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

Richmond Division

ERNEST CARLOS SUESBURY,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 81-0462-R
)	
DAVID NISBET,)	
)	
Defendant.)	

MEMORANDUM OPINION

This matter comes before the court on the defendant's motion under Rule 12(b)(6) to dismiss the complaint for failure to state a cognizable claim. See Fed. R. Civ. P. 12(b)(6). The defendant moves, in the alternative, for summary judgment under Rule 56. See id. 56(b). The plaintiff counters by moving under Rule 55 for entry of a default judgment. See id. 55. In the alternative, the plaintiff moves for summary judgment under Rule 56(a). For the reasons stated below, the court grants the defendant's Rule 12(b)(6) motion. It denies the plaintiff's motions for default and summary judgment.

On May 15, 1981, Ernest Carlos Suesbury, a prisoner at the Petersburg (Va.) Federal Correctional Institute, brought a section 1983 suit against David Nisbet, a correctional counselor at the prison. See 42 U.S.C. § 1983 (1976). Suesbury's complaint, in essence, makes the following allegations: first, that on March 23, 1981, Nisbet delivered legal mail to him four days after the prison received it; second, that on April 8, 1981, Nisbet delivered legal mail to him five days after the prison received it; and, third, that on April 8, 1981, Nisbet opened Suesbury's legal mail in his presence and read it.

The court holds that none of these allegations states a valid section 1983 claim. A delay in delivering legal mail of four or five days is not unreasonable. In addition, Suesbury does not allege that the late delivery prejudiced him

in any way. Thus, Nisbet's delay does not rise to the level of a constitutional claim. See Bolding v. Holshouser, 575 F.2d 461, 464-65 (4th Cir.), cert. denied, 439 U.S. 837 (1978). The fact that Nisbet read Suesbury's mail before delivering it also does not qualify as a constitutional violation. See Crowe v. Leeke, 550 F.2d 184, 188 (4th Cir. 1977).

Suesbury moves for entry of a default judgment on the ground that Nisbet filed his responsive pleading two days after the deadline set by the court. Such a minor failure to comply with the court's order does not warrant a default judgment. The fact that Suesbury was not prejudiced by the late filing strengthens this conclusion.

UNITED STATES DISTRICT JUDGE

DATE: _____