

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
CALIFORNIA

Jonathan Darosa v. Lowes Home Improvement

Darosa · No. 2:23-cv-00123-WBS-SCR · Decided April 17, 2025

SUMMARY

The magistrate judge recommends dismissing Jonathan Darosa’s action against Lowe’s Home Improvement without prejudice under Federal Rule of Civil Procedure 41(b) and Local Rule 110. The recommendation is based on Plaintiff’s failure to file a status report, appear at a scheduling conference and deposition, comply with court orders, and respond to an order to show cause.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                    |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Eastern District of California                                                                                                                                                                                                                                                                |
| WRITING FOR THE COURT | Sean C. Riordan                                                                                                                                                                                                                                                                                                                    |
| JURISDICTION          | United States District Court for the Eastern District of California                                                                                                                                                                                                                                                                |
| DECIDED               | April 17, 2025                                                                                                                                                                                                                                                                                                                     |
| DOCKET                | 2:23-cv-00123-WBS-SCR                                                                                                                                                                                                                                                                                                              |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                                              |
| PROCEDURAL POSTURE    | Findings and recommendations by a magistrate judge recommending dismissal without prejudice for failure to prosecute and failure to comply with court orders.                                                                                                                                                                      |
| STANDARD OF REVIEW    | Dismissal for failure to prosecute is evaluated under the five-factor framework considering the public interest in expeditious resolution, the court's need to manage its docket, the risk of prejudice to the defendant, the availability of less drastic alternatives, and the public policy favoring disposition on the merits. |
| PRECEDENTIAL VALUE    | nonprecedential                                                                                                                                                                                                                                                                                                                    |
| PARTIES               | Jonathan Darosa v. Lowes Home Improvement                                                                                                                                                                                                                                                                                          |

TOPICS

- sanctions
- civil procedure
- discovery dispute

PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether the action should be dismissed for failure to prosecute and failure to comply with court orders.
2. Whether dismissal without prejudice was an appropriate and sufficiently less drastic sanction under Federal Rule of Civil Procedure 41(b) and the applicable five-factor test.

## HOLDINGS

1. The magistrate judge recommended dismissal without prejudice because Plaintiff failed to comply with court orders, failed to appear at the scheduling conference and depositions, and failed to respond to the order to show cause.

## KEY QUOTATIONS

*“The Court finds that lesser sanctions would be futile given Plaintiff’s seeming unwillingness to participate in the litigation.”* (Findings and Recommendations at 4)

*“The Court recommends dismissal pursuant to Federal Rule of Civil Procedure 41(b) and Local Rule 110 for Plaintiff’s failure to comply with Court orders, failure to appear at the scheduling conference, and failure to prosecute this action.”* (Findings and Recommendations at 5)

## FACTUAL BACKGROUND

Plaintiff alleged that he was detained and allegedly battered by loss-prevention personnel at a Lowe's store after being suspected of shoplifting. After the action was removed and Plaintiff's counsel withdrew, Plaintiff failed to participate in required litigation activities, including filing a status report, appearing at a scheduling conference, appearing for depositions, and responding to an order to show cause. The court found that Plaintiff's nonparticipation prevented the case from proceeding and that dismissal without prejudice was the least drastic adequate sanction.

## PROCEDURAL HISTORY

Plaintiff commenced the action in California state court, filed a second amended complaint, and Defendant removed the action to federal court based on diversity jurisdiction. After counsel withdrew, Plaintiff proceeded pro se. Plaintiff failed to file a required status report, failed to appear at a pretrial scheduling conference and two noticed depositions, and failed to respond to an order to show cause. The magistrate judge recommended dismissal without prejudice under Federal Rule of Civil Procedure 41(b) and Local Rule 110, subject to review by the assigned district judge.

## DISPOSITION

other

## CASES CITED

- *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)
- *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)
- *Pagtalunan v. Galaza*, 291 F.3d 639, 641-43 (9th Cir. 2002)
- *In re Phenylpropanolamine Products Liability Litigation*, 460 F.3d 1217, 1228 (9th Cir. 2006)
- *Martinez v. Yist*, 951 F.2d 1153 (9th Cir. 1991)

## OPINION

(PS) *Darosa v. Lowes Home Improvement*

PER CURIAM.

1 2 3 4 5 6

7 UNITED STATES DISTRICT COURT

8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9

10 JONATHAN DAROSA No. 2:23-cv-00123-WBS-SCR

11 Plaintiff,

12 v. FINDINGS AND RECOMMENDATIONS

13

LOWES HOME IMPROVEMENT,

14 Defendant. 15

16 17 Plaintiff is proceeding pro se in this action. See ECF No. 19 (granting counsel’s motion to  
 18 withdraw). This matter was accordingly referred to the magistrate judge pursuant to Local Rule  
 19 302(c)(21) and 28 U.S.C. § 636(b)(1). ECF No. 19. Plaintiff failed to appear at the scheduling  
 20 conference and failed to respond to the Court’s subsequent Order to Show Cause. Accordingly,  
 21 the Court recommends this action be dismissed for failure to prosecute. 22 I. Background and  
 Procedural History 23 Plaintiff, represented by counsel at the time, commenced this action in  
 California state 24 court on June 30, 2022. ECF No. 1 at 2. Plaintiff filed a first amended  
 complaint on July 5, 25 2022, and a second amended complaint (SAC) in September 2022.  
 Defendant removed the action 26 to this Court on January 20, 2023, on the basis of diversity of  
 citizenship jurisdiction. ECF No. 1. 27 The operative complaint is the SAC, which is in the record  
 at Exhibit E to the Notice of Removal. 28 ECF No. 1-5. 1 The SAC asserts eight causes of action  
 based on state law. ECF No. 1-5. Plaintiff alleges 2 that on March 31, 2022, he was a customer in a  
 Lowe’s store and that he was stopped and 3 detained by loss prevention personnel on suspicion of  
 shoplifting. Id. at 4.1 Plaintiff alleges he 4 was “accosted” and “knocked to the ground and  
 battered.” Id. at 5. Plaintiff claims that 5 Roseville police were called to the scene, reviewed  
 videotape, and determined that Plaintiff had 6 not stolen any items. Id. at ¶ 14. Plaintiff alleges  
 Defendant’s employees made false statements 7 and requested that Plaintiff “and his primary mode  
 of transportation be subject to search and 8 seizure in violation of his right to be free from restraint  
 and arbitrary detention.” Id. at ¶ 83. 9 Defendant filed a motion to dismiss one of the eight counts

of the SAC on January 27, 10 2023. ECF No. 9. Plaintiff's counsel filed a motion to withdraw on February 22, 2023. ECF No. 11 13. Counsel was allowed to withdraw on April 4, 2023, and as Plaintiff was proceeding pro se 12 the matter was referred to Magistrate Judge Barnes. ECF No. 19. Magistrate Judge Barnes 13 expressed concern that counsel had withdrawn due to health reasons, and it appeared Plaintiff was 14 incarcerated and may not have been aware of the motion. ECF No. 20. Judge Barnes denied the 15 motion to dismiss without prejudice to renewal. ECF No. 20. Defendant filed a renewed motion 16 on September 15, 2023, and the motion was fully briefed. ECF No. 21. This Court 17 recommended the motion be denied, and the findings and recommendations were adopted in full. 18 ECF No. 43. 19 On February 21, 2025, this Court issued an order setting a pretrial scheduling conference 20 for March 27, 2025. ECF No. 40. The order required the parties to file status reports at least 14 21 days in advance of the conference. Id. at 1. Plaintiff did not file a status report. Defendant did 22 file a status report, and defense counsel reported that he had been unable to contact Plaintiff either 23 by phone or email to confer on a joint status report. ECF No. 42-1 at 3. Defense counsel also 24 reported that he had noticed Plaintiff's deposition for March 4, 2025, but that Plaintiff had not 25 appeared. Id. at 2. 26 On March 27, 2025, Plaintiff failed to appear for the pretrial scheduling conference. ECF 27 1 Page references are to the page number generated by the Court's CM/ECF system and 28 appearing on the upper right corner of the page.

1 No. 44. Defense counsel reported at the status conference that he had been in communication 2 once with Plaintiff recently and had reminded him of the status conference and had re-noticed his 3 deposition for March 28, 2025. The Court issued an Order to Show Cause on March 28, 2025, 4 which gave Plaintiff 14 days to respond. ECF No. 45. The order stated in part that "it appears 5 Plaintiff has not participated in this litigation for the past several months and he must now show 6 cause as to why his case should not be dismissed." Id. at 1. The Order to Show Cause further 7 provided: "Plaintiff is cautioned that failure to respond to this Order will result in a 8 recommendation that the action be dismissed." Id. at 2. On March 31, 2025, Defendant filed a 9 further status report stating that Plaintiff had again failed to appear for his deposition via Zoom at 10 the scheduled time, but that four and a half hours after the start time, Plaintiff sent an email 11 saying he was unable to login. ECF No. 46 at 2. 12 II. Analysis 13 Plaintiff failed to comply with the Court's order (ECF No. 40) when he did not file a 14 status report. Plaintiff then failed to appear for the pretrial scheduling conference. Plaintiff was 15 then advised via an Order to Show Cause that "failure to appear for a pretrial scheduling 16 conference is grounds for sanctions." ECF No. 45, citing Fed. R. Civ. P. 16(f)(1)(A) ("On motion 17 or on its own, the court may issue any just orders, including those authorized by Rule 18 37(b)(2)(A)(ii)-(vii), if a party . . . fails to appear at a scheduling or other pretrial conference."). 19 Plaintiff was "further cautioned that failure to participate in discovery or appear for deposition 20 may result in appropriate sanctions." ECF No. 45 at 2. Additionally, Plaintiff was warned that 21 failure to respond to the Order to Show Cause would result in a recommendation to dismiss the 22 action. 23 The Court has

considered the five factors set forth in *Ferdik v. Bonzelet*, 963 F.2d 1258, 24 1260 (9th Cir. 1992), and concludes that dismissal is appropriate. In considering whether to 25 dismiss a claim for failure to prosecute, the Court considers: 1) the public's interest in 26 expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of 27 prejudice to defendants; 4) the availability of less drastic alternatives; and 5) the public policy 28 favoring disposition of cases on their merits. *Id.* at 1260-61.

1. Public's interest in expeditious resolution of the litigation 2 "The public's interest in expeditious resolution of litigation always favors dismissal." 3 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). This action was filed over two 4 years ago and concerns an event that occurred in March 2022. Plaintiff has made no filings in 5 this action for over six months. This factor weighs in favor of dismissal. See *Pagtalunan v. 6 Galaza*, 291 F.3d 639, 641 (9th Cir. 2002) ("Given *Pagtalunan's* failure to pursue the case for 7 almost four months, this factor weighs in favor of dismissal."). 8

2. Court's need to manage its docket 9 In evaluating this factor, the trial court "is in the best position to determine whether the 10 delay in a particular case interferes with docket management." *Pagtalunan*, 291 F.3d at 642. 11 This case has been on the Court's docket for over two years. The Court has ruled on a motion to 12 dismiss and Plaintiff has failed to comply with recent orders of the Court. The Court's need to 13 manage its docket weighs in favor of dismissal, particularly given the heavy caseload in this 14 District. 15

3. Risk of prejudice to defendant 16 In evaluating this factor, the Court considers whether "plaintiff's actions impaired 17 defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the 18 case." *Pagtalunan*, 291 F.3d at 642. Limited delays and the pendency of a lawsuit are 19 insufficient to establish prejudice. *Id.* However, "[u]nnecessary delay inherently increases the 20 risk that witnesses' memories will fade and evidence will become stale." *Id.* at 643. This matter 21 cannot proceed to trial without Plaintiff's participation and it appears Plaintiff's participation has 22 been limited since counsel withdrew. Defense counsel states that Plaintiff has twice failed to 23 appear for deposition and has not answered written discovery. See ECF Nos. 42-1 and 46. The 24 Court finds this factor weighs in favor of dismissal. 25

4. Availability of less drastic alternatives 26 The Court has considered the availability of less drastic alternatives. As detailed above, 27 Plaintiff has failed to comply with two orders and failed to appear at the scheduling conference. 28 An Order to Show Cause was also previously issued by Magistrate Judge Barnes when Plaintiff 1 did not timely respond to Defendant's motion to dismiss. ECF No. 29. The Court finds that 2 lesser sanctions would be futile given Plaintiff's seeming unwillingness to participate in the 3 litigation. Plaintiff was clearly warned that failing to respond to the Court's most recent Order to 4 Show Cause would result in a recommendation to dismiss the action. The most severe approach 5 would be to dismiss the action with prejudice, however the Court concludes that the less drastic 6 alternative of dismissal without prejudice is appropriate. This factor weighs in favor of dismissal. 7

5. Public policy favoring disposition of cases on the merits 8 "Public policy favors disposition of cases on the merits." *Pagtalunan*, 291 F.3d at 643. 9 This factor generally always weighs against dismissal, and some cases have stated it "strongly 10

counsels against dismissal.” *Allen v. Bayer Corp. (In re Phenylpropanolamine Prods. Liab. Litig.)*, 460 F.3d 1217, 1228 (9th Cir. 2006). However, “this factor ‘lends little support’ to a party whose responsibility it is to move a case toward disposition on the merits but whose conduct impedes progress in that direction.” *Id.* The Court finds this factor weighs against dismissal. III. Conclusion The Court recommends dismissal pursuant to Federal Rule of Civil Procedure 41(b) and Local Rule 110 for Plaintiff’s failure to comply with Court orders, failure to appear at the scheduling conference, and failure to prosecute this action. Accordingly, IT IS HEREBY RECOMMENDED that: 1. This action be dismissed without prejudice; and 2. The Clerk enter judgment and close this file. These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, either party may file written objections with the court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court’s order. *Martinez v. Yist*, 951 F.2d 1153 (9th Cir. 1991). 3 || DATED: April 17, 2025

SEAN C. RIORDAN

UNITED STATES MAGISTRATE JUDGE

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