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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD T. COLLIER,  
Plaintiff,  
v.  
VALLEJO POLICE DEP'T, et al.,  
Defendants.

No. 2:13-cv-0852 LKK AC PS

FINDINGS & RECOMMENDATIONS

This action was referred to the undersigned pursuant to Local Rule 302(c)(21). On June 10, 2013, defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Local Rule 230(c) provides that opposition to the granting of a motion must be filed fourteen days preceding the noticed hearing date. The Rule further provides that “[n]o party will be entitled to be heard in opposition to a motion at oral arguments if written opposition to the motion has not been timely filed by that party.”

When plaintiff failed to timely oppose the motion to dismiss, the undersigned sua sponte continued the hearing and provided plaintiff additional time to file an opposition. ECF No. 31. Plaintiff was advised that failure to oppose the motion and appear at the hearing would result in a

1 recommendation that the action be dismissed. Id. No opposition was filed. On September 4,  
2 2013, plaintiff failed to appear at the hearing on defendants' motion. Plaintiff's failure to oppose  
3 and failure to appear should therefore be deemed a waiver of opposition to the granting of the  
4 motion.

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

14 In determining to recommend that this action be dismissed, the court has considered the  
15 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal  
16 of this action. The action has been pending since February 20, 2013 and has not yet reached past  
17 the pleading stage. Plaintiff's failure to comply with the Local Rules and the court's July 16,  
18 2013 order, and his failure to appear at the hearing, suggest that he has abandoned this action and  
19 that further time spent by the court thereon will consume scarce judicial resources in addressing  
20 litigation which plaintiff demonstrates no intention to pursue.

21 The fifth factor also favors dismissal. The court has advised plaintiff of the requirements  
22 under the Local Rules and granted ample additional time to oppose the pending motion, all to no  
23 avail. The court finds no suitable alternative to dismissal of this action.

24 Under the circumstances of this case, the third factor, prejudice to defendants from  
25 plaintiff's failure to oppose the motion, should be given little weight. Plaintiff's failure to oppose  
26 the motion does not put defendants at any disadvantage in this action. See Ferdik, 963 F.2d at  
27 1262. Indeed, defendants would only be "disadvantaged" by a decision by the court to continue  
28 an action plaintiff has abandoned. The fourth factor, public policy favoring disposition of cases

1 on their merits, weighs against dismissal of this action as a sanction. However, for the reasons set  
2 forth above, the first, second, and fifth factors strongly support dismissal and the third factor does  
3 not mitigate against it. Under the circumstances of this case, those factors outweigh the general  
4 public policy favoring disposition of cases on their merits. See Ferdik, 963 F.2d at 1263.

5 Accordingly, IT IS HEREBY RECOMMENDED that:

- 6 1. Defendants' June 10, 2013 motion to dismiss be granted; and
- 7 2. This action be dismissed.

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

16 DATED: September 5, 2013

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18 ALLISON CLAIRE  
19 UNITED STATES MAGISTRATE JUDGE

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