

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30475  
Summary Calendar

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STACEY THOMPSON,

Plaintiff-Appellant,

VERSUS

CHARLES C. FOTI, JR., Sheriff, Orleans  
Parish Criminal Sheriff's Office,  
MEDICAL DEPARTMENT, and UNIDENTIFIED PARTIES,

Defendants-Appellees.

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STACEY THOMPSON,

Plaintiff-Appellant,

VERSUS

CHARLES C. FOTI, JR., Sheriff, Orleans  
Parish Criminal Sheriff's Office  
and UNIDENTIFIED PARTIES,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA-94-511-H c/w 94-687-H)

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(October 26, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

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<sup>1</sup> Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Stacey Thompson contests the dismissal of his civil rights action for failure to prosecute. We **VACATE** and **REMAND**.

I.

Thompson, a prisoner *pro se* litigant proceeding *in forma pauperis*, filed a 42 U.S.C. § 1983 complaint alleging that he was denied adequate dental treatment while incarcerated at Orleans Parish Prison.<sup>2</sup> On May 13, 1994, the magistrate judge ordered Thompson to file a statement of facts supporting his claim, as well as lists of exhibits and witnesses. The order specified that failure to comply by June 10, 1994, could result in dismissal of the action. On June 9, 1994, Thompson filed a motion that was not responsive to the May 13 order. On June 15 and June 28, 1994, the magistrate judge ordered Thompson to show cause why his case should not be dismissed for failure to comply with the May order. Thompson failed to respond.

On July 19, 1994, 11 days after the final deadline for Thompson's response, the magistrate issued a recommendation that Thompson's complaints be dismissed, without prejudice, for failure to prosecute. Thompson objected to this recommendation, stating that his failure to comply with the order resulted from inmate counsel's inability to access Thompson's legal documents. Nevertheless, the district court adopted the recommendation, and dismissed Thompson's case without prejudice for failure to prosecute.

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<sup>2</sup> This case is a consolidation of two § 1983 actions filed by Thompson.

II.

Pursuant to Fed. R. Civ. P. 41(b), a district court may dismiss an action for failure to prosecute. The discretion to do so, however, is severely limited when the dismissal is with prejudice. **Berry v. CIGNA/RSI-CIGNA**, 975 F.2d 1188, 1191 (5th Cir. 1992). We note that although the district court dismissed Thompson's action without prejudice, the statute of limitations will prevent him from refileing his claim.<sup>3</sup> Therefore the dismissal was, in effect, with prejudice. See **Id.** A dismissal with prejudice for failure to prosecute is reviewed for abuse of discretion. **Id.**

This court stated in **Berry**:

We will affirm dismissals with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile.

**Id.** (footnote and citations omitted). The only evidence of delay by Thompson is his failure to respond to the May 13 order, as well as to two further demands on the same order. Our court has held that even the failure to respond to several court orders does not amount to a clear record of delay or contumacious conduct. **McGowan v. Faulkner Concrete and Pipe Co.**, 659 F.2d 554, 556-58 (5th Cir.

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<sup>3</sup> For § 1983 actions, federal courts apply the forum state's limitation period for personal injury actions. **Owens v. Okure**, 488 U.S. 235, 251 (1989). In Louisiana, the applicable period is one year. See **Elzy v. Roberson**, 868 F.2d 793, 794 (5th Cir. 1989). Because Thompson complains of events occurring in March of 1993, he would be barred from refileing his action.

1981); *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 384-85 (5th Cir. 1978). In any event, we find no evidence that the district court considered or employed any lesser form of sanction against Thompson. Therefore, we must conclude that the district court abused its discretion in dismissing Thompson's action for failure to prosecute.<sup>4</sup>

III.

For the foregoing reasons, the dismissal is **VACATED** and this case is **REMANDED** for further proceedings.

**VACATED** and **REMANDED**

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<sup>4</sup> Thompson has moved for leave to proceed *in forma pauperis*. Because Thompson was already proceeding *in forma pauperis* in the district court, and that status was not removed there, his motion is denied as unnecessary.