

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 RAYSHON THOMAS,

12 Plaintiff,

13 vs.

14 MICHELLE ROME, et al.,

15 Defendants.
16

1:16-cv-00192-DAD-GSA-PC

FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR FAILURE TO
OBEY COURT ORDER
(ECF No. 5)

OBJECTIONS, IF ANY, DUE IN THIRTY
(30) DAYS

17 On February 17, 2016, the Court issued an order requiring Plaintiff to either pay the
18 \$400.00 filing fee for this action or submit an application to proceed *in forma pauperis*, within
19 forty-five days. (ECF No. 5.) The forty-five day period has now expired, and Plaintiff has not
20 paid the filing fee, submitted an application, or otherwise responded to the Court's order.

21 In determining whether to dismiss this action for failure to comply with the directives
22 set forth in its order, "the Court must weigh the following factors: (1) the public's interest in
23 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
24 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
25 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d
26 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

27 "The public's interest in expeditious resolution of litigation always favors dismissal,"
28 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the

1 action has been pending since February 5, 2016. Plaintiff's failure to respond to the Court's
2 order may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the Court
3 cannot continue to expend its scarce resources assisting a litigant who will not resolve payment
4 of the filing fee for his lawsuit. Thus, both the first and second factors weigh in favor of
5 dismissal.

6 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
7 and of itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently
8 increases the risk that witnesses' memories will fade and evidence will become stale," id., and
9 it is Plaintiff's failure to pay the filing fee or submit an application to proceed *in forma pauperis*
10 that is causing delay. Therefore, the third factor weighs in favor of dismissal.

11 As for the availability of lesser sanctions, at this stage in the proceedings there is little
12 available to the Court which would constitute a satisfactory lesser sanction while protecting the
13 Court from further unnecessary expenditure of its scarce resources. Given that Plaintiff is a
14 prisoner who has not paid the filing fee for this action, the Court finds monetary sanctions of
15 little use, and given the early stage of these proceedings, the preclusion of evidence or
16 witnesses is not available. However, inasmuch as the dismissal being considered in this case is
17 without prejudice, the Court is stopping short of issuing the harshest possible sanction of
18 dismissal with prejudice.

19 Finally, because public policy favors disposition on the merits, this factor will always
20 weigh against dismissal. Id. at 643.

21 Accordingly, the Court **HEREBY RECOMMENDS** that this action be dismissed
22 based on Plaintiff's failure to obey the Court's order of February 17, 2016. These findings and
23 recommendations are submitted to the United States District Judge assigned to the case,
24 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after being
25 served with these findings and recommendations, Plaintiff may file written objections with the
26 Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and
27 Recommendations." Plaintiff is advised that failure to file objections within the specified time

28 ///

1 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th
2 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

3
4 IT IS SO ORDERED.

5 Dated: September 23, 2016

/s/ Gary S. Austin
6 UNITED STATES MAGISTRATE JUDGE