

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

RONALD WESLEY, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
EDWARD C. GERMAN, ESQUIRE :
MICHAEL E. ELLERY, ESQUIRE :
DOUGLAS K. JENKINS, ESQUIRE : NO. 03-CV-1049
Defendants. :

MEMORANDUM AND ORDER

J. M. KELLY, J. SEPTEMBER , 2003

Presently before the Court are two motions filed by Plaintiff Ronald Wesley ("Wesley") seeking: (1) entry of default judgment against Defendant Edward C. German, Esquire ("German") and (2) a court-ordered subpoena compelling German, his representatives, or the law firm of German, Gallagher & Murtagh, P.C. (the "law firm") to provide information relating to Defendants Michael E. Ellery, Esquire ("Ellery") and Douglas K. Jenkins, Esquire ("Jenkins") (collectively and including German, the "Defendants").

On April 22, 2003, Wesley, a prisoner at Graterford Correctional Facility in Pennsylvania, filed a Complaint against Defendants, who served as court-appointed counsel for Wesley in a prior matter, averring civil rights violations pursuant to 42 U.S.C. § 1983 ("Section 1983"). On April 24, 2003, the Clerk of Court for this district mailed a summons, a waiver of the summons and copy of the Complaint to German at the law firm, to which

Philip A. Ryan, Esquire, ("Ryan"), another lawyer at the law firm, responded, attempted settlement with Wesley on behalf of German, and notified him that Ellery and Jenkins were no longer connected with the law firm. Despite acknowledgment of Wesley's Complaint, neither German nor Ryan waived service of the summons, and the United States Marshals, who were later dispensed to effect personal service, were unable to locate Defendants. Further, the law firm refused Wesley's request for information relating to the location of Ellery and Jenkins to effect personal service of process. In the instant motions, Wesley requests that this Court enter default judgment against German, who has neither accepted service of the Complaint nor filed any responsive documents, and order Ryan or another attorney at the law firm to provide Wesley with certain information about Ellery and Jenkins so as to effect personal service. For the following reasons, we **DENY** Wesley's motions.

I. BACKGROUND

The instant motions stem from Defendants' representation of Wesley in a Section 1983 action he filed in this Court against several officers of the Pennsylvania Department of Corrections on March 10, 1999. See Wesley v. Vaughn, No. Civ. A. 99-1228 (E.D. Pa. 1999). On January 10, 2000, this Court granted Wesley's request for court-appointed counsel in his lawsuit, and, on

February 24, 2000, appointed German as Wesley's attorney. On April 7, 2000, Ellery entered his appearance on behalf of Wesley, but withdrew as Wesley's counsel on November 30, 2000. On the same day as Ellery withdrew as Wesley's counsel, Jenkins entered his appearance as Wesley's attorney.

On March 26, 2001, with both German and Jenkins serving as counsel for Wesley, a non-jury civil trial on Wesley's Section 1983 action against the correctional officers commenced. On April 2, 2001, after the first day of the trial, Wesley filed a motion requesting termination of his court-appointed attorneys, who Wesley claims provided negligent legal assistance. On April 3, 2001, this Court issued a Memorandum and Order continuing Wesley's civil trial and consolidating his Section 1983 suit with another case in which Wesley alleged Americans with Disabilities Act ("ADA") violations against the same correctional officers.¹ On April 5, 2001, the Court dismissed as moot Wesley's April 2, 2001 motion requesting termination of his court-appointed counsel.² Subsequently, on or about June 3, 2003, the non-jury

¹ The Court also granted Wesley's motion for appointment of counsel to proceed on his ADA claim and directed the Clerk of Court to attempt to appoint an attorney from the civil rights list.

² On May 10, 2001, the Court appointed Lubna A. Mian, Esquire ("Mian") as counsel for Wesley and, on June 5, 2001, we granted Mian's motion to withdraw as counsel for Wesley and directed the Clerk of Court to attempt to appoint another attorney from the civil rights list to represent Wesley in his Section 1983 claim and all related matters before the Court.

trial on Wesley's remaining ADA claim, continued from March 3, 2001, was held and Wesley represented himself. On June 4, 2003, this Court entered a directed verdict in favor of Defendants, and Wesley did not appeal that decision.

On April 22, 2003, Wesley filed the instant Section 1983 claim against German, Ellery and Jenkins. On April 24, 2003, the Clerk of Court mailed a summons and request for waiver of service of the summons, along with a copy of Wesley's Complaint to the law firm, where Wesley believed all three Defendants were employed. In a letter dated May 28, 2003, Ryan, an attorney at the law firm, notified Wesley that both Ellery and Jenkins were no longer connected with the law firm and that Ryan would be representing German, who was still associated with the law firm, in the matter. (Wesley Mot. Ex. 1.) In his letter, Ryan also offered Wesley \$500.00 to settle the matter, which, in a letter dated June 2, 2003, Wesley rejected. (Wesley Mot. Ex. 2.)

Nevertheless, neither German nor Ryan signed and returned the waiver of service of the summons to the Clerk of Court. As a result, the Clerk of Court then forwarded the summons and Complaint to the United States Marshals Service to effect service on Defendants. On June 23, 2003, the Marshals Service attempted

service of process upon Defendants at the law firm,³ but was told that German retired, and that Jenkins and Ellery were no longer associated with the law firm.⁴ Wesley then sent a letter, dated June 2, 2003, to Ryan requesting that he provide him or the Marshals Service with Ellery and Jenkins' home address and telephone number so that the Marshals Service could effect service upon them. (Wesley Mot. Ex. 2.) On June 27, 2003, Ryan refused to provide Wesley with the requested information without a court-ordered subpoena. (Wesley Mot. Ex. 5.)

On July 31, 2003, Wesley filed the instant motions requesting entry of default judgment against German and petitioning for a court-ordered subpoena requiring the law firm to provide Wesley with information relating to the whereabouts of Jenkins and Ellery. To this date, Defendants have not responded to Wesley's motions.

II. DISCUSSION

³ The Court's docket lists the address for Jenkins, German and Ellery as Booth & Tucker, LLP, 230 South Broad Street, Second Floor, Philadelphia, Pennsylvania 19102.

⁴ Notably, on the Process Receipt and Return form completed by the Marshals Service and returned to Wesley, the United States Marshal who attempted service first checked off the box showing that he had personally served German and recorded the date and time of service. (Wesley Mot. Ex. 4.) However, these parts of the document appear to have been later crossed out and, instead, the Marshal checked off the box indicating that he was unable to locate German. (Id.)

Wesley first requests that we enter default judgment against German for his alleged purposeful rejection of service by mail or by personal delivery from the Marshals Service, and his failure to respond to Wesley's Complaint. Wesley argues that German willfully evaded service because he believes that Wesley's claims against him are frivolous, and fabricated the excuse that German was retired from the law firm in an attempt to circumvent this Court's jurisdiction over him. Relying on Federal Rule of Civil Procedure 26, Wesley also requests that this Court issue an order requiring Ryan or a representative of the law firm to produce Ellery and Jenkins' contact information from their personnel records so that the Marshals Service can effect service of process. We discuss each of Wesley's requests in turn.

A. Default Judgment

Wesley first contends that since German and his representatives have refused service of process by mail and by personal delivery, and have failed to respond to Wesley's Complaint, this Court should enter default judgment against German pursuant to Federal Rule of Civil Procedure 55. Rule 55 provides that the Court may enter default judgment "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." Fed. R. Civ. P. 55(a). However, before a default

judgment may be entered, "the court must have jurisdiction over the party against whom the judgment is sought, which also means that the party must have been effectively served with process." 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2682 (3d ed. 1998). Compliance with the procedures for effecting service, as set forth in Federal Rule of Civil Procedure 4, is necessary for the court to obtain personal jurisdiction over the defendant. Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 569 (3d Cir. 1996). If a plaintiff does not serve an opposing party in compliance with Rule 4, any default judgment it receives is void and shall be set aside. United States v. One Toshiba Color Television, 213 F.3d 147, 156 (3d Cir. 2000). Rule 4(e), which governs service upon individuals within a judicial district of the United States, provides:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or incompetent person, may be effected in any judicial district of the United States:

(1) 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; or

(2) 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 or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e).

