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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNIS GARDNER,

Plaintiff,

v.

JASON BAUER

Defendant.

No. 2:14-cv-2908-KJM-KJN PS

ORDER

Plaintiff Dennis Gardner, proceeding without counsel, commenced this action on December 15, 2014. (ECF No. 1.)<sup>1</sup> Thereafter, on December 19, 2014, the court granted plaintiff's request to proceed *in forma pauperis*, screened plaintiff's complaint pursuant to 28 U.S.C. § 1915, and directed that the complaint be served by the U.S. Marshal on defendant and City of Vallejo police officer Jason Bauer. (ECF No. 3.) The court further ordered plaintiff, within 30 days from the date that the order was filed, to provide the U.S. Marshal with all necessary documents and information to effectuate service of process. (Id.)

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<sup>1</sup> Plaintiff, as the only party having appeared in the case, consented to the jurisdiction of a United States Magistrate Judge for all purposes, including the entry of final judgment, pursuant to 28 U.S.C. § 636(c). (ECF Nos. 7, 10.)

1           That same day, the court also issued an “Order Setting Status Conference.” (ECF No. 5.)  
2           The order directed plaintiff to “complete service of process on defendants named in the complaint  
3           within 120 days from the date of this order. Plaintiff is cautioned that this action may be  
4           dismissed if service of process is not accomplished within 120 days from the date that the  
5           complaint is filed. See Fed. R. Civ. P. 4(m).” (Id. at 1.) That same order set a status (pre-trial  
6           scheduling) conference for May 7, 2015 at 10:00 a.m., and stated that “[a]ll parties shall appear  
7           by counsel or in person if acting without counsel.” (Id. at 2.) The order also directed the parties  
8           to file a status report addressing specific topics no later than seven (7) days prior to the status  
9           conference. (Id. at 2-3.) The order specifically cautioned that “[f]ailing to obey federal or local  
10          rules, or [an] order of this court, may result in dismissal of this action. This court will construe  
11          pro se pleadings liberally, but pro se litigants must comply with the procedural rules.” (Id. at 3.)

12          Subsequently, on January 13, 2015, and January 22, 2015, plaintiff filed notices of  
13          submission of documents, potentially suggesting that plaintiff had submitted a completed  
14          summons form and a completed USM-285 form to the U.S. Marshal. (ECF Nos. 8, 9.) However,  
15          the notices made no mention of the complaint or other service documents. In any event,  
16          defendant has yet to appear in the case, and there has been no docket activity by plaintiff since  
17          January 2015. Such inactivity strongly suggests that defendant was never served with process,  
18          even though the 120-day period for service of process has now expired. Indeed, upon an inquiry  
19          by the court to the U.S. Marshal on May 4, 2015, the U.S. Marshal indicated that no service  
20          documents had been received from plaintiff related to this case.

21          Plaintiff also failed to file a status report prior to the May 7, 2015 status conference and  
22          failed to appear at that status conference in accordance with the court’s order. (ECF No. 11.)

23          Consequently, on May 8, 2015, the court issued an order and order to show cause. (ECF  
24          No. 12.) In that order, the court noted that, given plaintiff’s failures, it had considered whether  
25          the action should be dismissed. (Id.) Nevertheless, in light of plaintiff’s *pro se* status and the  
26          court’s desire to resolve the action on the merits, the court found it appropriate to first attempt  
27          lesser sanctions in the form of an order to show cause and monetary sanctions. (Id.) More  
28          specifically, the court ordered plaintiff, based on plaintiff’s failure to comply with court orders

1 and failure to prosecute the case, to: (1) pay the Clerk of Court \$150.00 in monetary sanctions;  
2 and (2) show cause in writing why this action should not be dismissed pursuant to Federal Rule of  
3 Civil Procedure 41(b), within 21 days from the date of the order and order to show cause. (Id.)<sup>2</sup>  
4 Plaintiff was cautioned that failure to pay the monetary sanctions and respond to the order to  
5 show cause by the required deadline may result in dismissal of the action with prejudice pursuant  
6 to Federal Rule of Civil Procedure 41(b). (Id.)

7 Although the applicable deadline has now passed, plaintiff failed to pay the monetary  
8 sanctions and failed to respond to the order to show cause; nor has plaintiff even requested an  
9 extension of time to do so. Therefore, the court finds that the action should be dismissed at this  
10 juncture.

