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

VICTOR MILITAN, et al.,

Plaintiffs,

No. CIV S-09-2470 MCE KJM PS

vs.

COUNTRYWIDE HOME LOANS, INC. et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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Defendants' motion to dismiss came on regularly for hearing on November 18, 2009. No appearance was made for plaintiff. Berrie Goldman appeared telephonically for defendants Countrywide Home Loans, Reconstruct Company and Mortgage Electronic Registration Systems. Upon review of the documents in support, no opposition having been filed, and good cause appearing, THE COURT FINDS AS FOLLOWS:

Plaintiff filed this action in state court and the action was removed to this court on September 2, 2009. On September 9, 2009, defendants filed a motion to dismiss, to which plaintiff did not timely respond. By order filed October 9, 2009, plaintiff was given additional time in which to file opposition to defendants' motion and was cautioned that failure to file opposition would be deemed as a statement of non-opposition. Plaintiff still has not filed an opposition and failed to appear at the hearing on the motion held on November 18, 2009.

1           The Federal Rules of Civil Procedure provide for dismissal of actions based on  
2 lack of prosecution. Fed. R. Civ. P. 41(b). Pro se litigants are bound by the rules of procedure,  
3 even though pleadings are liberally construed in their favor. King v. Atiyeh, 814 F.2d 565, 567  
4 (9th Cir. 1987). In determining whether to dismiss for lack of prosecution, generally the court  
5 considers (1) the public’s interest in expeditious resolution of litigation, (2) the court’s need to  
6 manage its docket, (3) the risk of prejudice to the defendants, (4) the public policy favoring  
7 disposition of cases on their merits, and (5) the availability of less drastic sanctions. See, e.g.,  
8 Al-Torki v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996). The court may dismiss a case sua  
9 sponte for lack of prosecution by the plaintiff. Hamilton Copper & Steel Corp. v. Primary Steel,  
10 Inc., 898 F.2d 1428 (9th Cir. 1990). Sua sponte dismissal requires a “close focus” on  
11 consideration of “less drastic alternatives” and whether or not there has been a “warning of  
12 imminent dismissal of the case.” Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992).

13           In determining that this action will be dismissed, the court has considered all the  
14 factors set forth in Al-Torki. The first two factors on their face favor the imposition of sanctions  
15 in this case which has been pending for more than two months with motion practice underway.  
16 Compare Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990). Regarding the third factor,  
17 defendants already have briefed their motion to dismiss, and would be prejudiced by the need for  
18 further litigation of this matter despite plaintiff’s non-responsiveness. Moreover, delay itself  
19 generally is prejudicial--witness memories fade and evidence becomes stale or undiscoverable.  
20 While the fourth factor favors resolution on the merits, in this case plaintiff has declined to  
21 oppose the motions to dismiss and has thus precluded the court’s evaluation of the potential  
22 merits of such an opposition. Under these circumstances, the fourth factor is outweighed by the  
23 others.

24           Focusing on the fifth Al-Torki factor and warning regarding imminent dismissal,  
25 as required by Oliva, the court in its October 9, 2009 order has advised plaintiff that this action is  
26 subject to dismissal, directed plaintiff to file opposition, and granted ample additional time to

1 oppose the pending motion after plaintiff failed to timely oppose defendants' motion to dismiss,  
2 all to no avail. From plaintiff's failure to respond to the most recent order and failure to appear  
3 at the hearing on the motions to dismiss, the court finds that plaintiff has abandoned this  
4 litigation. The court therefore concludes there is no suitable alternative less drastic sanction to  
5 dismissal.

6 Defendant Najarian Loans has noticed a motion to dismiss for December 2, 2009.  
7 Plaintiff again has failed to timely oppose the motion. In light of the court's recommendation  
8 that this action be dismissed, the December 2, 2009 hearing will be vacated.

9 Accordingly, IT IS HEREBY ORDERED that the hearing date of December 2,  
10 2009 is vacated; and

11 IT IS HEREBY RECOMMENDED that this action be dismissed with prejudice.

12 These findings and recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten  
14 days after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
17 shall be served and filed within ten days after service of the objections. The parties are advised  
18 that failure to file objections within the specified time may waive the right to appeal the District  
19 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: November 24, 2009.

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U.S. MAGISTRATE JUDGE