



IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY MAY 27 2022
STATE OF OKLAHOMA

CHRISTOPHER AVELLONE,

Plaintiff,

vs.

KELLY RAE BRISTOL,

Defendant.

RICK WARREN
COURT CLERK

108

Case No. CJ-2021-4340

The Honorable Anthony L. Bonner

**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S AMENDED PETITION**

The Plaintiff, Christopher Avellone ("Avellone"), respectfully submits his response to Defendant's Motion to Strike Plaintiff's Amended Petition.

The Defendant, Kelly Rae Bristol ("Bristol"), has again misinterpreted court rules. Indeed, this is at least the **fourth time** that Bristol has taken actions in this litigation that contravene court rules. First, Bristol improperly removed this case to federal court. Second, Bristol filed a motion to dismiss in federal court out of time and without leave. Third, after the federal court remanded the improperly removed case back to this Court, Bristol filed another motion to dismiss out of time and without leave. Now, Bristol has filed a motion to strike Avellone's Amended Petition because Bristol has misinterpreted OKLA. STAT. 12, § 2015(A), governing amendment of pleadings. These improper actions have wasted judicial resources, caused delay, and created inconvenience and expense for Avellone.

Section 2015(A) provides, in pertinent part, as follows:

A party may amend his or her pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he or she may so amend it at any time within twenty (20) days after it is served. Amendments to add omitted counterclaims or to add or drop parties may be made as a matter of course within the time specified above. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. (emphasis added).

The Oklahoma Pleading Code defines “pleadings” as “a petition and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim denominated as such; a third-party petition, if a person who was not an original party is summoned under the provisions of Section 14 of this act; and a third-party answer, if a third-party petition is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.” OKLA. STAT. 12, § 2007(A).

Bristol has never filed or served a responsive “pleading” in this case. Rather, Bristol has filed a pre-answer motion to dismiss, which is clearly **not** a “pleading.” This has been the law in Oklahoma for decades. *Stokes v. State*, 1965 OK 155, ¶ 3, 410 P.2d 59, 60 (“a motion is not defined as a pleading”). In *Winston v. Stewart & Elder, P.C.*, 2002 OK 68, 55 P.3d 1063, the Oklahoma Supreme Court held:

“Under the federal Rule 15(A) it is axiomatic that a complaint [the federal equivalent of Oklahoma’s petition] may be amended *by right* at any time before an answer is served. Allowing a party the right to amend by right without the court’s permission under the first sentence of § 2015 is consistent with the later language in Section 2015(A) which circumscribes a party’s right to amend ‘only’ with leave of court after a responsive pleading has been filed.”

Id., 2002 OK at ¶ 24, 55 P.3d at 1071 (bracketed alterations and emphasis in original)¹; *see also*, *State ex rel. Wright v. Okla. Corp. Comm’n*, 2007 OK 73, ¶ 51, 170 P.3d 1024, 1040 (“a petition may be amended by *right* at any time before an answer is served.”).

In *Tinker Federal Credit Union v. State Farm Mutual Auto Insurance Co.*, Case No. CIV-12-956-R, 2012 U.S. Dist. LEXIS 192092 (W.D. Okla. Oct. 30, 2012), the court considered the defendant’s argument that an amended petition filed in state court, prior to removal, was a

¹ “When in its assessment of Oklahoma’s procedural regime the Court addresses federally-evolved concepts, we may look to the federal courts for guidance in the interpretation and application of the rule in issue. Hence, federal extant jurisprudence and treatises on the pertinent federal procedure are enlightening in discerning the application which should be accorded § 2015(A)’s language set forth above.” *Winston*, 2002 OK at ¶ 23, 55 P.3d at 1070.

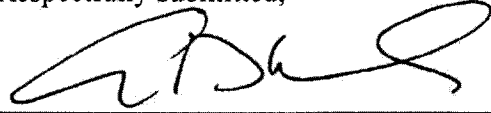
nullity because it had been filed without leave of court. Applying § 2015(A), the court held that “because no ‘responsive pleading’ to Plaintiff’s Petition had been filed, *i.e.*, answer, leave of court was not required for Plaintiff to file an Amended Petition.” *Id.* at *3.

Bristol’s reliance on the third sentence of § 2015(A) is entirely misplaced. The third sentence of § 2015(A) does not become operative unless the first sentence is inapplicable. For example, if Bristol had filed and served a responsive pleading; *i.e.*, an answer, then the first sentence would not apply. However, Bristol did not file an answer, so the first sentence of § 2015(A) controls. Accordingly, Avellone has the unqualified right under the first sentence of § 2015(A) to amend his petition once as a matter of course at any time before a responsive pleading has been served.

Avellone filed his Amended Petition on May 6, 2022. Filing the Amended Petition rendered Bristol’s pending motion to dismiss moot. *Phoenix Energy Mktg. v. Chase Oil Corp.*, Case No. 16-CV-0681-CVE-TLW, 2017 U.S. Dist. LEXIS 82126, *3 (N.D. Okla. May 30, 2017) (“Because plaintiff had filed an amended petition, the motions to dismiss the original petition were moot”); *Washington v. State ex rel. Dep’t of Corr.*, 1996 OK 139, n.2, 915 P.2d 359, 360. Bristol must now respond to the Amended Petition. OKLA. STAT. tit. 12, § 2015(A) (“A party **shall** respond to an amended pleading within the time remaining for response to the original pleading or within twenty (20) days after the service of the amended pleading, whichever period may be longer, unless the court otherwise orders.”).

For the foregoing reasons, Bristol’s motion to strike the Amended Petition should be denied, and Avellone should be awarded his costs and reasonable attorney fees incurred in responding to the motion to strike.

Respectfully submitted,



Eric D. Wade, OBA No. 19249
ROSENSTEIN FIST & RINGOLD
525 South Main, Suite 700
Tulsa, Oklahoma 74103-4508
(918) 585-9211 (Telephone)
(918) 583-5617 (Facsimile)
ericw@rflaw.com

ATTORNEYS FOR PLAINTIFF
CHRISTOPHER AVELLONE

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 27th day of May, 2022, a true, complete and correct copy of the above document was sent via United States Certified Mail, Return Receipt Requested, with proper postage thereon fully prepaid, to:

Scott E. Kiplinger
GABLE GOTWALS
499 W. Sheridan Avenue, Suite 2200
Oklahoma City, Oklahoma 73102



Eric D. Wade