

Item
250

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

NORMA ACORD,
West Virginia Residents,
Plaintiffs and Class Representatives,

v.

Civil Action No. 04-C-151-0

COLANE COMPANY, a West Virginia corporation,
individually and as a successor-in-interest to Cole & Crane
Real Estate Trust; COAL & 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 as 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; RICHARD FRY, a West
Virginia resident, individually,

RECEIVED & FILED
2010 MAR 31 P 4:10
ALVIN PORTER
CIRCUIT CLERK
LOGAN COUNTY

Defendants.

ORDER

Pending before the Court is Plaintiff's Rule 60 Motion for Relief From Judgment Based On Newly Discovery Evidence. Based on the supporting and opposing memoranda of law, the arguments of counsel and the pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL BACKGROUND

1. On July 16, 2009, the Court entered Orders granting Defendant Omar Mining Company's Motion for Summary Judgment and Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment.

290/214

page
5037-504

2. On July 27, 2009, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court entered its Final Judgment Order in Favor of Defendants Colane Corporation, Cole & Crane Real Estate Trust, Omar Mining Company, A.T. Massey Coal Company and Massey Energy Company.

3. On December 14, 2009, pursuant to Rule 60(b)(2) of the West Virginia Rules of Civil Procedure, the plaintiff filed Plaintiff's Rule 60 Motion for Relief From Judgment Based On Newly Discovery Evidence.

4. On February 18, 2010, the Court held oral argument with respect to the Plaintiff's Rule 60 Motion for Relief From Judgment Based On Newly Discovery Evidence

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Rule 60(b) of the West Virginia Rules of Civil Procedure provides that a court may relieve a party from a final judgment or order upon the following grounds: "(1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied or vacated; or (6) any other reason justifying relief from the operation of the judgment." W.Va. R. Civ. P. 60(b).

2. "A motion to vacate a judgment made pursuant to Rule 60(b) . . . is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. Pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

3. The Supreme Court of Appeals has recognized that granting relief pursuant to Rule 60(b) is an extraordinary remedy that should be rare:

Rarely is relief granted under this rule because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted.

Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W.Va. 692, 704 n.21, 474 S.E.2d 872, 884 n.21 (1996).

4. “[T]he weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit.” *Id.* at 705, 474 S.E.2d at 885. A Rule 60(b) motion “is simply not an opportunity to reargue facts and theories upon which a court has already ruled.” *Id.* at 706, 474 S.E.2d at 886.

5. In this instance, the plaintiff is seeking relief pursuant to Rule 60(b)(2) on the grounds of newly discovered evidence. The Supreme Court of Appeals has held that a party seeking to have a judgment set aside based upon newly discovered evidence carries a significant burden:

A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.”

Syl. Pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894); *see also* Cleckley, *et al.*, *Litigation Handbook on West Virginia Civil Procedure* 1198 (3d edition 2008).

6. "It is established . . . that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original summary judgment motion." *Powderidge*, 196 W.Va. at 706, 474 S.E.2d at 886. In order to fall within the "newly discovered" evidence provision of Rule 60(b), a plaintiff against whom summary judgment has been granted "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 706 n.25, 474 S.E.2d at 886 n.25.

7. The purported "newly discovered evidence" that is the subject of the plaintiff's motion is 1) the existence of an additional fact witness, Harvey Adkins, and 2) a congressional subcommittee staff report concerning the Agency for Toxic Substances and Disease Registry ("ATSDR") dated March 10, 2009.

8. The Court will first address whether the testimony of Mr. Adkins and the congressional subcommittee staff report satisfy the criteria of newly discovered evidence. To make this determination, the Court must determine whether the evidence was discovered since summary judgment, and whether the new evidence is such that due diligence would not have permitted the securing of the evidence before the circuit court's ruling." *Powderidge Unit Owners Ass'n*, 196 W.Va. at 706 n.25, 474 S.E.2d at 886 n.25.

9. With respect to Mr. Adkins, while the plaintiff claims in her motion that she acted with due diligence in her search for fact witnesses, the record in this matter establishes that the plaintiff noticed the depositions of five fact witnesses prior to summary judgment being granted. Edgard Franklin and Raymond Chafin's depositions were taken on September 17, 2004.

Carew Ferrell, Richard Large, and Luther Woods' depositions were noticed on January 10, 2006, April 4, 2006, and December 28, 2006, respectively. The record is devoid of any indication after December 28, 2006 that the plaintiff was making efforts to locate additional fact witnesses.

10. In fact, a status conference was held in this matter on June 9, 2008. At that time, counsel for the plaintiff was adamant that this matter was ready for trial. (Hr. Trans. 6/9/2009 at 7:10-12; 17:10-11). Counsel for the plaintiffs announced at that time that his liability case against the defendants was comprised of the above-mentioned fact witnesses:

MR. THOMPSON: [W]e've got Richard Large, Ray Chafin, Luther Woods, Ed Franklin, and Mr. Carew [Ferrell] . . . [W]e have five fact witnesses that go to liability and tortious liability, and we have one expert which would be Dr. Simonton, and I'm thinking that's the liability case. You know, liability would be what was done when by whom. And those five witnesses will tell that story.

THE COURT: So, you're saying you've put forth your witnesses. So, then fact witnesses and expert witnesses for the plaintiff.

MR. THOMPSON: Yes.

(Hr. Trans. 6/9/2009 at 11:14-22; 15:16-19).

11. Again, there is no indication in the record after December 2006 up until summary judgment was granted in July 2009 that the plaintiff was making efforts to locate additional witnesses. Counsel for the plaintiff's representations set forth above would seem to indicate such efforts were deemed unnecessary by the plaintiff's counsel and were not being made.

12. The plaintiff's argument that she was duly diligent in seeking additional fact witnesses throughout this litigation is in the form of affidavits from herself; the plaintiff's counsel, Kevin Thompson; and the prior plaintiff and class representative, Carlene Mowery. The

affidavits claim that multiple community and information meetings were held over the years in which the identities of persons who may have had knowledge concerning the relevant locations and time periods.

13. Courts have uniformly held it is not sufficient for a party to simply claim that he or she was diligent in obtaining evidence. Instead, a party must set out specific facts showing that due diligence was indeed exercised. *See, e.g., Hartig v. Stratman*, 760 N.E.2d 668, 671 (Ind. App. 2002) ("[A] finding of due diligence does not rest upon abstract conclusions about, or assertions of, its exercise but upon a particularized showing that all methods of discovery reasonably available to counsel were used and could not uncover the newly-found information."); *Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn. App. 1983) ("Affidavits in support of the motion should set out the fact constituting due diligence with particularity."); *Travis v. Bacherig*, 1928 WL 2063 at *6 (Tenn. App. 1928) ("Mere general statement that affiant inquired among persons likely to know, is not sufficient, the particulars must be shown."); *Heldmair v. Taman*, 58 N.E. 960, 960 (Ill. 1900) ("It is not sufficient to state merely that due diligence has been used, but the facts constituting diligence must be stated.").

14. The Court finds that the plaintiff has not carried her burden of showing that Mr. Adkins could not have been discovered by the exercise of due diligence prior to judgment. Although the plaintiff and her counsel now claim they were seeking additional witnesses throughout this litigation, the record is simply devoid of any indication the plaintiff and her counsel were making such attempts prior to the entry of judgment.

15. With respect to the congressional subcommittee staff report regarding the ATSDR, it was issued on March 10, 2009, over four months prior to the granting of judgment, and was a matter of public record. The plaintiff claims the report is newly discovered evidence

because she and/or counsel saw this report for the first time when it was referenced in a November 29, 2009 article by the New York Times.

16. Courts and commentators alike have been consistent that matters of public record which were previously available cannot be considered newly discovered evidence. *See, e.g., Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987) ("Evidence that is contained in public records at the time of trial cannot be considered newly discovered evidence."); *Federated Conservationists of Westchester County, Inc. v. County of Westchester*, 771 N.Y.S.2d 530, 531 (N.Y. App. Div. 2004) ("Evidence which is a matter of public record is generally not deemed new evidence which could not have been discovered with due diligence before trial. Moreover, it is clear from the record that the plaintiff did not diligently look for the documents before trial because it had expected to prevail at the trial. The plaintiff began a comprehensive search for the documents only after it lost at trial.") (internal quotations and citations omitted); Cleckley, *et al.*, *Litigation Handbook on West Virginia Civil Procedure* 1198 ("Courts reject, as newly discovered evidence, evidence contained in public records").

17. The Court finds that the plaintiff has not carried her burden of showing that the March 10, 2009 congressional subcommittee report could not have been discovered by the exercise of due diligence prior to judgment.

18. The Court finds that additional grounds also warrant the denial of the Plaintiff's Rule 60 Motion for Relief From Judgment Based On Newly Discovery Evidence.

19. In order to succeed on a motion pursuant to Rule 60(b)(2), the plaintiff also must show that the newly discovered evidence is of such a kind that it would produce a difference outcome from the previous judgment. *See syl. Pt. 1, Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953; Cleckley, *et al.*, *Litigation Handbook on West Virginia Civil Procedure* 1198.

20. With respect to Mr. Adkins' testimony, his deposition was taken on November 30, 2009. The Court has been provided with a copy of Mr. Adkins' deposition transcripts and reviewed the same.

