UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-21193-Civ-SCOLA

ARMANDO DE ZAYAS and ELENA DE ZAYAS,

Plaintiffs,

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

THIS MATTER is before the Court on the parties' cross-motions for summary judgment (ECF Nos. 49 & 57) and the Magistrate Judge's Report and Recommendations on those motions (ECF No. 129). The Magistrate Judge recommended that Defendant Bellsouth's Motion for Summary Judgment be granted and that the Plaintiffs' Motion for Summary Judgment be denied. The Plaintiffs have objected to the Magistrate's recommendations.

This case centers on the Plaintiffs' allegations that a telephone pole installed adjacent to their property for four months in 2009 somehow contaminated their well water. However, the Plaintiffs have not established any causal connection between the telephone pole and any contaminants in the Plaintiffs' water supply. The Plaintiffs rely on a *res ipsa loquitor* theory of liability to make their case, but given the facts of this case that theory fails.

The Plaintiffs' opposition to the Magistrate Judge's recommendations is singularly focused on the August 16, 2011 lab report which purports to reveal levels of pentachlorophenol in the Plaintiffs' well water that are higher than the maximum contaminant level set by the Florida Department of Health. The Plaintiffs admit this report was not produced until after the close of discovery in this case.[1] This evidence was properly excluded as the Plaintiffs were given an

[1] This matter was filed in state court in February 2011 and was removed to this Court by the Defendant. (Compl., ECF No. 1-2.) The initial discovery deadline in this Court was set for July 12, 2011 by the predecessor trial Judge. (Scheduling Order, ECF No. 6.) The discovery deadline was later extended to August 12, 2011. (Scheduling Order, ECF No. 15.) The August 16, 2011 report was excluded by the Magistrate Judge on a motion *in limine*.

adequate opportunity to prepare and to litigate this matter. The Plaintiffs have simply failed to proffer any evidence to make out a *prima facie* case on their claims.

Even if this Court were to accept the late report, summary judgment in favor of the Defendant would still be appropriate because the Plaintiffs have not presented any evidence to establish a causal link between the telephone pole and the increased levels of pentachlorophenol. The fact that the telephone pole was removed from Plaintiff's' property in December 2009, that a containment test in June 2011 revealed no pentachlorophenol in the Plaintiff's well water, and the fact that detectable amounts of pentachlorophenol are typically present in the ground water in Miami-Dade County renders the Plaintiffs' *res ipsa loquitor* theory of liability untenable. In short, the Plaintiffs have failed to proffer <u>any</u> evidence to establish causation for any of their claims. As the nonmoving party, the Plaintiffs are required to go beyond their pleadings and present admissible evidence demonstrating a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Plaintiffs' argument that additional time was required for more extensive testing due to environmental conditions is also unavailing. The Plaintiffs have not submitted a single expert affidavit – now or at any time in this litigation – as a proffer to support their suggestion that additional time was needed in order to determine whether the Plaintiffs' property was "contaminated" as a result of the subject telephone pole.[2] As a final factor, the Court notes that the Defendant's Statement of Undisputed Material Facts (ECF No. 50) was deemed admitted because the Plaintiffs did not file an opposing statement of facts controverting Defendant's Statement. S.D. Fla. L.R. 56.1(b); *see also Gossard v. JP Morgan Chase & Co.*, 612 F. Supp. 2d 1242, 1245-1246 (S.D. Fla. 2009). Moreover, many of the record citations relied on by the Plaintiffs in their Statement of Undisputed Facts (ECF No. 58) and in their Statement of Disputed Facts (ECF No. 71) do not stand for the propositions for which they were cited.

Having considered the Magistrate Judge's Report, the Plaintiffs' Objections, and having made a *de novo* review of the record, this Court finds the Magistrate Judge's Report and Recommendations cogent. It is **ORDERED and ADJUDGED** as follows:

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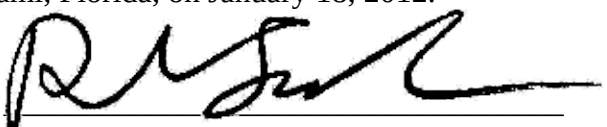
[2] Presumably testing to establish that the Plaintiffs' property was in fact "contaminated" with pentachlorophenol would have been accomplished before filing this lawsuit. The Plaintiffs have not presented any argument or evidence why this was not, or could not be, accomplished.

1. Judge Brown's Report and Recommendation (ECF No. 129) is **AFFIRMED and ADOPTED**. The Plaintiffs' Objection to the Magistrate's Report (ECF No. 131) is **OVERRULED**.
2. The Plaintiffs' Motion for Summary Judgment (ECF No. 57) is **DENIED**. The Defendant's Motion for Summary Judgment (ECF No. 49) is **GRANTED**.
3. The Defendant's Motion to Strike (ECF No. 135) is **DENIED**.
4. The Clerk shall **CLOSE** this case.

DONE and ORDERED in chambers, at Miami, Florida, on January 18, 2012.



ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record