

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

84 LUMBER COMPANY

CIVIL ACTION

VERSUS

NO. 12-1748

F.H. PASCHEN, S.N. NIELSEN &
ASSOCIATES, LLC, ET AL.

SECTION "R" (5)

ORDER AND REASONS

Defendant and third-party plaintiff F. H. Paschen, S. N. Nielsen & Associates, LLC moves for voluntary dismissal without prejudice of its claim against J&A Construction Management Resources Co. Inc.¹ For the following reasons, the Court grants the motion.

I. BACKGROUND

This case arises out of two school construction projects in Louisiana.² Defendant F.H. Paschen, S.N. Nielsen & Associates, LLC (Paschen) entered into contracts to build an elementary school at the Mildred Osborne School in New Orleans (Osborne Project) and a high school in South Plaquemines Parish (South Plaquemines Project).³ On both projects, Paschen was the

¹ R. Doc. 314.

² R. Doc. 28 at 2-3 ¶ 5.

³ *Id.* at 3 ¶ 5.

general contractor.⁴ Paschen subcontracted a portion of both projects to J&A Construction Management Resources Company, Inc. (J&A).⁵ J&A in turn subcontracted a portion of its work on both projects to 84 Lumber Company.⁶

On July 5, 2012, 84 Lumber sued Paschen and other defendants, alleging that 84 Lumber was not paid in full for work performed on the Osborne and South Plaquemines Projects.⁷ Paschen answered 84 Lumber's complaint and added J&A as a third-party defendant, asserting a breach of contract claim against it.⁸ J&A answered Paschen's third-party complaint and filed a breach of contract counterclaim against Paschen.⁹

The Court has since dismissed J&A's counterclaim against Paschen,¹⁰ as well as all other claims in this case apart from Paschen's claim against J&A. Trial on Paschen's claim is set for January 29. Paschen now moves for voluntary dismissal, without prejudice, of its claim against J&A. J&A does not oppose Paschen's motion, but requests dismissal with prejudice.¹¹

⁴ *Id.* at 2 ¶ 5.

⁵ *Id.* at 3 ¶ 7.

⁶ *Id.* at 3 ¶ 9.

⁷ R. Doc. 1.

⁸ R. Doc. 25.

⁹ R. Doc. 39.

¹⁰ R. Doc. 294.

¹¹ R. Doc. 316.

II. DISCUSSION

Federal Rule of Civil Procedure 41(a)(2) permits a plaintiff to dismiss her claims “only by court order, on terms that the court considers proper.”¹² “[M]otions for voluntary dismissal should be freely granted unless the non-moving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit.” *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002). But “[w]here the plaintiff does not seek dismissal until a late stage and the defendants have exerted significant time and effort, the district court may, in its discretion, refuse to grant a voluntary dismissal.” *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs., Inc.*, 903 F.2d 352, 360 (5th Cir. 1990).

The Court finds that J&A will not suffer legal prejudice by Paschen’s voluntary dismissal without prejudice. First, J&A does not even argue that it will suffer prejudice if the Court grants Paschen’s motion. Indeed, J&A states that it supports the motion, and merely requests that dismissal be with prejudice.¹³ Second, while trial is scheduled on January 29, J&A has not filed any substantive motions on Paschen’s claim against it. Moreover, J&A does not assert that it has expended considerable resources defending against

¹² Paschen cannot dismiss its claim by right under Rule 41(a)(1) because J&A has filed an answer and has not stipulated to dismissal.


¹³ R. Doc. 316.

Paschen's claim. *Cf. Hartford Accident*, 903 F.2d at 360 (affirming denial when plaintiff moved for dismissal after "defendants expended significant time and effort litigating" action). Nor does it appear that J&A will lose any legal defenses if Paschen renews its breach of contract claim against it. *Cf. Elbaor*, 279 F.3d at 318-19 (noting that loss of a statute of limitations defense constitutes legal prejudice).

III. CONCLUSION

For the foregoing reasons, the Court GRANTS Paschen's motion for voluntary dismissal. Paschen's claim against J&A is DISMISSED WITHOUT PREJUDICE.

New Orleans, Louisiana, this 19th day of January, 2018.


SARAH S. VANCE
UNITED STATES DISTRICT JUDGE