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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SCOTT E. POMBRIO,)	NO. CV 10-5604-GHK (MAN)
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
MAYOR A. VILLARAIGOSA, et al.,)	UNITED STATES MAGISTRATE JUDGE
)	
Defendants.)	

This Report and Recommendation is submitted to the Honorable George H. King, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On August 16, 2010, plaintiff filed a civil rights complaint. On August 20, 2010, he filed a First Amended Complaint. The First Amended Complaint names as defendants the Mayor of the City of Los Angeles and the "City-County of Los Angeles." The First Amended Complaint alleges

1 a single cause of action under the Americans with Disabilities Act of
2 1990 ("ADA"). Plaintiff alleges that defendants have violated the ADA
3 by implementing and enforcing policies at the Los Angeles Public Library,
4 Main Branch, and the Los Angeles County Law Library prohibiting library
5 users from bringing bags of personal possessions into the libraries and
6 leaving their personal possessions on library patios. Plaintiff
7 contends that these policies impair his ability to use the libraries.

8
9 On October 15, 2010, pursuant to the screening provisions of 28
10 U.S.C. § 1915(e)(2), the Court issued a Memorandum And Order Dismissing
11 First Amended Complaint With Leave To Amend (the "October Order"). In
12 the October Order, the Court concluded that the First Amended Complaint
13 fails to state any cognizable ADA claim against the defendants and fails
14 to state a claim against defendant Mayor Villaraigosa. The October
15 Order dismissed the First Amended Complaint with leave to amend and
16 directed plaintiff to file his Second Amended Complaint within 30 days.
17 The October Order expressly advised plaintiff as follows:

18
19 **Plaintiff is explicitly cautioned that failure to timely**
20 **file a Second Amended Complaint, or failure to correct the**
21 **deficiencies described herein, may result in a recommendation**
22 **that this action be dismissed pursuant to Fed. R. Civ. P.**
23 **41(b).**

24
25 (October Order at 12; emphasis in original.)

26
27 On December 3, 2010, plaintiff filed a belated request for a seven
28 month extension of time to file his Second Amended Complaint. On

1 December 6, 2010, the Court extended plaintiff's deadline for filing the
2 Second Amended Complaint to January 15, 2011. The Court's December 6,
3 2010 Order explicitly stated: "Plaintiff is cautioned that, if he has
4 not filed a Second Amended Complaint in compliance with the [October
5 Order] by that deadline, the Court may recommend the dismissal of this
6 action."

7
8 Plaintiff did not comply with the October Order by his extended
9 deadline, and he has not requested any further extension of time to do
10 so. It is now 20 days past the extended deadline established by the
11 October Order and the December 6, 2010 Order, and plaintiff has not
12 filed a Second Amended Complaint or otherwise communicated with the
13 Court. Accordingly, it is recommended that this action be dismissed,
14 without prejudice, pursuant to Rule 41(b).

15
16 **DISCUSSION**
17

18 Rule 41(b) of the Federal Rules of Civil Procedure grants federal
19 district courts the authority to *sua sponte* dismiss actions for failure
20 to prosecute. Link v. Wabash R. Co., 370 U.S. 626, 629-30, 82 S. Ct.
21 1386, 1388 (1962). In determining whether dismissal for lack of
22 prosecution is proper, a court must weigh several factors, including:
23 (1) the public's interest in expeditious resolution of litigation; (2)
24 the court's need to manage its docket; (3) the risk of prejudice to
25 defendants; (4) the availability of less drastic sanctions; and (5) the
26 public policy favoring the disposition of cases on their merits.
27 Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002); Ferdik v.
28 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

1 In this case, only the fifth factor, the general policy favoring
2 resolution of cases on the merits, arguably favors retention of this
3 action on the Court's docket. However, there currently is no operative
4 complaint in this case. Moreover, for the reasons set forth in the
5 October Order, plaintiff's asserted ADA claim is not cognizable, and it
6 is unclear whether he can state and prove any claim for relief against
7 the named defendants. Put otherwise, it does not appear that the merits
8 of plaintiff's claim, as it has been pleaded, favor retention of the
9 case on the docket.

10
11 Plaintiff's delay necessarily implicates both the public interest
12 in the expeditious resolution of litigation and the Court's need to
13 efficiently manage its docket, the first and second factors. See
14 Pahtalunan, 291 F.3d at 642; see also Yourish v. California Amplifier,
15 191 F.3d 983, 990-91 (9th Cir. 1999). Plaintiff's noncompliance with
16 the October Order has caused this action to come to a halt, thereby
17 impermissibly allowing plaintiff, rather than the Court, to control the
18 pace of the proceedings in this case. *Id.*

19
20 The third factor -- possible prejudice to the opposing party -- is,
21 at best, neutral. While there is no evidence that plaintiff's actions
22 have resulted in any actual prejudice to defendants as yet, the Ninth
23 Circuit has held that prejudice may be presumed from unreasonable delay.
24 See In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994); Moore v. Teflon
25 Communications Corp., 589 F.2d 959, 967-68 (9th Cir. 1978).

26
27 In addition, the fourth factor favors dismissal. The October Order
28 specifically admonished plaintiff that the failure to file a Second

1 Amended Complaint on a timely basis could result in the dismissal of
2 this action under Rule 41(b). The Court's December 6, 2010 Order
3 reiterated that caution. See Ferdik, 963 F.2d at 1262.

4
5 A balancing of these factors thus leads to the conclusion that
6 dismissal without prejudice, pursuant to Rule 41(b), is warranted. See
7 Ferdik, 963 F.2d at 1263 (dismissal appropriate where strongly supported
8 by three factors).

9
10 **RECOMMENDATION**

11
12 For the foregoing reasons, IT IS RECOMMENDED that the District
13 Judge issue an Order: (1) accepting and adopting this Report and
14 Recommendation; and (2) directing that Judgment be entered dismissing
15 this action without prejudice for lack of prosecution.

16 DATED: February 4, 2011.

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19 _____
20 MARGARET A. NAGLE
21 UNITED STATES MAGISTRATE JUDGE

22
23 **NOTICE**

24
25 Reports and Recommendations are not appealable to the Court of
26 Appeals, but may be subject to the right of any party to file objections
27 as provided in the Local Rules Governing the Duties of Magistrate Judges
28 and review by the District Judge whose initials appear in the docket

1 number. No notice of appeal pursuant to the Federal Rules of Appellate
2 Procedure should be filed until entry of the judgment of the District
3 Court.

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