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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERNANDO GASTELUM,
Plaintiff,
v.
EASINESS LP,
Defendant.

Case No. 1:22-cv-00166-ADA-CDB
FINDINGS AND RECOMMENDATIONS THAT
THIS ACTION BE DISMISSED WITHOUT
PREJUDICE FOR FAILURE TO PROPERLY
SERVE DEFENDANT, FAILURE TO PROSECUTE
AND FAILURE TO COMPLY WITH A COURT
ORDER
OBJECTIONS, IF ANY, ARE DUE WITHIN
TWENTY-ONE DAYS.
(ECF No. 20)

Background and Procedural History

Plaintiff Fernando Gastelum (“Plaintiff”) proceeding *pro se* initiated this action against Defendant Easiness LP (“Defendant”) on February 8, 2022. (ECF No. 1). On February 10, 2022, the Court set an initial scheduling conference for May 26, 2022, and advised Plaintiff he “shall diligently pursue service of summons and complaint...” (ECF No. 5).

On May 10, 2022, Plaintiff filed an affidavit of non-service describing a process server’s unsuccessful attempt to serve Defendant along with a proof of service stating that the summons and complaint were left with “JOHN JUAREZ, MANAGER IN CHARGE” on May 5, 2022. (ECF Nos. 6-7). On May 18, 2022, the Court continued the initial scheduling conference to June 30, 2022, to allow time for Defendant to file a responsive pleading. (ECF No. 8). On June 9, 2022, Plaintiff filed

1 an application for entry of default claiming Defendant had not filed its answer or otherwise defended
2 against his complaint. (ECF No. 9). According to the application, Defendant mailed this filing to
3 “John Juarez, Manager in Charge.” *Id.*

4 On June 27, 2022, the Court converted the June 30, 2022, initial scheduling conference into a
5 status conference. (ECF No. 10). That day, the Court held a status conference and Plaintiff appeared
6 telephonically. (ECF No. 11). The Court noted Plaintiff’s request for entry of default judgment did
7 not comply with Federal Rule of Civil Procedure 55(a) in that Plaintiff had not submitted an affidavit
8 or unsworn declaration showing that Defendant was properly served and failed to plead or otherwise
9 defend. (ECF No. 12). The Court ordered Plaintiff by no later than July 21, 2022, to file a supplement
10 to his request for a Clerk’s entry of default, addressing the issues regarding service identified during
11 the June 30, 2022, status conference, or to file a motion seeking an extension of time to serve
12 Defendant. *Id.* at 4.

13 On July 20, 2022, Plaintiff filed a proof of service stating that the summons and complaint
14 were left with “Than Win, Receptionist.” (ECF No. 13). Plaintiff’s process server noted that Than
15 Win “appeared to be in charge at Given Business Location 91765 21725 GATEWAY CENTER DR
16 DIAMOND BAR, CA 91765 at reception desk” and that she “tried to refuse service but confirmed
17 subject would not make himself available to accept.” *Id.* at 1.

18 On July 28, 2022, the Court issued findings and recommendations recommending that
19 Plaintiff’s application for an entry of default be denied without prejudice as Plaintiff’s request did not
20 comply with Federal Rule of Civil Procedure 55(a). (ECF No. 14). Further, the Court recognized
21 Plaintiff had elected to serve Defendant again making his request ostensibly moot. *Id.* at 3. Plaintiff
22 did not file objections to the Court’s findings and recommendations. On September 1, 2022, the
23 Honorable District Judge Ana de Alba issued an order adopting in full the Court’s findings and
24 recommendations. (ECF No. 16).

25 The next day, Plaintiff filed a second request for entry of default. (ECF No. 17). Plaintiff’s
26 second request noted a process server served Defendant on July 8, 2022, and Defendant had not filed
27 its answer or otherwise defended. *Id.* On October 3, 2022, the Court issued findings and
28 recommendations recommending that Plaintiff’s second request for entry of default be denied. (ECF

1 No. 18). The Court again noted Plaintiff's request for entry of default did not comply with Federal
2 Rule of Civil Procedure 55(a). *Id.* at 5. The Court found Plaintiff's request was technically deficient
3 as he failed to submit an affidavit or unsworn declaration. *Id.* Additionally, the Court determined
4 Plaintiff's request was substantively deficient as he failed to provide sufficient information for the
5 Court to determine if service was proper under either Federal or California rules. *Id.* The Court
6 recommended dismissing this case without prejudice to refiling another action if Plaintiff failed to
7 properly serve Defendant by October 31, 2022, or filed a third deficient request for entry of default
8 judgment. *Id.* at 6. Plaintiff did not file objections to the Court's findings and recommendation.

9 On December 7, 2022, District Judge de Alba issued an order adopting in part the Court's
10 findings and recommendations. (ECF No. 20). District Judge de Alba denied without prejudice
11 Plaintiff's second request for entry of default judgment and ordered Plaintiff to properly serve
12 Defendant by December 14, 2022. *Id.* at 2. District Judge de Alba noted if Plaintiff filed a third
13 deficient request for entry of default judgment or failed to properly serve Defendant, the action would
14 be dismissed without prejudice. Plaintiff has not filed any response or otherwise indicated an intention
15 to prosecute this case.

16 Accordingly, for the reasons described below, the Court recommends that Plaintiff's case be
17 dismissed without prejudice for failure to properly serve Defendant, failure to comply with a court
18 order, and failure to prosecute.

19 **Discussion**

20 A federal court is without personal jurisdiction over a defendant unless the defendant has been
21 served in accordance with Fed. R. Civ. P. 4." *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d
22 1132, 1135 (9th Cir. 2009) (quoting *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986)). If a defendant
23 is not served within 90 days after the complaint is filed, the court on motion or on its own after notice
24 to the plaintiff must dismiss the action without prejudice against that defendant or order that service be
25 made within a specified time. Fed. R. Civ. P. 4(m).

26 Here, well over 90 days have passed. Plaintiff filed the complaint against Defendant on
27 February 8, 2022. (ECF No. 1). The Court provided Plaintiff multiple extensions of time to properly
28 serve Defendant. (ECF Nos. 12, 16, 20); *see Crowley v. Bannister*, 734 F.3d 967, 976 (9th Cir. 2013)

1 (the district court may extend the time for service upon a showing of excusable neglect). The Court
2 even provided Plaintiff instructions on how to pursue service under federal and California state law.
3 (ECF No. 12). However, Plaintiff failed to file proof of service on Defendant in compliance with Rule
4 4. Fed. R. Civ. P. 4(m). Thus, the Court will recommend dismissal of Plaintiff’s complaint for failure
5 to effectuate service.

6 In addition, Plaintiff’s complaint also will be dismissed for failure to follow District Judge de
7 Alba’s order of December 7, 2022, and failure for to prosecute this case. (ECF No. 20). Courts weigh
8 five factors in deciding whether to dismiss a case for failure to comply with a court order: “(1) the
9 public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3)
10 the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
11 merits; and (5) the availability of less drastic sanctions.” *Allen v. Bayer Corp. (In re:*
12 *Phenylpropanolamine (PPA) Prods. Liab. Litig.)*, 460 F.3d 1217, 1226 (9th Cir. 2006) (citation
13 omitted). These factors are “not a series of conditions precedent before the judge can do anything,”
14 but for a judge to think about what to do. *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057
15 (9th Cir. 1998).

16 The public’s interest in expeditious resolution of litigation weighs in favor of dismissal of this
17 action. The public has an overriding interest in securing “the just, speedy, and inexpensive
18 determination of every action.” Fed. R. Civ. P. 1; *see Yourish v. California Amplifier*, 191 F.3d 983,
19 990 (9th Cir. 1999) (“The public’s interest in expeditious resolution of litigation always favors
20 dismissal.”). Plaintiff was provided instruction and over ten months to serve Defendant. District
21 Judge de Alba ordered Plaintiff to “properly serve Defendant by December 14, 2022.” (ECF No. 20).
22 Plaintiff has failed to respond to the December 7, 2022, order. This action can proceed no further
23 without Plaintiff’s compliance and his failure to comply indicates that Plaintiff does not intend to
24 diligently litigate this action. Accordingly, this factor weighs in favor of dismissal.

