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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

U.S. BANK NATIONAL
ASSOCIATION AS TRUSTEE,

NO. CIV. S-10-1623 LKK/GGH PS

Plaintiff,

v.

O R D E R

JAMIE GARCIA, et al.,

Defendants.

_____ /

The magistrate judge has issued findings and recommendations, recommending that defendant be held in criminal contempt of court for failing to personally appear at a sanctions hearing on September 2, 2010. Findings and Recommendations, September 3, 2010, ECF No. 8. Defendant was previously warned that such failure would be considered contempt of court and be "cause for further sanctions, including the possibility of incarceration." Magistrate's Order, August 13, 2010, ECF No. 4. The court now considers the magistrate's recommendation that plaintiff be adjudged in criminal contempt. For the reasons stated below, the

1 court HOLDS the defendant criminal contempt of court for failure
2 to appear at the September 2, 2010 hearing before the magistrate.

3 **I. Background**

4 Plaintiff U.S. Bank filed a complaint for unlawful detainer
5 against defendant in Sacramento Superior Court. Defendant removed
6 the case to this court, alleging that the unlawful detainer action
7 violated federal anti-discrimination law. Plaintiff has filed an
8 ex-parte application for an order to remand the case to state
9 court, and a request for attorney's fees and sanctions against
10 defendant. In that application, plaintiff stated that this case had
11 previously been removed to the Northern District Court on diversity
12 grounds, but was remanded back to state court on May 28, 2010.
13 Pl.'s Ex Parte Application, July 28, 2010, ECF No. 3. The
14 magistrate issued an order for the defendant to show cause why he
15 should not be sanctioned and enjoined from removing the state court
16 action to any federal court. Magistrate's Order, August 13, 2010,
17 ECF No. 4. The magistrate's proposed sanction to enjoin defendant
18 from removing the case again was "based on Garcia's apparent bad
19 faith effort to delay the state court unlawful detainer case."
20 Magistrate's Findings and Recommendations, note 3, ECF No. 8. The
21 magistrate set a hearing on sanctions for September 2, 2010, and
22 warned the defendant that "[f]ailure to appear and respond will be
23 considered contempt of court which will be cause for further
24 sanctions, including the possibility of incarceration."
25 Magistrate's Order, August 13, 2010, ECF No. 4. Defendant failed
26 to appear at the September 2, 2010 hearing, and the magistrate now

1 recommends that he be adjudged in criminal contempt for failure to
2 appear. The magistrate has certified the following facts to this
3 court: that the defendant was sued in state court in an unlawful
4 detainer action; that defendant filed a notice of removal to this
5 court, asserting federal question jurisdiction because of an
6 allegation that the unlawful detainer action was discriminatory;
7 that defendant has previously removed this case to the Northern
8 District Court, and that it was remanded back to state court for
9 lack of subject matter jurisdiction; that the instant action is the
10 second time that defendant has attempted to remove the same state
11 court action to federal court; and that defendant did not respond
12 or personally appear at a September 2, 2010 hearing as required by
13 the magistrate's order to show cause. Magistrate's Findings and
14 Recommendations 2-3, September 3, 2010, ECF No. 8. The magistrate
15 set the matter to be heard in this court on October 25, 2010, and
16 ordered defendant Garcia to appear. The defendant did not file any
17 objections to the Findings and Recommendations of the magistrate,
18 and failed to appear at this court's October 25, 2010 hearing.

19 **II. Analysis**

20 **A. The Contempt Authority of Article III and Magistrate Judges**

21 The contempt power is inherent in Article III courts. See
22 e.g., Michaelson v. United States ex rel. Chicago, St. P., M., &
23 O. R. Co., 266 U.S. 42, 65-66 (1924) ("That the power to punish
24 for contempts is inherent in all courts, has been many times
25 decided and may be regarded as settled law. It is essential to
26 the administration of justice."); In re Sequoia Auto Brokers

1 LTD, Inc., 827 F.2d 1281 (9th Cir. 1987) ("The contempt power is
2 inherent in article III courts, and not dependent on
3 Congressional authorization.").

4 Magistrate judges also have contempt authority, but it is
5 more limited than that of Article III judges. 28 U.S.C. §
6 636(e). For types of contempt that are not within the
7 magistrate's authority to punish, the magistrate may certify
8 facts to a district judge, who "shall thereupon hear the
9 evidence as to the act or conduct complained of and, if it is
10 such as to warrant punishment, punish such person in the same
11 manner and to the same extent as for a contempt committed before
12 a district judge." 28 U.S.C. § 636(e). The district court, then,
13 analyzes the facts certified by the magistrate as if the conduct
14 had occurred in the district court. "Under 28 U.S.C. § 636(e),
15 failure to produce documents and refusal to appear before the
16 [m]agistrate[] constitute contempt of the district court in
17 which that [m]agistrate[] sits." Aldridge v, Young, et. al., 782
18 F.Supp. 1457 (D. Nevada 1991). In this case, defendant's failure
19 to appear before the magistrate judge will be treated as if
20 defendant had failed to appear before this court.

21 **B. Civil vs. Criminal Contempt**

22 Contempt is either civil or criminal, depending on the
23 character of the punishment inflicted. "If it is for civil
24 contempt the punishment is remedial, and for the benefit of the
25 complainant. But if it is for criminal contempt the sentence is
26 punitive, to vindicate the authority of the court." Gompers v.

