

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  
Northern District of California  
Oakland Division

KAYLE HOWARD,

No. C 10-05655 LB

Plaintiff,

**ORDER RE SERVICE OF SUMMONS  
FOR DEFENDANTS NEECE,  
PAMPLONA, AND SUSAN SMITH**

v.

MICHAEL DALISAY, *et al.*,

Defendants.

On December 13, 2010, *pro se* Plaintiff Kayle Howard filed a complaint against Defendants Michael Dalisay, F. Culley, and Detectives Neece and Pamplona (erroneously sued as Pamploma) of the Alameda County Sheriffs Office; the Alameda County Sheriff's Office; Officer Susan Smith of the City of San Pablo; and the City of San Pablo. Complaint, ECF No. 1. The court granted Plaintiff's application to proceed *in forma pauperis* on December 16, 2010 and ordered the U.S. Marshal to serve Defendants with the summons. 12/16/10 Order, ECF No. 6 at 1. The clerk issued summons to Defendants on December 17, 2010. Summons, ECF No. 7.

Defendants Dalisay, Culley, and the Alameda County Sheriff's Office appeared in this case and filed a motion to dismiss Plaintiff's complaint on January 27, 2010. Motion to Dismiss, ECF No. 19. The City of San Pablo appeared in this case and filed an answer to Plaintiff's complaint on January 26, 2011. Answer, ECF No. 17. Plaintiff, Dalisay, Culley, the Alameda County Sheriff's Office, and the City of San Pablo have consented to this court's jurisdiction. *See* ECF Nos. 5 (Plaintiff), 14 (City of San Pablo), and 29 (Dalisay, Culley, and Alameda County Sheriff's Office).

1 Defendants Neece, Pamplona, and Smith have not appeared in this matter and have not consented to  
2 the court's jurisdiction.

3 **1. Issues Regarding Service of Susan Smith**

4 The U.S. Marshal executed the summons except with respect to Susan Smith. Proofs of Service,  
5 ECF Nos. 8-13. According to the U.S. Marshal, he was unable to affect service on her because she  
6 is not an officer with the San Pablo Police Department. See Proof of Service, ECF No. 9 at 1-2. San  
7 Pablo confirms in its answer that Susan Smith is not an officer with the San Pablo Police  
8 Department. Answer, ECF No. 17 at 2, ¶ 3. A plaintiff proceeding *in forma pauperis* must provide  
9 the U.S. Marshal with sufficient information to properly serve a defendant. See *Walker v. Sumner*,  
10 14 F.3d 1415, 1421-22 (9<sup>th</sup> Cir. 1994), *abrogated on other grounds by Sandin v. Conner*, 515 U.S.  
11 472 (1995). Accordingly, Plaintiff must file proof that she has served Susan Smith or provide the  
12 clerk with an accurate service address for Susan Smith by March 4, 2011. Once Plaintiff provides  
13 the clerk with a new address for Smith, the clerk shall reissue summons, and the U.S. Marshal shall  
14 serve a copy of the complaint, any amendments or attachments, Plaintiff's affidavit, and this order  
15 upon Defendants.

16 **2. Issues Regarding Service of Defendants Neece and Pamplona**

17 In her complaint, Plaintiff alleges that Neece and Pamplona work for the Alameda County  
18 Sheriff's Office. Complaint, ECF No. 1 at 1-2, ¶ 2. As such, the U.S. Marshal served Defendants  
19 Neece and Pamplona at the Alameda County Sheriff's Office who accepted service on their behalf.  
20 ECF Nos. 10 and 11. In San Pablo's answer, however, it claims that Neece and Pamplona are  
21 employees of the San Pablo Police Department, not the Alameda County Sheriff's Office. Answer,  
22 ECF No. 17 at 1-2, ¶ 2. It is unclear why the City of San Pablo, knowing that Neece and Pamplona  
23 are its employees, have not appeared on their behalf and thus rendered unnecessary the reissuance of  
24 summons and the re-serving of those Defendants. In any event, the clerk of the court shall reissue  
25 summons for Neece and Pamplona and the U.S. Marshal shall serve Neece and Pamplona at the  
26 following address:

27 San Pablo Police Department  
28 13880 San Pablo Avenue  
San Pablo, California 94806

1 **3. Continuance of Oral Argument on Dalisay, Culley, and the Alameda County Sheriff's**  
2 **Office's Motion to Dismiss**

3 Because this court cannot rule on motions to dismiss for failure to state a claim absent the  
4 consent of all parties (*See* 28 U.S.C. § 636(b) & (c)), the court will continue oral argument on  
5 Dalisay, Culley, and the Alameda County Sheriff's Office's motion to dismiss to give Plaintiff time  
6 to cure the defects in service. Therefore, the hearing on the motion to dismiss is hereby continued to  
7 April 21, 2011 at 11:00 a.m. Plaintiff's opposition is due by April 1, 2011 and Dalisay, Culley, and  
8 the Alameda County Sheriff's Office's reply is due by April 7, 2011.

9 Plaintiff must complete service on all Defendants by April 12, 2011. Fed. R. Civ. P. 4(m)  
10 (plaintiffs have 120 days within which to serve defendants). In this order, the court directs the clerk  
11 to reissue summons for Neece and Pamplona and the U.S. Marshal to serve those Defendants.  
12 Therefore, Plaintiff should concentrate on finding an accurate address for Susan Smith so that the  
13 clerk can reissue summons for her and the U.S. Marshal can properly serve her. If Plaintiff cannot  
14 complete service by April 12, 2011, she may move for an extension of time. The court will only  
15 grant an extension if Plaintiff demonstrates good cause for her failure to serve any of the remaining  
16 Defendants who have not been served. *See* Fed. R. Civ. P. 4(m). As long as Plaintiff has provided  
17 the U.S. Marshal with accurate identifying information for Defendants, "the marshal's failure to  
18 effect service is automatically good cause" warranting an extension of time under Rule 4(m). *See*  
19 *Walker*, 14 F.3d at 1422 (quotations and citation omitted). However, if Plaintiff does not provide an  
20 accurate address for Susan Smith and the U.S. Marshal is thus unable to serve her by April 12, 2011,  
21 Plaintiff risks dismissal without prejudice of her claims against Smith unless she shows good cause  
22 for an extension.

23 **IT IS SO ORDERED.**

24 Dated: February 11, 2011

25   
26 \_\_\_\_\_  
27 LAUREL BEELER  
28 United States Magistrate Judge