

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALISON HELEN FAIRCHILD,
Plaintiff,
v.
TONEY WAYNE MEREDITH, et al.,
Defendants.

No. 2:24-cv-1907-DC-CKD (PS)

ORDER

Plaintiff, proceeding without the assistance of counsel, filed the instant action on July 11, 2024, and paid the filing fee.¹ (ECF No. 1.) On July 12, 2024, the Clerk’s Office issued summons to serve the defendants. (ECF No. 5.)

By order dated December 6, 2024, plaintiff was cautioned that pursuant to Rule 4 of the Rule of Civil Procedure:

If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss 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.

Fed. R. Civ. P. 4(m). The order served to plaintiff on December 6, 2024, further informed

¹ Because plaintiff proceeds without counsel, this matter was referred to the undersigned under Local Rule 302(c)(21).

1 plaintiff the record did not reflect any proper service attempts and that plaintiff's complaint was
2 on the verge of being dismissed for failure to serve. Plaintiff was ordered to file a statement with
3 the court within 14 days indicating the status of service and any good cause reasons why
4 defendants had not been served pursuant to Federal Rule of Civil Procedure 4. Plaintiff was
5 cautioned that failure to respond to the order would result in a recommendation that this case be
6 dismissed.

7 Plaintiff has not filed a statement indicating the status of service or otherwise responded to
8 the court's December 6, 2024 order. However, further review of the docket reflects a certificate of
9 service was filed on October 11, 2024, indicating copies of the complaint, summons, and/or
10 waiver of summons forms were sent to several of the defendants by Certified Priority Mail, with
11 return receipts received. (ECF No. 9.) Accordingly, the court examines whether plaintiff has
12 demonstrated proper service of process on any defendants based on the information in the
13 previously filed certificate of service.

14 A federal court does not have jurisdiction over a defendant unless the defendant has been
15 served properly under Fed. R. Civ. P. 4. Direct Mail Specialists, Inc. v. Eclat Computerized
16 Techs., Inc., 840 F.2d 685 (9th Cir. 1988). Under Federal Rules of Civil Procedure Rule 4(e), an
17 individual within a judicial district of the United States may be served by:

18 (1) following state law for serving a summons in an action brought
19 in courts of general jurisdiction in the state where the district court is
located or where service is made; or

20 (2) doing any of the following:

21 (A) delivering a copy of the summons and of the complaint to the
22 individual personally;

23 (B) leaving a copy of each at the individual's dwelling or usual place
of abode with someone of suitable age and discretion who resides
24 there; or

25 (C) delivering a copy of each to an agent authorized by appointment
or by law to receive service of process.

26 Fed. R. Civ. P. 4(e).

27 A summons may be served by mail under California law, but it must be mailed with two
28 copies of the notice and acknowledgment provided in Cal. Civ. Proc. Code § 415.30(b), and with

1 a return envelope, postage prepaid, addressed to the sender. Cal. Civ. Proc. Code § 415.30.
2 Plaintiff has not complied with the requirements of § 415.30 because there is no indication the
3 defendants were provided with a postage prepaid return envelope and the acknowledgment form,
4 or that any defendant returned the form.

5 Based on the information in the certificate of service, plaintiff has not effected service
6 under any method set forth in Rule 4(e) of the Federal Rules of Civil Procedure. Instead, the
7 certificate of service indicates plaintiff requested waivers of service by certified mail. (ECF No. 9
8 at 2-6.)

9 Federal Rule of Civil Procedure 4(d) permits a plaintiff to avoid the costs of personal
10 service by providing a defendant with written notice, through first-class mail or other reliable
11 means, of the commencement of an action and with a request that defendant waive service of
12 summons. Fed. R. Civ. P. 4(d)(1). Such a notification must also be addressed to the individual
13 defendant, state the court where the complaint was filed, show when the request was sent, and
14 include a copy of the complaint, two copies of a waiver form, and a prepaid method for returning
15 the form. Id. The plaintiff shall “give the defendant a reasonable time of at least 30 days after the
16 request was sent ... to return the waiver.” Fed. R. Civ. P. 4(d)(1)(F).

17 Once notified, a defendant “has a duty to avoid unnecessary expenses of serving the
18 summons.” Fed. R. Civ. P. 4(d)(1). Accordingly, if the defendant does not sign and return the
19 waiver, absent good cause, “the court must impose on the defendant... the expenses later incurred
20 in making service[.]” Fed. R. Civ. P. 4(d)(2).

21 Here, as set forth, the certificate of service does not indicate any defendant was provided
22 with a prepaid method for returning the form. In addition, the certificate of service is unclear as to
23 whether a summons (AO-440) for each defendant, or a waiver of summons form (AO-399) for
24 each defendant, or both, were provided.² Finally, there is no indication that any defendant signed
25 and returned the waiver. Thus, the certificate of service does not establish that plaintiff satisfied
26

27 ² The certificate of service indicates copies of “the complaint and United States Court waiver of
28 summons form (AO-440)” were served on several of the defendants by certified mail. (ECF No. 9
at 2-6.)

1 the procedure set forth in Rule 4(d) for waiver of service. There is, further, no indication plaintiff
2 attempted service in any other manner.

3 Accordingly, plaintiff has not met the burden to prove service of process or waiver of
4 service of process. See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). “Rule 4 is a
5 flexible rule that should be liberally construed so long as a party receives sufficient notice of the
6 complaint.” Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) (internal quotations omitted).
7 However, even under a liberal construction, “neither actual notice nor simply naming the
8 defendant in the complaint will provide personal jurisdiction without ‘substantial compliance with
9 Rule 4.’” Benny, 799 F.2d at 492 (quoting Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir.
10 1982)).

11 A court may dismiss claims against a defendant who is not served “within 90 days after
12 the complaint is filed.” Fed. R. Civ. P. 4(m). The Ninth Circuit has explained that courts “are
13 generally more solicitous of the rights of pro se litigants, particularly when technical
14 jurisdictional requirements are involved.” Borzeka v. Heckler, 739 F.2d 444, 448 n.2 (9th Cir.
15 1984). In Borzeka, the Ninth Circuit set forth a four-factor test governing when Rule 4 service
16 requirements may be excused in the context of a motion to dismiss a litigant’s complaint for
17 failure to properly effectuate service—if “(a) the party that had to be served personally received
18 actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a
19 justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely
20 prejudiced if his complaint were dismissed.” 739 F.2d at 448.

21 On the record before the court, there appears no justifiable excuse for the failure to serve,
22 and no indication plaintiff would be severely prejudiced if her complaint were dismissed for
23 failure to serve. However, the undersigned will not recommend dismissal at this juncture.
24 Considering plaintiff’s pro se status and attempts to obtain waivers of service, there is good cause
25 to extend the service deadline. See Fed. R. Civ. P. 4(m). Service of the summons and complaint
26 must be made, or proper waiver of service demonstrated, within 45 days. Plaintiff is informed that
27 pro se status itself is not sufficient to show good cause for failure to serve. Townsel v. Contra
28 Costa County, 820 F.2d 319, 320 (9th Cir. 1987) (noting that ignorance of or confusion about

1 service requirements does not constitute “good cause” for failure to serve).

2 In accordance with the above, IT IS ORDERED as follows:

3 1. Sua sponte, the court extends the time for plaintiff to serve the defendants under
4 Rule 4 of the Federal Rules of Civil Procedure; service of the summons and complaint must be
5 made, or proper waiver of service demonstrated, within 45 days from the date of this order.

6 2. Plaintiff is cautioned that failure to effectuate service of process within this time or
7 to make a detailed showing of good cause for a further extension of time will result in a
8 recommendation that plaintiff’s claims be dismissed for failure to serve.

9 Dated: January 2, 2025



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

10
11
12
13 8, fair24cv1907.4m.2
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28