

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 15-cv-02854-PAB-NYW

MICHAEL A. PEREZ,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,
OFFICER SHEPARD,
OFFICER J. LEE,
NURSE MCKIEVER,
LIEUTENANT ANTHONY, and
ERIC EARWIN,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge [Docket No. 37] filed on March 23, 2016 (the "Recommendation"). On March 9, 2016, plaintiff filed a letter in which he indicated that he did not intend to file this lawsuit. Docket No. 32 at 1. Plaintiff stated that the lawsuit was filed by another inmate without plaintiff's permission and that plaintiff wishes to "pull out [of] this civil action." *Id.* at 2. On March 21, 2016, Magistrate Judge Wang held a status conference in which plaintiff repeated, under oath, that he never authorized the other inmate to file suit on his behalf and that he does not want to pursue this case. Docket No. 37 at 2. At the same status conference, counsel for defendants indicated that he had no objection to dismissal of this action. *Id.* Accordingly, the magistrate judge recommends

dismissal of this lawsuit. The magistrate judge also recommends that this case “should not count as a ‘strike’ against [p]laintiff Michael A. Perez for the purposes of the Prisoner Litigation Reform Act.” Docket No. 37 at 3.¹

The Recommendation states that objections to the Recommendation must be filed within fourteen days after service on the parties. See 28 U.S.C. § 636(b)(1)(C). Given the unusual circumstances of this case, the fact that plaintiff stated under oath that he had no intention of filing this lawsuit and does not wish for the lawsuit to continue, and the fact that counsel for defendants has indicated that he does not object to dismissal of this lawsuit, the Court finds that dismissal with prejudice is appropriate at this time.

Plaintiff did not voluntarily file this lawsuit and promptly cooperated in seeking dismissal. The Court therefore exercises its discretion pursuant to Fed. R. Civ. P. 54(d) and will not award defendants their costs. *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004) (“Whether or not a prevailing party shall be awarded costs is ‘within the court’s sound discretion’”) (quoting *Homestake Mining Co. v. Mid-Continent Exploration Co.*, 282 F.2d 787, 804) (10th Cir. 1960)).

¹The Prisoner Litigation Reform Act includes a “three strikes” rule that provides:

[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge [Docket No. 37] is **ACCEPTED**. It is further

ORDERED that this case is dismissed in its entirety. It is further

ORDERED that all parties to this action shall bear their own costs and fees. It is further

ORDERED that, given the circumstances of this case, this order shall not be considered a dismissal on the grounds that this case is “frivolous, malicious, or fails to state a claim upon which relief may be granted” for purposes of the Prisoner Litigation Reform Act’s “three strikes” provision, 28 U.S.C. § 1915(g).

DATED March 24, 2016.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge