

1 FOR PUBLICATION

2

3

4

5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

7

JOVITA B. TOMOKANE,

8

Plaintiff,

9

v.

10

HANSAE (SAIPAN), INC.,

11

Defendant.

12

) **CIVIL ACTION NO. 02-0182**

) **ORDER DENYING DEFENDANT’S**
) **MOTION TO QUASH FIRST**
) **AMENDED COMPLAINT PURSUANT**
) **TO COM. R. CIV. P. 15(a); AND FOR**
) **OTHER PURPOSES**

13

14 **I. INTRODUCTION**

15

THIS MATTER came on for hearing on September 23, 2002, at 9:00 a.m., in courtroom 205A, on Defendant’s: motion to quash, dismiss, strike the complaint and/or for an order for a more definite statement;¹ and, motion to quash the first amended complaint. Edward C. Arriola, Esq. and Victorino DLG. Torres,² Legal Intern, appeared with Plaintiff. Timothy MB Farrell, Esq. appeared for Defendant. The Court, having considered the parties submissions, having heard arguments of counsels, and being fully advised, now enters its ruling.

16

17

18 **II. BACKGROUND**

19

On March 27, 2002, Plaintiff, owner of Lot E.A. No. 121, filed a complaint against Defendant for encroachment, trespass to land, conversion of easements and premises, destruction to property and nuisance. On March 28, 2002, Defendant was served with the summons and complaint. By mutual agreement, Defendant was given until May 21, 2002, to answer the complaint. On May 21, 2002,

20

21

¹ Defendant’s motion was essentially to: quash service on the complaint because of a typographical error in name of Defendant company; dismiss the first, and third causes of actions; and, strike portions of the second and fifth causes of actions.

22

23

² The Court notes that defense counsel’s contention, on the record, that Victorino Torres’ appearance as a legal intern in this case was improper, is without merit.

24

25

26

1 Defendant moved to quash, dismiss, strike the complaint and/or for an order for a more definite statement.
2 On May 30, 2002, Plaintiff opposed the motion and on June 4, 2002, filed her first amended complaint
3 pursuant to Commonwealth Rules of Civil Procedure 15(a). On June 13, 2002, Defendant moved to quash
4 Plaintiff's first amended complaint. At the time of the September 23, 2002,³ hearing, Defendant had yet
5 to file its answer to the complaint or to the first amended complaint.

6 III. QUESTION PRESENTED

7 Whether Plaintiff's right to amend her complaint as a matter of course pursuant to Commonwealth
8 Rules of Civil Procedure 15(a) terminates with a filing of a motion to quash, strike, dismiss the original
9 complaint and/or for an order for a more definite statement.

10 IV. ANALYSIS

11 Rule 15(a) of the Commonwealth Rules of Civil Procedure provides:

12 A party may amend the party's pleading *once as a matter of course at any time*
13 *before a responsive pleading is served* or, if the pleading is one to which no responsive
14 pleading is permitted and the action has not been placed upon the trial calendar, the party
15 may so amend it at any time within 20 days after it is served. Otherwise a party may
16 amend the party's pleading only by leave of court or by written consent of the adverse
17 party; and leave shall be freely given when justice so requires.

18 Com. R. Civ. P. 15(a) [hereinafter Rule 15(a)] (emphasis added). The plain language of Rule 15(a)
19 permits a party to amend its pleading in three different ways: as a matter of course, by written consent of
20 the adverse party, or by leave of court.⁴ Defendant argues that Plaintiff should not be permitted to amend
21 her complaint as a matter of course because there is a pending motion on the complaint and that it would
22 be "bad practice" in general to allow plaintiffs to amend their complaints after a motion such as the one at
23 bar has been filed and calendared for a hearing. Plaintiff, on the other hand, avers that Rule 15(a) permits
24 her to amend her complaint as a matter of right any time before a responsive pleading is served and that
25 the pending motion is not a responsive pleading.

26 The question presented, one of first impression in the Commonwealth, prompts a two-part inquiry:
27 whether the pending motion to quash, dismiss, strike the complaint and/or for an order for a more definite
28

26 ³ The Court calendared the motion for hearing on July 3, 2002, but moved it to August 7, 2002, and again to
27 September 23, 2002.

28 ⁴ See *In Re Adoption of Magofna*, 1 N.M.I. 449, 455 (1990).

1 statement is a responsive pleading within the meaning of the rule; and, if it is not, whether the intervening
2 motion terminates Plaintiff's right to amend once as a matter of course. In interpreting Rule 15(a), the
3 Court looks to federal court decisions and treatises interpreting the federal counterpart rule as persuasive
4 authority.⁵

5 It is well settled that the plain language of Rule 15(a) allows a plaintiff to amend its complaint once,
6 as a matter of right, before a responsive pleading is served. In interpreting the meaning of "responsive
7 pleading," courts have looked at Rule 15(a) in relation to Rule 7(a)⁶ of the Federal Rules of Civil
8 Procedure. James Wm. Moore's treatise on federal practice states:

9 The term *responsive pleading* is defined by reference to Rule 7(a), which distinguishes
10 between pleadings and motions, and provides an exclusive list of what is a pleading: a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party
11 complaint, and an answer.

12 Pre-trial motions attacking the pleadings or seeking relief as to collateral matters
13 are not responsive pleadings. Accordingly, if no responsive pleading has been filed, the
14 filing of these motions does not cut off a plaintiff's right to amend as a matter of course.
15 Examples of pre-trial motions include: **Motions to dismiss[,] Motions for summary
16 judgment[,] Motions for a more definite statement under Rule 12[,] Motions for
17 production and inspection[,] Motions to quash service.**

18 *See Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84.*, 133 F.3d 1054, 1057 (7th Cir.
19 1998) (*quoting with emphasis* 3 MOORE'S FEDERAL PRACTICE ¶15.11 (3d ed. 1997) (footnotes omitted,
20 second emphasis added).⁷ Applying the distinction between pleadings and motions, contained in Rule 7(a),
21 to the case at bar, the Court finds that the pending motion is not a responsive pleading within the meaning
22 of Rule 15(a).

21 ⁵ *See Mafnas v. Commonwealth*, 2 N.M.I. 248, 264 n. 12 (1991).

22 ⁶ FED. R. CIV. P. 15(a) and 7(a) are identical to Com. R. Civ. P. 15(a) and 7(a).

23 ⁷*See Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995) (holding that "responsive pleading" does not include
24 a motion to dismiss for purposes of Rule 15(a)); *Breier v. N. California Bowling Proprietors' Ass'n*, 316 F.2d 787 (9th
25 Cir. 1963) (holding that a motion to dismiss is not a responsive pleading); *Taj Mahal Enters., Ltd. v. Trump*, 745 F. Supp.
26 240, 245 (D.N.J. 1990) (holding that a motion to dismiss or to strike is not a responsive pleading); *McLellan v. Mississippi
27 Power & Light Co.*, 526 F.2d 870, 872 n.2 (5th Cir. 1976) (holding that a motion to dismiss is not a responsive pleading);
28 *McDonald v. Hall*, 579 F.2d 120, 121 n.5 (1st Cir. 1978) (per curiam) (holding that "the portion of Rule 15(a) allowing a
party to amend his pleading once as a matter of right prior to the adverse party serving a responsive pleading . . . [permits
a party] at any time prior to the court's acting on the motion [for summary judgment], . . . a right to file his amended
pleading."); *Breuer v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1131 (holding that plaintiff "could have amended her complaint
prior to dismissal [by granting of a motion to dismiss or for summary judgment] without requesting or receiving leave
of the court.").

1 The next inquiry is whether the right to amend, once as a matter of course, is absolute or whether
2 it terminates with the filing of an intervening motion. A review of federal precedent on this issue reflects a
3 disparity among the circuits. The first approach, applied by some decisions of the Ninth Circuit, is based
4 on a rigid, literal reading of Rule 15(a) that the right to amend as a matter of course continues until a
5 responsive pleading is filed, regardless of what might happen prior to the filing of that responsive pleading.⁸
6 The rationale is that Rule 15(a) is silent as to the effect of an intervening motion, such as a motion for a
7 dismissal of the pleading, and therefore such action has no effect on the right to amend.⁹ The second
8 approach, adopted by a majority of circuits, is that the right to amend as a matter of course terminates with
9 the granting of a Rule 12(b)(6) motion and dismissal of the claims or counterclaims in the pleading.¹⁰

10 This Court is inclined to adopt the first approach, and finds persuasive the holding and rationale of
11 the Ninth Circuit in *Breier v. N. California Bowling Proprietors' Ass'n*, 316 F.2d 787 (9th Cir. 1963).
12 In *Breier*, the lower court had dismissed the complaints for failure to state a claim upon which relief could
13 be granted and denied appellants leave to file amended complaints as a matter of right under Rule 15(a).

14
15 ⁸ See *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984) (quoting *Breier*, 316 F.2d at 789 (holding that neither
16 the filing nor granting of a motion to dismiss before answer terminates the right to amend); see also *Wood v. Santa*
17 *Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1520 (9th Cir. 1983) (holding this right of amendment can survive
18 dismissal of a complaint if such dismissal precedes the defendant's answer). See also *Whitaker v. City of Houston*,
19 Texas, 963 F.2d 831, 835 (5th Cir. 1992) (holding that a literal interpretation of Rule 15(a) would allow a plaintiff to amend
20 as a matter of course even after a motion to dismiss has been granted).

21 ⁹ *Id.*

22 ¹⁰ See *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 388 (1st Cir. 1994) (citing *Jackson v. Salon*, 614 F.2d 15,
23 17 (1st Cir. 1980)) (holding that "a plaintiff's time to amend his or her complaint as a matter of right . . . terminates upon
24 a [] court's dismissal of the complaint."); *McDonald*, 579 F.2d at 121 & n.5 (stating that Rule 15(a) allows a party to
25 amend "at any time prior to the court's acting on the motion" to dismiss); *Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d
26 445, 448 n.1 (2d Cir. 1978) (holding that "it is equally well established that this right [to amend] terminates upon the
27 granting of the motion to dismiss."); *Whitaker*, 963 F.2d at 837 (adopting the rule that "the right to amend as of course
28 (per curiam) (holding that "[a]fter a complaint is dismissed, the right to amend under Fed. R. Civ. P. 15(a) terminates.");
Breier, 40 F.3d at 1131 (holding that "[b]ecause defendants' motions to dismiss or for summary judgment were not
responsive pleadings, [plaintiff] could have amended her complaint prior to dismissal without requesting or receiving
leave of the court."); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers*, 724 F.2d 1552, 1556 (11th Cir. 1984)
(adopting the rule that "after a complaint is dismissed the right to amend under Rule 15(a) terminates."); *Phillips v.*
Borough of Keyport, 179 F.R.D. 142, 146 (concluding that plaintiffs' right to amend the complaint expired on dismissal
of the pleading, even if no responsive pleading had been filed and even if the order of dismissal had not been affirmed
on appeal); *Hewlett-Packard Co. v. Arch Assocs. Corp.*, 172 F.R.D. 151, 153 (E.D. Pa. 1997) (holding that "[i]t is generally
held, however, that once a motion to dismiss has been granted, a plaintiff may amend its pleading only by leave of
court"); *Averbach v. Rival Mfg. Co.*, No. 85-2794, 1986 U.S. Dist. LEXIS 28293, 1986 WL 3111, at * 3 (E.D. Pa. 1986)
(holding that "[o]nce a motion to dismiss has been granted, a plaintiff does not have a right to amend a complaint").

1 In reversing the lower court's decision, the *Breier* court stated:

2 We think appellants were entitled to file amended complaints as a matter of right.
3 'A party may amend his pleading once as a matter of course at any time before a
4 responsive pleading is served' A motion to dismiss is not a 'responsive pleading'
5 within the meaning of the Rule. Neither the filing nor granting of such a motion before
6 answer terminates the right to amend; an order of dismissal denying leave to amend at that
7 stage is improper, and a motion for leave to amend (though unnecessary) must be granted
8 if filed.

9 Even if the question had been addressed to the Court's discretion, we think leave
10 to amend should have been granted. The purpose of pleading under the Rules 'is to
11 facilitate a proper decision on the merits.' To this end, Rule 15 'was designed to facilitate
12 the amendment of pleadings except where prejudice to the opposing party would result.'
13 'If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject
14 of relief, he ought to be afforded an opportunity to test his claim on the merits. In the
15 absence of any apparent or declared reason - - such as undue delay, bad faith or dilatory
16 motive on the part of the movant, repeated failure to cure deficiencies by amendments
17 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
18 amendment, futility of amendment, etc. - - the leave sought should, as the rules require, be
19 'freely given.'

20 *Id* at 789-90 (citations omitted).

21 Applying the above interpretation to the instance case, the Court finds: 1) Defendant's motion to
22 quash, dismiss, strike and/or for an order for a more a more definite statement is not a responsive pleading;
23 2) Defendant did not file a responsive pleading as defined by Rule 7(a); 3) Plaintiff's amendment to the
24 complaint filed on June 13, 2002, without leave of court, was proper under Rule 15(a) absent a showing
25 of apparent prejudice to Defend
26 ant.

27 V. CONCLUSION

28 For the foregoing reasons, the Court enters the following orders:

- 29 1. Defendant's June 13, 2002 motion to quash the first amended complaint is **DENIED**;
- 30 2. Defendant's May 21, 2002, motion to quash, dismiss, strike and/or for an order for a more
31 definite statement is moot and need not be addressed in light of the filing of the first amended complaint.

32 **SO ORDERED** this 12th day of December 2002.

33 /s/
34 VIRGINIA S. SABLAN-ONERHEIM, Associate Judge