IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20739
Summary Calendar

MARIA SEFATI,

Plaintiff-Appellant,

v.

M.D. ANDERSON HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-94-340)

(June 26, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

The district court sua sponte dismissed plaintiff-appellant Marie Sefati's Title VII suit 131 days after Sefati had filed her complaint (proceeding pro se and in forma pauperis) because Sefati had failed to serve defendant-appellee M.D. Anderson Hospital with a summons within the 120-day time period provided under the Federal Rules of Civil Procedure. The court's one sentence order incorrectly cites Rule 4(j). As of December 1,

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

1993, former Rule 4(j) was amended and redesignated as Rule 4(m). Two aspects of Rule 4(m) are relevant here. First, the Rule provides (as did former Rule 4(j)) that the court may dismiss an action on its own initiative only "after notice to the plaintiff." There is no indication in the record that the district court provided such notice to Sefati. Second, unlike former Rule 4(j), Rule 4(m) "authorizes the court to relieve a plaintiff of the consequences of [a failure to abide by the 120-day limit] even if there is no good cause shown." Fed. R. Civ. P. 4(m) advisory committee's note (1993). The advisory committee's notes provide some guidance as to when discretionary relief would be appropriate, stating that "[r]elief may be justified . . . if the applicable statute of limitations would bar the refiled action . . . ." In this case -- as is frequently the situation in Title VII actions -- the 90-day statute of limitations period provided for Title VII actions had run by the time the district court dismissed Sefati's claim, a fact that Sefati might have called to the district court's attention had the court given the notice contemplated by the Rule. Thus, although the district court's dismissal stated that it was "without prejudice," it had the practical effect of a dismissal with prejudice. The district court's brief order fails to provide any indication that it exercised the broader discretion afforded in this situation under Rule 4(m).

Under all the circumstances, we are unable to conclude that the dismissal was correct. The district court cited -- perhaps

inadvertently -- an outdated provision of the Federal Rules of Civil Procedure. It failed to provide any notice to the plaintiff of the possibility of dismissal, as required by Rule 4(m). The order of dismissal indicated that the dismissal would be without prejudice, but the practical (and predictable) effect of the order was a dismissal with prejudice. And finally, the order provides no indication that the court exercised the discretion provided for in Rule 4(m) in such a circumstance. Accordingly, we REVERSE the judgment and REMAND with instructions to reinstate the plaintiff's claim and provide the plaintiff with an additional, reasonable period of time in which to effect proper service upon the defendant.

REVERSED and REMANDED.