1 Bucks, 221 U.S. 418, 441 (1911). See also In re Sequoia at 827
2 F.2d 1283 ("Civil contempt is a refusal to do an act the court
3 has ordered for the benefit of a party; the sentence is
4 remedial. Criminal contempt is a completed act of disobedience;
5 the sentence is punitive to vindicate the authority of the
6 court".) While imprisonment can be ordered in both civil and
7 criminal contempt cases, it serves two different purposes. In
8 civil cases, imprisonment is remedial, and is ordered to coerce
9 the party to do an affirmative act required by court order. Once
10 the party complies with the court order, he may be released. By
11 contrast, in criminal contempt proceedings, imprisonment is
12 punitive, rather than remedial. It is "punishment for the
13 completed act of disobedience," and "the defendant cannot
14 shorten the term by promising not to repeat the offense."
15 Gompers 221 U.S. at 443.

16 In this case, the magistrate judge has recommended that
17 defendant Garcia be adjudged in criminal contempt for failing to
18 appear at the September 2, 2010 hearing on sanctions. Because
19 failure to appear is a 'completed act of disobedience,' which
20 defendant cannot later cure, the instant contempt charge is
21 criminal in nature. The court now turns to whether failure to
22 appear may be punished summarily under Fed. R. Crim. P. 42(b),
23 or whether the protections of Rule 42(a) apply.

24 **C. Failure to appear, when unexcused, occurs "in the presence of**
25 **the court."**

26 A district court judge may summarily punish criminal

1 contempt if the contempt occurs in the presence of the court.
2 Fed. R. Crim. P. 42(b). For criminal contempt that occurs
3 outside the presence of the court, Rule 42(a) applies. That rule
4 requires the court to issue an order to show cause, giving the
5 defendant notice stating the time and place of trial, allowing
6 the defendant reasonable time to prepare a defense, and stating
7 the essential facts constituting the charged criminal contempt
8 and describing it as such. Additionally, Rule 42(a) requires
9 that the court appoint an attorney to prosecute the case, and,
10 for serious contempts, hold a jury trial.

11 In the Ninth Circuit, failure to appear is not ordinarily
12 considered contemptuous conduct that occurs in the presence of
13 the court and is therefore not subject to summary punishment.
14 "[I]t is not counsel's absence from the courtroom at any
15 appointed hour which constitutes contempt, if any. . . the
16 contempt consists not in the absence from the courtroom, but in
17 the reasons for the attorney's presence elsewhere, and the
18 presence elsewhere was, of course, not in the presence of the
19 court." In re Allis, 531 F.2d 1391, 1392 (9th Cir. 1976).
20 Several other circuits have applied similar reasoning, holding
21 that failure to appear is not subject to summary punishment
22 because at the moment that a party fails to appear in court, the
23 judge does not yet know whether or not the absence is excused.
24 The Fourth Circuit, for example, reasoned that a criminal
25 contempt finding requires willfulness on the part of the
26 contemnor, see, e.g., United States v. Linney, 134 F.3d 274 (4th

1 Cir. 1998), and an absent party's willfulness is not within the
2 court's observation. "Although the fact of an attorney's or
3 party's absence from a scheduled proceeding may be obvious and
4 within the knowledge and presence of the court, the reason for
5 the absence is not." In re Gates, 600 F.3d 333, 339 (4th Cir.
6 2010) (internal citations omitted).

7 In the Second and Seventh Circuits, failure to appear is
8 punishable summarily. See, e.g., U.S. v. Agajanian, 852 F.2d 56,
9 59 (2nd Cir. 1988) ("Here, the contumacious conduct, consisting
10 of failure to appear for trial without [prior] excuse . . .
11 clearly occurred in the court's presence."); In re Troutt, 460
12 F.3d 887, 893 (7th Cir. 2006) ("Troutt's failure to appear at the
13 November 12 hearing . . . occurred in Judge Reagan's presence
14 and . . . disrupted the court's proceedings.").

15 In this case, defendant has been given an opportunity to
16 provide an excuse for his failure to appear, but has not done
17 so. Although at the time that defendant failed to appear at the
18 September 2, 2010 hearing, the magistrate did not know that the
19 absence was unexcused, the defendant has not offered any excuse,
20 has not filed any objections to the magistrate's recommendation
21 that defendant be held in contempt, and did not appear in this
22 court on October 25, 2010 to oppose the magistrate's
23 recommendations. It now appears that defendant's failure to
24 appear before the magistrate was willful and unexcused.
25 Defendant is therefore subject to summary criminal contempt
26 punishment under Fed. R. Crim. P. 42(b). Defendant's repeated

1 failure to comply with the court's orders has interfered with
2 the administration of justice.

3 **III. Conclusion**

4 Accordingly, the court orders as follows:


5 [1] Defendant Garcia is ADJUDGED in criminal contempt of
6 court, and SENTENCED to five (5) days imprisonment for his
7 unexcused failure to appear before the magistrate judge on
8 September 2, 2010.

9 [2] Defendant's sentence is STAYED until November 8, 2010.

10 [3] Defendant is ORDERED to appear before this court on
11 November 8, 2010 to assure the court that he will remand
12 the unlawful detainer action, U.S. Bank NA v. Jaime
13 Garcia, 09UD10568, back to Sacramento Superior Court, and
14 that he will not again attempt to remove it to any federal
15 court. [4] Defendant is warned that failure to appear will
16 result in a warrant being issued for his arrest.

17 IT IS SO ORDERED.

18 DATED: October 26, 2010.

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20 
21 LAWRENCE K. KARLTON
22 SENIOR JUDGE
23 UNITED STATES DISTRICT COURT
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