

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

David Rivas v. MCC San Diego; Jason Burganson

Case No. 25-cv-00806-AJB-BLM · No. 25-cv-00806-AJB-BLM · Decided January 13, 2026

OPINION

Rivas

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 DAVID RIVAS, Case No.: 25-cv-00806-AJB-BLM

BOP #14267-298,

12

ORDER DISMISSING CIVIL

Plaintiff,

13 ACTION FOR FAILING TO

vs. STATE A CLAIM PURSUANT

14 TO 28 U.S.C. § 1915(e)(2)(B)(ii) MCC San Diego; JASON BURGANSOON,

15 AND 28 U.S.C. § 1915A(b)(1)

Correctional Officer,

AND FOR FAILING TO

16 Defendants. PROSECUTE 17 18 19 Plaintiff David Rivas, proceeding without counsel while
incarcerated at the 20 Metropolitan Correctional Center in San Diego, filed this civil action
pursuant to Bivens v. 21 Six Unknown Named Federal Narcotic Agents, 403 U.S. 388 (1971),
together with a motion 22 to proceed in forma pauperis (“IFP”). (See Doc. Nos. 1; 2.) 23 On
October 17, 2025, the Court granted Plaintiff leave to proceed IFP but screened 24 and dismissed
his complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2) 25 and 1915A(b).
(Doc. No. 6.) While the Court noted Plaintiff’s Bivens claims against Officer 26 Burganson were
“dead on arrival” and expressed doubt as to whether Plaintiff could 27 effectively amend them, it
granted him 45 days leave in which to try. (See Doc. No. 6 at 13 28 (citing Harper v. Need, 71
F.4th 1181, 1187 (9th Cir. 2023)).) The Court also warned 1 Plaintiff that if he failed to timely
amend, a final judgment of dismissal would be entered 2 based both on his failure to state a claim
and his failure to prosecute in compliance with 3 the Court’s Order. (Id. at 14–15 (citing Lira v.
Herrera, 427 F.3d 1164, 1169 (9th Cir. 4 2005) (“If a plaintiff does not take advantage of the
opportunity to fix his complaint, a 5 district court may convert the dismissal of the complaint into

dismissal of the entire 6 action.”)).) More than a month has passed since Plaintiff’s amended complaint was due, 7 but he has failed to respond. Thus, for the reasons explained, the Court DISMISSES the 8 case.

9 I. FAILURE TO AMEND AND/OR PROSECUTE

10 The Court may sua sponte dismiss a case for lack of prosecution or failure to comply 11 with a court order. See *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); see 12 also Fed. R. Civ. P. 41(b) (providing for involuntary dismissal for failure to prosecute or 13 comply with the federal rules or court order). “The failure of the plaintiff eventually to 14 respond to the court’s ultimatum—either by amending the complaint or by indicating to the 15 court that [he] will not do so—is properly met with the sanction of a Rule 41(b) dismissal.” 16 *Edwards v. Marin Park*, 356 F.3d 1058, 1065 (9th Cir. 2004). “In determining whether to 17 dismiss a claim for failure to prosecute or failure to comply with a court order, the Court 18 must weigh the following factors: (1) the public’s interest in expeditious resolution of 19 litigation; (2) the Court’s need to manage its docket; (3) the risk of prejudice to 20 defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public 21 policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639, 22 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992)). 23 Because the Court clearly informed Plaintiff of his need to timely amend, factors 24 one, two, and four weigh in favor of dismissal. See *Ferdik*, 963 F.2d at 1262 (“[A] district 25 court’s warning to a party that his [or her] failure to obey the court’s order will result in 26 dismissal can satisfy the ‘consideration of alternatives’ requirement.”); *Henderson*, 779 27 F.2d at 1424; *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (“[T]he 28 public’s interest in expeditious resolution of litigation always favors dismissal.”); 1 *Pagtalunan*, 291 F.3d at 642 (“The trial judge is in the best position to determine whether 2 the delay in a particular case interferes with docket management and the public interest.”); 3 *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671, 674 (9th Cir. 1981) (a court is not 4 required to exhaust all alternatives prior to dismissal). Factor five also supports dismissal. 5 See *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 6 2006) (the public policy favoring disposition on the merits does not weigh against dismissal 7 where plaintiff’s “conduct impedes progress in that direction”). 8 Finally, Plaintiff initiated this suit more than nine months ago but has failed to file 9 any pleading sufficient to survive initial screening, and no defendant has been served. See 10 Fed. R. Civ. P. 4(c). “A federal court is without personal jurisdiction over a defendant 11 unless the defendant has been served in accordance with Fed. R. Civ. P. 4.” *Crowley v. 12 Bannister*, 734 F.3d 967, 974–75 (9th Cir. 2013) (citations omitted); see also *Flores v. 13 Velocity Express, LLC*, No. 12-CV-05790-JST, 2017 WL 3477081, at *2 (N.D. Cal. Aug. 14 11, 2017) (dismissing civil action for failure to prosecute where plaintiff’s failure to 15 communicate for nearly four months “indicate[d] [] he ha[d] no interest in pursuing his 16 claims”). 17 Thus, while the “pendency of a lawsuit is not sufficiently prejudicial in and of itself 18 to warrant dismissal,” *Pagtalunan*, 291 F.3d at 642, when taken together, the Court finds 19 the

weight of the *Ferdik* factors support dismissal and the entry of final judgment pursuant to Fed. R. Civ. P. 41(b) is now warranted. See *Hernandez v. City of El Monte*, 138 F.3d 21 393, 399 (9th Cir. 1998) (“We may affirm a dismissal where at least four factors support dismissal, or where at least three factors ‘strongly’ support dismissal.”) (quoting *Ferdik*, 23 963 F.2d at 1263).

24 II. CONCLUSION

25 For the reasons explained, the Court DISMISSES this civil action based on 26 Plaintiff’s failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. 27 §§ 1915(e)(2) (B)(ii) and 1915A(b)(1) and his failure to amend as required by the Court’s 28 October 17, 2025 Order. The Court further CERTIFIES that an IFP appeal would not be 1 ||taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). The Court DIRECTS the Clerk of 2 ||Court to enter a final judgment of dismissal and close the file. 3 IT IS SO ORDERED. 4 ||Dated: January 13, 2026 6 United States District Judge 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28