



present action against defendants Rick Kearney ("Kearney"), Mike Deloch, Philip Townson, William Gosnell, Carl Anson, Correctional Medical Services, Dr. Ivens, the State of Delaware Department of Corrections, Suesane Rickards, Georgia Perdue, Dr. Burns. (Id.)

2. Plaintiff is a pro se litigant proceeding in forma pauperis. On June 10, 2003, this court issued a service order requiring the United States Marshal ("USM") to serve the complaint upon the receipt of United States Marshal 285 forms ("USM 285 forms") for each defendant. (D.I. 8) This order indicated that upon receipt of all the USM 285 forms, the USM would serve a copy of the complaint upon each of the defendants identified in each USM 285 form. (Id.) Plaintiff repeatedly failed to submit USM 285 forms for all of the defendants. (D.I. 12, 13, 16, 17, 21)

3. On September 8, 2003 this court ordered plaintiff to complete and return to the Clerk of the Court an original USM 285 form for defendants the State of Delaware and the Sussex Correctional Institution. (D.I. 29 at 2-3) The court again notified plaintiff that the USM would not serve the complaint until all USM 285 forms were received by the Clerk of the Court. (Id. at 3) The court also indicated that failure to provide the USM 285 forms within 120 days of the September 8th order may result in the complaint being dismissed or defendants being dismissed pursuant to Fed. R. Civ. P. 4(m). (Id.)

4. On January 14, 2004 this court issued an order dismissing plaintiff's complaint for failure to prosecute based on plaintiff's failure to submit all the required USM 285 forms. (D.I. 33) Plaintiff subsequently appealed the case to the Third Circuit. (D.I. 35)

5. On January 22, 2004 the court withdrew the January 14th order dismissing plaintiff's complaint and directed the Clerk of Court to reopen the case. (D.I. 36) However, the court dismissed defendants Sussex Correctional Center and the State of Delaware without prejudice because plaintiff failed to submit the necessary USM 285 forms within 120 days for those defendants. (Id. at 1) The court stated that "[u]pon return of this case by the United States Court of Appeals for the Third Circuit, the United States Marshal shall forthwith serve a copy of the complaint and amended complaints, this order, a 'Notice of Lawsuit' form upon each of the defendants so identified in each 285 form." (Id. at 1-2)

6. On June 14, 2004 plaintiff filed the present motion for entry of default judgment. (D.I. 40) According to plaintiff's motion, "[d]efendant's warden, Rick Kearney was served with a copy of the summons and complaint as appears from the proof of service on file." (Id.) Furthermore, plaintiff states "[t]hat [d]efendant Rick Kearney has not filed or served an answer, or taken other actions as may be permitted by law although more than

55 day[]s have elapsed since the date of service.” (Id.) Since plaintiff only alleged that defendant Kearney had not filed or served an answer, the court assumes that plaintiff’s motion is only for entry of default against defendant Kearney.

7. Plaintiff did not explicitly state the basis for his motion for entry of default. According to Fed. R. Civ. P. 4(d)(2)(F), a defendant has at least 30 days from receipt of a request to waive service to waive such service. When a defendant waives service under Fed. R. Civ. P. 4(d), it has 60 days after the date the request was mailed to submit its answer. Fed. R. Civ. P. 4(d)(3).

8. On July 19, 2004 the USM served defendant Kearney. (D.I. 48) Since defendant Kearney was not served until after plaintiff’s motion for entry of default, the court denies plaintiff’s motion for entry of default.<sup>1</sup> Furthermore, defendant Kearney’s actions after waiver of service complied with the Federal Rules of Civil Procedure. On July 20, 2004 defendant Kearney returned a waiver of service of summons, well within the minimum 30-day period prescribed by Fed. R. Civ. P. 4(d)(2)(F). (Id.) Defendant Kearney filed his answer to plaintiff’s

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<sup>1</sup> The USM attempted to serve all thirteen named defendants in this case on July 19, 2004. (D.I. 43, 45, 46, 47, 48, 49, 54, 55, 56) Consequently, even if plaintiff’s motion was for entry of default against all the defendants the result would be the same. Plaintiff’s motion for entry of default preceded service by the USM and, therefore, must be denied.

complaint on September 20, 2004. This too was within the 60-day period of Fed. R. Civ. P. 4(d)(3). See Fed. R. Civ. P. 6. Consequently, plaintiff's motion for entry of judgment is denied.

Sue L. Robinson  
United States District Judge