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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARCUS R. WILLIAMS,

Plaintiff,

v.

KELLY HARRINGTON, et al.,

Defendants.

Case No. 1:12-cv-00226-LJO-EPG (PC)

ORDER FOR PLAINTIFF TO SHOW
CAUSE WHY DEFENDANT D.
JAYVINDER SHOULD NOT BE
DISMISSED FROM THIS ACTION
WITHOUT PREJUDICE BECAUSE OF
PLAINTIFF'S FAILURE TO LOCATE
DEFENDANT D. JAYVINDER
(ECF NO. 123)

THIRTY DAY DEADLINE

I. RELEVANT PROCEDURAL HISTORY

Marcus Williams ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. On February 17, 2012, Plaintiff commenced this action by filing a complaint. (ECF No. 1). The Court found cognizable claims against seven defendants (ECF Nos. 10, 16, 20, & 22), and, after the appropriate service documents were completed and returned (ECF No. 23), ordered the United States Marshal Service ("the Marshal") to serve the defendants (ECF No. 24).

However, because there was no information before the Court as to whether defendant D. Jayvinder had ever been served, on October 21, 2016, Chief Judge Lawrence J. O'Neill gave Plaintiff the option to have the Marshal re-serve defendant D. Jayvinder. (ECF No. 110). On

1 November 9, 2016, Plaintiff informed the Court that he wanted to have the Marshal re-serve
2 defendant D. Jayvinder. (ECF No. 112). Once Plaintiff submitted the appropriate service
3 documents, the Court issued an order directing the Marshal to serve process upon defendant D.
4 Jayvinder. (ECF No. 118). On January 9, 2017, the Marshal filed a return of service
5 unexecuted, indicating that the California Department of Corrections and Rehabilitation
6 (“CDCR”) had nobody by the name of D. Jayvinder in their records. (ECF No. 123).

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

8 Pursuant to Rule 4(m),

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

14 Fed. R. Civ. P. 4(m).¹

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

28 ¹ 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 Sonny Perez has expired under both the pre-
amendment version of the rule and the current version rule.

1 The return of service filed by the Marshal on January 9, 2017, indicates that, according
2 to the CDCR, the CDCR does not have anyone in their records by the name of D. Jayvinder.
3 (ECF No. 123). There is no indication on the return of service that the Marshal received a
4 response from defendant D. Jayvinder. (Id.) The Marshal certified that he or she was unable to
5 locate defendant D. Jayvinder. (Id.)

6 Pursuant to Rule 4(m), the Court will provide Plaintiff with an opportunity to show
7 cause why defendant D. Jayvinder should not be dismissed from the case because of Plaintiff's
8 failure to provide the Marshal with accurate and sufficient information to effect service of the
9 summons and complaint on defendant D. Jayvinder. If Plaintiff is unable to provide the
10 Marshal with additional information the Court will issue findings and recommendations to
11 Chief Judge O'Neill, recommending that defendant D. Jayvinder be dismissed from the case,
12 without prejudice.

13 **III. CONCLUSION**

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

- 15 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
16 show cause why the Court should not issue findings and recommendations to
17 Chief Judge O'Neill, recommending that defendant D. Jayvinder be dismissed
18 from this action, without prejudice, pursuant to Federal Rule of Civil Procedure
19 4(m).

20
21 IT IS SO ORDERED.

22 Dated: January 11, 2017

23 /s/ Eric P. Gray
24 UNITED STATES MAGISTRATE JUDGE
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