

1
2
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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

OSCAR W. JONES,

Case No. 1:10-cv-01530-SKO (PC)

Plaintiff,

ORDER REQUIRING PLAINTIFF TO
SHOW CAUSE WITHIN THIRTY DAYS
WHY ACTION SHOULD NOT BE
DISMISSED, WITHOUT PREJUDICE,
PURSUANT TO RULE 4(M)

v.

STEPHEN MAYBERG, et al.,

Defendants.

(Docs. 42-44)

Plaintiff Oscar W. Jones, a former civil detainee proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on August 25, 2010. This action for damages is proceeding against John Doe 2 and John Doe 3 for violating the Due Process Clause of the United States Constitution, relating to the failure to transport Plaintiff for medical treatment while he was at Coalinga State Hospital (“CSH”).

Rule 4(m) of the Federal Rules of Civil Procedure provides:

If a defendant is not served within 120 days after the complaint is filed, the court - on motion or on its own after notice to the plaintiff - must dismiss the action without 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.

Because Plaintiff is proceeding in forma pauperis, the Court is required to appoint the United States Marshal to serve the summons and complaint on his behalf, 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3), and a case cannot be dismissed where the Marshal and/or the Court fails to perform its duty, *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (internal quotations and

1 citation omitted), *abrogated on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995).
2 However, the Court's sua sponte dismissal of unserved defendants is appropriate if Plaintiff is
3 unable to provide the Marshal with information sufficient to effect service. Fed. R. Civ. P. 4(m);
4 *Walker*, 14 F.3d at 1421-22.

5 In this case, the defendants, both of whom were correctional officers, are unidentified, and
6 the Court opened early discovery for the limited purpose of allowing Plaintiff to identify them.
7 *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (citing *Gillespie v. Civiletti*, 629 E.2d
8 637, 642 (9th Cir. 1980)). After service of subpoenas duces tecum first on the Acting Director of
9 CSH and then on the Warden of Pleasant Valley State Prison, Plaintiff has not obtained any
10 documents which allow him to identify the Doe defendants.¹ Fed. R. Civ. P. 45. Accordingly,
11 pursuant to Rule 4(m), Plaintiff shall be provided with an opportunity to show good cause why
12 this action should not be dismissed. Fed. R. Civ. P. 4(m). If Plaintiff either fails to respond to this
13 order or responds but fails to show good cause, this action shall be dismissed, without prejudice.

14 Based on the foregoing, the Court HEREBY ORDERS that:

15 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall show
16 cause why this action should not be dismissed, without prejudice; and

17 2. The failure to respond to this order or the failure to show good cause will result in
18 dismissal of the action, without prejudice.

19

20 IT IS SO ORDERED.

21 Dated: November 4, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

22

23

24

25

26

27

28 ¹ Plaintiff's response to the subpoena results was filed on August 18, 2014, but his disagreement and/or dissatisfaction with the third parties' responses provides no basis for an exception from Rule 4(m). (Doc. 44.)