

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50059

(Summary Calendar)

RESOLUTION TRUST CORPORATION,
IN ITS CAPACITY AS CONSERVATOR
OF FIDELITY FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Plaintiff-Appellant,

versus

DISCOVERY LEARNING CENTERS I,
LTD.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CV-943)

(July 21, 1994)

Before SMITH, EMILIO M. GARZA, PARKER, Circuit Judges.

PER CURIAM:*

The Resolution Trust Corporation ("RTC") appeals the district court's dismissal with prejudice of its action against Discovery Learning Centers I, Ltd. ("Discovery") for failure to prosecute.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

See Fed. R. Civ. P. 41(b).¹ "We review a dismissal with prejudice for failure to prosecute for abuse of discretion." *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992)." Rule 41(b) allows the district court to dismiss an action upon the motion of a defendant, or upon its own motion, for failure to prosecute." *Id.* at 1190. "We will affirm dismissals with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." *Id.* at 1191 (footnote omitted).

The record fails to show that the district court employed lesser sanctions, or that it expressly determined that lesser sanctions would not prompt diligent prosecution. Moreover, aside from RTC's failure to respond to the magistrate judge's show cause order, nothing in the record supports a finding of delay or contumacious conduct.² See *id.* n.6 ("Generally, where a plaintiff

¹ Rule 41(b) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

² Because the district court was apprised of the status of the action through Discovery's status reports, we reject Discovery's argument that RTC's failure to file what would seemingly be duplicative case status reports amounted to a clear record of delay or contumacious conduct which would support the dismissal with prejudice. See *Link v. Wabash R.R.*, 82 S. Ct. 1386, 1388 (1962) ("The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.").

has failed only to comply with a few court orders or rules, we have held that the district court abused its discretion in dismissing the suit with prejudice."). We therefore hold that the district court abused its discretion by dismissing the action with prejudice.

Accordingly, we VACATE and REMAND the district court's judgment for further proceedings consistent with this opinion.