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

DMITRIY STOLYARCHUK

Plaintiff,

No. CIV S-11-1670 MCE CKD PS

vs.

AMTRUST BANK et al.

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is proceeding pro se in this action, referred to the undersigned pursuant to E.D. Cal. L.R. 302(c)(21). On July 21, 2011, defendants AmTrust Bank, Mortgage Electronic Registration Systems, Inc., and Residential Credit Solutions, Inc. filed a motion to dismiss and a motion for an order expunging the lis pendens recorded by plaintiff. (Dkt. No. 11.) On October 11, 2011, plaintiff filed a statement of non-opposition. (Dkt. No. 19.) In the statement of non-opposition, plaintiff requested that the action be dismissed without prejudice.

On October 14, 2011, the court ordered defendants to notify the court within seven (7) days whether they have any objection to the dismissal of the action without prejudice. (Dkt. No. 20.) Defendants AmTrust Bank, Mortgage Electronic Registration Systems, Inc. and Residential Credit Solutions, Inc. then filed timely objections, requesting that the action instead be dismissed with prejudice. (Dkt. No. 21.)

1 Consequently, on October 26, 2011, the court ordered plaintiff, within fourteen
2 (14) days, to file either a statement of non-opposition to dismissal of the action with prejudice or
3 an opposition to defendants AmTrust Bank, Mortgage Electronic Registration Systems, Inc., and
4 Residential Credit Solutions, Inc.'s motion to dismiss and motion for an order expunging the lis
5 pendens. (Dkt. No. 23.) Plaintiff was cautioned that failure to comply with the order would
6 result in a recommendation that the action be dismissed with prejudice pursuant to Fed. R. Civ.
7 P. 41(b). (Id.)

8 Although the deadline has now passed, the court docket reflects that plaintiff has
9 not filed a statement of non-opposition to dismissal of the action with prejudice or an opposition
10 to defendants' motion. In light of plaintiff's failure to do so, the undersigned will recommend
11 that this action be dismissed for failure to prosecute the action and for failure to comply with
12 court orders, and that defendants' motion to dismiss be denied as moot. See Fed. R. Civ. P.
13 41(b); L.R. 110. The undersigned will also recommend that the lis pendens recorded by plaintiff
14 on the subject property (4430 Woodhawk Way, Antelope, CA 95843) be expunged from the
15 official records of the Sacramento County Recorder's Office.¹

16 Accordingly, IT IS HEREBY RECOMMENDED that:

17 1. This action be dismissed pursuant to Federal Rule of Civil Procedure 41(b),
18 based on plaintiff's failure to prosecute the action and to comply with court orders;

19 2. Defendants AmTrust Bank, Mortgage Electronic Registration Systems, Inc.,
20 and Residential Credit Solutions, Inc.'s motion to dismiss (dkt. no. 11) be denied as moot;

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23 ¹ A court "shall order that the notice be expunged if the court finds that the claimant has not
24 established by a preponderance of the evidence the probable validity of the real property claim." Cal.
25 Civ. Proc. Code § 405.32. Even when a plaintiff is given leave to amend a complaint that was
26 dismissed, it is proper for the court to order the lis pendens expunged when the plaintiff fails to
establish that he is likely to prevail on the merits. Winding v. NDEX West, LLC, 2011 WL
1080650, at *4 (E.D. Cal. Mar. 21, 2011). Here, because the undersigned recommends that the
action be dismissed with prejudice, a recommendation that the lis pendens be expunged is also
appropriate.

1 3. The lis pendens recorded by plaintiff on the subject property (4430 Woodhawk
2 Way, Antelope, CA 95843) be expunged from the official records of the Sacramento County
3 Recorder's Office, and

4 4. The Clerk of Court be directed to close 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 (14) 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. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
10 shall be served and filed within seven (7) days after service of the objections. Failure to file
11 objections within the specified time may waive the right to appeal the District Court's order.
12 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

13 Dated: November 17, 2011

14 
15 CAROLYN K. DELANEY
16 UNITED STATES MAGISTRATE JUDGE

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