IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JEROME HAMILTON, Plaintiff, v. FAITH LEAVY, PAMELA FAULKNER, WILLIAM QUEENER, FRANCES LEWIS, GEORGE M. DIXON, JACK W. STEPHENSON, DEBORAH L. GRAIG, JOANNE SMITH, DENNIS LOEBE, ELDORA C. TILLERY, FRANCIS COCKROFT, JERRY BORGA, RICHARD SHOCKLEY, Defendants.	)	Civil Action No. 94-336-KAJ

MEMORANDUM ORDER

Presently before the court is the Defendants'[1] Motion to dismiss plaintiff Jerome Hamilton's (the "Plaintiff") complaint against defendant Richard Shockley (Docket Item ["D.I."] 334; the "Motion to "Dismiss"). The factual background and procedural history of this case have been previously set forth in several published and unpublished opinions.[2] For purposes of this Motion, the relevant background information is as follows. On May

[1]The "Defendants" are Faith Leavy ("Leavy"), Pamela Faulkner ("Faulkner"), William Queener ("Queener"), Frances Lewis ("Lewis"), George Dixon ("Dixon"), Jack Stephenson ("Stephenson"), Deborah Craig ("Craig"), JoAnne Smith ("Smith"), Dennis Loebe ("Loebe"), Eldora Tillery ("Tillery"), Francis Cockroft ("Cockroft"), Jerry Borga ("Borga"), and Richard Shockley ("Shockley").

[2]*See Hamilton v. Leavy*, 322 F.3d 776 (3d Cir. 2003); *Hamilton v. Leavy*, No. Civ. A. 94-336-GMS, 2001 WL 848603 (D. Del. July 27, 2001); *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997); and *Hamilton v. Lewis*, No. 94-336-SLR, 1995 WL 330728 (D. Del. May 26, 1995).

15, 1998, Plaintiff amended his complaint to add Dixon, Stephenson, Craig, Smith, Loebe, and Tillery. (D.I. 112.) Plaintiff amended the Complaint again on July 23, 1999 to include defendants Cockroft, Borga, and Shockley. (*Id*. at 164.) The Docket Sheet indicates that process was served on Shockley on August 3, 1999, but that entry is not accurate. (D.I. 182.) In fact, the "Process Receipt and Return" form for Shockley shows that the U.S. Marshal was unable to locate Shockley and service was not effected. (*Id*.)

Although Shockley has been named as a defendant in this case for more than four years, the Defendants, at the pre-trial conference, for the first time argued that Shockley had not been served with process pursuant to Fed. R. Civ. P. 4.[3] I directed both the parties to brief the issue. In his Answering Brief, Plaintiff does not assert that Shockley has been served with process. (D.I. 339.) Rather, Plaintiff argues that Shockley has waived any objection to lack of jurisdiction or insufficiency of service of process pursuant to Fed. R. Civ. P. 12(h)(1)[4] because Shockley has appeared in this case repeatedly through counsel, and his appearance through counsel "rise[s] to [a] level of voluntary appearance resulting in waiver of defense of insufficiency of service." (*Id*. at 4) (citing *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732-

[3]Rule 4(c) states that "[a] summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint."

[4]Rule 12(h)(1) states that a "defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

733 (7th Cir. 1991) and *Broadcast Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278, 279 (5th Cir. 1987)).

Plaintiff claims that the record demonstrates that the attorneys from the office of the Attorney General for the State of Delaware have "appeared repeatedly on behalf of all defendants, including ... Shockley, both in this Court and in the Court of Appeals;" "Shockley has filed motions and sought relief from this Court and from the Court of Appeals;" the Attorney General's Office "has made affirmative arguments on ... Shockley's behalf," which are "positions that can only be taken by ... Shockley in his individual capacity (including for example, qualified, absolute, and quasi-official judicial immunity);" the Attorney General's Office "filed a motion to dismiss for insufficiency of service of process on behalf of some defendants, but excluded ... Shockley, at the same time they made other affirmative motions for all defendants;" and the "Attorney General's Office has never excluded ... Shockley as a represented party on any paper." (*Id*. at 8.)

