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

JAMES JOHNSON,

Plaintiff,

No. 2:11-cv-00109 GEB KJN PS

v.

KHS&S CONTRACTOR; MARK GILL;
and DEREK STEVENS,¹

Defendants.

FINDINGS AND RECOMMENDATIONS

Through these proposed findings and recommendations, the undersigned recommends that plaintiff's case be dismissed without prejudice and that this case be closed. Although plaintiff was granted leave to amend his First Amended Complaint, plaintiff twice failed to do so and also failed to respond to an order to show cause.

I. BACKGROUND

Plaintiff, who is proceeding without counsel and in forma pauperis, filed his complaint on January 12, 2011. (Compl., Dkt. No. 1.) On March 7, 2011, the undersigned granted plaintiff's application to proceed in forma pauperis and screened plaintiff's complaint as

¹ An additional individual, Jim Fiene, was named as a defendant in plaintiff's original complaint. Mr. Fiene was not named as a defendant in the caption of plaintiff's First Amended Complaint.

1 required by 28 U.S.C. § 1915(e)(2). (Order, Mar. 7, 2011, Dkt. No. 3.) The undersigned
2 dismissed plaintiff's complaint without prejudice and granted plaintiff 30 days to file a first
3 amended complaint. (Id. at 5.)

4 On March 28, 2011, plaintiff timely filed a First Amended Complaint. (First Am.
5 Compl., Dkt. No. 4.) In an order signed on April 5, 2011, and entered April 6, 2011, the
6 undersigned screened plaintiff's First Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2)
7 and dismissed plaintiff's First Amended Complaint without prejudice. (Order, Apr. 6, 2011, Dkt.
8 No. 5.) The undersigned granted plaintiff 45 days from the date of that order to file a second
9 amended complaint. (Id. at 2-3.) Although plaintiff was required to file a second amended
10 complaint on or before May 20, 2011, plaintiff failed to do so.

11 As a result of plaintiff's failure to file a second amended complaint, the
12 undersigned entered an order to show cause ("OSC"), which required plaintiff to: (1) "show
13 cause in writing, no later than June 10, 2011, why his lawsuit should not be dismissed for failure
14 to prosecute and failure to follow the court's orders"; and (2) "file a second amended complaint
15 that addresses the issues raised in the court's screening orders entered on March 7, 2011, and
16 April 6, 2011," no later than June 10, 2011. (OSC at 3, May 26, 2011, Dkt. No. 6.) In ordering
17 plaintiff to show cause, the undersigned warned plaintiff: "Plaintiff's failure to file the required
18 writing or the second amended complaint shall constitute an additional ground for, *and plaintiff's*
19 *consent to*, the imposition of appropriate sanctions, including a recommendation that plaintiff's
20 case be involuntarily dismissed with prejudice pursuant to Federal Rule of Civil
21 Procedure 41(b)." (Id.) The OSC also provided:

22 Eastern District Local Rule 110 provides that "[f]ailure of counsel
23 or of a party to comply with these Rules or with any order of the Court
24 may be grounds for imposition by the Court of any and all sanctions
25 authorized by statute or Rule or within the inherent power of the Court."
26 Moreover, Eastern District Local Rule 183(a) provides, in part:

Any individual representing himself or herself without an
attorney is bound by the Federal Rules of Civil or Criminal
Procedure, these Rules, and all other applicable law. All

1 obligations placed on “counsel” by these Rules apply to
2 individuals appearing in propria persona. Failure to comply
3 therewith may be ground for dismissal . . . or any other
4 sanction appropriate under these Rules.

5 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se
6 litigants must follow the same rules of procedure that govern other
7 litigants.”). Case law is in accord that a district court may impose
8 sanctions, including involuntary dismissal of a plaintiff’s case with
9 prejudice pursuant to Federal Rule of Civil Procedure 41(b), where that
10 plaintiff fails to prosecute his or her case or fails to comply with the
11 court’s orders. See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)
12 (recognizing that a court “may act *sua sponte* to dismiss a suit for failure
13 to prosecute”); Hells Canyon Preservation Council v. U.S. Forest Serv.,
14 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss an
15 action pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a
16 plaintiff’s failure to prosecute or comply with the rules of civil procedure
17 or the court’s orders); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.
18 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district
19 court may dismiss an action for failure to comply with any order of the
20 court.”), cert. denied, 506 U.S. 915 (1992); Thompson v. Housing Auth. of
21 City of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam) (stating that
22 district courts have inherent power to control their dockets and may
23 impose sanctions including dismissal), cert. denied, 479 U.S. 829 (1986).

24
25 (Id. at 2-3.) The court’s docket reveals that plaintiff failed to file a second amended complaint or
26 a response to the OSC.

27 II. DISCUSSION

28 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an
29 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,
30 failure to comply with the court’s local rules, or failure to comply with the court’s orders.² See,
31 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*
32 *sua sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
33 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action
34 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute

35 ² Rule 41(b) provides, in part: “(b) **Involuntary Dismissal; Effect.** If the plaintiff fails
36 to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the
action or any claim against it.” Fed. R. Civ. P. 41(b).

1 or comply with the rules of civil procedure or the court's orders); Ferdik v. Bonzelet, 963 F.2d
2 1258, 1260 (9th Cir. 1992) ("Pursuant to Federal Rule of Civil Procedure 41(b), the district court
3 may dismiss an action for failure to comply with any order of the court."), cert. denied, 506 U.S.
4 915 (1992); Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district
5 court's dismissal of case for failure to prosecute when habeas petitioner failed to file a first
6 amended petition), cert. denied, 538 U.S. 909 (2003). This court's Local Rules are in accord.
7 See E. Dist. Local Rule 110 ("Failure of counsel or of a party to comply with these Rules or with
8 any order of the Court may be grounds for imposition by the Court of any and all sanctions
9 authorized by statute or Rule or within the inherent power of the Court."); E. Dist. Local
10 Rule 183(a) (providing that a pro se party's failure to comply with the Federal Rules of Civil
11 Procedure, the court's Local Rules, and other applicable law may support, among other things,
12 dismissal of that party's action).

13 A court must weigh five factors in determining whether to dismiss a case for
14 failure to prosecute, failure to comply with a court order, or failure to comply with a district
15 court's local rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

- 16 (1) the public's interest in expeditious resolution of litigation;
17 (2) the court's need to manage its docket; (3) the risk of prejudice
18 to the defendants; (4) the public policy favoring disposition of
cases on their merits; and (5) the availability of less drastic
alternatives.

19 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th
20 Cir. 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of Appeals has stated that
21 "[t]hese factors are not a series of conditions precedent before the judge can do anything, but a
22 way for a district judge to think about what to do." In re Phenylpropanolamine (PPA) Prods.
23 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

24 Although involuntary dismissal can be a harsh remedy, the five relevant factors
25 weigh in favor of dismissal of this action. The first two factors strongly support dismissal of this
26 action. Plaintiff's failure to file a second amended complaint and a response to the OSC despite

1 clear warnings of the consequences for such failures, strongly suggests that plaintiff has
2 abandoned this action or is not interested in seriously prosecuting it. See, e.g., Yourish v. Cal.
3 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) (“The public’s interest in expeditious resolution of
4 litigation always favors dismissal.”). Any further time spent by the court on this case, which
5 plaintiff has demonstrated a lack of any serious intention to pursue, will consume scarce judicial
6 resources and take away from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that
7 district courts have inherent power to manage their dockets without being subject to
8 noncompliant litigants).

9 In addition, the third factor, which considers prejudice to a defendant, should be
10 given some weight. See Ferdik, 963 F.2d at 1262. Although the court has not ordered that
11 plaintiff’s operative complaint be served on defendants, defendants remain named in a lawsuit. It
12 is difficult to quantify the prejudice suffered by defendants here; however, it is enough that
13 defendants have been named in a lawsuit that plaintiff has effectively abandoned. At a
14 minimum, defendants have been prevented from attempting to resolve this case on the merits by
15 plaintiff’s unreasonable delay in prosecuting this action. Unreasonable delay is presumed to be
16 prejudicial. See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

17 The fifth factor, which considers the availability of less drastic measures, also
18 supports dismissal of this action. As noted above, the court has actually pursued remedies that
19 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d
20 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court
21 actually tries alternatives before employing the ultimate sanction of dismissal.”), cert. denied,
22 Malone v. Frank, 488 U.S. 819 (1988). The court excused plaintiff’s initial failure to file a
23 second amended complaint, provided plaintiff with additional time to file a second amended
24 complaint, and granted plaintiff an opportunity to explain his failure to file that amended
25 pleading. Moreover, the court advised plaintiff that he was required to actively prosecute his
26 action and follow the court’s orders. It also warned plaintiff in clear terms that failure to file a

1 second amended complaint and a response to the OSC would result in a recommendation of
2 dismissal. Warning a plaintiff that failure to take steps towards resolution of his or her action on
3 the merits will result in dismissal satisfies the requirement that the court consider the alternatives.
4 See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur decisions also suggest that a district court’s warning
5 to a party that his failure to obey the court’s order will result in dismissal can satisfy the
6 ‘consideration of alternatives’ requirement.”) (citing Malone, 833 F.2d at 132-33). At this
7 juncture, the court finds no suitable alternative to a recommendation for dismissal of this action.
8 This finding is supported by the fact that plaintiff is proceeding in forma pauperis and thus would
9 very likely be unable to pay any monetary sanction imposed in lieu of dismissal.

10 The court also recognizes the importance of giving due weight to the fourth factor,
11 which addresses the public policy favoring disposition of cases on the merits. However, for the
12 reasons set forth above, factors one, two, three, and five strongly support a recommendation of
13 dismissal of this action, and factor four does not materially counsel otherwise. Dismissal is
14 proper “where at least four factors support dismissal or where at least three factors ‘strongly’
15 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
16 and quotation marks omitted). Under the circumstances of this case, the other relevant factors
17 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,
18 963 F.2d at 1263.

19 III. CONCLUSION

20 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

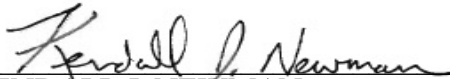
- 21 1. Plaintiff’s action be dismissed without prejudice.
- 22 2. The Clerk of Court be directed to close this case.

23 These findings and recommendations are submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
25 days after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).

1 Such a document should be captioned "Objections to Magistrate Judge's Findings and
2 Recommendations." Any response to the objections shall be filed with the court and served on
3 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
4 Failure to file objections within the specified time may waive the right to appeal the District
5 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
6 1153, 1156-57 (9th Cir. 1991).

7 IT IS SO RECOMMENDED.

8 DATED: June 17, 2011

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11 KENDALL J. NEWMAN
12 UNITED STATES MAGISTRATE JUDGE
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