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

SUNNY ETUKUDO,)
)
Plaintiff,)
)
vs.)
)
PORTFOLIO RECOVERY ASSOCIATES,)
)
Defendant.)
_____)

1:09-cv-01472-LJO-SMS
**ORDER REQUIRING COUNSEL TO
PERSONALLY APPEAR AND SHOW
CAUSE WHY CASE SHOULD NOT
BE DISMISSED FOR LACK OF
PROSECUTION**
Date: 3/19/10
Time: 9:30 a.m.
Ctrm: 7

This matter was initially set for a Mandatory Scheduling Conference on December 2, 2009 at 9:15 a.m. before the Honorable Sandra M. Snyder, United States Magistrate Judge, pursuant to the court's Order Setting Mandatory Scheduling Conference (Doc. 5).

On November 23, 2009, due to the press of business, the Court continued the Scheduling Conference from December 2, 2009 to January 12, 2010 at 9:15 a.m. before Judge Snyder via Minute Order (Doc. 7).

On or about January 5, 2010, in response to court staff inquiry, plaintiff's counsel verbally requested a further continuance to mid-February to engage in settlement negotiations. Therefore, the Scheduling Conference was hesitantly continued from

1 January 12, 2010 to February 24, 2010 at 9:30 a.m. before Judge
2 Snyder via Minute Order (Doc. 8).

3 On February 24, 2010, plaintiff's counsel did not
4 telephonically appear at 9:30 a.m. or otherwise contact the court.
5 In fact, court staff telephoned counsel's office on February 24,
6 2010 at approximately 3:30 p.m., and was advised by counsel's staff
7 person that counsel tried to call into the court that morning, but
8 could not get through, which is not a reasonable explanation as the
9 Court has two (2) rollover telephone lines directly to chambers.
10 Nevertheless, and to date, plaintiff's counsel has not contacted
11 the court or otherwise filed any document explaining his non-
12 appearance on February 24, 2010.

13 Therefore, a review of the instant action indicates that
14 plaintiff, by and through counsel, is not diligently prosecuting
15 this case.¹ The court possesses the discretionary authority to
16 dismiss an action based on plaintiff's failure to prosecute
17 diligently. Fed. R. Civ. P. 41(b); *Schwarzer, Tashima & Wagstaffe,*
18 Fed. Civ. Proc. Before Trial ¶ 16:431 (1997). Unreasonable delay
19 by plaintiff is sufficient to justify dismissal, even in the
20 absence of actual prejudice to the defendant (Moore v. Telfon
21 Communications Corp., 589 F.2d 959, 967-68 (9th Cir. 1978)) since a
22 presumption of injury arises from the occurrence of unreasonable
23 delay. Fidelity Philadelphia Trust Co. v. Pioche Mines Consol.,
24 Inc., 587 F.2d 27, 29 (9th Cir. 1978). Plaintiff then has the
25 burden of showing justification for the delay and, in the absence
26 of such showing, the case is properly dismissed for failure to

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28 ¹ Defendant has yet to be served.

1 prosecute. Nealey v. Transportation Maritima Mexicana, S.A., 662
2 F.2d 1275 (9th Cir. 1980).

3 **IT IS HEREBY ORDERED:**

4 1. That Craig R. Triance, Esq., **personally appear** for a
5 hearing on March 19, 2010, at 9:30 a.m. in Courtroom No. 7 on the
6 Sixth Floor of the Robert E. Coyle United States Courthouse, 2500
7 Tulare Street, Fresno, CA, 93721, and appear before the Honorable
8 Sandra M. Snyder, United States Magistrate Judge, and show cause
9 why this case should not be dismissed for lack of prosecution.

10 2. If there are any reasons why this action should not be
11 dismissed, counsel shall submit them in a sworn declaration of
12 facts, to be e-filed on or before March 12, 2010, to which a
13 supporting memorandum of law may be appended, to include:

14 (A) an explanation of the lack of activity in this case;

15 (B) an explanation of counsel's non-appearance on
16 February 24, 2010; and,

17 (C) shall list each specific step counsel plans to take
18 to prepare this case for trial, and even for scheduling.

19 Counsel is advised that a failure to comply with and/or
20 respond to this order will result in a recommendation to the
21 District Judge that this action be dismissed.

22 IT IS SO ORDERED.

23 **Dated: March 3, 2010**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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