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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALEJANDRO VARGAS HERNANDEZ,

1:11-cv-01237-LJO-GSA-PC

Plaintiff,

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

v.

SIX UNKNOWN AGENTS, et al.,

OBJECTIONS, IF ANY, DUE IN THIRTY
DAYS

Defendants.

_____ /

Plaintiff is a federal prisoner proceeding pro se with this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). On July 28, 2011, the Court issued an order requiring plaintiff to submit an application to proceed in forma pauperis, or pay the filing fee for this action, within thirty days. The thirty day period has now expired, and plaintiff has not submitted an application, paid the filing fee, or otherwise responded to the court's order.

Local Rule 110 provides that “failure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and all sanctions . . . within the inherent power of the Court.” 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;

1 and (5) the public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291
2 F.3d 639, 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,”” id.
4 (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action
5 has been pending since July 18, 2011. Plaintiff’s failure to resolve the payment of the filing fee for
6 this action may reflect Plaintiff’s lack of interest in prosecuting his case. In such an instance, the
7 Court cannot continue to expend its scarce resources assisting a litigant who will not respond to the
8 Court’s order to enable his case to proceed. Thus, both the first and second factors weigh in favor
9 of dismissal.

10 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and
11 of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently increases the
12 risk that witnesses’ memories will fade and evidence will become stale,” id., and it is plaintiff’s
13 failure to respond to the Court’s order and to notify the Court of his current address that is causing
14 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
16 available to the Court which would constitute a satisfactory lesser sanction while protecting the
17 Court from further unnecessary expenditure of its scarce resources. Plaintiff has not paid the filing
18 fee for this action, indicating that he may be indigent, making monetary sanctions of little use, and
19 given the early stage of these proceedings, the preclusion of evidence or witnesses is not available.
20 However, inasmuch as the dismissal being considered in this case is without prejudice, the Court is
21 stopping short of issuing the harshest possible sanction of 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 order of July 28, 2011.

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

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

5
6 IT IS SO ORDERED.

7 **Dated: September 22, 2011**

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE