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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA
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9 George Reed, III,

10 Plaintiff,

11 vs.

12 Captain Williams; Counselor Sprady; R.)
13 Shannon; C. Hudson; J. Herrera; CC II; S.)
14 Kern; H. Martinez CCII; Appeals)
15 Coordinators for Pleasant Valley State)
16 Prison, et al.

17 Defendants.

No. CV 1-08-00910-MHM

ORDER

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19 Currently before the Court is Defendant's¹ Motion to Dismiss. (Doc. 20-1). After
20 reviewing all documents submitted by the parties and the relevant law, the Court issues the
21 following order.

22 **I. BACKGROUND**

23 Plaintiff, who presently resides at the Pleasant Valley State Prison, initiated this action
24 pursuant to 42 U.S.C. § 1983 on June 27, 2008. (Doc. 1). On April 17, 2009, this Court
25 issued an order dismissing Plaintiff's complaint with leave to amend for failing to comply
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28 ¹As of this Court's order dated November 6, 2009, J. Herrera is the only remaining Defendant.

1 with Rules 8 and 10 of the Federal Rules of Civil Procedure. (Doc. 11). Plaintiff filed his
2 First Amended Complaint on May 13, 2009. (Doc. 12). Six months later, on November 6,
3 2009, this Court issued an order dismissing all of Plaintiff's claims except one. (Doc. 13).
4 The surviving claim alleged that Defendant withheld a package from Plaintiff, thus depriving
5 Plaintiff of his property without due process of law. (Doc. 12). In the November 6 order,
6 the Court issued the following warning: "If Plaintiff fails to timely comply with every
7 provision of this Order . . . the Court may dismiss this action without further notice." Id.

8 On May 7, 2010, Defendant filed a Motion to Dismiss Plaintiff's due process claim
9 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 20-1). Plaintiff did
10 not respond to Defendant's motion. Accordingly, on June 7, 2010, Defendant filed a
11 Declaration of Counsel in Lieu of Reply to Opposition to Defendant Herrera's Motion to
12 Dismiss. (Doc. 21) On October 25, 2010, this Court issued a notice pursuant to Wyatt v.
13 Terhune, 315 F.3d 1108, 1120 n.4 (9th Cir. 2003), instructing Plaintiff that he had until
14 November 15, 2010, to respond to Defendant's motion, and, pursuant to Local Rule 230(l),
15 failure to do so could "be deemed a waiver of any opposition to the granting of the motion
16 and [could] result in the imposition of sanctions, including dismissal of the action." (Doc.
17 24). Plaintiff nonetheless failed to file a response to Defendant's motion.

18 **II. DISCUSSION**

19 Local Rule of Civil Procedure 230(l) provides that failure "of the responding party to
20 file an opposition or to file a statement of no opposition may be deemed a waiver of any
21 opposition to the granting of the motion." Local Rule 230(l). Plaintiff may not escape this
22 rule simply by virtue of his being a pro se litigant. See King v. Atiyeh, 814 F.2d 565, 567
23 (9th Cir. 1986) (holding that "[p]ro se litigants must follow the same rules of procedure that
24 govern other litigants.") Accordingly, the key inquiry for the Court is whether granting
25 dismissal in this case would be appropriate.

26 The Ninth Circuit has created a "five-part 'test' to determine whether a dismissal
27 sanction is just: (1) the public's interest in expeditious resolution of the litigation; (2) the
28 court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions;

(4) the public policy favoring disposition of cases on the merits; and (5) the availability of less drastic sanctions.” Valley Eng’rs Inc. v. Elec. Eng’g Co., 158 F.3d 1051, 1057 (9th Cir. 1998). Under this test, “where a court order is violated, factors 1 and 2 support sanctions and 4 cuts against case-dispositive sanctions, so 3 and 5 . . . are decisive.” Id. Factor 5 “involves consideration of three subparts: whether the court explicitly discussed alternative sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of dismissal.” Id.

Based on the aforementioned test, the Court’s inquiry necessarily centers on factors 3 and 5. Under factor 3, the Court must consider the “risk of prejudice to the party seeking sanctions.” Valley Eng’rs, 158 F.3d at 1057. In this case, the risk of prejudice to the Defendant is continued expense and delay in connection with this litigation. Defendant appears to have made all reasonable efforts to ensure that the case is resolved efficiently and expeditiously. Plaintiff’s failure to respond to Defendant’s motion frustrates those efforts and prolongs the litigation process. Accordingly, factor 3 weighs in favor of granting dismissal.

Next, the Court must consider factor 5 and its three subparts. Although the Court has neither explicitly discussed alternative sanctions nor tried them, it has on several occasions warned Plaintiff about the possibility of dismissal. To the extent that the alternative sanction in this case would likely be an extension, the Court finds that it has already given Plaintiff sufficient time to respond to Defendant’s motion. Therefore, in light of this Court’s repeated warnings and the six months that Plaintiff has already had to answer Defendant’s motion, factor 5 weighs in favor of granting dismissal.

III. PLAINTIFF’S OTHER MOTIONS

To the extent that the Court finds that granting dismissal in this case would be appropriate, Plaintiff’s additional motions for production of documents, appointment of counsel, extension of time, and leave to amend (Doc. 25) are moot and the Court need not consider them.

IV. CONCLUSION

1 For the foregoing reasons, the Court finds that granting dismissal in this case would
2 be just.

3 **Accordingly,**

4 **IT IS ORDERED** granting Defendant's Motion to Dismiss. (Doc. 20)

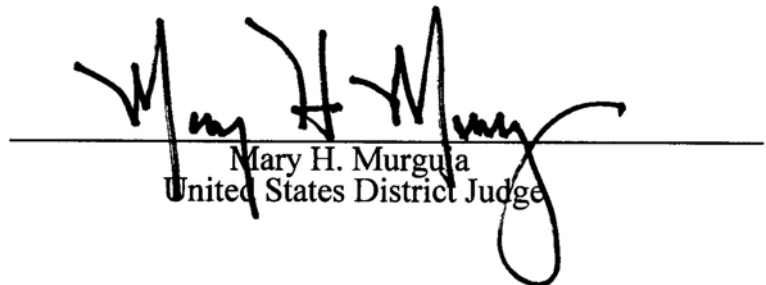
5 **IT IS FURTHER ORDERED** dismissing Plaintiff's amended complaint without
6 prejudice.

7 **IT IS FURTHER ORDERED** denying Plaintiff's Motion for Production of
8 Documents, Appointment of Counsel, Extension of Time, and Leave to Amend as moot.
9 (Doc. 25)

10 **IT IS FURTHER ORDERED** directing the Clerk of Court to terminate this matter.

11 DATED this 22nd day of March, 2011.

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Mary H. Murgula
United States District Judge