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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8  
9 ANTOINE DESHAWN BARNES,

10 Plaintiff,

11 v.

12 W. YAND,

13 Defendant.

Case No. 1:20-cv-00389-DAD-SAB

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSING ACTION  
FOR FAILURE TO SERVE IN  
COMPLIANCE WITH FED. R. CIV. P. 4(m)  
AND FAILURE TO COMPLY WITH  
COURT ORDER

FOURTEEN DAY DEADLINE

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15  
16 **I.**

17 **BACKGROUND**

18 Antoine Deshawn Barnes (“Plaintiff) is appearing *pro se* and *in forma pauperis* in this  
19 civil rights action pursuant to 42 U.S.C. § 1983. On March 16, 2020, Plaintiff filed a complaint  
20 against the Hanford Police Department, the Mayor of Hanford, and Officer W. Yand. (ECF No.  
21 1.) On April 3, 2020, a screening order issued finding that Plaintiff had failed to state any  
22 cognizable claims; and he was granted leave to file an amended complaint within thirty days.  
23 (ECF No. 8.)

24 On April 14, 2020, Plaintiff filed a first amended complaint against Officer W. Yand.  
25 (ECF No. 9.) On April 16, 2020, findings and recommendations issued recommending  
26 dismissing certain claims. (ECF No. 10.) The findings and recommendations was served on  
27 Plaintiff and contained notice that any objections were to be filed within thirty days. (*Id.*) No  
28 objections were filed. On June 9, 2020, the findings and recommendations was adopted and this

1 action is proceeding against Defendant Yand for unreasonable search and seizure in violation of  
2 the Fourth Amendment. (ECF No. 11.)

3 On June 10, 2020, an order was filed finding service of the complaint appropriate and  
4 Plaintiff was sent service documents for completion and return. (ECF No. 12.) Plaintiff returned  
5 the service documents on June 22, 2020. (ECF No. 14.) On June 23, 2020, an order issued  
6 directing the United States Marshal to serve the amended complaint. (ECF No. 15.) On  
7 September 9, 2020, Plaintiff's address was updated based on a notice of change of address and  
8 the summons was returned unexecuted by the United States Marshal. (ECF Nos. 17, 18.) The  
9 return notice stated, "Hanford Police Department has never employed anyone by the name 'W.  
10 Yand.' Hanford HR has also never had anyone by that name employed. They will not accept  
11 service." (ECF No. 18.)

12 On September 10, 2020, an order issued requiring Plaintiff to provide further information  
13 regarding Defendant Yand to effectuate service of the summons and complaint within thirty  
14 days. (ECF No. 19.) On October 9, 2020, the Court received multiple phone calls from Plaintiff  
15 and his family members seeking to have him released from custody. (See ECF No. 20.)  
16 Pursuant to the phone calls, Plaintiff had been transferred to the custody of the Monterey County  
17 Sheriff and he requested an extension of time to provide further information regarding Defendant  
18 Yand. (Id.) An order issued granting Plaintiff's request for an extension of time and directing  
19 the Clerk of the Court to update Plaintiff's address. (ECF No. 20.) Plaintiff was granted thirty  
20 days to respond to the September 10, 2020 order. (Id.)

21 On October 15, 2020, Plaintiff filed a notice of change of address updating his  
22 identification number. (ECF No. 21.) On October 26, 2020, the October 9, 2020 order was  
23 returned by the United States Postal Service as "Undeliverable, Attempted – Not Known." The  
24 October 9, 2020 order was reserved on this same date with the updated identification number.

25 More than thirty days have passed since Plaintiff was reserved with the order on October  
26 26, 2020 and Plaintiff has not complied with or otherwise responded to the order requiring him  
27 to provide further information so that Defendant Yand can be served.

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1 **II.**

2 **DISCUSSION**

3 **A. Failure to Serve**

4 Here, Plaintiff was ordered to provide additional information so that the United States  
5 Marshal could serve Defendant Yand and he has failed to respond to the order. On June 23,  
6 2020, the United States Marshal was directed to serve the first amended complaint. When the  
7 Marshal attempted to serve using the name in the complaint, they were informed that no such  
8 person had been employed by the Hanford Police Department or the City of Hanford. By an  
9 October 9, 2020 order, Plaintiff was informed that no such person by the name he provided in the  
10 complaint was employed by the Hanford Police Department and was ordered to provide  
11 additional information so that the complaint and summons could be served. Although he  
12 requested and received an extension of time to do so, Plaintiff has not responded to the  
13 September 9, 2020 order.

14 Rule 4(m) of the Federal Rules of Civil Procedure addresses the time requirements for  
15 service of the complaint in civil cases. Rule 4(m) provides:

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

21 Here, the United States Marshal has attempted service based on the information provided  
22 in the complaint and was unable to serve the defendant. On September 9, 2020, Plaintiff was  
23 ordered to provide further information so that the United States Marshal could effectuate service  
24 on Defendant Yand. On October 9, 2020, Plaintiff was granted a thirty day extension of time to  
25 respond to the September 9, 2020 order. This order was served with the correct inmate number  
26 on October 26, 2020. The time to respond has passed and Plaintiff has not complied with or  
27 otherwise responded to the order.

28 Plaintiff has failed to serve the complaint in compliance with Rule 4(m) of the Federal  
Rules of Civil Procedure nor has he shown good cause to further extend time for service.  
Therefore, the Court recommends that this action be dismissed for failure to serve in compliance

1 with Rule 4(m).

