

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

TERESA LUMAN,)	
MICHAEL D. MARTIN,)	
TERRI LYNN MARTIN, and)	
STEVEN CRAIG MARTIN, as the)	
children and next of kin to Mary Ann)	
Martin,)	
)	
Plaintiffs,)	
)	
v.)	Case No. CIV-16-43-M
)	
TODD M. OZDYCH, D.O.,)	
)	
Defendant.)	

ORDER

This matter is on the Court's August 2017 Trial Docket.

Before the Court is Plaintiffs' Motion for Dismissal Without Prejudice or in the Alternative Motion to Continue Deadlines, filed July 18, 2017. On July 21, 2017, defendant responded. Plaintiffs filed no reply.¹ Based on the parties' submissions, the Court makes its determination.

Plaintiffs move this Court to voluntarily dismiss this action, pursuant to Federal Rule of Civil Procedure 41(a)(2). Plaintiffs advise that due to scheduling conflicts, they have not had the opportunity to depose defendant and that they recently became aware of additional medical records that could be of benefit or necessary for both parties in the case. Plaintiffs contend they need additional time to review the medical records and have them also reviewed by an expert. Defendant asserts that he will suffer legal prejudice if this matter is dismissed.

¹ On July 25, 2017, the Court shortened plaintiffs' time to reply to defendant's response to plaintiffs' motion to dismiss and ordered plaintiffs to respond on or before July 27, 2017. *See* Court's July 25, 2017 Order [docket no. 59].

At this point in the litigation, Rule 41 only permits voluntary dismissal by a court order. *See* Fed. R. Civ. P. 41(a)(2) (“an action may be dismissed at the plaintiff’s request only by court order . . . [and] [u]nless the order states otherwise, a dismissal under this paragraph [] is without prejudice.”). “Absent ‘legal prejudice’ to the defendant, the district court normally should grant such a dismissal.” *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (citing *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986)). “The parameters of what constitutes ‘legal prejudice’ are not entirely clear, but relevant factors the district court should consider include: the opposing party’s effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation.” *Id.* (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir.1996)). “Each factor need not be resolved in favor of the moving party for dismissal to be appropriate, nor need each factor be resolved in favor of the opposing party for denial of the motion to be proper”. *Id.*

Having carefully reviewed the parties’ submissions, the Court finds that defendant would suffer legal prejudice if this matter is dismissed at this stage in the litigation. Specifically, the Court finds that defendant has diligently defended and prepared for this matter, taking depositions, as well as timely filing the required pretrial documents. Alternatively, plaintiffs have failed to adhere to the deadlines set by the Court in this matter, including ignoring the Court’s July 25, 2017 Order to file a reply to this instant motion to dismiss.² The Court finds that plaintiffs’ need to pursue necessary discovery in this matter at the eleventh hour is due to plaintiffs’ lack of diligence in prosecuting this matter and not a sufficient reason for dismissal. Further, the Court finds that a

² Plaintiffs failed to file pretrial filings, including their expert witness list and reports and trial witness and exhibit lists, which were due on June 1, 2017, as well participate with defendant on the Final Pretrial Report, which was due on July 20, 2017.

continuance of the trial in this matter is unwarranted. Therefore, the Court finds that this matter should not be dismissed.

Accordingly, for the reasons set forth above, the Court DENIES Plaintiffs' Motion for Dismissal without Prejudice or in the Alternative Motion to Continue Deadlines [docket no. 52].

IT ISO ORDERED this 28th day of July, 2017.


VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE