UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Alfredo Bruce Martinez, Plaintiff -vs- Charles L. Ryan, et al., Defendants.	CV-19-4449-PHX-DLR (JFM) **Report & Recommendation**

This matter is before the undersigned magistrate judge on referral for pretrial proceedings pursuant to 28 U.S.C. § 636(b)(1). Because the appropriate resolution of this matter is dispositive of claims or defenses, the undersigned proceeds by way of a Report & Recommendation to the referring district judge, pursuant to 28 U.S.C. § 636(b)(1)(B).

A. BACKGROUND

Plaintiff commenced this action by filing his Pro Se Prisoner Civil Rights Case on June 11, 2019 (Doc. 1). Plaintiff was granted *in forma pauperis* status. (Order 9/17/19, Doc. 6.) At the time of the original Complaint, Plaintiff was incarcerated, but has since been released from custody. (*See* Mot. Withdraw, Doc. 157.)

After answers were filed, the Court issued an original Scheduling Order (Doc. 21.) Discovery and motions practice began and eventually counsel entered an appearance for Plaintiff. On February 15, 2022, the Court granted the motion of Plaintiff's counsel to withdraw. (Order 2/15/22, Doc. 160.) That Order provided: "Any motion to amend the schedule based upon the withdrawal of Plaintiff's counsel must be filed on or before February 28, 2022." (*Id.* at 3.) Plaintiff did not seek any such amendment to the schedule.

The Court's recent Scheduling Order, granted on motion by Defendants, set a deadline for the parties to confer on settlement:

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> On or before **April 29, 2022** the parties must confer in person or by telephone in good faith efforts to settle this case. Counsel for Defendants are responsible for scheduling and initiating such conference."

(Order 3/4/22, Doc. at 2 (emphasis in original).)

On May 13, 2022 Defendants filed a Notice (Doc. 167) advising that their efforts to schedule a settlement conference with Plaintiff have been unanswered and that Plaintiff failed to appear at the time for which his deposition had been noticed on May 13, 2022, when Defendants proposed to conduct the settlement conference. (The undersigned does not address herein any separate sanctions based on Plaintiff's non-appearance for the deposition, leaving that matter to the procedures available to Defendants under Fed. R. Civ. P. 37.)

On May 16, 2022, the Court issued an Order to Show Cause (Doc. 168) giving Plaintiff through May 26, 2022 to file a response showing cause why sanctions should not be imposed for failure to comply with the Scheduling Orders by participating in the settlement discussions, and why this case should not be dismissed for failure to prosecute. Plaintiff has not responded.

Plaintiff has taken no apparent action since the withdrawal of counsel to prosecute this case. He has filed no motions, no notices of service regarding discovery, or other papers. He has not only failed to participate in the settlement discussions process and to respond to the resulting OSC, but he has also failed to appear for his deposition.

B. APPLICABLE LAW

Federal Rule of Civil Procedure 16(f) provides:

> **(1) In General.** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
>
> (A) fails to appear at a scheduling or other pretrial conference;
>
> (B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or
>
> (C) fails to obey a scheduling or other pretrial order.
>
> **(2) Imposing Fees and Costs.** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of

expenses unjust.

Here, Plaintiff has failed to obey the Court's scheduling order regarding settlement discussions.

The referenced sanctions include:

> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part;
> (vi) rendering a default judgment against the disobedient party; or
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). Rule 37(b)(2)(A)(v) permits as a sanction "dismissing the action or proceeding in whole or in part." Such a sanction, if justified, is appropriate for failure to participate in pretrial planning as ordered. *See Nascimento v. Dummer,* 508 F.3d 905, 909 (9th Cir. 2007). The Ninth Circuit has adopted a multi-factor analysis for applying such a sanction:

> We have constructed a five-part test, with three subparts to the fifth part, to determine whether a case-dispositive sanction under Rule 37(b)(2) is just: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." The sub-parts of the fifth factor are whether the court has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of case-dispositive sanctions. This "test" is not mechanical. It provides the district court with a way to think about what to do, not a set of conditions precedent for sanctions or a script that the district court must follow.

Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007). "The first two of these factors favor the imposition of sanctions in most cases, while the fourth factor cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions." *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).

Failure to Prosecute - Moreover, Plaintiff has the general duty to prosecute this case. *Fidelity Philadelphia Trust Co. v. Pioche Mines Consolidated, Inc.,* 587 F.2d 27, 29

(9th Cir. 1978). *See also* Fed. R. Civ. P. 41(b) (dismissal for failure to prosecute); *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962) (authority of a court to dismiss sua sponte under Rule 41(b) for lack of prosecution); and *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-1261 (9th Cir. 1992) (a district court may dismiss an action for failure to comply with any order of the Court).

By failing to participate in planning for and conducting the settlement discussions, and failing to respond to the Order to Show Cause, Plaintiff is failing to prosecute this action. There has been no other action by Plaintiff since the withdrawal of counsel to suggest that he has not abandoned the case.

In determining whether Plaintiff's failure to prosecute warrants dismissal of the case, the Court must weigh the same five factors relevant to a dismissal under Rule 37(b)(2)(A)(v), *i.e.*: "(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 the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Carey*, 856 F.2d at 1440 (*quoting Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). "The first two of these factors favor the imposition of sanctions in most cases, while the fourth factor cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions." *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).

Dismissal is Appropriate Sanction - Here, the first (**expeditiousness**), second (**management**), and third (**prejudice**) factors favor dismissal of this case. Plaintiff's failure to participate in the settlement discussions process and failure to respond to the Court's Order to Show Cause all indicate that Plaintiff is content to let the case languish and/or be dismissed. The same things prevent this Court from effectively managing its docket. Without Plaintiff's participation, Defendants cannot explore possibilities for settlement or other alternative dispute resolution methods.

The fourth factor (**merits decision**), as always, weighs against dismissal.

The fifth factor (**alternatives**) requires the Court to consider whether a less drastic

alternative is available, attempted, and has the party was warned. Plaintiff was warned in the original Scheduling Order (Order 12/10/19, Doc. 21 at 8, ¶ 4.8) and the Order to Show Cause about the risk of dismissal for failure to comply with scheduling orders, and sought Plaintiff's explanation to permit an attempt to address matters necessary to moving the case forward. Plaintiff's *in forma pauperis* status and unwillingness to even respond to the Court, indicate that meaningful sanctions less drastic than dismissal are not available. For example, monetary sanctions will likely be unenforceable, partial limitations in evidence or claims would be arbitrary and would likely result in evisceration of the claims.

The undersigned concludes that only one less drastic sanction is realistically available. In the instant case, and in the absence of a showing that Plaintiff's actions are the result of an intent to obtain unfair advantage (as opposed to simply abandoning the case) the undersigned finds that a dismissal with prejudice would be unnecessarily harsh. This action should therefore be dismissed without prejudice.

C. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment.

However, pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

D. RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED:

(A) The reference of this case to the magistrate judge be **WITHDRAWN**.

(B) Pursuant to Rules 16(f) and 41(b) of the Federal Rules of Civil Procedure this action be **DISMISSED WITHOUT PREJUDICE**.

(C) The Clerk of the Court be directed to enter judgment accordingly.

Dated: May 31, 2022

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James F. Metcalf
United States Magistrate Judge