

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFREY K. GOMEZ,
Plaintiff,
vs.
EDWARD S. ALAMEIDA, JR., et al.,
Defendants.

) 1:04-cv-05495-LJO-GSA-PC
)
) FINDINGS AND RECOMMENDATIONS TO
) DISMISS CASE FOR FAILURE TO OBEY
) COURT ORDERS
) (Doc. 27, 31.)
)
) OBJECTIONS, IF ANY, DUE IN THIRTY
) DAYS
)

On January 28, 2009, the court issued an order requiring plaintiff to file a fourth amended complaint within thirty days. (Doc. 27.) The thirty day period expired, and plaintiff failed to comply with the order. However, given that plaintiff had filed an appeal which was pending until April 28, 2009, the court issued another order on May 7, 2009, giving plaintiff another thirty- day opportunity to comply with the court's January 28, 2009 order. (Doc. 31.) More than forty-five days has passed, and plaintiff has not filed a fourth amended complaint or otherwise responded to the court's orders.¹

In determining whether to dismiss this action for failure to comply with the directives set forth in its order, “the Court must weigh the following factors: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring

¹Plaintiff did, however, file another appeal which was resolved on June 23, 2009. (Docs. 35, 39.)

1 disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citing
2 Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

3 “The public’s interest in expeditious resolution of litigation always favors dismissal,” id.
4 (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action has
5 been pending for more than five years. Plaintiff’s failure to respond to the Court’s orders may reflect
6 Plaintiff’s disinterest in properly prosecuting this case. In such an instance, the Court cannot continue
7 to expend its scarce resources assisting a litigant who will not help himself by submitting an amended
8 pleading making the clarifications required by the Court. Thus, both the first and second factors weigh
9 in favor of dismissal.

10 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of
11 itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently increases the risk
12 that witnesses’ memories will fade and evidence will become stale,” id., and it is Plaintiff’s failure to set
13 forth clear claims in the first instance and to respond to the Court’s order in the second instance that is
14 causing delay. Therefore, the third factor weighs in favor of dismissal.

15 As for the availability of lesser sanctions, at this stage in the proceedings there is little available
16 to the Court which would constitute a satisfactory lesser sanction while protecting the Court from further
17 unnecessary expenditure of its scarce resources. Plaintiff is proceeding in forma pauperis in this action,
18 making monetary sanctions of little use, and given the early stage of these proceedings, the preclusion
19 of evidence or witnesses is not available. However, inasmuch as the dismissal being considered in this
20 case is without prejudice, the Court is stopping short of issuing the harshest possible sanction of
21 dismissal with prejudice.

22 Finally, because public policy favors disposition on the merits, this factor will always weigh
23 against dismissal. Id. at 643.

24 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed based on
25 plaintiff’s failure to obey the court’s orders of January 28, 2009 and May 7, 2009.

26 These findings and recommendations are submitted to the United States District Judge assigned
27 to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being
28

1 served with these findings and recommendations, plaintiff may file written objections with the court.
2 Such a document should be captioned "Objections to Magistrate Judge's Findings and
3 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
4 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5
6 IT IS SO ORDERED.

7 **Dated: July 6, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28