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United States District Court, S.D. New York.

George ENG, Plaintiff,
v.
Charles SCULLY, Superintendant, Green Haven Correctional Facility, R. Hansen, A. Scalf, P. Bendon, and J. Holt, Defendants.

No. 84 CIV 5056 (MJL). | June 2, 1989.

Attorneys and Law Firms

Cahill Gordon & Reindel by David Wagner, New York City, for plaintiff.

Robert Abrams, Attorney General of the State of New York by Charles R. Fraser, Assistant Attorney General, New York City, for defendants Scalf and Scully.

Opinion

OPINION AND ORDER

LOWE, District Judge.

***1** Plaintiff George Eng moves to reinstate the complaint against defendant Andrew Scalf pursuant to Federal Rule of civil Procedure ("F.R.Civ.P.") 60. We grant the motion for the reasons set forth below.

BACKGROUND

Eng alleges in the complaint that on September 30, 1983, while being transported from the Special Housing Unit at Green Haven Correctional Facility to a van for conveyance to Clinton Correctional Facility, he was beaten by defendants Hansen, Scalf, Bendon, and Holt, four Green Haven correctional officers. He also alleges that defendant Scully, the Superintendent of Green Haven, was aware that Eng had suffered prior beatings by Green Haven correctional officers and had taken no action to prevent their recurrence.

Eng was granted leave to proceed *in forma pauperis,* and filed his complaint *pro se* on July 17, 1984, alleging deprivations of his federal civil rights. In August and November 1984, Eng attempted to serve summonses and a copy of the complaint upon the defendants at Green Haven through the offices of the United States Marshal's Service pursuant to F.R.Civ.P. 4(c)(2)(B). All of the defendants save Scalf were ultimately served. The Marshal's Service subsequently certified that Scalf had resigned from Green Haven on April 12, 1984 and relocated elsewhere.

None of the defendants answered the complaint. On May 1, 1985, this Court entered a default against each of the defendants except Scalf. In September of that year, the defendants in default moved to set aside entry of that determination.

While that motion was *sub judice,* the Marshal's Service located and served Scalf. Scalf acknowledged receipt of the summons and complaint on October 6, 1986. Three days later, the Attorney General filed an answer on his behalf.

In an opinion and order entered on January 6, 1987, we set aside the default. In a footnote to that opinion, we dismissed the complaint against Scalf on the grounds that Eng had not served Scalf within the 120 day period established by F.R.Civ.P. 4(j).

Nearly eighteen months later, Eng filed the present motion to reinstate Scalf as a defendant. The motion is opposed by Scalf and Scully.

DISCUSSION

F.R.Civ.P. 60(b)(6) provides that "[o]n motion and upon terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for ... any ... reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time...." This provision "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States,* 335 U.S. 601, 615 (1949).

In addition, F.R.Civ.P. 4(j) expressly provides that the 120 day limit for effecting service of the summons and complaint may be extended by the Court on a showing of "good cause why such service was not made within that period...." In determining whether "good cause" has been demonstrated, "a liberal interpretation of Rule 4" is appropriate if in the interests of justice. *Romandette v. Weetabix Co., Inc.,* 807 F.2d 309, 311 (2d Cir.1986). Particular regard should be given to whether (1) the plaintiff was diligent in making reasonable efforts to effect service, including but not limited to whether plaintiff moved under F.R.Civ.P. 6(b) for an enlargement

of time in which to effect service, and (2) whether untimely service would prejudice the defendant. *Gordon v. Hunt,* 116 F.R.D. 313, 318–21 (S.D.N.Y.), *aff'd,* 835 F.2d 452 (2d Cir.1987), *cert. denied,* 108 S.Ct. 1734 (1988). In addition, consideration should be given to whether "it appears that proper service may still be obtained." *Romandette,* 807 F.2d at 311.

***2** We believe that good cause exists here to extend the 120 day period. As a preliminary reason, the Supreme Court and this Circuit have long mandated that, to the extent possible, special consideration be given to incarcerated parties owing to the facts that they are often without counsel and are burdened by various difficulties inherent in litigating from a prison cell. *See Hughes v. Rowe,* 445 U.S. 5, 9 (1980); *Salahuddin v. Coughlin,* 781 F.2d 24 (2d Cir.1986). Eng commenced this action from prison, not to mention *in forma pauperis* and *pro se.* As a result of this status, a more flexible application of the 120 day rule is warranted here.[1]

Secondly, although Eng did not move under F.R.Civ.P. 6(b) for an extension of time to serve, he was clearly diligent in attempting to effect service. Within three weeks of filing the complaint, he endeavored to effect service via the United States Marshal's Service. His inability to serve Scalf was due to the latter's unexpected resignation and relocation, not to any inexcusable oversight or dilatoriness on Eng's part. His actions were reasonably calculated to ensure proper service. *See La Bruno v. Fauver,* 109 F.R.D. 43, 44 (D.N.J.1985) (efforts by *pro se* prisoner to effect service via Marshal's Service, without showing of prejudice to defendants, warrant extension of 120 day limit).

Thirdly, Scalf will not be prejudiced by reinstatement of the complaint against him. As a result of the defendants' initial failure to answer, the subsequent motion to vacate, and the Attorney General's stated conflict in representing more than one defendant, there has been no substantive discovery in this case. *See* Memorandum in Opposition at 6. Thus, Scalf's defense will not in the least be disadvantaged by his late entry into the matter.

Finally, Scalf has already been served. Thus, there is no chance of further delay—or of prejudice to the other defendants that such delay might engender—pending efforts to effect service.

Scalf and Scully argue that, even if there is good cause to extend the 120 day period for service, the dismissal of the complaint against Scalf should nevertheless be upheld since the motion to reinstate was filed more than 10 days from the date of the dismissal. They base their argument on Rule 3(j) of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Rule 3(j)"). That provision states in part that "[a] notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion...."

As a preliminary matter, there is a question as to whether this provision is even applicable here. The present motion is for "reinstatement" rather than reargument. Also, since we dismissed the complaint against Scalf *sua sponte* with notice to Eng pursuant to F.R.Civ.P. 4(j), there has been no argument as to the appropriateness of dismissal; thus, there can be no reargument.

***3** Nevertheless, even assuming that Local Rule 3(j) applies, we do not believe that it bars the relief sought. To read the rule as Scully and Scalf urge us to read it would undermine the broad equitable scope of F.R.Civ.P. 60(b) and F.R.Civ.P. 4(j)'s "good cause" exception to the 120 day period by strictly limiting the time during which an extension of that period could be sought. Accordingly, we shall consider whether there was good cause for the failure to file the present motion within 10 days of our dismissal.

Scully and Scalf contend that Eng's 18 month delay in filing the present motion cannot be excused since settlement negotiations, which Eng says caused the delay, occupied but a small portion of that period. We disagree, and believe that additional facts surrounding the delay warrant a finding of good cause. Eng's incarceration alone has no doubt slowed the litigation. Further, letters from Eng's counsel to the Court dated March 31, 1987 and February 10, 1988 indicate that Eng was prosecuting his case with a fair amount of diligence. Not only was he engaged in settlement negotiations, which consumed approximately 5 months of the 18 month period. He twice noticed depositions and served subpoenas duces tecum on non-party witnesses. However, discovery was postponed at the defendants' request due to the Attorney General's asserted conflict of interest. Indeed, the above letters and the February 29, 1988 letter to the Court from Assistant Attorney General Fraser indicate that a substantial portion of the 18 month period was consumed by efforts on the part of the defendants to secure substitute counsel. Furthermore, a substantial period of time elapsed when one Assistant Attorney General responsible for the case departed, and when her successor had to be relieved due to illness.

CONCLUSION

For the reasons stated above, we believe there is good cause for Eng's failure to both serve Scalf within 120 days of the filing of the complaint, and to file the present motion within 10 days of the order from which it seeks to be relieved. Accordingly, Eng's motion to reinstate the complaint against Scalf is granted pursuant to F.R.Civ.P.

4(j) and 60(b)(6).[2] Scalf will have 30 days from the date of this opinion to secure counsel, if he so desires. The parties are to appear for a pretrial conference on July 10, 1989 at 11:00 a.m. in courtroom 102. All discovery is stayed until that time or such earlier time as the parties agree to proceed.

It Is So Ordered.

Footnotes

1 We are not unaware that Eng received *pro bono* counsel starting in August 1984. *See* Memorandum in Opposition to Motion for Reargument at 8. However, this fact alleviates many but not all of the unique problems encountered by prisoner litigants. Meeting and communicating with counsel, for instance, remain formidably difficult. Moreover, given the facts of this case, we do not believe Eng should be penalized for the lack of diligence, if any, on the part of his attorneys in locating and serving Scalf.

2 We reject Eng's argument that the dismissal of the complaint against Scalf resulted from the Court's overlooking the fact that, at the time of the dismissal, Scalf had been served. The fact remains that he was not served within 120 days of the filing of the complaint. Nor were any facts excusing the late filing presented by Eng to the Court prior to the time the complaint was dismissed against Scalf.