

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANIEL DEAN ALVARADO, JR.,

Plaintiff,

v.

COUNTY OF TULARE, *et al.*,

Defendants.

Case No. 1:17-cv-01396-NONE-BAM (PC)

FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF ACTION FOR
FAILURE TO OBEY COURT ORDERS AND
FAILURE TO PROSECUTE

(ECF Nos. 21, 26)

FOURTEEN (14) DAY DEADLINE

I. Background

Plaintiff Daniel Dean Alvarado, Jr. (“Plaintiff”) is a former pretrial detainee proceeding *pro se* and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On April 22, 2019, the Court screened Plaintiff’s first amended complaint and issued findings and recommendations that this action proceed on Plaintiff’s first amended complaint against Defendant Rales for excessive force in violation of the Fourteenth Amendment and all other claims and defendants be dismissed from this action for failure to state a claim. (ECF No. 19.) On May 17, 2019, the assigned District Judge issued an order adopting the findings and recommendations in full. (ECF No. 20.) Accordingly, on May 21, 2019, the Court found service appropriate for Defendant Rales and issued an order directing Plaintiff to submit service documents for Defendant Rales within thirty (30) days. (ECF No. 21.) The order also warned Plaintiff that failure to comply would result in dismissal of this action. (Id.) On May 28, 2019,

1 the Court received Plaintiff's late objections to the prior findings and recommendations. (ECF
2 No. 22.)

3 Despite Plaintiff apparently receiving the findings and recommendations, on August 2,
4 2019, the findings and recommendations that had been served to Plaintiff's mailing address of
5 record were returned as "Undeliverable, Unclaimed." The Court's service order was also
6 returned as "Undeliverable, Unclaimed" on August 22, 2019. Following Plaintiff's failure to
7 provide an updated address or otherwise communicate with the Court, on October 10, 2019, the
8 undersigned issued findings and recommendations for dismissal of this action due to Plaintiff's
9 failure to prosecute. (ECF No. 23.) Plaintiff timely filed objections to the findings and
10 recommendations on October 21, 2019. (ECF No. 24.)

11 As Plaintiff's objections appeared to provide an updated mailing address, the Court found
12 it appropriate to vacate the pending findings and recommendations for failure to prosecute. (ECF
13 No. 26.) However, Plaintiff still had not provided completed service documents for Defendant
14 Rales. Therefore, the Court ordered re-service of the May 21, 2019 order directing Plaintiff to
15 submit service documents on Plaintiff's current address of record, and further ordered Plaintiff to
16 submit completed service documents for Defendant Rales or show cause in writing why this
17 action should not be dismissed for failure to prosecute. Plaintiff was warned that his failure to
18 comply would result in a recommendation of dismissal of this action for failure to obey court
19 orders and failure to prosecute. (Id.)

20 Plaintiff has not filed the required service documents, a notice of change of address, or
21 otherwise communicated with the Court, and the deadline to do so has expired.

22 **II. Legal Standard**

23 Local Rule 110 provides that "[f]ailure . . . of a party to comply with these Rules or with
24 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
25 within the inherent power of the Court." District courts have the inherent power to control their
26 dockets and "[i]n the exercise of that power they may impose sanctions including, where
27 appropriate, . . . dismissal." Thompson v. Hous. Auth., 782 F.2d 829, 831 (9th Cir. 1986). A
28 court may dismiss an action, with prejudice, based on a party's failure to prosecute an action,

1 failure to obey a court order, or failure to comply with local rules. See, e.g., Ghazali v. Moran, 46
2 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet,
3 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
4 amendment of complaint); Malone v. U.S. Postal Serv., 833 F.2d 128, 130–33 (9th Cir. 1987)
5 (dismissal for failure to comply with court order).

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

11 **III. Discussion**

12 Here, completed service documents for Defendant Rales are overdue, and Plaintiff has
13 failed to comply with the Court’s orders. The Court cannot effectively manage its docket if
14 Plaintiff ceases litigating his case. Thus, the Court finds that both the first and second factors
15 weigh in favor of dismissal.

16 The third factor, risk of prejudice to defendant, also weighs in favor of dismissal, since a
17 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
18 Anderson v. Air W., 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs against
19 dismissal because public policy favors disposition on the merits. Pagtalunan v. Galaza, 291 F.3d
20 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose
21 responsibility it is to move a case toward disposition on the merits but whose conduct impedes
22 progress in that direction,” which is the case here. In re Phenylpropanolamine (PPA) Products
23 Liability Litigation, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

24 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
25 dismissal satisfies the “considerations of the alternatives” requirement. Ferdik, 963 F.2d at 1262;
26 Malone, 833 at 132–33; Henderson, 779 F.2d at 1424. The Court’s May 21, 2019 service order
27 expressly warned Plaintiff that his failure to comply with that order would result in dismissal of
28 this action. (ECF No. 21, p. 2.) The Court’s August 31, 2020 order to show cause further warned

1 Plaintiff that his failure to comply would result in a recommendation of dismissal of this action
2 for failure to obey court orders and failure to prosecute. (ECF No. 26, p. 3.) Thus, Plaintiff had
3 adequate warning that dismissal could result from his noncompliance.

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

9 Finally, based on Plaintiff's failure to comply with or otherwise respond to these orders,
10 the Court is left with no alternative but to dismiss the action for failure to prosecute. In re PPA
11 Prods. Liab. Litig., 460 F.3d at 1228. This action, which has been pending since 2017, can
12 proceed no further without Plaintiff's cooperation and compliance with the orders at issue, and
13 the action cannot simply remain idle on the Court's docket, unprosecuted. Id.

14 **IV. Conclusion and Recommendation**

15 Accordingly, the Court HEREBY RECOMMENDS that this action be dismissed, without
16 prejudice, based on Plaintiff's failure to obey court orders and failure to prosecute.

17 These Findings and Recommendations will be submitted to the United States District
18 Judge assigned to the case, under the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**
19 **days** after being served with these Findings and Recommendations, Plaintiff may file written
20 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
21 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
22 specified time may result in the waiver of the "right to challenge the magistrate's factual
23 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
24 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).
25 IT IS SO ORDERED.

26 Dated: September 28, 2020

27 /s/ Barbara A. McAuliffe
28 UNITED STATES MAGISTRATE JUDGE