



January 28, 2016

VIA ECF AND U.S. MAIL

Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, GA 30303

Re: *Evans v. Georgia Regional Hospital, et al.*, No. 15-15234

To Whom It May Concern:

This letter is in response to the December 23, 2015 letter from Courtney C. Poole to the Clerk, wherein it is asserted that:

The case was dismissed by the District Court on a frivolity review before service was perfected on Appellees. Accordingly, Defendants/Appellees are not presently before the Court and do not intend to file any appellate briefs for consideration.

While it is of no particular concern to Ms. Evans whether anyone represents the Appellees on appeal or files briefing, it is clear under the law that adjudication of Ms. Evans' appeal is in no way affected by the fact that her case was dismissed prior to service of the defendants before the District Court.

Indeed, it is the normal course of procedure that service on the defendants will not be effected by the District Court until it approves the plaintiff's request to proceed *in forma pauperis*. One of the things a plaintiff seeks in filing *in forma pauperis* is that "[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); *Rance v. Rocksolid Granit USA, Inc.*, 583 F.3d 1284, 1286 (11th Cir. 2009) ("... 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 . . ."); *Powell v. Indep. Inventory Serv.*, 516 F. App'x 907, 908 (11th Cir. 2013) ("Because Powell proceeded IFP, she was entitled to have the United States Marshal serve the defendant. When a plaintiff is granted IFP status, 'officers of the court shall issue and serve all process, and perform all duties in such cases.' 28 U.S.C. § 1915(d)"); *Lockhart v. Holiday Inn Express Southwind*, 531 F. App'x 544, 548-49 (6th Cir. 2013) ("issues relating to service of process are out of the hands of a plaintiff proceeding *in forma pauperis* until the district court approves such service").

Thus, it is commonplace for Courts of Appeals to adjudicate appeals when the District Court dismisses the complaint under 28 U.S.C. § 1915 prior to service on any defendant. In *Harmon v. Berry*, 728 F.2d 1407 (11th Cir. 1984), “[t]he district court, acting upon a magistrate's recommendation, summarily dismissed the action as frivolous before service on the defendants.” *Id.* at 1409. The Eleventh Circuit reversed and reinstated the plaintiff’s claims. *Id.* Unsurprisingly, this pattern has repeated itself around the country. Procedurally, this case is very similar to *Franks v. Rubitschun*, 312 F. App’x 764 (6th Cir. 2009), where “[b]efore the complaint had been served on defendants” there was a “refer[al of] the complaint to a magistrate judge for recommendations” and was dismissed under 28 U.S.C. § 1915, which recommendation was accepted. Counsel was appointed on appeal (as was done here), and the Court of Appeals reversed on the merits, despite the fact that no defendant had been served. *Id.* at 765-66; *see also Shakur v. Selsky*, 391 F.3d 106, 110 (2d Cir. 2004) (reviving the plaintiff’s first amendment and RLUIPA claims despite the fact that “[t]he district court dismissed Shakur’s complaint with prejudice *sua sponte* pursuant to 28 U.S.C. § 1915A before the service of process on any defendant.”); *Covington v. Mitsubishi Motor Mfg. of Am., Inc.*, 154 Fed. Appx. 523, 524 (7th Cir. 2005) (reversing and remanding dismissal “under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim” that occurred “prior to service”).

In this litigation, when she was proceeding without counsel in the District Court, Ms. Evans filed a motion to appear *in forma pauperis*. Dk-2. The Magistrate, in issuing his Report and Recommendation, issued a separate order specifically directing that this Report “be served upon plaintiff and counsel for defendants.” Dk-5. Given this, and the very sequence of procedural events prescribed by 28 U.S.C. § 1915, the lack of service in the District Court is not the fault of Evans, and this appeal proceeds whether or not Appellees appear before this Court.

Sincerely,

LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.



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