

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

JAKE MOSBY and
FRANCES MARIE MOSBY

PLAINTIFFS

v.

No. 4:10CV00770 JLH

JOYCE WILLIAMS, Individually and
in her Official Capacity

DEFENDANT

ORDER

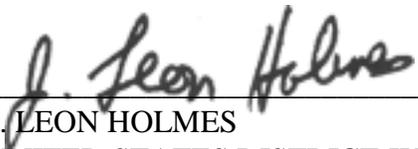
The complaint in this action was originally filed as an adversary proceeding in a bankruptcy case. The defendant filed an answer and a motion to dismiss or for summary judgment in the adversary proceeding and then filed a motion in this court asking that the reference be withdrawn. After the Court granted the motion to withdraw the reference, the plaintiffs filed a motion to dismiss without prejudice, to which the defendant has objected. The plaintiffs have replied saying that they are entitled to dismiss without prejudice pursuant to Fed. R. Civ. P. 41 because no answer has been filed. That assertion is incorrect. As noted above, an answer and a motion for summary judgment were filed before the reference was withdrawn, so the plaintiffs are not entitled to dismiss without prejudice as a matter of right. See Fed. R. Civ. P.41(a).

In considering a motion to dismiss without prejudice under Rule 41(a)(2), the Court must consider (1) the defendant's effort and expense in preparing for trial; (2) excessive delay and lack of diligence in prosecuting the case on the part of the plaintiff; (3) insufficient explanation of the need to take a dismissal; and (4) the fact that a motion for summary judgment has been filed. *Paulucci v. City of Duluth*, 826 F. 2d 780, 782 (8th Cir. 1987). "A party may not dismiss simply to avoid an adverse decision or seek a more favorable forum." *Cahalan v. Rohan*, 423 F. 3d 815, 818

(8th Cir. 2005). This case was filed only recently, so the defendant has not expended a great amount of effort and expense in this action. It is difficult to say from the record that the plaintiffs have failed to prosecute this action diligently. On the other hand, the defendant has filed a motion for summary judgment, and the plaintiffs have offered little by way of explanation of the need to dismiss. The record shows that the plaintiffs brought a similar if not identical action in 2006, and the court granted summary judgment in favor of the defendant in that action.

After considering all of the factors, the Court has concluded that the motion to dismiss without prejudice should be and hereby is denied. Document # 10.

IT IS SO ORDERED this 16th day of July, 2010.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE