IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

DOUGLAS WILLIAMS,

Plaintiff,

v.

GRANT COUNTY, **SHERIFF GLENN PALMER**, **JACKSON DEROSIER**, and **MICHAEL ALLEY**,

Defendants.

Case No. 2:15-cv-01760-SU

OPINION AND ORDER

SULLIVAN, United States Magistrate Judge:

Pro se plaintiff Douglas Williams, a prisoner at the Coffee Creek Correctional Facility in Wilsonville, Oregon, brings this civil rights action against defendants Grant County, Sheriff Glenn Palmer, Jackson Derosier, and Michael Alley. Defendants move to dismiss this action for

lack of prosecution under Fed. R. Civ. P. 41(b).[1] (Docket No. 45). For the following reasons, the Court DENIES defendants' Motion.

BACKGROUND

This action concerns an apparent suicide attempt that plaintiff committed while on suicide watch as a pretrial detainee at the Grant County Jail in August 2013, and defendants' alleged deliberate indifference to plaintiff's mental health needs.[2]

Plaintiff commenced this action on September 17, 2015, asserting claims for violations of the Eighth and Fourteenth Amendments to the U.S. Constitution under 42 U.S.C. § 1983, and for state law negligence. Compl. (Docket No. 1). On December 28, 2015, plaintiff's attorney moved to withdraw due to plaintiff's alleged failure to communicate with her (Docket No. 7), which the Court denied on January 13, 2016 (Docket No. 14). On March 4, 2016, defendants moved to dismiss for failure to state a claim (Docket No. 21), which the Court denied on September 12, 2016 (Docket No. 40).

On October 27, 2016, plaintiff's attorney again moved to withdraw, again due to plaintiff's alleged failure to communicate. (Docket No. 42). The Court denied the Motion without prejudice, due to the attorney's apparent failure to serve the Motion on opposing counsel or on her client as required by the Local Rules. (Docket No. 44). Defendants then filed the present Motion to Dismiss for Lack of Prosecution on November 16, 2016. (Docket No. 45). The same day, plaintiff's attorney remedied the deficiencies with her earlier Motion and again moved to withdraw (Docket No. 47), which the Court granted (Docket No. 54). On January 30,

[1] In CM/ECF, defendants designate their Motion as "Motion to Dismiss for Lack of Prosecution"; in the caption of the Motion itself, however, they title it "Defendants' FRCP 41(2)(b) Motion to Dismiss Complaint." (Docket No. 45). However, there is no Rule 41(2)(b). The Court assumes that defendants mean Rule 41(b), "Involuntary Dismissal."

[2] The Court recounts the factual background more fully in its September 12, 2016, Order denying defendants' Motion to Dismiss for Failure to State a Claim. (Docket No. 40).

2017, plaintiff, now without counsel, filed his Response to defendants' Motion to Dismiss (Docket No 57); the response consisted of a single, handwritten page in which he expressed his desire to continue pursuing the case, but explained that he had very few resources or help with which to do so. On January 31, 2017, the Court issued a Scheduling Order allowing plaintiff thirty days "to file a more substantive response" to defendants' Motion. (Docket No. 58).

On February 27, 2017, plaintiff filed his second Response to defendants' Motion. (Docket No. 59). This Response consisted of a single-page, typed letter in which plaintiff indicated his desire "to file a more substantive response" and said that he was "ready to proceed with this case." Id. He attached to the letter 324 pages of documents, including court filings from this action, communications between plaintiff and his former attorney, defendants' discovery requests, and approximately twenty handwritten photocopied pages. Id. These handwritten pages (pages 280-302) contain kytes,[3] various dated handwritten notes provided without context but that appear to be letters or diary entries, a letter to plaintiff's son, a Notice of Tort Claim that describes plaintiff's complaints, a note that begins "Help Me," and so on. These documents seemingly describe some of the events leading to plaintiff's alleged suicide attempt.

On March 9, 2017, defendants filed a Reply in support of their Motion (Docket No. 60), and the Court took this matter under advisement.[4]

LEGAL STANDARD

"Rule 41(b) specifically provides that the failure of the plaintiff to prosecute his claim is grounds for involuntary dismissal . . . ." Anderson v. Air W., Inc., 542 F.2d 522, 524 (9th Cir. 1976). A plaintiff must prosecute an action with "reasonable diligence" to avoid dismissal. Id.

[3] "'Kyte' is a shorthand reference for an Inmate Communication Form." Butler v. Lincoln County, No. CIV. 05-6204-TC, 2006 WL 2711487, at *1 (D. Or. Sept. 18, 2006).

[4] The parties have consented to the jurisdiction of the Magistrate Judge pursuant to 28 U.S.C. § 636. (Docket No. 38).

In determining whether to dismiss a claim for failure to prosecute, a court must consider: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002). Whether to dismiss an action under Rule 41(b) is within the court's discretion. See Ash v. Cvetkov, 739 F.2d 493, 495 (9th Cir. 1984).

ANALYSIS

Defendants argue that plaintiff has not taken any action to advance his case besides appearing at the hearing on the Motion to Dismiss for Failure to State a Claim. This includes plaintiff's allegedly not responding to defendants' discovery requests, not serving discovery requests of his own, and not developing a discovery plan or case management schedule. See Defs.' 41(b) Mot. Dismiss ¶¶ 3-8 (Docket No. 45); Jagelski Decl. ¶¶ 4-9 (Docket No. 46).