25 As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to
26 determine whether the delay in a particular case interferes with docket management and the public
27 interest.... It is incumbent upon the Court to manage its docket without being subject to routine
28 noncompliance of litigants....” *Pagtalunan v. Galaza*, 291 F.3d 639, 639 (9th Cir. 2002) (citing *Ferdik*

1 *v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)). Here, Plaintiff has failed to respond to the Court’s
2 December 7, 2022, Order. (ECF No. 7). The Court is experiencing an ongoing judicial emergency
3 and heavy caseload. Plaintiff has demonstrating a pattern of failing to comply with the Court’s order
4 directing compliance with the Federal Rules of Civil Procedure. (ECF Nos. 12, 14, 18, 20); *see King*
5 *v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (“*Pro se* litigants must follow the same rules of procedure
6 that govern other litigants.”) (overruled on other grounds). Plaintiff’s failure to respond is delaying
7 the case and interfering with docket management. Therefore, the second factor weighs in favor of
8 dismissal.

9 Turning to the risk of prejudice, a defendant suffers prejudice if a plaintiff’s actions impair a
10 defendant’s ability to go to trial or threaten to interfere with the rightful decision of the case. *Adriana*
11 *Int’l Corp. v. Thoenen*, 913 F.2d 1406, 1412 (9th Cir. 1990). Plaintiff’s failure to comply with a court
12 order and to prosecute this case imposes sufficient prejudice upon Defendant. Therefore, the third
13 factor weighs in favor of dismissal.

14 Next, because public policy favors disposition of cases on the merits, this factor weighs against
15 dismissal of Plaintiff’s case. *See Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998)
16 (the public policy favoring disposition of cases on their merits counsels strongly against dismissal).
17 However, on balance, the Court finds the public policy in favor of deciding cases on their merits is
18 outweighed by the factors in favor of dismissal. It was Plaintiff’s responsibility to serve the summons,
19 and complaint upon Defendant and thereafter to file proof of service. Despite being ordered to
20 effectuate service and the Court granting Plaintiff opportunities to do so, Plaintiff has not complied.
21 This action cannot remain idle on the Court’s docket, unprosecuted. Accordingly, this factor does not
22 outweigh Plaintiff’s failures to effectuate service, failure to comply with the Court’s order, and failure
23 to prosecute this case.

24 Lastly, the availability of less drastic sanctions weighs in favor of dismissal. “The district
25 court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of
26 the sanction and the adequacy of less drastic sanctions.” *Malone*, 833 F.2d at 131-32 (quoting *United*
27 *States v. Nat’l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir. 1986)). At this stage in the proceedings,
28 there is little available to the Court which would constitute a satisfactory lesser sanction while

1 protecting the Court from further unnecessary expenditures of its scarce resources. Additionally, the
2 Court only recommends dismissal without prejudice. Because the dismissal being considered in this
3 case is without prejudice, the Court is stopping short of using the harshest possible sanction of
4 dismissal with prejudice.

5 After weighing the factors, the Court finds that dismissal without prejudice is appropriate.

6 **Conclusion and Recommendations**

7 Based on the foregoing, the Court HEREBY RECOMMENDS that:

- 8 1. This action be dismissed without prejudice for failure to properly serve Defendant, failure
9 to prosecute and failure to comply with a court order; and
- 10 2. The Clerk of Court be directed to close this case.

11 These findings and recommendations will be submitted to the United States district judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
13 after being served with these findings and recommendations, Petitioner may file written objections
14 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
15 Recommendations.” Plaintiffs are advised that failure to file objections within the specified time may
16 result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)
17 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

18 IT IS SO ORDERED.

19 Dated: December 19, 2022

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22 UNITED STATES MAGISTRATE JUDGE
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