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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICARDO MARTINEZ,
Plaintiff,
v.
D. DAVEY, et al.,
Defendants.

Case No. 1:16-cv-00084-LJO-BAM (PC)
FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF ACTION,
WITH PREJUDICE, FOR FAILURE TO
STATE A CLAIM, FAILURE TO OBEY A
COURT ORDER, AND FAILURE TO
PROSECUTE
(ECF No. 42)
FOURTEEN (14) DAY DEADLINE

I. Background

Plaintiff Ricardo Martinez (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

On July 11, 2017, the Court dismissed the first amended complaint with leave to amend within thirty days after service. (ECF No. 42). Plaintiff was expressly warned that if he failed to file a second amended complaint in compliance with the Court’s order, this action would be dismissed for failure to state a claim and failure to obey a court order. (*Id.* at 10.) Thereafter, Plaintiff was granted a thirty-day extension of time to amend his complaint. (ECF No. 46.) The deadline for Plaintiff to file a second amended complaint has passed, and he has not complied with the Court’s order.

1 **II. Discussion**

2 Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with
3 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
4 within the inherent power of the Court.” District courts have the inherent power to control their
5 dockets and “[i]n the exercise of that power they may impose sanctions including, where
6 appropriate, . . . dismissal.” Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986). A
7 court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,
8 failure to obey a court order, or failure to comply with local rules. See, e.g., Ghazali v. Moran, 46
9 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet,
10 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
11 amendment of complaint); Malone v. U.S. Postal Serv., 833 F.2d 128, 130–33 (9th Cir. 1987)
12 (dismissal for failure to comply with court order).

13 In determining whether to dismiss an action, the Court must consider several factors:
14 (1) the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
15 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
16 cases on their merits; and (5) the availability of less drastic sanctions. Henderson v. Duncan, 779
17 F.2d 1421, 1423 (9th Cir. 1986); Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988).

18 Here, the action has been pending since October 2015, and Plaintiff’s second amended
19 complaint is overdue. Plaintiff has previously been granted an extension of time to file his second
20 amended complaint, but despite the Court’s leniency, he has not yet complied with the Court’s
21 July 11, 2017 order. The Court cannot hold this case in abeyance awaiting such compliance by
22 Plaintiff. Thus, the Court finds that both the first and second factors weigh in favor of dismissal.

23 The third factor, risk of prejudice to defendant, also weighs in favor of dismissal, since a
24 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
25 Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs
26 against dismissal because public policy favors disposition on the merits. Pagtalunan v. Galaza,
27 291 F.3d 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose
28 responsibility it is to move a case toward disposition on the merits but whose conduct impedes

1 progress in that direction,” which is the case here. In re Phenylpropanolamine (PPA) Prods. Liab.
2 Litig., 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

3 Finally, the court’s warning to a party that failure to obey the court’s order will result in
4 dismissal satisfies the “considerations of the alternatives” requirement. Ferdik, 963 F.2d at 1262;
5 Malone, 833 at 132–33; Henderson, 779 F.2d at 1424. The Court’s July 11, 2017 order expressly
6 warned Plaintiff that his failure to comply with that order would result in a dismissal of this
7 action, with prejudice, for failure to state a claim and failure to obey a court order. (ECF No. 42,
8 p. 10). Thus, Plaintiff had adequate warning that dismissal could result from his noncompliance.

9 Additionally, at this stage in the proceedings there is little available to the Court which
10 would constitute a satisfactory lesser sanction while protecting the Court from further
11 unnecessary expenditure of its scarce resources. Plaintiff is proceeding in forma pauperis in this
12 action, making monetary sanctions of little use, and the preclusion of evidence or witnesses is
13 likely to have no effect given that Plaintiff has ceased litigating his case.

14 **III. Conclusion and Recommendations**

15 Accordingly, it is HEREBY RECOMMENDED that:

- 16 1. This action be dismissed, with prejudice, for failure to state a claim pursuant to 28 U.S.C.
17 § 1915A;
- 18 2. This action be dismissed for failure to obey the Court’s July 11, 2017 order (ECF No. 42),
19 and for Plaintiff’s failure to prosecute this action; and
- 20 3. This dismissal count as a strike against Plaintiff under 28 U.S.C. § 1915(g).

21 These Findings and Recommendations 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)(1). Within
23 **fourteen (14) days** after being served with these Findings and Recommendations, Plaintiff may
24 file written objections with the Court. The document should be captioned “Objections to
25 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file
26 objections within the specified time may result in the waiver of the “right to challenge the

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1 magistrate's factual findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
2 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: October 4, 2017

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE