IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRANDON JOSEPH CARDENAS,

Plaintiff,

vs. No. CV 16-00457 JCH/GJF

AARON VIGIL,
PATRICK LOVATO,

Defendants.

MEMORANDUM OPINION AND ORDER OF DISMISSAL

THIS MATTER is before the Court *sua sponte* on the Prisoner's Civil Rights Complaint filed by Plaintiff Brandon Joseph Cardenas (Doc. 1). The Court will dismiss the Complaint without prejudice for failure to comply with a Court Order and failure to prosecute this action.

Plaintiff Cardenas is an incarcerated prisoner. He filed his Civil Rights Complaint on May 18, 2016. (Doc. 1). Cardenas submitted an application to proceed under § 1915 on May 18, 2016, but did not include the required six-month inmate account statement. (Doc. 2). On May 24, 2016, the Court ordered him to cure the deficiency by submitting his account statement. (Doc. 3). Cardenas then submitted his inmate account statement (Doc. 4) and the Court granted the application to proceed *in forma pauperis* on December 29, 2016. (Doc. 8). The Court also required Plaintiff Cardenas to make an initial partial payment of $12.35 or show cause why he should not be required to make the payment within 30 days of entry of the Order. (Doc. 8 at 1). Cardenas responded to the Order by filing an inmate account statement for a two-month period. (Doc. 9). The inmate account statement shows that Cardenas had an account balance sufficient to pay the initial partial payment, but spent his money on commissary purchases. (Doc. 9). *See*

Shabazz v. Parsons, 127 F.3d 1246, 1248-49 (10th Cir. 1997). "[W]hen a prisoner has the means to pay an initial partial filing fee and instead spends his money on amenities at the prison canteen or commissary, he should not be excused for failing to pay the initial partial filing fee." *Baker v. Suthers,* 9 F. App'x 947. 949 (10th Cir. 2001).

Plaintiff Cardenas did not pay the $12.35 initial partial payment or show cause why he should be relieved of the obligation to pay. On March 22, 2018, the Court issued an Order to Show Cause, ordering Plaintiff Cardenas to show cause within 30 days why the Complaint should not be dismissed for failure to make the initial partial payment. (Doc. 10). The copy of the March 22, 2018 Order sent to Cardenas was returned as undeliverable on April 3, 2018. (Doc. 11). Although not obligated to do so, the docket reflects that the Court located a possible updated address for Cardenas and re-mailed the Order to him at that address on April 11, 2018.

More than 30 days has elapsed since entry of the Court's March 22, 2018 Order and Plaintiff Cardenas has not made the initial partial payment, shown cause, or otherwise responded to the Court's March 22, 2018 Order. When a prisoner is granted leave to proceed *in forma pauperis*, § 1915 provides:

> "The court ***shall*** assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal."

28 U.S.C. § 1915(b)(1) (emphasis added). Plaintiff Cardenas was ordered to make the required partial payment under § 1915(b)(1) or show cause why the payment should be excused, but has failed to comply with the Court's Order. Further, under the Local Rules of the Court, Cardenas was obligated to keep the Court apprised of his correct mailing address, but has failed to do so. D.N.M. LR-Civ. 83.6; *Bradenburg v. Beaman,* 632 F.2d 120, 122 (10th Cir. 1980).

The Court may dismiss an action under Fed. R. Civ. P. 41(b) for failure to prosecute, to comply with the rules of civil procedure, or to comply with court orders. *See Olsen v. Mapes,* 333 F.3d 1199, 1204, n.3 (10th Cir. 2003). Cardenas has failed to comply with the Court's rules and orders and has failed to prosecute this proceeding by not making the initial partial payment and by not keeping the Court notified of his current mailing address. The Court will dismiss this proceeding under Fed. R. Civ. P. 41(b) for failure to comply with the Court's Order and failure to prosecute this action.

IT IS ORDERED that the Prisoner's Civil Rights Complaint filed by Plaintiff Brandon Joseph Cardenas is **DISMISSED** without prejudice under Fed. R. Civ. P. 41(b).

UNITED STATES DISTRICT JUDGE