

1 WO

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT

8

FOR THE DISTRICT OF ARIZONA

9

10

11

12 James Jackson Ellsworth,)

13 Plaintiff,)

No. CIV-11-02554-PHX-RCB

14 vs.)

O R D E R

15 Dennis Kendall, et al.,)

16 Defendants.)

17

18

Introduction

19

20

21

22

23

Plaintiff *pro se*, James Jackson Ellsworth, is incarcerated at the Arizona State Prison Complex-Florence, South Unit ("the Florence facility"). Currently pending before the court is his "Request for District Court Assistance" in serving defendant Rose Dacumos. Req. (Doc. 15) at 9.

24

Background

25

26

27

28

On December 23, 2011, plaintiff, who claims to "suffer[] from multiple scler[osis],]" filed the present action. Co. (Doc. 1) at 3, ¶ 3. He alleges that the defendants at the Florence facility were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment by failing

1 to provide him with a cane despite "the doctor[']s
2 prescri[ption]" for one "to assist . . . with his mobility[.]"
3 Id. Plaintiff further alleges that as a result of not being
4 provided with a cane, he fell, sustaining injuries to his head,
5 which required hospitalization and stitches. Id. at 4, ¶ 4.

6 After being granted leave to proceed *in forma pauperis*,
7 plaintiff was given 21 days from January 10, 2012, in which to
8 complete and return the service packets to the Clerk of the
9 Court as to defendants, "Nurse Rose, Nurse Judy, and Facility
10 Health Administrator Dennis Kendall." Ord. (Doc. 5) at 5, ¶
11 (4); and at 3:2-3. Plaintiff did that, and the Clerk forwarded
12 those completed service packets to the United States Marshal
13 Service ("USMS") for service as Fed.R.Civ.P. 4(c)(3) allows.

14 Plaintiff had indicated that service was to be made upon
15 each of the three defendants at the Florence facility.
16 Defendants Kendall and nurse Judy Jiminez, through their
17 attorney Paul E. Carter, Office of the Attorney General,
18 executed waivers of service, which were filed on their behalf.
19 See Docs. 8 and 9. As to "Nurse Rose," however, the summons was
20 returned unexecuted. The process receipt and return form ("form
21 USM-285") indicated, "Agency verified - no 'Nurse Rose' employed
22 at the facility listed." Doc. 7.

23 Thereafter, on April 11, 2012, the court granted
24 plaintiff's motion to amend his complaint "to indicate that
25 defendant "Nurse Rose" is properly identified as "Rose
26 Dacumos[.]" Ord. (Doc. 12) at 1:13-14. At that time, plaintiff
27 also was given twenty days from the date of receipt of the
28 service packet as to defendant Dacumos in which to complete and

1 return that packet to the Clerk of the Court for service by the
2 USMS. See id. Plaintiff did that, again specifying that
3 service was to made upon defendant Dacumos at the Florence
4 facility. See Doc. 14. The form USM-285 indicated, "Facility
5 returned packet - "RTS - No longer with Dept.[,]"¹ and was
6 returned as "Not Deliverable as Addressed Unable to Forward[.]"
7 Id. (sic) at 1 and 2.

8 Having twice attempted and failed to serve defendant
9 Dacumos, plaintiff filed the pending "request[] [for] the
10 Court's assistance in serving" her. Req. (Doc. 1) at 22.
11 Plaintiff is seeking such assistance claiming that he "does not
12 have the ability to conduct a search for the address of
13 Defendant Dacumos, and has no other means of effecting service."
14 Id. at 1:19-20.

15 Discussion

16 At this juncture, the court is not yet contemplating
17 dismissal pursuant to Fed.R.Civ.P. 4(m). That Rule does provide
18 some context for plaintiff Ellsworth's request though. Pursuant
19 to Rule 4(m):

20 If a defendant is not served within 120 days
21 after the complaint is filed, the court—
22 on motion or on its own after notice to the
23 plaintiff—must dismiss the action without
24 prejudice against that defendant or order that
25 service be made within a specified time. But
26 if the plaintiff shows good cause for the failure,
27 the court must extend the time for service for an
28 appropriate period.

25 Fed.R.Civ.P. 4(m). In a case such as this, where the plaintiff

27 ¹ Presumably, although the court cannot be certain, "RTS" refers
28 to defendant Rose Dacumos, as her name is plainly printed on the envelope
with that notation. See Doc. 14 at 2.

1 is proceeding *in forma pauperis*, the USMS, upon order of the
2 court, shall serve the summons and the complaint. Fed.R.Civ.P.
3 4(c)(2). "[A]n incarcerated pro se plaintiff proceeding in forma
4 pauperis is entitled to rely on the U.S. Marshal for service of
5 the summons and complaint and . . . should not be penalized by
6 having his action dismissed for failure to effect service where
7 the U.S. Marshal or the court clerk has failed to perform his
8 duties." Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994)
9 (internal quotation marks and citation omitted), *abrogated on*
10 *other grounds by Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293,
11 132 L.Ed.2d 418 (1995). "So long as the prisoner has furnished
12 the information necessary to identify the defendant, the
13 marshal's failure to effect service is automatically good
14 cause[.]" Walker, 14 F.3d at 1422 (internal quotation marks and
15 citation omitted). However, where a *pro se* plaintiff fails to
16 "prove that he provided the [USMS] with sufficient information
17 to serve [a given defendant] or that [the plaintiff] in fact
18 requested that [that defendant] be served[.]" *sua sponte*
19 dismissal of the unserved defendant is not an abuse of
20 discretion. Walker, 14 F.3d at 1422.

21 In the present case, "because plaintiff has not yet been
22 able to ascertain the proper location where defendant [Dacumos]
23 may now be served, he must remedy the situation or face
24 dismissal of his claims against him." See Brooks v. Munoz, 2010
25 WL 2523939, at *1 (S.D.Cal. June 21, 2010) (citing Walker, 14
26 F.3d at 1421-22 (holding prisoner failed to show cause why
27 prison official should not be dismissed under Rule 4(m) where
28 prisoner failed to show he had provided Marshal with sufficient

1 information to effectuate service)). The court is keenly aware
2 that "neither the [USMS] nor the Court may engage in
3 investigatory efforts on behalf of the parties to a lawsuit as
4 this would improperly place the Court in the role of an
5 advocate." DeRoche v. Funkhouser, 2008 WL 42277659, at *1
6 (D.Ariz. Sept. 16, 2008) (citing Hall v. Bellmon, 935 F.2d 1106,
7 1110 (10th Cir. 1991) (holding that the court should not assume
8 the role of advocate for a pro se litigant)); see also Ramirez
9 v. Denver Health Medical Center, 2006 WL 2527965, at *3 (D.Colo.
10 Aug. 30, 2006) (further noting that "[i]t is neither the role
11 nor the responsibility of the Court or the U.S. Marshals
12 Service, to investigate the whereabouts or to locate parties to
13 a lawsuit[]").

14 Nonetheless, the court agrees with the approach taken in
15 Brooks that "as long as [the] defendant['s] forwarding address
16 can be easily ascertained by reference to the [facility's]
17 personnel records, plaintiff is entitled to rely on the U.S.
18 Marshal to effect service upon this defendant on his behalf."
19 Brooks, 2010 WL 2523939, at *1 (citing Puett v. Blandford, 912
20 F.2d 270, 275 (9th Cir. 1990)); cf. Colon v. Zia, 2011 WL
21 6025657, at *3 (E.D.Cal. Dec. 2, 2011) (where state prisoner was
22 proceeding *pro se*, the court ordered the USMS to "enlist[] the
23 assistance of the Legal Affairs Division of" the state
24 department of corrections, to "attempt to serve [defendant] at
25 another address); Lateef v. Jackson, 2009 WL 393857, at *2
26 (N.D.Cal. Feb. 13, 2009) (where plaintiff inmate's summons was
27 returned with the comment that the defendant was "no longer at
28 the facility[,] the court ordered the Clerk of the Court to

1 send a copy of court's order to the facility "Litigation
2 Coordinator[,] who is requested to provide any forwarding
3 address information that is available with respect to" the
4 unserved defendant). Certainly, requiring a prison to provide
5 a former employee's forwarding address, which is "easily
6 ascertained by reference to the [prison's] personnel records,"
7 does not require either the court or the USMS to engage in any
8 type of investigative efforts. See Brooks, 2010 WL 2523939, at
9 *1 (citation omitted). This is not a situation such as Colon v.
10 Zia, 2011 WL 6025657 (E.D.Cal. Dec. 2, 2011), where the inmate
11 plaintiff is "request[ing] the Court to direct the Marshal to
12 investigate records of the Department of Justice, Federal Bureau
13 of Investigation, [the California Department of Corrections and
14 Rehabilitation], and [the] State of California to find
15 identifying information to locate and serve" a defendant. Id.
16 at *3.

17 In light of the foregoing, and consistent with the court's
18 approach in Brooks, the court hereby directs that Paul Edward
19 Carter, Office of the Attorney General, Liability Management
20 Section, and attorney of record for the served defendants
21 herein, contact the Florence facility, and provide a current
22 address for defendant Rose Dacumos, if such address is within
23 that facility's records or possession, and to forward that
24 address to the USMS in a confidential memorandum. See Brooks,
25 2010 WL 2523939, at *1. Alternatively, attorney Paul Edward
26 Carter, may endeavor to secure a waiver of service from
27 defendant Rose Dacumos.

28

1 Conclusion

2 Accordingly, **IT IS HEREBY ORDERED** that:

3
4 (1) Plaintiff's "Request for District Court Assistance"
5 (Doc. 15) is **GRANTED** to the extent set forth above;

6
7 (2) Paul Edward Carter, Office of the Attorney General,
8 Liability Management Section, shall provide the forwarding
9 address for defendant Rose Dacumos, if any, to the United States
10 Marshal in a *confidential memorandum* indicating that the summons
11 and complaint is to be delivered to that address on or before
12 July 2, 2012;

13
14 (3) Within thirty (30) days of receipt of any available
15 address from attorney Carter, the United States Marshal shall
16 serve a copy of plaintiff's complaint and summons upon defendant
17 Rose Dacumos in accordance with this order and the court's
18 January 10, 2012 order granting, *inter alia*, plaintiff leave to
19 proceed *in forma pauperis*;

20
21 (4) The Clerk of the Court shall provide a copy of: (1) the
22 court's January 10, 2012 order (Doc. 5]; (2) this order; (3) the
23 complaint, summons and a blank U.S. Marshal form 285 to the
24 attorney Carter for purposes of re-attempting service as to
25 defendant Rose Dacumos;

26
27 (5) Alternatively, if attorney Carter is unable to procure
28 defendant Rose Dacumos' address from the Florence facility, he

1 shall notify this court and plaintiff in writing by no later
2 than July 2, 2012.

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

DATED this 18th day of May, 2012.



Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record and plaintiff *pro se*