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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HERIBERTO AVILA, JR.,
Plaintiff,
v.
CITI MORTGAGE, INC.,
Defendant.

Case No. 1:17-cv-1581-LJO-BAM

**FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF THIS
ACTION FOR FAILURE TO OBEY A
COURT ORDER**

**OBJECTIONS DUE WITHIN THIRTY
DAYS**

Plaintiff Heriberto Avila, Jr., appearing pro se, filed this civil action on November 28, 2017. (ECF No. 1). On December 15, 2017, Plaintiff was ordered to either submit a long form in forma pauperis (“IFP”) application, or pay the \$400.00 filing fee within twenty-one (21) days of the Court’s order. (ECF No. 5).¹ To date, Plaintiff has not filed the proper IFP application, paid the filing fee, or otherwise complied with the Court’s order.

DISCUSSION

Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and all sanctions . . . within the inherent power of the Court.” District courts have the inherent power to control their dockets and “[i]n the exercise of that power, they may impose sanctions including,

¹ The twenty-one day deadline for Plaintiff to comply with the Court’s order expired on December 28, 2017. See (ECF No. 5).

1 where appropriate, . . . dismissal.” *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir.
2 1986). A court may dismiss an action, with prejudice, based on a party’s failure to prosecute an
3 action, failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v.*
4 *Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik*
5 *v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an
6 order requiring amendment of complaint); *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir.
7 1988) (dismissal for failure to comply with local rule requiring pro se plaintiffs to keep court
8 apprised of address); *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal
9 for failure to comply with court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir.
10 1986) (dismissal for lack of prosecution and failure to comply with local rules). In determining
11 whether to dismiss an action for lack of prosecution, failure to obey a court order, or failure to
12 comply with local rules, the court must consider several factors: (1) the public’s interest in
13 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
14 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
15 and (5) the availability of less drastic alternatives. *Ghazali*, 46 F.3d at 53; *Ferdik*, 963 F.2d at
16 1260-61; *Malone*, 833 F.2d at 130; *Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-
17 24.

18 In the instant case, the Court finds that the public’s interest in expeditiously resolving this
19 litigation and the Court’s interest in managing the docket weigh in favor of dismissal because
20 there is no indication that Plaintiff intends to prosecute this action. The third factor, risk of
21 prejudice to defendants, also weighs in favor of dismissal because a presumption of injury arises
22 from any unreasonable delay in prosecuting an action. *Anderson v. Air West*, 542 F.2d 522, 524
23 (9th Cir. 1976). The fourth factor, public policy favoring disposition of cases on their merits, is
24 greatly outweighed by the factors in favor of dismissal. Finally, a court’s warning to a party that
25 his failure to obey the court’s order will result in dismissal satisfies the “consideration of
26 alternatives” requirement. *Ferdik*, 963 F.2d at 1262; *Malone*, 833 at 132-33; *Henderson*, 779
27 F.2d at 1424. The Court’s order was clear that dismissal would result if Plaintiff failed to
28 comply with the order requiring him to pay the filing fee or demonstrate that he is eligible to

1 proceed without prepayment of the fee. (ECF No. 5). More than twenty-one days have passed
2 and Plaintiff has not filed the long form application to proceed *in forma pauperis*, paid the filing
3 fee in this action, or otherwise responded to the Court’s order. For this reason, the Court
4 recommends that this action be dismissed.

5 **CONCLUSION AND RECOMMENDATION**

6 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed without
7 prejudice, for Plaintiff’s failure to pay the filing fee or submit a complete application to proceed
8 *in forma pauperis* in compliance with the Court’s order.

9 These findings and recommendations are submitted to the district judge assigned to this
10 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within thirty (30)
11 days of service of this recommendation, Plaintiff may file written objections to this findings and
12 recommendations with the Court. Such a document should be captioned “Objections to
13 Magistrate Judge’s Findings and Recommendations.” The district judge will review the
14 magistrate judge’s findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C).
15 Plaintiff is advised that failure to file objections within the specified time may result in the
16 waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing
17 *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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19 IT IS SO ORDERED.

20 Dated: January 31, 2018

21 /s/ Barbara A. McAuliffe
22 UNITED STATES MAGISTRATE JUDGE
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