IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-00446-MEH

TRAVIS HODSON,

Plaintiff,

v.

NANCY KROLL,
MATTHEW ELBE,
BRANDON WILLIAMS,
ROBYN JUBA,
STEVE REAMS,
UNKNOWN DEPUTY (A), and
UNKNOWN DEPUTIES,

Defendants.

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**ORDER OF DISMISSAL**

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**Michael E. Hegarty, United States Magistrate Judge.**

This matter comes before the Court *sua sponte*, due to Plaintiff's failures to respond to this Court's June 2, 2017 order and July 5, 2017 order to show cause.

Plaintiff, an incarcerated person proceeding *pro se*, initiated this lawsuit on February 22, 2016, then filed the operative Third Amended Complaint during initial review on September 7, 2016 alleging that Defendants violated his Eighth and Fourteenth Amendment rights. ECF No. 11. The reviewing court dismissed one Defendant and the Plaintiff's request for money damages against Defendants in their official capacities. ECF No. 12. On March 2, 2017, the Defendants responded to the Third Amended Complaint by filing a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See* ECF No. 36. The following day, this Court issued an order directing the Plaintiff to file a response to the Defendant's motion on or before March 26, 2017 and granted Defendants' motion

to stay discovery pending resolution of the motion. ECF Nos. 38, 39.

The Court held a Status Conference on March 6, 2017 at which the Court was informed the Plaintiff had been found "incompetent" during a competency hearing in a state criminal case. ECF No. 40. The Court directed Plaintiff to file a motion for appointment of pro bono counsel and to attach a copy of the state court's order finding him incompetent; the Court also stayed the proceedings, including briefing on the motion to dismiss, pending further order of the Court. *Id.* Plaintiff filed the motion on March 16, 2017 and the Court granted it on March 20, 2017. ECF Nos. 44, 46. At a subsequent Status Conference on April 12, 2017, the Court informed the parties that the Clerk of the Court was still attempting to secure the appointment of counsel for the Plaintiff and ordered that the stay would remain in place to give the Clerk additional time. ECF No. 52. The Court did the same at an April 24, 2017 conference. ECF No. 54.

Finally, on June 2, 2017, the Court determined that it could not locate non-conflict, volunteer counsel to represent the Plaintiff. Accordingly, the Court lifted the stay and ordered Plaintiff to file a response to the motion to dismiss on or before June 26, 2017. ECF No. 56. A Certificate of Service demonstrates that the order was mailed to Plaintiff at his current address at the Weld County Jail. The address had been the same since May 11, 2016, when Plaintiff informed the Court of the change in his residence. *See* ECF No. 7. However, on June 12, 2017, the June 2, 2017 order was returned to the Court noting, "no longer in custody" and "unable to forward." ECF No. 58.

Consequently, this Court ordered Plaintiff to show cause on or before July 20, 2017 why this case should not be dismissed for his failure to prosecute the action. ECF No. 59. Plaintiff was reminded that he must comply with all court orders issued in his case and, as is any party, he is responsible for ensuring the Court has his current contact information at all times during the

litigation. *Id.* Plaintiff was also advised that his failure to timely respond to the Order to Show Cause would result in this Court dismissing the action for his failure to prosecute. *Id.* The record reflects that the order to show cause was also returned to the Court as "undeliverable." ECF No. 61. The Plaintiff did not respond.

Although Plaintiff is proceeding in this case without an attorney, he bears the responsibility of prosecuting this case with due diligence. Although the Court must liberally construe *pro se* filings, *pro se* status does not excuse the obligation of any litigant to comply with the same court orders and rules of procedure that govern other litigants. *See Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992); *see also Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994). The Plaintiff has neither appeared nor filed anything in this case since April 24, 2017. As such, the Plaintiff has filed no response to the motion to dismiss nor has he requested an extension of time in which to do so.

Additionally, the Federal Rules of Civil Procedure give a district court ample tools to deal with a recalcitrant litigant. *See Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993). Fed. R. Civ. P. 41(b) allows a defendant to move for dismissal of an action if the plaintiff fails to prosecute or to comply with a court order. *See id.*; *see also Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007). Although the language of Rule 41(b) requires that the defendant file a motion to dismiss, the rule has long been interpreted to permit courts to dismiss actions *sua sponte* for a plaintiff's failure to prosecute or to comply with the rules of civil procedure and/or the court's orders. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

"A district court undoubtedly has discretion to sanction a party for failing to prosecute or defend a case, or for failing to comply with local or federal procedural rules." *Reed v. Bennett,* 312 F.3d 1190, 1195 (10th Cir. 2002). However, a dismissal with prejudice is a more severe sanction

and, generally, requires the district court to consider certain criteria. *AdvantEdge Bus. Group v. Thomas E. Mestmaker & Assoc., Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009). The Tenth Circuit set forth a non-exhaustive list of factors a district court should consider when evaluating grounds for dismissal of an action with prejudice: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; ... (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (internal quotations and citations omitted). "[D]ismissal is warranted when 'the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits.'" *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1144 (10th Cir. 2007) (quoting *Ehrenhaus*, 965 F.2d at 921).

The Court finds the first factor is neutral since, although the Defendants have been named in a lawsuit and responded with a Motion to Dismiss, no further action has been taken against them. Regarding the second factor, Plaintiff's lack of response to this Court's orders and his failure to participate has interfered with the judicial process in that the Court has been unable to advance this case. Additionally, the necessity of issuing an Order to Show Cause increases the workload of the Court and interferes with the administration of justice.

Furthermore, the Plaintiff has provided no current contact information and no justification for his failures to respond to Court orders and to participate in the litigation; his culpability is evident. Plaintiff was warned in the Order to Show Cause that the Court would dismiss the action for his failure to prosecute; yet, he has made no response. Finally, the Court finds that no sanction less than dismissal without prejudice would be effective here. The Plaintiff has essentially

abandoned this litigation; thus, no monetary sanction would be practical.

Therefore, although consideration of the factors supports the more "severe" sanction of dismissal with prejudice, the Court concludes that dismissal without prejudice is the appropriate result where, as here, the *pro se* Plaintiff has been found "incompetent" by a state district court.

In sum, the Plaintiff appears to have abandoned his claims in this matter. He has failed to prosecute the case with due diligence by his failure to comply with the Court's order to respond to the Motion to Dismiss and failure to respond to this Court's order to show cause. All recent mailings from this Court have been returned as "undeliverable." For these reasons alone, dismissal of this action against the Defendants is warranted.

Based on the foregoing and the entire record herein, and pursuant to Fed. R. Civ. P. 41(b), the Court DISMISSES this case WITHOUT PREJUDICE for Plaintiff's failure to prosecute this action. The Clerk of the Court is directed to close this case.

Dated this 21st day of July, 2017, in Denver, Colorado.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge