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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SOPHIA ELLIOTT, et al.,
Plaintiffs,
v.
ROBERT ROSS, et al.,
Defendants.

Case No. 1:17-cv-01214-LJO-SAB
ORDER DISREGARDING DISMISSAL OF
DEFENDANTS COUNTY OF FRESNO
AND ANDRES SOLIS AND DIRECTING
CLERK OF THE COURT TO
ADMINISTRATIVELY TERMINATE
FRESNO COUNTY SHERIFF'S
DEPARTMENT AS A DEFENDANT IN
THIS MATTER

(ECF No. 44)

FOURTEEN DAY DEADLINE

Dominic Elliott, a minor, by and through his guardian ad litem, and Sophia Elliott (collectively "Plaintiffs") filed this action in Fresno County Superior Court on August 11, 2017, against Deputy Andres Solis, Fresno County Sheriff's Department, County of Fresno, Robert Ross, and Patrick J. McComb. (ECF No. 1-1.) On September 8, 2017, Defendants removed this action to the Eastern District of California. (ECF No. 1.) Defendants' motion to dismiss and motion for a more definite statement were granted on November 13, 2017. (ECF Nos. 16, 17.)

Plaintiffs filed a first amended complaint on November 27, 2017, against Deputy Andres Solis, County of Fresno, Robert Ross, and Patrick J. McComb. (ECF No. 18.) On December 11, 2017, Defendants County of Fresno and Solis filed an answer to the first amended complaint. (ECF No. 19.) On December 28, 2017, Defendants McComb and Ross filed an answer to the

1 complaint. (ECF No. 21.)

2 On March 27, 2019, Defendants McComb and Ross filed a motion for summary
3 judgment that is currently pending before the district judge. (ECF No. 36.)

4 On April 18, 2019, Plaintiffs filed an application for an order of dismissal of Defendants
5 Solis and County of Fresno. (ECF No. 44.) Plaintiffs' application states that the County of
6 Fresno does not have any objection to this request and it is unknown whether Defendant
7 McComb will stipulate to the dismissal. (Id.)

8 Rule 41(a) of the Federal Rules of Civil Procedure allows a party to dismiss some or all
9 of the defendants in an action through a Rule 41(a) notice. Wilson v. City of San Jose, 111 F.3d
10 688, 692 (9th Cir. 1997). Under Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, 'a
11 plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant
12 of an answer or a motion for summary judgment.' ” Commercial Space Mgmt. Co., Inc. v.
13 Boeing Co., Inc., 193 F.3d 1074, 1077 (9th Cir. 1999) (quoting Wilson v. City of San Jose, 111
14 F.3d 688, 692 (9th Cir. 1997)). Here, all defendants have filed an answer, so Plaintiffs cannot
15 voluntarily dismiss the defendants pursuant to Rule 41(a)(1)(A)(i).

16 Federal Rule of Civil Procedure 41(a)(1)(A)(ii) provides that a “plaintiff may dismiss an
17 action without a court order by filing a stipulation of dismissal signed by all parties who have
18 appeared.” Fed. R. Civ. P. 41(a)(1)(A)(ii). Plaintiffs have not filed a stipulation to the dismissal
19 of Defendants Fresno County and Solis and have indicated that it is unknown whether Defendant
20 McComb will stipulate to the dismissal. Further, the application does not address Defendant
21 Ross or Solis and whether they are willing to stipulate to the dismissal.

22 A party may also dismiss an action by filing a motion requesting the Court to dismiss the
23 action. Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal under Rule 41(a)(2) is
24 addressed to the sound discretion of the district court. Hamilton v. Firestone Tire & Rubber Co.
25 Inc., 679 F.2d 143, 145 (9th Cir. 1982). Plaintiffs have not filed a motion for dismissal which
26 complies with Local Rule 230.

27 Plaintiffs' application for an order of dismissal is defective under Rule 41(a) because it is
28 not a signed stipulation by all parties who have appeared and it is not a motion under Rule

1 41(a)(2). If Plaintiffs wish to dismiss specified defendants from this action, they are required to
2 comply with the procedures set forth in Rule 41 by filing a stipulation that complies with Rule
3 41(a)(1)(A)(ii) or a motion under Rule 41(a)(2).

4 The Court also notes that the Fresno County Sheriff's Department was not terminated as
5 a defendant although they were not named in the first amended complaint. The Court shall
6 therefore direct that the defendant be administratively terminated in this action.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. Plaintiffs' application for an order of dismissal is DISREGARDED;
- 9 2. Plaintiffs' shall file a request for dismissal that complies with Rule 41 of the
10 Federal Rules of Civil Procedure within **fourteen (14) days** of the date of service
11 of this order; and
- 12 3. The Clerk of the Court is DIRECTED to administratively terminate Fresno
13 County Sheriff's Department as a defendant in this matter.

14
15 IT IS SO ORDERED.

16 Dated: April 19, 2019


UNITED STATES MAGISTRATE JUDGE