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

JERRY W. BAKER,

Plaintiff,

No. 2:10-cv-1208 GEB KJN P

vs.

SOLANO COUNTY, 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 July 19, 2012, defendants renewed their motion for summary judgment in light of Woods v. Carey, __ F.3d __, 2012 WL 2626912,*1, *5 (9th Cir. July 6, 2012), providing contemporaneous notice of Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), as required by the Ninth Circuit. Plaintiff did not oppose the motion.

On August 31, 2012, 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

1 opposition would result in a recommendation that this action be dismissed pursuant to Rule 41(b)
2 of the Federal Rules of Civil Procedure. That deadline has now expired and plaintiff has not
3 responded to the court's order.

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

13 In determining to recommend that this action be dismissed, the court has
14 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
15 support dismissal of this action. The action has been pending for almost two years and has
16 reached the stage, set by the court’s February 11, 2011 scheduling order, for resolution of
17 dispositive motions and, if necessary, preparation for pretrial conference and jury trial. (Dkt. No.
18 20.) Plaintiff’s failure to comply with the Local Rules and the court’s January 12, 2012, and
19 subsequent orders suggest that he has abandoned this action and that further time spent by the
20 court thereon will consume scarce judicial resources in addressing litigation which plaintiff
21 demonstrates no intention to pursue.

22 Under the circumstances of this case, the third factor, prejudice to defendants
23 from plaintiff’s failure to oppose the motion, also favors dismissal. This action has been pending
24 for over two years, and defendants’ motion for summary judgment has been pending for over two
25 and a half months. Plaintiff’s failure to oppose the motion prevents defendants from

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1 addressing plaintiff's substantive opposition, and delays resolution of this action, thereby causing
2 defendants to incur additional time and expense.


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

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

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

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

21 DATED: October 9, 2012

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23 
24 KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE

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