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

DAVID MAURICE GOMEZ,

Plaintiff,

v.

A. HEDGEPEETH, et al.,

Defendants.

No. C 11-3784 TEH (PR)

ORDER GRANTING DEFENDANT
TYLER'S MOTION TO QUASH SERVICE
OF PROCESS, DENYING DEFENDANT
TYLER'S MOTION TO DISMISS
CLAIMS, GRANTING IN PART,
PLAINTIFF'S MOTION TO PLACE
DEFENDANT TYLER BACK IN ACTION

Docket Nos. 42, 58

I

On August 1, 2011, pro se Plaintiff David Maurice Gomez, a state prisoner incarcerated at Salinas Valley State Prison (SVSP), filed this civil rights complaint against a number of individuals who were employed at SVSP, including Dr. J. Tyler, who was a staff psychologist at SVSP during the time at issue. All Defendants, including Dr. J. Tyler, were served with the complaint and summons. On July 5, 2012, Sara D. Van Loh, Supervising Deputy Attorney General for the State of California, filed a notice and acknowledgment of receipt of complaint and summons on behalf of Defendant Tyler. Doc. #12. On July 20, 2012, Plaintiff filed a notice of the death of Dr. Tyler. Doc. #20. On August 3, 2012, the

United States District Court
For the Northern District of California

1 Court ordered that Defendants file a status report regarding Dr.
2 Tyler. Doc. #21. On August 8, 2012, Defendants filed a report
3 indicating that Dr. Tyler was not deceased. Doc. #22. However, on
4 October 30, 2012, Defendants filed a document titled, "Update to
5 Court-Ordered Status Report Regarding Defendant Tyler," in which Ms.
6 Van Loh stated that she inadvertently had accepted service on behalf
7 of a person named D. Tyler who is not the individual that Plaintiff
8 named in his complaint. Ms. Van Loh stated that, on October 18,
9 2012, she was informed that Dr. J. Tyler, who is the named Defendant
10 in this complaint, died several years ago. Doc. #41.

11 On November 5, 2012, Defendants filed a motion to quash
12 service of process on behalf of Dr. J. Tyler on the grounds that
13 service on her has not been effectuated and the notice of and
14 acknowledgment of receipt of summons and complaint executed by
15 counsel was ineffective.¹ Additionally, they move that the lawsuit
16 against Dr. J. Tyler be dismissed because, under California Civil
17 Procedure Code section 366.2, the limitations period for filing a
18 claim against a deceased individual is one year, and Dr. J. Tyler
19 allegedly died approximately two years ago.²

20 On November 19, 2012, Plaintiff filed a "motion to have
21 Dr. J. Tyler placed back in this civil action and that there be an
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23 ¹Counsel is appearing on behalf of Dr. Tyler solely for the
24 purpose of filing the motion to quash and to dismiss.

25 ²Section 366.2(a) provides that, "if a person against whom an
26 action may be brought on a liability of the person . . . dies before
27 the expiration of the applicable limitations period, and the cause of
28 action survives, an action may be commenced within one year after the
date of death, and the limitations period that would have been
applicable does not apply."

1 inquiry into this matter." Doc. #58. Plaintiff argues that the
2 claims against Dr. J. Tyler should not be dismissed because he
3 served the correct Dr. Tyler in August 2011, within one year of her
4 death which, according to Plaintiff, occurred in April 2011, and
5 that he should not be penalized because counsel accepted service on
6 behalf of someone Plaintiff had no intention of serving.

7 II

8 In her declaration in support of the motion to quash, Ms.
9 Van Loh states that, on May 31, 2012, she received a request for
10 representation from Nurse Practitioner D. Tyler of SVSP and that, on
11 June 18, 2012, she executed an acknowledgment of service on behalf
12 of D. Tyler believing that she was the defendant in Plaintiff's
13 lawsuit. Van Loh Dec. at ¶ 2. Ms. Van Loh states that she was
14 unaware and had no reason to know that the "Dr. Tyler" sued by
15 Plaintiff was not the D. Tyler who had requested representation from
16 the Attorney General's Office. Id. Ms. Van Loh also states that,
17 after she reviewed the documents relating to this case in
18 preparation for filing a dispositive motion, she realized that the
19 record referred to a Dr. J. Tyler rather than a D. Tyler. Van Loh
20 Dec. at ¶ 3. After making inquiries, she was told by Defendant
21 Gauche that Dr. J. Tyler, who Plaintiff named as a Defendant in his
22 complaint, had died several years ago. Van Loh Dec. at ¶ 4. Ms.
23 Van Loh states that she has had no communication with Dr. J. Tyler
24 and was not authorized by her to accept service on her behalf. Id.

25 The Federal Rules of Civil Procedure allow service of
26 process in accordance with the procedures for service of the state
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1 where the district court is located. Fed. R. Civ. P. 4(e)(1).
2 Under California law, service by mail is permitted when an
3 acknowledgment of receipt of summons is executed by a defendant and
4 returned to the sender. Cal. Civ. Proc. Code § 415.30(a), (c).
5 Service by mail is deemed complete on the date a written
6 acknowledgment of receipt of summons is executed and then returned
7 to the sender. Cal. Civ. Proc. Code § 415.30(c). Delivery of the
8 summons and complaint to an attorney who is not the designated agent
9 for service of process is ineffective. Wagner v. City of Pasadena,
10 78 Cal. App. 4th 943, 951 (2000); see also Tandy Corp. v. Superior
11 Court, 117 Cal. App. 3d 911, 913 (1981) (service was not completed
12 because acknowledgment of receipt of summons was not executed and
13 returned by defendant's agent) (citing Cal. Civ. Pro. Code
14 § 415.30(c)).

15 Because Ms. Van Loh did not accept service and summons on
16 behalf of Dr. J. Tyler, service upon her was not completed.
17 Accordingly, the motion to quash service of process on Defendant Dr.
18 J. Tyler is GRANTED.

19 However, this does not mean that the claims against her
20 should be dismissed at this time. Plaintiff argues that, if service
21 on Defendant Dr. J. Tyler is found to be defective, he should be
22 granted the opportunity to remedy it. The Court agrees.

23 Plaintiff acknowledges that, under California Civil
24 Procedure Code section 366.2(a), there is a one-year limitations
25 period for filing claims against a deceased individual. However,
26 Plaintiff claims he has met this obligation because he filed his
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1 complaint in August 2011, before the one-year period had elapsed
2 because Dr. J. Tyler passed away in April 2011. Ms. Van Loh states
3 she "heard" from another Defendant that Dr. J. Tyler passed away two
4 years ago.

5 The Court is unable to determine the specific date on
6 which Dr. J. Tyler died because neither party submits her
7 authenticated death certificate nor a declaration from an individual
8 with personal knowledge of Dr. J. Tyler's date of death. In the
9 interests of justice and for this motion only, the Court accepts
10 Plaintiff's representation that he filed this lawsuit against Dr. J.
11 Tyler within the one-year time frame. Thus, Plaintiff may now serve
12 the proper party. A proper party in lieu of Dr. J. Tyler would be
13 her successor or the executor, administrator or representative of
14 her estate. See Anderson v. Thomas, 2011 WL 121578, *1 (E.D. Cal.).
15 Accordingly, Defendants' motion to dismiss the claims against Dr. J.
16 Tyler is DENIED and Plaintiff's motion to have Dr. J. Tyler placed
17 back in this action is GRANTED, IN PART. Although Dr. J. Tyler
18 cannot be "placed back in this action" because she is deceased, her
19 successor or representative of her estate may be sued in her stead.
20 Also, as indicated below, Plaintiff's motion for an inquiry into
21 this matter is GRANTED.

22 In defense counsel's declaration, she made no mention of
23 knowledge of Dr. J. Tyler's successor or representative. Counsel
24 for Defendants is directed to conduct a reasonable investigation
25 into the status of Dr. J. Tyler's estate. If counsel is able to
26 obtain the name and address of the representative of Dr. J. Tyler's
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1 estate, counsel shall serve a notice of suggestion of death on both
2 the representative and Plaintiff and file a proof of service
3 reflecting the name and address of the person served. See Fed. R.
4 Civ. P. 25 (procedure for serving suggestion of death). If counsel
5 is unable to obtain information regarding a successor or
6 representative, she shall file a declaration describing the efforts
7 made to comply with this Order. Defendants' counsel is directed to
8 file one or the other of these documents within forty-five days from
9 the filing date of this Order.

10 At the same time, Plaintiff has a responsibility to inform
11 the Court of the name and address of the appropriate defendant to be
12 served. Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987)
13 (although incarcerated plaintiff who is proceeding in forma pauperis
14 may rely on service by the Marshal, he should attempt to remedy any
15 apparent defects of which he has knowledge). If the Marshal is
16 unable to effectuate service because the defendant is not where the
17 plaintiff claims, and the plaintiff is so informed, the plaintiff
18 must seek to remedy the situation or face dismissal. Walker v.
19 Sumner, 14 F.3d 1415, 1421-22 (9th Cir. 1994), overruled on other
20 grounds by Sandin v. Conner, 515 U.S. 472 (1995).

21 Therefore, Plaintiff must provide the Court with the
22 address of the legal representative of Dr. J. Tyler's estate such
23 that the Marshal is able to effect service upon that individual.
24 Failure to do so within seventy days from the filing date of this
25 Order will result in the dismissal of the claims against Dr. J.
26 Tyler pursuant to Federal Rule of Procedure 4(m) (time limit for
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1 service).

2 III

3 For the foregoing reasons:

4 1. Defendants' motion to quash service of process is
5 GRANTED. (Docket #42).

6 2. Defendants' motion to dismiss the claims against Dr. J.
7 Tyler is DENIED. (Docket #42).

8 3. Plaintiff's motion to have Dr. J. Tyler placed back
9 into this action is GRANTED, IN PART. (Docket #58).

10 4. Plaintiff's motion for an inquiry is GRANTED. (Docket
11 #58).

12 5. Defendants' counsel shall make a reasonable
13 investigation into the status of Dr. J. Tyler's estate and, if a
14 representative is discovered, shall serve a suggestion of death of
15 Dr. J. Tyler in accordance with Federal Rules of Civil Procedure 4
16 and 25 on the representative. Within forty-five days of the filing
17 date of this Order, Defendants' counsel shall file either a proof of
18 service reflecting service of the suggestion of death on the
19 representative of Dr. J. Tyler's estate or, if counsel is unable to
20 locate such a representative, a declaration detailing her efforts to
21 comply with this Order.

22 6. Plaintiff must provide the Court with accurate and
23 current information of the representative of Dr. J. Tyler's estate
24 such that the Marshal is able to effectuate service upon that party.
25 If Plaintiff fails to provide the Court with this information within
26 seventy days of the filing date of this Order, Plaintiff's claims

1 against Dr. J. Tyler will be dismissed pursuant to Rule 4(m) of the
2 Federal Rules of Civil Procedure; the dismissal will be without
3 prejudice to Plaintiff refiling a complaint with such information.

4 IT IS SO ORDERED.

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6 DATED 01/28/2013



THELTON E. HENDERSON
United States District Judge

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