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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JON HUMES,
Plaintiff,
v.
LUKENBILL, et al.,
Defendants.

No. 2:17-cv-2609 MCE KJN P

ORDER AND ORDER TO SHOW CAUSE

Plaintiff is a former jail inmate, now state prisoner, proceeding pro se. The undersigned recommended that this action be dismissed based on plaintiff’s failure to complete and return the USM-285 forms necessary to effect service on defendant Lukenbill. Plaintiff filed objections. Good cause appearing, the findings and recommendations are vacated.

As discussed below, plaintiff is ordered to show cause why defendant Lukenbill should not be dismissed for lack of service of process, and this action be dismissed. Fed. R. Civ. P. 4(m).

I. Background

This action was filed on December 13, 2017. Plaintiff amended his complaint twice, and this action proceeds on plaintiff’s second amended complaint. (ECF No. 16.) On May 2, 2018, the undersigned found plaintiff stated an Eighth Amendment claim against defendant Deputy Lukenbill. (ECF No. 20.) On May 18, 2018, the court ordered service of process on defendant

1 Lukenbill. On June 8, 2018, service was returned unexecuted. On June 14, 2018, plaintiff was
2 ordered to provide additional information for service on defendant Lukenbill. Plaintiff sought
3 judicial assistance. On November 13, 2018, the court provided additional assistance, and plaintiff
4 was directed to return the forms for service on defendant Lukenbill, which plaintiff did. On
5 December 14, 2018, the court ordered service of process on defendant Lukenbill; but on February
6 11, 2019, service was again returned unexecuted. On February 20, 2019, plaintiff was informed
7 that the Placer County Sheriff's Department was unwilling to accept service of process because
8 the County employed two correctional officers with the last name, "Lukenbill." (ECF No. 35 at
9 1.) Plaintiff was informed that he must provide additional information, and "shall promptly seek
10 such information through discovery, the California Public Records Act, California Government
11 code §§ 6250, et seq., or other means available to plaintiff." (ECF No. 35 at 1.) Plaintiff was
12 provided 60 days to provide the forms for service of process.

13 On May 10, 2019, the undersigned recommended that this action be dismissed based on
14 plaintiff's failure to timely comply with the February 20, 2019 order. On May 20, 2019, plaintiff
15 filed objections. In his objections, plaintiff states: "I am objecting . . . I do need help from the
16 court to figure out which Lukenbill beat me. I think it happened on 8-24-2016, and he was a
17 strong white guy." (ECF No. 38.)

18 II. Rules Governing Service of Process

19 If a defendant is not served within 90 days after the complaint is filed,
20 the court--on motion or on its own after notice to the plaintiff--must
21 dismiss the action without prejudice against that defendant or order
22 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. . . .

23 Fed. R. Civ. P. 4(m). Thus, Rule 4(m) offers two avenues of relief for plaintiffs who miss the
24 service deadline: the rule mandates an extension of time for plaintiffs who show good cause, and
25 allows a court to use its discretion to grant an extension of time even in the absence of good
26 cause. Lemoge v. United States, 587 F.3d 1188, 1198 (9th Cir. 2009). In the absence of good
27 cause a court may use its discretion to grant an extension of time where plaintiffs demonstrate
28 excusable neglect. Id. See also Boudette v. Barnett, 923 F.2d 754, 757 (9th Cir. 1991) (a plaintiff

1 may be required to show the following factors to bring the excuse to a level of good cause: ‘(a)
2 the party to be served personally received actual notice of the lawsuit; (b) the defendant would
3 suffer no prejudice; and (c) plaintiff would be severely prejudice if his complaint were
4 dismissed.’”)

5 Where plaintiffs proceed in forma pauperis, the U.S. Marshal, upon order of the court, is
6 authorized to serve the summons and the complaint. See 28 U.S.C. § 1915(c); see also Boudette,
7 923 F.2d at 757. A pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S.
8 Marshal for service of process, and plaintiff’s action should not be dismissed for failure to effect
9 service if the Marshal fails to perform his or her duty. Puett v. Blandford, 912 F.2d 270, 275 (9th
10 Cir. 1990). However, it remains plaintiff’s responsibility to provide the U.S. Marshal with
11 accurate and sufficient information to effect service. Walker v. Sumner, 14 F.3d 1415, 1422 (9th
12 Cir. 1994), overruled on other grounds by, Sandin v. Conner, 515 U.S. 472 (1995). Where a pro
13 se plaintiff fails to provide the U.S. Marshal with accurate and sufficient information to effect
14 service of the summons and complaint, the court’s *sua sponte* dismissal of the unserved defendant
15 is appropriate. Walker, 14 F.3d at 1421-22.

16 III. Discussion

17 Here, plaintiff has been provided multiple opportunities to identify defendant Lukenbill so
18 that the U.S. Marshal may execute service of process. Moreover, as early as June 14, 2018,
19 plaintiff was informed that he “shall *promptly* seek such information through discovery, the
20 California Public Records Act, Calif. Gov’t. Code §§ 6250, et seq., or other means available to
21 plaintiff.” (ECF No. 27 at 1 (emphasis added).) Where the U.S. Marshal has insufficient
22 information to locate a person for purposes of service, the U.S. Marshal has no additional duty
23 under these circumstances to investigate where that person might be found. Walker, 14 F.3d at
24 1421-22 (holding prisoner failed to show cause why prison official should not be dismissed under
25 Rule 4(m) where prisoner failed to show he had provided Marshal with sufficient information to
26 effectuate service).

27 Moreover, on November 13, 2018, plaintiff was informed that the court cannot
28 “investigate for litigants” and failed to “identify what court action he suggest[ed].” (ECF No. 30

1 at 2; see also ECF No. 35.) The court is a neutral decision-maker, not an advocate for any party,
2 and may not assist plaintiff in obtaining the identity of defendant Lukenbill. See Bias v.
3 Moynihan, 508 F.3d 1212, 1219 (9th Cir. 2007) (“A district court lacks the power to act as a
4 party’s lawyer, even for *pro se* litigants.”); Pliler v. Ford, 542 U.S. 225, 231 (2004) (federal
5 “judges have no obligation to act as counsel or paralegal to *pro se* litigants”); Barnes v. United
6 States, 241 F.2d 252 (9th Cir. 1956) (noting *pro se* litigant does not have rights that a represented
7 litigant does not have). As another district court explained, courts are “not required to act as an
8 investigative body in ascertaining a correct address [or name] for defendant.” Pember v. Ryan,
9 2014 WL 3397735, at *2 (D. Ariz. July 11, 2014), citing Allen v. Commissioner of Arizona State
10 Prison, 2014 WL 2435685, at *3 (D. Ariz. May 30, 2014).


11 In his objections, plaintiff identified no efforts or steps plaintiff may have taken to identify
12 defendant Lukenbill. Therefore, plaintiff must show cause, within thirty days, why defendant
13 Lukenbill should not be dismissed pursuant to Rule 4(m). Absent a showing of such cause, the
14 undersigned will recommend that defendant Lukenbill be dismissed without prejudice, and
15 because this action proceeds solely as to defendant Lukenbill, the action be dismissed.

16 IV. Orders

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. The findings and recommendations (ECF No. 37) are vacated.
- 19 2. Within thirty days from the date of this order, plaintiff shall show cause why defendant
20 Lukenbill should not be dismissed, and this action be dismissed. Fed. R. Civ. P. 4(m).

21 Dated: October 30, 2020

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24 KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE
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