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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ERIC MARTIN,

Plaintiff,

v.

DAVID WINETT, et al.,

Defendants.

CASE NO. 1:04-cv-05358-LJO-BAM PC

ORDER REQUIRING PLAINTIFF TO NOTIFY COURT IF HE WISHES TO WITHDRAW HIS REQUEST FOR VOLUNTARY DISMISSAL

(ECF No. 147)

THIRTY-DAY DEADLINE

Plaintiff Eric Martin (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Following the United States Court of Appeals for the Ninth Circuit order affirming the grant of Defendants’ motion for summary judgment, but finding that Plaintiff’s Eighth Amendment claims against Defendant Winnett and Due Process claims against Defendants Johnson, Stainer, and Winnett had been improperly dismissed at the screening stage, this action is proceeding on the limited claims revived by the Ninth Circuit. On November 22, 2011, Defendants filed a motion for summary judgment. After being granted three extensions of time to file an opposition, Plaintiff filed a notice of voluntary dismissal, requesting the action be dismissed without prejudice on March 30, 2012. (ECF No. 147.) The Court ordered Defendants to file an opposition or statement of non-opposition to Plaintiff’s motion for voluntary dismissal, and Defendants filed an opposition on April 30, 2012. (ECF No. 148, 149.)

“[U]nder Rule 41(a)(1)(I), ‘a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for summary judgment.’” Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc., 193 F.3d 1074, 1077 (9th Cir. 1999) (quoting Wilson v.

1 City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997)). In the instant action, Defendants filed a motion
2 for summary judgment prior to Plaintiff filing his notice of voluntary dismissal, therefore Plaintiff
3 is not entitled to voluntary dismissal under Rule 41. Pursuant to Rule 41(a)(2) “an action may be
4 dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.”

5 This action was filed on March 1, 2004. Given the age of this action, the history of the
6 proceedings, and the pending summary judgment motion, the Court finds that it would not be proper
7 to dismiss this action without prejudice, as requested by Plaintiff. If the Court grants Plaintiff’s
8 request for voluntary dismissal, the action will be dismissed with prejudice.

9 Accordingly, IT IS HEREBY ORDERED that:

- 10 1. Plaintiff shall notify the Court, within thirty days from the date of service of this
11 order, if he wishes to withdraw his request for voluntary dismissal.
- 12 2. If Plaintiff’s request for voluntary dismissal is withdrawn, Plaintiff shall file an
13 opposition to Defendants’ motion for summary judgment, within thirty days from the
14 date of service of this order; and
- 15 3. If Plaintiff’s request for voluntary dismissal is not withdrawn within thirty days, the
16 court will issue an order dismissing this action, with prejudice.

17 IT IS SO ORDERED.

18 **Dated: May 2, 2012**

/s/ **Barbara A. McAuliffe**
UNITED STATES MAGISTRATE JUDGE