

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Jonathan Bennett v. U. Garcia

Bennett v. Garcia · No. 2:21-cv-1340 WBS CSK P · Decided February 26, 2025

OPINION

(PC) Bennett v. Garcia

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 JONATHAN BENNETT, No. 2:21-cv-1340 WBS CSK P

12 Plaintiff,

13 v. ORDER AND FINDINGS AND

RECOMMENDATIONS

14 U. GARCIA, et al., 15 Defendants. 16 17 Plaintiff is proceeding without counsel with this
civil rights action filed pursuant to 18 42 U.S.C. § 1983. For the reasons stated herein, this Court
recommends that this action be 19 dismissed for plaintiff's failure to prosecute.

20 I. BACKGROUND

21 Plaintiff commenced this action on July 29, 2021, and has amended his complaint twice. 22
(ECF Nos. 1, 43, 70.) On January 6, 2023, the parties were informed that motions to dismiss 23
shall be briefed pursuant to Local Rule 230(l), and failure to timely oppose such a motion may be
24 deemed a waiver of opposition to the motion. (ECF No. 49 at 6.) The parties were also
informed 25 1 Per plaintiff's election (ECF No. 16), his due process and equal protection claims,
and 26 defendant Warden Robert Burton were dismissed without prejudice on October 19, 2021.
(ECF

27 No. 17 at 4.) Plaintiff's amended complaint named only defendants U. Garcia and F. Moreno as
defendants, as did plaintiff's second amended complaint. (ECF Nos. 43, 70.) Therefore, the 28
Clerk of the Court is directed to change the caption of this action as reflected above. 1 that the
failure of any party to comply with the January 6, 2023 order, the Federal Rules of Civil 2
Procedure, or the Local Rules of Court, may result in the imposition of sanctions including, but 3
not limited to, dismissal of the action or entry of default. (ECF No. 49 at 8, citing Fed. R. Civ. P. 4
41(b).) This action proceeds on plaintiff's second amended complaint against defendants U. 5
Garcia and F. Moreno, and was screened by the Court on October 3, 2023. (ECF Nos. 70, 72.) 6
On November 2, 2023, defendants filed a motion to dismiss. (ECF No. 73.) On

7 December 12, 2023, plaintiff was advised that failure to file an opposition to the motion to
8 dismiss would be “deemed as consent to have the (a) action dismissed for lack of prosecution,
and 9 (b) action dismissed based on plaintiff’s failure to comply with these rules and a court
order[, 10 and] “such a failure shall result in a recommendation that this action be dismissed
pursuant to 11 Federal Rule of Civil Procedure 41(b).” (ECF No. 74.) Plaintiff was also granted an
additional 12 thirty days to file an opposition, which he filed on December 18, 2023 (ECF No.
75). On March 13 8, 2024, the Court recommended that defendants’ motion to dismiss be denied.
(ECF No. 77.) 14 On May 3, 2024, the district court adopted the findings and recommendations in
full and denied 15 defendants’ motion to dismiss. (ECF No. 82.) 16 After he was paroled from
prison, plaintiff filed two notices of change of address on
17 March 14 and March 29, 2024, both to the same address, which remain plaintiff’s address of
18 record. (ECF Nos. 78, 80.) 19 On May 28, 2024, this Court issued a discovery and scheduling
order, setting the 20 discovery deadline for September 20, 2024, and the pretrial motions deadline
for December 13, 21 2024. (ECF No. 84.) 22 On October 25, 2024, newly assigned counsel for
defendants filed a motion to reopen 23 discovery for the sole purpose of taking plaintiff’s
deposition, and to extend the pretrial motions 24 deadline. (ECF No. 87.) New defense counsel
had been informed that plaintiff had absconded 25 from parole and his whereabouts were
unknown. (Id. at 3-4.) On November 4, 2024, defendants’ 26 motion was granted, the discovery
deadline was extended to December 30, 2024, for the sole 27 purpose of locating and deposing
plaintiff, and the pretrial motions deadline was extended to
28 February 11, 2025. (ECF No. 88.)

