



O

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BRUCE WESTIN,)
)
Plaintiff,)
)
v.)
)
DEPUTY ALEX VAZIRI,)
)
Defendant.)
)
_____)

Case No. CV 11-10738-MWF (MLG)
MEMORANDUM OPINION AND ORDER
DISMISSING COMPLAINT FOR FAILURE
TO SERVE AND PROSECUTE

On January 6, 2012, Plaintiff Bruce Westin filed this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983, naming the Los Angeles County Sheriff's Department and Deputy Alex Vaziri as defendants. The complaint alleged that Vaziri used unreasonable force against Plaintiff while arresting him on February 11, 2011, and that the Sheriff's Department was liable as Vaziri's employer.

On January 11, 2012, Magistrate Judge Marc L. Goldman dismissed the complaint with leave to amend with respect to the Sheriff's Department because the allegations against it were based solely upon the theory of respondeat superior, which is not a basis for liability under section 1983. See *Monell v. Department*

1 of *Social Svs.*, 436 U.S. 658, 691 (1978). Plaintiff did not file
2 an amended complaint within the time allowed, and on February 8,
3 2012, it was ordered that the United States Marshal effect service
4 upon Deputy Vaziri only. A service packet was sent to Mr. Westin
5 for completion and forwarding to the Marshal for the purpose of
6 effecting service.

7 It came to the Court's attention that the service packet had
8 never been sent to the Marshal, and on April 16, 2012, Magistrate
9 Judge Goldman issued an order directing Plaintiff to show cause
10 why the case should not be dismissed for failure to take
11 affirmative steps to serve the Defendant. On the same day,
12 Plaintiff filed a motion to extend the time to effect service and
13 on April 17, 2012, the order to show cause was dismissed and an
14 extension of time to effect service was granted.

15 On July 11, 2012, Plaintiff requested a second extension of
16 time to effect service. Plaintiff stated that he had sent the
17 wrong material to the Marshal and that service could not be
18 effected in that manner. He further stated that instead of
19 resubmitting the summons and complaint to the Marshal, he would
20 utilize the Sheriff's Department to effect service.

21 On July 13, 2012, Magistrate Judge Goldman granted Plaintiff
22 an extension of time to August 3, 2012, in which to effect service
23 on Vaziri, either through the United States Marshal, the sheriff's
24 department, or on his own. Plaintiff was cautioned that the
25 failure to timely effect service would result in dismissal of
26 this action without prejudice. As of August 23, 2012, no proof of
27 service has been filed and no additional extension of time has
28 been requested.

1 This action will be dismissed without prejudice. Rule 4(m) of
2 the Federal Rules of Civil Procedure provides that if service is
3 not made within 120 days after the filing of the complaint, and
4 the plaintiff cannot show good cause why service was not made
5 within that period, the action shall be dismissed without
6 prejudice upon the court's own initiative with notice to the
7 plaintiff. See *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir.
8 1991) (affirming dismissal of complaint for failure to timely serve
9 the summons and complaint); *Townsel v. County of Contra Costa*, 820
10 F.2d 319, 320 (9th Cir. 1987) (same). The 120 days in which to
11 effect service in this case expired on May 7, 2012. The second of
12 the two extensions of time to effect service expired on August 3,
13 2012. Plaintiff has still not served the summons and complaint.

14 While the court is mindful that Plaintiff is proceeding *pro*
15 *se*, he nonetheless has a responsibility to follow the Rules of
16 Civil Procedure and this Court's orders regarding service.
17 Plaintiff has failed effect service despite being twice
18 specifically informed of this requirement and being given
19 extensions of time to in which to do so. The failure to effect
20 service warrants dismissal of this action by reason of Rule 4(m).

21 In addition, Courts possess the discretionary authority to
22 dismiss an action based on a plaintiff's failure to diligently
23 prosecute or comply with a court order. Fed.R.Civ.P. 41(b); Local
24 Rule 12.1. See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-630
25 (1962). "Dismissal is a harsh penalty and is to be imposed only
26 in extreme circumstances." *Henderson v. Duncan*, 779 F.2d 1421,
27 1423 (9th Cir. 1986). The Court is required to weigh the following
28 factors in determining whether to dismiss a case for lack of

1 prosecution: "(1) the public's interest in expeditious resolution
2 of litigation; (2) the court's need to manage its docket; (3) the
3 risk of prejudice to the defendants; (4) the public policy
4 favoring disposition of cases on their merits; and (5) the
5 availability of less drastic sanctions." *Omstead v. Dell, Inc*,
6 594 F.3d 1081, 1084 (9th Cir. 2010); *In re Eisen*, 31 F.3d 1447,
7 1451 (9th Cir. 1994) (citing *Henderson*, 779 F.2d at 1423).

8 In weighing these factors, the court concludes that dismissal
9 is appropriate in this case. The case has been pending for eight
10 months without service upon the defendant. Plaintiff has twice
11 been given extensions of time and warned that his failure to
12 effect service would result in dismissal of this action. The
13 interest of the public and the court in bringing cases to
14 resolution weighs in favor of dismissal. There are no other
15 sanctions available when a party has failed to prosecute or effect
16 service.

17 Accordingly, it is ORDERED that this action be dismissed
18 without prejudice for failure to effect service and failure to
19 prosecute.



20
21 Dated: August 28, 2012

22
23

Michael W. Fitzgerald
United States District Judge

24 Presented By:



25
26
27

Marc L. Goldman
United States Magistrate Judge