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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bobby A. Ervin,

Plaintiff,

vs.

Lisa Michelle Estopare,

Defendant.

No. CV 09-8024-PCT-NVW

ORDER

Plaintiff Bobby M. Ervin moves the Court to dismiss his complaint against Defendant Lisa M. Estopare without prejudice pursuant to Fed. R. Civ. P. 41(a)(2). Mr. Ervin’s Complaint (doc. # 1) is dismissed without prejudice. The parties’ discovery dispute (doc. ## 61, 62) is therefore moot.

Fed. R. Civ. P. 41(a)(2) provides that “an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.” The district court must determine: (1) whether the dismissal should be allowed at all; (2) whether the dismissal should be with or without prejudice; and (3) what terms and conditions, if any, are appropriate. *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993), *aff’d sub nom. Burnette v. Lockheed Missiles & Space Co.*, 72 F.3d 766, 767 (9th Cir. 1995).

1 In the absence of “plain legal prejudice” to the defendant, courts generally allow
2 dismissal. *Id.* Legal prejudice is prejudice to some legal interest, claim, or argument.
3 *Westlands Water Dist. v. United States*, 100 F.3d 94 (9th Cir 1996). Plain legal prejudice
4 does not result because the dismissal may cause defendant to incur substantial expense in
5 preparing for trial. *Burnette*, 828 F. Supp. at 1443 (citing *Durnham v. Fla. E. Coast Ry. Co.*,
6 385 F.2d 366, 368 (5th Cir. 1967)). “The court may dismiss the claim even when the
7 plaintiff would gain a tactical advantage thereby.” *Id.* (citing *Hamilton v. Firestone Tire &*
8 *Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982)).

9 The district court has discretion to dismiss with or without prejudice. *Hargis v.*
10 *Foster*, 312 F.3d 404, 412 (9th Cir. 2002). The factors considered in determining whether
11 dismissal should be with or without prejudice are the same as those considered in deciding
12 whether to allow dismissal at all: (1) the defendant’s effort and expense in preparing for trial;
13 (2) the plaintiff’s lack of diligence in prosecuting the action; and (3) the sufficiency of
14 plaintiff’s explanation for seeking the dismissal. *See Burnette*, 828 F. Supp. at 1443-44
15 (citing *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987)).

16 Costs may be awarded as a condition to a dismissal without prejudice, but are not
17 mandatory. *See Westlands*, 100 F.3d at 97-98. In deciding whether to award costs and
18 attorneys fees, courts consider: (1) any excessive and duplicative expense of a second
19 litigation; (2) the effort and expense incurred by a defendant in preparing for trial; (3) the
20 extent to which the litigation has progressed; and (4) the plaintiff’s diligence in moving to
21 dismiss. *Williams v. Peralta Cmty. Coll. Dist.*, 227 F.R.D. 538, 540 (N.D. Cal 2005).

22 In this case, Ms. Estopare will not suffer legal prejudice if Mr. Ervin’s complaint is
23 dismissed. Ms. Estopare has not counterclaimed or requested affirmative relief, and no
24 dispositive motions have been filed by the parties. None of her defenses are compromised
25 by dismissal. Furthermore, Mr. Ervin does not appear to be unjustifiably delaying the
26 prosecution of the case. He seeks dismissal on the ground that he is suffering from various
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1 life-threatening illnesses and is therefore unable to proceed with his action. Thus, Mr.
2 Ervin's complaint is dismissed without prejudice.

3 It also appears that Ms. Estopare has incurred few, if any, expenses in defending this
4 action. She is not represented by an attorney, and the case is still in the early stages of the
5 discovery phase. In fact, Ms. Estopare has not even requested costs. Therefore, the Court
6 will not award Ms. Estopare costs. No other conditions for dismissal are warranted.

7 IT IS THEREFORE ORDERED that Mr. Ervin's Complaint (doc. # 1) is dismissed
8 without prejudice.

9 IT IS FURTHER ORDERED that Mr. Ervin's Notice of Dispute (doc. # 61) and Ms.
10 Estopare's Notice of Discovery Dispute (doc. # 62) are denied as moot. The clerk shall
11 terminate this action.

12 DATED October 26, 2009

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Neil V. Wake
United States District Judge