Although Wesley has attempted to serve German with notice of his suit by mailing a waiver of service and soliciting the Marshals Service to deliver a summons and Complaint to Defendants at their work place, he has not properly served German in compliance with Rule 4 since the waiver was not returned and German could not be located for personal service. In addition, although the May 28, 2003 letter from Ryan indicates that he is indeed aware of Wesley's suit, mere notice of a claim, without adherence to the procedures set forth in Rule 4, is insufficient to confer jurisdiction over a defendant. Ayers, 99 F.3d at 569. Nor do Wesley's good faith efforts to serve Defendants constitute proper service of process under Rule 4 or vest this Court with jurisdiction over this defendant. Miller v. Baxter Healthcare, No. Civ. A. 99-4752, 2003 U.S. Dist. LEXIS 6597, at *6 (E.D. Pa. Apr. 1. 2003) ("Acting in good faith is not sufficient to satisfy the service requirements of Rule 4.").

Moreover, we cannot credit Wesley's argument that he should be exempt from the strict service requirements of Rule 4 because of Wesley's allegation that German's conduct, through his representative, Ryan, reflects a continued and purposeful attempt to frustrate Rule 4 procedures. See, e.g., Electronics Boutique Holdings Corp. v. Zuccarini, No. Civ. A. 00-4055, 2001 U.S. Dist. LEXIS 765 (E.D. Pa. Jan. 25, 2001). While disfavored, Rule 4 provides a defendant the opportunity to reject a waiver of

service and instead, to incur the expense of personal service. Fed. R. Civ. P. 4(d)(2) & (5). Thus, German's choice to reject a waiver of service is not reflective of evasive conduct. Moreover, we do not view the Marshals Service's failed attempt to personally serve German at his law firm as evidence of German's evasive conduct. Although the Marshals Service was informed that German had retired and was no longer employed at the law firm, which appears inconsistent in light of Ryan's letter indicating that German was still associated with the law firm, we cannot determine that German's retirement and absence from the law firm is false or constitutes an attempt to evade service in this matter.⁵ Thus, we find that Wesley did not effect service in compliance with the procedures set forth in Rule 4 and thus, we are unable to enter default judgment against German at this time.

B. Court-Ordered Subpoena

Wesley next requests that this Court issue an order compelling Ryan or a representative from the law firm to disclose to him the address and home telephone numbers of Ellery and Jenkins. To support his request, Wesley relies on Federal Rule

⁵ Likewise, we reject Wesley's argument that Ryan's letter expressly reveals that he is refusing service on behalf of German because Wesley's claims are frivolous. Upon consideration of this letter, we find instead that Ryan's letter more likely points out the alleged problems with Wesley's Complaint in an effort to encourage settlement.

of Civil Procedure 26, which provides that "a party must, without awaiting a discovery request, provide to other parties: (A) the name, and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1). However, Rule 26(a)(1)(E) expressly exempts from initial disclosures actions "brought without counsel by a person in custody of the United States, a state, or a state subdivision." Fed. R. Civ. P. 26(a)(1)(E)(iii). Thus, as a prisoner proceeding pro se, Wesley is not entitled to initial disclosures pursuant to Rule 26 and, accordingly, we deny his motion for a court-ordered subpoena compelling the disclosure of certain personnel information relating to Ellery and Jenkins.

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

RONALD WESLEY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
EDWARD C. GERMAN, ESQUIRE	:	
MICHAEL E. ELLERY, ESQUIRE	:	
DOUGLAS K. JENKINS, ESQUIRE	:	NO. 03-CV-1049
Defendants.	:	

O R D E R

AND NOW, this day of September 2003, in
consideration of the Motions Requesting Entry of Default Judgment
Against Defendant German and Request for Issuance of a Court-
Ordered Subpoena filed by pro se Plaintiff Ronald Wesley
("Wesley") (Doc. No. 11), to which no response has been filed, it
is **ORDERED** that Wesley's Motions are **DENIED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.