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IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

NORMA ACORD, West Virginia residents,

Plaintiffs and class representatives,

CIVIL ACTION NO.: 04-C-151-0
Hon. Roger L. Perry, Judge

COLANE COMPANY, a West Virginia corporation, individually and successor-in-interest to Cole & Crane Real Estate Trust; COLE & CRANE REAL ESTATE TRUST, a West Virginia Trust; LOGAN COUNTY BOARD OF EDUCATION, a West Virginia public body; WEST VIRGINIA COAL & COKE COMPANY, a West Virginia Corporation; OMAR MINING COMPANY, a West Virginia Corporation, individually and a successor-in-interest to West Virginia Coal & Coke Company; A.T. MASSEY COAL COMPANY, a West Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company; MASSEY ENERGY COMPANY, a Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company,

Defendants.

ORDER DENYING PLAINTIFF'S RULE 60 MOTION FOR RELIEF FROM JUDGMENT IN FAVOR OF DEFENDANTS COLANE CORPORATION AND COLE & CRANE REAL ESTATE TRUST

On February 18, 2010, came plaintiff and class representative Norma Acord ("plaintiff"), by counsel Kevin Thompson and David R. Barney, Jr., and came defendants Colane

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Corporation ("Colane") and Cole & Crane Real Estate Trust ("Cole & Crane"), by counsel Edward M. Kowal and Andrew P. Ballard, for a hearing upon plaintiff's Motion for Relief from Judgment based upon newly discovered evidence, pursuant to West Virginia Rule of Civil Procedure 60(b)(2).

In her Motion, plaintiff stated that after the Court entered Final Judgment Orders in favor of defendants Colane and Cole & Crane, she discovered: the existence of an additional fact witness - Harvey Adkins; and a United States House of Representatives' subcommittee report criticizing the practices of the United States Agency for Toxic Substance & Disease Registry ("ATSDR") in unrelated site assessments. The plaintiff argued that Mr. Adkins' testimony provided "full factual support for the opinions and conclusions offered by" plaintiff's expert witness, Dr. Scott Simonton.¹ Further, the plaintiff argued that the newly discovered Congressional ATSDR report "is vital and wholly relevant because it casts significant doubt upon the government report upon which this Court relied in" granting Colane and Cole & Crane's dispositive motions.² Plaintiff professes not only do these matters warrant a classification of newly discovered evidence, but also that the Court's consideration of the same should provide a basis for granting

¹ Plaintiff's Rule 60 Motion for Relief from Judgment at p. 2.

² *Id.* at 5.

plaintiff relief from judgment entered in favor of defendant Colane and Cole & Crane.

The Court having considered the briefs, legal memorandum of the parties and the arguments of counsel, all as more fully set forth on the record, it is hereby **ORDERED** that plaintiff's Rule 60 Motion for Relief from Judgment based upon newly discovered evidence be, and this same is hereby, **DENIED**, with prejudice to the plaintiff.

In arriving at its decision, the Court finds that on June 25, 2009, defendant Colane brought on for hearing its Motion for Summary Judgment, while defendant Cole & Crane brought on for hearing its Motion to Dismiss. Following extensive oral arguments by counsel on these matters, the Court issued separate Orders granting the defendants' respective dispositive motions on July 15, 2009, finding that the plaintiff failed to satisfy her burden of proving the existence of a genuine issue of material fact for the jury to consider in these matters.

After final judgment was entered in favor of defendants Colane and Cole & Crane, plaintiff filed her Rule 60 Motion for Relief from Judgment on December 14, 2009. Colane and Cole & Crane filed their joint response on January 18, 2010, to which the plaintiff filed a Reply on January 29, 2010.

Thereafter, the Court heard arguments for and against plaintiff's Motion on February 18, 2010.

After carefully reviewing the plaintiff's Rule 60 Motion for Relief from Judgment and accompanying exhibits, defendants Colane and Cole & Crane's Response, plaintiff's reply and after listening to the arguments of counsel, the Court finds that plaintiff failed to proffer any evidence by way of her Motion, which would entitle her to relief from the Final Judgment Orders entered in favor of Colane and Cole & Crane.

In formulating this Order, the Court first addressed the issue of determining whether the testimony of Harvey Adkins and/or the Congressional ATSDR report should be classified as "newly discovered" evidence, pursuant to West Virginia Rule of Civil Procedure 60(b)(2) and precedential case law. In *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996), the West Virginia Supreme Court of Appeals held:

To come within the "newly discovered" evidence rule, the plaintiff at a minimum must show that the evidence was discovered since the adverse ruling and that the plaintiff was diligent in ascertaining and securing this evidence. By this, we mean that the new evidence is such that due diligence would not have permitted the securing of the evidence before the circuit court's ruling.

Id. at fn 25.

While the plaintiff claims in her Motion that she acted with due diligence in her search for fact witnesses, the record in this matter clearly establishes plaintiff noticed the deposition of four fact witnesses prior to the summary judgment stage: Edgar Franklin and Raymond Chafin on September 17, 2004; Carew Ferrell on January 10, 2006; and Richard Large on April 4, 2006.³ Therefore, plaintiff did not notice any other depositions of fact witnesses between April 4, 2006, and July 15, 2009 - the date on which this Court granted the defendants' dispositive motions.

In the more than three years between the last fact witness deposition secured by plaintiff and this Court's issuance of Orders granting Colane and Cole & Crane's dispositive motions, counsel for plaintiff urged this Court at every opportunity to schedule this matter for trial. The record establishes that it was not until after the Court granted defendants' dispositive motions that counsel for plaintiff

³ In addition, plaintiff also secured the deposition testimony of Luther Woods on December 28, 2006. While counsel for plaintiff identified Mr. Woods as a "fact witness" during a hearing on June 9, 2009, Mr. Woods' testimony focused upon: the history of the transfer real property between West Virginia Coal & Coke to Tom Stark; the formation of Colane; and Tom and Iola Stark's transfer of said real property to Colane. Further, his testimony provided a detailed history concerning the creation of the Cole & Crane Real Estate Trust and his understanding of Colane's general nature of business when it was incorporated in 1955.

claimed his diligent efforts to locate additional fact witnesses resulted with the identification of Harvey Adkins.

It is evident from the record that plaintiff believed the testimonies of Messrs. Franklin, Chafin, Large and Ferrell were sufficient to survive the summary judgment stage and she ceased any efforts to discover the identities of additional fact witnesses. Accordingly, the Court finds no support for plaintiff's allegation in her Motion for Relief from Judgment that she acted diligently in her efforts to discover the identity of Harvey Adkins. Pursuant to *Powderidge*, plaintiff cannot satisfy the minimum threshold requirement necessary to label Mr. Adkins' testimony as "newly discovered" evidence, and, for this reason, her Motion for Relief from Judgment fails.

Additionally, the Congressional ATSDR report addressed in plaintiff's Motion, which speaks for itself, indicates that it was published on March 10, 2009 - more than three months before the hearings on defendants' dispositive motions, and more than four months before entry of the Orders granting said motions. Yet plaintiff's Motion for Relief from Judgment states that she was unaware of the Congressional ATSDR report until she discovered a November 29, 2009, article in the *New York Times* chronicling complaints the "long-running failures of the ATSDR

to apply accepted risk assessment methodologies adequately to health consultations."⁴

Plaintiff bears the burden of gathering facts and evidence necessary to prove her case. Since the Congressional ATSDR Report is a matter of public record, and was available to plaintiff well in advance of the hearings upon defendants' dispositive motions and the Court's entry of Orders granting those motions, she failed to satisfy the minimum threshold in establishing she was diligent in ascertaining and securing this evidence. For these reasons, plaintiff's Motion for Relief from Judgment is denied.

It is of importance to note, however, that regardless of whether the plaintiff was diligent in ascertaining and securing the identity of Harvey Adkins and a copy of the Congressional ATSDR report, neither of these matters provides the Court with a basis to overturn the Final Judgment Orders entered in favor of Colane and Cole & Crane.

Mr. Adkins testified in his affidavit, and during his deposition, that he worked at the mine machinery repair shop in Omar, West Virginia, from 1951 until 1955. In the Orders granting Colane's Motion for Summary Judgment and Cole & Crane's Motion to Dismiss, this Court found that Colane acquired

⁴ Plaintiff's Rule 60 Motion for Relief from Judgment at p. 4.

ownership of the real property in question on May 10, 1955, and that Cole & Crane never possessed an ownership interest therein.

The testimony gathered from Mr. Adkins' affidavit and deposition leaves no doubt that he cannot identify the exact time in 1955 when his employment at the Omar shop was terminated. Accordingly, plaintiff cannot satisfy her burden of proving that the time of Mr. Adkins' employment at the Omar shop coincided with Colane's acquisition of the real property in question, which occurred on May 10, 1955.

Further, this Court determine in its Judgment Order granting Cole & Crane's Motion to Dismiss that: Cole & Crane was not in the chain of title concerning the real property in question; Colane was never a successor-in-interest to Cole & Crane; and Cole & Crane cannot be liable in this action as a joint venturer with any other entity. The testimony given by Mr. Adkins fails to allege any basis as to why the Court's Judgment Order in favor of Cole & Crane should be overturned.

In addition, Mr. Adkins testified that he only traveled to the dump on two to three occasions during his tenure as an employee at the mine machinery repair shop, when he assisted another shop employee in flushing a calcium carbide tank used by the shop to power acetylene torches. Mr. Adkins added that he did not know if any waste from the shop, be it in the form of scrap metal, hoses, hydraulic fluid, cleaning

fluids, oil or any other substance, was ever discarded at the dump. Accordingly, Mr. Adkins' testimony fails to create genuine issue of fact for the jury to resolve in this action and, therefore, cannot provide this Court with a basis for overturning the Final Judgment Orders entered in favor of defendants Colane and Cole & Crane.

Addressing the plaintiff's issues concerning the Congressional ATSDR report, the Court finds that in granting defendant Cole & Crane's Motion to Dismiss, the corresponding Order never referenced the March 8, 2004, ATSDR report, of which plaintiff complains. Therefore, plaintiff's evidence concerning the criticisms of the ATSDR found in the March 10, 2009, Congressional report fails to create a genuine issue of material fact for the jury to consider against defendant Cole & Crane, and the Final Judgment Order entered in favor of the defendant must stand.

The Court, however, did reference the March 8, 2004, ATSDR report in paragraphs 26, 27, 28 and 32 of the Conclusion of Law section set forth in its Order granting Colane's Motion for Summary Judgment. These enumerated paragraphs specifically refer to plaintiff's inability to satisfy the first two prongs of the test established in *Bower v. Westinghouse Electric Corporation*, 206 W.Va. 133, 522 S.E.2d 424 (1999), which address

a claimant's (1) significant exposure to (2) a known hazardous substance.

The Court stated in its Order granting Colane's Motion for Summary Judgment that the plaintiff was required to meet her burden of proof on each and every factor set forth in *Bower*, including factor three dealing with "tortious conduct of the defendant" and factor four pertaining to causation.

Having previously found that the plaintiff failed to produce a genuine issue of material fact for the jury to consider against Colane on *Bower's* tortious conduct and causation requirements, the Court could have granted judgment in favor of Colane without any reference to the March 8, 2004, ATSDR report. Therefore, the plaintiff's statement in her Rule 60 Motion that the "Congressional ATSDR Report is vital and wholly relevant because it casts significant doubt upon the government reports upon which this Court relied in making its rulings,"⁵ is not supported by the record.

When this Court announced in paragraph 35 of the Conclusion of Law section in its Order granting Colane's Motion for Summary Judgment that "the plaintiff's claim against Colane seeking establishment of a medical monitoring fund for the benefit of class members fails under the first four prongs of

⁵ Plaintiff's Rule 60 Motion for Relief from Judgment at p. 5.

Bower and, thereby renders the final two prongs moot," it could have easily written the paragraph to say plaintiff's claim fails under prongs three and four, making prongs 1, 2, 5 and 6 moot. In doing so, the Court would have never addressed the March 8, 2004, ATSDR report and still granted judgment in favor of Colane.

Based upon the foregoing, even if this Court deemed the testimony of Harvey Adkins and the Congressional ATSDR report to be "newly discovered" evidence pursuant to West Virginia Rule 60(b)(2) and precedential case law, the admission of said evidence into the record fails to prove the existence of even a mere scintilla of evidence in opposition to Colane and Cole & Crane's dispositive motions. Since the admission of said evidence does not provide the Court with a basis to overturn its Final Judgment Orders entered in favor of Colane and Cole & Crane, plaintiff's Rule 60 Motion for Relief from Judgment must be denied, with prejudice to the plaintiff.

Accordingly, the Court hereby **ORDERS** that plaintiff's Rule 60 Motion for Relief from Judgment based on Newly Discovered Evidence is **DENIED**, with prejudice to the plaintiff. This is a final appealable Order, and there is no just cause for delay of entry.

The Clerk shall mail certified copies of this Order to: Kevin Thompson, Esq., Thompson Barney, PLLC, 31 E. Second

Avenue, Williamson, West Virginia 25661, counsel plaintiff;
Andrew P. Ballard, Esq., Campbell Woods, PLLC, 517 Ninth Street,
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25719-1835, counsel for defendant Colane; and Jonathan L.
Anderson, Esq., Jackson Kelly, PLLC, 1600 Laidley Tower, Post
Office Box 553, Charleston, West Virginia 25322-0553, counsel
for defendants Omar Mining Company, A.T. Massey Coal Company and
Massey Energy Company.

ENTERED this 31st day of March, 2010.

Roger L. Perry
Hon. Roger L. Perry, Circuit Judge

Prepared by:

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