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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK AGNES,

Plaintiff,

v.

NURSE JOSEPH, et al.,

Defendants.

CASE NO: 1:10-cv-00807-LJO-GBC (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DISMISSING
DEFENDANT DIXON, WITHOUT
PREJUDICE, FOR FAILURE TO SERVE
PURSUANT TO FEDERAL OF CIVIL
PROCEDURE 4(M)

/ Doc. 49

On May 10, 2010, Plaintiff Mark Agnes (“Plaintiff”), a state prisoner proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983. Doc. 1. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 10, 2011, the Court directed the United States Marshal Service (“USMS”) to initiate service of process on Defendants. Doc. 16. On July 7, 2011, the USMS returned the first service attempt unexecuted as to Defendant Dixon. Doc. 17. On August 3, 2011, Defendant Joseph executed a waiver of service. Doc. 21. On September 1, 2011, the Court ordered Plaintiff to furnish further information for initiation of service of process as to Defendant Dixon. Doc. 23. Plaintiff submitted a response, and on September 20, 2011, the Court issued an order directing the USMS to make a second attempt to serve Defendant Dixon. Doc. 27. On October 31, 2011, the USMS returned the second service attempt unexecuted as to Defendant Dixon. Doc. 30. On November 16, 2011, the Court issued an order directing the USMS to make a third attempt to serve Defendant Dixon and to contact Legal Affairs Division of CDCR in attempting to execute service. Doc. 33. On June 13, 2012, the USMS returned the third service attempt unexecuted as to Defendant Dixon. Doc. 37.

1 In the first and second returns of unexecuted service, the USMS noted that Defendant Dixon
2 was not employed and not in the CDCR database. Docs. 17, 30. In the third return of unexecuted
3 service, the USMS noted that they contacted Legal Affairs and that the last known address had been
4 vacant for six (6) months and no forwarding information was available. Doc. 37.

5 On July 12, 2012, the Magistrate Judge issued findings and recommendations, recommending
6 that Defendant Dixon be dismissed from this action, without prejudice, for Plaintiff's failure to serve
7 within the 120-day period prescribed by Rule 4(m). Doc. 39. On August 16, 2012, the Court declined
8 to adopt the findings and recommendations, ordered Plaintiff to submit identifying information as
9 to Defendant Dixon, and permitted Plaintiff to engage in discovery. Doc. 41.

10 On August 29, 2012, Plaintiff submitted the same identifying information he provided on
11 September 9, 2011, and the same information that the Court has provided to the USMS in the last
12 two orders of service. Docs. 25, 27, 33, 43. On August 29, 2012, Plaintiff also filed a motion to
13 compel. Doc. 42. Defendant Joseph did not respond to the motion to compel. In a separate order, the
14 Court denied Plaintiff's motion to compel since Plaintiff did not serve discovery requests on
15 Defendant Joseph prior to filing his motion to compel. *See* Fed. R. Civ. P. 37(a)(3).

16 On November 6, 2012, the Magistrate Judge issued [Findings and Recommendations](#),
17 recommending that Defendant Dixon be dismissed from this action, without prejudice, for Plaintiff's
18 failure to serve within the 120-day period prescribed by Rule 4(m). Doc. 49. The parties have not
19 filed any objections.

20 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de*
21 *novo* review of this case. Having carefully reviewed the entire file, the Court finds the Findings and
22 Recommendations to be supported by the record and by proper analysis.

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1 Accordingly, IT IS HEREBY ORDERED that:

- 2 1. The Findings and Recommendations, filed November 6, 2012, are ADOPTED, in
3 full; and
- 4 2. Defendant Dixon is DISMISSED from this action, without prejudice, and toll the
5 applicable statute of limitations for any new action that Plaintiff might file for the
6 duration of this case, for failure to serve within the 120-day period prescribed by
7 Rule 4(m) of the Federal Rules of Civil Procedure.

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11 IT IS SO ORDERED.

12 **Dated: December 7, 2012**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE