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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VALENTINE E. UNDERWOOD,

1:08-cv-00986-AWI-GSA-PC

Plaintiff,

ORDER DENYING MOTION FOR
SUBSTITUTION, WITHOUT PREJUDICE
TO RENEWAL OF THE MOTION
WITHIN THIRTY DAYS
(Doc. 82.)

v.

M. KNOWLES, et al.,

Defendants.

THIRTY DAY DEADLINE

I. BACKGROUND

Valentine E. Underwood ("Plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff paid the filing fee for this action and is not proceeding in forma pauperis. Plaintiff filed the complaint commencing this action on July 17, 2008. (Doc. 1.) This action now proceeds on the original complaint, against defendants Northcutt and Martin for retaliation, in violation of the First Amendment; and against defendants Northcutt, Martin, Caviness, Lantz, Trujillo, Truitt, and Fambrough ("Defendants") for use of excessive force physical force, in violation of the Eighth Amendment.¹

On December 7, 2010, Defendants filed a Statement of Fact of Death, suggesting the death of defendant Seth Lantz during the pendency of this action. (Doc. 72.) On December 15,

¹All other claims and defendants were dismissed by the Court on October 21, 2009, based on Plaintiff's failure to state a claim. (Doc. 31.)

1 2010, the Court issued an order notifying the parties that the ninety-day period within which to
2 file a motion for substitution pursuant to Rule 25(a)(1) had not been triggered, because
3 Defendants' notice of defendant Lantz's death did not contain a declaration of service or other
4 proof reflecting that there was proper service of the notice on Lanz's successors or representatives
5 as provided by Rule 4. (Doc. 73.) On January 14, 2011, Plaintiff filed a motion for substitution
6 pursuant to Rule 25(a)(1). (Doc. 82.)

7 **II. RULE 25(a)(1) – MOTION FOR SUBSTITUTION**

8 Rule 25(a)(1) of the Federal Rules of Civil Procedure provides that:

9 [i]f a party dies and the claim is not thereby extinguished, the court may order
10 substitution of the proper parties. The motion for substitution may be made by any
11 party or by the successors or representatives of the deceased party and, together
12 with the notice of hearing, shall be served on the parties as provided in Rule 5 and
13 upon persons not parties in the manner provided in Rule 4 for the service of a
summons, and may be served in any judicial district. Unless the motion for
substitution is made not later than 90 days after the death is suggested upon the
record by service of a statement of the fact of the death as provided herein for the
service of the motion, the action shall be dismissed as to the deceased party.

14 Under Rule 25(a)(1), any party may file a motion for substitution, which must be served
15 on all parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule
16 4 for the service of a summons. Thus, parties may be served by service on their attorney, Fed. R.
17 Civ. P. 5(b), but non-party successors or representatives of the deceased party must be served in
18 the manner provided by Rule 4 for the service of a summons. See Barlow v. Ground, 39 F.3d
19 231, 232-234 (9th Cir. 1994).

20 Plaintiff requests that "S. Lantz's successors or representatives of his estate be substituted
21 as an [*sic*] defendant in this matter." (Motion, Doc. 82 at 1:22-26.) Plaintiff requests assistance
22 by the Court and the United States Marshal in identifying and serving the successors or
23 representatives of defendant Lantz's estate, on the ground that Plaintiff cannot afford the costs.
24 Plaintiff requests leave to proceed in forma pauperis for purposes of the motion for substitution.

25 To proceed with a motion for substitution, Plaintiff must provide proof of service of the
26 motion for substitution upon the other parties to this action and the successors or representatives
27 of Seth Lantz, as required by Rule 25(a)(1). Plaintiff is advised that he is responsible for
28 identifying and finding Seth Lantz's heirs or representatives. Such assistance is not a function of

1 the United States Marshals Service. Plaintiff is also responsible to arrange for service of the
2 motion for substitution. Even if Plaintiff was proceeding in forma pauperis, he would not be
3 entitled to assistance free of charge by the United States Marshal for service of the motion for
4 substitution.

5 Therefore, Plaintiff's motion for substitution shall be denied, without prejudice to
6 renewal of the motion in compliance with Rule 25(a)(1) within thirty days.

7 **III. CONCLUSION**

8 Based on the foregoing, IT IS HEREBY ORDERED that:

- 9 1. Plaintiff's motion for substitution, filed on January 14, 2011, is DENIED, without
10 prejudice to renewal of the motion within thirty days from the date of service of
11 this order; and
- 12 2. Plaintiff's failure to file a motion for substitution in compliance with Rule
13 25(a)(1) pursuant to this order shall result in the dismissal of defendant Seth Lantz
14 from this action.

15
16 IT IS SO ORDERED.

17 Dated: May 23, 2011

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE