

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

3 MANUEL E. SHOTWELL,

No. C 10-05232 CW (PR)

4 Plaintiff,

ORDER DENYING PLAINTIFF'S  
MOTION FOR DEFAULT JUDGMENT;  
DIRECTING CLERK OF COURT TO  
PROCEED PURSUANT TO FEDERAL  
RULE OF CIVIL PROCEDURE  
4(c)(3); DENYING AS MOOT  
PLAINTIFF'S MOTION FOR SERVICE  
BY THE U.S. MARSHAL

5 v.

6 S. BRANDT, et al.,

7 Defendants.

(Docket nos. 19 & 29)

8  
9 Plaintiff, a state prisoner currently incarcerated at Salinas  
10 Valley State Prison (SVSP), filed the instant pro se civil rights  
11 action pursuant to 42 U.S.C. § 1983.

12 On December 15, 2010, the Court determined that Plaintiff  
13 qualified to proceed in forma pauperis (IFP) and, accordingly,  
14 granted him IFP status. On December 16, 2010, however, Plaintiff  
15 paid the full filing fee of \$350.00. The Court consequently  
16 vacated his IFP status and ordered him to serve all of the named  
17 Defendants or face dismissal of his claims against those  
18 Defendants.

19 I. Plaintiff's Motion for Default Judgment

20 On December 29, 2011, Plaintiff filed a motion for default  
21 judgment as to all Defendants. In his motion, he states that  
22 Defendants were served with the summons and complaint in this case  
23 on September 8, 2011, and that they have not yet responded. In  
24 support of his motion, he attaches signed certified mail receipts  
25 dated September 8, 2011.

26 Plaintiff argues that because Defendants have not timely  
27 appeared in this action after having been served, he is entitled to  
28 a default judgment against them. The Court has ascertained,

1 however, that no Defendant has notified the California Attorney  
2 General's Office of the pendency of this action or that he has been  
3 served with the summons and complaint; no Defendant is represented  
4 by the California Attorney General's Office at this time.

5 The reasonable inference to be drawn from the above is that  
6 Plaintiff's attempt to serve Defendants was unsuccessful.  
7 Accordingly, Plaintiff's application for the entry of default  
8 judgment is DENIED as premature.

9 II. Plaintiff's Request for Court-Ordered Service

10 In various filings that pre-date his motion for default  
11 judgment, Plaintiff requests that the Court direct either the  
12 United States Marshal or other Court personnel to assist him in  
13 effectuating service of process. The Court hereby addresses those  
14 requests.

15 Under 28 U.S.C. § 1915, the Court may authorize a party to  
16 proceed IFP in an action or proceeding if the party submits an  
17 affidavit showing the person is unable to pay such fees. 28 U.S.C.  
18 § 1915(a)(1). If such authorization is granted, the Marshal is  
19 directed to serve all process in the case. Id. § 1915(c),(d). If  
20 such authorization is denied, the plaintiff is not automatically  
21 entitled to have the Marshal serve Defendants. Fed. R. Civ. P.  
22 4(c)(2). However, even if a plaintiff is not proceeding IFP, the  
23 Court has discretion, at the plaintiff's request, to order that  
24 service be made by the Marshal or by a person specially appointed  
25 by the Court. Fed. R. Civ. P. 4(c)(3).

26 This action has been pending since November of 2010.  
27 Plaintiff, an incarcerated state prisoner, appears to have  
28 exercised diligence in attempting to serve Defendants but has been

1 unable to effect service himself. The Court, therefore, will  
2 exercise its discretion under Federal Rule of Civil Procedure  
3 4(c)(3) and direct the Clerk of the Court to attempt to serve  
4 Defendants, as set forth in the Conclusion of this Order.

5 In light of the above, Plaintiff's motion for service by the  
6 Marshal is DENIED as moot.

7 CONCLUSION

8 For the foregoing reasons, the Court orders as follows:

9 1. The Clerk of the Court shall mail a Notice of Lawsuit and  
10 Request for Waiver of Service of Summons, two copies of the Waiver  
11 of Service of Summons, a copy of the complaint and all attachments  
12 thereto (docket no. 1) and a copy of this Order to SVSP Lieutenants  
13 S. Brandt, L. Negron and R.A. Kessler; SVSP Sergeant B. Petersen;  
14 SVSP Warden G. Lewis; SVSP Appeals Coordinators E. B. Jones, P.  
15 Nickerson and E. Medina; SVSP Correctional Officers C. Santos, G.  
16 Gudino, S. Celaya and D. Garcia; SVSP Captain W. Muniz and the  
17 Chief of the Inmate Appeals Branch in Sacramento, N. Grannis.

18 The Clerk of the Court shall also mail a copy of the  
19 complaint and a copy of this Order to the California Attorney  
20 General's Office. Additionally, the Clerk shall mail a copy of  
21 this Order to Plaintiff.

22 2. Defendants are cautioned that Rule 4 of the Federal Rules  
23 of Civil Procedure requires them to cooperate in saving unnecessary  
24 costs of service of the summons and complaint. Pursuant to Rule 4,  
25 if Defendants, after being notified of this action and asked by the  
26 Court, on behalf of Plaintiff, to waive service of the summons,  
27 fail to do so, they will be required to bear the cost of such  
28 service unless good cause be shown for their failure to sign and

1 return the waiver form. If service is waived, this action will  
2 proceed as if Defendants had been served on the date that the  
3 waiver is filed, except that pursuant to Rule 12(a)(1)(B),  
4 Defendants will not be required to serve and file an answer before  
5 sixty (60) days from the date on which the request for waiver was  
6 sent. (This allows a longer time to respond than would be required  
7 if formal service of summons is necessary.) Defendants are asked  
8 to read the statement set forth at the foot of the waiver form that  
9 more completely describes the duties of the parties with regard to  
10 waiver of service of the summons. If service is waived after the  
11 date provided in the Notice but before Defendants have been  
12 personally served, the Answer shall be due sixty (60) days from the  
13 date on which the request for waiver was sent or twenty (20) days  
14 from the date the waiver form is filed, whichever is later.

15 3. Defendants shall answer the complaint in accordance with  
16 the Federal Rules of Civil Procedure. The following briefing  
17 schedule shall govern dispositive motions in this action:

18 a. No later than ninety (90) days from the date their  
19 answer is due, Defendants shall file a motion for summary judgment  
20 or other dispositive motion. The motion shall be supported by  
21 adequate factual documentation and shall conform in all respects to  
22 Federal Rule of Civil Procedure 56. If Defendants are of the  
23 opinion that this case cannot be resolved by summary judgment, they  
24 shall so inform the Court prior to the date the summary judgment  
25 motion is due. All papers filed with the Court shall be promptly  
26 served on Plaintiff.

27 b. Plaintiff's opposition to the dispositive motion  
28 shall be filed with the Court and served on Defendants no later

1 than sixty (60) days after the date on which Defendants' motion is  
2 filed.

3 The Ninth Circuit has held that the following notice should be  
4 given to pro se plaintiffs facing a summary judgment motion:

5 The defendant has made a motion for summary  
6 judgment by which they seek to have your case dismissed.  
7 A motion for summary judgment under Rule 56 of the  
8 Federal Rules of Civil Procedure will, if granted, end  
9 your case.

10 Rule 56 tells you what you must do in order to  
11 oppose a motion for summary judgment. Generally, summary  
12 judgment must be granted when there is no genuine issue  
13 of material fact -- that is, if there is no real dispute  
14 about any fact that would affect the result of your case,  
15 the party who asked for summary judgment is entitled to  
16 judgment as a matter of law, which will end your case.  
17 When a party you are suing makes a motion for summary  
18 judgment that is properly supported by declarations (or  
19 other sworn testimony), you cannot simply rely on what  
20 your complaint says. Instead, you must set out specific  
21 facts in declarations, depositions, answers to  
22 interrogatories, or authenticated documents, as provided  
23 in Rule 56(e), that contradict the facts shown in the  
24 defendant's declarations and documents and show that  
25 there is a genuine issue of material fact for trial. If  
26 you do not submit your own evidence in opposition,  
27 summary judgment, if appropriate, may be entered against  
28 you. If summary judgment is granted [in favor of the  
defendants], your case will be dismissed and there will  
be no trial.

19 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en  
20 banc).

21 Plaintiff is advised to read Rule 56 of the Federal Rules of  
22 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)  
23 (party opposing summary judgment must come forward with evidence  
24 showing triable issues of material fact on every essential element  
25 of his claim). Plaintiff is cautioned that because he bears the  
26 burden of proving his allegations in this case, he must be prepared  
27 to produce evidence in support of those allegations when he files  
28 his opposition to Defendants' dispositive motion. Such evidence

1 may include sworn declarations from himself and other witnesses to  
2 the incident, and copies of documents authenticated by sworn  
3 declaration. Plaintiff will not be able to avoid summary judgment  
4 simply by repeating the allegations of his complaint.

5 c. Defendants shall file a reply brief no later than  
6 thirty (30) days after the date Plaintiff's opposition is filed.

7 d. The motion shall be deemed submitted as of the date  
8 the reply brief is due. No hearing will be held on the motion  
9 unless the Court so orders at a later date.

10 4. Discovery may be taken in this action in accordance with  
11 the Federal Rules of Civil Procedure. Leave of the Court pursuant  
12 to Rule 30(a)(2) is hereby granted to Defendants to depose  
13 Plaintiff and any other necessary witnesses confined in prison.

14 5. All communications by Plaintiff with the Court must be  
15 served on Defendants, or Defendants' counsel once counsel has been  
16 designated, by mailing a true copy of the document to Defendants or  
17 Defendants' counsel.

18 6. It is Plaintiff's responsibility to prosecute this case.  
19 Plaintiff must keep the Court informed of any change of address and  
20 must comply with the Court's orders in a timely fashion.

21 7. Extensions of time are not favored, though reasonable  
22 extensions will be granted. Any motion for an extension of time  
23 must be filed no later than fifteen (15) days prior to the deadline  
24 sought to be extended.

25 This Order terminates Docket nos. 19 and 29.

26 IT IS SO ORDERED.

27 DATED: 3/19/2012

28   
\_\_\_\_\_  
CLAUDIA WILKEN  
UNITED STATES DISTRICT JUDGE