

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

WILLIS L. GRAYSON, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 98-466-KAJ
	)	
DR. GORDON J. OSTRUM, SR.,	)	
	)	
Defendant.	)	

**MEMORANDUM ORDER**

**I. Introduction**

On August 7, 1998, Willis L. Grayson, Jr. ("Plaintiff"), a prisoner detained at the Delaware Correctional Center ("DCC"),<sup>1</sup> filed a complaint pursuant to 42 U.S.C. § 1983, alleging that the defendants<sup>2</sup> failed to adequately treat injuries that he suffered as a result of an attack by another inmate. (D.I. 2). In an order entered on January 14, 1999, the court dismissed Plaintiff's Complaint with respect to all of the defendants as time-

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<sup>1</sup>Prior to August 12, 1994 and since June 16, 1998 Plaintiff has been incarcerated at the DCC. Plaintiff was incarcerated from August 12, 1994 to June 16, 1998 at a Multi-Purpose Criminal Justice Facility ("Gander Hill") in New Castle County, Delaware.

<sup>2</sup>The defendants included Stan Taylor, the Commissioner of the Delaware Department of Corrections, Sherese Brewington-Carr, the warden of Gander Hill, Correctional Medical Systems, which was a medical and health care provider for DCC and Gander Hill inmates, Prison Health Systems ("PHS"), which is the current medical and health provider for DCC and Gander Hill inmates, Jean Snyder, a Regional Vice President of PHS, Dr. Robinson, a medical doctor who formerly worked at DCC and Gander Hill, and Dr. Ostrum, a medical doctor for PHS at Gander Hill. (D.I. 45 at 1-2.)

barred by the statute of limitations. (D.I. 45 at 7-8, 10.) Plaintiff appealed that order to the United States Court of Appeals for the Third Circuit, and, in an order dated November 2, 1999, the Third Circuit dismissed Plaintiff's appeal as frivolous as to all of the defendants except Dr. Ostrum. (D.I. 51; D.I. 56 at 3.)

In a judgment and opinion entered on December 28, 2000, the Third Circuit vacated the District Court's order "to the extent that it was the Court's intention to dismiss Dr. Ostrum under Rule 4(m)." (D.I. 56 at 3.) Even though Dr. Ostrum had not been served with a summons or a copy of the complaint within 120 days after the filing of the complaint, as required by Fed. R. Civ. P. 4(m), the Third Circuit explained that because Plaintiff was proceeding *in forma pauperis* under 28 U.S.C. § 1915, "he was entitled to depend on the United States Marshal for effecting service in this case" (citing Fed. R. Civ. P. 4(c)(2), 28 U.S.C. 1915(d)). (D.I. 56 at 3-4.) Here, the Marshals attempted service on Dr. Ostrum at the address provided by Plaintiff on the U.S. Marshal-285 form, but the Marshals were unable to locate Dr. Ostrum at that address. (*Id.*) Once Plaintiff became aware of the unsuccessful attempt at service on Dr. Ostrum, Plaintiff wrote a letter to the District Court Clerk's Office and provided an alternate address for Dr. Ostrum, but Plaintiff was not aware of and was never told of the need to complete a new U.S. Marshal-285 form. (*Id.*) Moreover, Plaintiff's letter was not forwarded to the Marshal's Service, and no further attempt at service on Dr. Ostrum was made by the U.S. Marshal. (*Id.*) Accordingly, the Third Circuit held that Plaintiff "substantially complied with his responsibilities for service of process under the *in forma pauperis* statute," vacated "the District Court's order to the extent that it impliedly

dismissed Dr. Ostrum under Rule 4(m),” and remanded “the matter for further proceedings consistent with ... [the Third Circuit’s] opinion.” (D.I. 56 at 5.)

On June 16, 2001, this court, following the Third Circuit’s instructions, ordered Plaintiff to submit a U.S. Marshal-285 form for Dr. Ostrum. (D.I. 60.) Plaintiff submitted the U.S. Marshal-285 form and on July 10, 2001 the court entered an order requiring service of process on Dr. Ostrum. (D.I. 62.) On August 7, 2001 Dr. Ostrum waived service of a summons and acknowledged receiving a copy of the complaint. (D.I. 65.) On April 22, 2003, the court ordered the U.S. Marshal to serve upon Dr. Ostrum at his New Jersey address a copy of the complaint (D.I. 2), the order dated January 13, 1999 (D.I. 45), the Judgment dated November 29, 2000 (D.I. 56), the administrative order dated June 19, 2001 (D.I. 60), the order entered on July 10, 2001 (D.I. 62), the return of service dated August 7, 2001 (D.I. 65), Plaintiff’s motion to amend the complaint (D.I. 81), Plaintiff’s motion to supplement the complaint (D.I. 84), Plaintiff’s motion for appointment of counsel and expert witnesses (D.I. 89), the memorandum orders dated March 3, 2003 (D.I. 91 and 92), Plaintiff’s motion demanding default judgment dated March 25, 2003 (D.I. 93), a “Notice of Lawsuit” form, filing fee orders, and a “Return of Waiver” form. (D.I. 97.)

On June 12, 2003, Plaintiff filed another motion for default judgment. (D.I. 104.) On July 3, 2003, Dr. Ostrum filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (D.I. 106; the “12(b)(6) Motion.”) On July 15, 2003, Plaintiff filed a motion for an extension of time to respond to Dr. Ostrum’s 12(b)(6) motion (D.I. 108), and on

August 14, 2003 Plaintiff renewed a motion for appointment of counsel and expert witnesses (D.I. 114) that had previously been denied. (See D.I. 92.)

## **II. Discussion**

As noted earlier, the Third Circuit vacated this court's previous order with respect to Dr. Ostrum. Although Dr. Ostrum had not been served within the 120 days after the filing of the complaint as required by Rule 4(m), the Third Circuit stated that under Fed. R. Civ. P. 4(c) and 28 U.S.C. § 1915(d), Plaintiff was entitled to rely on the United States Marshal for effecting service because the Plaintiff was proceeding *in forma pauperis*. Furthermore, the Third Circuit stated that, in some instances, the time for service of process may be extended upon a showing of good cause pursuant to Fed. R. Civ. P. 4(m). (*Id.*)

The U.S. Marshals have now properly served Dr. Ostrum in the manner provided by Fed. R. Civ. P. 4, and Dr. Ostrum has returned a waiver of service of a summons has acknowledged receipt of the complaint, and has moved to dismiss. (D.I. 102, D.I. 106.) Now that Dr. Ostrum has been properly served, Dr. Ostrum's 12(b)(6) Motion will be granted because Plaintiff's suit against Dr. Ostrum is time-barred by the statute of limitations for the reasons articulated in the order entered on January 14, 1999 (D.I. 45).

## **III. Conclusion**

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that Dr. Ostrum's 12(b)(6) Motion (D.I. 106) is GRANTED. Plaintiff's motions for default judgment (D.I. 93 and 104) are DENIED as moot, Plaintiff's motion for an extension of

time to respond to Dr. Ostrum's 12(b)(6) motion (D.I. 108) is DENIED, and Plaintiff's renewed motion for appointment of counsel and expert witnesses (D.I. 114) is DENIED.<sup>3</sup>

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE

March 3, 2003  
Wilmington, Delaware

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<sup>3</sup>Because there is a clearly dispositive statute of limitations defense, no sound purpose would be served by giving the Plaintiff leave to further respond or by appointing counsel for Plaintiff.