

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

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE LUIS BARBOZA,

Plaintiff,

v.

DEUTSCHE BANK SECURITIES, et al.,

Defendants.

1:10-cv-00559 OWW MJS

MEMORANDUM DECISION AND ORDER
GRANTING DEFENDANTS' MOTION
TO DISMISS (DOC. 33) AND
DIRECTING CLERK OF COURT TO
SERVE COPY ON STATE BAR

This case, which concerns a mortgage loan encumbering real property located in Wasco, California, was removed from Kern County Superior Court by Defendant Deutsche Bank Securities on March 31, 2010. Doc. 1. The Complaint alleges five causes of action: (1) fraud; (2) unconscionable contract, (3) breach of the covenant of good faith and fair dealing, (4) violation of California Business and Professions Code § 17200, and (5) reformation. Doc. 1-1.

On April 12, 2010 and April 16, 2010, respectively, Defendants Deutsche Bank Securities, Inc. and Litton Loan Servicing LP (collectively "Defendants") filed motions to dismiss and/or strike. Docs. 9, 10, 15, 17. Plaintiff's unconscionable contract claim was dismissed without leave to amend; Plaintiff's

1 prayer for punitive damages in paragraph 10 of the Complaint was
2 stricken; the remainder of Defendants' motion to strike was
3 denied as moot; and Plaintiff's causes of action for (1) fraud,
4 (2) breach of the covenant of good faith and fair dealing, (3)
5 violation of § 17200 of the Business & Professions Code, and (4)
6 reformation were dismissed with leave to amend. Doc. 24.
7

8 The Court permitted Plaintiff fifteen (15) days to file
9 an amended complaint. See Doc. 26, 6/21/2010 Hearing Transcript,
10 at 2:17-19. On July 10, 2010, Defendants served Plaintiff with
11 notice of the Court's Order of Dismissal. Doc. 27. That made
12 the due date for the amended complaint July 25, 2010. More than
13 two months have passed since the Order of Dismissal was served.
14 Plaintiff has yet to file an amended complaint.
15

16 On September 8, 2010, Defendants moved to dismiss the
17 complaint with prejudice pursuant to Federal Rule of Civil
18 Procedure 41(b), which instructs that a defendant may move to
19 involuntarily dismiss an action "[i]f the plaintiff fails to
20 prosecute or to comply with these rules or a court order"
21

22 In response to the Rule 41(b) motion to dismiss,
23 Plaintiff's counsel, Gary Lane, Esq. (SBN: 050960), filed a
24 "motion to withdraw," claiming that his client no longer wished
25 Lane to prosecute the case on the client's behalf. However, Lane
26 never served the motion on his client. Because of the non-
27 service, the motion was denied without prejudice and Lane was
28

1 instructed to re-serve and re-notice the motion in accordance
2 with State Bar of California Rules. See Doc. 41.

3 The deadline for the filing of an opposition to the
4 motion to dismiss expired on November 1, 2010. Plaintiff filed no
5 opposition or statement of non-opposition. The Court issued the
6 following Minute Order on November 8, 2010:
7

8 MINUTE ORDER: Plaintiff's counsel has indicated that
9 Plaintiff "has clearly expressed to Counsel that he does
10 not authorize Counsel to proceed with [this] litigation."
11 See [Doc.] 41. Pursuant to Local Rule 230(c), Plaintiff's
12 counsel was required to file an opposition or notice of
13 non-opposition to the pending motion to dismiss 33 on or
14 before 11/1/2010. This deadline passed while Counsel's
15 motion to withdraw 37 was pending. Given that the motion
16 to withdraw has been denied without prejudice [Doc.] 41,
17 Plaintiff's counsel SHALL FILE either a statement of non-
18 opposition or a stipulation of dismissal on or before
19 12:00 noon on WEDNESDAY 11/10/2010.

20 Instead of responding to the motion to dismiss in any
21 way, or taking reasonable action to protect his client's
22 interests, Mr. Lane filed his own hearsay written "statement"
23 that his client "has no opposition to the Motion to Withdraw as
24 Attorney." Doc. 43. No proof of service or affidavit was
25 attached. Critically, no such motion is or was pending, as the
26 motion to withdraw was denied without prejudice and not renewed.

27 As Plaintiff failed to timely file an amended complaint
28 and has not requested an extension, dismissal of this action
pursuant to Fed. R. Civ. P. 41(b) is appropriate. However,
because Plaintiff's counsel has given no indication that he
served his client either with his motion to withdraw or any

1 previous order of this court, the dismissal shall be WITHOUT
2 PREJUDICE.

3 Mr. Lane has several cases pending in this District, and
4 has previously neglected to timely file opposition papers, see
5 *Aguero v. MortgageIT Inc., et al.*, 1:09-cv-00640 OWW SMS,
6 *Rodriguez-Carcamo v. GMAC Mortgage LLC, et al.*, Doc. 15, 1:09-cv-
7 02110 AWI DLB, Doc. 15. Accordingly, and because of Mr. Lane's
8 apparent failure to notify his client of the progress of this
9 litigation, the Clerk of Court is ordered to serve a copy of this
10 Memorandum Decision on the State Bar of California. Mr. Lane is
11 also ordered to serve a copy on his client and to docket a copy
12 of his proof of service. Defendant shall file a form of order
13 consistent with this memorandum decision within five (5) days of
14 electronic service.
15
16

17
18 SO ORDERED

19 Dated: November 18, 2010

20 /s/ Oliver W. Wanger
21 Oliver W. Wanger
22 United States District Judge
23
24
25
26
27
28