

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHRISTOPHER YOUNG,

Plaintiff-Appellant,

v.

MICHAEL M. KRAUS, Owner of Tree
Works Inc., sued individually and in his
official capacity for the Tree Works, Inc.,
and in his capacity as a person; et al.,

Defendants-Appellees.

No. 18-15813

D.C. No.
1:15-cv-00383-LEK-KSC
District of Hawaii,
Honolulu

ORDER

Before: O'SCANNLAIN, BERZON, and IKUTA, Circuit Judges.

Upon a review of the record and the response to the court's July 9, 2018 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 3), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

All other pending motions are denied as moot.

DISMISSED.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

CHRISTOPHER YOUNG

Plaintiff,

V.

MICHAEL M. KRAUS, OWNER OF
TREE WORKS INC., COUNTY OF
HAWAII, POLICE DEPARTMENT,
PATRICK T. KIHARA AS A
POLICE OFFICER IN THE
COUNTY OF HAWAII, STATE OF
HAWAII, JOHN DOES 1 -10, JANE
DOES 1-10, DOE CORPORATIONS
1-10, DOE PARTNERSHIPS 1-10,
AND DOE GOVERNMENT
ENTITIES 1-10,

Defendants.

JUDGMENT IN A CIVIL CASE

Case: CIV NO. 15-00383 LEK-KSC

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

April 9, 2018

At 3 o'clock and 15 min p.m.
SUE BEITIA, CLERK

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Final Judgment is entered in favor of Defendant Michael M. Kraus, Owner Of Tree Works, Inc. against Plaintiff Christopher Young pursuant to the "Findings And Recommendation To Grant Defendants' Motion For Sanctions Against Plaintiff", ECF NO. [152], supplemented by the Entering Order, ECF NO. [154], the "Order Adopting Magistrate Judge's Findings And Recommendation", ECF NO. [155] and the "Order Denying Plaintiff's Motion For Reconsideration", ECF NO. [158].

IT IS FURTHER ORDERED that as to Defendant Michael M. Kraus,

Owner Of Tree Works, Inc. is awarded \$826.50 in Attorneys' Fees.

CHRISTOPHER YOUNG VS. MICHAEL M. KRAUS, ETC., ET AL; CIVIL 15-00383 LEK-KSC;
JUDGMENT IN A CIVIL CASE

April 9, 2018

Date

SUE BEITIA

Clerk

/s/ Sue Beitia by EPS

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CHRISTOPHER YOUNG,)	CIVIL 15-00383 LEK-KSC
)	
Plaintiff,)	
)	
vs.)	
)	
MICHAEL M. KRAUS, Owner of)	
Tree Works Inc., COUNTY OF)	
HAWAII, POLICE DEPARTMENT,)	
PATRICK T. KIHARA as a Police)	
Officer in the County of)	
Hawaii, State of Hawaii, JOHN)	
DOES 1-10, JANE DOES 1-10,)	
DOE CORPORATIONS 1-10, DOE)	
PARTNERSHIPS 1-10, AND DOE)	
GOVERNMENT ENTITIES 1-10,)	
)	
Defendants.)	
)	

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On January 22, 2018, the magistrate judge filed his Findings and Recommendation to Grant Defendants' Motion for Sanctions Against Plaintiff ("1/22/18 F&R"). [Dkt. no. 152.] On January 24, 2018, the magistrate judge filed an entering order as a supplement to the 1/22/18 F&R ("1/24/18 F&R Supplement"). [Dkt. no. 154.] On February 16, 2018, this Court filed an order adopting the 1/22/18 F&R, as modified by the 1/24/18 F&R Supplement ("2/16/18 Order"). [Dkt. no. 155.]

On March 9, 2018 pro se Plaintiff Christopher Young ("Plaintiff") filed a document titled

Verification of Plaintiff's Objection to Judge Kevin S.C. Chang's Findings and Recommendation to

Grant Defendants' Motion for Sanctions and Dismissal Against Plaintiff [Dkt. No. 152] on 01/22/18 and Judge Leslie E. Kobayashi's Order Adopting Magistrate Judge's Findings and Recommendation [Dkt. No. 155] on 2/16/18 for Failure to Address Proof of Evidence in the Record 1-155.

[Dkt. no. 156.] Plaintiff's filing has been construed as a motion for reconsideration of the 2/16/18 Order ("Motion for Reconsideration"). [EO: Court Order Regarding Pltff.'s "Objection" Filed on March 9, 2017 [sic], filed 3/12/18 (dkt. no. 157).] The Court has considered the Motion for Reconsideration as non-hearing matter pursuant to Rule LR7.2(e) of the Local Rules of Practice of the United States District Court for the District of Hawai'i. Plaintiff's Motion for Reconsideration is hereby denied for the reasons set forth below.

BACKGROUND

The parties and this Court are familiar with the factual and procedural background of this case, and only the background relevant to the Motion for Reconsideration will be repeated here.

At the time of the 1/22/18 F&R, Defendants Michael M. Kraus and Tree Works, Inc. ("the Tree Works Defendants") were the only remaining defendants in this case. See Order Denying the Portion of Pltff.'s Motion Seeking Reconsideration of this Court's January 27, 2017 Order and Denying Without Prejudice the Portion of the Motion Attempting to

Appeal the Order or Rulings Issued by the Magistrate Judge, filed 2/17/17 (dkt. no. 111) ("2/17/17 Reconsideration Order"), at 9 (terminating Defendants the County of Hawai'i, the County of Hawai'i Police Department, and Patrick T. Kihara as parties).¹

The 1/22/18 F&R recommended that this Court grant the Tree Works Defendants' Motion for Sanctions Against Plaintiff ("Motion for Sanctions"), [filed 12/5/17 (dkt. no. 142)]. The Tree Works Defendants sought dismissal of Plaintiff's claims against them on the ground that Plaintiff failed to comply with orders filed on June 23, 2017, October 12, 2017, and November 7, 2017. [Motion for Sanctions at 2; Mem. in Supp. of Motion for Sanctions at 7.] Plaintiff did not file a memorandum in opposition to the Motion for Sanctions, but presented arguments at the January 22, 2018 hearing on the Motion for Sanctions. [Minutes, filed 1/22/18 (dkt. no. 151).]

In the 1/22/18 F&R, the magistrate judge found Plaintiff's failure to comply with multiple court orders "resulted in additional motions practice and . . . interfer[ed] with the orderly progression of this action." [1/22/18 F&R at 7.] In addition, Plaintiff's "abusive and unfounded use of the appeals process . . . impede[d] the proceedings." [Id.] The burdensome delays caused by Plaintiff's tactics "threaten[ed] to

¹ The 2/17/17 Reconsideration Order is also available at 2017 WL 659393.

interfere with the rightful decision of the case," and further delays "would be unduly prejudicial" to the Tree Works Defendants. [Id. at 8.] The magistrate judge also found prior attempts to discourage Plaintiff's tactics through sanctions less drastic than dismissal were unsuccessful. The magistrate judge therefore recommended dismissal of Plaintiff's claims against the Tree Works Defendants and an award of attorney's fees incurred in connection with the Motion for Sanctions. [Id. at 9-10.] The 1/24/18 F&R Supplement recommended the Tree Works Defendants be awarded \$826.50 in attorney's fees. [Dkt. no. 154.] As previously noted, the 2/16/18 Order adopted the 1/22/18 F&R, as modified by the 1/24/18 F&R Supplement.

In the instant Motion for Reconsideration, Plaintiff argues reconsideration of the 2/16/18 Order is warranted because: this Court, the magistrate judge, the defendants, and defense counsel are corrupt; the 1/22/18 F&R did not address all of the relevant evidence in this case; this case was improperly removed from state court; the Ninth Circuit is also corrupt, and this case has been improperly allowed to proceed while Plaintiff's Ninth Circuit appeals were pending; Kraus's liability for the injuries Plaintiff suffered in the motor vehicle accident at issue in this case has never been addressed; Kihara's liability for failing to issue a citation regarding the accident has not been addressed; and this case presents many issues regarding the

violation of Hawai'i insurance laws, which should be addressed in the state courts.

STANDARD

The 2/16/18 Order was a case dispositive order. In light of Plaintiff's pro se status, his Motion for Reconsideration is liberally construed as a Fed. R. Civ. P. 59(e) motion. See, e.g., Pregana v. CitiMortgage, Inc., Civil No. 14-00226 DKW-KSC, 2015 WL 1966671, at *2 (D. Hawai'i Apr. 30, 2015) ("The Court liberally construes the [plaintiffs'] filings because they are proceeding pro se." (citing Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987))).

Rule 59(e) states: "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Plaintiffs may seek reconsideration pursuant to Rule 59(e), even though final judgment has not been entered in this case. See Grandinetti v. Sells, CIV. NO. 16-00517 DKW/RLP, 2016 WL 6634868, at *1 (D. Hawai'i Nov. 8, 2016) ("When a ruling has resulted in a final judgment or order . . . a motion for reconsideration may be construed as either a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) or a motion for relief from judgment under Rule 60(b)." (citing Sch. Dist. No. 1J Multnomah Cty. v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993))).

Rule 59(e) offers "an extraordinary remedy, to be used sparingly in the interests of finality and

conservation of judicial resources.” Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotation marks and citation omitted). In the Ninth Circuit, a successful motion for reconsideration must accomplish two goals. First, “a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision.” Na Mamo O `Aha `Ino v. Galiher, 60 F. Supp. 2d 1058, 1059 (D. Haw. 1999). Second, it “must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.” Id.

Courts have established three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011); Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1178-79 (9th Cir. 1998). The District of Hawaii has implemented these standards in Local Rule 60.1.

United States ex rel. Atlas Copco Compressors LLC v. RWT LLC, Civ. No. 16-00215 ACK-KJM, 2017 WL 2986586, at *1 (D. Hawai‘i July 13, 2017).

DISCUSSION

To the extent the Motion for Reconsider alleges this case was wrongfully removed and should be decided in state court, Plaintiff’s arguments have been considered and rejected in multiple prior orders. See, e.g., Order Denying “Verification of Plaintiff’s Objection to Judges Failing to Address the Rule 4 Violations of the Defendants County’s Counsel in the Removal on 9/28/2015,” filed 4/19/16 (dkt. no. 46), at 5-7; Order Denying Pltff.’s Appeal of the Magistrate Judge’s Order Granting Defs.’

Motion for Sanctions Against Pltff., filed 10/12/17 (dkt. no. 134), at 5-6; Order Denying Pltff.'s Motion for Reconsideration, filed 11/1/17 (dkt. no. 11/7/17), at 4-5.² This Court will not revisit those arguments here. Moreover, neither the 1/22/18 F&R, the 1/24/18 F&R Supplement, nor the 2/16/18 Order addressed issues related to removal and remand. Plaintiff's arguments related to removal and remand cannot be grounds for reconsideration of the 2/16/18 Order.

Similarly, the 1/22/18 F&R, the 1/24/18 F&R Supplement, and the 2/16/18 Order did not address Plaintiff's claims against Kihara, and this Court has already disposed of those claims on the merits. [Order Granting in Part and Denying in Part the County Defs.' Motion to Dismiss Christopher Young Amendment (Sic) of Complaint Filed March 4, 2016 [Document 35], filed 1/27/17 (dkt. no. 106) ("1/27/17 Dismissal Order"), at 9-15;³ 2/17/17 Reconsideration Order at 3-7.] Plaintiff's arguments related to his claims against Kihara cannot be grounds for reconsideration of the 2/16/18 Order.

Plaintiff is correct that his claims against Kraus have not been addressed on the merits, and the 2/16/18 Order does not

² The 4/19/16 order, the 10/12/17 order, and the 11/7/17 order are also available at 2016 WL 1587217, 2017 WL 4560129, and 2017 WL 5163237, respectively.

