

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

KAAREN TEUBER <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 4:11cv00059
)	Judge Richard A. Schell
STATE OF TEXAS <i>et al.</i> ,)	
)	
Defendants.)	

**FEDERAL DEFENDANTS’ MOTION TO DISMISS
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(5)**

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Defendants Gary Locke, Secretary of the U.S. Department of Commerce, and Robert Groves, Director of the U.S. Census Bureau (collectively, “Federal Defendants”), by and through their attorneys of record, and move to dismiss Plaintiffs’ claims against the Federal Defendants pursuant to Federal Rule of Civil Procedure 12(b)(5) on the basis that Plaintiffs have failed to serve the Federal Defendants with process within 120 days of filing the Complaint, as required by Federal Rule of Civil Procedure 4(m).

I. STATEMENT OF ISSUE

To effect service on any officer of the United States, Federal Rule of Civil Procedure 4(i) requires the plaintiff to serve a copy of the summons and complaint on the U.S. Attorney, the U.S. Attorney General, and the officers themselves, and Rule 4(m) requires that such service be accomplished within 120 days of filing the complaint. In this lawsuit in which Secretary Locke and Director Groves have been named in their official capacities, Plaintiffs have failed to serve any of those entities within 120 days of the date the Complaint was filed. The issue: Should the

Court dismiss Plaintiffs' claims against the Federal Defendants without prejudice for Plaintiffs' failure to properly serve Secretary Locke and Director Groves within 120 days of filing suit?

II. FACTS

On February 10, 2011, Plaintiffs filed this lawsuit challenging the State of Texas's redistricting of Congressional, State House, State Senate, and State Board of Education districts. (*See* Pls.' Original Compl. & Request for Inj. & Decl. Relief, & Designation of a Three-Judge Court.) Plaintiffs have named as Defendants, *inter alia*, Secretary Locke and Director Groves, two officers of the United States, solely in their official capacities. (*Id.* ¶¶ 11-12.)

As of June 10, 2011, 120 days had elapsed since Plaintiffs filed this lawsuit. Plaintiffs, however, have still not served the Federal Defendants with process. (Decl. of Wendy M. Doty ("Doty Decl."), ¶ 3.) In particular, Plaintiffs have failed to serve the U.S. Attorney for the Eastern District of Texas, have failed to serve the Attorney General, have failed to serve Secretary Locke, and have failed to serve Director Groves. (*Id.*) On March 31, 2011, counsel for the Federal Defendants sent a letter to Plaintiffs' counsel to inquire whether and when they intended to effect service of process on the Federal Defendants. (*Id.*, Ex. A.) Plaintiffs' counsel did not respond. (*Id.* ¶ 4.) On May 3, 2011, counsel for the Federal Defendants sent a follow-up email to Plaintiffs' counsel to the same effect. (*Id.*, Ex. B.) Again, Plaintiffs' counsel did not respond. (*Id.* ¶ 5.)

III. ARGUMENT

To serve process on a United States officer or employee sued in an official capacity, a plaintiff must: (1) serve the United States; and (2) send a copy of the summons and complaint by registered or certified mail to the officer. Fed. R. Civ. P. 4(i)(2). To serve the United States, a plaintiff must: (1) deliver a copy of the summons and complaint to the U.S. Attorney for the

district in which the suit is brought, or send a copy of the summons and complaint to the civil process clerk at the office of the U.S. Attorney; and (2) send a copy of the summons and complaint by registered or certified mail to the Attorney General in Washington, D.C. Fed. R. Civ. P. 4(i)(1)(A), (B). In sum, to serve an officer of the United States, a plaintiff must serve the U.S. Attorney, the Attorney General, and the officer.

Under Rule 4(m), if service is not made within 120 days after the filing of the complaint, the court must dismiss the action without prejudice or direct that service be effected within a specified time. Fed. R. Civ. P. 4(m). Only if the plaintiff makes a showing of “good cause” for failing to timely effect service must the court allow the plaintiff additional time for service. *Id.* The plaintiff bears the burden of demonstrating good cause. *Winters v. Teledyne Mobile Offshore, Inc.*, 776 F.2d 1304, 1305 (5th Cir. 1985). To establish good cause, the plaintiff must show “at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.” *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993) (quotations omitted); *see also Winters*, 776 F.2d at 1306 (plaintiff must make a showing of good faith and provide some reasonable basis for noncompliance). A dilatory plaintiff is not absolved from complying with Rule 4(m) simply because a defendant has actual notice of the suit or is otherwise not prejudiced by noncompliance. *See McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 907 (5th Cir. 1995); *Peters*, 9 F.3d at 345; *Mused v. U.S. Dep’t of Agric. Food & Nutrition Serv.*, 169 F.R.D. 28, 34 (W.D.N.Y. 1996). If no good cause is shown, the court exercises its discretion to determine whether to dismiss the case or extend the time for service. *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996).

Plaintiffs in this case have unquestionably failed to comply with the requirements of Rules 4(i) and 4(m) by failing to serve the U.S. Attorney, the Attorney General, Secretary Locke, or Director Groves within 120 days of filing the Complaint. (Doty Decl. ¶ 3.) Furthermore, no “good cause” could possibly exist to excuse Plaintiffs’ failure to effect service. Counsel for the Federal Defendants has twice reminded counsel for Plaintiffs, over the course of two months, that they have failed to effect service upon the Federal Defendants. (*Id.* ¶¶ 4-5.) Plaintiffs nonetheless failed to effect service in response to those communications, or to respond to them in any way. (*Id.*) “[S]uch attorney neglect . . . does not constitute good cause for plaintiff’s failure to serve timely the [Federal Defendants].” *Mused*, 169 F.R.D. at 33.

For the same reason, this Court should not exercise its discretion to award Plaintiffs more time to serve the Federal Defendants. “[T]hough leniency may sometimes be appropriate for those who have in good faith attempted timely service, to afford it to litigants who have failed to make even the most basic efforts would turn Rule 4(m) into a toothless tiger.” *Knorr v. Coughlin*, 159 F.R.D. 5, 7 (N.D.N.Y. 1994) (quotations omitted). Here, Plaintiffs have made no effort to serve the Federal Defendants, nor have Plaintiffs requested additional time to serve the Federal Defendants. *See Nelson v. Amerus Life Ins. Co.*, No. 5:06-cv-124, 2007 WL 1521506, at *2 (S.D. Miss. May 21, 2007) (declining to exercise discretionary power where plaintiff failed to request additional time to complete service). “This lack of diligence on the part of plaintiff militates against the Court exercising its discretion to excuse [plaintiffs’] failure to comply with Rule 4(m).” *Mused*, 169 F.R.D. at 33.¹

¹ Plaintiffs have also excluded the Federal Defendants from other aspects of this case. In particular, they did not notify the Federal Defendants of the Rule 26(f) conference that Plaintiffs conducted with the non-Federal Defendants on May 4, 2011. (*See* J. Report Under Fed. R. Civ. P. 26(f), May 23, 2011, at 8; Doty Decl. ¶ 6.)

CONCLUSION

For the foregoing reasons, the Federal Defendants respectfully request that this Court grant their Motion to Dismiss the claims against them for Plaintiffs' failure to serve the Federal Defendants within 120 days.

Respectfully submitted,

TONY WEST
Assistant Attorney General

MALCOLM BALES
United States Attorney

SANDRA SCHRAIBMAN
Assistant Director
Federal Programs Branch

s/ Wendy M. Doty
WENDY M. DOTY
DC Bar No. 490228
Trial Attorney
Federal Programs Branch
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue NW, Room 7218
Washington, DC 20530
Telephone: (202) 616-7420
Fax: (202) 616-8470
Email: wendy.ertmer@usdoj.gov

Dated: June 16, 2011

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2011, a copy of the foregoing document, together with all attachments, was filed electronically via the Court's ECF system, through which a notice of the filing will be sent to all counsel of record.

s/ Wendy M. Doty

WENDY M. DOTY