IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN ALAN MAGRITZ,

ORDER

Petitioner,

06-C-590-C

v.

DEIRDRE MORGAN, Warden,
Oakhill Correctional Institution,

Respondent.

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In this petition for a writ of habeas corpus filed under 28 U.S.C. § 2254, petitioner has filed a motion for reconsideration of the magistrate judge's December 4, 2006 order, staying a decision on petitioner's request for leave to withdraw his petition voluntarily. In the order, the magistrate judge noted that petitioner had requested voluntary dismissal of his petition "without prejudice" after the respondent had moved to dismiss his petition. The magistrate judge reasoned that because respondent had been required to defend the action, petitioner was not entitled to an automatic dismissal without prejudice under Fed. R. Civ. Pro. Rule 41(a)(1). Instead, he advised petitioner that the court would exercise its authority under Rule 41(a)(2) and permit dismissal only if the dismissal was with prejudice. He then gave petitioner an opportunity to withdraw his request or face dismissal with prejudice.

A decision of a magistrate judge on a pretrial matter will be upheld by a district judge unless the decision is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). In this instance, I conclude that it was contrary to law for the magistrate judge to apply Fed. R. Civ. P. 41(a)(2) to petitioner's notice of voluntary dismissal. At the time petitioner filed the notice, it should have been accepted as an automatic dismissal without prejudice under Fed. R. Civ. P. 41(a)(1) and this action should have been closed forthwith.

Fed. R. Civ. P. 81(a)(2) provides that the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings "to the extent that the practice in such proceedings is not set forth in the statutes of the United States [or] the Rules Governing Section 2254 Cases. . . ." The Rules Governing Section 2254 Cases do not include a rule governing voluntary dismissals of habeas corpus petitions. Therefore, it was permissible to apply Rule 41 to plaintiff's request. Garrett v. United States, 178 F.3d 940 (7th Cir. 1999) (assuming that Rule 41 applies to habeas corpus actions). However, the fit is not perfect.

With one exception that does not appear to apply here, Fed. R. Civ. P. 41(a)(1) allows a plaintiff to dismiss an action without prejudice and without an order of the court

> (i) 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, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

If an answer or a motion for summary judgment has been filed, however, Fed. R. Civ. P. 41(a)(2) applies. A dismissal under Rule 41(a)(2) requires a court order and allows the court

to determine the conditions, including a condition that the dismissal be with prejudice.

In determining whether a dismissal falls under Rule 41(a)(1) or (a)(2), the majority of courts, including the court of appeals for this circuit, have held that the language of Rule 41(a)(1) is explicit and that a motion to dismiss filed by the defendant does not preclude voluntary dismissal under Rule 41(a)(1)(i). See, e.g., Marques v. Federal Reserve Bank of Chicago, 286 F.3d 1014 (7th Cir. 2002)(motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) insufficient to disturb absolute right to dismiss suit voluntarily [under Rule (a)(1)] in absence of answer or motion for summary judgment); Merit Ins. Co. v. Leatherby Ins. Co., 581 F.2d 135 (7th Cir. 1978) (where defendant elects to abstain from decisive joining of issue by filing answer or motion for summary judgment, plaintiff entitled to Rule 41(a)(1) dismissal); Scam Instrument Corp. v. Control Data Corp., 458 F.2d 885, 890 (7th Cir. 1972)(one year's discovery insufficient to preclude Rule 41(a)(1) dismissal without prejudice where no answer or summary judgment filed); Littman v. Bache & Co., 252 F.2d 479, 481 (2nd Cir. 1958)(Rule 41(a)(1) must be "given a literal interpretation").

In habeas corpus actions, there are no motions for summary judgment. Answers are the norm under 28 U.S.C. § 2243 and Rule 5 of the Rules Governing Section 2254 Cases. (According to the Advisory Committee Notes to Rule 5, the term "return" as used in 28 U.S.C. § 2248 has been replaced by the term "answer" except when referring to prior practice.) In addition, Rule 4 allows the respondent to file a motion to dismiss in lieu of an answer, so long as the judge reviewing the petition authorizes it. The Advisory Committee

Notes explain,

> Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either [immediate] dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that petitioner is not in custody within the meaning of 28 U.S.C. § 2254; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition.

In this case, the magistrate judge ordered respondent to file an answer no later than 30 days after the date of service of the petition upon her. In addition, he authorized respondent to file a motion to dismiss before filing an answer.

> If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

The record reveals that on November 27, 2006, respondent opted to file a motion to dismiss. One day later, on November 28, 2006, petitioner filed a notice of voluntary dismissal. Because respondent had not filed an answer, the notice was proper under Fed. R. Civ. P. 41(a)(1)(i).

A notice of dismissal properly filed under Rule 41(a)(1)(i) terminates an action on the date it is filed if the time requirements set forth in subsection (i) are met. Winterland Concessions Co. v. Smith, 706 F.2d 793 (7th Cir. 1983) (citing Scam Instrument Corp. v.

Control Data Corp., 458 F.2d 885 (7th Cir. 1972). As noted above, the time requirements of subsection (i) were met in this case. Therefore, this suit was terminated with the filing of petitioner's notice of voluntary dismissal on November 28, 2006 and the dismissal was and is without prejudice.

ORDER

IT IS ORDERED that petitioner's motion for reconsideration of the magistrate judge's order staying the proceedings to allow petitioner to withdraw his notice of dismissal is GRANTED. Petitioner's notice of voluntary dismissal dated November 28, 2006 is a valid voluntary dismiss without prejudice under Fed. R. Civ. P. 41(a)(1)(i) and the Clerk of Court is directed to close this file.

Entered this 19th day of December, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge