

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

THOMAS L. SCHROEDER,

Plaintiff,

v.

TONY GOTH,
MARK THOMPSON and
JON RYAN PETERSON,

Defendants.

ORDER

03-C-0299-C

This is an action in which plaintiff contends that on November 15, 1999, while he was confined at the Rock County jail, defendant Thompson used excessive force against him and defendants Goth and Peterson failed to intervene to protect him from physical injury. On September 24, 2003, Magistrate Judge Stephen Crocker entered a scheduling order establishing deadlines for completion of various stages of this litigation. In keeping with that order, on January 21, 2004, defendants moved for summary judgment. Plaintiff has until February 21, 2004 in which to oppose the motion. Now plaintiff has filed a “motion to Dismiss Without Prejudice.” I construe plaintiff’s motion as a motion for voluntary dismissal of the case, pursuant to Fed. R. Civ. P. 41(a)(2).

When a motion for voluntary dismissal is filed after the defendant has filed an answer or motion for summary judgment such as in this case, Rule 41(a)(2) provides that the action may be dismissed by the plaintiff "only upon order of the court and upon such terms and conditions as the court deems proper." Because defendant has been required to defend this action, I will grant plaintiff's motion for voluntary dismissal only on the condition that the dismissal is with prejudice. This means that the order dismissing the case will serve as a judgment on the merits in favor of defendants.

Plaintiff has two options.

(1) If he does not want to prosecute this case any longer, he can do nothing. In that event, the suit will be dismissed with prejudice. ("With prejudice" means that plaintiff can never bring the same claims against the same defendants); or

(2) If he objects to a dismissal of his case with prejudice, he may have until March 5, 2004, to write to the court to withdraw. At the same time, he must send the court a brief, findings of fact, and evidentiary materials in opposition to defendants' motion for summary judgment. He must send copies of all documents to defendants' counsel. If plaintiff withdraws his motion and opposes the motion for summary judgment, defendants may have 10 days after service of the plaintiff's response in which to serve and file a reply.

ORDER

IT IS ORDERED that plaintiff may have until March 5, 2004, in which to withdraw his motion for voluntary dismissal. If, by March 5, 2004, plaintiff fails to advise the court that he is withdrawing his notice of voluntary dismissal, the clerk of court is directed to enter judgment dismissing this case with prejudice.

Entered this 12th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge