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

JOHN KENT,

Plaintiff,

No. 2:07-cv-02361 MCE KJN PS

v.

CITY OF SACRAMENTO, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Presently before the court is defendants’ motion for summary judgment or partial summary judgment (Dkt. No. 69), to which plaintiff filed no written opposition or statement of non-opposition.¹ Plaintiff failed to respond to defendants’ motion for summary judgment despite the fact that plaintiff has been repeatedly warned in this case and in a parallel action entitled Kent v. California Department of Consumer Affairs et al., 2:09-cv-02905 KJM KJN PS (“Kent II”), that his failure to prosecute his lawsuits or to follow the court’s orders, the court’s Local Rules, or the Federal Rules of Civil Procedure would result in a recommendation that his action be dismissed. As a result of plaintiff’s failure to respond to defendants’ motion for summary judgment despite myriad warnings of the potential consequence of such a failure, the undersigned

¹ This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 recommends that plaintiff's action be dismissed with prejudice pursuant to Federal Rule of Civil
2 Procedure 41(b) and Eastern District of California Local Rules ("Local Rules") 110 and 183(a).

3 I. BACKGROUND

4 Plaintiff commenced this action in November 2007 (Dkt. No. 1), and filed his
5 operative Second Amended Complaint on May 27, 2008 (Dkt. No. 8). On December 30, 2009,
6 the magistrate judge previously assigned to this case entered a Status (Pretrial Scheduling) Order,
7 which requires that all law and motion matters other than motions for continuances, temporary
8 restraining orders, or other emergency applications be heard no later than December 14, 2011.²
9 (Status (Pretrial Scheduling) Order at 3-4, Dkt. No. 46.)

10 On October 19, 2011, defendants filed their motion for summary judgment and
11 noticed that motion for a hearing to take place on December 8, 2011.³ Defendants also filed a
12 Proof of Service reflecting service of defendants' moving papers on plaintiff (Dkt. No. 70).

13 Pursuant to the court's Local Rule 230(c), plaintiff was required to file a written
14 opposition to the motion for summary judgment, or a statement of non-opposition, no later than
15 14 days prior to the December 8, 2011 hearing date, or November 24, 2011.⁴ Notably, November
16

17 ² This case was re-assigned to the undersigned on February 9, 2010, as a result of the
18 undersigned taking the bench. (Order of Reassignment, Dkt. No. 54.)

19 ³ On September 30, 2011, plaintiff filed a motion for an extension of time to conduct further
20 discovery despite the fact that the discovery deadline had not yet passed (Dkt. No. 67). The court
21 notified plaintiff that he had defectively noticed his motion and directed plaintiff to re-notice his
22 motion—which was in effect a motion to modify the scheduling order in this case—in accordance
23 with the court's Local Rule 230(b), and also contact the undersigned's Courtroom Deputy regarding
24 available hearing dates. (Minute Order, Oct. 4, 2011, Dkt. No. 68.) Plaintiff failed to take any
25 subsequent action in regards to that motion.

26 ⁴ Local Rule 230(c) provides:

(c) Opposition and Non-Opposition. Opposition, if any, to the granting of
the motion shall be in writing and shall be filed and served not less than
fourteen (14) days preceding the noticed (or continued) hearing date. A
responding party who has no opposition to the granting of the motion shall
serve and file a statement to that effect, specifically designating the motion
in question. No party will be entitled to be heard in opposition to a motion

1 24, 2011, was the Thanksgiving holiday. However, even providing plaintiff with the most liberal
2 and charitable reading of the Federal Rules of Civil Procedure and the court’s Local Rules,
3 plaintiff was required to file a written opposition or statement of non-opposition *at the latest* on
4 November 28, 2011. Nevertheless, plaintiff failed to file a timely written opposition to
5 defendants’ motion for summary judgment or a statement of non-opposition. Indeed, plaintiff
6 has filed nothing with the court since defendants filed their motion for summary judgment.

7 On November 28, 2011, defendants filed a notice of their intent not to file a reply
8 brief in support of the motion for summary judgment because plaintiff had failed to file and serve
9 a timely written opposition (Dkt. No. 71). On November 29, 2011, the court vacated the hearing
10 date on defendants’ motion for summary judgment in light of plaintiff’s failure to oppose that
11 motion. (Minute Order, Nov. 29, 2011, Dkt. No. 72.)

12 Considering plaintiff’s status as a pro se party, the court ordinarily would have
13 continued the December 8, 2011 hearing and provided plaintiff with additional time to file a
14 response to the motion for summary judgment. However, such a continuance is not warranted in
15 this case because plaintiff has been repeatedly warned of the consequences for failing to follow
16 the court’ Local Rules, that even pro se parties must follow the Local Rules, and that his failure
17 to timely respond to a potentially dispositive motion would result in a recommendation that his
18 case be involuntarily dismissed with prejudice. Accordingly, plaintiff cannot claim ignorance of
19 the applicable Local Rules.

20 In this case, the court has repeatedly warned plaintiff in various contexts that his
21 failure to follow the court’s Local Rules, the court’s orders, and the Federal Rules of Civil
22 Procedure—including his failure to respond to motions—could result in the imposition of
23 sanctions including involuntary dismissal. (See Order, Apr. 23, 2008, at 6 (“Plaintiff is
24 cautioned that failure to file an amended complaint containing a ‘short and plain statement of the

25 _____
26 at oral arguments if opposition to the motion has not been timely filed by that
party. . . .

1 claim,' may be grounds for dismissal.”), Dkt. No. 6; Order, July 23, 2008, at 7 (service order
2 stating that “[f]ailure to comply with this order may result in a recommendation that this action
3 be dismissed”), Dkt. No. 9; Scheduling Order ¶ 6 (including the following warnings: (1) “Failing
4 to obey federal or local rules, or order of this court, may result in dismissal of this action” ;
5 (2) “Even though the court will construe pro se pleadings liberally, pro se litigants must comply
6 with the procedural rules”; and (3) “the parties are cautioned that pursuant to Local Rule
7 78-230(c), opposition to granting of a motion must be filed fourteen (14) days preceding the
8 noticed hearing date”), Dkt. No. 11; Order to Show Cause, Nov. 24, 2008, at 2 (“Plaintiff shall
9 show cause, in writing, within 20 days after the filing date of this order, why this case should not
10 be dismissed for failure to comply and failure to complete service of process are required by Fed.
11 R. Civ. P. 4(m).”), Dkt. No. 12; Order to Show Cause, July 7, 2009, at 2 (addressing plaintiff’s
12 failure to oppose a motion to stay the proceedings in violation of Local Rules 110, 183(a),
13 and 230(c), and warning plaintiff that his failure to oppose the motion would be grounds for
14 dismissal), Dkt. No. 28; Order, Aug. 19, 2009, at 3 (order setting a status conference in which the
15 parties were warned: (1) “Failing to obey federal or local rules, or order of this court, may result
16 in dismissal of this action”; (2) “Even though the court will construe pro se pleadings liberally,
17 pro se litigants must comply with the procedural rules”; and (3) “the parties are cautioned that
18 pursuant to Local Rule 78-230(c), opposition to granting of a motion must be filed fourteen (14)
19 days preceding the noticed hearing date”), Dkt. No. 37; Order, Oct. 1, 2009, at 2 (resetting status
20 conference and noting that the court had previously “cautioned that failure to obey the Federal
21 Rules, Local Rules, or orders of the court could result in sanctions, including a recommendation
22 that the case be dismissed”), Dkt. No. 40.)

23 Most recently, on September 16, 2011, the court granted the City of Sacramento’s
24 (“City”) motion to compel plaintiff to attend his deposition in this case, a motion which the City
25 filed after plaintiff’s repeated failure to facilitate the taking of his deposition. (Order, Sept. 16,
26 2011, Dkt. No. 66.) In granting the City’s motion to compel, the court provided plaintiff with the

1 following warning:

2 Plaintiff is yet again warned that his failure to prosecute this action
3 or his failure to comply with the Federal Rules of Civil Procedure, the
4 court's orders, or the court's Local Rules will result in a recommendation
5 that his entire action be involuntarily dismissed with prejudice. Eastern
6 District Local Rule 110 provides that "[f]ailure of counsel or of a party to
7 comply with these Rules or with any order of the Court may be grounds
8 for imposition by the Court of any and all sanctions authorized by statute
9 or Rule or within the inherent power of the Court." Moreover, Eastern
10 District Local Rule 183(a) provides, in part:

11 Any individual representing himself or herself without an
12 attorney is bound by the Federal Rules of Civil or Criminal
13 Procedure, these Rules, and all other applicable law. All
14 obligations placed on "counsel" by these Rules apply to
15 individuals appearing in propria persona. Failure to comply
16 therewith may be ground for dismissal . . . or any other
17 sanction appropriate under these Rules.

18 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se
19 litigants must follow the same rules of procedure that govern other
20 litigants."). Case law is in accord that a district court may impose
21 sanctions, *including involuntary dismissal of a plaintiff's case* pursuant to
22 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to
23 prosecute his or her case or fails to comply with the court's orders, the
24 Federal Rules of Civil Procedure, or the court's local rules. See Chambers
25 v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court "may act
26 *sua sponte* to dismiss a suit for failure to prosecute"); Hells Canyon
27 Preservation Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir.
28 2005) (stating that courts may dismiss an action pursuant to Federal Rule
29 of Civil Procedure 41(b) *sua sponte* for a plaintiff's failure to prosecute or
30 comply with the rules of civil procedure or the court's orders); Ghazali v.
31 Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) ("Failure to follow a
32 district court's local rules is a proper ground for dismissal."), cert. denied,
33 516 U.S. 838 (1995); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.
34 1992) ("Pursuant to Federal Rule of Civil Procedure 41(b), the district
35 court may dismiss an action for failure to comply with any order of the
36 court."), cert. denied, 506 U.S. 915 (1992); Thompson v. Housing Auth. of
37 City of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam) (stating that
38 district courts have inherent power to control their dockets and may
39 impose sanctions including dismissal), cert. denied, 479 U.S. 829 (1986).

40 (Id. at 6-7.)

41 Such admonitions regarding plaintiff's obligation to follow the court's orders and
42 applicable procedural rules—and plaintiff's failures in this regard—are not limited to this action.

43 The court has provided numerous, similar warnings to plaintiff in Kent II. (See Kent II, Order,

1 July 22, 2010, at 3 (ordering service of plaintiff's Ninth Amended Complaint and stating that
2 "Plaintiff's failure to comply with this order may result in a recommendation that this action be
3 dismissed"), Dkt. No. 21; Kent II, Order, Jan. 4, 2011 (continuing hearing on motion to dismiss
4 because of plaintiff's failure to file a written opposition and warning plaintiff that his failure to
5 prosecute and follow rules and orders will result in a dismissal pursuant to Federal Rule of Civil
6 Procedure 41(b)), Dkt. No. 29; Kent II, Order & Findings & Recommendations, June 28, 2011, at
7 21-22 (addressing plaintiff's failure to serve three defendants and again admonishing plaintiff
8 that his failure to prosecute his case or comply with the court's orders could result in dismissal
9 with prejudice), Dkt. No. 42; Kent II, Order, Sept. 29, 2011, at 2-3 (noting plaintiff's "propensity
10 to not follow the Federal Rules of Civil Procedure, the court's Local Rules, and the court's
11 orders" and warning plaintiff that "that his failure to prosecute this action or to comply with the
12 Federal Rules of Civil Procedure, the court's orders, or the court's Local Rules will result in a
13 recommendation that his entire action be involuntarily dismissed with prejudice"), Dkt. No. 48;
14 accord Kent II, Order & Order to Show Cause, Oct. 21, 2011, at 2-4, Dkt. No. 50; Kent II, Order,
15 Nov. 16, 2011, at 3-5, Dkt. No. 52.)

16 II. DISCUSSION

17 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may act on its
18 own accord to dismiss an action for failure to prosecute the action, failure to comply with the
19 Federal Rules of Civil Procedure, failure to comply with the court's local rules, or failure to
20 comply with the court's orders.⁵ See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)
21 (recognizing that a court "may act *sua sponte* to dismiss a suit for failure to prosecute"); Hells
22 Canyon Preservation Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005)
23 (recognizing that courts may dismiss an action pursuant to Federal Rule of Civil Procedure 41(b)

24
25 ⁵ Federal Rule of Civil Procedure 41(b) provides, in relevant part: "**(b) Involuntary**
26 **Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order,
a defendant may move to dismiss the action or any claim against it."

1 *sua sponte* for a plaintiff's failure to prosecute or comply with the rules of civil procedure or the
2 court's orders); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) ("Pursuant to Federal
3 Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with
4 any order of the court."), cert. denied, 506 U.S. 915 (1992); Pagtalunan v. Galaza, 291 F.3d 639,
5 642-43 (9th Cir. 2002) (affirming district court's dismissal of case for failure to prosecute when
6 habeas petitioner failed to file a first amended petition), cert. denied, 538 U.S. 909 (2003). This
7 court's Local Rules are in accord. See Local Rule 110 ("Failure of counsel or of a party to
8 comply with these Rules or with any order of the Court may be grounds for imposition by the
9 Court of any and all sanctions authorized by statute or Rule or within the inherent power of the
10 Court."); Local Rule 183(a) (providing that a pro se party's failure to comply with the Federal
11 Rules of Civil Procedure, the court's Local Rules, and other applicable law may support, among
12 other things, dismissal of that party's action).

13 A court must weigh five factors in determining whether to dismiss a case for
14 failure to prosecute, failure to comply with a court order, or failure to comply with a district
15 court's local rules or the Federal Rules of Civil Procedure. See, e.g., Ferdik, 963 F.2d at 1260.
16 Specifically, the court must consider:

- 17 (1) the public's interest in expeditious resolution of litigation;
18 (2) the court's need to manage its docket; (3) the risk of prejudice
19 to the defendants; (4) the public policy favoring disposition of
 cases on their merits; and (5) the availability of less drastic
 alternatives.

20 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th
21 Cir. 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of Appeals has stated that
22 "[t]hese factors are not a series of conditions precedent before the judge can do anything, but a
23 way for a district judge to think about what to do." In re Phenylpropanolamine (PPA) Prods.
24 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

25 Although involuntary dismissal can be a harsh remedy, the relevant factors weigh
26 in favor of dismissal of this action. The first two factors strongly support dismissal of this action.

1 Plaintiff's failure to file a written opposition or statement of non-opposition to defendants'
2 motion for summary judgment despite clear warnings of the consequences for such a failure,
3 strongly suggests that plaintiff has abandoned this action or is not interested in seriously
4 prosecuting it. See, e.g., Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("The
5 public's interest in expeditious resolution of litigation always favors dismissal."). Indeed, in
6 Kent II, the court recently noted that plaintiff has repeatedly sought to extend filing deadlines on
7 the grounds that he does not "have the time" to meet his deadlines. The court stated:

8 Finally, the undersigned addresses two additional matters. First,
9 the undersigned addresses plaintiff's ongoing attempts to seek relief from
10 this court on the grounds that he "does not have time" to perform certain
11 required acts. On at least three occasions in this case, plaintiff has sought
12 extensions of time based on his purported lack of time (see Dkt. Nos. 30,
13 43, 51). Plaintiff's reliance on his purported lack of time is entirely
14 inappropriate and does not provide a proper basis for an extension of time.
15 If plaintiff truly does not have time to prosecute the lawsuit that he filed,
16 he should simply dismiss his case. Plaintiff should understand in no
17 uncertain terms that the filing of a lawsuit is not a game or a hobby.

18 Second, the undersigned notes that, to date, the court has been
19 extremely lenient with plaintiff. Although the undersigned has repeatedly
20 warned plaintiff of the consequences for delaying this action and not
21 obeying the court's orders and applicable procedural rules, the undersigned
22 has not actually sanctioned plaintiff or recommended the dismissal of
23 plaintiff's case. As a result, plaintiff might believe that the undersigned's
24 warnings are hollow and that the court will never actually sanction
25 plaintiff. If such is the case, plaintiff should cease laboring under such an
26 incorrect assumption.

19 (See Kent II, Order, Nov. 16, 2011, at 2-3.) Despite this clear warning to plaintiff on November
20 16, 2011, which was only one in a long list of similar admonitions in Kent II and this case,
21 plaintiff still failed to respond to defendants' motion for summary judgment in this case. Any
22 further time spent by the court on this case, which plaintiff has demonstrated a lack of any
23 serious intention to pursue, will continue to consume scarce judicial resources and take away
24 from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district courts have
25 inherent power to manage their dockets without being subject to noncompliant litigants).

26 In addition, the third factor, which considers prejudice to a defendant as a result of

1 plaintiff's failure to timely oppose a dispositive motion, favors dismissal. See Ferdik, 963 F.2d
2 at 1262. Defendants in this action have diligently pursued their defense of plaintiff's claims
3 since this action was filed in 2007, and, in that regard filed a dispositive motion within the time
4 prescribed by the court. Yet plaintiff chose not to respond to that motion and thereby prevented
5 the efficient resolution of a case that has been pending for four years. Plaintiff's failure to
6 oppose the motion or communicate with the court or explain his non-participation in this
7 litigation, raises the real possibility that defendants might be forced to unnecessarily engage in
8 further litigation against claims that plaintiff does not appear to value enough to pursue in a
9 serious manner. Such unreasonable delay is presumed to be prejudicial. See, e.g., In re
10 Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

11 The fifth factor, which considers the availability of less drastic measures, also
12 supports dismissal of this action. As noted above, the court has actually pursued remedies that
13 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d
14 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court
15 actually tries alternatives before employing the ultimate sanction of dismissal.”), cert. denied,
16 Malone v. Frank, 488 U.S. 819 (1988). In both this case and in Kent II, the court previously
17 excused plaintiff's initial failures to oppose various motions and granted plaintiff additional time
18 to file oppositions or statements of non-opposition. In each such instance, the court advised
19 plaintiff of the requirement of opposing motions and informed him of the requirements of the
20 Local Rules. Furthermore, the court has advised plaintiff *ad nauseam* that he is required to
21 comply with the court's Local Rules and the Federal Rules of Civil Procedure even though he is
22 proceeding without counsel. It has also warned plaintiff in clear terms that failure to comply
23 with the court's orders and Local Rules would result in a recommendation of dismissal with
24 prejudice. Warning a plaintiff that failure to take steps towards resolution of his or her action on
25 the merits will result in dismissal satisfies the requirement that the court consider the alternatives.
26 See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur decisions also suggest that a district court's warning

1 to a party that his failure to obey the court's order will result in dismissal can satisfy the
2 'consideration of alternatives' requirement.") (citing Malone, 833 F.2d at 132-33). At this
3 juncture, the court finds no suitable alternative to a recommendation for dismissal of this action.
4 This finding is supported by the fact that plaintiff is proceeding in this case in forma pauperis,
5 which in turn suggests that plaintiff would be unable to pay any monetary sanction imposed in
6 lieu of dismissal.

7 The court also recognizes the importance of giving due weight to the fourth factor,
8 which addresses the public policy favoring disposition of cases on the merits. However, for the
9 reasons set forth above, factors one, two, three, and five strongly support a recommendation of
10 dismissal of this action, and the fourth factor does not materially counsel otherwise. Dismissal is
11 proper "where at least four factors support dismissal or where at least three factors 'strongly'
12 support dismissal." Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
13 and quotation marks omitted). Under the circumstances of this case, the other relevant factors
14 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,
15 963 F.2d at 1263.

16 III. CONCLUSION


17 For the foregoing reasons, IT IS HEREBY RECOMMENDED that plaintiff's case
18 be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) and Eastern
19 District of California Local Rules 110 and 183(a).

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
22 days after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
24 Such a document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendations." Any response to the objections shall be filed with the court and served on
26 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).

1 Failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
3 1153, 1156-57 (9th Cir. 1991).

4 IT IS SO RECOMMENDED.

5 DATED: December 1, 2011

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8 KENDALL J. NEWMAN
9 UNITED STATES MAGISTRATE JUDGE
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