UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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MATTHEW J. KING, Plaintiff, v. AMY CALDERWOOD, et al., Defendants.	Case No. 2:13-cv-02080-GMN-PAL ORDER (Mtn for Svs – Dkt. #20)

This matter is before the court on Plaintiff Matthew J. King's Motion for Service (Dkt. #20). Plaintiff is a prisoner proceeding in this civil rights action pro se. The court has considered the Motion.

Plaintiff filed the complaint in state court, and on November 12, 2013, Defendants Amy Calderwood, James G. Cox, Roland Daniels, Duane Graham, Cary Leavitt, Jennifer Nash, Chad Smith, and James Larry Wuest ("Defendants"), through counsel, filed a Petition for Removal (Dkt. #1). The court screened the complaint pursuant to 28 U.S.C. § 1915A, and ordered that the complaint would proceed, as pled, against the Defendants. *See* Screening Order (Dkt. #6). The court stayed this case to allow the parties to conduct a mediation. *Id.* After an unsuccessful mediation, defense counsel filed an Acceptance of Service (Dkt. #15) for all of the Defendants except Duane Graham, who is no longer employed by the Nevada Department of Corrections ("NDOC"). Defense counsel, Ms. Mercedes Menendez, filed Graham's last known address under seal. *See* Notice of Under Seal Submission (Dkt. #17).

The court directed the Clerk of Court to issue summons to Graham and directed the U.S. Marshal's Service ("USMS") to serve the complaint on the address listed in the Notice *See* Order (Dkt. #18). The Clerk of Court issued Summons (Dkt. #19). The USMS attempted to serve the complaint and Summons but was unsuccessful. *See* Summons Returned Unexecuted

(Dkt. #21) (indicating service attempted on three occasions, but that Graham no longer resided at the address provided by the Attorney General). However, Plaintiff's Motion indicates that previously, Graham was personally served through the Clark County Sheriff's Civil Process Division with the complaint and summons in this case. Plaintiff has attached an affidavit of service filed in the state court prior to removal indicating Graham was personally served. *See* Affidavit of Service (Dkt. #20) at 3. Plaintiff also indicates Graham is no longer employed by NDOC.

It appears that Plaintiff's Motion for Service and the court's Order (Dkt. #18) crossed in the mail, because the motion requests the court order the USMS to serve Graham at the address listed in the AG's under seal submission. However, Graham was already served with the complaint and summons prior to removal. Neither side disputes that Graham was personally served at his place of employment, through a person designated to receive service, by a Deputy Clark County Sheriff according to Rule 4(c) and (d) of the Nevada Rules of Civil Procedure. In fact, defense counsel acknowledged in the Petition for Removal that all of the other Defendants, including Graham, were served with process on October 11, 2013. *Id.* at 2: 6-10 and at Exh. B. Therefore, Graham need not be served again, as he was already served prior to removal. *See, e.g.*, 28 U.S.C. § 1448.

Furthermore, although defense counsel attempted to limit her appearance solely to settlement discussions by filing a limited Notice of Appearance (Dkt. #8), she had already made a general appearance as counsel for all of the Defendants except Quentin Byrne, who had not yet been served at the time the case was removed, when she filed the Petition for Removal on November 12, 2013, on behalf of the Defendants. *See* Petition for Removal (Dkt. #1) at 2:14-18. Ms. Menendez is counsel of record for all Defendants except Byrne unless and until she is granted permission to withdraw.

Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion to Serve (Dkt. #20) is DENIED AS MOOT, as Defendant Graham was properly served prior to removal.

2. Defense counsel shall file a responsive pleading on behalf of Defendant Graham no later than **February 19, 2015.**

Dated this 5th day of February, 2015.

PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE