

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED ENGINEERING SOLUTION, INC., a California corporation,)	Case No.: 5:12-CV-00986-LHK
)	
Plaintiff,)	ORDER DISMISSING DEFENDANTS
v.)	KENWORTH TRUCK COMPANY,
)	KALYPSO, INC., PARAMETRIC
PACCAR, INC., a Delaware corporation;)	TECHNOLOGY CORPORATION,
KENWORTH TRUCK COMPANY, an)	ANDREW TIMM, AND JORDAN
unknown entity; KALYPSO, INC., a)	REYNOLDS; ORDER SETTING CASE
corporation; PARAMETRIC TECHNOLOGY)	MANAGEMENT CONFERENCE FOR
CORPORATION, a Massachusetts corporation;)	REMAINING PARTIES
ANDREW TIMM, an individual; JORDAN)	
REYNOLDS, an individual; and DOES 1)	
through 100, inclusive,)	
)	
Defendants.)	

Plaintiff Advanced Engineering Solution, Inc. (“Plaintiff”) filed a complaint against Paccar, Inc. (“Paccar”); Kenworth Truck Company (“Kenworth Truck”); Kalypso Inc. (“Kalypso”), Parametric Technology Corporation (“Parametric Technology”); Andrew Timm (“Timm”); Jordan Reynolds (“Reynolds”); and Does 1 through 100, inclusive (collectively, “Defendants”), on February 27, 2012, asserting ten causes of action. *See* ECF No. 1 (“Complaint”). On March 27, 2012, Paccar filed an Answer and Counterclaims. ECF No. 11. Plaintiff filed an Answer to Paccar’s Counterclaims on April 17, 2012. ECF No. 20. On May 11, 2012, Defendant Timm filed a motion to dismiss Plaintiff’s Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to which Plaintiff failed to respond. *See* ECF No. 28. Accordingly, on July 23, 2012,

1 the Court issued an Order to Show Cause Why this Case Should Not Be Dismissed For Failure to
2 Prosecute. *See* ECF No. 33 (“OSC”). The Court ordered Plaintiff to respond by August 13, 2012,
3 and to appear at an OSC hearing on August 30, 2012.

4 In response to the OSC, Plaintiff explains that it continues to suffer financial hardship and
5 has been unable to find new counsel since The Williams Law Firm withdrew as Plaintiff’s counsel
6 on April 26, 2012.¹ *See* ECF Nos. 21, 24. In light of Plaintiff’s financial hardship, Plaintiff
7 requests: (1) dismissal of this case without prejudice due to financial inability to pursue litigation;
8 or, alternatively, (2) transfer of this case to the United States District Court, Western Division of
9 Texas, Austin Division (“Texas Court”), where Plaintiff is the defendant in a case Plaintiff alleges
10 is related to the instant suit; or, alternatively, (3) that the Court allow Plaintiff 60 additional days to
11 seek and obtain representation. *See* ECF No. 36 (“Response”) at 2. In light of Plaintiff’s motion
12 for dismissal without prejudice pursuant to Federal Rule of Civil Procedure 41(a), the Court
13 provided Defendants an opportunity to respond. Defendants Timm, Parametric Technology, and
14 Paccar filed oppositions to Plaintiff’s request for dismissal without prejudice, transfer, or an
15 extension of time. *See* ECF No. 38 (“Timm Opp’n”); ECF No. 40 (“Parametric Technology
16 Opp’n”); ECF No. 41 (“Paccar Opp’n”). The Court held an OSC hearing on August 30, 2012, at
17 which Plaintiff, Timm, Parametric Technology, and Paccar appeared.

18 **I. Rule 41(a)(1)(A)(i) Dismissal**

19 Pursuant to Federal Rule of Civil Procedure 41(a), a plaintiff may dismiss an action without
20 a court order by filing “a notice of dismissal before the opposing party serves either an answer or a
21 motion for summary judgment.” Fed. R. Civ. P. 41(a)(1)(A)(i). “Unless the notice . . . states
22 otherwise, the dismissal is without prejudice.” Fed. R. Civ. P. 41(a)(1)(B). “Under Rule 41(a)(1),
23 a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of
24 an answer or a motion for summary judgment. . . . The dismissal is effective on filing and no court
25 order is required.” *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (internal citations
26 omitted); *accord United States v. Real Property Located at 475 Marin Lane, Beverly Hills, CA*,

27 _____
28 ¹ Plaintiff retained Structure Law Group for the sole, limited purpose of filing the Response to the
OSC. Response at 1 n.1.

1 545 F.3d 1134, 1145 (9th Cir. 2008). Moreover, a plaintiff need not dismiss the entire action
2 pursuant to Rule 41(a)(1); rather, “[t]he plaintiff may dismiss some or all of the defendants, or
3 some or all of his claims, through a Rule 41(a)(1) notice.” *Wilson*, 111 F.3d at 692 (internal
4 citations omitted). A Rule 41(a)(1)(A)(i) dismissal does not require a particular form of a notice of
5 dismissal, so long as the intent to dismiss is clear. *Goudlock v. Thompson*, Civil No. 08cv00204
6 BEN (RBB), 2011 WL 1167545, at *6 (S.D. Cal. Jan. 28, 2011) (citing *Williams v. Ezell*, 531 F.2d
7 1261, 1263 (5th Cir. 1976) (holding that plaintiff’s failure to cite Rule 41(a)(1) in its “motion for
8 dismissal” was of no consequence where plaintiff’s intent to dismiss was apparent).

