

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

KATIE THOMAS

PLAINTIFF

vs.

Case No. 4:10-cv-04042

UNITED STATES OF AMERICA

DEFENDANT

ORDER

BEFORE the Court is Defendant's Motion To Strike Amended and Substituted Complaint, or In The Alternative, To Dismiss. ECF. No. 12. Plaintiff has responded to the Motion. ECF. No. 15. Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) (2005), United States District Judge Harry F. Barnes referred the Motion to the undersigned for decision. This matter is ready for decision.

1. Background:

On April 1, 2010, Plaintiff, Katie Thomas commenced this action against Defendant, United States of America. Plaintiff alleges she is the surviving spouse of James Thomas and she brings a wrongful death action pursuant to the Arkansas Wrongful Death Act, Ark. Code. Ann. §16-62-102, for the wrongful death of her husband on behalf of herself and all of the deceased's heirs at law. ECF. No. 1.

On July 14, 2010, Defendant filed a Motion to Dismiss (ECF No. 8) alleging this action should be dismissed because a wrongful death action brought under the Arkansas Wrongful Death Statute must be brought by and in the name of the personal representative of the deceased person. If there is no personal representative of the deceased person, then a wrongful-death action must be

brought by all of the heirs at law. *See* Ark. Code Ann. § 16-62-102(b). Defendant alleges Plaintiff's complaint states she has filed a wrongful death claim on behalf of all of the deceased's heirs at law, however, she is the only named Plaintiff and she has not been appointed the personal representative of James Thomas' estate. As a result, Defendant argues Plaintiff's complaint should be dismissed.

On August 9, 2010, Plaintiff filed her Amended and Substituted Complaint. ECF No. 10. The Amended and Substituted Complaint added Marilyn Ratcliff as an additional Plaintiff. According to Plaintiff, Marilyn Ratcliff is the only other heir at law of James Thomas. ECF No. 10.

On August 23, 2010 Defendant filed a Motion To Strike Amended and Substituted Complaint, or In The Alternative, To Dismiss. ECF. No. 12. According Defendant, Plaintiff's Amended and Substituted Complaint should be stricken for Plaintiff's failure to follow Rule 15 of the Federal Rules of Civil Procedure for Amended and Supplemental Pleadings. Defendant argues Plaintiff was required to obtain leave of this Court in order to amended her Complaint. Defendant also argues Plaintiff failed to follow Local rule 5.5(e) which requires Plaintiff attach a copy of the amended pleading to the motion seeking leave to amend.

2. Discussion:

Rule 15(a) of the Federal Rules of Civil Procedure provides that, after a responsive pleading has been served, "a party may amend its pleadings only with the opposing party's written consent or the court's leave." *See* Fed. R. Civ. P. 15(a)(2). In this matter, Plaintiff failed to obtain Defendant's consent or seek leave of court before filing her Amended and Substituted Complaint. As a result, Plaintiff's Amended and Substituted Complaint should be stricken based on her failure to follow the Federal Rules of Civil Procedure and Local Rule 5.5(e) which requires a party who moves to amend a pleading to attach a copy of the amendment to the motion.

Should Plaintiff wish to file an amended complaint, she should do so within thirty (30) days and she should follow the Federal Rules of Civil Procedure and this Court's Local Rules as they relate to amendment of pleadings.

IT IS THEREFORE ORDERED Defendant's Motion To Strike Amended and Substituted Complaint, or In The Alternative, To Dismiss, (ECF. No. 12) is hereby **GRANTED** in part, and **DENIED** in part. Defendant's Motion to Strike is **GRANTED** and Plaintiff's Amended and Substituted Complaint is stricken. Defendant's Alternative Motion to Dismiss is **DENIED** as moot. Plaintiff is allowed thirty (30) days following the entry of this Order to seek consent of the Defendant or leave of Court to file any amended complaint in this matter.

Further, the hearing on Defendant's Motion to Dismiss (ECF No. 8) currently set for October 5, 2010, is continued and will be reset at a later date.

DATED this **1st day of October, 2010.**

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE