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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS BENSON, et al.,
Plaintiffs,
v.
OCWEN LOAN SERVICING, et al.,
Defendants.

No. 2:14-cv-2495-TLN-KJN-PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

Through these findings and recommendations, the undersigned recommends that plaintiffs’ case be dismissed with prejudice and that this case be closed.¹ Plaintiffs Thomas and Marcella Benson twice failed to file an opposition to the motion to dismiss plaintiffs’ complaint pursuant to Rule 12(b)(6) filed by defendants Ocwen Loan Servicing, LLC, Mortgage Electronic Registration Systems, Inc., and HSBC Bank USA, N.A. despite plaintiffs having been clearly warned of the consequences for failing to do so.

I. BACKGROUND

Plaintiffs, proceeding without counsel, filed their complaint on October 24, 2014, and paid the filing fee. (ECF No. 1.) That same day, the court issued an order setting a status conference. (ECF No. 4.) That order advised the parties that “[f]ailing to obey federal or local rules, or [an]

¹ This case proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 order of this court, may result in dismissal of this action. This court will construe pro se
2 pleadings liberally, but pro se litigants must comply with the procedural rules.” (Id. at 3.)
3 Additionally, it cautioned the parties that “pursuant to Local Rule 230(c), opposition to granting
4 of a motion must be filed fourteen days preceding the noticed hearing date. The Rule further
5 provides that ‘no party will be entitled to be heard in opposition to a motion at oral arguments if
6 written opposition to the motion has not been timely filed by that party.’ Moreover, Local Rule
7 230(i) provides that failure to appear may be deemed withdrawal of opposition to the motion or
8 may result in sanctions.” (Id.) Finally, the order notified the parties that “Local Rule 110
9 provides that failure to comply with the Local Rules ‘may be grounds for imposition of any and
10 all sanctions authorized by statute or Rule or within the inherent power of the Court.’” (Id.)

11 On November 26, 2014, defendants filed a motion to dismiss plaintiffs’ complaint
12 pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 12.) The motion to dismiss was
13 noticed for hearing on January 15, 2015. (Id.) On the same day, plaintiffs filed an ex parte
14 application for a temporary restraining order and preliminary injunction against defendants to
15 enjoin them from foreclosing on plaintiff’s residential property loan that is the subject of the
16 present action. (ECF No. 10.) The District Judge assigned to this matter denied this application
17 on December 1, 2014, on the grounds that plaintiffs failed to demonstrate a likelihood of success
18 on the merits. (ECF No. 15.)

19 As noted above, pursuant to this court’s Local Rules, plaintiffs were obligated to file and
20 serve a written opposition, or a statement of non-opposition, to the pending motion at least
21 fourteen (14) days prior to the hearing date, or January 1, 2015. See E.D. Cal. L.R. 230(c).²
22 However, plaintiffs failed to file an opposition or statement of non-opposition to the motion by

23 ² More specifically, Eastern District Local Rule 230(c) provides:
24

25 **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of the
26 motion shall be in writing and shall be filed and served not less than fourteen (14)
27 days preceding the noticed (or continued) hearing date. A responding party who
28 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 that deadline.

2 As a result of plaintiffs' failure, but in light of their pro se status, the undersigned issued
3 an order on January 9, 2015, continuing the hearing on the motion to dismiss until February 19,
4 2015, and providing plaintiffs with an additional opportunity to file an opposition or statement of
5 non-opposition to the motion on or before February 5, 2015. (ECF No. 16.) In that order, the
6 undersigned specifically warned plaintiffs that their "failure to file a written opposition will be
7 deemed a statement of non-opposition to the pending motion and consent to the granting of the
8 motion [to dismiss], and shall constitute an additional ground for the imposition of appropriate
9 sanctions, including a recommendation that plaintiffs' case be involuntarily dismissed with
10 prejudice pursuant to Federal Rule of Civil Procedure 41(b)." (Id. at 3). The order also advised
11 plaintiffs as follows:

12 Eastern District Local Rule 110 provides that "[f]ailure of counsel or of a party to
13 comply with these Rules or with any order of the Court may be grounds for
14 imposition by the Court of any and all sanctions authorized by statute or Rule or
15 within the inherent power of the Court." Moreover, Eastern District Local Rule
16 183(a) provides, in part:

