

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

DENNY LEE ELMER

PLAINTIFF

v.

CIVIL No. 4:10-cv-4159

**JOHNNY GODBOLT
and NURSE JOAN McCLEAN**

DEFENDANTS

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Now before the Court is the Plaintiff's Motion to Dismiss this action. ECF No. 6. Denny Elmer ("Plaintiff"), currently an inmate in the Hempstead County Detention Facility in Hope, Arkansas, filed this civil rights action under 42 U.S.C. § 1983. Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) (2005), the Honorable Jimm Larry Hendren, Chief United States District Judge, referred this case to the undersigned for the purpose of making a report and recommendation.

I. Background

Plaintiff filed his Complaint on November 16, 2010, ECF No. 1, alleging denial of medical care. Plaintiff specifically alleged he had "been passing blood exceedingly bad" and that "over due time it has gotten worse." *Id.* at ¶ V. Plaintiff indicated he filled out medical requests and asked to go to the hospital due to abdominal cramping and the passing of blood in his stool. *Id.* The grievance attached by Plaintiff to his complaint indicated his medical requests had been denied. *Id.*

On November 22, 2010, this Court directed service of Plaintiff's Complaint on the named Defendants – Johnny Godbolt and Joan McClean. ECF No. 5. Service has not yet been perfected upon either Defendant.

In his Motion to Dismiss, Plaintiff states he is seeking to dismiss his case because the Defendants are "doing the proper things, now to help me out. Medically [sic]". ECF No. 6.

II. Applicable Law

Federal Rule of Civil Procedure 41(a)(1)(A)(i) provides that a plaintiff may, without the court's permission, voluntarily dismiss an action “before the opposing party serves either an answer or a motion for summary judgment.”

III. Discussion

Service has not yet been perfected on Defendants in this matter, and Defendants have not filed an Answer. Thus, Plaintiff is entitled to a voluntary dismissal.

IV. Conclusion

It is the Report and Recommendation of the undersigned that Plaintiff’s Motion to Dismiss, ECF No. 6, be **GRANTED** and this case be voluntarily dismissed, without prejudice.

It is further recommended that if service has not been perfected on Defendants at the time of any adoption of this report and recommendation, that such service be **QUASHED**.

Furthermore, having filed this action, Plaintiff remains liable for the filing fee. *See e.g., In re Tyler*, 110 F.3d 528, 529-30 (8th Cir. 1997) (holding even if the petition is dismissed, the full filing fee is still assessed because the PLRA makes prisoners responsible for their filing fees the moment the prisoner brings a civil action or file an appeal.).

DATED this 13th day of December 2010.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U. S. MAGISTRATE JUDGE