



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: WATER CONTAMINATION LITIGATION CIVIL ACTION NO. 16-C-6000

THIS DOCUMENT APPLIES TO:

JANET L. THOMPSON,

v.

Civil Action No. 16-C-123 KAN

AMERICAN WATER WORKS SERVICE
COMPANY, et al.,

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Pending before the Court is plaintiff's motion for summary judgment filed on November 5, 2018 (Transaction ID 62628637). Having reviewed the motion and the responses filed by defendants¹, and having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously **DENY** plaintiff's motion for the following reasons.

II. Findings of Fact

1. Following an in-person hearing on September 21, 2018, the Court entered a detailed, final order granting defendant J. Clifford Forrest's motion to dismiss plaintiff's Amended Complaint, and dismissing with prejudice Mr. Forrest and any defendants who were not served with the Amended Complaint on October 3, 2018. *Order Granting Defendant J. Clifford Forrest's Motion to Dismiss Plaintiff's Amended Complaint* (Transaction ID 62517690).

¹ Defendant J. Clifford Forrest's Response to Plaintiff Janet L. Thompson's "Summary Judgment" and "Opt-Out" Filings (Transaction ID 62668045) filed November 14, 2018; West Virginia-American Water Company's Response to Plaintiff's Motion for Summary Judgment (Transaction ID 62710959) filed November 30, 2018; and Defendant J. Clifford Forrest's Joinder in Defendant West Virginia-American Water Company's Response to Plaintiff's Motion for Summary Judgment (Transaction ID 62724628) filed December 4, 2018.

2. On October 3, 2018, the Court also entered a detailed, final order granting the motion to dismiss of remaining defendants, West Virginia-American Water Works Company and American Water Works Service Company, and dismissing plaintiff's Amended Complaint, with prejudice. *Order Granting West Virginia-American Water Works Company's and American Water Works Service Company's Motion to Dismiss* (Transaction ID 62517821).

3. The thirty day time period for filing a notice of appeal under Rule 5(b) of the West Virginia Rules of Appellate Procedure ran on November 2, 2018.

4. Plaintiff's current motion for summary judgment was filed on November 5, 2018. *Motion for Summary Judgment-Liability Only* (Transaction ID 62628637).

5. Plaintiff's motion for summary judgment refers to "Original Complaints-Federal and State, amended complaints, Objections, Settlements and Non Documented Response/Denials to Amended Complaint." *Id.*, Motion at 1.

6. Ms. Thompson's affidavit, included within the motion, states "I was a victim of the Defendant, West Virginia-American Water's... intentional actions, involving the sale of its chemically laced potable water, as safe and clean for human consumption." *Id.*, at 2.

7. On November 5, 2018, plaintiff also filed an untitled "response" in the Supreme Court of Appeals of West Virginia. (Transaction ID 62648723).²

III. Conclusions of Law

1. The Court's October 3, 2018, order was a final order.
2. To challenge the order, plaintiff could (1) file a motion under Rule 59 of the West Virginia Rules of Civil Procedure within ten days of the entry of the order; (2) file a motion

² The "response" is time stamped as having been filed in both the Supreme Court of Appeals and in the Circuit Court of Kanawha County, West Virginia (Transaction ID No. 62648723).

under Rule 60(b) of the West Virginia Rules of Civil Procedure; or (3) file a timely notice of appeal under Rule 5(b) of the West Virginia Rules of Appellate Procedure.

3. Plaintiff's motion cannot be considered under Rule 59 of the West Virginia Rules of Civil Procedure because it was not filed within ten days of the entry of the final order. See, *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 695–96, 474 S.E.2d 872, 875–76 (1996)("When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).").

4. Plaintiff's motion for summary judgment is untimely because it was filed after the action was dismissed. As discussed below, the motion must be considered under Rule 60(b). Nonetheless, the motion fails to establish there are no genuine issues of material fact as required by Rule 56 of the West Virginia Rules of Civil Procedure. Plaintiff may not simply rely generally on pleadings and other filings, nor does her affidavit establish the lack of a factual dispute. Syl. Pt. 3, *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995) (stating that a properly supported motion for summary judgment includes affirmative evidence demonstrating that there is no genuine issue of a material fact). Therefore, even if the Court were to consider the motion under Rule 56, it would deny the motion.

5. Notwithstanding the title, plaintiff's motion can only be considered as a motion for relief from a judgment order pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. Under Rule 60(b), plaintiff's motion fails. The Court's order accurately reflects the

Court's ruling from the bench at the hearing on September 21, 2018, so there is no plausible claim of "clerical error."

6. Ms. Thompson, who appeared at the September 21, 2018, hearing pursuant to the Court's prior orders, was given the opportunity to respond first to defendant Forrest's motion to dismiss and then to discuss additional matters related to the complaint she filed. She expressly refused and left the courtroom despite the Court's direct request that she stay. Ms. Thompson's current motion makes no claim of newly discovered evidence, fraud, misrepresentation, or other "misconduct of an adverse party" and does not contain any information from which the Court could glean such an argument. Therefore, the Court **DENIES** plaintiff's motion under Rule 60(b) of the West Virginia Rules of Civil Procedure.

7. Ms. Thompson also filed a "response" in the Supreme Court of Appeals of West Virginia. Plaintiff's attempt to appeal generally divests a circuit court of jurisdiction. A limited exception allows a circuit court to deny motions made under Rule 60(b) where a notice of appeal has been filed. Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* 1396 (5th ed. 2017); see also Fed. R. Civ. P. 62.1(a) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."). Applying this exception, the Court denies plaintiff's motion.

For these reasons, the motion for summary judgment is **DENIED**. The Court directs the Mass Litigation Manager to electronically file and serve this Order on all counsel of record, and

to send a copy of this Order to *pro se* plaintiff Janet Thompson via U.S. Mail at the following address:

Janet L. Thompson
1326 Elmwood Avenue
Charleston, WV 25301

It is so **ORDERED**.

ENTER: December 13, 2018.

/s/ Alan D. Moats
Lead Presiding Judge
Water Contamination Litigation