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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY C. BONTEMPS,
Plaintiff,
v.
RON BARNES et al.,
Defendant.

No. 2:12-cv-2249 TLN CKD P (TEMP)

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Abbott’s motion to compel and request for monetary or terminating sanctions.

For the reasons discussed herein, the court will recommend granting defendant’s request for terminating sanctions pursuant to Federal Rule of Civil Procedure 41(b).

BACKGROUND

Plaintiff is proceeding on his original complaint in this action against defendant Abbott on claims for excessive use of force and retaliation. (ECF Nos. 1 & 8) On November 12, 2014, the court issued a discovery and scheduling order in this case that clearly laid out when the parties could serve discovery requests and when the parties needed to respond to discovery requests. (ECF No. 28) Plaintiff has ignored this court’s discovery and scheduling order as well as this court’s more recent orders granting defendant Abbott’s motions to compel.

1 Specifically, on February 25, 2015, defendant Abbott filed his first motion to compel,
2 which plaintiff failed to oppose. (ECF No. 29) On April 9, 2015, then-Magistrate Judge Dale A.
3 Drozd granted defendant Abbott's motion. (Id.) Judge Drozd found that plaintiff had not
4 responded at all to Defendant's Interrogatories, Set One, or Defendant's Requests for Production,
5 Set One. (ECF No. 30) Judge Drozd ordered plaintiff to serve defense counsel with his
6 responses to defendant's discovery requests within twenty-one days. (Id.) Judge Drozd also
7 cautioned plaintiff that his failure to timely oppose motions to compel or other motions brought
8 by defendant Abbott could result in a recommendation for dismissal of this action based on
9 plaintiff's failure to prosecute the case. (Id.)

10 On May 21, 2015, defendant Abbott filed a second motion to compel, which again
11 plaintiff failed to oppose. (ECF No. 33) The undersigned reviewed plaintiff's responses to
12 defendant's interrogatories and found that they were incomplete, nonresponsive, and/or
13 nonsensical. (Id.) The court ordered plaintiff to serve further responses to Defendants'
14 Interrogatories, Set One, Nos. 1-5, 7-9, and 12-17, within twenty-one days. (Id.) The court also
15 found that plaintiff had not adequately responded to defendant's seven requests for production of
16 documents. (Id.) Plaintiff had neither objected to defendant's requests nor produced a single
17 document even though he appeared to acknowledge the existence of documents responsive to the
18 defendant's requests. (Id.) The court ordered plaintiff to serve further responses to Defendants'
19 Requests for Production of Documents Nos. 1-7, within twenty-one days. (Id.)

20 The court also warned plaintiff once more that he was required to respond or state in
21 writing his lack of opposition to defendant Abbott's motions and that his repeated failure to
22 comply with this court's orders to oppose or affirmatively state his non-opposition to defendant's
23 motions could result in a recommendation for dismissal of this action based on plaintiff's failure
24 to prosecute the case. (Id.) Finally, the court denied defendant's request for an award of
25 monetary sanctions against plaintiff, but the court cautioned plaintiff that if he failed to provide
26 defense counsel with further responses to defendant Abbott's discovery requests as this court
27 ordered, the court would entertain a renewed motion to compel with a request for an award of
28 expenses and/or a motion to dismiss this action based on plaintiff's failure to prosecute. (Id.)

1 On January 22, 2016, defense counsel filed a third motion to compel, which once again
2 plaintiff has failed to oppose. (ECF No. 38) In the pending motion, defense counsel contends
3 that plaintiff has not supplemented his interrogatory responses or produced any documents in
4 response to defendant's discovery requests. (Id.) Instead, plaintiff has instructed defense counsel
5 to petition the California Department of Corrections and Rehabilitation and/or this court for the
6 documents. (Id.) Defense counsel argues that the court should compel plaintiff to properly
7 respond to defendant's discovery requests and impose monetary sanctions on him, or
8 alternatively, the court should dismiss this action. (Id.)

9 DISCUSSION

10 "Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
11 action for failure to comply with any order of the court." Ferdik v. Bonzelet, 963 F.2d 1258,
12 1260 (9th Cir. 1992). In Ferdik, the United States Court of Appeals for the Ninth Circuit held that
13 a district court did not abuse its discretion when it dismissed a pro se litigant's civil rights action
14 for failing to file an amended complaint. The court explained that, in deciding whether to dismiss
15 a case for failure to comply with a court order, the district court must weigh five factors:

16 "(1) the public's interest in expeditious resolution of litigation; (2)
17 the court's need to manage its docket; (3) the risk of prejudice to
18 the defendants; (4) the public policy favoring disposition of cases
on their merits; and (5) the availability of less drastic alternatives."

19 Id. at 1260-61 (quoting Thompson v. Hous. Auth. of City of Los Angeles, 782 F.3d 829, 831 (9th
20 Cir. 1986).

21 In this case, the first two factors as well as the fifth factor cited by the court in Ferdik
22 strongly support dismissal of this action. This case has been pending before the court since
23 August 30, 2012. Although discovery in this case closed on February 27, 2015, this case has not
24 moved past the discovery stage for more than a year because of plaintiff's repeated failure to
25 respond to defendant's discovery requests in compliance with this court's prior orders. This court
26 has twice ordered plaintiff to respond to defendant's discovery requests and has provided him
27 with guidance on how to do so. This court has also twice warned plaintiff that he is required to
28 respond or state in writing his lack of opposition to all of defendant Abbott's motions and that his

1 repeated failure to comply with this court's orders to oppose or affirmatively state his non-
2 opposition to defendant's motions could result in a recommendation for dismissal of this action
3 based on plaintiff's failure to prosecute the case. Inexplicably, plaintiff has once again failed to
4 respond to defendant Abbott's discovery requests and has failed to file any response to
5 defendant's pending motion to compel.

6 Plaintiff's refusal to participate fully in discovery and prosecute this action has made it
7 impossible for this court to adjudicate this civil action. Plaintiff's repeated failure to comply with
8 court orders demonstrates that further time spent by the court on this case will consume scarce
9 judicial resources in addressing litigation which plaintiff has shown he has no intention to
10 diligently and properly pursue. Under these circumstances, the court has no suitable less drastic
11 alternative but to recommend dismissal of this action.¹

12 The third factor discussed in Ferdik, the risk of prejudice to defendant Abbott, also weighs
13 in favor of dismissal. As this court previously advised plaintiff, defendant Abbott is entitled to
14 discover the kind of information he seeks with the interrogatories and requests for production of
15 documents at issue. Plaintiff's failure to respond to defendant's discovery requests prevents the
16 defendant from addressing plaintiff's claims and unnecessarily delays resolution of this action
17 thereby forcing the defendant to incur additional time and expense. See In re Eisen, 31 F.3d
18 1447, 1452-53 (9th Cir. 1994) ("When considering prejudice to the defendant, 'the failure to
19 prosecute diligently is sufficient by itself to justify dismissal, even in the absence of a showing of
20 actual prejudice to the defendant from the failure.... The law presumes injury from unreasonable
21 delay.'") (quoting Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976)).

22 Finally, the fourth factor, public policy favoring disposition of cases on the merits, weighs
23 against dismissal of this action. However, for the reasons set forth above, the first, second, third,
24 and fifth factors strongly support dismissal. Under the circumstances of this case, those factors
25 outweigh the general public policy favoring disposition of cases on their merits.

26
27 ¹ The pro se plaintiff is proceeding in forma pauperis and cannot pay a monetary sanction. In
28 addition, imposing the lesser sanctions suggested by Rule 37(b) would not be appropriate and/or
would be tantamount to a default judgment in defendant's favor.

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CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendant’s request for terminating sanctions (Doc. No. 38) be granted; and
2. This action be dismissed pursuant to Federal Rule of Civil Procedure 41(b).

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

Dated: April 8, 2016



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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