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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK JOYNER,

Plaintiff,

v.

KEN RITTMANN, JIM HEWETSON,
FUNCTIONAL DEVICES, INC., and DOES
1 THROUGH 20, INCLUSIVE,

Defendants.

Case No. CV 10-08948-JEM

MEMORANDUM AND ORDER
DISMISSING CASE WITH PREJUDICE
PURSUANT TO FED. R. CIV. P. 41(b)

This case was initiated as a state court complaint for misappropriation of trade secrets and unfair competition and was removed to this Court on diversity of citizenship grounds on November 19, 2010. Plaintiff is Jack Joyner. Defendants are Ken Rittmann, Jim Hewetson, and Functional Devices, Inc.

This case is dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. Plaintiff essentially has abandoned the case, refusing to communicate with his own counsel, opposing counsel or the Court, refusing to respond to discovery and to Defendants' Motion to Dismiss, and repeatedly disregarding Court orders.

1 **BACKGROUND**

2 Plaintiff's counsel was given permission to withdraw on May 3, 2011, citing an
3 irremediable breakdown in the attorney-client relationship and no communication with
4 Plaintiff for over six weeks. On May 9, 2011, the Court vacated a status conference
5 scheduled May 10, 2011, at the request of Defendants because they had been unable to
6 communicate with Plaintiff. Defendants were ordered to contact the clerk when they were
7 able to reach Plaintiff, at which point the Court would set another status conference.

8 When Defendants were unable to reach Plaintiff, the Court set a status conference
9 for June 30, 2011. All parties were ordered to appear.

10 On June 6, 2011, Defendants filed a Motion to Dismiss based on Plaintiff's failure to
11 respond to discovery due May 23, 2011, and failure to respond to letters and emails
12 regarding the status conference and the outstanding discovery. The status conference set
13 for June 30, 2011, was moved to July 7, 2011, the date of the hearing on Defendants'
14 Motion to Dismiss. Mr. Joyner has not responded to Defendants' discovery, did not file any
15 opposition to the Motion to Dismiss, and did not appear at the July 7, 2011, hearing despite
16 the order to appear.

17 On July 7, 2011, the Court continued the status conference to August 4, 2011. All
18 parties were ordered to appear. Plaintiff was ordered to show cause why the action should
19 not be dismissed. Plaintiff also was ordered to provide the Court with a current address in
20 accordance with Local Rule 41-6.

21 In an abundance of caution to be certain that Plaintiff was served with the Court's
22 orders, Defendants were instructed to undertake efforts to contact Plaintiff and to file a
23 declaration setting forth those efforts. Defense counsel Kevin Wheeler filed a declaration on
24 August 2, 2011, detailing his efforts to contact Plaintiff. Mr. Wheeler tried to contact Plaintiff
25 by letter, email, and telephone voicemail but received no return communication from
26 Plaintiff. Mr. Wheeler then dispatched a process server who was able to locate Plaintiff at a
27 boat slip in Santa Barbara and served him with the Order to Show Cause. A proof of
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1 service of same was filed with the Court. Defendants incurred \$5,775.85 in fees and costs
2 in attempting to locate Plaintiff and file their Motion to Dismiss.

3 At the August 4, 2011, hearing, Plaintiff did not appear despite the order to appear.
4 The Court then delayed the hearing a half hour. Plaintiff has never appeared or
5 communicated with the Court.

6 DISCUSSION

7 The Court has the inherent power to achieve the orderly and expeditious disposition
8 of cases by dismissing actions pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute and
9 failure to comply with court orders. See Link v. Wabash R.R. Co., 370 U.S. 626, 629-30
10 (1962); see also Pagtalunan v. Galaza, 291 F.3d 639, 640 (9th Cir. 2002). A dismissal
11 under Rule 41(b) - other than for lack of jurisdiction, improper venue, or failure to join a party
12 - operates as an adjudication on the merits. Fed. R. Civ. P. 41(b).

13 Because dismissal is a harsh penalty, the Court must weigh five factors when
14 considering whether to dismiss an action for failure to prosecute: (1) the public's interest in
15 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
16 prejudice to the defendants/respondents; (4) the public policy favoring disposition of cases
17 on their merits; and (5) the availability of less drastic alternatives. Pagtalunan, 291 F.3d at
18 642; Al-Torki v. Kaempfen, 78 F.3d 1381, 1384-85 (9th Cir. 1996). Having weighed these
19 factors, the Court finds that dismissal of this action with prejudice is warranted.

20 In the instant case, the first two factors favor dismissal. "[T]he public's interest in
21 expeditious resolution of litigation always favors dismissal." Yourish v. California Amplifier,
22 191 F.3d 983, 990 (9th Cir. 1999). The Court twice served Plaintiff with an Order to Show
23 Cause why the case should not be dismissed for failure to prosecute. Plaintiff failed to
24 provide discovery or respond to Plaintiff's Motion to Dismiss and disregarded Court orders
25 to appear at scheduling conferences. Plaintiff's conduct hinders the Court's ability to move
26 this case toward disposition and indicates that Plaintiff does not intend to litigate this action
27 diligently. Plaintiff's unwillingness to communicate with Defendants and the Court has
28 interfered with the public's interest in the expeditious resolution of this litigation.

1 The third factor, risk of prejudice to the defendants, weighs in favor of dismissal.
2 Where a party offers a poor excuse for failing to comply with a court's order, the prejudice to
3 the opposing party is sufficient to favor dismissal. See Yourish, 191 F.3d at 991-92. Here,
4 Plaintiff never offered any explanation for his refusal to respond to discovery or the Motion
5 to Dismiss, and has refused to respond to Defendants and the Court, despite orders to
6 appear. Defendants have presented evidence of significant costs incurred in seeking to
7 contact Plaintiff and move this case forward. Moreover, in some cases, "[t]he failure to
8 prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a
9 showing of actual prejudice to the defendant." In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir.
10 1994) (quoting Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976)); see also
11 Morris v. Morgan Stanley & Co., 942 F.2d 648, 651-52 (9th Cir. 1991). Because Plaintiff
12 has offered no reason for his failure to prosecute this case diligently and Defendants have
13 been forced to incur significant expense, the "prejudice" element also favors dismissal.

14 The fourth factor, the availability of less drastic sanctions, ordinarily counsels against
15 dismissal. In the instant case, however, there is no less drastic sanction available. The
16 Court attempted to avoid dismissal by *sua sponte* continuing the status conference from
17 July 7 to August 4 and ordering Defendants to provide proof that Plaintiff was served with
18 the Order to Show Cause. Nevertheless, Plaintiff has not responded to the Court's orders
19 and did not appear at two status conferences despite being ordered to do so. "[A] district
20 court's warning to a party that his or her failure to obey the court's order will result in
21 dismissal can satisfy the 'consideration of alternatives' requirement." Ferdik, 963 F.2d at
22 1262 (citations omitted). In these circumstances, there is no less drastic sanction available
23 to the Court.

24 The fifth and final factor requires the Court to consider the public policy favoring
25 disposition of cases on the merits. "Although there is indeed a policy favoring disposition on
26 the merits, it is the responsibility of the moving party to move towards that disposition at a
27 reasonable pace, and to refrain from dilatory and evasive tactics." Morris, 942 F.2d at 652.
28 Here, Plaintiff failed to meet his responsibility by failing to respond to discovery and the

1 Motion to Dismiss, disregarding Court orders to appear at the July 7 and August 4 status
2 conferences, and refusing to communicate or respond to Defendants and the Court.

3 In light of Plaintiff's failure to comply with the Court's orders, the procedural history of
4 this case, and the factors weighing in favor of dismissal, the Court concludes that dismissal
5 of this action for failure to prosecute is warranted. See Link, 370 U.S. at 630-31 ("The
6 authority of a court to dismiss sua sponte for lack of prosecution has generally been
7 considered an 'inherent power,' governed not by rule or statute but by the control
8 necessarily vested in courts to manage their own affairs so as to achieve the orderly and
9 expeditious disposition of cases."). The dismissal is with prejudice.

10 **ORDER**

11 IT IS HEREBY ORDERED that Judgment be entered dismissing this action with
12 prejudice.

13 IT IS SO ORDERED.

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15 DATED: August 5, 2011

16 /s/ John E. McDermott
17 JOHN E. MCDERMOTT
18 UNITED STATES MAGISTRATE JUDGE
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