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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

MARCOS GONZALES,)	1:09-cv-1549 AWI DLB
)	
Plaintiff,)	
)	ORDER ON DEFENDANT’S
v.)	MOTION FOR
)	INVOLUNTARY DISMISSAL
M. MILLS, THE COUNTY OF)	
FRESNO, SHERIFF MARGARET)	
MIMS, THE FRESNO COUNTY)	
SHERIFF DEPARTMENT, and DOES)	(Doc. No. 22)
1 through 100 inclusive,)	
)	
Defendants.)	

This is a civil rights action filed by Plaintiff Marcos Gonzales (“Gonzales”) against the County of Fresno (“the County”) and personnel of the Fresno County Sheriff’s Department. Gonzales filed suit in 2009 and alleged violations of state law, as well as 42 U.S.C. § 1983. The only Defendant who has made an appearance and been served is the County. The remaining defendants were served on February 27, 2011. See Court’s Docket Doc. Nos. 26, 27, 28. The County now moves for an involuntary dismissal under Rule 41(b). For the reasons that follow, the Court will grant the motion and close this case.

PROCEDURAL BACKGROUND

Gonzales filed this lawsuit on August 31, 2009. See Court’s Docket Doc. No. 1. A summons was issued on September 2, 2009. See id. at Doc. No. 7. Summonses were returned

1 executed for each Defendant on March 4, 2010. See id. at Doc. Nos. 10, 11, 12, 13, 14. The
2 returned summonses indicated that each Defendant was served at the Fresno County Clerk's
3 Office. See id. The summons that identifies each Defendant was stamped "Service accepted on
4 behalf County of Fresno Only." See id. at Doc. No. 29-1 at Ex. A.

5 On March 22, 2010, counsel for the County informed Gonzales's counsel that the
6 summons was served with the Clerk of the Board of Supervisors of the County. See Velasco
7 Dec. Ex. A. The letter stated that service was accepted by the County only. Id. The letter
8 continued, "The Clerk cannot accept service for the individuals. To serve an employee of the
9 Sheriff's Department, service needs to be with the Sheriff's Department Civil Desk." Id.

10 On March 23, 2010, the County filed its answer. See id. at Doc. No. 15.

11 On April 14, 2010, the Magistrate Judge issued a scheduling order. See id. at Doc. No.
12 20. Initial disclosures were ordered to be exchanged by May 3, 2010, the non-expert discovery
13 deadline was set at February 11, 2011, the expert discover deadline was set for March 25, 2011,
14 and trial was set for September 13, 2011. See id.

15 On June 4, 2010, after receiving reminders from the County on May 6 and June 3,
16 Gonzales filed his Rule 26 disclosures. See id. at Doc. No. 22-2 at ¶ 3; Velasco Dec. ¶ C; Doc.
17 No. 21.

18 On May 13, 2010, Defendants served written discovery on Gonzales. See Velasco Dec. ¶
19 B. After several e-mail exchanges, agreements to extend the time in which to respond (due in
20 part to Gonzales's transfer from Fresno County Jail to Wasco State Prison), and the threat of
21 motions to compel, answers to the discovery requests were received on August 10, 2010.
22 See id. at Ex. D, E, F, G, H.

23 On October 14, 2010, after apparently having cleared dates among the counsel, the
24 County set Gonzales's deposition for October 27, 2010. See id. at Ex. I. On October 26, 2010,
25 Gonzales canceled the deposition. See id. at Doc. No. 22-2 at ¶ 12. Gonzales's counsel's office
26 indicated that numerous attempts had been made to contact Gonzales, but that Gonzales was not
27 returning any of the calls. Id. The County's counsel sent an e-mail requesting new dates for a
28 deposition and stated the County's intention to follow the scheduling order. See id. at Velasco

1 Ex. J. Later on October 26, the respective counsels spoke on the telephone and set a new
2 deposition date of December 1, 2010. See id. at Ex. K.

3 On November 16, 2010, Gonzales's counsel sent an e-mail that indicated that Gonzales
4 was unavailable on December 1 until 1:30 p.m., due to a court hearing in an unrelated matter.
5 See id. at Ex. L. The same day, the respective counsels confirmed the deposition for 1:30 p.m.
6 on December 1, 2010. See id.

7 On December 1, 2010, Gonzales's counsel appeared, but Gonzales did not. See id. at Ex.
8 M. It was represented on the record that Gonzales was ordered to report to his parole officer and
9 had not been released by the officer. See id. About one hour later, an individual from
10 Gonzales's counsel's office indicated that Gonzales had failed a drug test ordered by the parole
11 officer and, as a result, Gonzales was being checked in to a drug rehabilitation facility. See id. at
12 Doc. No. 22-2 at ¶ 17. Gonzales's counsel was to inform County's counsel of the location of the
13 facility. See id.

14 On December 8, 2010, County's counsel received the name of Gonzales's rehabilitation
15 facility. See Velasco Dec. Ex. N. The County was told to work with the facility to set the
16 deposition. See id.

17 The County attempted to set deposition dates, but received no help from the rehabilitation
18 center and instead asked Gonzales's counsel for assistance. See id. at Ex. O.

19 On January 4, 2011, the County followed up with Gonzales's counsel regarding efforts to
20 set a deposition date of January 26, 2011. See id. at Ex. P.

21 On January 20, 2011, Gonzales' counsel's office indicated that Gonzales had checked
22 himself out of the rehabilitation facility and that they were trying to contact Gonzales for the
23 January 26, 2011, deposition date. See id. at Ex. Q. The e-mail indicates that Gonzales's
24 counsel had lost communication with Gonzales. See id. However, the parties managed to set the
25 deposition for January 26, 2011, at 1:00 p.m. See id.

26 On January 25, 2011, the County's counsel contacted Gonzales's counsel to confirm the
27 January 26, 2011, deposition. See Velasco Dec. ¶ 23. Gonzales's counsel's office indicated that
28 numerous attempts had been made to contact Gonzales without luck, but that they would

1 continue to try throughout the day. See id. At approximately 4:30 p.m., the County’s counsel
2 was informed that Gonzales had not been located and that the deposition would have to be
3 canceled. See id.

4 On February 3, 2011, the County filed this motion for involuntary dismissal. See id. at
5 Doc. No. 22.

6 DEFENDANT’S MOTION

7 Defendant’s Argument

8 The County argues that dismissal is appropriate because Gonzales has failed to prosecute
9 this action. Gonzales has not properly served individual defendants, and it is well beyond the
10 120 day deadline of Rule 4(m). Gonzales has conducted no discovery in this matter, despite his
11 allegations that discovery would likely create evidentiary support for his *Monell* claims.
12 Gonzales has failed to keep in contact with his own attorney, which has delayed discovery.
13 Gonzales failed to attend three noticed depositions. His failures have prevented the County from
14 exploring Gonzales’s claims, including claims of injury, and interfered with the County’s ability
15 to seek out and obtain expert opinions.

16 Plaintiff’s Opposition

17 Gonzales’s attorney argues that Gonzales is now in the Fresno County Jail, so his
18 deposition may proceed. The failure to timely serve other individual defendants was an
19 administrative error, and service has now been accomplished. There is no prejudice because the
20 same law office will likely represent the named individual defendants. Gonzales’s counsel
21 explains that no discovery has been propounded because he is relying on numerous witnesses
22 who will be subpoenaed for trial.

23 Almanza Declaration

24 Lisa Almanza, the administrative assistant of Gonzales’s attorney, has filed a declaration
25 in support of Gonzales’s opposition. In the declaration, Almanza states that it has been difficult
26 keeping in contact with Gonzales, and that she has advised Gonzales “on numerous occasions” to
27 keep in contact with the office. See Almanza Dec. ¶¶ 2, 3. Almanza also indicates that the only
28 contact information for Gonzales is his mother’s telephone number and address. See id. at ¶ 8.

1 Almanza declares that, although all written discovery has been answered, it has been very
2 difficult getting responses from Gonzales. See id. & at ¶ 10. Almanza declares that, although
3 Gonzales’s deposition was scheduled “numerous times, either contact had been lost with
4 Gonzales and our office could not confirm [Gonzales] was in custody.” Id. at ¶ 11. Almanza
5 explained that each time Gonzales’s deposition was on calendar, we notified Gonzales by way of
6 correspondences.” Id. at ¶ 16. Of particular note, Almanza declares that, during the week of
7 December 17, she received a call from Gonzales in which he advised “that he was ‘on the run’
8 and had checked himself out of [the rehabilitation center].” Id. at ¶ 17. Almanza advised
9 Gonzales that he was scheduled for a deposition on January 16, 2011,¹ and Gonzales “stated that
10 he would be present.” Id. at 18.

11 Additionally, Almanza explained that she believed that she had served all defendants in
12 this case because the County Clerk accepted service of all the summons. See id. at ¶ 5. Almanza
13 states that it was her oversight that she did not serve the other individuals correctly as per the
14 County’s letter, and that she has made arrangements to serve the remaining defendants
15 immediately. See id. at ¶¶ 6, 7.

16 Legal Standard

17 Under Federal Rule of Civil Procedure 41(b), a defendant may move the court for an
18 involuntary dismissal of the plaintiff’s case if the “plaintiff fails to prosecute or to comply with
19 these rules or a court order.” Fed. R. Civ. Pro. 41(b). Similarly, a defendant may file a motion
20 for sanctions if “a party . . . fails, after being served with proper notice, to appear for that
21 person’s deposition.” Fed. R. Civ. Pro. 37(d)(1)(A)(I). Sanctions for a party’s failure to appear
22 at his deposition include “dismissing the action or proceeding in whole or in part.” Fed. R. Civ.
23 Pro. 37(b)(2)(A)(v), (d)(3). Before a court imposes the harsh sanction of dismissal under either
24 Rule 37(d) or Rule 41(b), the court must consider five factors: (1) the public’s interest in
25 expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of
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27 ¹Almanza’s declaration indicates January 16. However, this appears to be a typo because e-mails dated
28 January 20, 2011, confirm a deposition date of January 26. See Velasco Dec. Ex. Q. The Court will view the
January 16 date as a typo, and that Almanza was actually referring to January 26. See id.

1 prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on
2 their merits; and (5) the availability of less drastic sanctions. See Pagtalunan v. Galaza, 291 F.3d
3 639, 642 (9th Cir. 2002) (Rule 41(b) sanctions); Stars' Desert Inn Hotel & Country Club v.
4 Hwang, 105 F.3d 521, 524 (9th Cir. 1997) (Rule 37(d) sanctions). "In evaluating the propriety of
5 sanctions, we look at all incidents of a party's misconduct." Adriana Intl. Corp. v. Lewis & Co.,
6 913 F.2d 1406, 1411 (9th Cir. 1990). In most cases, the first two of these factors will favor the
7 imposition of sanctions, while the fourth cuts against a default or dismissal sanction. See Henry
8 v. Gill Industries, Inc., 983 F.2d 943, 948 (9th Cir. 1993); Wanderer v. Johnston, 910 F.2d 652,
9 656 (9th Cir. 1990). Thus, the key factors in most cases are prejudice and availability of lesser
10 sanctions. See Henry, 983 F.3d at 948; Wanderer, 910 F.2d at 656. "A defendant suffers
11 prejudice if the plaintiff's actions impair the defendant's ability to go to trial or threaten to
12 interfere with the rightful decision of the case." In re: Phenylpropanolamine (PPA) Prods. Liab.
13 Litig., 460 F.3d 1217, 1227 (9th Cir. 2006) (hereinafter "PPA"); Pagtalunan, 291 F.3d at 642;
14 Henry, 983 F.2d at 948. The law also presumes prejudice from an unreasonable delay. PPA, 460
15 F.3d at 1227. Additionally, dismissal under Rule 37(d) must be supported by a finding of
16 "willfulness, bad faith or fault." Stars, 105 F.3d at 525; Fjelstad v. American Honda Motor Co.,
17 762 F.2d 1334, 1340 (9th Cir. 1985). "Disobedient conduct not shown to be outside the control
18 of the litigant is sufficient to demonstrate willfulness, bad faith or fault warranting default."
19 Stars, 105 F.3d at 525; Henry, 983 F.2d at 948.

20 Discussion

21 After reviewing the moving papers, the Court agrees with the County that the evidence
22 shows a failure to prosecute, a failure to follow the Federal Rules of Civil Procedure, and a
23 failure to follow the scheduling order. First, Gonzales failed to timely file his Rule 26
24 disclosures. It is true that the disclosures were filed, but they were filed a month past the
25 scheduling order's deadline. Second, the written discovery was provided significantly late. It
26 took extensions, the threat of motions to compel, and an additional two months beyond the due
27 date for Gonzales to respond. Third, Gonzales was on notice since March 22, 2010, that the
28 individual defendants had not been served. There is no explanation given for the failure to serve

1 the individual defendants, especially since the March 22, 2010, letter informed Gonzales about
2 how to accomplish service. Simply saying that there was an oversight is not a justification.
3 Further, that Gonzales has now served the individual defendants is not helpful. The individual
4 defendants were served well beyond Rule 4(m)'s 120 day time limit, see Fed. R. Civ. Pro. 4(m),
5 and at a time when non-expert discovery had already closed. By the time an answer is due
6 (March 16, 2011), expert discovery will be closed in nine days. The scheduling order and the
7 deadlines established by it are not to be casually disregarded. See Johnson v. Mammoth
8 Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992). Inclusion of these new defendants would
9 require amending the scheduling order and resetting the trial date. Significant disruption of the
10 scheduling order would occur with very little justification. See Fed. R. Civ. Pro. 16(b)(4)
11 (allowing amendment of scheduling order upon a showing of "good cause" and the judge's
12 consent); Johnson, 975 F.2d at 609. Fourth, Gonzales has not countered the assertion that he has
13 not propounded discovery. Fifth, Gonzales has failed to appear at three scheduled depositions.
14 The dates for these depositions were determined through consultation with counsel. There is only
15 one reason provided for Gonzales's failure to attend one of the depositions. It appears, from the
16 Velasco declaration, that Gonzales was taken into custody on December 1, 2010, because he
17 failed a drug test. See Velasco Dec. ¶ 17. Even if the Court were to find that his being taken
18 into custody and enrolled in a rehabilitation center was conduct beyond Gonzales's control (a
19 dubious finding since presumably Gonzales voluntarily took the drugs), there are still absolutely
20 no reasons given for missing the October 26, 2010, deposition, or the January 26, 2011,
21 deposition, especially as the Almanza declaration shows that Gonzales said that he would attend
22 the January 26, 2011, deposition. See Almanza Dec. ¶ 17. Gonzales's failure to appear at the
23 October and January depositions was disobedient conduct and thus, willful or bad faith or fault.
24 See Stars, 105 F.3d at 525; Henry, 983 F.2d at 948. Sixth, and perhaps most importantly, it
25 appears that Gonzales has utterly failed to adequately keep in contact with his counsel. The
26 opposition papers make clear that Gonzales was repeatedly told about the importance of keeping
27 in contact with his counsel, yet he failed to do so. See Almanza Dec. ¶¶ 2, 3, 8, 11, 16, 17, 18.
28 That failure to keep in contact appears to be the reason for the very tardy discovery responses.

1 See id. It is also one of the primary reasons for the difficulties in obtaining Gonzales's
2 deposition. See id.

3 The above shows a failure by Gonzales to follow the scheduling order, the rules of
4 procedure, his own counsel, or his own case. The Court will consider the mandatory five factors
5 in order to determine whether dismissal is appropriate.

6 The public's interest in expeditious resolution of litigation favors dismissal. This case
7 has been pending for over a year and a half, yet it is apparent that the case is not ready for trial.

8 The Court's need to manage its docket favors dismissal. The Eastern District of
9 California – Fresno Division has a significantly impacted docket. The docket is overly
10 congested, and stalled cases due to a lack of prosecution aggravate the situation.

11 Third, the County has suffered prejudice. The failure to obtain Gonzales's deposition
12 significantly impairs the County's ability to explore, defend, and challenge the claims against it.
13 See Stars, 105 F.3d at 525. Further, with the recent service of the individual defendants, a new
14 scheduling order would have to be considered and previously set deadlines, including the trial
15 date, may need to be reset if the case proceeds. There is no good reason for such changes and
16 delays. See Johnson, 975 F.2d at 608-10. Further, Gonzales's repeated failure to respond timely
17 to discovery, and repeated failure to attend his deposition, has created an unreasonable delay,
18 which in turn creates a presumption of prejudice. See PPA, 460 F.3d at 1227. Finally, the
19 scheduling and rescheduling of depositions, and the additional efforts to obtain discovery
20 responses, represent expenses that would not otherwise have been incurred by the County had
21 Gonzales responsibly cooperated.

22 Fourth the public policy favoring disposition of a case on the merits weighs against
23 dismissal, but it does so on a significantly diminished basis. “[A] case that is stalled or
24 unreasonably delayed by a party's failure to comply with deadlines and discovery obligations
25 cannot move forward toward resolution on the merits. Thus, we have also recognized that this
26 factor ‘lends little support’ to a party whose responsibility it is to move a case toward disposition
27 on the merits but whose conduct impedes progress in that direction.” PPA, 460 F.3d at 1228.
28 Gonzales's unreasonable delays and failure to comply with discovery has stalled the case, thus,

1 as recognized by *PPA*, this factor provides “little support” against dismissal. See id.

2 Finally, with respect to less drastic alternatives, it is possible for the Court to vacate the
3 scheduling order, set entirely new deadlines, and reopen discovery. However, while new
4 defendants have been served, Rule 4(m) was violated, the discovery deadlines have all expired,
5 and there is no good reason proffered for the very untimely service. The Court sees no legitimate
6 justification to completely abandon the scheduling order. See Johnson, 975 F.2d at 608-10.
7 Gonzales’s counsel represents that Gonzales is now in the Fresno County jail, so the Court could
8 order Gonzales to submit to the deposition. However, the discovery deadline has passed, and
9 untimely offers to comply with previous discovery requests are not helpful. See Henry, 983 F.2d
10 at 947; G-K Properties v. Redevelopment Agency of San Jose, 577 F.2d 645, 647-48 (9th Cir.
11 1978) (order of dismissal affirmed: “last minute tender” of discovery does not cure effects of
12 discovery misconduct). Moreover, Gonzales has failed to keep in contact with his attorney and
13 failed to attend his depositions without any good reason demonstrated. Simply because Gonzales
14 is in jail does not make it clear that he would diligently pursue his case from this point forward.
15 The Court does not know why it should take extraordinary efforts to force Gonzales to litigate his
16 own case. Given the evidence before the Court, completely starting this case over with a new
17 scheduling order and a new trial date would reward irresponsible behavior and is not a legitimate
18 option.²

19 In sum, four of the five factors favor dismissal, and the fifth factor weighs against
20 dismissal in a diminished capacity. The long and short of the matter is that Gonzales filed this
21 case, was informed of the importance of prosecuting the case and attending his deposition, was
22 informed of the importance of keeping in contact with his attorney, but failed to do so. Gonzales
23 has failed to adequately explain why he refused to behave like a responsible litigant. As shown
24 by his failure to keep in contact with his attorney or attend his depositions, the Court can only
25 conclude that Gonzales does not care about his case any more. The Court will grant the County’s

27 ²Even if the Court considers this an option, the court’s docket, the prejudice to the County, and the interest
28 in quick resolutions significantly outweigh this alternative, even when coupled with the diminished interest in
resolving the case on the merits. Cf. Pagtalunan, 291 F.3d at 643.

1 Rule 41(b) dismissal. See PPA, 460 F.3d at 1226-29; Pagtalunan, 291 F.3d at 642-43; Stars, 105
2 F.3d at 524-25; Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981).

3
4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Defendant County of Fresno's Rule 41(b) motion for involuntary dismissal is
6 GRANTED; and
7 2. The Clerk shall CLOSE this case.

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9 IT IS SO ORDERED.

10 Dated: March 15, 2011

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13 CHIEF UNITED STATES DISTRICT JUDGE
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