Griffin v. Inogen

2023 | Cited 0 times | E.D. Texas | October 23, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION LINTON J. GRIFFIN, Plaintiff, v. INOGEN, Defendant.

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Civil Action No. 4:23-cv-411-ALM-KPJ

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE Pending before the Court is under Rule 5), wherein Defendant seeks

to dismiss Plaintiff claims under Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure. See Dkt. 5 at 1. Plaintiff filed a response (Dkt. 8), and Defendant filed a reply (Dkt. 9). For the following reasons, the Court recommends the Motion (Dkt. 5) be GRANTED IN PART and DENIED IN PART.

I. BACKGROUND On May 8, 2023, Plaintiff, proceeding pro se, filed 1) against Defendant, identified . 1

Dkt. 1. In the Complaint (Dkt. 1), Plaintiff alleges retaliation and discrimination claims under Title VII of the Civil Rights Act of 1964. Id. at 3. In support of these claims, Plaintiff alleges Gary Wilson called him racial slurs, such - against his wishes. See id. Plaintiff received negative evaluations after he complained to Human Resources. See id. Plaintiff further

1 Both the Complaint (Dkt. 1) and summons (Dkt. 3) identify See Dkts. 1 at 1; 3 at 1. Defendant contends that 5 at 1. alleges that, after filing a complaint with the Equal Employment Opportunity Commission (the he was subjected to increased work scrutiny, verbally abused by a supervisor, and denied access to mandatory training received by co-workers. See id.

On June 2, 2023, summon was Plaintiff returned executed on June 26, 2023. See Dkts. 3 4. On July 5, 2023, Defendant filed the Motion (Dkt. 5), arguing Plaintif comply with Rule 4 of the Federal Rules of Civil Procedure. See generally Dkt. 5. Specifically,

Defendant argues this action should be dismissed under Rule 12(b)(5), as Plaintiff mailed the See id. at 5. Defendant further argues service was improper because

Plaintiff mailed the summons himself. See id. at 6. Defendant additionally contends the Court should dismiss this action under Rule 12(b)(5) because the summons incorrectly named Defendant rather than Id. at 9. Finally, Defendant argues summons was defective because it did authorized to accept service on behalf of Defendant. See id. In support of the Motion (Dkt. 5), Defendant includes a declaration of Erika Ivie, a Senior Human Resources Business Partner of Inogen, Dkt. 5-1 at 1 2, a copy of the summons and complaint, id. at 3 7, service, Dkt. 5-2.

On July 31, 2023, the Court ordered Plaintiff to file a response to the Motion (Dkt. 5), if any, advising Plaintiff t . . . creates a presumption that the party does not controvert the facts set out by movant and has no 7 at 1 (quoting LOC. R. CV-7(d)) (internal quotation marks omitted). On August 7, 2023, Plaintiff filed a response asserting he performed service upon Defendant in compliance with Rule 106 of the Texas Rules of Civil Procedure. See Dkt. 8 at 1. On August 14, 2023, Defendant filed a reply (Dkt. 9) arguing as follows: Plaintiff did not perform service as required under Rule 106 of the Texas Rules of Civil Procedure as he did not serve the president, vice president, or registered agent of Defendant; Plaintiff fails to refute summons and complaint does not excuse proper service; and the summons was defective due to

does not contain the name and

of Defendant. See Dkt. 9 at 27.

II. LEGAL STANDARD The plaintiff bears the burden of proof regarding the sufficiency of service of process. See FED. R. CIV. P. 4(c); see also Coleman v. Bank of N.Y. Mellon, 969 F. Supp. 2d 736, 744 (N.D. Tex. 2013) (citing Lechner v. Citimortgage, Inc., No. 09-cv-302, 2009 WL 2356142, at *1 (N.D. Tex. July federal courts have broad discretion to dismiss an action. Coleman, 969 F. Supp. 2d at 744 (quoting Chapman v. Trans Union LLC, No. H-11-553, 2011 WL 2078641, at *1 (S.D. Tex. May 26, 2011)); see also Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 645 (5th Cir. 1994) (discretion to dismiss an action for ineffective service of process . . . (citing of Lab , 788 F.2d 1115, 1116 (5th Cir. 1986))).

hen a district court finds insufficient process or insufficient service, it may either dismiss the suit for failure to effect service or quash the service, giving the plaintiff an opportunity to reserve the defendant. Currington v. XTO Energy, Inc., No. 12-cv-589, 2013 WL 12155258, at *1 (E.D. Tex. July 2, 2013) (collecting cases). Additionally, Coleman, 969 F. Supp. 2d at 744 (collecting cases).

For service to be effective, the plaintiff must comply with the requirements of Federal Rule of Civil Procedure 4. See FED. R. CIV. P. 4. Federal Rule of Civil Procedure 4(b) provides that, on seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff

for service on the defendant FED. R. CIV. P. 4(b). Furthermore, Rule 4(m) requires service within ninety (90) days of the filing of the lawsuit, although the time for service may be extended upon a

showing of good cause. See FED. R. CIV. P. 4(m); see also Tate v. Dall. Indep. Sch. Dist., No. 21-cv-895, 2022 WL 272711, at *2 (N.D. Tex. Jan. 10, 2022), R. & R. adopted, 2022 WL 270859 (N.D. Tex. Jan. 28, 2022).

