

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA I. BUCCOLA,
Plaintiff,
v.
JOSEPH L. BOUCHER, et al.,
Defendants.

Case No. 22-cv-03877-NC

**ORDER GRANTING MOTION TO
DISMISS PURSUANT TO FEDERAL
RULES OF CIVIL PROCEDURE 37
AND 41**

Re: ECF 263, 271, 272

The City of Carmel-by-the-Sea and five individual Defendants move to dismiss this action based on Plaintiff Theresa Buccola’s failure to comply with the Court’s discovery order at ECF 255. For the reasons below, the Court GRANTS the motion and dismisses this action as to all Carmel Defendants with prejudice pursuant to Federal Rules of Civil Procedure 37(b) and 41(b).

I. BACKGROUND

A. Factual Background¹

Plaintiff initiated this action against the Carmel Defendants and Monterey County for alleged violations of her constitutional rights stemming from her July 2020 arrest for entering Carmel Beach while it was closed in the early months of the COVID-19 pandemic. Following an announcement of the closure of Carmel Beach for Independence

¹ The Court takes the following facts as true for purposes of this motion, based on the most recent operative pleading, Plaintiff’s Third Amended Complaint. ECF 197 (TAC).

1 Day weekend in 2020, Plaintiff called the Carmel Police Department to question the beach
2 closure and was warned she would be arrested if she entered the beach. TAC ¶¶ 19–20.
3 Plaintiff alleges the beach closure violated her “God-given right to access the navigable
4 waters of the Coast of California.” TAC ¶¶ 74–75. Plaintiff entered, then re-entered, the
5 Carmel Beach despite signs indicating the beach was closed and a verbal warning from a
6 Carmel officer on-site. TAC ¶¶ 22–23, 26–27. Two Carmel officers then arrested Plaintiff
7 and brought her to jail. TAC ¶ 28. Plaintiff was subject to searches of her person and
8 property by Carmel and Monterey officers following her arrest. TAC ¶¶ 29–31, 35, 38–42.

9 In February 2021, Plaintiff went to the Carmel Police Department “to obtain the
10 body-worn footage” of her July 2020 arrest. TAC ¶ 49. Two Carmel officers informed
11 Plaintiff that they had a warrant for her arrest, which Plaintiff maintains was defective, and
12 proceeded to arrest and search her. TAC ¶¶ 52, 55, 58, 63, 65.

13 The criminal charges against Plaintiff related to these events have since been
14 dismissed. TAC ¶ 70.

15 **B. Procedural Background**

16 Plaintiff filed this action on June 30, 2022. ECF 1. The Court granted motions to
17 dismiss the initial, first amended, and second amended complaints with leave to amend.
18 ECF 38, 86, 155. Plaintiff filed a third amended complaint. TAC. The Court granted
19 Monterey’s motion to dismiss the third amended complaint without leave to amend. ECF
20 250. The Court granted in part and denied in part the Carmel Defendants’ motion to
21 dismiss the third amended complaint with and without leave to amend. ECF 253. The
22 Court ordered Plaintiff to file an amended complaint, or a statement indicating she did not
23 intend to amend, by October 16, 2024. ECF 266. To date, Plaintiff has filed neither.

24 As to the present motion, the City served Plaintiff with interrogatories and requests
25 for document production. The Court ordered Plaintiff to provide supplemental responses
26 and productions for a limited number of interrogatories and requests for production of
27 documents by June 14, 2024. ECF 165. The Court then extended the deadline to July 15,
28 2024. ECF 207. After the parties failed to comply with orders to meet and confer about

1 discovery disputes, the Court offered a second chance and ordered the parties to meet after
2 a hearing. ECF 211. Later, the Court noted that it “finds that Buccola has not complied
3 with the Court’s discovery Order at ECF 165, but the Court will narrow that Order and
4 provide Buccola a further opportunity to comply.” ECF 255. Specifically, the Court
5 ordered Plaintiff to respond to the narrowed discovery by September 9, 2024. ECF 255.
6 The Court wrote that if Plaintiff failed to comply with the order by the extended deadline,
7 the Carmel Defendants “may file a motion seeking leave to file a motion for sanctions
8 under Federal Rule of Civil Procedure 37, as they requested in ECF 244.” ECF 255.

9 The Carmel Defendants filed a Motion to Dismiss for Failure to Comply with
10 Discovery Order, pursuant to Federal Rules of Civil Procedure 37 and 41. ECF 263
11 (Mot.). After the Court *sua sponte* extended Plaintiff’s time to respond to the motion, ECF
12 269, Plaintiff filed a late opposition. The Court nonetheless considers Plaintiff’s
13 opposition, entitled “Opposition to an Interloper’s Void Document and Objection to
14 Interlocutory Order No. 269.” ECF 271 (Opp’n). The Carmel Defendants filed a reply,
15 ECF 272, and the Court held a hearing on the motion on October 2, 2024, at which
16 Plaintiff and counsel for the Carmel Defendants both appeared. ECF 275.

17 All parties have consented to the jurisdiction of a magistrate judge pursuant to 28
18 U.S.C. § 636(c). ECF 7, 11, 13.

19 **II. LEGAL STANDARD**

20 Federal Rule of Civil Procedure 41(b) permits a defendant to “move to dismiss the
21 action or any claim against it” when “the plaintiff fails to prosecute or to comply with
22 these rules or a court order.” Rule 37(b)(2)(A) provides that when a party “fails to obey an
23 order to provide or permit discovery,” courts “may issue further just orders,” including
24 “dismissing the action or proceeding in whole or in part.” The Court also “must order the
25 disobedient party . . . to pay the reasonable expenses, including attorney’s fees, caused by
26 the failure, unless the failure was substantially justified or other circumstances make an
27 award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C). Dismissal for failure to comply
28 with a court order “operates as an adjudication on the merits.” Fed. R. Civ. P. 42(b).

1 **III. DISCUSSION**

2 Plaintiff does not dispute that she violated the Court’s discovery order. *See* ECF
3 255; Opp’n. The only question at issue, then, is whether dismissal is the appropriate
4 sanction as requested by the Carmel Defendants. The Court concludes it is, based on an
5 analysis of the relevant factors and Plaintiff’s representations. Plaintiff’s arguments to the
6 contrary focus only on whether her failure to comply with the Court’s order was justified,
7 and are unavailing, as discussed below. The Court therefore dismisses this action as to all
8 Carmel Defendants, but declines to award costs or fees on the motion.

9 **A. Dismissal is the Appropriate Sanction for Plaintiff’s Failure to Comply with**
10 **the Court’s Discovery Order**

11 Courts weigh five factors in considering whether to dismiss a case for failure to
12 comply with court-ordered discovery: “(1) the public’s interest in expeditious resolution of
13 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
14 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the
15 availability of less drastic sanctions.” *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir.
16 1997) (citation omitted). Applying these factors, dismissal is appropriate here.

17 “Where a court order is violated, the first two factors support sanctions.” *Id.*
18 (quoting *Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990)). This is
19 because “in this era of crowded dockets,” parties that disobey a discovery order “deprive
20 other litigants of an opportunity to use the courts as a serious dispute-settlement
21 mechanism.” *G-K Props. v. Redev. Agency of City of San Jose*, 577 F.2d 645, 647 (9th
22 Cir. 1978). And, as here, courts can expend considerable resources resolving discovery
23 disputes. *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (2002) (“It is incumbent upon the
24 Court to manage its docket without being subject to routine noncompliance of litigants.”);
25 *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1170 (9th Cir. 2012) (noting noncompliance
26 with discovery “led to multiple hearings and motions before this Court which have nothing
27 to do with the merits of this case” and detracted from “the Court’s ability to efficiently
28 manage its docket in a manner fair to all parties with pending cases”). On the other hand,

1 “the fourth factor cuts against” dismissal because dismissal for disobeying a discovery
2 order undermines disposition of the case on the merits. *Payne*, 121 F.3d at 507.

3 Therefore, “it is the third and fifth factors that are decisive.” *Adriana*, 913 F.2d at
4 1412. As to prejudice to the Carmel Defendants, “[f]ailure to produce documents as
5 ordered . . . is considered sufficient prejudice.” *See id.* The Carmel Defendants also noted
6 that many of the discovery requests that Plaintiff failed to respond to concern her
7 calculations of damages, preventing them from fully defending against a demand for \$52
8 million. *See* TAC at 16. Further, the Court-ordered discovery concerned Plaintiff’s social
9 media statements about the events underlying this action. *See Adriana*, 913 F.2d at 1412
10 (“A defendant suffers prejudice if the plaintiff’s actions impair the defendant’s ability to
11 go to trial or threaten to interfere with the rightful decision of the case.”). Plaintiff’s
12 noncompliance thus prejudices the Carmel Defendants.

13 As to the fifth factor, the Court has both exercised and considered less drastic
14 sanctions. The Court extended the time for Plaintiff to respond to discovery multiple times
15 and narrowed the scope of ordered discovery. *See Chase v. Int’l Ass’n of Machinists and*
16 *Aerospace Workers*, No. 20-cv-08841-ODW-SK, 2022 WL 2052657, at *6 (C.D. Cal. Apr.
17 8, 2022) (recognizing orders to respond to discovery and extensions of time as less drastic
18 sanctions). Plaintiff was also on notice before the filing of the present motion that the
19 Carmel Defendants sought to dismiss this matter because she had not complied with the
20 discovery order, *see* ECF 244, and that the Court indicated the Carmel Defendants could
21 seek leave to do so if she continued to not comply. *See* ECF 255; *Chase*, 2022 WL
22 2052657, at *6 (recognizing warnings that failure to obey a court order could lead to
23 dismissal as less drastic sanctions).

24 At the motion hearing, the Court asked Plaintiff about alternate sanctions and
25 invited her to suggest any lesser sanctions that might be appropriate. In particular, the
26 Court suggested excluding Plaintiff from presenting damages at trial, and repeatedly asked
27 Plaintiff if she would respond to the ordered discovery if the matter was stayed until she
28 did so or if she was otherwise given more time. Plaintiff asserted that she had no

1 obligation to comply with discovery in any form and would not be a willing participant in
2 doing so.² Since the hearing, Plaintiff has further objected to communicating or
3 cooperating with opposing counsel and has failed to comply with a filing deadline. In
4 particular, the Court ordered Plaintiff to file an amended complaint, or statement indicating
5 she did not intend to amend her complaint, by October 16, 2024. ECF 266. Plaintiff failed
6 to do either and instead filed an “Objection” to the Court’s order that stated she “continues
7 to recoil from . . . the court’s seeming necessity to compel the Plaintiff to answer and
8 respond” to “the traitorous acts of pretend counsel.” ECF 277 at 2. In a Petition for Writ
9 of Habeas Corpus filed the next day, Plaintiff identified herself as “a woman who is
10 refusing to do business or interact with” opposing counsel. ECF 278 at 4, 5.

11 As a result, the Court concludes lesser sanctions would be fruitless; an extension of
12 discovery deadlines or stay of the case would be futile given Plaintiff’s declared intent to
13 defy discovery orders and pattern of refusing to respond to opposing counsel or adhere to
14 Court orders. And excluding evidence of damages at trial would not remedy Plaintiff’s
15 nonresponse to discovery concerning the events underlying this matter. “[I]t is appropriate
16 to reject lesser sanctions where the court anticipates continued deceptive misconduct.”
17 *Comput. Task Grp., Inc. v. Brothby*, 364 F.3d 1112, 1116–17 (9th Cir. 2004) (citation
18 omitted).

19 Finally, a party’s noncompliance with a discovery order “must be due to
20 willfulness, fault, or bad faith” to justify case-dispositive sanctions. *Id.* at 1115. Plaintiff
21 has not offered any arguments to suggest mistake or error led to her failure to comply with
22 the Court’s discovery order, and instead has appeared deliberate and steadfast in her efforts
23 to pole-vault over her discovery obligations.

24 Taken together, these factors weigh in favor of dismissal under Rule 37(b).

25 **1. Plaintiff’s Arguments Lack Merit**

26 Plaintiff raised three related arguments in her defense at the hearing and in her
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28 ² Plaintiff’s Opposition to the motion to dismiss similarly argued she was “under no obligation to respond to a document entered by” opposing counsel. Opp’n 1.

1 Opposition, arguing that she should not have been ordered to respond to discovery from
2 opposing counsel in the first instance and is still not obligated to do so. The Court has
3 addressed each argument previously but will do so again here. Ultimately, Plaintiff’s
4 arguments are unavailing, and none speak to why Plaintiff could willingly ignore a Court
5 order.

6 **a. Status and Standing of Opposing Counsel**

7 In Plaintiff’s Opposition, she argues she “is under no obligation to respond to [the
8 motion to dismiss] entered by a repeated trespasser” because counsel for the Carmel
9 Defendants “Mr. Fay has no authority, standing or business entering anything into this
10 case.” Opp’n 1. Plaintiff’s arguments stem from Jonathan Redford’s, the former lead
11 attorney for the Carmel Defendants, error in practicing in this matter when he was not a
12 member of the bar of the Court, in violation of the Northern District of California’s Civil
13 Local Rules. Though stemming from a legitimate slight, this subject has now been
14 thoroughly addressed by the Court, which concluded Plaintiff was not prejudiced by
15 Redford’s unauthorized practice and that current counsel, Thomas Fay, is authorized to
16 litigate this action. *See* ECF 149, 158, 211.

17 **b. Default Judgment**

18 Relatedly, Plaintiff has argued she is entitled to default judgment based on opposing
19 counsel’s lack of standing. At the motion hearing, Plaintiff emphasized *Dr. JKL Ltd. v.*
20 *HPC IT Educ. Ctr.* as controlling authority that she need not respond to opposing counsel
21 or, apparently, the Court’s discovery order. *See* 749 F. Supp. 2d 1038 (N.D. Cal. 2010).
22 As an initial matter, *Dr. JKL* is not controlling here, though the Court has nonetheless
23 reviewed the decision. *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001)
24 (discussing how district court opinions are persuasive but not binding on other courts in the
25 district). More importantly, the facts here are not analogous to those in *Dr. JKL*. In *Dr.*
26 *JKL*, District Court Judge Richard Seeborg³ granted a motion to strike and motion for
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28 ³ Judge Seeborg is now Chief Judge for the Northern District of California.

1 default, in part because one of the corporate parties was represented by a *pro se* litigant in
 2 violation of a Local Rule requiring corporations to be represented by licensed counsel.
 3 749 F. Supp. 2d at 1046, 1048, 1051. No corporations are parties to this case. In *Dr. JKL*,
 4 the parties also failed to cure their error despite having the opportunity to do so. *Id.* Here,
 5 counsel for the Carmel Defendants have remedied their errors such that they are all
 6 members of the bar of the Court who have properly appeared in this matter.

7 *Dr. JKL* also does not support the positions Plaintiff advocates. Judge Seeborg
 8 cited Civil Local Rule 3-9(b): “Sanctions (including default or dismissal) *may* be imposed
 9 for failure to comply with local rules.” *Id.* at 1046 (emphasis added). Here, the Court has
 10 already assessed and issued sanctions as to former and current counsel for the Carmel
 11 Defendants as it has deemed appropriate. *See* ECF 251, 270, 283. Plaintiff also
 12 conveniently overlooks one of the key reasons Judge Seeborg granted the motions to strike
 13 and for default—the corporation’s failure to respond to a motion from the opposing party.
 14 *Dr. JKL*, 749 F. Supp. 2d at 1046, 1048, 1051. Notably, Judge Seeborg emphasized that a
 15 *pro se* litigant “must comply with both the local and the Federal Rules, both in terms of
 16 pleading requirements and filing deadlines . . . and cannot simply ignore a motion filed by
 17 the opposing party.” *Id.*

18 The Court also discusses *Dr. JKL* and why it does not entitle Plaintiff to default
 19 judgment in its order denying Plaintiff’s motion for entry of default, ECF 281, which
 20 Plaintiff filed the same day as the motion hearing, ECF 274.

21 **c. Agreement with Opposing Counsel**

22 In addition, Plaintiff points to an email she sent to opposing counsel demanding
 23 documentation to prove their licensure and professional standing, and warning that their
 24 failure to respond by a certain time would constitute tacit agreement that counsel lacked
 25 standing to litigate this matter. *See* ECF 274, Ex. C. Plaintiff argued at the motion hearing
 26 that her email constituted a private contract between the parties (and possibly the Court),
 27 and that opposing counsel’s nonresponse obviated the need for her to abide by the Court’s
 28 discovery order. It is well-settled that an unanswered demand or offer is insufficient to

1 establish a contract. *S.F. Iron & Metal Co. v. Sweet Steel Co.*, 23 F.2d 783, 785 (9th Cir.
2 1928) (“It is true that a mere offer made to another, does not become an agreement merely
3 from the fact that the person to whom it is made makes no reply, even though the offer
4 states that silence will be taken for consent.”). And nothing in Plaintiff’s unanswered
5 email could constitute permission from the Court to ignore its discovery order. The Court
6 has further addressed this argument in its orders denying Plaintiff’s motion for entry of
7 default and motion seeking leave of Court to file six motions for reconsideration. ECF 281
8 at 1–2; ECF 282 at 4.

9 **2. The Court Dismisses the Action as to all Carmel Defendants with**
10 **Prejudice**

11 The Court notes that Plaintiff failed to comply with an order concerning discovery
12 propounded only by the City, not all Carmel Defendants. Nonetheless, the Court finds it
13 appropriate to dismiss this action as to all Carmel Defendants because Plaintiff herself
14 alleges the individual Defendants are agents of the City, the ordered discovery pertained to
15 all Carmel Defendants, and the Carmel Defendants share common counsel. *See Payne*,
16 121 F.3d at 510 (noting court’s discretion to determine the scope of sanctions for failure to
17 comply with a discovery order and finding it reasonable to conclude noncompliance could
18 prejudice multiple parties). Plaintiff also did not, for example, specify that she only
19 refuses to participate in discovery from just the City, but rather has objected to discovery
20 and filings from any and all Carmel Defendants and their shared counsel.

21 Because dismissal for failure to comply with a court order under Rules 37(b) and
22 41(b) “operates as an adjudication on the merits,” the Court dismisses this matter as to all
23 Carmel Defendants with prejudice. *See Fed. R. Civ. P. 41(b)*.

24 **B. No Costs or Attorney’s Fees are Awarded on the Motion**

25 Although courts typically must order a party that disobeys a discovery order to pay
26 the opposing party’s reasonable expenses, the Court finds the “circumstances make an
27 award of expenses unjust” here. *See Fed. R. Civ. P. 37(b)(2)(C)*. The Carmel Defendants
28 did not request or itemize expenses in their motion. At the motion hearing, they also

1 indicated they plan to seek attorney’s fees under separate statutory authority. Moreover,
2 Plaintiff is a *pro se* litigant bringing a civil rights action. The Court does not want to
3 dissuade other litigants who may not be able to afford counsel from bringing actions
4 seeking to safeguard important rights.

5 **IV. CONCLUSION**

6 The Court dismisses this matter as to the Carmel Defendants with prejudice.
7 Judgment will be entered in a separate order. No costs or fees are awarded in connection
8 with the motion.

9 **IT IS SO ORDERED.**

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Dated: October 24, 2024



NATHANAEL M. COUSINS
United States Magistrate Judge