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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JASON LUCERO,
CDCR #V-33131,

Plaintiff,

vs.

S. ARMALE, Correctional Officer;
W. GILLIS, Officer,

Defendants.

Case No.: 3:17-cv-00957-BTM-RBB

ORDER:

**1) GRANTING MOTIONS
REQUESTING COURT
ASSISTANCE AND FOR
EXTENSION OF TIME
[ECF Nos. 25, 26]**

AND

**(2) RE-DIRECTING U.S. MARSHAL
TO EFFECT SERVICE UPON
DEFENDANTS ARMALE AND
GILLIS PURSUANT TO
Fed. R. Civ. P. 4(c)(3)**

Jason Lucero (“Plaintiff”), currently incarcerated at the California Health Care Facility (“CHCF”) in Stockton, California, is proceeding pro se in this case, and has filed an Amended Complaint against two correctional officers at Richard J. Donovan Correctional Facility (“RJD”) in San Diego.¹ *See* ECF No. 8. Unlike most prisoners,

¹ Plaintiff was incarcerated at California State Prison—Sacramento (“CSP-SAC”) in Represa, California, when he first initiated this civil action 2½ years ago. *See* Compl., ECF No. 1 at 1. By the time he filed his

1 Plaintiff is *not* proceeding *in forma pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)—
2 he has instead prepaid the \$400 civil and administrative filing fee required by 28 U.S.C.
3 § 1914(a). *See* ECF Nos. 9, 11.

4 **I. Procedural Background**

5 On June 21, 2018, the Court screened Plaintiff’s Amended Complaint *sua sponte*
6 as required by 28 U.S.C. § 1915A, and liberally construed his claims to arise under 42
7 U.S.C. § 1983, as opposed to *Bivens v. Six Unknown Named Agents of the Federal*
8 *Bureau of Narcotics*, 403 U.S. 388 (1971), because he alleges Defendants Armale and
9 Gills, both state correctional officers at RJD, violated his constitutional rights while he
10 was incarcerated there in June 2016. *See* ECF No. 13 at 5-9. So construed, the Court
11 found Plaintiff’s Amended Complaint “contains Eighth Amendment claims sufficient to
12 survive the ‘low threshold’ for proceeding past the *sua sponte* screening” required by 28
13 U.S.C. § 1915A(b), but also noted that he “remain[ed] responsible for effecting service of
14 the summons and his Amended Complaint.” *Id.* at 8-9. And while the Court tolled Fed. R.
15 Civ. P. 4(m)’s 90-day time period for service while it conducted its mandatory screening,
16 *id.* at 9 (citing *Butler v. Nat’l Cmty. Renaissance of California*, 766 F.3d 1191, 1204 n.8
17 (9th Cir. 2014)), it ordered Plaintiff to either: 1) file a written request to the Clerk to issue
18 a summons as to Defendants Armale and Gills so that he might use them to effect service
19 of his Amended Complaint within 90 days, or 2) file a written request that the Court
20 order service be effected on his behalf by the United States Marshal or deputy marshal
21 pursuant to Fed. R. Civ. P. 4(c)(3). *See* ECF No. 13 at 10.

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24 Amended Complaint on January 9, 2018, Plaintiff had been transferred to Salinas Valley State Prison in
25 Soledad, California. *See* ECF No. 8 at 1. While he has not filed a formal change of address in conjunction
26 with his current Motion, the Court notes that he mailed it from CHCF in Stockton. *See* ECF No. 25 at 5.
27 After confirming that Plaintiff is indeed now incarcerated at CHCF, the Court has directed the Clerk of
28 the Court to amend the docket to include Plaintiff’s current address. *See* <https://inmatelocator.cdcr.ca.gov/Details.aspx?ID=V33131> (last visited Oct. 21, 2019). Plaintiff is cautioned, however, that it is his
duty to “keep the court and opposing parties advised as to his current address.” *See* S.D. Cal. CivLR
83.11(b).

1 Thereafter, Plaintiff filed both a Motion Requesting U.S. Marshal Service and a
2 renewed Motion to Appoint Counsel pursuant to 28 U.S.C. § 1915(e)(1). *See* ECF Nos.
3 15, 17. On November 14, 2018, the Court denied Plaintiff’s request for appointment of
4 counsel, but granted his Motion for U.S. Marshal service pursuant to Fed. R. Civ. P.
5 4(c)(3). *See* ECF No. 18. The Court directed the Clerk of the Court to issue a summons as
6 to Plaintiff’s Amended Complaint, and ordered Plaintiff to provide the U.S. Marshal with
7 the information necessary to serve Defendants Armale and Gillis within the time
8 provided by Fed. R. Civ. P. 4(m). *See id.* at 5-6. On December 10, 2018, the Clerk
9 provided Plaintiff with material necessary to effect service via the U.S. Marshal. *See* ECF
10 Nos. 19-20.

11 On August 27, 2019, after waiting eight full months for Plaintiff to serve
12 Defendants Armale and Willis via the U.S. Marshal without response, the Court ordered
13 Plaintiff to show cause (“OSC”) why his case should not be dismissed for failure to serve
14 and/or prosecute pursuant to Fed. R. Civ. P. 4(m) and S. D. Cal. Civil Local Rule 41.1.
15 *See* ECF No. 21; *see also* Fed. R. Civ. P. 5(d); S. D. Cal. CivLR 5.2 (“Proof of service of
16 all papers required or permitted to be served, ... must be filed in the clerk’s office
17 promptly and in any event before action is to be taken thereon by the court or the
18 parties.”); S.D. Cal. CivLR 41.1a. (“Actions or proceedings which have been pending in
19 this court for more than six months, without any proceeding or discovery having been
20 taken therein during such period, may, after notice, be dismissed by the court for want of
21 prosecution[.]”).

22 On September 20, 2019, and in response to the Court’s OSC, Plaintiff filed a
23 Motion for Extension of Time. *See* ECF No. 22. On September 23, 2019, the Court
24 granted Plaintiff’s Motion, and directed him to either file proof of service, or another
25 motion for extension of time pursuant to Fed. R. Civ. P. 4(m), no later than October 21,
26 2019. *See* ECF No. 23.

27 On October 15, 2019, and October 18, 2019, respectively, Plaintiff filed a “Motion
28 Requesting Assistance in Effecting Service on Defendants,” and a “Motion for Extension

1 of Time.” *See* ECF Nos. 25, 26. He asks the Court to re-issue the materials he needs in
2 order to serve Defendants Armale and Gillis, and requests an extension of time in which
3 to do so because he has been assigned to the CHCF acute crisis unit, lacks access any law
4 library, must solicit all supplies “via mail,” and was separated from all of his property,
5 including copy of his complaint and the “service packet” the Court previously provided
6 to him, as the result of a cell search. *See* ECF Nos. 25 & 26 at 1.

7 **II. Discussion**

8 Rule 4 of the Federal Rules of Civil Procedure provides:

9 [i]f a defendant is not served within 90 days after the complaint is filed, the
10 court—on motion or on its own after notice to the plaintiff—must dismiss
11 the action without prejudice against that defendant or order that service be
12 made within a specified time. But if the plaintiff shows good cause for the
failure, the court must extend the time for service for an appropriate period.

13 Fed. R. Civ. P. 4(m). “In the absence of service of process (or waiver of service by the
14 defendant) . . . a court ordinarily may not exercise power over a party the complaint
15 names as a defendant.” *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344,
16 350 (1999); *Crowley v. Bannister*, 734 F.3d 967, 974-75 (9th Cir. 2013) (“A federal court
17 is without personal jurisdiction over a defendant unless the defendant has been served in
18 accordance with Fed. R. Civ. P. 4.”) (citations omitted).

19 As the Court noted in its August 27, 2019 OSC, the 90 days provided by Fed. R.
20 Civ. P. 4(m) to effect service has elapsed in this case; and no proof of service upon any
21 Defendant has yet to be filed. *See* Fed. R. Civ. P. 4(l)(1) (“[P]roof of service must be
22 made to the court.”); S.D. Cal. CivLR 5.2; *Walker v. Sumner*, 14 F.3d 1415, 1421-22 (9th
23 Cir. 1994) (where a pro se plaintiff fails to provide the Marshal with sufficient
24 information to effect service, the court’s *sua sponte* dismissal of those unserved
25 defendants is appropriate under Fed. R. Civ. P. 4(m)). However, the district court has
26 broad discretion under Rule 4(m) to extend time for service upon a showing of good
27 cause even after the service period has expired. *See Mann v. American Airlines*, 324 F.3d
28 1088, 1090 (9th Cir. 2003).

1 Here, the Court finds Plaintiff’s mental illness and serial transfers between CDCR
2 facilities over the course of this litigation are sufficient to show good cause to extend the
3 time permitted for Plaintiff to execute service in this case. *See Eldridge v. Block*, 832
4 F.2d 1132, 1136 (9th Cir. 1987) (“[S]trict time limits ... ought not to be insisted upon’
5 where restraints resulting from a pro se prisoner plaintiff’s incarceration prevent timely
6 compliance with court deadlines.”) (citing *Tarantino v. Eggers*, 380 F.2d 465, 468 (9th
7 Cir. 1967)). Prosecution has stalled for more than two years, however, and Plaintiff’s
8 claims against Defendants Armale and Gillis are alleged to have arisen in June 2016—
9 more than three years ago. Therefore, Plaintiff is hereby cautioned that *no additional*
10 *extensions of time pursuant to Fed. R. Civ. P. 4(m) will be granted*. While a court’s
11 discretion under Rule 4(m) is broad, “no court has ruled that the discretion is limitless.”
12 *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007).

13 **III. Conclusion and Orders**

14 Accordingly, the Court hereby:

15 1) **GRANTS** Plaintiff’s Motion Requesting Court Assistance in Effecting
16 Service (ECF No. 25) and Motion for Extension of Time (ECF No. 26) and finds good
17 cause to extend the time in which he must serve Defendants Armale and Gillis pursuant
18 to Fed. R. Civ. P. 4(m).

19 2) **DIRECTS** the Clerk of the Court to provide Plaintiff with an additional
20 “IFP Package” consisting of: (a) this Order; (b) the Court’s November 14, 2018 Order
21 Directing U.S. Marshal Service as to Plaintiff’s First Amended Complaint (ECF No. 8);
22 (c) three certified copies of Plaintiff’s Amended Complaint; (d) a re-issued summons as
23 to Plaintiff’s Amended Complaint; and (e) two blank USM Form 285s for Plaintiff’s use
24 in serving Defendants Armale and Gillis.

25 3) **ORDERS** Plaintiff to complete, as accurately and clearly as possible, the
26 new USM Marshal Form 285s provided to him, to include an address where Defendants
27 Armale and Gillis may be served, *see* S.D. Cal. CivLR 4.1(c), and to return them,

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1 together with the Clerk's re-issued summons and two copies of his Amended Complaint,
2 to the U.S. Marshal **no later than November 22, 2019.**

3 4) **ORDERS** the U.S. Marshal or a deputy marshal, within 30 days of receiving
4 Plaintiff's completed USM Form 285s, **but in no event later than December 23, 2019,**
5 to effect service of his Amended Complaint and summons upon Defendants Armale and
6 Gillis as directed by Plaintiff, and to thereafter file proof of that service, or proof and
7 explanation as to the reasons why service was *not* executed, with the Clerk of the Court.
8 All costs of service will be advanced by the United States pursuant to the Court's
9 November 14, 2018 Order directing service pursuant to Fed. R. Civ. P. 4(c)(3). *See* ECF
10 No. 18.

11 5) **ORDERS** Defendants Armale and Gillis, once they have been served, to
12 reply to Plaintiff's Amended Complaint within the time provided by the applicable
13 provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while
14 Defendants may occasionally be permitted to "waive the right to reply to any action
15 brought by a prisoner confined in any jail, prison, or other correctional facility under
16 section 1983," once the Court has conducted its sua sponte screening pursuant to 28
17 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination
18 based on the face on the pleading alone that Plaintiff has a "reasonable opportunity to
19 prevail on the merits," the Defendants are required to respond).

20 6) **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
21 serve upon Defendants, or if appearance has been entered by counsel, upon Defendants'
22 counsel, a copy of every further pleading, motion, or other document submitted for the
23 Court's consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must include with every
24 original document he seeks to file with the Clerk of the Court, a certificate stating the
25 manner in which a true and correct copy of that document has been served on
26 Defendants or their counsel, and the date of that service. *See* S.D. Cal. CivLR 5.2.

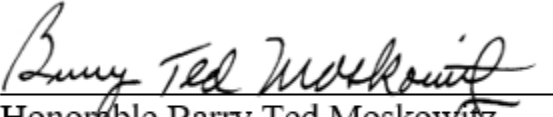
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1 Any document received by the Court which has not been properly filed with the
2 Clerk or which fails to include a Certificate of Service upon the Defendants, or their
3 counsel, may be disregarded.

4 **IT IS SO ORDERED.**

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6 Dated: October 24, 2019

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8 Honorable Barry Ted Moskowitz
9 United States District Judge
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