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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEVIN E. FIELDS,

1:06-cv-00407-AWI-GSA-PC

Plaintiff,

ORDER TO SHOW CAUSE WHY
DEFENDANT ROBERTS SHOULD NOT BE
DISMISSED FROM THIS ACTION FOR
FAILURE TO EFFECT SERVICE
(Doc. 66.)

v.

P. ROBERTS, et al.,

Defendants.

THIRTY DAY DEADLINE

I. BACKGROUND

Kevin E. Fields (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on April 10, 2006. (Doc. 1.) This action now proceeds on Plaintiff’s Fifth Amended Complaint filed on June 24, 2010, against defendant P. Roberts for retaliation against Plaintiff from February 28, 2006 to March 15, 2006, and defendant Jeff Neubarth for deliberate indifference.¹ (Doc. 51.)

On October 31, 2011, the United States Marshal (“Marshal”) filed a return of service unexecuted, indicating the Marshal was unable to locate Defendant Roberts for service of process. (Doc. 66.)

¹The remaining claims against defendant Roberts were dismissed from this action by the Court on March 17, 2011, based on Plaintiff’s failure to state a claim upon which relief could be granted. (Doc. 56.)

1 **II. SERVICE BY UNITED STATES MARSHAL**

2 Pursuant to Rule 4(m),

3 If a defendant is not served within 120 days after the complaint is filed, the court –
4 on motion or on its own after notice to the plaintiff – must dismiss the action without
5 prejudice against that defendant or order that service be made within a specified time.
But if the plaintiff shows good cause for the failure, the court must extend the time
for service for an appropriate period.

6 Fed. R. Civ. P. 4(m).

7 In cases involving a plaintiff proceeding in forma pauperis, the Marshal, upon order of the
8 Court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(2). “[A]n incarcerated pro
9 se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the
10 summons and complaint and ... should not be penalized by having his action dismissed for failure
11 to effect service where the U.S. Marshal or the court clerk has failed to perform his duties.” Walker
12 v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994) (quoting Puett v. Blandford, 912 F.2d 270, 275 (9th
13 Cir. 1990)), abrogated on other grounds by Sandin v. Connor, 515 U.S. 472 (1995). “So long as the
14 prisoner has furnished the information necessary to identify the defendant, the marshal’s failure to
15 effect service is ‘automatically good cause’” Walker, 14 F.3d at 1422 (quoting Sellers v. United
16 States, 902 F.2d 598, 603 (7th Cir.1990)). However, where a pro se plaintiff fails to provide the
17 Marshal with accurate and sufficient information to effect service of the summons and complaint,
18 the Court’s sua sponte dismissal of the unserved defendants is appropriate. Walker, 14 F.3d at 1421-
19 22.

20 **Background**

21 On March 28, 2011, the Court issued an order directing the Marshal to initiate service of
22 process upon defendants in this action. (Doc. 59.) On May 19, 2011, the Marshal filed a return of
23 service unexecuted as to defendant Roberts. (Doc. 60.) The return of service indicated that the
24 Marshal was unable to locate defendant Roberts; defendant Roberts was not listed as employed at
25 the facility; and the CDC Locator did not have record of defendant Roberts. (Doc. 60.) On
26 September 22, 2011, the Court issued an order directing the Marshal to again attempt to locate and
27 serve defendant Roberts, using the assistance of the CDCR’s Legal Affairs Division. (Doc. 63.) The
28 Marshal’s second attempt to locate and serve defendant Roberts was unsuccessful, and on October

1 31, 2011, the Marshal filed a return of service unexecuted indicating that the Legal Affairs Division
2 reported that defendant Roberts was never employed by the CDCR, worked for a contractor
3 company, is no longer employed, and moved out of state. (Doc. 66.)

4 Pursuant to Rule 4(m), the Court will provide Plaintiff with the opportunity to show cause
5 why defendant Roberts should not be dismissed from this action at this time for inability to serve
6 process. Plaintiff has not provided sufficient information to identify and locate defendant Roberts
7 for service of process, and the Marshal was unable to locate defendant Roberts using the assistance
8 of the CDCR's Legal Affairs Division. If Plaintiff is unable to provide the Marshal with additional
9 information, defendant Roberts shall be dismissed from the action.

10 **III. CONCLUSION**

11 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

- 12 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall show
13 cause why defendant Roberts should not be dismissed from this action pursuant to
14 Rule 4(m); and
- 15 2. The failure to respond to this order or the failure to show cause will result in the
16 dismissal of defendant Roberts from this action, and may result in the dismissal of
17 this action in its entirety for failure to comply with a court order.

18
19 IT IS SO ORDERED.

20 Dated: November 2, 2011

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE