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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES R. PATTERSON,

Plaintiff,

v.

KERN COUNTY SHERIFF'S OFFICE, et
al.,

Defendants.

Case No. 1:12-cv-00132-LJO-MJS (PC)

**FINDINGS AND RECOMMENDATION TO
DISMISS ACTION WITH PREJUDICE FOR
FAILURE TO OBEY COURT ORDER AND
FAILURE TO PROSECUTE**

(ECF No. 39)

FOURTEEN (14) DAY DEADLINE

Plaintiff James R. Patterson is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This matter proceeds on a Third Amended Complaint excessive force claim against Defendants McMasters and Miller.

On September 5, 2013, Defendants filed a motion to dismiss the action under the unenumerated provisions of Federal Rule of Civil Procedure 12(b) asserting that Plaintiff failed to exhaust administrative remedies. Plaintiff was required to file an opposition or a statement of non-opposition by not later than September 30, 2013. Local Rule 230(*l*). The September 30, 2013 deadline passed without Plaintiff responding or seeking an extension

1 of time to do so.

2 On January 13, 2014, the Court ordered Plaintiff to file opposition to Defendants'
3 Motion by not later than February 6, 2014.¹ The February 6, 2014 deadline passed without
4 Plaintiff responding or seeking an extension of time to do so. Plaintiff has not obeyed the
5 Court's January 13, 2014 order.

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

21 In determining whether to dismiss an action for lack of prosecution, failure to obey a
22 court order, or failure to comply with local rules, the Court must consider several factors: (1)
23 the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its
24 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition
25 of cases on their merits; and (5) the availability of less drastic alternatives. Thompson, 782
26 F.2d at 831; Henderson, 779 F.2d at 1423-24; Malone, 833 F.2d at 130; Ferdik, 963 F.2d at
27 1260-61; Ghazali, 46 F.3d at 53.

28 ¹ Pursuant to Woods v. Carey, 684 F.3d 934 (9th Cir. 2012) and Wyatt v. Terhune, 315 F.3d 1108 (9th Cir.
2003), the Court notified Plaintiff of rights and requirements for opposing Defendants' Motion to Dismiss.

1 In the instant case, the public's interest in expeditiously resolving this litigation and
2 the Court's interest in managing its docket weigh in favor of dismissal. The third factor, risk
3 of prejudice to Defendants, also weighs in favor of dismissal, since a presumption of injury
4 arises from the occurrence of unreasonable delay in prosecuting this action which arose
5 over two years ago. Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth
6 factor - public policy favoring disposition of cases on their merits - is greatly outweighed by
7 the factors in favor of dismissal discussed herein. Finally, as for the availability of lesser
8 sanctions, at this stage in the proceedings there is little available which would constitute a
9 satisfactory lesser sanction while preserving scarce Court resources. Plaintiff has not paid
10 the filing fee for this action and is likely unable to pay, making monetary sanctions of little
11 use.

12 Plaintiff has failed to oppose Defendants' Motion to Dismiss notwithstanding that he
13 was given additional time to do so. This is a reasonable basis to conclude Plaintiff is unable
14 to make a showing in opposition. See 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b); Local
15 Rule 230(l). Plaintiff was expressly advised by the Court that failure to file an opposition or
16 a statement of non-opposition may result in dismissal of the action with prejudice, for failure
17 to prosecute. (Order, ECF No. 39, at 2:8-10.)

18 Having balanced all relevant factors, the undersigned finds they weigh in favor of
19 dismissal and accordingly HEREBY RECOMMENDS that this action be DISMISSED WITH
20 PREJUDICE based on Plaintiff's failure to obey the Court's order and failure to prosecute.

21 These Findings and Recommendation will be submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within
23 fourteen (14) days after being served with these Findings and Recommendation, the
24 parties may file written objections with the Court. The document should be captioned
25 "Objections to Magistrate Judge's Findings and Recommendation." A party may respond to
26 another party's objections by filing a response within fourteen (14) days after being served
27 with a copy of that party's objections. The parties are advised that failure to file objections
28 within the specified time may waive the right to appeal the District Court's order. Martinez v.

1 Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: February 11, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE