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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EMILIA DUARTE,

vs.

HECTOR BARDALES,

Plaintiff,

Defendant.

CASE NO. 06-CV-0158 W (NLS)
**ORDER GRANTING
PLAINTIFF'S NOTICE OF
VOLUNTARY DISMISSAL (Doc.
No. 198)**

I. BACKGROUND

On May 20, 2008 a Ninth Circuit Court of Appeal reversed this Court's November 9, 2006 Order denying Plaintiff Emilia Duarte's ("Duarte") Federal Rule of Civil Procedure¹ 59 motion to alter or amend the Court's earlier judgment entered against her. Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008). The Ninth Circuit determined that equitable tolling applied to the Hague Convention's Article 12 and remanded the action to this Court to determine whether tolling applied and, if so, reach the petition's merits. Id. On July 31, 2008 Defendant Hector Bardales ("Bardales") moved to set the matter on an expedited calendar and to adjudicate the case by submitting declarations to the Court. (Doc. No. 192.) On August 13, 2008 the Court issued an Order to Show Cause why the case should not proceed by declaration and on

¹All future references to "Rule" shall be to the Federal Rules of Civil Procedure.

1 summary judgment. (Doc. No. 194.) To date, Duarte has not responded to the Order.

2 On August 22, 2008, however, Duarte moved under Rule 41(a)(2) to voluntarily
3 dismiss all claims in the action. (Doc. No. 198.) Duarte's counsel represents that
4 counsel will be taking medical leave and unable to represent Duarte in this action.
5 (*Beverly Baker-Kelly Decl.* ¶ 3.) Counsel also represents that she has been unable to find
6 anyone to handle Duarte's case on a *pro bono* basis. (*Id.* ¶ 4.) Duarte, herself, consents
7 to the dismissal on the basis that it would be unfair to both parties and to the children
8 to prolong this case. (*Notice* ¶ 3.) Defendant Bardales opposes the motion of voluntary
9 dismissal and argues that because Duarte never had a realistic chance of prevailing, any
10 dismissal should be contingent upon the payment of his costs and attorneys' fees.
11 (*Objections* 3.)

12 13 **II. LEGAL STANDARD & ANALYSIS**

14 Duarte seeks to voluntarily dismiss her action pursuant to Federal Rule of Civil
15 Procedure 41. Bardales, in opposition, conditionally agrees to dismissal provided that
16 he recover his costs and attorney's fees. In support, Bardales provides some evidence
17 tending to substantiate several recognized defenses to Duarte's Hague petition. First,
18 Bardales argues that Duarte's statute of limitations cannot be equitably tolled because
19 Duarte at all times knew where Bardales and the children were residing. (*Objections*
20 3-7.) Furthermore, Bardales offers evidence that the children were healthy, well-
21 settled, and preferred living in San Diego with their father. (*Id.* 7-8.) Finally, Bardales
22 insists that Duarte would not have prevailed because she placed the children in "grave
23 risk" by constant exposure to physical, sexual, and emotional abuse (*Id.* 8-10.)

24 Once an answer or summary judgment motion has been filed, a plaintiff may only
25 voluntarily dismiss a case by court order. Fed. R. Civ. P. 41(a)(2). Upon granting a
26 voluntary dismissal, courts typically condition the dismissal on plaintiff's reimbursing
27 defendants for court costs and attorney fees. Cauley v. Wilson, 754 F.2d 769, 771 (7th
28 Cir. 1985). However, in close cases a district court does not abuse its discretion by

1 refusing to award attorneys' fees. See Stevedoring Services of America v. Armilla Int'l
2 B.V., 889 F.2d 919, 922 (9th Cir. 1989) (refusing to award costs and attorney fees
3 where plaintiff had a "realistic chance of prevailing").

4 The Court is not prepared to hold that Duarte did not have a "realistic chance
5 of prevailing." Of course, Duarte's and her counsel's dilatory behavior throughout this
6 lawsuit clouds the issue. But the Court is mindful of the complicated issues and facts
7 where children and cross-border Hague petitions are involved. Additionally, the Ninth
8 Circuit found in favor of Duarte on appeal, which suggests that any prejudice in the
9 Court below was more than harmless error. The Court regrets that Duarte and
10 Bardales have invested so much time, effort, and money into this dispute, across three
11 courts, without a resolution on the merits. Nevertheless, the Court **GRANTS** Duarte's
12 motion for voluntary dismissal, **OVERRULES** Bardales' objections and **DENIES**
13 Bardales' requests for costs and attorney's fees, and **DISMISSES** Duarte's Complaint.

14 Duarte next asks for a Court Order for her to exercise her visitation rights.
15 (*Notice ¶ 5.*) This request is **DENIED**. As the California Family Court has already
16 awarded sole custody to Bardales, this Court cannot entertain jurisdiction to alter or
17 amend the state court judgment. Clements v. Airport Auth. of Washoe County, 69
18 F.3d 321, 326 (9th Cir. 1995) (citing 28 U.S.C. § 1738). The Court also **DENIES**
19 Duarte's request to entertain continuing jurisdiction over her costs and hypothetical
20 motion for attorneys' fees.² (*Notice ¶¶ 6-9.*) Duarte has chosen to dismiss her action;
21 the Court will not retain jurisdiction over a dismissed case.

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27 ²Plaintiff further states "In the alternate, [Plaintiff] requests the Court to instruct her
28 if other measures are appropriate" in order to collect court costs and attorney's fees. (*Notice*
¶¶ 7, 9.) As the Court has repeatedly advised Plaintiff's counsel, the Court is not in the
position to offer legal consultation to either party.

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2 **III. CONCLUSION**

3 For the above reasons, the Court **GRANTS** Duarte's motion for voluntary
4 dismissal and **DISMISSES** Duarte's Complaint. Additionally, the Court **DENIES**
5 Bardales' request for attorney's fees.

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7 **IT IS SO ORDERED.**

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9 **Dated: September 4, 2008**

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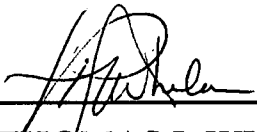
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Hon. THOMAS J. WHELAN
United States District Court
Southern District of California