

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CHARLES J. SUMMERS,

Plaintiff,

Civil Action 2:17-cv-481

v.

Magistrate Judge Chelsey M. Vascura

**OHIO DEPARTMENT OF
MEDICAID, et al.,**

Defendants.

ORDER

For the reasons that follow, this action is **DISMISSED WITHOUT PREJUDICE** pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute.

I.

The Court noticed this action for a preliminary pretrial conference on August 23, 2017. Counsel for Defendants appeared by telephone. Plaintiff, who is proceeding without counsel, failed to appear. Defense counsel indicated that during the Rule 26(f) conference, Plaintiff provided his telephone number, and the parties agreed that Defense counsel would call Plaintiff to join on the call before calling the Court. When Defense counsel called the number Plaintiff provided, Plaintiff did not pick up the phone, and his voicemail inbox was full such that Defense counsel could not leave a message. The Court also tried the telephone number that Plaintiff provided to Defense counsel and obtained the same result.

Following the August 23, 2017 conference, the Court issued a Show Cause Order directing Plaintiff to show cause why he failed to call in for the conference within fourteen days. (ECF No.

15.) The Court specifically cautioned Plaintiff as follows: “Plaintiff is advised that failure to respond to this show cause order could result in sanctions, including the sanction of dismissal of this action for failure to prosecute.” (*Id.* at 1.) Although Plaintiff’s response to the Show Cause Order was due on or before September 6, 2017, he has not yet responded.

II.

The Court’s inherent authority to dismiss a plaintiff’s action with prejudice because of his failure to prosecute is expressly recognized in Rule 41(b), which provides in pertinent part: “If the plaintiff fails to prosecute or comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.” Fed. R. Civ. P. 41(b); *Link v. Walbash R.R. Co.*, 370 U.S. 626, 629–31 (1962). “This measure is available to the district court as a tool to effect management of its docket and avoidance of unnecessary burdens on the tax-supported courts and opposing parties.” *Knoll v. AT & T*, 176 F.3d 359, 63 (6th Cir. 1999).

The Sixth Circuit directs the district courts to consider the following four factors in deciding whether to dismiss an action for failure to prosecute under Rule 41(b):

- (1) whether the party’s failure is due to willfulness, bad faith, or fault;
- (2) whether the adversary was prejudiced by the dismissed party’s conduct;
- (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and
- (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Schafer v. City of Defiance Police Dept., 529 F.3d 731, 737 (6th Cir. 2008) (citing *Knoll*, 176 F.3d at 363). “Although typically none of the factors is outcome dispositive, . . . a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.” *Schafer*, 529 F.3d at 737 (quoting *Knoll*, 176 F.3d at 363).

III.

Although the record here amply demonstrates such delay, the Court finds that dismissal *without prejudice* is more appropriate under the circumstances. More specifically, although Plaintiff failed to appear at the conference and further failed to respond to the Court's Show Cause Order, this case remains in its infancy such that the Court can discern no prejudice to Defendants should Plaintiff be permitted to re-file. The Court's August 23, 2017 Show Cause Order provided Plaintiff with adequate notice of the Court's intention to dismiss for failure to prosecute and supplied him with a reasonable period of time to comply. Because Plaintiff failed to timely respond to the Show Cause Order, this action is **DISMISSED WITHOUT PREJUDICE** under Rule 41(b).

IT IS SO ORDERED.

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE