

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Justin Whittier,)	CIV-12-2430-PHX-DGC (MHB)
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
Joe Arpaio, et al.,)	
)	
Defendants.)	

On November 13, 2013, Plaintiff Justin Whittier, who is confined in the Maricopa County Lower Buckeye Jail, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983. In a December 27, 2013 Order, the Court dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On January 10, 2013, Plaintiff filed his First Amended Complaint (Doc. 7). The Court screened the amended pleading, ordered Defendant Arpaio to answer, and dismissed the remaining Defendants without prejudice. Further, in the screening Order, Plaintiff was directed to file and serve a notice of change of address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff was warned that if he failed to timely comply with the provisions set forth in the screening Order, the action would be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

On May 6, 2013, the docket reflected that mail sent from the Clerk of the Court to Plaintiff was returned as undeliverable indicating that Plaintiff is no longer in custody. (Doc.

1 9.) Having failed to notify the Court of a new address, on May 20, 2013, the Court ordered
2 that no later than “ten (10) days from the date of [its] Order, Plaintiff shall either: (1) file a
3 notice of change of address, or (2) show cause why this matter should not be dismissed for
4 failure to prosecute in light of his failure to file a notice of change of address.” (Doc. 10.)
5 The time for responding has expired, and Plaintiff has not responded to the Order to show
6 cause or, otherwise, communicated with the Court. The Court, therefore, will determine
7 whether dismissal is appropriate.

8 Plaintiff has the general duty to prosecute this case. See Fidelity Philadelphia Trust
9 Co. v. Pioche Mines Consolidated, Inc., 587 F.2d 27, 29 (9th Cir. 1978). Rule 41(b) of the
10 Federal Rules of Civil Procedure provides that “[f]or failure of the plaintiff to prosecute or
11 to comply with these rules or any order of court, a defendant may move for dismissal of an
12 action.” In Link v. Wabash Railroad Co., 370 U.S. 626, 629-31 (1962), the Supreme Court
13 recognized that a federal district court has the inherent power to dismiss a case *sua sponte*
14 for failure to prosecute, even though the language of Rule 41(b) of the Federal Rules of Civil
15 Procedure appears to require a motion from a party. Moreover, in appropriate circumstances,
16 the Court may dismiss a complaint for failure to prosecute even without notice or hearing.
17 See id. at 633.

18 In determining whether Plaintiff’s failure to prosecute warrants dismissal of the case,
19 the Court must weigh the following five factors: “(1) the public’s interest in expeditious
20 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to
21 the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the
22 availability of less drastic sanctions.” Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988)
23 (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)). “The first two of these
24 factors favor the imposition of sanctions in most cases, while the fourth factor cuts against
25 a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser
26 sanctions.” Wanderer v. Johnson, 910 F.2d 652, 656 (9th Cir. 1990).

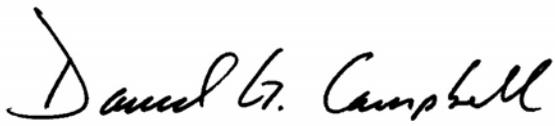
27 Here, the first, second, and third factors favor dismissal of this case. Plaintiff’s failure
28 to respond to Court orders prevents the case from proceeding in the foreseeable future. The

1 fourth factor, as always, weighs against dismissal. The fifth factor requires the Court to
2 consider whether a less drastic alternative is available. The Court has already ordered
3 Plaintiff to (1) file a notice of change of address, or (2) show cause why this matter should
4 not be dismissed for failure to prosecute in light of his failure to file a notice of change of
5 address. Plaintiff has not responded.

6 The Court finds that only one less drastic sanction is realistically available. Rule
7 41(b) provides that a dismissal for failure to prosecute operates as an adjudication upon the
8 merits unless the court in its order for dismissal otherwise specifies. In the instant case, the
9 Court finds that a dismissal with prejudice would be unnecessarily harsh. The Amended
10 Complaint and this action will therefore be dismissed without prejudice pursuant to Rule
11 41(b) of the Federal Rules of Civil Procedure.

12 **IT IS THEREFORE ORDERED** that pursuant to Rule 41(b) of the Federal Rules
13 of Civil Procedure this action is dismissed without prejudice.

14 DATED this 23rd day of July, 2013.

15
16 

17
18

19 David G. Campbell
20 United States District Judge
21
22
23
24
25
26
27
28