date;

**IT IS ORDERED:** Defendant Sean McAleer's motion to dismiss Plaintiff's Complaint is **DENIED**;

**IT IS FURTHER ORDERED:** The service of the summons and complaint made on Defendant McAleer on April 7, 1998, is **QUASHED**, and service shall be made on or before December 16, 1998, or this action shall be dismissed against Defendant McAleer for failure to prosecute.

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RAYMOND J. BRODERICK, J.