

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
TOLEDO



Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 07-32399
)	
James H. Fields)	Chapter 7
)	
Debtor(s).)	Adv. Pro. No. 07-3309
)	
James H. Fields,)	Hon. Mary Ann Whipple
)	
Plaintiff(s),)	
)	
v.)	
)	
Erie County Sheriff, et al,)	
)	
Defendant(s).)	

ORDER OF DISMISSAL

Plaintiff filed his complaint initiating this adversary proceeding on December 19, 2007. Pursuant to the summons issued by the Clerk, the response date to the complaint was January 22, 2008, and the initial pretrial scheduling conference was set for January 29, 2008. On January 18, 2008, Defendants, who are all county government officials or employees, filed a motion in response

to the complaint instead of an answer. The motion was variously styled as one to dismiss brought under Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, a motion to abstain under 28 U.S.C. § 1334(c)(1) or a motion for relief from stay under 11 U.S.C. § 362 (stated as under 28 U.S.C. 362 in the motion) so as to proceed with a civil forfeiture action in state court.

The court held the initial pretrial scheduling conference on January 29, 2008, on Plaintiff's "Complaint for Injunctive Relief and Damages." The result of the pretrial conference was issuance of a scheduling order to facilitate the court's decision of Defendants' motion, including a deadline for Plaintiff to file a response.

Instead of a response to Defendants' motion, Plaintiff filed on January 31, 2008, a motion to voluntarily dismiss this adversary proceeding, stating only that "it is the Debtor's [Plaintiff's] desire after consulting with his criminal Attorney Dennis Levin, that the Debtor feels it would be in his best interest to request a motion for dismissal of this adversarial proceeding" and asking "that the above caption [sic] adversary proceeding be dismissed." Plaintiff does not cite any rule of procedure as the basis for the motion to dismiss. Defendants filed a response to the motion to dismiss on February 8, 2008, asking that their motion be granted instead. As a result, the court has before it dueling motions to dismiss.

Although no rule is stated, *Williams v. Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976)(failure to cite Rule 41 irrelevant), the rule that applies to Plaintiff's motion to dismiss is Rule 41(a) of the Federal Rules of Civil Procedure, which applies here under Rule 7041 of the Federal Rules of Bankruptcy Procedure. Under Rule 41, there are three possible types of dismissal available at a plaintiff's request: by stipulation signed by all parties who have appeared, by notice of dismissal filed by the plaintiff and by court order on the plaintiff's motion and upon such conditions as the court deems appropriate. *D.C. Elecs., Inc. v. Narton Corp.*, 511 F.2d 294, 296 (6th Cir. 1975). As there

is no stipulation to dismiss this action, the other two methods of dismissal are potentially in issue. Where dismissal by notice is properly invoked, the right is absolute, the court has no discretion and no court order is required; the notice is self-executing. *Id.* at 298; *American Soccer Co., Inc. v. Score First Enters.*, 187 F.3d 1108, 1110 (9th Cir. 1999). Where dismissal by motion is requested, the court generally has discretion to grant or deny and to condition relief as may be appropriate. *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603-04 (3d Cir. 1991).

The critical limitation on a plaintiff's notice to dismiss is that it can only be filed "before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." Fed. R. Civ. P. 41(a)(1)(i). The Sixth Circuit addressed this part of the rule in *Aamot v. Kassel*, 1 F.3d 441 (6th Cir. 1993). Defendant in *Aamot* filed a Rule 12(b)(6) motion to dismiss in response to the complaint. His motion to dismiss had exhibits attached, as does Defendants' motion to dismiss this adversary proceeding. After the motion to dismiss was filed, plaintiffs in *Aamot* filed notices of dismissal under Rule 41(a)(1). The trial court treated the motion to dismiss as a motion for summary judgment because of the attached exhibits, struck the notices of dismissal as untimely and then granted the defendant's motion for summary judgment. On appeal, the Sixth Circuit reversed and took a bright line stand, declining to "'treat' motions to dismiss filed pursuant to Rule 12(b)(6) as summary judgment motions for purpose of barring voluntary dismissal." *Id.* at 444. As a result, since Defendants have not filed an answer or a motion for summary judgment denominated as such, Plaintiff is still permitted to dismiss this adversary proceeding by notice under Rule 41(a)(1)(i) and without court order, an action over which this court would have no discretion, even generally in cases such as this one where the defendant raises subject matter jurisdiction as a defense, *see Nix v. Fulton Lodge 2 of the Int'l Ass'n of Machinists*, 452 F.2d 794, 797-98 (5th Cir. 1971); *University of S. Alabama v. American Tobacco*, 168 F.3d 405, 409 (11th Cir. 1999).

Plaintiff has not, however, filed a notice of dismissal. Rather, the filing is styled as a motion and requests a court order. Case law varies as to whether such a procedural oversight should be overlooked as harmless and treated as a notice, or whether it opens the plaintiff up to an involuntary dismissal on the merits and with conditions under Rule 41(a)(2). *Compare Matthews v. Gaither*, 902 F.2d 877, 880 (11th Cir. 1996)(no significance to styling document as motion to dismiss instead of as notice) *with Parker v. Freightliner Corp.*, 940 F.2d 1019, 1022-23 (7th Cir. 1991)(imposition of condition on dismissal not erroneous where plaintiff made motion for dismissal instead of filing notice). Given the bright line direction of the Sixth Circuit in *Aamot* with respect to preserving a plaintiff's right to voluntary dismissal by notice, the court is inclined to agree with the former line of cases and find that the form error is harmless and that the court thus has no discretion to deny the Plaintiff's motion and address Defendants' motion instead. Even if the court does have discretion, the court notes that this action is still in its relative infancy; pleadings are not complete and no discovery has occurred. And while it is not deciding Defendants' motion, at least the part seeking relief from stay is procedurally inappropriate in the context of this adversary action as opposed to in the underlying Chapter 7 case. Moreover, Defendants cite no conditions or other stipulations that should be attached to dismissal of this action to the extent the court has discretion to avoid prejudice to them. Accordingly, the court will grant Plaintiff's motion to dismiss and deny Defendants' motion to dismiss as moot.

For good cause appearing,

IT IS ORDERED that Plaintiff's Motion to Dismiss Adversary Proceeding [Doc. #10] is GRANTED and Defendants' Motions to Dismiss F. R. C. P. 12(b)(1) & (6); Motion for Abstention 28 U.S.C. 1334(c)(1); Motion for Relief from Stay 28 U.S.C. 362 [Doc. #7] is DENIED, without prejudice; and

IT IS FURTHER ORDERED that the complaint and this action are hereby treated as dismissed, without prejudice.