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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEN EDWARD SMITH,
Plaintiff,
v.
LOWE’S HIW, INC.,
Defendant.

No. 2:13-cv-01713-WBS-AC

FINDINGS & RECOMMENDATIONS

Plaintiff is proceeding in this action in pro per. On August 20, 2013, plaintiff filed a notice of removal of his case against defendant Lowe’s HIW, Inc. ECF No. 1. On August 27, 2013, defendant filed a motion to dismiss, ECF No. 6, followed by a motion to strike on September 24, 2013, ECF No. 10. On October 28, 2013, plaintiff filed a motion to amend his complaint. ECF No. 12. The court granted plaintiff’s motion on November 4, 2013, and dismissed defendant’s motion to dismiss and motion to strike as moot accordingly. ECF No. 13. On January 16, 2014, plaintiff filed a first amended complaint (“FAC”), ECF No. 15, which defendant moved to dismiss on January 30, 2014, ECF No. 18. On May 13, 2014, the court dismissed plaintiff’s FAC with leave to amend. ECF No. 33. Plaintiff filed his second amended complaint (“SAC”) on June 2, 2014, ECF No. 34, which defendant moved to dismiss on June 16, 2014, ECF No. 35.

On September 11, 2014, the undersigned struck plaintiff’s negligent infliction of

1 emotional distress claim from his SAC and recommended that his remaining claims be dismissed
2 with leave to amend. ECF No. 40. The court adopted the undersigned’s recommendations in full
3 on October 24, 2014. ECF No. 42. On October 27, 2014, the court ordered plaintiff to file a third
4 amended complaint (“TAC”) by November 26, 2014. ECF No. 43. On December 4, 2014, the
5 court ordered plaintiff to show cause within fourteen (14) days why he failed to timely file an
6 amended complaint to avoid having his claims dismissed pursuant to Federal Rule of Civil
7 Procedure 41(b) for failure to prosecute. ECF No. 44. Plaintiff has yet to respond to the court’s
8 order to show cause.

9 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an action
10 for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure, failure to
11 comply with the court’s local rules, or failure to comply with the court’s orders. See, e.g.,
12 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act sua sponte
13 to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S. Forest
14 Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action pursuant
15 to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff’s failure to prosecute or comply
16 with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d 1258, 1260
17 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
18 an action for failure to comply with any order of the court.”); Pagtalunan v. Galaza, 291 F.3d 639,
19 642–43 (9th Cir. 2002) (affirming district court’s dismissal of case for failure to prosecute when
20 habeas petitioner failed to file a first amended petition). This court’s Local Rules are in accord.
21 See E.D. Local Rule 110 (“Failure of counsel or of a party to comply with these Rules or with any
22 order of the Court may be grounds for imposition by the Court of any and all sanctions authorized
23 by statute or Rule or within the inherent power of the Court.”); E.D. Local Rule 183(a) (providing
24 that a pro se party’s failure to comply with the Federal Rules of Civil Procedure, the court’s Local
25 Rules, and other applicable law may support, among other things, dismissal of that party’s
26 action).

27 A court must weigh five factors in determining whether to dismiss a case for failure to
28 prosecute, failure to comply with a court order, or failure to comply with a district court’s local

1 rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

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

6 Id. at 1260–61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir.
7 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of Appeals has stated that
8 “[t]hese factors are not a series of conditions precedent before the judge can do anything, but a
9 way for a district judge to think about what to do.” In re Phenylpropanolamine (PPA) Prods.
10 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

11 Although involuntary dismissal can be a harsh remedy, on balance the five relevant
12 factors weigh in favor of dismissal of this action. The first two factors strongly support dismissal
13 of this action. Plaintiff’s failure to file a TAC and to respond to this court’s order strongly
14 suggests that he has abandoned this action or is not interested in seriously prosecuting it. See,
15 e.g., Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) (“The public’s interest in
16 expeditious resolution of litigation always favors dismissal.”). Any further time spent by the
17 court on this case, which plaintiff has demonstrated a lack of any serious intention to pursue, will
18 consume scarce judicial resources and take away from other active cases. See Ferdik, 963 F.2d at
19 1261 (recognizing that district courts have inherent power to manage their dockets without being
20 subject to noncompliant litigants).

21 In addition, the third factor, which considers prejudice to a defendant, favors dismissal.
22 Defendant has filed three motions to dismiss in this case already, ECF Nos. 6, 18, 35, and
23 plaintiff’s unreasonable delay in prosecuting this action has further delayed the resolution of this
24 case on the merits. Unreasonable delay is presumed to be prejudicial. See, e.g., In re
25 Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

26 The fifth factor, which considers the availability of less drastic measures, also supports
27 dismissal of this action. The court has already pursued remedies that are less drastic than a
28 recommendation of dismissal, including providing plaintiff with the opportunity to remedy his
failure to file an amended complaint. See Malone v. U.S. Postal Serv., 833 F.2d 128, 132 (9th

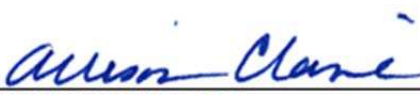
1 Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court actually tries
2 alternatives before employing the ultimate sanction of dismissal.”), cert. denied, 488 U.S. 819
3 (1988). Having failed to receive a response from plaintiff, the court finds no suitable alternative
4 to a recommendation for dismissal of this action.

5 The court also recognizes the importance of giving due weight to the fourth factor, which
6 addresses the public policy favoring disposition of cases on the merits. However, for the reasons
7 set forth above, factors one, two, three, and five strongly support a recommendation of dismissal
8 of this action, and factor four does not materially counsel otherwise. Dismissal is proper “where
9 at least four factors support dismissal or where at least three factors ‘strongly’ support dismissal.”
10 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations and quotation marks
11 omitted). Under the circumstances of this case, the other relevant factors outweigh the general
12 public policy favoring disposition of actions on their merits. See Ferdik, 963 F.2d at 1263.

13 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed with
14 prejudice pursuant to Federal Rule of Civil Procedure 41(b) and 4(m) and Local Rules 110 and
15 183(a).

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. 28 U.S.C. § 636(b)(1); see also E.D.
20 Local Rule 304(b). Such a document should be captioned “Objections to Magistrate Judge's
21 Findings and Recommendations.” Any response to the objections shall be filed with the court
22 and served on all parties within fourteen days after service of the objections. E.D. Local Rule
23 304(d). Failure to file objections within the specified time may waive the right to appeal the
24 District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst,
25 951 F.2d 1153, 1156-57 (9th Cir. 1991).

26 DATED: December 24, 2014

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28 ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE