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

Richmond Division

BARRY C. ZELKIN,

Plaintiff,

v.

NICHOLAS BRADY, SECRETARY OF THE
DEPARTMENT OF THE TREASURY,

Defendant.

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File No. 92-15

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6). For the reasons stated below, this Motion is GRANTED.

FACTUAL BACKGROUND

This action alleges race discrimination in employment arising under the 1964 Civil Rights Act as amended to include federal employees. The Plaintiff, an adult white male, alleges that he has been employed by the IRS Warehouse and Distribution Center in Henrico County, Virginia. In January, 1991, Mr. Zelkin received an annual evaluation performance from his supervisors. Apparently Mr. Zelkin was less than pleased with his scores and claims that the evaluation did not accurately reflect the fine quality job performed by him. The Plaintiff asserts that the evaluation was a product of discrimination based upon his race in violation of the federal civil rights laws.

Mr. Zelkin then filed an administrative complaint before the EEOC. By letter dated July 19, 1991, the EEOC made a final agency decision dismissing Mr. Zelkin's complaint. A copy of this letter was mailed to both Mr. Zelkin and to his counsel, Bob Geary. Although it is not certain when the Plaintiff received notice of the EEOC's decision, it is clear that he had notice of the agency's final action by at least August 21, 1991. On that date, Mr. Zelkin filed a complaint in federal court alleging the same facts as alleged in the instant case. Zelkin v. Brady, Civil Action No. 3:91CV470-R (E.D. Va. 1991). That action was dismissed by Final Order and Accompanying Memorandum Opinion, both issued on December 27, 1991, on the grounds of insufficiency of service of process. The instant action was thereafter filed on January 10, 1992.

DISCUSSION

The Government argues that Mr. Zelkin's complaint must be dismissed because it was not filed within the thirty day time limit for filing discrimination complaints arising out of federal employment. Section 2000e-16(c) of Title 42 of the United States Code states in pertinent part that an employee aggrieved by the final disposition of an administrative complaint of discrimination may file a civil action in federal court "[w]ithin thirty days of receipt of notice of final action." At the latest, Mr. Zelkin received notice from the EEOC that his complaint had been dismissed by August 21, 1991, the date he filed his original complaint in federal court. Since the present complaint was filed on January 10, 1992, well after the thirty day time limit established by

Section 2000e-16(c), the Government contends that Mr. Zelkin's case must be dismissed as untimely.

Referring to the doctrine of equitable tolling, Mr. Zelkin asserts that his case should not be dismissed. The Plaintiff relies on the recent Supreme Court case of Irwin v. Veterans Administration, 112 L.Ed. 2d 435 (1990), a case in which the Court concluded that the thirty day time limit of Section 2000e-16(c) was subject to the traditional doctrine of equitable tolling in certain situations. The Court observed, for example, that equitable tolling had been permitted in situations where a claimant had actively pursued his judicial remedies by filing a defective pleading during the statutory period. Id. at 444 (citing American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) (plaintiff's timely filing of an individual action tolled the limitations period in a related class action claim) and Burnett v. New York Central R. Co., 380 U.S. 424 (1965) (plaintiff filed timely complaint in wrong court)).

The Plaintiff argues that that is precisely what happened in his case. In the initial action filed pro se, the District Court found two deficiencies in the service of process after Mr. Zelkin had litigated and lost the question of whether service was proper, despite the fact that Mr. Zelkin had attempted to serve the U.S. Attorney by certified mail.¹ Zelkin now maintains that his initial

¹In a Memorandum Opinion dated December 27, 1991, Judge Spencer ruled that, first, the service performed by the Plaintiff did not satisfy Fed. R. Civ. P. 4(c), which requires that service be performed by a U.S. Marshal or by someone appointed by the Court. Secondly, Judge Spencer found that the service failed to

complaint was the type of "defective pleading" contemplated by Irwin and, therefore, the statutory limit should have been tolled while his prior cause of action was pending. Furthermore, given its responses in both the first cause of action and the present case, the Plaintiff argues that the Government has not been blindsighted by Mr. Zelkin's claims and would not be unduly prejudiced by having to defend this lawsuit.

In its brief, the Government also cites Irwin as support for its argument. The Government correctly notes that the Supreme Court emphasized that the doctrine was to be applied "only sparingly" by the federal courts. Irwin, 112 L.Ed. 2d at 444. Although a timely, albeit technically defective, pleading may cause a court to invoke the doctrine of equitable tolling, the Supreme Court has made clear that "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." Id. (citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984)).

The Government goes on to suggest that the doctrine of equitable tolling cannot save Mr. Zelkin's present complaint from dismissal because he failed to exercise due diligence in preserving his legal rights. The Government maintains, and the file bears this out, that in the first case the Defendant called attention to the service of process deficiencies and admonished the Plaintiff to cure such defects in its Answer and Motion to Dismiss, filed _____
satisfy the hand delivery requirement of Fed. R. Civ. P. 4(d)(4).

October 28, 1991. Mr. Zelkin never responded to the motion to dismiss and allowed two full months to pass without making any effort to correct this defect before his case was ultimately dismissed on December 27, 1991. Accordingly, the Government argues that it was the Plaintiff's own inexcusable neglect which occasioned the dismissal of his first action; thus, he has no equity to draw on.

The issue, then, before the Court is an extremely narrow one: Whether the timely complaint filed by Mr. Zelkin before Judge Spencer was the type of defective pleading which should allow for equitable tolling or whether dismissal is appropriate here because the Plaintiff failed to exercise due diligence in preserving his legal rights in regards to his first cause of action. The line between these two conflicting views is extraordinarily thin due to the fact that, to a certain extent, all pleading deficiencies are the result of a lack of industry or preparedness on the part of one of the parties.

Courts addressing dismissals for lack of proper service have often viewed the requirements of Fed. R. Civ. P. 4 in a liberal fashion. For instance, the District of Columbia Circuit has stated:

Where the necessary parties in the government have actual notice of a suit, suffer no prejudice from a technical defect in service, and there is a justifiable excuse for the failure to serve properly, courts should not and have not construed Rule 4(d)(4) so rigidly . . . as to prevent relief from dismissal. This is especially true when dismissal signals the demise of all or some of the plaintiff's claims.

Jordan v. United States, 694 F.2d 833, 836 (D.C. Cir. 1982)

(emphasis added) (citations omitted); see also Karlsson v. Rabinowitz, 318 F.2d 666, 668 (4th Cir. 1963) (noting that where actual notice of the commencement of an action and the duty to defend has been received by the one served, the federal service requirements should be liberally construed to uphold the jurisdiction of the court to insure the opportunity for a trial on the merits).

In Borzeka v. Heckler, 739 F.2d 444 (9th Cir. 1984), the Ninth Circuit analyzed an analogous case brought under the Social Security Act. In that case, the plaintiff who was handling the litigation pro se complied with all of Rule 4(d)'s requirements except the requirement that the summons and complaint be personally served on the United States Attorney. This step was not carried out because the plaintiff claimed that he was "verbally advised" by the district court that neither himself nor the United States Marshal would or could deliver the documents. Thus, he sent them the only way he knew how -- by certified mail. Id. at 446.

In ruling that dismissal is not always required when Rule 4(d)'s personal service requirement has not been technically complied with, the Ninth Circuit in Borzeka examined four critical factors: (a) whether the party that had to be served personally received actual notice; (b) whether the defendant would suffer no prejudice from the defect in service;² (c) whether there is a

²In this context, prejudice to the defendant is not viewed in the literal sense. In other words, the prejudice must result from the defect in service itself, not from the fact that a liberal construction of the rules would have the effect of preventing a dismissal of the plaintiff's case -- a rather obvious cross to bear

justifiable excuse for the failure to serve properly, and (d) whether the plaintiff would be severely prejudiced if his complaint were dismissed.³ Id. at 447.

Applying these factors to Mr. Zelkin's case, it is apparent that the U.S. Attorney had actual notice of the lawsuit and would not have been prejudiced from the technical defect in service. It is also clear that because of the 30-day time limitation, the Plaintiff, who filed his first complaint pro se, would be severely prejudiced by dismissal, assuming equitable tolling does not apply. On the other hand, the Plaintiff has offered no justifiable excuse as to why he did not comply with the clear, albeit technical, service of process requirements of Rule 4. The Plaintiff also does not explain why the defect was not cured after the U.S. Attorney pointed it out to him, nor why he failed to even file a response to the Government's Answer and Motion to Dismiss.

This Court's role, of course, is not to sit in review of Judge Spencer's decision to dismiss Mr. Zelkin's first case. The question before this Court is only whether the Plaintiff failed to exercise due diligence in preserving his legal rights. Given the

from the Government's perspective.

³In remanding the case, the Borzeka Court instructed the lower court to consider two additional factors, both of which are also present in the instant case. First, the plaintiff in Borzeka like Mr. Zelkin elected not to cure the defect in service after the defect was pointed out to him. Second, as the Plaintiff here, the plaintiff in Borzeka was proceeding pro se when the defective service was made. The Ninth Circuit stated that courts should generally be more solicitous of the rights of pro se litigants, particularly when technical jurisdictional requirements are involved. Id. at 447-48 n.2.

facts cited above and bearing in mind the policy of liberal construction in regards to the federal service requirements, it seems likely that Judge Spencer was less than impressed with Mr. Zelkin's efforts to properly prosecute his cause of action. Mr. Zelkin has offered no excuse nor explanation as to why in his initial case he improperly served the Defendant, why he failed to cure the defect in service, or why he failed to answer the Government's motion to dismiss for improper service. Noting the admonition that the doctrine of equitable tolling should be used only sparingly, it is fair to infer that Mr. Zelkin's neglect was inexcusable and that he should not be given the benefit of the doctrine. Therefore, the Court dismisses Mr. Zelkin's complaint because it was filed more than thirty days after he received notice of the final EEOC action and because he has not demonstrated that the principles of equitable tolling should be applied to his case.⁴

CONCLUSION

Although this is a close issue, the Court is troubled by the fact that the Plaintiff in his first case was put on notice of the service defect and in two months never attempted to cure the defect nor even file a response to the motion to dismiss. Although

⁴Even if the Court had decided that the doctrine of equitable tolling applied, it may have been determined that dismissal of Mr. Zelkin's case was nevertheless appropriate.

The instant case was filed on January 10, 1992, fourteen days after Mr. Zelkin's first cause of action was dismissed. His first case was filed on August 21, 1991 after the Plaintiff or his counsel received notice of the EEOC's final action. If this notice was received more than sixteen days before his first case was filed, as is certainly possible, then the 30-day statute of limitations would bar relief, even ignoring the four months that Mr. Zelkin's case was pending before Judge Spencer.

technical defects in pleading should not bar a court from applying the doctrine of equitable tolling where the first action was timely filed, courts should be much less forgiving where a plaintiff has not diligently worked to preserve his legal rights. Such is the case here. Thus, the Government's motion is GRANTED, and the Plaintiff's case is hereby DISMISSED.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE