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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY C. BONTEMPS,
Plaintiff,
v.
SOTAK, et al.,
Defendants.

No. 2:09-cv-2115-MCE-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He alleges that defendants Smith and Sotak provided inadequate medical care during his incarceration at the Sacramento County Jail. ECF No. 24. Pending before the court is defendants’ Joint Motion for Terminating Sanctions or Involuntary Dismissal (ECF No. 126). Plaintiff has filed an opposition (ECF No. 130) and defendants have filed a reply (ECF No. 131). For the reasons stated below, defendants’ motion should be granted.

I. Background

Defendants previously requested an order compelling plaintiff to: (1) attend and cooperate in his deposition by providing truthful, complete, and non-evasive responses to defendants’ questions; (2) produce documents requested by defendants in the deposition notice; and (3) pay monetary sanctions in the amount of \$4,438.25 based on his conduct during his first deposition. ECF No. 112. That motion was granted in part based on the finding that plaintiff’s conduct at the

1 first deposition was “combative and evasive,” inexcusable, and in violation of Rule 30(d)(2) of
2 the Federal Rules of Civil Procedure. ECF No. 121. The court ordered plaintiff to provide
3 responsive documents at a second deposition. In light of plaintiff’s incarceration and pro se
4 status, the court denied defendants’ request for monetary sanctions. However, plaintiff was
5 warned that continued failure to cooperate in a second deposition would result in a
6 recommendation that this case be terminated due to his failure to obey a court order. *Id.* at 4-5.

7 On September 14, 2018 defendants filed the instant motion for terminating sanctions.
8 ECF No. 126. Defendants state that they re-noticed plaintiff’s deposition, that plaintiff made no
9 objection prior to the deposition, yet once again refused to cooperate. ECF No. 126-2 ¶ 3; ECF
10 No. 126-3 at ¶ 4. At the beginning of the deposition, plaintiff announced that it could “not go
11 forward” because he had twice been “touched in an inappropriate manner” by CDCR physicians.
12 ECF No. 126-2, Ex. C at 5, 7-8. He added that he was in “severe pain” and that his hearing aids
13 were not working correctly. *Id.* at 8. When defense counsel attempted to speak, plaintiff
14 interrupted, declaring, “Excuse me, I’m not through yet.” *Id.* He went on to express his view that
15 CDCR was “covering up” the inappropriate touching by transferring him from prison to prison in
16 an effort to keep plaintiff from making his allegations public. *Id.* He concluded, “Now, so with
17 that said on the record, I’m out of here.” *Id.* at 9. Thereafter, when defense counsel attempted to
18 question plaintiff, he became hostile and aggressive in his manner and made it clear he was
19 leaving and would not cooperate with the deposition. *Id.* at 9-10; ECF No. 126-2 ¶ 5; ECF No.
20 126-3 ¶ 6. Despite the court’s order with respect to defendants’ motion to compel, plaintiff
21 produced no documents. ECF No. 126-2 ¶ 5.

22 Based on plaintiff’s conduct at his first deposition and his refusal to cooperate in the
23 second deposition, in direct violation of the court’s order, defendants argue it would be futile to
24 attempt a third deposition. ECF No. 126-1 at 4. To date, the costs incurred in defending against
25 plaintiff’s lawsuit exceed \$100,000. ECF No. 126-2 ¶ 8; ECF No. 126-3 ¶ 7.

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1 **II. Legal Standards**

2 Federal Rule of Civil Procedure 16(f) states:

3 On motion or on its own, the court may issue any just orders,
4 including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party .
5 . . . fails to obey a scheduling or other pretrial order.

6 Federal Rule of Civil Procedure 37(b)(2)(A) states:

7 The court . . . may issue further just orders. They may include the following:

8 . . .

9 dismissing the action or proceeding in whole or in part . . .

10 The U.S. Court of Appeals for the Ninth Circuit has held that five factors are to be
11 considered before imposing the sanction of dismissal, namely:

12 (1) the public’s interest in expeditious resolution of litigation;

13 (2) the court’s need to manage its docket;

14 (3) the risk of prejudice to the other party;

15 (4) the public policy favoring disposition of cases on their merits;

16 and

17 (5) the availability of less drastic sanctions.

18 *Leon v. IDX Systems*, 464 F.3d 951 (9th Cir. 2006) (upholding terminating sanctions for willful
19 destruction of evidence). When a court’s order is violated, the first two factors will militate in
20 favor of dismissal, while the fourth will weigh against. *Adriana Intl. Corp. v. Lewis & Co.*, 913
21 F.2d 1406, 1412 (9th Cir. 1990); *see also Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th
22 Cir. 1990) (“The public’s interest in expeditious resolution of litigation always favors
23 dismissal.”). As to the third factor, a party must establish that their adversary’s actions impaired
24 their ability to proceed to trial or threatened to interfere with the rightful decision of the case.

25 *Malone v. United States Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987). Finally, with regard to
26 the availability of lesser sanctions, the court must consider whether:

27 (1) the court explicitly discussed the feasibility of less drastic sanctions

28 and explained why alternative sanctions would be inappropriate;

 (2) the court implemented alternative sanctions; and

1 (3) the court warned the disobedient party of the possibility of dismissal before
2 ordering the dismissal.

3 *Adriana Intl. Corp.*, 913 F.2d at 1412-1413.

