

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>JOSEPH REISINGER,</b>	:	<b>Civil Action No. 3:09-CV-210</b>
	:	
<b>Plaintiff,</b>	:	
	:	<b>(Judge Conner)</b>
<b>v.</b>	:	
	:	<b>(Magistrate Judge Carlson)</b>
<b>THE CITY OF WILKES-BARRE,</b>	:	
<b>et al,</b>	:	
	:	
<b>Defendants.</b>	:	

**REPORT AND RECOMMENDATION**

**I. Statement of Facts and of the Case**

This is a civil rights action brought by Joseph Reisinger against the City of Wilkes-Barre, and others. (Doc. 1) In December of 2010, the district court ruled on various discovery and scheduling matters (Docs. 76 and 77), and referred this case to the undersigned for further pre-trial management. (Doc. 78.) We then entered a scheduling order in this case, an order which called upon the parties to confer and endeavor to set a schedule for the resolution of this case. (Doc. 80.)

The Plaintiff has now filed a motion pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure seeking to voluntarily dismiss this complaint with prejudice.

(Doc. 81.) The stated reason for this voluntary dismissal is to permit the Plaintiff to pursue an appeal of the district court's discovery rulings. (Id.)

We express no views regarding whether the discovery and scheduling orders previously entered by the district court would constitute to the type of final order which may be appealed pursuant to 28 U.S.C. §1291 following a voluntary dismissal. Instead, we recognize that this question is an issue that the parties must litigate at another time and in another forum. However, for the reasons set forth below, we believe that the Plaintiff is entitled to request that his own case be dismissed with prejudice. Therefore, it is recommended that the motion to dismiss be granted.

## **II. Discussion**

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides as follows:

### **(a) Voluntary Dismissal.**

**(2) *By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Fed. R. Civ. P., Rule 41(a)(2).

In this case, Reisinger has specifically requested that the dismissal of his case be with prejudice. (Doc. 81.) Where a plaintiff like Reisinger seeks dismissal of his

own case with prejudice, it is generally held that the court has no discretion, but must grant the plaintiff's request, and dismiss his claims with prejudice. See e.g., Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964); Gilbreth Int'l. Corp. v. Lionel Leisure, Inc., 587 F. Supp. 606, 614 (E.D. Pa. 1983); John Evans, Inc. v. Majik Ironers, Inc., 95 F.R.D. (E.D.Pa. 1982). See also 8 Moore's Federal Practice 3d §41.40[3] (2010). Accordingly, since Reisinger seeks dismissal of this case, with prejudice, his request should be granted.

### **III. Recommendation**

For the foregoing reasons, IT IS RECOMMENDED that the Plaintiff's motion to dismiss the complaint with prejudice (Doc. 81) be GRANTED.

The parties are further placed on notice that pursuant to Local Rule 72.3:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 7th day of January, 2011.

***S/Martin C. Carlson*** \_\_\_\_\_  
Martin C. Carlson  
United States Magistrate Judge