

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUSAN P. VANDERBURGH,
Plaintiff,

v.

GOLDEN EMPIRE MORTGAGE dba GEM
CAPITAL FUNDING and EMC MORTGAGE
CORPORATION,
Defendants.

No. C 09-01361 CW
ORDER DENYING
PLAINTIFF'S SECOND
MOTION FOR RELIEF
FROM JUDGMENT

Plaintiff moves for leave to file a motion for reconsideration of the Court's March 19, 2010 Order dismissing this case with prejudice and to set aside that Order. Because a motion for reconsideration applies to orders issued before the entry of final judgment, see Civil L.R. 7-9, Plaintiff's motion is construed as a motion for relief from judgment under Federal Rule of Civil Procedure 60(b).

BACKGROUND

On September 30, 2009, the Court issued an Order dismissing Plaintiff's complaint with leave to amend within three weeks from the date of the order. Plaintiff did not file an amended complaint

1 within the three week period. On November 5, 2009, Defendant EMC
2 Mortgage Corporation (EMC) filed, under Federal Rule of Civil
3 Procedure 41(b), a motion to dismiss the complaint with prejudice
4 on the ground that Plaintiff had failed to comply with an order of
5 the Court. On November 25, 2009, the Court issued an Order
6 granting EMC's motion to dismiss. On the same date, judgment was
7 entered in favor of EMC and against Plaintiff.

8 On December 9, 2009, Plaintiff filed her first motion for
9 reconsideration and to vacate the November 25, 2009 Order and
10 Judgment. Plaintiff indicated that, due to faulty mail service,
11 she did not receive the Court's September 30 and November 25 Orders
12 and only became aware of them when she used a friend's account to
13 access the Court's electronic case filing (ECF) system. Plaintiff
14 also moved for access to the Court's ECF system. On February 9,
15 2010, the Court granted Plaintiff's motion for relief from judgment
16 with leave to file an amended complaint within three weeks from the
17 date of the Order. The Court also granted her motion for
18 permission to use the ECF system. The Court mailed these Orders to
19 Plaintiff at an address in San Diego, California that was on file
20 with the Court. On February 16, 2010, the mail was returned as
21 undeliverable. On February 17, 2010, the Court re-mailed the
22 Orders to an address in Escondido, California, that appeared on one
23 of Plaintiff's briefs. Plaintiff did not file an amended complaint
24 within the required time period. On March 19, 2010, the Court
25 issued an Order dismissing the case with prejudice.

26 Plaintiff moves for relief from judgment a second time on the
27 grounds that: she did not know mail was being sent to her San Diego
28 address, her husband has been ill, she is the sole caretaker of her

1 four children and there is new evidence in that Defendant EMC has
2 filed a notice of default against the property at issue.

3 LEGAL STANDARD

4 Federal Rule of Civil Procedure 60(b) provides that, "upon
5 such terms as are just," a court may relieve a party from final
6 judgment for the following reasons:

7 (1) mistake, inadvertence, surprise, or excusable
8 neglect; (2) newly discovered evidence which by due
9 diligence could not have been discovered in time to move
10 for a new trial under Rule 59(b); (3) fraud (whether
11 heretofore denominated intrinsic or extrinsic),
misrepresentation, or other misconduct of an adverse
party; (4) the judgment is void; (5) the judgment has
been satisfied, released or discharged; (6) any other
reason justifying relief from operation of the judgment.

12 Fed. R. Civ. P. 60(b).

13 DISCUSSION

14 Plaintiff's arguments are unavailing. That she was unaware
15 that the Court had sent her mail is not excusable, in light of the
16 fact that this is what gave rise to the first dismissal of her
17 complaint. As discussed above, Plaintiff filed her first motion
18 for relief from judgment on December 9, 2009, arguing that she
19 failed to comply with the Court's order because she had not
20 received the Court's mail. She filed her reply to that motion on
21 December 31, 2009. After her motion was fully briefed, she should
22 have been expecting the Court to rule on it. Given her past
23 history of not receiving mail, Plaintiff should have taken action
24 to ensure that it would not occur again. However, she did not do
25 so. Plaintiff submits that she changed her address, but was too
26 busy to file a notice of change of address with the Court.
27 However, under Civil Local Rule 3-11, a party proceeding pro se has
28 a duty to "promptly file with the Court and serve upon all opposing

1 parties a Notice of Change of Address.”

2 On February 17, 2010, the day after the Court’s mail to
3 Plaintiff was returned as undeliverable, the Court re-mailed its
4 Orders to an address that appeared in the caption of one of
5 Plaintiff’s pleadings, which she now indicates is her current
6 address. See Docket # 46. This mailing was not returned to the
7 Court. Plaintiff failed to respond to this mailing and does not
8 explain why she did not do so. She also does not explain why she
9 did not check on the status of her motion. Two months after the
10 Court’s second mailing, Plaintiff filed a notice of change of
11 address and this second motion for relief from judgment. However,
12 this second delay is inexcusable and is insufficient grounds for
13 vacating the judgment a second time.

14 Plaintiff’s argument that there is new evidence is misplaced.
15 She appears to believe that EMC’s recording of a notice of default
16 against her real property was wrongful because it was done while
17 this case was pending, that is, before the Court issued the March
18 19, 2010 Order dismissing her case. However, Plaintiff never
19 requested, nor did the Court issue, an injunction preventing the
20 filing of a notice of default. In fact, the only substantive
21 ruling in this case was the September 9, 2009 Order dismissing all
22 of Plaintiff’s causes of action with instructions for remedying
23 their deficiencies, if Plaintiff truthfully could do so. Because
24 Plaintiff never filed an amended complaint, she has not stated any
25 cognizable claims against EMC. Therefore, the fact that this case
26 was pending did not preclude EMC from filing a notice of default.
27 Nor does the filing of a notice of default change the fact that
28 Plaintiff has not stated any claim upon which relief may be

1 granted.

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CONCLUSION

3 Accordingly, Plaintiff's motion for relief from judgment is
4 denied.

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6 IT IS SO ORDERED.

7 Dated: July 28, 2010



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CLAUDIA WILKEN
United States District Judge

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