

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**RUBEN GARCIA, JR.,**

**Plaintiff,**

**v.**

**OLD REPUBLIC DEFAULT  
MANAGEMENT SERVICES, SAXON  
MORTGAGE SERVICES, INC., and  
DOES 1 through 50, inclusive,**

**Defendants.**

**CV F 08-1879 AWI SMS**

**ORDER DISMISSING ACTION  
FOR FAILURE TO  
PROSECUTE AND DENYING  
MOTION TO DISMISS AND  
MOTION TO BE RELIEVED  
AS COUNSEL AS MOOT**

Doc. # 33

This is an action for damages, injunctive and declaratory relief, rescission and quiet title by plaintiff Ruben Garcia (“Garcia”) against defendants Old Republic Default Management Services (“Old Republic”), a default mortgage trustee, and Saxon Mortgage Services, Inc. (“Saxon”), a mortgage servicing company (collectively, “Defendants”). Concurrently with the filing of this action, Garcia filed a notice of pendency of action (hereinafter, “lis pendens”) in the chain of title of property formerly owned by Garcia that was the subject of a non-judicial foreclosure. The currently operative pleading is the First Amended Complaint (“FAC”), filed on January 8, 2009. Pending before the court since December 16, 2008, is a motion to expunge the notice of lis pendens and, since January 23, 2009, a motion to dismiss the FAC. More recently, defendant Saxon has filed a motion to dismiss on the ground Garcia had abandoned the case. For the reasons that follow, the court will grant Saxon’s motion to dismiss on the ground of failure to

1 prosecute thereby mooting the other pending motions.

2 Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, courts have broad  
3 authority to dismiss an action “on terms the court considers proper.” “The power to invoke this  
4 sanction is necessary in order to prevent undue delays in the disposition of pending cases and to  
5 avoid congestion in the calendars of the District Courts.” Link v. Wabash R.R. Co., 370 U.S.  
6 626, 632 (1962). Generally, in applying the sanction of dismissal for failure to prosecute, the  
7 court considers: (1) “the public’s interest in expeditious resolution of litigation; (2) the court’s  
8 need to manage its docket; (3) the risk of prejudice to defendants; (4) the public policy favoring  
9 disposition of cases on their merits and (5) the availability of less drastic sanctions.” Henderson  
10 v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). To dismiss for failure to prosecute, each of the  
11 five factors need not be present. Oliva v. Sullivan, 958 F.2d 272, 275 (9th Cir. 1992). (Sneed, J.  
12 Dissenting). In addition, “when circumstances make such action appropriate, a District Court  
13 may dismiss a complaint for failure to prosecute even without affording notice of its intention to  
14 do so or providing an adversary hearing before acting.” Link, 370 U.S. at 633.

15 The court notes that there has been no participation by Plaintiff in this case since the  
16 filing of the FAC in January of 2009. Under circumstances slightly different than those evident in  
17 this case, the court has ordered the Office of the Chief Trial Counsel for the State Bar of  
18 California added to the service list so that arrangements can be made for some continuity  
19 of counsel following the cessation of practice of the Roth Law Firm. In the present case, the  
20 court ordered Homan Mobasser, who was listed as Plaintiff’s attorney to be notified on the  
21 court’s docket report, to contact Plaintiff in conjunction with Mobasser’s motion to be relieved as  
22 Plaintiff’s counsel. Mobasser submitted a declaration in response to the court’s order in which  
23 he stated that the Roth Law Firm had sent correspondence to Plaintiff on January 29, 2009, and  
24 Mobasser had sent correspondence to Plaintiff on February 4, 2009. In both cases the  
25 correspondence was sent to Plaintiff’s last known address and in both cases there was no  
26 response by Plaintiff.

1 Based on Mobasser's representations to the court, the court finds that any effort to secure  
2 continuity of counsel through the Office of the Chief Trial Counsel is unlikely to be successful.  
3 The court further finds that Saxon will be prejudiced by the consumption of more time in an  
4 effort to assure adequate representation for Plaintiff where there is no indication that Plaintiff  
5 will be located or that he has any interest in the continuation of this action. Given the court's  
6 need to manage a heavy case load and given that there appears to be no alternative that would  
7 further the resolution of this action, the court finds that the consideration of all relevant factors  
8 weighs in favor of dismissal for failure to prosecute.

9 Recognizing the possibility that Plaintiff may, in fact, be uninformed as to the fate of both  
10 the Roth Law Firm and his case, the court will dismiss the action in its entirety without prejudice.  
11 The court will order the case administratively closed. Because the court is dismissing the case  
12 and ordering the case administratively closed, Mobasser's motion to be relieved as counsel and  
13 Saxon's motion to dismiss the action in its merits will be denied as moot.

14  
15 THEREFORE, for the reasons discussed, Plaintiff's First Amended Complaint is hereby  
16 ORDERED DISMISSED in its entirety as to all Defendants. Such dismissal is without  
17 prejudice. Saxon's motion to dismiss the FAC, Docket # 16, and Mobasser's motion to  
18 withdraw as attorney, Docket # 29, are both DENIED as MOOT. The Clerk of the Court Shall  
19 CLOSE THE CASE. In the event Saxon may determine that further order of the court is  
20 necessary to expunge the notice of lis pendens, Saxon shall submit a proposed order for that  
21 purpose.

22  
23 IT IS SO ORDERED.

24 **Dated:** September 18, 2009

/s/ Anthony W. Ishii  
CHIEF UNITED STATES DISTRICT JUDGE