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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERNANDO GASTELUM,
Plaintiff,
v.
BED BATH & BEYOND, INC.
Defendant.

Case No. 1:22-cv-01173-ADA-CDB

**FINDINGS AND RECOMMENDATION
TO DISMISS PLAINTIFF'S COMPLAINT
WITHOUT PREJUDICE FOR FAILING
TO PROSECUTE AND TO COMPLY
WITH FED. R. CIV. PRO. 4(m)**

(Docs. 12, 13)

Pending before the Court is Plaintiff Fernando Gastelum's response to this Court's Order to Show Cause (OSC) why sanctions should not be imposed for his failure to timely serve and file summons returned executed consistent with Rule 4, Fed. R. Civ. Pro. For the reasons set forth herein, the Court declines to discharge the OSC and will recommend that the action be dismissed without prejudice for failure to prosecute, failure to comply with this Court's orders and failure to comply with Rule 4.

BACKGROUND

Plaintiff commenced this action on September 14, 2022, in which he raises claims against Defendant for violations of the Americans with Disabilities Act (ADA) under 42 U.S.C. §12101, *et seq.*, as well as claims under California's Unruh Civil Rights Act. (Doc. 1). On September 28, 2022, the Clerk of Court issued new civil case documents and directed Plaintiff to "diligently

1 pursue service of summons and complaint.” Included in those documents was the Court’s
2 scheduling conference order, which referred Plaintiff to Rule 4’s requirement that the complaint
3 be timely served and explained the consequences of not doing so included dismissal of unserved
4 defendants. (Doc. 5).

5 On December 9, 2022, the Court issued an Order to Show Cause (OSC) why sanctions
6 should not be imposed for Plaintiff’s failure to prosecute this action by serving the summons and
7 complaint in a timely manner. (Doc. 8). Plaintiff timely responded with a filing in which he
8 represented he had reached a settlement with Defendant and that he expected to file dispositional
9 papers within 30 days. (Doc. 9). Although Plaintiff’s representations in his filing were not
10 directly responsive to explaining why he had not served the summons and complaint, the Court
11 nevertheless found that Plaintiff’s response constituted good cause and ordered him to file
12 dispositional papers no later than January 18, 2023. (Doc 10). The Court also vacated the
13 Scheduling Conference scheduled for that same date. (*Id.*).

14 On the last day of his time for filing dispositional documents (January 18, 2023), Plaintiff
15 filed a motion to retain this action on active calendar in which he advanced various reasons why
16 he had been unable to comply with the Court’s order to file dispositional documents and
17 requested 30 additional days to file said documents. (Doc. 11). The Court denied Plaintiff’s
18 motion because he still had not filed or otherwise returned an executed summons, Defendant still
19 had not appeared, and the Court still had no information establishing whether Plaintiff had served
20 the summons and complaint. (Doc. 12). Further, the Court issued a second OSC why sanctions
21 should not be imposed (including dismissal of the action) for Plaintiff’s failure to prosecute the
22 action. (*Id.*). The Court specifically stated: “The 90 days provided under Rule 4(m) for Plaintiff
23 to complete service on Defendant of the summons and complaint is past due, and Plaintiff has
24 offered no satisfactory explanation for his failure to comply with the Court’s orders and Rule 4 in
25 connection with service.”

26 On January 30, 2023, Plaintiff filed a response to the OSC in which he acknowledged he
27 purposefully had not served Defendant. (Doc. 13). He reiterated that he expected the parties’
28 purported settlement agreement to arrive promptly after December 12, 2022, and referred the

1 Court to an article available in “Fashion Network” that speculated on Defendant’s financial
2 circumstances as to why Plaintiff was unable to file dispositional documents. (*Id.*). Plaintiff
3 represented in his response to the OSC that he did not serve process on Defendant “because he
4 was led to believe that the case settled” and argued he “should not be punished for this by
5 dismissal of the claim.” (*Id.*).

