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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Douglas Eric Ross,

10 Plaintiff,

11 v.

12 Jeffrey Van Winkle, et al.,

13 Defendants.
14

No. CV-14-01480-PHX-NVW (ESW)

ORDER

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16 This is a civil rights action brought by pro se prisoner Douglas Eric Ross
17 (“Plaintiff”) pursuant to 42 U.S.C. § 1983. Before the Court is Defendants Akin and
18 Contreras’ unopposed Motion to Dismiss for Failure to Prosecute (Doc. 117), which
19 Defendant Burke has joined (Doc. 121). For the following reasons, the Court will grant
20 Defendants’ Motion (Doc. 117) and Joinder (Doc. 121) and dismiss this action with
21 prejudice.

22 **I. BACKGROUND**

23 **A. Plaintiff’s Claims**

24 Plaintiff is confined in the Arizona State Prison Complex-Eyman (“ASPC-
25 Eyman”) in Florence, Arizona. On June 27, 2014, Plaintiff filed a four-count Complaint
26 (Doc. 1) pertaining to an alleged assault committed by former ASPC-Eyman Correctional
27 Officer Defendant Burke. Plaintiff also sued Correctional Officers Akin and Contreras
28 and Deputy Warden Van Winkle for their alleged conduct in regards to the alleged

1 assault. The Court ordered Defendants Burke, Akin, and Contreras to answer Counts
2 One, Two, and Three. (Doc. 22 at 7). The Court dismissed Count Four and Defendant
3 Van Winkle. (*Id.*).

4 In July 2015, the Court granted Plaintiff leave to file a six-count First Amended
5 Complaint (Doc. 67) naming Burke, Akin, Contreras, and other prison personnel as
6 Defendants. (Docs. 64, 68). After screening the First Amended Complaint pursuant to
7 28 U.S.C. § 1915(e)(2), the Court found that Count Six stated an Eighth Amendment
8 claim against Defendant Quintana, who was the nurse in charge at ASPC-Eyman at the
9 time of the alleged assault. (Doc. 64 at 8-9; Doc. 68 at 1-2). The Court ordered
10 Defendant Burke to answer Count One, Defendant Akin to answer Count Two,
11 Defendant Contreras to answer Count Three, and Defendant Quintana to answer Count
12 Six. (Doc. 68 at 2). The remaining counts and Defendants were dismissed. Defendants
13 Burke, Akin, Contreras, and Quintana have answered the First Amended Complaint.
14 (Doc. 69, 78, 85).

15 **B. Defendant Quintana’s Motion for Summary Judgment**

16 Inmates must exhaust their available administrative remedies before bringing
17 Section 1983 lawsuits based on prison conditions. 42 U.S.C. § 1997e(a). On December
18 2, 2015, Defendant Quintana filed a Motion for Summary Judgment for Failure to
19 Exhaust Administrative Remedies (Doc. 98). Defendant Quintana asserted that Plaintiff
20 did not file any grievance appeals relating to the allegations against her and therefore
21 failed to exhaust his administrative remedies. (*Id.* at 4).

22 The Court advised Plaintiff of the requirements for responding to the Motion for
23 Summary Judgment. (Docs. 101, 111). Plaintiff, however, did not file a response. On
24 January 26, 2016, the Court granted Defendant Quintana’s Motion for Summary
25 Judgment. (Doc. 112).

26 **C. Defendants’ Motion to Compel Plaintiff’s Medical Records**

27 In November 2015, Defendants Akin and Contreras moved for an order
28 compelling Plaintiff to sign an authorization for the release of Plaintiff’s medical records.

1 (Doc. 90). Plaintiff did not respond. On December 22, 2015, the Court granted the
2 Motion to Compel. (Doc. 109).

3 **D. Defendants’ Motion to Dismiss for Failure to Prosecute**

4 On March 1, 2016, Defendants Akin and Contreras filed a Motion to Dismiss for
5 Failure to Prosecute (Doc. 117), which indicates that Plaintiff has refused to sign an
6 authorization releasing his medical records. Defendants Akin and Contreras stated that
7 because this case involves “allegations of physical assault, with no available video
8 footage to prove or disprove the claims, medical records would be the best evidence by
9 which to test Plaintiff’s allegations.” (*Id.* at 2). Defendants Akin and Contreras asserted
10 that they are prejudiced by Plaintiff’s refusal to provide access to Plaintiff’s medical
11 records. (*Id.*).

12 On March 3, 2016, the Court advised Plaintiff of the March 18, 2016 deadline for
13 responding to the Motion to Dismiss (Doc. 117). (Doc. 119). In bold letters, the Court
14 informed Plaintiff that pursuant to Rule 7.2(i) of the Local Rules of Civil Procedure
15 (“LRCiv”), the “failure of Plaintiff to respond to the Motion to Dismiss may in the
16 discretion of the Court be deemed as consent to the granting of that Motion without
17 further notice, and judgment may be entered dismissing the complaint and action with
18 prejudice as to Defendants Akin and Contreras” (*Id.* at 2) (bold omitted).

19 Defendant Burke joined the Motion to Dismiss (Doc. 117) on March 11, 2016.
20 (Doc. 121). On that same date, the Court affirmed the March 18, 2016 response deadline.
21 (Doc. 123). In bold letters, the Court advised Plaintiff that the failure to “respond to the
22 Motion to Dismiss may in the discretion of the Court be deemed as consent to the
23 granting of that Motion without further notice, and judgment may be entered dismissing
24 the complaint and action with prejudice as to all defendants pursuant to LRCiv 7.2(i).”
25 (*Id.* at 2) (bold omitted).

26 In addition, the Court required Plaintiff to sign and return the authorization for
27 medical records that counsel for Defendants Akin and Contreras previously mailed to
28 Plaintiff. (Doc. 122). The Court set a deadline of March 18, 2016 and advised Plaintiff

1 in bold letters that if he “fails to comply with this Order, the Court may dismiss this
2 action with prejudice without further notice to Plaintiff.” (*Id.* at 1-2) (bold omitted).

3 **E. Plaintiff’s Allegation that He Did Not Receive the Motion to Dismiss**

4 On March 15, 2016, Plaintiff filed two documents asserting that he did not receive
5 a copy of the Motion to Dismiss (Doc. 117). (Docs. 124, 125). Plaintiff states that “all I
6 have is a ‘Court Order’ indicating a deadline to respond, but do not know what the
7 defendants filed as my failure to prosecute & what other arguments that may have been
8 presented in support of this Motion.” (Doc. 124 at 2). The Court observed that the
9 Certificate of Service attached to the Motion to Dismiss did not reflect Plaintiff’s updated
10 address as notified in a document that Plaintiff filed in January 2015. (Doc. 48). The
11 Court ordered Defendants Akin and Contreras to mail the Motion to Dismiss to Plaintiff
12 at the updated address. (Doc. 127 at 2). The Court required Plaintiff to respond to the
13 Motion to Dismiss no later than fourteen days from the date of service. (*Id.*).
14 Defendants Akin and Contreras filed a Notice of Service stating that on March 29, 2016,
15 they mailed Plaintiff the Motion to Dismiss in compliance with the Court’s March 11,
16 2016 Order (Doc. 127). (Doc. 128). Plaintiff did not respond by the April 15, 2016
17 deadline.¹

18 On May 6, 2016, counsel for Defendants Akin and Contreras informed the Court
19 that Plaintiff has not complied with the Court’s order to sign an authorization releasing
20 Plaintiff’s medical records. (Doc. 130).

21 **II. DISCUSSION**

22 As Plaintiff has been warned, the Court may deem Plaintiff’s failure to respond to
23 Defendants’ Motion to Dismiss for Failure to Prosecute (Doc. 117) and Joinder (Doc.
24 121) as Plaintiff’s consent to the granting of the Motion. *See* LRCiv 7.2(i); *Ghazali v.*
25 *Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995). Prior to granting the Motion, however, the
26 Court must weigh five factors: (i) the public’s interest in expeditious resolution of

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28 ¹ Fourteen days from March 29, 2016 is April 12, 2016. Pursuant to Fed. R. Civ.
P. 6(d), three days are added to the response deadline.

1 litigation, (ii) the Court’s need to manage its docket, (iii) the risk of prejudice to the
2 defendants, (iv) the public policy favoring disposition of cases on their merits, and (v) the
3 availability of less drastic sanctions. *See Ghazali*, 46 F.3d at 53 (citing *Henderson v.*
4 *Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). All five factors weigh in favor of
5 dismissal.

6 **A. Factors One and Two: Public’s Interest in Expedient Resolution of**
7 **Litigation and the Court’s Need to Manage its Docket**

8 “[T]he public’s interest in expeditious resolution of litigation always favors
9 dismissal.” *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). This
10 case has been pending for nearly two years. Plaintiff has been given ample time to
11 respond to Defendants’ Motion to Dismiss, but has failed to do so. Plaintiff has caused
12 this case to stall by disobeying the Court’s order to sign a medical release. Plaintiff’s
13 conduct has adversely affected the Court and public’s interest in judicial efficiency and
14 the prompt resolution of cases. Further, the Court’s interest in controlling its docket
15 supports the dismissal of this action that Plaintiff has effectively abandoned. *See Ferdik*
16 *v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (recognizing the “district courts’ power
17 to manage their dockets without being subject to the endless vexatious noncompliance of
18 litigants . . .”). For these reasons, factors one and two weigh in favor of dismissing this
19 case.

20 **B. Factor Three: The Risk of Prejudice to Defendants**

21 “To prove prejudice, a defendant must establish that plaintiff’s actions impaired
22 defendant’s ability to proceed to trial or threatened to interfere with the rightful decision
23 of the case.” *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (citing *Malone v.*
24 *United States Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987)). Plaintiff alleges that he
25 has sustained physical injuries arising from Defendants’ actions. Plaintiff’s refusal to
26 allow Defendants to obtain Plaintiff’s medical records prevents the full and fair litigation
27 of this case. The risk of prejudice to Defendants is great if this case is not dismissed for
28 Plaintiff’s failure to prosecute and obey the Court’s orders.

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IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment in favor of Defendants, dismiss this action with prejudice, and terminate the case.

Dated this 19th day of May, 2016.



Neil V. Wake
United States District Judge