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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NOEL ORTEGA,

Plaintiff,

No. 2:07-cv-1110 FCD KJN P

vs.

T. FELKER, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding without counsel with a civil rights action pursuant to 42 U.S.C. § 1983. On February 12, 2010, defendants filed a motion for summary judgment. On June 18, 2008, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc) and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988). In that same order, plaintiff was advised of the requirements for filing an opposition to the pending motion and that failure to oppose such a motion might be deemed a waiver of opposition to the motion.

On April 29, 2010, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. In the same order, plaintiff was informed that failure to file an opposition would result in a recommendation that this action

1 be dismissed pursuant to Fed. R. Civ. P. 41(b). The thirty day period has now expired and
2 plaintiff has not responded to the court's order.

3 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
4 an action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258,
5 1260 (9th Cir. 1992). “In determining whether to dismiss a case for failure to comply with a
6 court order the district court must weigh five factors including: ‘(1) the public's interest in
7 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
8 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
9 and (5) the availability of less drastic alternatives.’” Ferdik, 963 F.2d at 1260-61 (quoting
10 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
11 F.3d 52, 53 (9th Cir. 1995).

12 In determining to recommend that this action be dismissed, the court has
13 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
14 support dismissal of this action. The action has been pending for three years and has reached the
15 stage, set by the court's July 27, 2009 scheduling order, for resolution of dispositive motions and,
16 if necessary, preparation for pretrial conference and jury trial. (See Scheduling Order, filed July
17 27, 2009.) Plaintiff's failure to comply with the Local Rules and the court's April 29, 2010 order
18 suggests that he has abandoned this action and that further time spent by the court thereon will
19 consume scarce judicial resources in addressing litigation which plaintiff demonstrates no
20 intention to pursue.

21 Under the circumstances of this case, the third factor, prejudice to defendants
22 from plaintiff's failure to oppose the motion, also favors dismissal. Plaintiff's failure to oppose
23 the motion prevents defendants from addressing plaintiff's substantive opposition, and would
24 delay resolution of this action, thereby causing defendants to incur additional time and expense.

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1 The fifth factor also favors dismissal. The court has advised plaintiff of the
2 requirements under the Local Rules and granted ample additional time to oppose the pending
3 motion, all to no avail. The court finds no suitable alternative to dismissal of this action.

4 The fourth factor, public policy favoring disposition of cases on their merits,
5 weighs against dismissal of this action as a sanction. However, for the reasons set forth supra,
6 the first, second, third, and fifth factors strongly support dismissal. Under the circumstances of
7 this case, those factors outweigh the general public policy favoring disposition of cases on their
8 merits. See Ferdik, 963 F.2d at 1263.

9 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
10 dismissed pursuant to Federal Rule of Civil Procedure 41(b).

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
13 one days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
16 objections shall be filed and served within fourteen days after service of the objections. The
17 parties are advised that failure to file objections within the specified time may waive the right to
18 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: June 7, 2010

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23 KENDALL J. NEWMAN
24 UNITED STATES MAGISTRATE JUDGE

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