11 Eastern District Local Rule 110 provides that “[f]ailure of counsel or of a party to comply  
12 with these Rules or with any order of the Court may be grounds for imposition by the Court of  
13 any and all sanctions authorized by statute or Rule or within the inherent power of the Court.”  
14 Moreover, Eastern District Local Rule 183(a) provides, in part:

15 Any individual representing himself or herself without an attorney  
16 is bound by the Federal Rules of Civil or Criminal Procedure, these  
17 Rules, and all other applicable law. All obligations placed on  
18 “counsel” by these Rules apply to individuals appearing in propria  
19 persona. Failure to comply therewith may be ground for dismissal,  
20 judgment by default, or any other sanction appropriate under these  
21 Rules.

22 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the  
23 same rules of procedure that govern other litigants”) (overruled on other grounds). A district  
24 court may impose sanctions, including involuntary dismissal of a plaintiff’s case pursuant to  
25 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his or her case or  
26 fails to comply with the court’s orders, the Federal Rules of Civil Procedure, or the court’s local  
27 rules. See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act  
28 sua sponte to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.  
Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss an action

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<sup>2</sup> Because the court is cognizant that plaintiff is proceeding *in forma pauperis*, the amount of monetary sanctions imposed was necessarily minimal.

1 pursuant to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's failure to prosecute  
2 or comply with the rules of civil procedure or the court's orders); Ghazali v. Moran, 46 F.3d 52,  
3 53 (9th Cir. 1995) (per curiam) ("Failure to follow a district court's local rules is a proper ground  
4 for dismissal"); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) ("Pursuant to Federal  
5 Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with  
6 any order of the court"); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir.  
7 1986) (per curiam) (stating that district courts have inherent power to control their dockets and  
8 may impose sanctions including dismissal or default).

9 A court must weigh five factors in determining whether to dismiss a case for failure to  
10 prosecute, failure to comply with a court order, or failure to comply with a district court's local  
11 rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

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

15 Id. at 1260-61; accord Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002); Ghazali, 46  
16 F.3d at 53. The Ninth Circuit Court of Appeals has stated that "[t]hese factors are not a series of  
17 conditions precedent before the judge can do anything, but a way for a district judge to think  
18 about what to do." In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226  
19 (9th Cir. 2006).

20 Although involuntary dismissal can be a harsh remedy, on balance the five relevant  
21 factors weigh in favor of dismissal here. The first two Ferdik factors strongly support dismissal,  
22 given that plaintiff's failure to comply with the court's orders and failure to prosecute his case  
23 have unreasonably delayed the progress of this litigation. The third Ferdik factor also favors  
24 dismissal. Although the defendant has not yet appeared in the case, he has been named in a civil  
25 action, and plaintiff's failure to take the steps necessary to serve the defendant has also deprived  
26 defendant of notice of this litigation and hampered defendant's ability to move this case forward  
27 towards resolution.

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1           Additionally, the fifth Ferdik factor, which considers the availability of less drastic  
 2 measures, also supports dismissal. As noted above, the court has already attempted less drastic  
 3 sanctions – monetary sanctions and the issuance of an order to show cause. However, plaintiff  
 4 ultimately failed to pay the sanctions and failed to respond to the order to show cause, despite the  
 5 court’s clear warning that such failure may result in dismissal. Furthermore, the court finds no  
 6 suitable alternative to dismissal at this juncture. Given plaintiff’s complete failure to respond to  
 7 the court’s prior orders and instructions, the imposition of further monetary sanctions would be  
 8 futile, and the court is unable to frame any meaningful issue or evidentiary sanctions based on the  
 9 limited record before it.

10           Finally, the court finds that the fourth Ferdik factor, which addresses the public policy  
 11 favoring disposition of cases on the merits, does not materially counsel against dismissal. If  
 12 anything, a disposition on the merits has been hindered by plaintiff’s own failure to comply with  
 13 the court’s orders and prosecute his case. In any event, the court finds that the fourth Ferdik  
 14 factor is outweighed by the other Ferdik factors.

15           Consequently, dismissal is appropriate.


16 CONCLUSION

17           For the reasons outlined above, IT IS HEREBY ORDERED that:

- 18           1. The action is dismissed pursuant to Federal Rule of Civil Procedure 41(b).
- 19           2. The Clerk of Court shall vacate all dates and close this case.

20           IT IS SO ORDERED.

21           Dated: June 4, 2015

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KENDALL J. NEWMAN  
 24 UNITED STATES MAGISTRATE JUDGE

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