

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GULET MOHAMED,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11-cv-50 (AJT/TRJ)
)	
UNKNOWN AGENTS,)	
)	
Defendants.)	
_____)	

ORDER

On February 16, 2012, the Court issued an Order [Doc. No. 40] requiring the plaintiff to show cause why this action should not be dismissed pursuant to Fed. R. Civ. P 4(m) for failing to effect service on the remaining defendants in this case within 120 days from the filing of suit. Upon consideration of plaintiff’s response [Doc. No. 41] and the government’s reply thereto [Doc. No. 43], the Court finds that plaintiff has failed to establish “good cause for the failure” to serve and the case will be dismissed without prejudice.

On May 24, 2011, the plaintiff filed his Second Amended Complaint alleging two categories of claims. The first category of claims related to his placement on the no-fly-list and was brought against defendants Attorney General Eric Holder, Federal Bureau of Investigation (“FBI”) Director Robert Mueller, Director of the Terrorists Screening Center Timothy Healy, and “Unknown Terrorists Screening Center Agents” (the “no-fly-list claims”). The second category of claims were brought against “Unknown Agents” and alleged that those agents tortured him in Kuwait (the “torture claims”).

On August 26, 2011, the Court granted the government's motion to dismiss the no-fly-list claims on the grounds that the Courts of Appeals had exclusive jurisdiction over those claims, and transferred those claims to the Fourth Circuit. [Doc. No. 32]. The Court retained jurisdiction over the torture claims, although plaintiff had yet to effect service upon the Unknown Agent defendants, the only remaining defendants in the case. On September 1, 2011, the Court entered a scheduling order setting the initial Rule 16 pretrial conference for September 28, 2011, the close of discovery on January 13, 2012, and the final pretrial conference for January 19, 2012. [Doc. No. 33]. On September 28, 2011, after the initial pretrial conference, the Court entered a Rule 16(b) Scheduling Order. [Doc. No. 35].

The plaintiff did not raise with the Court during the discovery period any issues related to service on the Unknown Agents. Rather, on January 18, 2012, the day before the final pretrial conference, he filed an emergency motion to continue the final pretrial conference [Doc. No. 37], on the grounds that based on agreements reached with the government, he intended to request not later than February 22, 2012 leave to add additional defendants through a third amended complaint. The Court denied that motion in an Order dated January 18, 2012 [Doc. No. 38]; and the final pre-trial conference was held on January 19, 2012 as scheduled, at which the Court scheduled a trial date of March 19, 2012.

With no service yet effected on the remaining defendants, the Court entered its show cause Order on February 16, 2012. [Doc. No. 40]. On February 27, 2012, plaintiff filed his response to the show cause Order [Doc. No. 41]; and on February 28, 2012, plaintiff filed his motion for leave to file a third amended complaint [Doc. No. 42].

Rule 4(m) requires a Court to dismiss an action without prejudice if a defendant has not been served within 120 days, unless the plaintiff “shows good cause for the failure.” Fed. R. Civ. P. 4(m). Plaintiff contends that he has not been able to execute service because he “does not know the identities of the persons responsible for his torture and detention.” [Doc. No. 41, p. 3]. The Court concludes that the plaintiff has not demonstrated good cause for his failure to effect service.

Beginning no later than September 1, 2012, plaintiff had the ability to seek through discovery the identities of those “Unknown Agents.” However, as reflected in the record [Doc. Nos. 36 and 37], plaintiff’s first effort in that regard was his issuance of a discovery subpoena to the FBI on October 7, 2012, requesting the identity of the Unknown Agents who had allegedly tortured the plaintiff. On October 24, 2011, the government objected to the subpoena, but proposed that plaintiff file a third amended complaint, which would name the FBI agents by pseudonyms, to be provided by the government, and the government would accept service on behalf of those so identified agents, without prejudice to those agents’ rights to move to dismiss the claims against them. On November 28, 2011, over a month later, plaintiff agreed to proceed in that manner. However, plaintiff then delayed moving to file a third amended complaint pursuant to that proposal until February 28, 2012, after the final pre-trial conference and after the Court set a trial date. Nowhere in his response to the show cause Order has the plaintiff explained (1) the one-month delay in agreeing with the government’s proposal or (2) the delay in filing its third amended complaint in accordance with that agreement.

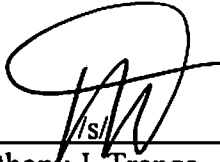
In his response, the plaintiff also seeks an extension of time “in the interests of judicial economy.” In that regard, the plaintiff argues that there is a chance the claims

that were transferred to the Fourth Circuit could be remanded to this Court, and, if they were, dismissal of this action would create duplicative litigation. What this position ignores is that the claims transferred to the Fourth Circuit relate to different allegations and different defendants than those that remain here, as this Court previously stated in its Memorandum Opinion dated August, 26, 2011. [Doc. No. 31, at 20 (holding that the plaintiff's torture claims are unrelated to the no-fly-list claims)]. The plaintiff also fails to recognize that were his request to extend the time for him to effect service on some defendant, either existing or to be joined, discovery, which closed on January 13, 2012, would need to be extended and the trial date currently set for March 19, 2012, would need to be vacated.

For all the above reasons, the Court finds and concludes that the plaintiff has failed to show cause for his failure to effect service, as required; and it is hereby

ORDERED that this action be, and the same hereby is, DISMISSED without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

The Clerk is directed to forward copies of this Order to all counsel of record.



Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 2, 2012