

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CARLOS LAMONTE JOHNSON, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 02-369-KAJ  
 )  
 MEDICAL DEPARTMENT, DR. IVENS,) )  
 DR. BAILEY, and DR. TRIVEDI ) )  
 )  
 Defendant. )  
 )

**MEMORANDUM OPINION**

**I. INTRODUCTION**

Presently before me is a Motion to Dismiss (Docket Item ["D.I."] 61; the "Motion") filed by Keith Ivens, M.D. ("Dr. Ivens") for insufficiency of service of process pursuant to Federal Rule of Civil Procedure 4(m) and for failure to prosecute pursuant to Rule 41(b). For the reasons that follow, Dr. Ivens' Motion will be granted.<sup>1</sup>

**II. BACKGROUND**

Plaintiff Carlos Lamonte Johnson ("Plaintiff") is a *pro se* litigant who, at the time he filed his Complaint, was incarcerated at the Delaware Correctional Center ("DCC") in Smyrna, Delaware. (D.I. 2.) On May 15, 2002, after being permitted to proceed *in forma pauperis*, Plaintiff commenced this action against Dr. Ivens<sup>2</sup> under 42 U.S.C.

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<sup>1</sup> Also before me is a Motion to Stay (D.I. 47), filed by Plaintiff on March 15, 2004, in which he requested that his case "be extended until [he] get[s] out [of prison]." Plaintiff has since been released and thus his request is moot.

<sup>2</sup> Dr. Bailey, Dr. Trivedi, and Correctional Medical Services, Inc. ("CMS") were also named as defendants in the Complaint but have since been dismissed from the case. (See D.I. 2, 60, 64.)

§ 1983. (*Id.*) On August 27, 2002, this court ordered Plaintiff, pursuant to Federal Rules of Civil Procedure 4(c)(2) and (d)(2), to “complete and return to the Clerk of the Court an original ‘U.S. Marshal - 285’ form [‘285 form’] for each defendant[.]”<sup>3</sup> (D.I. 16 at 1.) The court also informed Plaintiff that his “[f]ailure to submit this form may provide grounds for dismissal of the lawsuit pursuant to Fed. R. Civ. P. 4(m).” (*Id.*) In response, on September 8 and September 12, 2002, Plaintiff completed, and returned to the Clerk of the Court, 285 forms for Correctional Medical Services (“CMS”), Dr. Ivens, Dr. Bailey, and Dr. Trivedi. (D.I. 23, 26, 30, 31.) On January 6, 2003, service was returned to the Court unexecuted as to Dr. Ivens. (D.I. 26.)

Evidently, Plaintiff also had difficulty in serving CMS; however, In my March 31, 2004 Memorandum Order, I found that Plaintiff had made a good faith effort to comply With Fed. R. Civ. P. 4 in his attempts to effect service of process upon CMS. (D.I. 50 at 4.) I therefore exercised my discretion pursuant to Fed. R. Civ. P. 4(m) to grant an extension of time for Plaintiff to serve CMS. (D.I. 50.) Plaintiff failed to submit a completed 285 form during the extension, and, as a result, I dismissed the action against CMS without prejudice on June 4, 2004. (D.I. 60.)

On February 22, 2005, I ordered that if Plaintiff was going to file an answering brief in response to a motion to dismiss filed by defendants Bailey and Trivedi, he must do so on or before March 8, 2005. (D.I. 51, 63.) Plaintiff, however, failed to file a response to the motion and on April 20, 2005, I ordered that Plaintiff’s claims be

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<sup>3</sup> U.S. Marshal - 285 forms allow a plaintiff to request that the court direct that service of the summons and complaint “be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis[.]” Fed. R. Civ. P. 4(c)(2).

dismissed without prejudice as to defendants Bailey and Trivedi. (D.I. 64.) On July 21, 2004, Dr. Ivens, the only remaining defendant, filed this Motion to Dismiss. (D.I. 61)

### III. STANDARDS

#### A. Rule 4(m)

An action against a defendant may be dismissed “[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint.” Fed. R. Civ. P. 4(m). It is a well settled principle that district courts, upon determining that process or service of process was insufficient, have broad discretion in dismissing a plaintiff’s complaint. *Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992); *Mettle v. First Union Nat’l Bank*, 279 F. Supp. 2d 598, 604 (D.N.J. 2003). In determining whether to dismiss a complaint, or grant a plaintiff an extension of time to serve a defendant, the court must follow a two step procedure. *McCurdy v. Am. Bd. of Plastic Surgery*, 157 F.3d 191, 196 (3d Cir. 1998); *Mettle*, 279 F. Supp. 2d at 604.

