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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LARRY MONTGOMERY,)	NO. CV 11-08631-MAN
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on October 24, 2011, seeking review of the denial of his application for a period of disability, disability insurance benefits, and supplemental security income and an order reversing the Commissioner's decision or, alternatively, remanding this matter for a new hearing or new proceedings. On October 26, 2011, this Court issued its Case Management Order, setting forth, *inter alia*, a schedule for the preparation and filing of pleadings, including a Joint Stipulation. On December 19, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The Commissioner filed his Answer on May 2, 2012, in which he requested that his decision be affirmed.

1 On June 11, 2012, plaintiff's then-counsel, Denise Bourgeois Haley,
2 filed a Motion To Withdraw as Attorney of Record ("Motion"). By the
3 Motion, Ms. Haley sought leave to withdraw pursuant to Local Rules 83-
4 2.9.2.1. In support of the Motion, Ms. Haley asserted, *inter alia*, that
5 she "has diligently researched the issues and formed the opinion that
6 [s]he cannot pursue this matter on behalf of [plaintiff]. It is
7 [plaintiff's] counsel's further opinion that pursuit of this action
8 could subject plaintiff and counsel to sanctions under Rule 11."
9 (Motion at 4.)

10
11 In a June 14, 2012 Minute Order (the "June 14 Order"), this Court
12 granted the Motion and directed plaintiff either to file a notice of
13 dismissal on or before June 28, 2012, or to file a motion for summary
14 judgment on or before July 31, 2012. On July 17, 2012, the copy of the
15 June 14 Order mailed to plaintiff was returned to the Clerk's Office by
16 the U.S. Postal Service, with the following explanation for the
17 nondelivery of the document: "RETURN TO SENDER[;] ATTEMPTED - NOT
18 KNOWN[;] UNABLE TO FORWARD." (See Docket No. 16 at 1, copy of returned
19 envelope.)

20
21 In an August 3, 2012 Minute Order (the "August 3 Order"), the Court
22 -- after receiving the returned copy of the June 14 Order and finding
23 that plaintiff had neither filed a change of address, in accordance with
24 Local Rule 41-6, nor complied with the deadlines set forth in the June
25 14 Order -- ordered plaintiff to file and serve, by not later than
26 August 17, 2012, a notice of change of address along with either a
27 notice of dismissal or a motion for summary judgment. Plaintiff was
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1 **"expressly cautioned"** that, should he fail to comply with the August 3
2 Order, " **the Court will presume that plaintiff no longer wishes to**
3 **pursue this action and may dismiss this case, without prejudice, for**
4 **failure to prosecute."** (August 3 Order at pp. 1-2; emphasis in
5 original.)
6

7 On August 10, 2012, the copy of the August 3 Order mailed to
8 plaintiff was returned to the Clerk's Office by the U.S. Postal Service,
9 with the following explanation for the nondelivery of the document:
10 "Return to Sender" and "ATTEMPTED - NOT KNOWN." (See Docket No. 18 at
11 1, copy of returned envelope.) Further, plaintiff has not filed a
12 notice of change of address, a notice of dismissal, a motion for summary
13 judgment, or otherwise communicated with the Court in response to either
14 the June 14 Order or August 3 Order.
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16 **DISCUSSION**

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18 Rule 41(b) of the Federal Rules of Civil Procedure grants federal
19 district courts the authority to *sua sponte* dismiss actions for failure
20 to prosecute. Link v. Wabash R. Co., 370 U.S. 626, 629-30, 82 S. Ct.
21 1386, 1388 (1962). In determining whether dismissal for lack of
22 prosecution is proper, a court must weigh several factors, including:
23 (1) the public's interest in expeditious resolution of litigation; (2)
24 the court's need to manage its docket; (3) the risk of prejudice to
25 defendants; (4) the availability of less drastic sanctions; and (5) the
26 public policy favoring the disposition of cases on their merits.
27 Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002); Ferdik v.
28

1 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

2
3 With respect to the first and second factors, plaintiff's delay
4 necessarily implicates both the public interest in the expeditious
5 resolution of litigation and the Court's need to efficiently manage its
6 docket. See Pagtalunan, 291 F.3d at 642; see also Yourish v. California
7 Amplifier, 191 F.3d 983, 990-91 (9th Cir. 1999). Plaintiff's failures
8 to comply with the June 14 Order and August 3 Order, and his failure to
9 provide the Court with a valid address, have caused this action to come
10 to a halt, thereby impermissibly allowing plaintiff, rather than the
11 Court, to control the pace of the proceedings in this case. *Id.* In
12 addition, plaintiff's conduct indicates that he does not intend to
13 litigate this matter diligently. Significantly, the Court, in contrast
14 to plaintiff, has spent valuable time to move this case along -- time
15 which it could have devoted to other cases on its docket. See Clayton
16 v. Astrue, 2011 U.S. Dist. LEXIS 150710, at *3 (S.D. Cal. November 18,
17 2011)(citing the court's expenditure of time as a factor weighing in
18 favor of dismissal under 41(b)). Allowing plaintiff to continue to halt
19 the process would frustrate not only the public's interest in the
20 expeditious resolution of litigation but also the Court's need to manage
21 its own docket. See Ferdik, 963 F.2d at 1262 (noting that "[i]t is
22 incumbent upon us to preserve the district courts' power to manage their
23 dockets without being subject to the endless vexatious noncompliance of
24 litigants"). Accordingly, the first two factors strongly weigh in favor
25 of dismissal.

26
27 The third factor -- the risk of prejudice to defendants -- also
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1 weighs in favor of dismissal. When, as in this case, a plaintiff
2 unreasonably delays prosecution of an action, a rebuttable presumption
3 of prejudice to defendant arises. See In re Eisen, 31 F.3d 1447, 1452-
4 53 (9th Cir. 1994). Although that presumption may be rebutted when a
5 plaintiff proffers a reasonable excuse for the delay, plaintiff has
6 failed to provide any explanation, let alone a reasonable excuse, for
7 failing to comply with the June 14 and August 3 Orders. Thus, the third
8 factor does not support allowing this stalled case to continue.

9
10 In addition, the fourth factor -- the availability of less drastic
11 sanctions -- strongly favors dismissal. The Ninth Circuit has set forth
12 the following three-part analysis to determine whether a district court
13 properly exercised its discretion in determining that no less harsh
14 sanction than dismissal is appropriate: (1) whether the court discussed
15 the feasibility of less drastic sanctions and why those sanctions would
16 not be appropriate; (2) whether the court previously implemented
17 alternate sanctions; and (3) whether the court warned the party of the
18 possibility of dismissal. Adriana Int'l Corp. v. Thoeron, 913 F.2d
19 1406, 1412 (9th Cir. 1990). The Court has attempted to avoid dismissal
20 by specifically warning plaintiff that failure to comply with its
21 August 3 Order may result in dismissal, without prejudice, for failure
22 to prosecute. Further, in recognition of plaintiff's *pro se* status, the
23 Court has waited several days past the deadline set forth in the
24 August 3 Order before dismissing this case. Despite the Court's
25 attempts to explore meaningful alternatives to dismissal, however,
26 plaintiff has failed to participate in his litigation, and thus, lesser
27 sanctions do not appear to be appropriate. See Henderson v. Duncan, 779
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1 F.2d 1421, 1424 (9th Cir. 1986)(noting that the "district court need not
2 exhaust every sanction short of dismissal before finally dismissing a
3 case, but must explore possible and meaningful alternatives").
4 Nevertheless, the Court has determined that the instant action should be
5 dismissed *without* prejudice -- a sanction which is less drastic than
6 dismissal with prejudice.

7
8 The fifth factor, the general policy favoring resolution of cases
9 on the merits, weighs against dismissal. However, plaintiff has a
10 responsibility to move a case towards disposition at a reasonable pace
11 and to avoid dilatory and evasive tactics. See Morris v. Morgan Stanley
12 Co., 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not met this
13 responsibility despite having been given ample time to do so. Under
14 these circumstances, and given the Court's present inability to
15 communicate with plaintiff, the public policy favoring resolution of
16 cases on the merits does not outweigh plaintiff's failure to comply with
17 this Court's orders and to prosecute this action diligently.

18
19 A balancing of these factors leads to the conclusion that dismissal
20 without prejudice, pursuant to Rule 41(b) and Local Rule 41-1, is
21 warranted. See Ferdik, 963 F.2d at 1263 (dismissal is appropriate where
22 strongly supported by three factors).

23
24 **CONCLUSION**

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26 Accordingly, for the reasons stated above, IT IS ORDERED that the
27 above-captioned case is dismissed without prejudice for lack of
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1 prosecution.¹

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3 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
4 copies of this Memorandum Opinion and Order and the Judgment on
5 plaintiff and counsel for defendant.

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7 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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9 DATED: August 22, 2012

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13 MARGARET A. NAGLE
14 UNITED STATES MAGISTRATE JUDGE
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27 ¹ Dismissal is not only under Rule 41(b), but also pursuant to
28 Local Rule 41-6, given that more than 15 days have passed since the
return of the June 14 Order as undeliverable and plaintiff's failure to
provide notice of his correct address.