

FILED**NOT FOR PUBLICATION**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUITAUG 20 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES DOUGLAS WILLIAMS, Jr.,

No. 18-55379

Plaintiff-Appellant,

D.C. No. 2:17-cv-06130-MWF-KS

v.

MEMORANDUM*

COUNTY OF LOS ANGELES; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Submitted August 15, 2018**

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

James Douglas Williams, Jr., appeals pro se from the district court's order dismissing his Title VII employment action for failure to effect timely and proper service of the summons and complaint under Federal Rule of Civil Procedure 4(m).

We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

discretion. *Oyama v. Sheehan (In re Sheehan)*, 253 F.3d 507, 511 (9th Cir. 2001).

We affirm.

The district court did not abuse its discretion by dismissing Williams's action without prejudice because Williams failed to effect proper service of the summons and complaint and otherwise failed to show good cause for his failure to timely serve the summons and complaint. *See Fed. R. Civ. P. 4(c)* (any person who is not a party may serve a summons and complaint); *Fed. R. Civ. P. 4(j)* (setting forth how to serve a state or local government); *Fed. R. Civ. P. 4(m)* (requiring court to dismiss action without prejudice if a defendant is not served within 90 days after the complaint is filed absent a showing of good cause); *In re Sheehan*, 253 F.3d at 512 (discussing Rule 4(m)'s "good cause" standard).

Contrary to Williams's contention, his action was not dismissed for failure to file an opposition to the County defendants' motion to dismiss, which he did not receive.

We lack jurisdiction to consider the district court's order denying Williams's motion for reconsideration because Williams failed to file an amended or separate notice of appeal. *See Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

Case No. CV-17-6130-MWF (KSx)

Date: February 20, 2018

Title: James Douglas Williams Jr. -v- County of Los Angeles et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:
Rita Sanchez

Court Reporter:
Not Reported

Attorneys Present for Plaintiff:
None Present

Attorneys Present for Defendant:
None Present

Proceedings (In Chambers): ORDER RE: SPECIALLY APPEARING DEFENDANT, THE COUNTY OF LOS ANGELES' ET. AL. MOTION TO DISMISS PLAINTIFF'S COMPLAINT [22]; DEFENDANT PATRICA MOLINA'S MOTION TO DISMISS FOR IMPROPER SERVICE AND FAILURE TO STATE CLAIM FOR WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT [24]

Before the Court are two motions. First, there is the Motion to Dismiss Plaintiff's Complaint filed by Defendants the County of Los Angeles, Stephen Strati, Angie Chea, Derrick Robinson, Tina Martinez, Tara Walker, Steven Cheng, Eryn Houston, Patricia Adriano, and Jose Arias (collectively, the "County Defendants"), filed on December 21, 2017 (the "County Motion"). (Docket No. 22). Second, there is Defendant Patricia Molina's Motion to Dismiss for Improper Service and Failure to State Claim for which Relief can be Granted or, in the Alternative, for a More Definite Statement (the "Molina Motion"). (Docket No. 24). Plaintiff has not opposed either the County Motion or the Molina Motion.

The County Motion and the Molina Motion are scheduled to be heard on **February 26, 2018**. The Court read and considered the papers on both Motions and deems the matters appropriate for decision without oral argument. *See Fed. R. Civ. P.*

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78(b); Local Rule 7-15. The hearings on both Motions are therefore **VACATED** and removed from the Court's calendar.

For the reasons discussed below, the County Motion and the Molina Motion are both **GRANTED** and this action is **DISMISSED without prejudice** based upon Plaintiff's failure to timely or properly serve any of the Defendants.

I. BACKGROUND

Pro se Plaintiff James Douglas Williams, Jr., an African-American male, asserts discrimination and retaliation claims arising from his employment with the Los Angeles County Department of Public and Social Services ("DPSS"). (Complaint at 2). Plaintiff alleges that he was discriminated against on account of his gender and race because Defendants would only promote Hispanic or Asian females. (*Id.* at 5).

In 2004, Plaintiff passed the eligibility exam for employment as a Clerk with Los Angeles County, but was not hired initially. (*Id.* at 2). After filing a formal complaint with the Equal Employment Opportunity Commission, Plaintiff successfully appealed the decision to the County's Department of Human Resources ("DHR"). (*Id.*). On September 4, 2004, Plaintiff began working as a clerk with the DPSS. (*Id.*).

In September 2005, Plaintiff called DHR to inquire about a promotion to the Intermediate Clerk position, as he had finished his probationary period with positive evaluations. (*Id.* at 2, 62–66). DHR informed Plaintiff that there was a County-wide freeze on hiring and promotions. (*Id.* at 2). Plaintiff believed that he was nonetheless entitled to a promotion. (*Id.*).

On February 12, 2007, Plaintiff submitted an application for the Intermediate Clerk position. (*Id.* at 3). DHR informed Plaintiff that he was required to take an eligibility exam to be considered for the position, but no examinations were being conducted at the time. (*Id.*).

In September 2015, after passing the required examination, Plaintiff applied for the position of Eligibility Worker I. (*Id.*). DHR informed Plaintiff that it had begun

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calling eligible candidates, but had not reached his band. (*Id.*). By September 2016, DHR had stopped calling people on the eligibility list. (*Id.*). Following a September 28, 2016 staff meeting, Plaintiff contacted District Director Angie Chea and notified her that he was interested in an Eligibility Worker I position. (*Id.*).

On January 17, 2017, Plaintiff, believing that the Clerk and Intermediate Clerk positions were “paired class positions,” requested assistance from “Internal Affairs and Employee Relations” to obtain a promotion from his position as a Clerk to Intermediate Clerk. (*Id.* at 4, 42–43). Derrick Robinson, a DHR representative, informed Plaintiff that those positions were not paired class positions. (*Id.* at 4, 27).

II. DISCUSSION

“The motions authorized by Federal Rules 12(b)(4) and 12(b)(5) permit the defendant to challenge departures from the proper procedure for serving the summons and complaint and the contents of the former for purposes of giving notice of the action’s commencement.” 5B Charles Alan Wright, Arthur R. Miller, *et al.*, *Federal Practice and Procedure* § 1353 (3d ed. rev. 2014) (footnote omitted); *see also Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1126–27 (C.D. Cal. 2015). “Federal Rule of Civil Procedure 12(b)(5) permits dismissal of an action based on insufficient service of process.” *Id.* “Once service is challenged, plaintiffs bear the burden of establishing that service was valid under Rule 4.” *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) (citing 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1083 (3d ed. 2002 & Supp. 2003)).

“A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4.” *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (citing *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)). “[N]either actual notice, nor simply naming the person in the caption of the complaint, will subject defendants to personal jurisdiction if service was not made in substantial compliance with Rule 4.” *Crowley v. Bannister*, 734 F.3d 967, 975 (9th Cir. 2013) (internal quotation marks, citations, and alterations omitted).

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Review of Plaintiff's Proofs of Service (Docket Nos. 8–18) confirms – as argued in both the County Motion and Molina Motion – that Plaintiff has not substantially complied with Rule 4. First, Plaintiff served the Complaint and Summons himself. But Rule 4(c)(2) requires that service be effected by “any person who is at least 18 years old **and not a party**[.]” Fed. R. Civ. P. 4(c)(2) (emphasis added); *see also* Cal. Code. Civ. Proc. § 414.10 (only nonparties permitted to serve a summons in California). Second, Plaintiff filed his Complaint on August 18, 2017. Pursuant to Rule 4(m), Plaintiff was required to serve Defendants within 90 days after filing the Complaint – *i.e.*, by November 16, 2017. But Plaintiff did not mail a Summons and Complaint to Defendants until November 30, 2017. Plaintiff's service thus does not comply with Rule 4 or with the relevant service provisions of the California Code of Civil Procedure. *See* Fed. R. Civ. P. 4(e), (j) (setting forth requirements for service upon individuals and state and local government entities); Cal. Code Civ. Proc. §§ 415.20(b), 415.30(a) (setting forth relevant requirements for “substituted” (*i.e.*, leaving a copy with a person of suitable age and subsequent mailing) service and service by mail in California).

Federal Rule of Civil Procedure 4(m) provides two options when a plaintiff fails to timely serve defendants. First, if the plaintiff shows good cause for not effectuating service within 90 days, the court must extend the time for service. *Crowley*, 734 F.3d at 976 (quoting *Lemoge v. United States*, 587 F.3d 1188, 1198 (9th Cir. 2009)). Second, if good cause is not established, the court may either extend the time for service upon a showing of “excusable neglect” or dismiss the action without prejudice. *Id.*; *see also* *Oyama v. Sheehan* 253 F.3d 507, 512 (9th Cir. 2001).

To demonstrate good cause or excusable neglect, a plaintiff is required to show that “(a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed.” *Oyama*, 253 F.3d at 512. Plaintiff, who did not oppose either of the Motions, has demonstrated neither good cause nor excusable neglect.

In sum, Plaintiff's service is defective for two reasons: (1) the manner in which he served Defendants (*i.e.*, personally delivering the Summons and Complaint himself

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and mailing the Summons and Complaint) does not comply with Rule 4 or relevant provisions of the California Code of Civil Procedure; and (2) even if the method of service were proper, it occurred after the 90-day deadline imposed by Rule 4(m) and Plaintiff has not demonstrated good cause or excusable neglect for that tardiness. The Court thus elects to dismiss this action without prejudice.

Finally, the Court notes that Defendant Deitra Whitaker has not appeared in this action (“specially” or otherwise), and thus has not moved to dismiss the Complaint. But Plaintiff effected service upon Whitaker in the same manner as the other Defendants (that is, late and defectively). (See Proof of Service, Docket No. 15). The arguments raised in the Motions thus apply with equal force with respect to Whitaker and warrant dismissal of the entire action without prejudice.

III. CONCLUSION

For the reasons set forth above, the County Motion and the Molina Motion are both **GRANTED** and the action is **DISMISSED without prejudice**.

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. The Court **ORDERS** the Clerk to treat this Order, and its entry on the docket, as an entry of judgment. Local Rule 58-6.

IT IS SO ORDERED.

**Additional material
from this filing is
available in the
Clerk's Office.**