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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KHALID LANIER,

Plaintiff,

v.

CITY OF FRESNO, et al.,

Defendants.

CASE NO. 1:10-cv-01120-LJO-SKO

**FINDINGS AND
RECOMMENDATIONS THAT
PLAINTIFF'S COMPLAINT BE
DISMISSED**

OBJECTIONS DUE: 21 DAYS

I. INTRODUCTION

On January 19, 2012, the Court issued an order (Doc. 81) continuing the scheduling conference in this action to March 6, 2012, and requiring Plaintiff Khalid Lanier ("Plaintiff"), currently representing himself in *propria persona*, to contact counsel for Defendant Officer Castillo ("Officer Castillo") to meet and confer regarding the issues at question in the scheduling conference, as required pursuant to the Court's Order Setting Mandatory Scheduling Conference (Doc. 5-1).

On February 28, 2012, Officer Castillo filed a separate scheduling report, indicating that "Plaintiff ha[d] failed to meet and confer with Defendant's counsel regarding the joint scheduling order and to provide Defendant's counsel with his contact information." (Doc. 82, 3:11-13.)

On March 1, 2012, the Court issued an order to show cause as to why Plaintiff's action should not be dismissed for failure to comply with the Court's orders. (Doc. 83.) The order to show cause

1 was served on Plaintiff via U.S. mail on March 1, 2012, and was returned to the Court as
2 undeliverable, unable to forward, on March 12, 2012.

3 For the reasons set forth below, the Court RECOMMENDS that Plaintiff's claim be
4 dismissed pursuant to Local Rule 110 for Plaintiff's failure to obey the Court's orders.

5 II. FACTUAL AND PROCEDURAL BACKGROUND

6 On June 21, 2010, Plaintiff, then represented by counsel, filed a complaint against
7 Defendants City of Fresno ("City"), Officer Castillo, Officer Stephen Taylor ("Officer Taylor"), and
8 County of Fresno ("County" or, collectively, "Defendants"). (Doc. 1.) Plaintiff alleged that he had
9 been driving a vehicle on June 20, 2008, "which, unbeknownst to him, had been stolen by his
10 girlfriend and passenger, Carol Schumann" ("Ms. Schumann"). (Doc. 1, ¶ 16.) Plaintiff asserted that
11 he was unaware of the stolen status of the vehicle, or that Ms. Schumann was "in possession of a
12 firearm," until a police car indicated that he should "pull over." (Doc. 1, ¶ 16.) Plaintiff alleged that
13 he exited the freeway and "proceeded for several blocks until he parked the [vehicle] in the vicinity
14 of the Twilight Haven retirement home." (Doc. 1, ¶ 17.) Plaintiff contended that, although he was
15 attempting to "surrender peaceably to the officers," the officers "deliberately collided the front of
16 their vehicle with the front driver side" of the vehicle Plaintiff had been driving. (Doc. 1, ¶¶ 17-18.)
17 "[P]erceiving that the police officers intended to drive their squad car directly" into Plaintiff's
18 vehicle, Plaintiff "fled from the vehicle he had been driving, narrowly escaping." (Doc. 1, ¶ 19.)
19 Plaintiff then "ran into a neighboring building, followed by Officer Castillo." (Doc. 1, ¶ 20.)
20 Plaintiff alleged that he "again attempted to surrender to Officer Castillo," but Officer Castillo "shot
21 Plaintiff . . . in the back." (Doc. 1, ¶ 20.)

22 On October 8, 2010, District Judge Lawrence J. O'Neill granted Defendants' motions to
23 dismiss and allowed Plaintiff leave to amend. (Docs. 21, 22.) Plaintiff filed a first amended
24 complaint on October 19, 2010, alleging the same facts as above. (Doc. 23, ¶¶ 16-20.) On
25 December 9, 2010, Judge O'Neill granted in part Defendants' motion to dismiss, dismissing with
26 prejudice the claims against Officer Taylor, City, and County, but permitting certain claims against
27 Officer Castillo to proceed. (Doc. 31.) On January 18, 2011, Judge O'Neill denied Plaintiff's motion
28 for reconsideration and corrected the claims remaining in effect against Officer Castillo. (Doc. 40.)

1 On February 25, 2011, Plaintiff filed a motion for relief from judgment and to amend, which was
2 denied by Judge O'Neill on March 22, 2011. (Docs. 45, 50.)

3 On November 30, 2011, the Court granted the motion to withdraw as attorney of record
4 brought by Plaintiff's former counsel. (Doc. 74.) The Court ordered that if Plaintiff obtained new
5 counsel, such new counsel must file an appearance by no later than January 17, 2012. (Doc. 74.)
6 Alternatively, Plaintiff was ordered to notify the Court if he would be proceeding in *propria persona*.
7 (Doc. 74.) Plaintiff did not file any notice regarding his representation, nor did new counsel file a
8 substitution of attorney with the Court. The Court had indicated, however, that if Plaintiff failed to
9 file any notice, the Court would find that Plaintiff had elected to represent himself. (Doc. 74.)

10 The Court ordered that a joint scheduling report be filed by no later than January 17, 2012,
11 for a status conference set for January 24, 2012. (Doc. 74.) On January 17, 2012, Officer Castillo
12 filed his amended scheduling conference report, stating that Plaintiff, representing himself in *propria*
13 *persona*, had not responded. (Doc. 80.)

14 On January 19, 2012, the Court issued an order (Doc. 81) continuing the scheduling
15 conference to March 6, 2012, and ordering Plaintiff to contact counsel for Officer Castillo to meet
16 and confer regarding the issues at question in the scheduling conference, as required pursuant to the
17 Court's Order Setting Mandatory Scheduling Conference (Doc. 5-1). Plaintiff was informed that
18 "[a] party representing himself in *propria persona* is required to comply with the Federal Rules of
19 Civil Procedure, the Local Rules of this Court, and all Court orders" and that "[t]he Court's Order
20 Setting Mandatory Scheduling Conference, issued on June 22, 2010, requires all parties to meet and
21 confer prior to submitting a joint scheduling report." (Doc. 81, 2:3-11; *see also* Doc. 5-1.) Plaintiff
22 was also ordered to provide the Court and Defendant's counsel with his contact information,
23 including a telephone number. (Doc. 81, p. 2.) Plaintiff was "cautioned that failure to comply with
24 the Court's order may result in the imposition of sanctions, including dismissal of his action."
25 (Doc. 81, 2:21-22.) The Court's January 19, 2012, order was served on Plaintiff via U.S. mail; the
26 mailing was not returned.

27 On February 28, 2012, Officer Castillo filed a separate scheduling report, indicating that
28 "Plaintiff has failed to meet and confer with Defendant's counsel regarding the joint scheduling order

1 and failed to provide Defendant's counsel with his contact information." (Doc. 82, 3:11-13.)
2 Plaintiff also failed to provide the Court with his contact information as required in the January 19,
3 2012, order. (Doc. 81, 2:19-20.) On March 1, 2012, the Court issued an order to show cause as to
4 why Plaintiff's action should not be dismissed for failure to comply with the Court's order and
5 vacated the scheduling conference. (Doc. 83.) The order to show cause was served on Plaintiff via
6 U.S. mail, and was returned as undeliverable as addressed, unable to forward, on March 12, 2012.

7 III. DISCUSSION

8 A party representing himself in *propria persona* is required to comply with the Federal Rules
9 of Civil Procedure, the Local Rules of this Court, and all Court orders. The Local Rules of the
10 United States District Court, Eastern District of California, Rule 110 provides that "[f]ailure of
11 counsel or of a party to comply with these Rules or with any order of the Court may be grounds for
12 the imposition by the Court of any and all sanctions . . . within the inherent power of the Court."
13 District courts have the inherent power to control their dockets and "[i]n the exercise of that power
14 they may impose sanctions including, where appropriate . . . dismissal." *Thompson v. Housing Auth.*,
15 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action, with prejudice, based on a party's
16 failure to prosecute an action, failure to obey a court order, or failure to comply with local rules. *See*,
17 *e.g.*, *Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local
18 rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply
19 with an order requiring amendment of complaint); *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir.
20 1988) (dismissal for failure to comply with local rule requiring pro se plaintiff to keep court apprised
21 of address); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure
22 to comply with court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal
23 for failure to lack of prosecution and failure to comply with local rules).

24 In determining whether to dismiss an action for lack of prosecution, failure to obey a court
25 order, or failure to comply with local rules, the court must consider several factors: (1) the public's
26 interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk
27 of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and
28 (5) the availability of less drastic alternatives. *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir.

1 2002); *see also* *Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24; *Malone*, 833 F.2d at
2 130; *Ferdik*, 963 F.2d at 1260-61; *Ghazali*, 46 F.3d at 53. "These factors are not a series of
3 conditions precedent before the judge can do anything, but a way for a district judge to think about
4 what to do." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir.
5 2006) (citation omitted).

6 Here, the Court finds that dismissal of Plaintiff's complaint is appropriate. In considering the
7 first factor, "[t]he public's interest in expeditious resolution of litigation always favors dismissal."
8 *Pagtalunan*, 291 F.3d at 642 (citation omitted). Plaintiff failed to comply with the June 22, 2010,
9 Court Order Setting Mandatory Scheduling Conference (Doc. 5-1) requiring all parties to meet and
10 confer prior to the filing of the scheduling report. Plaintiff also failed to comply with the Court's
11 January 19, 2012, Order (Doc. 81) reminding Plaintiff of his need to comply with the Court Order
12 Setting Mandatory Scheduling Conference, requiring Plaintiff to contact Officer Castillo's counsel
13 to meet and confer, and ordering Plaintiff to provide the Court and opposing counsel his current
14 contact information, including telephone number. Due to Plaintiff's failure to comply with the
15 Court's orders, the first factor weighs in favor of dismissing the action.¹

16 The second factor, the court's need to manage its docket, also weighs in favor of dismissal.
17 "The court cannot manage its docket if it maintains cases in which a plaintiff fails to litigate his case.
18 The court's limited resources must be spent on cases in which the litigants are actually proceeding."
19 *Lopez v. Washington Mut. Bank, F.A.*, No. 1:09-CV-1838 AWI/JLT, 2010 WL 2629039, at *1 (E.D.
20 Cal. Jun. 25, 2010). Here, Plaintiff has essentially disappeared from the proceedings and has not
21 provided the Court or opposing counsel with any method to contact him. The Court cannot keep
22 cases open and pending on the chance that a party may some day decide to continue litigating the
23 action. "It would be absurd to require the district court to hold a case in abeyance indefinitely just
24

25 ¹ The Court notes that its last order, the order to show cause dated March 1, 2012, (Doc. 83), was served on
26 Plaintiff via U.S. mail and was returned as undeliverable. However, the January 19, 2012, order (Doc. 81) requiring
27 Plaintiff to meet and confer with Officer Castillo's counsel was served on Plaintiff via U.S. mail and not returned; as such,
28 Plaintiff received notice of that Court order and nonetheless failed to comply. Plaintiff had notice that he was to provide
the Court and opposing counsel his contact information (Doc. 81, 3:6-7.) Further, Local Rule 182(f) provides in
pertinent part that "[e]ach appearing attorney and pro se party is under a continuing duty to notify the Clerk and all other
parties of any change of address or telephone number of the attorney or pro se party." As such, Plaintiff failed to comply
with both the Court's order and the Local Rule.

1 because it is unable, through the plaintiff's own fault, to contact the plaintiff to determine if his
2 reasons for not prosecuting his lawsuit are reasonable or not." *Carey*, 856 F.2d at 1441.

3 The third factor, the risk of prejudice to defendants, also weighs in favor of dismissal, since
4 a presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
5 *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976).

6 The fourth factor of public policy favoring disposition on the merits normally weighs against
7 dismissal. *Id.* at 643. "At the same time, a case that is stalled or unreasonably delayed by a party's
8 failure to comply with deadlines . . . cannot move forward toward resolution on the merits. Thus, [the
9 Ninth Circuit has] also recognized that this factor 'lends little support' to a party whose responsibility
10 it is to move a case toward disposition on the merits but whose conduct impedes progress in that
11 direction." *In re PPA*, 460 F.3d at 1228 (citation omitted). As such, this factor has little weight in
12 cases such as this where the plaintiff essentially appears to be unable or unwilling to proceed with
13 the action. *See id.*; *Lopez*, 2010 WL 2629039, at *2.

14 Concerning the fifth factor, the availability of lesser sanctions, "[t]he district court abuses its
15 discretion if it imposes a sanction of dismissal without first considering the impact of the sanction
16 and the adequacy of less drastic sanctions." *In re PPA*, 460 F.3d at 1228. The court must consider
17 the "feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate,"
18 whether there was an "alternative methods of sanctioning or curing the malfeasance before ordering
19 dismissal," and whether "the court warn[ed] the plaintiff of the possibility of dismissal before
20 actually ordering dismissal." *Id.* at 1229 (citations omitted). Here, Plaintiff was expressly warned
21 that dismissal would result from his noncompliance with the Court's order. The Court's January 19,
22 2012, order stated that Plaintiff's "failure to comply with the Court's order may result in the
23 imposition of sanctions, including dismissal of his action." (Doc. 81, 2:21-22) Further, because
24 Plaintiff is proceeding pro se and has essentially disappeared from the action, monetary sanctions
25 are not a viable alternative. As such, under the circumstances present in this case, there is no
26 alternative to dismissal.

