UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EDWARD B. SPENCER, Plaintiff, v. WILLIAM J. SCHLAERTH, *et al*., Defendants.	Case No. 1:17-CV-00797-AWI-EPG ORDER TERMINATING DEFENDANT J. CLARK KELSO ORDER TERMINATING MOTIONS AS MOOT (ECF Nos. 5, 25, 30)

Edward B. Spencer ("Plaintiff") is a state prisoner proceeding *pro se* in this action. On May 23, 2017, this case was removed from state court. (ECF No. 1). Defendant Kelso thereafter filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. (ECF No. 5). On June 7, 2017, Plaintiff filed a motion to remand to state court. (ECF No. 10). On June 14, 2017, Plaintiff filed a motion for leave to file a Second Amended Complaint. (ECF No. 12).

The Court entered an Order on August 30, 2017 recognizing that Plaintiff's motion for leave to amend was filed 19 days after Defendant Kelso's Rule 12(b) motion to dismiss, and under Rule 15, Plaintiff had the right to file an amended complaint as a matter of course, *see* Fed. R. Civ. P. 15(a)(1)(B) (providing that a plaintiff may amend its pleading once as matter of course after service of a Rule 12(b) motion). (ECF No. 18). Plaintiff's amended complaint was filed on October 10, 2017. (ECF No. 24).

Defendant Kelso responded to the Second Amended Complaint by filing a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 25). Likewise, on October 24, 2017, Defendants Bruce Barnett and CCHCS filed a Rule 12(b)(6) motion to dismiss. (ECF No. 26). On November 20, 2017, Plaintiff filed an opposition to Defendants Bruce Barnett and CCHCS's motion to dismiss. (ECF No. 29).

Also on November 20, 2017, Plaintiff filed a self-titled "Motion for an Order to Dismiss Defendant J. Clark Kelso without prejudice." (ECF No. 30). The motion moves to "dismiss Defendant J. Clark Kelso from all [causes] of action." The motion further states that Plaintiff "chooses to have the case heard in State Court without J. Clark Kelso as a Defendant."

Defendant Kelso has not filed an answer or motion for summary judgment. In light of Plaintiff's notice, the claims against Defendant Kelso have been terminated, *see* Fed. R. Civ. P. 41(a)(1)(A)(i); *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997), and dismissed without prejudice. *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995) ("Even if the defendant has filed a motion to dismiss, the plaintiff may terminate his action voluntarily by filing a notice of dismissal under Rule 41(a)(1).").

The case shall continue against Defendants Bruce Barnett and CCHCS. As the Court explained in its August 30, 2017 Order (ECF No. 18, p. 2), Plaintiff's June 7, 2017 motion to remand (ECF No. 10) is moot upon the filing of the Second Amended Complaint. *See Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528 (8th Cir. 1996) (after plaintiff sought leave to file a new complaint, holding that plaintiff's action equates to acceptance of federal jurisdiction and thus remand was no longer appropriate because a "procedural defect in removal, such as untimeliness, does not affect the federal court's subject matter jurisdiction and therefore may be waived").

Thus, if Plaintiff intends to have this case proceed in state court as he has indicated in his November 20, 2017 motion, he must either:

1) file a notice of voluntary dismissal without prejudice as to Defendants Bruce Barnett and CCHCS in this case and re-file the case in state court; or
2) File a motion to remand for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(c).

Accordingly, the Clerk is directed to terminate J. Clark Kelso as a Defendant and the motions filed by Defendant Kelso (ECF Nos. 5, 25) as they are now found as moot.

The Clerk shall also terminate as moot the motion filed by Plaintiff on November 20, 2017. (ECF No. 30). Because Rule 41 is self-executing, a motion was not required.

IT IS SO ORDERED.

Dated: **November 27, 2017**

/s/ Eric P. Grosjean
UNITED STATES MAGISTRATE JUDGE