

1
2
3
4
5 **UNITED STATES DISTRICT COURT**

6 EASTERN DISTRICT OF CALIFORNIA

7
8 ELVIA ARACELA MELENDEZ-
9 SALAZAR,

10 Plaintiff,

11 v.

12 GOLDEN EMPIRE TOWING, INC., et al.,

13 Defendants.

Case No. 1:17-cv-00151-SAB

ORDER SETTING MOTION TO DISMISS
DEFENDANT AOC ADJUSTERS FRESNO,
LTD. FOR HEARING ON AUGUST 23,
2017, AT 10:00 A.M.

(ECF No. 21)

14 This action was filed on February 3, 2017. On July 25, 2017, Plaintiff filed a motion to
15 dismiss Defendant AOC Adjusters Fresno, Ltd. only. (ECF No. 21.) The motion is captioned
16 joint motion to dismiss and is signed by Plaintiff and Defendant AOC Adjusters Fresno, Ltd.,
17 who request that the Court dismiss with prejudice Defendant AOC Adjusters Fresno, Ltd. only.

18 The Court notes that a plaintiff can dismiss a defendant without a court order pursuant to
19 Federal Rule of Civil Procedure 41(a)(1)(A)(ii), which provides that a “plaintiff may dismiss an
20 action without a court order by filing a stipulation of dismissal signed by all parties who have
21 appeared.” Fed. R. Civ. P. 41(a)(1)(A)(ii). Here, the request to dismiss Defendant AOC
22 Adjusters Fresno, Ltd. is only signed by Plaintiff and Defendant AOC Adjusters Fresno, Ltd.
23 Defendant Golden Empire Towing, Inc. has appeared in this action, and therefore the motion to
24 dismiss (ECF No. 21) is not a sufficient voluntary dismissal under Rule 41(a)(1).

25 The Court also notes that Plaintiff cannot voluntarily dismiss Defendant AOC Adjusters
26 Fresno, Ltd. pursuant to Rule 41(a)(1)(A)(i). “[U]nder Rule 41(a)(1)(A)(i), ‘a plaintiff has an
27 absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a
28 motion for summary judgment.’ ” Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc., 193

1 F.3d 1074, 1077 (9th Cir. 1999) (quoting Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir.
2 1997)). Here, Defendant AOC Adjusters Fresno, Ltd. has filed an answer.

3 As Plaintiff captioned and docketed the filing as a motion to dismiss and it is insufficient
4 under Rule 41(a)(1), the Court construes it as a motion to dismiss under Rule 41(a)(2). A motion
5 for voluntary dismissal under Rule 41(a)(2) is addressed to the sound discretion of the district
6 court. Hamilton v. Firestone Tire & Rubber Co. Inc., 679 F.2d 143, 145 (9th Cir. 1982).

7 The Local Rules provide that all motions shall be noticed on the motion calendar of the
8 assigned judge and the responding party shall file an opposition or statement of non-opposition
9 fourteen days prior to the noticed hearing date. L.R. 230(b). In this instance, Plaintiff did not set
10 the motion for hearing and the motion does not address whether Defendant Golden Empire
11 Towing, Inc. opposes the dismissal of Defendant AOC Adjusters Fresno, Ltd. Therefore, the
12 Court sets the motion for hearing on August 23, 2017, at 10:00 a.m. in courtroom 9 before the
13 undersigned. Defendant Golden Empire Towing, Inc. shall file an opposition or statement of
14 non-opposition on or before August 9, 2017.

15 Alternately, if the request to dismiss Defendant AOC Adjusters Fresno, Ltd. is
16 unopposed, Plaintiff may withdraw the motion to dismiss and the parties may file a stipulation
17 signed by all parties who have appeared pursuant to Rule 41(a)(1)(A)(ii).

18 Based on the foregoing, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff's motion to dismiss (ECF No. 21) is set for hearing on August 23, 2017,
20 at 10:00 a.m. in courtroom 9 before the undersigned; and
- 21 2. Defendant Golden Empire Towing, Inc. shall file an opposition or statement of
22 non-opposition on or before August 9, 2017.

23 IT IS SO ORDERED.

24 Dated: July 26, 2017

25 
26 _____
27 UNITED STATES MAGISTRATE JUDGE
28