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6 UNITED STATES DISTRICT COURT  
7 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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9 REAMEL CURTIS,

10 Plaintiff,

11 v.

12 J. GONZALES and J. BURGARIN,

13 Defendants.  
14

Case No. 1:15-cv-00553-LJO-JDP

FINDINGS AND RECOMMENDATIONS  
THAT THE COURT DISMISS THE CASE  
FOR PLAINTIFF'S FAILURE TO  
RESPOND TO DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT, FAILURE  
TO PROSECUTE, AND FAILURE TO  
COMPLY WITH A COURT ORDER

(Doc. No. 66.)

15 Plaintiff Reamel Curtis is a state prisoner proceeding *in forma pauperis* in this civil rights  
16 action brought under 42 U.S.C. § 1983. On April 26, 2018, defendants J. Gonzales and J.  
17 Burgarin moved for summary judgment. (Doc. No. 66.) They served their motion on plaintiff  
18 by mailing it to him at his last known address. (*Compare* Doc. No. 65, at 1, *with* Doc. No. 66, at  
19 3.) Plaintiff had 21 days to oppose defendants' motion under Local Rule 230(l), but he failed to  
20 do so. The undersigned gave plaintiff another chance to respond to defendants' motion for  
21 summary judgment, allowing plaintiff to respond to the motion by Monday, July 16, 2018.  
22 (Doc. No. 72.) The undersigned also explained that if plaintiff failed to respond by the new  
23 deadline, the court might deem defendants' motion unopposed, grant the motion on the merits,  
24 and dismiss the case. Plaintiff's new deadline for responding to defendants' motion for summary  
25 judgment has passed, and plaintiff still has not responded.  
26

27 Local Rule 230(l) provides that the failure to oppose a motion "may be deemed a waiver  
28 of any opposition to the granting of the motion and may result in the imposition of sanctions."

1 Among other sanctions, the court may treat the facts asserted by defendants as “undisputed for  
2 purposes of the motion.” Fed. R. Civ. P. 56(e)(2).

3 Considering plaintiff’s failure to respond to defendants’ summary judgment motion, the  
4 undersigned recommends that the court deem the facts asserted by defendants undisputed and  
5 grant their motion for summary judgment on the merits. *See* Fed. R. Civ. P. 56(e)(2).

6 Specifically, the undersigned recommends that the court credit defendant’s asserted facts,  
7 including:

8 (a) Defendant Bugarin did not disregard plaintiff’s substantial risk of serious harm. Plaintiff  
9 contends that Bugarin knew that inmate Butler was plaintiff’s “documented enemy,” but  
10 nonetheless approved plaintiff’s transfer to Facility 3-A, where Butler attacked him.  
11 (Doc. No. 13, at 6; *see also* Doc. No. 12, ¶¶ 9-10.) However, Correctional Sergeant  
12 Rasley, not Bugarin, approved plaintiff’s transfer to Facility 3-A. (Doc. No. 66-4, ¶¶ 7-  
13 8, 13.) Bugarin did not participate in transferring plaintiff to Facility 3-A, and thus did  
14 not disregard plaintiff’s risk of serious harm. Plaintiff later changed his theory and  
15 testified during his deposition that Bugarin escorted plaintiff to Facility 3-A  
16 (Doc. No. 66-6, at 11:25-12:3), but this never happened (Doc. No. 66-4, ¶ 8).

17 (b) Defendant Gonzales did not disregard plaintiff’s substantial risk of serious harm.  
18 Plaintiff contends that, after his transfer to Facility 3-A, Gonzales ignored his warning of  
19 safety risks and his request to be transferred to a new location. (Doc. No. 13, at 6;  
20 Doc. No. 12, ¶¶ 11-13.) Plaintiff, however, conceded during his deposition that he never  
21 had any personal interaction with Gonzales. (Doc. 66-6:11-13.) He sent Gonzales two  
22 request forms to discuss “housing” with Gonzales, but those forms did not inform  
23 Gonzales of plaintiff’s safety risk, and Gonzales did not learn about the risk. (*Id.* at 8:18-  
24 10:7; Doc. No. 66-5, ¶ 4.)

25 These undisputed facts defeat plaintiff’s failure-to-protect claims, since he cannot show  
26 that defendants were deliberately indifferent to his safety—as would be required for plaintiff to  
27 succeed on his failure-to-protect claims. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). No  
28 other claim remains, and the grant of summary judgment ends the case.

1 The undersigned also recommends that the court dismiss this case for plaintiff's failure to  
2 prosecute and failure to comply with a court order. *See* Fed. R. Civ. P. 41(b); *Hells Canyon*  
3 *Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005). Dismissal for a plaintiff's  
4 failure to prosecute or failure to comply with a court order operates as an adjudication on the  
5 merits unless the court orders otherwise. *See* Fed. R. Civ. P. 41(b). Deciding whether to dismiss  
6 a case with prejudice for failure to prosecute is a matter committed to the court's discretion. *See*  
7 *Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002). Involuntary dismissal is a harsh  
8 penalty, but a district court has duties to resolve disputes expeditiously and to avoid needless  
9 burden for the parties. *See* Fed. R. Civ. P. 1; *Pagtalunan*, 291 F.3d at 642.

10 The fact that defendants have litigated this case all the way to summary judgment only to  
11 meet with plaintiff's unreasonable delay favors dismissal with prejudice. Considering the  
12 public's interest in expeditious resolution of litigation and this court's need to manage its docket,  
13 the undersigned recommends that the court dismiss the case with prejudice.

#### 14 **Findings and Recommendation**

15 The undersigned recommends that the court dismiss the case with prejudice for two  
16 independent reasons:

- 17 1. The facts asserted by defendants J. Gonzales and J. Burgarin in their motion for  
18 summary judgment are unopposed under Fed. R. Civ. P. 56(e)(2), so the court should  
19 grant defendants' summary judgment motion (Doc. 66) on the merits.
- 20 2. Plaintiff's failure to prosecute this case and failure to comply with a court order  
21 warrant dismissal.

22 The undersigned submits the findings and recommendations to the district judge  
23 presiding over this case under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of  
24 Practice for the United States District Court, Eastern District of California. Within 14 days of  
25 the service of the findings and recommendations, plaintiff may file written objections to the  
26 findings and recommendations with the court and serve a copy on all parties. That document  
27 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The  
28 district judge will review the findings and recommendations under 28 U.S.C. § 636(b)(1)(C).

1 Plaintiff's failure to file objections within the specified time may result in the waiver of rights on  
2 appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

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4 IT IS SO ORDERED.

5 Dated: July 19, 2018

  
UNITED STATES MAGISTRATE JUDGE

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