1 On November 21, 2024, defendants noticed plaintiff’s deposition for December 16, 2024, 2 and
served plaintiff with the deposition notice by mail at his address of record. (ECF No. 91 at 5- 3 7.)
Plaintiff did not respond to the deposition notice or to multiple efforts by defense counsel to 4
contact plaintiff. (ECF No. 91 at 2.) 5 On January 13, 2025, defendants filed a motion to dismiss
for failure to prosecute or in the 6 alternative to extend the case schedule and compel plaintiff’s
deposition. (ECF No. 90.) Plaintiff 7 has not filed a timely opposition or otherwise responded to
the motion to dismiss. 8 Orders served on plaintiff’s address of record (ECF Nos. 82, 84, 88) in
May 2024 and

9 November 2024 have not been returned by the postal service as undeliverable.2

10 II. DEFENDANTS’ MOTION TO DISMISS

11 A. Defendants’ Position 12 Defendants move to dismiss because plaintiff failed to attend his
deposition scheduled for

13 December 16, 2024, failed to communicate, and has absconded from parole. (ECF No. 90 at 1.)
14 Defendants provided the declaration of plaintiff’s parole agent Moke Phovixay, who attests to
the 15 following: (a) plaintiff paroled from CDCR custody on March 17, 2024, and Moke
Phovixay was 16 assigned to be plaintiff’s parole agent on March 18, 2024; (b) almost all of
Agent Phovixay’s 17 contacts with plaintiff have been at his residence at 4725 Marconi Avenue,

Apartment #26, 18 Carmichael, California, or at the parole office; (c) agent Phovixay's last face to face contact with 19 plaintiff was on August 21, 2024, at the parole office; (d) on September 4, 2024, the agent 20 attempted to visit plaintiff at his home, but was unable to make contact; (e) on September 13, 21 2024, the agent spoke with plaintiff's brother, Christopher Edwards, who to the agent's 22 knowledge, still lives at plaintiff's last address at 4725 Marconi Avenue, who informed the agent 23 that Edwards also had not seen plaintiff; (f) on September 24, 2024, the agent made a second 24 attempt to visit plaintiff at his home but was unable to make contact; the agent also visited 25 plaintiff's last work location, but plaintiff was not there; and (g) as of December 19, 2024, the 26 parole agent still had no contact with plaintiff. (ECF No. 90-2 at 1-2.) 27 2 Though on April 29, 2024, mail was returned to the Court as undeliverable, beginning in May 28 2024, mail to the plaintiff has not been returned as undeliverable. See Docket. 1 Defense counsel's efforts to locate plaintiff have also been unavailing. After mailing the 2 deposition notice, defense counsel called plaintiff on November 26, 2024, at two phone numbers 3 associated with plaintiff; one was disconnected, and the other went straight to voicemail. (ECF 4 No. 90-1 at 2.) Defense counsel made subsequent attempts to call plaintiff on December 6 and 5 11, 2024, but was unable to reach plaintiff. (Id.) After the consistent inability to contact plaintiff 6 failed, defendants canceled the deposition to avoid unnecessary costs. (Id. at 3.) Defendants 7 point out that plaintiff is aware he is required to notify the Court of any change of address 8 because he did so on March 14 and March 29, 2024. Defendants argue that four of the five 9 factors in *Pagtalunan v. Galaza*, 291 F.3d 639, 634 (9th Cir. 2002), support dismissal of this case. 10 (ECF No. 90 at 4-5.) In the alternative, defendants seek an order compelling plaintiff to 11 participate in a deposition and extend the discovery and pretrial motions deadlines. (ECF No. 90 12 at 6.) 13 B. Governing Standards 14 "District courts have inherent power to control their dockets" and, in exercising that 15 power, may impose sanctions, including dismissal of an action. *Thompson v. Housing Auth.*, 16 City of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986). Failure to cooperate in discovery may 17 result in the imposition of sanctions, including, but not limited to, a recommendation that this 18 action be dismissed. See Fed. R. Civ. P. 37(b)(2)(A) (sanctions may be imposed for failure to 19 comply with a discovery order). The standards governing dismissals for failure to appear for 20 deposition under Rule 37 and for lack of prosecution under Rule 41(b) are "basically the same." 21 *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987). 22 A court may dismiss an action based on a party's failure to prosecute an action, obey a 23 court order, or comply with local rules. See, e.g., *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 24 (9th Cir. 1992) (dismissal for failure to comply with a court order to amend a complaint); *Malone*, 25 833 F.2d at 130-31) (dismissal for failure to comply with a court order); *Henderson v. Duncan*, 26 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to prosecute and to comply with local 27 rules). 28 In determining whether to dismiss an action, the Court must consider several factors: 1 (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its 2 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of 3

cases on their merits; and (5) the availability of less drastic sanctions. *Carey v. King*, 856 F.2d 4 1439, 1440 (9th Cir. 1988). 5 C. Discussion 6 First, the public's interest in the expeditious resolution of cases always favors dismissal. 7 See *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999), superseded by statute on other 8 grounds; *Pagtalunan*, 291 F.3d at 642 (citing *Yourish*, 191 F.3d at 990) (finding a failure to 9 prosecute for almost four months weighing in favor of dismissal). Here, plaintiff has not 10 communicated with the Court since his March 29, 2024 change of address notice (ECF No. 80), 11 has not responded to defendants' motions filed in October 2024 and January 2025, and plaintiff 12 has absconded from parole for six months, which strongly weighs in favor of dismissal.³ 13 Second, the Court is required to manage its docket without being subject to a litigant's 14 noncompliance. *Pagtalunan*, 291 F.3d at 642 (citing *Ferdik*, 963 F.2d at 1261; see also *Morris v. 15 Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991) (a plaintiff has the burden "to move 16 toward . . . disposition at a reasonable pace, and to refrain from dilatory and evasive tactics"). 17 Based on the parole agent's declaration, the last personal contact with plaintiff was on

18 August 21, 2024. Defense counsel's efforts to contact plaintiff have been unavailing, and 19 plaintiff did not respond to the deposition notice or appear for the December 16, 2024 deposition. 20 The parole agent confirms that plaintiff's address of record is shared with plaintiff's brother, 21 Christopher Edwards. Mr. Edwards claimed he had not seen plaintiff, but it is unclear whether 22 plaintiff may have picked up his mail after the parole agent's contact with Mr. Edwards in

23 September 2024. Further, plaintiff has not filed a change of address though he knows of the 24 25 3 As of February 20, 2025, plaintiff has not been returned to state custody. This information was obtained from the CDCR Inmate Locator website, <https://ciris.mt.cdcr.ca.gov/> (accessed Feb. 20 26 2025). The Court may take judicial notice of public records available on online inmate locators. See *United States v. Basher*, 629 F.3d 1161, 1165 (9th Cir. 2011) (taking judicial notice of 27 Bureau of Prisons' inmate locator available to the public); see also *Foley v. Martz*, 2018 WL 5111998, at *1 (S.D. Cal. Oct. 19, 2018) (taking judicial notice of CDCR's inmate locator). 28 1 requirement to do so and has previously filed changes of address. (ECF Nos. 78, 80.) The Court 2 cannot effectively manage its docket if plaintiff does not participate in the case, plaintiff cannot 3 be contacted by defense counsel to re-schedule plaintiff's deposition, and defendants cannot file 4 their anticipated motion for summary judgment because plaintiff's deposition cannot be taken. In 5 addition, this district court in particular has a strong need and interest in managing its docket 6 given the extremely high caseload in the Eastern District of California. Thus, this Court finds that 7 the second factor—the Court's need to manage its docket—weighs in favor of dismissal. 8 Third, plaintiff's actions in absconding from parole, failing to participate in discovery, 9 failing to respond to defense counsel's phone calls, and failing to respond to the deposition notice 10 or appear for deposition, have unreasonably delayed and impaired defendants' ability to depose 11 plaintiff, depriving defendants of an opportunity to discover evidence and facts, preventing them

