

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANN ZHAI,

Plaintiff,

v.

WOODLAND MEMORIAL HOSPITAL,
et al.,

Defendants.

No. 2:18-cv-02975-TLN-KJN (PS)

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff Ann Zhai, who proceeds without counsel and in forma pauperis, commenced this action on November 14, 2018. (ECF Nos. 1, 2.) On January 7, 2019, the court ordered plaintiff, within thirty days, to provide the U.S. Marshal “with all information needed . . . to effectuate service of process” on defendants and, within ten days thereafter, to “file a statement with the court that such documents have been submitted to the U.S. Marshal.” (ECF No 3 at 3.) The court warned plaintiff that “[f]ailure to comply with this order may result in any appropriate sanctions, including monetary sanctions and/or dismissal of the action pursuant to Federal Rule of Civil Procedure 41(b).” (*Id.*) However, plaintiff failed to file a statement with the court as directed.

Based on plaintiff’s failure, the court considered whether the action should be dismissed. Nevertheless, in light of plaintiff’s pro se status and the court’s strong desire to resolve the action on the merits, the court first attempted lesser measures in the form of an order to show cause.

1 More specifically, on March 11, 2019, the court ordered plaintiff, within fourteen days to show
2 cause “in writing why the court should not impose monetary sanctions and/or dismiss this action
3 based upon plaintiff’s failure to follow the court’s previous order.” (ECF No. 6 at 2.)

4 Although the applicable deadline has now passed, plaintiff has failed to respond to the
5 order to show cause. Therefore, the court recommends dismissal at this juncture.

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

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

10 Any individual representing himself or herself without an attorney is
11 bound by the Federal Rules of Civil or Criminal Procedure, these
12 Rules, and all other applicable law. All obligations placed on
13 “counsel” by these Rules apply to individuals appearing in propria
14 persona. Failure to comply therewith may be ground for dismissal,
15 judgment by default, or any other sanction appropriate under these
16 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 for dismissal”); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal
Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with
any order of the court”); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir.
1986) (per curiam) (stating that district courts have inherent power to control their dockets and

1 may impose sanctions including dismissal or default).

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

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

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

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

20 Additionally, the fifth Ferdik factor, which considers the availability of less drastic
21 measures, also supports dismissal. As noted above, the court has already attempted less drastic
22 measures—an order to show cause—prior to recommending dismissal. However, plaintiff failed
23 to respond to the order to show cause. Further, given plaintiff's in forma pauperis status and her
24 complete failure to respond to the court's previous orders and instructions, the imposition of
25 monetary sanctions would be futile. Based on the limited record in this matter, the court is also
26 unable to frame any meaningful issue or evidentiary sanctions. Thus, the court finds no suitable
27 alternative to dismissal at this juncture.

28 Finally, the court finds that the fourth Ferdik factor, which addresses the public policy

1 favoring disposition of cases on the merits, does not materially counsel against dismissal. If
2 anything, a disposition on the merits has been hindered by plaintiff's own failure to comply with
3 the court's orders and prosecute her case. In any event, the court finds that the fourth Ferdik
4 factor is outweighed by the other Ferdik factors.

5 Consequently, dismissal is appropriate.

6 Accordingly, IT IS HEREBY RECOMMENDED that:


- 7 1. The action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure
8 41(b).
- 9 2. The Clerk of Court be directed to vacate all dates and close this case.

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

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

24 IT IS SO ORDERED AND RECOMMENDED.

25 Dated: April 3, 2019

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