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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLOS MELGAR,
Plaintiff,
v.
L. SCHMIDT, et al.,
Defendants.

No. 2: 15-cv-2256 JAM KJN P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On January 13, 2017, defendant filed a motion for summary judgment. Plaintiff did not file an opposition. On March 4, 2016, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

On March 24, 2017, 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

1 would result in a recommendation that this action be dismissed pursuant to Rule 41(b) of the
2 Federal Rules of Civil Procedure.

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

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

13 In determining to recommend that this action be dismissed, the court has considered the
14 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal
15 of this action. The action has been pending for 1 1/2 years and has reached the stage, set by the
16 court's June 27, 2016 scheduling order, for resolution of dispositive motions and, if necessary,
17 preparation for pretrial conference and jury trial. (See Scheduling Order, filed June 27, 2016.)
18 Plaintiff's failure to comply with the Local Rules and the court's March 24, 2017 order suggests
19 that he has abandoned this action and that further time spent by the court thereon will consume
20 scarce judicial resources in addressing litigation which plaintiff demonstrates no intention to
21 pursue.

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

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

1 The fourth factor, public policy favoring disposition of cases on their merits, weighs
2 against dismissal of this action as a sanction. However, for the reasons set forth above, the first,
3 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,
4 those factors outweigh the general public policy favoring disposition of cases on their merits. See
5 Ferdik, 963 F.2d at 1263.

6 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
7 dismissed without prejudice pursuant to 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 3, 2017

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19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE

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