

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITH NELSON,

Petitioner,

vs.

Civil No. 17-cv-1052-DRH-CJP

JACQUELINE LASHBROOK,

Respondent.

MEMORANDUM and ORDER

This matter is before the court on petitioner's Motion for Voluntary Dismissal (Doc. 15) and respondent's Motion to Dismiss Untimely Habeas Petition with Prejudice (Doc. 16).

Petitioner Nelson filed his petition for habeas relief pursuant to 28 U.S.C. § 2254 in September 2017. The response was originally due by December 18, 2017. Respondent sought and was granted an extension of time to January 17, 2018, in which to file her response. Petitioner filed his motion on December 26, 2017, before the response to the petition was filed.

Fed. R. Civ. P. 41(a)(1)(A) provides that "Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff 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; or (ii) a stipulation of dismissal signed by all parties who have appeared." Such a dismissal is ordinarily without prejudice. Rule 41(a)(1)(B).

Plaintiff filed his motion before respondent filed her answer, so he is

entitled to dismiss without prejudice if Rule 41(a)(1) applies. Respondent argues in her motion that the habeas petition was untimely and therefore should be dismissed with prejudice, but she does not address the applicability of Rule 41(a)(1).

Rule 12 of the Rules Governing Section 2254 Cases says that the Federal Rules of Civil Procedure should be applied in habeas cases to the extent that they are not inconsistent with the habeas rules or any statutory provision. There is nothing in the habeas rules or the relevant statutes regarding voluntary dismissal, so the court will apply Rule 41(a).

Petitioner's Motion for Voluntary Dismissal (Doc. 15) is **GRANTED**. Respondent's Motion to Dismiss Untimely Habeas Petition with Prejudice (Doc. 16) is **DENIED**.

This action is dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a)(1).

IT IS SO ORDERED.

  Judge Herndon
2018.01.08
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UNITED STATES DISTRICT JUDGE