³ The 1/27/17 Dismissal Order is also available at 2017 WL 390268. The 2/17/17 Reconsideration Order denied Plaintiff's motion for reconsideration of the 1/27/17 Order.

address all of the evidence in this case. However, these arguments do not constitute grounds for reconsideration of the 2/16/18 Order because Plaintiff's claims against Kraus have been dismissed, not on the merits, but as a sanction for Plaintiff's repeated failure to comply with court orders. The fact that Plaintiff's claims against Kraus have not been addressed on the merits is not grounds for reconsideration of the 2/16/18 Order.

Plaintiff also argues this case should not have been allowed to proceed while his appeals were pending before the Ninth Circuit. First, Plaintiff never moved for a stay pending any of his appeal. Second, even if he had made such motions, they would have been denied because all of the appeals were dismissed for lack of jurisdiction; none of Plaintiff's appeals were considered on the merits. See Ninth Circuit Order, filed 6/10/16 (dkt. no. 62); Ninth Circuit Order, filed 8/29/16 (dkt. no. 74); Ninth Circuit Order, filed 4/21/17 (dkt. no. 118); Ninth Circuit Order, filed 12/19/17 (dkt. no. 146). To the extent Plaintiff seeks reconsideration of the 2/16/18 Order on the ground that he was not required to comply with the court orders discussed in the 1/22/18 F&R during the pendency of his Ninth Circuit appeals, Plaintiff's argument is rejected.

Finally, Plaintiff's corruption argument fails. To the extent he alleges his failure to comply with court orders should not be sanctioned because of misconduct by the Tree Works

Defendants and their counsel, Plaintiff has failed to identify any specific misconduct, violation of the applicable rules, or violation of court orders. Further, Plaintiff never sought and obtained sanctions against the Tree Works Defendants. Plaintiff has also failed to identify any specific judicial misconduct. To the extent Plaintiff believed there was any judicial impropriety, his remedy was to file a motion to recuse, which he did not do. Plaintiff's unsubstantiated beliefs that the Tree Works Defendants and their counsel were corrupt and that there was judicial misconduct in this case did not excuse him from complying with court orders and do not constitute grounds for reconsideration of the 2/16/18 Order. The alleged corruption is nothing more than a suspicion based on Plaintiff's disagreement with the Tree Works Defendants' position and with the judicial rulings in this case. "Mere disagreement with a previous order is an insufficient basis for reconsideration." Davis v. Abercrombie, Civil No. 11-00144 LEK-BMK, 2014 WL 2468348, at *3 n.4 (D. Hawai'i June 2, 2014) (citations and internal quotation marks omitted).

Plaintiff has therefore failed to present any ground that warrants reconsideration of the 2/16/18 Order.

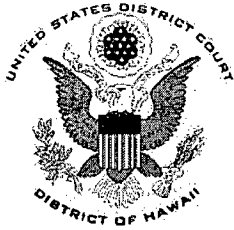
CONCLUSION

On the basis of the foregoing, Plaintiff's March 9, 2018 "Objection," which has been construed as a motion for

reconsideration of this Court's February 16, 2018 order, is
HEREBY DENIED. The Clerk's Office is DIRECTED to enter final
judgment and close the case immediately.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, April 9, 2018.



/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

CHRISTOPHER YOUNG VS. MICHAEL M. KRAUSE, ETC., ET AL; CIVIL 15-
00383 LEK-KSC; ORDER DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHRISTOPHER YOUNG,)	CV 15-00383 LEK-KSC
)	
Plaintiff,)	
)	
vs.)	
)	
MICHAEL M. KRAUS, Tree Works)	
Inc., COUNTY OF HAWAII,)	
POLICE DEPARTMENT,)	
PATRICK T. KIHAYA as a Police)	
Officer In The County Of Hawaii,)	
State of Hawaii, JOHN DOES 1-10;)	
JANE DOES 1-10; DOE)	
CORPORATIONS 1-10; DOE)	
PARTNERSHIPS; and DOE)	
GOVERNMENT ENTITIES 1-10;)	
)	
Defendants.)	
_____)	

ORDER ADOPTING MAGISTRATE JUDGE'S
FINDINGS AND RECOMMENDATION

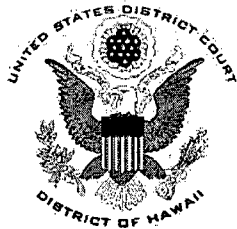
Findings and Recommendation having been filed and served on all parties on January 22, 2018, and amended by entering order filed and served on January 24, 2018, and no objections having been filed by any party,

IT IS HEREBY ORDERED AND ADJUDGED that, pursuant to Title 28, United States Code, Section 636(b)(1)(C) and Local Rule 74.2, the Findings and Recommendation to Grant Defendants' Motion for Sanctions Against Plaintiff, ECF NO. [152] – as supplemented by the January 24, 2018 entering order, ECF

NO. [154] – are adopted as the opinion and order of this Court.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, February 16, 2018.



/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

CHRISTOPHER YOUNG VS. MICHAEL M. KRAUSE, ET AL; CV 15-00383 LEK-KSC;
ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHRISTOPHER YOUNG,)	CIVIL NO. 15-00383 LEK-KSC
)	
Plaintiff,)	FINDINGS AND RECOMMENDATION TO
)	GRANT DEFENDANTS' MOTION FOR
vs.)	SANCTIONS AGAINST PLAINTIFF
)	
MICHAEL M. KRAUS, ET AL.,)	
)	
Defendants.)	
)	
)	

FINDINGS AND RECOMMENDATION TO GRANT DEFENDANTS'
MOTION FOR SANCTIONS AGAINST PLAINTIFF

Before the Court is Defendants Michael Kraus and Tree Works, Inc.'s (collectively "Defendants") Motion for Sanctions Against Plaintiff ("Motion"), filed December 5, 2017. Plaintiff Christopher Young ("Plaintiff") did not file a response.

This matter came on for hearing on January 22, 2018. Plaintiff appeared pro se by phone and Ronald Shigekane, Esq., appeared on behalf of Defendants. After careful consideration of Defendants' submissions, the applicable law, and the arguments of Plaintiff and counsel, the Court HEREBY RECOMMENDS that the Motion be GRANTED for the reasons articulated below.

BACKGROUND

On October 10, 2016, Defendants filed a motion to compel answers to interrogatories. Doc. No. 90. The Court orally granted the motion at the December 20, 2016 hearing and ordered Plaintiff to submit responses to interrogatories by

February 6, 2017. Doc. No. 104. A written order issued on January 12, 2017 ("Discovery Order"), directing Plaintiff to provide complete and detailed responses to Defendants' interrogatories by February 6, 2017. Doc. No. 105. Plaintiff attempted to appeal the Discovery Order, but his request was denied without prejudice because it did not comply with Local Rule 74.1 and because it was untimely. See Order Denying the Portion of Plaintiff's Motion Seeking Reconsideration of This Court's January 27, 2017 Order and Denying Without Prejudice the Portion of the Motion Attempting to Appeal the Order or Rulings Issued by the Magistrate Judge ("Reconsideration Order"), Doc. No. 111 at 8. U.S. District Judge Leslie Kobayashi afforded Plaintiff an opportunity to file an amended appeal of the Order, but imposed a deadline of March 3, 2017 to do so, and identified issues to be addressed in any amended appeal. Id. at 8-9. Plaintiff did not file an amended appeal of the Order.

On March 13, 2017, Plaintiff filed an appeal of the Reconsideration Order. Doc. No. 114. The Ninth Circuit dismissed the appeal for lack of jurisdiction on April 21, 2017. Doc. No. 118.

On May 1, 2017, Defendants filed a motion for sanctions against Plaintiff. Doc. No. 119. The motion was heard on June 23, 2017. The same day, this Court issued an Order Granting Defendants' Motion for Sanctions Against Plaintiff ("Sanction

Order"). Doc. No. 125. This Court declined to recommend dismissal at that time, but again ordered Plaintiff to provide complete and detailed responses to Defendants' interrogatories by July 7, 2017, and awarded Defendants the fees and costs incurred in connection with the motion. Id. at 5. The Court cautioned Plaintiff that his failure to timely produce responses would result in the imposition of additional sanctions, including the possibility of dismissal. Id. at 6. On June 29, 2017, the Court issued an Entering Order ("EO") concluding that defense counsel reasonably and necessarily incurred \$739.50 in fees. Doc. No. 129.

On July 10, 2017, Plaintiff filed a document entitled "Verification of Plaintiff's Objection to the 6/23/17 Order Granting Defendants' Motion for Sanctions Against Plaintiff." Doc. No. 130. On October 12, 2017, Judge Kobayashi issued an Order Denying Plaintiff's Appeal of the Magistrate Judge's Order Granting Defendants' Motion for Sanctions Against Plaintiff and the Magistrate Judge's Entering Order Determining the Amount of the Sanction ("10/12/17 Order"). Doc. No. 134. Plaintiff was ordered to provide complete and detailed responses to the interrogatories by November 9, 2017, and to remit payment of the \$739.50 sanction by November 16, 2017. Id. at 12.

On October 30, 2017, Plaintiff filed a document entitled "Verification Plaintiff's Objection to Judge's Order

10/12/17 Continue to Avoid this Court's Lack of Jurisdiction Based on Undisputed Violations in Removal 09/28/2015 Proof of Evidence in the Docket at [Dkt. Nos. 1-135]." Doc. No. 135. In an October 31, 2017 EO, Judge Kobayashi construed the filing as a motion for reconsideration of the 10/12/17 Order and denied the same. Doc. No. 136. The November 9 and 16, 2017 deadlines to produce responses to the interrogatories and to pay the \$739.50 sanction, respectively, remained in effect. Id. A formal order issued on November 7, 2017 ("11/7/17 Order"), again ordering Plaintiff to comply with the foregoing deadlines. Doc. No. 137.

On November 13, 2017, Plaintiff filed a document entitled "Verification Plaintiff's Reply and Objection to Judge Kobayashi's Order/Judgement [Dkt. No. 134] 10/12/2017, [Dkt. No. 136] 10/31/2017 and Judge Chang's Order [Dkt. No. 125] 06/23/2017." Doc. No. 139. Because Plaintiff signed and mailed this filing prior to receiving the 11/7/17 Order, Judge Kobayashi construed it as a supplemental memorandum in support of Plaintiff's motion for reconsideration. Doc. No. 141.

On November 14, 2017, Plaintiff appealed the 10/12/17 Order.¹ Doc. No. 140. On December 19, 2017, the Ninth Circuit dismissed Plaintiff's appeal for lack of jurisdiction. Doc. No. 146.

¹ Plaintiff failed to pay the requisite fee.

DISCUSSION

Defendants request that the Court impose terminating sanctions and award attorneys' fees incurred in connection with this Motion. Federal Rule of Civil Procedure ("FRCP")

37(b)(2)(A) states:

If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order² to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(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

² Courts can apply FRCP 37(b)(2) to enforce oral orders as well as minute orders. Yourish v. Cal. Amplifier, 191 F.3d 983, 987 (9th Cir. 1999) (discussing Henry v. Sneiders, 490 F.2d 315 (9th Cir. 1974)).

obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). Courts have wide discretion to impose appropriate sanctions under Rule 37, but the court's discretion to impose terminating sanctions is narrowed. Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004). This is because terminating sanctions, such as the dismissal of a plaintiff's action, are very severe. Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007). A court's use of sanctions must be tempered by due process. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980). Thus, the harshest sanctions are inappropriate if the failure to comply was due to a party's inability to comply or to circumstances beyond the party's control. Id. "Only 'willfulness, bad faith, and fault' justify terminating sanctions." Connecticut Gen. Life, 482 F.3d at 1096 (citation omitted).

The Ninth Circuit has constructed a five-part test to determine whether case-dispositive sanctions are warranted:

"(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.

Id. This test is not a mechanical one. Id. "The list of factors amounts to a way for a district judge to think about what to do, not a series of conditions precedent before the judge can do anything, and not a script for making what the district judge does appeal-proof." Id. (citation and quotations omitted).

Where, as here, the party to be sanctioned violated a Court Order, the first and second factors weigh in favor of, and the fourth cuts against, terminating sanctions. Computer Task Group, 364 F.3d at 1115.

A. Public's Interest in Expeditionary Resolution and Court's Need to Manage its Docket

"The public's interest in expeditious resolution of litigation always favors dismissal." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citation omitted). Moreover, "[i]t is incumbent upon the Court to manage its docket without being subject to routine noncompliance of litigants such as [Plaintiff]." Id. (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992)). Plaintiff's failure to comply with the Discovery Order, Sanction Order, and multiple orders issued by Judge Kobayashi, has resulted in additional motions practice and is interfering with the orderly progression of this action. So too is Plaintiff's abusive and unfounded use of the appeals process to impede the proceedings. The first two factors accordingly weigh in favor of terminating sanctions.

B. The Risk of Prejudice to Defendants

The Court next considers the prejudice to Defendants. "To prove prejudice, a defendant must establish that plaintiff's actions impaired defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the case." Id. (citing Malone v. United States Postal Serv., 833 F.2d 128, 131 (9th Cir. 1987)). Delay alone is not sufficient prejudice. Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990) (citing United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 604 (9th Cir. 1988)). Here, Plaintiff's violation of Court orders, submission of meritless filings, and repeated appeals to the Ninth Circuit, have forced Defendants to expend time and incur unnecessary expenses. Moreover, Plaintiff's dilatory conduct, including his refusal to engage in the discovery process, has and continues to impair Defendants' ability to proceed to trial. This in turn threatens to interfere with the rightful decision of the case. The continued burden to Defendants, caused by the delays, would be unduly prejudicial.

C. Public Policy Favoring Disposition of Cases on Their Merits

The Court acknowledges that the policy favoring disposition of cases on their merits weighs against dismissal. Pagtalunan, 291 F.3d at 643 (citing Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998)) ("Public policy favors

disposition of cases on the merits."). However, considering the totality of the circumstances and because all of the preceding factors favor the imposition of terminating sanctions, this factor is outweighed.

D. Availability of Less Drastic Sanctions

In the present case, the Court has imposed less drastic sanctions to no avail. Additional fee awards would be ineffective, as Plaintiff refuses to remit payment, notwithstanding multiple Court orders requiring him to do so. The imposition of other sanctions would be equally futile given Plaintiff's ongoing contumacy and willful, bad faith conduct. The Court has afforded Plaintiff many opportunities over the course of nearly one year to comply with its orders, which have been met with defiance. Even multiple threats of dismissal could not compel Plaintiff to obey Court orders. Accordingly, this factor supports terminating sanctions.

Upon application of the relevant factors, the Court finds that terminating sanctions are appropriate. As such, the Court recommends dismissal of this action.

Defendants additionally request attorneys' fees associated with this Motion. In lieu of, or in addition to, any of the sanctions listed in FRCP 37(b)(2)(A), "the court must order the disobedient party . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the

failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

Per the Court's foregoing discussion, and based on the record currently before the Court, Plaintiff's failure to produce complete and detailed responses to Defendants' interrogatories and timely remit the fee award, and his violation of multiple Court orders, were not substantially justified. Nor do circumstances exist that would make an award of expenses unjust. Attorneys' fees associated with this Motion are therefore appropriate. Defense counsel is to submit a declaration setting for the fees reasonably incurred in connection with this Motion. The Court will thereafter supplement this Findings and Recommendation to include the recommended fee award.


CONCLUSION

Based on the foregoing, the Court RECOMMENDS that Defendants' Motion for Sanctions Against Plaintiff, filed December 5, 2017, be GRANTED, and that this action be DISMISSED.

IT IS SO FOUND AND RECOMMENDED.

DATED: Honolulu, Hawaii, January 22, 2018.




Kevin S.C. Chang
United States Magistrate Judge

CIVIL NO. 15-00383 LEK-KSC; YOUNG V. KRAUS, et al.; FINDINGS AND RECOMMENDATION TO GRANT DEFENDANTS' MOTION FOR SANCTIONS AGAINST PLAINTIFF

**Additional material
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