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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUIS RODRIGUEZ,

Plaintiff,

v.

HEFFLEFINGER, et al.,

Defendants.

1:13-cv-00231-DAD-GSA-PC

**ORDER GRANTING DEFENDANTS' MOTION
FOR AUTHORITY TO SERVE NOTICE OF
DEATH BY PUBLICATION
(ECF. No. 74.)**

I. PROCEDURAL HISTORY

Luis Rodriguez ("Plaintiff") was a state prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on February 14, 2013. (ECF No. 1.) The case now proceeds with Plaintiff's Second Amended Complaint filed on July 14, 2014, on the following cognizable claims: (1) retaliation in violation of the First Amendment against defendants Anderson, Hefflefinger, Badger, McAllister, Tredwell, Sheldon, Speidell, Duncan, Lovofoy, and Huerta; (2) violation of the Eighth Amendment against defendant Lovofoy for inadequate medical care; and (3) violation of the Eighth Amendment against defendants Hefflefinger and Lovofoy based on conditions of confinement. (ECF No. 25.)

1 **II. BACKGROUND**

2 A notice of Plaintiff's death was placed on the court's record by his wife, Caroline
3 Grenot, on April 25, 2016, in which Ms. Grenot requested information regarding continuation
4 of the suit on behalf of plaintiff's estate. (ECF No. 67.) On May 4, 2016, defendants filed a
5 formal notice of Plaintiff's death with the court. (ECF No. 66.) Defendants produced evidence
6 that Plaintiff's daughter, Amelia Garcia, was served by personal delivery on May 7, 2016.
7 (ECF No. 69.) However, the evidence defendants supplied to the court established that while
8 personal delivery of the notice was attempted by defendants on Plaintiff's wife, Caroline
9 Gremot, and plaintiff's brother, David Rodriguez, neither were located at their respective
10 addresses, and therefore, neither was served with notice. (ECF No. 69.) Moreover, the
11 documents submitted by defendants did not indicate that any other attempts were made to serve
12 either Ms. Grenot or Mr. Rodriguez, both of whom defendants represented to be non-party
13 successors or representatives, by means other than personal delivery.

14 On November 3, 2016, the Court ordered defendants to supplement their previously
15 filed notice with evidence of proper service upon both Caroline Grenot and David Rodriguez
16 within twenty-one days. (ECF No. 72.) On November 7, 2016, defendants filed a proof of
17 service for Plaintiff's widow, C. Grenot, showing that she was personally served with the
18 Notice of Death on September 14, 2016. (ECF No. 73.)

19 On November 22, 2016, Defendants filed a motion for an order permitting service of
20 Notice of Death of Plaintiff upon David Rodriguez by publication. (ECF No. 74.) No
21 opposition has been filed.

22 **III. RULE 25(a)(1) – SUBSTITUTION OF PARTIES**

23 Rule 25(a)(1) of the Federal Rules of Civil Procedure provides for the dismissal of an
24 action if a motion for substitution is not made within ninety days after service of a statement
25 noting plaintiff's death. Fed. R. Civ. P. 25(a)(1). Two things are required for the running of
26 the ninety-day period to commence: a party must (1) formally suggest the death of the party on
27 the record, and (2) serve the suggestion of death on the other parties and nonparty successors or
28 representatives. Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994.) A party may be served

1 with the suggestion of death by service on his or her attorney as provided for in Rule 5, and
2 non-party successors or representatives of the deceased party must be served the suggestion of
3 death in the manner provided for in Rule 4 for the service of a summons. Fed. R. Civ. P.
4 25(a)(3); Barlow, 39 F.3d at 232-34.

5 Rule 4 states a summons may be served either by “following state law for serving a
6 summons in an action brought in courts of general jurisdiction in the state where the district
7 court is located or where service is made,” or by doing any of the following: (1) “delivering a
8 copy of the summons and of the complaint to the individual personally”; (2) “leaving a copy of
9 each at the individual’s dwelling or usual place of abode with someone of suitable age and
10 discretion who resides there”; or (3) “delivering a copy of each to an agent authorized by
11 appointment or by law to receive service of process.” Fed. R. Civ. P. 4(e). In California,
12 service of a summons may be effected by personal delivery, California Code of Civil Procedure
13 § 415.10, by leaving a copy of the summons at an office or residence with an appropriate
14 person and thereafter mailing another copy to the same individual at the same address, §
15 415.20, by mail, § 415.30, or by publication, § 415.50. Additionally, failing these methods, a
16 court in California may order a summons be served “in a manner which is reasonably
17 calculated to give actual notice to the party to be served.” Cal. Code Civ. Proc., § 413.30.

18 California Code of Civil Procedure § 415.50(a) provides that a party may, by court
19 order, serve a summons by publication if the party to be served “cannot with reasonable
20 diligence be served in another manner” and if one of the following is true: (1) “[a] cause of
21 action exists against the party upon whom service is to be made or he or she is a necessary or
22 proper party to the action”; (2) “[t]he party to be served has or claims an interest in real or
23 personal property in this state that is subject to the jurisdiction of the court . . .” An order for
24 publication must direct publication of the summons in a newspaper in California “that is most
25 likely to give actual notice to the party to be served.” Id. at § 415.50(b).

26 **III. DISCUSSION**

27 Defendants move for an order permitting service of the Notice of Death of Plaintiff by
28 publication in the Los Angeles Times under California Code of Civil Procedure § 415.50.

1 Defendants assert that D. Rodriguez, brother of the deceased Plaintiff, is an individual whom
2 defendants believe to be most recently domiciled in Los Angeles County. Defendants have
3 been unable to locate or contact D. Rodriguez and therefore cannot serve him with the Notice
4 of Death directly.

5 Defendants argue that D. Rodriguez, Plaintiff's brother, is not a necessary or proper
6 party to this § 1983 action because he is not a successor to Plaintiff's claim whom Defendants
7 were required to serve. Fed. R. Civ. P. 25(a)(1). Nevertheless, to comply with the court's
8 order to serve D. Rodriguez, Defendants request an order permitting them to serve the Notice
9 of Death of Plaintiff by publication in the Los Angeles Times.

10 Defendants have shown that they diligently attempted to locate and serve D. Rodriguez,
11 without success. Therefore, the Court finds good cause to authorize defendants to serve D.
12 Rodriguez with the Notice of Death of Plaintiff by publication in the Los Angeles Times.
13 Further, the Court shall deem publication of the Notice of Death in a California newspaper
14 necessary in light of D. Rodriguez's last known addresses in Los Angeles County.

15 **IV. CONCLUSION**

16 In light of the foregoing, IT IS HEREBY ORDERED that:

- 17 1. Defendants are authorized to serve D. Rodriguez with the Notice of Death of
18 Plaintiff by publication in the Los Angeles Times, a newspaper published in the
19 State of California, at Los Angeles, California, which is hereby designated as the
20 newspaper most likely to give actual notice to D. Rodriguez, and that
21 publication be made once a week for four weeks;
- 22 2. It is further ordered that if the address of D. Rodriguez be ascertained prior to
23 the expiration of the time for publication of the Notice of Death, that a copy of
24 the Notice of Death be forthwith served upon D. Rodriguez in the manner
25 provided for in Rule 4 for the service of a summons; and

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3. The Court deems publication of the Notice of Death in a California newspaper necessary in light of D. Rodriguez's last known addresses in Los Angeles County.

IT IS SO ORDERED.

Dated: January 18, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE