

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14718
Non-Argument Calendar

D.C. Docket No. 1:20-cv-00102-JRH-BKE

PRECIOUS WILEY,
Surviving Spouse of Randy B. Wiley,

Plaintiff - Appellant,

versus

DEPARTMENT OF VETERANS AFFAIRS,
UNITED STATES GOVERNMENT,
EISENHOWER ARMY MEDICAL CENTER,

Defendants – Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(May 26, 2021)

Before JORDAN, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Precious Wiley appeals *pro se* the district court's order *sua sponte* dismissing her *pro se* complaint under the Federal Tort Claims Act alleging the wrongful death of her husband due to an Eisenhower Army Medical Center ("EAMC") employee's negligence. The district court found that Wiley failed to effect proper service on EAMC and the other defendants, the Department of Veterans Affairs, Office of General Counsel, and the United States Government, Veterans Affairs. On appeal, Wiley contends that she served each of the defendants with a copy of the complaint by certified mail and mailed copies of the certified notices to the Veterans Affairs office and the United States Attorney for the Southern District of Georgia. After a review of the record, we affirm the district court's order of dismissal.

I.

Although we generally review a district court's interpretation of Rule 4 *de novo*, we review the district court's order dismissing a complaint without prejudice for failing to timely serve a defendant under Rule 4 for abuse of discretion. *Lepone-Dempsey v. Carroll Cty. Comm'rs*, 476 F.3d 1277, 1280 (11th Cir. 2007). While we construe the pleadings of *pro se* litigants liberally, we still require them to conform to procedural rules. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007).

To serve the United States, Rule 4 requires, in relevant part: (1) sending a copy of the summons and complaint to the civil process clerk at the United States Attorney's Office by registered or certified mail; and (2) sending a copy of the summons and complaint to the Attorney General of the United States in Washington, D.C., by registered or certified mail. Fed. R. Civ. P. 4(i)(1). To serve a United States agency, Rule 4 requires, in relevant part: (1) serving the United States; and (2) sending a copy of the summons and complaint to the agency by registered or certified mail. Fed. R. Civ. P. 4(i)(2). A court must allow a reasonable time for a party to cure its failure to serve a required person under Rule 4(i)(2), if the party has served either the United States Attorney or the United States Attorney General. Fed. R. Civ. P. 4(i)(4).

Pursuant to Rule 4, "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m)." Fed. R. Civ. P. 4(c)(1). Rule 4(m) provides, in part, that "if a defendant is not served within 90 days after the complaint is filed, 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." Fed. R. Civ. P. 4(m). If the plaintiff shows good cause for the failure, however, "the court must extend the time for service for an appropriate period." *Id.* If the district court finds that a plaintiff has failed to show good cause for failing to effect service timely, it must

consider whether circumstances warrant an extension of time based on the facts of the case. *Lepone-Dempsey*, 476 F.3d at 1282. “Only after considering whether any such factors exist may the district court exercise its discretion and either dismiss the case without prejudice or direct that service be effected within a specified time.” *Id.*

II.

Based on our review of the record, we conclude that the district court did not abuse its discretion in dismissing Wiley’s complaint without prejudice for her failure to serve the defendants properly. Although Wiley contends on appeal that she sent a copy of the complaint to all parties, she does not state that she sent a copy of the summons. If she did send the certified notices to the United States Attorney for the Southern District of Georgia and the Veterans Affairs office, she still failed to comply with Rule 4(i) because she did not serve the United States government.

Moreover, Wiley has not shown good cause warranting an extension of time for her to effectuate service properly. Wiley does not assert that the district court failed to consider factors that might have justified an extension of time. Therefore, she has abandoned that issue. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (stating that issues not briefed on appeal by a *pro se* litigant are deemed abandoned). Regardless, the district court considered that dismissing Wiley’s

complaint would not prejudice her because, based on the dates alleged in her complaint, her claim would be timely. Accordingly, for the aforementioned reasons, we affirm the district court's order dismissing Wiley's complaint without prejudice.

AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 26, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-14718-GG
Case Style: Precious Wiley v. Department of Veterans Affairs, et al
District Court Docket No: 1:20-cv-00102-JRH-BKE

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG

at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14718-GG

PRECIOUS WILEY,
Surviving Spouse of Randy B. Wiley

Plaintiff - Appellant,

versus

DEPARTMENT OF VETERANS AFFAIRS,
UNITED STATES GOVERNMENT,
EISENHOWER ARMY MEDICAL CENTER,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

BEFORE: JORDAN, GRANT, and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

PRECIOUS WILEY, Surviving Spouse
of Randy B. Wiley,

Plaintiff,

v.

UNITED STATES GOVERNMENT;
DEPARTMENT OF VETERANS
AFFAIRS; and EISENHOWER ARMY
MEDICAL CENTER,

Defendants.

CV 120-102

ORDER

After a careful, *de novo* review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. (Doc. no. 9.) The Magistrate Judge recommended dismissal of the case without prejudice because Plaintiff failed to timely effect service of process. (See doc. no. 7.) In her objections, Plaintiff argues that she served the three named Defendants with a copy of the complaint, as demonstrated by providing certified mail tracking numbers. (See generally doc. no. 9.)


However, as the Magistrate Judge explained in both his July 22, 2020 Order and November 5, 2020 Report and Recommendation, Federal Rule of Civil Procedure 4 requires service of the summons and complaint on specific entities, including the civil process clerk at the office of the United States Attorney for the Southern District of Georgia. (Doc. no. 3, pp.

1-2; doc. no. 7, p. 2.) Plaintiff's objections state that she served only a copy of the complaint on the three named Defendants. (See doc. no. 9.) Moreover, service of the objections does not satisfy the Rule 4 requirements for service of the summons and complaint.

Finally, the Court recognizes Plaintiff requests a non-specific extension of time "if need be to file other objections." (Id.) However, the Court cannot advise Plaintiff beyond the information in the November 5, 2020 Order about the "need" for objections, and Plaintiff's description of her attempts at service show the Magistrate Judge correctly concluded the case is due to be dismissed. Thus, to the extent Plaintiff intended to request additional time to object only if the Court did not accept as satisfactory her service efforts, the request is denied as procedurally improper.

Accordingly, the Court **OVERRULES** all of Plaintiff's objections, **ADOPTS** the Report and Recommendation of the Magistrate Judge as its opinion, **DISMISSES** Plaintiff's complaint without prejudice based on the failure to timely effect service, and **CLOSES** this civil action.

SO ORDERED this 30th day of November, 2020, at Augusta, Georgia.



J. RANDAL HALL, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

PRECIOUS WILEY, Surviving Spouse)	
of Randy B. Wiley,)	
)	
Plaintiff,)	
)	
v.)	CV 120-102
)	
UNITED STATES GOVERNMENT;)	
DEPARTMENT OF VETERANS)	
AFFAIRS; and EISENHOWER ARMY)	
MEDICAL CENTER,)	
)	
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff filed the above-captioned case on July 21, 2020, and because she is proceeding *pro se*, on July 22, 2020, the Court provided her with basic instructions regarding the development and progression of this case. (Doc. nos. 1, 3.) The Court explained Plaintiff is responsible for serving Defendants and explained how service could be accomplished. (Doc. no. 3, pp. 1-2.) The Court specifically informed Plaintiff, under Fed. R. Civ. P. 4(m), she had ninety days from the complaint filing to accomplish service and that failure to accomplish service could result in dismissal of the case. (*Id.* at 2.) When the ninety days for effecting service under Fed. R. Civ. P. 4(m) expired and there was no evidence any Defendant had been served, the Court entered an Order directing Plaintiff to show cause why this case should not be dismissed without prejudice for failure to timely effect service. (Doc. no. 5.)

In response, Plaintiff returned a United States Postal Service receipt for three pieces of certified mail sent to two unidentified addresses in Augusta, Georgia, and one unidentified address in Washington, DC. (Doc. no. 6.) Plaintiff does not identify what was in the certified mail or a specific address where the certified mail was sent in Augusta or Washington, DC. Plaintiff states only that she sent the mail to the “United States Government,” “Department of Veterans Affairs,” and “Eisenhower Army Medical Center.” (Id. at 1.) Nor has Plaintiff produced signed certified mail receipts showing who may have accepted the certified mail.

As the Court explained in the July 22, 2020 Order, (doc. no. 3), to serve agencies, corporations, officers, or employees of the United States subject to service under Fed. R. Civ. P. 4(i), Plaintiff must deliver a copy of the summons and the complaint, via registered or certified mail, to (1) the civil process clerk at the office of the United States Attorney for the Southern District of Georgia; (2) the Attorney General of the United States, Washington, D.C.; and (3) the officer or agency being sued. Fed. R. Civ. P. 4(i)(1)-(2). There is no indication in the complaint that any of the three named Defendants - the United States Government, a federal agency, and an army medical center - would not be subject to service under Rule 4(i). The unsigned, certified mail receipts do not establish compliance with Rule 4(i), as there is no indication Plaintiff served, via certified mail, the civil process clerk at the office of the United States Attorney for the Southern District of Georgia or the United States Attorney General. Simply put, the documents do not show that summons have been returned executed or valid service has been accomplished.

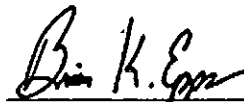
Plaintiff has not shown good cause for failing to timely effect service, and the Court finds that no other circumstances warrant any further extension of the service period. The

Advisory Committee Note to Rule 4(m) provides some guidance as to factors that may justify an extension of time for service. Such considerations include if a defendant is evading service or if the statute of limitations would bar a refiled action. Horenkamp v. Van Winkle & Co., 402 F.3d 1129, 1132-33 (11th Cir. 2005) (citing Advisory Committee Note to Rule 4(m), 1993 Amd.). There is no indication any Defendant may be attempting to evade service. Nor is there any indication the statute of limitations may bar a refiled action. Although the complaint does not list all dates of medical treatment provided, based on the information in the complaint, it appears Plaintiff's deceased husband was treated at the end of 2019 and passed away on February 3, 2020. (Doc. no. 1, p. 7.) See United States v. Kwai Fun Wong, 575 U.S. 402, 405 (2015) ("The Federal Tort Claims Act . . . provides that a tort claim against the United States 'shall be forever barred' unless it is presented to the 'appropriate Federal agency within two years after such claim accrues' and then brought to federal court 'within six months' after the agency acts on the claim." (citation omitted)). Although the complaint does not indicate Plaintiff first presented her claim to the appropriate federal agency before filing her case in federal court, nothing about dismissal without prejudice for failure to timely effect service will impact Plaintiff's ability to argue any refiled action satisfies the applicable statute of limitations.

In sum, the responsibility for effecting service stands firmly with Plaintiff. Despite having been provided with the information and tools needed to effect service, Plaintiff has not complied with the Federal Rules of Civil Procedure, as all litigants appearing in this Court are required to do. See Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989) ("[O]nce a *pro se* . . . litigant is in court, he is subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure.") The Court warned Plaintiff that failure to

effect service within the ninety days allowed under Rule 4 could lead to dismissal of the entire case. (See doc. nos. 3, 5.) Accordingly, the Court **REPORTS** and **RECOMMENDS** this case be **DISMISSED** without prejudice for failure to timely effect service. See Dixon v. Blanc, 796 F. App'x 684, 686-87 (11th Cir. 2020) (*per curiam*); Schnabel v. Wells, 922 F.2d 726, 728-29 (11th Cir. 1991).

SO REPORTED and RECOMMENDED this 5th day of November, 2020, at Augusta, Georgia.



BRIAN K. EPPS
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA