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

TARIQ M. KATINA,

Plaintiff,

No. 2:10-cv-02016 JAM KJN PS

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
“MERS”; CITI MORTGAGE;
NEIGHBOR’S FINANCIAL
CORPORATION; CR TITLE
SERVICES INC.; JOHN OR JANE
DOES 1-1000,

Defendants.

ORDER and
FINDINGS AND RECOMMENDATIONS

_____ /
Pending before the court are three motions filed by defendants¹ CitiMortgage, Inc., CR Title Services, Inc., and Mortgage Electronic Registration Systems, Inc. (collectively, the “Moving Defendants”) that are pending before the court: (1) a motion to dismiss filed pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6) (Dkt. No. 6); a motion to strike filed pursuant to Federal Rule of Civil Procedure 12(f) (Dkt. No. 5); and a motion to expunge

¹ The court’s docket reveals that defendant Neighbor’s Financial Corporation has not appeared in this action since this case was removed to federal court. The remaining defendants’ Notice of Removal claims that Neighbor’s Financial Corporation had not been served with plaintiff’s complaint as of the time of the removal to this court.

1 plaintiff's notice of pendency of action (lis pendens) (Dkt. No. 10). Plaintiff failed to file written
2 oppositions or statements of non-opposition to these motions. Accordingly, the court continued
3 the hearing on these motions and provided plaintiff with another opportunity to file such written
4 oppositions or statements of non-opposition. The court also warned plaintiff that his failure to
5 file such documents with the court would constitute plaintiff's consent to the granting of the
6 motions and also result in a recommendation that his case be dismissed. Plaintiff has again failed
7 to file written oppositions or statements of non-opposition with respect to the three pending
8 motions. Accordingly, the undersigned recommends that plaintiff's action be dismissed with
9 prejudice pursuant to Federal Rule of Civil Procedure 41(b) and that the motion to expunge the
10 lis pendens be granted.

11 I. BACKGROUND

12 On July 29, 2010, the Moving Defendants removed this action from the Superior
13 Court to this court.² (Dkt. No. 1.) The Moving Defendants filed their motion to strike and
14 motion to dismiss on August 2, 2010, and filed their motion to expunge the lis pendens on
15 October 1, 2010. (Dkt. Nos. 5, 6, 10.) The Moving Defendants subsequently re-noticed their
16 motions for hearings to take place on November 8, 2010 (see Dkt. Nos. 16-20), and the court
17 continued the hearing to December 16, 2010 (Dkt. No. 21).³ Pursuant to this court's Local Rules,
18 plaintiff was obligated to file and serve written oppositions or statements of non-opposition to
19 the Moving Defendants' motions at least fourteen days prior to the hearing date, or December 2,

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21 ///

23 ² Although there were some initial problems regarding the service of removal documents and
24 the motions on plaintiff by the Moving Defendants, plaintiff was ultimately served with all necessary
25 documents and given ample time to prepare oppositions to the motions. (See Order, Oct. 8, 2010,
26 Dkt. No. 15; Order, Dec. 7, 2010, Dkt. No. 25.)

³ A more detailed procedural history can be found in orders entered by the undersigned on
October 8, 2010, and December 7, 2010. (Dkt. Nos. 15, 25.)

1 2010. See E. Dist. Local Rule 230(c).⁴ Plaintiff failed to do so.

2 As a result of plaintiff's failure to file written oppositions or statements of non-
3 opposition to the Moving Defendants' motions, the undersigned continued the hearing on those
4 motions to January 27, 2011, and ordered plaintiff to file written oppositions or statements of
5 non-opposition to the pending motions on or before January 6, 2011. (Order, Dec. 7, 2010, at 5.)

6 The undersigned's order conveyed the following warning to plaintiff:

7 Eastern District Local Rule 110 provides that "[f]ailure of counsel
8 or of a party to comply with these Rules or with any order of the Court
9 may be grounds for imposition by the Court of any and all sanctions
10 authorized by statute or Rule or within the inherent power of the Court."
11 Moreover, Eastern District Local Rule 183(a) provides, in part:

12 Any individual representing himself or herself without an
13 attorney is bound by the Federal Rules of Civil or Criminal
14 Procedure, these Rules, and all other applicable law. All
15 obligations placed on "counsel" by these Rules apply to
16 individuals appearing in propria persona. Failure to comply
17 therewith may be ground for dismissal . . . or any other
18 sanction appropriate under these Rules.

19 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se
20 litigants must follow the same rules of procedure that govern other
21 litigants."). Case law is in accord that a district court may impose
22 sanctions, *including involuntary dismissal of a plaintiff's case* pursuant to
23 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to
24 prosecute his or her case, fails to comply with the court's orders, or fails to
25 comply with the court's local rules. See Chambers v. NASCO, Inc., 501
26 U.S. 32, 44 (1991) (recognizing that a court "may act *sua sponte* to
dismiss a suit for failure to prosecute"); Hells Canyon Preservation
Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating
that courts may dismiss an action pursuant to Federal Rule of Civil
Procedure 41(b) *sua sponte* for a plaintiff's failure to prosecute or comply
with the rules of civil procedure or the court's orders); Ghazali v. Moran,

21 ⁴ Eastern District Local Rule 230(c) provides:

22 **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of
23 the motion shall be in writing and shall be filed and served not less than
24 fourteen (14) days preceding the noticed (or continued) hearing date. A
25 responding party who has no opposition to the granting of the motion shall
26 serve and file a statement to that effect, specifically designating the motion
in question. No party will be entitled to be heard in opposition to a motion
at oral arguments if opposition to the motion has not been timely filed by that
party. . . .

1 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) (“Failure to follow a district
2 court’s local rules is a proper ground for dismissal.”); Ferdik v. Bonzelet,
3 963 F.2d 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil
4 Procedure 41(b), the district court may dismiss an action for failure to
5 comply with any order of the court.”); Thompson v. Housing Auth. of City
of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam) (stating that
6 district courts have inherent power to control their dockets and may
7 impose sanctions including dismissal).

8 (Id. at 4-5.) The undersigned further admonished plaintiff that: “*Plaintiff’s failure to file written*
9 *oppositions may be deemed a statement of non-opposition to the pending motions, and shall*
10 *constitute additional grounds for the imposition of appropriate sanctions, including a*
11 *recommendation that plaintiff’s case be involuntarily dismissed pursuant to Federal Rule of Civil*
12 *Procedure 41(b).*” (Id. at 5 (emphasis in original).)

13 The court’s docket reveals that plaintiff again failed to file written oppositions or
14 statements of non-opposition to the Moving Defendants’ motions. Plaintiff failed to do so
15 despite being given ample opportunity to do so and explicit warnings that the failure to file
16 written oppositions or statements of non-opposition would result in the dismissal of his lawsuit.

17 II. DISCUSSION

18 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an
19 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,
20 failure to comply with the court’s local rules, or failure to comply with the court’s orders.⁵ See,
21 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*
22 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
23 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action
24 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute
25 or comply with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d

26 ⁵ Rule 41(b) provides, in part: “**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” Fed. R. Civ. P. 41(b).

1 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court
2 may dismiss an action for failure to comply with any order of the court.”); Pagtalunan v. Galaza,
3 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district court’s dismissal of case for failure to
4 prosecute when habeas petitioner failed to file a first amended petition). This court’s Local
5 Rules are in accord. See E. Dist. Local Rule 110 (“Failure of counsel or of a party to comply
6 with these Rules or with any order of the Court may be grounds for imposition by the Court of
7 any and all sanctions authorized by statute or Rule or within the inherent power of the Court.”);
8 E. Dist. Local Rule 183(a) (providing that a pro se party’s failure to comply with the Federal
9 Rules of Civil Procedure, the court’s Local Rules, and other applicable law may support, among
10 other things, dismissal of that party’s action).⁶

11 A court must weigh five factors in determining whether to dismiss a case for
12 failure to prosecute, failure to comply with a court order, or failure to comply with a district
13 court’s local rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

- 14 (1) the public’s interest in expeditious resolution of litigation;
15 (2) the court’s need to manage its docket; (3) the risk of prejudice
16 to the defendants; (4) the public policy favoring disposition of
cases on their merits; and (5) the availability of less drastic
alternatives.