4 **III. Analysis**

5 On July 18, 2018, the court granted defendants' motion to compel to the extent that (1) the
6 parties were directed to meet, confer, and agree on a date for plaintiff's second deposition, and (2)
7 plaintiff was directed to provide documents responsive to defendants' requests for production.
8 ECF No. 121 at 5-6. The order specifically warned that if plaintiff failed to cooperate at his
9 second deposition, this action could be terminated for failure to obey a court order. *Id.* at 4 n.2.

10 It is clear from defendants' motion that plaintiff adamantly refused to participate in the
11 second deposition from the moment it began. Plaintiff offers no rational explanation and
12 certainly no justification for his unwillingness to cooperate. In his opposition, he claims that the
13 inappropriate touching he referenced at the second deposition (noticed on August 7, 2018 and
14 held on August 27, 2018) excuses his failure to cooperate. ECF No. 126-2 ¶¶ 2-3. It does not.
15 The allegation of misconduct has nothing to do with the claims in this case or with the deposition
16 itself. Even if it did, plaintiff could have promptly raised his objection after receipt of
17 defendants' August 7, 2018 notice of deposition. *See* ECF No. 130 at 6 (suggesting that the first
18 instance of alleged misconduct occurred over seven months prior to the notice of second
19 deposition, on December 27, 2017); *id.* at 2 (alleging a second instance of misconduct on April
20 27, 2018, over three months prior to the second notice of deposition). He also could have
21 succinctly stated his objection on the record and then proceeded with the deposition. Instead,
22 after defendants had incurred the costs of hiring a court reporter and traveling to the prison a
23 second time for plaintiff's deposition, plaintiff refused to cooperate, interposing this nonsensical
24 objection and preventing the deposition from being completed. ECF No. 131 at 2.

25 Plaintiff also objected at the second deposition citing "severe pain" and a defective
26 hearing aid. However, he fails to substantiate these objections with any evidence and abandons
27 these objections in his opposition. Instead, plaintiff claims for the first time, that he could not go
28 forward with the second deposition because of depression and post-traumatic stress disorder

1 caused by the alleged inappropriate touching. ECF No. 130 at 2-3. Again, these objections are
2 unsubstantiated. Further, plaintiff does not explain why he failed to voice these objections at the
3 second deposition or better yet, in advance of the second deposition.

4 In short, plaintiff fails to show how the alleged instances of inappropriate touching relieve
5 him from his discovery obligations. Plaintiff was warned that his continued failure to cooperate
6 with his deposition would result in dismissal. ECF No. 121 at 4 n.2. Nothing in his opposition
7 justifies his refusal to cooperate with the court's order or excuses his non-compliance with
8 discovery.

9 The court does not lightly undertake the recommendation of terminating sanctions.
10 Nevertheless, they appear necessary in this case. Plaintiff has failed to comply with this court's
11 discovery orders, thus the first two of the Ninth Circuit's factors – the public's interest in
12 expeditious resolution of litigation and the court's need to manage its docket - are met. *See*
13 *Adriana Intl. Corp.*, 913 F.2d at 1412. And defendants have adequately shown a risk of
14 prejudice. Unreasonably delaying the litigation by failing to produce documents and refusing to
15 be deposed, as ordered by the court, is sufficient to show prejudice. *See In re:*
16 *Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006).

17 While public policy does favor disposition of cases on the merits, courts have recognized
18 that:

19 [A] case that is stalled or unreasonably delayed by a party's failure
20 to comply with deadlines and discovery obligations cannot move
21 forward toward resolution on the merits. Thus, we have also
22 recognized that this factor lends little support to a party whose
responsibility it is to move a case toward disposition on the merits
but whose conduct impedes progress in that direction.

23 *Id.* at 1228. Given that it is plaintiff's conduct which has impeded the progress of this case, the
24 court finds that this factor does not weigh in favor of a lesser sanction.

25 Finally, the court has previously considered the less drastic sanction of monetary sanctions
26 to obtain plaintiff's compliance and found it wanting. The less drastic sanction of evidentiary
27 sanctions would also be inadequate, as the allegations forming plaintiff's Eighth Amendment
28 medical claims are quite vague. *See* ECF No. 24 (Fourth Amended Complaint). Defendants

1 cannot be expected to move forward without discovery specifying the basis for plaintiff's claims
2 and clarifying when and where the alleged civil rights violations occurred. Further, the explicit
3 warning to plaintiff that his failure to comply with discovery orders would result in dismissal, was
4 ineffective. In the July 18, 2018 order on defendants' motion to compel, the court wrote:

5 Plaintiff is an inmate proceeding pro se and in forma pauperis and is almost
6 certainly unable to pay the monetary sanctions requested by defendants, a factor
7 that is properly considered. *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir.
8 1994). If, however, plaintiff fails to appear at his second deposition or fails to
cooperate in the same, *the court will recommend that this action be terminated for
failure to obey a court order.*

9 ECF No. 121 at 4 n.2 (emphasis added). This passage also demonstrates that plaintiff was, in no
10 uncertain terms, warned about the possibility of terminating sanctions.

11 **IV. Conclusion**

12 Based on the foregoing, it is RECOMMENDED that defendants' motion for terminating
13 sanctions (ECF No. 126) be GRANTED and this case be dismissed with prejudice.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
19 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
20 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: December 12, 2018.

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23 EDMUND F. BRENNAN
24 UNITED STATES MAGISTRATE JUDGE
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