

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

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

SAMUEL H. TUCKER,

Plaintiff,

No. CIV S-09-0087 JAM GGH P

vs.

D. CALVIN,

Defendant.

ORDER

_____ /

Pending before the court is the U.S. Marshal's December 8, 2009, request for reimbursement for the cost of personal service of defendant Calvin. On December 10, 2009, defendants filed a response to this request. For the following reasons, defendant Calvin is ordered to reimburse the U.S. Marshal for the cost of personal service.

On January 12, 2009, plaintiff filed the original complaint. On January 23, 2009, the undersigned found that the complaint stated a colorable claim against defendant Calvin but dismissed the claims against the remaining defendants with thirty days to file an amended complaint. Thirty days passed and plaintiff did not file an amended complaint. Accordingly, on March 19, 2009, the undersigned ordered plaintiff to return the forms necessary to effect service of defendant Calvin within thirty days. On March 30, 2009, plaintiff returned these forms.

////

1 On April 30, 2009, the undersigned ordered the U.S. Marshal to serve defendant
2 Calvin. This order directed the Marshal to notify defendant within ten days of the
3 commencement of the action and to request a waiver of service of summons in accordance with
4 Fed. R Civ. P. 4(d) and 28 U.S.C. § 566(c). The April 30, 2009, order further stated that if a
5 waiver of summons was not returned within sixty days from the date of the mailing of the request
6 for waiver, the U.S. Marshal was to personally serve defendant.

7 On May 27, 2009, the U.S. Marshal mailed the waiver to defendant. On July 24,
8 2009, defendant filed a motion to dismiss but he did not return the waiver. After not receiving
9 the waiver within sixty days, on November 25, 2009, the U.S. Marshal personally served
10 defendant at High Desert State Prison. The cost of personal service was \$103.62.

11 Fed. R. Civ. P. 4(d)(2) provides that if a defendant located within the United
12 States fails, without good cause, to sign and return a waiver, the court may impose on the
13 defendant the expenses of personal service. In the opposition to the pending request, defendant
14 does not address whether he had good cause for failing to return the waiver. Instead, he argues
15 that he was not required to return the waiver because service was improper. The court will first
16 address these arguments.

17 Citing Fed. R. Civ. P. 4(b), defendant argues that service was improper because
18 the USM 285 form was prepared by a non-party. The form, court file doc. # 20, was signed by
19 inmate Hakim Hussin Akbar who was apparently assisting plaintiff. Fed. R. Civ. 4(b) states, “On
20 or after filing the complaint, the plaintiff may present a summons to the clerk for signature and
21 seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff
22 for service of the defendant.” Fed. R. Civ. P. 4(a) sets forth the requirements for the contents of
23 summons.

24 The rule cited by defendant, Fed. R. Civ. P. 4(b), is addressed to the requirements
25 of summons rather than USM-285 forms. In any event, Rule 4 does not state that the summons
26 must contain the plaintiff’s signature. Rather, it states that the summons must contain the name

1 and address of plaintiff, which plaintiff's USM-285 form contained. Fed. R. Civ. P. 4(a)(1)(C).

2 Defendant also argues that he was not required to return the USM 285 form
3 because service was made more than 120 days after the complaint was filed. Fed. R. Civ. P.
4 4(m) provides that if a defendant is not served within 120 days after the complaint is filed with
5 the court, the court—on motion or on its own after notice to the plaintiff—must dismiss the action
6 without prejudice against that defendant or order that service be made within a specified time.
7 To avoid dismissal, a plaintiff may show good cause for the failure to serve to avoid dismissal—
8 an almost automatic good cause finding when the court has assumed service of process.

9 Fed. R. Civ. P. 4(m) does not excuse defendant from returning the waiver. At the
10 time the waiver was served on defendant, this action had not been dismissed pursuant to Rule
11 4(m). If defendant believed that service was untimely, it is unclear why he did not move to
12 dismiss pursuant to this rule. For these reasons, defendants' argument that he was not required to
13 return the waiver due to untimely service is without merit.

14 Finally, defendant argues that by filing the motion to dismiss, he made a general
15 appearance in this action which submitted him to the court's jurisdiction. While defendant may
16 have appeared in the action by filing the motion to dismiss, this also does not excuse his failure
17 to return the waiver.

18 In essence, defendant is suggesting that the court be required to check whether a
19 waiver has been returned each time a defendant, whom the court has ordered the U.S. Marshal to
20 serve, make an appearance. If the waiver has not been returned, defendant is suggesting that the
21 court be required to inform the U.S. Marshal of the appearance so that no personal service
22 occurs.

23 The court does not have the resources to engage in the administrative task
24 defendant is suggesting. Requiring a defendant to return the form, as he is required to by the
25 Federal Rules, is not unreasonable.

26 \\\

1 Defendant has not shown good cause for his failure to return the waiver. For that
2 reason, he is ordered to pay the cost of service.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. Within fourteen days of the date of this order, defendant shall reimburse the
5 U.S. Marshal for the cost of personal service, \$103.62;

6 2. The Clerk of the Court shall serve a copy of this order on Valerie Duran, U.S.
7 Marshals Service.

8 DATED: December 17, 2009

9 /s/ Gregory G. Hollows

10 _____
11 UNITED STATES MAGISTRATE JUDGE

12 tuck87.ord
13
14
15
16
17
18
19
20
21
22
23
24
25
26