

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

----oo0oo----

CONNIE J. WILSON,
Plaintiff,

v.

NO. CIV. 2:09-863 WBS GGH

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

JPMORGAN CHASE BANK, NA., as
successor by merger to
Washington Mutual Bank, a/k/a
JPMorgan Chase Bank, N.A., as
an acquirer of certain assets
and liabilities of Washington
Mutual Bank from the FDIC
acting as receiver and LENDER
DOE,

Defendants._____
_____ /

----oo0oo----

Plaintiff Connie J. Wilson brought this action against
defendant JPMorgan Chase Bank, NA alleging various federal and
state claims arising out of plaintiff's mortgage transaction.
Presently before the court is defendant's motion to dismiss this
action pursuant to Federal Rule of Civil Procedure 41(b).

1 I. Factual and Procedural Background

2 On April 9, 2010, defendant filed a motion to dismiss
3 plaintiff's Second Amended Complaint ("SAC"). (Docket No. 41.)
4 The court granted defendant's motion in its entirety on June 25,
5 2010, but also granted plaintiff leave to file an amended
6 complaint within twenty days. (Docket No. 46.) Plaintiff did
7 not file an amended complaint within the allotted twenty days and
8 has not done so to this date, almost two months later. Defendant
9 now moves the court to dismiss plaintiff's action with prejudice
10 and enter judgment on the merits in its favor pursuant to Federal
11 Rule of Civil Procedure 41(b). As is the practice with so many
12 of the plaintiffs' attorneys who have recently inundated this
13 court with these mortgage cases, plaintiff's attorney, Kimberlee
14 A. Rode, demonstrated her indifference to the rules of this court
15 by failing to file any opposition or statement of non-opposition
16 to the motion.

17 II. Discussion

18 Rule 41(b) states:

19 If the plaintiff fails to prosecute or to comply with
20 these rules or a court order, a defendant may move to
21 dismiss the action or any claim against it. Unless the
22 dismissal order states otherwise, a dismissal under
23 this subdivision (b) . . . operates as an adjudication
24 on the merits.

25 Fed. R. Civ. P. 41(b). Dismissal under Rule 41(b) is a sanction,
26 to be imposed only in "extreme circumstances." Dahl v. City of
27 Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996) (quoting
28 Thompson v. Housing Auth. of Los Angeles, 782 F.2d 829, 831 (9th
Cir. 1986) (per curiam)).

Here, plaintiff failed to comply with the court's June

1 25, 2010 Order by not filing an amended complaint within twenty
2 days of the date of the Order or indicating her intention to not
3 do so. Where the court grants a motion to dismiss with leave to
4 amend, "[t]he failure of the plaintiff eventually to respond to
5 the court's ultimatum--either by amending the complaint or by
6 indicating to the court that it will not do so--is properly met
7 with the sanction of a Rule 41(b) dismissal." Edwards v. Marin
8 Park, Inc., 356 F.3d 1058, 1065 (9th Cir. 2004); see also Yourish
9 v. Cal. Amplifier, 191 F.3d 983, 986-87 (9th Cir. 1999) ("Under
10 Ninth Circuit precedent, when a plaintiff fails to amend his
11 complaint after the district judge dismisses the complaint with
12 leave to amend, the dismissal is typically considered a dismissal
13 for failing to comply with a court order"); Ferdik v.
14 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

15 In determining whether a case ought to be dismissed for
16 failure to comply with an order, the court must weigh five
17 factors: "(1) the public's interest in expeditious resolution of
18 litigation; (2) the court's need to manage its docket; (3) the
19 risk of prejudice to the defendants; (4) the public policy
20 favoring disposition of cases on their merits; and (5) the
21 availability of less drastic alternatives." Ferdik, 963 F.2d at
22 1260-61 (internal citations omitted).

23 The first two factors--the public's interest in the
24 expeditious resolution of litigation and the court's need to
25 manage its docket--weigh heavily in favor of dismissal. This
26 litigation has been ongoing for almost a year and a half and
27 plaintiff has not yet filed a complaint that can survive a motion
28 to dismiss. Plaintiff's failure to file an amended complaint

1 before the court's deadline or communicate that she does not wish
2 to amend has caused this action to come to a complete halt.
3 Given this court's heavy caseload, particularly with regards to
4 mortgage and foreclosure related litigation, the court must have
5 control of its docket to ensure the orderly and efficient
6 administration of justice. By failing to file an amended
7 complaint, plaintiff has effectively seized control of the pace
8 of the litigation and docket and prevented the expeditious
9 resolution of this action. Dismissal of this action would
10 resolve this litigation and assist in the effective management of
11 the court's docket, and accordingly the first two factors
12 strongly favor granting defendant's motion.

13 The risk of prejudice to the defendant also favors
14 dismissal. Plaintiff's delay in either filing an amended
15 complaint or communicating her choice not to amend to the court
16 has forced defendant to remain a party to a pending action that
17 does not state a claim against it. While the pendency of a
18 lawsuit alone is not sufficiently prejudicial to warrant
19 dismissal, the impact of pendent litigation can justify dismissal
20 when plaintiff's excuse for failing to timely amend is weak. See
21 Yourish, 191 F.3d at 991-92 (citing Malone v. U.S. Postal Serv.,
22 833 F.2d 128, 131 (9th Cir. 1987) ("Whether prejudice is
23 sufficient to support an order of dismissal is in part judged
24 with reference to the strength of the plaintiff's excuse for the
25 default.")). Plaintiff has not provided any reason for her
26 failure to file an amended complaint. The court's June 25, 2010
27 Order very clearly stated that plaintiff had twenty days from the
28 date of the Order to file an amended complaint, if she could do

1 so consistent with the Order. The court cannot conceive of a
2 strong excuse for failing to file an amended complaint if
3 plaintiff wanted to continue prosecuting this action.
4 Accordingly, there is sufficient prejudice to the defendant from
5 delay that this factor strongly weighs in favor of dismissal.
6 See id.

7 The fourth factor, the public policy favoring
8 disposition of cases on their merits, weighs against dismissing
9 this action because of plaintiff's failure to amend the
10 complaint. However, this consideration is outweighed by the
11 previously discussed delay, risk of prejudice, and waste of
12 resources that would be incurred by allowing plaintiff's action
13 to remain on the court's docket. Moreover, from plaintiff's
14 failure to avail herself of the opportunity to further amend her
15 complaint, the court can only infer that she cannot do so
16 consistent with this court's order. Therefore, there is no merit
17 to plaintiff's claims.

18 Finally, the court does not believe that less drastic
19 alternatives exist that would remedy the previously discussed
20 issues. While the court could offer plaintiff an additional
21 amount of time to amend her complaint, plaintiff's lack of
22 response to defendant's motion indicates that plaintiff either
23 has no desire to move forward with this action or does not have
24 much respect for deadlines imposed by this court. Were the court
25 to afford plaintiff another opportunity to amend her complaint
26 there is no guarantee that she would choose to do so within the
27 time provided, leading to further waste of court resources and
28 delay. Accordingly, this factor also weighs in favor of

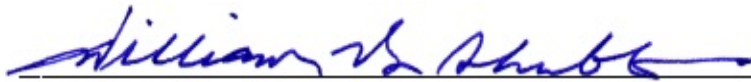
1 dismissal.

2 Because four of the five factors weigh in favor of
3 dismissing plaintiff's action pursuant to Rule 41(b), the court
4 will grant defendant's motion.

5 IT IS THEREFORE ORDERED that defendant's motion to
6 dismiss under Rule 41(b) be, and the same hereby is, GRANTED, and
7 this action is hereby DISMISSED with prejudice.

8 DATED: August 26, 2010

9

10 

11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28