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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Kenneth Lavenue,

10 Plaintiff,

11 vs.

12 Sterling Edmunds, Jr., in his official
13 capacity as CEO of SunTrust Mortgage;
14 Mortgage Electronic Registration Systems,
15 Inc. (MERS); Crestar Mortgage
16 Corporation; and SunTrust Mortgage, Inc.,

17 Defendants.

No. CV-10-1479-PHX-DGC

ORDER

18 In mid-July 2010, Plaintiff brought this quiet title action (Doc. 1) and filed a
19 motion for a temporary restraining order seeking to enjoin a trustee sale of his home
20 (Doc. 4). In an order dated July 20, 2010, the motion was denied for lack of subject
21 matter jurisdiction. Doc. 10 at 2. Because the jurisdictional defect arguably could be
22 cured by amendment, the motion also was denied because Plaintiff's "show me the note"
23 argument is wholly without merit. *Id.* at 2-4.

24 More than seven months later, on March 3, 2011, the Court issued an order
25 providing that the case would be dismissed in 14 days if Plaintiff did not show good
26 cause for his failure to serve process on Defendants. Doc. 11. To date, Plaintiff has filed
27 no response to the order to show cause. Nor has he filed a response the motion to dismiss
28 filed on March 11, 2011 by Defendants MERS and Bank of America (as successor in
interest to Crestar Mortgage Corporation). Doc. 12. This case will be dismissed for

1 failure to prosecute, for failure to comply with the rules and the Court's order to show
2 cause, and for lack of jurisdiction.

3 Before dismissing an action for failure to prosecute or failure to comply with the
4 rules or an order, the Court must weigh five factors: (1) the public's interest in
5 expeditious resolution of litigation, (2) the Court's need to manage its docket, (3) the risk
6 of prejudice to the defendants, (4) the public policy favoring disposition of cases on their
7 merits, and (5) the availability of less drastic sanctions. *Ghazali v. Moran*, 46 F.3d 52, 53
8 (9th Cir. 1995).

9 The first two factors favor dismissal. Plaintiff filed this suit more than eight
10 months ago (Doc. 1), but apparently has not served process on all Defendants. Plaintiff
11 was provided with the order to show cause on March 3, 2011, and the motion to dismiss
12 one week later. Docs. 11, 12. He has been provided with sufficient time to respond to
13 the order and motion, but has failed to do so. Because the Court and the public have a
14 strong interest in judicial efficiency and the prompt resolution of litigation, Plaintiff's
15 failure to prosecute this action weighs in favor of dismissal. The third factor – risk of
16 prejudice to Defendants – also weighs in favor of dismissal. Defendants forced to incur
17 expenses and defend themselves in court are prejudiced by a plaintiff's failure to respond
18 to motions or to prosecute the case in a timely and efficient manner. The fourth factor, as
19 always, weighs against dismissal. As for the fifth factor, the Court notes that it warned
20 Plaintiff that this action would be dismissed if he did not respond to the order to show
21 cause. Plaintiff nonetheless chose to disregard the Court's order. Given this warning,
22 and the fact that additional extensions of time would likely elicit the same lack of
23 response, the Court concludes that dismissal is warranted. *See* Fed. R. Civ. P. 41(b);
24 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.1992).

25 Defendants move to dismiss the complaint for lack of subject matter jurisdiction
26 pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Doc. 12. Federal
27 courts “possess only that power authorized by Constitution and statute,” *Kokkonen v.*
28 *Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994), and “the

1 presumption is that [they are] without jurisdiction unless the contrary affirmatively
2 appears,” *Fifty Associates. v. Prudential Insurance Co. of America*, 446 F.2d 1187, 1190
3 (9th Cir. 1970). Pursuant to federal statutes, this Court has subject matter jurisdiction
4 over a case where the complaint alleges a federal cause of action or the amount in
5 controversy exceeds \$75,000 and the parties are citizens of different states. 28 U.S.C. §§
6 1331, 1332(a).

7 As previously explained (Doc. 10 at 2), the complaint, even when liberally
8 construed, asserts no cause of action raising a federal question. Nor does it plead
9 sufficient facts to establish complete diversity of citizenship. *Id.* The Court accordingly
10 will grant Defendants’ motion and dismiss the complaint for lack of subject matter
11 jurisdiction.

12 **IT IS ORDERED:**

- 13 1. The case is **dismissed** for Plaintiff’s failure to prosecute and comply with
14 the rules and the Court’s order to show cause (Doc. 11).
15 2. Defendants’ motion to dismiss for lack of jurisdiction (Doc. 12) is **granted**.
16 3. The Clerk is directed to enter judgment accordingly and terminate this
17 action.

18 Dated this 6th day of May, 2011.

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23 David G. Campbell
24 United States District Judge
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