

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

GARY HENSLEY

CIVIL ACTION

VERSUS

NO: 09-47

REDI-MED OF MANDEVILLE, ET AL

SECTION: "J" (4)

**ORDER AND REASONS**

Before the Court is the Defendants' Motion to Dismiss Pursuant to FRCP 12(b)(1) and 12(b)(6) (Rec. Doc. 5) as well as Plaintiff's Motion to Amend Complaint for Damages (Rec. Doc. 11). For the reasons below, Plaintiff's Motion to Amend Complaint for Damages is **GRANTED**, and Defendant's Motion to Dismiss is **DENIED as moot**.

**BACKGROUND**

Plaintiff filed suit seeking damages relating to a drug test administered by the Defendants in connection with a pre-employment physical examination. The Defendants filed a motion to dismiss for failure to state a claim and lack of subject matter jurisdiction. The Defendants argue that the Court does not have diversity jurisdiction in this matter and that the

plaintiff's claims are prescribed. The Plaintiff has opposed the motion and also responded by filing a motion to amend his complaint, which amendment he claims addresses the issues raised in the motion to dismiss.


#### **DISCUSSION**

Federal Rule of Civil Procedure 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 Plaintiff is seeking permission of the Court to amend his complaint, such permission is unnecessary, as Plaintiff may amend by right. Although the Defendants filed a reply memorandum addressing the claims asserted in the Plaintiff's amended complaint, they also requested the opportunity to fully brief the allegations of the amended complaint. Accordingly,

**IT IS ORDERED** that the Defendants' Motion to Dismiss (Rec. Doc. 5) is **DENIED as moot**;

**IT IS FURTHER ORDERED** that the Plaintiff's Motion to Amend Complaint for Damages (Rec. Doc. 11) is **GRANTED**.

New Orleans, Louisiana this the 19th day of May, 2009.



CARL J. BARBIER  
UNITED STATES DISTRICT JUDGE