According to the Plaintiff, the Motion should be denied because Shockley, through the Attorney General's Office, has led "plaintiff to believe that service [wa]s adequate" and that no insufficiency of service of process defense was going to be made. *Trustees of Cent. Laborers' Welfare Fund*, 924 F.2d at 732-733. Plaintiff also claims that the Attorney General's Office voluntarily appeared for Shockley and that "counsel's involvement in the litigation on [a party's] behalf constitute[s] an appearance, thereby waiving any defect pertaining to personal jurisdiction." *Broadcast Music,* 811 F.2d at 279. However, the cases Plaintiff relies upon are distinguishable. In *Broadcast*

Music, the defendants' attorney entered an appearance for the defendants, and was authorized to enter such an appearance. Thus, the Fifth Circuit found that "any jurisdictional defect based upon imperfect service of process" was waived. *Id*. at 281. Here, the Attorney General's Office was authorized to represent Shockley in his official capacity (D.I. 334 at 2), but all of Plaintiff's claims against the Defendants in their official capacities, including claims against Shockley, were dismissed by this court pursuant to the doctrine of sovereign immunity. *See Hamilton v. Leavy*, 2001 WL 848603 at *6. Although the claims made by Plaintiff were allowed to go forward against the Defendants in their individual capacities, there is no record indicating that Shockley has ever authorized the Attorney General's Office to represent him in his individual capacity. (D.I. 334 at 2.)

In *Trustees of Cent. Laborers' Welfare Fund*, the court held that the because the Defendants actively engaged in communications with the court without ever raising any question as to adequacy of service, the defendants waived the defense of improper service as the basis for vacating a default judgment. 924 F.2d at 733. Here, there is no record of any communication with Shockley by anyone involved in this litigation, including the Attorney General's Office, Plaintiff, Plaintiff's counsel, the court, or the U.S. Marshal's Office. Shockley has not attended any meetings or court proceedings, and has not manifested consent to the State's representation of him in his individual capacity.

Given the lengthy history of this case, it is understandable that Plaintiff believes a finding of waiver of the service of process defense is in order. But there is no record

from which I can draw an inference that Shockley had notice of the case and even tacitly consented to the State's representing him in his individual capacity. To rule for the Plaintiff, I would have to say that a person who never heard he was sued could potentially be found liable based on the decisions of lawyers he never agreed could represent him. That I cannot do, as it is fundamentally at odds with the constitutional requirement of due process. *Cf. Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 472 (3d Cir. 2003) (noting due process argument associated with alleged insufficiency of service of process.)

On April 22, 2004, oral argument was held on Defendants' Motion to Dismiss and I gave Plaintiff two options with respect to Shockley. I told him that I would continue the case in order to give him ample time to effect service of process on Shockley,[5] or that I would dismiss Shockley from the case and allow Plaintiff to pursue whatever recourse he believed he might have separately against the State and/or Shockley. On April 23, 2004, Plaintiff responded by letter to the choices presented to him at oral argument, stating that he believed "Shockley should remain part of this case and that the case should proceed to trial as scheduled." (D.I. 358.) In short, Plaintiff did not choose either option that I presented to him. Since I cannot hold Shockley in the case when there is no evidence that he is aware of it, and since the Plaintiff insists that he wants to proceed against Shockley, I will continue the trial date.

Accordingly, IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss (D.I. 334) is DENIED without prejudice and;

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[5]Trial was originally set to begin May 3, 2004.

1. The trial will be continued until December 6, 2004;

2. Plaintiff shall serve Shockley with process forthwith;

3. Plaintiff shall submit for my consideration a discovery and deposition schedule to address issues raised in his letter of April 23, 2004; and

4. The pretrial conference will be held on November 22, 2004 at 4:30 p.m.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

April 27, 2004
Wilmington, Delaware