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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Thomas D. Grabinski and Deanne)
Grabinski, husband and wife,

No.CV 04-01751-PHX-MHM

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Plaintiffs,

ORDER

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vs.

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National Union Fire Insurance Company)
of Pittsburgh, PA, a Pennsylvania)
corporation, Steven Kent, a single man,)

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Defendants.

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Currently before the Court is Plaintiffs’ Motion to Dismiss Without Prejudice (Dkt.#79), Defendants’ Motion for Summary Judgment (Dkt#81), and Defendants’ Motion for Summary Disposition of its Motion for Summary Judgment (Dkt.#104). After reviewing the papers, the Court issues the following Order.

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I. Plaintiffs’ Motion to Dismiss

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Apparently, Plaintiffs have decided that it would be in their best interest to withdraw their claims and ask this Court to grant their motion to dismiss without prejudice. (Dkt.#79) Defendants call this motion “a transparent attempt to obtain the litigation stay the Court previously denied” and urge that this Court should only grant a dismissal if it is with prejudice, or alternatively if the Court grants Defendants their reasonable costs and attorneys fees. (Dkt.#103 at 1-2) Defendants have already apparently incurred a great deal of legal

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1 expenses preparing their motion for summary judgment and conducting discovery in this
2 case. (Dkt.#103 at 14-15)

3 Federal Rule of Civil Procedure 41(a)(2) explains that “an action may be dismissed at the
4 plaintiff’s request only by court order, on terms that the court considers proper. The decision
5 to grant or deny a voluntary dismissal under Rule 41(a)(2) is not mandatory but is within the
6 Court’s discretion. Stevedoring Serv. v. Armilla Int’l, B.V., 889 F.2d 919, 921 (9th Cir.
7 1989). A plaintiff may dismiss an action without prejudice under Rule 41(a)(2) “so long as
8 the defendant will not be prejudiced.” Id. Prejudice includes “the defendant’s effort and
9 expense of preparation for trial, excessive delay and lack of diligence on the part of the
10 plaintiff in prosecuting the action, . . . and the fact that a motion for summary judgment has
11 been filed by the defendant.” Ratkovich v. Smith Kline, 951 F.2d 155, 158 (7th Cir. 1991).

12 Here, dismissal without prejudice appears inappropriate. As explained below, Defendants
13 have fully briefed a motion for summary judgment that demonstrates that they are entitled
14 to judgment; granting Plaintiffs’ motion to dismiss would enable Plaintiffs to escape from
15 this adverse ruling. Moreover, Plaintiffs appear to be using Rule 41(a)(2) to avoid the
16 consequence of their failure to diligently pursue the case. For these reasons, Plaintiffs’
17 Motion to Dismiss is denied.

18 **II. Defendants’ Motion for Summary Judgment**

19 Defendants move for summary judgment on Plaintiffs’ abuse of process claim, the sole
20 remaining claim in this litigation. (Dkt.#81) In essence, they argue that Grabinski has not
21 established a genuine issue of material fact precluding dismissal of his abuse of process
22 claims against Defendants because Defendants did not disobey a court order and because
23 Grabinski can present no facts establishing an improper motive. (Dkt.#81 at 11-12)
24 Defendants further argue that the alleged improper statements of National Union’s counsel
25 at trial fail both as a matter of law and for lack of evidentiary support. (Dkt.#81 at 13) They
26 also argue that Grabinski’s allegations regarding National Union’s deposition of Grabinski
27 fail as a matter of law. (Dkt. #81 at 14) This motion was filed on November 26, 2008.
28 (Dkt.#81)

1 Plaintiffs failed to respond to this motion. On January 1, 2009, Defendants filed a Motion
2 for Summary Disposition of Its Motion for Summary Judgment. (Dkt.#104) Plaintiffs did
3 not respond to this motion either, despite Defendants' identification therein of Local Rule of
4 Civil Procedure 7.2(I), which provides that if "counsel does not serve and file the required
5 answering memoranda . . . such noncompliance may be deemed a consent to the denial or
6 granting of the motion and the Court may dispose of the motion summarily." The Ninth
7 Circuit has approved of this rule in Ching v. Lewis, 963 F.2d 378 (9th Cir. 1992).

8 This rule is discretionary, not mandatory; however, where, as here, it appears that there
9 is no genuine issue of material fact, the law and facts Defendants cite in their motion appear
10 to support judgment in their favor, and Plaintiffs have failed to respond to Defendants'
11 motion, the Court finds that it is appropriate to grant Defendants Motion for Summary
12 Judgment.

13 **Accordingly,**

14 **IT IS HEREBY ORDERED** denying Plaintiffs' Motion to Dismiss (Dkt.#79).

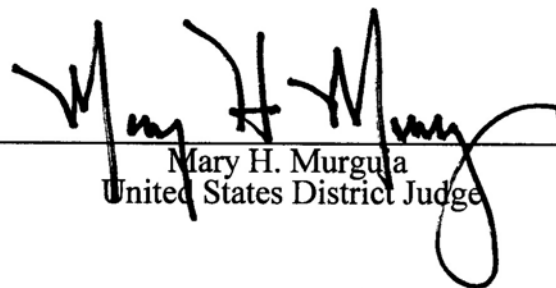
15 **IT IS FURTHER ORDERED** granting Defendants' Motion for Summary Judgment
16 (Dkt.#81).

17 **IT IS FURTHER ORDERED** granting Defendants' Motion for Summary Disposition
18 of its Motion for Summary Judgment (Dkt.#104).

19 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment accordingly.

20 DATED this 10th day of June, 2009.

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Mary H. Murgula
United States District Judge