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JAMES W. HAY Clerk  
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

NATHANIEL BORRELL DYER,

:

Plaintiff,

:

:

:

:

v.

:

CIVIL ACTION FILE

NO. 1:18-CV-03284-CAP

ATLANTA INDEPENDENT SCHOOL  
SYSTEM,

:

:

:

Defendant.

:

:

**RESPONSE TO DEFENDANT'S NOTICE OF OBJECTION  
TO PLAINTIFF'S AMENDED RESPONSE TO DEFENDANT'S  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Plaintiff respectfully opposes the Defendant's Notice of Objection to Plaintiff's Amended Response to Defendant's Motion to Dismiss for Failure to State a Claim (Doc. 19). For the reasons set forth below, Plaintiff respectfully asks this Court to disregard Defendant's notice of objection.

## **PROCEDURAL BACKGROUND**

Because a motion is not considered a pleading within the meaning of Rule 15 (see Rule 7(a)), Federal Rule 15(a) if read literally, would permit a Plaintiff to amend his pleading, without leave of court, even after the Court had granted a motion to dismiss or a motion for summary judgment. Thus, a mere filing of a motion to dismiss does not prevent the Plaintiff from amending his complaint as a matter of right. See *Keene Lumber Co. v. Leventhal*, 165 F.2d 815 (1st Cir. 1948).

The second part of Rule 15(a) deals with amendments by leave of court or by written consent of the adverse party. Rule 15(a) specifically provides that “leave shall be freely given when justice so requires.” Under the interpretation of Federal Rule 15(a) in *Keene Lumber*, supra, the Plaintiff has the right to one amendment, without leave of court, even though the Defendant has filed a motion to dismiss the complaint. However, Plaintiff requested leave of court to file his amended response.

## **ARGUMENT AND CITATION TO AUTHORITY**

### **I. NEITHER THE FEDERAL RULES NOR THE LOCAL RULES PERMITS PLAINTIFF TO FILE AN AMENDED RESPONSE TO A MOTION TO DISMISS, AND PRO SE PARTIES ARE EXPECTED TO ABIDE BY PROCEDURAL RULES.**

Defendant states, “Neither the Federal Rules of Civil Procedure nor the Local Rules allow for the filing of an amended response to a motion to dismiss.” However, this statement does not reconcile with Defendant’s Reply in Support of Motion to Dismiss for Failure to State a Claim filed on August 29, 2018 (Doc. 9)

which states, “Defendant respectfully requests that this Court either disregard any argument made after the twenty fifth page of the Plaintiff’s response or require Plaintiff to file an amended response that complies with the Local Rules.” This contradiction indicates either a significant oversight on the part of the Defendant or willful misconduct by the Defendant to submit a request to the Court that could not be legally satisfied by the Plaintiff.

Furthermore, Defendant’s Notice of Objection to Plaintiff’s Amended Response to Defendant’s Motion to Dismiss for Failure to State a Claim (Doc. 19) falsely states, “Plaintiff respectfully requests that this Court disregard Plaintiff’s Amended Response when this Court rules on Defendant’s Motion to Dismiss.” To be clear, Plaintiff never made this request to the Court or authorized the Defendant to make this request to the Court on his behalf.

Due process protections within the United States Constitution ensures a Pro Se litigant’s claim will be heard despite a litigant’s potential lack of familiarity with procedure. Plaintiff fully understands that an individual choosing Pro Se representation must observe all the rules of the legal action and has acted accordingly in good faith. Unfortunately, it has become evident that the Defendant has opted to engage in malfeasance and procedural acrobatics through successive motions to dismiss the Plaintiff’s claim in order to prolong legal proceedings and distract from the factual dispute that needs to be resolved by the Court.

AISS filed a Notice of Removal on July 9, 2018 in Superior Court to Federal Court claiming that it was not interposed for any improper purposes, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. (Doc. 1). The Defendant has failed miserably in abiding by the standards they acknowledge in their Notice of Removal. Consequently, Defendant’s notice of objection to Plaintiff’s amended response should be disregarded.

**II. PLAINTIFF’S AMENDED RESPONSE IS ANOTHER  
IMPROPER ATTEMPT TO FILE A SURREPLY.**

Defendant has mischaracterized Plaintiff’s amended response as a surreply, which Defendant already acknowledged was formally withdrawn by the Plaintiff. Defendant also falsely states, “In filing his Amended Response, Plaintiff is transparently attempting to circumvent the Federal Rules and Local Rules.” As a reminder, the Defendant asked the Court to “require Plaintiff to file an amended response that complies with the Local Rules.” The Defendant failed to acknowledge this request in their Procedural Background section which would have been pronounced under August 29, 2018. (Doc. 19). Under Argument and Citation to Authority, Defendant states that Plaintiff’s response exceeds the page limitation established by Local Rule 7.1 (D). Defendant respectfully requested the Court either disregard any argument made after the twenty-fifth page of Plaintiff’s response or require Plaintiff to file an amended response that complies with the Local Rules. (Doc. 9). As a Pro Se litigant, Plaintiff chose to do the later and comply with Local Rule 7.1(D). In addition, Defendant asserts no factual inadequacy in the amended response and the original claim remained the same.

A motion to dismiss under Rule 12(b)(6) should be granted only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 335 U.S. 41, 48 (1957) (emphasis added); see also *Fed. R. Civ. P.* 12(b)(6); *Bell Atlantic Corp v. Twombly*, 550 U.S. 540, 570 (2007). A motion under Rule 12(b)(6) merely tests the legal sufficiency of a complaint, requiring a court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the plaintiff. *Twombly*, 550 U.S. at 556-57. A complaint should never be dismissed because the

court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. *Id.*

For all the reasons set forth above, Plaintiff respectfully requests that this Court disregard Defendant's Notice of Objection to Plaintiff's Amended Response to Defendant's Motion to Dismiss for Failure to State Claim in its entirety and continue legal proceedings with the Plaintiff's amended response. (Doc. 18).

Respectfully submitted this 7th day of December, 2018.



Nathaniel Borrell Dyer  
*Plaintiff Pro Se*

**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing was prepared using Times New Roman font, 14-point type, which is one of the font and print selections approved by the Court in L.R.5.1(B).

This 7th day of December, 2018.



Nathaniel Borrell Dyer  
*Plaintiff Pro Se*

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This 7th day of December, 2018.




Nathaniel Borrell Dyer  
*Plaintiff Pro Se*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of December, 2018, a copy of the document entitled **RESPONSE TO DEFENDANT'S NOTICE OF OBJECTION TO PLAINTIFF'S AMENDED RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** was delivered by first class mail to:

Nelson Mullins Riley & Scarborough LLP  
Atlantic Station / 201 17th Street, NW / Suite 1700  
Atlanta, GA 30363

  
Nathaniel Borrell Dyer  
*Plaintiff Pro Se*

  
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