



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.

**AMERICAN WATER WORKS SERVICE
COMPANY, et al.,**

Civil Action No. 16-C-123 KAN

**ORDER GRANTING DEFENDANT J. CLIFFORD FORREST'S
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

On September 21, 2018, the Presiding Judges assigned to the Water Contamination Litigation, held a status conference and heard Defendant J. Clifford Forrest's *Motion to Dismiss Plaintiff's Amended Complaint* (Transaction ID 58788717). At the September 21, 2018, hearing Mr. Forrest appeared by and through counsel, and Ms. Thompson appeared *pro se*. The Presiding Judges have reviewed and fully considered the Mr. Forrest's motion, Ms. Thompson's responses, and the Amended Complaint, as well as the arguments presented, and have conferred with one another to ensure uniformity of their decision, as contemplated by West Virginia Trial Court Rule 26.07(a).

For the reasons set forth on the record at the September 21, 2018, hearing and explained further below, Mr. Forrest's motion to dismiss is **GRANTED** and this action is **DISMISSED WITH PREJUDICE** as to Mr. Forrest and also as to any defendants who were not served with the Amended Complaint.

I. FINDINGS OF FACT

1. Plaintiff Janet L. Thompson filed her original complaint in this action *pro se* in the Circuit Court of Kanawha County on January 8, 2016 (Transaction ID 58747733). The complaint named only two defendants, American Water Works Service Company, Inc. and West Virginia-American Water Company.

2. At the time she filed her complaint, Ms. Thompson was subject to a pre-filing injunction order entered by Judge Joanna I. Tabit of the Circuit Court of Kanawha County. *See* Oct. 2, 2015 Order Granting Petitioners' Request for Declaratory Judgment and Motion for Extraordinary Relief in *City of Charleston, et al. v. Thompson*, Case No. 15-P-180 (Transaction ID 58788717) Ex. 12.

3. That order found Ms. Thompson to be a vexatious litigant who had filed repeated and meritless litigation "go[ing] well beyond the airing of legitimate grievances and constitut[ing] vexatious and oppressive misuse of the judicial system." *Id.* at ¶ 30. According to the pre-filing injunction order, Ms. Thompson, if acting *pro se*, was required to "submit any civil action, other action, or any other filing requesting relief from the Circuit Court of Kanawha County on behalf of herself or of any other person . . . to the Chief Judge of the Circuit Court for review and a finding that the civil action or filing states a tenable cause of action before filing. . . ." *Id.* at ¶ 31. The pre-filing injunction order also states that "Ms. Thompson may not initiate a civil action or other filing by another means other than those prescribed in this paragraph" and that "this is a fair and reasonable resolution that maintains Ms. Thompson's access to the Court system and constitutional rights while at the same time preventing an unconscionable drain on judicial and governmental resources." *Id.*

4. Ms. Thompson complied with the pre-filing injunction order as to her original complaint in this action. *See* Feb. 2, 2016 Order in *Thompson v. W. Va. Am. Water Co.*, Case

No. 16-C-123 (Transaction ID 58788717), Ex. 13. Her complaint was then referred to the Mass Litigation Panel, consistent with the Administrative Order of the Supreme Court of Appeals of West Virginia dated January 28, 2016.

5. On February 26, 2016, however, Ms. Thompson filed a materially altered Amended Complaint that added more than twenty-one (21) new defendants, thirty (30) paragraphs of new legal theories, “ET AL” group pleading against unspecified defendants, five (5) pages of addenda including handwritten notes and sketches, as well as new requests for injunctive relief. *See* Feb. 26, 2016 Am. Compl. Mr. Forrest was one of the defendants named for the first time in Ms. Thompson’s Amended Complaint.

6. Ms. Thompson did not comply with the pre-filing injunction order before filing her Amended Complaint and did not obtain “a finding that the civil action or filing states a tenable cause of action before filing.” Oct. 2, 2015 Order (Transaction ID 58788717) Ex. 12 at ¶ 31. Ms. Thompson’s violation of Judge Tabit’s Order would be a sufficient basis to dismiss Ms. Thompson’s Amended Complaint against Mr. Forrest with prejudice.

7. Ms. Thompson also did not serve any of the newly-added defendants, except for Mr. Forrest. *See* Feb. 26, 2016 Summons; Am. Compl. at Cert. of Service.

8. Mr. Forrest filed a motion to dismiss the Amended Complaint on March 30, 2016, arguing that the Amended Complaint should be dismissed with prejudice because: (1) Ms. Thompson filed the Amended Complaint without the pre-filing review required by the injunction precluding her *pro se* filings; (2) the claims alleged by Ms. Thompson were released and enjoined by settlements, orders, and injunctions in the bankruptcy case of Freedom Industries, Inc. (“Freedom”); (3) the two-year statute of limitations bars all of Ms. Thompson’s claims against Mr. Forrest; and (4) Ms. Thompson did not sufficiently plead—and could never

plead—the requisite elements of her claims against Mr. Forrest, and also sought impossible relief.

9. On July 31, 2018, the Court issued an Order (Transaction ID 62293346) noticing and scheduling a hearing on Mr. Forrest’s motion to dismiss for September 21, 2018. The Court also set a briefing schedule on Mr. Forrest’s motion. That Order was mailed to the address on file for Ms. Thompson.

10. Ms. Thompson filed a three-sentence response to Mr. Forrest’s motion on August 19, 2018, two days after the response date ordered by the Court. Ms. Thompson’s three-sentence filing offered no substantive responses to the dismissal arguments made by Mr. Forrest.

11. At the hearing on September 21, 2018, Mr. Forrest appeared by counsel, and Ms. Thompson appeared *pro se*. Ms. Thompson was given an opportunity to address the Court regarding Mr. Forrest’s motion to dismiss, including the argument that Ms. Thompson’s claims were resolved in the Freedom bankruptcy proceedings.

12. In response, Ms. Thompson was belligerent and aggressive. She stated on the record, among other things, that she was not present to discuss the bankruptcy of Freedom Industries, Inc., (“Freedom”) and that her goal was to make the Freedom property chemical free. She refused to answer questions posed by the Court, raised her voice, talked over and verbally attacked the Court, became visibly angry, and charged out of the courtroom while the Court continued to ask her questions and offer her an opportunity to address the issues raised by her Amended Complaint and the pending motion. Ms. Thompson made no substantive response at the hearing to any of the arguments for dismissal raised by Mr. Forrest, including the argument that Ms. Thompson’s claims were resolved in the Freedom bankruptcy proceedings.

II. CONCLUSIONS OF LAW

A. Ms. Thompson's Claims In This Action Were Released And Resolved In The Freedom Industries, Inc. Bankruptcy Proceedings.

13. Relying on veil-piercing theories, Ms. Thompson's Amended Complaint seeks to hold Mr. Forrest, the shareholder of Chemstream Holdings, LLC, liable on claims that she alleges relate to a January 9, 2014 chemical spill in Charleston, West Virginia. *See* Am. Compl. ¶¶ 22-23, 27-37.

14. The spill, Ms. Thompson alleges, emanated from a facility owned and operated by Freedom, a company in which Chemstream Holdings, LLC held an ownership interest and of which Mr. Forrest served, for a short period before the incident, as director. *See id.* ¶¶ 33-34. In particular, Ms. Thompson alleges that, “[o]n or about January 9, 2014, the Plaintiff and about 300,000 West Virginians were informed that a chemical had leaked from a tank, located on the Etowah River Terminal property, which was operated by Freedom Industries” and that “Freedom Industries, Inc. . . . did cause and allow the chemical . . . to be spilled into the Elk River” *Id.* ¶¶ 22-23.

15. Freedom, however, filed for bankruptcy in January 2014, rendering the types of veil-piercing, alter ego, and similar claims alleged by Ms. Thompson here against Freedom's owners, officers, and directors (including Mr. Forrest) exclusive property of the bankruptcy estate. *In re Freedom Indus., Inc.*, No. 2:14-bk-20017 (Bankr. S.D. W. Va.); *see, e.g., Steyr-Daimler-Puch Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) (“[T]he bankruptcy estate is comprised of all legal and equitable interests of the debtor including . . . the right of [the debtor] to proceed against its alter ego and claim its equitable interest in assets of the alter ego into the bankrupt estate.”); *In re Charles Edwards Enters., Inc.*, 344 B.R. 788, 790 (Bankr. N.D. W. Va. 2006) (“Alter ego theories, however, are the exclusive property of the bankruptcy estate and

cannot be pursued by any party other than the Chapter 7 trustee in the absence of abandonment or the grant of derivative standing.”); *see also In re Emoral, Inc.*, 740 F.3d 875, 879-81 (3d Cir. 2014); *Kalb, Voorhis & Co. v. Am. Fin’l Corp.*, 8 F.3d 130, 133 (2d Cir. 1993).

16. Ms. Thompson claimed to be a creditor of Freedom and actively participated in the Freedom bankruptcy proceedings. She appeared in the proceedings as early as January 22, 2014 (Transaction ID 58788717, Ex. 1), participated in the creditors’ meeting on February 25, 2014 (*Id.*, Ex. 2), and made multiple requests for recovery from the bankruptcy estate (*Id.*, Exs. 3-4 and Transaction ID 62381814, Ex. 14). She received mailed notices from the bankruptcy court (*e.g.*, Transaction ID 58788717, Ex. 11 (Certificate of Notice listing Ms. Thompson)).

17. On June 15, 2015, Freedom, the West Virginia Department of Environmental Protection, and Chemstream Holdings, LLC (on behalf of its direct and indirect affiliates including Mr. Forrest) entered into a settlement agreement in the Freedom bankruptcy proceedings (the “Chemstream Settlement”). J. Clifford Forrest Mot. to Dismiss (Transaction ID 58788717), Ex. 5. Under the settlement, to facilitate remediation efforts at the Freedom site, Chemstream Holdings, LLC contributed \$1,100,000 in cash and an assignment of rights to an escrow account containing approximately \$2,720,000. *Id.* ¶ 3. In exchange, Freedom released Chemstream Holdings, LLC and its owners, officers, and directors (including Mr. Forrest) from any potential liability for veil-piercing, alter ego, and similar claims. *Id.* ¶ 7.

18. The parties to the Chemstream Settlement then sought bankruptcy court approval to enter the agreement. *See* Forrest Mot. to Dismiss (Transaction ID 58788717), Ex. 6. As a creditor of Freedom, Ms. Thompson received notice of the Chemstream Settlement, participated in the bankruptcy proceedings related to the Chemstream Settlement, and objected to the

Chemstream Settlement on June 29, 2015, alleging the same veil-piercing theories she alleges against Mr. Forrest here. *See* Forrest Mot. to Dismiss (Transaction ID 58788717), Ex. 7.

19. The bankruptcy court, however, overruled Ms. Thompson's objections and approved the Chemstream Settlement in its entirety, including the releases of Chemstream Holdings, LLC and Mr. Forrest, finding the settlement to be "in the best interests of the Debtor, its estate and its creditors." *See* Forrest Mot. to Dismiss (Transaction ID 58788717), Ex. 8 ¶¶ 1-2. The bankruptcy court's approval order states that the Chemstream "Settlement Agreement is hereby approved in its entirety, and all of its terms," including the releases, "are incorporated herein by reference, and shall be fully binding and effective as to the Debtor [Freedom] and each and all of the other Parties." *Id.* ¶ 2. The bankruptcy court's approval order goes on to state that "[t]his Order (including the Settlement Agreement incorporated herein by reference) . . . is and shall be final, binding and effective on all parties in interest in the Debtor's chapter 11 case," including Ms. Thompson. *Id.* ¶ 3. Ms. Thompson did not appeal the bankruptcy court's order approving the Chemstream Settlement and releasing Mr. Forrest.

20. The bankruptcy court also later confirmed Freedom's Chapter 11 liquidation plan, which reiterated these releases of Mr. Forrest from all potential veil-piercing and alter ego liability arising from, among other things, the January 9, 2014 incident and enjoined such claims in future proceedings like this one. *See* Forrest Mot. to Dismiss (Transaction ID 58788717), Ex. 9 §§ 1.16, 1.71, 11.8, 11.12, 11.13. The bankruptcy court found the Plan to be in the best interests of Freedom's creditors and ordered, *inter alia*, that "[t]he Plan shall be binding upon . . . the holders of all Claims," including Ms. Thompson. *Forrest Mot. to Dismiss* (Transaction ID 58788717), Ex. 10 ¶¶ I, BB, 1, 5-6, 19.

21. Ms. Thompson did not object to the Freedom Chapter 11 Plan or appeal the bankruptcy court's order confirming it. Instead, pursuant to and under the Freedom Chapter 11 Plan, Ms. Thompson recovered on her proof of claim and was issued a check in December 2017 for her share of the distribution resulting from the approved Chemstream Settlement and confirmed Chapter 11 Plan. Forrest Reply Br. (Transaction ID 62381814), Ex. 16 at 1 (listing Ms. Thompson among Class V claimants with her proposed distribution); *Id.*, Ex. 15 (claims administrator report stating that the "Administrator made distributions on December 11, 2017 from the Class V Spill Claims Fund—Ms. Thompson's group—"by forwarding checks").

22. Accordingly, Ms. Thompson's Amended Complaint against Mr. Forrest—asserting veil-piercing claims that Freedom owned, settled, and released in the bankruptcy proceedings—violates the bankruptcy court order approving the Chemstream Settlement and the orders and injunctions contained in the confirmed Chapter 11 Plan. Ms. Thompson participated in those proceedings and was paid from the bankruptcy estate. The Amended Complaint must be dismissed with prejudice as to Mr. Forrest. *Cf. Estate of Bayliss v. Lee*, 315 S.E.2d 406, 411-12 & n.7 (W. Va. 1984) (matters "ascertained and settled in the federal bankruptcy," where the challengers were parties, are "not assailable in [West Virginia] courts under principles of collateral estoppel"); *id.* ("It is generally recognized that where a bankruptcy court has obtained proper jurisdiction, its judgments are entitled to the principles of collateral estopped."); *see also Katchen v. Landy*, 382 U.S. 323, 334 (1966) ("[A] creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined," and "if his claim is rejected, its validity may not be relitigated in another proceeding on the claim."); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151-52 (2009); *Sampson v. Chase Home Finance*, 667 F. Supp. 2d 692, 695-96 (S.D. W. Va. 2009) ("An order of confirmation must be given *res judicata* effect as to

those issues which were or could have been decided at the time of confirmation To rule otherwise, would undermine the bankruptcy court's confirmation order.”).

23. The filings and orders in the Freedom bankruptcy court proceedings are subject to judicial notice and properly considered by this Court in dismissing Ms. Thompson's Amended Complaint. *See Forshey v. Jackson*, 671 S.E.2d 748, 752 (W. Va. 2008) (“Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice.”); *Sturm v. Bd. of Educ.*, 672 S.E.2d 606, 612 n.9 (W. Va. 2008) (considering federal court order on motion to dismiss); *State ex rel. TermNet v. Jordan*, 619 S.E.2d 209, 211 n.2 (W. Va. 2005) (taking judicial notice of Circuit Court records as public records). Ms. Thompson does not dispute the existence of these orders or her direct participation in the Freedom bankruptcy proceedings.¹

B. Dismissal With Prejudice Is Also Warranted For Any Defendants Not Served With The Amended Complaint.

24. Although Ms. Thompson filed her Amended Complaint in this action on February 26, 2016, Ms. Thompson has failed to serve it on most of the defendants, including but not limited to Matthew Mazefsky; David McCombie; James Barker; Chemstream Holdings, LLC; Mountaineer Holdings, LLC; WV Funding, LLC; and all shareholders, employees, directors, and officers of such entities. *See* W. Va. R. Civ. P. 4(k) (allowing 120 days for service).

25. Additionally, counsel for defendants Eastman Chemical Company, William E. Tis, Charles E. Herzing, and Gary Southern who were present at the September 21, 2018, status conference and hearing confirmed their clients were not served with the Amended Complaint.

26. At the September 21, 2018 motion hearing, Ms. Thompson offered no explanation, let alone one amounting to good cause, for this failure, despite being offered the opportunity. *Id.*

¹ Ms. Thompson's Amended Complaint also violates the pre-filing injunction order issued by Judge Tabit and could be dismissed with prejudice, alternatively, based on the plain text of that injunction as well.

27. Accordingly, any defendants who were not served with the Amended Complaint are dismissed from this action with prejudice.

III. ORDER

WHEREFORE, Mr. Forrest's motion to dismiss is **GRANTED** and this action is **DISMISSED WITH PREJUDICE** as to Mr. Forrest and any defendants who were not served with the Amended Complaint.

The Court **FINDS** upon **EXPRESS DETERMINATION** that this is a final order available for the proper application of the appellate process pursuant to Rule 54(b) of the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review. The parties are hereby advised: (1) that this is a final order; (2) that any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) that a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

The Clerk is directed to close this case, and place it among the cases ended. A copy of this order is this day served on the parties of record via File & ServeXpress. The Court also directs the Mass Litigation Manager 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: October 3, 2018.

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