

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

RICHARD BONOMI,
Plaintiff,

No. C 10-5847 PJH

v.

ORDER

CITY AND COUNTY OF SAN
FRANCISCO, et al.,
Defendants.

_____ /

This case was originally filed in the Superior Court of California, County of San Francisco, on November 12, 2010, against defendants City and County of San Francisco (“the City”) and DOES One through Twenty. Summons was issued as to the City and the twenty DOES.

On December 10, 2010, plaintiff filed a first amended complaint, substituting “Officer Marci aka Officer Marcy aka Officer Marcie” as a defendant in place of one of the DOES. On December 22, 2010, the City removed the case to this court. In the notice of removal, the City stated that it was the only defendant that had been served as of the date of removal. To date, Officer Marcic (correct spelling) has not appeared in the case.

On March 28, 2011, after the case had been pending in this court for 95 days, the case was stayed for 50 days (to May 17, 2011) at the parties’ request. On May 24, 2011, the case was stayed for a further 50 days (to July 13, 2011).

At the July 11, 2012, hearing on the City’s motion for summary judgment, plaintiff’s counsel represented that defendant Officer Marcic had been served with the summons and

United States District Court
For the Northern District of California

1 complaint. If Officer Marcic was in fact served while the case was pending in state court,
2 then the removal was improper, because “all defendants who have been properly joined
3 and served must join in or consent to the notice of removal.” 28 U.S.C. § 1446(b)(2)(A).

4 If Officer Marcic was not served while the case was pending in state court, then it is
5 possible that plaintiff served him after the City filed the notice of removal. However, it is
6 difficult for the court to ascertain how plaintiff could have served Officer Marcic at any time
7 since the case was removed, given that no summons has been issued by the clerk of this
8 court.

9 In addition, under Federal Rule of Civil Procedure 4(m), the court is required to
10 dismiss claims against any defendant who has not been served with the summons and
11 complaint within 120 days of the date the complaint is filed. In the case of actions that are
12 removed from state court, and that include defendants who have not yet been served, this
13 court counts the 120 days from the date of removal.

14 Here, the amount of time from the date of removal until the first order staying the
15 case was 95 days. Following the lifting of the stay, the remaining period required to make
16 up the 120 days (25 days) ended on August 8, 2011. If Officer Marcic was served after that
17 date, the court will dismiss the claims against him pursuant to Rule 4(m).

18 Accordingly, the court ORDERS plaintiff to establish when and under what
19 circumstances Officer Marcic was served, if he in fact was served. No later than Monday,
20 July 16, 2012, plaintiff’s counsel shall file a proof of service showing service of the
21 summons and first amended complaint on Officer Marcic. If plaintiff’s counsel fails to
22 comply with this order, the court will dismiss the claims against Officer Marcic.

23
24 **IT IS SO ORDERED.**

25 Dated: July 11, 2012



PHYLLIS J. HAMILTON
United States District Judge