

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JOYCE HORMAN, et al.,

Plaintiffs,

v.

HENRY KISSINGER, et al.,

Defendants.

Civil Action No. 77-1748

**FILED**

MAR 20 1981

MEMORANDUM AND ORDER

JAMES E. DAVEY, Clerk

This matter comes before the court on plaintiffs' motion to dismiss without prejudice pursuant to Rule 41(a)(2), Fed. R.

Civ. P. That rule provides:

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

As is apparent from the rule, dismissal without prejudice is not a matter of right but is discretionary with the court.

See Stern v. Barnett, 452 F.2d 211, 213 (7th Cir. 1971).

However, the majority rule is that a dismissal without prejudice should be allowed unless defendant will suffer some prejudice.

other than the mere prospect of a second lawsuit. E.g. Le Compte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976); 9 C. Wright and A. Miller, Federal Practice and Procedure §2364 at 165;

5 Moore's Federal Practice and Procedure §41.05 1 at 41-72.

As a result, in most cases a dismissal should be granted unless the defendant will suffer some legal harm. Le Compte v. Mr. Chip, Inc., supra, 528 F.2d at 604.

The government makes essentially three arguments in opposition to plaintiff's motion. First, it states that if plaintiffs were to refile this suit at a later date, defense of the suit would be time-consuming and expensive. This is the type of prejudice which stems directly from the prospect of a second suit, and is normally not a factor warranting great consideration. See Note, Voluntary Dismissal By Order of Court--Federal Rules of Civil Procedure 41(a)(2) and Judicial Discretion, 48 Notre Dame Lawyer 446, 458 (1972). Second, the government argues that this court's ruling on the fraudulent concealment-statute of limitations issue should be reversed. Plaintiffs seek to voluntarily dismiss this action and have submitted for the court's determination the narrow question of whether dismissal should be with or without prejudice. Accordingly, the defendant will not be allowed to litigate the statute of limitations issue because it is beyond the scope of the matter before the court. Finally, the government argues that dismissal should be with prejudice because absolutely privileged material is essential to the continuation of plaintiffs' suit. If a case cannot be proven without material withheld by a court as privileged, it will be terminated either by the court or by the plaintiff. However, no authority has been presented to the court to the effect that such a dismissal must be or should be with prejudice.

Plaintiffs seek dismissal without prejudice in order to be able to return to court if new evidence comes to light which would permit them to prove their allegations. The court should consider the fact that a dismissal with prejudice has the effect of a final adjudication on the merits and thus is a bar to a future suit brought by plaintiffs on the same cause of action. Hudson Engineering Co. v. Bingham Pump Co., 298 F. Supp.

387, 389 (S.D.N.Y. 1969). In addition, dismissal without prejudice has been allowed to give plaintiff an opportunity to secure new evidence after he has found, by discovery or otherwise, that he cannot prove his present claim. 9 C. Wright and A. Miller, Federal Practice and Procedure §2364 at 167 citing Cone v. West Virginia Pulp & Paper, 330 U.S. 212, 217 n.5 (1947). Therefore, it is, this 20<sup>th</sup> day of March, 1981,

ORDERED that plaintiffs' motion is granted and this action is dismissed without prejudice.

  
UNITED STATES DISTRICT JUDGE