17 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th
18 Cir. 1995). The Ninth Circuit Court of Appeals has stated that “[t]hese factors are not a series of
19 conditions precedent before the judge can do anything, but a way for a district judge to think
20 about what to do.” In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226
21 (9th Cir. 2006).

22 Although involuntary dismissal can be a harsh remedy, the five relevant factors
23 weigh in favor of dismissal of this action. The first two factors strongly support dismissal of this

24 ⁶ The Ninth Circuit Court of Appeals had held that under certain circumstances a district
25 court does not abuse its discretion by dismissing a plaintiff’s case pursuant to Federal Rule of Civil
26 Procedure 41(b) for failing to file an opposition to a motion to dismiss. See, e.g., Trice v. Clark
County Sch. Dist., 376 Fed. Appx. 789, 790 (9th Cir. 2010).

1 action. Plaintiff's failure to file written oppositions or statements of non-opposition to the
2 Moving Defendants' motions in the first instance, and his failure to do so a second time, despite
3 clear warnings of the consequences for such failures, strongly suggests that plaintiff has
4 abandoned this action or is not interested in seriously prosecuting it. See, e.g., Yourish v. Cal.
5 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("The public's interest in expeditious resolution of
6 litigation always favors dismissal."). Moreover, although plaintiff had notice of the continued
7 hearing date and his potentially final opportunity to file responses to the Moving Defendants'
8 motions on or before January 6, 2011, plaintiff took no action. Any further time spent by the
9 court on this case, which plaintiff has demonstrated a lack of any serious intention to pursue, will
10 consume scarce judicial resources and take away from other active cases. See Ferdik, 963 F.2d at
11 1261 (recognizing that district courts have inherent power to manage their dockets without being
12 subject to noncompliant litigants).

13 In addition, the third factor, which considers prejudice to the Moving Defendants
14 as a result of plaintiff's failure to timely oppose the motions, should be given some weight. See
15 Ferdik, 963 F.2d at 1262. Motions to dismiss and to strike are aids to simplifying the issues and
16 dismissing improper claims or parties before discovery ensues. Plaintiff's failure to oppose the
17 Moving Defendants' motions after being given two opportunities to do so, and his failure to
18 communicate with the court or explain his non-participation in this litigation, raises the real
19 possibility that all of the defendants may be forced to unnecessarily engage in further litigation
20 against claims that plaintiff does not appear to value enough to pursue in a serious manner.
21 Indeed, defendants have been diligently pursuing their motions, and plaintiff stalled this matter
22 and prevented the efficient resolution of this lawsuit. Moreover, unreasonable delay is presumed
23 to be prejudicial. See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at
24 1227. Additionally, plaintiff's lis pendens creates a cloud on the title to the property at issue in
25 this litigation, which is prejudicial to at least some of the defendants in this action. See Kirkeby
26 v. Superior Court of Orange County, 33 Cal. 4th 642, 647, 93 P.3d 395, 398 (2004) ("A lis

1 pendens is a recorded document giving constructive notice that an action has been filed affecting
2 title to or right to possession of the real property described in the notice.”).

