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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TRACY FIDEL ALFORD,
Plaintiff,
v.
DR. MA,
Defendant.

No. 2:13-cv-2493 KJM KJN P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On March 9, 2016, defendant was granted an extension of time in which to file a renewed motion for summary judgment. (ECF No. 34.) On April 8, 2016, defendant filed a supplemental motion for summary judgment. On April 8, 2016, defendants provided plaintiff with the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹ See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

On June 24, 2016, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. In that same order, plaintiff was advised of the requirements for filing an opposition to the pending motion and that failure to oppose such a

¹ The court provided plaintiff with Rand notice on March 18, 2014 (ECF No. 15), and defendants also provided plaintiff with Rand notice on March 25, 2015. (ECF No. 26 at 29-32.)

1 motion would be deemed as consent to have the: (a) pending motion granted; (b) action
2 dismissed for lack of prosecution; and (c) action dismissed based on plaintiff's failure to comply
3 with these rules and a court order. Plaintiff was also informed that failure to file an opposition
4 would result in a recommendation that this action be dismissed pursuant to Rule 41(b) of the
5 Federal Rules of Civil Procedure.²

6 The thirty day period has now expired and plaintiff has not responded to the court's order.

7 "Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
8 action for failure to comply with any order of the court." Ferdik v. Bonzelet, 963 F.2d 1258,
9 1260 (9th Cir. 1992). "In determining whether to dismiss a case for failure to comply with a
10 court order the district court must weigh five factors including: '(1) the public's interest in
11 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
12 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
13 and (5) the availability of less drastic alternatives.'" Ferdik, 963 F.2d at 1260-61 (quoting
14 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
15 F.3d 52, 53 (9th Cir. 1995).

16 In determining to recommend that this action be dismissed, the court has considered the
17 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal
18 of this action. The action has been pending for over 2 years and 10 months, and has reached the
19 stage, set by the court's June 9, 2014 scheduling order, for resolution of dispositive motions and,
20 if necessary, preparation for pretrial conference and jury trial. (See Scheduling Order, ECF No.
21 19.) Plaintiff's failure to comply with the Local Rules and the court's June 24, 2016, order
22 suggests that he has abandoned this action and that further time spent by the court thereon will
23 consume scarce judicial resources in addressing litigation which plaintiff demonstrates no
24 intention to pursue.

25 Under the circumstances of this case, the third factor, prejudice to defendants from
26 plaintiff's failure to oppose the motion, also favors dismissal. Plaintiff's failure to oppose the

27 ² Plaintiff failed to timely oppose defendant's initial motion for summary judgment and was
28 provided these same admonitions on June 23, 2015. (ECF No. 29.)

1 motion prevents defendants from addressing plaintiff's substantive opposition, and would delay
2 resolution of this action, thereby causing defendants to incur additional time and expense.


3 The fifth factor also favors dismissal. The court has advised plaintiff of the requirements
4 under the Local Rules and granted ample additional time to oppose the pending motion, all to no
5 avail. The court finds no suitable alternative to dismissal of this action.

6 The fourth factor, public policy favoring disposition of cases on their merits, weighs
7 against dismissal of this action as a sanction. However, for the reasons set forth supra, the first,
8 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,
9 those factors outweigh the general public policy favoring disposition of cases on their merits. See
10 Ferdik, 963 F.2d at 1263.

11 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
12 dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(b).

13 These findings and recommendations are submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
15 after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
18 objections shall be filed and served within fourteen days after service of the objections. The
19 parties are advised that failure to file objections within the specified time may waive the right to
20 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: November 1, 2016

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24 KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE

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