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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 MANUEL ANTONIO GONZALEZ,
11 Plaintiff,
12 v.
13 J. RAZO, et al.,
14 Defendants.

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

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANT
R.N. RICE BE DISMISSED FROM THIS
ACTION, WITHOUT PREJUDICE
(ECF NOS. 50 & 56)

TWENTY-ONE DAY DEADLINE

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17 **I. RELEVANT PROCEDURAL HISTORY**

18 Manuel Antonio Gonzalez (“Plaintiff”) is a state prisoner, and is the plaintiff in this
19 civil rights action filed pursuant to 42 U.S.C. § 1983, which includes attendant state law claims.
20 Plaintiff filed the complaint commencing this action on July 16, 2015. (ECF No. 1). This case
21 now proceeds on Plaintiff’s claims for unconstitutional excessive force against defendants
22 Correctional Officer Razo and Correctional Officer Johnson; failure to protect against
23 defendant Correctional Officer Blankenship; deliberate indifference to serious medical against
24 defendant R.N. Rice and defendant Ybarra; retaliation in violation of the First Amendment
25 against defendant Ybarra; assault and battery against defendants Correctional Officer Razo and
26 Correctional Officer Johnson; negligence against defendant Correctional Officer Blankenship;
27 and medical malpractice against defendant R.N. Rice. (ECF Nos. 31, 36, & 54).

28 After the appropriate service documents were completed and returned (ECF No. 44), the

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

6 On May 16, 2017, the Court ordered Plaintiff to show cause why the Court should not
7 issue findings and recommendations to Judge Dale A. Drozd, recommending that defendant
8 R.N. Rice be dismissed from this action, without prejudice, pursuant to Federal Rule of Civil
9 Procedure 4(m). Plaintiff did not respond.

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

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

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

17 Fed. R. Civ. P. 4(m).¹

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

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 ‘automatically good cause....’” Walker, 14 F.3d at 1422 (quoting Sellers v. United States, 902
2 F.2d 598, 603 (7th Cir.1990)). However, where a *pro se* plaintiff fails to provide the Marshal
3 with accurate and sufficient information to effect service of the summons and complaint,
4 dismissal of the unserved defendant is appropriate. Walker, 14 F.3d at 1421-22.

5 **III. ANALYSIS**

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

11 Plaintiff has failed to provide the Marshal with accurate and sufficient information to
12 effect service of the summons and complaint on defendant R.N. Rice, and has failed to serve
13 defendant R.N. Rice within the time period required by Federal Rule of Civil Procedure 4(m).
14 The Court gave Plaintiff an opportunity to show good cause for the failure, but Plaintiff failed
15 to respond. Accordingly, the Court will recommend that defendant R.N. Rice be dismissed
16 from the action, without prejudice.

17 **IV. CONCLUSION AND RECOMMENDATION**

18 Based on the foregoing, the Court HEREBY RECOMMENDS that defendant R.N. Rice
19 be dismissed from this action because of Plaintiff’s failure to provide the Marshal with accurate
20 and sufficient information to effect service of the summons and complaint on defendant R.N.
21 Rice within the time period prescribed by Federal Rule of Civil Procedure 4(m).

22 These Findings and Recommendations will be submitted to the United States District
23 Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1).
24 Within **twenty-one (21) days** after being served with a copy of these Findings and
25 Recommendations, any party may file written objections with the court and serve a copy on all
26 parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and
27 Recommendations.” Any reply to the objections shall be served and filed within **seven (7)**
28 **days** after service of the objections. The parties are advised that failure to file objections

1 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler,
2 772 F.3d 834, 839 (9th Cir. 2014) (quoting Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
3 1991)).

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5 IT IS SO ORDERED.

6 Dated: June 14, 2017

/s/ Eric P. Grogan
7 UNITED STATES MAGISTRATE JUDGE