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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Murlene T. Spinks,
Plaintiff,
v.
Placer County and DOES 1-50,
Defendants.

No. 2:15-cv-00671-JAM-KJN

**ORDER DENYING PLACER COUNTY'S
MOTION TO DISMISS**

Anthony Skeaton ("Skeaton") died on July 10, 2013 from a heroin withdrawal episode while incarcerated at Placer County Auburn Main Jail. Compl., ECF No. 1, ¶¶ 1, 5-10. Skeaton's mother, Plaintiff Murlene T. Spinks ("Spinks" or "Plaintiff") brings this suit under 42 U.S.C. § 1983 against Defendant Placer County ("Defendant") and its unnamed employees, alleging their indifference to Skeaton's health conditions violated her and Skeaton's constitutional rights. See Compl.¹

Defendant moves to dismiss this action, claiming it was not timely served. See Mot., ECF No. 20. Plaintiff opposes. See

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for January 30, 2018. In deciding this motion, the Court takes as true all well-pleaded facts in the operative complaint.

1 Opp'n, ECF No. 23. For the reasons explained below, the Court
2 denies Defendant's motion.

3 I. FACTUAL AND PROCEDURAL BACKGROUND

4 On July 10, 2013, Skeaton, an inmate at Placer County Auburn
5 Main Jail, became medically distressed from a heroin withdrawal
6 and collapsed and died. See Compl. ¶¶ 1, 5-10. Plaintiff claims
7 Defendant and its officers did not check on Skeaton for several
8 hours, despite other inmates yelling "man down" to get the
9 officers' attention. See id., ¶¶ 6-10.

10 Plaintiff, on behalf of her decedent son, brought suit
11 against Defendant on March 25, 2015, alleging: (1) Defendant and
12 its officers violated Skeaton's Eighth Amendment rights by
13 denying him serious medical aid and having an inadequate or no
14 policy directing Defendant's officials on how to provide medical
15 aid and (2) Defendants' actions and the resulting death of
16 Plaintiff's son violated her Fourteenth Amendment rights. See
17 Compl. ¶¶ 11-22. Plaintiff simultaneously filed an application
18 to proceed in forma pauperis (the "IFP Application"). ECF No. 2.

19 On February 4, 2016, the Court granted Plaintiff's IFP
20 Application and the Clerk of the Court issued a summons and civil
21 case documents. ECF Nos. 3-5. The Court's "Order Requiring
22 Joint Status Report" stated that "Plaintiff(s) shall complete
23 service of process on all parties within ninety (90) days of the
24 date of filing of the complaint." ECF No. 5, at 1. Then
25 Plaintiff filed a motion on March 4, 2016 requesting that the
26 U.S. Marshals Service serve Defendant with the complaint. The
27 Court granted this motion four days later. ECF Nos. 6-7.

28 On May 31, 2016, the Court issued a minute order requiring

1 Plaintiff to file a status report, which Plaintiff did on June
2 25, 2016. ECF Nos. 8-9. In the status report, Plaintiff's
3 former counsel stated that "[t]o date, U.S. Marshals have not
4 served the defendants in this case [.]" Pl.'s Status Report at
5 1. Plaintiff's former attorney explains he took no further
6 action because he believed nothing further was required. Decl.
7 of Stanley C. Goff ("Goff Decl."), ECF No. 23-2, ¶¶ 5-8.

8 In September 2017, the Court granted Plaintiff's request for
9 substitution of counsel and Plaintiff personally served Defendant
10 with the complaint on October 25, 2017. ECF Nos. 10-11, 19.
11 Plaintiff also filed a first amended complaint, but subsequently
12 withdrew it. ECF Nos. 12, 18.

13 II. OPINION

14 Parties may move to dismiss a complaint based on
15 "insufficient service of process" under Federal Rule of Civil
16 Procedure 12(b)(5). Once service is challenged, the plaintiff
17 bears the burden of establishing that service was valid under
18 Federal Rule of Civil Procedure 4. Brockmeyer v. May, 383 F.3d
19 798, 801 (9th Cir. 2004). Rule 4(m) states in relevant part
20 that if "a defendant is not served within 90 days after the
21 complaint is filed, the court—on motion or on its own after
22 notice to the plaintiff—must dismiss the action without
23 prejudice against that defendant or order that service be made
24 within a specified time." Id. "But if the plaintiff shows good
25 cause for the failure, the court must extend the time for
26 service for an appropriate period." Id.

27 A. Commencement Of The Time Limit To Complete Service

28 Defendant first argues that because the complaint was filed

1 on March 25, 2015, service was required to be accomplished no
2 later than June 23, 2015. Mem. at 3, 5. Not so.

3 The time limit for service to be completed under Rule 4(m)
4 does not begin until after the Court acts on Plaintiff's IFP
5 Application. See Scary v. Phila. Gas Works, 202 F.R.D. 148,
6 151-52 (E.D. Pa. 2001) (citing Jarrett v. U.S. Sprint Commc'ns
7 Co., 22 F.3d 256, 259 (10th Cir. 1994), among other cases, to
8 rule that the limitations period was tolled during the pendency
9 of the motion for in forma pauperis); Ellis v Principi, 223
10 F.R.D. 446, 447-48 (S.D. Miss. 2004); Lowery v. Carrier Corp.,
11 953 F. Supp. 151, 156 (E.D. Tex. 1997).

12 Here, the time limit for Plaintiff to complete service did
13 not begin until the Court granted the IFP Application on
14 February 4, 2016. See Scary, 202 F.R.D. at 151-52; Ellis, 223
15 F.R.D. at 447-48 (S.D. Miss. 2004); Lowery, 953 F. Supp. at 156
16 (E.D. Tex. 1997).

17 B. Extension Of Time To Complete Service

18 Defendant argues that, even if Plaintiff's time to serve
19 was tolled during the pendency of the IFP Application, the
20 complaint must be dismissed because Plaintiff served it almost
21 21 months after the IFP Application was granted. See Mem. at 5,
22 Reply at 2. The Court finds otherwise.

23 When deciding whether to dismiss a case or extend the time
24 period for service of process, Rule 4(m) provides two avenues
25 for relief. Lemoge v. United States, 587 F.3d 1188, 1198 (9th
26 Cir. 2009) (internal citation omitted). "The first is
27 mandatory: the district court must extend time for service upon
28 a showing of good cause." Id. "The second is discretionary: if

1 good cause is not established, the district court may extend
2 time for service upon a showing of excusable neglect." Id. The
3 Court may also extend time for service retroactively, even after
4 time for completion of service has expired. See Mann v. Am.
5 Airlines, 324 F.3d 1088, 1090 (9th Cir. 2003).

6 1. Mandatory Extension of Time

7 The U.S. Marshals Service's failure to effect service of
8 process, where they are required to do so, may constitute good
9 cause for an extension of time to complete service under Rule
10 4(m). See, e.g., Puett v. Blandford, 912 F.2d 270, 275 (9th
11 Cir. 1990). In Puett, the Ninth Circuit held that "an
12 incarcerated pro se plaintiff proceeding in forma pauperis is
13 entitled to rely on" the U.S. Marshals Service to serve the
14 complaint and summons. Id. Because the plaintiff in Puett
15 provided "the necessary information to help effectuate service,
16 plaintiff [was not] penalized by having his or her action
17 dismissed for failure to effect service where the U.S. Marshal
18 or the court clerk ha[d] failed to perform the duties required
19 of each of them under 28 U.S.C § 1915(c)" and Rule 4. Id.; see
20 also Romandette v. Weetabix Co., 807 F.2d 309, 311 (2d Cir.
21 1986) (finding "good cause" and holding that the district court
22 erred in dismissing a pro se inmate's case proceeding in forma
23 pauperis for failure to effect service "because the U.S. Marshal
24 had yet to effect personal process through no fault of the
25 litigant").

26 Plaintiff contends she has "good cause" for failure to
27 complete service based on the order granting her IFP Application
28 and the order directing the U.S. Marshals Service to complete

1 service. See Opp'n at 6. But, as Defendant points out, courts
2 have found a lack of good cause where the plaintiff is aware of
3 the U.S. Marshals Service's delays in effectuating service and
4 does nothing in response. Reply at 3; Harrison v. Smith, 11-CV-
5 03186, 2013 U.S. Dist. LEXIS 93851 (N.D. Cal. Jul. 3, 2013)
6 (citing Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987),
7 in directing plaintiff to provide the U.S. Marshals Service with
8 necessary information to serve the defendant and warning that a
9 failure to do so would result in dismissal with prejudice); see
10 also Puett, 912 F.2d 270; Jacques v. McDonald, CV 16-3599, 2017
11 U.S. Dist. LEXIS 193894, *5-*6 (C.D. Cal. Sept. 27, 2017)
12 (dismissing pro se prisoner plaintiff's case where plaintiff
13 failed to provide necessary information to the U.S. Marshals
14 Service).

15 In this case, although the U.S. Marshals Service did not
16 complete service as it was ordered to by the Court, Plaintiff
17 has failed to show good cause. She, or her former attorney,
18 could have raised the U.S. Marshals Service's failure to execute
19 service with the Court and did not. Unlike the plaintiff in
20 Puett, Plaintiff had a lawyer and did not have the limitations
21 in following up with the U.S. Marshals Service that a prisoner
22 without a lawyer might. Puett, 912 F.2d 270. Similar to the
23 courts' approaches to the plaintiffs in Harrison and Jacques,
24 this Court also finds Plaintiff could have tried to remedy any
25 apparent defects of which she had knowledge. Harrison, 2013
26 U.S. Dist. LEXIS 93851; Jacques, 2017 U.S. Dist. LEXIS 193894.

27 As Defendant points out, "Plaintiff had the resources
28 available through her attorney to employ any number of options

1 to effectuate service [including] following up with the U.S.
2 Marshals regarding service, seeking an extension from the Court
3 to effectuate service and/or Court intervention regarding
4 service by the U.S. Marshals [.]” Opp’n at 4. Instead,
5 Plaintiff, through her counsel, did not avail herself of any of
6 those options. Accordingly, the Court finds that Plaintiff has
7 failed to show good cause for failure to timely serve Defendant
8 under Rule 4(m)’s first avenue for relief. The Court is not
9 mandated to retroactively extend time for service.

10 2. Discretionary Extension of Time

11 In the absence of good cause giving rise to a mandatory
12 extension of time for service, a court must proceed to the second
13 step of the analysis and decide whether, in its discretion, it
14 should extend the prescribed time for service. Trueman v.
15 Johnson, CIV 02-2179, 2011 WL 6721327, *5-6 (D. Ariz. Dec. 21,
16 2011); Fed. R. Civ. Proc. 4(m). The court’s discretion, however,
17 must be predicated on a finding of excusable neglect. Trueman,
18 2011 WL 67212327, *5-6; Lemoge, 587 F.3d at 1198 (“The second
19 [avenue for relief under Rule 4(m)] is discretionary: if good
20 cause is not established, the district court may extend time for
21 service upon a showing of excusable neglect.”).

22 Excusable neglect encompasses situations in which the
23 failure to comply with a filing deadline (or in this case, a
24 service deadline) is attributable to negligence. See Lemoge, 587
25 F.3d at 1192. To determine when neglect is excusable, courts
26 conduct the equitable analysis specified in Pioneer Inv. Servs.
27 Co. v. Brunswick Assoc. Ltd., 507 U.S. 380 (1993), by examining
28 at least four factors: (1) danger of prejudice to the opposing

1 party; (2) length of delay and its potential impact on the
2 proceedings; (3) reason for the delay; and (4) whether the movant
3 acted in good faith." Lemoge, 587 F.3d at 1192 (internal
4 citation and quotation marks omitted); Pioneer, 507 U.S. at 395.
5 In some cases, "the prejudice a denial would cause to the movant
6 must also be considered, but it is not a fact that must be
7 assessed in each and every case." SEC v. Platforms Wireless
8 Int'l Corp., 617 F.3d 1072, 1092 (9th Cir. 2010) (internal
9 quotation marks and citation omitted).

10 a. Prejudice to Defendant

11 Prejudice to a defendant "requires greater harm than simply
12 that relief would delay resolution of the case." Lemoge, 587
13 F.3d at 1196 (internal citation omitted). Allowing a plaintiff
14 more time to serve would result in a defendant losing a quick
15 victory, which they would have obtained if the court dismissed an
16 action for untimely service. See Bateman v. U.S. Postal Service,
17 231 F.3d 1220, 1224-25 (9th Cir. 2000). But loss of this quick
18 victory is not sufficiently prejudicial to the defendant to deny
19 the plaintiff an extension of time for service. See Trueman,
20 2011 WL 6721327, *4. And being forced to litigate on the merits
21 is also not sufficiently prejudicial to the defendant where there
22 is far greater prejudice to the plaintiff from the statute of
23 limitations barring re-filing. Id.

24 Here, in contrast with Defendant, Plaintiff would suffer
25 severe prejudice if the motion were granted because Plaintiff
26 would be barred from re-filing the case, due to California's two-
27 year statute of limitations on personal injury actions. Opp'n at
28 7; Chardon v. Soto, 462 U.S. 650, 654 (1983) (stating that state

1 law applies in 42 U.S.C. § 1983 actions to determine what the
2 limitations period is, whether the period was tolled, and the
3 effects of tolling); Cal. Code Civ. Proc. § 335.1 (two years to
4 bring an action for assault, battery, injury, or death by the
5 wrongful act or neglect of another). Skeaton died on July 10,
6 2013 and the last date to file a complaint would have been July
7 10, 2015. So, if the motion is granted, Plaintiff would lose the
8 ability to re-file.

9 Defendant counters that it would suffer prejudice from the
10 court granting Plaintiff extra time for service because it is
11 entitled to timely litigate the events giving rise to this action
12 and it may not be able to depose some of the inmates who have
13 relevant testimony. Reply at 5. Defendant reasons that some of
14 these inmates "may be incarcerated in other distant facilities or
15 may have been released and moved out of the area." Id.; Mem. at
16 2. Further, Defendant claims that some of its own employees and
17 former employees' memories about the relevant incidents may have
18 faded. Reply at 5; Mem. at 2.

19 Defendant also argues that the statute of limitations
20 barring the instant action does not preclude dismissal, citing
21 Cardenas v. City of Chicago, 646 F.3d 1001 (7th Cir. 2011) and
22 Vaher v. Town of Orangetown, 916 F.Supp.2d 404 (S.D.N.Y. 2013).
23 Reply at 5. Defendant's reliance on these cases is misplaced.
24 In Cardenas, the plaintiffs were not proceeding in forma pauperis
25 and did not rely on the U.S. Marshals Service to execute service.
26 646 F.3d at 1005. In Vaher, the defendants repeatedly raised
27 service deficiencies and the plaintiff did not reasonably attempt
28 to cure them. 916 F.Supp.2d at 421. In contrast, Plaintiff is

1 proceeding in forma pauperis, relied on the U.S. Marshals Service
2 to execute service (which it failed to do), and actually
3 completed service upon Defendants.

4 Because the severe prejudice to Plaintiff from granting the
5 motion significantly outweighs the prejudice to Defendant, this
6 factor weighs in favor of retroactively granting Plaintiff an
7 extension to serve Defendant. See Alamzad v. Lufthansa
8 Consulting GMBH, C04-01602, 2005 WL 1869400, *2-3 (N.D. Cal. Aug.
9 4, 2005) (finding that prejudice to defendant is not sufficient
10 for the purposes of Rule 12(b)(5) motion where defendant would
11 lose the benefit of expiration of the statute of limitations and
12 plaintiff would suffer severe prejudice where he may have been
13 barred from re-filing).

14 b. Length And Impact Of Delay

15 The determination of whether a length of time is reasonable
16 depends upon the facts of each case, considering the interest in
17 finality, the reason for delay, the practical ability of the
18 litigant to learn earlier of the grounds relied upon, and
19 prejudice to the other parties. See Lemoge, 587 F.3d at 1196-97
20 (internal quotation marks and citation omitted). The impact of
21 the delay is lower where no scheduling orders for discovery or
22 motion practice have been entered and the litigation has not been
23 proceeding with other defendants. Trueman, 2011 WL 6721327, *6.

24 In this case, the length of the delay is significant—
25 Defendant was served with the complaint more than 2.5 years after
26 filing and more than 1.5 years after the IFP Application was
27 granted. See Compl.; Order Granting IFP Application. But the
28 impact of the delay is not.

1 While it may be difficult for Defendant to gather relevant
2 witnesses to obtain testimony, it may be as difficult, if not
3 more difficult, for Plaintiff to locate percipient witnesses that
4 will be needed for her to meet her burden of proof in this case.
5 Defendant has also maintained and already produced documents
6 related to Skeaton's death, under a public and medical records
7 request. Decl. of Mark E. Merin, ECF No. 23-1, ¶ 2. Further,
8 Defendant has conducted an investigation concerning Skeaton's
9 death. See Reply at 4-5. And Defendant may also still have a
10 significant record of the facts surrounding Skeaton's death. See
11 Cal. Gov. Code § 12525 (when a person dies while in the custody
12 of a local or state correctional facility in California, the
13 agency in charge of the correctional facility "shall report in
14 writing to the Attorney General, within 10 days after the death,
15 all facts in the possession of the law enforcement agency or
16 agency in charge of the correctional facility concerning the
17 death."). Accordingly, the negative impact of the delay on
18 Defendant is not necessarily greater than that which Plaintiff is
19 likely to experience. This factor also weighs in favor of
20 retroactively granting Plaintiff a discretionary extension to
21 serve Defendant.

22 c. Reason For Delay

23 Courts also consider whether there are "adequate reasons for
24 the delay." Lemoge, 587 F.3d at 1197. Even negligence can be
25 excused if the mistakes leading to untimely service were made in
26 good-faith. Id. The reasons for delay in this case are:
27 (1) Plaintiff's IFP Application status; (2) the U.S. Marshals
28 Service not completing service; and (3) Plaintiff's former

1 attorney failing to follow up with the Court or the U.S. Marshals
2 Service about the failure to execute service. While the Court
3 does not condone Plaintiff's former attorney's silence and
4 inactivity in pursuing the completion of service, that silence
5 and inactivity seems to be rooted in carelessness rather than
6 gamesmanship. Lemoge, 587 U.S. at 1197; Goff Decl. ¶¶ 5-8. The
7 length of the IFP Application's pendency and the U.S. Marshals
8 Service's failure to execute service are not all Plaintiff's or
9 her former counsel's fault. While Plaintiff and her former
10 counsel "could have handled [their] practice better," the Court
11 finds Plaintiff has provided adequate reasons for the delay in
12 service. Lemoge, 587 U.S. at 1197.

13 d. Good Faith

14 This factor depends on whether the "plaintiff acted in bad
15 faith, or was engaging in gamesmanship, as opposed to simply
16 being dilatory." Trueman, 2011 WL 6721327, *6. Good faith can
17 exist where a party's "errors resulted from negligence and
18 carelessness, not from deviousness or willfulness." Lemoge, 587
19 F.3d at 1197 (internal quotation marks and citation omitted). As
20 described above, Plaintiff has not acted in bad faith. The Court
21 finds that Plaintiff's former counsel's failure to be more
22 proactive in pursuing the completion of service was a result of
23 being dilatory, careless, or negligent, rather than any
24 gamesmanship, deviousness, or willfulness.

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1 For the foregoing reasons, the Court finds that Plaintiff
2 has shown excusable neglect in delaying service on Defendant and
3 exercises its discretion to retroactively grant Plaintiff an
4 extension to serve Defendant.

5 III. ORDER

6 For the reasons set forth above, the Court DENIES
7 Defendant's motion to dismiss. Defendant shall file its Answer
8 within twenty days of the date of this Order.

9 IT IS SO ORDERED.

10 Dated: March 13, 2018

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12 JOHN A. MENDEZ,
13 UNITED STATES DISTRICT JUDGE
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