9 Here, neither Timm nor Parametric Technology has yet served an answer or a motion for
10 summary judgment, and therefore Plaintiff may dismiss its claims against them without prejudice
11 pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). Likewise, Plaintiff has not yet even
12 filed proof of service of the Summons and Complaint on Defendants Kenworth Truck, Kalypso,
13 and Reynolds, and thus none of those Defendants has yet filed an answer or a motion for summary
14 judgment either.² Accordingly, the Court construes Plaintiff’s request for dismissal as a notice of
15 dismissal pursuant to Rule 41(a)(1)(A)(i) with respect to Timm, Parametric Technology, Kenworth
16 Truck, Kalypso, and Reynolds. Although Timm had filed a motion to dismiss, the Ninth Circuit
17 has held that a pending motion to dismiss is not the equivalent of a motion for summary judgment
18 for purposes of Rule 41(a)(1)(A)(i). *See Miller v. Reddin*, 422 F.2d 1264, 1266 (9th Cir. 1970).
19 The mere fact that Paccar, another co-Defendant, had served an answer prior to Plaintiff’s request
20 for dismissal does not vitiate Plaintiff’s “absolute right to voluntarily dismiss . . . some or all of the
21 defendants” so long as the Defendants whom Plaintiff seeks to dismiss have not yet served an
22 answer or motion for summary judgment. *Wilson*, 111 F.3d at 692. Accordingly, Plaintiffs’ claims
23 against Timm, Parametric Technology, Kenworth Truck, Kalypso, and Reynolds are DISMISSED
24 WITHOUT PREJUDICE.

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27 ² Dismissal of the action against Kenworth Truck and Kalypso without prejudice is also proper
28 under Federal Rule of Civil Procedure 4(m), as Plaintiff has failed to serve them within 120 days of
filing the complaint.

1 Furthermore, although Timm and Parametric Technology insist that they should be awarded
2 costs and fees in the event of a dismissal without prejudice, the Court may impose costs and fees
3 upon a plaintiff as a condition of voluntary dismissal only pursuant to Federal Rule of Civil
4 Procedure 41(a)(2), not Rule 41(a)(1)(A)(i). Rule 41(a)(2) applies to a voluntary dismissal only if
5 a defendant files an answer or a motion for summary judgment before the plaintiff seeks to
6 voluntarily dismiss the action. As previously discussed, neither Timm nor Parametric Technology
7 has filed an answer or a motion for summary judgment, and therefore Rule 41(a)(2) does not apply
8 to them. Accordingly, Timm and Parametric Technology cannot seek attorneys' fees and costs
9 under Rule 41(a)(2), and their request for fees and costs is DENIED.

10 II. Rule 41(b) Dismissal

11 Unlike the other Defendants, Paccar has filed an answer and has asserted counterclaims
12 against Plaintiff, and therefore Plaintiff cannot dismiss this action against Paccar without prejudice
13 absent a court order. *Wilson*, 111 F.3d at 692 (“Once the defendant serves an answer or a motion
14 for summary judgment, however, the plaintiff may no longer voluntarily dismiss under Rule
15 41(a)(1), but must file a motion for voluntary dismissal under Rule 41(a)(2).”). Federal Rule of
16 Civil Procedure 41(a)(2) provides that when a notice of dismissal may no longer be filed and not
17 all parties will stipulate to dismissal, “an action may be dismissed at the plaintiff’s request only by
18 court order, on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2). Here, Plaintiff
19 requests dismissal without prejudice pursuant to Rule 41(a)(2), but Plaintiff makes clear that its
20 request for dismissal without prejudice is contingent upon dismissal of Paccar’s counterclaims as
21 well. *See* Response at 3 (“Nothing by way of this request is intended to seek a dismissal of
22 [Plaintiff’s] claims without the concurrent dismissal of related counterclaims.”). Under Rule
23 41(a)(2), however, “[i]f a defendant has pleaded a counterclaim before being served with the
24 plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection only if the
25 counterclaim can remain pending for independent adjudication.” Because Plaintiff is explicit that it
26 does not seek dismissal against Paccar unless Paccar’s counterclaims are also dismissed, and
27 because Paccar objects to Plaintiff’s request for dismissal without prejudice, the Court cannot
28 construe Plaintiff’s request as a true motion for dismissal pursuant to Rule 41(a)(2).

1 Instead, the Court must consider whether dismissal of this action for failure to prosecute is
2 warranted pursuant to Federal Rule of Civil Procedure 41(b). Rule 41(b) permits involuntary
3 dismissal “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order.” The
4 district court has the inherent power to dismiss a case *sua sponte* for lack of prosecution.
5 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) (citing *Ash v. Cvetkov*, 739 F.2d 493,
6 496 (9th Cir. 1984) (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962))). A dismissal pursuant
7 to Rule 41(b) is committed to the sound discretion of the district court. *Link*, 370 U.S. at 633.
8 “Dismissal, however, is so harsh a penalty it should be imposed as a sanction only in extreme
9 circumstances.” *Thompson v. Hous. Auth. of L.A.*, 782 F.2d 829, 831 (9th Cir. 1986). Before
10 dismissing a case for failure to prosecute, a court should weigh the following factors: “(1) the
11 public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket;
12 (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on
13 their merits[;] and (5) the availability of less drastic sanctions.” *Henderson*, 779 F.2d at 1423
14 (citations omitted).

15 Here, the Court invoked its inherent power to dismiss a case *sua sponte* for lack of
16 prosecution and issued an Order to Show Cause why this case should not be dismissed for failure
17 to prosecute because of Plaintiff’s failure to file an opposition to Defendant Timm’s motion to
18 dismiss and motion to strike. *See* ECF No. 33. Plaintiff’s only explanation for its failure to
19 prosecute this action is its financial inability to retain counsel. Plaintiff is a California corporation
20 and is therefore required to be represented by counsel. *See* Civ. L.R. 3-9(b) (“A corporation,
21 unincorporated association, partnership or other such entity may appear only through a member of
22 the bar of this Court.”). Plaintiff’s counsel withdrew more than four months ago, with Plaintiff’s
23 consent, yet Plaintiff has made no progress in procuring new counsel. *See* ECF Nos. 21, 24.
24 Accordingly, the public’s interest in expeditious resolution of litigation and the Court’s need to
25 manage its docket weigh in favor of dismissal under Rule 41(b).

26 On the other hand, Defendant Paccar has not shown how it has been prejudiced by
27 Plaintiff’s failure to oppose Defendant Timm’s motions to dismiss and to strike, which was the sole
28 basis for the Court’s Order to Show Cause. Paccar did not join in Timm’s motions to dismiss and

1 to strike. Rather, Paccar filed its Answer and Counterclaims on March 27, 2012, and Plaintiff filed
2 its Answer to Paccar's Counterclaims on April 17, 2012. A hearing on Timm's motions was set for
3 September 6, 2012, and the initial case management conference was set for that same day. *See*
4 ECF No. 30. Accordingly, discovery has not yet commenced, and no case schedule has been set.
5 Therefore, at this point, any prejudice suffered by Paccar has been minimal in comparison to the
6 severe prejudice Plaintiff will suffer if this action is dismissed with prejudice pursuant to Rule
7 41(b).

8 Moreover, Plaintiff requests an additional 60 days to locate and retain new counsel,
9 suggesting a desire to continue litigating this action. Although Plaintiff provided no declaration or
10 other evidence in connection with its OSC Response demonstrating Plaintiff's efforts to retain new
11 counsel, Plaintiff explained at the August 30, 2012 OSC hearing that it expects its financial
12 prospects to improve substantially in the near future. Indeed, Plaintiff was able to retain counsel
13 for the limited purpose of filing its OSC Response and appearing at the OSC hearing, further
14 evidencing a good faith effort and intent to pursue this action. Bearing in mind the strong public
15 policy favoring disposition of cases on their merits, the Court finds Plaintiff's actions sufficiently
16 promising and in good faith to overcome the public's interest in expeditious resolution of litigation
17 and the Court's need to manage its docket.

18 Accordingly, the Court grants Plaintiff one last opportunity to locate new counsel and to
19 prosecute this action diligently. An initial case management conference is set for October 24,
20 2012, at 2:00 p.m. By October 3, 2012, Plaintiff shall retain new counsel, who shall: (1) file a
21 notice of appearance; (2) file a status report advising the Court of how Plaintiff intends to proceed
22 with the litigation; and (3) meet and confer with counsel for Paccar pursuant to Federal Rule of
23 Civil Procedure 26(f). Plaintiff's failure to retain new counsel by October 3, 2012, will result in
24 dismissal of this action against Paccar with prejudice.³

25 III. CONCLUSION

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27 ³ Because the Court grants Plaintiff's request for additional time to retain new counsel, the Court
28 need not rule on Plaintiff's request in the alternative to transfer this case to the United States
District Court, Western Division of Texas, Austin Division, pursuant to 28 U.S.C. § 1404(a). In
any event, Plaintiff has not filed a proper § 1404(a) motion to transfer venue.

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For the foregoing reasons, Plaintiff's claims against Defendants Timm, Parametric, Kenworth Trucking, Kalypso, and Reynolds are DISMISSED WITHOUT PREJUDICE. An initial case management conference for the remaining parties (Plaintiff and Defendant Paccar) is set for October 24, 2012, at 2:00 p.m.

IT IS SO ORDERED.

Dated: September 12, 2012



LUCY H. KOH
United States District Judge