

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
DISTRICT OF NEVADA**

WILLIAM CATO SELLS, JR.,
Plaintiff,
v.
E.K. McDANIEL, et al.,
Defendants.

3:08-cv-170-RCJ-WGC

ORDER

Currently before the Court are Defendants’ Motion for Involuntary Dismissal Pursuant to Fed. R. Civ. P. 41(b) (#123) and the Report and Recommendation of U.S. Magistrate Judge (#142).

BACKGROUND¹

Plaintiff William Cato Sells (“Plaintiff”) was formerly an inmate in custody of the Nevada Department Corrections (“NDOC”) at Ely State Prison (“ESP”). Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. Defendants are E.K. McDaniel, Adam Endel, Howard Skolnik, and Greg Cox.

This action was originally filed on February 15, 2008, in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, and removed to federal court on April 3, 2008. Plaintiff alleges that he was retaliated against for his prior litigation activities. Specifically, he alleges that he was falsely charged with various disciplinary violations and denied reclassification from his High Risk Potential segregated status at ESP.

¹ These facts are taken from Judge Cobb’s Report and Recommendation on this matter. (R&R (#142) at 1-3).

1 On screening, Plaintiff was allowed to proceed on his Complaint.

2 In 2009, Defendants moved for summary judgment, which was granted as to all claims
3 except a single claim for denial of procedural due process protections in connection with
4 Plaintiff's disciplinary hearing.

5 Plaintiff was granted parole in the latter part of 2009. On November 2, 2009, Plaintiff
6 filed a notice of change of address indicating he was residing in Ocean Shores, Washington
7 on November 2, 2009. He filed another notice of change of address on August 5, 2010,
8 indicating his new address at the Grays Harbor County Jail in Montesano, Washington.

9 On August 25, 2010, this Court issued its Pretrial Notice Order indicating that a
10 proposed joint pretrial order was due on or before October 1, 2010.

11 On September 16, 2010, Plaintiff was convicted of Second Degree Identity Theft (Count
12 I) and Second Degree Possession of Stolen Property (Count II), and was sentenced
13 consecutively to forty-three (43) to fifty-seven (57) months (Count I) and twenty-two (22) to
14 twenty-nine (29) months (Count II).

15 Defendants requested an extension of time to file the pretrial order due to Plaintiff's
16 incarceration in the state of Washington. Plaintiff filed a notice of change of address indicating
17 his residence at the Grays Harbor County Jail in Montesano, Washington. Plaintiff also moved
18 to extend the time to file the pretrial order.

19 Plaintiff filed yet another notice of change of address indicating his residence at the
20 Coyote Ridge Correctional Center in Connell, Washington on February 3, 2011.

21 The motions for extension of time were granted, and the deadline for submission of the
22 pretrial order was extended to allow the parties to engage in efforts in settling the action.
23 Subsequently, Plaintiff filed a notice of change of address indicating his residence at Clallam
24 Bay Correctional Center in Clallam Bay, Washington.

25 Efforts to settle the matter were unsuccessful, and the Court issued an order indicating
26 that the parties were to file their proposed joint pretrial order by June 20, 2011. It is noted that
27 in trying to procure Plaintiff's appearance for the settlement conference in the District of
28 Nevada by video conference, the Court was notified by the information technology

1 representative at the Clallam Bay Correctional Center that they were unable to establish a
2 video connection. Plaintiff appeared at the settlement conference via telephone.

3 On June 7, 2011, Defendants filed a motion for leave to file a motion for involuntary
4 dismissal and motion to stay the pretrial deadlines pending resolution of the motion to dismiss;
5 both were granted. Defendants filed the instant motion on July 8, 2011.

6 Plaintiff is presently incarcerated at the Clallam Bay Correctional Center in Clallam Bay,
7 Washington.

8 LEGAL STANDARD

9 Federal Rule of Civil Procedure 41(b) provides, “[i]f the plaintiff fails to prosecute or to
10 comply with these rules or a court order, a defendant may move to dismiss the action or any
11 claim against it.” Fed. R. Civ. P. 41(b). Such a dismissal is considered an adjudication on the
12 merits. *Id.* Under this rule, plaintiffs must prosecute their claims with “reasonable diligence”
13 to avoid dismissal. *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976).

