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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GLORIA GARCIA,)	NO. CV 12-02059-MAN
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
CAROLYN W. COLVIN, ¹)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	

Plaintiff filed a Complaint on March 15, 2012, seeking review of the denial of her 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 March 16, 2012, this Court issued its Case Management Order, setting forth, *inter alia*, a schedule for the preparation and filing of pleadings, including a Joint

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 Stipulation. On April 24, 2012, the parties consented, pursuant to 28
2 U.S.C. § 636(c), to proceed before the undersigned United States
3 Magistrate Judge. The Commissioner filed her Answer on October 15,
4 2012, in which she requested that her decision be affirmed.

5
6 On October 31, 2012, plaintiff's then-counsel, Marc V. Kalagian,
7 filed a Notice of Motion and Motion To Withdraw as Attorney of Record
8 and Motion for Extension of Time with a supporting memorandum of points
9 and authorities and declaration by Marc V. Kalagian (collectively, the
10 "Motion"). By the Motion, Mr. Kalagian sought leave to withdraw as
11 attorney of record pursuant to Local Rule 83-2.9.2.1 and "permission
12 from the [C]ourt for an extension of time to permit the transfer of the
13 pleadings, case management order, and certified administrative record to
14 [plaintiff] for her action." (Motion at 3-4.) In support of the
15 Motion, Mr. Kalagian asserted, *inter alia*, that "[t]he relationship
16 between counsel and [plaintiff] has deteriorated to the point where no
17 meaningful dialogue can take place." (Motion at 3.)

18
19 On November 5, 2012, the Court issued an Order regarding the Motion
20 ("November 5 Order") briefly discussing the grounds on which the Motion
21 rested and setting forth the Court's tentative conclusion that the
22 Motion should be granted. Before granting the Motion, however, the
23 Court provided plaintiff with an opportunity to be heard. Plaintiff was
24 directed to submit on or before November 26, 2012, a written Opposition
25 to the Motion or, if she did not oppose the Motion, to file a Notice of
26 Dismissal, a Notice of Substitution of Attorney, or a notice advising
27 that she intended to represent herself.

1 On November 28, 2012, the Court received a letter submitted by
2 plaintiff ("November 28 Letter"). The November 28 Letter failed to
3 comply with the November 5 Order, because although plaintiff indicated
4 that she opposed the Motion, she did not set forth any fact(s) or
5 argument in opposition to the Motion. Further, while plaintiff claimed
6 that she had "an explanation" for why the Motion should not be granted,
7 she did not provide it to the Court.

8
9 By Order dated November 28, 2012 ("November 28 Order"), the Court
10 granted plaintiff one final opportunity to comply with the November 5
11 Order. On December 13, 2012, the Court received a letter submitted by
12 plaintiff ("December 13 Letter"). Because plaintiff failed to serve the
13 December 13 Letter on her counsel, as directed by the Court, and on
14 counsel for defendant, in violation of Rule 5(a)(1) of the Federal Rules
15 Civil Procedure, the December 13 Letter constituted an improper ex parte
16 communication with the Court.

17
18 Notwithstanding the impropriety of this communication, on December
19 19, 2012, the Court, in an effort to move this case forward, ordered
20 that the December 13 Letter be filed and that the Clerk serve copies of
21 it on plaintiff's counsel and on counsel for defendant ("December 19
22 Order"). The Court noted that, in the December 13 Letter, plaintiff
23 advised the Court that she would be representing herself unless and
24 until she retained new counsel. Additionally, the Court found that the
25 December 13 Letter did not set forth any fact(s) or arguments in
26 opposition to the Motion. Accordingly, for the reasons stated in the
27 November 5 Order, and because plaintiff did not present any fact(s) or
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1 legal argument in opposition to the Motion, the Court granted the
2 Motion. Mr. Kalagian was relieved as counsel and directed to deliver
3 the pleadings, case management order, and certified administrative
4 record to plaintiff promptly. Additionally, plaintiff (or her new
5 counsel, if she obtained counsel) was directed to file a motion for
6 summary judgment on or before February 12, 2013.

7
8 Plaintiff did not comply with the December 19 Order, nor did she
9 request additional time to do so. On March 4, 2013, the Court issued an
10 Order To Show Cause ("OSC"). After finding that the "deadline has
11 elapsed and nothing has been filed, in violation of the Court's December
12 19 Order," the Court directed plaintiff to show cause, by not later than
13 March 25, 2013, "why plaintiff or her new counsel, if she obtained
14 counsel, did not timely file her motion for summary judgment, and why
15 the Court should not recommend that this action be dismissed for failure
16 to prosecute and failure to comply with the Court's December 19 Order."
17 (OSC at 1.) Plaintiff was informed that she could satisfy her
18 obligations under the OSC by filing a motion for summary judgment by
19 March 25, 2013. Plaintiff was expressly cautioned that if she failed to
20 comply with the OSC, the Court would "**deem such failure to be both a**
21 **further violation of a Court order and further evidence of a lack of**
22 **prosecution on plaintiff's part.**" (*Id.*; emphasis in original.)
23 Plaintiff was also warned that, if she failed to comply with the OSC,
24 "**this action [could] be dismissed pursuant to Fed. R. Civ. P. 41(b) and**
25 **Local Rule 41-1.**" (*Id.*; emphasis in original.)

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1 It is now more than two weeks past the deadline set forth in the
2 OSC, and plaintiff has not filed a motion for summary judgment or
3 otherwise communicated with the Court in response to the OSC. Without
4 plaintiff's participation, this action cannot proceed.

5
6 **DISCUSSION**
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8 Rule 41(b) of the Federal Rules of Civil Procedure grants federal
9 district courts the authority to *sua sponte* dismiss actions for failure
10 to prosecute. Link v. Wabash R. Co., 370 U.S. 626, 629-30, 82 S. Ct.
11 1386, 1388 (1962). In determining whether dismissal for lack of
12 prosecution is proper, a court must weigh several factors, including:
13 (1) the public's interest in expeditious resolution of litigation; (2)
14 the court's need to manage its docket; (3) the risk of prejudice to
15 defendants; (4) the availability of less drastic sanctions; and (5) the
16 public policy favoring the disposition of cases on their merits.
17 Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002); Ferdik v.
18 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

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

15
16 The third factor -- the risk of prejudice to defendants -- also
17 weighs in favor of dismissal. When, as in this case, a plaintiff
18 unreasonably delays prosecution of an action, a rebuttable presumption
19 of prejudice to defendant arises. See In re Eisen, 31 F.3d 1447, 1452-
20 53 (9th Cir. 1994). Although that presumption may be rebutted when a
21 plaintiff proffers a reasonable excuse for the delay, plaintiff has
22 failed to provide any explanation, let alone a reasonable excuse, for
23 failing to comply with the December 19 Order and the OSC. Thus, the
24 third factor does not support allowing this stalled case to continue.

25
26 In addition, the fourth factor -- the availability of less drastic
27 sanctions -- strongly favors dismissal. The Ninth Circuit has set forth
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1 the following three-part analysis to determine whether a district court
2 properly exercised its discretion in determining that no less harsh
3 sanction than dismissal is appropriate: (1) whether the court discussed
4 the feasibility of less drastic sanctions and why those sanctions would
5 not be appropriate; (2) whether the court previously implemented
6 alternate sanctions; and (3) whether the court warned the party of the
7 possibility of dismissal. Adriana Int'l Corp. v. Thoeron, 913 F.2d
8 1406, 1412 (9th Cir. 1990). The Court has attempted to avoid dismissal
9 by specifically warning plaintiff that failure to comply with its OSC
10 could result in dismissal, without prejudice, for failure to prosecute.
11 Further, in recognition of plaintiff's *pro se* status, the Court has
12 waited several days past the deadline set forth in the OSC before
13 dismissing this case. Despite the Court's attempts to explore
14 meaningful alternatives to dismissal, however, plaintiff has failed to
15 participate in her litigation, and thus, lesser sanctions do not appear
16 to be appropriate. See Henderson v. Duncan, 779 F.2d 1421, 1424 (9th
17 Cir. 1986)(noting that the "district court need not exhaust every
18 sanction short of dismissal before finally dismissing a case, but must
19 explore possible and meaningful alternatives"). Nevertheless, the Court
20 has determined that the instant action should be dismissed *without*
21 *prejudice* -- a sanction less drastic than dismissal with prejudice.

22
23 The fifth factor, the general policy favoring resolution of cases
24 on the merits, weighs against dismissal. However, plaintiff has a
25 responsibility to move a case towards disposition at a reasonable pace
26 and to avoid dilatory and evasive tactics. See Morris v. Morgan Stanley
27 Co., 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not met this
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1 responsibility despite having been given ample time to do so. Under
2 these circumstances, the public policy favoring resolution of cases on
3 the merits does not outweigh plaintiff's failure to comply with this
4 Court's orders and to prosecute this action diligently.

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

10
11 **CONCLUSION**

12
13 Accordingly, for the reasons stated above, IT IS ORDERED that the
14 above-captioned case is dismissed without prejudice for lack of
15 prosecution.

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

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21 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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23 DATED: April 10, 2013

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MARGARET A. NAGLE
27 UNITED STATES MAGISTRATE JUDGE