21. Mr. Adkins began working for West Virginia Coal & Coke at the general mine repair shop in Omar in 1951. (Depo. Adkins 7:19-8:9). After Omar Mining purchased assets related to West Virginia Coal & Coke's mining operations in or around December 1954, Mr. Adkins continued to work in the repair shop until some time in 1955. (Depo. Adkins 15:15-22). Mr. Adkins has no recollection of when in 1955 he stopped working for Omar Mining. (Depo. Adkins 39:9-13).

22. Over the four to five year period Mr. Adkins worked in the mine shop, he only made two or three trips to the dump, and on each occasion it was to empty the residue from a used calcium carbide tank. (Depo. Adkins 17:9-15; 41:16-20; 42:23-43:3). Mr. Adkins made no other trips to the dump. (Depo. Adkins 42:23-43:3). Mr. Adkins testified he could not recall ever seeing oil, fluids, or anything else from the repair shop taken to the local dump:

Q. On those two or three occasions Mr. Adkins, where you went to the dump on the truck, did you see any item, any piece of trash in that dump that you were certain it came from the Omar shop?

MR. THOMPSON: If you can remember.

Q. And that's based on your memory, sir.

A. Well, now the only thing I can tell you that I can remember is the carbide.

(Depo. Adkins 52:15-24; 53:16-21).

23. Mr. Adkins has no recollection as to when those two or three occasions he visited the dump occurred. (Depo. Adkins 43:17-44:4). Mr. Adkins has no idea whether this occurred from 1951 through December 1954 when he worked for West Virginia Coal & Coke, or
{C1693858.1}

whether it occurred during the brief period he worked for Omar Mining. (Depo. Adkins 43:17-44:4).

24. The Court finds that consideration of Mr. Adkins' testimony would not create a different result from the Court's prior granting of summary judgment.

25. First, Mr. Adkins' testimony was clear that his only knowledge and involvement regarding the local dump was emptying the remnants of a calcium carbide storage tank on two to three occasions over a four to five year period. (Depo. Adkins 17:9-15; 41:16-20; 42:23-43:3). Nowhere in the Rule 60(b)(2) motion does the plaintiff contend that the calcium carbide remnants were harmful, or that the calcium carbide remnants were even found to exist in related sampling. In their briefing, the defendants represented that the by-product from the calcium carbide tank that was actually dumped would have been calcium hydroxide, or lime. Again, nowhere in her briefing did the plaintiff attempt to assert otherwise.

26. The Court rejects the plaintiff's assertion that, without underlying factual testimony, the plaintiff's expert, and a jury, may simply assume that various materials from the Omar Shop were placed in the local dump over fifty years ago based solely upon the type of facility it was and the type of work that may have been performed there.

27. Second, Mr. Adkins' testimony has no bearing as to these defendants. The Court has already ruled that none of the defendants have any successor liability for West Virginia Coal & Coke. (Order Granting Defendants Massey Energy and A.T. Massey's Motion for Summary Judgment at pp.6-11). On the two or three occasions Mr. Adkins emptied the tank between 1951 to 1955, he had no idea when it occurred. (Depo. Adkins 43:17-44:4). Mr. Adkins has no idea whether this occurred when he worked for West Virginia Coal & Coke, or whether it occurred in the brief period he worked for Omar Mining. (Depo. Adkins 43:17-44:4).

28. Lastly, the Court ruled that Omar Mining owed no duty to the plaintiff and the class she represents, and further could not be liable to the plaintiff under strict liability and public nuisance theories. (Order Granting Defendant Omar Mining's Motion for Summary Judgment at pp.12-15). Mr. Adkins' testimony cannot be the basis to change the legal conclusions the Court previously reached.

30. With respect to the March 2009 congressional subcommittee reports concerning the ATSDR, the Court finds that consideration of it too would not create a different result from the Court's prior granting of summary judgment. The relevancy of this document is unclear given that neither the report nor any of the materials attached thereto apply to the ATSDR's evaluation of the Omar School site. In any event, as detailed in its Orders, the Court's granting of summary judgment to the defendants was based, *inter alia*, upon the plaintiff's failure to produce evidence sufficient to create a material fact concerning the defendants conduct from a period of time over fifty years ago. A congressional subcommittee staff report from March 2009 concerning the ATSDR does not create a genuine issue of material fact regarding the defendants' conduct during the relevant time period.

31. Accordingly, the Court finds the plaintiff has failed to show that the purported newly discovered evidence could not have been discovered by the exercise of due diligence prior to judgment and, even if considered, is of such a kind that it would produce a difference outcome from the Court's previous judgment.

CONCLUSION

Wherefore, based on the foregoing findings and conclusions, it is **ORDERED** the Plaintiff's Rule 60 Motion for Relief From Judgment Based On Newly Discovery Evidence be

