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

SAMMY R. QUAIR, SR.,

Plaintiff,

No. 2:11-cv-2293 JAM CKD P

vs.

GERTZ,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding without counsel with a civil rights action pursuant to 42 U.S.C. § 1983. On September 12, 2012, defendants filed a motion for summary judgment. (Dkt. No. 44.) On September 18, 2012, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012) 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).

On October 30, 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 that failure to oppose such a motion would result in a recommendation that this action be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. (Dkt. No. 47.) On December 6, 2012, plaintiff was granted a forty-five day extension of time to file and serve his

1 opposition. (Dkt. No. 49.) The forty-five day period has now expired and plaintiff has not filed
2 an opposition or otherwise responded to the court's order.

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

12 In determining to recommend that this action be dismissed, the court has
13 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
14 support dismissal of this action. The action has been pending since August 2011 and has reached
15 the stage, set by the court's February 17, 2012 scheduling order, for resolution of dispositive
16 motions and, if necessary, preparation for pretrial conference and jury trial. (See Dkt. No. 32.)
17 Plaintiff's failure to comply with the Local Rules and the court's December 6, 2012 order
18 suggests that he has abandoned this action and that further time spent by the court thereon will
19 consume scarce judicial resources in addressing litigation which plaintiff demonstrates no
20 intention to pursue.

21 Under the circumstances of this case, the third factor, prejudice to defendants
22 from plaintiff's failure to oppose the motion, also favors dismissal. Plaintiff's failure to oppose
23 the motion prevents defendants from addressing plaintiff's substantive opposition, and would
24 delay resolution of this action, thereby causing defendants to incur additional time and expense.

25 The fifth factor also favors dismissal. The court has advised plaintiff of the
26 requirements under the Local Rules and granted ample additional time to oppose the pending

1 motion, all to no avail. The court finds no suitable alternative to dismissal of this action.

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

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

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

17 Dated: February 1, 2013

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19 CAROLYN K. DELANEY
20 UNITED STATES MAGISTRATE JUDGE

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