

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 08-cv-01639-PAB-BNB
(Consolidated with Civil Action No. 08-cv-01896-PAB-BNB)

GALLAGHER'S NYC STEAKHOUSE FRANCHISING, INC.,

Plaintiff,

v.

1020 15th STREET, INC. and
BRUCE RAHMANI,

Defendants.

Civil Action No. 08-cv-01896-PAB-BNB

1020 15th STREET, INC.,

Consolidated Plaintiff,

v.

GALLAGER'S (sic) STEAKHOUSE-GRAND CENTRAL
OYSTER BAR FRANCHISING, INC.,

Consolidated Defendant.

ORDER

On September 5, 2008, while Civil Action No. 08-cv-01896-WYD-KLM was pending before Chief Judge Wiley Y. Daniel, defendant Gallagher's Steakhouse-Grand Central Oyster Bar Franchising, Inc. filed a motion to dismiss [Docket No. 4] the complaint of plaintiff 1020 15th St., Inc. Chief Judge Daniel ordered 1020 15th St., Inc. to respond to the motion to dismiss no later than November 24, 2008 [Docket 08-cv-

01896, No. 18]. At a November 25, 2008 hearing, I granted a motion to consolidate Civil Action No. 08-cv-01896-WYD-KLM with Civil Action No. 08-cv-01639-PAB-BNB. I also granted an oral motion by 1020 15th St., Inc. for an extension of time until 5:00 p.m. the following day to file a response to Gallagher's Steakhouse-Grand Central Oyster Bar Franchising, Inc.'s motion to dismiss [Docket 08-cv-01639, No. 52]. A response was not forthcoming. Instead, on November 26, 2008, 1020 15th St., Inc. filed a "Notice of Filing First Amended Complaint" [Docket 08-cv-01896, No. 19]. On December 2, 2008, 1020 15th St., Inc. corrected the deficiencies in the November 26 filing by submitting a motion for leave to file its first amended complaint [Docket 08-cv-01639, No. 54]. This motion was ultimately granted [Docket 08-cv-01639, No. 58] and an amended complaint was filed on December 10, 2008 [Docket 08-cv-01639, No. 59].

Thus, as of December 10, 2008, the operative pleading was the First Amended Complaint. Gallagher's Steakhouse-Grand Central Oyster Bar Franchising, Inc.'s motion to dismiss is therefore directed at an inoperative, superseded pleading. See, e.g., *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir. 1990) ("[A] pleading that has been amended under Rule 15(a) supersedes the pleading it modifies . . .") (internal quotation marks omitted). As such, the motion to dismiss is moot. Therefore, it is

ORDERED that Gallagher's Steakhouse-Grand Central Oyster Bar Franchising, Inc.'s motion to dismiss [Docket 08-cv-01896, No. 4] is DENIED as moot.

DATED February 13, 2009.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge