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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES K. GOLDSMITH,
Plaintiff,
v.
MATTHEW CATE, et al.,
Defendants.

No. 2:13-cv-0943 KJN P

ORDER AND FINDINGS &
RECOMMENDATIONS

Plaintiff is a former state prisoner proceeding without counsel with a civil rights action pursuant to 42 U.S.C. § 1983. On February 24, 2014, defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On December 16, 2013, the court advised plaintiff that motions to dismiss shall be briefed pursuant to Local Rule 230(l). (ECF No. 15.)

On March 28, 2014, 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 of the requirements for filing an opposition to the pending motion and that failure to oppose such a motion would be deemed as consent to have the: (a) pending motion granted; (b) action dismissed for lack of prosecution; and (c) action dismissed based on plaintiff's failure to comply with these rules and a court order. Plaintiff was also informed that failure to file an opposition would result in a recommendation that this action be dismissed pursuant to Rule 41(b) of the

1 Federal Rules of Civil Procedure.

2 The thirty day period has now expired and plaintiff has not responded to the court's order.

3 "Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
4 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 considered the
13 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal
14 of this action. The action has been pending for almost one year and, provided plaintiff's claims
15 survived the motion to dismiss, would be ready to schedule the deadlines for accomplishing
16 discovery and the filing of pretrial motions. Plaintiff's failure to comply with the Local Rules and
17 the court's March 28, 2014 order suggests that he has abandoned this action and that further time
18 spent by the court thereon will consume scarce judicial resources in addressing litigation which
19 plaintiff demonstrates no intention to pursue.

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

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

27 The fourth factor, public policy favoring disposition of cases on their merits, weighs
28 against dismissal of this action as a sanction. However, for the reasons set forth supra, the first,

1 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,
2 those factors outweigh the general public policy favoring disposition of cases on their merits. See
3 Ferdik, 963 F.2d at 1263.


4 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the Court is
5 directed to assign a district judge to this case; and

6 IT IS RECOMMENDED that this action be dismissed without prejudice pursuant to
7 Federal Rule of Civil Procedure 41(b).

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: May 6, 2014

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE