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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MONICA LAM AND DOUGLAS RING,
Plaintiffs,
v.
PENNY MAC, et al.,
Defendants.

No. 2:19-cv-00709-TLN-CKD PS

FINDINGS AND RECOMMENDATIONS

This case, in which plaintiffs are proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). See 28 U.S.C. § 636(b)(1). All defendants have been dismissed except two: Auctions.com and Nations Direct Mortgage, LLC. (ECF Nos. 62, 63.) On December 26, 2019, Auctions.com filed a motion for judgment on the pleadings. (ECF No. 65.) The motion was noticed to be heard on February 5, 2020.

On January 31, 2020, because plaintiffs had not filed either an opposition or a statement of non-opposition to the motion, the undersigned continued the hearing on the motion to March 18, 2020 and directed plaintiffs to file an opposition to the motion, or a statement of non-opposition, no later than March 4, 2020. (ECF No. 67.) Plaintiffs were advised that failure to file an opposition would be deemed a statement of non-opposition and would result in a recommendation that the action against Auctions.com be dismissed. In addition, the undersigned ordered plaintiffs to show cause, by no later than March 4, 2020, why the court should not also recommend

1 dismissal of defendant, Nations Direct Mortgage, LLC, for want of prosecution under Federal
2 Rule of Civil Procedure 41. (ECF No. 67.)

3 Although the deadlines have now passed, the court docket reflects that plaintiffs have not
4 filed an opposition to Auctions.com’s motion or a statement of non-opposition to the motion.
5 Similarly, plaintiffs have not attempted to show cause why Nations Direct Mortgage, LLC should
6 not also be dismissed. The Federal Rules of Civil Procedure provide for dismissal of actions
7 based on lack of prosecution. Fed. R. Civ. P. 41(b). Pro se litigants are bound by the rules of
8 procedure, even though pleadings are liberally construed in their favor. King v. Atiyeh, 814 F.2d
9 565, 567 (9th Cir. 1987). In determining whether to dismiss for lack of prosecution, generally the
10 court considers (1) the public’s interest in expeditious resolution of litigation, (2) the court’s need
11 to manage its docket, (3) the risk of prejudice to the defendants, (4) the public policy favoring
12 disposition of cases on their merits, and (5) the availability of less drastic sanctions. See, e.g., Al-
13 Torki v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996). The court may dismiss a case sua sponte
14 for lack of prosecution by the plaintiff. Hamilton Copper & Steel Corp. v. Primary Steel, Inc.,
15 898 F.2d 1428 (9th Cir. 1990). Sua sponte dismissal requires a “close focus” on consideration of
16 “less drastic alternatives” and whether or not there has been a “warning of imminent dismissal of
17 the case.” Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992).

18 In determining that this action will be dismissed, the court has considered all the factors
19 set forth in Al-Torki. The first two factors on their face favor the imposition of sanctions in this
20 case brought by plaintiff and which has been proceeding forward since plaintiff initiated this
21 action on April 26, 2019. See Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990).
22 Regarding the third factor, defendant Auctions.com has already briefed its motion and would be
23 prejudiced by the need for further litigation of this matter despite plaintiffs’ non-responsiveness.
24 Moreover, delay itself generally is prejudicial—witness memories fade and evidence becomes
25 stale or undiscoverable. While the fourth factor favors resolution on the merits, in this case
26 plaintiffs have declined to oppose the motion to dismiss and thus have precluded the court’s
27 evaluation of the potential merits of such an opposition.

28 Focusing on the fifth Al-Torki factor and warning regarding imminent dismissal, as

1 required by Oliva, the court in its order of January 31, 2020 has advised plaintiffs that this action
2 is subject to dismissal, directed plaintiffs to file an opposition and show cause, and granted ample
3 additional time to oppose the pending motion and show cause after plaintiffs failed to oppose
4 defendants' motion to dismiss, all to no avail. In light of plaintiffs' failures, the court concludes
5 there is no suitable alternative less drastic sanction to dismissal. The undersigned will therefore
6 recommend that this action be dismissed for failure to prosecute the action and for failure to
7 comply with court orders and Local Rules. See Fed. R. Civ. P. 41(b); L.R. 110.

8 Accordingly, IT IS HEREBY RECOMMENDED that:

- 9 1. This action be dismissed with prejudice; and
- 10 2. The Clerk of Court be directed to close this case.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
16 within the specified time may waive the right to appeal the District Court's order. Martinez v.
17 Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: April 7, 2020

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21 CAROLYN K. DELANEY
22 UNITED STATES MAGISTRATE JUDGE

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