

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-00933-BNB

ROBERT DALE BAARS, JR.,

Applicant,

v.

WARDEN KEVIN MILYARD, SCF, and
JOHN SUTHERS, The Attorney General of the State of Colorado,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 12 2010

GREGORY C. LANGHAM
CLERK

ORDER DISMISSING CASE

Applicant, Robert Dale Baars, Jr., a State of Colorado prisoner, initiated this action on April 12, 2010, by submitting to the Court an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, a "Pro Se Motion to Dismiss § 2254 Action Without Prejudice," and a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 in a Habeas Corpus Action. Magistrate Judge Boyd N. Boland reviewed the filings and entered an order on April 26, 2010 that denied Mr. Baars leave to proceed *in forma pauperis* and directed him to pay the \$5.00 filing fee. Mr. Baars paid the filling fee on May 10, 2010.

In the "Pro Se Motion to Dismiss § 2254 Action Without Prejudice," Mr. Baars requests that the Court dismiss the instant action without prejudice so that he may exhaust his state court remedies. The Court must construe the Motion liberally because Applicant is a *pro se* litigant. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Fed. R. Civ. P. 41(a)(1)(A)(i) provides that “the [applicant] may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment” No answer has been filed by Respondent in this action. Further, a voluntary dismissal under Rule 41(a)(1)(A)(i) is effective immediately upon the filing of a written notice of dismissal, and no subsequent court order is necessary. **See** J. Moore, Moore's Federal Practice ¶ 41.02(2) (2d ed. 1995); **Hyde Constr. Co. v. Koehring Co.**, 388 F.2d 501, 507 (10th Cir. 1968).

Therefore, the Court will construe the Motion as a Notice of Dismissal filed pursuant to Rule 41(a)(1)(A)(i) and order the file closed as of April 12, 2010. **See Hyde Constr. Co.**, 388 F.2d at 507. The Court will dismiss the instant action without prejudice to allow Mr. Baars to return to state court to exhaust his state court remedies. The Court, however, refrains from determining whether Mr. Baars is able to proceed with a 28 U.S.C. § 2254 action in this Court under 28 U.S.C. § 2244(d). Accordingly, it is

ORDERED that the action is dismissed pursuant to Fed. R. Civ. P. 41(a)(1). It is FURTHER ORDERED that the voluntary dismissal is without prejudice and is effective as of April 12, 2010, the date Applicant filed the Notice in this action.

DATED at Denver, Colorado, this 11th day of May, 2010.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge, for
ZITA LEESON WEINSHIENK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

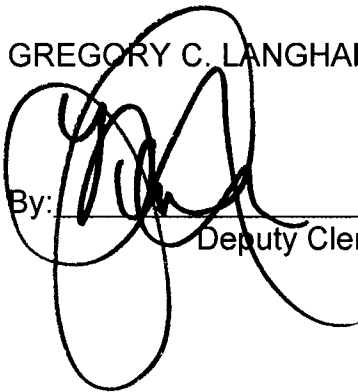
CERTIFICATE OF MAILING

Civil Action No. 10-cv-00933-BNB

Robert Dale Baars, Jr.
Prisoner No. 82327
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 5/12/10

GREGORY C. LANGHAM, CLERK

By:  _____
Deputy Clerk