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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ALVION S. THOMPSON,  
Plaintiff,  
v.  
SAN JOSE POLICE DEPARTMENT, et al.  
Defendants.

Case Number C 05-2195 JF (PVT)  
ORDER<sup>1</sup> DISMISSING ACTION  
WITHOUT PREJUDICE

Plaintiff, proceeding *pro se*, filed this action on May 27, 2005, and on the same date requested leave to proceed *in forma pauperis* and requested appointment of counsel. Those motions were denied. On August 16, 2005, the Court granted Plaintiff's request for voluntary dismissal of the action without prejudice. On October 26, 2005, Plaintiff filed a one-page document requesting that the action be reopened and that Plaintiff be permitted to proceed *in forma pauperis*. On November 4, 2005, the Court granted Plaintiff's motion to reopen the case upon the condition that he pay the filing fee, and denied his renewed application to proceed *in forma pauperis*. Plaintiff filed an amended complaint on January 19, 2006 and paid the \$250

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<sup>1</sup> This disposition is not designated for publication and may not be cited.

1 filing fee on January 25, 2006. Plaintiff filed proofs of service with respect to Defendants San  
2 Jose Police Department and the California Department of Corrections shortly thereafter.

3 On February 22, 2006, Defendant City of San Jose, erroneously sued as the “San Jose  
4 Police Department,” filed a motion to dismiss the action for lack of subject matter jurisdiction  
5 pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to  
6 Federal Rule of Civil Procedure 12(b)(6). The motion was set for hearing on April 28, 2006.  
7 The Department of Corrections did not file a motion or answer.

8 On February 22, 2006, Plaintiff filed a motion for default judgment, which motion was  
9 declined by the Clerk of the Court the following day. Plaintiff filed opposition to Defendant  
10 City’s motion on March 3, 2006, but failed to serve a copy of the opposition upon Defendant  
11 City; as a result, the City did not file a reply.

12 On April 24, 2006, Plaintiff filed a motion for voluntary dismissal of the action, stating  
13 that he now believes that the action properly should be pursued in state court, and requesting a  
14 refund of his \$250 filing fee. Plaintiff failed to serve a copy of the motion upon Defendant City;  
15 as a result, the City did not file a response to the motion.

16 Pursuant to Federal Rule of Civil Procedure 41(a), a plaintiff is entitled to dismiss an  
17 action without leave of court at any time before the defendant answers or files a motion for  
18 summary judgment. Such dismissal is without prejudice, except that such dismissal operates as  
19 an adjudication on the merits “when filed by a plaintiff who has once dismissed in any court of  
20 the United States or of any state an action based on or including the same claim.” Fed. R. Civ. P.  
21 41(a). It is not clear whether Plaintiff’s prior dismissal of *this* action comes within this latter  
22 provision, in light of the fact that the action subsequently was reopened. Because Plaintiff  
23 wishes to dismiss the instant action in order to pursue it in state court, the Court concludes that  
24 dismissing the instant action on the merits would be unjust. Accordingly, the Court will grant  
25 Plaintiff’s motion to dismiss the instant action without prejudice to Plaintiff’s filing of the same  
26 claims in state court. The Court cannot grant Plaintiff’s request for a refund of his \$250 filing  
27 fee; Plaintiff has not cited, and the Court has not discovered, any authority that would permit  
28 such a refund.

**ORDER**

- (1) Plaintiff's motion for voluntary dismissal of the instant action is GRANTED as set forth above;
- (2) Defendant City's motion to dismiss is MOOT;
- (3) The action is DISMISSED WITHOUT PREJUDICE; and
- (4) The Clerk of the Court shall close the file.

DATED: May 1, 2006



JEREMY FOGEL  
United States District Judge

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1 Copies of Order served on:

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3 Plaintiff pro se:

4 Alvion S. Thompson  
5 96 Almaden Street # 305  
6 San Jose, CA 95113

6 Alvion S. Thompson  
7 1352 Old Rose Pl.  
8 San Jose, CA 95128

8 Counsel for Defendant City of San Jose:

9 Michael J. Dodson  
10 Office of the City Attorney  
11 City of San Jose  
12 200 East Santa Clara Street  
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