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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY LC DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SYDNEY FRANCIS,

Plaintiff,

v.
OREGON STATE UNIVERSITY;
TARAS LISKEVYCH; and DOES 1
through 100 inclusive,

Defendants.

CASE NO. 16cv1860-WQH-WVG
ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Plaintiff’s First Amended Complaint. (ECF No. 29).

I. BACKGROUND

On July 21, 2016, Plaintiff Sydney Francis initiated this action by filing a Complaint alleging the following causes of action against Defendants Oregon State University (“OSU”), Taras Liskevych, and Does 1 through 100, inclusive. (ECF No. 1).

On June 1, 2017, the Court issued an Order denying a motion to change venue filed by Defendant OSU and granting a motion to dismiss for failure to state a claim filed by Defendant OSU. (ECF No. 23). The Court also dismissed the complaint against Defendant Taras Liskevych for insufficient service. *Id.*

On July 3, 2017, Plaintiff filed a motion for leave to file an amended complaint. (ECF No. 24). On September 11, 2017, the Court granted the motion for leave to file

1 an amended complaint. (ECF No. 27). On September 19, 2017, Plaintiff filed the first
2 amended complaint. (ECF No. 27). In the first amended complaint, Plaintiff alleges
3 the following causes of action against Defendants OSU and Liskevych: (1) breach of
4 contract; (2) fraud/deceit; (3) fraud/bad faith; (4) intentional infliction of emotional
5 distress; (5) civil conspiracy; and (6) punitive damages. (ECF No. 27). These causes
6 of action generally arise from allegations that Defendants cancelled Plaintiff's athletic
7 scholarship to play volleyball for OSU and dismissed her from the team at some point
8 following her freshman year. *Id.*

9 On October 3, 2017, Defendant OSU filed a motion to dismiss the first amended
10 complaint. (ECF No. 29). Defendant OSU contends the amended complaint fails to
11 cure the deficiencies of the prior complaint. Defendant OSU contends that Plaintiff
12 fails to state any claim with respect to each cause of action alleged in the first amended
13 complaint. *Id.*

14 The record reflects that Plaintiff has not filed a response in opposition to the
15 motion to dismiss.

16 **II. DISCUSSION**

17 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state
18 a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of
19 Civil Procedure 8(a) provides that "[a] pleading that states a claim for relief must
20 contain . . . a short and plain statement of the claim showing that the pleader is entitled
21 to relief." Fed. R. Civ. P. 8(a)(2). "A district court's dismissal for failure to state a
22 claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a 'lack of a
23 cognizable legal theory or the absence of sufficient facts alleged under a cognizable
24 legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)
25 (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). "To
26 survive a motion to dismiss, a complaint must contain sufficient factual matter,
27 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v.*
28 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

1 (2007)).

2 A district court may properly grant an unopposed motion pursuant to a local rule
3 where the local rule permits, but does not require, the granting of a motion for failure
4 to respond. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (affirming
5 dismissal for failing to oppose a motion to dismiss, based on a local rule providing that
6 “[t]he failure of the opposing party to file a memorandum of points and authorities in
7 opposition to any motion shall constitute consent to the granting of the motion”). Civil
8 Local Rule 7.1 provides, “If an opposing party fails to file the papers in the manner
9 required by Civil Local Rule 7.1.e.2, that failure may constitute a consent to the
10 granting of a motion or other request for ruling by the court.” CivLR 7.1(f)(3)(c).
11 “Although there is ... a [public] policy favoring disposition on the merits, it is the
12 responsibility of the moving party to move towards that disposition at a reasonable
13 pace, and to refrain from dilatory and evasive tactics.” *In re Eisen*, 31 F.3d 1447, 1454
14 (9th Cir. 1994) (quoting *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir.
15 1991)) (affirming dismissal for failure to prosecute).

16 The docket reflects that the motion to dismiss for failure to state a claim was
17 served on Plaintiff’s counsel on October 3, 2017. The docket reflects that Defendant
18 OSU obtained a hearing date of November 6, 2017 for its motion to dismiss. (ECF No.
19 29-1). Pursuant to the local rules, Plaintiff was to file any response to the motion to
20 dismiss no later than fourteen days prior to the hearing date. The docket reflects that
21 Plaintiff has failed to file any response to the motion as required by Civil Local Rule
22 7.1.e.2. The Court construes Plaintiff’s failure to oppose the motion to dismiss as “a
23 consent to the granting of” the motions. CivLR 7.1(f)(3)(c). Upon a review of the
24 motion to dismiss and the First Amended Complaint, the Court concludes that
25 Defendant OSU’s motion raises meritorious arguments sufficient to establish that
26 Plaintiff fails to state a claim against OSU with respect to each cause of action in the
27 First Amended Complaint. Fed. R. Civ. P. 12(b)(6). The motion to dismiss is granted.
28 (ECF No. 29).

1 **III. RULING OF THE COURT**

2 IT IS HEREBY ORDERED that the motion to dismiss filed by Defendant
3 Oregon State University is GRANTED. (ECF No. 29). The Complaint is dismissed
4 without prejudice as to Defendant Oregon State University. Plaintiff shall file any
5 motion for leave to file an amended complaint pursuant to Local Civil Rule 7.1 and
6 within thirty (30) days of the date this Order is issued.

7 The record reflects that no proof of service or responsive pleading has been filed
8 with respect to Defendant Taras Liskevych. Federal Rule of Civil Procedure 4(m)
9 requires that a summons and complaint be served “within 90 days after the complaint
10 is filed” Fed. R. Civ. P. 4(m). If a plaintiff fails to serve the summons and
11 complaint within that time limit, the court may dismiss the action without prejudice
12 after notice to the plaintiff. *Id.* This Order constitutes notice to Plaintiff that the Court
13 will dismiss this action against Defendant Liskevych without prejudice on **December**
14 **20, 2017** unless, no later than that date, Plaintiff files either (1) proof that service of the
15 summons and complaint was timely effectuated or (2) a declaration under penalty of
16 perjury showing good cause for failure to timely effect service upon the Defendant
17 Liskevych accompanied by a motion for leave to serve process outside of the 90-day
18 period.

19
20 DATED:

21 11/29/17



22 **WILLIAM Q. HAYES**
23 United States District Judge
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