



BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
SKYLINE CORPORATION at al.
Petitioners,

vs.

Docket No. 13-0562

HON. TIMOTHY L. SWEENEY, Judge
of the Circuit Court of Pleasants County,
West Virginia,

and

THOMAS R. LIKENS, and
LORI LIKENS.

Respondents.

RESPONDENT / PLAINTIFF'S RESPONSE TO PETITION

Now comes Thomas R. Likens and Lori Likens, Plaintiffs below and Respondents herein,
by counsel M. Paul Marteney, for their Response to the Petition for Writ of Mandamus and/or
Prohibition filed herein.

TABLE OF CONTENTS

Authorities Cited 1
Questions Presented 2
Statement of the Case 3
Argument Question 1 4
Argument Question 2 6
Certificate of Service 8

AUTHORITIES CITED

W. Va. Code § 21-9-11a 3, 4, 6

W.Va. Code § 21-9-10(b) 5

W. Va. R. Civ. P. 8(a) 7

Conseco Finance Servicing Corp. v. Myers, 211 W. Va. 631, 567 S.E.2d 641 (W.Va., 2002) .. 5

Cowie v. Roberts, [173 W. Va. 64], 312 S.E.2d 35 (1984) 4

Daurelle v. Traders Federal Savings & Loan Assn., 143 W. Va. 674, 104 S.E.2d 320 (1958) .. 4

Ewing v. Bd. of Educ. of County of Summers, 202 W. Va. 228, 503 S.E.2d 541, (1998) 7

Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985) 4

Jenkins v. McKeithen, 395 U.S. 411, 423, 89 S. Ct. 1843, (1969) 7

Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 605, 245 S.E.2d 157 (1978) 7

Mounts v. Chafin, 186 W. Va. 156, 411 S.E.2d 481 (1991) 4

Murphy v. Smallridge, 196 W. Va. 35, 468 S.E.2d 167 (1996) 7

State ex rel. Smith v. Kermit Lumber & Pressure Treating Co., 200 W. Va. 221, 488 S.E.2d 901
(1997) 7

Wiggins v. Eastern Associated Coal Corp., 178 W.Va. 63, 357 S.E.2d 745 (1987) 5

QUESTIONS PRESENTED

1. Does West Virginia Code § 21-9-1 1a, as amended, require a Plaintiff to file an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board as a condition precedent to filing a civil action in Circuit Court when the Plaintiffs do not allege an imminent threat of property or personal injury?
2. Does a Complaint devoid of any meaningful allegations of fact satisfy the pleading requirements of West Virginia Rules of Civil Procedure?

STATEMENT OF THE CASE

On September 4, 2012, Respondent-Plaintiffs filed their Complaint against Petitioner-Defendants in the Circuit Court of Pleasants County, West Virginia, which Complaint was assigned Civil Action 12-C-28. Plaintiffs alleged they purchased a home manufactured by Defendant Skyline Corporation (hereinafter referred to as "Skyline") from Defendant AAA Mobile Homes, Inc. of New Martinsville (hereinafter referred to as "AAA Homes."). The Complaint further explicitly identified the location said home was delivered to and set up by AAA Homes. The Complaint alleged the home was negligently designed and built by Skyline to the extent that it was not suitable for its intended purpose, and was defective when delivered, and that the home was negligently delivered, set up and completed by AAA Homes, causing damage and accelerated deterioration to the home and Plaintiffs' property.

The Complaint further alleged breach of express warranty, breach of contract, unjust enrichment, and destruction of property. Neither Defendant has filed an Answer to the Complaint, nor has either Defendant filed a Motion for More Definite Statement. On October 8, 2012, Skyline and AAA Homes, by their counsel, moved to dismiss all claims asserted by the plaintiffs against them in Civil Action No. 12-C-28 pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and West Virginia Code § 21-9-11a. App. At 12-19. The Plaintiffs did not file any response to the motion to dismiss, but argued the issue at the hearing on said Motion held before the Honorable Judge Timothy Sweeney, Respondent herein, on December 19, 2012.

Plaintiffs' counsel admitted in open Court that the plaintiffs had not filed an administrative

complaint before filing their civil action. App. at p. 27. Skyline informed the Court that it had confirmed with the West Virginia Division of Labor that the plaintiffs did not file an administrative complaint. App. at p. 28.

Plaintiffs belatedly filed their Proposed Findings of Fact and Conclusions of Law, and Defendants filed a proposed Order. On April 25, 2013 the Circuit Court entered an Order denying defendants' motion to dismiss. App. at 1-2.

On April 30, 2013, Skyline filed its motion for stay to pursue this extraordinary writ. On May 3, 2013, AAA Homes filed a response in support of the motion for stay. All counsel entered into a stipulation of stay on May 8, 2013 which was filed with the Circuit Court.

ARGUMENT

I. West Virginia Code § 21-9-1 1a, as amended, does not require a Plaintiff to file an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board as a condition precedent to filing a civil action in Circuit Court, when the Plaintiffs do not allege an imminent threat of property or personal injury and when the Complaint alleges causes of action for which administrative remedies are not available through the Board.

The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act. *Syl. Pt. 1, Daurette v. Traders Federal Savings & Loan Association.*, 143 W. Va. 674, 104 S.E.2d 320 (1958), *Syl. Pt. 1, Cowie v. Roberts,*

[173 W. Va. 64], 312 S.E.2d 35 (1984), *Syl. Pt. 1, Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985), *Syl. Pt. 4, Mounts v. Chafin*, 186 W. Va. 156, 411 S.E.2d 481 (1991). The exhaustion of administrative remedies is not required where such remedies are duplicative or the effort to obtain them futile.” *Syllabus Point 6, Wiggins v. Eastern Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987). “The rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law.” *Syl. Pt. 2, Daurette v. Traders Fed. Savings & Loan Assn., supra.*

Plaintiffs Thomas Likens and Lori Likens filed their Complaint against Defendants, alleging defects in the design, manufacture, delivery, and set-up of a manufactured home manufactured by Skyline and sold and set up by Defendant AAA Mobile Homes. The Complaint seeks damages for destruction of personal property not part of the manufactured home, and for distress and anxiety, as well as exemplary damages. None of these remedies are available from the Board under W. Va. Code § 21-9-11a, and resorting to the Manufactured Housing Construction and Safety Standards Board for such claims would be futile due to its lack of jurisdiction over such claims.

“W.Va. Code § 21-9-10(b) (2002) clearly provides that any payment to purchasers or prospective purchasers of manufactured homes by the Manufactured Housing Construction and Safety Board, from licensee bonds or other forms of financial assurance provided by manufacturers, dealers, distributors or contractors of manufactured homes pursuant to W.Va. Code § 21-9-10, shall not include punitive or exemplary damages, any compensation for property damage other than to the manufactured home, any recompense for any personal injury or inconvenience, any reimbursement for alternate housing, or any payments for attorney fees, legal expenses or court costs.” *Conseco*

Finance Servicing Corp. v. Myers, 211 W. Va. 631, 567 S.E.2d 641 (W.Va., 2002).

Further, Respondents, who had the burden of proof on their Motion, provided no evidence they had complied with the Notice requirements explicit in the statute they assert. “Every dealer or contractor who moves homes from one place to another shall provide written notification to every purchaser of a manufactured home of the availability of administrative assistance from the board in investigating and ordering corrections of any defect in the manufacture or installation of a manufactured home and the period of exclusive jurisdiction given to the board. The board may prescribe that the notice contain any information the board determines to be beneficial to the purchaser or owner of the manufactured home in exercising that person's rights under this section.” W. Va. Code 21-9-11a(c).

II. The Complaint filed in this matter is not devoid of any meaningful allegations of fact and does satisfy the pleading requirements of West Virginia Rules of Civil Procedure. Even if it did not, the proper remedy would be a Motion for a More Definite Statement.

The Complaint clearly identifies the home in question by its address, manufacturer, seller and buyers. The Complaint generally alleges defects in design, construction and set up, and specifically references express and implied warranties. Further, Plaintiffs expressly address negligence in work performed “including grading and foundation building, and during said work intentionally or negligently destroyed existing landscaping and heirloom plants belonging to Plaintiffs.” Defendants are on notice that the Complaint against them relates to a specific building, that Plaintiffs’ complaints are toward specific elements, actions and failures to act, that they sound in negligence and specific

performance. Further it may be presumed that Defendants are intimately knowledgeable of the contents of their own express warranties, and of their own acts and work performed under their control. Neither Defendant has filed an Answer to the Complaint, nor has either Defendant filed a Motion for More Definite Statement.

Generally, a motion to dismiss should be granted only where “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996). “For this reason, motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions.” *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605-06, 245 S.E.2d 157, 159 (1978)” *Ewing v. Board of Educ. of County of Summers*, 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998). “For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.” *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, *supra* at 605, 158.

“Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure.” *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997). The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist. *German v. Killeen*, 495 F. Supp. 822, 827 (E.D. Mich. 1980); *see also Jenkins v. McKeithen*, 395 U.S. 411, 423-24, 89 S. Ct. 1843, 1849-50, 23 L. Ed. 2d 404, 417-18 (1969). *See* W. Va. R. Civ. P. 8(a).

The Complaint in this matter meets the notice pleading requirements of the West Virginia Rules of Civil Procedure. It identifies the manufactured home that is the subject of the litigation,

the parties, the work performed by the Defendants, the location of the work performed, the warranties and contract that were breached (both of which are authored by the Defendants and the contents of which it may be assumed they have intimate knowledge), and the nature of the duties breached by Defendants and types of damage alleged.

For the foregoing reasons, therefore, Respondent-Plaintiffs pray this Court deny the relief sought in the Complaint, and remand the matter for further proceedings.



M. Paul Marteney, WV Bar 7194

Counsel for Plaintiffs

PO Box 157, St. Marys, WV 26170

(304) 684-0924

CERTIFICATE OF SERVICE

The foregoing pleading was served upon the following parties by fax and by United States Mail, postage prepaid, this 21st day of June, 2013, addressed as follows:

John R. Teare, Jr., Spilman Thomas & Battle, PO Box 273, Charleston, WV 25321

Keith C. Gamble, Pullin, Fowler, Flanagan, Brown and Poe, PLLC, 2414 Cranberry Plaza Morgantown, WV 26508

Hon. Timothy L. Sweeney, Pleasants County Circuit Court, 301 Court Street, St. Marys, WV 26170