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

24 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se litigants must
25 follow the same rules of procedure that govern other litigants.") (overruled on
26 other grounds). Case law is in accord that a district court may impose sanctions,
27 including involuntary dismissal of a plaintiff's case pursuant to Federal Rule of
28 Civil Procedure 41(b), where that plaintiff fails to prosecute his or her case or fails
to comply with the court's orders, the Federal Rules of Civil Procedure, or the
court's local rules.³ See Chambers v. NASCO, Inc., 501 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

³ The Ninth Circuit Court of Appeals had held that under certain circumstances a district court does not abuse its discretion by dismissing a plaintiff's case pursuant to Federal Rule of Civil 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. App'x. 789, 790 (9th Cir. 2010) (unpublished).

1 683, 689 (9th Cir. 2005) (stating that courts may dismiss an action pursuant to
2 Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's failure to
3 prosecute or comply with the rules of civil procedure or the court's orders);
4 Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) ("Failure to follow a
5 district court's local rules is a proper ground for dismissal"); Ferdik v. Bonzelet,
6 963 F.2d 1258, 1260 (9th Cir. 1992) ("Pursuant to Federal Rule of Civil Procedure
7 41(b), the district court may dismiss an action for failure to comply with any order
8 of the court"); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th
9 Cir. 1986) (per curiam) (stating that district courts have inherent power to control
10 their dockets and may impose sanctions including dismissal or default).

11 (Id. at 2-3.) Although the February 5, 2015 deadline has now passed, the court's docket reveals
12 that plaintiffs again failed to file an opposition to the motion to dismiss.⁴

13 II. DISCUSSION

14 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an action
15 for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure, failure to
16 comply with the court's local rules, or failure to comply with the court's orders. See, e.g.,
17 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court "may act sua sponte
18 to dismiss a suit for failure to prosecute"); Hells Canyon Preservation Council v. U.S. Forest
19 Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action pursuant
20 to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's failure to prosecute or comply
21 with the rules of civil procedure or the court's orders); Ferdik v. Bonzelet, 963 F.2d 1258, 1260
22 (9th Cir. 1992) ("Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
23 an action for failure to comply with any order of the court"); Pagtalunan v. Galaza, 291 F.3d 639,
24 642-43 (9th Cir. 2002) (affirming district court's dismissal of case for failure to prosecute when
25 habeas petitioner failed to file a first amended petition). This court's Local Rules are in accord.
26 See E.D. Cal. L.R. 110 ("Failure of counsel or of a party to comply with these Rules or with any
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⁴ The undersigned further notes that the court's orders have not been returned to the court as undeliverable. Nevertheless, even if they had been, it is plaintiffs' duty to keep the court informed of their current address, and service of the court's orders at the address on record was effective absent the filing of a notice of change of address. In relevant part, Local Rule 182(f) provides: "Each appearing attorney and pro se party is under a continuing duty to notify the Clerk and all other parties of any change of address or telephone number of the attorney or the pro se party. Absent such notice, service of documents at the prior address of the attorney or pro se party shall be fully effective."

1 order of the Court may be grounds for imposition by the Court of any and all sanctions authorized
2 by statute or Rule or within the inherent power of the Court”); E.D. Cal. L.R. 183(a) (providing
3 that a pro se party’s failure to comply with the Federal Rules of Civil Procedure, the court’s Local
4 Rules, and other applicable law may support, among other things, dismissal of that party’s
5 action).

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

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

12 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir.
13 1995). The Ninth Circuit Court of Appeals has stated that “[t]hese factors are not a series of
14 conditions precedent before the judge can do anything, but a way for a district judge to think
15 about what to do.” In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226
16 (9th Cir. 2006).

17 Although involuntary dismissal can be a harsh remedy, on balance the five relevant
18 factors weigh in favor of dismissal of this action. The first two factors strongly support dismissal
19 of this action. Plaintiffs’ repeated failure to oppose defendant’s motion to dismiss, despite clear
20 warnings of the consequences, strongly suggests that plaintiffs have abandoned this action or are
21 not interested in seriously prosecuting it. See, e.g., Yourish v. Cal. Amplifier, 191 F.3d 983, 990
22 (9th Cir. 1999) (“The public’s interest in expeditious resolution of litigation always favors
23 dismissal”). Any further time spent by the court on this case, which plaintiffs have demonstrated
24 a lack of any serious intention to pursue, will consume scarce judicial resources and take away
25 from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district courts have
26 inherent power to manage their dockets without being subject to noncompliant litigants).

27 In addition, the third factor, which considers prejudice to a defendant, should be given
28 some weight. See Ferdik, 963 F.2d at 1262. Here, defendants have been named in a lawsuit that

1 plaintiffs have effectively abandoned. At a minimum, defendants have been prevented from
2 attempting to resolve this case on the merits by plaintiffs' unreasonable delay in prosecuting this
3 action. Unreasonable delay is presumed to be prejudicial. See, e.g., In re Phenylpropanolamine
4 (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

5 The fifth factor, which considers the availability of less drastic measures, also supports
6 dismissal of this action. As noted above, the court has actually pursued remedies that are less
7 drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d 128, 132
8 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court actually
9 tries alternatives before employing the ultimate sanction of dismissal”). Before recommending
10 dismissal, the court granted plaintiffs an additional opportunity to oppose the motion to dismiss
11 and advised plaintiffs that they were required to actively prosecute the action and follow the
12 court's orders. It also warned plaintiffs in clear terms that failure to oppose the motion to dismiss,
13 or file a statement of non-opposition to the motion, would result in a recommendation of
14 dismissal of the action with prejudice. Warning a plaintiff that failure to take steps towards
15 resolution of his or her action on the merits will result in dismissal satisfies the requirement that
16 the court consider the alternatives. See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur decisions also
17 suggest that a district court's warning to a party that his failure to obey the court's order will
18 result in dismissal can satisfy the ‘consideration of alternatives’ requirement”) (citing Malone,
19 833 F.2d at 132-33). In any event, the court finds no suitable alternative to a recommendation for
20 dismissal at this juncture. Because plaintiffs have not made any attempt to comply with the
21 court's prior orders, the court has little confidence that plaintiffs would pay monetary sanctions if
22 they were to be imposed in lieu of dismissing the case.

23 The court also recognizes the importance of giving due weight to the fourth factor, which
24 addresses the public policy favoring disposition of cases on the merits. However, for the reasons
25 set forth above, factors one, two, three, and five strongly support a recommendation of dismissal
26 of this action, and factor four does not materially counsel otherwise. Dismissal is proper “where
27 at least four factors support dismissal or where at least three factors ‘strongly’ support dismissal.”
28 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations and quotation marks

1 omitted). Under the circumstances of this case, the other relevant factors outweigh the general
2 public policy favoring disposition of actions on their merits. See Ferdik, 963 F.2d at 1263. If
3 anything, a disposition on the merits has been hindered by plaintiffs' own failure to prosecute the
4 case and comply with court orders. Moreover, given the assigned District Judge's denial of
5 plaintiffs' application for a temporary restraining order and preliminary injunction on the basis
6 that plaintiffs failed to show a likelihood of success on the merits, the court has grave concerns
7 regarding the merits of plaintiffs' claims.

8 **III. CONCLUSION**

9 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 10 1. The February 19, 2015 hearing on defendants' motion to dismiss is VACATED.
- 11 2. The March 12, 2015 status (pretrial scheduling) conference is VACATED. If

12 necessary, the court will reset the date of that conference.

13 IT IS ALSO HEREBY RECOMMENDED that:

- 14 1. Plaintiffs' action be DISMISSED WITH PREJUDICE pursuant to Federal Rule of
15 Civil Procedure 41(b) for failure to prosecute the action and failure to follow the Local Rules and
16 the court's orders.
- 17 2. Defendants' motion to dismiss (ECF No. 12) be DENIED AS MOOT.
- 18 3. The Clerk of Court be directed to close this case and vacate all dates.

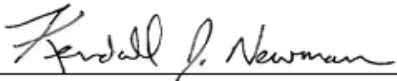
19 These findings and recommendations are submitted to the United States District Judge
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
21 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
24 shall be served on all parties and filed with the court within fourteen (14) days after service of the
25 objections. The parties are advised that failure to file objections within the specified time may
26 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
27 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

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IT IS SO ORDERED AND RECOMMENDED.

Dated: February 9, 2015


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE