

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**August 16, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

JOSEPH ANTONETTI,

Plaintiff - Appellant,

v.

FNU SANTISTEFAN; FNU MARTINEZ,  
Warden; FNU BROWN, Warden; FNU  
BUCKALEW, Lt.; JOHN GAY, Secretary;  
GEO CORP; FNU CHAVEZ, Cpt.;  
ALISHA LUCERO; FNU ETTER, STIU;  
FNU MENDOZA, STIU; FNU UYUON,  
STIU; FNU GOMEZ, CSW; FNU LUJAN-  
GRISHAM, Gov.; JOHN/JANE DOES, 1-  
15; FNU DURAN; NMCD,

Defendants - Appellees.

No. 23-2060  
(D.C. No. 1:21-CV-00279-DHU-DLM)  
(D. N.M.)

**ORDER AND JUDGMENT\***

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.\*\*

Joseph Antonetti appeals from an order of the district court dismissing his civil rights complaint with prejudice. The district court dismissed Antonetti's complaint

\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

\*\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute and comply with the district court's order to file an amended complaint. The district court erred in dismissing Antonetti's complaint with prejudice without considering the factors set out by this court in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992). Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we **reverse** the district court's order of dismissal and **remand** to the district court for further proceeding consistent with this opinion.<sup>1</sup>

Antonetti commenced this action by filing a "Prisoner's Civil Rights Complaint" in district court. The district court, thereafter, entered an order dismissing Antonetti's complaint without prejudice for failure to state a claim. The order of dismissal, however, granted Antonetti an opportunity to file an amended complaint within thirty days.<sup>2</sup> Instead of filing an amended complaint, Antonetti filed a motion to reconsider the dismissal order. He also sought to appeal the dismissal order to this court. The district court denied the motion to reconsider and extended the amendment deadline by an additional thirty days. This court dismissed Antonetti's notice of appeal, noting in part that the appeal was premature as Antonetti's deadline to file an amended complaint was pending and the dismissal order was not a final judgment.

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<sup>1</sup> Antonetti's motion to proceed on appeal in forma pauperis is **granted**.

<sup>2</sup> Notably, this comprehensive order detailed the pleading flaws in Antonetti's complaint—including setting out claims only cognizable under 28 U.S.C. § 2241 and failing to set forth plausible factual allegations in support of the claims for relief—and noted that if Antonetti "declines to timely amend, the Court may dismiss the case with prejudice."

When Antonetti failed to file a timely amended complaint, the district court dismissed the entire case. In so doing, it relied entirely on Rule 41(b). Dist. Ct. Order at 1-2 (“The extended deadline for Antonetti to file an amended complaint has now passed. He has not filed an amended complaint, sought further extension of the deadline, or otherwise shown cause for his failure to amend. The Court will therefore dismiss this case under Fed. R. Civ. P. 41(b) for ‘failure to prosecute [and] comply with the . . . court’s orders.’ *Olsen v. Mapes*, 333 F.3d 1199, 1204 n.3 (10th Cir. 2003).”).

The only basis cited by the district court in its order of dismissal is Antonetti’s failure to prosecute and to comply with the district court’s orders. It is certainly true that Rule 41(b) authorizes involuntary dismissals for failure to prosecute as well as failure to comply with rules and court orders. This court has, however, allowed district courts to dismiss claims under Rule 41(b) “without attention to any particular procedures” *only* when the dismissal is without prejudice. *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007); *see also AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009). Before dismissing *with* prejudice, on the other hand, district courts “must” consider the *Ehrenhaus* factors. *Nasious*, 492 F.3d at 1162; *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1143 (10th Cir. 2007). Given that the sole basis for the district court’s order of dismissal with prejudice was Rule 41(b),<sup>3</sup> its failure to

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<sup>3</sup> Because it did not form the basis for the district court’s order of dismissal, this court offers up no opinion on whether it would be appropriate to dismiss

consider the *Ehrenhaus* factors before dismissing Antonetti’s case requires that this court reverse. *See Nasious*, 492 F.3d at 1163-64 (reversing dismissal with prejudice and remanding where the district court did not consider the *Ehrenhaus* factors); *cf. Ecclesiastes 9:10-11-12, Inc.*, 497 F.3d at 1151 (affirming dismissal with prejudice where the district court “thoroughly considered and properly applied the *Ehrenhaus* criteria”).

We **REVERSE** the district court’s with-prejudice order of dismissal and **REMAND** to the district court for further proceedings consistent with this opinion.

Entered for the Court

Michael R. Murphy  
Circuit Judge

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Antonetti’s case with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) based on the analysis set out in the district court original without-prejudice dismissal order, *see supra* n.2.