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United States District Court
For the Northern District of California

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

JESUS H. BORJAS,

Plaintiff,

vs.

JOSEPH McGRATH, et al.,

Defendant(s).

) No. C 04-02252 JW (PR)

) ORDER REGARDING SERVICE ON
) DEFENDANTS; DENYING
) MOTIONS FOR ENTRY OF
) DEFAULT; INSTRUCTIONS TO
) CLERK

) (Docket Nos. 44 & 45)

Plaintiff, a California prisoner, filed a pro se civil rights action under 42 U.S.C. § 1983 against various PBSP employees for violations of plaintiff’s constitutional rights. Plaintiff’s original complaint was dismissed with leave to amend. On August 17, 2007, the Court partially dismissed some of the claims in plaintiff’s first amended complaint, and ordered service of the remaining cognizable claims upon the following defendants at Pelican Bay State Prison (PBSP):
Correctional Officers D. Forkner, Tweed, M.L. Bray, P. Martinez, Ferguson, Speaker, Johnson, and R. Roberts; Medical Technical Assistant Mullens; Registered Nurses A. Rochuba, A. Atkins, L. Bree and S. Bliesner; Dr. A. Everett, Dr. Drikvrega, Health Care Manager Dr. D. Winslow, Dr. Duncan, Appeals Coordinator Nimrod, Associate Warden Schwartz, and Warden J. McGrath.

1 A. Summonses Returned Unexecuted

2 On August 31, 2007, summonses were issues as to the above defendants.
3 However, several of the summonses were returned unexecuted on September 28,
4 2007 for the following reasons:

5 1. Defendants Unknown at PBSP

6 The summons for defendant Dr. Duncan was returned with the following
7 comment: “Subject is unknown at the facility. The facility will not accept service.”
8 (See Docket No. 20.) Accordingly, this defendant has not been served. Federal
9 Rule of Civil Procedure 4(m) contemplates that service of process normally will be
10 accomplished within four months of the filing of the complaint. Although the Court
11 can have the Marshal serve process on a defendant, it is plaintiff’s responsibility to
12 provide a name, including a first name or initial, and address for each defendant to
13 be served. Plaintiff must provide the Court with this information in a pleading no
14 later than **thirty (30) days** from the date of this order, in order for the Court to
15 provide the United States Marshal with sufficient information for service to be
16 effected under Fed. R. Civ. P. 4(c)(2). See Walker v. Sumner, 14 F.3d 1415, 1422
17 (9th Cir. 1994). Failure to do so may result in dismissal of the complaint against
18 defendant Duncan under Rule 4(m).

19 2. More Information Needed

20 The summons for defendant Johnson was returned with the following
21 comment: “More information is needed on subject to be served. There are nine
22 personnel at the facility with the last name of Johnson.” (See Docket No. 25.)
23 Additional information is required from plaintiff in order to proceed against this
24 defendant. Plaintiff must provide the first name or initial of defendant Johnson to
25 the Court in a pleading within **thirty (30) days** from the date of this order in order
26 for the Court to provide the United States Marshal with sufficient information for
27 service to be effected under Fed. R. Civ. P. 4(c)(2). See Walker, 14 F.3d at 1422.
28 Failure to do so may result in dismissal of the complaint against this defendant.

1 3. No Longer at Facility

2 The summonses for defendants R. Roberts, Dr. D. Winslow, Warden J.
3 McGrath, and Dr. A. Everett were returned with the comment on each either that
4 “Subject is no longer at the facility. The facility will not accept service.” (See
5 Docket Nos. 19, 22, 23 & 24.) Accordingly, these defendants have not been served.

6 The clerk of the Court shall send a copy of this order to the Litigation
7 Coordinator at PBSP, who is requested to provide any forwarding address
8 information that is available with respect to these defendants. However, it is
9 ultimately plaintiff’s responsibility to provide a name and address for each defendant
10 to be served in order for the Court to direct the Marshal to serve process on a
11 defendant. Plaintiff must provide the Court with this information in a pleading no
12 later than **thirty (30) days** from the date of this order, in order for the Court to
13 provide the United States Marshal with sufficient information for service to be
14 effected under Fed. R. Civ. P. 4(c)(2). See Walker, 14 F.3d at 1422. Failure to do
15 so may result in dismissal of the complaint against these defendants under Rule 4(m)
16 of the Federal Rules of Civil Procedure.

17 B. Summonses Not Yet Returned

18 The summonses as to defendants A. Atkins and Schwartz have not yet been
19 returned either executed or unexecuted. It appears that these defendants have not
20 been served. Federal Rule of Civil Procedure 4(m) contemplates that service of
21 process normally will be accomplished within four months of the filing of the
22 complaint. Although the Court can have the Marshal serve process on a defendant,
23 it is plaintiff’s responsibility to provide a name and address for each defendant to be
24 served. At a minimum, plaintiff must provide a last name and first initial of each
25 defendant. Plaintiff has failed to do so for defendant Schwartz. Plaintiff must
26 provide the Court with defendant’s correct first name or initial in a pleading no later
27 than **thirty (30) days** from the date of this order, in order for the Court to provide
28 the United States Marshal with sufficient information for service to be effected

1 under Fed. R. Civ. P. 4(c)(2). See Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir.
2 1994). Failure to do so may result in dismissal of the complaint against these
3 defendants under Rule 4(m).

4 5 CONCLUSION

6 For the foregoing reasons:

7 1. Plaintiff shall provide the Court with the necessary information
8 as discussed above for unserved defendants Duncan, Johnson, R. Roberts, Dr. D.
9 Winslow, Warden J. McGrath, Dr. A. Everett, A. Atkins and Schwartz in a pleading
10 **no later than thirty (30) days** from the date of this order. Plaintiff must provide the
11 Court with this information in order for the Court to provide the United States
12 Marshal with sufficient information for service to be effected under Fed. R. Civ. P.
13 4(c)(2). See Walker, 14 F.3d at 1422. **Failure to do so may result in dismissal of**
14 **the complaint against these defendants under Rule 4(m) of the Federal Rules of**
15 **Civil Procedure.**

16 2. Plaintiff's motion for default judgment against defendants A. Atkins
17 and Scwhartz (Docket Nos. 44 & 45) are DENIED as premature; defendants have
18 not been served with summons and the complaint, let alone had adequate time to
19 discover the facts underlying plaintiff's claims.

20 3. The Clerk of the Court is instructed to send a copy of this order to the
21 Litigation Coordinator at PBSP, to comply with the Court's request to provide
22 information regarding defendants who are no longer at the facility.

23 4. The Clerk shall issue summons and the United States Marshal shall
24 serve, without prepayment of fees, a copy of the **July 10, 2006 Amended**
25 **Complaint** in this matter, all attachments thereto, a copy of the Court orders dated
26 August 17, 2007 (Docket No. 18) and April 11, 2008 (Docket No. 30), and a copy of
27 this order upon **Dr. Srikureja, F. Guy, Sr., and Rogers at Pelican Bay State**
28 **Prison** as it appears that these defendants were not initially served.

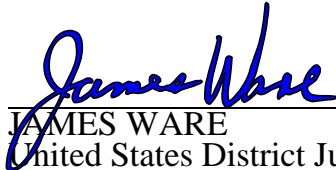
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5. The Clerk shall terminate Cal Terhune from this action since plaintiff has not named him as a defendant in his amended complaint which supersedes the original complaint.

No later than **sixty (60) days** from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the amended complaint found to be cognizable in the previous court orders. The parties shall comply with the briefing schedule set forth in the court order dated April 11, 2008.

This order terminates Docket Nos. 44 and 45.

DATED: ___ February 18, 2009 ___



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JESUS H. BORJAS,
Plaintiff,

Case Number: CV04-02252 JW

CERTIFICATE OF SERVICE

v.

JOSEPH McGRATH, et al.,
Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on _____, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jesus H. Borjas E-89513
California Correctional Institution (CCI)
P. O. Box 1902
Tehachapi, Ca 93581

Dated: _____

Richard W. Wieking, Clerk
By: Elizabeth Garcia, Deputy Clerk