

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SHANTELL D. LEWIS,)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	
)	No. 12-3112-KHV
TROY J. CARRELL and)	
STEVEN C. CHASTAIN,)	
)	
Defendants.)	
_____)	

ORDER

Under 42 U.S.C. § 1983, Shantell D. Lewis, an inmate in the custody of the Kansas Department of Corrections El Dorado Correctional Facility in El Dorado, Kansas, brings suit pro se and in forma pauperis against two correctional officers – Troy J. Carrell and Steven C. Chastain – for excessive force during a pat-down on January 20, 2012, in violation of plaintiff’s Eighth Amendment rights. On September 21, 2012, Carrell filed Defendant’s Motion To Dismiss (Doc. #11). Plaintiff did not respond within 21 days, as required by D. Kan. Rules 6.1(d) and 7.1(c). The Court sustained the motion because of plaintiff’s failure to respond, D. Kan. Rule 7.4(b) (failure to file timely responsive brief waives right to do so later), for substantially the reasons stated in defendant’s memorandum in support, Memorandum In Support Of Defendant Carrell’s Motion To Dismiss (Doc. #12) filed September 21, 2012, and for reasons briefly stated in the order, Order And Order To Show Cause (Doc. #15) filed October 31, 2012.

This matter is before the Court on plaintiff’s two motions for reconsideration – Motion For Reconsideration (Doc. #17) filed November 13, 2012, and Motion For Reconsideration (Doc. #18) filed November 30, 2012 – which are substantially similar, and his Motion For Face To Face Conference (Doc. #20) filed December 20, 2012. The main difference between plaintiff’s two

motions for reconsideration is that the former (Doc. #17) is handwritten and the latter (Doc. #18) is typed. The motions state that plaintiff did not respond to Carrell's motion to dismiss because he never received a copy of the motion. Counsel for defendant, John Wesley Smith, certified that he mailed plaintiff a copy of the motion to dismiss and memorandum in support by First Class United States Mail. Nevertheless, at this time the Court finds no reason to disbelieve plaintiff's statement that he did not receive the motion. Plaintiff is entitled to notice and an opportunity to respond to defendant's motion to dismiss. The Court therefore vacates its order on defendant's motion, Order And Order To Show Cause (Doc. #15) filed October 31, 2012, to give plaintiff an opportunity to respond to defendant's motion. See Zhu v. Fisher, Cavanaugh, Smith & Lemon, P.A., 151 F. Supp.2d 1254, 1257 (D. Kan. 2001) (where plaintiff claimed to have not received copy of defendant's motion to dismiss, even if defendant complied with service requirements under Federal Rules, plaintiff should be allowed to respond to merits of defendant's motion to dismiss).

Plaintiff's Motion for Face To Face Conference (Doc. #20) seeks an in-person hearing to "get some rulings" on plaintiff's motions for reconsideration and to require defendant to "hand over the Documents" that are on file but plaintiff has not received. Because the Court sustains plaintiff's motions for reconsideration and instructs the Clerk to send by certified mail the documents plaintiff requests, the Court overrules his motion for an in-person hearing.

IT IS THEREFORE ORDERED that plaintiff's Motion For Reconsideration (Doc. #17) filed November 13, 2012, and Motion For Reconsideration (Doc. #18) filed November 30, 2012, be and hereby are **SUSTAINED**. The Court vacates its order on defendant's motion to dismiss, Order And Order To Show Cause (Doc. #15) filed October 31, 2012, to give plaintiff an opportunity to respond.

The Court directs the Clerk to mail to plaintiff by certified mail the following: Defendant's Motion To Dismiss (Doc. #11), Memorandum In Support Of Defendant Carrell's Motion To Dismiss (Doc. #12), Notice Of Withdrawal Of Counsel And Entry Of Appearance Of Substituted Counsel (Doc. #13) and Notice Of Withdrawal Of Counsel And Entry Of Appearance Of Substituted Counsel (Doc. #14) all filed September 21, 2012.

Plaintiff's response to Defendant's Motion To Dismiss (Doc. #11) is due by January 28, 2013. Defendant's reply is due by February 11, 2013.

IT IS FURTHER ORDERED that plaintiff's Motion For Face To Face Conference (Doc. #20) filed December 20, 2012 be and hereby is **OVERRULED**.

IT IS FURTHER ORDERED that on or before January 28, 2013, plaintiff shall show cause in writing why the Court should not dismiss his claims against Steven C. Chastain without prejudice, for failure to effectuate service of process. This extends the deadline set in the Court's previous order.

If plaintiff does not timely respond to Troy J. Carrell's motion to dismiss, the Court will dismiss this case as to Carrell without further notice. If plaintiff does not timely show cause, the Court will dismiss this case as to Chastain without further notice.

Dated this 2nd day of January, 2013 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge