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\*E-Filed 1/12/12\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

LINO NSHIMBA,

No. C 10-2982 RS

Plaintiff,

**ORDER GRANTING MOTION TO  
REOPEN ACTION AND TO PERMIT  
PLAINTIFF TO APPEAR *IN PRO SE***

v.

LOWE'S HOME IMPROVEMENT  
WAREHOUSE, INC., et al.,

Defendants.

On December 9, 2011 this action was dismissed pursuant to Rule 37(b)(2)(A)(v) of the Federal Rules of Civil Procedure, as a sanction for plaintiff's failure to comply with discovery obligations. The dismissal order expressly declined to enter default judgment against plaintiff, and provided that the dismissal was without prejudice, because the record did not permit a determination as to the extent to which, if any, plaintiff, as opposed to his counsel, was at fault. Plaintiff, acting without counsel, has now filed a motion to reopen the case and to substitute himself *in pro se* in the place of his counsel of record. Plaintiff asserts that while he had repeated difficulties reaching his counsel to obtain information regarding the status of this case, counsel had reassured him that it was proceeding normally and that there was nothing else he needed to do. Plaintiff contends he only

1 learned this action had been dismissed when he made independent inquiries to Court staff.  
2 Plaintiffs' assertions are plausible in light of the conduct of his attorney reflected in the record.

3 Defendant has opposed the motion to reopen, relying on *West Coast Theater Corp. v. City of*  
4 *Portland*, 897 F.2d 1519 (9th Cir. 1990) for the proposition that, "the faults and defaults of the  
5 attorney may be imputed to, and their consequences visited upon, his or her client. *Id.* at 1523.  
6 *West Coast*, however, in turn relied on *In re Hill*, 775 F.2d 1385 (9th Cir. 1985), which more fully  
7 explained that where "the impact of the sanction imposed is primarily against the client," discretion  
8 should be exercised with caution. *Id.* at 1387. In the analogous context of dismissal under Rule  
9 41(b) for failure to prosecute or to comply with a court order, the *Hill* court observed, "[a]pplication  
10 of the remedy rests within the sound discretion of the court, but since it may severely punish a party  
11 not responsible for the alleged dereliction of his counsel, the Rule should only be invoked in  
12 extreme circumstances." *Id.* (quoting *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437  
13 F.2d 1336 (9th Cir. 1970)).

14 Accordingly, good cause appearing, plaintiff's motion to reopen is granted, as is his motion  
15 to substitute himself *in pro se*. The parties shall appear for a further Case Management Conference  
16 on February 16, 2012, with a joint Case Conference Management Statement to be submitted one  
17 week in advance. Plaintiff may wish to seek assistance from the Legal Help Center, a free service of  
18 the Volunteer Legal Services Program, by calling 415/782.9000 x8657 or signing up for an  
19 appointment on the 15th Floor of the Courthouse, Room 2796. At the Legal Help Center, plaintiff  
20 may speak with an attorney who may be able to provide basic legal help but not legal representation.

21  
22 IT IS SO ORDERED.

23  
24 Dated: 1/11/12



25 RICHARD SEEBORG  
26 UNITED STATES DISTRICT JUDGE  
27  
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