

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

BARRY LOUIS LAMON,
Plaintiff,
v.
MAURICE JUNIOUS, et al.,
Defendants.

) Case No.: 1:09-cv-00484-AWI-SAB (PC)
)
) FINDINGS AND RECOMMENDATIONS
) REGARDING DEFENDANT COHEN'S MOTION
) TO DISMISS OR, IN THE ALTERNATIVE,
) QUASH SERVICE OF THE SUMMONS AND
) AMENDED COMPLAINT
)
) [ECF No. 103]
)

Plaintiff Barry Louis Lamon is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

I.

BACKGROUND

This action is proceeding on Plaintiff's first amended complaint against Defendants Magvas, Talisman, Barda, Cohen, and Osborne for retaliation in violation of the First Amendment.

On April 3, 2014, Defendants Talisman, Osborne, and Magvas, filed an answer to the amended complaint.

On April 4, 2014, Defendant Barda was dismissed from the action, without prejudice, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure for failure to effectuate service of process.

1 Now pending before the Court is Defendant Cohen's motion to dismiss or, in the alternative,
2 quash service of the summons and complaint, by and through special appearance by the Office of the
3 Attorney General.

4 Plaintiff filed an opposition to Defendant Cohen's motion on October 1, 2014, and Defendant
5 filed a reply on October 7, 2014.

6 **II.**

7 **DISCUSSION**

8 In the instant case, Plaintiff is proceeding in forma pauperis. (ECF No. 4.) On March 5, 2013,
9 the Court authorized service by the Marshal pursuant to Rule 4(d). (ECF No. 39.)

10 On September 15, 2014, the United States Marshal returned the USM-285 form for Defendant
11 Doctor Eric Cohen, which indicates that personal serve was effectuated on Alison DeLong, Litigation
12 Coordinator, on September 5, 2014.

13 Defendant Cohen, by way of special appearance by the Office of the Attorney General, moves
14 to dismiss the claims against him or, in the alternative quash the service of the summons and amended
15 complaint on the ground that service was defective, and personal jurisdiction is lacking. See Fed. R.
16 Civ. P. 12(b)(5).

17 Service of an individual within a judicial district of the United States may be effected by
18 "delivering a copy of [the summons and complaint] to an agent authorized by appointment of law to
19 receive service of process." Fed. R. Civ. P. 4(e)(2)(C). The "agent" referred to in this rule is not just
20 an employee or business agent of some kind, but instead must be an agent specifically designated to
receive service of process. See Gerritsen v. Escobar Y Cordova, 721 F.Supp. 253, 256 (C.D. Cal.
21 1988).

22 If a defendant is not served within 120 days after the complaint is filed, the court must dismiss
23 the action without prejudice against that defendant or order that service be made within a specified
24 time. Fed. R. Civ. P. 4. If a plaintiff shows good cause for the failure, the court must extend the time
25 for service for an appropriate period. Id. An incarcerated pro se plaintiff proceeding in forma
26 pauperis is entitled to rely on the Marshal for service of the summons and complaint. Puett v.
27 Blandford, 912 F.2d 270, 275 (9th Cir. 1990). If a plaintiff has provided the necessary information to

1 help effectuate serve, he should not be penalized by having his or her action dismissed for failure to
2 effective service where the Marshal or the court clerk has failed to perform the duties required under
3 28 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil Procedure. Id.

4 In this instance, Ms. DeLong declares under penalty of perjury that she has not been
5 specifically designated to accept service of process on behalf of Dr. Cohen. (ECF No. 103, DeLong
6 Decl. ¶ 3.) Ms. DeLong specifically declares that “[o]n September 5, 2014, [she] mistakenly accepted
7 personal service on behalf of Dr. Eric Cohen, who is named as a defendant in this lawsuit. At the time
8 [she] accepted service, [she] believed the named defendant to be a former Atascadero State Hospital
9 employee with the same surname.” (Id. at ¶ 2.)

10 “Once service is challenged, plaintiffs bear the burden of establishing that service was valid
11 under Rule 4.” Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). While “Rule 4 is a flexible
12 rule that should be liberally construed so long as a party receives sufficient notice of the complaint,”
13 United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984),
14 there must still be “substantial compliance” with Rule 4; otherwise, “neither actual notice nor simply
15 naming the defendant in the complaint will provide personal jurisdiction.” Direct Mail Specialists,
16 Inc. v. Eclat Computerized Technologies, Inc., 840 F.2d 685, 688 (9th Cir. 1988) (quoting Benny v.
17 Pipes, 799 F.2d 489, 492 (9th Cir. 1986)). If the plaintiff is unable to satisfy his burden, the Court has
18 the discretion to either dismiss the action or retain the action and quash the service of process. Stevens
19 v. Sec. Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir. 1976).

20 In his opposition, Plaintiff contends that Dr. Cohen should not be dismissed because Plaintiff is
21 proceeding in forma pauepris and he cannot reasonably be expected to locate this Defendant, outside
22 in society, if the Office of the Attorney General cannot find him. Plaintiff argues that the California
23 Department of Corrections and Rehabilitation (CDCR) and the Office of the Attorney General have
24 not been unable to locate Dr. Cohen. Plaintiff therefore reasons that CDCR and the Office of the
25 Attorney General “should be held responsible for locating their former employee for service of
26 summons and complaint in this action.” (ECF NO. 105, Opp’n at 4.)

27 To the extent Plaintiff argues that the CDCR and/or the Office of the Attorney General are
28 legally responsible for locating parties that he has sued, Plaintiff’s argument is without merit. As

1 stated herein, it is Plaintiff's responsibility to provide sufficient details to locate and identify a party to
2 be served with the summons and complaint. See Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir.
3 1994), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995); see also Pierce v.
4 Woodford, 416 Fed. App'x 660, 661 (9th Cir. 2011) (holding it is not abuse of discretion to dismiss
5 action without prejudice for prisoner's failure to provide U.S. Marshal with necessary information to
6 effectuate service). This authority holds true even in instances, such as here, where Plaintiff is
7 proceeding in forma pauperis and service is ordered and effectuated by the U.S. Marshal. Walker v.
8 Sumner, 14 F.3d at 1422. Therefore, although Plaintiff is incarcerated and is proceeding pro se and in
9 forma pauperis, he is not relieved of the burden of providing the Marshal with sufficient information
10 to serve each named Defendant. See, e.g., King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se
11 litigants must follow the same rules of procedure that govern other litigants."), overruled on other
12 grounds by Lacey v. Maricopa Cnty., 693 F.3d 896 (9th Cir. 2012). Neither the Court nor the Marshal
13 is under an obligation to investigate and locate an unserved defendant. Boulware v. Ervin, No. CV-
14 05-05165, 2010 WL 5110445 at *1 (E.D. Cal. Dec. 8, 2010).

15 Although service on Defendant Cohen was defective because Ms. DeLong was not authorized
16 to accept service on behalf of Defendant Dr. Cohen, there is a reasonable prospect that Defendant
17 Cohen can be served properly. ““Generally service will be quashed in those cases in which there is a
18 reasonable prospect that the plaintiff will be able to serve the defendant properly.”” Crayton v.
19 Rochester Medical Corp., No. 1:07-CV-01318-OWW-GSA, 2008 WL 3367604, at *5 (E.D. Cal. Aug.
20 8, 2008) (quoting Wishart v. Agents for Int'l Monetary Fund I.R.S., No. C-95-20178 SW, 1995 WL
21 494586, at *2 (N.D. Cal. Aug. 14, 1995). The Court finds Plaintiff should be granted an opportunity
22 to provide additional information for service of Dr. Cohen by and through the registry which
23 employed him. Therefore, the Court finds that dismissal of the claims against Dr. Cohen are not
24 justified, at this juncture, and the Court shall instead recommend to quash the insufficient service as to
25 Defendant Dr. Cohen.

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IV.

RECOMMENDATION

Based on the foregoing,

IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to quash service of the summons and amended complaint on Defendant Doctor Cohen be GRANTED; and
2. Plaintiff be given the opportunity, following the order resolving the instant recommendation, to provide further information for service of the summons and complaint on Defendant Doctor Cohen.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after being served with these Findings and Recommendations, the parties may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **November 12, 2014**

George A. Baze