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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

DENISE SHANTALL BARNES-DE-LA-
TEXERA, ET AL.,

Plaintiffs,

v.

SAN JORGE CHILDREN'S HOSPITAL,
ET AL.,

Defendants.

Civil No. 11-1740 (SEC)

OPINION AND ORDER

Before the Court are the coplaintiff's motion for voluntary dismissal without prejudice, Docket # 238, the codefendant's opposition thereto, Docket # 245, and the coplaintiff's reply, Docket # 260. After reviewing the filings and the applicable law, this motion is **DENIED**.

Factual and Procedural Background

Denise Shantall Barnes and her 20-year-old daughter, MPB, bring this diversity medical malpractice action against Dr. Sunsiree Santana-Velazquez (Santana), among other defendants. In a nutshell, the plaintiffs seek damages for the alleged wrongful death of a relative; the underlying facts are largely impertinent for present purposes. So a recount only of the material facts of this protracted litigation follows.

The plaintiffs filed suit on July 29, 2011, Docket # 1, and, after various procedural nuances, on August 31, 2012, they amended their complaint to include Santana. Docket # 115. As the case proceeded, the plaintiffs started resisting to the taking of MPB's deposition. Docket # 182. But on February 25, 2014, the Court overruled the plaintiffs' objections. Docket # 206. MPB then sought reconsideration and moved for a protective order, arguing "emotional distress." Docket # 216. MPB provided no competent evidence to sustain her dubious request,

2 however, so the Court gave her two weeks within which to submit new medical evidence
3 supporting her allegations of psychological distress. Docket # 226.

4 Yet MPB turned a deaf ear to that order. So the Court admonished MPB for violating its
5 order, noting that she never furnished the requested medical documentation. Docket # 234. The
6 Court also denied her motion for reconsideration and gave her “one last chance” to substantiate
7 her request. *Id.* at 2. Then, as a result of the May 2014 status conference, the Court also ordered
8 MPB to inform by May 27 whether she could be deposed on June 23; otherwise, the Court held,
9 the deposition would be held on June 27. Docket # 236.

10 Instead of complying with that last order, MPB filed the instant motion under Federal
11 Rule of Civil Procedure 41(a)(2), seeking to dismiss without prejudice her claims against the
12 defendants. Docket # 238. The gravamen of her case is that she cannot be deposed because of
13 her “fragile psychological state,” *id.* at 2, and that, in her view, a dismissal without prejudice
14 would not prejudice the defendants. *Id.* at 5.

15 Santana timely opposed and requested that the dismissal should be with prejudice.
16 Docket # 245. He says that, at this stage of the litigation—over two years after being sued (he
17 was joined in August, 2012)—he will be prejudiced by a dismissal without prejudice, arguing
18 that (1) the defendants have invested substantial time and money defending this case, *id.* at 6;
19 (2) the plaintiffs violated court orders, *id.* at 7; and (3) the significant passage of time causes
20 legal prejudice. *Id.* at 10-11. Alternatively, if a dismissal without prejudice were granted,
21 Santana prays for the imposition of curative conditions. *Id.* at 11-16.

22 **Standard of Review**

23 Federal Rule of Civil Procedure 41(a)(2) commands that, after the defendant has
24 answered the complaint or filed a motion for summary judgment, “an action may be dismissed
25 at the plaintiff’s request only by court order, on terms that the court considers proper.” By
26 requiring that approval, the First Circuit has explained, a district court ensures that “no other

2 party will be prejudiced.” Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000)
3 (quoting P.R. Mar. Shipping Auth. v. Leith, 668 F.2d 46, 50 (1st Cir. 1981)). The court is
4 responsible for exercising its discretion to ensure “that such prejudice will not occur,”
5 Colon-Cabrera v. Esso Standard Oil Co., 723 F.3d 82, 87 (1st Cir. 2013) (citing Doe, 216 F.3d
6 at 160), most especially because a voluntary dismissal under this rule is without prejudice unless
7 the “order states otherwise.” Fed. R. Civ. P. 41(a)(2). Put another way, a district court abuses
8 its discretion in countenancing a dismissal without prejudice only where “the defendant will
9 suffer legal prejudice.” Colon-Cabrera, 723 F.3d at 87 (quoting Leith, 668 F.2d at 50). But
10 “[t]he mere prospect of a subsequent lawsuit does not constitute such prejudice.” Id. (quoting
11 Doe, 216 F.3d at 160-61).

12 In reaching that determination, the First Circuit has instructed district courts to consider,
13 among other considerations, the so-called Pace factors: (1) the effort and costs incurred by the
14 defendants in preparation for trial; (2) excessive delay and want of diligence in prosecuting the
15 action; (3) the legitimacy (or lack thereof) of the explanation for the need to take a dismissal;
16 and (4) whether a summary-judgment motion has been filed by the defendants. Doe, 216 F.3d
17 at 160 (quoting Pace v. S. Express Co., 409 F.2d 331, 334 (7th Cir.1969)). That is not to say that
18 courts must “analyze each factor or limit their consideration to these factors” Id. This is
19 because the ““enumeration of the[se] factors . . . is not equivalent to a mandate that each and
20 every such factor be resolved in favor of the moving party before dismissal is appropriate. It
21 is rather simply a guide for the trial judge, in whom the discretion ultimately rests.”” Id. (quoting
22 Tyco Labs., Inc. v. Koppers Co., 627 F.2d 54, 56 (7th Cir. 1980)). Thus, “it is appropriate to
23 consider whether ‘a party proposes to dismiss the case at a late stage of pretrial proceedings, or
24 seeks to avoid an imminent adverse ruling.’” Colon-Cabrera, 723 F.3d at 88 (quoting In re
25 FEMA Trailer Formaldehyde Prods. Liab. Litig., 628 F.3d 157, 162 (5th Cir.2010)).

2 **Applicable Law and Analysis**

3 The critical issue in this case is whether the defendants will be unfairly treated by
4 allowing MPB to take a dismissal without prejudice.¹ The analysis is primarily guided by the
5 Pace factors, which the Court considers sequentially.

6 The first factor—the effort and expenses incurred by the defendants in preparation for
7 trial—cuts against MPB’s request for a dismissal without prejudice. As a threshold matter, MPB
8 “recognizes that the defendants . . . have invested a considerable amount of time in defending
9 and trying this case.” Docket # 238, p.5. That is a sensible, indeed inevitable, concession. It is
10 true, as MPB posits, that “the expense incurred in defending against a lawsuit does not amount
11 to legal prejudice.” Docket # 260, p. 2 (citing Westlands Water Dist. v. U.S., 100 F.3d 94, 97
12 (9th Cir. 1996)). But that argument of course fails to recognize that “the defendant’s resulting
13 costs are appropriate factors to consider under Rule 41(a)(2).” Colon-Cabrera, 723 F.3d at 89
14 (citing Doe, 216 F.3d at 160-61). And as matters now stand, the defendants, and particularly
15 Santana, have made considerable investments of time and money in this case, having
16 aggressively litigated this action for over three years. Santana has, for instance, filed pleadings;
17 participated in numerous depositions; attended several discovery and status conferences; and

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19 ¹True, only Santana opposed MPB’s request, so the other defendants waived any objections
20 under Local Rule 7(b). But even if a party waives any objections to a motion, a district court must
21 nonetheless consider the merits thereof (as opposed to summarily granting the unopposed motion) when
22 the Federal Rules of Civil Procedure so mandate. Rodríguez-Salgado v. Somoza-Colombani, 937 F.
23 Supp.2d 206, 211 (D.P.R. 2013) (discussing and construing Local Rule 7(b) and NEPSK, Inc. v. Town
24 of Houlton, 283 F.3d 1(1st Cir. 2002)); see also Rivera-Torres v. Rey-Hernández, 502 F.3d 7, 13 (1st
25 Cir. 2007) (reminding that “an unopposed motion for summary judgment should not be granted unless
26 the record discloses that there is no genuine issue as to any material fact and that the movant is entitled
to judgment as a matter of law”). And in this context, Rule 41(a)(2) obligates a district court to ensure
that “no other party will be prejudiced.” Doe 216 F.3d at 160 (citation and internal quotation marks
omitted). In all events, and for the reasons stated below, summarily granting MPB’s motion would
“clearly offend equity,” Town of Houlton, 283 F.3d at 7, as the legal prejudice that would be inflicted
upon all defendants, some of whom have been part of this suit since 2011, is patent and substantial.

2 submitted memoranda, including a motion to dismiss for want of prosecution. See David v.
3 Huskipower Outdoor Equip. Corp., 936 F.2d 193, 199 (5th Cir.1991) (affirming finding of
4 prejudice “where motion to dismiss was filed after a year had passed . . . the parties had spent
5 months filing pleadings, attending conferences, and submitting memoranda”); Mateo v. Empire
6 Gas Co., 287 F.R.D. 124, 128 (D.P.R. 2012). The first factor therefore weighs heavily against
7 MPB.

8 The same holds true for the second element, which zeroes in on a plaintiff’s excessive
9 delay or lack of diligence in prosecuting an action. See Colon-Cabrera, 723 F.3d at 89 (citing
10 Doe, 216 F.3d at 160-61). MPB says she has been active in the litigation of this case, and that
11 “any delay in this case has been due to the complexity of the case.” Docket # 238 p. 6. Not so.
12 It suffices to say that the plaintiffs have displayed an intransigent approach to discovery, which,
13 for the last year, has provoked unwarranted delays. See Dockets ## 216, 226, 234, 252. For
14 instance, the Court even admonished MPB for failing to comply with its orders but gave her
15 “one last chance“ to make things right, Docket # 234, thus ordering that her deposition be held
16 no later than June 27, 2014. Docket # 236. But as of today, that deposition is still outstanding.
17 In short, the plaintiffs’ unjustified refusal to go forward with MPB’s deposition continues to
18 drag out the proceedings in a way that prejudices the defendants. So this factor militates in a
19 finding of legal prejudice. Cf. U.S. ex rel. Doe v. Dow Chemical Co., 343 F.3d 325, 330 (5th
20 Cir. 2003) (affirming a finding of prejudice where “Doe’s counsel had been sanctioned by the
21 district court for failure to participate in the discovery process”); Xiong v. Fresno County
22 Economic Opportunities, 36 Fed.Appx. 630, 631 (9th Cir. 2002) (affirming district court’s
23 finding that “risk of prejudice to the defendants weighed in favor of dismissal because the
24 plaintiffs’ action caused the defendants to wait unnecessarily ‘in limbo’ and to expend further
25 time and money to monitor the action”).
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1 The third factor—MPB’s explanation for the need to take a dismissal—also weighs
2 against MPB. As said, MPB argues, without citing any caselaw, that a dismissal without
3 prejudice will allow her to prepare emotionally for the deposition. Docket # 238, pp. 8-9; see
4 also id. at 9 (MPB’s “emotional and psychological state and her desire to improve constitute
5 sufficient explanation and good cause for the need to take a dismissal”). But that
6 explanation literally elevates self-serving optimism over reasonable inferences. The record
7 makes clear, and common sense suggests, that MPB’s reason for taking a dismissal is to avoid
8 being deposed. Yet MPB cannot use Rule 41(a)(2) to circumvent this court’s previous rulings,
9 which had ordered the taking of MPB’s deposition. “A party is not permitted to dismiss merely
10 to escape an adverse decision” Porter v. ABB Power T&D, Inc., No. 08-04100, 2008 WL
11 2437940, *2 (W.D. Mo. June 13, 2008); Strahan v. Diodati, 755 F. Supp. 2d 318, 322-323 (D.
12 Mass. 2010); see also In re FEMA Trailer Formaldehyde Products Liab. Litig., 628 F.3d 157,
13 163 (5th Cir. 2010) (affirming district court’s entry of dismissal with prejudice, remarking that
14 “[w]hen a plaintiff files any court case . . . sitting back is no option. He must be prepared to
15 undergo the costs, psychological, economic and otherwise, that litigation entails.”) (emphasis
16 added).² This consideration therefore cuts against MPB’s request for a dismissal without
17 prejudice.

