

FSM SUPREME COURT TRIAL DIVISION

ROSA MUTI and KEMES MUTI, on behalf of the )  
children of their late father, Muti Kette, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CHUUK PUBLIC UTILITIES CORPORATION )  
and CHUUK STATE, )  
 )  
Defendants. )  
\_\_\_\_\_ )

CIVIL ACTION NO. 2021-1004

ORDER DENYING MOTION TO STRIKE AMENDED COMPLAINT

Larry Wentworth  
Associate Justice

Decided: August 16, 2021

APPEARANCES:

For the Plaintiffs: Sabino S. Asor, Esq.  
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Weno, Chuuk FM 96942

For the Defendant: Erick Divinagracia, Esq.  
(CPUC) Ramp & Mida Law Firm  
P.O. Box 1480  
Kolonia, Pohnpei FM 96941

For the Defendant: Charleston Bravo  
(Chuuk) Legal Consultant  
Chuuk Attorney General's Office  
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HEADNOTES

Civil Procedure – Pleadings – Amendment

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Motions; Civil Procedure – Pleadings

A motion to dismiss is not a responsive pleading because motions are not pleadings. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Pleadings – Amendment

Rule 15(a) permits the plaintiffs to amend their complaint without seeking leave of court, and as a matter of course, against any defendant who has not yet answered. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Interpretation of Rules

Although the court must first look to FSM sources of law, when an FSM court has not previously construed an FSM civil procedure rule which is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance in interpreting the rule. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 n.1 (Chk. 2021).

Civil Procedure – Pleadings – Amendment

If the case has more than one defendant, and not all have filed responsive pleadings, the plaintiff may amend the complaint as a matter of course with regard to those defendants that have yet to answer. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Pleadings – Amendment

When a defendant did not file an answer before the plaintiffs filed their amended complaint, that defendant cannot have the plaintiffs' amended complaint stricken even though the defendant's co-defendant had already filed an answer. The plaintiffs could amend their complaint against the movant defendant as a matter of course and without leave of court. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Pleadings – Amendment

When a claim asserted by a plaintiff is against a number of defendants jointly liable for their combined conduct or acts, that to such a claim “a responsive pleading” is not served until all of the defendants have answered the claim, not just some of them. In respect to such claims of joint liability, the plaintiff can serve an amended complaint as of right. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Pleadings – Amendment

When a plaintiff moves to amend a complaint, although a court should exercise its discretion liberally to allow amended pleadings, a motion to amend a complaint may be denied if it is futile. But when the plaintiff has the right to file an amended complaint as a matter of course, Rule 15(a)'s plain language shows that the court lacks the discretion to reject the amended complaint based on its alleged futility. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 377 (Chk. 2021).

Civil Procedure – Motions; Civil Procedure – Pleadings – Amendment

As an amended complaint supersedes the original complaint, no motion of any kind can later be addressed to the original complaint as it performs no function in the action. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 374, 378 (Chk. 2021).

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## COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

## I. PROCEDURAL HISTORY

On May 4, 2021, the plaintiffs, Rosa Muti and Kemes Muti (“the Mutis”), filed their complaint against Chuuk Public Utilities Corporation (“CPUC”) and Chuuk State, alleging that the defendants were liable to them for violation of due process and civil rights violations and for unjust enrichment because the defendants allegedly used the Mutis' land to provide public utilities but had not paid any rent for the land since the initial

lease expired in 2000.

On May 24, 2021, defendant Chuuk filed its Answer with Affirmative Defenses. On May 25, 2021, defendant CPUC filed its Motion to Dismiss Complaint, in which it asserted that the complaint should be dismissed because a summons was not served with the complaint; because the plaintiffs lacked standing to sue on behalf of the Muti Kette estate since there was no probate court order appointing them administrators; and because it was barred by the six-year statute of limitations.

On May 31, 2021, the Mutis filed an amended complaint. On June 21, 2021, CPUC moved to strike the Mutis' amended complaint because the Mutis had not sought leave of court to file an amended complaint; because, although the amended complaint was served with a summons, it was not properly served since a plaintiff, Kemes Muti, served the amended complaint and summons; because it would have been futile to seek leave of court to file the amended complaint since the amended complaint did not cure the original complaint's defects (lack of standing and omission of indispensable parties); and because the Mutis did not oppose CPUC's original motion to dismiss and are therefore deemed to have consented to CPUC's motion to dismiss and that, since sufficient grounds exist to dismiss the original complaint, this action against CPUC should be dismissed.

On June 28, 2021, the Mutis filed their opposition to CPUC's motion to strike and also moved and to strike Chuuk State's answer because its affirmative defenses were not sufficiently elaborated. The Mutis also included, without any points and authorities or supporting argument, a motion for leave to file their May 31, 2021 amended complaint.

On June 29, 2021, Chuuk filed its Joinder to CPUC's Motion to Strike, adopting CPUC's arguments that the Mutis needed leave of court to file an amended complaint and that the attempt to amend was futile because the amendment did not cure the original complaint's defects.

On July 12, 2021, CPUC filed a reply to the Mutis' opposition, and on July 15, 2021, the Mutis filed a surreply to the CPUC's motion to strike. The Mutis' surreply included affidavits from the Mutis' siblings, with which the Mutis sought to bolster their position that they had standing. And on August 9, 2021, CPUC filed a rejoinder (which it called a surreply) noting that, even if the court recognized the affidavits, those affidavits did not take into account the interest in the land of the Mutis' non-surviving sibling and that sibling's possible heirs.

## II. ANALYSIS

### A. *Motion to Strike Amended Complaint*

#### 1. *Effect of Chuuk's Answer*

CPUC (joined by Chuuk) contends that since Chuuk filed an answer to the original complaint, the Mutis could not file an amended complaint without first seeking and obtaining leave of court. For this proposition, CPUC relies on Civil Procedure Rule 15(a) which, in pertinent part, provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

CPUC further contends that, even if leave had been sought from the court, the amended complaint still could not be permitted since the Mutis' amendment does not cure the complaints' defects and therefore amending the complaint is pointless or futile.

Muti v. Chuuk Public Utilities Corp.  
23 FSM R. 374 (Chk. 2021)

CPUC has not filed a responsive pleading – it did not file an answer. CPUC’s motion to dismiss is not a responsive pleading because motions are not pleadings. See, e.g., Primo v. Pohnpei Transp. Auth., 9 FSM R. 407, 410 (App. 2000) (plaintiff may amend a complaint once without leave of court anytime before a responsive pleading is filed and a Rule 12 motion to dismiss is not a responsive pleading); see also FSM Civ. R. 7(a).

Plainly, FSM Civil Procedure Rule 15(a) permits the Mutis to amend their complaint without seeking leave of court, and as a matter of course, against any defendant who has not yet answered. Williams v. Board of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1291 (11th Cir. 2007); Barksdale v. King, 699 F.2d 744, 747 (5th Cir. 1983); Boyd v. District of Columbia, 465 F. Supp. 2d 1, 3 (D.D.C. 2006); see also 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1481, at 661 (3d ed. 2010).<sup>1</sup> “If the case has more than one defendant, and not all have filed responsive pleadings, the plaintiff may amend the complaint as a matter of course with regard to those defendants that have yet to answer.” Williams, 477 F.3d at 1291.

Therefore, since CPUC did not file an answer before the Mutis filed their amended complaint, CPUC cannot have the Mutis’ amended complaint stricken even though CPUC’s co-defendant Chuuk had already filed an answer. The Mutis could amend their complaint against CPUC as a matter of course and without leave of court. Furthermore,

[w]here a claim asserted by a plaintiff is against a number of defendants jointly liable for their combined conduct or acts, that to such a claim “a responsive pleading” is not served until all of the defendants have answered the claim, not just some of them. In respect to such claims of joint liability, . . . the plaintiff . . . could serve an amended complaint as of right.

Pallant v. Sinatra, 7 F.R.D. 293, 300 (S.D.N.Y. 1945); see also Harlee v. Hagen, 538 F. Supp. 389, 393 (E.D.N.Y. 1982). The Mutis seek to hold CPUC and Chuuk jointly liable for the use of their land. The Mutis thus had the right to file and serve their May 31, 2021 amended complaint without seeking leave of court.

## 2. Amended Complaint’s Alleged Futility

CPUC further contends that the amended complaint should be stricken because the amended complaint does not cure the original complaint’s defects and therefore the attempted amendment is futile.

When a plaintiff moves to amend a complaint, “[a]lthough a court should exercise its discretion liberally to allow amended pleadings, a motion to amend a complaint may be denied if it is futile.” Tom v. Pohnpei Utilities Corp., 9 FSM R. 82, 87 (App. 1999). But “[w]hen the plaintiff has the right to file an amended complaint as a matter of course, however, the plain language of Rule 15(a) shows that the court lacks the discretion to reject the amended complaint based on its alleged futility.” Williams, 477 F.3d at 1292 n.6 (emphasis in original).

The court must therefore deny the motion(s) to strike the Mutis’ amended complaint. The Mutis filed their amended complaint as a matter of right and the court therefore lacks the discretion to reject it based on its alleged futility. Thus, the court cannot rule now on the merits of CPUC’s arguments in its motion to strike, its reply, and its rejoinder, regardless of how meritorious they might be.

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<sup>1</sup> Although the court must first look to FSM sources of law, FSM Const. art. XI, § 11, when an FSM court has not previously construed an FSM civil procedure rule which is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance in interpreting the rule. *In re* Sanction of Sigrah, 19 FSM R. 305, 311 n.1 (App. 2014); *George v. Albert*, 17 FSM R. 25, 31 n.1 (App. 2010); *Berman v. College of Micronesia-FSM*, 15 FSM R. 582, 589 n.1 (App. 2008).

B. *Other Motions*

The Mutis' May 31, 2021 Amended Complaint is thus the operative pleading. It supersedes the original complaint. Its filing made CPUC's motion to dismiss the original complaint obsolete. "As the amended complaint supersedes the original complaint no motion of any kind can now be addressed to the original complaint as it performs no function in the action . . ." United States v. Shofner Iron & Steel Works, 71 F. Supp. 161, 162 (D. Or. 1947), *rev'd on other grounds*, 168 F.2d 286 (9th Cir. 1948). The court will thus make no ruling on the merits of the motion to dismiss the original complaint.

Since the Mutis' May 31, 2021 Amended Complaint is the operative pleading, the Mutis' motion to strike Chuuk's answer to the original complaint and to file their amended complaint are now both nullities.

C. *Scheduling Order*

Since the Mutis' May 31, 2021 Amended Complaint is now the operative pleading, the court hereby gives the defendants, CPUC and Chuuk, until September 2, 2021, to answer or otherwise defend against the Mutis' amended complaint.

III. CONCLUSION

CPUC's motion to strike the plaintiffs' amended complaint is denied, and the defendants are given to September 2, 2021, to answer or otherwise defend against the amended complaint.

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FSM SUPREME COURT APPELLATE DIVISION

GAY JEAN MIGUEL, a minor through Mikehla Miguel, next of kin,	)	APPEAL CASE NO. P13-2016
	)	(Civil Action No. 2013-008)
Appellant,	)	
	)	
vs.	)	
	)	
FEDERATED STATES OF MICRONESIA SOCIAL SECURITY ADMINISTRATION,	)	
	)	
Appellant.	)	
_____	)	

OPINION

Oral Argument: October 16, 21, 2020  
Decided: August 19, 2021

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court  
Hon. Larry Wentworth, Associate Justice, FSM Supreme Court  
Hon. Mayceleen JD. Anson, Specially Assigned Justice, FSM Supreme Court\*

\*Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei