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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARMSTRONG AZAH,

Plaintiff,

No. 2:11-cv-01746 MCE KJN PS

v.

SAXON MORTGAGE, et al.,

Defendants.

ORDER and FINDINGS AND
RECOMMENDATIONS

_____/

Presently before the court is defendant Saxon Mortgage Services, Inc.’s (“Saxon”) motion to dismiss plaintiff’s complaint pursuant to Federal Rule of Civil Procedure 12(b).¹ Plaintiff filed no written opposition, statement of non-opposition, or other response to the pending motion despite being given multiple opportunities to do so and clear warnings from the court that failure to oppose the motion would lead to the involuntary dismissal of his lawsuit with prejudice. For the reasons that follow, the undersigned recommends that plaintiff’s action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) and Local Rules 110 and 183(a).

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¹ This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 I. BACKGROUND

2 On July 6, 2011, Saxon filed its motion to dismiss plaintiff's complaint. (Dkt.
3 No. 7.) Saxon noticed its motion to dismiss for a hearing to take place before the undersigned on
4 August 25, 2011, and that motion was subsequently re-noticed for a hearing date of September 8,
5 2011.² (Notice to Reschedule Mot. to Dismiss, Dkt. No. 9.) Pursuant to this court's Local Rules,
6 plaintiff was required to file and serve a written opposition or statement of non-opposition to the
7 pending motion at least fourteen days prior to the re-noticed hearing date, or August 25, 2011.
8 See E. Dist. Local Rule 230(c).³ Plaintiff failed to file any response to the motion to dismiss.

9 On August 29, 2011, and in response to plaintiff's failure to file a response to
10 Saxon's motion to dismiss, the undersigned entered an order that: (1) continued the hearing on
11 the motion to dismiss until October 6, 2011; and (2) required plaintiff to file a written opposition
12 or statement of non-opposition to the pending motion on or before September 8, 2011. (Order,
13 Aug. 29, 2011, Dkt. No. 11.) That order states, in part:

14 Eastern District Local Rule 110 provides that "[f]ailure of counsel
15 or of a party to comply with these Rules or with any order of the Court
16 may be grounds for imposition by the Court of any and all sanctions
17 authorized by statute or Rule or within the inherent power of the Court."
18 Moreover, Eastern District Local Rule 183(a) provides, in part:

19 Any individual representing himself or herself without an
20 attorney is bound by the Federal Rules of Civil or Criminal
21 Procedure, these Rules, and all other applicable law. All

22 ² The other named defendant in this case, Quality Loan Service Corp., previously filed a
23 Declaration of Nonmonetary Status in this action, and plaintiff did not object to that filing. (See
24 Notice of Non-Opposition to Quality Loan Serv. Corp.'s Decl. of Nonmonetary Status, Dkt. No. 10.)

25 ³ Eastern District Local Rule 230(c) provides:

26 **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of
the motion shall be in writing and shall be filed and served not less than
fourteen (14) days preceding the noticed (or continued) hearing date. A
responding party who has no opposition to the granting of the motion shall
serve and file a statement to that effect, specifically designating the motion
in question. No party will be entitled to be heard in opposition to a motion
at oral arguments if opposition to the motion has not been timely filed by that
party. . . .

1 obligations placed on “counsel” by these Rules apply to
2 individuals appearing in propria persona. Failure to comply
3 therewith may be ground for dismissal . . . or any other
4 sanction appropriate under these Rules.

5 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se
6 litigants must follow the same rules of procedure that govern other
7 litigants.”). Case law is in accord that a district court may impose
8 sanctions, *including involuntary dismissal of a plaintiff’s case* pursuant to
9 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to
10 prosecute his or her case or fails to comply with the court’s orders, the
11 Federal Rules of Civil Procedure, or the court’s local rules.⁴ See
12 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a
13 court “may act *sua sponte* to dismiss a suit for failure to prosecute”); Hells
14 Canyon Preservation Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th
15 Cir. 2005) (stating that courts may dismiss an action pursuant to Federal
16 Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to
17 prosecute or comply with the rules of civil procedure or the court’s
18 orders); Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam)
19 (“Failure to follow a district court’s local rules is a proper ground for
20 dismissal.”), cert. denied, 516 U.S. 838 (1995); Ferdik v. Bonzelet, 963
21 F.2d 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil
22 Procedure 41(b), the district court may dismiss an action for failure to
23 comply with any order of the court.”), cert. denied, 506 U.S. 915 (1992);
24 Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir.
25 1986) (per curiam) (stating that district courts have inherent power to
26 control their dockets and may impose sanctions including dismissal), cert.
denied, 479 U.S. 829 (1986).

16 (Id. at 2-3 (footnote in original).) Later in that order, the court again warned plaintiff that:
17 “*Plaintiff’s failure to file a written opposition will be deemed a statement of non-opposition to*
18 *the pending motion and plaintiff’s consent to the granting of the motion to dismiss, and shall*
19 *constitute an additional ground for the imposition of appropriate sanctions, including a*
20 *recommendation that plaintiff’s case be involuntarily dismissed pursuant to Federal Rule of Civil*
21 *Procedure 41(b).*” (Id. at 3 (emphasis in original).) Thus, the court gave plaintiff very clear
22 warnings that his case would be dismissed for failure to prosecute his action or his failure to
23 comply with the Federal Rules of Civil Procedure, the court’s orders, or the court’s Local Rules.

24 ⁴ The Ninth Circuit Court of Appeals had held that under certain circumstances a district
25 court does not abuse its discretion by dismissing a plaintiff’s case pursuant to Federal Rule of Civil
26 Procedure 41(b) for failing to file an opposition to a motion to dismiss. See, e.g., Trice v. Clark
County Sch. Dist., 376 Fed. Appx. 789, 790 (9th Cir. 2010), cert. denied, 131 S. Ct. 422 (2010).

1 The court’s docket reveals that plaintiff has again failed to file a written
2 opposition or statement of non-opposition to Saxon’s motion to dismiss. Plaintiff failed to do so
3 despite being given an additional opportunity oppose the motion to dismiss and explicit warnings
4 that the failure to file a written opposition or statement of non-opposition would result in the
5 dismissal of his lawsuit with prejudice.

6 II. DISCUSSION

7 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an
8 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,
9 failure to comply with the court’s local rules, or failure to comply with the court’s orders.⁵ See,
10 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*
11 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
12 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action
13 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute
14 or comply with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d
15 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court
16 may dismiss an action for failure to comply with any order of the court.”), cert. denied, 506 U.S.
17 915 (1992); Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district
18 court’s dismissal of case for failure to prosecute when habeas petitioner failed to file a first
19 amended petition), cert. denied, 538 U.S. 909 (2003). This court’s Local Rules are in accord.
20 See E. Dist. Local Rule 110 (“Failure of counsel or of a party to comply with these Rules or with
21 any order of the Court may be grounds for imposition by the Court of any and all sanctions
22 authorized by statute or Rule or within the inherent power of the Court.”); E. Dist. Local
23 Rule 183(a) (providing that a pro se party’s failure to comply with the Federal Rules of Civil
24

25 ⁵ Rule 41(b) provides, in part: “**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to
26 prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action
or any claim against it.” Fed. R. Civ. P. 41(b).

1 Procedure, the court's Local Rules, and other applicable law may support, among other things,
2 dismissal of that party's action).

3 A court must weigh five factors in determining whether to dismiss a case for
4 failure to prosecute, failure to comply with a court order, or failure to comply with a district
5 court's local rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

- 6 (1) the public's interest in expeditious resolution of litigation;
7 (2) the court's need to manage its docket; (3) the risk of prejudice
8 to the defendants; (4) the public policy favoring disposition of
cases on their merits; and (5) the availability of less drastic
alternatives.

9 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th
10 Cir. 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of Appeals has stated that
11 "[t]hese factors are not a series of conditions precedent before the judge can do anything, but a
12 way for a district judge to think about what to do." In re Phenylpropanolamine (PPA) Prods.
13 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

14 Although involuntary dismissal can be a harsh remedy, the five relevant factors
15 weigh in favor of dismissal of this action. The first two factors strongly support dismissal of this
16 action. Plaintiff's failure to file an opposition or statement of non-opposition to Saxon's motion
17 to dismiss in the first instance, and his failure to do so a second time despite clear warnings of the
18 consequences for such failures, strongly suggests that plaintiff has abandoned this action or is not
19 interested in seriously prosecuting it. See, e.g., Yourish v. Cal. Amplifier, 191 F.3d 983, 990
20 (9th Cir. 1999) ("The public's interest in expeditious resolution of litigation always favors
21 dismissal."). Moreover, although plaintiff had notice of the continued hearing date and his
22 potentially final opportunity to respond to Saxon's motion on or before September 8, 2011,
23 plaintiff took no action. Any further time spent by the court on this case, which plaintiff has
24 demonstrated a lack of any serious intention to pursue, will consume scarce judicial resources
25 and take away from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district
26 courts have inherent power to manage their dockets without being subject to noncompliant

1 litigants).

2 In addition, the third factor, which considers prejudice to a defendant as a result of
3 plaintiff's failure to timely oppose a motion to dismiss, should be given some weight. See
4 Ferdik, 963 F.2d at 1262. A motion to dismiss is an aid to simplifying the issues and dismissing
5 improper claims or parties before discovery commences. Plaintiff's failure to oppose the motion
6 to dismiss after being given two opportunities to do so, and his failure to communicate with the
7 court or explain his non-participation in this litigation, raise the real possibility that Saxon might
8 be forced to unnecessarily engage in further litigation against claims that plaintiff does not appear
9 to value enough to pursue in a serious manner. Saxon has been diligently pursuing its motion,
10 and plaintiff stalled this matter and prevented the efficient resolution of this lawsuit. Such
11 unreasonable delay is presumed to be prejudicial. See, e.g., In re Phenylpropanolamine (PPA)
12 Prods. Liab. Litig., 460 F.3d at 1227.

13 The fifth factor, which considers the availability of less drastic measures, also
14 supports dismissal of this action. As noted above, the court has actually pursued remedies that
15 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d
16 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court
17 actually tries alternatives before employing the ultimate sanction of dismissal.”), cert. denied,
18 Malone v. Frank, 488 U.S. 819 (1988). The court excused plaintiff's initial failure to oppose the
19 potentially dispositive motion, granted plaintiff additional time to file an opposition or statement
20 of non-opposition, and continued the hearing on the motion. Moreover, the court advised
21 plaintiff of the requirement of opposing the motion to dismiss and informed him of the
22 requirements of the Local Rules. Furthermore, the court advised plaintiff that he was required to
23 comply with the court's Local Rules and the Federal Rules of Civil Procedure even though he is
24 proceeding without counsel. It also warned plaintiff in clear terms that failure to comply with the
25 court's orders would result in a recommendation of dismissal with prejudice. Warning a plaintiff
26 that failure to take steps towards resolution of his or her action on the merits will result in

1 dismissal satisfies the requirement that the court consider the alternatives. See, e.g., Ferdik, 963
2 F.2d at 1262 (“[O]ur decisions also suggest that a district court’s warning to a party that his
3 failure to obey the court’s order will result in dismissal can satisfy the ‘consideration of
4 alternatives’ requirement.”) (citing Malone, 833 F.2d at 132-33). At this juncture, the court finds
5 no suitable alternative to a recommendation for dismissal of this action. This finding is
6 supported by the fact that plaintiff’s claims center on his default on a substantial loan, which in
7 turn suggests that plaintiff would very likely be unable to pay any monetary sanction imposed in
8 lieu of dismissal.

9 The court also recognizes the importance of giving due weight to the fourth factor,
10 which addresses the public policy favoring disposition of cases on the merits. However, for the
11 reasons set forth above, factors one, two, three, and five strongly support a recommendation of
12 dismissal of this action, and the fourth factor does not materially counsel otherwise. Dismissal is
13 proper “where at least four factors support dismissal or where at least three factors ‘strongly’
14 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
15 and quotation marks omitted). Under the circumstances of this case, the other relevant factors
16 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,
17 963 F.2d at 1263.

18 III. CONCLUSION

19 In light of the foregoing, IT IS HEREBY ORDERED that the hearing on Saxon’s
20 motion to dismiss (Dkt. No. 7), presently scheduled for October 6, 2011, is vacated.

21 It is FURTHER RECOMMENDED that:

22 1. Plaintiff’s case be dismissed with prejudice as to all defendants pursuant to
23 Federal Rule of Civil Procedure Rule 41(b) and Local Rules 110 and 183(a).

24 2. The Clerk of Court be directed to close this case and vacate all future dates
25 in this case.

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