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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANNY ATKINS,  
Plaintiff,  
v.  
BANK OF AMERICA , N.A.,  
Defendant.

Case No. [15-cv-00051-MEJ](#)  
**ORDER DISMISSING CASE FOR  
FAILURE TO PROSECUTE**

**INTRODUCTION**

Plaintiff Danny Atkins has made no appearance in this case in several months and has not responded to the Court’s Order to Show Cause for failure to prosecute. Based on the procedural history discussed below, the Court finds it appropriate to dismiss this case pursuant to Federal Rule of Civil Procedure 41(b). The October 29, 2015 hearing is **VACATED**.

**BACKGROUND**

On January 6, 2015, Atkins brought this case under the California Homeowner Bill of Rights, Cal. Civ. Code § 2923.6, in response to pending foreclosure proceedings initiated by Defendant Bank of America, N.A. Compl. ¶ 1, Dkt. No. 1. On June 19, 2015, Atkins’ counsel, the Mellen Law Firm, filed a Motion to Withdraw as Counsel based on “an irretrievable breakdown of the relationship” and “a serious and irreconcilable conflict of interest between the Mellen Law Firm and Plaintiff.” Mot. at 1, Dkt. No. 18. Atkins failed to respond.

On July 9, 2015, the Court granted the Mellen Law Firm’s Motion, finding Atkins’ failure to communicate with his counsel constituted good cause for withdrawal and that the Mellen Law Firm complied with the requirements for withdrawal under Civil Local Rule 11-5(a) and the

1 California Rules of Professional Conduct. Dkt. No. 21. Because Atkins did not consent to the  
2 withdrawal and no substitution of counsel was filed on his behalf, the Court granted the Motion on  
3 the condition that the Mellen Law Firm serve Atkins with all filings from the Court and Bank of  
4 America until a substitution of counsel was filed. The Mellen Law Firm filed proof of service of  
5 the Order upon Atkins. Dkt. No. 22. Since that time, Atkins has not appeared in this case.

6 On September 30, 2015, Bank of America filed a Request for a Telephonic Conference.  
7 Dkt. No. 23. In its request, Bank of America stated Atkins had failed to respond to outstanding  
8 discovery, failed to meet in confer as required by the undersigned's Discovery Standing Order,  
9 and failed to follow through on its request for a stipulation to extend deadlines to allow Atkins  
10 more time to obtain an attorney. *Id.*

11 Based on these alleged failures, the Court ordered Atkins to show cause why this case  
12 should not be dismissed for failure to prosecute and failure to comply with court deadlines. Dkt.  
13 No. 24. The Court ordered Atkins to file a declaration by October 15, 2015 and warned him that it  
14 may dismiss this case without a hearing if no responsive declaration was filed. The Mellen Law  
15 Firm served the Order to Show Cause on Atkins. Dkt. No. 25. Atkins has again failed to respond.

16 **LEGAL STANDARD**

17 Under Rule 41(b), "the district court may dismiss an action for failure to comply with any  
18 order of the court." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992); *see also Oliva v.*  
19 *Sullivan*, 958 F.2d 272, 273-74 (9th Cir. 1992) (district court may dismiss sua sponte for failure to  
20 meet court deadline). "[T]he district court must weigh the following factors in determining  
21 whether a Rule 41(b) dismissal is warranted: '(1) the public's interest in expeditious resolution of  
22 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4)  
23 the public policy favoring disposition of cases on their merits; and (5) the availability of less  
24 drastic sanctions.'" *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting  
25 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). The *Henderson* factors "are 'not a  
26 series of conditions precedent before the judge can do anything,' but a 'way for a district judge to  
27 think about what to do.'" *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. (In re PPA)*, 460  
28 F.3d 1217, 1226 (9th Cir. 2006) (quoting *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051,

1 1057 (9th Cir. 1998)). Dismissal is appropriate “where at least four factors support dismissal . . .  
2 or where at least three factors ‘strongly’ support dismissal.” *Hernandez v. City of El Monte*, 138  
3 F.3d 393, 399 (9th Cir. 1998).

#### 4 DISCUSSION

5 The first two *Henderson* factors strongly support dismissal. First, “the public’s interest in  
6 expeditious resolution of litigation always favors dismissal.” *Yourish v. Cal. Amplifier*, 191 F.3d  
7 983, 990 (9th Cir. 1999). Second, the Court’s need to manage its docket also weighs in favor of  
8 dismissal. Atkins delayed adjudication of this case by failing to appear on his own behalf or file a  
9 substitution of counsel after the Court granted the Mellen Law Firm’s Motion to Withdraw. He  
10 has also failed to respond to outstanding discovery, failed to meet in confer with Bank of America  
11 as required by the undersigned’s Discovery Standing Order, and failed to follow through on Bank  
12 of America’s request for a stipulation to extend deadlines to allow Atkins more time to obtain an  
13 attorney. Finally, Atkins has not responded to this Court’s show cause order. Non-compliance  
14 with procedural rules and the Court’s orders wastes “valuable time that [the Court] could have  
15 devoted to other . . . criminal and civil cases on its docket.” *Ferdik*, 963 F.2d at 1261.

16 As for the third *Henderson* factor, the mere pendency of a lawsuit cannot constitute  
17 sufficient prejudice to require dismissal. *Yourish*, 191 F.3d at 991. However, “prejudice . . . may .  
18 . . . consist of costs or burdens of litigation.” *In re PPA*, 460 F.3d at 1228. Moreover, “a  
19 presumption of prejudice arises from a plaintiff’s unexplained failure to prosecute.” *Laurino v.*  
20 *Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002). A plaintiff has the burden of  
21 demonstrating a non-frivolous reason for failing to meet a court deadline. *Id.*; *see also Yourish*,  
22 191 F.3d at 991. Here, Atkins failed to respond to the Court’s Order to Show Cause and offered  
23 no explanation for his failure to follow through on discovery and procedural requirements in the  
24 prosecution of this case. Therefore, the Court concludes the third *Henderson* factor also supports  
25 dismissal.

26 The fourth *Henderson* factor, that public policy favors disposition of cases on their merits,  
27 normally weighs strongly against dismissal. *See, e.g., Hernandez*, 138 F.3d at 399. “At the same  
28 time, a case that is stalled or unreasonably delayed by a party’s failure to comply with deadlines . . .

1 . cannot move forward toward resolution on the merits.” *In re PPA*, 460 F.3d at 1228. The Ninth  
2 Circuit has “recognized that this factor ‘lends little support’ to a party whose responsibility it is to  
3 move a case toward disposition on the merits but whose conduct impedes progress in that  
4 direction.” *Id.* (quoting *In re Exxon Valdez*, 102 F.3d 429, 433 (9th Cir. 1996)). Thus, if the  
5 fourth *Henderson* factor weighs against dismissal here, it does so very weakly.

6 Finally, the Court has already attempted less drastic sanctions, without success, and  
7 therefore determines that trying them again would be inadequate or inappropriate. “Though there  
8 are a wide variety of sanctions short of dismissal available, the district court need not exhaust  
9 them all before finally dismissing a case.” *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674  
10 (9th Cir. 1981). Here, the Court already attempted the lesser sanction of issuing an Order to Show  
11 Cause and giving Atkins an opportunity to explain the failure to prosecute his case. As Atkins  
12 failed to respond, another order requiring him to respond is likely to be futile. *See, e.g., Gleason*  
13 *v. World Sav. Bank, FSB*, 2013 WL 3927799, at \*2 (N.D. Cal. July 26, 2013) (finding dismissal  
14 under Rule 41(b) appropriate where the court previously attempted the lesser sanction of issuing  
15 an Order to Show Cause and giving the plaintiff an additional opportunity to re-plead). Further,  
16 the Order to Show Cause warned Atkins of the risk of dismissal; thus he cannot maintain the Court  
17 failed in its “obligation to warn the plaintiff that dismissal is imminent.” *Oliva*, 958 F.2d at 274.  
18 Accordingly, the Court finds the fifth factor also weighs in favor of dismissal.

19 **CONCLUSION**

20 Based on the analysis above, the Court finds at least four of the five *Henderson* factors  
21 weigh in favor of dismissal. As Atkins has failed to prosecute this case, dismissal is appropriate.  
22 However, a less drastic alternative is to dismiss without prejudice. *See Ferdik*, 963 F.2d at 1262.  
23 Dismissal will minimize prejudice to Bank of America, but dismissing the case without prejudice  
24 will preserve the ability of Atkins to seek relief. Thus, “[i]n an abundance—perhaps  
25 overabundance—of caution,” the Court finds dismissal without prejudice is appropriate. *Faulkner*  
26 *v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1021 (9th Cir. 2013) (remanding to the district court in  
27 order to consider whether dismissal should have been without prejudice).

28 Accordingly, the Court **DISMISSES** this case **WITHOUT PREJUDICE** for failure to

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prosecute and failure to comply with the Court’s deadlines and orders.

The Mellen Law Firm shall serve this Order upon Atkins.

**IT IS SO ORDERED.**

Dated: October 20, 2015



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MARIA-ELENA JAMES  
United States Magistrate Judge