

The Honorable John C. Coughenour

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE
9

10 RICHARD AZPITARTE,

11 Plaintiff,

12 v.

13
14 KING COUNTY, RON SIMS, SUSAN
15 RAHR, DAVID REICHERT, DENOBI
16 OLEGBA, ELIZABETH DERAITUS,
17 LAMAR REED, THE ESTATE OF STEVE
18 COX, SCOTT LAVIELLE, STEVE
19 WRIGHT, JIM McMEINES, CEDAR
20 RAPIDS TOWING LLC, JONY McCALL,
21 GEORGE McCALL, MARK LEMOINE,
22 JASON STANLEY, STEPHANIE WARDEN,
23 MIKE HATCH, CW WILLIAMS
24 CONSTRUCTION COMPANY, SYDNEY
25 JACKSON and BILL TURNER,

26 Defendants.

Case No. C07-1998-JCC

ORDER GRANTING MOTION
TO DISMISS

23 This matter comes before the Court on Defendant King County's Motion to Dismiss
24 (Dkt. No. 64), Plaintiff's Response (Dkt. No. 70), and Defendant King County's Reply (Dkt.
25 No. 75). Having considered the parties' briefing and supporting documentation, the Court has
26 determined that oral argument is unnecessary and hereby GRANTS the motion to dismiss.

ORDER GRANTING MOTION TO DISMISS
PAGE - 1

1 **I. BACKGROUND**

2 This matter concerns actions taken on August 26–27, 2004, by King County officials to
3 abate a public nuisance. (First Am. Compl. ¶ 34 (Dkt. No. 1 at 23); State Court Order Granting
4 Inj. 2 (Dkt. No. 32-2 at 33).) Prior to these actions, Plaintiff Richard Azpitarte had accumulated
5 junk, debris, and over eighty vehicles on his property and, allegedly, on the adjacent public
6 rights-of-way. (State Court Order Granting Inj. 2 (Dkt. No. 32-2 at 33).) In 2002, King County
7 issued a Notice and Order informing him that he was violating civil county codes and directing
8 him to bring his property into compliance. (Notice and Order (Dkt. No. 32-2 at 1–3).) When
9 Plaintiff failed to comply, the county sought an injunction in state court, which was granted on
10 June 25, 2004 (State Court Order Granting Inj. 2–3 (Dkt. No. 32-2 at 33–34)), and upheld on
11 appeal to the extent that it applied to violations on Plaintiff’s own property, *see King County v.*
12 *Azpitarte*, 130 Wash. App. 1047 (2005). The injunction directed Plaintiff to “cease using the
13 property for accumulation and/or storage of vehicles, remove any vehicles currently stored on
14 the property [other than six operative vehicles per legal lot], and remove all associated and/or
15 other junk and debris” by August 24, 2004, and authorized King County “to enter the subject
16 property and abate the code violations” if Plaintiff did not comply by that date. (State Court
17 Order Granting Inj. 2–3 (Dkt. No. 32-2 at 33–34).) Plaintiff failed to comply with the
18 injunction, and, on August 26 and August 27, King County entered the property and removed
19 most of the vehicles. (*See* First Am. Compl. ¶ 34 (Dkt. No. 1 at 23).)

20 Plaintiff originally brought this action in King County Superior Court, but Defendants
21 removed the case to federal court. (Notice of Removal (Dkt. No. 1 at 1–3).) The Complaint
22 alleges that King County’s enforcement of the code violations was made in retaliation for his
23 having won a discrimination suit against the county in 1989. (First Am. Compl. ¶¶ 26, 28–34
24 (Dkt. No. 1 at 21–23).) Plaintiff also alleges that, for more than a decade, King County
25 officials would repeatedly “hover” a county helicopter over Plaintiff’s house to harass him, on
26 anywhere from a weekly to a daily basis. (*Id.* ¶ 27 (claiming that “[w]henver [Plaintiff]

1 returns [to his home] for any significant period of time, defendant Jackson resumes the
2 harassment with the helicopter”).) Finally, Plaintiff claims that the King County officials and
3 private contractors who executed the abatement order exceeded the scope of that order and
4 removed the vehicles in a negligent fashion. (*Id.* ¶ 34–35.) Plaintiff argues that these alleged
5 actions violated the federal and state constitutions, along with various state tort and
6 discrimination laws. (*Id.* ¶ 43–71.)

7 Plaintiff’s case has been exceedingly mismanaged from the start. The complaint names
8 twenty-one defendants, but, sixteen months after filing, King County appears to be the only
9 defendant to have been served.¹ (*See* Summons 2 (Dkt. No. 1 at 5).) The parties originally
10 agreed to exchange initial disclosures by March 4, 2008, but Plaintiff’s counsel failed to submit
11 the disclosures even after being repeatedly reminded that he had missed the deadline. (Order
12 Granting Mot. to Compel and for Sanctions 2 (Dkt. No. 47).) On June 25, 2008, Defendant
13 served Plaintiff with interrogatories and requests for production of documents, but Plaintiff
14 failed to respond within thirty days as required by Federal Rule of Civil Procedure 33(b)(1)(2).
15 (*Id.*) On August 25, 2008, Defendants’ attorney, Mark Stockdale, sent Plaintiff’s attorney, John
16 Scannell, an e-mail explaining that the responses to interrogatories and requests for production
17 were over one month late and the initial disclosures were over five months late; in response,
18 Mr. Scannell indicated that Plaintiff would provide all of the required discovery by September
19 5, 2008. (*Id.*) However, Plaintiff again failed to meet this deadline, apparently because certain
20 of the responsive documents had been stolen from his home the week before; he would not
21 indicate when he would provide the required information. (*Id.* at 2–3.)

22
23 ¹ The King County Prosecuting Attorney’s Office has appeared on behalf of Defendants
24 King County, Ron Sims, Susan Rahr, David Reichart, Denobi Olegba, Elizabeth Deraitus, Bill
25 Turner, Lamar Reed, the Estate of Steve Cox, Steve Wright, Jim Memeines, Mark Lemoine,
26 Jason Stanley, Stephanie Warden, Mike Hatch, and Sydney Jackson, but not on behalf of the
non-governmental Defendants Cedar Rapids Towing LLC, Jony McCall, George McCall, and
CW Williams Construction Company. (Notice of Association (Dkt. No. 5).)

1 On September 24, 2008, Defendants moved to compel discovery and for sanctions in
2 light of Plaintiff's complete failure to provide disclosures and discovery. (Dkt. No. 27.) The
3 Court granted the motion, noting that Plaintiff had failed to provide any reasonable excuse for
4 the six-month delay in providing initial disclosures or the three-month delay in responding to
5 Defendants' interrogatories and requests for documents. (Order Granting Mot. to Compel and
6 for Sanctions 4–5 (Dkt. No. 47).) The Court found that Defendants had been prejudiced by the
7 extremely tardy initial disclosures, and, as a sanction, precluded Plaintiff from using any non-
8 party witnesses in further proceedings. (*Id.* at 5–6.) Finally, the Court granted Defendants'
9 request for the attorneys' fees incurred in filing the motion to compel. (*Id.* at 6.)

10 Even after being sanctioned, Plaintiff and his attorney have continued to prosecute this
11 case in a disjointed and haphazard manner; in particular, Plaintiff has failed to comply with
12 nearly *every* deadline required by the local rules and the Court's orders. On October 2, 2008,
13 Defendants moved for summary judgment, and Plaintiff's response was submitted one day late.
14 (*See* Resp. to Summ. J. Mot. (Dkt. No. 44 at 9).) On October 27, 2008, Plaintiff moved to
15 amend the complaint to add a defendant and additional facts (Dkt. No. 51), even though the
16 Court had specifically ordered that all pleading amendments be filed by September 5, 2008
17 (Dkt. No. 16); Plaintiff's reply, which was itself filed nine days late, provided no justification
18 for filing the motion to amend more than seven weeks after the Court's deadline. (*See* Rep. to
19 Second Mot. to Amend Compl. 1–2 (Dkt. No. 57).) The Court ordered that that the parties
20 complete mediation by August 29, 2008; Defendants initially attempted to schedule the
21 mediation in July 2008, but Plaintiff has repeatedly refused to participate. (*See* Stockdale Decl.
22 2 (Dkt. No. 66).) Finally, under the local rules and the Court's orders, the parties were required
23 to exchange pretrial statements by January 28, 2009, but Plaintiff did not provide Defendants
24 with the required statement until February 12, 2009. (Stockdale Decl. 2 (Dkt. No. 76).)

25 The reason for these delays is unclear, but they appear to stem in large part from
26 incompetence on the part of Plaintiff and his attorney, in particular regarding their ability to

1 communicate with one another. Plaintiff tried to justify the initial six-month discovery delays
2 in part because he “lost [his] cell phone, which could not be located in [his] house because it
3 was set to vibrate.” (Azpitarte Decl. 2 (Dkt. No. 35).) Similarly, his attorney explained that his
4 own “cell phone got shut off.” (Scanell Decl. 2 (Dkt. No. 36) (“Mr. Azpitarte always tries to
5 reach me by cell phone but he did not have the new cell phone number.”).) Plaintiff’s attorney
6 scheduled two depositions for December 10, 2008, but had to cancel them the day before
7 because he was unable to locate his client. (Stockdale Decl. 2 (Dkt. No. 63).) Plaintiff’s
8 attorney also explained that he could not respond to Defendants’ attempts to engage in
9 mediation because the Plaintiff could not be located. (1/16/09 Email from John Scannell to
10 Mark Stockdale (Dkt No. 66-4 at 2) (“I have been unable [to respond to your earlier e-mails]
11 because I cannot locate my client. He has never given me a mailing address except the address
12 where he cannot live, so I have had to rely on his cell phone. We have been phoning him every
13 day but to no avail.”).) At the same time, Plaintiff has called the Court’s chambers several
14 times over the past four months to complain that his attorney would not return his calls and
15 refused to withdraw from the case; each time he called, the Court informed Plaintiff that any
16 complaints about his attorney should be made in writing and mailed to the Court, but no
17 written complaints have been received.

18 On February 5, 2009, Defendants moved to dismiss the action based on Plaintiff’s
19 failure to diligently prosecute his case and to comply with the Court’s orders and rules. (Mot.
20 1–2 (Dkt. No. 64).) Defendants also moved to continue the upcoming trial date to allow
21 briefing and consideration of the motion to dismiss. (Mot. to Continue 2 (Dkt. No. 61).) The
22 Court granted the motion and continued the trial date from March 9, 2009, until May 4, 2009.
23 (Order Granting Continuance (Dkt. No. 77).)

24 **II. DISCUSSION**

25 The Federal Rules of Civil Procedure authorize a court, upon motion by a defendant, to
26 dismiss an action with prejudice if the plaintiff fails to prosecute the case, fails to comply with

1 a court order, or fails to comply with the Federal Rules of Civil Procedure. FED. R. CIV. P.
2 41(b). The power to dismiss an action for failure to prosecute “is necessary in order to prevent
3 undue delays in the disposition of pending cases and to avoid congestion in the calendars of the
4 District Courts.” *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–30 (1962) (affirming dismissal
5 for failure to prosecute based on attorney’s unexcused failure to attend pretrial conference and
6 other delays). Although dismissal is a harsh penalty reserved for extreme circumstances, it is
7 appropriate when plaintiff fails to prosecute with “reasonable diligence” and does not require
8 an explicit showing of actual prejudice to the defendant. *See Anderson v. Air West, Inc.*, 542
9 F.2d 522, 524 (9th Cir. 1976) (noting that there is a rebuttable presumption of injury from
10 unreasonable delay).

11 In this case, Plaintiff and his attorney have repeatedly violated this Court’s orders (the
12 mediation deadline of August 29, 2008; the pleading amendment deadline of September 5,
13 2008), the Federal Rules of Civil Procedure (Rule 26(a)’s deadline for initial disclosures; Rule
14 33(b)(2)’s deadline for responding to interrogatories), and the local rules (Local Rule CR
15 7(d)’s briefing schedules; Local Rule CR 16(h)’s deadline for filing a Pretrial Statement), and
16 they have generally failed to prosecute Plaintiff’s case with “reasonable diligence.” To
17 determine whether dismissal is appropriate, the Court considers five factors: “(1) the public’s
18 interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the
19 risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
20 merits; (5) the availability of less drastic sanctions.” *Malone v. USPS*, 833 F.2d 128, 130 (9th
21 Cir. 1987). In this case, all five factors support dismissal with prejudice for Plaintiff’s failure to
22 prosecute and to comply with the Court’s orders and rules.

23 **A. The Public’s Interest in Expeditious Resolution of Litigation**

24 “The public’s interest in expeditious resolution of litigation always favors dismissal.”
25 *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (*quoting Yourish v. Cal. Amplifier*,
26 191 F.3d 983, 990 (9th Cir. 1999)). Moreover, the public’s interest is especially pronounced in

1 cases with governmental defendants. In this case, Plaintiff’s unreasonable delays have wasted
2 taxpayer money on two fronts, squandering the resources of both the federal judiciary and the
3 King County Prosecuting Attorney’s Office.

4 **B. The Court’s Need to Manage its Docket**

5 Plaintiff’s failure to prosecute has already forced the Court to needlessly devote time
6 and resources to two additional motions—the instant motion to dismiss and the previous
7 motion to compel and for sanctions. *See Pagtalunan*, 291 F.3d at 642 (“Arguably, Pagtalunan’s
8 petition has consumed some of the court’s time that could have been devoted to other cases on
9 the docket.”); *Yourish*, 191 F.3d at 990 (finding that Plaintiffs’ failure to file an amended
10 complaint by the court’s deadline “require[ed] the district court to devote further time and
11 resources to this matter rather than to the merits of an amended complaint”). Moreover, in
12 order to adequately brief and consider the motion to dismiss, the Court was required to grant a
13 two-month continuance of the trial date and all pre-trial deadlines. Finally, although Plaintiff’s
14 counsel has indicated that he could be prepared to try the case based on the current trial date
15 (Scannell Decl. (Dkt. No. 71)), Plaintiff has suggested over the phone that he might still move
16 for substitution of counsel, which would likely require a further continuance if granted. Given
17 the impact of Plaintiff’s delay on the Court’s docket, this factor strongly supports dismissal.

18 **C. The Risk of Prejudice to the Defendant**

19 “In determining whether a defendant has been prejudiced, we examine whether the
20 plaintiff’s actions impair the defendant’s ability to go to trial or threaten to interfere with the
21 rightful decision of the case.” *Malone*, 833 F.2d at 131. In this case, Defendants’ prejudice is
22 evident. Defendants have made a diligent effort to litigate this case, but Plaintiff’s untimely
23 initial disclosures, responses to interrogatories, and pretrial statement have impaired
24 Defendants in meaningfully defending themselves against Plaintiff’s accusations. Defendants
25 have had to devote substantial resources to these disputes, ultimately resolving them only with
26 the Court’s assistance. Defendants prepared for depositions that Plaintiff had requested, only to

1 have the depositions cancelled the night before when Plaintiff's attorney could not locate his
2 client. (Stockdale Decl. 2 (Dkt. No. 63).) Finally, "unnecessary delay inherently increases the
3 risk that witnesses' memories will fade and evidence will become stale," *Pagtalunan*, 291 F.3d
4 at 643, so Plaintiff's actions threaten to interfere with the rightful decision of this case.

5 Moreover, "[w]hether prejudice is sufficient to support an order of dismissal is in part
6 judged with reference to the strength of plaintiff's excuse for the default." *Malone*, 833 F.2d at
7 131. Here, Plaintiff has provided no reasonable justification for any of the myriad failures to
8 prosecute. As the Court noted in its previous order, Plaintiff's excuses for the discovery
9 violations all concerned the preceding month, and therefore did little to explain the six-month
10 delay in filing initial disclosures or the three-month delay in responding to Defendants'
11 discovery requests. (Order Granting Mot. to Compel and for Sanctions 4 (Dkt. No. 47).)
12 Plaintiff has provided no justification for filing his motion to amend the complaint seven weeks
13 after the Court-ordered pleading amendment deadline.² As for the failure to engage in
14 mediation and to timely file a pretrial statement, Plaintiff now suggests that these delays were
15 justified because Plaintiff's Second Motion to Amend Complaint was still pending. (*See*
16 *Scannell Decl. 1* (Dkt. No. 69).) This appears to be a conveniently revisionist justification, as
17 Plaintiff's counsel originally told Defendants that he could not respond to the mediation
18 request because he could not locate his client (1/16/09 Email from John Scannell to Mark
19

20 ² Instead, Plaintiff claims only that the Court's Status Conference Minute Entry—which
21 stated "Pleading amendment/3rd pty action due by 9/5/2008" (Dkt. No. 16)—was unclear.
22 "Plaintiff contends that such an order put him on notice with respect to pleading amendments
23 that would bring in third parties would [sic] be due by September 5, 2008, not all pleading
24 amendments whatsoever." (Reply re: Second Motion to Amend Complaint 2 (Dkt. No. 57).)
25 The Court finds this argument utterly unconvincing—the entry makes clear that pleading
26 amendments and thirty-party actions are both independently subject to the deadline. Moreover,
Plaintiff's argument is particularly puzzling given that the proposed amended complaint *would*
have brought in an additional defendant, so he would have violated even his own implausible
interpretation of the Court's order. (Proposed Second Amended Complaint ¶ 23 (Dkt. No. 51-
2) (adding Gayle Suave as a defendant).)

1 Stockdale (Dkt No. 66-4 at 2)) and originally appeared surprised upon learning that a Pretrial
2 Statement had been required under the local rules (Kim Decl. ¶ 5 (Dkt. No. 65 at 2)). Either
3 way, a pending motion does not authorize a party to disobey an explicit Court order; if Plaintiff
4 believed the pending motion to amend would impede fruitful mediation, he should have raised
5 that concern with the Court. *See Malone*, 833 F.2d at 130 (dismissing a case based on a failure
6 to comply with a court order and noting that plaintiff’s counsel had never communicated with
7 the court to clarify the order).

8 Finally, Plaintiff suggests that he should not be held accountable for these unexcused
9 failures because there is no evidence that he was to blame, rather than his attorney. (Resp. 2
10 (Dkt. No. 70) (arguing that dismissal is inappropriate “when there is no sign of either client
11 neglect of court processes or knowledge of the attorney’s neglect”).) The Supreme Court has
12 flatly rejected this proposition:

13 There is certainly no merit to the contention that dismissal of petitioner’s claim
14 because of his counsel’s unexcused conduct imposes an unjust penalty on the
15 client. Petitioner voluntarily chose this attorney as his representative in the
16 action, and he cannot now avoid the consequences of the acts or omissions of
17 this freely selected agent. Any other notion would be wholly inconsistent with
our system of representative litigation, in which each party is deemed bound by
the acts of his lawyer-agent and is considered to have notice of all facts, notice
of which can be charged upon the attorney.

18 *Link*, 370 U.S. at 633–34; *see also Anderson*, 542 F.2d at 526 (“The plaintiff cannot avoid this
19 dismissal by arguing that she is an innocent party who will be made to suffer for the errors of
20 her attorney.”). Moreover, in this case, there is evidence that Plaintiff’s negligence was at least
21 partly to blame for the failure to prosecute. (See 1/16/09 Email from John Scannell to Mark
22 Stockdale (Dkt No. 66-4 at 2) (noting that Plaintiff had never provided his attorney with an up-
23 to-date mailing address); Azpitarte Decl. 2 (Dkt. No. 35) (blaming the breakdown in
24 communication between Plaintiff and his attorney in part on the Plaintiff’s loss of his cell
25 phone).) Finally, it is clear from Plaintiff’s phone calls to chambers that he was aware of his
26 attorney’s many errors, yet he never took the extra step of mailing a written complaint, despite

1 being repeatedly advised that this was the only way the Court could acknowledge a request to
2 substitute counsel. Plaintiff took no action to rectify his attorney's known, unreasonable
3 failures; accordingly, he must be held accountable for such failures.

4 **D. The Public Policy Favoring Disposition of Cases on their Merits**

5 Although public policy generally favors disposition of cases on the merits, the Court
6 may also consider the strength or weakness of the plaintiff's case when determining whether
7 dismissal is appropriate. *Anderson*, 542 F.2d at 526. "[T]he court should not closely scrutinize
8 the merits of an action when reviewing an order of dismissal," *id.*, but even a cursory review of
9 the record in this case indicates that Plaintiff has little chance of success on the merits. First,
10 Defendants' pending motion for summary judgment makes several strong arguments for
11 dismissing the action in its entirety. (*See* Second Mot. for Summ. J. (Dkt. No. 30).) Second, as
12 a sanction for the extraordinary delay in filing initial disclosures, the Court prohibited Plaintiff
13 from using any nonparty witnesses "to supply evidence on a motion, at a hearing, or at a trial."
14 (Order Granting Mot. to Compel and for Sanctions 5–6 (Dkt. No. 47).) Finally, Plaintiff
15 appears to have conducted little to no discovery. Therefore, even if summary judgment were
16 not granted in its entirety, Plaintiff would be limited at trial to proving his case through only
17 his own testimony and the testimony of his opposing parties. Given the unlikelihood that
18 Plaintiff will succeed on the merits, the public policy favoring disposition of cases on the
19 merits is entitled to far less weight in the analysis.

20 **E. The Availability of Less Drastic Sanctions**

21 In considering whether less drastic sanctions are available, the Court should consider
22 the feasibility of lesser sanctions, whether such sanctions have already been imposed, and
23 whether Plaintiff has previously been warned of the possibility of dismissal. *Malone*, 833 F.2d
24 at 132. In this case, the Court has already reprimanded Plaintiff for failing to provide initial
25 disclosures and discovery responses (*see* Order Granting Mot. to Compel and for Sanctions 5
26 (Dkt. No. 47) (calling Plaintiff's complete discovery failure "inexcusable")), granted attorneys'

1 fees and costs to Defendants (*see id.* at 6), and imposed sanctions limiting the witnesses that
2 Plaintiff may use to prove his case at trial (*see id.* at 5–6). Despite these prior sanctions,
3 Plaintiff’s unjustified delays have continued unabated.

4 The Court finds that more drastic sanctions are now required and that no sanction short
5 of dismissal is feasible to address the failure to prosecute. Although the Court could sanction
6 Plaintiff’s attorney again and force him to withdraw from the case, *see Malone*, 833 F.2d at
7 132 n.1, this would only further set back the trial schedule and thereby further prejudice
8 Defendants.

9 Although the Court’s prior order did not explicitly warn that the case might be
10 dismissed, Plaintiff concedes that the order put him on notice that “dismissal . . . could result
11 from failure to provide discovery.” (Resp. 4 (Dkt. No. 70).) Plaintiff argues, however, that
12 dismissal is inappropriate because his subsequent delays did not specifically involve *discovery*.
13 (*Id.*) The Court finds this argument unpersuasive. Plaintiff and his attorney have exhibited a
14 pattern of unprofessionalism and unreasonable delay throughout this entire litigation, from
15 discovery, to motion briefing, to mediation, to the preparation of a pretrial statement. The early
16 indications of this general pattern formed the basis of the Court’s prior sanctions, and Plaintiff
17 cannot avoid the consequences of his actions simply because the most recent delays have taken
18 a different form. The Court finds no feasible, available lesser remedies, so this factor (like all
19 of the others) favors dismissal with prejudice.

20 **III. CONCLUSION**

21 For the foregoing reasons, Defendants’ Motion to Dismiss (Dkt. No. 64) is GRANTED.
22 Defendants’ Motion for Summary Judgment (Dkt. No. 30) and Plaintiff’s Motion to Amend
23 Complaint (Dkt. No. 51) are DENIED AS MOOT.

24 //

25 //

26 //

ORDER GRANTING MOTION TO DISMISS

PAGE - 11

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

SO ORDERED this 3rd day of March, 2009.

A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
United States District Judge