

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

ISHMAEL K WHITAKER,	:	
	:	
Plaintiff,	:	
	:	
VS.	:	NO. 4:22-CV-00038-CDL-MSH
	:	
Sergeant JEFFERSON, <i>et al.</i> ,	:	
	:	
Defendants.	:	
	:	

REPORT AND RECOMMENDATION

Pending before the Court is Defendant Cynthia Patillo, Ph.D.’s motion to dismiss (ECF No. 45). For the reasons stated below, it is recommended that the motion be denied.

BACKGROUND

On February 14, 2022, the Court received Plaintiff Ishmael Whitaker’s Complaint alleging various claims against Dr. Patillo and others related to his incarceration at the Muscogee County Jail (“Jail”) (ECF No. 1). In the Complaint, Whitaker identified Dr. Patillo as the “Doctor-Supervisor” at the Jail, and listed the Jail as her place of employment. Compl. 4, ECF No. 1. Whitaker also filed a motion to proceed *in forma pauperis* (“IFP”), which was granted (ECF Nos. 2, 4). At the time Whitaker filed his complaint, he was still an inmate at the jail. Compl. 4. However, he was subsequently released, and the Court ordered Whitaker to complete a non-prisoner IFP motion, which Whitaker did (ECF Nos. 7-8, 10). On June 24, 2022, the Court issued an order granting his non-prisoner IFP motion and allowing his claims against Dr. Patillo and Defendant Cole for failure to prevent his

suicide attempt and his claims against Defendant Jefferson for excessive force, retaliation, and bodily privacy to proceed for further factual development. Order & R. 1, 14, ECF No. 11. The Court further ordered that service be made on Defendants. *Id.* at 15.

On June 24, 2022, the Clerk issued a summons for Defendants, including Dr. Patillo (ECF No. 13). The summons was provided to the United States Marshals Service (“USMS”) for service on June 28, 2022, and USMS apparently mailed the summons and complaint to Dr. Patillo at the Jail (ECF No. 16). For reasons that are unclear, USMS failed to follow up on service of the complaint, and it was not until December 28, 2022, that the summons was returned unexecuted (ECF No. 39). The same day, the Clerk prepared another summons directed at Dr. Patillo and instructed USMS to personally serve her (ECF Nos. 35, 36). USMS personally served Dr. Patillo on January 6, 2023 (ECF No. 40). On January 26, 2023, Dr. Patillo served her present motion to dismiss (ECF No. 45).

DISCUSSION

Dr. Patillo moves to dismiss Whitaker’s complaint pursuant to Rules 41(b) and 4(m) of the Federal Rules of Civil Procedure. Def.’s Mem. in Supp. of Mot. to Dismiss 1-6, ECF No. 45-1. Defendant contends that since the Court issued its order allowing his claims to proceed on June 24, 2022, “Plaintiff has taken virtually no steps whatsoever to pursue his claims against this Defendant.” *Id.* at 2. Dr. Patillo cites the fact that she was only recently served with the complaint along with Whitaker’s failure to prosecute in other similar cases. *Id.* at 2-3. She further argues that Whitaker’s failure to perfect service within the time frame provided by Rule 4(m) requires dismissal. *Id.* at 4-6. For the following reasons, the Court recommends Dr. Patillo’s motion to dismiss be denied.

Under Rule 41(b), a Court can dismiss an action “[if] the plaintiff fails to prosecute or to comply with these rules or a court order.” Fed. R. Civ. P. 41(b). Here, Dr. Patillo does not cite any order Whitaker has failed to comply with other than the Court’s June 24, 2022, screening order wherein it advised him of his duty to prosecute this action. Def.’s Mem. in Supp. of Mot. to Dismiss 2. As explained below, however, because USMS did not perfect service on Dr. Patillo until January 6, 2023, it is difficult to see how Whitaker could have prosecuted the action against her. Perhaps Whitaker could have contacted the Court to ascertain the status of service on Dr. Patillo, but considering his reliance on USMS to obtain service, dismissal for failure to prosecute under these circumstances and without any further warning from the Court would be harsh. Further, Whitaker’s failure to prosecute in other cases cannot serve as grounds to dismiss Dr. Patillo in this case. It may very well be that Whitaker fails to prosecute his case going forward. His track record certainly favors such a prediction, but the Court cannot preemptively dismiss a case for failure to prosecute.

Dr. Patillo primarily relies on Whitaker’s failure to timely perfect service to support her motion. Generally, a plaintiff is required to perfect service on a defendant within 90 days after a complaint is filed. Fed. R. Civ. P. 4(m). If the defendant is not served, the court “on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.” *Id.* “[I]f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” *Id.*

However, if a plaintiff is proceeding IFP, there are additional considerations. When

a Court grants a plaintiff IFP status, “[t]he officers of the court *shall* issue and serve all process, and perform all duties in such cases.” 28 U.S.C. § 1915(d) (emphasis added). Further, a district court “must” order that service be made by USMS or a person appointed by the court if a plaintiff is authorized to proceed IFP. Fed. R. Civ. P. 4(c)(3). The Eleventh Circuit has explained:

Together, Rule 4(c)(2) and 28 U.S.C. § 1915(c) stand for the proposition that when a plaintiff is proceeding in forma pauperis the court is obligated to issue plaintiff’s process to a United States Marshal who must in turn effectuate service upon the defendants, thereby relieving a plaintiff of the burden to serve process once reasonable steps have been taken to identify for the court the defendants named in the complaint.

Rance v. Rocksolid Granit USA, Inc., 583 F.3d 1284, 1286-87 (11th Cir. 2009) (quotation marks omitted). When USMS fails to properly serve a defendant through no fault of the IFP plaintiff, the good cause exception for failure to perfect timely service is satisfied. *Id.* at 1288.

Here, it is not clear why USMS failed to timely perfect service on Dr. Patillo. It may have been the fault of the Court, USMS, or both, but it was not the fault of Whitaker. He provided USMS with the Jail address for Dr. Patillo, which is reasonable because that is where she was allegedly providing mental health services. Compl. 4. USMS eventually served Dr. Patillo at another location, apparently without any difficulty considering how quickly she was served after the Clerk directed personal service (ECF No. 40). Therefore, he satisfies the good cause exception for failure to timely perfect service.

CONCLUSION

For the reasons explained above, the Court **RECOMMENDS** that Defendant Dr.

Patillo's motion to dismiss (ECF No. 45) be denied. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. Any objection should be no longer than **TWENTY (20) PAGES** in length. *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 30th day of January, 2023.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE