

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
 FLEXBORROW LLC, et al., :  
 :  
 Plaintiffs, :  
 :  
 -against- :  
 :  
 TD AUTO FINANCE LLC, :  
 :  
 Defendant. :  
 -----X

ORDER  
16-CV-6359 (JFB)(ARL)

**FILED**  
 IN CLERK'S OFFICE  
 U.S. DISTRICT COURT E.D.N.Y.  
 ★ JUL 18 2017 ★

JOSEPH F. BIANCO, District Judge:

LONG ISLAND OFFICE

By Memorandum and Order dated June 16, 2017, the Court granted defendant's motion to dismiss the complaint and granted plaintiffs leave to file an amended complaint within thirty days of that decision. Plaintiffs' time to file an amended complaint has since elapsed, and plaintiffs have neither filed an amended complaint nor otherwise communicated with the Court. Accordingly, for the reasons that follow, this case is dismissed for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) with prejudice to the federal RICO claims and without prejudice to the New York State law claims for lender liability and fraud.

Rule 41(b) authorizes a district court to "dismiss a complaint for failure to comply with a court order, treating the noncompliance as a failure to prosecute." *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962)); see *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996) ("[D]ismissal [pursuant to Rule 41(b)] is a harsh remedy and is appropriate only in extreme situations."); *Wynder v. McMahon*, 360 F.3d 73, 79 (2d Cir. 2004) ("Rule [41(b)] is intended to serve as a rarely employed, but useful, tool of judicial administration available to district courts in managing their specific cases and general caseload."). Moreover, it is well-settled that a district court "may act *sua sponte* to dismiss a suit for failure to prosecute." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citing *Link*, 370 U.S. at 630); see also *Le Sane*

*v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001) (“Although the text of Fed. R. Civ. P. 41(b) expressly addresses only the case in which a defendant moves for dismissal of an action, it is unquestioned that Rule 41(b) also gives the district court authority to dismiss a plaintiff’s case *sua sponte* for failure to prosecute.”).

Courts have repeatedly found that “[d]ismissal of an action is warranted when a litigant, whether represented or instead proceeding *pro se*, fails to comply with legitimate court directives.” *Yulle v. Barkley*, No. 9:05-CV-0802, 2007 WL 2156644, at \*2 (N.D.N.Y. July 25, 2007) (citations omitted). A district court contemplating dismissal of a plaintiff’s claim for failure to prosecute and/or to comply with a court order pursuant to Rule 41(b) must consider:

- 1) the duration of plaintiff’s failures or non-compliance; 2) whether plaintiff had notice that such conduct would result in dismissal; 3) whether prejudice to the defendant is likely to result; 4) whether the court balanced its interest in managing its docket against plaintiff’s interest in receiving an opportunity to be heard; and 5) whether the court adequately considered the efficacy of a sanction less draconian than dismissal.

*Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 63 (2d Cir. 2000). In deciding whether dismissal is appropriate, “[g]enerally, no one factor is dispositive.” *Nita v. Conn. Dep’t of Env. Prot.*, 16 F.3d 482, 485 (2d Cir. 1994); see *Peart v. City of New York*, 992 F.2d 458, 461(2d Cir. 1993) (“[D]ismissal for want of prosecution is a matter committed to the discretion of the trial judge [and] the judge’s undoubtedly wide latitude is conditioned by certain minimal requirements.”) (quoting *Merker v. Rice*, 649 F.2d 171, 173-74 (2d Cir. 1981)).

Here, plaintiffs have failed to communicate with the Court since June 16, 2017 and did not file an amended complaint by July 17, 2017. Under these circumstances, no sanction less than dismissal will alleviate the prejudice to defendant of continuing to keep this action open. Moreover, the Court needs to avoid calendar congestion and ensure an orderly and expeditious disposition of cases. Therefore, all the above-referenced factors favor dismissal of the instant case.

Accordingly, the above-referenced factors favor dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) with prejudice to the federal RICO claims and without prejudice to the New York State law claims for lender liability and fraud. The Clerk of the Court shall enter judgment accordingly and close this case.

SO ORDERED.

S/ Joseph F. Bianco

JOSEPH F. BIANCO

UNITED STATES DISTRICT JUDGE

Dated: July 18, 2017

Central Islip, New York