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

DEAN A. DOGLIETTO,

Plaintiff,

No. CIV 2:11-cv-1501-MCE-JFM

vs.

TRINITY PROT. SERV., INC.

Defendant.

ORDER

_____ /

On July 26, 2012 the court held a hearing on defendant’s June 12, 2012 motion for terminating sanctions or, alternatively, evidentiary and monetary sanctions pursuant to Federal Rule of Civil Procedure 37. Joann Pheasant appeared for plaintiff. Carolyn Hall appeared for defendant. On review of the motion, opposition and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

RELEVANT BACKGROUND

This action was initially filed in the Sacramento County Superior Court and removed to this court on June 2, 2011. The complaint names Trinity Protection Services (“Trinity”) and Does 1 through 5 as defendants. When this action was removed to this court, plaintiff was proceeding through counsel. On July 19, 2011, however, plaintiff’s counsel filed a motion to withdraw, which was granted on August 22, 2011 by the Honorable Morrison C. England. The case was then referred to the undersigned pursuant to Local Rule 302(c)(21).

1 Following referral, the undersigned set a pretrial scheduling conference for
2 December 22, 2011. The day before the scheduling conference, plaintiff's new (and current)
3 counsel, Joann Pheasant, filed a notice of appearance. In the scheduling order that issued
4 following the conference, a discovery deadline of April 12, 2012 was set. Also, in light of
5 plaintiff's new counsel, the undersigned referred the case back to Judge England.

6 On March 12, 2012, one month before the discovery deadline, Trinity served both
7 its initial disclosures and its initial set of discovery requests (interrogatories and requests for
8 production of documents) on plaintiff, through his counsel, Ms. Pheasant. Hall Decl., ¶ 2.
9 Additionally, defendant noticed plaintiff's deposition for April 9, 2012 with a request that
10 documents be produced at the deposition. Id. ¶ 5; Ex. C. Due to scheduling conflicts, the parties
11 stipulated to conduct plaintiff's deposition after the discovery deadline on May 4, 2012. See id.
12 ¶¶ 7-13.

13 On May 4, 2012, plaintiff's deposition was delayed by an hour because plaintiff's
14 counsel mistakenly assumed that defendant had canceled the deposition, despite defendant's
15 three emails to Ms. Pheasant confirming the deposition date. See Hill Decl., ¶ 14; Ex. D. When
16 counsel did appear at the deposition, she failed to produce initial disclosures or any documents
17 responsive to defendant's discovery requests. Id. Consequently, defendant was able to conduct
18 only a portion of the deposition and forced to continue the rest until after plaintiff complied with
19 his discovery obligations. Id. Trinity has yet to complete plaintiff's deposition.

20 As of the date that defendant filed the instant motion, and despite plaintiff's
21 repeated assurances that he would produce his initial disclosures and responses to defendant's
22 discovery requests, see Hall Decl., ¶¶ 7, 11-15; Ex. D, plaintiff has not only failed to propound
23 any written discovery or notice any depositions, Hall Decl. ¶ 17, but he has further failed to
24 serve his initial disclosures, failed to respond to defendant's discovery requests and failed to file
25 an opposition to defendant's June 7, 2012 motion to compel. Finally, neither plaintiff nor his
26 attorney made an appearance at a hearing on defendant's June 7, 2012 motion to compel and

1 requirements of Rule 26(a)(1)(A) are designed to accelerate the exchange of basic information
2 and “help focus the discovery that is needed, and facilitate preparation for trial or settlement.”
3 See Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 26(a).” Sender v. Mann,
4 225 F.R.D. 645, 650 (D. Colo. 2004). By failing to provide any initial disclosures, plaintiff
5 plainly violated his disclosure obligation under Rule 26(a)(1)(A). Moreover, plaintiff’s failure to
6 respond to defendant’s discovery requests violated his discovery obligations under Rules 33(b)
7 and 34(b)(2).

8 Alternatively, defendant moves for dismissal due to plaintiff’s failure to
9 prosecute. It is well established that a district court has authority to dismiss a plaintiff’s action
10 because of his or her failure to prosecute or to comply with court orders. See Fed. R. Civ. P.
11 41(b); Link v. Wabash Railroad Co., 370 U.S. 626, 629-30 (1962) (holding that a court’s
12 authority to dismiss for lack of prosecution is necessary to prevent undue delays in the
13 disposition of pending cases and to avoid congestion in the calendars of the district courts);
14 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (holding that a district court may
15 dismiss an action for failure to comply with any order of the court). The standards governing
16 dismissal for failure to comply with a court order are basically the same under either Rule 37(b)
17 or Rule 41(b). Malone, 833 F.2d at 130.

18 In addition to dismissal of the action, defendant also seeks monetary sanctions
19 pursuant to Federal Rule of Civil Procedure 37(d)(3). Such sanctions may include “reasonable
20 expenses, including attorney’s fees, caused by the failure, unless the failure was substantially
21 justified or other circumstances make an award of expenses unjust.” Id.

22 Plaintiff opposes this motion on a number of grounds. First, counsel for plaintiff
23 avers that she has been unable to obtain the information for discovery because plaintiff became
24 homeless on or about January 2012. Yet this reason is contradicted by plaintiff’s testimony
25 wherein he testified that he has been living with friends since June 2010. Second, plaintiff’s
26 counsel asserts that she has had a difficult time communicating with plaintiff because of his

1 intermittent phone access, intermittent access to a car, and limited access to his documents.
2 Plaintiff's testimony at his May 4, 2012 deposition, however, evidences regular use of his
3 computer, access to the Internet, possession of documents, and access to a cell phone. Third,
4 counsel states that plaintiff's previous counsel kept plaintiff's files until late-May 2012. This,
5 though, is contradicted by plaintiff's counsel mid-April 2012 statement to defense counsel that
6 she was unable to produce documents before plaintiff's deposition because she had "a pile of
7 stuff" to go through. Furthermore, by email dated April 24, 2012, plaintiff's counsel told
8 defense counsel that it would take a significant amount of time to organize and produce
9 plaintiff's documents. Fourth, plaintiff's current counsel claims she did not participate in
10 discovery because she was under the impression, based on her conversations with previous
11 counsel, that there existed an agreement that discovery would be deferred pending consideration
12 of a settlement agreement. Defendant argues that plaintiff lacks any evidence of this agreement.
13 Even if there had been such an agreement, the scheduling order that issued should have made it
14 clear that discovery would be proceeding. Moreover, defense counsel declares that she never
15 spoke to Ms. Pheasant about conversations or communications that defense counsel had with
16 plaintiff's prior counsel. Defense counsel also declares that she never spoke to Joann Pheasant
17 about any settlement negotiations or offers. Fifth, plaintiff's counsel's failure to appear at the
18 hearing was explained as a "computer problem." Finally, counsel denies that her conduct was
19 willful. She contends there have simply been some errors and this all boils down to a "basic
20 problem of late discovery."

21 On review, the court determines that defendant has been greatly prejudiced by
22 plaintiff's conduct in this action, including inter alia his tardy responses to discovery requests,
23 improper service of discovery responses, failure to appear at a hearing, failure to respond at all to
24 discovery responses, and failure to communicate. Accordingly, defendant's motion will be
25 partially granted.

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1 Based on the foregoing, IT IS HEREBY ORDERED that:

2 1. Defendant’s June 12, 2012 motion is partially granted;

3 2. Plaintiff shall serve signed responses to defendant’s discovery requests by
4 personal service or by mail within ten days of the date of this order;

5 3. Defendant’s request for sanctions is partially granted. Plaintiff is hereby
6 ordered to pay to defendant \$5,000 for the aforementioned discovery abuses.

7 DATED: September 7, 2012.

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10 UNITED STATES MAGISTRATE JUDGE

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