

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MANUEL ANTONIO GONZALEZ,
Plaintiff,
v.
J. RAZO, et al.,
Defendants.

Case No. 1:15-cv-01098-DAD-EPG (PC)

ORDER FOR PLAINTIFF TO SHOW
CAUSE WHY THE COURT SHOULD NOT
ISSUE FINDINGS AND
RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANT
R.N. RICE BE DISMISSED FROM THIS
ACTION, WITHOUT PREJUDICE,
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 4(M)

(ECF NO. 50)

TWENTY-ONE DAY DEADLINE

I. RELEVANT PROCEDURAL HISTORY

Manuel Antonio Gonzalez (“Plaintiff”) is a state prisoner, and is the plaintiff in this civil rights action filed pursuant to 42 U.S.C. § 1983, which includes attendant state law claims. Plaintiff filed the complaint commencing this action on July 16, 2015. (ECF No. 1). This case now proceeds on Plaintiff’s claims for unconstitutional excessive force against defendants Correctional Officer Razo and Correctional Officer Johnson; failure to protect against defendant Correctional Officer Blankenship; deliberate indifference to serious medical against defendant R.N. Rice and defendant Ybarra; retaliation in violation of the First Amendment against defendant Ybarra; assault and battery against defendants Correctional Officer Razo and Correctional Officer Johnson; negligence against defendant Correctional Officer Blankenship;

1 and medical malpractice against defendant R.N. Rice. (ECF Nos. 31, 36, & 54).

2 After the appropriate service documents were completed and returned (ECF No. 44), the
3 Court ordered the United States Marshal Service (“the Marshal”) to serve the defendants (ECF
4 No. 49). On April 3, 2017, the summons for defendant R.N. Rice was returned unexecuted.
5 (ECF No. 50). According to the Marshal, the “L/O” (litigation office) informed the Marshal
6 that defendant R.N. Rice resigned in 2014, and did not leave a forwarding address or contact
7 information. (Id.).

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

9 Pursuant to Federal Rule of Civil Procedure 4(m),

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

15 Fed. R. Civ. P. 4(m).¹

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

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 R.N. Rice has expired under both the pre-
amendment version of the rule and the current version rule.

² While Plaintiff is not proceeding *in forma pauperis*, the Court granted Plaintiff’s request for
service of process by the Marshal. (ECF No. 21).

1 with accurate and sufficient information to effect service of the summons and complaint,
2 dismissal of the unserved defendant is appropriate. Walker, 14 F.3d at 1421-22.

3 The return of service filed by the Marshal on April 3, 2017, indicates that, according to
4 the litigation office, defendant R.N. Rice resigned in 2014 and did not leave a forwarding
5 address or contact information. (ECF No. 50). There is no indication on the return of service
6 that the Marshal received a response from defendant R.N. Rice. (Id.). The Marshal certified
7 that he or she was unable to locate defendant R.N. Rice. (Id.).

8 Pursuant to Rule 4(m), the Court will provide Plaintiff with an opportunity to show
9 cause why the Court should not issue findings and recommendations, recommending that
10 defendant R.N. Rice be dismissed from the case because of Plaintiff's failure to provide the
11 Marshal with accurate and sufficient information to effect service of the summons and
12 complaint on defendant R.N. Rice. If Plaintiff is unable to provide the Marshal with additional
13 information, the Court will issue findings and recommendations to District Judge Dale A.
14 Drozd, recommending that defendant R.N. Rice be dismissed from the case, without prejudice.

15 **III. CONCLUSION**

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

- 17 1. Within **twenty-one (21) days** from the date of service of this order, Plaintiff shall
18 show cause why the Court should not issue findings and recommendations to Judge
19 Drozd, recommending that defendant R.N. Rice be dismissed from this action,
20 without prejudice, pursuant to Federal Rule of Civil Procedure 4(m); and
21 2. Failure to respond to this order may result in defendant R.N. Rice being dismissed
22 from this action, without prejudice.

23 IT IS SO ORDERED.
24

25 Dated: May 15, 2017

26 /s/ Eric P. Drozd
27 UNITED STATES MAGISTRATE JUDGE
28