

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA COTTER,  
Plaintiff,  
v.  
JP MORGAN CHASE BANK, et al.,  
Defendants.

Case No. [15-cv-01802-MEJ](#)

**ORDER DISMISSING CASE FOR  
FAILURE TO PROSECUTE**

**INTRODUCTION**

Since filing this case in March 2015, Plaintiff Cynthia Cotter (“Plaintiff”) has repeatedly failed to comply with Court orders and deadlines. For the reasons set forth below, the Court finds it appropriate to dismiss this case pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute.<sup>1</sup>

**BACKGROUND**

On March 7, 2007, Plaintiff executed a promissory note, promising to pay Defendant SBMC Mortgage the principal amount of \$440,000.00, plus interest. The Note was secured by a Deed of Trust encumbering the real property located at 3325 San Leandro Street, Oakland, California 94601. After Plaintiff defaulted on her loan payments, Defendant JPMorgan Chase Bank, N.A. initiated non-judicial foreclosure proceedings and subsequently sold the property at a trustee’s sale on January 17, 2015. On March 19, 2015, Plaintiff initiated this action by filing a Complaint in Alameda County Superior Court. Dkt. No. 1. Defendants removed the case to this

---

<sup>1</sup> All parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). Therefore, the undersigned may exercise jurisdiction to conduct all proceedings in this matter.

1 Court on April 21, 2015. *Id.*

2 After Defendants moved to dismiss Plaintiff’s Complaint, the Court referred the case to the  
3 ADR Unit for a telephone conference to assess the case’s suitability for mediation. Dkt. No. 9.  
4 The parties were instructed to participate in a telephone conference by May 26, 2015 and be  
5 prepared to discuss prospects for loan modification and settlement. *Id.* Although the ADR Unit  
6 scheduled a phone conference to take place on May 11, 2015 (Dkt. No. 10), Plaintiff did not  
7 appear and did not otherwise contact the ADR Unit or the Court to explain her absence.  
8 Accordingly, the Court ordered Plaintiff to show cause why her case should not be dismissed for  
9 failure to prosecute. Dkt. No. 15.

10 Plaintiff did not respond to the Order to Show Cause, but instead filed an Opposition to  
11 Defendants’ pending Motions to Dismiss. Dkt. No. 17. The Court then referred the parties back  
12 to the ADR Unit for the telephonic conference. Dkt. No. 18. After Plaintiff appeared for an initial  
13 phone conference on July 14, 2015, she failed to appear for a follow up conference on August 12.  
14 Based on the ADR Unit’s recommendation, the Court set the matter for a Case Management  
15 Conference on September 3, 2015, and ordered the parties to file a joint status report by August  
16 27. Dkt. No. 23. Although Defendants filed a separate report, they stated that Plaintiff failed to  
17 respond to repeated attempts to obtain her input in completing a joint report. Dkt. No. 25. The  
18 Court issued a Second Order to Show Cause, directing Plaintiff to show cause by September 8,  
19 2015 as to why this case should not be dismissed for failure to prosecute and warning her that the  
20 Court would dismiss the case if she failed to file a response by September 8. Dkt. No. 26. As of  
21 the date of this Order, no response has been received.

22 **LEGAL STANDARD**

23 Under Rule 41(b), “the district court may dismiss an action for failure to comply with any  
24 order of the court.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992); *see also Oliva v.*  
25 *Sullivan*, 958 F.2d 272, 273-74 (9th Cir. 1992) (district court may dismiss sua sponte for failure to  
26 meet court deadline). “[T]he district court must weigh the following factors in determining  
27 whether a Rule 41(b) dismissal is warranted: ‘(1) the public’s interest in expeditious resolution of  
28 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4)

1 the public policy favoring disposition of cases on their merits; and (5) the availability of less  
2 drastic sanctions.” *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting  
3 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). The *Henderson* factors “are ‘not a  
4 series of conditions precedent before the judge can do anything,’ but a ‘way for a district judge to  
5 think about what to do.’” *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. (In re PPA)*, 460  
6 F.3d 1217, 1226 (9th Cir. 2006) (quoting *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051,  
7 1057 (9th Cir. 1998)). Dismissal is appropriate “where at least four factors support dismissal . . .  
8 or where at least three factors ‘strongly’ support dismissal.” *Hernandez v. City of El Monte*, 138  
9 F.3d 393, 399 (9th Cir. 1998).

### 10 DISCUSSION

11 Here, the Court finds that the *Henderson* factors support dismissal. First, “the public’s  
12 interest in expeditious resolution of litigation always favors dismissal.” *Yourish v. Cal. Amplifier*,  
13 191 F.3d 983, 990 (9th Cir. 1999). Plaintiff delayed adjudication of the claims in this case by  
14 failing to participate in ADR proceedings and repeatedly disregarding Court orders, including the  
15 most recent Order to Show Cause.

16 Second, the Court’s need to manage its docket also weighs in favor of dismissal. Non-  
17 compliance with procedural rules and the Court’s orders wastes “valuable time that [the Court]  
18 could have devoted to other . . . criminal and civil cases on its docket.” *Ferdik*, 963 F.2d at 1261.

19 As for the third *Henderson* factor, the mere pendency of a lawsuit cannot constitute  
20 sufficient prejudice to require dismissal. *Yourish*, 191 F.3d at 991. However, “prejudice . . . may .  
21 . . . consist of costs or burdens of litigation.” *In re PPA*, 460 F.3d at 1228. Moreover, “a  
22 presumption of prejudice arises from a plaintiff’s unexplained failure to prosecute.” *Laurino v.*  
23 *Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002). A plaintiff has the burden of  
24 demonstrating a non-frivolous reason for failing to meet a court deadline. *Id.*; *see also Yourish*,  
25 191 F.3d at 991. Here, Plaintiff failed to participate in ADR proceedings, failed to cooperate in  
26 the filing of a joint status report (and did not file a separate status report), failed to respond to the  
27 Court’s Order to Show Cause, and has offered no explanation for her failure to prosecute.  
28 Therefore, the Court concludes that the third *Henderson* factor also supports dismissal.



1 case without prejudice will preserve the ability of Plaintiff to seek relief. Thus, “[i]n an  
2 abundance—perhaps overabundance—of caution,” the Court finds that dismissal without  
3 prejudice is appropriate. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1021 (9th Cir. 2013)  
4 (remanding to the district court in order to consider whether dismissal should have been without  
5 prejudice).

6 Accordingly, this case is hereby **DISMISSED WITHOUT PREJUDICE** for failure to  
7 prosecute and failure to comply with the Court’s deadlines and orders.

8 **IT IS SO ORDERED.**

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: September 11, 2015

  
\_\_\_\_\_  
MARIA-ELENA JAMES  
United States Magistrate Judge

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 CYNTHIA COTTER,  
4 Plaintiff,

5 v.

6 JP MORGAN CHASE BANK, et al.,  
7 Defendants.  
8

Case No. [15-cv-01802-MEJ](#)

**CERTIFICATE OF SERVICE**

9  
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
District Court, Northern District of California.

11 That on September 11, 2015, I SERVED a true and correct copy(ies) of the attached, by  
12 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
13 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
receptacle located in the Clerk's office.

14 Cynthia Cotter  
15 3325 San Leandro Street  
16 Oakland, CA 94601

17  
18 Dated: September 11, 2015

19 Richard W. Wieking  
20 Clerk, United States District Court

21 

22 By: \_\_\_\_\_  
23 Chris Nathan, Deputy Clerk to the  
24 Honorable MARIA-ELENA JAMES  
25  
26  
27  
28

United States District Court  
Northern District of California