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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL THOMAS HARVEY,
Plaintiff,
v.
ANDREW EISSINGER, CHARLES
DUKE, SHANNON LANEY, and JAKE
HERMINGHAUS,
Defendants.

No. 2:10-cv-1653-KJM-EFB PS

ORDER

On November 27, 2013, defendants filed a motion to dismiss the fifth amended complaint for failure to state a claim.¹ ECF No. 97. Defendants noticed the hearing on that motion for January 8, 2014. *Id.* Pursuant to this court’s local rules, plaintiff was required to file an opposition or a statement of non-opposition to the motion by December 26, 2013. *See* E.D. Cal. L.R. 230(c); Fed. R. Civ. P. 6(a).

Plaintiff failed to timely file an opposition or a statement of non-opposition. Therefore, on December 30, 2013, plaintiff was ordered to show cause, in writing, no later than January 15, 2014, why sanctions should not be imposed for failure to timely file an opposition or a statement of non-opposition to the pending motion. ECF No. 99. The order also continued the hearing on defendants’ motion to dismiss to January 29, 2014, and ordered plaintiff to file an opposition or

¹ This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to 28 U.S.C. § 636(b)(1) and Eastern District of California Local Rule 302(c)(21).

1 statement of non-opposition to the pending motion no later than January 15, 2014. *Id.* Plaintiff
2 failed to timely respond to the December 30 order. However, court records reflected that the
3 Clerk of the Court failed to serve plaintiff with the December 30 order to show cause. Therefore,
4 on January 17, 2014, the Clerk was directed to serve plaintiff with a copy of the December 30
5 order. The January 17 order also continued the hearing on defendants' motion to dismiss to
6 February 26, 2014, and ordered plaintiff to file a response to the order to show cause and an
7 opposition or statement of non-opposition to defendants' motion to dismiss by February 12, 2014.
8 ECF No. 100.

9 On January 27, 2014, plaintiff filed a response to the order to show cause, which is dated
10 January 23, 2014. In his response, plaintiff explains that he never received a copy of defendants'
11 motion to dismiss and therefore was not able to file an appropriate response. ECF No. 102. Also on
12 January 27, 2014, defendants filed a certificate of service, reflecting that they served plaintiff with
13 their motion to dismiss on January 27, 2014. ECF No. 101. In light of the fact that defendants
14 failed to timely serve plaintiff with their motion to dismiss, the order to show cause is discharged
15 and no sanctions will be imposed. Further, the court will continue the hearing on defendants'
16 motion to dismiss and provide plaintiff with additional time to prepare a response to the pending
17 motion.

18 Accordingly, it is hereby ORDERED that:

- 19 1. The December 30, 2013 order to show cause is discharged. No sanctions will be
20 imposed.
- 21 2. The hearing on defendants' motion to dismiss (ECF No. 97) is continued to April 9,
22 2014 at 10:00 a.m. in Courtroom No. 8.
- 23 3. Plaintiff shall file an opposition to the motion, or a statement of non-opposition thereto,
24 no later than March 26, 2014.
- 25 4. Failure of plaintiff to file an opposition to the motion will be deemed a statement of
26 non-opposition thereto, and may result in a recommendation that this action be dismissed for lack
27 of prosecution and/or for failure to comply with court orders and this court's Local Rules. *See*
28 Fed. R. Civ. P. 41(b); E.D. Cal. L.R. 110.

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5. Defendants may file a reply to plaintiff's opposition, if any, on or before April 2, 2014.

6. The Clerk of the Court is directed to serve plaintiff with a copy of the November 27, 2013, motion to dismiss.

DATED: February 6, 2014.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE