

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

STEVEN ALAN MAGRITZ,

Petitioner,

ORDER

v.

06-C-590-C

DEIRDRE MORGAN, Warden,
Oakhill Correctional Institution,

Respondent.

This is an action for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner Steven Alan Magritz challenges his January 17, 2003 judgment of conviction in the Circuit Court for Dane County for slander of title. On October 25, 2006, this court ordered respondent to respond to the petition. Respondent filed her answer to the petition on November 27, 2006. On November 28, 2006, petitioner deposited in the mail a motion for voluntary dismissal of his petition; this court received that motion on November 30, 2006.

When a motion for voluntary dismissal is filed after the respondent has filed an answer such as in this case, Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that the action may be dismissed by the petitioner "only upon order of the court and upon such terms and conditions as the court deems proper." Because respondent has been required to defend this action, this court will grant petitioner'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 respondent.

I note that petitioner appears to have prepared his motion before respondent filed her answer on November 27. However, petitioner did not deposit the motion in the mail until November 28. As stated in the order to show cause, the mailbox rule governs this case, meaning that petitioner did not “file” his motion until November 28. Although it may seem unduly harsh to deny petitioner the right to have his petition dismissed without prejudice as a result of his having filed his motion merely one day after respondent filed her answer, petitioner could have avoided this by preparing his motion earlier. A litigant who waits to file a motion for voluntary dismissal until his opponent’s time for answering has nearly expired does so at his own peril.

If petitioner is opposed to a dismissal of his case with prejudice, he should request that his motion for voluntary dismissal be withdrawn no later than December 15, 2006. At the same time, he should file his response to respondent’s answer to his petition.

ORDER

IT IS ORDERED that petitioner may have until December 15, 2006 in which to withdraw his motion for voluntary dismissal. If, by December 15, 2006, petitioner fails to request withdrawal of his notice of voluntary dismissal, the clerk of court will be directed to enter judgment dismissing this case with prejudice.

Entered this 4th day of December, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge