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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DERRICK BROWN,

Plaintiff,

vs.

KERN VALLEY STATE PRISON, et al.,

Defendants.

1:17-cv-01168-DAD-GSA-PC

FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR FAILURE TO
OBEY COURT ORDER
(ECF No. 7.)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS

I. BACKGROUND

Derrick Brown (“plaintiff”) is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on August 18, 2017, together with an application to proceed *in forma pauperis*, at the United States District Court for the Southern District of California. (ECF Nos. 1, 2.) On August 28, 2017, plaintiff filed the First Amended Complaint as a matter of course. (ECF No. 3.) On August 29, 2017, the case was transferred to this court. (ECF No. 4.)

1 Plaintiff's first application to proceed *in forma pauperis* was not completed. (ECF No.
2 2.) Plaintiff signed the application, but he did not provide *any* of the information requested on
3 the first two pages of the form. Plaintiff's failure to complete the form prevents the court from
4 ruling on the application. On August 31, 2017, the court issued an order requiring Plaintiff to
5 submit a new, completed application to proceed *in forma pauperis*, or pay the filing fee for this
6 action, within thirty days. (ECF No. 7.)

7 On September 6, 2017, Plaintiff filed a second application to proceed *in forma pauperis*.
8 (ECF No. 8.) Plaintiff's second application suffers from the same deficiencies as the first
9 application. Plaintiff signed the application, but he failed to provide *any* of the required
10 information concerning his financial status, thus preventing the court from ruling on the
11 application.

12 On September 15, 2017, Plaintiff filed a third application to proceed *in forma pauperis*.
13 (ECF No. 11.) Plaintiff's third application also suffers from deficiencies that prevent the court
14 from ruling on the application. Plaintiff failed to provide the required information, and he also
15 failed to sign the application.

16 The thirty-day time period has now expired, and Plaintiff has not filed a completed
17 application to proceed *in forma pauperis* or paid the filing fee for this action. Therefore,
18 Plaintiff failed to comply with the court's August 31, 2017, order.

19 **II. DISMISSAL FOR FAILURE TO COMPLY WITH COURT ORDER**

20 In determining whether to dismiss this action for failure to comply with the directives
21 set forth in its order, "the Court must weigh the following factors: (1) the public's interest in
22 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
23 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
24 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d
25 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

26 "The public's interest in expeditious resolution of litigation always favors dismissal,"
27 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
28 action has been pending since August 18, 2017. Plaintiff's failure to comply with the court's

1 order may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the court
2 cannot continue to expend its scarce resources assisting a litigant who will not resolve payment
3 of the filing fee for his lawsuit. Thus, both the first and second factors weigh in favor of
4 dismissal.

5 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
6 and of itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently
7 increases the risk that witnesses' memories will fade and evidence will become stale," id., and
8 it is Plaintiff's failure to pay the filing fee or submit a completed application to proceed *in*
9 *forma pauperis* that is causing delay. Therefore, the third factor weighs in favor of dismissal.

10 As for the availability of lesser sanctions, at this stage in the proceedings there is little
11 available to the court which would constitute a satisfactory lesser sanction while protecting the
12 court from further unnecessary expenditure of its scarce resources. Given that Plaintiff is a
13 prisoner proceeding *pro se* who has not paid the filing fee for this action, the court finds
14 monetary sanctions of little use, and given the early stage of these proceedings, the preclusion
15 of evidence or witnesses is not available. However, inasmuch as the dismissal being
16 considered in this case is without prejudice, the court is stopping short of issuing the harshest
17 possible sanction of dismissal with prejudice.

18 Finally, because public policy favors disposition on the merits, this factor will always
19 weigh against dismissal. Id. at 643.

20 **III. CONCLUSION AND RECOMMENDATIONS**

21 Based on the foregoing, the court **HEREBY RECOMMENDS** that this action be
22 dismissed based on Plaintiff's failure to obey the court's order of August 31, 2017.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within**
25 **fourteen (14) days** from the date of service of these findings and recommendations, Plaintiff
26 may file written objections with the court. Such a document should be captioned "Objections
27 to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
28 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.

1 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
2 (9th Cir. 1991)).

3
4 IT IS SO ORDERED.

5 Dated: October 24, 2017

/s/ Gary S. Austin
6 UNITED STATES MAGISTRATE JUDGE