

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SAMUEL K. PORTER,

1:09-cv-01244-AWI-GSA-PC

Plaintiff,

ORDER GRANTING MOTION TO DISMISS
PURSUANT TO RULE 41
(Doc. 30.)

v.

CAPTAIN JENNINGS, et al.,

ORDER DISMISSING ACTION IN ITS
ENTIRETY WITHOUT PREJUDICE

Defendants.

ORDER DIRECTING CLERK TO CLOSE FILE

_____/

Plaintiff Samuel K. Porter (“plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the complaint on July 17, 2009. (Doc. 1.) The case now proceeds on Plaintiff’s amended complaint filed November 23, 2009. (Doc. 28.) On February 12, 2010, the court dismissed the amended complaint for failure to comply with Rule 8(a), with leave to amend. (Doc. 29.) On March 12, 2010, plaintiff filed a motion to dismiss the complaint, without prejudice to re-filing the complaint after exhausting administrative remedies. (Doc. 30.)

In Wilson v. City of San Jose, the Ninth Circuit explained:

Under Rule 41(a)(1), 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. Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995) (citing Hamilton v. Shearson-Lehman American Express, 813 F.2d 1532, 1534 (9th Cir. 1987)). A plaintiff may dismiss his action so long as the plaintiff files a notice of

1 dismissal prior to the defendant's service of an answer or motion for summary
2 judgment. The dismissal is effective on filing and no court order is required. Id.
3 The plaintiff may dismiss some or all of the defendants, or some or all of his
4 claims, through a Rule 41(a)(1) notice. Id.; Pedrina v. Chun, 987 F.2d 608, 609-
5 10 (9th Cir. 1993). The filing of a notice of voluntary dismissal with the court
6 automatically terminates the action as to the defendants who are the subjects of
7 the notice. Concha, 62 F.2d at 1506. Unless otherwise stated, the dismissal is
8 ordinarily without prejudice to the plaintiff's right to commence another action for
9 the same cause against the same defendants. Id. (citing McKenzie v. Davenport-
10 Harris Funeral Home, 834 F.2d 930, 934-35 (9th Cir. 1987)). Such a dismissal
11 leaves the parties as though no action had been brought. Id.

12 Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997). No defendant has filed an answer
13 or motion for summary judgment in this action. Therefore, plaintiff's motion shall be granted.

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Plaintiff's motion to dismiss the complaint is GRANTED;
- 16 2. This action is DISMISSED in its entirety without prejudice; and
- 17 3. The Clerk of the Court is DIRECTED to close the file in this case and adjust the
18 docket to reflect voluntary dismissal of this action pursuant to Rule 41(a).

19 IT IS SO ORDERED.

20 **Dated:** April 26, 2010

21 /s/ Anthony W. Ishii
22 CHIEF UNITED STATES DISTRICT JUDGE