3 The fifth factor, which considers the availability of less drastic measures, also
4 supports dismissal of this action. As noted above, the court has actually pursued remedies that
5 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d
6 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court
7 actually tries alternatives before employing the ultimate sanction of dismissal.”). The court
8 excused plaintiff’s initial failure to oppose the Moving Defendants’ motions, granted plaintiff
9 substantial additional time to file written oppositions or statements of non-opposition, and
10 continued the hearing on the pending motions. Moreover, the court advised plaintiff of the
11 requirement of opposing the motions and informed him of the requirements of the Local Rules.
12 Furthermore, the court advised plaintiff that plaintiff was required to comply with the court’s
13 Local Rules and the Federal Rules of Civil Procedure even though he is proceeding without
14 counsel. It also warned plaintiff in clear terms that failure to comply with the court’s orders
15 could result in a recommendation of dismissal. Warning a plaintiff that failure to take steps
16 towards resolution of his or her action on the merits will result in dismissal satisfies the
17 requirement that the court consider the alternatives. See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur
18 decisions also suggest that a district court’s warning to a party that his failure to obey the court’s
19 order will result in dismissal can satisfy the ‘consideration of alternatives’ requirement.”) (citing
20 Malone, 833 F.2d at 132-33). At this juncture, the court finds no suitable alternative to a
21 recommendation of dismissal of this action. This finding is supported by the fact that plaintiff’s
22 complaint, which alleges that plaintiff has encountered financial difficulties leading to the
23 foreclosure of his home (see generally Compl.), suggests that plaintiff would very likely be
24 unable to pay any monetary sanction imposed in lieu of dismissal.

25 The court also recognizes the importance of giving due weight to the fourth factor,
26 which addresses the public policy favoring disposition of cases on the merits. However, for the

1 reasons set forth above, factors one, two, three, and five strongly support a recommendation for
2 dismissal of this action, and factor four does not materially counsel otherwise. Dismissal is
3 proper “where at least four factors support dismissal or where at least three factors ‘strongly’
4 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
5 and quotation marks omitted). Under the circumstances of this case, the other relevant factors
6 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,
7 963 F.2d at 1263.

8 Finally, the undersigned recommends that, in light of the recommended dismissal
9 of this action, the court also order expungement of the recorded lis pendens, i.e., the notice of
10 pendency of action recorded by plaintiff on July 2, 2010, at book number 2010072, page number
11 1047 in the official records of Sacramento County. The recommended dismissal of this action
12 counsels as much. Moreover, the Moving Defendants argue, in part, that the lis pendens should
13 be expunged because plaintiff’s complaint does not assert a “real property claim,” as defined by
14 statute. See Cal. Civ. Proc. Code § 405.31 (stating that “the court shall order the notice
15 expunged if the court finds that the pleading on which the notice is based does not contain a real
16 property claim”); Kirkeby, 33 Cal. 4th at 647, 93 P.3d at 398 (“A lis pendens may be filed by any
17 party in an action who asserts a ‘real property claim.’”). Plaintiff has the burden of proof with
18 respect to the Moving Defendants’ motion to expunge the lis pendens insofar as the “real
19 property claim is concerned, and plaintiff has not met his burden.⁷ See Cal. Civ. Proc. Code §§
20 405.30-405.31; see also Kirkeby, 33 Cal. 4th at 647, 93 P.3d at 398 (“Unlike most other motions,
21 when a motion to expunge is brought, the burden is on the party opposing the motion to show the
22 existence of a real property claim.”). Accordingly, the lis pendens should be expunged.

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25 ⁷ Of course, plaintiff has not responded to any of the Moving Defendants’ arguments in favor
26 of removal of the lis pendens.

1 In light of the foregoing, IT IS HEREBY ORDERED that:

2 1. The hearing on the Moving Defendants' motion to strike, motion to
3 dismiss, and motion to expunge the notice of pendency of action (Dkt. Nos. 5, 6, 10), presently
4 scheduled for January 27, 2011, is vacated.

5 It is FURTHER RECOMMENDED that:

6 1. Plaintiff's case be dismissed with prejudice pursuant to Rule 41(b) of the
7 Federal Rules of Civil Procedure.

8 2. The notice of pendency of action recorded by plaintiff on July 2, 2010, at
9 book number 2010072, page number 1047 in the official records of Sacramento County be
10 expunged.

11 3. The Clerk of Court close this case and vacate all future dates in this case.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
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. Id.; see also E. Dist. Local Rule 304(b).
16 Such a document should be captioned "Objections to Magistrate Judge's Findings and
17 Recommendations." Any response to the objections shall be filed with the court and served on
18 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
19 Failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
21 1153, 1156-57 (9th Cir. 1991).

22 IT IS SO RECOMMENDED.

23 DATED: January 14, 2011

24 
KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE
26