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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LAMONT SHEPARD,

Plaintiff,

v.

DR. COHEN,

Defendant.

Case No. 1:11-cv-00535-DAD-EPG (PC)

ORDER FOR PLAINTIFF TO SHOW
CAUSE WHY DEFENDANT DR. COHEN
SHOULD NOT BE DISMISSED FROM
THIS ACTION WITHOUT PREJUDICE
BECAUSE OF PLAINTIFF'S FAILURE
TO PROVIDE THE MARSHAL WITH
ACCURATE AND SUFFICIENT
INFORMATION TO EFFECT SERVICE OF
THE SUMMONS AND COMPLAINT ON
DEFENDANT DR. COHEN
(ECF NO. 124)

THIRTY DAY DEADLINE

I. RELEVANT PROCEDURAL HISTORY

Lamont Shepard ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This case is currently proceeding on Plaintiff's Second Amended Complaint. (ECF No. 41). The Court¹ found cognizable claims in the complaint, and ordered it served on defendants Dr. Cohen and Vera-Brown. (ECF No. 48). Defendants Sgt. J. Lopez, Correctional Officer ("C/O") Z. Dean, and C/O J. Campbell were previously served, and the case against them has now been resolved.

¹ Magistrate Judge Gary S. Austin was the presiding magistrate judge in this case until October 13, 2015. (ECF No. 87).

1 (ECF No. 117). A settlement conference was held as to the claims against defendants Sgt. J.
2 Lopez, C/O Z. Dean, and C/O J. Campbell on May 20, 2016. (ECF No. 97). The case did not
3 settle. (Id.). Because the claims against defendants Sgt. J. Lopez, C/O Z. Dean, and C/O J.
4 Campbell were not settled, a trial was held on August 2, 2016. (ECF No. 115). At the trial, the
5 Court allowed the parties to engage in settlement negotiations, and the case settled. (Id.). As to
6 the claims against defendant Vera-Brown, summary judgment was entered in her favor on all of
7 the claims against her. (ECF No. 85).

8 As to defendant Dr. Cohen, on May 26, 2015, the summons was returned unexecuted
9 because the United States Marshal Service (“Marshal”) (ECF No. 78) was unable to locate him.
10 Accordingly, the Court issued an order for Plaintiff to show cause why defendant Dr. Cohen
11 should not be dismissed from the case (ECF No. 80). Plaintiff filed a response, stating that he
12 did not know defendant Dr. Cohen’s address, but that the California Department of Corrections
13 and Rehabilitation (“CDCR”) should have that information. (ECF No. 82). The Court then
14 ordered the Marshal to initiate re-service by contacting the Legal Affairs Division of the CDCR
15 for assistance in locating and effecting service on defendant Dr. Cohen. (ECF No. 83).

16 On December 3, 2015, the summons was once again returned unexecuted. (ECF No.
17 88). According to the Marshal, it contacted the CDCR Special Investigator for the CDCR
18 Legal Division, but the address given to the Marshal was not valid and the CDCR did not have
19 another address. (Id.). On December 21, 2015, District Judge Dale A. Drozd dismissed
20 defendant Dr. Cohen from the case without prejudice. (ECF No. 90).

21 On August 8, 2016, Plaintiff asked for leave to effect service on several parties. (ECF
22 No. 116). The Court granted the motion as to defendant Dr. Cohen. (ECF No. 118). Plaintiff
23 submitted the service documents (ECF No. 120), and the Marshal was directed to serve
24 defendant Dr. Cohen (ECF No. 121).

25 On January 26, 2017, the summons was returned unexecuted. (ECF No. 124). The
26 Marshal stated that the waiver of service was returned to sender, and that the return enveloped
27 stated that defendant Dr. Cohen was deceased. (Id.).

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

2 Pursuant to Rule 4(m),

3 If a defendant is not served within 90 days after the complaint is filed, the court
4 – on motion or on its own after notice to the plaintiff – must dismiss the action
5 without prejudice against that defendant or order that service be made within a
6 specified time. But if the plaintiff shows good cause for the failure, the court
7 must extend the time for service for an appropriate period.

8 Fed. R. Civ. P. 4(m).²

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

22 The return of service filed by the Marshal on January 26, 2017, indicates that the waiver
23 of service was returned unexecuted, and that defendant Dr. Cohen is now deceased. (ECF No.
24 124). There is no indication on the return of service that the Marshal received a response from
25 defendant Dr. Cohen. (Id.). The Marshal certified that it was unable to locate defendant Dr.
26 Cohen. (Id.).

27 Pursuant to Rule 4(m), the Court will provide Plaintiff with an opportunity to show

28 ² Fed. R. Civ. P. 4(m) was amended in 2015 to reduce the time for serving a defendant from 120 days to 90 days. However, the time period to serve defendant Dr. Cohen has expired under both the pre-amendment version of the rule and the current version rule.

1 cause why defendant Dr. Cohen should not be dismissed from the case because of Plaintiff's
2 failure to provide the Marshal with accurate and sufficient information to effect service of the
3 summons and complaint on defendant Dr. Cohen, who it appears is deceased. If Plaintiff is
4 unable to provide the Marshal with additional information the Court will issue findings and
5 recommendations to District Judge Dale. A. Drozd, recommending that defendant Dr. Cohen be
6 dismissed from the case, without prejudice, and that the case be closed.

7 **III. CONCLUSION**

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

- 9 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
10 show cause why the Court should not issue findings and recommendations to
11 District Judge Dale. A. Drozd, recommending that defendant Dr. Cohen be
12 dismissed from this action, without prejudice, pursuant to Federal Rule of Civil
13 Procedure 4(m), and that the case be closed.

14
15 IT IS SO ORDERED.

16 Dated: January 27, 2017

17 /s/ Eric P. Groj
18 UNITED STATES MAGISTRATE JUDGE
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