

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**DEBORAH R. DOLEN aka Author
“Mabel White”**

Plaintiff,

v.

**JULIE RYALS aka THE DESIGN
SHOPPE, & JANE DOE LIBEL
CYBERSTALKER**

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§

Civil Action No.: 8:09-cv-02120-SDM-AEP

Judge: Steven D. Merryday

JURY DEMANDED

**DEFENDANTS MARY JOANNE KIDD, JEFFERY A. KIDD AND MARY HARVEY’S
MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, TO
DISMISS PURSUANT TO F.R.C.P. RULE 41(a)(2)**

Defendants Mary Joanne Kidd (hereafter referred to as “Joanne Kidd”), Jeffery A. Kidd and Mary Harvey (jointly referred to herein as “Defendants” and/or “The Kidds”) file this, their motion for judgment on the pleadings pursuant to F.R.C.P. Rule 12 (c) or, in the alternative, to dismiss pursuant to F.R.C.P. Rule 41 (a)(2), conditioning such dismissal on it being with prejudice to refiling. The Kidds would show as follows:

1. Although Plaintiff Deborah Dolen (hereinafter “Plaintiff” or “Dolen”) attempted to make claims against The Kidds in her Complaint and in her First Amended Complaint, it appears that Dolen has sought to dismiss them by simply omitting them from the Second Amended Complaint. No formal motion to dismiss has been filed.

2. With no allegations against the Kidds in the Second Amended Complaint, there is no basis on which Dolen could recover anything from them. Therefore, a take nothing judgment on the pleadings pursuant to F.R.C.P. Rule 12 (c) should be rendered against Dolen and in favor of the Kidds. Alternatively, to the extent that Dolen’s omission of all allegations and claims

against the Kidds from the Second Amended Complaint may be construed to be an attempt to dismiss those claims pursuant to F.R.C.P. Rule 41 (a), the Kidds request that such deemed motion be conditioned on being with prejudice to refiling as authorized under F.R.C.P. Rule 41 (a)(2).

3. As discussed in detail in a recent Fifth Circuit opinion

A district court generally imposes terms and conditions when granting a motion for a voluntary dismissal under Rule 41(a)(2) in order to protect the defendant. 9 WRIGHT & MILLER, *supra*, at § 2366. A “plaintiff has the option to refuse a Rule 41(a)(2) voluntary dismissal and to proceed with its case if the conditions imposed by the court are too onerous.” *Mortgage Guar. Ins. Corp. v. Richard Carlyon Co.*, 904 F.2d 298, 301 (5th Cir. 1990). However, an “important qualification” to this rule is that “the plaintiff’s option to withdraw the motion to dismiss must be exercised in a timely fashion.” *Id.* A plaintiff must have “a reasonable period of time within which to refuse the conditional voluntary dismissal by withdrawing her motion for dismissal or to accept the dismissal despite the imposition of conditions.” *Id.* (quoting *Lau v. Glendora Unified Sch. Dist.*, 792 F.2d 929, 931 (9th Cir. 1986)).

Cranford v. Morgan Southern, Inc., slip op., p. 4 (5th Cir. 2009), **EXHIBIT A**

4. Here, Plaintiff did NOT file a formal motion to dismiss under Rule 41(a)(2). Therefore, it is believed that the Kidds are still nominally defendants in this case and the claims that previously were or could have been brought against them are subject to judgment on the currently live pleadings under F.R.C.P. Rule 12 (c). Under the Second Amended Complaint, there are no claims left and a take nothing judgment should thus be rendered against Dolen and in favor of the Kidds. It is only in the alternative and in an abundance of caution that Rule 41(a)(2) is discussed herein.

5. It is noted that the Kidds’ counterclaims against Dolen survive regardless of whether Dolen’s claims are dismissed under Rule 12 (c) or under Rule 41(a)(2). As Rule 41(a)(2) says in pertinent part: “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 the defendant 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." In this case, the Kidd's counterclaims were filed and have never changed since February 8, 2009. However, they are amenable to independent adjudication, so they do not stand as a barrier to dismissal of Dolen's previously asserted claims.

6. Notably, Dolen has on several occasions suggested that she could and planned to dismiss the Kidds and refile the same claims in state court. Given Dolen's extensive history of filing suits, there is little doubt that she would not hesitate to file these claims again in state court if she thought she could do so. In fact, when she moved back to Florida, she asked the Houston court to dismiss this case in its entirety so that she could do just that – refile in Florida state court. It is that very threat that leads the Kidds to request judgment on the pleadings and, in the alternative, that any dismissal under Rule 41(a)(2) be conditioned upon the dismissal being with prejudice to refiling.

7. It is also noted that all of the claims that Dolen originally made against The Kidds were based on alleged actions that Dolen attributed to The Kidds initially and now, in the second amended complaint, is attributing to The Kidds' co-defendant, Julie Ryals. Since there are no factual allegations left in any of Dolen's live pleadings to support any legal claim against the Kidds, all such claims that have been or could have been brought should be dismissed based on the amended pleadings.

WHEREFORE, premises considered, Mary Joanne Kidd, Jeffery A. Kidd and Mary Harvey pray that all claims previously asserted against them by plaintiff, Deborah R. Dolen be