Rule 12(b)(4) allows the defendant to move for dismissal based on insufficient process. See FED. R. CIV. P. 12(b)(4). 12(b)(4) concerns the form of the process 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353 (3d ed. 2004); Gartin v. Par Pharm. Cos., Inc., 289 Cir. 2008). Thus, 12(b)(4) is proper only to challenge noncompliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of the Velasquez v. Singh, No. 16-cv-63, 2017 WL 10181040, at *1 (W.D. Tex. Sept. 25, 2017) (citing 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353 (3d ed. Supp. 2010)). Further, Rule 12(b)(5) permits a party to challenge the method of service attempted by the plaintiff or the lack of delivery of the summons and complaint. See FED. R. CIV. P. 12(b)(5); see also Gartin, 289 692 n.3.

III. ANALYSIS Defendant is correct that service was improper. Rule 4(h) of the Federal Rules of Civil Procedure provides that service on a corporation may be effectuated within the United States either:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute and the statute so requires by also mailing a copy of each to the defendant . . . . FED. R. CIV. P. 4(h)(1). Stacey Thompson, an administrative employee for Defendant, who signed for the delivery. Dkt. 5- 1 at 1. Additionally, Plaintiff addressed the summons to not See id.; Styles v. McDonalds Rest., No. 17-cv-791, 2019 WL 2266636, at *4 (E.D. Tex. Jan. 28, 2019) ven though proceeding pro se, it is responsibility to find and to provide agent for service and correct address for preparing summons, so that service of complaint and summons may issue; it is not the clerk s office responsibility to research and supply this information , R. & R. adopted, 2019 WL 1219117 (E.D. Tex. Mar. 15, 2019).

As Defendant argues, Texas law specifies that service of process must be served on the president, vice president, or registered agent. See Tex. Bus. Orgs. Code §§ 5.201(a) (b), 5.255. And Plaintiff cannot mail the summons himself, as he is a party to this litigation. See FED. R. CIV. P.

a suit may serve process in that suit . . . . Perry v. Texas, No. 21-cv-838, 2022 WL 4479243, at *8 (E.D. Tex. Aug. 9, 2022) 4 nor the Texas Rules of Civil Procedure permit a , R. & R. adopted, 2022 WL 4474141 (E.D. Tex. Sept. 26, 2022). Accordingly, service upon Defendant was improper.

Furthermore, the summons was defective. Plaintiff has not named Defendant correctly as an error easily corrected now that Plaintiff is aware of this mistake and the person authorized to accept service. See Coleman, 969 F. Supp. 2d at to properly name [the defendants] on the summons and to

ensure that a separate summons was

(citations omitted)).

While service was improper and the summons was defective, Defendant does not argue or indicate in any way that it has been prejudiced by the improper service or defective summons. No dispositive motions affecting Defendant have been filed or heard in the case, nor has the Court entered a default judgment against Defendant. See Velasquez, 2017 WL 10181040, at *2 e, no dispositive motions affecting the Defendant have been filed or heard in this case. was received and timely responded to by Defendant with the present Motion . . . . Furthermore,

federal courts have consistently held that, as an alternative to dismissal without prejudice, it is proper service. See, e.g., Hicks v. Dall. Cnty. Cmty. Colls., No. 17-cv-809, 2017 WL 6628454,

at *3 (N.D. Tex. Sept. 18, 2017) (collecting cases), R. & R. adopted, 2017 WL 6621574 (N.D. Tex. Dec. 28, 2017). Plaintiff, proceeding pro se, erred by not 2

addressing the summons to Defendant generally rather than a registered agent,

2 See Dkt. 9 at 1. Thus, Defendant makes clear that its arguments are predicated on technicalities, not substance. See Sys. Signs Supplies v. U.S. Dep t of Just., 903 F.2d 1011, 1014 (5th [A]ctual notice and efforts, coupled with his pro se status, arguably provide grounds for leniency . . .). sending the summons himself as one of the parties to the litigation, and sending the summons to business locations. But Plaintiff made a good faith effort to serve Defendant and, therefore, dismissal pursuant to Rules 12(b)(4) and 12(b)(5) is not appropriate. See Grant- Brooks v. Nationscredit Home Equity Servs. Corp., No. 01-cv-2327, 2002 WL 424566, at *4 (N.D. Tex. Mar. (quoting Stanga v.

McCormick Shipping Corp., 268 F.2d 544, 554 (5th Cir. 1959))).

Accordingly, the Court finds the Motion (Dkt. 5) should attempted service is quashed; however, the Motion (Dkt. 5) should be denied in all other respects.

Additionally, Plaintiff should be given the opportunity to attempt service in compliance with Rule 4 of the Federal Rules of Civil Procedure.

IV. RECOMMENDATION For the foregoing reasons, the Court recommends the Motion (Dkt. 5) be GRANTED IN PART and DENIED IN PART. The Motion (Dkt. 5) should be GRANTED to the extent it seeks DENIED to the extent it seeks dismissal under Rules 12(b)(4) and 12(b)(5). The Court further recommends Plaintiff be given thirty (30) days following the receipt of the Memorandum Adopting the Report and Recommendation, if any, to attempt to serve the summons and complaint upon Defendant in compliance with Rule 4 of the Federal Rules of Civil Procedure.

Griffin v. Inogen

2023 | Cited 0 times | E.D. Texas | October 23, 2023

Within fourteen (14) days after ser serve and file specific written objections to the findings and recommendations of the magistrate

judge. 28 U.S.C. § 636(b)(1)(C).

A party is entitled to a de novo review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this report shall bar an aggrieved party from appellate review of those factual findings and legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. Id.; Thomas v. Arn, 474 U.S. 140 (1985); , 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), superseded by statute on other grounds, 29 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).