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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CONSTANCE FERRARA POOLE,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 3:91CV00177
)	
STANLEY EUGENE FOSTER, ET.)	
AL.,)	
)	
Defendants.)	

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's motion for voluntary dismissal under Rule 41(a)(2).

BACKGROUND

This case was originally brought in September of 1990 in Pennsylvania. After an answer was filed, the parties agreed that the Pennsylvania District Court lacked personal jurisdiction over the Defendants. Therefore, in February or March of 1991, the parties stipulated to a transfer of venue to this Court. Plaintiff did not file a timely demand for a jury trial.

Plaintiff has now moved for voluntary dismissal. Plaintiff claims that she now wishes to proceed in state court where she can exercise her right to a jury trial.

DISCUSSION

Voluntary dismissal is left to the sound discretion of the Court under Rule 41(a)(2) of the Rules of Civil Procedure.

It appears that the Plaintiff seeks to dismiss this action and proceed against the Defendants in Virginia state court.

Voluntary dismissal will generally be denied where the purpose of voluntary dismissal is to overcome a waiver of a jury trial. See Paturzo v. Home Life Ins. Co., 503 F.2d 333, 336 (4th Cir. 1974) ("Understandably, the court below did not want to permit plaintiff to use indirect methods to obtain those rights he had forfeited through his own lack of diligence."); Noonan v. Cunard S.S. Co., 375 F.2d 69, 71 (2d Cir. 1967); McNeilab Inc. v. American Home Products Corp. 683 F.Supp. 332, 337 (S.D.N.Y. 1987); Second-79th Street Co. v. U.S. Steel Corp., 22 F.R.D. 98 (D.N.Y. 1958).

The Court FINDS that this simple case has languished long enough in the court system. Defendant has already expended \$4,500.00 in legal fees. The Court finds that the Defendant will be substantially prejudiced by voluntary dismissal at this stage, after the right to a jury trial has been waived. Therefore, Plaintiff's motion will be DENIED.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CONSTANCE FERRARA POOLE,)

Plaintiff,)

v.)

STANLEY EUGENE FOSTER, ET.)
AL.,)

Defendants.)

CIVIL ACTION NO. 3:91CV00177

ORDER

This matter is before the Court on Plaintiff's motion for voluntary dismissal under Rule 41(a)(2). For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's motion is DENIED.

It is so ORDERED.

Let the Clerk send a copy of this order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CONSTANCE FERRARA POOLE,)
)
Plaintiff,)
)
v.) CIVIL ACTION NO. 3:91CV00177
)
STANLEY EUGENE FOSTER, ET.)
AL.,)
)
Defendants.)

PRETRIAL ORDER

At a hearing held on July 17, 1991, this case was set for a trial without a jury on October 10, 1991 at 10:00 a.m.

Discovery must be concluded by September 26, 1991.

By October 3, 1991, one week prior to trial, counsel must exchange with each other and file with the Clerk a list of witnesses proposed to be called, a list of exhibits, and the exhibits themselves, premarked. Objections to exhibits must be noted within five (5) calendar days after the exhibits are filed; otherwise the exhibits shall stand admitted in evidence.

Counsel should file with the Clerk by 12:00 Noon three (3) calendar days before trial written proposed findings of fact and conclusions of law. If the third day before trial is a Saturday or Sunday, the proposed findings of fact and conclusions of law shall be filed with the Clerk no later than 5:00 p.m. Friday.

Now that a trial date has been set, this case cannot be transferred to a Magistrate, without leave of Court, unless the Magistrate can maintain the dates set herein.

If the parties settle the case, they must submit a final order within thirty (30) days unless the Court has otherwise ordered. If such an order is not submitted the Court will dismiss the case with prejudice for failure to prosecute.

The Scheduling Order previously issued by the Court shall remain in effect.

Let the Clerk send a copy of this order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE

B E N C H M E M O

TO: Judge Williams
FROM: Mark Henriques
DATE: July 11, 1991

RE: POOLE V. FOSTER
File No. 3:91CV00177

HEARING: Motion for Voluntary Dismissal
Wednesday, July 17, 1991; 11:00 a.m.

COUNSEL:	<u>Plaintiff</u>	<u>Defendant</u>
	E. Thomas Rilee, III Rilee, Cantor & Russell	A. Donald McEachin McEachin & Gee

Judge, Plaintiff has moved for voluntary dismissal, which Defendant opposes.

This case was originally brought in September of 1990 in Pennsylvania. After an answer was filed, the parties agreed that the Pennsylvania District Court lacked personal jurisdiction over the Defendants. Therefore, in February or March of 1991, they stipulated to a transfer of venue here. We got the case in April and sent out an April 18, 1991 Scheduling Order putting the case on our August pretrial list.

On May 31, 1991, Plaintiff moved for voluntary dismissal, stating that the reason for the delay was difficulty in retaining local counsel. On June 12, 1991, Defendant filed its opposition, and scheduled this hearing.

DISCUSSION

Voluntary dismissal at this stage is left to your sound

discretion under Rule 41(a)(2), therefore there's lots of room to maneuver.

It appears that the Plaintiff seeks to dismiss this action and proceed against the Defendants in Virginia state court. The major reason for this strategy appears to be that the Plaintiff has waived a right to a jury trial in federal court. Voluntary dismissal has generally been denied where the purpose of voluntary dismissal was to overcome a waiver of a jury trial. See Noonan v. Cunard S.S. Co., 375 F.2d 69, 71 (2d Cir. 1967); McNeilab Inc. v. American Home Products Corp. ⁶⁸³ 670 F.Supp. ^{327, 337} 558 (S.D.N.Y. 1987); Second ~~79~~th Street Co. v. U.S. Steel Corp., 22 F.R.D. 98 ^S (D.N.Y. 1958).

As an option, you could allow dismissal, but put restrictive conditions on any future proceedings. For example, you could deny a jury trial in state court. Additionally, you can (and should) require that any discovery materials collected in this case may be used freely in any subsequent litigation. See, e.g., Stevenson v. Missouri Pac. R. Co., 53 F.R.D. 184 (D.C. Ark. 1971).

Weighing in favor of dismissal is the fact that the Defendant will only be minimally prejudiced. Although the Defendant claims to have spent \$4500 on the case so far, you couldn't tell by looking at the pleadings. Much of the expense has been in discovery, which will still be valuable in a state trial. In the absence of severe prejudice to the Defendant, the general rule is to allow a voluntary dismissal.

CONCLUSION

The case law is mixed, with two somewhat contradictory rules in operation. These rules indicate that: 1) voluntary dismissal should not be used to defeat a waiver of a jury trial; 2) voluntary dismissal should usually be granted unless the Defendant will suffer "plain legal prejudice."

I recommend that you GRANT Plaintiff voluntary dismissal but WITH PREJUDICE as to Plaintiff's right to a jury trial. This will remove the one persuasive prejudice that Defendant will suffer, the loss of a bench trial. If Plaintiff still wants to go to state court, without a jury trial, she should have that option.