

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
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

ALLEN KELTNER,
Plaintiff,

v.

COUNTY OF LAKE, *et al.*,
Defendants.

Case No. [14-cv-05636-NJV](#)

ORDER DISMISSING CASE

On August 13, 2015, the court entered a Stipulation and Order (Doc. 21), granting the parties’ request for a modified briefing schedule and to move the hearing on the Motion to Dismiss to November 3, 2015. The stipulated briefing schedule required that Plaintiff file his response to the Motion to Dismiss on or before August 31, 2015. Plaintiff did not file a response. On September 8, 2015, Defendants filed a Reply to Plaintiff’s Failure to Oppose the Motion to Dismiss (Doc. 22), in which Defendants propose the court take Plaintiff’s failure to file an opposition to the Motion as a concession. As of this date, Plaintiff has not responded to the Motion to Dismiss, or to Defendants’ suggestion that Plaintiff has conceded the motion.

On October 1, 2015, the court issued an Order to Show Cause (Doc. 23), in which the court noted that “[i]t appears then that Plaintiff does indeed concede the Motion, or has otherwise abandoned this case,” and ordered that Plaintiff, on or before October 9, 2015, show cause as to why the court should not dismiss this case for failure to prosecute. Plaintiff was warned that “his failure to respond to this order will result in the dismissal of this action.” Plaintiff has again failed to respond.

“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action

1 for failure to comply with any order of the court.” *Ferdik v. Bonzelet* 963 F.2d 1258, 1260 (9th
2 Cir. 1992). “In determining whether to dismiss a claim for failure to prosecute or failure to comply
3 with a court order, the Court must weigh the following factors: (1) the public’s interest in
4 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
5 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
6 public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639,
7 642 (9th Cir. 2002) (citing *Ferdik*, 963 F.2d at 1260–61).

8 The court finds that these factors support dismissal. First, “[t]he public’s interest in
9 expeditious resolution of litigation always favors dismissal.” *Yourish v. California Amplifier*, 191
10 F.3d 983, 990 (9th Cir. 1999). Second, the court’s need to manage its docket weighs in favor of
11 dismissal. This case was filed in December of 2014, and through the parties’ stipulations the
12 Motion to Dismiss was filed in July of 2015. Almost three months have passed and Plaintiff has
13 made no effort to respond. The court cannot manage its docket when the prosecuting party will
14 not participate. Third, the risk of prejudice to the defendants generally requires that “a defendant .
15 . . . establish that plaintiff’s actions impaired defendant’s ability to proceed to trial or threatened to
16 interfere with the rightful decision of the case.” *Pagtalunan*, 291 F.3d at 642. However, “a
17 presumption of prejudice arises from a plaintiff’s unexplained failure to prosecute.” *Lamina v.*
18 *Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002). Plaintiff has not overcome this
19 presumption and, thus, this factor weighs in favor of dismissal. Fourth, there appears no available
20 less drastic alternative. Plaintiff is represented by counsel. Counsel stipulated to an extended
21 briefing schedule. After Plaintiff missed the deadline to respond, Defendants filed a Reply
22 pointing to Plaintiff’s failure and suggesting that Plaintiff did not oppose the Motion to Dismiss.
23 At that time, Plaintiff could have filed a response to Defendants’ assertion. The court then issued
24 the Show Cause Order, which Plaintiff ignored, despite the warning that failure to respond would
25 result in the court’s order of dismissal. The court finds that there is no available less drastic
26 alternative and this factor weighs in favor of dismissal. The fifth factor weighs against dismissal,
27 because “[p]ublic policy favors disposition of cases on the merits.” *Pagtalunan*, 291 F.3d at 643.
28

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

Dismissal is appropriate “where at least four factors support dismissal, . . . or where at least three factors ‘strongly’ support dismissal.” *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) (quoting *Ferdik*, 963 F.2d at 1263). Here, four out of five factors support dismissal.

Accordingly, it is ORDERED that this case is DISMISSED without prejudice for failure to prosecute.

The Clerk of the Court shall close the file.

The matter is referred to the court’s standing committee on professional conduct.

IT IS SO ORDERED.

Dated: October 16, 2015



NANDOR J. VADAS
United States Magistrate Judge