

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

WEST COAST LIFE INSURANCE
COMPANY,

Plaintiff,

v.

Case No: 2:14-cv-175-FtM-38DNF

BOURKE J. GORMAN, EDWARD J.
GORMAN, III, PATRICK A. GORMAN
and THOMAS E. MURPHY,

Defendants.

ORDER¹

This matter comes before the Court on the Defendant, Bourke Gorman's Notice of Voluntary Dismissal without Prejudice Construed as a Motion to Voluntarily Dismiss Count II Counterclaim for Civil Damages against Plaintiff and Count III Cross-Claim Against Thomas E. Murphy for Civil Damages ([Doc. #42](#)) filed on July 22, 2014. The Plaintiff voluntarily dismisses without prejudice Counts II and III but states that Count I, the Plaintiff's Counter Claim and Cross-Claim for Declaratory Judgment brought against Plaintiff/Counter-Defendant and Cross Defendants remains in effect.

Gorman seeks to voluntarily dismiss Counts II and III without prejudice; however, Gorman does not present the Court with any law or reference to the Federal Rules as

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grounds for the Court to dismiss the claims. [Federal Rule of Civil Procedure 41](#) allows a plaintiff to dismiss an entire action but not a single count in a multi-count action as desired here. [Campbell v. Altec Indus., Inc.](#), 605 F.3d 839, 841 n.1 (11th Cir. 2010) (“Rule 41 allows a plaintiff to dismiss all of his claims against a particular defendant, its text does not permit plaintiffs to pick and choose, dismissing only particular claims within an action.”) (citing [Klay v. United Healthgroup, Inc.](#), 376 F.3d 1092, 1106 (11th Cir. 2004)). Thus, the use of [Rule 41](#) would not be proper here because all Parties will remain in the case despite the dismissal of Counts II and III.

The Eleventh Circuit continued that a plaintiff wishing to eliminate particular claims or issues from the action should amend the complaint under [Fed. R. Civ. P. 15\(a\)](#) rather than dismiss under [Rule 41](#). *Id.* Under [Rule 15\(a\)](#), Gorman could file an amended complaint with Count I as the only remaining claim. Thus, the Notice to Dismiss Counts II and III construed as a motion to voluntarily dismiss is deemed improper and is due to be denied without prejudice. Gorman is given leave to file an amended complaint under [Rule 15\(a\)](#) without Counts II and III.

Accordingly, it is now

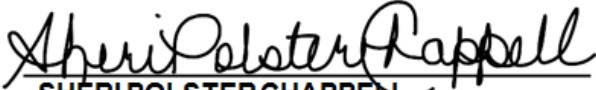
ORDERED:

The Defendant, Bourke Gorman's Notice of Voluntary Dismissal without Prejudice Construed as a Motion to Voluntarily Dismiss Count II Counterclaim for Civil Damages against Plaintiff and Count III Cross-Claim Against Thomas E. Murphy for Civil Damages ([Doc. #42](#)) is **DENIED** without prejudice.

- (1) The Defendant/ Counter-Plaintiff Borke Gorman is given leave to file an Amended Complaint dropping Counts II and III.

(2) Gorman has up to and including **August 25, 2014**, to file his amended complaint.

DONE and **ORDERED** in Fort Myers, Florida this 15th day of August, 2014.


SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record