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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAMIEN DeVOID,

Case No. 1:09-cv-00015-OWW-GBC (PC)

Plaintiff,

ORDER GRANTING MOTION FOR
DISMISSAL, ACTION DISMISSED WITH
PREJUDICE

v.

D. HERNANDEZ, et al.,

Defendants.

CLERK TO CLOSE CASE

_____ /

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s First Amended Complaint, filed September 28, 2009 (ECF No. 7), alleging Eighth Amendment violations against Defendants M. Mulkern and M. Pasion. (ECF No. 8.) On March 22, 2010, Defendants filed an Answer and, on January 31, 2011, filed a Motion for Summary Judgment. (ECF Nos. 16 & 20.) After being ordered to respond (ECF No. 21) and receiving an extension of time (ECF No. 24), on May 12, 2011 Plaintiff filed a notice stating that he would no longer like to pursue this suit. (ECF No. 25.) On May 16, 2011, Defendants filed a Statement of Non-Opposition to Plaintiff’s Notice. (ECF No. 26.)

In response to Plaintiff’s notice, on May 20, 2011, the Court issued a Notice informing the parties of its intent to dismiss Plaintiff’s action with prejudice because of the

1 stage in proceedings. (ECF No. 27.) Plaintiff was given twenty days to object. (Id.) He
2 has filed nothing in response.

3 Under Rule 41(a)(1), a plaintiff has an absolute right to voluntarily dismiss his action
4 prior to service by the defendant of an answer or a motion for summary judgment. Concha
5 v. London, 62 F.3d 1493, 1506 (9th Cir. 1995) (citing Hamilton v. Shearson-Lehman
6 American Express, 813 F.2d 1532, 1534 (9th Cir. 1987)); see also Wilson v. City of San
7 Jose, 111 F.3d 688, 692 (9th Cir. 1997). Once the defendant serves an answer or a
8 motion for summary judgment, however, the plaintiff may no longer voluntarily dismiss
9 under Rule 41(a)(1), but must file a motion for voluntary dismissal under Rule 41(a)(2).
10 Fed.R.Civ.P. 41(a). Unlike a Rule 41(a)(1) notice of dismissal, a Rule 41(a)(2) motion
11 requires court approval. Concha, 62 F.3d at 1506.

12 Because Defendants have answered and filed a Motion for Summary Judgment,
13 Plaintiff cannot voluntarily dismiss this action under Rule 41(a)(1). Thus, the Court deems
14 Plaintiff's Notice a Motion for Voluntary Dismissal under Rule 41(a)(2), which requires court
15 approval.

16 Pursuant to Plaintiff's Motion, the Court HEREBY ORDERS that:

- 17 1. Plaintiff's Motion for Voluntary Dismissal under Rule 41(a)(2) is GRANTED;
- 18 2. This action is DISMISSED WITH PREJUDICE; and
- 19 3. Clerk to close to case.

20 IT IS SO ORDERED.

21 **Dated:** June 21, 2011

22 /s/ Oliver W. Wanger
23 UNITED STATES DISTRICT JUDGE
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