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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MALACHI ANTHONY RILEY,
Plaintiff,
v.
SACRAMENTO POLICE
DEPARTMENT, et al.,
Defendants.

No. 2:14-cv-00462-KJM-AC

FINDINGS & RECOMMENDATIONS

Plaintiff is proceeding in this action in pro per. On August 5, 2015, defendants filed a motion for summary judgment noticed for hearing on September 16, 2015. ECF No. 55. On September 11, 2015, the court continued the hearing in light of plaintiff’s failure to file a timely opposition or notice of non-opposition. ECF No. 58. The court warned plaintiff at that time that a second failure to file a timely opposition or notice of non-opposition would lead to the dismissal of this action for failure to prosecute. Id. On October 13, 2015, when plaintiff failed to file an opposition or notice of non-opposition a second time, the court issued an order to show cause why this case should not be dismissed for failure to prosecute. ECF No. 59. Plaintiff has yet to respond to the court’s order.

Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure, failure to

1 comply with the court’s local rules, or failure to comply with the court’s orders. See, e.g.,
2 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act sua sponte
3 to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S. Forest
4 Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action pursuant
5 to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff’s failure to prosecute or comply
6 with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d 1258, 1260
7 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
8 an action for failure to comply with any order of the court.”); Pagtalunan v. Galaza, 291 F.3d 639,
9 642–43 (9th Cir. 2002) (affirming district court’s dismissal of case for failure to prosecute when
10 habeas petitioner failed to file a first amended petition). This court’s Local Rules are in accord.
11 See E.D. Local Rule 110 (“Failure of counsel or a party to comply with these Rules or with any
12 order of the Court may be grounds for imposition by the Court of any and all sanctions authorized
13 by statute or Rule or within the inherent power of the Court.”); E.D. Local Rule 183(a) (providing
14 that a pro se party’s failure to comply with the Federal Rules of Civil Procedure, the court’s Local
15 Rules, and other applicable law may support, among other things, dismissal of that party’s
16 action).

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

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

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

28 Although involuntary dismissal can be a harsh remedy, on balance the five relevant

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

10 In addition, the third factor, which considers prejudice to a defendant, should be given
11 some weight. See Ferdik, 963 F.2d at 1262. Defendants have been active in this lawsuit since
12 February 2014. See ECF Nos. 8–13. Plaintiff's failure to timely oppose defendants' motion for
13 summary judgment at this stage prejudices defendants by unreasonably delaying the resolution of
14 this matter, while needlessly increasing its cost. Unreasonable delay is presumed to be
15 prejudicial. See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

16 The fifth factor, which considers the availability of less drastic measures, also supports
17 dismissal of this action. The court has already pursued remedies that are less drastic than a
18 recommendation of dismissal, including providing plaintiff with the opportunity to remedy his
19 failure to file an opposition. See Malone v. U.S. Postal Serv., 833 F.2d 128, 132 (9th Cir. 1987)
20 ("[E]xplicit discussion of alternatives is unnecessary if the district court actually tries alternatives
21 before employing the ultimate sanction of dismissal."), cert. denied, 488 U.S. 819 (1988). Having
22 failed to receive a response from plaintiff, the court finds no suitable alternative to a
23 recommendation for dismissal of this action.

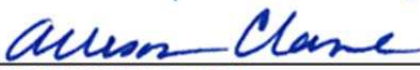
24 The court also recognizes the importance of giving due weight to the fourth factor, which
25 addresses the public policy favoring disposition of cases on the merits. However, for the reasons
26 set forth above, factors one, two, three, and five strongly support a recommendation of dismissal
27 of this action, and factor four does not materially counsel otherwise. Dismissal is proper "where
28 at least four factors support dismissal or where at least three factors 'strongly' support dismissal."

1 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations and quotation marks
2 omitted). Under the circumstances of this case, the other relevant factors outweigh the general
3 public policy favoring disposition of actions on their merits. See Ferdik, 963 F.2d at 1263.

4 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed without
5 prejudice pursuant to Federal Rule of Civil Procedure 41(b) and 4(m) and Local Rules 110 and
6 183(a).

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
11 Findings and Recommendations.” Any reply to the objections shall be served and filed within
12 fourteen (14) days after service of the objections. The parties are advised that failure to file
13 objections within the specified time may waive the right to appeal the District Court’s order.
14 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: November 13, 2015

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17 ALLISON CLAIRE
18 UNITED STATES MAGISTRATE JUDGE
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