Defendants' reasons for seeking dismissal are insufficient. Defendants raise what is essentially a discovery dispute, arguing that plaintiff has not adequately participated in discovery. The proper response is to appeal to the Court's discovery dispute resolution procedures, or to move to compel; plaintiff's alleged noncompliance does not justify defendants' ignoring these procedures by moving to dismiss.

Additionally, plaintiff is incarcerated, and presumably has access to few of the documents or other discovery materials defendants seek. At least part of what plaintiff apparently does have he turned over with his second Response. Further, considering that plaintiff's complained-of events occurred while he was in the Grant County Jail, and because Grant County is a defendant here, defendants may have access to most of those discovery materials that do exist. If defendants believe that plaintiff does have materials that he has failed to turn over, then

defendants should move to compel and the Court will hear the motion and resolve any disputes (including by issuing whatever sanctions would be appropriate, including dismissal, if warranted). Defendants may not shortcut these procedures. See Collins v. Pitchess, 641 F.2d 740, 742 (9th Cir. 1981) ("In this case, however, the record indicates that [plaintiff] has been active in prosecuting his suit . . . . It may well be . . . that [plaintiff] 'lacks the legal skills with which to bring a formidable . . . opponent to grips.' But this is a familiar problem to any district court confronted, as here, with a pro se plaintiff. It does not reflect a lack of diligence warranting dismissal for want of prosecution.").

Regarding the factors the Court considers on a motion to dismiss for failure to prosecute: (1) the public's interest in expeditious resolution of litigation is not significantly affected by requiring defendants to pursue discovery dispute procedures before seeking dismissal, especially as this case has not been pending for a significant time (discovery deadlines had also been suspended pending the Court's ruling on defendants' Motion to Dismiss for Failure to State a Claim); (2) the Court's need to manage its docket is also not pressing given that defendants have not shown serious delay in this matter, nor provided any indication that plaintiff's alleged inaction has wasted the Court's resources or time; (3) the risk of prejudice to defendants is minimal because they have discovery dispute procedures available to address their complaints, and because there has not been great delay or other harm to defendants shown; (4) there are available significantly less drastic alternatives to dismissal, namely, discovery dispute procedures and motions to compel, which defendants have not pursued; and (5) the policy favoring disposition of cases on their merits strongly counsels not dismissing at this time. Thus, factors (1), (2), and (3) may weigh in favor of dismissal, but only very weakly, while factors (4) and (5) very strongly militate against dismissal.

Given the latitude affording pro se plaintiffs, especially incarcerated ones, see, e.g., Woods v. Carey, 684 F.3d 934, 938 (9th Cir. 2012), plaintiff has for now shown reasonable diligence in attempting to prosecute this action, especially in providing the above-described documents with his second Response; defendants have thus not shown that this case warrants dismissal. See, e.g., Thomas v. Gerber Prods., 703 F.2d 353, 355-57 (9th Cir. 1983) (holding that the district court abused its discretion in imposing monetary sanction on a pro se plaintiff for failing to comply with discovery given plaintiff's inability to pay, and also abused its discretion in dismissing action for plaintiff's failure to comply with those sanctions); Tolbert v. Leighton, 623 F.2d 585, 587 (9th Cir. 1980) ("We agree that it is an abuse of discretion to dismiss a plaintiff's case for failure to prosecute where (1) the only evidence of dilatoriness is his or his attorney's failure to attend a pretrial conference; (2) the court has not warned that failure to attend will create a risk of dismissal; and (3) the case is still 'young.'"); *Ott v. Mortg. Inv'*rs Corp. of Ohio, 65 F. Supp. 3d 1046, 1069 (D. Or. 2014) ("A variety of less severe sanctions, such as a warning, are more than adequate to ensure that plaintiffs meet all future deadlines. Finally, plaintiffs' counsel made a mistake that was in no way willful or the result of bad faith. Accordingly, dismissal based on plaintiffs' failure to prosecute is not warranted."); Brown v. Lane, No. CIV. 99-347-AS, 2000 WL 776691, at *3 (D. Or. Apr. 25, 2000) ("Dismissal for lack of prosecution is a harsh penalty imposed as a sanction only in extreme circumstances. The district court has an obligation . . . to consider less drastic alternatives prior to dismissing a case for lack of prosecution."); cf. Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991) (holding that dismissal for failure to prosecute was appropriate sanction where plaintiffs engaged in dilatory conduct for five years, repeatedly failed to respond to correspondence regarding discovery and arbitration, failed to appear at a scheduled meeting, and misrepresented their

intentions to the district court on five separate occasions); *Summers v. Or. Dep't of Corr.*, No. 2:14-cv-00312-SB, 2015 WL 5686741, at *3 (D. Or. Sept. 24, 2015) (dismissing for failure to prosecute where plaintiff made himself unavailable for discovery and ignored a court order for 60 days, and the court had offered less drastic alternatives that plaintiff ignored).

CONCLUSION

Defendants have not met their burden in moving to dismiss for failure to prosecute. Defendants essentially complain of a discovery dispute, which they have not sought to remedy through the appropriate discovery dispute resolution procedures. The governing five-factor analysis strongly weighs against dismissal. Thus, the Court DENIES defendants' Motion to Dismiss for Lack of Prosecution. (Docket No. 45).

IT IS SO ORDERED.

DATED this 6th day of April, 2017.

/s/ Patricia Sullivan
PATRICIA SULLIVAN
United States Magistrate Judge