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

HOMER TYRONE LEWIS,
Plaintiff,
vs.
JAMES E. TILTON et al.,
Defendants.

CASE NO. 1:07-cv-00519 OWW DLB P

FINDINGS AND RECOMMENDATIONS
RECOMMENDING ACTION BE DISMISSED
WITH PREJUDICE

A. Background

Plaintiff Homer Tyrone Lewis (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in a civil rights action pursuant to 42 U.S.C. § 1983. Defendants have not yet appeared in this action.

On March 24, 2008, Plaintiff filed a first amended complaint. (Doc. 12). Incorporated by reference is a signed declaration of Inmate Kenneth R. Calihan, Inmate No. F-17158. (Doc. 12, First Amended Complaint, Exh. J). On November 19, 2008, the Court received a letter from Inmate Kenneth R. Calihan, charging Plaintiff with falsifying Inmate Calihan’s signature and filing a false declaration with the Court. (Doc. 15). Inmate Calihan states that he did not sign the declaration.

This Court issued an order on November 25, 2008, commanding Plaintiff to show cause why his conduct in preparing and filing the declaration of Inmate Kenneth Calihan is not in violation of Rule 11 and why sanctions, up to and including dismissal of this action, should not be imposed. Plaintiff was

1 also advised of the Court’s inherent power to impose terminating sanctions. (Doc. 16). Plaintiff was
2 ordered to file a response within fifteen days of service of the order.

3 On December 12, 2008, Plaintiff filed a motion for a sixty-day extension of time to file his
4 response. (Doc. 17). In his motion, Plaintiff attests that he is housed in Administrative Segregation.
5 Plaintiff attests that he requires additional time to secure a declaration from his witness, Inmate Ernesto
6 Fierro, E-72521, whom is also housed in Administrative Segregation, and has knowledge of the relevant
7 events at issue and will dispute Inmate Calihan’s assertions.

8 A show cause hearing was held in this matter on January 23, 2009 to allow Plaintiff an
9 opportunity to be heard. Plaintiff Homer Lewis was present and testified. Plaintiff’s witness inmate
10 Fierro and inmate Calihan also testified. The Court now issues the instant Findings and
11 Recommendations.

12 **B. Legal Standard**

13 **I. Rule 11 of the Federal Rule of Civil Procedure**

14 Federal judges have broad powers to impose sanctions against parties or counsel for improper
15 conduct in litigation. Rule 11(b) of the Federal Rules of Civil Procedure provides that “[b]y presenting
16 to the court a pleading, written motion or other paper - whether by signing, filing, submitting, or later
17 advocating it - an attorney or unrepresented party certifies that to the best of the person’s knowledge,
18 information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being
19 presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase
20 the cost of ligation;...and (3) the factual contentions have evidentiary support, or, if so specifically
21 identified, will likely have evidentiary support after a reasonable opportunity for further investigation
22 or discovery...” Rule 11(c) provides for the imposition of appropriate sanctions for a violation of Rule
23 11(b) on any attorney, law firm or party that has violated the rule or is responsible for the violation
24 committed. Any sanction imposed must be limited to what suffices to deter repetition of the conduct
25 or comparable conduct by others similarly situated. F.R.C.P. 11(c)(4).

26 **II. Court’s Inherent Equitable Power**

27 As Plaintiff was previously informed, “courts have inherent power to dismiss an action when
28 a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly

1 administration of justice.” Anheuser-Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 348 (9th
2 Cir. 1995) (quoting Wyle v. R. J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983)). “[B]ecause
3 dismissal is so harsh a penalty, it should be imposed only in extreme circumstances.” Wyle, 709 F.2d
4 at 589. “It is well settled that dismissal is warranted where...a party has engaged deliberately in
5 deceptive practices that undermine the integrity of judicial proceedings” Anheuser-Busch, Inc., 69
6 F.3d at 348.

7 Before imposing a sanction of dismissal, the Court must weigh several factors: (1) the public’s
8 interest in expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of
9 prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on its merits;
10 and (5) the availability of less drastic sanctions. Valley Engineers, Inc. v. Electric Engineering Co., 158
11 F.3d 1051, 1057 (9th Cir. 1998), cert. denied, 526 U.S. 1064, 119 S.Ct. 1455 (1999); In re Exxon
12 Valdez, 102 F.3d 429, 433 (9th Cir. 1996); Henry v. Gill Industries, Inc., 983 F.2d 943, 948 (9th Cir.
13 1993); United States v. Kahaluu Constr. Co., Inc., 857 F.2d 600, 603 (9th Cir. 1988); Thompson v.
14 Housing Authority of City of Los Angeles, 782 F.2d 829, 831 (9th Cir.), cert. denied, 479 U.S. 829, 107
15 S.Ct. 112 (1986).

16 **C. Discussion**

17 At issue at the hearing is a three page declaration submitted by Plaintiff as an exhibit to his First
18 Amended Complaint. The first two pages sets forth the purported statements of the declarant Inmate
19 Calihan; the third page bears Inmate Calihan’s signature and is dated January 6, 2008. (Doc. 12, Exh.
20 J).

21 Inmate Calihan testified that he did not prepare the declaration and denied the bulk of the
22 statements contained in the declaration as untrue. Inmate Calihan testified that he had prepared another
23 declaration for use in a separate court proceeding, although he cannot recall the particular proceeding
24 for which it was prepared. Inmate Calihan testified that he believed that the third page of the declaration
25 at issue here, bearing his signature, was detached from his other declaration and used to prepare this
26 purportedly false declaration.

27 Plaintiff then testified on his own behalf. Plaintiff testified that the declaration at issue is genuine
28 and that Inmate Calihan “confessed” to typing and signing the declaration. Plaintiff testified that he had

1 told Inmate Calihan that he was suing the defendants named in this action, but did not go into great detail
2 about the lawsuit. When asked by the Court how Inmate Calihan was able to prepare a detailed
3 declaration tailored to the allegations of Plaintiff, Plaintiff testified that Inmate Calihan had learned the
4 details of the lawsuit from Inmate Ernesto Fierro, who had been assisting Plaintiff with the litigation.

5 Next, Inmate Ernesto Fierro testified that he had drafted Plaintiff's first lawsuit.¹ Inmate Fierro
6 testified that Inmate Calihan showed him the signed declaration in June 2007. Inmate Fierro also
7 testified that he never told Inmate Calihan of the allegations in Plaintiff's complaint, although he may
8 have discussed them once and only briefly with Calihan prior to June 2007. Inmate Fierro explicitly
9 testified that before the declaration was done up, he did not discuss the facts as set forth in the
10 declaration with Inmate Calihan. When questioned about the similarities between the allegations set
11 forth in the complaint and the facts in the declaration, Inmate Fierro testified that he was surprised by
12 the similarities, and assumed that Inmate Calihan knew what was in the complaint by talking with
13 Plaintiff. Inmate Fierro also testified that he did not tell anyone about the lawsuit.

14 For the reasons set forth in the following paragraph of this Findings and Recommendations, the
15 Court finds that Plaintiff's explanation for the preparation of the declaration by Inmate Calihan are not
16 credible.

17 First, Inmate Calihan testified that he did not prepare the declaration and that his signature was
18 improperly taken from another document. Second, Plaintiff testified that Inmate Calihan was provided
19 with information about the lawsuit from Inmate Fierro, and was thus able to prepare a declaration helpful
20 to Plaintiff. However, Plaintiff's testimony is directly contradicted by his own witness, Inmate Fierro,
21 who testified that he did not inform Inmate Calihan of the allegations in Plaintiff's complaint. Inmate
22 Fierro also testified that he knew of the declaration as early as June 2007 and that it was signed and dated
23 a few months prior, when the fact is that the declaration at issue was purportedly signed and executed
24 on January 6, 2008. Plaintiff's attempts to explain how Inmate Calihan could have knowledge sufficient
25 to prepare a declaration useful to Plaintiff are simply not credible.

26 The Court finds that Inmate Calihan did not prepare nor sign the declaration at issue. The Court

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28 ¹ The Court presumes that witness Inmate Fierro is referring to Plaintiff's first complaint filed in this action, on April
2, 2007. (Doc. 1).

1 further finds that Plaintiff intentionally and in bad faith made false representations to the court by filing
2 the declaration with his first amended complaint, and also during the hearing held on January 23, 2009
3 with respect to the authenticity of the declaration. Having found that Plaintiff made false representations
4 to the court, the court turns to the propriety of dismissal as a sanction.

5 The court does not undertake the imposition of dismissal as a sanction lightly. Wyle, 709 F.2d
6 at 589. However, having considered the availability of lesser sanctions, nothing short of dismissal is
7 appropriate in a situation such as this where there is a close nexus between Plaintiff's misconduct and
8 the merits of his claims. See Anheuser-Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 348 (9th
9 Cir. 1995).

10 The court finds that the public's interest in expeditiously resolving this litigation and the court's
11 interest in managing the docket weigh in favor of dismissal, as this case has been pending since April
12 2, 2007. The third factor, risk of prejudice to the party seeking sanctions, is inapplicable since
13 defendants have not yet appeared in the action and are not moving for sanctions. However, a
14 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action, and this
15 action has been unnecessarily delayed by Plaintiff's conduct. Anderson v. Air West, 542 F.2d 522, 524
16 (9th Cir. 1976). The fourth factor -- public policy favoring disposition of cases on their merits -- is
17 greatly outweighed by the factors in favor of dismissal discussed herein. Finally, Plaintiff is a prisoner
18 and is proceeding in forma pauperis. The imposition of monetary sanctions would have little or no effect
19 on Plaintiff, and would be a sanction of no consequence. The court could simply disregard the
20 declaration; however, allowing Plaintiff to continue with this action would not deter repetition of such
21 conduct or comparable conduct, and such a sanction would serve only to place Plaintiff back in the
22 position he should have been in - proceeding with his first amended complaint minus the false
23 declaration. Dismissal is the only sanction that adequately redresses the severity of Plaintiff's
24 misrepresentations to this court.

25 **D. Conclusion**

26 Accordingly, the Court HEREBY FINDS that Plaintiff Homer Lewis has intentionally misled
27 the Court, and RECOMMENDS that this action is dismissed, with prejudice, as a sanction for Plaintiff's
28 false representations.

1 These Findings and Recommendations are submitted to the United States District Judge assigned
2 to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **twenty (20) days** after
3 being served with these Findings and Recommendations, Plaintiff may file written objections with the
4 court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and
5 Recommendations.” Plaintiff is advised that failure to file objections within the specified time may
6 waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: February 4, 2009

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE