

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANGELO JOE,

Plaintiff,

v.

JOHN DOE, Manager of Health Services;
DR. GARY BRIDGEWATER, M.D.;
WILLIAM McCREEDY; DR. HORN, M.D;
and SHARON ZUNKER,

Defendants.

ORDER

01-C-0704-C

Presently before the court is plaintiff's "Motion to Voluntarily Dismiss Complaint." Plaintiff was granted leave to proceed in this case on an Eighth Amendment claim that defendants were deliberately indifferent to his serious medical needs. In his motion for voluntary dismissal, plaintiff states that he cannot properly litigate his case because he is a lay person with no training in the law or medicine and because he no longer has the assistance of a former inmate who was helping him with his case. Plaintiff seeks a dismissal without prejudice to his refiling his claim at a later date.

Fed. R. Civ. P 41(a)(1) allows a plaintiff to dismiss an action voluntarily without prejudice by filing a notice of dismissal "at any time before service by the adverse party of an answer or of a motion for summary judgment," or by stipulation of all the parties. Defendants have answered plaintiff's complaint and moved for summary judgment and plaintiff has not obtained defendants' consent to

dismiss this case without prejudice. Accordingly, pursuant to Fed. R. Civ. P. 41(a)(2), plaintiff can only obtain a dismissal “upon order of the court and upon such terms and conditions as the court deems proper.”

Plaintiff’s motion for voluntary dismissal is dated October 21, 2002, which is three days before his opposition to defendants’ summary judgment motion was due and more than eight months since he was granted leave to proceed on his Eighth Amendment claim. At this late date, a dismissal without prejudice would be unfair to defendants, who have invested time and resources in answering plaintiff’s complaint, engaged in discovery and filed a summary judgment motion, brief and proposed findings of fact. Accordingly, if plaintiff wishes to dismiss this action, the dismissal will be with prejudice. Plaintiff may have until November 11, 2002, in which to inform the court whether, under the circumstances, he wishes to withdraw his request for voluntary dismissal. If plaintiff advises the court and opposing counsel that he is withdrawing his request, he may have until November 25, 2002, in which to serve and file a response to defendants’ summary judgment motion. Defendants reply will be due on December 5, 2002. If, by November 11, 2002, plaintiff does not withdraw his request, I will dismiss this case with prejudice.

ORDER

IT IS ORDERED that

1. A decision on plaintiff’s request to dismiss his case is STAYED; and
2. Plaintiff may have until November 11, 2002, in which to inform the court whether he wishes

to withdraw his request. If, by November 11, 2002, plaintiff fails to withdraw the request, I will dismiss the case with prejudice. If, however, plaintiff advises the court and opposing counsel that he is withdrawing his request, then he may have until November 25, 2002, in which to oppose defendants' summary judgment motion. Defendants may have until December 5, 2002, in which to serve and file their reply.

Entered this 31st day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge