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

EDUARDO M. SMALL and
KATRINA M. SMALL,

Plaintiffs,

No. CIV S-09-0458 GEB DAD PS

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS,
INC., et al.,

ORDER

Defendants.

_____/

On October 22, 2009, plaintiffs, proceeding pro se with a civil action arising from foreclosure on real property, filed a motion for summary judgment and noticed it for hearing on October 30, 2009. Although the motion is subtitled “Discovery Matter,” plaintiffs assert that the motion “is based upon Defendants Counsel . . . committing Perjury, heaping fraud upon the court, and failing to respond to Plaintiff’s affidavit in the form of an affidavit.”

Plaintiffs’ motion suffers from several defects. First, to the extent that plaintiffs’ motion can be considered a motion for summary judgment, the motion is defective because such a motion must be set for hearing “not less than thirty-one (31) days after mailed or electronic service and filing of the motion.” Local Rule 78-230(b). Plaintiffs filed their motion only eight days prior to the proposed hearing date. In addition, a plaintiff’s motion for summary judgment

1 should be brought for the purpose of obtaining judgment in the plaintiff's favor on the claims
2 alleged in the plaintiff's complaint. All such motions must comply with Federal Rule of Civil
3 Procedure 56 and Local Rule 56-260. Plaintiffs' motion does not comply with the applicable
4 rules, and it does not appear that plaintiffs are seeking judgment in their favor on the merits of
5 the claims alleged in their complaint. In this case, it would also be premature for plaintiffs to file
6 a motion for summary judgment prior to the court's disposition of defendants' pending motion to
7 dismiss all of plaintiffs' claims for failure to state any claim upon which relief may be granted.

8 Second, to the extent that plaintiffs' motion can be considered a motion dealing
9 with a discovery matter, the motion is defective because such motions must be scheduled for
10 hearing on a calendar at least 21 days after the date of filing. Local Rule 37-251(a). As noted
11 supra, plaintiffs filed their motion only eight days prior to the proposed hearing date. In addition,
12 motions dealing with discovery matters cannot be heard unless the parties have conferred and
13 attempted to resolve their differences, and the parties have set forth their differences and the
14 grounds therefor in a joint statement re discovery disagreement. Local Rule 37-251(b). It does
15 not appear that plaintiffs' motion concerns a discovery disagreement, but if it does, plaintiffs
16 have not complied with the requirements of Local Rule 37-251.

17 Third, to the extent that plaintiffs' motion can be construed as a counter-motion to
18 defendants' motion to dismiss, plaintiffs' motion is defective for two reasons. Pursuant to Local
19 Rule 78-230(e), counter-motions must be related to the general subject matter of the original
20 motion and must be served and filed in the manner and on the date prescribed for filing
21 opposition to the original motion. Here, any counter-motion to defendants' motion to dismiss
22 was due no later than October 16, 2009. Plaintiffs' motion was not filed on or before October
23 16, 2009, and the motion does not appear to be related to the general subject matter of
24 defendants' motion to dismiss.

25 For all of these reasons, plaintiffs' motion for summary judgment will not be
26 placed on the court's calendar for hearing on October 30, 2009.

1 IT IS ORDERED that plaintiffs' October 22, 2009 motion for summary judgment
2 re discovery matter (Doc. No. 25) will not be placed on the court's law and motion calendar on
3 October 30, 2009, and the motion is denied without prejudice for the reasons set forth in this
4 order.

5 DATED: October 26, 2009.

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9 DALE A. DROZD
10 UNITED STATES MAGISTRATE JUDGE

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