

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

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

CHRISTOPHER CASTILLO,

1:11-cv-0262-LJO-GSA-PC

Plaintiff,

FINDINGS AND RECOMMENDATION TO
DISMISS CASE FOR FAILURE TO OBEY A
COURT ORDER

vs.

NORTH KERN STATE PRISON,

OBJECTIONS, IF ANY, DUE IN 30 DAYS

Defendant.

_____ /

On April 5, 2011, the Court issued an order requiring Plaintiff to complete and return the Court's consent/decline form within thirty days, indicating whether he consents to or declines the jurisdiction of a Magistrate Judge in this action. The thirty-day period has now expired, and Plaintiff has not returned the Court's form or otherwise responded to the Court's order.

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

1 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639,
2 642 (9th Cir. 2002) (citing 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,”
4 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
5 action has been pending since November 17, 2010. Plaintiff’s failure to respond to the Court’s
6 order may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court
7 cannot continue to expend its scarce resources assisting a litigant who will not help himself by
8 returning the Court’s form. Thus, both the first and second factors weigh in favor of dismissal.

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

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

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

23 Accordingly, the Court HEREBY RECOMMENDS that this action be dismissed based
24 on Plaintiff’s failure to obey the Court’s order of April 5, 2011.

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

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

6
7 IT IS SO ORDERED.

8 **Dated: May 25, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE