

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  
EASTERN DISTRICT OF CALIFORNIA**

**RAFAEL VALTIERRA and OFELIA  
VALTIERRA,** )  
 )  
 **Plaintiffs,** )  
 )  
 **v.** )  
 )  
 **WELLS FARGO BANK, N.A., FKA** )  
 **WACHOVIA MORTGAGE, CAL-** )  
 **WESTERN RECONVEYANCE** )  
 **CORPORATION, WACHOVIA** )  
 **MORTGAGE FS, and 10 JOHN DOES,** )  
 **Defendants.** )  
 \_\_\_\_\_ )

**CIV-F-10-1455 AWI GSA  
ORDER DISMISSING CASE**

**I. History**

On June 21, 2006, Plaintiffs Rafael and Ofelia Valtierra (“Plaintiffs”), obtained a \$488,000 mortgage from World Savings Bank, FSB (“World Savings”) which through a number of corporate changes has become Defendant Wells Fargo Bank, N.A. (“Wells Fargo”). The loan was secured by a Deed of Trust against 1921 Katherine Court, Turlock, CA, which was recorded on July 5, 2006. The Deed of Trust named Plaintiffs as trustors, World Savings as beneficiary, and third party Golden West Savings Association Services Company as trustee. Plaintiff fell behind on payments, and a Notice of Default was recorded on August 3, 2009 by Defendant Cal-Western Reconveyance Corporation (“Cal-Western”). A Notice of Trustee Sale was recorded on November 5, 2009 setting a public auction for November 24, 2009; this document named Cal-Western as the trustee. The sale took place on March 8, 2010. Wells Fargo was the high bidder

1 at \$327,930.00; the outstanding amount Plaintiff owed on the mortgage had ballooned to  
2 \$559,109.93. A Trustee's Deed upon Sale was recorded on March 16, 2010, in which Cal-  
3 Western conveyed the property to Wells Fargo. At an unspecified date, Wells Fargo sent  
4 Plaintiff written notice of a program whereby Plaintiff had until April 30, 2010 to conduct a short  
5 sale. It is unclear what communications occurred between the parties concerning this program  
6 prior to the trustee sale.

7 The origin of this case is not altogether clear. Wells Fargo filed a suit against Plaintiffs  
8 on April 2, 2010 in Stanislaus County Superior Court for unlawful detainer of the property.  
9 Summary judgment was granted in favor of Wells Fargo on June 24, 2010. Plaintiffs received an  
10 order to stay eviction proceedings on July 14, 2010, but were ultimately evicted on August 17,  
11 2010. Plaintiffs filed a notice of removal with the Stanislaus County Superior Court on August  
12 11, 2010. However, no notice of removal was filed in federal district court. Instead, Plaintiffs  
13 (proceeding pro se) filed a complaint in federal district court. Plaintiffs allege that they contacted  
14 Wells Fargo in November 2008 to formally dispute the mortgage, but that Wells Fargo and Cal-  
15 Western has continued to try to collect on the debt notwithstanding the dispute. The complaint  
16 alleged violations of the Fair Debt Collection Practices Act for seeking to collect on a debt  
17 without first verifying or validating it and violations of the Fair Credit Reporting Act for passing  
18 erroneous information to credit reporting agencies. Doc. 1. The complaint did not directly  
19 address Wells Fargo's unlawful detainer claim. Nonetheless, Plaintiffs filed a "notice of  
20 contempt of federal jurisdiction" and a motion for a temporary restraining order. Docs. 4 and 5.  
21 Both dealt with Wells Fargo's unlawful detainer claim and sought to reverse the eviction. Wells  
22 Fargo filed a motion to dismiss. Doc. 9. As far as can be determined from the docket, Cal-  
23 Western has not been served in this case. Plaintiffs' request was denied. Doc. 11. Wells Fargo's  
24 motion was granted. Doc. 16. Plaintiffs were granted leave to amend; they were given until  
25 March 14, 2011 to file an amended complaint and explain why Cal-Western has not been served.  
26 Plaintiffs have neither filed an amended complaint nor elaborated on Cal-Western's service. On  
27 May 11, 2011, the court issued an order to show cause why the case should not be dismissed for  
28 lack of prosecution, requiring a written response by May 26, 2011. Doc. 18. Again, the deadline

1 has passed and Plaintiffs remain silent.

## 3 **II. Legal Standards**

4 A court may dismiss an action based on a party's failure to prosecute an action or failure  
5 to obey a court order. Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992). In  
6 determining whether to dismiss this action for failure to comply with the directives set forth in its  
7 order, "the Court must weigh the following factors: (1) the public's interest in expeditious  
8 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to  
9 defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy  
10 favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir.  
11 2002), citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992). "These factors are 'not  
12 a series of conditions precedent before the judge can do anything,' but a 'way for a district judge  
13 to think about what to do.'" In re Phenylpropanolamine (PPA) Products Liability Litigation, 460  
14 F.3d 1217, 1226 (9th Cir. 2006), quoting Valley Eng'rs Inc. v. Elec. Eng'g Co., 158 F.3d 1051,  
15 1057 (9th Cir. 1998).

## 17 **III. Discussion**

18 Weighing the relevant factors, the court finds dismissal for lack of prosecution  
19 appropriate. This suit can not proceed without the participation of Plaintiffs. "The public's  
20 interest in expeditious resolution of litigation always favors dismissal." Yourish v. California  
21 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999). Plaintiffs have neither filed an amended complaint  
22 nor explained why Cal-Western has not been served despite two court orders directing them to do  
23 so. "Whether prejudice is sufficient to support an order of dismissal is in part judged with  
24 reference to the strength of the plaintiff's excuse for the default." Malone v. United States Postal  
25 Service, 833 F.2d 128, 131 (9th Cir. 1987). In this case, Plaintiffs have provided no explanation  
26 for the lack of prosecution. There is no active complaint. Dealing with the case on its merits is  
27 impossible without the cooperation of Plaintiffs.

**IV. Order**

Accordingly, this action is DISMISSED with prejudice for Plaintiff's failure to prosecute.  
The Clerk of the Court is DIRECTED to close the case.

IT IS SO ORDERED.

Dated: June 2, 2011

  
\_\_\_\_\_  
CHIEF UNITED STATES DISTRICT JUDGE

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