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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DANA GRAY,
Plaintiff,
vs.
ROMERO, et al.,
Defendants.

1:13-cv-01473-DAD-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANT
REBEL’S MOTION TO DISMISS UNDER
RULE 41(b) BE DENIED
(ECF No. 221.)**
**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS**

I. BACKGROUND

Dana Gray (“Plaintiff”) is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. This case was filed on September 12, 2013. (ECF No. 1.)

On May 4, 2017, the court issued an order striking Plaintiff’s Fifth Amended Complaint, filed on May 2, 2017, as it was filed in violation of the court’s order, without leave to amend until after the resolution of pending motions affecting the content of the complaint. (ECF No. 206.) The court’s order required the parties to respond within thirty days whether it

1 would be beneficial for the court to schedule a settlement conference. (Id.) Defendants
2 responded that a settlement conference would not be beneficial. (ECF Nos. 207, 220.)

3 On June 17, 2017, defendant Dr. Cyril Rebel (“Defendant”) filed a motion to dismiss
4 this case under Rule 41(b) of the Federal Rules of Civil Procedure. (ECF No. 221.) On June
5 21, 2017, Plaintiff filed an opposition and a motion for summary judgment. (ECF No. 225.)
6 On June 28, 2017, Defendant filed a reply. (ECF No. 227.)

7 **II. DEFENDANT REBEL’S MOTION TO DISMISS UNDER RULE 41(b)**

8 **A. Legal Standard**

9 Rule 41(b) provides that a plaintiff’s failure to prosecute her claim or to comply with a
10 court order is grounds for involuntary dismissal of the action. Fed. R. Civ. P. 41(b); see also
11 Link v. Wabash R.R., 370 U.S. 626, 629–31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (recognizing
12 the district court’s authority to dismiss a plaintiff’s action with prejudice for failure to prosecute
13 the action).

14 A dismissal under Rule 41(b) serves as an adjudication on the merits unless the
15 dismissal states otherwise. Fed. R. Civ. P. 41(b). Because dismissal under Rule 41(b) “is so
16 harsh a penalty it should be imposed as a sanction only in extreme circumstances.” Lal v.
17 California, 610 F.3d 518, 525 (9th Cir. 2010) (quoting Dahl v. City of Huntington Beach, 84
18 F.3d 363, 366 (9th Cir. 1996).

19 To avoid dismissal, a plaintiff is required to prosecute her claim with “reasonable
20 diligence.” Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976). “A Rule 41(b)
21 dismissal ‘must be supported by a showing of unreasonable delay.’” Omstead v. Dell, Inc., 594
22 F.3d 1081, 1084 (9th Cir. 2010) (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir.
23 1986). In determining whether to dismiss an action for failure to prosecute or comply with a
24 court order, the court must weigh five factors: “(1) the public’s interest in expeditious
25 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
26 defendants; (4) the availability of less drastic alternatives; and (5) the public policy favouring
27 disposition of cases on their merits.” Id. Dismissal may be justified when “at least four factors
28 support dismissal . . . or where at least three factors ‘strongly’ support dismissal.” Yourish v.

1 California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) (quoting Hernandez v. City of El
2 Monte, 138 F.3d 393, 399 (9th Cir. 1998).

3 **B. Defendant's Motion**

4 Defendant moves for the involuntary dismissal of this action and for an entry of
5 judgment in Defendant's favor, and against Plaintiff, on the grounds that "Plaintiff has
6 persisted with multiple filings, oppositions, objections, requests and motions that have
7 unnecessarily impeded the progress of this litigation, in blatant disregard for the rulings of this
8 Court." (Id. at 3:17-20.) Defendant asserts that Plaintiff failed to comply with the court's order
9 of March 28, 2017, which required Plaintiff to "file a fifth amended complaint not exceeding
10 25 pages in length, . . . adding sufficient factual allegations demonstrating that her claims against
11 defendants Rebel and Ziomek are not time-barred under California Code of civil Procedure §
12 340.5." (ECF No. 221 at 4:2-6, quoting ECF No. 184.) Defendant states that "Plaintiff's
13 response to this order was the submission of a (proposed) Fifth Amended Complaint which was
14 44 pages in length . . . [and] failed yet again to add sufficient factual allegations demonstrating
15 that her claims against Dr. Rebel were not time-barred." (Id. at 4:7-11.)

16 Defendant also attests that Plaintiff *sua sponte* offered testimony from a *pro bono*
17 expert witness despite the lack of authority to submit expert medical testimony at this stage of
18 the case. Defendant argues that he [Defendant] should not be subjected to this costly and
19 harassing litigation which has been proceeding for over four years and has incurred over
20 \$40,000 in attorney's fees and costs in the defense of Dr. Rebel.

21 Defendant contends that four of the five applicable factors enumerated above weigh in
22 favor of dismissal of this action: "(1) the public's interest in expeditious resolution of
23 litigation, because the progress of this case over the past 4+ years has been anything but
24 expeditious due to Plaintiff's incessant filings and non-compliance with Court orders; (2) this
25 Court's need to manage its docket, because the caseload of the Fresno Division is particularly
26 onerous; (3) the prejudice to Dr. Rebel, because of the time, energy and monetary expenses (in
27 excess of \$40,000) that he (and his professional liability carrier) have expended during the
28 pendency of this case; and (4) the absence of less drastic alternatives, because Plaintiff's claims

1 against Dr. Rebel are time-barred, as has already been determined by this Court.” ECF No. 221
2 at 7:3-12.)

3 **C. Plaintiff’s Opposition**

4 Plaintiff argues that Defendant misstated the facts in his motion to dismiss. Plaintiff
5 argues that she has shown that her claims are not time barred, because Defendant Rebel was her
6 specialist of record until April 19, 2011, and Plaintiff’s injuries are continuing violations.
7 Plaintiff claims that Defendant has delayed the proceedings by refusing to enter into settlement
8 negotiations for Plaintiff’s medical claims and by avoiding facing accountability for his
9 medical errors.

10 Plaintiff also asserts that she has been timely and compliant with court orders, that her
11 documents each have a clear objective related to prosecution, that she is entitled to use the
12 assistance of a jailhouse lawyer, and that Plaintiff’s, and her jailhouse lawyer’s criminal
13 convictions, are not relevant to this case.

14 Plaintiff cites case authority in support of her assertion that she has not failed to
15 prosecute this case. Plaintiff also argues that pursuant to the five factors enumerated above, her
16 case should not be dismissed because she has worked toward an expedient resolution of this
17 case; it is not prejudicial to Defendant for Plaintiff to have “medical merits;” Plaintiff should be
18 allowed to proceed with this case using the assistance of her jailhouse lawyer; and Plaintiff
19 favors adjudication of this case on the merits. (ECF No. 226 at 14:21-22.)

20 **D. Discussion**

21 The court does not find that Plaintiff failed to prosecute this case. On the contrary,
22 Plaintiff has shown extreme diligence in responding to court orders, filing motions, and
23 submitting arguments in support of her claims. To date, more than 230 documents have been
24 filed in this case, approximately half of them by Plaintiff.

25 However, the court *does* find that Plaintiff failed more than once to comply with court
26 orders. Most recently, on May 2, 2017, Plaintiff filed a Fifth Amended Complaint that was 44
27 pages long, in violation of the court’s March 28, 2017, order limiting her to 25 pages. (ECF
28 Nos. 184, 204.) This violation resulted in the striking of the Fifth Amended Complaint,

1 without leave to amend pending the resolution of pending motions. Plaintiff has also persisted
2 with unreasonable litigation practices such as filing voluminous documents without good cause,
3 filing multiple requests for the same relief, and inundating the court and Defendants with
4 unmeritorious motions.

5 As discussed below, the court finds that only two of the five factors strongly favor the
6 dismissal of this case at this time.

7 **1. The Public's Interest in Expeditious Resolution of Litigation**

8 The public's interest in expeditious resolution of litigation always favors dismissal.
9 Yourish, 191 F.3d at 990. This case has been pending more than four years, since September
10 12, 2013. Plaintiff has caused delays in the litigation by her filing of voluminous documents
11 and her persistence in challenging a large number of the court's decisions. However, other
12 delays that cannot be attributed to Plaintiff have also arisen due to the court's heavy caseload,
13 daily workload, and busy calendar. Nonetheless, whatever the reasons for delay, the court finds
14 that the public's interest in resolution of cases strongly favors dismissal of this case.

15 **2. The Court's Need to Manage Its Docket**

16 "District courts have an inherent power to control their dockets." In re
17 Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1227 (9th Cir. 2006) (quoting
18 Thompson v. Hous. Auth. of City of Los Angeles, 782 F.2d 829 (1986) (per curiam)). The
19 court's need to manage its docket favors dismissal when the plaintiff's conduct causes "the
20 action to come to a complete halt thereby allowing [the plaintiff] to control the pace of the
21 docket rather than the Court." Yourish, 191 F.3d at 990. In this case, Plaintiff's failure to
22 follow court directives and the unreasonable volume of her filings have hindered the court's
23 ability to move this case toward disposition. Therefore, the court finds that the second factor
24 also strongly favors dismissal.

25 **3. The Risk of Prejudice to Defendants**

26 "A defendant suffers prejudice if the plaintiff's actions impair the defendant's ability to
27 go to trial or threaten to interfere with the rightful decision of the case." Adriana Int'l Corp. v.
28 Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990). A rebuttable presumption of prejudice arises

1 from a plaintiff's unexplained failure to prosecute. Hernandez, 138 F.3d at 400–01 (9th Cir.
2 1998). In this instance, this presumption is unwarranted because Plaintiff has not failed to
3 prosecute this case, and while Plaintiff's failure to comply with the court's directives causes
4 prejudice to Defendants, this factor does not strongly favor dismissal of this case at this stage of
5 the litigation. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). It is
6 well settled that where a plaintiff appears *in pro per* in a civil rights case, the court must
7 construe the pleadings liberally and afford plaintiff any benefit of the doubt. See Karim–
8 Panahi, 839 F.2d at 623. Consequently, the court finds that the third factor does not strongly
9 favor dismissal.

10 **4. Availability of Less Drastic Alternatives**

11 Under the fourth factor, the court must consider “alternate, less severe, sanctions before
12 ordering dismissal.” Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994). Sanctions
13 alternative to dismissal include “a warning, a formal reprimand, placing the case at the bottom
14 of the calendar, a fine . . . ,” Malone v. United States Postal Serv., 833 F.2d 128, 132 n.1 (9th
15 Cir. 1987), and amendment of the complaint, AmerisourceBergen Corp. v. Dialysis West, Inc.,
16 445 F.3d 1132, 1136 (9th Cir. 2006) (“Rule 15(a) is very liberal and leave to amend ‘shall be
17 freely given when justice so requires.’” (quoting Fed. R. Civ. P. 15(a)). However, every
18 alternative sanction need not be exhausted to dismiss a case. Henderson, 779 F.2d at 1424. In
19 fact, a warning by the court that failure to obey a court order may result in dismissal can satisfy
20 the requirement to consider alternative sanctions. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th
21 Cir. 1992) (citing Malone, 833 F.2d at 132–33). Here, the court's order granting Plaintiff leave
22 to “file a fifth amended complaint not exceeding 25 pages in length” did not explicitly warn
23 Plaintiff that terminating sanctions could result if she failed to comply with the order, ECF No.
24 184 at 3, and thus did not satisfy the court's obligation to consider less drastic alternatives to
25 dismissal pursuant to Ferdik. In this case, the court recommends that the case be allowed to
26 proceed subject to Plaintiff's compliance with court orders and adherence to reasonable
27 litigation practices from this date forward. Accordingly, the court finds that the fourth factor
28 does not support dismissal.

1 **5. Public Policy Favoring Disposition of Cases on Its Merits**

2 Because public policy favors disposition of a case on the merits, the fifth factor tends to
3 weigh against dismissal. See e.g., Hernandez, 138 F.3d at 399, 401 (9th Cir. 1998) (“[T]he
4 public policy favoring disposition of cases on their merits counsels strongly against dismissal.”)
5 However, “it is the responsibility of the moving party to move towards that disposition at a
6 reasonable pace, and to refrain from dilatory and evasive tactics.” Morris v. Morgan Stanley &
7 Co., 942 F.2d 648, 652 (9th Cir. 1991). While delays have slowed this matter’s progression to
8 resolution on the merits, the court finds it inappropriate to dismiss this case at this stage of the
9 proceedings without an opportunity for Plaintiff to demonstrate that she is willing and able to
10 engage in reasonable litigation and comply with the court’s orders. Therefore, the court finds
11 that the fifth factor does not favor dismissal.

12 Based on the foregoing analysis, the court finds that dismissal of this matter for failure
13 to prosecute and failure to comply with court orders under Rule 41(b) is not warranted.
14 Accordingly, the court shall recommend that Defendant Rebel’s motion for involuntary
15 dismissal of this case be denied.

16 **V. CONCLUSION AND RECOMMENDATIONS**

17 Based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

- 18 1. Defendant Rebel’s motion to dismiss this case under Rule 41(b), filed on June 2,
19 2017, be DENIED;
- 20 2. This case be allowed to proceed subject to Plaintiff’s compliance with court
21 orders and adherence to reasonable litigation practices from this date forward;
22 and
- 23 3. This case be referred back to the Magistrate Judge for further proceedings.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
26 **(14) days** after the date of service of these findings and recommendations, any party may file
27 written objections with the court. Such a document should be captioned “Objections to
28 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be

1 served and filed within **ten (10) days** after the date the objections are filed. The parties are
2 advised that failure to file objections within the specified time may result in the waiver of rights
3 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v.
4 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

5
6 IT IS SO ORDERED.

7 Dated: August 6, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE