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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHANNON O. MURPHY, SR.

Plaintiff,

v.

JP MORGAN CHASE & CO.,

Defendant.

No. 2:20-cv-1688-TLN-CKD PS

FINDINGS AND RECOMMENDATIONS TO
DISMISS FOR FAILURE TO PROSECUTE

(ECF No. 6)

Plaintiff, proceeding pro se, filed a complaint against defendant asserting various causes of action for being denied a bank account in a “rude” manner; he also requested leave to proceed in forma pauperis. (See ECF Nos. 1, 2.) The court granted plaintiff’s IFP request and dismissed the complaint for failure to state a claim. (ECF No. 3.) Plaintiff was given 28 days to amend the complaint and was warned that a failure to do so by the required deadline “may result in the imposition of sanctions, including dismissal of the action with prejudice pursuant to Federal Rule of Civil Procedure 41(b).” (Id. at 4.) When that deadline passed with no filings from plaintiff, the court on October 21, 2020 issued an order to show cause within 14 days why this action should not be dismissed with prejudice under Rule 41(b) for failure to prosecute this case, and failure to comply with the court’s prior order. (ECF No. 4.)

On October 30, 2020, plaintiff instead filed a document entitled “Complaint, Judicial Misconduct,” asserting some indecipherable form of misconduct by District Judge Nunley, who is

1 assigned to this case along with the undersigned. (ECF No. 5.) On November 4, 2020, the
2 undersigned responded to that filing, reminding plaintiff that he was being given “one final
3 opportunity” to comply with the court’s prior order by filing within 10 days either an amended
4 complaint or a notice of voluntary dismissal. (ECF No. 6 at 2.) Plaintiff was again warned that
5 failure to comply “will result in a recommendation that this action be dismissed with prejudice
6 pursuant to Federal Rule of Civil Procedure 41(b).” (Id.) More than 10 days have passed without
7 a response from plaintiff. Accordingly, the undersigned recommends dismissing this case with
8 prejudice under Rule 41(b).

9 A district court may impose sanctions, including involuntary dismissal of a plaintiff’s case
10 pursuant to Federal Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his or her
11 case or fails to comply with the court’s orders, the Federal Rules of Civil Procedure, or the court’s
12 local rules. See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court
13 “may act sua sponte to dismiss a suit for failure to prosecute”); Hells Canyon Preservation
14 Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (approving sua sponte dismissals
15 under Rule 41(b)); Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) (“Failure to
16 follow a district court’s local rules is a proper ground for dismissal.”); Ferdik v. Bonzelet, 963
17 F.2d 1258, 1260 (9th Cir. 1992), as amended (May 22, 1992) (“Pursuant to Federal Rule of Civil
18 Procedure 41(b), the district court may dismiss an action for failure to comply with any order of
19 the court.”); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per
20 curiam) (stating that district courts have inherent power to control their dockets and may impose
21 sanctions including dismissal or default). This court’s Local Rules are in accord. See E.D. Cal.
22 Local Rule 110 (“Failure of counsel or of a party to comply with these Rules or with any order of
23 the Court may be grounds for imposition by the Court of any and all sanctions authorized by
24 statute or Rule or within the inherent power of the Court.”); E.D. Cal. Local Rule 183(a)
25 (providing that a pro se party’s failure to comply with the Federal Rules of Civil Procedure, the
26 court’s Local Rules, and other applicable law may support, among other things, dismissal of that
27 party’s action).

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

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

9 Id. at 1260-61; accord Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002).

10 Here, the first two factors weigh in favor of dismissal, because this case has already been
11 delayed by plaintiff's failure to take the steps necessary to move this case forward. The third
12 factor also favors dismissal, because, at a minimum, defendant has been deprived of an
13 opportunity to be promptly notified of the lawsuit and prepare its defense. With the passage of
14 time, memories fade and evidence becomes stale. The fifth factor also favors dismissal because
15 the court has already attempted less drastic alternatives. Specifically, after granting plaintiff leave
16 to proceed without paying the filing fee, the court informed plaintiff of the complaint's
17 deficiencies and granted him leave to amend. However, plaintiff has repeatedly failed to file an
18 amended complaint, leaving the court with little alternative but to recommend dismissal. Given
19 plaintiff's request to proceed IFP, it is unlikely that monetary sanctions would be effective.

20 As to the fourth factor, the public policy favoring disposition of cases on their merits, that
21 factor is outweighed by the other Ferdik factors. Indeed, it is plaintiff's own failure to prosecute
22 the case and comply with the rules that precludes a resolution on the merits. Therefore, after
23 carefully evaluating the Ferdik factors, the court concludes that dismissal is appropriate.

24 Accordingly, IT IS HEREBY RECOMMENDED that:

- 25 1. Plaintiff's claims be DISMISSED with prejudice pursuant to Federal Rule of Civil
26 Procedure 41(b); and
- 27 2. The Clerk of Court be directed to close this case.

28 These findings and recommendations are submitted to the United States District Judge
assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
3 shall be served on all parties and filed with the court within fourteen (14) days after service of the
4 objections. The parties are advised that failure to file objections within the specified time may
5 waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th
6 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

7 Dated: November 18, 2020



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CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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