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IN CLERKS OFFICE  
U.S. DISTRICT COURT N.Y.  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
MICHAEL SPINNER, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al,

Defendants.  
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**REPORT**  
**AND**  
**RECOMMENDATION**

01 CV 2715 (CPS)

By letter dated December 29, 2003, defendants request that the Court, pursuant to Fed. R. Civ. P. 41(b), dismiss with prejudice the claims of Alexander Timofeev, one of the named plaintiffs in this class action.<sup>1</sup> Defendants assert that plaintiffs have failed to produce Mr. Timofeev for a deposition, and that plaintiffs' counsel has represented that they are unable to locate Mr. Timofeev. Plaintiffs, by letter dated January 5, 2004, concede that they have been unable to locate or communicate with Mr. Timofeev. Therefore, plaintiffs assert that Mr. Timofeev's claims should be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

**DISCUSSION**

Rule 41(a)(2) provides that, unless all parties agree to a stipulation of dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon

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<sup>1</sup> In the Court's Order granting class certification, Judge Sifton noted that, since Mr. Timofeev could not be located, he was not an adequate class representative, and therefore his claim would proceed only on an individual basis. (Mem. and Order dated Oct. 6, 2003, at 11 n.7).

such terms and conditions as the court deems proper.” Fed. R. Civ. P. 41(a)(2).<sup>2</sup> Rule 41(b) states that, “a defendant may move for dismissal of an action or of any claim . . . [f]or failure of the plaintiff to prosecute . . . [u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.” Fed. R. Civ. P. 41(b). “Voluntary dismissal without prejudice is . . . not a matter of right.” Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990), and “[i]t is within the district court’s sound discretion to deny a Rule 41(a)(2) motion to dismiss.” Catanzano v. Wing, 277 F.3d 99, 109 (2d Cir. 2001). However, if the defendant will not be prejudiced, a voluntary dismissal without prejudice under Rule 41(a)(2) will generally be allowed. Wakefield v. N. Telecom, Inc., 769 F.2d 109, 114 (2d Cir. 1985). Generally speaking, “starting a litigation all over again does not constitute legal prejudice.” D’Alto v. Dahon California, Inc., 100 F.3d 281, 283 (2d Cir. 1996) (citing Jones v. SEC, 298 U.S. 1, 19 (1936)).

In considering whether an action should be dismissed without prejudice, courts consider the following factors:

- 1) the plaintiff’s diligence in bringing the motion; 2) any “undue vexatiousness” on plaintiff’s part; 3) the extent to which the suit has progressed, including the defendant’s effort and expense in preparation for trial; 4) the duplicative expense of relitigation; and
- 5) the adequacy of the plaintiff’s explanation for the need to dismiss.

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<sup>2</sup> Rule 41(a)(2) also states that, [u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice. Fed. R. Civ. P. 41(a)(2).

Catanzano v. Wing, 277 F.3d at 110 (quoting Zagano v. Fordham Univ., 900 F.2d at 14), see also Bosteve Ltd. v. Marauszowski, 110 F.R.D. 257, 259 (E.D.N.Y. 1986).

Here, plaintiffs agreed to the dismissal of Mr. Timofeev's claims as soon as the matter was brought to the attention of the Court by defendants. Although the Court cannot evaluate the adequacy of Mr. Timofeev's explanation for his absence because counsel has been unable to contact him, there has been no showing that Mr. Timofeev's absence is the result of bad faith or a lack of diligence on the part of plaintiff's counsel. Since this action will proceed on a class basis, the prospect of relitigation of Mr. Timofeev's claims is unlikely; presumably Mr. Timofeev will be entitled to any relief ultimately granted to the class.

Finally, and most important, defendants have not been prejudiced by the absence of Mr. Timofeev. Although the discovery process is nearing completion, defendants have been able to take discovery of the remaining named plaintiffs in this action. Since plaintiffs have agreed to dismiss Mr. Timofeev's claims, defendants will not be forced to defend against those claims without adequate preparation. Because Mr. Timofeev has not been produced for a deposition, plaintiffs are hereby precluded from calling him as a witness at trial. If plaintiffs are able to locate Mr. Timofeev at least sixty (60) days before the date set for trial, plaintiffs may make an application to the Court to introduce his testimony as a witness, provided that adequate time is given to defendants to depose him prior to trial.

Thus, for the foregoing reasons, this Court respectfully recommends that Mr. Timofeev's claims be dismissed without prejudice.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b); Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail copies of this Report and Recommendation to the parties.

**SO ORDERED.**

Dated: Brooklyn, New York  
January 17, 2004

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CHERYL L. POLLAK  
United States Magistrate Judge