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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RODERICK BRYAN RUSSELL, JR.,

Plaintiff,

v.

SONNY PEREZ; K. TOOR;
AND WOODWARD,

Defendants.

Case No. 1:14-cv-00487-EPG (PC)

**ORDER FOR PLAINTIFF TO SHOW
CAUSE WHY CASE SHOULD NOT BE
DISMISSED WITHOUT PREJUDICE
FOR PLAINTIFF'S FAILURE TO
EFFECT SERVICE
(ECF NO. 15)**

THIRTY DAY DEADLINE

I. RELEVANT PROCEDURAL HISTORY

Plaintiff, Roderick Bryan Russell, Jr., is a former state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on April 7, 2014. (ECF No. 1). This action now proceeds on the First Amended Complaint filed on February 17, 2015, against defendant Sonny Perez on claims for excessive force in violation of the Eighth Amendment and retaliation in violation of the First Amendment. (ECF Nos. 8 & 12).

On May 3, 2016, the Court issued an order directing the United States Marshal (“Marshal”) to serve process upon defendant Sonny Perez. (ECF No. 14). On September 16, 2016, the Marshal filed a return of service unexecuted, indicating that the Marshal was unable

1 to locate defendant Sonny Perez for service of process. (ECF No. 15).

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

3 Pursuant to Rule 4(m),

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

9 Fed. R. Civ. P. 4(m).¹

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

23 **Background**

24 The return of service filed by the Marshal on September 16, 2016, indicates that,
25 according to the CDCR, defendant Sonny Perez retired and did not leave a forwarding address.
26 (ECF No. 15). There is no indication on the return of service that the Marshal received a

27 ¹ Fed. R. Civ. P. 4(m) was amended in 2015 to reduce the time for serving a defendant from 120
28 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 response from defendant Sonny Perez. (Id.) The Marshal certified that he or she was unable to
2 locate defendant Sonny Perez. (Id.)

3 Pursuant to Rule 4(m), the Court will provide Plaintiff with an opportunity to show
4 cause why the case should not be dismissed for failure to serve process (the only remaining
5 defendant in the case, defendant Sonny Perez, has not been served). Plaintiff has not provided
6 sufficient information to identify and locate defendant Sonny Perez for service of process. If
7 Plaintiff is unable to provide the Marshal with additional information the case shall be
8 dismissed without prejudice.

9 **III. CONCLUSION**

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

- 11 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
12 show cause why the case should not be dismissed without prejudice pursuant to
13 Rule 4(m).

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15 IT IS SO ORDERED.

16 Dated: September 26, 2016

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