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22 ²Even if MPB’s proffered reason were to hold water, she cannot substantiate it in any event.
23 Despite the multiple opportunities given, she marshals no new medical evidence on this front; rather,
24 she merely furnishes a sworn statement by Barnes (her mother and coplaintiff) that vouchsafes that
25 MPB “has broken down by simply imagining that she would be questioned . . . [and] that she would
26 prefer to die than dealing with the subject.” Docket # 260-1. That evidence, although moving, is
unconvincing, however, because it shows (if anything) that MPB should not have brought suit in the
first place; that is, her psychological state precluded her from doing so. See In re FEMA Trailer
Formaldehyde Products Liab. Litig., 628 F.3d at 163.

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2 Contrarily, the last Pace factor—whether summary-judgment motions have been filed
3 by the defendants—favors dismissal without prejudice. The defendants have lodged no
4 summary-judgment motions.

5 The Court, having considered the legitimate interests of both the plaintiffs and the
6 defendants, together with the foregoing Pace factors, denies MPB’s Rule 41(a)(2) motion. See
7 also Noonan v. Cunard S. S. Co., 375 F.2d 69, 71 (2d Cir. 1967) (Friendly, J.); Boyd v. Rhode
8 Island Dep’t of Corr., 206 F.R.D. 36, 38 (D.R.I. 2001). On this record (containing 274 docket
9 entries), moreover, the dismissal should be with prejudice. This is because the defendants will
10 suffer legal prejudice if the Court countenances MPB’s dismissal-without-prejudice
11 request—even if curative conditions were imposed. See Leith, 668 F.2d at 50; see also
12 Gonzalez-Santos v. Torres-Maldonado, 283 F.R.D. 61, 63 (D.P.R. 2012). Sanctioning a
13 voluntary dismissal without prejudice would, for example, allow MPB to refile this action
14 whenever she turns 21, exposing the defendants to a third lawsuit. (Barnes will continue
15 prosecuting her claims here, so this case and a parallel local litigation will most likely conclude
16 by the time MPB decides to renew her claims.) And that constitutes legal prejudice. Cf. Central
17 Montana Rail v. BNSF Ry. Co., 422 Fed. Appx. 636, 638 (9th Cir. 2011) (“[D]istrict court
18 noted that, if it had dismissed the action without prejudice, BNSF could face litigation in state
19 court . . . after almost four years of litigation.”). If more were needed, the Court is particularly
20 troubled by MPB’s explanation, which, for the reasons just given, is a thinly-veiled attempt to
21 violate discovery orders with impunity. That is beyond the pale.

22 One loose end remains. Where, as here, a dismissal without prejudice is denied, and,
23 instead, a dismissal with prejudice is entered, a court should give a plaintiff time to withdraw
24 her motion and proceed with the case. Fontanez v. Jefferson Pilot Life Ins. Co., No. 93-2268,
25 1994 WL 424096, at *1 (1st Cir. Aug. 15, 1994) (per curiam) (unpublished table decision) (“If
26 a plaintiff’s motion to dismiss without prejudice is to be denied, the plaintiff ordinarily should

2 be given the opportunity to allow the case to proceed on the merits, rather than being subjected
3 to a dismissal with prejudice.”); accord, e.g., Michigan Surgery Investment, LLC v. Arman, 627
4 F.3d 572, 575 (6th Cir. 2010); Mateo, 287 F.R.D. at 127 n. 2. Accordingly, the Court will delay
5 the entry of judgment for **20 days** within which MPB may withdraw her Rule 41(a)(2) motion
6 and proceed with this action.

7 **Conclusion**

8 For the reasons stated, MPB’s motion is **DENIED**.

9 **IT IS SO ORDERED.**

10 In San Juan, Puerto Rico, this 1st day of December, 2014.

11 s/Salvador E. Casellas
12 SALVADOR E. CASELLAS
13 U.S. Senior District Judge
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