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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRANDON COUCH JOHNSON,
Plaintiff,
v.
MARCOS CAMACHO, et al.,
Defendants.

No. 2:18-cv-00173-MCE-KJN PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

On April 5, 2018, the court granted plaintiff’s application to proceed *in forma pauperis* and dismissed plaintiff’s original complaint with leave to amend. (ECF No. 7.) Plaintiff was given 28 days to file either an amended complaint or a notice of voluntary dismissal of the action. (Id.) Additionally, plaintiff was expressly cautioned that failure to file either an amended complaint or a notice of voluntary dismissal by the required deadline may result in dismissal of the action with prejudice pursuant to Federal Rule of Civil Procedure 41(b). (Id.) The deadline passed and plaintiff failed to file either an amended complaint or a notice of voluntary dismissal.

Accordingly, the court considered whether the action should be dismissed. Nevertheless, in light of plaintiff’s *pro se* status and the court’s general preference to resolve actions on their merits, the court first attempted lesser sanctions in the form of an order to show cause and monetary sanctions. On May 17, 2018, based on his failure to comply with the court’s prior orders, the court ordered that, within 21 days, plaintiff shall: (1) pay the Clerk of Court \$100.00

1 in monetary sanctions; and (2) show cause in writing why the action should not be dismissed
2 pursuant to Federal Rule of Civil Procedure 41(b). (ECF No. 8.) Plaintiff was specifically
3 cautioned that failure to timely comply with the order would result in a recommendation that the
4 action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b). (Id.)

5 Although the applicable deadline has now passed, plaintiff failed to pay the monetary
6 sanctions and failed to respond to the order to show cause. Therefore, the court recommends
7 dismissal at this juncture.

8 Eastern District Local Rule 110 provides that “[f]ailure of counsel or of a party to comply
9 with these Rules or with any order of the Court may be grounds for imposition by the Court of
10 any and all sanctions authorized by statute or Rule or within the inherent power of the Court.”

11 Moreover, Eastern District Local Rule 183(a) provides, in part:

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

17 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the
18 same rules of procedure that govern other litigants”) (overruled on other grounds). A district
19 court may impose sanctions, including involuntary dismissal of a plaintiff’s case pursuant to
20 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his or her case or
21 fails to comply with the court’s orders, the Federal Rules of Civil Procedure, or the court’s local
22 rules. See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act
23 sua sponte to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
24 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss an action
25 pursuant to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff’s failure to prosecute
26 or comply with the rules of civil procedure or the court’s orders); Ghazali v. Moran, 46 F.3d 52,
27 53 (9th Cir. 1995) (per curiam) (“Failure to follow a district court’s local rules is a proper ground
28

1 for dismissal”); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal
2 Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with
3 any order of the court”); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir.
4 1986) (per curiam) (stating that district courts have inherent power to control their dockets and
5 may impose sanctions including dismissal or default).

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, 963 F.2d at 1260. Specifically, the court must consider:

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

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

17 Although involuntary dismissal can be a harsh remedy, on balance the five relevant
18 factors weigh in favor of dismissal here. The first two Ferdik factors strongly support dismissal,
19 given that plaintiff’s failure to comply with the court’s orders and failure to prosecute his case
20 have unreasonably delayed the progress of this litigation. The third Ferdik factor also favors
21 dismissal. Although the defendants have not yet appeared in the case, they have been named in a
22 civil action, and plaintiff’s failure to prosecute the case has hampered defendants’ ability to move
23 this case forward towards resolution.

24 Additionally, the fifth Ferdik factor, which considers the availability of less drastic
25 measures, also supports dismissal. As noted above, the court has already attempted less drastic
26 sanctions—monetary sanctions and the issuance of an order to show cause—prior to
27 recommending dismissal. However, plaintiff ultimately failed to pay the sanctions and failed to
28 respond to the order to show cause. Furthermore, the court finds no suitable alternative to

1 dismissal at this juncture. Given plaintiff's complete failure to respond to the court's prior orders
2 and instructions, the imposition of further monetary sanctions would be futile, and the court is
3 unable to frame any meaningful issue or evidentiary sanctions based on the limited record before
4 it.

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

10 Consequently, dismissal is appropriate.

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 vacate all dates and close this case.

15 In light of these recommendations, IT IS ALSO HEREBY ORDERED that all pleading,
16 discovery, and motion practice in this action are STAYED pending resolution of the findings and
17 recommendations. With the exception of objections to the findings and recommendations and
18 any non-frivolous motions for emergency relief, the court will not entertain or respond to any
19 motions and other filings until the findings and recommendations are resolved.

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

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IT IS SO ORDERED AND RECOMMENDED.

Dated: June 18, 2018



KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

14/ps.18-173.johnson v. comacho.F&R 41b dismissal