IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
NINTH DIVISION

JESSICA VIRDEN MALLETT, for Individually and on Behalf of a Class of Similarly Situated Person,

Plaintiff,

v.

CENTRAL ARKANSAS WATER,

Defendant.

Case No. 60CV-17-3701

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

COMES NOW the Plaintiff Jessica Virden Mallett ("Plaintiff" or "Mallett"), for herself and for all other Arkansas citizens similarly situated, and respectfully submits this legal memorandum in opposition to Defendant Central Arkansas Water's ("CAW") motion to dismiss.

INTRODUCTION

This suit is brought against CAW for implementing certain business policies and practices that violated the Arkansas Deceptive Trade Practices Act ("ADTPA"), and allowed it to be unjustly enriched. In sum, the complaint alleges that CAW routinely turns on the sprinkler meters of its customers without their knowledge, and without their consent. It then also charges the sprinkler fees hidden within the customers' monthly bills, and without an explanation.

The complaint brings claims for unjust enrichment, violations of the Arkansas Deceptive Trade Practices Act ("ADTPA"), and declaratory and injunctive relief pursuant to the Arkansas Declaratory Judgment Act.

CAW has moved to dismiss this action. But its arguments for dismissal have no merit for the reasons that follow.

LAW AND ARGUMENT

A. Legal Standards on a Rule 12(b)(6) Motion.

In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. ARCP Rule 8(f). *Hollingsworth v. First National Bank & Trust Co.*, 311 Ark. 637, 639, 846 S.W.2d 176, 178.

B. CAW Fails to Show that it Lacks Insurance as Required by A.C.A. § 21-9-301 and in order to be Immune to a Suit for Damages.

CAW's lead argument is that it is immune from this suit under A.C.A. § 21-9-301(a). It is wrong.

The statute provides as follows:

> (a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages ***except to the extent that they may be covered by liability insurance***.
>
> A.C.A. § 21-9-301(a) (emphasis added).

Noticeably absent from CAW's primary argument is proof supporting the final and necessary prong of A.C.A. § 21-9-301. CAW fails to aver or attempt to demonstrate that it does not have insurance.

The statute is clear. A movant must establish that it is one of the covered public entities, and also that if fails to have liability insurance in order for it to be immune to a suit for damages. Because CAW is completely silent as to insurance, and thus, it has failed to meet its burden on the motion.

Further, even if CAW were to later show that it has no liability coverage, this suit continues. The third count of the complaint is for declaratory and injunctive relief under the Arkansas Declaratory Judgement Act, which is not a suit for damages.

C. CAW Also Fails to Show that the Arkansas Public Service Commission Authorized it to Activate its Customer's Sprinkler Meters without Their Knowledge and Consent.

Next, CAW argues for dismissal saying it is entitled to protection under the ADTPA's safe harbor. As with it did with its lead argument, CAW again fails to meet the requirements of the statute.

The ADTPA's safe harbor provision for public utilities specifically provides a safe harbor for only those actions or transactions that "have been authorized by the Arkansas Public Service Commission." A.C.A. § 4-88-101(4). But CAW's motion provides nothing to show that the Public Service Commission ever even reviewed the practices complained of in the pleading, much less approved them. CAW has failed to meet its burden here as well.

D. Act 986 Amended the ADPTA, But Was Not Effective At the Time of the Filing of This Suit, and Therefore, Does Not Apply.

On page 5 of its brief, CAW argues for dismissal under the inapplicable recent amendment to the ADTPA.

The section of the ADTPA that CAW cites, A.C.A. § 4-88-113(f)(1)(A) and (B), was embodied in House Bill 1742, which was passed by the Arkansas Legislature this year. The bill became Act 986, but it wasn't the law when this case was brought.

This amendment was not effective until the 91st day after the 2017 General Assembly adjourned. The 91st General Assembly convened on January 9, 2017 and adjourned *sine die* on Monday, May 1, 2017. Thus, the 91st day fell on August 1, 2017. *See* Amendment 7 of the Arkansas Constitution; *Stroud v. Cagle*, 87 Ark. App. 95, 98-99, 189 S.W.3d 76, 79 (Ark. App. 2004); *citing Tate v. Bennett*, 341 Ark. 829, 20 S.W.3d 370 (2000).

This action was filed on July 19, 2017, which was before this amendment forming the basis for CAW's argument became effective. As such, the statute cited by CAW has no relevance.

E. Defendant also Fails to Meet its Burden with Respect to Punitive Damages.

In her prayer of relief, Plaintiff asks for an award of punitive damages. Under Arkansas law, punitive damages are recoverable for gross, wanton, and culpable negligence. *Vogler v. O'Neal*, 226 Ark. 1007, 1015, 295 S.W.2d 629, 634 (1956). It is also clear, that where a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred, punitive damages are recoverable. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518 *21, 385 S.W.3d 822, 836 (2011).

Plaintiff has alleged a willful act by CAW to automatically turn on its customers sprinkler meters without their knowledge or consent as a matter of business policy, and further, intentionally hid the unlawful sprinkler fees within certain non-negotiable governmental/environmental fees on the monthly bills. Complaint at ¶¶ 2, 10 – 16, 18 – 24. Such actions meet the punitive damages standards of *Vogler* and *Schafer*.

CAW moves for dismissal of Plaintiff's plea for punitive damages, and says punitive damages are not recoverable on either the unjust enrichment or ADTPA claims. CAW is wrong.

First, as to the *First National Bank of DeWitt v. Cruthis*[1] case cited by the Defendant, the Supreme Court never even mentions punitive damages anywhere in the opinion. Simply put, the words do not appear and were not at issue at all there.

Second, in Defendant's *Clark v. Farmers Exch. Inc.*[2] case, the Court simply said punitive damages were not generally available chancery court. The Supreme Court was focused on the split court system that Arkansas had at the time and that punitive damages were not available in chancery court. Importantly, the Supreme Court noted, that if there was no objection, the chancery court could award damages normally awarded in circuit court – including punitive damages. But all of this was clear dicta, because the Supreme Court specifically said that it "need not address this issue." *Clark*, 347 Ark. at 87, 61 S.W.3d at 144. Thus, CAW has not met its burden on its motion.

CAW has also failed to meet its burden with respect to its raised punitive damages issue with respect to the ADTPA claim. Here, CAW cites to *Wallis v. Ford Motor Co*.[3] and *Baptist*

[1] 360 Ark. 528, 203 S.W.3d 88.

[2] 347 Ark. 81, 61 S.W.3d 140.

[3] 362 Ark. 317, 208 S.W.3d 153.

Health v. Murphy[4] for the proposition that the cases hold that punitive damages are not recoverable under the ADTPA. But neither opinion made such a holding. And neither opinion addressed the issue at all. The words "punitive damages" don't even appear in *Wallis*. And the only reason the words appear in *Baptist Health* is to footnote that the compensatory and punitive damages claims had been dismissed without prejudice two years earlier, because the plaintiffs there only wished to pursue injunctive relief.

There are no appellate cases in Arkansas holding that punitive damages are not recoverable under the ADTPA or under a theory of unjust enrichment. CAW wants this Court to step out there with no precedent.

But it is clear, as discussed above, that punitive damages are recoverable when there are intentional, willful, or knowing acts related to the legal transgression. For example, the Supreme Court has held that punitive damages are not generally available in actions for breach of contract. But also said, in the same opinion, that punitive damages may be appropriate where there was a willful or malicious act in connection with the contract. *Curtis v. Partain*, 272 Ark. 400, ____, 614 S.W.2d 671, _____ (1981). The same should also hold true for unjust enrichment claims as they are generally grounded in the theory of implied-in-fact contract. 17 C.J.S Contracts §6, p. 574.

[4] 2010 Ark. 358, 373 S.W.3d 269.

WHEREFORE, Plaintiff prays for an order denying CAW's motion to dismiss in all respects, and for all other fair and just relief.

Respectfully Submitted,

STEEL, WRIGHT, GRAY & HUTCHINSON

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CERTIFICATE OF SERVICE

I certify that on this 24th day of August, 2017, the foregoing was filed with the Court's electronic filing, which in turn will serve all counsel of record electronically.

Scott Poynter