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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Carpenter Crest 401,

10 Plaintiff,

11 v.

12 Rebekah Converti, et al.,

13 Defendants.
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No. CV-15-02004-PHX-JZB

ORDER

15 Pending before the Court is Plaintiff's Motion for Leave to File First Amended
16 Complaint, which was filed in response to the Court's Order to Show Cause why
17 Plaintiff's claims against John Doe Converti, the fictitious name of Defendant Rebekah
18 Converti's husband, should not be dismissed with prejudice. (Doc. 21.) Plaintiff seeks to
19 amend his Complaint to identify John Doe Converti as Roberto Garcia, and to allow
20 Plaintiff an additional 60 days to effect service on Mr. Garcia. (*Id.*) For the following
21 reasons, the Court will dismiss John Doe Converti with prejudice for Plaintiff's failure to
22 prosecute, enter full and final judgment in this case, and deny Plaintiff's Motion to
23 Amend as moot.

24 **I. Background**

25 On October 6, 2015, over 20 months ago, Plaintiff filed his Complaint in this
26 action. (Doc. 1.) On November 23, 2015, Plaintiff filed a Motion for Alternative Service
27 as to Rebekah Converti and John Doe Converti. (Doc. 7.) In his Motion, Plaintiff sought
28 to have the Court "allow alternative service of the summons and complaint upon

1 Defendant Rebekah Converti, and if married, upon her husband John Doe Converti
2 (collectively ‘Converti’).” (*Id.*) On January 21, 2016, the Court granted Plaintiff’s
3 Motion as to Rebekah Converti. (Doc. 8.) However, because Plaintiff indicated that he
4 did not know if Rebekah Converti is married, and failed to identify any steps taken to
5 determine “where, if Ms. Converti is married, her husband resides,” the Court denied the
6 Motion as to John Doe Converti without prejudice. (*Id.*)

7 On January 27, 2016, Defendants Rebekah Converti and The 2-Acorns, Inc. were
8 served with the Summons and Complaint. (Doc. 11.) On March 7, 2016, after these two
9 Defendants failed to respond to the Complaint, Plaintiff filed a Motion for Entry of
10 Default Judgment against them, which the Court construed as a Motion for Entry of
11 Default. (Docs. 12, 13, 14.) On March 8, 2016, the Clerk entered default against
12 Rebekah Converti and The 2-Acorns, Inc. (Doc. 13.) On April 22, 2016, the Court
13 ordered Plaintiff to submit additional briefing that addressed the factors provided in *Eitel*
14 *v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). (Doc. 14.) On May 6, 2016, Plaintiff
15 filed a Motion for Entry of Default Judgment against Defendants Rebekah Converti and
16 The 2-Acorns, Inc. pursuant to Rule 55(b) of the Federal Rules of Civil Procedure. (Doc.
17 15.) Due to several errors in Plaintiff’s damage calculations, however, the Court denied
18 Plaintiff’s Motion without prejudice. (Doc. 16.)

19 On November 28, 2016, Plaintiff filed an Amended Motion for Entry of Default
20 Judgment against Rebekah Converti and The 2-Acorns, Inc. (Doc. 17.) On March 2,
21 2017, the Court granted Plaintiff’s Motion for Entry of Default Judgment, and, on the
22 same day, the Clerk of Court entered Judgment in favor of Plaintiff and against
23 Defendants Rebekah Converti and The 2-Acorns, Inc. (Docs. 18, 19.) In the Court’s
24 Order at Doc. 18 granting the Motion for Default Judgment, the Court stated the
25 following:

26 Plaintiff also names John Doe Converti, the fictitious name of
27 Rebekah Converti’s husband, as a Defendant in this action.
28 (Doc. 1.) Plaintiff claims in the Complaint that it is unknown
whether Rebekah Converti is married, and, to date, Plaintiff
has not further identified or served this fictitiously-named
Defendant. (*Id.* ¶ 6.) The Court’s reference to “Defendant

1 Converti” throughout this Order refers only to Rebekah
2 Converti.

3 (Doc. 18 at 2, n.2.)

4 After the Court entered judgment against the named Defendants, Plaintiff took no
5 action in this case with regard to the John Doe Defendant for weeks. Therefore, on
6 March 20, 2017, the Court ordered that on or before April 3, 2017, Plaintiff shall either
7 move to dismiss John Doe Converti with prejudice, or show cause why this Court should
8 not dismiss this matter with prejudice pursuant to the Federal Rules of Civil Procedure.

9 (Doc. 20.)

10 On April 3, 2017, in response to the Court’s Order to Show Cause, Plaintiff filed a
11 Motion for Leave to File First Amended Complaint, in which he seeks to file a First
12 Amended Complaint identifying the John Doe Defendant as Roberto Garcia. (Doc. 21.)
13 Plaintiff’s counsel claims he “now has reason to believe” Mr. Garcia was the spouse of
14 Rebekah Converti during the relevant time and remains so today. (*Id.*) Plaintiff further
15 “seeks a court order granting him sixty (60) days to effect service of process on
16 Defendant Garcia,” asserting that “[s]erving Rebekah Converti was very difficult because
17 she evaded service, and her whereabouts were unknown. We expect that we will
18 encounter the same problems with Defendant Garcia.” Although the Motion claims that
19 “[u]ndersigned counsel diligently searched, through skip traces and other means, to find
20 out Rebekah’s marriage status during the relevant time period and her current marriage
21 status,” the Motion fails to provide any explanation for why Roberto Garcia could not be
22 identified until **over 17 months** after the Complaint was filed. (*Id.*) Plaintiff’s Motion
23 also does not provide any explanation for failing to timely move to amend to identify Mr.
24 Garcia until **after** judgment was entered against the named Defendants and the Court
25 issued an Order to Show Cause notifying Plaintiff of his failure to pursue his claims
26 against Rebekah Converti’s husband.

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28 **II. Dismissal for Failure to Prosecute Pursuant to Rule 41(b)**

1 Plaintiff has the general duty to prosecute this case. *See Fidelity Philadelphia*
2 *Trust Co. v. Pioche Mines Consolidated, Inc.*, 587 F.2d 27, 29 (9th Cir. 1978). Rule
3 41(b) of the Federal Rules of Civil Procedure provides that [i]f the plaintiff fails to
4 prosecute or to comply with these rules or a court order, a defendant may move to
5 dismiss the action or any claim against it.” In *Link v. Wabash Railroad Co.*, 370 U.S.
6 626, 629-31 (1962), the Supreme Court recognized that a federal district court has the
7 inherent power to dismiss a case *sua sponte* for failure to prosecute. Moreover, in
8 appropriate circumstances, the Court may dismiss a complaint for failure to prosecute
9 even without notice or hearing. *See id.* at 633. Pursuant to Rule 41(b), plaintiffs must
10 prosecute their actions with “reasonable diligence” to avoid dismissal. *Anderson v. Air*
11 *West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) (affirming the district court’s dismissal for
12 failure to prosecute where the plaintiff failed to serve several defendants for
13 approximately one year).

14 Where the identity of a defendant is unknown prior to the filing of a complaint, the
15 plaintiff should be given an opportunity to conduct discovery and identify the unknown
16 defendants, unless it is clear that discovery would not uncover the identities of the
17 unknown defendants. *See, e.g., Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir.
18 1999). However, the plaintiff must take steps to conduct any necessary discovery and
19 then “proceed with his claims.” *Gillespie v. Civilett*, 629 F.2d 637, 643 (9th Cir. 1980).
20 *See also Petty v. County of Franklin, Ohio*, 478 F.3d 341, 345-46 (6th Cir. 2007)
21 (affirming dismissal of doe defendants where Plaintiff failed to amend to name them after
22 an opportunity to identify them through discovery); *Garcia v. Clark County*, 428 Fed.
23 Appx. 706, 708-09 (9th Cir. Apr. 18, 2011) (“Neither did the district court abuse its
24 discretion when it denied Maria leave to amend the complaint to identify the Doe
25 defendants. Maria had ample opportunity prior to the time defendants moved for
26 summary judgment to conduct reasonable discovery, identify these defendants, and seek
27 leave to amend the complaint to name them properly.”).

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1 Here, Plaintiff failed to make any effort to amend his Complaint to properly name
2 John Doe Converti within any reasonable time. Plaintiff filed his Complaint in this
3 matter on October 6, 2015. (Doc. 1.) On November 23, 2015, Plaintiff moved for an
4 order from the Court allowing Plaintiff to serve both Rebekah Converti and John Doe
5 Converti by alternative service. (Doc. 7.) In the Motion, Plaintiff asserted that he did not
6 know whether Defendant Rebekah Converti was married, and he did not seek to amend
7 the Complaint to identify Rebekah Converti’s husband by name. On January 21, 2016,
8 over 17 months ago, the Court issued an Order granting Plaintiff’s request for alternative
9 service as to Defendant Rebekah Converti, but denying without prejudice the request as
10 to John Doe Converti because “[a]lthough Plaintiff . . . named John Doe Converti as a
11 Defendant, Plaintiff indicates that [he] does not know if Ms. Converti is married, and
12 provides no information regarding where, if Ms. Converti is married, her husband
13 resides.” (Doc. 8.) Accordingly, as of January 21, 2016, the Court had notified Plaintiff
14 of the need to identify Ms. Converti’s husband before proceeding on the claims against
15 him.

16 However, it wasn’t until April 3, 2017, over 14 months later, that Plaintiff moved
17 to amend the Complaint to name John Doe Converti. Prior to that time, Plaintiff chose to
18 proceed in seeking judgment against Ms. Converti and The 2-Acorns, Inc., on the same
19 claims Plaintiff asserts against John Doe Converti, which took several months due in
20 large part to the deficiencies in Plaintiff’s briefing. (Docs. 12, 13, 14, 15, 16, 17, 18.) At
21 no point during this roughly 14-month period of time did Plaintiff move to amend the
22 Complaint to identify John Doe Converti. Further, in the Court’s March 2, 2017 Order
23 granting Plaintiff’s request for default judgment against Ms. Converti and The 2-Acorns,
24 Inc., the Court again specifically noted that “Plaintiff also names John Doe Converti, the
25 fictitious name of Rebekah Converti’s husband, as a Defendant in this action. (Doc. 1.)
26 Plaintiff claims in the Complaint that it is unknown whether Rebekah Converti is
27 married, and, to date, Plaintiff has not further identified or served this fictitiously-named
28 Defendant. (*Id.* ¶ 6.)” (Doc. 18 at 2 n.2.)

1 However, Plaintiff took no action with regard to John Doe Converti. It was not
2 until 32 days later, after the Court issued an Order to Show Cause regarding John Doe
3 Converti, and over 17 months after Plaintiff filed his Complaint in this matter, that
4 Plaintiff moved to amend his Complaint to identify Defendant John Doe Converti. (Doc.
5 21.) The Motion to Amend claims that “[u]ndersigned counsel diligently searched,
6 through skip traces and other means, to find out Rebekah’s marriage status during the
7 relevant time period and her current marriage status. Undersigned counsel now has
8 reason to believe that Rebekah Converti was married to Roberto Garcia during all
9 relevant times and that she remains married to him today.” (*Id.*) However, Plaintiff
10 provides no basis for his failure to identify John Doe Converti within any sort of
11 reasonable time. Plaintiff does not explain when the skip traces or “other means” were
12 employed to attempt to identify Ms. Converti’s husband, or what document or
13 information was not available during the first **17 months** this case was pending, but that
14 became available only after the Court issued an Order to Show Cause regarding John Doe
15 Converti’s status as a Defendant. Likewise, Plaintiff fails to submit any evidence
16 regarding the skip traces or “other means” used to find John Doe Converti’s true identity
17 during the first 17 months of this case. Further, Plaintiff was aware, as of March 8, 2016,
18 when default was entered against Rebekah Converti and The 2-Acorns, Inc., that he
19 would be unable to locate John Doe Converti through any discovery to those Defendants.
20 (Doc. 13.) For all of these reasons, it appears clear to this Court that Plaintiff failed to
21 prosecute his claims against John Doe Converti with any sort of diligence, which has
22 caused unreasonable delay.

23 In determining whether Plaintiff’s failure to prosecute warrants dismissal of his
24 claims, the Court must weigh the following five factors: “(1) the public’s interest in
25 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk
26 of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
27 merits; and (5) the availability of less drastic sanctions.” *Carey v. King*, 856 F.2d 1439,
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1 1440 (9th Cir. 1988) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.
2 1986)).

3 The Court finds the first three factors weigh heavily in favor of dismissing
4 Plaintiff's claims against John Doe Converti. As set forth in detail above, Plaintiff
5 caused unreasonable delay by his failure to move to amend to properly name the John
6 Doe Defendant until 17 months after filing the Complaint, and 14 months after the Court
7 highlighted for Plaintiff to the need to identify and locate John Doe to serve him.
8 Notably, Plaintiff does not appear to have even located Defendant John Doe Converti,
9 stating in his Motion that "[s]erving Rebekah Converti was very difficult because she
10 evaded service, and her whereabouts were unknown. We expect that we will encounter
11 the same problems with Defendant Garcia." (Doc. 21.) The Court finds the extreme and
12 unreasonable delay undercuts the public's interest in expeditious resolution of this
13 litigation.

14 Further, the Court's need to manage its docket is severely hindered by Plaintiff's
15 failure to prosecute here, as this case has now been pending for over 20 months, and
16 Plaintiff's request to amend comes after the Court has spent extensive time and resources
17 resolving Plaintiff's request to enter default judgment against the named Defendants.
18 Additionally, the risk of prejudice to the John Doe Defendant weighs in favor of
19 dismissal because a presumption of injury arises from unreasonable delay in the
20 prosecution of an action. *See Anderson*, 542 F.2d at 524 (The Ninth Circuit Court "has
21 consistently held that the failure to prosecute diligently is sufficient by itself to justify a
22 dismissal, even in the absence of a showing of actual prejudice to the defendant from the
23 failure."). And, the Court has already adjudicated the claims against the named
24 Defendants, the same claims that form the basis for Plaintiff's claims against John Doe
25 Converti.

26 The fourth factor, the policy favoring adjudication on the merits, as in most cases,
27 weighs against dismissal of this action. Finally, the Court has considered possible less
28 drastic sanctions and cannot identify any such available sanction. The Court has already

1 ordered Plaintiff to show cause why this case should not be dismissed with prejudice, and
2 Plaintiff's response fails to provide any specific explanation for his extreme and
3 unreasonable delay. Further, at this late stage of the case, after Plaintiff has failed to
4 prosecute its claims against John Doe Converti for over 17 months, no less drastic
5 sanction is available.

6 In sum, the Court finds that the above factors weigh heavily in favor of dismissal
7 of Plaintiff's claims against John Doe Converti with prejudice for Plaintiff's failure to
8 prosecute. Therefore, the Court will vacate its previous partial judgment, entered against
9 Defendants Rebekah Converti and The 2-Acorns, Inc., and enter a full and final judgment
10 in this action.

11 Accordingly,

12 **IT IS ORDERED** that the Judgment at Doc. 19 entered against the named
13 Defendants is vacated.

14 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to enter full and
15 final judgment in this matter as follows:

16 1. For the reasons provided by the Court in its Order at Doc. 18, and pursuant
17 to Rule 55(b)(2) of the Federal Rules of Civil Procedure, the Clerk shall enter Judgment
18 in favor of Plaintiff and against Defendants Rebekah Converti and The 2-Acorns, Inc. in
19 the following amounts: (1) \$350,000 in principal; (2) \$102,666.74, which represents 22
20 months of unpaid monthly interest payments; and (3) additional monthly interest
21 payments of \$4,666.67 until the principal amount of \$350,000, plus all accrued interest,
22 has been paid in full to Plaintiff.

23 2. Pursuant to Rule 58 of the Federal Rules of Civil Procedure, the Clerk of
24 Court shall enter judgment dismissing Defendant John Doe Converti with prejudice.

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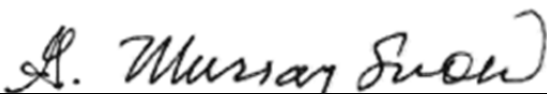
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IT IS FURTHER ORDERED that Plaintiff's Motion to Amend (Doc. 21) is denied as moot.

Dated this 27th day of July, 2017.



Honorable G. Murray Snow
United States District Judge