

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 21-1400 PA (JCx)	Date	January 21, 2022
Title	David Worden v. Krista Hemming, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE
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Kamilla Sali-Suleyman

Not Reported

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: IN CHAMBERS — COURT ORDER

On July 13, 2021, the Court issued an Order requiring plaintiff David Worden (“Plaintiff”) to file his 1st Amended Complaint by no later than July 28, 2021, and directing Plaintiff, who is appearing pro se, to properly serve defendants with the Summons and 1st Amended Complaint and to filed with the Court Proofs of Service by no later than August 16, 2021. Although Plaintiff did timely file the 1st Amended Complaint, he has not filed Proofs of Service indicating that he has served defendants with the Summons and 1st Amended Complaint within the deadline established by the Court.

As a result of Plaintiff’s failure to file Proofs of Service as required by the Court’s July 13, 2021 Order, the Court, on September 16, 2021, ordered Plaintiff to show cause in writing by no later than October 4, 2021, why this action should not be dismissed for lack of prosecution, failure to comply with the Court’s July 13, 2021 Order, and for failure to timely serve defendants as required by Federal Rule of Civil Procedure 4(m). The Court warned Plaintiff in its September 16, 2021 Order that failure to timely or adequately respond to the Order to Show Cause may result in the dismissal of this action without further warning.

Under Federal Rule of Civil Procedure 4(m), service of process on a defendant is due within 90 days of the filing of the complaint. Here, Plaintiff filed this action on February 12, 2021, and the 1st Amended Complaint on July 28, 2021. Whether calculated from the filing date of the initial Complaint, the 1st Amended Complaint, or the date of the Court’s July 13, 2021 and September 16, 2021 Orders, Rule 4(m)’s 90-day period has expired and Plaintiff has not filed a proof of service or requested additional time to do so despite the Court’s repeated provision of additional time for Plaintiff to do so. Even after receiving multiple orders to show cause, Plaintiff has still not filed a proof of service concerning the 1st Amended Complaint. Rule 4(m) provides:

If a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff

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– must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m).

Plaintiff has not responded to the Court’s September 16, 2021 Order to Show Cause and therefore has not established any reason for his failure to comply with Rule 4(m). The Court therefore dismisses the 1st Amended Complaint under Rule 4(m) without prejudice as a result of Plaintiff’s failure to timely serve defendants or establish good cause for that failure.

Grounds also exist to dismiss Plaintiff’s action for failure to diligently prosecute. A court may dismiss with prejudice an action or claim sua sponte if “the plaintiff fails to prosecute or to comply with the [Federal Rules of Civil Procedure] or a court order.” Fed. R. Civ. P. 41(b); see Link v. Wabash R.R. Co., 370 U.S. 626, 629–30, 82 S. Ct. 1386, 1388, 8 L. Ed. 2d 734 (1962) (dismissal for failure to prosecute); Yourish v. Cal. Amplifier, 191 F.3d 983, 987–88 (9th Cir. 1999) (dismissal for failure to comply with court order). This inherent power supports the orderly and expeditious disposition of cases. See Link, 370 U.S. at 629–30, 82 S. Ct. 1386, 1388–89, 8 L. Ed. 2d 734; Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992); Yourish, 191 F.3d at 987–88.

In Henderson v. Duncan, the Ninth Circuit set forth five factors for a district court to consider before resorting to the penalty of dismissal: “(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.” 779 F.2d 1421, 1423 (9th Cir. 1986). Dismissal is appropriate “where at least four factors support dismissal, or where at least three factors ‘strongly’ support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (internal citations omitted) (citing Ferdik, 963 F.2d at 1263). Cases involving sua sponte dismissal merit special focus on the fifth Henderson factor. Id.

Here, in assessing the first Henderson factor, the public’s interest in expeditious resolution of litigation will be satisfied by dismissal. See Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (“The public’s interest in expeditious resolution of litigation always favors dismissal.” (quoting Yourish, 191 F.3d at 990)). Relatedly, with respect to the second factor, the Court’s need to manage its docket will be served by dismissing Lozano. See id. (“It is

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incumbent upon the Court to manage its docket without being subject to routine noncompliance of litigants.”).

The third Henderson factor at least marginally favors dismissal. While “pendency of a lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal,” see Pagtalunan, 291 F.3d at 642, unreasonable delay creates a presumption of prejudice, see In re Eisen, 31 F.3d 1447, 1452 (9th Cir. 1994); Moore v. Teflon Commc’ns Corp., 589 F.2d 959, 967–68 (9th Cir. 1978). Here, as discussed above, Plaintiff has not timely served defendants. Nor has Plaintiff adequately explained Plaintiff’s failure to do so. See Anderson v. Air W., Inc., 542 F.2d 522, 525 (9th Cir. 1976) (“Delay in serving a complaint is a particularly serious failure to prosecute because it affects all the defendant’s preparations.”).

The fourth and fifth Henderson factors also favor dismissal of the action. By requiring Plaintiff to explain why this action should not be dismissed for lack of prosecution, and allowing Plaintiff to satisfy the Order to Show Cause simply by filing a proof of service, Plaintiff was on notice that the failure to adequately respond to the Order to Show Cause could result in the dismissal of the action. Despite this notice, Plaintiff has failed to serve defendants with the 1st Amended Complaint, failed to respond to the Court’s September 16, 2021 Order, or to otherwise prosecute his claim with diligence. Additionally, the Court is adopting the “less-drastic” sanction of dismissal of the un-served defendant without prejudice. See McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996); see also Henderson, 779 F.2d at 1424 (“The district court need not exhaust every sanction short of dismissal before finally dismissing a case, but must explore possible and meaningful alternatives.”). Thus, the Henderson factors weigh in favor of dismissing this action.

The Court finds that Plaintiff has abandoned his claims by failing to file the required Proofs of Service or respond to the Court’s orders. The Court dismisses this action without prejudice for lack of prosecution and for failure to comply with a Court order. See Fed. R. Civ. P. 41(b); see also Yourish, 191 F.3d at 986-88; Ferdik, 963 F.2d at 1260. The Court will issue a Judgment consistent with this order. The Motions to Dismiss (Docket Nos. 25, 26, & 28) are denied as moot.

IT IS SO ORDERED.