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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LAMONT SHEPARD,
 Plaintiff,

 v.

COHEN, et al.,

 Defendants.

No. 1:11-CV-00535-DAD-EPG-PC

ORDER DISMISSING DEFENDANT COHEN
FROM THIS ACTION DUE TO PLAINTIFF’S
FAILURE TO EFFECT SERVICE, WITHOUT
PREJUDICE

I. RELEVANT PROCEDURAL HISTORY

Lamont Shepard (“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 March 30, 2011. (Doc. No. 1.) The action now proceeds on the Second Amended Complaint filed on May 19, 2014, against defendant Dr. Cohen with respect to plaintiff’s due process claim, and against defendants Dr. Cohen, Sergeant J. Lopez, C/O Z. Dean, and C/O J. Campbell with respect to plaintiff’s excessive use of force claim. (Doc. No. 41.)

On December 3, 2015, the United States Marshal (“Marshal”) filed a return of service unexecuted as to defendant Cohen, indicating that the Marshal was unable to locate defendant Cohen for purposes of service of service of process. (Doc. No. 88.)

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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
4 filed, the court — on motion or on its own after notice to the
5 plaintiff — must dismiss the action without prejudice against that
6 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.

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

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

21 **A. Background**

22 On November 18, 2013, the Court issued an order directing the Marshal to initiate service
23 of process of the first amended complaint upon the defendants in this action, Dr. Cohen, Sergeant
24 J. Lopez, Correctional Officer Dean, and Correctional Officer J. Campbell. (Doc. No. 13.) On
25 January 9, 2014, the Marshal filed waivers of service signed by defendants Campbell, Dean, and
26 Lopez. (Doc. No. 17.) On January 27, 2014, defendants Lopez, Dean, and Campbell filed an
27 answer. (Doc. No. 18.) On January 29, 2014, the Court issued a scheduling order commencing
28 discovery in this action. (Doc. No. 22.)

1 On May 1, 2014, plaintiff filed a motion to amend his complaint, which was granted, and
2 on May 19, 2014, he filed the second amended complaint, adding defendant Vera Brown to the
3 action. (Doc. Nos. 38, 41.) On June 10, 2014, defendants Lopez, Dean, and Campbell filed an
4 answer to the second amended complaint. (Doc. No. 43.) On August 1, 2014, the Court issued
5 an order for the Marshal to cease service of process of the first amended complaint. (Doc. No.
6 47.)

7 On August 22, 2014, the Court issued an order directing the Marshal to initiate service of
8 process of the second amended complaint upon defendants Brown and Cohen. (Doc. No. 54.)
9 On October 14, 2014, the Marshal filed a waiver of service signed by defendant Brown. (Doc.
10 No. 59.) On November 24, 2014, defendant Brown filed an answer to the second amended
11 complaint. (Doc. No. 63.) In light of defendant Brown's late appearance in the case, the Court
12 issued a second scheduling order on December 5, 2014, extending the pretrial deadlines in this
13 action. (Doc. No. 66.)

14 On May 26, 2015, the Marshal filed a return of service unexecuted as to defendant Cohen.
15 (Doc. No. 78.) The return of service indicated that on September 26, 2014, the Marshal mailed
16 service documents to defendant Cohen at Corcoran State Prison, at the address provided by
17 plaintiff for that purpose. *Id.* On May 26, 2015, the Marshal was unable to locate and serve
18 defendant Cohen. *Id.* On May 29, 2015, the court issued an order requiring plaintiff to show
19 cause why defendant Cohen should not be dismissed from this case, due to plaintiff's failure to
20 effect service pursuant to Rule 4(m). (Doc. No. 80.) On June 12, 2015, plaintiff responded to the
21 order, reporting that he did not know defendant Cohen's current address, and requesting
22 assistance from CDCR to locate defendant Cohen. (Doc. No. 82.)

23 On July 9, 2015, the court issued an order directing the Marshal to initiate re-service upon
24 defendant Cohen using the assistance of the CDCR's Legal Affairs Division. (Doc. No. 83.) On
25 December 3, 2015, the Marshal again filed a return of service unexecuted as to defendant Cohen,
26 indicating that on July 25, 2015, they sent mail to CDCR's Special Investigator for CDCR's
27 Legal Division, and on October 30, 2015, they mailed service documents to a new address for
28 defendant Cohen, which was also found to be invalid. *Id.* On November 19, 2015, the CDCR

1 reported they had no new information regarding defendant Cohen's current address. *Id.* Thus,
2 the Marshal was unable to locate defendant Cohen for service.

3 **B. Discussion**

4 Plaintiff has been granted ample opportunity but has not provided sufficient information
5 to locate defendant Dr. Cohen for purposes of service of process. The U.S. Marshal has made
6 two attempts, at the Court's direction, to locate defendant Cohen, without success. As discussed
7 above, where a *pro se* plaintiff fails to provide the Marshal with accurate and sufficient
8 information to effect service of the summons and complaint, the court's *sua sponte* dismissal of
9 the unserved defendants is appropriate. *Walker*, 14 F.3d at 1421-22. The court finds that plaintiff
10 is unable to locate defendant Cohen, and any further attempts at service of process would be
11 futile. The court cannot continue to expend its scarce resources assisting a litigant who cannot
12 locate a defendant against whom his case proceeds. Plaintiff was forewarned in the Court's order
13 of May 29, 2015, that if he could not provide the U.S. Marshal with additional information to
14 locate defendant Cohen for purposes of service of process, defendant Cohen would be dismissed
15 from this action. (Doc. No. 80 at 3:3-5.)

16 **III. CONCLUSION**

17 Accordingly, based on the foregoing,

- 18 1. Defendant Dr. Cohen is DISMISSED without prejudice from this action, based on
19 Plaintiff's failure to effect service pursuant to Rule 4 of the Federal Rules of Civil
20 Procedure; and
- 21 2. The Clerk of the Court is DIRECTED to reflect the dismissal of defendant Cohen on the
22 Court's docket.

23 IT IS SO ORDERED.

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26 Dated: **December 18, 2015**

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28 **DALE A. DROZD**
UNITED STATES DISTRICT JUDGE

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