First, the district court should 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.

*Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995).

Courts have found that “good cause” exists for an extension of time when the plaintiff has made a good faith effort to comply with the rule and there is a reasonable justification for the plaintiff’s noncompliance. *Momah v. Albert Einstein Med. Ctr.*, 158 F.R.D. 66, 69 (E.D. Pa. 1994) (citing *Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (3d Cir. 1988)).

**B. Rule 41(b)**

Under Rule 41(b) of the Federal Rules of Civil Procedure, “a defendant may move for dismissal of an action or of any claim against the defendant” in instances where “the plaintiff [has failed] to prosecute or to comply with these rules or any order of court.” Fed. R. Civ. P. 41(b). A court’s authority to dismiss claims under Rule 41(b) is based on the “‘inherent power’ [of the court] ... to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.” *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962). “The procedural history of each case must be examined” in order to determine whether a motion under Rule 41(b) should be granted. *Marshall v. Sielaff*, 492 F.2d 917, 918 (3d Cir. 1974).

**IV. DISCUSSION**

**A. Rule 4(m)**

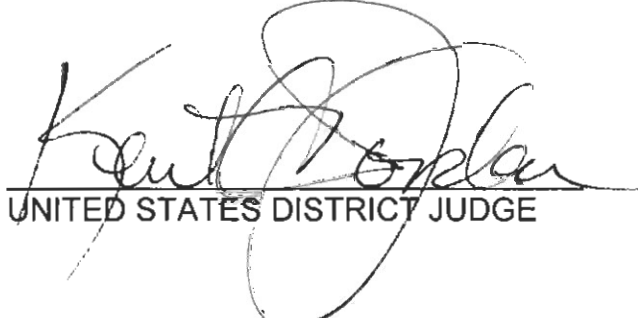
Dr. Ivens asserts that Plaintiff has yet to serve him properly even though 798 days have passed since Plaintiff filed his complaint. (D.I. 61 at ¶ 7.) Now, more than ten months after Dr. Ivens filed this Motion, Plaintiff has still failed to serve him. Thus, Plaintiff has clearly exceeded the 120 days allowed for service of process under Rule 4(m). Because Plaintiff has made no attempt to show that there is a reasonable justification for his noncompliance, good cause does not exist for an extension of time. See *Dominic*, 841 F.2d at 517; *Momah*, 158 F.R.D. at 69. Additionally, I will not exercise my discretion to extend the time, because Plaintiff has made no further effort to comply with Fed. R. Civ. P. 4(m).

**B. Rule 41(b)**

Independent grounds exist under Rule 41(b) to grant Dr. Ivens' Motion. Plaintiff has not had any correspondence with this court during the last ten months.<sup>4</sup> Furthermore, Plaintiff did not respond to defendants Bailey and Trivedi's motion to dismiss (D.I. 51), even after being ordered to file his answer brief before March 8, 2005. (D.I. 63.) Plaintiff has had more than sufficient time to indicate that he is still interested in pursuing this case, but has not done so. Thus, consistent with *Marshall*, 492 F.2d at 918, the procedural history clearly shows that Plaintiff has failed to prosecute this case.

**V. CONCLUSION**

Accordingly, IT IS HEREBY ORDERED that Dr. Ivens' Motion to Dismiss (D.I. 61) is GRANTED and Plaintiff's Motion to Stay (D.I. 47) is DENIED as moot.

  
UNITED STATES DISTRICT JUDGE

June 1, 2005  
Wilmington, Delaware

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<sup>4</sup> Plaintiff's last correspondence with this court was a letter dated July 23, 2004, in which he stated that he "never knew the correct names of his defendants until now." (D.I. 62.) He also stated that he "read that they are trying to get some parts of [his] case dismissed" and asked that his time be extended to "get a lawyer so [he] can be compensated for pain and suffering." (D.I. 62.) This letter, however, was not responsive to Dr. Ivens' Motion and does not remedy the deficiencies in Plaintiff's prosecution of this case.