6 DISCUSSION

7 Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with these Rules
8 or with any order of the Court may be grounds for the imposition by the Court of any and all
9 sanctions . . . within the inherent power of the Court.” District courts have the inherent power to
10 control their dockets and “[i]n the exercise of that power they may impose sanctions, including,
11 where appropriate ... dismissal.” *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986).
12 A court may dismiss an action based on a party’s failure to prosecute an action, failure to obey a
13 court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*, 46 F.3d 52, 53–54
14 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*, 963 F.2d 1258,
15 1260–61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring amendment of
16 complaint); *Carey v. King*, 856 F.2d 1439, 1440–41 (9th Cir. 1988) (dismissal for failure to
17 comply with local rule requiring *pro se* plaintiff to keep court apprised of address); *Malone v.*
18 *U.S. Postal Service*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure to comply with
19 court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to
20 prosecute and failure to comply with local rules).

21 In determining whether to dismiss an action for failure to obey a court order or failure to
22 comply with the Local Rules, the court must consider several factors, including: “(1) the public’s
23 interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the
24 risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
25 merits; and (5) the availability of less drastic sanctions.” *Henderson*, 779 F.2d at 1423–24; *see*
26 *also Ferdik*, 963 F.2d at 1260–61; *Thompson*, 782 F.2d at 831. “The public’s interest in
27 expeditious resolution of litigation always favors dismissal.” *Pagtalunan v. Galaza*, 291 F.3d
28 639, 642 (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)).

1 Here, given the Court’s repeated directions to Plaintiff, the undersigned finds that the
2 public’s interest in expeditiously resolving this litigation and the Court’s interest in managing the
3 docket weigh in favor of dismissal. The third factor, risk of prejudice to Defendant, also weighs
4 in favor of dismissal since a presumption of injury arises from the occurrence of unreasonable
5 delay in prosecuting an action. *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976).

6 The fourth factor – public policy favoring disposition of cases on their merits – does not
7 weigh against dismissal, as Plaintiff has intimated as early as the original filing of the Complaint
8 that he is pursuing a settlement with Defendant and does not wish to see resolution of this case
9 on the merits. (Doc. 1 ¶ 16). See *Wilson v. Jones*, 2:19-cv-0249-WBS-AC-P, 2019 WL
10 4955030, *1 (E.D. Cal. Oct. 8, 2019) (public policy not offended where parties express desire to
11 settle case without litigation). Finally, a court’s warning to a party that his failure to obey the
12 court’s order will result in dismissal satisfies the “consideration of alternatives” requirement.
13 *Ferdik*, 963 F.2d at 1262; *Malone*, 833 F.2d at 132–33; *Henderson*, 779 F.2d at 1424. Here, the
14 Court issued two OSCs requiring Plaintiff to show cause why the Court should not recommend
15 that this action be dismissed for failing to diligently pursue service. (Docs. 8, 12). Thus, Plaintiff
16 had adequate warning that sanctions, up to and including dismissal of the case, would result from
17 his noncompliance with the OSC. Furthermore, the recommended sanction, dismissal without
18 prejudice, is not so harsh as to completely block Plaintiff from raising another action against
19 Defendant. At this time, it is simply an inefficient use of the Court’s strained resources to
20 manage this case, when it appears from Plaintiff’s filings that he prefers to reach an informal
21 resolution with Defendant rather than diligently litigating this action.

22 Aside from his failure to comply with Court orders and failure to prosecute, there is a
23 separate and independent reason why Plaintiff’s action should be dismissed: he failed to comply
24 with Rule 4, Fed. R. Civ. Pro. Rule 4(m) provides in part:

25 If a defendant is not served within 90 days after the complaint is filed, the court -
26 on motion or on its own after notice to the plaintiff - must dismiss the action
27 without prejudice against that defendant or order that service be made within a
28 specified time. But if the plaintiff shows good cause for the failure, the court must
extend the time for service for an appropriate period.

1 These findings and recommendations are submitted to the district judge assigned to this
2 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within fourteen
3 (14) days of service of this recommendation, any party may file written objections to these
4 findings and recommendations with the Court and serve a copy on all parties. Such a document
5 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The
6 district judge will review the magistrate judge’s findings and recommendations pursuant to 28
7 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified
8 time may waive the right to appeal the district judge’s order. *Wilkerson v. Wheeler*, 772 F.3d
9 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10 IT IS SO ORDERED.

11 Dated: February 8, 2023

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14 UNITED STATES MAGISTRATE JUDGE