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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN MONTUE,

Plaintiff,

No. CIV S-06-1276 MCE GGH P

vs.

THERESA SCHWARTZ, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. For the following reasons, the court recommends that this action be dismissed for plaintiff's failure to serve defendants pursuant to Fed. R. Civ. P. 4(m).

Fed. R. Civ. P. 4(m) provides,

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

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1 Plaintiff paid the filing fee.¹ On December 15, 2006, the court found that the
2 amended complaint filed November 22, 2006, stated a colorable claim for relief against the
3 defendants. The court granted plaintiff sixty days to effect service of process. On February 8,
4 2007, the court granted plaintiff a forty-five day extension of time to serve defendants.

5 On March 22, 2007, plaintiff filed a status report stating that he served defendants
6 by first class mail. On April 20, 2007, the court issued an order finding that plaintiff had not
7 properly served defendants. The court informed plaintiff of the proper procedures to effect
8 service. This order stated that Fed. R. Civ. P. 4(e) provides that service upon individuals within
9 a judicial district from whom a waiver of service has not been obtained may be made by personal
10 service or pursuant to the law of the state in which the district is located. The order went on to
11 describe the procedures by which plaintiff could serve defendants by mail under California law.
12 Plaintiff was granted thirty days to properly serve defendants.

13 On June 19, 2007, plaintiff filed a motion for an extension of time to serve
14 defendants. Plaintiff stated that on April 24, 2007, he filed an administrative appeal requesting
15 that the Litigation Coordinator pick up his amended complaints so that defendants could be
16 personally served. Plaintiff claimed that on May 9, 2007, the Litigation Coordinator responded
17 that it was plaintiff's responsibility to serve defendants.

18 Plaintiff claimed that on May 10, 2007, because he was only allowed law library
19 access once per week while in administrative segregation, he gave the amended complaints to the
20 Senior Librarian so that he could personally serve defendants. The Senior Librarian accepted the
21 complaints but told plaintiff that he would not serve defendants. The Senior Librarian told
22 plaintiff that he would ask the Litigation Coordinator to pick the complaints up. Plaintiff alleges
23 that the Litigation Coordinator did not pick up the complaints and on June 7, 2007, attempted to
24 return them to plaintiff. Because plaintiff refused to accept them, they remain in the prison law
25

26 ¹ This court has previously found plaintiff to be barred by the three strikes provision of
28 U.S.C. § 1915(g). See CIV S-02-1573 FCD GGH P.

1 library.

2 On July 11, 2007, the court denied plaintiff's June 19, 2007, motion for extension
3 of time to serve defendants. In this order, the court stated that it could extend the 120 service
4 period upon a showing of good cause for failure to effect service in a timely manner. In re
5 Sheehan, 253 F.3d 507, 512 (9th Cir. 2001). "[I]f there is no good cause, the court has discretion
6 to dismiss without prejudice or to extend the time period." The Ninth Circuit has held that at a
7 minimum, good cause means excusable neglect. Id.

8 In the July 11, 2007, order the court found that plaintiff had failed to show good
9 cause for his request for extension of time:

10 One of the grounds for the request are that prison officials have refused to
11 personally serve defendants with the amended complaint. The refusal of prison
12 officials to serve the amended complaint does not constitute good cause for
13 plaintiff's failure to effect timely service. While plaintiff is a prisoner, there is no
14 law mandating that prison officials act as plaintiff's process server, and there are
15 other means to effect personal service.

16 Plaintiff may also be arguing that inadequate law library access hindered his
17 ability to serve defendants by mail. However, plaintiff does not describe how
18 allegedly inadequate law library access prevented him from timely serving
19 defendants by mail. Because the court provided plaintiff with explicit instructions
20 regarding the procedures to follow, it does not appear that he required a
21 significant amount of law library access to serve defendants by mail. Accordingly,
22 the request for extension of time is denied and plaintiff is ordered to show cause
23 why this action should not be dismissed for his failure to serve defendants within
24 the time limits set forth in Rule 4(m).

19 July 11, 2007, order, p 3.

20 The court ordered plaintiff to show cause within twenty days why this action
21 should not be dismissed for his failure to timely effect service pursuant to Fed. R. Civ. P. 4(m).

22 On July 30, 2007, plaintiff filed a response to the show cause order. Plaintiff claims that on June
23 14, 2007, he properly served seven of the defendants by mail. Plaintiff claims that he served
24 these defendants at the Office of the Attorney General.² However, approximately six months

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26 ² State law does not authorize the Attorney General to accept service of process on behalf
of defendants sued in their individual capacities. See Jackson v. Hayakawa, 682 F.2d 1344,

1 have passed since that time and no defendants have appeared. Moreover, and in any event,
2 plaintiff confuses his contingent right to serve by mail with the question of whether he must
3 utilize another form of service if the defendants do not effect the acknowledgment of service
4 required for effective mail service. See Cal. Code of Civ. Pro. 415.30 (d). Simply serving the
5 acknowledgment of service does not mean that a person must appear.

6 Plaintiff also suggests that he cannot serve the remaining defendants because he
7 does not have the money to pay for the stamps to serve them by mail. The court cannot allow the
8 prosecution of this action to be indefinitely delayed because plaintiff cannot afford to pay
9 postage.

10 Plaintiff also claims that he personally served defendant Perez. Personal service
11 cannot be performed by the plaintiff himself. Fed. R. Civ. P. 4(c)(2).

12 Plaintiff has been given adequate information by the court regarding service
13 procedures and adequate time to serve defendants. Plaintiff has not shown good cause why this
14 action should not be dismissed for his failure to serve defendants within the time limits set forth
15 in Fed. R. Civ.P. 4(m).

16 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed.

17 These findings and recommendations are submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
19 days after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
22 shall be served and filed within ten days after service of the objections. The parties are advised

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26 1347-48 (9th Cir. 1982).

1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 02/01/08

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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