

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE

Plaintiff,

vs.

FREDERICK DIMOND, ROBERT DIMOND,
and MOST HOLY FAMILY MONASTERY,
a New York Not-for-Profit Corporation

Defendants

**AFFIDAVIT IN
OPPOSITION TO
DEFENDANTS' MOTION
FOR VOLUNTARY
DISMISSAL OF
DEFENDANTS'
COUNTERCLAIMS
WITHOUT PREJUDICE**

Index No. 08-cv-00347-JTC

WYNN L. BOWMAN, ESQ. hereby declares, under penalty of perjury:

1. I am an attorney admitted to practice before this Court and attorney for the Plaintiff Eric E. Hoyle ("Plaintiff") in this action.

2. As an initial matter, Defendants' Certificate of Service for the pending motion states that the papers were served electronically to notify K. Wade Eaton, Esq., Chamberlain, D'Amanda, Oppenheimer & Greenfield, Plaintiff's previous attorney in this matter. *See*, Docket No. 125, Attachment #2.

3. Notwithstanding, I submit this Affidavit in Opposition to Defendants' motion pursuant to Fed. R. Civ. P. 41 for dismissal without prejudice with the right to re-file counterclaims in any subsequent legal proceeding or if any claim is brought by Eric Hoyle or on his behalf against the above named Defendants.

BACKGROUND

4. In addition to the “Background” detailed by Defendants’ Affidavit in support of its motion, please filings from the CM/ECF website in this case, consisting of sixteen (16) pages with one hundred twenty-five (125) docket entries spanning five (5) years and seven (7) months.

DISCUSSION

A. Fed. R. Civ. P. 41(a)(2)

5. The purpose of Rule 41(a)(2) is to permit the moving party to dismiss the action while avoiding prejudice to the opposing party through the imposition of curative conditions. The primary purpose is to protect the interests of the non-moving party. *Burnette v. Godshall*, 828 F. Supp. 1439, 1442 (N.D. Cal. 1993).

6. A dismissal without prejudice should be denied when the opposing party will suffer “plain legal prejudice.” *Bosteve Ltd. V. Marauszwiki*, 110 F.R.D. 257, 259 (E.D.N.Y. 1986).

7. The mere filing of a responsive pleading or motion is not, without more, a basis to deny a voluntary dismissal without prejudice, however, the expense associated with preparation of a summary judgment motion may be considered in determining whether the non-moving party has been prejudiced.

8. The factors most commonly considered on a motion for a voluntary dismissal are: (1) the extent to which the suit has progressed, including the opposing party’s effort and expense in preparing for trial, (2) the moving party’s diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of the party’s

explanation for the need to dismiss. *Gap, In. v. Stone Int'l Trading, Inc.*, 169 F.R.D. 584, 588 (S.D.N.Y. 1997).

9. Other factors that have been cited include whether the motion is made after the opposing party has made a dispositive motion or at some other critical juncture in the case. *Schandelmeier v. Otis Div. of Baker-Material Handling Corp.*, 143 F.R.D. 102, 103 (W.D.Pa. 1992 (case pending for 20 months; dismissed with prejudice).

10. A Dismissal may be denied when it is sought late in the litigation and the opposing party has been put to great effort and expense in defending the action. *Zagano v. Fordham Univ.*, 900 F.2d 12, 14-15 (2d Cir. 1990) (affirming denial of voluntary dismissal of Title VII action, which had been pending for over four years and had involved extensive discovery).

11. In this case, the Plaintiff has been put to great effort and expense in defending the action. The Plaintiff has paid over Two Hundred Thirty Thousand Dollars (\$230,000) in attorneys' fees, and was required to return to the area from out of state for depositions on at least three (3) occasions, including paying thousands of dollars for airfare, lodging and expenses.

12. To allow an appeal from a dismissal without prejudice invites circumvention of the final judgment rule, and therefore should generally not be permitted. *Gannon Int'l, Ltd. V. Blocker*, 684 F.3d 785, 791 (8th Cir. 2012) (“in most cases, a district court abuses its discretion when it frustrates the limitations on federal appellate jurisdiction by entering a Rule 41(a)(2) order dismissing remaining claims without prejudice for the purpose of facilitating the immediate appeal of an earlier interlocutory order”).

13. The Defendants are aware that it is Plaintiff's intention to file an appeal of the dismissal of his claims and the denial of his motion to file a Second Amended Complaint. The

Defendants are moving to dismiss their counterclaims to allow Plaintiff to file an appeal. Moreover, Defendants are requesting a dismissal without prejudice to be able to have their counterclaims available to them if Plaintiff is successful on his appeal. Therefore, the reason that the Defendants are moving to dismiss their claims without prejudice is to circumvent the final judgment rule.

14. A voluntary dismissal without prejudice under Rule 41(a)(2) renders the proceedings a nullity and leaves the parties as if the action had never been brought. *Robinson v. Willow Glen Acad.*, 895 F.2d 1168, 1169 (7th Cir. 1990).

15. The statute of limitations is generally not tolled by the commencement of an action that is later voluntarily dismissed by court order. *Neal v. Xerox Corp.*, 991 F. Supp. 494, 498 (E.D. Va. 1998) (rule that statute of limitations is not tolled by commencement of action that is later voluntarily dismissed).

16. It is clear that Defendants are attempting to have the Court give them permission to re-file their claim if the Plaintiff is successful on his appeal. In fact, they have stated that they have no intention of pursuing the claim unless there is a subsequent legal proceeding brought by Eric Hoyle against the Defendants. It is clear that Defendants' requests for conditions is an attempt to circumvent a statute of limitations defense in subsequent proceedings.

17. Rule 41(a)(2) provides that the district court may impose terms and conditions on an order granting a voluntary dismissal, the purpose of this rule is to protect the non-moving party. *Cross Westchester v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989) (the purpose of authorizing terms and conditions on a voluntary dismissal is to protect the non-moving party from prejudice).

18. The conditions the court may impose vary, imposing few or no conditions early in a case, but courts impose more stringent conditions when the case has reached an advanced stage. *Brooks v. State Bd. Of Elections*, 173 F.R.D. 547, 549-550 (S.D. Ga 1997) (dismissal with prejudice was appropriate condition).

19. The Court may not impose conditions on non-moving party to protect the moving party from the consequences of the dismissal. *Cross Westchester v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989) (district court could not dismiss on condition that non-moving defendant waive statute of limitations defense once action was refilled).

20. Any conditions attached to a dismissal without prejudice should be to protect the non-moving party. Defendants' request for the right to re-file counterclaims in any subsequent legal proceeding is clearly to protect their interest and have no support in law. As such, even in the event that the Court deems it appropriate to grant Defendants' motion to dismiss, there should be no conditions attached for the benefit of Defendants.

21. Payment of non-moving party's cost of litigation is proper condition of dismissal under Rule 41(a)(2), and may be imposed sua sponte. Cost should ordinarily be awarded as a condition to a dismissal without prejudice, and if the district court denies them, the court should provide its reasons for the denial. *Schwarz v. Folloder*, 767 F.2d 125, 127 (5th Cir. 1985)

22. The purpose of an award of attorney's fees and costs is to reimburse the non-moving party for litigation costs incurred in view of the risk that the same suit will be refilled and will result in duplicative expenses. *Gap, Inc. v. Stone Int'l Trading, Inc.*, 169 F.R.D. 584, 588-589 (S.D.N.Y. 1997), *aff'd*, 125 F.3d 845 (2d Cir. 1997)

23. In determining whether to award costs and attorney's fees to non-moving party after a voluntary dismissal without prejudice, courts generally consider the following factors: (1)

any excessive and duplicative expense of a second litigation; (2) the effort and expense incurred by a non-moving party in preparing for trial; (3) the extent to which the litigation has progressed; and (4) the moving party's diligence in moving to dismiss. *U.S. ex rel. Haskins v. Omega Instr.*, 25 Supp. 2d 510, 515-516 (D.N.J. 1998) (awarding costs and fees because moving party delayed their voluntary dismissal).

24. The non-moving party should be awarded the costs incurred in opposing the moving party's motion for a voluntary dismissal. *King v. City of Berkeley*, 1991 U.S. Dist. LEXIS 16225, at *3 (N.D. Cal. Oct. 30, 1991) (courts "often order" payment of opposing cost).

25. It is readily apparent that the factors of this case dictate that Plaintiff should be awarded cost in opposing the Defendants' motion. Furthermore, this Court should award Plaintiff costs and attorney's fees to reimburse him in view that the same suit will be refilled and result in duplicative expenses.

26. The Plaintiff will: (1) have excessive and duplicative expenses of a second litigation in any subsequent legal proceeding; (2) Plaintiff has already incurred over Two Hundred and Thirty Thousand Dollars (\$230,000) and spent countless hours in preparing for trial, including four trips back to the area; (3) the litigation has been pending for almost six (6) years, with over One Hundred and Twenty-Five (125) docket entries; and (4) the defendants have failed to diligently move to dismiss their claims.

27. Moreover, the Defendants have failed to diligently move to dismiss their claims since Plaintiff's claims were dismissed and the only claims remaining in the case were their counterclaims.

28. The Plaintiff's claims were dismissed on June 22, 2012, and Plaintiff's motion for reconsideration was denied on November 9, 2012. The Defendants failed to move to dismiss

