

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEP 24 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DARRYL BURGHARDT,

Plaintiff-Appellant,

v.

RENEE STEIN-GRAHAM,

Defendant-Appellee.

No. 18-15191

D.C. No. 5:12-cv-05190-BLF  
Northern District of California,  
San Jose

ORDER

Before: LEAVY, HAWKINS, and TALLMAN, Circuit Judges.

The district court certified that this appeal is frivolous and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On March 7, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's March 7, 2018 order, and the opening brief received on March 29, 2018, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis

(Docket Entry No. 8), and dismiss this appeal as frivolous, pursuant to 28 U.S.C.

§ 1915(e)(2).

**DISMISSED.**

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8 DARRYL BURGHARDT,  
9 Plaintiff,

10 v.  
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12 R. STEIN-GRAHAM,  
13 Defendant.  
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16 Case No. 12-05190 BLF (PR)  
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18 **ORDER OF DISMISSAL**

19 Plaintiff, a state prisoner, filed the instant civil rights action in *pro se* pursuant to 42  
20 U.S.C. § 1983, against prison officials at Pelican Bay State Prison (“PBSP”). This matter  
21 was remanded by the Ninth Circuit only with respect to unserved Defendant R. Stein-  
22 Graham. (Docket No. 57 at 3.) The matter was reopened on December 22, 2016. (Docket  
23 No. 58.)

24 After several unsuccessful service attempts, the Court continually extended time  
25 and opportunities for Plaintiff to provide specific, accurate and current location for  
26 Defendant R. Stein-Graham such that the Marshal is able to effect service. (See Docket  
27 Nos. 60, 75 & 77.) In the last order, Plaintiff was granted a final extension of time to  
28 attempt to obtain the current location for Defendant Stein-Graham such that the Marshal is  
able to effect service. (Docket No. 77.) Plaintiff was directed to immediately request

1 information of Defendant's location from the several agencies he identified in his last  
2 notice to the Court, (Docket No. 76), and to file notice that he had made such written  
3 inquiries within fourteen days from the date the order was filed. (Docket No. 77 at 3-4.)  
4 Plaintiff was then advised that if his inquiries did not yield any information regarding  
5 Defendant's current location within twenty-eight days after he has made such written  
6 inquiry, the Court had no choice but to dismiss Plaintiff's claims against Defendant Stein-  
7 Graham without prejudice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.  
8 (*Id.* at 4.)

9 On November 21, 2017, Plaintiff filed notice with evidence that he submitted  
10 "confidential mail that seeks the whereabouts of defendant R. Graham" to the prison  
11 mailroom on November 15, 2017. (Docket No. 78, Ex. 1.) The Court granted Plaintiff a  
12 final extension of time to receive a response to his inquiries, and to file any information  
13 regarding Defendant's current location by January 10, 2018. (Docket No. 79.)

14 On January 10, 2018, Plaintiff filed a status report stating that two of the letters he  
15 sent were returned undelivered; one agency responded that they were unable to assist him;  
16 and he has not yet received a response from the fourth agency. (Docket No. 83.) Given  
17 that it has been nearly two months since Plaintiff sent his inquiry, it does not appear likely  
18 that any response is forthcoming from this fourth agency.

19 The Court has afforded Plaintiff ample time and opportunity to obtain a current  
20 location for Defendant Stein-Graham where he can be served in order to proceed with this  
21 action. This matter has been pending for over a year, and Plaintiff has failed to show good  
22 cause for his failure to obtain Defendant's current location. *See* Fed. R. Civ. P. 4(m).  
23 Accordingly, the Court has no choice but to dismiss Plaintiff's claims against Defendant  
24 Stein-Graham without prejudice pursuant to Rule 4(m), and close this action. 11pm

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## CONCLUSION

For the reasons discussed above, Plaintiff's claims against Defendant R. Stein-Graham are DISMISSED without prejudice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

The Clerk shall terminate any pending motions and close this action.

## IT IS SO ORDERED.

Dated: Jan 22, 2005

  
BETH LABSON FREEMAN  
United States District Judge

United States District Court  
Northern District of California

Order of Dismissal  
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