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

JERALD RANDALL,

Plaintiff,

No. 2:10-cv-0052 JAM JFM (PC)

vs.

T. KIMURA, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On June 20, 2012, defendants Wrigley and Swingle filed a motion to dismiss this action with prejudice as a sanction for plaintiff’s failure to comply with discovery. On November 16, 2010, the court advised plaintiff of the requirements for filing an opposition to a motion pursuant to Fed. R. Civ. P. 41 and that failure to oppose such a motion might be deemed a waiver of opposition to the motion.

On July 31, 2012, 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 be dismissed pursuant to Fed. R. Civ. P. 41(b). The thirty day period has now expired and plaintiff has neither responded to the court’s order nor filed an opposition to defendants’ motion.

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

10 In determining to recommend that this action be dismissed, the court has
11 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
12 support dismissal of this action. The action has been pending for over two and a half years and
13 has reached the stage, set by the court’s revised scheduling order, filed March 30, 2012
14 scheduling order, for completion of discovery and preparation of dispositive motions. (See
15 Discovery and Revised Scheduling Order, filed March 30, 2012.) Plaintiff’s failure to comply
16 with the Local Rules and the court’s July 31, 2012, order suggests that he has abandoned this
17 action and that further time spent by the court thereon will consume scarce judicial resources in
18 addressing litigation which plaintiff demonstrates no intention to pursue.

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

22 Under the circumstances of this case, the third factor, prejudice to defendants
23 from plaintiff’s failure to oppose the motion, should be given little weight. Plaintiff’s failure to
24 oppose the motion does not put defendants at any disadvantage in this action. See Ferdik, 963
25 F.2d at 1262. Indeed, defendants would only be “disadvantaged” by a decision by the court to
26 continue an action plaintiff has abandoned. The fourth factor, public policy favoring disposition

1 of cases on their merits, weighs against dismissal of this action as a sanction. However, for the
2 reasons set forth supra, the first, second, and fifth factors strongly support dismissal and the third
3 factor does not mitigate against it. Under the circumstances of this case, those factors outweigh
4 the general public policy favoring disposition of cases on their merits. See Ferdik, 963 F.2d at
5 1263.

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

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

16 DATED: September 11, 2012.

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19 UNITED STATES MAGISTRATE JUDGE

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