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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 ERNESTO G. LIRA,

No. C 00-905 SI

9 Plaintiff,

**ORDER DENYING DEFENDANT
MANN'S MOTION TO DISMISS**

10 v.

11 DIRECTOR OF CORRECTIONS OF THE
12 STATE OF CALIFORNIA, et al.,

13 Defendants.
14 _____/

15 Defendant Karen Mann has filed a motion to dismiss based on insufficiency of service of
16 process, which is currently set for a hearing on January 12, 2007. Pursuant to Civil Local Rule 7-1(b),
17 the Court determines the matter is appropriate for resolution without oral argument, and VACATES the
18 hearing. For the reasons set forth below, the Court DENIES the motion.

19 **BACKGROUND**

20 On March 14, 2000, plaintiff Ernesto Lira, acting *in pro per*, filed his original complaint in this
21 case. Plaintiff alleged that his due process rights were violated in connection with his gang validation
22 process and his continued retention in Administrative Segregation. On January 22, 2001, the Court
23 issued an Order of Service, finding plaintiff's complaint stated a cognizable claim for relief and ordering
24 the U.S. Marshals Service to serve eighteen defendants, including defendant Mann.

25 On February 26, 2001, the Litigation Coordinator at Duel Vocational Institution (DVI) did not
26 accept service for Mann because Mann no longer worked at that institution. Wolff Decl., Ex. A. On
27 June 21, 2001, the U.S. Marshals Service filed a return of service with the Court stating that service was
28

1 refused by DVI with respect to Mann, that the Service had learned that Mann was now working for the
 2 Parole Office in Region I located in Sacramento, California, and that the complaint was mailed to this
 3 address on March 5, 2001. Feudale Decl. Ex. B; Docket No. 29.¹ The return also stated, “[n]o
 4 acknowledgment received as of 6/20/01.” *Id.*²

5 Defendants filed an answer to the complaint on October 24, 2001. The answer stated that Mann
 6 had not been served, and that no appearance was made on her behalf. On October 30, 2001, plaintiff
 7 sent a letter to the Court seeking clarification of the status of Mann’s service. He wrote:

8 In the answer, page 1, footnote 1, Defendants aver that Defendant K. Mann has not yet
 9 been served, nor requested representation, and no appearance is made on behalf of
 10 Defendant. On page 6 of Defendants’ answer they deny allegations against[] Defendant
 11 K. Mann. I am confused, so please answer the following questions. #1. What efforts
 12 should I take in order that Defendant K. Mann can be served and represented – please
 13 note that I have no access to a phone or any assistance with my cause . . . #2. Can I
 14 request that the first defendants provide me with present location of Defendant K. Mann
 15 in order to serve her?

16 Chapman Decl. Ex. A; Docket No. 38. Plaintiff sent another letter on December 5, 2001, advising the
 17 Court of the address at which he believed Mann could be served, and repeating his request for guidance:

18 Your Honor a Defendant in my ongoing action before this Court has not been served with
 19 my complaint and/or civil action against her. Her name is Mrs. K. Mann and to my
 20 knowledge her present address is:

21 Parole Region One
 22 9825 Goethe Rd. Suite 200
 23 Sacramento, Cal. 95827

24 What do I do? Do I provide this address to the Defendant[’s] attorney? Do I again serve
 25 her with a complaint and summons? Do I forward this above address to the U.S.
 26 Marshals Service? . . . [P]lease advi[s]e me how I may proceed and serve Defendant K.
 27 Mann.

28 *Id.*, Ex. B; Docket No. 45.

In February 2002, plaintiff communicated with Mann directly, informing her that she needed to
 contact defendants’ counsel at the Attorney General’s Office, and enclosing a copy of a declaration and

¹ Mann’s motion papers do not state whether she received that complaint.

² The court docket entry incorrectly states that service had been effected upon Mann. *See* Docket No. 29. Although plaintiff emphasizes this fact and states that, as a result of this docket entry, he had “every reason to believe that the Marshals had effected sufficient service on Mann,” plaintiff has not submitted a declaration stating that he actually relied on this docket entry.

1 a set of interrogatories. Mann acknowledges that she received this letter. *See* Def's Motion at 2; Wolff
2 Decl., Ex. B. Plaintiff's letter stated, *inter alia*,

3 It took me some time to get your address. I had to get at your boss man E. Alameida Jr.
4 Who is now the Director of Corrections, que no?

5 Check it out Mrs. K. Mann. You need to contact the attorney who is represented in this
6 civil action as your attorney. His name is Mr. Jonathan L. Wolff, and his number is (415-
7 703-1113).

8 Wolff Decl. Ex. B. Plaintiff and defendants' counsel then exchanged letters about Mann's status. *Id.*
9 at Ex. C-E. A letter dated March 8, 2002, from defendants' counsel to plaintiff stated:

10 To our knowledge, Ms. Mann has not been served in this case. In order for her to be
11 properly served, you should request that the U.S. Marshal's office serve her pursuant to
12 Rule 4 of the Federal Rules of Civil Procedure. For your information, Ms. Mann may
13 be served c/o Litigation Coordinator, Parole Region II, 1515 Clay Street, 10th Floor,
14 Oakland, CA 94612. Only after Ms. Mann has been properly served may discovery be
15 propounded upon her.

16 *Id.*, Ex. E. On May 16, 2002, plaintiff submitted a request with the U.S. Marshals Service asking the
17 Marshals to serve Mann at the address listed in the March 8, 2002 letter. *See* Chapman Decl. Ex. C;
18 Docket No. 64.

19 The next day, on May 17, 2002, the Court granted defendants' motion for summary judgment,
20 concluding that plaintiff's complaint contained both exhausted and unexhausted claims, and that the
21 Prison Litigation Reform Act mandated dismissal under such circumstances. Presumably because of
22 the summary judgment order, the U.S. Marshals Service never served Mann as requested in plaintiff's
23 May 16, 2002 letter.

24 Plaintiff appealed the summary judgment order, and the Ninth Circuit reversed. The case was
25 remanded to this Court on December 28, 2005. Now represented by counsel, on June 28, 2006, plaintiff
26 moved to correct and amend his complaint pursuant to the Ninth Circuit's mandate. By order filed
27 August 29, 2006, the Court granted plaintiff's motion and deemed his amended complaint filed. On
28 October 2, 2006, a summons was issued as to Mann, and she was served with the summons and amended
complaint on October 3, 2006.

DISCUSSION

Mann moves to dismiss the complaint for insufficiency of service of process, contending that

1 plaintiff never served her with the original complaint, and thus that she should be dismissed from this
2 action. Rule 4(m) of the Federal Rules of Civil Procedure authorizes the dismissal of an action if service
3 of the summons and complaint is not effected within 120 days after the filing of the complaint. Rule
4 4 also provides “that if the plaintiff shows good cause for the failure, the court shall extend the time for
5 service for an appropriate period.” Fed. R. Civ. P. 4(m). “At a minimum, ‘good cause’ means excusable
6 neglect. A plaintiff may also be required to show the following: (a) the party to be served personally
7 received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would
8 be severely prejudiced if his complaint were dismissed.” *Boudette v. Barnette*, 923 F.2d 754, 756 (9th
9 Cir. 1991). “The current rule requires a district court to grant an extension of time if good cause is
10 shown, and permits the district court to grant such an extension even absent good cause.” *Mann v Am.*
11 *Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003).

12 The Court concludes that there was good cause for the failure to serve Mann with the original
13 complaint, and finds *Puett v. Blandford*, 912 F.2d 270 (9th Cir. 1990), instructive. In *Puett*, the Ninth
14 Circuit held a district court abused its discretion in dismissing a complaint for failure to timely serve,
15 finding that the plaintiff had demonstrated good cause for the failure to serve because he
16 “conscientiously took numerous steps to ensure that the defendants would be served,” and the Marshals
17 Service did not effect proper service. *Id.* at 275. “[A]n incarcerated pro se plaintiff proceeding in forma
18 pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint, and, having
19 provided the necessary information to help effectuate service, plaintiff should not be penalized by having
20 his or her action dismissed for failure to effect service where the U.S. Marshal or the court clerk has
21 failed to perform the duties required of each of them under 28 U.S.C. § 1915(c) and Rule 4 of the
22 Federal Rules of Civil Procedure.” *Id.*

23 Here, the record shows that the U.S. Marshals Service first attempted to serve Mann in February
24 2001 at DVI, and again at a different address after determining that Mann had relocated to the Region
25 I Parole Office in Sacramento, California. There is no indication in the record whether the U.S.
26 Marshals Service further attempted service, despite the notation on the June 2001 return of service that
27 they had not received an acknowledgment of service as of June 22, 2001. Once defendants filed an
28 answer in October 2001 stating that Mann had not been served, plaintiff promptly acted to cure the

1 deficiency in service. Plaintiff immediately sent a letter to the Court seeking clarification and assistance
2 with serving Mann. Plaintiff sent another letter to the Court on December 5, 2001, providing what he
3 believed was Mann's new work address at the Region I Parole Office in Sacramento. Plaintiff continued
4 to take steps regarding service of Mann, communicating with her directly in February 2002, and then
5 corresponding with defendants' counsel about how to effect service on Mann. Defense counsel advised
6 plaintiff to request a renewed service attempt by the U.S. Marshals Service, and provided plaintiff with
7 the correct address for Mann. Plaintiff followed that advice and requested renewed service by letter
8 lodged May 16, 2002. Service was never effected, presumably due to the Court's May 17, 2002 order
9 granting summary judgment in favor of defendants. Plaintiff has established good cause to excuse the
10 failure to timely serve Mann with the original complaint because he acted diligently to cure the
11 deficiencies in service.

12 The Court further finds that the other factors mentioned in *Boudette* weigh in favor of excusing
13 the service deficiency. Mann does not deny that she received actual notice of the lawsuit by plaintiff's
14 February 5, 2002 letter to her, and the record is unclear as to whether Mann received the complaint that
15 the U.S. Marshals Service mailed to her at the Sacramento office in March 2001.

16 Relatedly, the Court finds that Mann will not be prejudiced from the failure to serve the original
17 complaint. Mann asserts that she will be prejudiced because the events giving rise to plaintiff's
18 complaint occurred in 1996, and thus "it is likely that her memory with respect to many of the allegations
19 against her has faded." Reply at 7. However, because Mann had actual notice of the lawsuit no later
20 than February 2002, she could have taken steps at that time to preserve her memories of the events at
21 issue. Moreover, the passage of time in this case is due largely to the appeal of the summary judgment
22 order, and all defendants will face this same difficulty of fading memories.

23 Plaintiff would also be severely prejudiced if defendant Mann's motion to dismiss was granted
24 because the claims against Mann would likely be time-barred. *See* Fed. R. Civ. P. 4(m) Adv. Comm.
25 Notes (1993) ("Relief may be justified, for example, if the applicable statute of limitations would bar
26 the refiled action . . ."); *see also Mann*, 324 F.3d at 1090 (discussing Rule 4(m) and 1993 Advisory
27 Committee Notes quoted *supra*).

28 Finally, the Court notes that even if plaintiff had not established good cause under Rule 4(m),

1 the Court would exercise its discretion to extend the time to serve Mann past the 120-day deadline.
2 Plaintiff has been incarcerated in Administrative Segregation during the pendency of this lawsuit, and
3 was acting *pro se* for much of this litigation. The record reflects some degree of confusion as to Mann's
4 location and proper address for service. Once alerted to the deficiency in service on Mann, plaintiff took
5 a number of steps to cure the deficiency, including directly contacting Mann and corresponding with
6 defendants' counsel, and requesting that the U.S. Marshals Service re-serve Mann.

7
8 **CONCLUSION**

9 For the foregoing reasons, the Court hereby DENIES defendant Mann's motion to dismiss.
10 (Docket No. 107).

11 **IT IS SO ORDERED.**

12
13 Dated: January 8, 2007



SUSAN ILLSTON
United States District Judge