

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AI CONSULTING LLC, et al., :
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 Plaintiffs, :
 :
V. :
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CELLCO PARTNERSHIP d/b/a VERIZON: :
WIRELESS and VERIZON TRADEMARK :
SERVICES LLC, et al., :
 :
 :
 Defendants. :

RULING AND ORDER

Plaintiffs have filed a motion (Doc. # 63) to vacate their notice of voluntary dismissal without prejudice (Doc. # 46), which was filed pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure on March 30, 2005. After the notice was filed, the Clerk entered an order dismissing the action and the case was terminated. On April 18, the order was vacated by the court, the case was reopened, and the matter was referred to Magistrate Judge Martinez for a settlement conference and a ruling on a motion for sanctions filed by the defendants. Since then, efforts to bring about a settlement have been unsuccessful.

In support of their motion to vacate the notice of voluntary dismissal, plaintiffs state that the notice was filed because they "had elected to file a non-federal jurisdiction case, subsuming only state law claims, against the defendants in the State of Connecticut Superior Court, which the defendants have indicated they would remove to this Court." Pls.' Mot. to Vacate at 5. They also point out that plaintiff AI Consulting,

LLC "is out of business," and "may have to file bankruptcy, which may spawn more litigation." Id. They contend that, in this situation, Rule 60(b)(6) permits the notice of voluntary dismissal to be vacated so that the litigation can be "handled in this one case and as expeditiously as possible." Id.

Defendants @Wireless Enterprises, Inc. and Craig Jerabeck oppose the motion to vacate on the ground that the filing of the notice "immediately and automatically terminated the action." Defs.' Response to Briefing Order (Doc. # 60) at 3. In addition, they contend that what plaintiffs are really doing is seeking to avoid the effect of the prior pending action doctrine. In this regard, they explain that after this action was dismissed by virtue of plaintiffs' notice, @Wireless commenced an action against plaintiff AI Consulting LLC in the Western District of New York, which remains pending. Defs.' Opp. to Mot. to Vacate at 3.

Plaintiffs' argument that it would make more sense to permit this action to proceed than require them to start yet another one has some practical appeal. However, the filing of the notice automatically discontinued the action, as defendants correctly point out. See Thorp v. Scarne, 599 F.2d 1169, 1176 (2d Cir. 1979) ("In contrast to other methods of dismissal contemplated by Rule 41, voluntary dismissal prior to defendant's service of an answer or a motion for summary judgment is effective in the

absence of any action by the court."); see also Vogel v. American Kiosk Mgmt., 371 F. Supp. 2d 122, 129 (D. Conn. 2005) (Hall, J.) (notice of voluntary dismissal becomes effective upon filing without any action by the court); Seippel v. Jenkins & Gilchrist, No. 03 Civ. 6942 (SAS), 2004 WL 2809205, at *1 (S.D.N.Y. Dec. 7, 2004) ("Rule 41(a)(1) means just what it says - if no answer or motion for summary judgment has been served, the plaintiff has the unilateral right to discontinue his action. There is no discretion of the court involved.") (citation omitted).

Accordingly, plaintiffs' motion is hereby denied and the action is dismissed without prejudice. See Vogel, 371 F. Supp. 2d at 129. Defendants' motion for sanctions remains pending before Magistrate Judge Martinez.

So ordered.

Dated at Hartford, Connecticut this 16th day of November 2005.

_____/s/_____
Robert N. Chatigny
United States District Judge