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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LANCE WARNER,

Plaintiff,

v.

M. McMAHON, et al.,

Defendants.

CASE NO. C08-1144JLR

ORDER DISMISSING
CLAIMS AGAINST
DEFENDANT I. LARSON
WITHOUT PREJUDICE

Before the court is the issue of Plaintiff Lance Warner’s failure to effect service of the summons and first amended complaint on Defendant I. Larson. Having reviewed the record and for the reasons that follow, the court DISMISSES Plaintiff’s claims against I. Larson without prejudice.

I. BACKGROUND

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. By order filed on October 6, 2009, the court

1 directed Plaintiff to complete four USM-285 forms for purposes of serving each of the
2 four Defendants. (Dkt. # 21.) By order filed on November 30, 2009, the court directed
3 the United States Marshal to serve Defendants in accordance with the USM-285 forms
4 submitted by Plaintiff. (Dkt. # 24.) On January 27, 2010, the United States Marshal filed
5 notice that I. Larson could not be located based on the information provided by Plaintiff.
6 (Dkt. # 26.) On March 8, 2010, the court entered a second order directing Plaintiff to
7 submit within 60 days additional information necessary for the United States Marshal to
8 identify and serve Defendants.¹ (Dkt. # 27.) On April 6, 2010, Defendants M.
9 McMahon, B. Landingham, and M. Day waived service and answered the first amended
10 complaint. (Dkt. ## 30-31.) By contrast, I. Larson did not waive service, did not answer
11 the complaint, and did not otherwise appear. Plaintiff did not submit additional
12 information within the 60-day period specified in the court's March 8, 2010 order.

13 By order filed on May 25, 2010, the court ordered Plaintiff to show cause within
14 30 days why the court should not dismiss I. Larson from this action without prejudice.
15 (Dkt. # 33.) In that order, the court stated that “[i]f Plaintiff does not respond to this
16 order or otherwise fails to show good cause, the court shall dismiss I. Larson from this
17 action without prejudice.” (*Id.* at 2.) Later on the same date, Plaintiff requested an
18 extension of time to comply with the court's March 8, 2010 order. (Dkt. # 34.) Plaintiff
19 sought an extension of the deadline to June 21, 2010. (*Id.*) By order filed on June 17,

21 ¹ This order cautioned Plaintiff that “when service of a complaint is not made upon a
22 defendant within 120 days after the complaint was filed, the court may be required to dismiss the
plaintiff's claims against that defendant.” (*Id.* at 2 (citing Fed. R. Civ. P. 4(m)).)

1 2010, the court granted Plaintiff's motion for an extension of time and extended the
2 deadline to respond to the court's March 8, 2010 and May 25, 2010 orders to June 25,
3 2010. (Dkt. # 35.) Again, the court emphasized: "If Plaintiff does not meet this new
4 deadline, or otherwise show good cause for his failure to do so, the court shall dismiss I.
5 Larson from this action without prejudice." (*Id.* at 2.)

6 Plaintiff did not respond to the court's orders or otherwise file any motion or
7 submission with the court by the June 25, 2010 deadline. In recognition of the mailing
8 and litigation difficulties associated with Plaintiff's imprisonment, the court delayed
9 taking action until the present date, thereby extending the deadline in an abundance of
10 caution. Plaintiff has still not filed any response, motion, or other submission with the
11 court.

12 II. ANALYSIS

13 Federal Rule of Civil Procedure 4(m) provides:

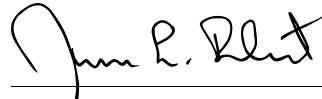
14 If a defendant is not served within 120 days after the complaint is filed, the
15 court—on motion or on its own after notice to the plaintiff—must dismiss
16 the action without prejudice against that defendant or order that service be
made within a specified time. But if the plaintiff shows good cause for the
failure, the court must extend the time for service for an appropriate period.

17 Fed. R. Civ. P. 4(m). An incarcerated plaintiff proceeding in forma pauperis is entitled,
18 upon order of the court, to rely on the United States Marshal to effect service of the
19 summons and complaint. 28 U.S.C. § 1915(d); *Walker v. Sumner*, 14 F.3d 1415, 1422
20 (9th Cir. 1994), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).
21 Further, a plaintiff "should not be penalized by having his action dismissed for failure to
22 effect service where the U.S. Marshal or the court clerk has failed to perform his duties."

1 | *Walker*, 14 F.3d at 1422 (quoting *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990)).
2 | “So long as the prisoner has furnished the information necessary to identify the
3 | defendant, the marshal’s failure to effect service ‘is automatically good cause’” for
4 | extending the time for service. *Id.* (citing *Sellers v. United States*, 902 F.2d 598, 603 (7th
5 | Cir. 1990)).

6 | On this record, the court concludes that Plaintiff’s claims against I. Larson must be
7 | dismissed without prejudice. On November 30, 2009, the court ordered the United States
8 | Marshal to serve Plaintiff’s first amended complaint based on the information provided
9 | by Plaintiff. The United States Marshal attempted to serve I. Larson, but ultimately could
10 | not do so. The court thus directed Plaintiff to provide within 60 days additional
11 | information necessary for the purpose of identifying and serving I. Larson. Plaintiff did
12 | not meet this deadline. The court extended deadline and Plaintiff did not meet the
13 | extended deadline. During this time, the 120-day period of Rule 4(m) expired and the
14 | court repeatedly warned Plaintiff of the consequence of not responding to the court’s
15 | orders. As of the present date, Plaintiff has not served I. Larson, has not provided the
16 | additional information necessary for the United States Marshal to identify and serve I.
17 | Larson, and has not requested additional time to effect service or otherwise shown good
18 | cause for his delay. In light of the foregoing, the court DISMISSES Plaintiff’s claims
19 | against I. Larson without prejudice. Fed. R. Civ. P. 4(m); *Walker*, 14 F.3d at 1422. This
20 | order does not affect Plaintiff’s claims against the other Defendants.

Dated this 22nd day of July, 2010.



JAMES L. ROBART
United States District Judge

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