

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERNARD HUGHES,

Plaintiff,

v.

MARTIN H. JANSEN, M.D., et al.,

Defendants.

No. 2:11-cv-1856-KJM-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with this civil rights action under 42 U.S.C. § 1983. On August 4, 2015, after plaintiff’s limited appointment counsel failed to timely file an amended complaint, defendant Jansen moved to dismiss this action for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure. ECF No. 52. For the reasons stated below, it is recommended that the motion be denied.

A district court must “weigh five factors to determine whether to dismiss a case for lack of prosecution: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994); accord, *Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1138 (9th Cir. 2000).

After defendant filed the motion to dismiss, plaintiff’s limited appointment counsel filed a second amended complaint in accordance with the court’s orders. ECF Nos. 59, 60. Defendant

1 Jansen then moved to dismiss that complaint for failure to state a claim pursuant to Rule 12(b)(6).
2 ECF No. 61. Plaintiff, now proceeding pro se, has opposed defendant's motion and defendant has
3 filed a reply. ECF Nos. 69, 71. In light of these filings, the court cannot find that the factors to
4 consider in dismissing an action for failure to prosecute support dismissal.

5 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion to dismiss for
6 lack of prosecution (ECF No. 52) be denied.

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
9 after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
12 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
13 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 DATED: February 24, 2016.

15 
16 EDMUND F. BRENNAN
17 UNITED STATES MAGISTRATE JUDGE
18
19
20
21
22
23
24
25
26
27
28