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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COREY WILLYARD,
Plaintiff,
v.
MCDANIELS, et al.,
Defendants.

No. 2:14-cv-0780-EFB (PC)

FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Plaintiff has now twice failed to timely appear for a settlement conference before the undersigned, resulting in a significant waste of time and resources for defendants’ counsel and the court. It appears that plaintiff is not seriously interested in prosecuting his case or complying with court orders. Accordingly, the undersigned recommends that the action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b).

BACKGROUND

In a December 7, 2015 order, the assigned judge, Judge Brennan, scheduled a settlement conference in this case for February 23, 2016, at 9:00 a.m., in Courtroom No. 25 before the undersigned. (ECF No. 18.) The order specifically cautioned that the “failure of any counsel, party or authorized person subject to this order to appear in person may result in the imposition of

1 sanctions.” (Id.)

2 At the February 23, 2016 settlement conference, attorney Gary Brickwood appeared on
3 behalf of defendants, along with assistant county counsel Jim Ross. Both of defendants’
4 representatives traveled over 150 miles from Redding to Sacramento for the settlement
5 conference. However, even though the undersigned trailed the start of the settlement conference
6 by 30 minutes, plaintiff, who proceeds without counsel, entirely failed to appear.

7 Consequently, on February 25, 2016, the court issued an order to show cause. (ECF No.
8 21.) In that order, the court acknowledged that the December 7, 2015 order scheduling the
9 settlement conference was returned to the court as undeliverable. Nevertheless, the court noted
10 that it was also informed that one of the court’s administrators had obtained plaintiff’s new
11 contact information through plaintiff’s probation officer, and was ultimately able to speak to
12 plaintiff and notify him regarding the date and time of the settlement conference. Indeed, that
13 communication apparently prompted plaintiff to file a notice of change of address on February
14 10, 2016. (ECF No. 19.) At the February 23, 2016 settlement conference, defendants’ counsel
15 also advised the court that he had sent an additional notice of the settlement conference to
16 plaintiff’s new address, once the notice of change of address was filed. As such, it appeared that
17 plaintiff was well aware of the settlement conference, but nonetheless failed to appear without
18 providing any notice to defendants’ counsel or the court. Thus, the court directed plaintiff to
19 show cause, within seven (7) days, why he should not be required to pay \$250.00 in sanctions
20 based on his failure to appear at the court-ordered settlement conference. The court specifically
21 cautioned plaintiff that failure to respond to the order by the required deadline may result in
22 dismissal of the action with prejudice pursuant to Federal Rule of Civil Procedure 41(b).

23 When plaintiff ultimately failed to respond to the order to show cause by the required
24 deadline, the undersigned issued findings and recommendations for dismissal of the action
25 pursuant to Federal Rule of Civil Procedure 41(b) on March 10, 2016. (ECF No. 22.) Thereafter,
26 on March 21, 2016, plaintiff filed a notice apologizing for his absence at the February 23, 2016
27 settlement conference, and requesting that another settlement conference be scheduled. (ECF No.
28 23.) In light of that filing and plaintiff’s *pro se* status, the court vacated the findings and

1 recommendations for dismissal and discharged the order to show cause on March 28, 2016,
2 permitting another settlement conference to be scheduled. (ECF No. 24.) However, the court
3 cautioned plaintiff that “if he again fails to appear for the conference, substantial monetary
4 sanctions and/or dismissal of the action may result.” (Id.)

5 On April 5, 2016, the court issued a minute order setting another settlement conference in
6 this matter before the undersigned on June 14, 2016, at 9:00 a.m., in Courtroom No. 25. (ECF
7 No. 25.) The parties were directed to exchange, and deliver to the court, settlement conference
8 statements no later than seven (7) days prior to the settlement conference. (Id.) Although
9 defendants submitted a timely settlement conference statement, plaintiff failed to submit any
10 statement prior to the settlement conference or otherwise communicate with the court.

11 On June 14, 2016, the day of the second settlement conference, plaintiff again failed to
12 appear at 9:00 a.m. as ordered. Defendants’ representatives were in attendance, having once
13 again traveled over 150 miles from Redding to Sacramento for the settlement conference.
14 According to defendants’ counsel, his office staff had reached out to plaintiff on June 9, 2016, to
15 remind him about the settlement conference. At that time, plaintiff apparently told defendants’
16 counsel that he had forgotten about the June 14, 2016 settlement conference, that he was
17 homeless, and that he was not sure how he would get to the conference. Nevertheless, plaintiff
18 never notified the court or defendants’ counsel that he would not be attending the settlement
19 conference, nor did he request a continuance of the settlement conference.

20 On June 14, 2016, at 9:30 a.m., the court concluded that plaintiff had failed to appear and
21 went on the record cancelling the settlement conference, releasing defense counsel and stating
22 that an order recommending dismissal of the case would be forthcoming. However, at 9:40 a.m.
23 the undersigned’s courtroom deputy clerk received a telephone call stating that plaintiff had
24 appeared, for reasons unknown, purportedly at the Yolo County courthouse. Plaintiff was
25 instructed to forthwith travel to the federal courthouse in Sacramento. The undersigned waited
26 two hours but plaintiff again failed to appear.

27 Just before noon, plaintiff arrived at the Sacramento federal courthouse. At that time,
28 plaintiff was informed by the undersigned’s courtroom deputy clerk that he should appear before

1 the undersigned at 1:15 p.m. However, when plaintiff's matter was ultimately called at 1:15 p.m.,
2 plaintiff again failed to appear. Thereafter, around 1:30 p.m., officers at the security checkpoint
3 advised the court that plaintiff was on his way to the courtroom. On the record, plaintiff was
4 unable to give any plausible excuse for his failure to timely appear at the settlement conference.

5 DISCUSSION

6 A court must weigh five factors in determining whether to dismiss a case for failure to
7 prosecute, failure to comply with a court order, or failure to comply with a district court's local
8 rules. See, e.g., Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). Specifically, the court
9 must consider:

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

13 Id. at 1260-61; accord Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002). The Ninth
14 Circuit Court of Appeals has stated that "[t]hese factors are not a series of conditions precedent
15 before the judge can do anything, but a way for a district judge to think about what to do." In re
16 Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

17 Here, the first two factors strongly weigh in favor of dismissal. Plaintiff failed to file a
18 required settlement conference statement, and twice failed to timely appear for a settlement
19 conference, without any plausible excuse and without any prior notification to the court or
20 defendants' counsel. Plaintiff's actions have resulted in a significant waste of time and resources
21 for an already-overburdened court, and also strongly suggest that plaintiff is not seriously
22 interested in prosecuting his case. Indeed, based on plaintiff's conduct thus far, the court has no
23 confidence that plaintiff would comply with future court deadlines and orders.

24 The third factor also favors dismissal, because defendants have been prejudiced, at a
25 minimum, by having to travel over 150 miles on two occasions to settlement conferences for
26 which plaintiff either failed to timely appear or entirely failed to appear.

27 With respect to the fifth factor, the court has already attempted less drastic measures by
28 issuing an order to show cause and ultimately vacating the initial findings and recommendations

1 for dismissal to provide plaintiff with another opportunity for a settlement conference.
2 Additionally, because plaintiff has no ability to pay any monetary sanctions, the imposition of
3 such sanctions would be meaningless. Even though the court is sympathetic to the fact that
4 plaintiff may be homeless and indicates that he has mental health issues, that does not excuse
5 plaintiff from, at a minimum, notifying the court and defendants' counsel of his inability to attend
6 a settlement conference on the scheduled date and requesting a continuance, or otherwise
7 complying with court orders and instructions.

8 Finally, as to the fourth factor addressing the policy favoring disposition of cases on their
9 merits, it is plaintiff's own repeated failures that preclude a resolution on the merits here. In any
10 event, the fourth factor is clearly outweighed by the other factors.

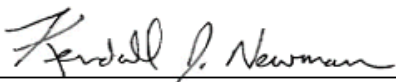
11 Accordingly, IT IS HEREBY RECOMMENDED that:

- 12 1. The action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure
13 41(b).
- 14 2. The Clerk of Court be directed to close this case.

15 These findings and recommendations are submitted to the assigned judge, Judge Brennan.
16 Within fourteen (14) days after being served with these findings and recommendations, any party
17 may file written objections with the court and serve a copy on all parties. Such a document
18 should be captioned "Objections to the Findings and Recommendations." Any reply to the
19 objections shall be served on all parties and filed with the court within fourteen (14) days after
20 service of the objections. The parties are advised that failure to file objections within the
21 specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158
22 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

23 IT IS SO RECOMMENDED.

24 Dated: June 16, 2016

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26 _____
27 KENDALL J. NEWMAN
28 UNITED STATES MAGISTRATE JUDGE