UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WAYNE PHILLIP VANCE,

Plaintiff,

v.

9:18-cv-748 (BKS/ATB)

GLEN ENGSTROM, et al.,

Defendants.

Appearances:

Plaintiff pro se:
Wayne Phillip Vance
12-B-3682
Attica Correctional Facility
Box 149
Attica, NY 14011

For Defendants:
Letitia James
Attorney General of the State of New York
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The Capitol
Albany, NY 12224

Hon. Brenda K. Sannes, Chief United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Wayne Phillip Vance, currently an inmate at Attica Correctional Facility, brought this action under 42 U.S.C. § 1983 against the New York State Department of Corrections and Community Supervision ("DOCCS") and several of its employees. (Dkt. No. 1). On August 4, 2022, after Plaintiff refused to be transported from Attica to a facility nearer

Syracuse, New York for the trial scheduled to begin on August 1, 2022, the Court issued an Order to Show Cause directing Plaintiff to set forth "why this case should not be dismissed for failure to prosecute and/or failure to comply with court orders." (Dkt. No. 279, at 9). Plaintiff responded to the Court's order, (Dkt. No. 281), and has submitted a number of other letters to the Court, (*see* Dkt. Nos. 280, 283, 284, 285, 287, 288, 289, 290, 291, 292, 293, 295, 296, 297, 298, 300, 301, 302, 304, 305, 306, 307, 308, 311). Defendants responded to Plaintiff's submission, arguing that Plaintiff's "extensive history of disregard for Court orders, including his most recent failure to appear for trial, supports dismissal of his case." (Dkt. No. 282, at 2; *see also* Dkt. No. 277 (Defendants' request for dismissal with prejudice)). At the Court's direction, Defendants also submitted an evidentiary response to Plaintiff's claim that he was prevented from bringing his property. (Dkt. No. 294). For the following reasons, the Court grants Defendants' motion and dismisses this action under Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute and failure to comply with Court orders.

II. BACKGROUND

As the Court noted in its order to show cause, Plaintiff's "refusal to leave his facility for trial on July 28, 2022, follows a history of failing to follow court orders and disruptive conduct." (Dkt. No. 279, at 2). This history includes refusing to be deposed until after Defendants filed a motion to dismiss for failure to prosecute; failing to comply with the Court's orders, including an order directing him to provide a proffer of the testimony expected from his trial witnesses; refusing to follow the Court's orders to stop his argumentative and disruptive discourse during court telephone conferences; and repeatedly disparaging this Court and its authority. Plaintiff has been warned multiple times that failure to follow the Court's orders and any further "disruptive conduct" could lead to contempt sanctions, including the dismissal of his case. (*See, e.g.*, Dkt. No. 148 (warning on December 28, 2020); Dkt. No. 196 (warning on December 9, 2021); Text

Minute Entry dated 1/27/22; Text Minute Entry dated 7/26/22). The Court presumes familiarity for purposes of this decision with the history of this case, as set forth in the order to show cause, which is incorporated by reference. (Dkt. No. 279, at 2–8).

A. Plaintiff's Refusal to Be Transported for Trial

Trial on Plaintiff's two remaining excessive force claims was set to begin on August 1, 2022. DOCCS Directive 4919 governs "Transportation for Court Appearances." (Dkt. No. 294-3). Directive 4919 specifies that an inmate being transported for a court appearance "will be allowed to take only one court bag of personal property." (*Id.* at 3). The directive further specifies which items are "required" or "allowed" within the inmate's "one bag limit." (*Id.* at 4). The court bags "used for this purpose measure roughly 39"x23"." (Dkt. No. 294-2, ¶ 5). The inmate's property which is not transported for the court appearance "shall be packed and stored in accordance with Directive #4934, 'Inmate Property – Temporary Storage of Personal Belongings.'" (Dkt. No. 294-3, at 4; *see also* Dkt. No. 294-5 (Directive 4934 dated August 17, 2022)).[1] Directive 4919 requires the completion of a Form 4919C, which contains a provision memorializing an inmate's decision not to take legal papers. (Dkt. No. 294-3, at 3, 9). Directive 4919 states that "[i]f the inmate declines to take legal work, the draft/area sergeant will question the inmate and complete" the portion of the form stating the reasons why the inmate chose not to take legal papers. (*Id.*).

Defendants have submitted sworn declarations from Attica Correction Officer B. Christian and Sergeant T. Wilson providing the following information. (Dkt. Nos. 277, 294-1, 294-2). On July 28, 2022, CO Christian instructed Plaintiff to leave his cell so that he could be

[1] The Court does not rely on the version of Directive 4934 provided by Defendants, as its effective date post-dates the events at issue.

transported from Attica to a facility closer to Syracuse for trial. (Dkt. No. 277, ¶ 2; Dkt. No. 294-1, ¶¶ 2–3). CO Christian let the inmates who had upcoming travel out of their cells, after which Plaintiff "came to the front gate without any packed bags" and stated that he "was not leaving without his stuff." (Dkt. No. 294-1, ¶ 3). CO Christian was "advised that [Plaintiff] had refused to pack his bags the day before although he had received instruction to do so." (*Id.* ¶ 4). Plaintiff refused to "comply with the direction provided to him about preparing for the trip," and he refused to sign a form documenting his refusal to attend court. (*Id.* ¶ 6; *see also* Dkt. No. 276 (refusal to attend court form signed by CO Christian stating that Plaintiff refused to sign)). The next day, July 29, 2022, Plaintiff stopped Sergeant Wilson to "speak to [him] regarding an upcoming court trip." (Dkt. No. 294-2, ¶ 2). Plaintiff showed Sergeant Wilson "approximately 20–30 packages he had stacked on the rear shelf of his cell, each of which was approximately 6"x6"x8" in size." (*Id.* ¶ 3). Each package had a "hand-drawn evidence label upon it"; Sergeant Wilson noticed that one of the items was a "hot pot." (*Id.*).

In his letters to the Court Plaintiff has accused "the Defendants" of preventing him from coming to court. In a letter dated July 28, 2022, Plaintiff requested that the trial be rescheduled or adjourned "because the Defendants had used different tactics to prevent [him] from appearing in court for the scheduled trial proceedings." (Dkt. No. 280, at 1). According to Plaintiff, "A-Block area officers" at Attica "refused to provide [him] with enough draft bags to prevent [him] from packing [his] legal materials, exhibits and other personal property." (*Id.*). Plaintiff asserts that he was "able to show" the officers "the necessary legal papers" but that the officers "still went through with their ill-plans." (*Id.*; *see also* Dkt. No. 283, at 1 (similar letter dated August 1, 2022 in which Plaintiff again asserts that Defendants have used "different tactics" to prevent him from appearing at trial and that he "did not refuse to pack up or refuse to go to court")). In Plaintiff's

response to the Court's order to show cause, he similarly asserts that he is "under the care, custody and control of the Defendants who had used different tactics to prevent [him] from appearing in court" and that he "cannot be held[] accountable for their actions." (Dkt. No. 281, at 1). Plaintiff seeks a "judgement by default or necessity . . . for the relief demanded in [his] supplemental complaint" and argues that this case "must be assign[ed] to a new judge so that he or she will be able to carry out the special functions for the entering of a judgement by default or necessity" which is "long overdue." (*Id.*).

With his response, Plaintiff provides a list of over fifty separately numbered "exhibits" which he contends are "admissible evidence" that he was not permitted to pack. (Dkt. No. 281-1, at 1–2). While a few of these items may conceivably be related to the trial, (*see, e.g.*, *id.* at 2 ("Exhibit #113 a pro se litigation guidelines litigation packet")), the vast majority of the exhibits Plaintiff has listed have no discernible relevance to the two excessive force claims remaining for trial. To list just a few examples, Plaintiff contends he was prevented from packing up the following exhibits or legal material: Norelco clippers; his hot pot; "an electrical extension cord of the Plaintiff"; a Walkman; a fan; magazines from the library; "6 dupont registry magazines"; "catalogs of approved vendors"; various articles of clothing including "(3) pairs of boxers"; Plaintiff's "blood stained undershort"; personal mail; dentures; "incorrect, illegal or fraudulent legal materials"; the "illegitimate civil docket sheet for this case"; and various unidentified letters and photographs. (*Id.* at 1–2).

In a later submission, on September 6, 2022, Plaintiff attached an affidavit purportedly signed by seven inmate witnesses who witnessed Attica officials "use different tactics" to prevent Plaintiff from packing his legal materials, and a copy of an inmate grievance Plaintiff submitted regarding the issue. (Dkt. No. 288, at 9–12). That submission includes copies of letters

addressed to the "Inmates Records Staff or Attica Administrators," and dated in August, after the incident at issue here, requesting "1 or 2 regular size draft bags/personal property bag(s) to pack up and produce [Plaintiff's] legal materials, exhibits and other personal property." (*Id.* at 22–26).

B. Summary of Plaintiff's Most Recent Submissions

Since his refusal to be transported for trial, and after the Court issued its order to show cause, Plaintiff has submitted over twenty letters to the Court in which he continues to reject the Court's authority, disparage the Court's rulings, make requests in violation of the Court's order, and expound on issues irrelevant to the two excessive force claims remaining for trial.[2]

On September 6, 2022, the Court received a 31-page submission from Plaintiff again referencing his request for a judgment of "default or necessity"—a motion that the Court denied on December 16, 2021. (Dkt. No. 204). On September 15, 2022, the Court received a letter from Plaintiff containing his fourth motion seeking to recuse the undersigned and Magistrate Judge Andrew T. Baxter from this case. (Dkt. No. 292; *see* Dkt. Nos. 117, 203, 275 (denying Plaintiff's previous motions for recusal)). Plaintiff asserts that these recusals are necessary because the undersigned and Magistrate Judge Baxter "have been labeled as Defendants and [are] being sued for mishandling the case while conspiring with the other Defendants to encroach on" Plaintiff's rights. (*Id.* at 1). Plaintiff argues that the orders of the undersigned, Magistrate Judge Baxter, and Judge Mae A. D'Agostino are "invalid, void and unenforceable" and that these judges are "playing foul illegal games." (*Id.*). Plaintiff's letter also references his "illegally appointed standby trial counsel" and an "unlawful lengthy trial." (*Id.*). He again asserts that assignment of

[2] The Court has made it clear to Plaintiff that there are only two excessive force claims remaining for trial. (*See* Text Minute Entry dated 1/27/22 (telephone conference addressing the two remaining excessive force claims that will go to trial); Dkt. No. 252 (May 24, 2022 text order directing Plaintiff to submit a proffer of "the testimony Plaintiff expects to elicit from each witness that would be relevant to one of the remaining claims for trial: (1) the excessive force claim regarding the incident on 5/11/2016 and (2) the excessive force claim regarding the incident on 8/26/16")).

this matter to a new judge is warranted so that "judgement by default or necessity . . . for the relief demanded in [his] supplemental complaint" can be entered. (*Id.* at 2). Attached to this letter Plaintiff submits another copy of his "unresolved issues" letter and a copy of "The Plaintiff's Presentation Legal Packet for a Jury Trial." (Dkt. No. 292-1). Plaintiff's presentation is fifty-eight pages long and primarily consists of a recitation of his grievances regarding how this case has been handled and/or matters not related to the two excessive force claims remaining. (*See, e.g.*, *id.* at 7 (referencing his "illegal court appointed standby trial counsel" and the Court's "illegal or deceptive activities"), 8 (referencing an "unlawful trial" and asserting that the Court "does not have any authority at all to conduct this trial" and has issued "illegitimate orders"), 13 (complaining about the "deliberate sabotaging of [his] entire criminal case" and his "unlawful imprisonment"), 20 (asserting that the Court has put Plaintiff and his friends and relatives "through a painfully wicked or poisonous legal process to cause us to suffer"), 39 (arguing that the undersigned "engaged in illegal or deceptive activities by conducting a pretrial telephone conference without any legal authority or right for such action while labeled as a Defendant"), 46–47 (arguing that his trial brief and memorandum of law state the facts which entitle him to be "released from this unlawful imprisonment for" his underlying criminal conviction), 48 (referencing "Exhibits A–T" which are relevant to Plaintiff's "criminal case"), 55 (referencing the "illegitimate civil docket sheet"), 58 (referencing the July 26, 2022 final pretrial conference and stating that the undersigned "developed the telephone conference record with a lot of mumbo jumbo nonsense in her unlawful attempt to act like she was obeying the law")). Plaintiff's presentation continually references his "supplemental complaint" and a judgment of "default or necessity." (*E.g.*, *id.* at 7, 8–9, 15, 18, 29, 35–36, 56, 62 ("You guys as the trial jury are required to enter a special verdict or judgement by default or necessity against the Defendants for the

relief demanded in my supplemental complaint and motion papers for a summary judgement.")). It appears that Plaintiff intends this presentation as an opening statement and intends it to include a reading into the record of the filings in this case, many of which he denominates as "illegitimate." (*See id.* at 20–63; *see also* Dkt. No. 298, at 1, 3–4 (containing an "updated copy of pages 47 and 48" of Plaintiff's legal presentation)).

Plaintiff has continued to file letters that have nothing to do with the two excessive force claims remaining for trial. (*See* Dkt. Nos. 295, 295-1; *see also* Dkt. No. 296 (duplicate of Dkt. No. 295) (letters blaming Defendants for the NAACP's declining to represent Plaintiff in this matter and regarding "wrongful convictions and other problems"); Dkt. No. 298 (containing copy of letter to the NAACP informing it of its "obligation to work with [Plaintiff]"); Dkt. Nos. 291, 293 (copies of a June 16, 2022 letter entitled "unresolved issues")).

Plaintiff has continued to file requests that the Court acknowledge receipt of or respond to his various submissions, in violation of the Court's directive that he stop filing such requests. (*See* Text Minute Entry dated 7/26/22 (directing Plaintiff not to file any further "requests for acknowledgement"); Dkt. Nos. 284, 289). Plaintiff filed other irrelevant submissions. (*See, e.g.*, Dkt. Nos. 287 (submission consisting of a book page discussing the adoption of the Declaration of Independence), 301 (letter regarding "basketball")).

On September 28, 2022, the Clerk's Office of this Court received a large box from Plaintiff which contained many items marked as exhibits. (*See* Dkt. Nos. 297, 299). The contents of the box included, among other items, "one bag of bloody undershorts," state-issued prison clothes, a hot pot, a fan, an extension cord, clippers, "three books in terrible condition," dentures, a set of bed linens, and family photos. (Dkt. No. 299). In a letter accompanying these contents, Plaintiff stated that Defendants have been "conspiring" to prevent him from packing exhibits and

legal paperwork for trial and that he is "being forced to spend money on legal expenses and postage fee to mail out the [box contents] through the package room" at Attica. (Dkt. No. 297, at 1). Because the Court is not a repository for discovery materials and exhibits and/or evidence are not filed with the Court, the Court declined to review or accept the box for filing and ordered that the box be returned to Plaintiff at Attica. (Dkt. No. 299). Plaintiff's later letters disparage that Court Order. (*See* Dkt. No. 304 (complaining about the Court's "illegitimate docket text order" returning the property that Plaintiff sent to the Court); Dkt. No. 305 (same); Dkt. No. 308 (complaining that the Court "illegally returned" his evidence to Attica)).

Finally, Plaintiff submitted four "electronic recordings" which he asserts are "relevant to [his] assault by staff and personal injury claims." (Dkt. No. 302, at 1; *see also* Dkt. No. 303). While three of the recordings appear to be relevant to Plaintiff's remaining excessive force claims—including a DVD labeled "Vance, 12B3682, 5-11-16," a cassette tape labeled "Vance, W, 12B3682, CHO Bullis 16-388 6/29/16," and a DVD labeled "8/26/16, L16-459"—the other three cassette tapes appear to have no relevance.

III. DISCUSSION

Defendants seek dismissal of this action with prejudice "as a sanction for Plaintiff's contempt." (Dkt. No. 277, at 1). Defendants argue that Plaintiff "willfully made himself unavailable for the August 1, 2022 trial date," noting that the Court cleared its calendar for this trial and the trial date was set after considering the availability of "nine defendants, and defense counsel." (*Id.* at 1–2). Defendants describe the lengths defense counsel and the nine defendants took in anticipation of the August 1, 2022 trial, including arranging for childcare and readjusting work schedules at DOCCS, which impacted "dozens of other correction officers who had to cover [the Defendants'] shifts." (*Id.* at 2). Defendants also cite to Plaintiff's history of disruptive conduct, "persistent disrespect of the Court on the record," and the numerous warnings the Court

has given Plaintiff regarding the sanction of dismissal. (*Id.*). In response to Plaintiff's assertions that Defendants provided him "insufficient draft bags" to pack his property and used different "tactics" to prevent his appearance at trial, Defendants note that none of the nine Defendants, who are "current and former correction officers at Clinton and Upstate Correctional Facilities," has "any involvement with Plaintiff's transport from Attica Correctional Facility." (Dkt. No. 282, at 1). Defendants also argue that Plaintiff's submissions fail to "acknowledge the significant disruptions posed to the Court and other parties by his failure to attend the trial" or indicate that Plaintiff "agree[s] to comply with Court orders" in the future. (*Id.*). Finally, Defendants note that (1) Plaintiff's various submissions discuss "vaguely-described exhibits appear[ing] to have no conceivable relevance to Plaintiff's two remaining excessive force claims"; (2) Plaintiff "continues to insist upon resolving his 'supplemental complaint'"; and (3) Plaintiff "remains focused on matters outside the merits of his actual remaining claims," such as his insistence that the case be assigned to a new judge. (*Id.* at 2; *see also* Dkt. No. 294, at 2–3). Defendants argue that these submissions demonstrate that, "if given another opportunity, Plaintiff will again disregard this Court's authority, insist on proceeding with irrelevant and previously-dismissed claims, and decline to properly prosecute this matter in accordance with the Court's direction." (Dkt. No. 294, at 3).

Under Rule 41(b) of the Federal Rules of Civil Procedure, "[i]f the plaintiff fails to prosecute or to comply with [the Federal Rules of Civil Procedure] or a court order," a court may dismiss the action. Fed. R. Civ. P. 41(b); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–30 (1962); *see also* N.D.N.Y. L.R. 41.2(a) ("Whenever it appears that the plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge may order it dismissed."). When determining whether dismissal under Rule 41(b) is appropriate, courts consider whether:

> (1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions.

U.S. ex rel. Drake v. Norden Sys., Inc., 375 F.3d 248, 254 (2d Cir. 2004) (citations omitted). None of these factors is dispositive. *Lopez v. Smurfit-Stone Container Enter., Inc.*, 289 F.R.D. 103, 104–05 (W.D.N.Y. 2013).

Moreover, it is "beyond dispute" that "a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial." *Lewis v. Rawson*, 564 F.3d 569, 580 (2d Cir. 2009) (quoting *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990)). In such instances the *Drake* factors may not be "particularly helpful," as the "intentional refusal to proceed with the commencement of a trial . . . may be fairly categorized as the most flagrant instance of a plaintiff's 'failure to prosecute.'" *Triplett v. Asch*, No. 17-cv-656, 2021 WL 2227748, at *4, 2021 U.S. Dist. LEXIS 103185, at *10–12 (N.D.N.Y. June 2, 2021) (first quoting *Lewis*, 564 F.3d at 577; and then quoting *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 364 (6th Cir. 1999)); *see also Lewis v. Frayne*, No. 12-cv-1070, 2018 WL 2248413, at *15, 2018 U.S. Dist. LEXIS 81839, at *50–51 (D. Conn. May 15, 2018) (noting that "courts often discuss both [*Lewis* and *Drake*] when determining whether dismissal for failure to proceed with trial is appropriate"), *aff'd*, 788 F. App'x 79 (2d Cir. 2019).

Here, the Court concludes that Plaintiff's history of disruptive conduct, disparagement of the Court's orders and its authority, refusal to focus on or prosecute the two remaining excessive force claims, and refusal to be transported for trial warrant dismissal of this action.

A. Plaintiff's History of Disruptive Conduct

Before turning to the *Drake* factors, the Court considers Plaintiff's history of disruptive conduct and his refusal to prosecute the two excessive force claims remaining. As set forth above, Plaintiff's submissions are replete with references to the Court's "mishandling" of this case, the "illegitimate" orders that have been issued, the "unlawful trial," and the Court's lack of "authority." Plaintiff also repeatedly makes requests for the recusal of the undersigned and Magistrate Judge Baxter, and for the reassignment of this matter to a new judge who will enter a judgment of "default or necessity." Plaintiff's persistent disregard of the Court and its authority indicates that Plaintiff is unwilling to recognize or submit to the Court's authority over his claims. Plaintiff's defiant and insulting behavior weighs strongly in favor of dismissal. *Cf. Pimentel v. Delta Air Lines, Inc.*, 818 F. App'x 100, 101–02 (2d Cir. 2020) (summary order) (noting that the Second Circuit has "upheld dismissals with prejudice as a sanction where pro se litigants repeatedly used abusive language toward judges" and finding that the district court did not abuse its discretion in dismissing a pro se plaintiff's case where the plaintiff "continued to insult the judges and declare that he would not follow court orders" (citing *Koehl v. Bernstein*, 740 F.3d 860, 862–64 (2d Cir. 2014))); *see Wingate v. Burke*, No. 14-cv-4063, 2022 WL 3362164, at *1–3, 2022 U.S. Dist. LEXIS 123057, at *4–11 (E.D.N.Y. Apr. 18, 2022) ("*Wingate I*") (recommending dismissal of the plaintiff's case where the plaintiff "continued to address irrelevant issues at length, insult the Court and opposing counsel," and was generally "uncooperative [and] abusive"), *report-recommendation adopted sub nom. Wingate v. Greene*, 2022 WL 2702844, 2022 U.S. Dist. LEXIS 122916 (E.D.N.Y. July 12, 2022) ("*Wingate II*").

Second, despite his voluminous submissions to the Court, Plaintiff refuses to meaningfully acknowledge or address the two excessive force claims which remain for trial. Plaintiff refused to comply with the Court's order directing that he submit a proffer of the

relevant testimony that he expected to elicit from the approximately forty witnesses that he named in a witness list, (Dkt. Nos. 252, 269), and none of his trial submissions acknowledge or address the fact that there are only two excessive force claims remaining for trial, (Dkt. Nos. 229, 229-1, 240, 246, 248). Instead, Plaintiff remains stubbornly fixated on unrelated matters, including the criminal conviction for which he is presently incarcerated, the relief demanded in his "supplemental complaint," and the entry of a judgment by "default or necessity." Plaintiff has therefore forfeited his right to prosecute the two remaining excessive force claims. *Cf. Triplett*, 2021 WL 2227748, at *5, 2021 U.S. Dist. LEXIS 103185, at *14 ("Plaintiff's words and actions have made it abundantly clear that he no longer desires to prosecute this matter."); *Lewis*, 2018 WL 2248413, at *22, 2018 U.S. Dist. LEXIS 81839, at *72 ("[Plaintiff] has forfeited his right to prosecute this case.").

B. The *Drake* Factors

The Court also concludes that the *Drake* factors weigh in favor of dismissal. First, Plaintiff's failure to appear at trial on August 1, 2022, will cause a delay of significant duration for which he is responsible. *Drake*, 375 F.3d at 254; *see Spencer v. Doe*, 139 F.3d 107, 113 (2d Cir. 1998) (noting that there are two aspects to this first factor: "(1) that the failures were those of the plaintiff, and (2) that these failures were of significant duration" (citing *Jackson v. City of New York*, 22 F.3d 71, 75 (2d Cir. 1994)). Plaintiff failed to comply with DOCCS directives and orders to prepare for his transportation for the scheduled trial, and Defendants had no involvement whatsoever in Plaintiff's refusal to be transported. While Plaintiff contends that he was prevented from packing up and bringing with him exhibits and other evidence, most of the purported "exhibits" he identifies bear no relevance to the two excessive force claims remaining. *Cf. Frederick v. Murphy*, No. 10-cv-6527, 2018 WL 10247403, at *6–7, 2018 U.S. Dist. LEXIS 233136, at *18–21 (W.D.N.Y. Apr. 16, 2018) (finding that the plaintiff "failed to set forth a

satisfactory excuse for the disruption and expense caused by his failure to appear at trial" where "the only credible explanation for Plaintiff's failure to appear at his day-certain trial date was an apparent desire to take a shower prior to coming to court"). As the Court's trial calendar is booked until at least March 2023, Plaintiff's failure to appear at trial has occasioned a delay of at least seven months, and likely longer, as a new trial date would also need to accommodate the schedule of nine Defendants and two defense counsel. Moreover, Plaintiff's earlier disruptive conduct has led to other significant delays, and this case has been pending for over four years. (*See* Text Minute Entry dated 12/10/2020 and Text Order dated 12/28/2020 (Plaintiff refused to participate in a deposition until Magistrate Judge Baxter gave defense counsel leave to move to dismiss for lack of prosecution); Text Minute Entry dated 12/9/21 (Plaintiff rejected the first pro bono counsel appointed by the Court); Dkt. No. 217 (Plaintiff sought appointment of new pro bono counsel); Dkt. No. 245 (Plaintiff rejected the second pro bono counsel appointed by the Court)). The Court further notes that, in addition to the time it spent preparing for trial, it has also spent much valuable time and resources reviewing Plaintiff's numerous submissions which repeatedly raise issues irrelevant to the scope of the issues that the Court has ruled will be decided at trial, and baselessly insult the Court, Defendants, and Court-appointed attorneys.

The Court finds that the second factor also weighs in favor of dismissal. "While a court is ordinarily obligated to afford a special solicitude to *pro se* litigants, dismissal of a *pro se* litigant's action as a sanction may nonetheless be appropriate so long as a warning has been given that noncompliance can result in dismissal." *Koehl*, 740 F.3d at 862 (internal citation, citation, and internal quotation marks omitted). Plaintiff has been warned multiple times that failure to follow the Court's orders and any further disruptive or obstructionist conduct would lead to contempt sanctions, including the dismissal of his case. (*See, e.g.*, Dkt. No. 148 (warning

Plaintiff on December 28, 2020 that obstructionist conduct at his deposition or the "rehash[ing]" of "various 'issues'" already addressed and decided in this case could lead to sanctions, "including the dismissal of his action" (emphasis omitted)); Dkt. No. 196 (warning Plaintiff on December 9, 2021 that "failing to follow the court's orders and any further disruptive conduct could lead to contempt sanctions including the dismissal of his case" (emphasis omitted)); Text Minute Entry dated 1/27/22 ("Plaintiff was warned that failing to follow the court's orders and any further disruptive conduct could lead to contempt sanctions including the dismissal of his case." (emphasis omitted))). Most recently, at the final pretrial conference on July 26, 2022, the Court "reminded" Plaintiff that "failing to follow the court's orders and any further disruptive conduct could lead to contempt sanctions including the dismissal of his case." (Text Minute Entry dated 7/26/22). The Court issued this warning after Plaintiff "argued with the court regarding the court's rulings." (*Id.*). It was the next day that Plaintiff failed to pack his property for transport. Thus, Plaintiff had clear notice that his case could be dismissed.

The third factor—likely prejudice to the Defendants as a result of further delay—also weighs in favor of dismissal. Plaintiff has not provided an adequate explanation for his failure to appear for trial on August 1, and his assertion that he was prevented from bringing a number of items which are not relevant to the claims remaining for trial does not outweigh the prejudice resulting to Defendants. As noted above, the nine Defendants and two defense counsel all "made sacrifices to ensure they were available for this trial," including arranging childcare and rearranging their work schedules, and this case has been pending for over four years. (Dkt. No. 277, at 2); *Wingate I*, 2022 WL 3362164, at *5, 2022 U.S. Dist. LEXIS 123057, at *15 (noting that prejudice "resulting from unreasonable delay may be presumed as a matter of law" and that, even absent that presumption, the defendants were prejudiced "by preparing for a trial that did

not go forward"); *Lewis*, 2018 WL 2248413, at *19, 2018 U.S. Dist. LEXIS 81839, at *63 (finding this factor weighed in favor of dismissal where the plaintiff had been "unnecessarily litigious, combative, and uncooperative"); *cf. Frederick*, 2018 WL 10247403, at *6, 2018 U.S. Dist. LEXIS 233136, at *18 ("Whatever minimal inconvenience Plaintiff experienced by not showering is far outweighed by the resulting prejudice to Defendants and the Court from his failure to appear.").

Fourth, the Court concludes that its need to alleviate congestion on its court calendar outweighs Plaintiff's right to an opportunity for a day in court. This Court has a full trial docket, with a backlog of trials resulting from the Covid-19 pandemic. Plaintiff had an opportunity for his day in court, and he unilaterally failed to appear for the scheduled trial. *Cf. Wingate II*, 2022 WL 2702844, at *3, 2022 U.S. Dist. LEXIS 122916, at *7–8 ("Plaintiff had his day in court, succeeding past the summary judgment stage, and the Court was prepared to afford him the trial he had sought."). Moreover, this factor is "more likely to weigh in favor of dismissal" where a plaintiff "swamp[s] the court with irrelevant or obstructionist filings" than where the plaintiff has "silently failed to proceed in a timely fashion." *Lewis*, 2018 WL 2248413, at *20, 2018 U.S. Dist. LEXIS 81839, at *64 (citation omitted). Here, even considering only the few months since Plaintiff's failure to appear for trial, Plaintiff has continued to submit disparaging and irrelevant filings, up to and including a large box of his personal property. Conspicuously absent from Plaintiff's many submissions is any meaningful reference to the two excessive force claims that were set for trial.

Finally, the Court has considered the efficacy of lesser sanctions and concludes that no lesser sanction than dismissal is appropriate in these circumstances. Plaintiff is proceeding in forma pauperis, and a monetary fine would therefore be unlikely to alter his behavior. *Cf.*

Wingate I, 2022 WL 3362164, at *5, 2022 U.S. Dist. LEXIS 123057, at *16. As Plaintiff is presently incarcerated, an order holding him in contempt also would be unlikely to change his behavior going forward. As described above, Plaintiff's submissions are replete with his criticisms of this Court and his disregard of its authority. There is therefore no reason to believe that Plaintiff will be willing to recognize or submit to the authority of this Court over his claims if the Court were to impose a lesser sanction.

In sum, the Court finds that the *Drake* factors weigh in favor of dismissal of this action. Plaintiff's evident disregard for the Court and other involved parties and his persistent focus on irrelevant matters such as his "supplemental complaint" while ignoring the two excessive force claims which remain for trial render it impossible for this case to proceed in any meaningful way. *Cf. Lewis*, 2018 WL 2248413, at *22, 2018 U.S. Dist. LEXIS 81839, at *72 ("Plaintiff's history of uncivil behavior, courtroom disruptions, aggressive courtroom behavior, frivolous filings, including motions for sanctions of opposing counsel, recusal of the court, requests to subpoena state officials with no relevant information, . . . as well as his repeated failure to proceed on the eve of trial, is the type of extreme vexatious conduct which overburdens the court, prejudices defense and makes a mockery of the justice system.").

IV. CONCLUSION

For these reasons, it is hereby

ORDERED that Defendants' motion for dismissal with prejudice (Dkt. No. 277) is **GRANTED**; and it is further

ORDERED that Plaintiff's letter request to reschedule the trial (Dkt. No. 280) is **DENIED**; and it is further

ORDERED that the Complaint (Dkt. No. 1) is **DISMISSED with prejudice** for failure to prosecute and failure to comply with Court orders; and it is further

ORDERED that all other pending motions (Dkt. Nos. 292, 306) are denied as moot; and it is further

ORDERED that the Clerk of the Court is directed to serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules and close this case.

IT IS SO ORDERED.

Dated: November 15, 2022
Syracuse, New York

Brenda K. Sannes
Chief U.S. District Judge

2018 WL 10247403
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Michael FREDERICK, Plaintiff,
v.
Patrick MURPHY, Officer, Michael Robyck, Officer, Jamie Robinson, Officer, Donald Holton, Sergeant, and Vandergrif, Officer, Defendants.

6:10-CV-06527 EAW
|
Signed 04/16/2018

Attorneys and Law Firms

Michael Frederick, Attica, NY, pro se.

Bernard F. Sheehan, NYS Attorney General's Office Department of Law, Rochester, NY, for Defendants.

DECISION AND ORDER

ELIZABETH A. WOLFORD, United States District Judge

BACKGROUND

***1** Plaintiff Michael Frederick ("Plaintiff"), a *pro se* inmate housed by the New York State Department of Corrections and Community Supervision, filed this action on September 15, 2010, alleging violations of his civil rights. (Dkt. 1). A jury trial was scheduled to begin on September 25, 2017, at 9:00 AM. (Dkt. 109). This was a "day-certain trial that [would] not be adjourned except for the trial of criminal cases." (*Id.* at 1). However, on the morning of September 25, 2017, Plaintiff failed to appear for trial. At that time, Defendants made an oral motion to dismiss this matter for failure to prosecute. On the same day, the Court issued an Order to Show Cause, directing Plaintiff to indicate whether he intended to continue to pursue this action and to set forth any reasons why the Court should not dismiss the case. (Dkt. 127). Plaintiff and Defendants filed responsive papers, arguing why the case should not or should be dismissed, respectively. (*See* Dkt. 129; Dkt. 132; Dkt. 133; Dkt. 135).[1] In sum and substance, Plaintiff claims that he was harassed and threatened after requesting a shower in the morning hours of September 25, 2017, and, ultimately, the correctional officers unilaterally denied him the opportunity to go on his court trip. (Dkt. 132; Dkt. 135). In response, Defendants argue that Plaintiff was never threatened or harassed, he requested to take a shower during the night shift when inmates were not permitted to do so, and Plaintiff simply refused to go on his court trip. (Dkt. 133-3).

On December 18, 2017, the Court issued a Decision and Order in which it reserved decision on Defendants' motion and set an evidentiary hearing. (Dkt. 136). On February 12, 2018, the Court held an evidentiary hearing and heard testimony from Plaintiff, Correctional Officer Maurizio Perfetti ("Officer Perfetti"), Correctional Officer Michael Mawhir ("Officer Mawhir"), and Correctional Officer Shawn Paucke ("Officer Paucke"). (Dkt. 138). The Court reserved decision on Defendants' motion.

For the following reasons, Defendants' motion is granted, and Plaintiff's action is dismissed with prejudice.

EVIDENTIARY HEARING[2]

I. Plaintiff's Testimony

Plaintiff testified that at some point during the late evening hours of September 24, 2017, or the early morning hours of September 25, 2017, he asked Officer Mawhir if he could take a shower before his court trip, and Officer Mawhir denied the request. Plaintiff waited until a sergeant "came to sign ... the log book," at which time Plaintiff asked the sergeant if he could take a shower before his court trip. The sergeant indicated that he did not take issue with that request, but that "[i]t's all on the officers." Plaintiff acknowledged the sergeant's response.

***2** At some point in the early morning hours on September 25, 2017, Officer Perfetti woke Plaintiff for his court trip. Plaintiff then requested permission to take a shower before embarking from the prison, but Officer Perfetti denied Plaintiff's request and said that "it's up to the block officer." Plaintiff and Officer Perfetti "started debating," at which time Officer Perfetti walked away from the prison cell and Plaintiff told him, "Suck my dick." As Officer Perfetti left Plaintiff's cell, Plaintiff yelled, "I'm not refusing to go to court." Plaintiff testified that either Officer Mawhir or Officer Paucke then placed Plaintiff on "keep-lock," and Plaintiff was denied his food privileges. Subsequently, another corrections officer, Officer Wolff, helped eliminate Plaintiff's "keep-lock" status and Plaintiff was then able to receive food.

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Plaintiff testified that he felt as if he would have been physically assaulted if he went to court on September 25, 2017, because he believed the correctional officers were "joining up against [him.]" However, when the Court inquired as to whether anyone actually communicated any threat of physical harm, Plaintiff responded that he never received such a threat and that Officer Mawhir only said, "I can show you that I can be a A hole." Instead, Plaintiff explained that his fear of physical injury was aroused simply because of his past dealings with how correctional officers "do us." He also testified that he did not feel safe around Officer Mawhir.

On cross-examination, Plaintiff testified that he had been aware of his trial date for several months. Plaintiff also confirmed that he could have taken a shower during his recreational time, and that inmates were not generally permitted to shower between the hours of 11:00 P.M. to 7:00 A.M.

II. Officer Perfetti's Testimony

Officer Perfetti testified that on September 25, 2017, he was working as a transportation officer at the Elmira Correctional Facility and was assigned to take Plaintiff to Rochester for a court appearance that morning. He explained that at about 5:00 A.M., he went to Plaintiff's prison cell, but that he had previously been told that Plaintiff might refuse his court trip because he had not been granted permission to take a shower. When Officer Perfetti arrived at Plaintiff's prison cell, Plaintiff refused to leave for his court trip. Plaintiff did not explain why he was refusing to leave, and he did not ask for a shower at that time. Officer Perfetti also testified that he was not authorized to grant Plaintiff permission to take a shower at that time.

Afterwards, Officer Perfetti notified Officer Mawhir that Plaintiff had refused to go on his court trip. Officer Mawhir was the block officer in charge of the cellblock during the overnight shift, and Officer Perfetti observed Officer Mawhir make a notation in the inmate logbook. Officer Perfetti also testified that he never heard Plaintiff shout that he was not refusing to leave, and he had no knowledge of any threatening remarks made by Officer Mawhir towards Plaintiff.

Officer Perfetti waited until 8:00 A.M., at which time the office for the inmate records coordinator opened, and he then retrieved an inmate refusal form and returned to Plaintiff's prison cell. However, Plaintiff declined to sign the refusal form. Officer Perfetti then told Officer Paucke that Plaintiff refused to sign the form, and Officer Paucke documented Plaintiff's refusal in the inmate logbook. Defendants' counsel presented Officer Perfetti with Defendants' Exhibit A, and Officer Perfetti confirmed both that it was the inmate refusal form and that he and Officer Paucke had signed it. Defendants' Exhibit A was entered into evidence. (*See* Dkt. 133-1 at 7).

Officer Perfetti testified that he presented the inmate refusal form to Plaintiff, and that Plaintiff simply stated, "I don't want to sign nothing." Officer Perfetti never threatened or harassed Plaintiff, and he was not aware that anyone else had done so either. Officer Perfetti was also not aware that Plaintiff was denied any meals before or after September 25, 2017, and Officer Perfetti never denied Plaintiff a shower.

***3** On cross-examination, Officer Perfetti testified that he overheard Plaintiff say "something" at the time he left the cell after Plaintiff initially refused to attend his court trip, but he was unconcerned with whatever Plaintiff had said. Later, Officer Mawhir informed Officer Perfetti that Plaintiff had said, "Suck my dick."

III. Officer Mawhir's Testimony

Officer Mawhir testified that he was the block officer for Plaintiff's cellblock, and that his shift began at 11:00 P.M. on September 24, 2017, and ended at 7:00 A.M. on September 25, 2017. In his capacity as the block officer, Officer Mawhir would make rounds and ensure the overall security of the cellblock. He testified that inmates were not permitted to leave their cells between the hours of 11:00 P.M. and 7:00 A.M., unless there was an emergency or the inmate was permitted to leave for a court trip.

At about 11:00 P.M., Officer Mawhir began his shift and reminded Plaintiff that he had a court trip in the morning. At that time, Plaintiff requested permission to take a shower, but Officer Mawhir denied the request, stating that Plaintiff was not allowed to shower during the overnight shift. Plaintiff insisted that he was entitled to a shower and requested to speak with a sergeant. Officer Mawhir asked Plaintiff whether he had requested a shower during the previous shift, or whether he had taken his recreational opportunity that night, and Plaintiff replied in the negative to both questions.

Officer Mawhir then testified that inmates were not permitted to shower during the night shift for security reasons. During the "sergeant rounds," Plaintiff spoke with the on-duty sergeant, Sergeant Richter, and requested a shower. Officer

Mawhir did not overhear their conversation, but Sergeant Richter said that he had informed Plaintiff that he was not able to take a shower at that time.

At about 5:00 A.M. on September 25, 2017, Officer Perfetti entered the prison cellblock and walked towards Plaintiff's cell. Officer Mawhir testified that he did not overhear the substance of Officer Perfetti's and Plaintiff's conversation. Subsequently, Officer Perfetti informed Officer Mawhir that Plaintiff refused to go on his court trip. Officer Mawhir recorded Plaintiff's refusal in the inmate logbook. Officer Mawhir testified that he heard Plaintiff yell, "Suck my dick," but he did not hear Plaintiff shout anything related to his court trip.

Defendants' counsel presented Officer Mawhir with Defendants' Exhibit B. Officer Mawhir identified Defendants' Exhibit B as a copy of several inmate logbook entries, and these entries were entered into evidence. (*See* Dkt. 133 at 8). The entry appearing at 10:50 P.M. on September 24, 2017, signified the start of Officer Mawhir's shift. (*See id.*). At 5:00 A.M. on September 25, 2017, a notation stated that Plaintiff refused to proceed with his court trip. (*See id.* at 9). At 6:55 A.M., an additional entry indicated that Officer Mawhir's tour had ended and that he was off duty. (*Id.*).

Officer Mawhir testified that he never threatened or harassed Plaintiff, and he denied knowledge of any individual who refused to permit Plaintiff to eat his meals or otherwise threatened or harassed him.

On cross-examination, Officer Mawhir testified that he "might have" told Officer Perfetti that Plaintiff said, "Suck my dick," but Officer Mawhir explained that he "figured" Officer Perfetti had heard this statement because Plaintiff "yelled it through the block." Officer Mawhir also testified that while he did not hear Plaintiff shout that he was not refusing his court trip, he could not say with certainty that Plaintiff never stated as much. Officer Mawhir indicated that his desk was about fifteen feet away from Plaintiff's prison cell.

***4** Although Officer Mawhir testified on direct examination that he did not overhear the conversation between Officer Perfetti and Plaintiff regarding Plaintiff's refusal to proceed to court, Officer Mawhir further testified that, at some point, Officer Perfetti had informed Officer Mawhir that Plaintiff refused to leave for court. However, Officer Mawhir then testified that he could not recall whether Officer Perfetti had yelled this conclusion to Officer Mawhir or had walked over to the desk to tell him because, "I can't remember that day."

IV. Officer Paucke's Testimony

Officer Paucke testified that on September 25, 2017, he served as the "number one officer" in Plaintiff's cellblock at the Elmira Correctional Facility. He began his shift around 7:00 A.M., relieving Officer Mawhir from duty. In his capacity as the number one officer, Officer Paucke maintained the inmate logbook and monitored phone calls, among other responsibilities.

Officer Paucke did not interact with Plaintiff on the morning of September 25, 2017. However, at a little past 8:00 A.M., Officer Perfetti requested that Officer Paucke witness the inmate refusal form that Plaintiff would not sign. Officer Paucke identified Defendants' Exhibit A as the inmate refusal form, and confirmed that he had signed it on the morning of September 25, 2017. Officer Paucke also identified Defendants' Exhibit B as a copy of the inmate logbook, and he testified that he had entered the notation indicating Plaintiff's decision not to sign the inmate refusal form in the logbook. (*See* Dkt. 133 at 9).

Although Officer Paucke sat about ten to fifteen feet away from Plaintiff's cell, he did not overhear Plaintiff yell at Officer Perfetti. Officer Paucke also testified that he was not aware of any harassing behavior or threats made towards Plaintiff, or that Plaintiff was deprived of any meals. He further confirmed that a correctional officer could not terminate an inmate's food privileges.

On cross-examination, Officer Paucke testified that on some previous occasion, of which he did not recall with great specificity, Plaintiff was granted permission to take a shower because he was working in the prison gallery as a "porter."

DISCUSSION

I. Burden of Proof

"While [a] plaintiff's failure to prosecute may be excused for good cause, [ ]he bears the burden of demonstrating such cause." *Carvalho v. Reid*, No. 90 Civ. 7654 (PKL), 2000 WL 48870, at *1 (S.D.N.Y. Jan. 20, 2000) (citing *West v. City of New York*, 130 F.R.D. 522, 526 (S.D.N.Y. 1990)). In other words, it is the plaintiff's burden to proffer sufficient evidence demonstrating that his failure to prosecute his case

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may be excused. *See* *Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275, 1280 (9th Cir. 1980) (stating that the plaintiff "has the ultimate burden of persuasion both as to the excuse for his own delay and as to lack of prejudice to the defendant" under a Rule 41(b) motion to dismiss for failure to prosecute (quoting *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 67 (2d Cir. 1963) (discussing the plaintiff's burden in the context of laches))); *Austin v. Alexander's Dep't Stores, Inc.*, No. 84 Civ. 1044-CSH, 1985 WL 2886, at *1 (S.D.N.Y. Oct. 1, 1985) ("[The p]laintiff's attorney has failed to present any compelling reason why this Court should excuse her repeated failure to appear."); *see also* 9 Wright & Miller, Fed. Prac. & Proc. § 2370, at 689-95 (3d ed. 2008) ("An action may be dismissed under Federal Rule 41(b) if the plaintiff, *without offering some explanation that is satisfactory to the court*, is not ready to present his or her case at trial or if the plaintiff refuses to proceed at the trial." (emphasis added)).

II. Credibility Determinations

***5** Resolution of the legal issues in this matter cannot be achieved without first making credibility determinations. Since Plaintiff was the only witness called to testify on his behalf, this case hinges upon the Court's assessment of Plaintiff's credibility. Although the Court did not find Officer Mawhir's or Officer Paucke's testimony to be especially compelling, Officer Perfetti was a more credible witness than Plaintiff, and the Court finds his testimony to be particularly persuasive.

The Court notes that Officer Mawhir and Officer Paucke had some difficulty recalling certain events occurring on September 25, 2017, as well as certain prior interactions with Plaintiff. However, Officer Perfetti unequivocally testified that Plaintiff was not threatened on September 25, 2017, and that he simply refused to attend his court date for no other discernible reason than his inability to take a shower. Since Officer Mawhir testified that he did not overhear the conversation between Plaintiff and Officer Perfetti, Officer Perfetti's testimony was crucial to Defendants' position. Furthermore, Officer Perfetti's testimony is supported by documentary evidence, including the inmate logbook and the inmate refusal form, both of which corroborate Officer Perfetti's conduct as described by his testimony.

At best, Plaintiff's testimony indicates that he requested a shower prior to proceeding to court, and that this request was denied. Plaintiff's testimony that he was denied food, was harassed, and was confronted with an objective threat of physical harm is unsupported by the hearing testimony. Indeed, Plaintiff's own testimony confirms that he never received a verbal threat of violence in relation to his decision to appear in court. As such, the Court finds Plaintiff's testimony that he acted under the belief that the correctional officers might physically assault him to be speculative and self-serving, and thus, the Court does not credit this excuse for Plaintiff's failure to proceed with his trial on September 25, 2017. Based upon the Court's observations of the witnesses at the hearing, including their demeanor and conduct, as well as their testimony, the Court finds Plaintiff's account of the events leading up to his failure to appear for trial on September 25, 2017, to be less credible than Defendants' position. In making this credibility determination, the Court is mindful that the burden of proof rested with Plaintiff. Plaintiff has failed to carry this burden.

In sum, the hearing evidence demonstrates that Plaintiff refused to appear for his trial date because he was unable to obtain a shower on the morning of September 25, 2017. This was not a legitimate reason to refuse to attend the trial. Any nuisance experienced by Plaintiff from his inability to shower was relatively minor, and Plaintiff failed to prove that he was somehow entitled to receive a shower prior to his court trip. Instead, the evidence establishes that inmates, such as Plaintiff, are generally not permitted to leave their cells during the late night and early morning hours for security and safety reasons at the prison. The Court now turns to determine the appropriate sanction for Plaintiff's failure to appear for trial.

III. Plaintiff's Case is Dismissed for Failure to Prosecute

Although Rule 41 of the Federal Rules of Civil Procedure permits federal courts to dismiss an action for failure to prosecute, *see* Fed. R. Civ. P. 41(b), this authority "has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962); *see* *Lewis v. Rawson*, 564 F.3d 569, 575 (2d Cir. 2009) (same). "It is beyond dispute that a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial." *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990) (footnote omitted). "One naturally expects the plaintiff to be present and ready to put on [his] case when the day of trial arrives. A litigant's day in court is the culmination of

a lawsuit, and trial dates—particularly civil trial dates—are an increasingly precious commodity in our nation's courts." *Moffitt v. Ill. State Bd. of Educ.*, 236 F.3d 868, 873 (7th Cir. 2001). "Where a plaintiff does not appear at the trial date or ... is inexcusably unprepared to prosecute the case, Rule 41(b) dismissal is particularly appropriate. Indeed, such behavior constitutes the epitome of a 'failure to prosecute.' " *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 364 (6th Cir. 1999); *see* *Noli v. C.I.R.*, 860 F.2d 1521, 1527 (9th Cir. 1988) (noting that the "dismissal for failure properly to prosecute will normally arise where a party fails to appear at trial").

***6** The Second Circuit has "fashioned guiding rules that limit a trial court's discretion in this context...." *U.S. ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004). The *Drake* factors consider whether

> (1) The plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions.

Id. However, this Court is guided by the more recent Second Circuit decision in *Lewis v. Rawson*, 564 F.3d 569 (2d Cir. 2009). There, the court determined that the *Drake* factors were "not particularly helpful" in analyzing whether dismissal was appropriate where the plaintiff declined to proceed with his proof at trial. *Id.* at 577. In *Lewis*, the Second Circuit affirmed the district court's dismissal of the plaintiff's case for failure to prosecute where the *pro se* plaintiff refused to testify, and his testimony was "the only direct evidence that could support his claims." *Id.*

The scenario presented in *Lewis* is akin to the present matter, where Plaintiff failed to appear for the commencement of his day-certain trial. The *Lewis* court questioned the usefulness of the *Drake* factors in this context by distinguishing the *Lewis* facts from cases involving missed filing deadlines or the noncompliance with discovery orders. *See* *id.* at 580 ("[W]here a district court is confronted with a 'plaintiff's unwillingness to proceed on the date scheduled for trial, as opposed to the more typical failure to comply with her discovery obligations on time, or to meet some other pre-trial deadline,' it is 'not unreasonable' to consider treating such unwillingness 'more severely.' " (quoting *Moffitt*, 236 F.3d at 873)). The dilatory conduct of a plaintiff during motion practice or discovery, while not condoned by the Court, is distinguishable from the intentional refusal to proceed with the commencement of a trial, which may be fairly categorized as the most flagrant instance of a plaintiff's "failure to prosecute." *See, e.g.*, *Knoll*, 176 F.3d at 364.

Here, the only credible explanation for Plaintiff's failure to appear at his day-certain trial date was an apparent desire to take a shower prior to coming to court. The evidence does not demonstrate that the correctional officers wrongfully denied Plaintiff a shower on the morning of his trial. Whatever minimal inconvenience Plaintiff experienced by not showering is far outweighed by the resulting prejudice to Defendants and the Court from his failure to appear. Indeed, Defendants had assisted Plaintiff in securing both his own presence and the presence of his requested witness for the trial, and the Court had assembled a jury pool in preparation for *voir dire* on the morning of September 25, 2017. *See* *Wareham v. Pa. Dep't of Corr.*, No. 2:13-CV-0188, 2014 WL 5361547, at *6 (W.D. Pa. Oct. 21, 2014) ("[I]t is wholly unfair to the [d]efendant who subpoenaed several witnesses on [the p]laintiff's behalf, and to the assembled jury pool, to allow a continuance at this very belated date."); *see also* *Maiorani v. Kawasaki Kisen K. K., Kobe*, 425 F.2d 1162, 1163 (2d Cir. 1970) (affirming dismissal of the case where the plaintiff's counsel failed to appear for trial, noting that "[o]pposing counsel, their witnesses, and parties to other cases awaiting trial have rights too"). As one district court aptly stated, "[t]he Court cannot permit a party to defy Court orders, waste Court resources, disrupt the lives of potential jurors, witnesses, and opposing counsel, and prejudice the opposing party in this manner." *Njema v. Wells Fargo Bank, N.A.*, No. 13-CV-0519 (PJS/JSM), 2016 WL 308780, at *5 (D. Minn. Jan. 25, 2016), *aff'd*, 673 F. App'x 609 (8th Cir. 2017); *see* *Wareham*, 2014 WL 5361547, at *6 (noting the plaintiff's "personal responsibility for not attending the trial, the prejudice to [the d]efendant and its witnesses for the failure to attend the trial, the inconsideration to the jury pool,

[and] the costs to the jury office who assembled the jury pool" in determining that dismissal was appropriate).

***7** In its December 18, 2017, Decision and Order, the Court stated that if Plaintiff had "refused to appear at his properly scheduled trial date for the negligible reason that he had not yet taken a shower," his case would be dismissed. (Dkt. 136 at 7 (emphasis omitted)); *see generally* Smith v. Levinson, No. SACV 12-1511 AG (ANx), 2013 WL 12153548, at *1 (C.D. Cal. Nov. 27, 2013) (finding the excuse that the plaintiff's counsel was "having car trouble" or "lacked enough gas money to make the hearing" to be "completely inadequate"). It is worth repeating once more that Plaintiff was aware that this was a "day-certain" trial date, and that no adjournment would be granted except for a conflict with a criminal trial. (Dkt. 104; Dkt. 109); *cf.* *Colon v. Mack*, 56 F.3d 5, 7 (2d Cir. 1995) (reversing dismissal "in light of [the plaintiff's] averment that he had not received prior notice of a court date [and] the guards communicated in English, which [the plaintiff] did not understand, and the conversation [notifying him of his court appearance] occurred in the middle of the night" on the day of jury selection). The Court has already spent precious time and resources preparing for Plaintiff's trial, and it has lost $2,523.26 in jury selection costs. (Dkt. 127 at 3). In addition, Defendants and their counsel have also expended significant time, resources, and costs in preparing for trial. *See* *Yongping Zhou v. Belanger*, 528 F. App'x 618, 622 (7th Cir. 2013) (noting that the defendant "was prejudiced by readying himself for trial").

Plaintiff has failed to set forth a satisfactory excuse for the disruption and expense caused by his failure to appear at trial. Plaintiff was afforded his day in court, and, by his own volition, he decided to squander the opportunity by wasting scarce judicial resources. Upon consideration of its own substantially full court calendar, the Court finds that no other sanction but dismissal would be appropriate under these circumstances. The Court now turns to whether dismissal should be with or without prejudice.

IV. Plaintiff's Action is Dismissed With Prejudice

"Dismissal with prejudice is a harsh remedy to be utilized only in extreme situations." *Theilmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972). "Nonetheless, the authority to invoke it for failure to prosecute is vital to the efficient administration of judicial affairs and provides meaningful access for other prospective litigants to overcrowded courts." *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42 (2d Cir. 1982); *see* *Link*, 370 U.S. at 629-30 ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." (footnote omitted)). The Second Circuit has noted that "[b]urgeoning filings and crowded calendars have shorn courts of the luxury of tolerating procrastination." *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 668 (2d Cir. 1980).

In *Lewis*, the Second Circuit concluded that "where a party fails to appear or refuses to proceed with trial *after* the jury ha[s] been drawn, dismissal with prejudice may be particularly appropriate." 564 F.3d at 581 (quotation marks omitted). The sanctity of the right to a jury trial may be especially imperiled by its misuse after a jury has been impaneled. *See* *Theilmann*, 455 F.2d at 856 ("[T]he right to a jury trial is too precious to permit its effectiveness to be destroyed by non-utilization of jurors drawn caused by unnecessary delays in preparation, lack of attention to the case, or undue procrastination by party or counsel or both." (citation omitted)). Nonetheless, even before a jury is selected, a great number of potential jurors must deviate from their daily routine in order to engage in one of the most crucial functions of civic life. This most precious of civic responsibilities is simply too important to be slighted at any of its stages. *See generally* *Yongping Zhou*, 528 F. App'x at 622 (noting that "the 24 prospective jurors summoned for the venire were seriously inconvenienced"); *Lewis*, 564 F.3d at 581 ("[W]e must be concerned with the quality of the jury experience for each person summoned to serve. We want jurors to experience a court system that works well, respects their time and their lives, and values their performance of this most vital civic duty." (quotation marks and citation omitted)).

***8** Therefore, after considering Plaintiff's inexcusable failure to proceed with his day-certain trial date, his inconsideration for the resources expended by the Court and Defendants in preparing for his trial, the inconvenience caused to the prospective jurors and the costs to the Court in assembling the jury pool, the Court concludes that the most appropriate sanction under these circumstances is to dismiss Plaintiff's action with prejudice.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (Dkt. 127) is granted, and Plaintiff's amended complaint (Dkt. 4) is dismissed with prejudice. The Clerk of Court is directed to close this case.

SO ORDERED.

All Citations

Slip Copy, 2018 WL 10247403

Footnotes

1 The Court summarized these submissions in its December 18, 2017, Decision and Order, in which it reserved its decision on Defendants' motion and scheduled an evidentiary hearing. (Dkt. 136). Accordingly, the Court assumes the parties' familiarity with these motion papers, and it will not rehash their contents here.

2 The summary of the evidence has been prepared without the benefit of a transcript, and is based on the Court's notes from the hearing.

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2018 WL 2248413
Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

Kacey LEWIS, Plaintiff,
v.
Dr. Mark FRAYNE, Dr. Robert Berger,
and Dr. Gerard Gagne, Defendants.

CIVIL ACTION NO. 3:12-cv-1070 (VLB)
|
Signed 05/15/2018

Attorneys and Law Firms

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Terrence M. O'Neill, Neil D. Parille, Attorney General's Office, Hartford, CT, for Defendants.

MEMORANDUM OF DECISION DISMISSING CASE

Vanessa L. Bryant, United States District Judge

***1** Under consideration by the court is dismissal of this case under Federal Rule of Civil Procedure 41(b). As discussed below, the court considers whether the case should be dismissed under two standards. First, the court considers the "substantial justification" standard outlined in *Lewis v. Rawson*, 564 F.3d 569 (2d Cir. 2009) which states the standard for dismissal when a plaintiff refuses to go forward with a duly scheduled trial. Second, the court considers dismissal under the standard applicable when a party fails to go forward with trial announced in *Drake v. Norden Systems, Inc.*, 375 F.3d 248 (2d Cir. 2004). The facts currently before the court weigh in favor of dismissal under either standard. Under either of these standards the conduct of the Plaintiff warrants dismissal and accordingly the case is DISMISSED.

I. Procedural Background

The court begins with a brief procedural history of the case helpful in understanding the ultimate ruling. Plaintiff Kacey Lewis ("Plaintiff" or "Lewis"), an inmate in the Cheshire Correctional Institution, proceeding *pro se*, brings Eighth Amendment deliberate indifference and Fourteenth Amendment due process claims against Defendants Mark Frayne ("Frayne"), Robert Berger ("Berger"), and Gerard Gagne ("Gagne"), doctors at Northern Correctional Institution ("Northern"), in connection with the involuntary administration of psychotropic medication. Throughout this case, Plaintiff has asserted that he does not suffer from a mental illness and that Defendant's violated his constitutional rights by forcibly medicating him to prevent him from pursuing a suit in the Connecticut Superior Court, challenging the criminal conviction for which he is detained.

Plaintiff first brought his Complaint in this action on July 20, 2012. [Dkt. 1.] The case was inactive for months and the parties failed to comply with the first Scheduling Order [Dkt. 17]; accordingly the court ordered Plaintiff to show cause why the case should not be dismissed by February 14, 2014. [Dkt. 23.] Plaintiff "demonstrated no good cause for his failure to diligently prosecute this case," and the court dismissed the action on February 20, 2014. [Dkt. 25.] Plaintiff moved for reconsideration of the dismissal [Dkt. 26], the court denied reconsideration [Dkt. 27], Plaintiff appealed the decision [Dkt. 28], and the Second Circuit vacated the dismissal and remanded for further proceedings on December 16, 2014. [Dkt. 30.] The court entered its first Amended Scheduling Order on December 19, 2014, setting jury selection for November 3, 2015. [Dkt. 31.] On February 23, 2015, Plaintiff filed his Amended Complaint. [Dkt. 34.]

Plaintiff moved to appoint counsel on March 16, 2015 [Dkt. 37], and the court granted that motion [Dkt. 39]. Attorney Dan LaBelle appeared to represent Plaintiff on May 26, 2015. [Dkt. 45.] Plaintiff's counsel moved to continue trial for the first time on October 1, 2015, citing his recent appointment as pro bono counsel, the need to file an amended pleading, and the need for limited discovery. [Dkt. 51.] The court granted the motion and rescheduled all deadlines including jury selection, now to take place on March 31, 2016. [Dkt. 53.]

***2** On December 15, 2015, Plaintiff moved to remove Mr. LaBelle as counsel as "the attorney-client relationship has broken down." [Dkt. 54.] Plaintiff requested to represent himself. *Id.* Mr. LaBelle agreed with the statement, explaining his late appointment to the case, the need for additional time to complete discovery and prepare for trial leading to his motion for a continuance, and recounting a meeting with Plaintiff where he presented Plaintiff a full set of discovery materials. [Dkt. 55.] Plaintiff did not accept the discovery materials, stated he wished to proceed pro se, and abruptly ended the meeting. *Id.* The court referred the matter to Magistrate Judge Margolis, who "urge[d] plaintiff to reconsider his

motion." [Dkt. 58.] Rather than heed Magistrate Judge Margolis' advice, Plaintiff filed a Motion for Judicial Recusal stating Judge Bryant "has showed bias and prejudice against the Plaintiff in prior judicial proceedings," and citing the Court's disqualification of a certain juror in a criminal case involving Lewis in 1999 in Connecticut Superior Court. [Dkt. 59.] The court denied the Motion for Recusal and granted the Motion to Withdraw as Counsel. [Dkt. 61.]

The court granted Plaintiff's Motion to File a Second Amended Complaint on February 10, 2016 [Dkt. 72] and, because of the amendment, rendered a Second Amended Scheduling Order resetting all deadlines including the jury selection date, now set for June 30, 2016. [Dkt. 73.]

Plaintiff submitted a flurry of motions in late April and early May of 2016, including a motion for Summary Judgment [Dkt. 93, dated April 19, 2016], motion to compel production of certain documents including prison video recordings and movement logs [Dkt. 97, dated April 22, 2016], motion to sanction opposing counsel for making the allegedly untrue statement that Plaintiff stated he was "involuntarily medicated for psychiatric disorders" (Plaintiff asserts he has never admitted to having psychiatric disorders) [Dkt. 96, dated April 22, 2016], and motion for permission to file a separate trial memorandum since he would not likely be able to confer with opposing counsel as a pro se prisoner [Dkt. 98, dated May 6, 2016]. Defendants responded to all motions and filed their own Joint Trial Memorandum on June 1, 2016. [Dkt. 107.] The court granted Plaintiff's Motion for Leave to File Separate Trial Memorandum [Dkt. 112], denied Plaintiff's Motion for Sanctions because defense counsel's allegedly incorrect statement was consistent with Plaintiff's own allegations and, even if incorrect, would not have warranted sanctions [Dkt. 113] and denied Plaintiff's Motion to Compel for failure to establish Defendants improperly withheld any discovery [*id.*].

Confronted with Mr. Lewis' refusal to confer with defense counsel and file a joint trial memorandum, the court made a significant concession in an effort to assure that the trial would go forward as scheduled. The court deviated from its standard practice outlined in its Chambers Practices, which requires parties to meet and confer to discuss the conduct of the trial and file a joint trial memorandum. Under Chambers Practices, the joint trial memorandum must include a joint statement of the case and a list of witnesses, including the anticipated subjects and duration of witness testimony. This information helps the court to determine the time necessary to try the case, empanel a jury, and manage its docket on which several cases are scheduled for trial each month.

On June 6, 2016, after having entered several prior scheduling orders, the court scheduled jury selection for July 1, 2016 [Dkt. 110] and trial to begin July 22, 2016. [Dkt. 108.] On June 16, 2016, Plaintiff requested an extension of time to file his Trial Memorandum [Dkt. 118], which the court granted [Dkt. 121]. As a result, the court postponed the July 2016 jury selection and trial dates. [Dkt. 122.] Plaintiff also moved to strike Defendants' Trial Memorandum "because the Defendants failed to seek permission from the court to file a separate trial brief," despite the fact that Plaintiff insisted that the parties file separate briefs. [Dkt. 119]. Plaintiff's motion to strike was denied, as Defendants sufficiently explained why they could not file a trial memorandum jointly with Plaintiff. [Dkt. 121.]

***3** On June 28, 2016, Plaintiff filed his trial memorandum. [Dkt. 127.] On July 18, 2016, Plaintiff moved to reopen discovery in order to respond to Defendants' Supplemental Motion in Opposition to Plaintiff's Motion for Summary Judgment. [Dkt. 133.] That same day, the court granted in part and denied in part Plaintiff's Motion for Summary Judgment, allowing trial to proceed as to liability and damages for Plaintiff's Eighth Amendment claim and solely with respect to damages on his Fourteenth Amendment claim. [Dkt. 139.] On July 19, 2016, the court denied Plaintiff's Motion to Reopen Discovery as moot given the court's summary judgment decision, and given that the Defendant's supplemental briefing to which Plaintiff sought to respond concerned only issues of law not requiring further discovery. [Dkt. 142.]

Contemporaneous with Plaintiff's Motion to Reopen Discovery, Plaintiff moved to appoint an expert witness to opine about "diagnosis and treating mental illness" and "the side-effects of antipsychotic, neuroleptic drugs [and] psychotropic drugs." [Dkt. 134.] The court granted Plaintiff's request and provided Plaintiff with a list of medical professionals supplied by the Connecticut Medical Society, along with their contact information, and awarded Plaintiff up to $1,000 to compensate any expert retained for records review and interview. [1] [Dkt. 149.] The court stated it would consider approving additional funds for additional services upon review of the initial records review and interview. *Id.* To date, Plaintiff has not availed himself of this prosecutorial tool.

Defendants moved to continue the Final Pretrial Conference, initially scheduled for July 28, 2016 [Dkt. 143], and on July 27, 2016 the court rescheduled said conference for December 7, 2016. [Dkt. 153.] That same day, the court set the Final Scheduling Order scheduling jury selection for January 3, 2017. [Dkt. 156.] Defendants moved to continue the Pretrial Conference on December 5, 2016 due to a medical issue. [Dkt. 195.] The court granted the motion and continued the Pretrial Conference to December 15, 2016. [Dkt. 196.]

The Pretrial Conference lasted 50 minutes. At the hearing, the court and Plaintiff discussed various pretrial matters, including Plaintiff's general preparedness to argue his case pro se without an expert, particularly in view of the fact that the critical issue in the case was whether Plaintiff suffered from a mental illness which required him to be medicated.

At the hearing, Plaintiff also demanded that he receive court filings directly from the court rather than through the prison litigation system like all other inmates. [Dkt. 199.] Plaintiff represented that officials at Corrigan, where he was housed, were not giving him electronic court filings in a timely manner, and as a result Plaintiff claimed he did not learn he had a court proceeding until an hour before the hearing began. *Id.* This district has a memorandum of understanding with the Connecticut Department of Corrections under which the Department has agreed to deliver to inmates with cases pending in our district all court filings, including docket entries. The clerk of the court reported that these cases comprised 19.61 percent of the district's pending civil caseload at the end of 2017. The court asked the courtroom deputy to state for the record what notices Plaintiff should have received with respect to the December 15, 2016 hearing. *Id.* The courtroom deputy stated the pretrial hearing was originally scheduled on July 27, 2017 for December 7, notice was given to the prison through PRISSCAN, and Plaintiff should have been notified at that time. The hearing was continued on December 6 and notice was provided to Corrigan and should have been provided to Plaintiff at that time as well. *Id.* The court asked if Plaintiff received notice in July of the December pretrial hearing. *Id.* Plaintiff stated he did not receive the July notice, and he was at a different prison facility at that time, and he definitely did not receive the December notice of continuance. *Id.* The court directed the clerk to physically mail the Plaintiff all court orders and ordered defense counsel to mail Plaintiff everything the defense filed on the docket. *Id.* The court made this additional concession to appease Plaintiff despite the fact that no other inmate has informed this court that he did not receive a court filing from the Department of corrections as provided in the memorandum of understanding.

***4** At the hearing, Mr. Lewis also insisted on filing his jury instructions late, in contravention of the court's orders, and refused to proceed when his request was denied. Specifically, the court denied Plaintiff's request to file jury instructions during the trial rather than with the trial memorandum in accordance with Chambers Practices. [Dkt. 199.] The court explained jury instructions and other trial materials must be filed in advance of trial in order to allow the court sufficient time to consider them. *Id.* Plaintiff responded that he understood the court's June Order as stating Plaintiff did not need to file a trial memorandum because he was proceeding pro se. *Id.* The court explained the earlier Order stated Plaintiff was not required to file a joint trial memorandum with Defendants because he had previously refused. *Id.* (referencing Dkt. 112). The court further emphasized that the allowance to file his own trial memorandum did not award Plaintiff the right to file portions of the trial memorandum seven months after the trial memorandum deadline on the eve of trial or during trial. *Id.* The Plaintiff requested an exception, stating Defendants gave Plaintiff certain trial materials after the trial memorandum deadline. *Id.* The court asked defense counsel to recount the timing of his discovery productions. *Id.* Defense counsel responded that he went to the facility where Plaintiff was housed before the Joint Trial Memorandum deadline over the summer but Plaintiff refused to see defense counsel or accept the defense's portion of the joint trial memorandum. *Id.* Defense counsel then filed Defendants' own trial memorandum on the docket and sent those materials to Plaintiff after the trial memorandum deadline. *Id.* As defense counsel began this explanation, Plaintiff disrupted the proceedings, abruptly exited the Pretrial Conference, and shouted at the court: “I'm finished with your hearing. It's on the record that I objected to it. You can make whatever rulings you want to make, Judge, and I'll file my appeals as they're appropriate.” *Id.* The court informed the Plaintiff that he was not required to remain in the courtroom, after which the Plaintiff abruptly left the courtroom in a loud and disruptive manner. *Id.* As he exited he veered toward defense counsel, in a menacing manner and shouted “You're gonna [sic] lose this case.” *Id.*

Plaintiff filed proposed jury instructions on December 22, 2016. [Dkt. 206.] Just five days later, on December 27, 2016, Plaintiff moved to continue the January jury selection and trial dates as his subpoenas for potential witnesses had not yet been served by the U.S. Marshal's Office. [Dkt. 208.] The Plaintiff

had no basis to know whether his subpoenas had or had not been served. The court denied the request for continuance, stating that there was ample time to serve the subpoenas. [Dkt. 219.] However, to allay Plaintiff's concerns and avert another barrage of filings, the court entered a superfluous order directing the U.S. Marshal's Office to promptly serve Plaintiff's subpoenas. [Dkt. 219.]

Jury selection took place on January 3, 2017 and took three hours and 52 minutes. [Dkt. 221.] That same day, the parties attended a one hour and ten minute settlement conference with Magistrate Judge Richardson which did not lead to settlement. [Dkt. 222.] After jury selection Assistant Attorney General O'Neill informed Plaintiff and the court that prison officials planned to relocate Plaintiff to the Hartford Correctional Center ("HCC") for trial. Plaintiff expressed concern that he would not have access to his belongings, including his legal material and the Assistant Attorney General representing the Defendants assured Plaintiff and the court that his belongings had been transported. [Dkt. 227 at 2.] HCC is in the same city as the courthouse in which the trial was to be held, and is considerably closer than Corrigan-Radgowski Correctional Center, in which Plaintiff was housed leading up to trial. It is customary for inmates to be relocated to a correctional facility close to the seat of court where their trial is being conducted. Plaintiff was relocated to HCC after jury selection. Department of Corrections Administrative Directive 60.10 requires that all inmate property be searched and inventoried before upon arrival at a facility. http://portal.ct.gov/DOC/AD/AD-Chapter-6.

On January 5, 2017, the first day scheduled for the presentation of evidence, while the jury was waiting in the jury deliberation room, the court was informed that Plaintiff refused to enter the courtroom. In an effort to placate Plaintiff, the court directed a judicial assistant to find Plaintiff in the courthouse hallway and offer him a blazer provided by the court to wear in front of the jury. Plaintiff refused the gesture and refused to enter the courtroom. The court then met with Plaintiff in the atrium to ask him to enter the courtroom and present his grievance. The court's efforts were unavailing. Mr. Lewis was agitated, boisterous, and disrespectful towards the court. He refused to enter the courtroom and stated his intent to file an appeal. The court recorded the interaction and immediately thereafter played the recording on the record. Below is a transcription of the colloquy:

C: This is the first day of evidence in your trial. I asked my assistant to come out and bring you a sports coat to offer you an opportunity to wear that during the trial and she tells me that you're not coming into the courtroom, is that correct?

***5** P: I don't have anything to say to you, Judge. I don't have anything to say to you. [Unintelligible]

C: You don't have to explain anything. I just want to make sure you understand that you have the right not to go forward with your trial, but if you make that decision, then I am going to dismiss the case today.

P: Do whatever you want, judge. But I'll tell you what. I'm not refusing to proceed with my trial. If you want to go into the court room, and have an ex parte, I'm happy to do that.

C: No, I don't care to have an ex parte about this. If you're not coming into the courtroom where the trial will be conducted, then you're declining to participate in your trial and therefore I will dismiss the case.

P: Yeah well, I'm sure the Second Circuit will wonder [unintelligible]. They will also wonder why I was transferred in the middle of jury selection and all my papers were confiscated—that I've been asking for since December. They will also wonder why the last three days I haven't had a shower haven't been given any of my clothes and my personal items have all been taken from me. They will also wonder why—about that.

C: So you're telling me that your materials—

P: —the stuff that I left with on Tuesday—

C: —from Corrigan were not transferred to Hartford?

P: No if you would listen, if you would listen for one minute. The stuff that I left with in the courtroom that I had with me on Tuesday was confiscated when I was brought there, to Hartford. And the stuff I had in Corrigan, I was not allowed to access that. The last 42 hours ... I haven't showered, any of my clothes. I'm not going in front of the court smelling like whatever, haven't had any sleep or anything like that.

C: Mr. Lewis, please come into the courtroom.

P: I'm not going in the courtroom.

C: Listen to me ...

P: I'm not going in the courtroom.

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C: Would you please listen to me.

P: I am listening but I'm not going in no courtroom.

C: Mr. Lewis, the jury is not in the courtroom.

P: I don't care who's in there. I'm not going in front of the court, after being up for two or three days without a shower.

C: Mr. Lewis, you are in front of the Court. I would like a formal record of this. I want to make it in front of Mr. O'Neill who, if you recall, on Tuesday indicated that he was going to make an effort to get you those things ...

P: I don't care what he said. [unintelligible]

C: Mr. Lewis, I want to make a complete record.

P: You can make a complete record, but I'm telling you right now, I'm not playing any more games.

C: Come into the courtroom.

P: I'm not coming in the courtroom. I haven't had a shower since the last time I saw you. I haven't seen any of my papers. I'm not playing any more games.

C: I understand. Mr. Lewis, I'm not asking you to appear before the jury today. I'm asking you.

P: I'm not appearing in front of nobody.

C: Alright, well that's your choice. If you want to resolve this, we can try to do that, but we have to deal with ...

P: [unintelligible] I asked you to intervene on this on Tuesday before Mr. O'Neil, and you let him handle it, and you see what happened. I'm not playing any more games.

***6** C: He's not here. He's in the courtroom. We can make a record of what happened in the courtroom.

P: You can make a record of whatever you want to make. I'm done playing games. The record will show all my papers was confiscated when I left here, I was transferred in the middle of jury selection. The stuff I have at Corrigan I've been asking for since December 7. What they tried to do is just drop it off ... I haven't seen those papers since I left here. All my trial papers were confiscated. I want to talk to the FBI right now, file an obstruction of justice charge. That's who I want to talk to. I don't want to talk to no judge. I want to file an obstruction of justice. I want to talk to a federal agent.... If you want to drag me into the courtroom, I'm sure the press [members of which were present and attentive to the colloquy] would like that. I'm just telling you, I haven't showered, I haven't brushed my teeth, I'm not going into any courtroom. It's as simple as that. It's as simple as that. You can take it as defiance, but I did ask you to intervene about this, but you decided to refer it to the Attorney General. ... he's complicit in it ... I'm going to ask them to investigate that as well.

C: Do you have anything else you would like to say?

P: No, I don't. I wish you would leave me alone. That's all I have to say.

D: I will do that.

[Dkt. 234.]

After this exchange, the court took the bench and played the recording into the record, noting that had Mr. Lewis come into the courtroom they could have perhaps come to a better understanding of what happened, found a way for him to access his materials, and proceeded with the trial later. *Id.* However, Plaintiff's refusal allowed the court no opportunity to determine any basis to continue the trial, and Plaintiff stated he had lost trust in the court and wanted to file an appeal. Accordingly, the court dismissed the case without prejudice to a motion to reopen by February 9, 2017 stating good cause for Plaintiff's refusal to proceed with the trial. This was meant to allow the Plaintiff an opportunity to reconsider his position and demonstrate excusable neglect to prosecute his case. [Dkt. 224.]

On February 3, 2017, Mr. Lewis filed a timely motion to reopen the case in which he reiterated what he said on the first day of evidence when he refused to enter the courtroom. [Dkt. 227.] *Id.* The court held a two-day hearing on the Motion to Reopen, on September 12, 2017 and October 30, 2017. On the first and much of the second day, Plaintiff persisted in insisting falsely that he was deprived of his legal material and use of the bathing facilities. Only after the court repeatedly explained the standard of review did Mr. Lewis finally admit that his material was not denied him, but that he refused to cooperate with officials to obtain them. Plaintiff explained that he was "shocked" by his transfer and inability to have all of his material immediately upon entering HCC. The court credited Mr. Lewis' account that he "panicked" when

he was told he was being transferred and his panic escalated when he was told he could not have his glasses and legal material immediately. His extremely heightened emotional state prevented him from thinking clearly enough to accept the offers made to him at HCC.

***7** In the succeeding days, Plaintiff became intractably "stubborn" and was so overwrought up by the time he returned to court on January 5 that he was both unprepared for trial and emotionally unable to appreciate what the court was saying to him. In light of Plaintiff's testimony, mindful of the Second Circuit's preference for matters to be decided on the merits and the deference to be accorded to *pro se* litigants, the court reopened Plaintiff's case on November 16, 2017 and set a new trial date of May 1, 2018. [Dkt. 286.]

On February 7, 2018, Mr. Lewis resumed his dilatory litigation practices. He moved for an order to find Defendants in contempt for failing to give him access to his legal materials. [Dkt. 288.] Defendants responded that they made an appointment in November for Plaintiff to review his legal materials, but Plaintiff failed to appear for his appointment and failed to request to review his legal materials at any point after that. [Dkt. 290.] After Plaintiff filed his motion for contempt, Defendants again arranged for Plaintiff to review his property and he did so on February 20, 2018. *Id.* The court found Plaintiff's motion moot. [Dkt. 293.]

Plaintiff filed another in a persistent series of meritless motions for reconsideration, in which he did not deny that he received access to his legal materials on February 20, 2018. [Dkt. 295.] The court denied the motion for reconsideration for failure to meet the reconsideration standard, articulating the standard which it articulated on numerous prior occasions in Orders denying his prior motions for reconsideration. The court counseled once again that Plaintiff was required, and failed, to cite an intervening change in law, the availability of new evidence, or the need to prevent manifest injustice which would result from the failure to reconsider the court's ruling. [Dkt. 296 (citing *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (stating the reconsideration standard)).]

Trial memoranda for the May 1, 2018 trial were due March 15, 2018. [Dkt. 286.] Neither party submitted a new trial memorandum. On April 3, 2018, the court issued a notice presuming that the parties intended to rely on their prior trial memoranda. [Dkt. 299.] On April 5, 2018, the court accordingly ordered the Clerk's Office to re-issue the subpoenas for trial witnesses requested with Plaintiff's Second Trial Memorandum. [Dkt. 301.] Later that day, the court received Plaintiff's Third Trial Memorandum and eighteen applications for issuance of subpoenas for witnesses to testify at trial, including non-parties. [Dkts. 303, 306–310, 313–325.]

Lewis issued subpoenas for individuals who had no apparent knowledge of his case, including a member of the Governor's staff. Plaintiff's trial memorandum did not contain sufficient information about the substance of the anticipated testimony to determine whether a subpoena should be issued or the date on which he anticipated the witness' testimony would be offered. *Id.* Each application sought to call the subpoenaed party to appear on May 1, 2018, the date of jury selection. *Id.* The dates set forth for the presentation of evidence were May 7, 9, 11, 14, 18, 21, 22, 24, 25, 31, and June 1. [Dkt. 330.] Accordingly, the court issued an Order granting the Plaintiff's motions for issuance of subpoenas, but ordered that witnesses would appear in the order listed in Plaintiff's Third Trial Memorandum beginning on May 7, 2018, with no more than five witnesses called on any particular day. [Dkt. 341.] The court entered a notice stating Plaintiff could object to the order in which witnesses were called to appear at jury selection on May 1, 2018. *Id.*

***8** Plaintiff also filed two pretrial motions with his Third Trial Memorandum: a motion to wear civilian clothes and not be restrained at trial [Dkt. 304] and a motion in limine to preclude evidence of his criminal history at trial. [Dkt. 305.] The court granted the Plaintiff's unopposed motion to wear civilian clothes and denied his motion to be unrestrained in light of his demonstrated inability to control his anger, unpredictability, aggressive conduct toward opposing counsel and the court, and violent criminal history. [Dkt. 345.] The court denied Plaintiff's motion in limine, finding that Plaintiff's criminal history was relevant and potentially probative in light of Defendants' contention that their decision to involuntarily medicate the Plaintiff was not deliberately indifferent to his medical needs. *Id.*

On April 12, 2018, Plaintiff filed yet another motion for contempt which did not satisfy the contempt standard. [Dkt. 331]. In it, he charged that a subpoenaed party failed in August 2016 to produce a video recording of surveillance footage from Northern Correctional Institution. [Dkt. 331.] The August 2016 subpoena directed the subpoenaed party to produce the recording of surveillance footage from June 9, 2011 to the Clerk's Office, so it could be used as a trial exhibit in the trial which was aborted because Plaintiff refused to

enter the courtroom. *Id.* Plaintiff asserted he contacted the Clerk's Office on March 22, 2018, to confirm that the Clerk's Office had the recording, and the Clerk's Office responded that they had no record of receiving it. *Id.* Defendants responded that they had a copy of the recording, and asserted that it was provided to them at the abrupt close of the January 2017 trial along with Defendants' exhibits. [Dkt. 336.] The court accordingly denied the motion for contempt and ordered Defendants to bring the recording to trial and deliver it to the courtroom deputy. [Dkt. 337.] Defense counsel produced that recording on May 1, 2018. [Dkt. 356 at 1:15:30–1:16:00.]

On April 16, 2018, Defendants moved for a status conference, asserting that many of the individuals listed as witnesses in Plaintiff's Third Trial Memorandum could not offer relevant testimony, that a number of Plaintiff's exhibits were irrelevant, and also alerting the court that defense counsel was unavailable on May 18, 2018 due to his son's college graduation. [Dkt. 334.] The court denied the motion for status conference as the court was presiding over a trial which was not scheduled to end until the day before Plaintiff's trial and accordingly could not accommodate a conference; but the court offered to address the issues after jury selection, if time permitted. [Dkt. 335.]

The court also vacated the May 18, 2018 trial date, as the remaining trial dates scheduled were sufficient to allow for the length of trial estimated by both parties, jury deliberations, and could also accommodate a modest measure of customary delay. *Id.*

On May 1, 2018, the parties and 50 prospective jurors appeared for jury selection. Mr. Lewis was uncooperative and disruptive of the proceedings once again. A United States Marshal reported that when Mr. Lewis arrived at the courthouse he seemed "very agitated," did not want to be restrained in the courtroom despite the court's order, and told the U.S. Marshal not to talk to him. [5/1/2018 email, Deputy United States Marshal A. Dave to Courtroom Deputy J. Shafer.] The U.S. Marshal escorted Mr. Lewis out of the building and back into the Department of Corrections vehicle to calm down. *Id.* The U.S. Marshal read Mr. Lewis the court's order that he be restrained. *Id.* Mr. Lewis subsequently calmed down and was escorted back into the courthouse. *Id.*

The court then took the bench to address preliminary matters with the parties before jury selection. At this time, Plaintiff alerted the court that he was involved in a recent altercation with a corrections officer and was placed in restricted housing, where he did not have access to his legal materials and would not be able to complete his trial preparations. He anticipated being in restrictive housing through May 10. Accordingly, Plaintiff asserted he would not be able to proceed with trial through the first three days scheduled for presentation of evidence, and requested a modification of the trial schedule to begin on May 14, 2018 and proceed on three unscheduled days beyond those set aside for the presentation of evidence. The court had other matters scheduled after the trial dates set aside for this matter, including jury selection for multiple other cases and a bench trial, which precluded the court from extending the trial schedule as Plaintiff requested. The court explained that eliminating the first three days of trial would not leave enough dates for both parties to present their evidence and present closing arguments, for the court to instruct the jury, and for the jury to deliberate. Plaintiff then moved in the alternative for "extraordinary relief," namely for the court to order the Department of Corrections to allow him access to his legal materials while in restrictive housing, giving the impression that his possession of these items in the restrictive housing unit contravened the Department of Corrections' safety and security policies. The court explained that it had no authority to order the Department of Corrections to change the safety and security protocol of the restrictive housing unit.

***9** The court asked Plaintiff to explain why he was in restrictive housing. Plaintiff described the events as follows:

> C: When were you placed in restrictive housing?
>
> P: On the 24 th of April, which is a week ago, on the evening of last Tuesday. ...
>
> C: Mr. Lewis, why are you in restrictive housing?
>
> P: According to prison staff at McDougal, they indicated that I interfered with safety and security. Specifically, they charged me with interfering with an officer's duties. They alleged that I interfered with the officer in securing the cell doors in the housing unit, and specifically what she states in the report I delayed her from properly securing the unit by interrupting her, and the charge is interfering with safety and security. I don't have anything much to say about that because that's not been adjudicated and the facts are in dispute. I'm not going to get into the facts about it because it wouldn't be fair to them because they're not here. ...
>
> C: Mr. Lewis, I'm not concerned about the ultimate adjudication of—[interruption]

P: Yeah, I know you're not, your honor.

C: Listen to me. I'm not concerned about, I'm not responsible for, I will not weigh in in any way on the appropriateness of your being assigned to a restrictive housing unit from the standpoint of the Department of Corrections' disciplinary process. But I need to understand what you did that caused you to be placed in restrictive housing. Do you deny that you were present at the time they alleged you were present?

P: I don't deny that I was present. I deny the allegations in the disciplinary report.

C: Tell me from your perspective what happened.

P: I'll tell you what happened and before I tell you what happened it's important I give you some background on how the unit is operated. At McDougal, we're allowed to have access to typewriters for legal work only. Last Tuesday, I was preparing a motion for this case. I did the rough draft and I was attempting to go type it. ... You have to first give the officer your ID to receive the [typewriter] ribbon. When it was time for us to be released at 6:30, I proceeded like I normally do ... to the officer's desk to retrieve the ribbon. It's a room that we use to do the typing in. It's secure. So I waited for another officer who was on the floor to open that door to allow me in. In between that time, I think about 10 minutes had elapsed because there was new inmates moving into the unit and he was securing them on the bottom tier. You're technically not allowed to be out, but other inmates like me was on the top tier.... A tier is just a floor, it's the bottom, the lower level of the housing unit.... When I got into the room, I noticed that the correction tape, which is another device that's used in a manual typewriter, someone had removed it. Normally it's kept in there, but oftentimes some inmates take it out. The CTO, the Correctional Treatment Officer in the unit, she usually leaves an additional one ... So when I realized that the correction tape wasn't there, I went back and asked the officer at the unit ... the bubble ... they call it a bubble, the officer station in each unit ... I asked her, did the CTO happen to leave additional correction tape? She just went berserk—'what am I your secretary?' ... I was like 'No, I'm just trying to find out.' I said 'forget it,' and I give her ... the ribbon back so I could get my ID, and then she wouldn't give it to me for whatever reason. She was telling me to lock up. ... That means go inside your cell. At this time, I made a phone call and I let my sister know that I'm probably going to seg. Because normally, whenever they say that, they're calling a lieutenant to bring you to seg.

***10** C: Let's go back. You went to the bubble and asked if there was extra corrections tape. She started raising her voice at you ... and then what happened?

P: I said let me have my ID ... she was getting loud, I walked away from it. I went to use the phone.

C: And where was the phone?

P: If you're in the bubble, the phone is where the deputy is sitting ...

C: Why did you call your sister?

P: Because she needed to know that I'm going to seg. and if I don't call her she'll know where I'm at.

C: Why did you think you were going to seg.?

P: Because this is a normal practice ... Whenever they say 'lock up' they call in a lieutenant; that means you're going to seg. I just know that from my experience.... Actually, I called my sister twice. After I called her, I had some of my legal papers, my CD players, and my headphones inside of a bag. Being that I knew I was going to seg., I didn't want them to get lost. So I told my cellmate who was taking a shower at the time on the top level, I told him to make sure this got packed with my property when the C/O's came, I told him I was going to seg. Then I called my sister again and told her if she would bring my clothes on Tuesday and to make sure to remember to bring my reading glasses because I might not have them. At this time, just as I anticipated, several C/O's arrived and a lieutenant and handcuffed me and brought me to seg. And around 5:00 in the morning last Wednesday I was served with the ticket charging me with interfering with safety and security. In between that time I was interviewed by the unit manager of the unit I was in and I explained to her what happened, but the disciplinary hearing has not been held and I'm anticipating I will be found guilty and I will be held in a restrictive housing unit for 15 days, and that's estimating that I will be released around the 11 th ....

C: Mr. Lewis, what would have happened if you had gone to your cell as she told you to do?

L: Probably the same thing because once they call the lieutenant it doesn't matter, they're going to take you out of your cell anyway.... When she realized that I wasn't being

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bullied, I wasn't going inside my cell during my recreation period [she called the lieutenant].

C: *So she told you to go to your cell, you refused to go, and when she realized you refused to follow her instructions, she told you that you were going to seg. Isn't that consistent with disciplinary violation?*

P: *Yea, it's consistent with disobeying a direct order. It would have been a Class B offense under the code of discipline.... I don't dispute that I didn't follow her last order. What I dispute is the allegations and the substance of the complaint and the charge of her complaint that I interfered with her duties ... a Class A offense ... You can get up to 10 days of punitive seg for a Class B offense....*

C: So Mr. Lewis, if you had gone to the bubble, and she had spoken to you aggressively, and told you to go to your cell, and you didn't go to your cell, *you knew at that time that was a Class B offense which could be punishable by housing you in segregation up to ten days where you would not have had your legal material and couldn't prepare for trial.*

***11** P: *Yes.*

[Dkt. 356 at 6:20–31:30] (emphasis added)

Plaintiff then raised additional motions for the court to "refrain from offering the jury panel descriptions or definitions of medical conditions" in its statement of the case at the beginning of jury selection. *Id.* at 32:00. Plaintiff also moved for an order that courthouse personnel escort Plaintiff to the Clerk's Office and to the U.S. Marshal's Office at some point that day for official business. *Id.* at 34:00–35:35. Plaintiff refused the court's request that he explain why he needed to go to the Clerk's Office or the U.S. Marshal's Office, stating only that it was for "official business" and that he did not feel it was important to disclose his reasons. *Id.* Absent any reason to grant his motions, the court denied his requests to be escorted around the building to the clerk's office, where members of the public could be present, and the Marshals' office, where the lock-up is located.

The court confirmed that Plaintiff needed five days to put in his case and Defendants needed three days. Plaintiff confirmed that it would be "impossible" for him to proceed with trial as scheduled, with the presentation of evidence to begin on May 7. *Id.* at 1:11:00. The court then recessed, consulted its calendar, and found that, in light of the four cases scheduled for trial in June with jury selection May 29, there was no possibility of trying this case unless the parties were prepared to proceed as scheduled. *Id.* at 1:13:00–1:14:55. The court again asked Plaintiff if he was prepared to proceed as scheduled, and he said he would not be prepared to present evidence on May 7, 9, or 11. *Id.* The court excused the venire panel and notified the parties that it would consider how to proceed. *Id.* at 1:15:00-1:15:20. That day, the court set a Rule 41(b) hearing for May 7, 2018 to consider whether to dismiss this action for failure to prosecute. [Dkt. 354.]

The court determined that under the Department of Corrections' administrative directives, disobeying a direct order is a class B offense punishable by up to 10 days in restricted housing. [Conn. Dept. of Corr. Admin. Directive 9.5 at 5, 12.]. Thereafter, the court issued an order stating:

> In view of the age of this case and the fact that the Plaintiff's conduct has twice prevented the case from proceeding to trial, once after a jury was selected and most recently after a venire panel had been summoned and without prior notice, which he had the opportunity to give, the court shall conduct a hearing to consider whether to dismiss this case for failure to prosecute on Monday, May 7, 2018 at 9:30am. The court orders Plaintiff's counselor to provide Plaintiff with a copy of the Notice of Electronic Filing as well as this accompanying Notice immediately.

II. Standard of Law

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law." *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (affirming dismissal for failure to prosecute where plaintiff's counsel failed to appear at a duly scheduled pre-trial conference and gave

no reasonable explanation for his absence, finding it could "reasonably be inferred from [counsel's] absence, as well as from the drawn-out history of the litigation that petitioner had been deliberately proceeding in dilatory fashion."). The Supreme Court noted that the authority to dismiss for failure to prosecute was expressly recognized in Federal Rule of Civil Procedure 41(b), which states:

> ***12** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Courts conduct two analyses to determine whether dismissal for failure to prosecute is appropriate. The first and most applicable here applies when a plaintiff refuses to go forward with a properly scheduled trial. *Lewis v. Rawson*, 564 F.3d 569 (2d Cir. 2009). The second "generally applies in cases involving instances of litigation misconduct such as the failure to comply with a scheduling order or timely to respond to pending motions." *Id.* at 576 (citing *Drake v. Norden Systems, Inc.*, 375 F.3d 248 (2d Cir. 2004)). Both analyses are discussed below.

a. Analysis Where a Plaintiff Refused to Proceed with a Properly Scheduled Trial

A district court acts well within its discretion in requiring strong justification for a continuance after a jury has been sworn. *Lewis*, 564 F.3d at 577. Where a plaintiff refuses to go forward with trial, "it is beyond dispute ... that a district court may dismiss a case under Rule 41(b)" and may treat such unwillingness "more severely" than "the more typical failure to comply with her discovery obligations on time, or to meet some other pre-trial deadline." *Lewis*, 564 F.3d at 580. There are no tests defining "strong justification" for a continuance or when dismissal is an appropriate "more severe" measure. However, courts point to certain circumstances as grounds for dismissal, including the insufficiency of other means of resolving a plaintiff's grievance, plaintiff's ability to proceed with available evidence and later request a continuance or to proceed with his or her full case and later appeal any adverse judgment, and plaintiff's history of delay or vexatious conduct. The categories of grounds for dismissal are discussed below.

i. Dismissal Where the Court Considered Alternative Ways to Address the Issue, but Found them Insufficient

The Second Circuit has found insufficient justification for continuance where the plaintiff, an inmate, stated he feared for his life because he was being held at a facility where some of the defendants worked as guards. *Lewis*, 564 F.3d at 578. The Court emphasized the presumption that inmates will be treated properly and lawfully at any state correctional facility in rendering its decision. *Id.* The district court considered other options including detention in a special housing unit with 24-hour video surveillance and adjournment for a month to transfer the case to a different court so plaintiff could be housed in a different prison. *Id.* However, plaintiff refused to be placed in the special housing unit and the court found adjournment and transfer to a new venue untenable, as it would have required empaneling a new jury. *Id.* The court also considered the plaintiff and his counsel's delay in requesting a continuance, noting that even if plaintiff and his counsel were not told explicitly that plaintiff would be transferred to a facility closer to the courthouse for trial, they should have known he would be transferred closer to the courthouse and that, given his crimes, he would be housed in a maximum security facility. At the least, he and his attorney stated they were aware of his impending transfer the weekend before trial was to begin. *Lewis* at 579. Their failure to raise the issue until the morning of trial was an unreasonable delay, and plaintiff's refusal to accept the solution provided by the court warranted dismissal. *Id.*

ii. Dismissal Where Plaintiff Could have Proceeded with Available Evidence

***13** It is insufficient to request a continuance at the beginning of a trial because key evidence is unavailable where

the party could have proceeded with available evidence. In *Moffitt*, for example, the Seventh Circuit affirmed a district court's dismissal with prejudice where the plaintiff, who was hospitalized for drug and alcohol addiction, failed to appear for trial and her attorney announced she was not prepared to go forward in her client's absence. *Moffitt v. Illinois State Bd. of Ed.*, 236 F.3d 868, 868-69 (7th Cir. 2001). Plaintiff's counsel explained plaintiff was the only one who could testify to matters alleged in the complaint, but the Court found ten depositions had been taken in the case and the attorney could have proceeded by calling other witnesses and introducing plaintiff's deposition, interrogatories, and other exhibits. *Id.* Further, plaintiff had "by her misfeasance and nonfeasance ... shown no interest in moving forward with the trial" because she did not read the notice from her attorney regarding the trial date, did not notify her counsel she was voluntarily checking into a drug treatment program, and failed to submit credible evidence that she was physically unable to attend trial." *Id.* "Once [plaintiff's] pretrial motions for a continuance had been denied and the jury was empaneled, [plaintiff] and her counsel should have expected that the case would be dismissed if they did not proceed with the trial." *Id.* On review, the Seventh Circuit noted there was no real record of delay on plaintiff's part and sanctions less severe than dismissal had not already proven ineffective, but those considerations were outweighed when the plaintiff was unwilling to proceed on the trial date scheduled. *Id.* at 873. The Seventh Circuit considered evidence that plaintiff's drug addiction had spiraled out of control and she reasonably decided to begin rehabilitative treatment, but also noted that plaintiff should have provided the court with evidence of her treatment during the week before trial when she was admitted to establish her unavailability. Finally, the Seventh Circuit found that plaintiff's counsel could have proceeded with other evidence rather than refusing to proceed at all. The Court concluded the district court acted reasonably in denying a continuance and dismissing the case. *Id.* at 876.

The Fifth Circuit has also dismissed when plaintiff's counsel could have begun the trial with the evidence available. In *Lopez v. Aransas Cnty. Independent Sch. Dist.*, 570 F.2d 541 (5th Cir. 1978), plaintiff alleged race-based employment discrimination. On May 5, 1977 the court clerk set the case for docket call on June 13. On the day of trial, plaintiff's counsel stated the plaintiff was unavailable for trial and would remain unavailable until the following month when the academic year ended. *Id.* at 544. The court denied the motion for a continuance. Plaintiff's attorney refused to call any witnesses, although plaintiff's deposition had been filed and ten defense witnesses including named defendants were present. *Id.* The court dismissed with prejudice and also noted that plaintiffs knew months earlier when the case was scheduled and when plaintiff was available, but made an eleventh-hour oral motion for a continuance. *Id.*

Similarly, in *Michelsen v. Moore-McCormack Lines, Inc.*, 429 F.2d 394 (2d Cir. 1970), plaintiff alleged injury due to poor conditions on his employer's boat. The week of trial, plaintiff's counsel requested a postponement due to unavailability of plaintiff, who was at sea, and his doctor, who was ill. The Court suggested the case proceed as to liability, but counsel stated plaintiff's prima facie case required the unavailable doctor. The Court then suggested testimony via telephone, but counsel stated the doctor was too ill to participate at all. The Court postponed the case until the following Monday, at which point plaintiff's counsel renewed his motion to adjourn. The jury was sworn and the Court denied plaintiff's motion, stating counsel should proceed with plaintiff's deposition transcript. When plaintiff refused to proceed, the Court dismissed for failure to prosecute. *Id.* at 395. Even though plaintiff's counsel could not have foreseen his doctor falling ill, the Second Circuit affirmed, stating Plaintiff's counsel "presumably had other evidence" including plaintiff's deposition transcript and should have presented the evidence available and then requested an adjournment until Monday to permit the doctor and plaintiff to testify. *Id.* at 396. If counsel had done so, the Court could have assessed the importance of the doctor's testimony to liability in considering whether to grant an adjournment. But with no evidence presented, the Court did not abuse its discretion in denying an adjournment and dismissing the case.

iii. Dismissal Where Plaintiff Could have Proceeded with Trial and Later Appealed any Adverse Judgment

Similar to situations where the plaintiff could have presented available evidence and later requested a continuance, dismissal is also appropriate where a plaintiff could have presented his case in full and preserved his objections for appeal. In *Eddy v. Weber County*, 77 F.3d 492 (10th Cir. 1996), after the jury was impaneled and opening statements were made, the pro se plaintiff requested all witnesses be sequestered. The Court granted the motion except as to the sheriff, who was sitting at defense counsel table, because

he was the designated representative for the defendant. The plaintiff objected, arguing other members of the sheriff's department would not testify truthfully in the sheriff's presence. The Court warned if plaintiff was unwilling to proceed, "I'll just dismiss the case. Is that what you want?" *Id.* at *1. The plaintiff stated he would not proceed, and the Court dismissed the case for failure to prosecute. The Tenth Circuit upheld the decision, stating plaintiff could have proceeded at trial and raised his challenge to the court's ruling on appeal from any adverse judgment, but plaintiff's refusal to proceed even with the Court's threat of dismissal warranted dismissal. *Id.*

***14** Likewise, a court has "no real choice but to dismiss the case" when the plaintiff attempts to forego trial in favor of an immediate appeal of an adverse ruling. In *Palmieri v. Defaria*, 88 F.3d 136 (2d Cir. 1996), plaintiff alleged copyright infringement. The parties appeared for the first day of trial, but plaintiff's counsel requested a stay so he could take an interlocutory appeal of an adverse *in limine* ruling. The Court denied the request. Plaintiff's counsel asserted the plaintiff had insufficient evidence for trial and would permit judgment to be entered against him so he might appeal the final judgment. The court instead dismissed the case for failure to proceed with trial. *Id.* at 138-9. The Second Circuit affirmed, noting the plaintiff could have proceeded with his case especially since the district court expressed willingness to revisit his evidentiary rulings depending on how the evidence developed at trial. *Id.* at 141.

iv. Dismissal Where Plaintiff has a History of Protracting Litigation or Vexatious Conduct

A plaintiff's history of protracting litigation and requesting trial continuances may also serve as grounds to deny a continuance and dismiss for failure to prosecute, regardless of the basis for the final request. In *Doe v. Winchester Bd. of Ed.*, 2017 WL 214176 (D. Conn. Jan. 18, 2017) (Bolden, J.), plaintiff alleged defendant school board failed to protect her minor child from alleged sexual assault by a classmate. The Court denied summary judgment on March 21, 2013, after which the case was scheduled for trial and postponed five times, each time at Plaintiff's request, often on the "very eve of trial." *Id.* at *1. Prior trial dates were postponed because plaintiff failed to submit exhibits, moved to add new witnesses to her witness list as late as three days before trial, agreed to an (ultimately unsuccessful) settlement conference three days before a previous trial date, and counsel moved to withdraw on the eve of two different trial dates. *Id.* After the fifth motion for a continuance, the Court issued an Order to Show Cause why the case should not be dismissed for failure to prosecute. *Id.* The Order warned that plaintiff's failure to respond to the Order to Show Cause could, by itself, result in dismissal for failure to prosecute. *Id.* Plaintiff failed to file a response memorandum and failed to appear in person at the show cause hearing, appearing by telephone instead. "Based on the protracted history of this case and the Court's numerous interactions with Plaintiff, including an on the record colloquy and an in camera discussion with her and her current counsel, the Court has no reason to believe that Plaintiff will ever be able to proceed to trial. Plaintiff has proven incapable of maintaining counsel and complying with Court orders essential to this case proceeding to trial, such as by failing to appear for Court-ordered proceedings." *Id.* at *1. The Court found Plaintiff's refusal to proceed with five scheduled trial dates, three in the span of a three-month period preceding the Court's Order to Show Cause, justified dismissal under Rule 41(b). *Id.* at *12.

Similarly, in *Zagano v. Fordham Univ.*, 900 F.2d 12 (2d Cir. 1990), the plaintiff filed an employment discrimination action. The case proceeded through discovery for four years, during which time two witnesses died and two others fell into poor health. *Id.* at 13. At a pretrial conference, plaintiff's counsel stated plaintiff intended to pursue the action and trial was set. Plaintiff's counsel protested that discovery was not complete, and the court briefly extended the discovery deadline, but plaintiff made no further efforts to complete discovery. *Id.* On the discovery deadline, plaintiff requested that the case be placed on the suspended case calendar. The Court denied the request but continued the trial by nine days. Nine days before trial, plaintiff's counsel moved to voluntarily dismiss the case because plaintiff brought the action "inadvertently," and preferred to resolve the dispute through an administrative hearing. The Court denied the motion for undue delay. When plaintiff declined to proceed with trial, the Court dismissed with prejudice under Rule 41(b), citing plaintiff's use of the federal action as an instrument of vexation and the fact that defendants had been prejudiced by the time spent preparing for trial and diminishing availability of witnesses.

***15** Similarly, even where no single act is particularly egregious, dismissal may be appropriate based on the cumulative effect of a party's multiple delays. In *Theilmann*

v. Rutland Hosp., Inc., 455 F.2d 853 (2d Cir. 1972), plaintiff alleged medical malpractice. Plaintiff retained new counsel within months of trial, who upon his appearance informally requested that the case be postponed and left the country for a vacation without awaiting a response from the court. Another lawyer from new counsel's firm wrote a second letter requesting postponement until September given his partner's vacation, and the motion was denied. On the first day of trial, one of the new lawyers appeared, argued plaintiff's case was not prepared to proceed and requested a continuance. The court declined. Counsel then stated he could not proceed, and the court dismissed with prejudice under Rule 41(b). The Second Circuit upheld the ruling stating the cumulative acts of plaintiff's new counsel caused unnecessary delay, even though the retention of new counsel might under other circumstances have warranted a continuance.

The Second Circuit has also dismissed where plaintiff failed to timely notify the court of the need for a delay, even where the need may have been legitimate. In *Ali v. A&G Co.*, 542 F.2d 595, (2d Cir. 1976), plaintiff brought a personal injury suit. The day before trial, plaintiff's counsel requested a trial delay to complete discovery. The court denied the request. On the first day of trial, plaintiff and his counsel failed to appear. The Court dismissed with prejudice for lack of prosecution and later denied a motion to vacate that dismissal. The Second Circuit affirmed, citing plaintiff's failure to explain the discovery delay until the eve of trial, and failure to arrange their schedules to be present. *Id.* at 596.

b. Analysis for Other Litigation Misconduct

Dismissal is a harsh remedy and is appropriate only in extreme situations." *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996). A case should not be dismissed unless "particular procedural prerequisites" are accorded to the Plaintiff, including "notice of the sanctionable conduct, the standard by which it will be assessed, and an opportunity to be heard." *Mitchell v. Lyons Prof'l Servs., Inc.*, 708 F.3d 463, 467 (2d Cir. 2013) (collecting cases). Federal Rule of Civil Procedure 41(b) authorizes the district court to dismiss an action "[i]f the plaintiff fails to prosecute or to comply with [the] rules or a court order."

"[*P*]*ro se* plaintiffs should be granted special leniency regarding procedural matters," and their claims should be dismissed for failure to prosecute "only when the circumstances are sufficiently extreme." *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001) (internal quotation marks omitted). Courts should be especially hesitant to dismiss claims for procedural deficiencies. *Lucas*, 84 F.3d at 535.

The Second Circuit has made clear that the analysis for dismissal under Rule 41(b) for failure to proceed with a duly scheduled trial (discussed above) is distinct from the analysis for dismissal due to "litigation misconduct such as the failure to comply with a scheduling order." *Lewis*, 564 F.3d at 576, *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014) (per curiam). However, courts often discuss both tests when determining whether dismissal for failure to proceed with trial is appropriate. The five *Drake* factors for dismissal for litigation misconduct are whether:

I. the plaintiff's failure to prosecute caused a delay of significant duration;

II. plaintiff was given notice that further delay would result in dismissal;

III. defendant was likely to be prejudiced by further delay;

IV. the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and

V. the trial court adequately assessed the efficacy of lesser sanctions.

Drake v. Norden Sys., Inc., 375 F.3d 248, 254 (2d Cir. 2004). None of these factors is dispositive. *Baptiste v. Sommers*, 768 F.3d 216. All factors need not weigh in favor of dismissal for dismissal to be appropriate under *Drake. See, e.g.*, *Lewis*, 564 F.3d at 583 (finding that three factors supported dismissal and two were neutral and affirming the district court's dismissal with prejudice). How courts evaluate each factor is discussed below.

I. Step One

***16** While the Drake factors are by their nature a case-specific analysis, courts have found a delay of trial by as little as ten days to be "significant" where it was preceded by repeated delays throughout the litigation. *See, e.g.,* *Peart v. City of N.Y.*, 992 F.2d 458, 462 (2d Cir. 1993) (discussed below). In addition, where both parties have played a role in

the slow pace of litigation, dismissal may still be appropriate where the delays were largely caused by plaintiff. *See, e.g., Drake*, 375 F.3d 248 (discussed below).

In *Drake*, plaintiff alleged that defendant contractors had defrauded the government under the False Claims Act. The case was stalled for three years until the government decided not to intervene, and then the complaint was served on defendants and amended twice, the last of which on December 17, 1997. 375 F.3d at 252. Defendants moved to dismiss and on August 24, 2000 the Court dismissed certain counts without prejudice to amending the complaint within 60 days. Plaintiff failed to amend within the time allotted and on July 25, 2001 the court granted partial summary judgment. On January 31, 2002, the court notified plaintiff there had been no action on his case in six months and the case was subject to dismissal unless plaintiff gave a satisfactory explanation for its inaction within 20 days. *Id.* at 254. Plaintiff's counsel responded within the 20 day window with a third amended complaint and explanation that the case was complex, required significant discovery and motions practice, and counsel had experienced scheduling conflicts. The court found significant the 17 month delay between the court's order to amend the complaint and the plaintiff's submission of an amendment, filed only after the court issued a warning of dismissal. *Id.* at 255. The court found that although the slow pace of the litigation was not exclusively caused by plaintiff, it was caused largely by plaintiff and weighed in favor of dismissal. *Id.* at 255.

The *Lewis* court also considered the *Drake* factors in addition to the "substantial justification" factors discussed earlier in this memorandum. The court found the plaintiff's request to transfer the case to a different courthouse in order to house the plaintiff at a different prison would have required a delay of two to three weeks. 564 F.3d at 582. The proposed transfer "not only risked a mistrial, it demanded it." *Id.* at 582. The delay was significant and weighed in favor of dismissal. *Id.*

Even where the requested trial delay is only ten days, the delay may be significant, because to excuse such a request would ignore the fact that when delays are "multiplied over and over for one reason or another in one case after another, as [they] surely [are] and would be once the bar realizes that deadlines mean nothing, the net result is the build-up of a paralyzing backlog of pending cases." *Peart v. City of N.Y.*, 992 F.2d 458, 462 (2d Cir. 1993) (cited by Drake as fashioning the factors now known as the *Drake* factors). In *Peart*, the Court found delay throughout the litigation significant where discovery continued for three years and involved extensions sought by both parties. Once discovery closed, plaintiff refused to collaborate on the joint trial memorandum, but instead submitted his own trial memorandum deleting eight of defendant's witnesses and adding a new claim. *Id.* at 460. After holding a hearing, adding defendant's missing witnesses and deleting the additional claim, the Court allowed each party to file his own pre-trial memorandum and scheduled the case for trial. Three weeks before trial, plaintiff's counsel stated she was unavailable due to a conflicting trial date. *Id.* at 460. At a pretrial conference four days before trial, plaintiff's counsel stated she had no intention to file pretrial materials because she was on trial in another matter. The Court refused to postpone the trial date until after the conflicting trial ended. *Id.* at 461. When plaintiff's counsel failed to appear on the day of trial, the Court dismissed for failure to prosecute and noncompliance with the Court's order to proceed. The Second Circuit found the delay sufficient under the first *Drake* factor due to plaintiff's particularly egregious behavior, and due to the combined effect such behavior has on the court calendar.

***17** Conversely, where a pro se plaintiff causes a one month delay in responding to summary judgment briefing, such delay does not weigh in favor of dismissal. In *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206 (2d Cir. 2001), plaintiff sued his former employer for race and religious discrimination. Plaintiff's attorney withdrew during discovery and plaintiff proceeded pro se. Eighteen months later, the court ordered plaintiff to file a status report and warned if he failed to do so the court would dismiss for failure to prosecute. *Id.* at 209. Both parties submitted status reports and defendant moved for summary judgment. When plaintiff did not file an objection, the court ordered plaintiff to respond to the defendant's Rule 56.1 statement of facts within ten business days or risk dismissal under Rule 41(b). Plaintiff did not respond and two months later the court dismissed with prejudice. The Court found the case as a whole had not been efficiently litigated, but the noncompliance causing dismissal was only a month old. Since plaintiff was pro se, that tardiness did not weigh in favor of dismissal with prejudice. *Id.* at 210.

The length of delay occasioned by Plaintiff's voluntary and knowing conduct is considerable. This case was filed on July 20, 2012. After numerous extensions of the court's scheduling orders, the court herded the Plaintiff to trial, conducted jury selection and was scheduled to commence the presentation of evidence on January 5, 2017. On that date, Mr. Lewis belligerently refused to proceed with the presentation of evidence, falsely stating corrections officials denied him access to his legal material, reading glasses and bathing facilities. The court conducted two days of hearings at which evidence was introduced to establish that Mr. Lewis was not denied his legal material, glasses and bathing facilities. He simply refused to access them because prison officials would not give him his material immediately, but rather searched them first consistent with safety and security protocol. Despite his voluntary refusal to proceed with trial, the court reopened the case to afford Plaintiff an opportunity to resolve the case on the merits. Jury selection was again scheduled for May 1, 2018, just days after the court concluded a criminal trial and weeks before the court's May 29, 2018 jury selection date, when no fewer than three trials were scheduled to proceed and a bench trial was also scheduled to convene. There was simply insufficient time to complete the trial unless it proceeded as scheduled. The court's next conceivable available date was October 2, 2018, on which there are presently nine cases scheduled for trial. The delay occasioned by Plaintiff's conduct is considerable.

II. Step Two

Step two of the *Drake* factors considers whether the court gave notice that further delay would cause dismissal. The Second Circuit has found it persuasive when a court has made clear statements to the plaintiff or his counsel advising that continued failure to proceed with trial would result in dismissal. *See, e.g., Lewis*, 564 F.3d 569. However, warnings to pro se plaintiffs using technical language may not be sufficient. *LeSane*, 239 F.3d 206.

For example, the *Drake* court found the only notice of risk of dismissal plaintiff received was the court clerk's warning that the case would be dismissed absent a satisfactory explanation for his inaction within 20 days. 375 F.3d at 254. Plaintiff timely submitted an explanation, but with it also requested an extension to complete complex research and discovery. *Id.* The district court dismissed the case, but gave no notice that Drake's case would be dismissed if there was any further request to delay the litigation. *Id.* The Second Circuit found the district court gave insufficient notice of the risk of dismissal.

Conversely, the Second Court found the district court in *Lewis* gave "clear notice" to both plaintiff and his lawyer that plaintiff's refusal to go forward with trial would result in dismissal. 564 F.3d 569. When plaintiff notified the court of his fear of retaliation from defendant guards working at the prison where he was being held, the *Lewis* court discussed an alternative arrangement with plaintiff, whereby he could be housed in a special unit at the prison under 24-hour surveillance. When plaintiff refused that arrangement, the court stated "If there's no other solution, I would dismiss the case and certainly preserve his right to appeal." *Id.* at 574. The court gave multiple opportunities for plaintiff to confer with his counsel to decide whether to change course to avoid dismissal. *Id.* This was sufficient notice of the risk of dismissal under the second *Drake* factor.

***18** Similarly, the *Peart* Court found notice of the risk of dismissal was given at the pretrial conference when the Court specifically told counsel that if she did not appear on day one of trial she must inform her client that the case will be dismissed. 992 F.2d at 462.

However, in *LeSane*, the Court found the district court's notice to the pro se plaintiff that "if it received no submission from plaintiff by August 3, 1999, the Court would dismiss this case pursuant to Rule 41(b) of the FRCP for failure to prosecute" was a "brief and technical" warning. 239 F.3d at 210. The Second Circuit found the district court should have fully described what was needed using ordinary language and commonplace examples. The notice given leaned in favor of dismissal but did not require it.

Mr. Lewis knew the consequence of his refusal to proceed with trial as scheduled. As an initial matter, this case has been dismissed previously twice due to Mr. Lewis' failure to prosecute. [Dkts. 25, 224.] In fact, the case was dismissed in January of 2017 for his failure to proceed with trial after the jury was selected and was waiting in the jury deliberation room to be brought into the courtroom to hear the first day of evidence. In that instance, the court reopened the case after two days of hearings in a written decision explaining the law in this area.

On the day of the first day of jury selection for the second trial, May 1, 2018, Mr. Lewis stated he was unprepared to proceed

while the jury panel was in the jury assembly room waiting to be brought into the courtroom for jury selection.

That day, the court scheduled a Federal Rule of Civil Procedure 41(B) Hearing for May 7, 2018, formally notifying the Plaintiff that the case could be dismissed. Mr. Lewis obfuscated the court's attempt to give him a final opportunity to avert dismissal at the May 7, 2018 hearing. Mr. Lewis refused to participate meaningfully in the hearing; when offered the opportunity to cross-examine the defense witnesses, he refused to state whether he wished to do so. Instead, he continuously repeated a mantra to the effect that Rule 41 afforded him an opportunity to be heard and that he did not have to offer evidence. Despite refusing to offer evidence, Mr. Lewis repeatedly interrupted the defense's presentation of evidence, contradicting the witnesses and offering factual content. When reminded that he would have to be sworn in if he wished to offer evidence, Mr. Lewis repeated his mantra in apparent refusal to take the oath and continued to interject. After several rounds the court ignored Mr. Lewis and heard the Defendants evidence.

The evidence offered by the Defendants established that a person in the restrictive housing unit is entitled to have their property, including legal material in their cell. It further established that Mr. Lewis did not have his property because he never requested it.

Mr. Lewis had clear notice that the case would be dismissed if he did not proceed with trial as scheduled or show cause why he could not have done so. Mr. Lewis refused to participate in the Rule 41(b) hearing leaving the court no choice but to dismiss the case again for voluntarily refusal to proceed with trial with the knowledge that he case would be dismissed.

III. Step Three

***19** Step three of the Drake analysis requires courts to consider whether the defendant is likely to be prejudiced by further delay. Where the delay in question is lengthy, prejudice may be presumed as a matter of law. *Drake*, 375 F.3d at 257. The need to spend time and money preparing for trial weighs in favor of dismissal, although it does not by itself require dismissal. See Lewis, 564 F.3d at 582; *Peart*, 992 F.2d at 462.

At step three, the Drake court noted prejudice may be presumed as a matter of law depending on the length of and justification for the delay. 375 F.3d at 257. However, even where prejudice is presumed, it is rebuttable and both sides should submit evidence to support their arguments. *Id.* Showcasing the refutability of this presumption, the Second Circuit found delay in filing a third amended complaint caused only limited prejudice to defendants regarding claims from the prior complaint which survived summary judgment, as the defense was "in a good position to preserve evidence and prepare their defense" without the third amended complaint. *Id.* at 257. By comparison, defendants suffered greater prejudice as to claims from the prior complaint which had been dismissed without prejudice, because defendants were left "in the dark as to the exact contours of the charges against them" for the full 17 months during which plaintiffs delayed before filing their third amended complaint. *Id.* at 257.

The *Lewis* court found delay of two to three weeks would prejudice "the entity bearing the defense's costs ... insofar as it had expended resources to arrange for the presence of the eight defendants, an additional witness, and plaintiff himself on the day of trial." 564 F.3d at 582. That prejudice would not by itself warrant dismissal, but did weigh in its favor. *Id.*

The *Peart* court, like the *Lewis* court, also noted the presumption of prejudice resulting from unreasonable delay and the time and money defendants spent preparing for a trial to begin as scheduled. *Id.* at 462. The need to expend such resources again for a new trial date would prejudice the defense. *Id.*

However, illustrating that the presumption of prejudice is rebuttable, the *LeSane* Court found no evidence that plaintiff's delay caused any particular or especially burdensome prejudice to defendants beyond the delay itself. 239 F.3d at 210. For example, there were no indications that the delay increased the litigation costs for defendants or reduced their likelihood of success on the merits. Even so, the *LeSane* court found the third *Drake* factor leaned slightly in favor of dismissal. *Id.*

The Defendants would be prejudiced by any further delay. First, this case has been protracted unnecessarily by the Plaintiff. He has been unnecessarily litigious, combative, and uncooperative. It was filed more than six years ago, trial has been scheduled and rescheduled multiple times, a jury was selected, and counsel appeared to select a second jury.

The Defendants, physicians charged with providing medical care to inmates, have been repeatedly drawn away from their important duties to attend and testify at court proceedings. State officials with seemingly little or no information about the case have been summoned to testify. Memories are doubtlessly fading, and one defendant no longer works for the Department of Corrections. The unnecessary time and cost to a state with a burgeoning deficit is highly prejudicial and the medical care of inmates is being compromised by this protracted litigation.

IV. Step Four

***20** Step four of the *Drake* analysis considers the need to alleviate court calendar congestion carefully balanced against the plaintiff's right to an opportunity for a day in court. Where a plaintiff "swamp[s] the court with irrelevant or obstructionist filings," this factor is more likely to weigh in favor of dismissal than where a plaintiff has silently failed to proceed in a timely fashion. *LeSane*, 239 F.3d at 210.

At step four, the *Drake* court noted that plaintiff's delay had not impacted the trial calendar or otherwise impeded the court's work. 375 F.3d at 257. This factor weighed against dismissal. *Id.*

The district court in *Lewis* did not express on the record whether it balanced the court calendar with plaintiff's right to a day in court. 564 F.3d at 582. Absent evidence of such balancing, the Second Circuit found the fourth *Drake* factor neutral.

The *Peart* court did carefully balance the court's calendar with plaintiff's rights and found the fourth *Drake* factor weighed in favor of dismissal. 992 F.2d at 462. The presiding judge was sitting by distinction for a limited time to relieve court backlog, and delay would have caused the case to be put back on the original judge's docket in contravention of the purpose behind having a guest judge serve by distinction. *Id.* The court also noted that "the failure to be ready for trial is one of the basic causes creating a backlog of calendars," and found plaintiff's counsel's failure to appear for trial, failure to timely file pre-trial materials, and disrespect for the Court warranted dismissal despite the consequences to the client.

Finally, the *LeSane* Court found no "compelling evidence of an extreme effect on court congestion," and noted that "plaintiff's failure to prosecute in this case was silent and unobtrusive rather than vexatious and burdensome: plaintiff simply did not make submissions required by the court; he did not swamp the court with irrelevant or obstructionist filings." 239 F.3d at 210. This factor did not weigh in favor of dismissal.

This case was already delayed nearly a year and one half because of Mr. Lewis' prior refusal to proceed with trial and the court's full trial and hearing docket. In light of Mr. Lewis' most recent refusal to go forward, if the court were to reschedule this trial yet again it would be delayed until October 2018 at the earliest. Mr. Lewis has had an opportunity to have, but chose not to have, his day in court. The uncontested evidence at the Rule 41 hearing established that inmates, including Mr. Lewis, may have legal papers and reading glasses in the restricted housing unit upon request. Mr. Lewis does not contend that he did have his materials and glasses, and the facts reflect that he did not request these items. Mr. Lewis routinely demonstrates to the court his keen knowledge of Department of Corrections Administrative Directives, and the defense offered evidence at the Rule 41 hearing that this was not Mr. Lewis' first experience in the restrictive housing unit. Mr. Lewis knowingly and voluntarily caused himself to be transferred to the restrictive housing unit, made arrangements to have his sister bring clothing for him to wear in court, and arranged to have his cellmate secure certain of his personal belongings. He did not so much as request his legal material so that he would be prepared for his court appearance. Balancing the impact of Mr. Lewis' dilatory and obstreperous conduct on the court's calendar against his right to have the court summon a third jury panel to select a jury to hear his case weighs in favor of dismissal.

V. Step Five

***21** Finally, the fifth Drake factor is whether the trial court adequately assessed the efficacy of lesser sanctions before dismissing. A brief statement that lesser sanctions, such as a fine, would be inadequate may be sufficient. *See* *Peart*, 992 F.2d at 463.

The district court in *Drake* briefly considered imposing a fine as a lesser sanction for plaintiff's failure to file a third amended complaint until 17 months after the deadline. 375 F.3d at 255. The district court rejected a fine as inadequate to address the prejudice to defendants, and the Second Circuit found that conclusion was not "clearly erroneous." *Id.* However, the Second Circuit noted the district court should have explained

on the record why a sanction less severe than dismissal would have been insufficient. *Id.*

The district court in *Lewis* did not consider the efficacy of lesser sanctions on the record. 564 F.3d at 582. The Second Circuit noted the omission and found the fifth *Drake* factor neutral, weighing neither for nor against dismissal. *Id.*

In *Peart* that "no lesser sanction, other than the award of fees and costs to the defendant, is appropriate or would be sufficiently potent given [attorney's] behavior and actions" was sufficient to show the court did consider lesser sanctions but concluded they were not justified given plaintiff's counsel's egregious behavior. 992 F.2d at 463.

The court in *LeSane* found no indication the district court considered lesser sanctions, such as deeming defendant's Rule 56.1 statement of facts admitted absent objection. 239 F.3d at 211. Given the clear alternative to dismissal in LeSane, the Second Circuit found the district court's failure to consider it on the record weighed against dismissal. *Id.*

Mr. Lewis is indigent. He has filed a plethora of cases in this court, in all of which he qualified for a filing fee dispensation. Imposition of a fine would have no effect on him. Nor would any other sanction be effective, as Mr. Lewis is incarcerated. Moreover, Mr. Lewis knowingly and voluntarily caused his transfer to the restrictive housing unit. He failed to follow the corrections officer's instruction to return to his cell, knowing that trial was imminent and that the punishment would be segregation.

Finally, for the second time, Mr. Lewis refused to prepare for trial, and for that reason for the second time refused to proceed with trial. He was deceitful on both occasions, falsely claiming that he was deprived of his trial material. Mr. Lewis had no truly legitimate reason for failing to go forward with trial on either occasion. His repeated willful misconduct constitutes an intolerable abuse of the judicial process for which no sanction but dismissal would be effective.

VI. Conclusion: Plaintiff's Case Warrants Dismissal

In summary, The Drake factors weigh in favor of dismissal in *Lewis v. Frayne*: (1) Mr. Lewis caused a delay of an indeterminate duration by failing to proceed with trial as scheduled. (2) The court gave immediate notice of a Rule 41(b) Hearing Mr. Lewis appeared but refused to meaningfully participate. (3) The defense is prejudiced as it now must spend additional time and resources preparing for trial a fourth time as memories fade and the medical needs of Defendants are repeatedly delayed on dates they are repeatedly summoned to appear in court for hearings and trials. (4) The trial is delayed for an extended period because court has multiple trials scheduled for May 29, 2018 jury selection, has already set dates for one June 2018 trial (*Majocha v. Eversource Energy Service*, 3:16-cv-742), and has already set dates for a July 2018 trial (*United States v. Cirino*, 17-cr-232), and Mr. Lewis has a pattern of voluminous frivolous motion and hearing practice leading up to any court appearance. (5) The court considered, but found that it had no legal authority to grant, Plaintiff's motion for "extraordinary relief" to order corrections to waive any safety and security protocol which prevented him from having his legal material in the restricted housing unit. Finally, the court has repeatedly employed lesser means to avoid dismissal of Plaintiff's case for failure to prosecute, all to no avail, including most recently holding a hearing on the record after Plaintiff's failure to enter the courtroom on the first day of evidence at his January 2017 trial and the rule 41(b) hearing after he informed the court on May 1, 2018 that he refused to proceed with trial. Such accommodations have proven unavailing and perhaps emboldening.

***22** There is "strong justification" for dismissal under Rule 41(b) and *Lewis v. Rawson*. Although Mr. Lewis professes that he will not have his legal materials through May 10, 2018 and cannot put the "finishing touches" on his trial preparations, the evidence shows that this is not true. Moreover, Mr. Lewis admitted he made the same false claim as an excuse for his refusal to go forward with evidence in the last trial scheduled in this case after which the case was dismissed for failure to prosecute. Mr. Lewis knew the consequence of yet another willful refusal to proceed.

Even assuming he was deprived of his material, he could have proceeded to trial and done his best, and appealed any adverse verdict, particularly since this case has been pending since 2012 and Plaintiff has submitted trial memoranda for three scheduled trials in this case, in July 2016, January 2017, and May 2018. That he bears the weight of his transfer to restricted housing is apt since he was transferred because he willfully refused to go to his cell when instructed. Instead he walked around the unit making multiple telephone calls and talking to his cellmate flagrantly flouting a direct order of a corrections officer knowing that he was engaging in an offence punishable by a transfer to segregation.

Plaintiff's history of uncivil behavior, courtroom disruptions, aggressive courtroom behavior, frivolous filings, including motions for sanctions of opposing counsel, recusal of the court, requests to subpoena state officials with no relevant information, for reconsideration which fail to satisfy the oft-articulated standard, refusal to participate in proceedings as well as his repeated failure to proceed on the eve of trial, is the type of extreme vexatious conduct which overburdens the court, prejudices defense and makes a mockery of the justice system. This conduct strongly weighs in favor of dismissal particularly where, as here, the court has made every gesture and concession to the Plaintiff in deference to the fact that he terminated his court-appointed *pro bono* counsel (as he did in *Lewis v. Waterbury* 3:10-cv-00112-VLB on the eve of trial. Dkt. 164) and insisted on proceeding *pro se.* Mr. Lewis has forfeited his right to prosecute this case. For all of the reasons set forth above, this case is DISMISSED with prejudice.

VII. Plaintiff is Awarded Nominal Damages

Plaintiff is entitled to nominal damages for the deprivation of his procedural due process rights. In July 2016, the Court granted summary judgment in Plaintiff's favor as to his procedural due process claim. [Dkt. 139 at 15-16 ("Defendant Frayne's involvement in Lewis's treatment prior to and continuing after the hearing, his supervisory role at Northern, his appointment as Lewis's advocate at the hearing, the absence of any indication that Frayne actually advocated against the forcible administration of medication against Lewis's will, and his membership on the three-person health panel charged with deciding whether to authorize Lewis's involuntary medication, collectively, render unconstitutional the procedures under which the panel reached its decision and Lewis was forcibly medicated against his will.").] Plaintiff is accordingly entitled to damages for his Constitutional deprivation. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978).

However, Plaintiff is entitled to only nominal damages. In its summary judgment decision, the Court noted that Plaintiff offered no facts "that could have plausibly altered the panel decision" to involuntarily medicate him. [Dkt. 139 at 23.] Although the Court subsequently granted Plaintiff's Motion to Appoint Expert [Dkt. 149], Plaintiff failed to secure a medical expert, and listed no independent physicians among his witnesses for trial who might have challenged the propriety of the decision to involuntarily medicate him. [Dkt. 303 (Third Trial Memorandum).] Absent evidence that Plaintiff would not have been medicated but for his procedural due process deprivation, Plaintiff cannot establish an actual injury arising out of his deprivation and is entitled to nominal damages not to exceed $1.00. *Carey*, 435 U.S. at 266-67 ("The denial of procedural due process should be actionable for nominal damages without proof of actual injury."); *Warren v. Pataki*, 823 F.3d 125, 143 (2d Cir. 2016) ("If the outcome would not have been different" had full procedural due process been afforded, "the plaintiff is presumptively entitled to no more than nominal damages."); *Poventud v. City of N.Y.*, 750 F.3d 121, 137 (2d Cir. 2014) ("[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury."); *Miner v. Glens Falls*, 999 F.2d 655, 660 (2d Cir. 1993) ("Absent a showing of causation and actual injury, a plaintiff is entitled only to nominal damages" for the denial of procedural due process.).

***23** Plaintiff is accordingly awarded nominal damages of $1.00 for his procedural due process claim and this case is dismissed. The Clerk is directed to close this file.

IT IS SO ORDERED this 15th day of May 2018 at Hartford, Connecticut.

All Citations

Not Reported in Fed. Supp., 2018 WL 2248413

Footnotes

1 At a pretrial conference on December 15, 2016, Plaintiff notified the court he was unable to secure an expert for trial, despite writing letters to approximately 40 experts including those recommended by the court. *Id.* The court expressed disappointment for the Plaintiff but explained that medical experts usually charge much more per hour for service in a litigation than the court was able to provide the Plaintiff. *Id.*

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818 Fed.Appx. 100 (Mem)
This case was not selected for publication in West's Federal Reporter.
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United States Court of Appeals, Second Circuit.

Nicholas PIMENTEL, aka Aasir Azzarmi, Plaintiff-Appellant,
v.
DELTA AIR LINES, INC., Tanya Morgan, Individually, Sergey Yeremeyev, Individually, Clifford Schwenker, Individually, Bill Ittounas, Individually, Sheandra R. Clark, Individually, Pamela Kelly, Individually, Natasha Anderson, Individually, Fabio Maciel, Individually, Charlotte Ling, Individually, Supervisors John Doe, Individually, Jill Wubben, Individually, Ryan Rangel, Individually, Marcy J. Davidson, Individually, Sedgwick Claims Management Services, Inc., Robert Reinlan, Dana Sabghir, Individually, Ira Rosenstein, Individually, Jones & Jones, Inc., Morgan, Lewis & Bockius LLP, Pamela Alson, Individually, Elaine Little, Individually, Defendants-Appellees.

19-2343 (L)
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19-2376 (Con)
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19-2499 (Con)
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19-2510 (Con)
|
August 27, 2020

Appeals from two judgments of the United States District Court for the Eastern District of New York (Donnelly, *J.*; Orenstein, *M.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments be and it hereby are **AFFIRMED**.

Attorneys and Law Firms

Appearing for Appellant: NICHOLAS PIMENTEL, pro se, New York, N.Y.

Appearing for Appellees: Brendan T. Killeen, Morgan, Lewis & Bockius LLP, New York, N.Y.

Present: ROSEMARY S. POOLER, PETER W. HALL, DENNY CHIN, Circuit Judges.

***101 SUMMARY ORDER**

In these consolidated appeals, Appellant Nicholas Pimentel, a/k/a Aasir Azzarmi, proceeding pro se, appeals the district court's judgments dismissing his Discrimination Action (E.D.N.Y. 17-cv-5317) and Labor Action (E.D.N.Y. 18-cv-2999). Appellant also moves for various relief in this Court. After issuing several warnings to Appellant, the district court dismissed the actions with prejudice, pursuant to Fed. R. Civ. P. 41(b), for failure to comply with court orders and for using abusive language toward the judges. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review dismissals pursuant to Rule 41(b) "for an abuse of discretion in light of the record as a whole." *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014). A district court must weigh five factors when considering a Rule 41(b) dismissal: (1) the duration of noncompliance with the court order; (2) whether notice was given that the action would be dismissed for failure to comply; (3) whether the other party will be prejudiced by further delay in the proceedings; (4) the balance of the court's interest in managing its docket with the litigant's interest in being heard; and (5) the availability of a lesser sanction. *Id.* Additionally, we are mindful that dismissal is "the harshest of sanctions" and should only be used in "extreme" situations with pro se litigants. *Id.* at 217 (internal quotation marks omitted).

The district court did not abuse its discretion in dismissing Appellant's cases with prejudice. In its July 12, 2019 order—giving Appellant one final chance to comply with court orders—the court adequately weighed the five factors, explaining that Appellant had been warned several times about needing to comply with court orders, had "wasted the Court's and counsel's time," and that "opposing counsel has had to devote needless energy and time responding to [Appellant's] frivolous and offensive filings." However, given Appellant's pro se status and the fact that his noncompliance had lasted only "a few months[,]" the court gave him one final chance to comply with court orders by ordering him to file a letter stating that he would so comply, essentially imposing a "lesser sanction" and giving him one final warning. When Appellant failed to comply with that order, and instead continued to ***102** insult the judges and declare that he would not follow court orders, the district court properly dismissed the actions.

We have upheld dismissals with prejudice as a sanction where pro se litigants repeatedly used abusive language toward judges. *See Koehl v. Bernstein*, 740 F.3d 860, 862–64 (2d Cir. 2014). In *Bernstein*, we explained that a court's "liberal pro se practice ... is not a sword with which to insult a trial judge" and that "the right to accuse a judge of bias (or of misconduct) does not carry with it the right to abuse and insult." 740 F.3d at 863 (internal quotation marks omitted).

Appellant's challenges to the dismissal are meritless. First, the district court did not err in dismissing the action with prejudice rather than granting Appellant's motion for voluntary dismissal without prejudice pursuant to Rule 41(a). Appellant's motion was filed long after the Appellees had answered the complaint, and thus Appellant was not entitled to dismissal without prejudice unless the Appellees stipulated to such dismissal. *See* Fed. R. Civ. P. 41(a)(1)(A). Second, the district court did not err in finding that the Labor Action was related to the Discrimination Action and thus assigning the case to Judge Donnelly; pursuant to the court's local rules, "all pro se civil actions filed by the same individual" are deemed related "[i]n the interest of judicial economy[.]" E.D.N.Y. Local Rule 50.3.1(e). In any event, even considering the Labor Action separately, Appellant continued to insult the judges in his filings in that action after being warned that such language could result in dismissal; thus, dismissal of the Labor Action was proper for the reasons discussed above. Third, the district court's reasons for dismissal were not speculative and did not change over time—the district court repeatedly warned Appellant that refusal to comply with court orders and the continued use abusive language toward the judges could result in dismissal, and those were the reasons the court ultimately dismissed the case.

To the extent Appellant challenges the district court's orders prior to dismissal, including its discovery orders, we do not review those orders. *See* *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 192 (2d Cir. 1999) (holding that interlocutory orders do not merge with the final judgment where the case was dismissed pursuant to Rule 41(b) and are thus unreviewable on appeal).

We also reject Appellant's claims that the district judge and magistrate judge should have been recused from the cases based on their alleged bias. Most of Appellant's arguments rely on the fact that the judges ruled against him and in favor of the Appellees, but judicial rulings alone do not constitute evidence of bias. *See* *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").

Finally, we deny Appellant's various motions. Appellant's request for a refund of the filing fee is rejected because he has been granted in forma pauperis status on appeal and has not paid any fees to this Court. Appellant's motions to strike the Appellees' briefs are meritless. *C.f.* *Brown v. Maxwell*, 929 F.3d 41, 51–52 (2d Cir. 2019). The remaining motions—seeking to appeal, to vacate, to remand, for judicial notice, for certified questions, for an injunction, and to confirm an arbitration award—are rendered moot by this decision.

We have considered the remainder of Appellant's arguments and find them to be without merit. Accordingly, the judgments ***103** of the district court hereby are AFFIRMED.

All Citations

818 Fed.Appx. 100 (Mem)

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2021 WL 2227748
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Omar TRIPLETT, a/k/a The Doctor, Plaintiff,
v.
Chad ASCH, staff worker or T.A., CNYPC;
Mark Martin, staff worker or T.A., CNYPC;
Teryle Williams, staff worker or T.A., CNYPC;
and Dr. Berkheimer, CNYPC, Defendants.

9:17-cv-656 (MAD/TWD)
|
Signed 06/02/2021

Attorneys and Law Firms

OMAR TRIPLETT, O1-A-2100, Marcy Correctional Facility, P.O. Box 3600, Marcy, New York 13403, Plaintiff pro se.

OF COUNSEL: DENISE BUCKLEY, AAG, HELENA PEDERSON, AAG, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, The Capitol, Albany, New York 12224, Attorneys for Defendants.

MEMORANDUM-DECISION AND ORDER

Mae A. D'Agostino, U.S. District Judge:

I. INTRODUCTION

***1** On June 19, 2017, Plaintiff pro se Omar Triplett ("Plaintiff"), an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), commenced this action asserting claims arising out of his previous confinement at the Central New York Psychiatric Center ("CNYPC"). *See* Dkt. No. 1. On August 29, 2017, the Court reviewed the sufficiency of the Complaint, directed certain Defendants to respond, dismissed certain claims with and without prejudice, and afforded Plaintiff the opportunity to submit an amended pleading. *See* Dkt. No. 12. On November 30, 2018, the Court granted in part Plaintiff's motion to amend his complaint, and the amended complaint is now the operative pleading. *See* Dkt. Nos. 65 & 66. The claims that survived initial review are: (1) Eighth Amendment excessive force claims against Security Hospital Treatment Assistants ("SHTA") Chad Asch, Mark Martin, and Teryle Williams; (2) Eighth Amendment excessive force and failure to protect claims against SHTA Supervisor Kenneth Paparella; and (3) Fourteenth Amendment due process claims against Dr. Harold Berkheimer, Dr. Luis Hernandez, and Executive Director Maureen Bosco (collectively "Defendants"). *See* Dkt. No. 65.

On September 6, 2019, the remaining Defendants moved for partial summary judgment. *See* Dkt. No. 93. The Court granted Plaintiff two extensions of time to respond to the pending motion, which he did on December 3, 2019. *See* Dkt. No. 103. In an Order and Report-Recommendation dated June 2, 2020, Magistrate Judge Dancks recommended that the Court grant in part and deny in part Defendants' motion for summary judgment. *See* Dkt. No. 110. On June 23, 2020, the Court adopted Magistrate Judge Dancks' Order and Report-Recommendation in its entirety. *See* Dkt. No. 111. As a result, the following claims remained for trial: (1) Defendants Asch, Martin, and Williams used excessive force on Plaintiff in violation of the Eighth Amendment on June 19 & 20, 2014; and (2) Defendant Berkheimer force medicated Plaintiff in violation of his Fourteenth Amendment due process rights on June 19, 2014.

On January 7, 2021, the Court appointed *pro bono* trial counsel to represent Plaintiff at trial. *See* Dkt. No. 112. That same day, the Court set a telephone pretrial conference for February 8, 2021. At the February 8, 2021 telephone pretrial conference, the Court set a firm trial date of June 1, 2021.

In a letter received on April 22, 2021, Plaintiff submitted a request to appoint new *pro bono* counsel and indicated his desire to settle this case. *See* Dkt. No. 128. On April 29, 2021, the Court held a telephone status conference with Plaintiff and his *pro bono* counsel, Robert Schofield, Esq. and Evan Piercey, Esq. At this status conference, Plaintiff first indicated that he did not request court-appointed counsel. *See* Transcript of Status Conference dated Apr. 29, 2021 ("Apr. 29 Tr.") at 3. Second, Plaintiff stated that there was no need for a trial because he planned on pursuing a settlement of this case. *See id.* Further, Plaintiff indicated that he has been busy with other litigation he has pending in the Southern and Eastern Districts of New York. *See id.* at 3-4. Thereafter, *pro bono* counsel addressed the Court and indicated that they had spoken with the Attorney General's Office regarding possible settlement and relayed that, while they would be unable to meet Plaintiff's demands, they would make a counteroffer in due course. *See id.* at 4. At this point, the Court asked Plaintiff

if he was willing to continue being represented by *pro bono* counsel for the time being, so that counsel could continue settlement discussions with the Attorney General's Office. *See id.* at 4-5. In response, Plaintiff again stated that he had no desire to proceed to trial and discussed a prior trial in Syracuse “when the people flagrantly conspired and lied at [him] on the stand,” as the reason he distrusts the legal system. *See id.* at 5. At this point, the Court again inquired whether Plaintiff would like to proceed with appointed counsel or proceed with this litigation *pro se. See id.* at 7. In response, Plaintiff stated that he wanted to have *pro bono* counsel relieved from further representation in this matter. *See id.* Upon relieving appointed counsel, the Court instructed Plaintiff as follows:

> ***2** If this case is not settled by June 1st, it is going to go to trial, and if you refuse to participate in trial, the case will be dismissed. This case is four years old, it needs to be brought to a conclusion. One way to bring it to a conclusion is settlement, and the other way is ... a trial. And I want to be very, very clear: If you are unable to settle the case by June 1st, then there will be a jury here in Albany waiting for you to come and to try the case; and if you don't come, for any reason, this case will be dismissed.

Id. at 8. The Court further attempted to dissuade Plaintiff from proceeding *pro se* when appointed counsel was ready to proceed. *See id.* at 9. Finally, Plaintiff indicated that he intended to try to get a change of venue to New York City, implying that he was about to be released from custody and that he would soon by living there. *See id.* at 10. In concluding the status conference, Mr. Schofield stated that he remained willing to assist in getting to Plaintiff the file that his law firm had created during its representation of Plaintiff and that they were further willing to assist Plaintiff in finding new counsel, should he so desire. *See id.* at 10-11.

On May 19, 2021, the Court attempted to hold the previously scheduled final pretrial conference by telephone with Plaintiff and representatives from the Attorney General's Office. When the Court called Marcy Correctional Facility, it was informed by the Acting Supervising Offender Rehabilitation Coordinator at Marcy C.F. that Plaintiff refused to leave his cell to participate in the conference. *See* Text Order dated May 19, 2021. Due to Plaintiff's refusal to participate, the Court rescheduled the conference for May 21, 2021, and further reminded Plaintiff in its written text order that trial is scheduled to begin on June 1, 2021 and that his refusal to participate in trial and/or conferences will result in this case being dismissed. *See id.*

On May 21, 2021, Plaintiff appeared for the rescheduled pretrial conference. *See* Text Minute Entry dated May 21, 2021. At this conference, the Court first reiterated the firm trial date, to which Plaintiff again stated that he did not want to proceed with trial and would instead prefer to settle this case. *See* Transcript of Status Conference dated May 21, 2021 (“May 21 Tr.”) at 2. After hearing the parties' respective positions on settlement, it was clear that settlement would not be possible at that time. *See id.* at 2-10. Thereafter, Plaintiff requested to adjourn the trial date and new *pro bono* counsel to be appointed. *See id.* at 11-12. The Court denied the request to adjourn the trial date and refused to appoint new *pro bono* counsel at such a late date. *See id.* at 12-13. The Court reminded Plaintiff that it had already appointed “an excellent attorney” to represent him and that, despite the Court's attempts to convince him to proceed with appointed counsel, Plaintiff was adamant about proceeding *pro se. See id.* at 12-13. Plaintiff then indicated that he was willing to proceed to trial *pro se*, but stated that his other pending lawsuits were occupying a significant amount of his time. *See id.* at 15-16. At this point, Plaintiff asked if the Court could “reinstate” Mr. Schofield as *pro bono* counsel, to which the Court responded that it would reach out to Mr. Schofield to determine his willingness to be reappointed as *pro bono* counsel. *See id.* The conference concluded with the Court advising Plaintiff that, in the absence of a settlement, he would be produced for trial on June 1, 2021. *See id.*

***3** Thereafter, the Court reached out to Mr. Schofield regarding continuing his law firm's representation of Plaintiff. Mr. Schofield agreed to assist Plaintiff and the Court in attempting to negotiate a settlement between the parties, but indicating that he was unable to represent Plaintiff at trial due to commitments he had made since he was relieved from further representing Plaintiff. As such, Mr. Schofield was re-appointed to represent Plaintiff for the sole purpose of assisting in settlement discussions on May 24, 2021. *See* Dkt. No. 144. In the week leading up to trial, Mr. Schofield was able to get a significantly higher settlement offer from Defendants than that which was previously offered. Notwithstanding these efforts, Mr. Schofield was unable to

relate the new settlement offer to Plaintiff, despite his multiple attempts, due to Plaintiff's refusal to accept any telephone calls from appointed counsel.

On June 1, 2021, Defendants, representatives of the Attorney General's Office, and approximately thirty (30) prospective jurors were at the James T. Foley Courthouse prepared to start with jury selection and the trial of this matter. Prior to the start of proceedings, the Court was informed by Deputy Superintendent for Correctional Mental Health Danielle Medbury at Marcy C.F. that Plaintiff refused to be taken to Court that morning. Upon learning of Plaintiff's refusal, the Court attempted to schedule a telephone conference for approximately 10:00 a.m. with Plaintiff to discuss his refusal to be transported for trial. After several attempts, officials instructed the Court that Plaintiff was again refusing to come out of his cell or otherwise participate in a conference with the Court.

Upon learning of Plaintiff's refusal to be transported for trial or to participate in a telephone conference to explain his refusal, the Court granted Defendants' oral motion to dismiss this case. In granting Defendants' motion, the Court indicated that a written order outlining the reasons for dismissal would follow, which are set forth below.

II. DISCUSSION

Although Rule 41 of the Federal Rules of Civil Procedure permits federal courts to dismiss an action for failure to prosecute, *see* Fed. R. Civ. P. 41(b), this authority "has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962); *see also* *Lewis v. Rawson*, 564 F.3d 569, 575 (2d Cir. 2009). "It is beyond dispute that a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial." *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990) (footnote omitted). " 'One naturally expects the plaintiff to be present and ready to put on [his] case when the day of trial arrives. A litigant's day in court is the culmination of a lawsuit, and trial dates — particularly civil trial dates — are an increasingly precious commodity in our nation's courts.' " *Frederick v. Murphy*, No.6:10-cv-6527, 2018 WL 10247403, *5 (W.D.N.Y. Apr. 16, 2018) (quoting *Moffitt v. Ill. State Bd. of Educ.*, 236 F.3d 868, 873 (7th Cir. 2001)). " 'Where a plaintiff does not appear at the trial date or ... is inexcusably unprepared to prosecute the case, Rule 41(b) dismissal is particularly appropriate. Indeed, such behavior constitutes the epitome of a "failure to prosecute.' " *Id.* (quoting *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 364 (6th Cir. 1999)); *see also* *Noli v. C.I.R.*, 860 F.2d 1521, 1527 (9th Cir. 1988) (noting that the "dismissal for failure properly to prosecute will normally arise where a party fails to appear at trial").

The Second Circuit has "fashioned guiding rules that limit a trial court's discretion in this context...." *United States ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004). The *Drake* factors consider whether

> ***4** (1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions.

Id. However, this Court is guided by the more recent Second Circuit decision in *Lewis v. Rawson*, 564 F.3d 569 (2d Cir. 2009). There, the court determined that the *Drake* factors were "not particularly helpful" in analyzing whether dismissal was appropriate where the plaintiff declined to proceed with his proof at trial. *Id.* at 577. In *Lewis*, the Second Circuit affirmed the district court's dismissal of the plaintiff's case for failure to prosecute where the *pro se* plaintiff refused to testify, and his testimony was "the only direct evidence that could support his claims." *Id.*

The scenario presented in *Lewis* is akin to the present matter, where Plaintiff failed to appear for the commencement of his day-certain trial. The *Lewis* court questioned the usefulness of the *Drake* factors in this context by distinguishing the

Lewis facts from cases involving missed filing deadlines or the noncompliance with discovery orders. *See* *id.* at 580 ("[W]here a district court is confronted with a 'plaintiff's unwillingness to proceed on the date scheduled for trial, as opposed to the more typical failure to comply with her discovery obligations on time, or to meet some other pre-trial deadline,' it is 'not unreasonable' to consider treating such unwillingness 'more severely' ") (quoting *Moffitt*, 236 F.3d at 873). The dilatory conduct of a plaintiff during motion practice or discovery, while not condoned by the Court, is distinguishable from the intentional refusal to proceed with the commencement of a trial, which may be fairly categorized as the most flagrant instance of a plaintiff's "failure to prosecute." *Knoll*, 176 F.3d at 364.

Here, on the date that trial was scheduled to commence, June 1, 2021, Plaintiff refused to be transported to the courthouse and then repeatedly refused to participate in a conference call with the Court. Plaintiff has offered no explanation for his behavior, other than his past insistence that this case should settle, which he preferred to trial.

Once this case became trial ready, the Court appointed Mr. Schofield as *pro bono* counsel, an extremely well-qualified attorney who has been practicing for nearly twenty-five years. Despite this, on April 29, 2021, Plaintiff made it clear that he no longer wanted to be represented by appointed counsel and would prefer to proceed *pro se.* On that date, when Plaintiff stated that he wanted to proceed with this matter *pro se*, the Court specifically instructed Plaintiff that "[i]f this case is not settled by June 1st, it is going to go to trial, and if you refuse to participate in trial, the case will be dismissed." *See* Apr. 29 Tr. at 8. After Plaintiff refused to participate in the previously scheduled May 19, 2021 status conference, the Court rescheduled that conference for May 21, 2021. At this rescheduled conference, the Court again reiterated the firm June 1, 2021 trial date and refused to appoint new *pro bono* counsel or further adjourn this trial. *See* May 21 Tr. at 3-12. In refusing to adjourn this trial, the Court noted that the trial date was set back in January 2021, that the facts of this case relate to events that occurred in 2014, and that Defendants are entitled to their day in court. The Court again warned Plaintiff that, absent settlement, that this case was going forward on June 1, 2021.[1] *See id.* at 13.

***5** Thereafter, in an effort to facilitate Plaintiff's desire to settle this matter, and at Plaintiff's request, Mr. Schofield was reappointed to represent Plaintiff for purposes of settling this case. Mr. Schofield diligently worked at settling the case and obtained a settlement offer from Defendants that was significantly higher than any offer previously made. Despite these efforts, Plaintiff repeatedly refused to communicate with Mr. Schofield to discuss the possible settlement. Mr. Schofield even appeared at the courthouse on the morning of June 1, 2021 in an effort to discuss the settlement offer with Plaintiff in person, prior to the start of trial. Mr. Schofield, of course, was unable to discuss his efforts with Plaintiff because he refused to be transported to the courthouse or participate in a telephone conference.

Plaintiff's words and actions have made it abundantly clear that he no longer desires to prosecute this matter and that Defendants' motion to dismiss this matter must be granted. Plaintiff's failure to appear for his day-certain trial date caused significant prejudice to Defendant and the Court. Defendants were ready and willing to engage with Plaintiff to discuss settlement, but he refused to engage. The Court assembled a jury pool in preparation for *voir dire* on the morning of June 1, 2021, many of whom traveled great distances to be present. As one district court aptly stated, "[t]he Court cannot permit a party to defy Court orders, waste Court resources, disrupt the lives of potential jurors, witnesses, and opposing counsel, and prejudice the opposing party in this manner." *Njema v. Wells Fargo Bank, N.A.*, No. 13-CV-0519, 2016 WL 308780, *5 (D. Minn. Jan. 25, 2016), *aff'd*, 673 Fed. Appx. 609 (8th Cir. 2017).

It is worth repeating once more that Plaintiff was aware that this was a day-certain trial date, and that the Court was unwilling to adjourn the trial at such a late date. The Court has already spent significant time and resources preparing for Plaintiff's trial. In addition, Defendants and their counsel have also expended significant time, resources, and costs in preparing for trial. Plaintiff has failed to put forth any satisfactory excuse for the disruption and expense caused by his failure to appear at trial. Plaintiff was afforded his day in court, and, by his own volition, he decided to squander that opportunity by wasting scarce judicial resources. Upon consideration of the facts set forth above and the applicable law, the Court finds that no other sanction but dismissal with prejudice would be appropriate under these circumstances. *See* *Lewis*, 564 F.3d at 581 (noting that "where a party fails to appear or refuses to proceed with trial *after* the jury ha[s] been drawn, dismissal with prejudice may be particularly appropriate").

III. CONCLUSION

After carefully considering the entire record in this matter and the applicable law, the Court hereby

ORDERS that Defendants' motion to dismiss is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendants' favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 2227748

Footnotes

1 The Court also notes that in all telephone conferences with the Court, Plaintiff was generally cogent, polite, and responsive to the Court's inquiries.

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2022 WL 3362164
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United States District Court, E.D. New York.

Blake WINGATE, Plaintiff,
v.
Correction Officer BURKE, et al., Defendants.

No. 14-CV-4063-EK-JRC
|
Signed April 18, 2022

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REPORT AND RECOMMENDATION

JAMES R. CHO, United States Magistrate Judge:

***1** Plaintiff Blake Wingate ("Plaintiff"), a *pro se* inmate housed by the New York State Department of Corrections, filed this action on June 27, 2014, alleging violations of his civil rights. *See* Compl., Dkt. 1. In this trial-ready case, jury selection was scheduled to commence on April 13, 2022 immediately followed by trial before the Honorable Eric R. Komitee. *See* Order dated April 6, 2022, Dkt. 357. The sole issue to be tried before the jury was whether nine current or former Correction Officers or New York City Department of Correction employees -- Rhoda Greene, William Feaster, Edmond Burke, Derrick Wallace, Andre Hall, James Stanton, Nekeisha Delapenha, Thomas Scully, and Kimberley Johnson (collectively, "Defendants") -- violated Plaintiff's First Amendment rights by interfering with his mail. *See* Opinion & Order, Dkt. 246.

On April 13, 2022, jury selection commenced before the undersigned Magistrate Judge. During the jury selection process, plaintiff was uncooperative, abusive, and repeatedly obstructed the proceedings. Plaintiff's obstructionist behavior culminated on April 18, 2022 -- the third day set aside for jury selection -- when Plaintiff walked out of jury selection and asked to return to his facility. As a result of Plaintiff's objectionable conduct throughout the jury selection process, Defendants repeatedly moved on the record on April 13, 14, and 18, 2022 to dismiss the case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Defendants also filed a motion to dismiss. *See* Mot. to Dismiss, Dkt. 370; transcript from proceedings on April 13, 2022 ("Apr. 13 Tr.") at 49:20-50:9; transcript from proceedings on April 14, 2022 ("Apr. 14 Tr.") at 199:23-25; and transcript from proceedings on April 18, 2022 ("Apr. 18 Tr.") at 18:15-19:1. For the reasons discussed below and on the record on April 18, 2022, this Court respectfully recommends that the Court grant Defendants' motion, and dismiss Plaintiff's case with prejudice.

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Background

The Court will assume familiarity with the facts and procedural history of this matter and will discuss the procedural history only insofar as it is relevant. On June 27, 2014, Plaintiff commenced this action under 42 U.S.C. § 1983 alleging various violations of his constitutional rights. *See* Compl. On April 6, 2018, Defendants moved for summary judgment. *See* Mot. for Summary J., Dkt. 220. On August 14, 2018, the Court granted Defendants' motion in part and dismissed all of Plaintiff's claims, except for his claim that Defendants had interfered with his mail while in city custody at Rikers Island. *See* Opinion & Order.

On April 6, 2022, the Court scheduled jury selection to commence on April 13, 2022, followed thereafter by trial. *See* Dkt. entry dated April 6, 2022. On April 13, 2022, Plaintiff arrived several hours late to jury selection because he claimed that he needed to get batteries for his hearing aids before coming to Court. *See* Mot. to Dismiss at 2. When he arrived Plaintiff was agitated and uncooperative. *See id.* During the jury selection process, Plaintiff repeatedly interrupted the proceedings, refused to accept court orders, and used "extremely vulgar and racially charged language" throughout the proceedings. *Id.* This Court sets forth below a few of the plethora of offensive and disrespectful comments Plaintiff made during the proceedings:

***2** THE COURT: Mr. Wingate.

MR. WINGATE: No. Mr. Wingate is talking right now. You wanted me to get ready. I'm ready....

THE COURT: Mr. Wingate.

MR. WINGATE: Stop. Stop. Don't do that, Jack, because you about to call the jury in here. I wait until the jury come in here and embarrass you.

Apr. 13 Tr. at 12:17-24.

MR. ARKO: Your Honor --

MR. WINGATE: Shut up. Ain't nobody talking to you. Wait until I'm finished, dude.

Apr. 13 Tr. at 13:4-6.

THE COURT: You need to calm down.

MR. WINGATE: You need to get the f**k out of here, because if you sit on this case, it's going to be a mock trial.

Apr. 13 Tr. at 28:12-15.

THE COURT: You will not come back if you don't stop talking.

MR. WINGATE: I don't care if I come back. Maybe you'll be gone by then maybe you'll go back to back Wuhan and make a new disease.

Apr. 13 Tr. at 40:9-13.

THE COURT: You're going to move on.

MR. WINGATE: Just one paragraph. So slow down, Cho. Shut the hell up.

Apr. 13 Tr. at 43:12-14.

THE COURT: I'm warning –

MR. WINGATE: I'm warning you.... You don't have patience, you don't have tolerance, and you can suck my d**k. How about that? Put it in your mouth and treat it like a Tic-Tac.

Apr. 13 Tr. at 44:12-18.

THE COURT: You have to stop talking.

MR. WINGATE: You can suck my d**k. Get out of here....

Apr. 13 Tr. at 45:2-4.

THE COURT: You have to calm down.

MR. WINGATE: I'm calm like a grape. You should see when I'm upset. I beat off, masturbate, shoot all over the place. I might shoot in your face....

Apr. 13 Tr. at 45:18-21.

MR. WINGATE: ... Kiss my a**. I'm going to be quiet because you so stupid....

...

MR. WINGATE: I was cooperating. I was reading off two documents, you cut me off. When you did that, you pulled my d**k, I don't like that.

THE COURT: Mr. Wingate, you need to watch your language.

MR. WINGATE: Under the First Amendment, there's not a man or a woman in the room who never heard pull my d**k, suck my d**k, or kiss my a**. These are all correction officers, this is New York's Boldest ...

Apr. 13 Tr. at 47:3 – 48:3.

THE COURT: I'm letting you know you are to comply with my orders. I'm instructing you not to --

MR. WINGATE: I don't respect your orders, you're not here.

Apr. 13 Tr. at 49:11-14.

THE COURT: Okay. Mr. Wingate, watch your language.

MR. WINGATE: I'm not gonna watch my language. I can disrespect anybody I want, any time I want --

THE COURT: You are not going to disrespect anyone in my courtroom, Mr. Wingate.

...

THE COURT: I already made my ruling, Mr. Wingate.

MR. WINGATE: Shut the f**k up.

Apr. 13 Tr. at 79:4 – 80:6.

During the proceedings, Plaintiff also spoke at length about unrelated claims and tried to relitigate prior court orders, including the Court's prior ruling on Defendants' motion for summary judgment. *See* Mot. to Dismiss at 2-5. The Court instructed Plaintiff numerous times to stop talking and not raise issues that were irrelevant or have already been decided, especially in front of potential jurors. *See id.* Plaintiff continued to obstruct the proceedings. *See id.*

Notwithstanding Plaintiff's obstructionist conduct, on Wednesday, April 13, 2022, the Court managed to *voir dire* 31 potential jurors and excused 17 jurors for cause. The remaining 14 jurors were instructed to return to Court on Thursday, April 14, 2022 to complete jury selection. *See* Dkt. entry dated April 13, 2022. The Court further instructed Plaintiff that if he continued to disrupt the proceedings, the Court may dismiss his case under Rule 41. *See* Apr. 13 Tr. at 31:6-21. At the conclusion of proceedings on Wednesday, April 13, 2022, Plaintiff made it clear in front of the potential jurors that he did not intend to appear in Court the following day. *See* Apr. 13 Tr. at 186:17-20.

***3** Even though the Court ordered Plaintiff to return to Court by 9:00 a.m. on Thursday, April 14, 2022, Plaintiff failed to appear. The police escort that had been sent to the facility to pick up Plaintiff notified the Court that Plaintiff was refusing to come to Court because he was "not feeling well." *See* Dkt. 369; *see also* Apr. 14 Tr. at 199:11-21. In the afternoon of April 14, 2022, the Court scheduled a telephonic conference with Plaintiff. During the call, Plaintiff continued to address irrelevant issues at length, insult the Court and opposing counsel, and continued to use obscene language. *See, e.g.*, Apr. 14 Tr. at 212:1-6; 217:20-219:2. The Court reminded Plaintiff again that if he failed to cooperate with court orders, his case could be dismissed under Rule 41(b). *See id.* at 213:22-25; 214:16-20. Plaintiff stated that he had received medical attention in the morning, and was prepared to proceed with jury selection. *See* Dkt. entry dated Apr. 14, 2022. However, given that the police escort sent to pick up Plaintiff in the morning had already left the facility when Plaintiff initially refused to come to Court, and given the time of day, the Court adjourned the jury selection proceedings until 9 a.m. on Monday, April 18, 2022. *See id.* This Court excused the 14 jurors that had returned to Court on April 14th and instructed them to return for a third day on Monday, April 18, 2022.[1] *See id.; see also* Apr. 14 Tr. at 214:3-8.

On Monday, April 18, 2022, Plaintiff continued to obstruct the proceedings and refused to proceed with jury selection even though potential jurors were waiting in the Courthouse. *See, e.g.,* Apr. 18 Tr. at 6:23-9:7; 16:19-17:10. The Court instructed Plaintiff that he could raise any issues regarding the Court's pretrial orders with Judge Komitee after completing jury selection. *See id.* at 15:12-14. However, Plaintiff refused to continue with the jury selection process and abruptly left the Courtroom returning to the holding cell adjoining the Courtroom before the Court could even continue with jury selection. This Court warned Plaintiff as he was leaving the Courtroom that if he left, this Court would have no choice but to recommend dismissal of his action in light of his failure to cooperate with the jury selection proceedings. Plaintiff ignored the Court's warning and returned to the holding cell. The officers who had escorted Plaintiff to the Courthouse then notified this Court that Plaintiff had asked them to return him to Green Haven Correctional Facility where he was being housed. *See id.* at 17:14-15; 18:10-11.

After Plaintiff walked out of the Courtroom and refused to participate in jury selection, Defendants renewed their motion to dismiss pursuant to Rule 41(b). *See id.* at 18:15-19:1. In light of Plaintiff's failure to cooperate with the proceedings and his obstructionist behavior, this Court recommended on the record that Judge Komitee grant Defendants' motion and dismiss the case. *See id.* at 19:2-9; 19:18-20:7. This Report and Recommendation further articulates this Court's reasons for recommending dismissal with prejudice.

Discussion

I. Legal Standard

Under Rule 41(b) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a case if "the plaintiff fails to prosecute or to comply with these rules or a court order." Fed. R. Civ. P. 41(b). "A district court has the inherent power to dismiss a case with prejudice for lack of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure." *Stanford v. R.C. Doliner, Inc.*, No. 01-CV-1052, 2001 WL 1502554, at *1 (S.D.N.Y. Oct. 19, 2001). Courts have this power "in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Lewis v. Cavanaugh*, No. 10-CV-112, 2019 WL 340742, at *2 (D. Conn. Jan. 28, 2019), *aff'd sub nom. Lewis v. Cavanugh*, 821 F. App'x 64 (2d Cir. 2020).

However, while a court may dismiss a case under Rule 41(b), "courts should endeavor to avoid dismissal when reasonably possible." *Lewis*, 2019 WL 340742, at *2; *see also Koehl v. Bernstein*, 740 F.3d 860, 862 (2d Cir. 2014) (noting that "[w]hile district courts generally have broad discretion with respect to the imposition of sanctions," dismissal is a "harsh remedy" that should only be used in "extreme situations" when a "court finds willfulness, bad faith, or any fault by the non-compliant litigant." (internal quotations and citations omitted)). "While [courts are] ordinarily obligated to afford a special solicitude to *pro se* litigants, dismissal of a *pro se* litigant's action as a sanction may nonetheless be appropriate so long as a warning has been given that noncompliance can result in dismissal." *Koehl*, 740 F.3d at 862 (internal citations and quotations omitted) (noting that the "liberal *pro se* practice is a shield against the technical requirements ... not a sword with which to insult a trial judge" (internal citations and quotations omitted)); *see also Melendez v. City of New York*, No. 12-CV-9241, 2014 WL 6865697, at *2 (S.D.N.Y. Dec. 4, 2014) (collecting cases where courts have dismissed *pro se* plaintiffs' claims for failure to prosecute).

***4** To determine whether to dismiss for lack of prosecution, courts should consider the following five factors:

> (1) the duration of the plaintiff's failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal.

Jefferson v. Rosenblatt, No. 13-CV-5918, 2018 WL 3812441, at *3 (E.D.N.Y. Aug. 10, 2018). "No single factor is generally dispositive." *Id.* (citing *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014)).

II. Analysis

The Court now turns to each of the five factors in this case. First, Plaintiff has repeatedly failed to comply with court orders throughout the eight years his case has been pending before this Court culminating most recently with his uncooperative and obstructionist behavior during jury selection. *See* Mot. to Dismiss at 5. From the outset of jury selection, Plaintiff repeatedly failed to follow this Court's instructions causing inordinate delay in the selection process. His abusive and inappropriate behavior during the proceedings and frequent outbursts forced this Court to issue him repeated warnings to control himself. Plaintiff's clear refusal to participate in the jury selection process and obstructionist behavior came to a head when he walked out of jury selection on Monday, April 18, 2022 and asked to return to his facility while prospective jurors -- who had been called to the Courthouse on three separate days for jury selection -- were waiting outside the Courtroom.

Defendants further recounted other examples of Plaintiff's history of obstructionist behavior. For example, Plaintiff "walked out of a scheduled [deposition] that took place on March 21, 2017," and was uncooperative at the final

pretrial conference before Judge Komitee on April 6, 2022. Additionally, Defendants note that multiple judges have instructed Plaintiff about the limited scope of his litigation. *See id.* However, despite repeated instructions, Plaintiff continued to raise unrelated claims and tried to relitigate issues that had already been decided, even during jury selection. *See id.*

The second factor weighs in favor of dismissal, as Plaintiff had adequate notice that his case would be dismissed if he continued to defy court orders. *See Melendez v. City of New York*, 2014 WL 6865697, at *3 (noting that the second factor pointed in favor of dismissal because the court warned plaintiff three times about the potential for dismissal). During each of the three days of jury selection, the Court warned Plaintiff that his case may be dismissed if he continued to obstruct the proceedings, and even reminded Plaintiff of this fact as he walked out of the Courtroom on April 18, 2022. *See* Apr. 18 Tr. at 17:5-8. Further, Defendants filed a motion to dismiss under Rule 41(b) and provided Plaintiff with a copy of the motion in court on April 18, 2022. *See* Apr. 18 Tr. at 11:5-9. [2]

***5** The third factor also weighs in favor of dismissal. Defendants will be prejudiced by any further delay in these proceedings as this case has been pending for eight years. "Prejudice resulting from unreasonable delay may be presumed as a matter of law." *Jefferson*, 2018 WL 3812441, at *4 (citing *Peart v. City of N.Y.*, 992 F.2d 458, 462 (2d Cir. 1993)). However, "even absent [a presumption of prejudice], Defendants have been prejudiced by preparing for a trial that did not go forward." *Id.*

The fourth factor points in favor of dismissal. By failing to comply with court orders and walking out of jury selection, Plaintiff inconvenienced the Court, Defendants, and, more important, prospective jurors who were forced to come to court on three separate days for jury selection, resulting in a waste of time and this Court's resources. Courts have held that failing to appear for jury selection or trial weighs in favor of dismissal, even where a plaintiff otherwise does not "significantly burden the Court." *Jefferson*, 2018 WL 3812441, at *4 (collecting cases); *see also Lewis v. Rawson*, 564 F.3d 569, 581 (2d Cir. 2009) (concluding that "where a party fails to appear or refuses to proceed with trial after the jury ha[s] been drawn, dismissal with prejudice may be particularly appropriate."); *Frederick v. Murphy*, No. 10-CV-06527, 2018 WL 10247403, at *7 (W.D.N.Y. Apr. 16, 2018) ("Nonetheless, even before a jury is selected, a great number of potential jurors must deviate from their daily routine in order to engage in one of the most crucial functions of civic life."). Here, this factor weighs heavily in favor of dismissal in light of Plaintiff's lack of consideration "for the resources expended by the Court and Defendants in preparing for his trial, the inconvenience caused to the prospective jurors and the costs to the Court in assembling the jury pool." *See Frederick*, 2018 WL 10247403, at *8.

Finally, this Court does not believe any lesser sanction would be appropriate. As Plaintiff is proceeding *in forma pauperis*, a monetary sanction is unlikely to change Plaintiff's behavior. *See Jefferson*, 2018 WL 3812441, at *4. Further, holding Plaintiff in contempt would unlikely compel Plaintiff to comply with any court order as he is already incarcerated.

Given that Plaintiff has not complied with court orders, even with the repeated threats of dismissal, this Court shares Defendants' concerns that Plaintiff may not abide by court orders at trial and could "taint the jury and engage in antics that will result in a mistrial." Mot. to Dismiss at 6. Accordingly, this Court is not convinced that any lesser sanction would be effective, and thus, recommends that this action be dismissed with prejudice.

Conclusion

In summary, for the reasons stated above and on the record on April 18, 2022, this Court respectfully recommends that Plaintiff's case be dismissed for failure to prosecute and comply with court orders.

A copy of this Report and Recommendation is being electronically served on counsel. Further, the Court directs Defendants' counsel to serve a copy of this Report and Recommendation by overnight mail and first-class mail on Plaintiff at both the Green Haven Correctional Facility, P.O. Box 4000, Stormville, New York 12582, and at Five Points Correctional Facility, 6600 State Route 96, Caller Box 119, Romulus, New York 14541, and file proof of service on ECF.

Any objections to the recommendations made in this Report must be filed with the Honorable Eric R. Komitee within 14 days after the filing of this Report and Recommendation and, in any event, on or before **May 2, 2022**. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's

order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; *Caidor v. Onondaga Cty.*, 517 F.3d 601, 604 (2d Cir. 2008) (explaining that "failure to object timely to a ... report [and recommendation] operates as a waiver of any further judicial review of the magistrate judge's] decision").

***6 SO ORDERED.**

All Citations

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Footnotes

1 To accommodate Plaintiff's religious observances, on April 6, 2022, the Court agreed not to hold trial-related proceedings on Fridays.

2 Plaintiff refused to accept service of Defendants' motion to dismiss.

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Rhoda GREENE, Edmond Burke, Derrick Wallace, Andrew Hall, James Stanton, Nekeisha Delapenha, et al., Defendants.

14-cv-4063(EK)(JRC)
|
Signed July 12, 2022

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MEMORANDUM & ORDER

ERIC KOMITEE, United States District Judge:

***1** The Court has received Magistrate Judge Cho's Report and Recommendation ("R&R") dated April 18, 2022. ECF No. 374. Judge Cho recommends that I grant Defendants' motion to dismiss this case under Federal Rule of Civil Procedure 41(b) because of the Plaintiff's failure to comply with court orders and his failure to prosecute his case. Plaintiff (who is currently incarcerated at Five Points Correctional Facility, and proceeding *pro se* here) filed objections to the R&R on May 9, 2022. Pl.'s Objections to R&R ("Pl.'s Objs."), ECF No. 381. [1] For the reasons set forth below, I adopt the R&R in full and grant the motion to dismiss.

When a party submits a timely objection, the court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). Those portions of the R&R that are not objected to are reviewed for clear error on the face of the record. *See* Advisory Comm. Notes to Fed. R. Civ. P. 72(b); *accord State Farm Mut. Auto. Ins. Co. v. Grafman*, 968 F. Supp. 2d 480, 481 (E.D.N.Y. 2013).

A case may be dismissed under Rule 41(b) for failure to prosecute or failure to comply with a court order. Fed. R. Civ. P. 41(b); *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001). In weighing dismissal, courts consider

> (1) the duration of the plaintiff's failure to comply with the court order, (2) whether plaintiff was on

> notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal.

Baptiste v. Sommers, 768 F.3d 212, 216 (2d Cir. 2014).[2]

***2** For the reasons Judge Cho stated in the R&R, each of these factors weighs in favor of dismissal. Most significantly, throughout the final pretrial conference and jury selection, Plaintiff declined to comply with the Court's orders and obstructed the proceedings with abusive outbursts and inappropriate statements. Judge Cho enumerated several examples of Plaintiff's most obstructive conduct; they are set forth in the margin.[3] *See, e.g.*, *Koehl v. Bernstein*, 740 F.3d 860, 862 (2d Cir. 2014) (affirming dismissal with prejudice following *pro se* plaintiff's "repeated use of abusive, insulting language directed at the Magistrate Judge").

Plaintiff declined to return to court for the second day of jury selection, scheduled for Thursday, June 14. Refusal/Waiver of Right to be Physically Present at Court, ECF No. 369. According to a form filled out by prison authorities that morning – titled "Refusal/Waiver of Right to be Physically Present in Court" and signed by two witnesses – Plaintiff "refused his Court trip" because he was "not feeling well." *See id.*; *see also* Tr. of Proceedings dated April 14, 2022 ("Apr. 14 Tr."), ECF No. 372 (during phone conference, scheduled for 9:30 a.m. on April 14 after Plaintiff did not appear in court, Mr. Wingate said that he did not come because of medical reasons). On the phone, after making more aggressive comments to opposing counsel – including that he would "blow her back out with her partner and whoever else is on the line" if she filed a Rule 41 motion – Plaintiff agreed to continue jury selection on Monday, April 18. Apr. 14 Tr. 210:15-16, 219:24-220. Plaintiff did return on April 18, but abruptly exited the courtroom shortly thereafter and refused to continue with the proceeding. Tr. of Proceedings dated April 18, 2022 ("Apr. 18 Tr.") 236:16-238:12, ECF No. 375. Because of the severity of Plaintiff's conduct and the fact that it lasted several days, the first *Baptiste* factor is easily satisfied.

The second factor is satisfied because Plaintiff had clear notice that his conduct could result in dismissal. "While a court is ordinarily obligated to afford a special solicitude to *pro se* litigants, dismissal of a *pro se* litigant's action as a sanction may nonetheless be appropriate so long as a warning has been given that noncompliance can result in dismissal." *Koehl*, 740 F.3d at 862; *see also Pimentel v. Delta Air Lines, Inc.*, 818 F. App'x 100, 101 (2d Cir. 2020) (affirming dismissal of case where, after issuing several warnings to *pro se* plaintiff, "the district court dismissed the actions with prejudice, pursuant to Fed. R. Civ. P. 41(b), for failure to comply with court orders and for using abusive language toward the judges"). Exhibiting an exceptional degree of patience, Judge Cho warned Plaintiff of this risk repeatedly throughout jury selection. *See, e.g.*, Apr. 14 Tr. 213:22-214:1 ("Mr. Wingate, you have received numerous warnings that your case may be dismissed if you continue to disrupt your own proceedings and refuse to comply with the orders of this Court."); *id.* at 214:16-23 (The Court: "[I]f you do not appear on Monday to complete jury selection, I may have to recommend that Judge Komitee dismiss this case ... for your obstruction of these proceedings and for failure to comply with court orders. Do you understand, Mr. Wingate?"; Plaintiff: "Yes."); Apr. 18 Tr. 223:9-19 (warning the parties that they "may not speak over me or each other and ... may not interrupt me or each other," and that "[i]f these rules are not complied with, I may hold a party in contempt or recommend to Judge Komitee that he dismiss[es] the case").

***3** When Plaintiff left the courtroom on April 18, proclaiming "I am done.... I am out of here," Judge Cho asked: "It appears that you are packing up and preparing to leave the courtroom. Are you refusing to participate in the jury selection process?" Apr. 18 Tr. 236:15-237:1. When Plaintiff did not respond, Judge Cho advised Plaintiff – as he was still in the courtroom but preparing to leave – that if he "refuse[d] to participate in the jury selection process," Judge Cho would "have no choice but to recommend dismissal of [the] action today." *Id.* at 237:4-7. Plaintiff left anyway and did not return. *Id.* at 237:13-14, 238:5-18.

The third factor is satisfied because this case has been pending for eight years. *See* R&R 8. And Plaintiff's interest in having his case heard — the fourth *Baptiste* factor — does not balance favorably here against the Court's interest in controlling its docket. Plaintiff had his day in

court, succeeding past the summary judgment stage, and the Court was prepared to afford him the trial he had sought. Finally, the fifth factor weighs in favor of dismissal because no lesser sanction would be appropriate. Judge Cho exhibited extraordinary patience in proceeding with Plaintiff's case, and afforded him multiple opportunities to continue despite Plaintiff's obstructive and abusive behavior. *See id.* at 9-10. For these reasons, Judge Cho correctly concluded that dismissal is the appropriate sanction in this case. *E.g.*, *Jenkins v. Charles*, No. 13-CV-3405, 2018 WL 626340, at *4-5 (S.D.N.Y. Jan. 30, 2018) (dismissing case for "abuse of the court process, abuse of judicial officers, outbursts in court, and attacks on the integrity of the court" after plaintiff "hijacked the proceedings," was "confrontational," and "kept interrupting the Court").

Plaintiff's objections are without merit. He defends his conduct as being merely "assertive," but the quotations above and in the R&R make clear the degree of understatement that argument entails. Many of Plaintiff's objections focus on the (unfounded) perception that he was denied his right to exercise his religion during trial because the Court "breached" an agreement to allow Plaintiff to participate in Friday prayers, and that Judge Cho "sought [to] dismiss based upon [Plaintiff's] religion." Pl.'s Objs. 2-3. There is simply no evidence to support Plaintiff's allegations; at the pretrial conference on April 6, I actively sought to accommodate Plaintiff's religious observance on Fridays by amending the trial schedule to exclude Friday, *see* Defs.' Ex. E, Tr. of Proceedings dated April 6, 2022, ECF No. 383-5, and neither Judge Cho nor I conducted this proceeding on a Friday. [4]

***4** Having reviewed the record, I agree with Judge Cho's findings and conclusions and therefore adopt the R&R in its entirety. This case is dismissed with prejudice.

SO ORDERED.

All Citations

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Footnotes

1 After he filed his objections and Defendants responded, *see* ECF No. 383, Plaintiff submitted additional filings at ECF Nos. 385, 386, and 387, including a "Notice of Addendum" to the R&R. These filings "contravene[ ] the general principle that supplementary filings require leave of the court." *Endo Pharms. Inc. v. Amneal Pharms., LLC*, No. 12-cv-8060, 2016 WL 1732751, at *9 (S.D.N.Y. Apr. 29, 2016). Moreover, "the decision to permit a litigant to submit a surreply is a matter left to the court's discretion, as is the decision to strike a party's filing." *Id.* "Plaintiff has failed to show good cause for filing a sur-reply as he has not established that the ... defendants raised a new issue for the first time on reply." *Ramon v. Corp. City of New York*, No. 17-cv-2307, 2019 WL 1306061, at *7 (E.D.N.Y. 2019). Thus, for the purposes of this order I disregard plaintiff's unauthorized sur-replies and take into account only his timely objections to the R&R, made on May 9, 2022, at ECF No 381.

2 Unless otherwise noted, when quoting judicial decisions this order accepts all alterations and omits all citations, and internal quotation marks.

3 Plaintiff made a series of vulgar, sexually explicit comments to Judge Cho and others in the courtroom. I need not repeat these here, as they are set forth in the R&R and various transcripts. *See* R&R 2-4; *see also* Tr. of Proceedings on April 13, 2022 ("Apr. 13 Tr.") 12:17-24, 28:12-15, 43:12-45:21, 44:12-18, 45:2-4, 47:3-48:3, ECF No. 373. Plaintiff also made a series of explicitly racist comments. *See, e.g.*, Apr. 13 Tr. 40:9-13. And Plaintiff left no question about his views of the Court's authority, stating among other things that "I don't respect your orders, you're not here," "[s]hut the f**k up," and "I'm not gonna watch my language. I can disrespect anybody I want, any time I want." *Id.* at 49:11-14, 79:4–80:6.

4 The first day of jury selection was on Wednesday, April 13; the second day was scheduled for Thursday, April 14, but Mr. Wingate did not come to court. During the phone conference that day, Judge Cho inquired whether the following day (a Friday) might be an option for conducting jury selection, to which Plaintiff replied that it was not. Apr. 14 Tr. 198:10-12 (The Court: "Now, to clarify, are you able to participate in jury selection tomorrow, Friday?"; Plaintiff: "No, tomorrow is Jum['ah]"). Judge Cho then adjourned jury selection until the morning of Monday, April 18.

Nothing in the record indicates any religious (or other) bias by Judge Cho. Plaintiff's objections follow the same line of obstructive conduct he demonstrated in court – arguing that Judge Cho lacks "integrity" and acts with bias, *see* Pl.'s Objs. 8, 18; and rejecting the Court's authority generally. *See, e.g.*, *id.* at 5 ("judges and magistrates ... can kick rocks and go somewhere else").

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