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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD ABERCROMBIE,
Plaintiff,
vs.
DR. KAUT, et al.,
Defendants.

1:11-cv-00048-GSA-PC
ORDER DISMISSING SOLE DEFENDANT
KAUT FROM THIS ACTION FOR
PLAINTIFF'S FAILURE TO EFFECT
SERVICE, AND DISMISSING THIS
ACTION IN ITS ENTIRETY
ORDER FOR CLERK TO CLOSE CASE

I. RELEVANT PROCEDURAL HISTORY

Richard Abercrombie ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on January 11, 2011. (Doc. 1.) On January 27, 2011, Plaintiff consented to the jurisdiction of a Magistrate Judge under 28 U.S.C. § 636(c), and no other parties have appeared in this action. (Doc. 5.) Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall conduct any and all proceedings in the case until such time as reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

1 This action now proceeds on Plaintiff's initial Complaint, against sole defendant Dr.
2 Richard M. Kaut ("Defendant"), for denial of medical care in violation of the Eighth
3 Amendment.¹ (Doc. 1.) On August 7, 2014, the United States Marshal ("Marshal") filed a
4 return of service unexecuted, indicating the Marshal was unable to locate Defendant for service
5 of process. (Doc. 33.)

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

7 Pursuant to Rule 4(m),

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

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

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

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¹ On January 5, 2012, the court dismissed all remaining claims and defendants from this action, based on Plaintiff's failure to state a claim under § 1983. (Doc. 11.)

1 **Background**

2 On January 13, 2012, the Court issued an order directing the Marshal to initiate service
3 of process upon the sole defendant in this action, Defendant Dr. Kaut. (Doc. 13.) On April 19,
4 2013, the Marshal filed a return of service unexecuted as to Defendant. (Doc. 15.) The return
5 of service indicated that on January 18, 2012, the Marshal mailed service documents to
6 Defendant at Corcoran District Hospital, at the address provided by Plaintiff. Id. On February
7 6, 2012, the mail was returned, indicating that Defendant was not at that address. Id. On June
8 14, 2012, the Marshal again attempted service by mail using a new address for Defendant,
9 without success. Id. On October 24, 2012, the Marshal sent the service documents to
10 Defendant using a P.O. Box address. Id. On March 21, 2013, after receiving no response from
11 Defendant, the Marshal forwarded the service documents for personal service. Id. The
12 Marshal attempted personal service on March 28, 2013, and discovered that Defendant has not
13 been a tenant at the address used since 2009. Id.

14 On April 22, 2013, the Court issued an order for Plaintiff to show cause why this case
15 should not be dismissed for failure to effect service upon defendant Kaut pursuant to Rule
16 4(m). (Doc. 16.) On May 13, 2013, Plaintiff responded and provided the Court with two new
17 addresses for defendant Kaut, (1) 2107 Livingston Street, Ste. A, Oakland, CA 94606, and (2)
18 6222 Seminary Ave., Oakland, CA 94605. (Doc. 18.) On May 15, 2013, the Court was
19 informed by the Marshal that personal service had already been attempted at the Livingston
20 Street address in March 2013, without success. On January 21, 2014, the Marshal filed a return
21 of service unexecuted as to Defendant. (Doc. 22.) The return of service indicated that on June
22 18, 2013, the Marshal mailed service documents to Defendant at 6222 Seminary Ave.,
23 Oakland, CA 94605. Id. On January 7, 2014, after receiving no response from Defendant, the
24 Marshal forwarded the service documents for personal service. Id. The Marshal attempted
25 personal service on January 16, 2014 and found that Defendant was not recognized at that
26 address. Id.

27 On February 27, 2014, the Court issued another order for Plaintiff to show cause why
28 this case should not be dismissed for failure to effect service upon defendant Kaut. (Doc. 23.)

1 On March 17, 2014, Plaintiff filed a response to the Court's order, providing copies of
2 information obtained as a result of internet search. (Doc. 24.) On March 21, 2014, the court
3 ordered Plaintiff to file a declaration providing evidence of Defendant Kaut's current address,
4 or the case would be dismissed. (Doc. 25.) On April 17, 2014, Plaintiff filed a declaration
5 signed under penalty of perjury, informing the Court that Dr. Kaut is currently working at a
6 new, current address in Susanville, California. (Doc. 31.) On April 22, 2014, the court issued
7 an order directing the Marshal to re-attempt service upon Dr. Kaut at the Susanville address.
8 (Doc. 32.) On August 7, 2014, the Marshal filed a return of service unexecuted as to Defendant
9 Kaut. (Doc. 33.) The return of service indicates that on April 28, 2014, the Marshal mailed
10 service documents to Defendant at 1800 Spring Ridge Drive, Susanville, CA 96130. Id. On
11 May 28, 2014, the mail was returned as undeliverable with a notation "RTS – Refused." Id.
12 The Marshal then forwarded the service documents for personal service. Id. The Marshal
13 attempted personal service at the Susanville address on August 4, 2014, without success,
14 finding that the "subject hasn't been there 10 years," with no forwarding address. Id.

15 *Discussion*

16 Plaintiff has been granted multiple opportunities during the past year and has not
17 provided sufficient information to locate Defendant Dr. Kaut for service of process. The
18 Marshal has made three attempts, at the court's direction, to locate this Defendant at addresses
19 provided by Plaintiff, without success. As discussed above, where a pro se plaintiff fails to
20 provide the Marshal with accurate and sufficient information to effect service of the summons
21 and complaint, the court's sua sponte dismissal of the unserved defendants is appropriate.
22 Walker, 14 F.3d at 1421-22. The court finds that Plaintiff is unable to locate Defendant Kaut,
23 and any further attempts at service of process would be futile. The court cannot continue to
24 expend its scarce resources assisting a litigant who cannot locate the sole defendant against
25 whom his case proceeds. Plaintiff was forewarned in the court's order of March 21, 2013, that
26 if he could not provide a valid current address for Defendant, this case would be dismissed in
27 its entirety. (Doc. 25 .)

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1 **III. CONCLUSION**

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

- 3 1. Defendant Kaut is DISMISSED from this action, based on Plaintiff's failure to
4 effect service pursuant to Rule 4 of the Federal Rules of Civil Procedure;
- 5 2. This case is DISMISSED in its entirety based on the dismissal of the sole
6 defendant; and
- 7 3. The Clerk of Court is directed to CLOSE this case.

8
9 IT IS SO ORDERED.

10 Dated: August 8, 2014

/s/ Gary S. Austin
11 UNITED STATES MAGISTRATE JUDGE