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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUIS CARMONA,
Plaintiff,
v.
D’ALESSANDRO,
Defendant.

No. 2:10-cv-0898 KJM KJN P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On January 14, 2015, defendant filed a motion for summary judgment. On January 14, 2015, defendant 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). (ECF No. 50.)

On May 7, 2015, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. 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 would be deemed as consent to have the: (a) pending motion granted; (b) action dismissed for lack of prosecution; and (c) action dismissed based on plaintiff’s failure to comply with these rules and a court order. Plaintiff was also informed that failure to file an opposition

1 would result in a recommendation that this action be dismissed pursuant to Rule 41(b) of the
2 Federal Rules of Civil Procedure.

3 On July 16, 2015, plaintiff was granted an additional fourteen days in which to file an
4 opposition. That fourteen day period has now expired and plaintiff has not responded to the
5 court's order.

6 "Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
7 action for failure to comply with any order of the court." Ferdik v. Bonzelet, 963 F.2d 1258,
8 1260 (9th Cir. 1992). "In determining whether to dismiss a case for failure to comply with a
9 court order the district court must weigh five factors including: '(1) the public's interest in
10 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
11 prejudice to the defendant; (4) the public policy favoring disposition of cases on their merits; and
12 (5) the availability of less drastic alternatives.'" Ferdik, 963 F.2d at 1260-61 (quoting Thompson
13 v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46 F.3d 52, 53
14 (9th Cir. 1995).

15 In determining to recommend that this action be dismissed, the court has considered the
16 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal
17 of this action. The action has been pending for over five years and has reached the stage, set by
18 the court's June 13, 2014 scheduling order, for resolution of dispositive motions and, if necessary,
19 preparation for pretrial conference and jury trial. (ECF No. 42.) On February 23, 2015, and
20 March 26, 2015, plaintiff was granted two extensions of time in which to file an opposition.
21 (ECF Nos. 61, 63.) Plaintiff's failure to comply with the Local Rules, and the court's May 7,
22 2015, and July 16, 2015 orders suggests that he has abandoned this action and that further time
23 spent by the court thereon will consume scarce judicial resources in addressing litigation which
24 plaintiff demonstrates no intention to pursue.

25 Under the circumstances of this case, the third factor, prejudice to defendant from
26 plaintiff's failure to oppose the motion, also favors dismissal. Plaintiff's failure to oppose the
27 motion prevents defendant from addressing plaintiff's substantive opposition, and would delay
28 resolution of this action, thereby causing defendant to incur additional time and expense.


1 The fifth factor also favors dismissal. The court has advised plaintiff of the requirements
2 under the Local Rules and granted ample additional time to oppose the pending motion, all to no
3 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, weighs
5 against dismissal of this action as a sanction. However, for the reasons set forth *supra*, the first,
6 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,
7 those factors outweigh the general public policy favoring disposition of cases on their merits. See
8 Ferdik, 963 F.2d at 1263.

9 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
10 dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(b).

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
13 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: August 3, 2015

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22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE

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