

13-1224

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRANDY EPLION,

Plaintiff,

v.

FILED
2013 OCT 30 AM 11:16
CATHY S. BRISSON
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 10-C-1473

The Hon. Jennifer Bailey

THE WEST VIRGINIA DIVISION OF CORRECTIONS,
an agency of the State of West Virginia; and
JOHN DOE, unknown person or persons,

Defendants.

DISMISSAL ORDER

On October 18, 2013 came the defendant, The West Virginia Division of Corrections, by counsel, Lou Ann S. Cyrus, Natalie C. Schaefer, and Shuman, McCuskey & Slicer, PLLC, for a hearing on WVDOC's motion seeking to have this Court dismiss the instant action with prejudice in its entirety because the Plaintiff has failed to join an indispensable party. Upon review of the parties' pleadings, hearing argument of counsel, and after careful and mature consideration, the Court hereby FINDS as follows:

1. Rule 19(a) of the West Virginia Rules of Civil Procedure provides that a person who is subject to service of process shall be joined as a party in the action if:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

2. Whether a party is INDISPENSABLE under the Rules of Civil Procedure is a determination to be made by the trial court. *Pioneer Co. v. Hutchinson*, 159 W. Va. 276, 220 S.E.2d 89 (1975). However, facts determine whether a party is indispensable and a necessary part of the case, and the court may only proceed if to do so would be consistent with principles of equity and good conscience. *Housing Auth. of City of Bluefield v. E.T. Boggess, Architect, Inc.*, 160 W. Va. 303, 233 S.E.2d 740 (1977).

3. An indispensable party's presence is required in order that the court may make adjudication equitable to all persons involved. *Dixon v. Am. Indus. Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974).

4. In the instant matter, C.O. Crawford was dismissed by Order dated April 20, 2012 for Plaintiff's failure to timely serve him. A second (and substantively identical) Complaint was filed in Civil Action No. 12-C-964 against this Defendant and Crawford on May 30, 2012; however, this refiling does not relieve the Plaintiff from her failure to initially join an indispensable party in this matter. Moreover, C.O. Crawford was dismissed from the second civil action by Order dated February 1, 2013 due to the Plaintiff's failure to serve C.O. Crawford in that matter. Subsequently, the second Complaint was dismissed with prejudice, by Order entered on February 25, 2013 due to being duplicative of this civil action.

5. Plaintiff filed a third Complaint, Civil Action No. 13-C-804, pending before the Honorable Judge Bloom. C.O. Crawford filed a Motion to Dismiss the same. On June 3, 2013, Judge Bloom entered an Order staying Civil Action No. 13-C-804 and finding that he would not address Crawford's Motion to Dismiss Civil Action No. 13-C-804 until a Motion

to Consolidate this matter with Civil Action No. 13-C-804 had been filed and ruled upon by this Court. Thereafter, Plaintiff requested this Court to consolidate this matter with Civil Action No. 13-C-804. Notably, the West Virginia Division of Corrections has not been served in Civil Action No. 13-C-804, and the time for service has expired.

6. Regarding the Plaintiff's failure to timely serve an alleged offending correctional officer defendant, on June 13, 2012, the Honorable Judge Bloom, in addressing circumstances identical to those herein, dismissed a case against the West Virginia Regional Jail Authority in its entirety, with prejudice, finding that the correctional officer was an indispensable party to the lawsuit, despite the filing of a second Complaint.

7. Judge Bloom's opinions confirm the notion that a Defendant should not be held responsible for a Plaintiff's lack of diligence and care to join a necessary party. In several other instances, judges in this circuit have concurred with this conclusion and have followed suit by dismissing the action.

8. In almost identical circumstances, on May 28, 2013, the Honorable Judge Zakaib dismissed a case against the West Virginia Division of Corrections in its entirety, with prejudice, due to Plaintiff's failure to properly join the offending correctional officer, finding that the correctional officer was an indispensable party.

9. Similarly, on July 21, 2013, the Honorable Judge Webster dismissed a case against the West Virginia Division of Corrections in its entirety, with prejudice, due to Plaintiff's failure to join the offending officer because that officer was deemed an indispensable party. Likewise, the Honorable Carrie Webster dismissed the West Virginia

Division of Corrections with prejudice due to Plaintiff's failure to join the offending officer because that officer was deemed an indispensable party in Civil Action No. 12-C-690.

10. As in the afore-mentioned cases previously dismissed in this jurisdiction for failure to join an indispensable party, the instant Plaintiff failed to properly join the alleged offending officer, C.O. Ronald Crawford, who is alleged to have committed the sexual assault, harassment, and abuse against her. Plaintiff is claiming damages from said alleged assault.

11. The way the case is currently postured, Defendant C.O. Ronald Crawford would not be present at trial and would not participate in the defense of this matter.

12. Rule 19(a) was created specifically to avoid such a dilemma. *Dixon*, 157 W. Va. 735, 205 S.E.2d 4.

13. To the extent that Plaintiff argues that Rule 21 of the West Virginia Rules of Civil Procedure disallows the dismissal of an action for misjoinder, Rule 21 grants the Court discretion "on such terms as are just." W. Va. Civ. P. Rule 21.

14. Plaintiff's reliance on W. Va. Code §56-4-34 and 56-4-53 is wholly misplaced and will be disregarded because neither statute has any bearing on the issue presented in Defendant's Motion to Dismiss. Specifically, issues related to nonjoinder as explained in W. Va. Code §56-4-34 are addressed in Rules 20 and 21 of the West Virginia Rules of Civil Procedure, not *Rule 19*, which is the applicable rule in this matter:

Three types of parties are generally recognized with respect to the issue of joinder under Rule 19 and Rule 20: indispensable parties, necessary parties and proper parties. Indispensable and necessary parties are associated with Rule 19. Proper parties are associated with Rule 20. As the note to W. Va. R. Civ. P. 19 states in part:

“Indispensable parties are those without whose presence the action cannot proceed.... Necessary parties are defined as those who should be joined if feasible, but whose presence is not essential.” Furthermore, as *the note to W. Va. R. Civ. P. 20 states in part: “This rule deals with joinder of parties other than ‘necessary’ and ‘indispensable’ parties, which are dealt with in Rule 19....* Those joinable under this rule are generally called ‘proper’ parties in federal courts.” Of course, this Court is not unmindful that a mechanical designation of parties as indispensable, necessary or proper, should not be substituted for a comprehensive analysis of the rules of joinder. See WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1604 (1972). However, those designations are still in use in federal cases and are somewhat helpful in distinguishing the reasons why the joinder of parties is granted or denied.

Anderson v. McDonald, 170 W. Va. 56, 59-60 (W. Va. 1982)(emphasis added).

15. Contrary to Plaintiff’s assertion, W. Va. Code §56-4-34 does not preclude dismissal in the instant action. That code provision simply stands for the proposition that a party’s failure to include or exclude *non-indispensable* (yet, proper and even necessary) parties does not warrant dismissal. In the instant action, this Court finds that Crawford is *indispensable* (as opposed to simply “necessary” or “proper”) under W. Va. Rule Civ. Pro. 19(a), and therefore, the Plaintiff’s failure to serve him despite multiple opportunities to do so has prohibited the WVDOC from fully defending itself in this matter:

We believe the test under the old Rule 19 as stated in *Dixon, supra*, is rather compatible to the present Rule 19 although it lacks some of the specificity of Rule 19(a), which requires two general inquiries for joinder of a person who is subject to service of process. First, is his presence necessary to give complete relief to those already parties? Second, does he have a claim that, if he is not joined, will be impaired or will his nonjoinder result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations? If the absent person meets the foregoing test, his joinder is required. However, *in the event that the absent person cannot be joined, the suit should be dismissed only if the court concludes that the 19(b) criteria cannot be met.*

Wachter v. Dostert, 172 W. Va. 93 (1983)(emphasis added). The *Wachter* Court further observed that:

. . . it does appear that there has been a shift in emphasis by the federal courts since the 1966 Amendments to the federal rule. The test has become less scholastic in the sense of trying to define who is an indispensable party. ***Instead, under the amended rule, the emphasis is placed on the question of whether the case can be equitably prosecuted in the absence of a missing party. If so, there is no reason to join the party or to dismiss the action.*** [Footnote omitted].

Id. at 280(emphasis added).

16. Indeed, “[i]n the absence of a necessary party the merits of a cause may not be adjudicated.” *Bowen v. West Va. Gas Corp.*, 121 W. Va. 403, 3 S.E.2d 629 (1939).

Plaintiff’s claims against Crawford have been dismissed (twice) and therefore, he cannot now be made a party in the instant case.

17. Plaintiff claims that WVDOC can interplead Crawford as a third party defendant; however, neither the text of Rule 14 nor West Virginia case law supports the Plaintiff’s assertion that WVDOC must defeat its own Rule 12(b)(7) Motion by impleading C.O. Crawford. On the contrary, Rule 14(a) is a permissive provision that allows a Defendant to choose whether or not to implead a third-party Defendant, and does not contemplate mandatory joinder of a third-party Defendant that the Plaintiff initially sued, and then simply failed to timely serve. It would be illogical for Rule 14(a) and Rule 12(b)(7) to co-exist if Rule 14(a) required a Defendant to add a party whose presence in the lawsuit would defeat the Defendant’s Rule 12(b)(7) motion. *See, e.g., Bass v. Harbor Light Marina, Inc.*, 372 F. Supp. 786, 794 (Dist. Ct. S.C. 1974)(suggesting that Defendant choose between a

Rule 14(a) impleader and a Rule 12(b)(7) Motion, depending on Defendant's litigation strategy).

18. In this case, the Plaintiff wants the Court to mandate this Defendant to implead Crawford due to her own failure to timely serve him in multiple lawsuits, with prejudice, literally years after the alleged offending conduct. As noted above, not only is this mandate not required under the Rules of Civil Procedure, but it is not feasible due to the dismissal of Crawford with prejudice.

19. Plaintiff was given 120 days to serve C.O. Ronald Crawford but failed to do so. The WVDOC should not be held responsible for C.O. Ronald Crawford's portion of damages, if awarded, due to Plaintiff's lack of attention to her case. By allowing this case to go forward as currently postured, Plaintiff's inattention to her own case would be rewarded at the WVDOC's expense.

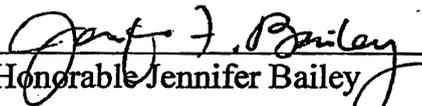
20. Named defendant Crawford is an indispensable party to this case. As such, this civil action cannot proceed in his absence, because to do so would be inconsistent with principles of equity and good conscience.

21. Accordingly, this Court hereby **GRANTS** the West Virginia Division of Corrections's Motion to Dismiss Plaintiff's Complaint with prejudice as she has failed to join an **INDISPENSABLE** party whose absence would make an equitable adjudication impossible.

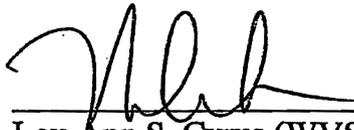
22. Turning to the Plaintiff's Motion to Consolidate, as a result of the above ruling, there is no portion of this case remaining; accordingly, this Court hereby DENIES Plaintiff's Motion to Consolidate.

The Clerk is DIRECTED to forward a copy of this Order to all counsel of record.

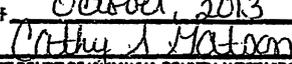
Entered this 30th day of October, 2013.


The Honorable Jennifer Bailey

Prepared by:



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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30
DAY OF October, 2013
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Copy Provided to:

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