

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MEL HIBBETS, ET AL.

CIVIL ACTION

VERSUS

NO: 07-5169

LEXINGTON INSURANCE COMPANY,
ET AL.

SECTION: "J" (5)

ORDER AND REASONS

Before the Court is Defendant's Motion to Dismiss (Rec. Doc. 10) as well as Plaintiff's Motion for Leave to File First Supplemental and Amending Complaint. For the reasons below, Plaintiff's Motion for Leave to File First Supplemental and Amending Complaint is **GRANTED**, and Defendant's Motion to Dismiss is **DENIED as moot**.

BACKGROUND

Plaintiff filed suit, and requested class certification for damages, for systematic failures of Lexington Insurance Company to pay under insurance policies after Hurricane Katrina. Defendant filed a motion to dismiss for failure to state a claim. Defendant argued that the original complaint failed to state any factual allegation that would give rise to a cause of action.

Plaintiffs responded by filing a motion for leave to file an amended complaint, which it claims addresses the issues raised in the motion to dismiss.

Defendant, thereafter, notified the Court that it had no opposition to Plaintiff's Motion to Amend. (Rec. Doc. 17). Further, Defendant filed a second motion to dismiss based upon Plaintiff's amended complaint, set for hearing on February 20. (Rec. Doc. 20).

DISCUSSION

FED. R. CIV. P.15(a) provides that a party may amend its complaint once as a matter of course as long as the opposing party has not filed responsive pleadings. The Fifth Circuit has held that for the purposes of Rule 15(a) a motion to dismiss is not a responsive pleading. *McGruder v. Phelps*, 608 F.2d 1023, 1025 (5th Cir. 1979). Accordingly, even though the Plaintiffs are seeking permission of the court to amend his complaint, such permission is unnecessary, as Plaintiffs may amend by right.

Even though a district court is permitted to consider a motion to dismiss even after an amended complaint has been filed, it is not required to do so, especially given that the Defendant does not object to the filing of the amended complaint and has already filed a second motion to dismiss. Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss(Rec. Doc.

10) is **DENIED as moot;**

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File First Supplemental and Amending Complaint is **GRANTED.**

New Orleans, Louisiana this the 6th day of February, 2008.



CARL J. BARBIER
UNITED STATES DISTRICT JUDGE