12 from defending against plaintiff's claims, and interfering with the timely resolution of this case
13 filed in 2021. See *Woolery v. Shasta Cnty. Jail*, 2022 WL 2452293, at *3 (E.D. Cal. July 6, 14
2022), report and recommendation adopted, 2022 WL 4292290 (E.D. Cal. Sept. 16, 2022) 15
(prisoner's failure to participate in discovery prejudiced defendants because it impaired their 16
ability to determine relevant defenses to prisoner's claims and delayed resolution) (citations 17
omitted). Under the circumstances of this case, the third factor, prejudice to defendants from 18
plaintiff's failure to participate in discovery by failing to respond to the deposition notice and 19
failing to appear for his deposition, and failure to communicate with defense counsel weighs in 20
favor of dismissal. 21 The fourth factor—public policy favoring a disposition of actions on its
merits—usually 22 weighs against dismissal. However, plaintiff's own actions in failing to
participate in discovery 23 and what appears to be his evasion from parole are impeding the
progress of this case. "[A] case 24 that is stalled or unreasonably delayed by a party's failure to
comply with deadlines and discovery 25 obligations cannot move forward toward resolution on
the merits." In re Phenylpropanolamine 26 (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1228 (9th
Cir. 2006). Thus, the fourth factor "lends 27 little support" to the weighing of these factors, and
does not weigh against dismissal under these 28 circumstances. See *id.* 1 The fifth factor—
availability of less drastic sanctions—presents a closer question. See 2 *Yourish*, 191 F.3d at 992
(although finding that the less drastic alternatives factor did not weigh 3 in favor of dismissal,
finding three other factors strongly favored dismissal, and holding that the 4 district court did not
abuse its discretion in dismissing the case based on plaintiff's failure to 5 timely amend). In this
case, the defendants' notice of deposition was served on plaintiff at his 6 address of record despite
defense counsel's inability to locate or communicate with plaintiff, and 7 despite learning plaintiff
had absconded on parole. Since May 2024, mail sent to plaintiff has not 8 been returned to the
Court, and apparently not returned to defense counsel. Because plaintiff has 9 failed to respond to
the deposition notice or appear for his deposition, and apparently has 10 absconded from parole,
issuing an order compelling his attendance at another deposition would 11 be futile. In addition,
warning a plaintiff that failure to obey a court order will result in dismissal 12 can suffice to meet
the "consideration of alternatives" requirement. *Malone*, 833 F.2d at 132 13 (citing *Buss v.*
Western Airlines, Inc., 738 F.2d 1053, 1054 (9th Cir. 1984)). Here, plaintiff has 14 twice been
warned about the consequences of failing to comply with Local Rule 230(l) and the 15 Federal
Rules of Civil Procedure, as well as failing to oppose a motion to dismiss. (ECF No. 49 16 at 6, 8;
ECF No. 74.) Further, less drastic monetary sanctions would also be ineffective because 17
plaintiff was indigent at the time he filed this action, is proceeding in forma pauperis, and there is
18 no evidence that his financial circumstances have changed. Because plaintiff has failed to 19
participate in discovery, was warned about the failure to oppose a motion to dismiss, less drastic
20 monetary sanctions would be ineffective, and because plaintiff has absconded from parole, 21
apparently abandoning this action, the Court finds that less drastic sanctions are not warranted 22
under these circumstances. Thus, this factor weighs in favor of dismissal. 23 "Dismissal is a harsh

penalty and is to be imposed only in extreme circumstances.” 24 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). This Court finds that plaintiff failing 25 to participate in his own deposition and having absconded parole for the last six months 26 constitutes extreme circumstances. Having weighed the five factors, the Court finds that the first, 27 second, third and fifth factors discussed above weigh in favor of dismissal, and outweigh the 28 fourth factor. Accordingly, this Court recommends dismissal of this action based on plaintiff’s 1 | failure to prosecute.

2 | WI. SCHEDULING

3 The December 30, 2024 discovery deadline and the February 11, 2025 pretrial motions 4 || deadline have both expired. In light of the instant recommendations, the discovery and pretrial 5 || motions deadlines will be reset if this action is not dismissed as recommended.

6 | IV. CONCLUSION

7 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the Court is 8 | directed to change the caption of this action to Jonathan Bennett v. U. Garcia. 9 Further, IT IS RECOMMENDED that this action be dismissed for failure to prosecute. 10 These findings and recommendations are submitted to the United States District Judge 11 || assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days 12 | after being served with these findings and recommendations, plaintiff may file written objections 13 || with the court and serve a copy on all parties. Such a document should be captioned “Objections 14 || to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file 15 || objections within the specified time may waive the right to appeal the District Court’s order. 16 || Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991). 17 ig Dated: February 25, 2025 A aA Chan Spo

19 CHI SOO KIM

20 UNITED STATES MAGISTRATE JUDGE

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