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

PHAL S. PACHECO, an individual,

Plaintiff,

No. 2:10-cv-03420 JAM KJN PS

v.

PAUL FINANCIAL, LLC, a Delaware
Limited Liability Company; PREMIER
CAPITAL MORTGAGE, a Business
Entity, form unknown; GMAC
MORTGAGE, LLC, a Delaware Limited
Liability Company; FOUNDATION
CONVEYANCING LLC, a Delaware
Limited Company, MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., A Delaware
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

ORDER and
FINDINGS AND RECOMMENDATIONS

Presently before the court ¹ is a motion to dismiss plaintiff’s complaint filed by the
following defendants: GMAC Mortgage, LLC, Executive Trustee Services, LLC, and Mortgage
Electronic Systems, Inc. (“Moving Defendants”). The Moving Defendants filed their motion on

¹ This action proceeds before the undersigned pursuant to Eastern District of California
Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 December 29, 2010. Plaintiff has filed no written opposition, statement of non-opposition, or
2 other response to the pending motion despite being given multiple opportunities to do so and
3 clear warnings from the court that failure to do so would lead to the involuntary dismissal of his
4 lawsuit. For the reasons that follow, the undersigned recommends that plaintiff's action be
5 dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b).

6 I. BACKGROUND

7 On December 22, 2010, the Moving Defendants removed plaintiff's case to
8 federal court.² (Notice of Removal, Dkt. No. 1.) On December 29, 2010, the Moving
9 Defendants filed a motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil
10 Procedure 12(b)(6) and noticed that motion for a hearing before the undersigned to take place on
11 February 3, 2011. (Mot. to Dismiss, Dkt. No. 7.) Pursuant to this court's Local Rules, plaintiff
12 was obligated to file and serve a written opposition or statement of non-opposition to the Moving
13 Defendants' motion at least fourteen days prior to the hearing date, or January 20, 2011. See E.
14 Dist. Local Rule 230(c).³ Plaintiff failed to file any response to the motion to dismiss.

15 On January 24, 2011, and in response to plaintiff's failure to file a response to the
16 Moving Defendants' motion, the undersigned entered an order that: (1) continued the hearing on
17 the Moving Defendants' motion to dismiss until March 3, 2011, and (2) required plaintiff to file

18 ² It appears that plaintiff previously filed a lawsuit against parties including GMAC
19 Mortgage, LLC and Mortgage Electronic Systems, Inc., which are also named defendants here. (See
20 Pacheco v. Paul Financial, LLC, et al., 2:10-cv-00085 GEB GGH PS (E.D. Cal.)) That action,
21 which appears to relate to the exact same subject matter as the present action, was dismissed with
22 prejudice on July 22, 2010. (Pacheco, 2:10-cv-00085 GEB GGH PS, Dkt. Nos. 20, 21.)

23 ³ Eastern District Local Rule 230(c) provides:

24 **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of
25 the motion shall be in writing and shall be filed and served not less than
26 fourteen (14) days preceding the noticed (or continued) hearing date. A
responding party who has no opposition to the granting of the motion shall
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 *opposition to the pending motion and consent to the granting of the motion to dismiss, and shall*
2 *constitute an additional ground for the imposition of appropriate sanctions, including a*
3 *recommendation that plaintiff's case be involuntarily dismissed pursuant to Federal Rule of Civil*
4 *Procedure 41(b).” (Id. at 3-4 (emphasis in original).) Thus, the court gave plaintiff very clear*
5 *warnings that his case would be dismissed for failure to prosecute his action or his failure to*
6 *comply with the Federal Rules of Civil Procedure, the court’s orders, or the court’s Local Rules.*

7 The court’s docket reveals that plaintiff has again failed to file a written
8 opposition or statement of non-opposition to the Moving Defendants’ motion to dismiss.
9 Plaintiff failed to do so despite being given an additional opportunity to do so and explicit
10 warnings that the failure to file a written opposition or statement of non-opposition would result
11 in the dismissal of his lawsuit.

12 II. DISCUSSION

13 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an
14 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,
15 failure to comply with the court’s local rules, or failure to comply with the court’s orders.⁴ See,
16 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*
17 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
18 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action
19 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute
20 or comply with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d
21 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court
22 may dismiss an action for failure to comply with any order of the court.”); Pagtalunan v. Galaza,
23 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district court’s dismissal of case for failure to
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25 ⁴ Rule 41(b) provides, in part: “**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to
26 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 prosecute when habeas petitioner failed to file a first amended petition). This court's Local
2 Rules are in accord. See E. Dist. Local Rule 110 ("Failure of counsel or of a party to comply
3 with these Rules or with any order of the Court may be grounds for imposition by the Court of
4 any and all sanctions authorized by statute or Rule or within the inherent power of the Court.");
5 E. Dist. Local Rule 183(a) (providing that a pro se party's failure to comply with the Federal
6 Rules of Civil Procedure, the court's Local Rules, and other applicable law may support, among
7 other things, dismissal of that party's action).

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

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

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

19 Although involuntary dismissal can be a harsh remedy, the five relevant factors
20 weigh in favor of dismissal of this action. The first two factors strongly support dismissal of this
21 action. Plaintiff's failure to file an opposition or statement of non-opposition to the Moving
22 Defendants' motion to dismiss in the first instance, and his failure to do so a second time, despite
23 clear warnings of the consequences for such failures, strongly suggests that plaintiff has
24 abandoned this action or is not interested in seriously prosecuting it. See, e.g., Yourish v. Cal.
25 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("The public's interest in expeditious resolution of
26 litigation always favors dismissal."). Moreover, although plaintiff had notice of the continued

1 hearing date and his potentially final opportunity to file a response to the Moving Defendants’
2 motion on or before February 3, 2011, plaintiff took no action. Any further time spent by the
3 court on this case, which plaintiff has demonstrated a lack of any serious intention to pursue, will
4 consume scarce judicial resources and take away from other active cases. See Ferdik, 963 F.2d at
5 1261 (recognizing that district courts have inherent power to manage their dockets without being
6 subject to noncompliant litigants).

7 In addition, the third factor, which considers prejudice to a defendant as a result of
8 plaintiff’s failure to timely oppose its motion to dismiss, should be given some weight. See
9 Ferdik, 963 F.2d at 1262. A motion to dismiss is an aid to simplifying the issues and dismissing
10 improper claims or parties before discovery ensues. Plaintiff’s failure to oppose the Moving
11 Defendants’ motion after being given two opportunities to do so, and his failure to communicate
12 with the court or explain his non-participation in this litigation, raises the real possibility that all
13 defendants in this action may be forced to unnecessarily engage in further litigation against
14 claims that plaintiff does not appear to value enough to pursue in a serious manner. Indeed, the
15 Moving Defendants have been diligently pursuing their motion to dismiss, and plaintiff stalled
16 this matter and prevented the efficient resolution of his lawsuit. Moreover, unreasonable delay is
17 presumed to be prejudicial. See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,
18 460 F.3d at 1227.

19 The fifth factor, which considers the availability of less drastic measures, also
20 supports dismissal of this action. As noted above, the court has actually pursued remedies that
21 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d
22 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court
23 actually tries alternatives before employing the ultimate sanction of dismissal.”). The court
24 excused plaintiff’s initial failure to oppose the Moving Defendants’ motion, granted plaintiff
25 substantial additional time to file an opposition or statement of non-opposition, and continued the
26 hearing on the motion to dismiss. Moreover, the court advised plaintiff of the requirement of

1 opposing a motion to dismiss and informed him of the requirements of the Local Rules.
2 Furthermore, the court advised plaintiff that he was required to comply with the court's Local
3 Rules and the Federal Rules of Civil Procedure even though he is proceeding without counsel. It
4 also warned plaintiff in clear terms that failure to comply with the court's orders would result in a
5 recommendation of dismissal. Warning a plaintiff that failure to take steps towards resolution of
6 his or her action on the merits will result in dismissal satisfies the requirement that the court
7 consider the alternatives. See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur decisions also suggest that a
8 district court’s warning to a party that his failure to obey the court’s order will result in dismissal
9 can satisfy the ‘consideration of alternatives’ requirement.”) (citing Malone, 833 F.2d at 132-33).
10 At this juncture, the court finds no suitable alternative to a recommendation for dismissal of this
11 action. This finding is supported by the fact that plaintiff’s complaint, which alleges that plaintiff
12 has encountered financial difficulties leading to the foreclosure of his home (see generally
13 Compl.), suggests that plaintiff would very likely be unable to pay any monetary sanction
14 imposed in lieu of dismissal.

15 The court also recognizes the importance of giving due weight to the fourth factor,
16 which addresses the public policy favoring disposition of cases on the merits. However, for the
17 reasons set forth above, factors one, two, three, and five strongly support a recommendation for
18 dismissal of this action, and factor four does not materially counsel otherwise. Dismissal is
19 proper “where at least four factors support dismissal or where at least three factors ‘strongly’
20 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
21 and quotation marks omitted). Under the circumstances of this case, the other relevant factors
22 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,
23 963 F.2d at 1263.

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

25 1. The hearing on the Moving Defendants’ motion to dismiss (Dkt. No. 7),
26 presently scheduled for March 3, 2011, is vacated.

1 It is FURTHER RECOMMENDED that:


2 1. Plaintiff's case be dismissed with prejudice as to all defendants pursuant to
3 Rule 41(b) of the Federal Rules of Civil Procedure.

4 2. The Clerk of Court close this case and vacate all future dates in this case.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
9 Such a document should be captioned "Objections to Magistrate Judge's Findings and
10 Recommendations." Any response to the objections shall be filed with the court and served on
11 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
12 Failure to file objections within the specified time may waive the right to appeal the District
13 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
14 1153, 1156-57 (9th Cir. 1991).

15 IT IS SO ORDERED AND RECOMMENDED.

16 DATED: February 11, 2011

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20 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

21 KJN:nkd
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