2 **B. Failure to Comply**

3 Additionally, on September 10, 2020, Plaintiff was ordered to provide further information  
4 to effectuate service of process in this action. He was granted an additional thirty days in which  
5 to respond and has not provided the information or otherwise responded to the October 10, 2020  
6 order granting him an extension of time to do so.

7 Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with these  
8 Rules or with any order of the Court may be grounds for imposition by the Court of any and all  
9 sanctions . . . within the inherent power of the Court.” The Court has the inherent power to  
10 control its docket and may, in the exercise of that power, impose sanctions where appropriate,  
11 including dismissal of the action. Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir.  
12 2000).

13 A court may dismiss an action based on a party’s failure to prosecute an action, failure to  
14 obey a court order, or failure to comply with local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52,  
15 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet, 963 F.2d  
16 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order to file an amended  
17 complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to  
18 comply with local rule requiring pro se plaintiffs to keep court apprised of address); Malone v.  
19 United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply  
20 with court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack  
21 of prosecution and failure to comply with local rules).

22 In determining whether to dismiss an action for failure to comply with a pretrial order,  
23 the Court must weigh “(1) the public’s interest in expeditious resolution of litigation; (2) the  
24 court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public  
25 policy favoring disposition of cases on their merits; and (5) the availability of less drastic  
26 sanctions.” In re Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d 1217, 1226  
27 (9th Cir. 2006) (internal quotations and citations omitted). These factors guide a court in  
28 deciding what to do, and are not conditions that must be met in order for a court to take action.

1 Id. (citation omitted).

2 In this instance, the public's interest in expeditious resolution of the litigation and the  
3 Court's need to manage its docket weigh in favor of dismissal. Plaintiff was ordered to provide  
4 additional information about the defendant so that the amended complaint and summons could  
5 be served within thirty days of September 10, 2020. He was granted an additional thirty days on  
6 October 9, 2020. Plaintiff has neither filed additional information nor otherwise responded to the  
7 Court's order. Plaintiff's failure to comply with the orders at issue hinders the Court's ability to  
8 move this action towards disposition, and indicates that Plaintiff does not intend to diligently  
9 litigate this action.

10 Since it appears that Plaintiff does not intend to litigate this action diligently there arises a  
11 rebuttable presumption of prejudice to the defendants in this action. In re Eisen, 31 F.3d 1447,  
12 1452-53 (9th Cir. 1994). This risk of prejudice may be rebutted if Plaintiff offers an excuse for  
13 the delay. In re Eisen, 31 F.3d at 1453. The risk of prejudice to the defendants also weighs in  
14 favor of dismissal.

15 The public policy in favor of deciding cases on their merits is greatly outweighed by the  
16 factors in favor of dismissal. It is Plaintiff's responsibility to move this action forward. This  
17 action can proceed no further without Plaintiff's cooperation and compliance so the defendant  
18 can be served. The Marshal has attempted service and found that no person by the name  
19 provided by Plaintiff is employed with the Hanford Police Department. Plaintiff has not  
20 provided any information that would allow the Marshal to serve the complaint and the action  
21 cannot simply remain idle on the Court's docket, unprosecuted. In this instance, the fourth factor  
22 does not outweigh Plaintiff's failure to comply with the Court's orders.

23 Finally, Plaintiff is proceeding in this action *in forma pauperis* and monetary sanctions  
24 are not available. Since Plaintiff has failed to provide information in order to allow the  
25 defendant to be served evidentiary sanctions would serve no purpose. Additionally, a court's  
26 warning to a party that their failure to obey the court's order will result in dismissal satisfies the  
27 "consideration of alternatives" requirement. Ferdik, 963 F.2d at 1262; Malone, 833 F.2d at 132-  
28 33; Henderson, 779 F.2d at 1424. The Court's September 9, 2020 order requiring Plaintiff to

1 provide further information on the defendant expressly stated: “Plaintiff’s failure to respond to  
2 this order will result in the dismissal of Defendant Yand from this action.” (ECF No. 19 at 2.)  
3 The October 9, 2020 order stated, “Plaintiff’s failure to comply with this order will result in the  
4 issuance of sanctions, up to and including dismissal of this action.” (ECF No. 20 at 4.) Thus,  
5 Plaintiff had adequate warning that dismissal would result from his noncompliance with the  
6 Court’s order and his failure to serve the complaint.

7 **III.**

8 **CONCLUSION AND RECOMMENDATION**

9 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed for  
10 Plaintiff’s failure to effectuate service of process in compliance with Rule 4(m) of the Federal  
11 Rules of Civil Procedure and failure to comply with the September 9, 2020 order requiring him  
12 to provide further information on the defendant.

13 These findings and recommendations are submitted to the district judge assigned to this  
14 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within **fourteen**  
15 **(14) days** of service of this recommendation, Plaintiff may file written objections to these  
16 findings and recommendations with the Court. Such a document should be captioned  
17 “Objections to Magistrate Judge’s Findings and Recommendations.” The district judge will  
18 review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. §  
19 636(b)(1)(C). Plaintiff is advised that failure to file objections within the specified time may  
20 waive the right to appeal the district judge’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
21 1991).

22 IT IS SO ORDERED.

23 Dated: December 9, 2020

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26 UNITED STATES MAGISTRATE JUDGE  
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