14 However, “prisoner status alone does not justify automatic dismissal for inability to
15 prosecute.” *Hernandez v. Whiting*, 881 F.2d 768, 770 n.2 (9th Cir. 1989) (citing *Collins v.*
16 *Pitchess*, 641 F.2d 740, 741 (9th Cir. 1981)). This is because: (1) “imprisonment suspends
17 the plaintiff’s usual right to be personally present at judicial proceedings brought by himself or
18 on his behalf”; and (2) “a civil litigant, including an incarcerated prisoner, is presumed to have
19 no constitutional entitlement to court-ordered counsel unless his case carries the risk of
20 affecting his physical liberty.” *Hernandez*, 881 F.2d at 770-71 (citations omitted).

21 The Ninth Circuit has instructed that “a trial court may not lightly dismiss an incarcerated
22 individual’s suit for failure to prosecute.” *Hernandez*, 881 F.2d at 771. Thus, “before
23 dismissing a prisoner’s *pro se* action for failure to appear due to incarceration, the trial court
24 must investigate the reasonable alternatives to such a severe sanction” which may include:
25 “bench trial in the prison, should the parties waive a jury; trial by depositions, despite this
26 approach’s weakness on credibility issues; postponement of trial until the prisoner’s release,
27 if scheduled to occur within a reasonable time; and compelling the prisoner’s presence through
28 an ad testificandum writ.” *Id.* at 771 (citing *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir.

1 1978)).

2 Technological advances may also offer reasonable alternatives. See e.g., *Moss v.*
3 *Gomez*, 162 F.3d 1169 (9th Cir. 1998) (unpublished) (suggesting trial by deposition or
4 videoconferencing as reasonable alternatives).

5 DISCUSSION

6 Defendants argue that Plaintiff's action should be dismissed because Plaintiff is unable
7 to appear in any meaningful manner for trial. (Mot. for Involuntary Dismissal (#123) at 5-6.)

8 Plaintiff argues that he may appear at trial via internet web camera. (Opp'n to Mot.
9 (#136) at 2). In addition, Plaintiff argues that he may potentially be released from prison in
10 Washington following resolution of his direct appeal in February 2012. (*Id.* at 3.)

11 In their reply, Defendants argue that Plaintiff misrepresented his ability to appear via
12 internet web camera because the videoconferencing equipment at Clallam Bay is incompatible
13 with that of the District Court in Reno, Nevada. (Reply to Mot. (#139) at 2-3; Decl. of Denise
14 L. Larson (#139-1) at 2-3 (¶ 5)). Moreover, they argue that Clallam Bay does not have the
15 equipment to allow Plaintiff to appear via internet web camera. (Reply to Mot. (#139) at 3;
16 Decl. of Denise L. Larson (#139-1) at 3 (¶ 6)). Finally, Defendants argue that Plaintiff's
17 optimism regarding his release is misplaced. (*Id.* at 4).

18 The Court finds that Plaintiff is unable to appear in any acceptable or meaningful way
19 for any scheduled trial based on the facts in the record. The Court notes that it granted
20 summary judgment on one remaining claim in October 2009 and that this case has not been
21 able to move forward due to Plaintiff's incarceration. Based on the record before the Court,
22 the Court finds that there are no reasonable alternatives to the dismissal of this case. Plaintiff
23 cannot appear by video and Plaintiff has not shown that he has secured other arrangements
24 that would let him appear at a future trial via video. Additionally, after reviewing the record on
25 the technology at the Clallam Bay Correctional Center, Plaintiff is not authorized to use the
26 Jpay equipment to access this Court. Additionally there is no videoconferencing, web camera,
27 or "Skype" available by which he could appear before this Court. Therefore, this Court
28 dismisses this case. As such, the Court GRANTS Defendants' Motion for Involuntary

1 Dismissal Pursuant to Fed. R. Civ. P. 41(b) (#123) and DENIES the Report and
2 Recommendation of U.S. Magistrate Judge (#142).

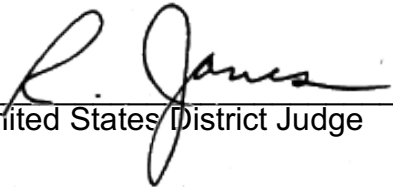
3 **CONCLUSION**

4 For the foregoing reasons, IT IS ORDERED that Defendants' Motion for Involuntary
5 Dismissal Pursuant to Fed. R. Civ. P. 41(b) (#123) is GRANTED.

6 IT IS FURTHER ORDERED that the Report and Recommendation of U.S. Magistrate
7 Judge (#142) is DENIED.

8 The Clerk of the Court shall enter judgment accordingly.

9
10 DATED: This 30th day of March, 2012.

11
12 
13 United States District Judge

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28