

15-0122

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

LEWIS COUNTY, WV
FILED

RUBIN RESOURCES, INC.,
a West Virginia corporation,

2015 JAN -6 A 9:5

Plaintiff,

JOHN B. HINZMAN
CIRCUIT CLERK

v.

CIVIL ACTION NO.: 13-C-64
John L. Henning, Circuit Judge
By Order of the Supreme Court of
Appeals of West Virginia

GAROLD "GARY" W. MORRIS, II,
Individually,

Defendant.

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Pending before the Court are Plaintiff Rubin Resources, Inc.'s ("Rubin") "Motion for Summary Judgment on all Claims" and Defendant Garold "Gary" W. Morris, II's ("Mr. Morris") "Motion for Summary Judgment." The parties have submitted memoranda of law in support of their respective positions to the Court, and the Court has heard oral arguments on the motions.

Upon consideration of the record before it and the oral argument of counsel, the Court is of the opinion that Rubin's "Motion for Summary Judgment on All Claims" should be **DENIED** and Mr. Morris's "Motion for Summary Judgment" should be **GRANTED** for the reasons further explained below.

FINDINGS OF FACT

1. In 2009, Rubin negotiated an agreement with Jackson Smith Enterprises d/b/a West Virginia Energies ("WVE") to lease all of its development rights, including oil and gas deep rights. In accordance with this agreement, WVE offered the subject 121-acre tract of land.

2. WVE agreed to warrant the title to the oil and gas leasehold estate. The warranty included a “make good” provision, which provided that “[u]pon legal examination of such leasehold(s), should the title be found to be defective [WVE] shall, at [its] expense, perform any curative action that is necessary and required by [Rubin’s] legal examiner. Should the title be found to be not a ‘good and marketable’ leasehold then [WVE] hereby agrees to replace the lease with substitute property acceptable to [Rubin].”

3. Per the terms of the agreement, Rubin retained Mr. Morris to perform a title examination and render a title opinion on the 121-acre subject tract.

4. In a letter dated July 24, 2000, Mr. Morris provided a title opinion certifying “good and marketable title” and concluding that Rubin “has the exclusive right to drill upon the subject leasehold[.]”

5. Relying on Mr. Morris’s opinion letter, Rubin accepted WVE’s assignment of all of its development rights to the 121-acre tract. In September 2000, Rubin drilled the Maple No. One well on the subject property and began production.

6. Approximately twelve years later, in September 2012, Rubin entered into an agreement with Antero Resources Appalachian Corporation (“Antero”) whereby Antero agreed to purchase Rubin’s Marcellus Shale rights in the subject property for \$216,000 with a 2.375% override, with a present value of \$30,000.

7. Antero performed its own title examination. During the course of its investigation, Antero discovered a recorded Declaration of Pooling. This Declaration of Pooling was recorded by CNG Development Company (“CNG”) on October 3, 1986.

8. The Declaration of Pooling documented CNG’s pooling agreement on the subject 121-acre tract as well as an adjacent 180-acre tract.

9. Antero alerted Rubin to this title defect and advised Rubin that it no longer intended to follow through with the agreement.

10. Rubin, in turn, informed CNX, successor-in-title to CNG, that it had been operating the Maple No. One well. To resolve any claim of CNX against Rubin, Rubin paid CNX compensation in the amount of \$32,455.81 and assigned an overriding interest to CNX.

11. Rubin initiated the instant lawsuit against Mr. Morris to recover the amount paid to CNX and to recover the agreed-upon amount between Antero and Rubin that was forfeited as a result of the title defect, which Mr. Morris failed to discover.

12. Mr. Morris does not dispute Rubin's allegations of negligence. Rather, the parties disagree over which damages, if any, were proximately caused by Mr. Morris's negligence.

13. These issues have been fully briefed by the parties, and the motions are ripe for disposition.

CONCLUSIONS OF LAW

1. The familiar standard in the West Virginia Rules of Civil Procedure is that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c).

2.

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

3. “Generally, in a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) the attorney’s employment; (2) his / her neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.” Syl. Pt. 1, *Calvert v. Sharf*, 217 W. Va. 684, 619 S.E.2d 197 (2005).

4. “In an attorney malpractice action, proof of the attorney’s negligence alone is insufficient to warrant recovery; it must also appear that the client’s damages are the direct and proximate result of such negligence.” *Id.* at Syl. Pt. 3 (citation omitted).

5. “Damages arising from the negligence of an attorney are not presumed, and a plaintiff in a malpractice action has the burden of proving both his loss and its causal connection to the attorney’s negligence.” *Id.* at Syl. Pt. 4 (citation omitted).

6. In the instant matter, the parties filed “Plaintiff and Defendant’s Joint Stipulations.” Among other things, the parties stipulate that “Mr. Morris does not dispute Rubin Resources allegations of negligence.” (Pl. and Def.’s Joint Stipulations, ¶ 1.) They further stipulate that, “within the scope of Mr. Morris’ attorney-client relationship with Rubin Resources in July 2000, Mr. Morris prepared a title opinion letter dated July 24, 2000, and that the letter did not note the existence of a Declaration of Pooling affecting the [subject] Property and two adjoining parcels.” (*Id.* at ¶ 4.) In short, the parties do not dispute that Mr. Morris was retained by Rubin and that he neglected a reasonable duty in failing to report the title defect. Thus, at issue in this matter is whether this negligence proximately caused Rubin’s claimed damages.

Settlement with CNX, Successor-in-Title to CNG

7. As set forth above, Rubin and CNX entered into a settlement agreement whereby Rubin paid CNX compensation of \$32,455.81. This sum includes \$15,000 for a site location fee and \$17,455.81, the value of 1/32nd overriding royalty interest through December 31, 2012.

8. Rubin contends that the settlement amount is an “actual loss” that Rubin paid out-of-pocket. Rubin states that its reliance on the defective title opinion caused them to acquire the subject property and drill the producing Maple No. One well. This, in turn, caused the damages Rubin paid to CNX.

9. Mr. Morris, on the other hand, argues that Rubin’s reporting to CNX of its trespass was voluntary and, in this instance, unnecessary. Specifically, Mr. Morris argues that Rubin had acquired good title to the natural gas underlying the subject property by October 2012 as a result of adverse possession. Thus, Rubin had no duty to report its well to CNX or to pay CNX any amount of money. In short, Mr. Morris argues that Rubin voluntarily reported and paid to CNX \$32,455.81 in the absence of any legal obligation to do so.

10. Mr. Morris relies on *Calvert v. Scharf*, 217 W. Va. 684, 619 S.E.2d 197 (2005) in arguing that Rubin’s voluntary settlement with CNX severs any causal link between Mr. Morris’s admitted negligence and the settlement with CNX.

11. In *Calvert*, the parties were faced with a will provision that may or may not have effectuated the intended distribution. *Id.* at 687-88, 619 S.E.2d at 200-01. The executor of the will filed a declaratory judgment action seeking a declaration that it should distribute the assets as the decedents intended. *Id.* at 687, 619 S.E.2d at 200. The will at issue, however, may not have validly exercised a power of appointment, thereby resulting in funds being distributed in a manner not in accordance with the decedents’ intentions. *Id.* at 687-88, 619 S.E.2d at 200-01.

12. The parties to the declaratory judgment action filed cross-motions for summary judgment. *Id.* at 688, 619 S.E.2d at 201. The parties reached a settlement prior to the hearing on these cross motions, however. *Id.*

13. Subsequently, certain beneficiaries under the will filed a legal malpractice suit against the drafters of the will in question. *Id.* The *Calvert* Court found that, as “direct, intended, and specifically identifiable beneficiaries of Erma’s will . . . the Calverts have standing to assert that the negligence of the defendant lawyers frustrated this aspect of Erma’s testamentary plan.” *Id.* at 694, 619 S.E.2d at 207. The *Calvert* Court further “assume[d] without deciding that there was neglect of a reasonable duty in the drafting of Erma’s will.” *Id.* Thus, the first two elements of a cause of action for attorney malpractice were satisfied.

14. With respect to damages, the *Calvert* Court found that the Calverts “failed to establish that they have suffered damages that were proximately caused by attorney malpractice.” *Id.* at 696, 619 S.E.2d at 209.

15. In reaching this conclusion, the court stated that

[i]f, in the instant case, the declaratory judgment action had proceeded to a final judgment, the question of whether or not the Calverts have suffered any loss resulting from negligence in the drafting of Erma’s will would have been definitively answered. However, due to their settlement of the declaratory judgment action, there has been no final judicial determination as to whether any negligence in the drafting of Erma’s will proximately caused injury to the Calverts.

Id.

16. The Calverts maintained that they sustained damages as a result of the settlement they voluntarily reached with other beneficiaries under the will. The court was not persuaded:

These damages, which the Calverts have either voluntarily paid or voluntarily agreed to pay, simply bear no causal relationship to any negligence on the part of the attorneys who drafted Erma’s will. Had the declaratory judgment action proceeded to its conclusion and resulted in a final judicial determination that Erma’s exercise of her power of appointment had failed, then the causal connection between the attorney’s negligence and any losses sustained by the Calverts would have been established. However, the Calverts’ voluntary settlement of the declaratory judgment action precluded any such determination. Thus, as a matter of law, no [attorney malpractice] cause of action exists.

Id.

17. For these same reasons, this Court finds that the amount Rubin voluntarily paid to CNX is not recoverable as damages proximately caused by Mr. Morris's negligence. Rubin self-reported the drilling of Maple No. One well to CNX and voluntarily entered into a settlement agreement with CNX. This settlement occurred in spite of the fact that the well was drilled and had been producing for more than the ten year statutory period for adverse possession. In other words, although Rubin paid money out of pocket to settle any claim CNX had against it as a result of Rubin's impermissible extraction, this amount may have been wholly avoided by operation of this state's adverse possession laws. There was no judicial determination of whether the minerals were adversely possessed by Rubin, however, so it cannot be said that the amount Rubin voluntarily paid to CNX flowed as a result of Mr. Morris's negligence.

18. Rubin's voluntary settlement with CNX precluded any such determination; therefore, it also precludes any finding that these claimed damages were proximately caused by Mr. Morris's negligence.

19. This Court recognizes that courts generally "favor and encourage settlements between parties to a controversy to avoid the vexation and expense of litigation." *State ex rel. Showen v. O'Brien*, 89 W. Va. 634, 109 S.E. 830, 831 (1921). On the other hand, courts look with disfavor

upon a settlement procured by fraud or imposition, and particularly when designed to delay, hinder, or defeat enforcement of the rights of others vitally interested in the subject-matter of the controversy. The rule favoring compromise settlements does not apply in furtherance of a fraudulent design, but only where the rights and interests of the parties immediately concerned, whether legal or equitable have in good faith been observed and respected.

Id.

20. This Court finds no fraud in Rubin's settlement with CNX; however, the voluntary settlement operated as a detriment to Mr. Morris in that it precluded any judicial determination of whether his negligence proximately caused the claimed damages. Mr. Morris was unable to argue that Rubin adversely possessed the minerals beneath the subject tract. Allowing Mr. Morris to advance this argument could have precluded any liability on Rubin's part. Accordingly, this Court will not allow the settlement to further infringe on his interest in being held liable for only those damages proximately caused by his negligence.

Contract with Antero

21. Rubin also seeks to recover from Mr. Morris \$246,000, which is the amount Antero had agreed to pay for the subject property prior to the discovery of the title defect.

22. Mr. Morris contends that these damages are too speculative in nature to be recoverable in this action. Mr. Morris also claims that these damages were not foreseeable at the time of his representation.

23.

[R]ecoverable damages are those 'as may fairly and reasonably be considered as arising naturally – that is, according to the usual course of things – from the breach of the contract itself, *or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract*, as the probable result of its breach.

Kentucky Fried Chicken v. Sellaro, 158 W. Va. 708, 716, 214 S.E.2d 823, 827 (1975) (internal citation and quotations omitted).

24. "Damages which are remote, conjectural, or speculative, cannot be recovered, and in order to sustain a recovery for damages there must be proof which furnishes reasonable certainty of damage and the amount thereof." Syl. Pt. 5, *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W. Va. 351, 193 S.E.2d 544 (1972).

25. In *Keister v. Talbott*, 182 W. Va. 745, 391 S.E.2d 895 (1990), Ralph Keister acquired an option to purchase two tracts of land from Hazel Brown. Mr. Keister hired the defendant, William Talbott, to examine title to the tracts, with specific inquiry as to ownership of both surface and coal and mining rights. *Id.* at 747, 391 S.E.2d at 897.

26. Mr. Talbott advised Mr. Keister that Ms. Brown had title to both the surface and mineral rights. *Id.* Accordingly, Mr. Keister purchased the tracts of land; however, when he attempted to lease out the coal rights, Mr. Talbott learned that a third party was claiming to have those rights. *Id.*

27. Mr. Talbott subsequently advised Mr. Keister that the coal rights had been conveyed away by prior owners. *Id.* Mr. Talbott claimed that improper indexing resulted in his failure to discover the conveyance. *Id.*

28. Mr. Keister and his wife initiated suit against Mr. Talbott and the county clerk responsible for indexing at the relevant time, alleging that they were deprived of the coal ownership as a result of the defendants' negligence. *Id.* at 747-48, 391 S.E.2d at 897-98.

29. Prior to trial, the trial court limited the amount of recovery to the difference between the purchase price and fair market value of the property without the coal. *Id.* at 748, 391 S.E.2d at 898. The trial court found that, as a matter of law, the plaintiffs could not establish a causal connection between the defendants' negligence and their loss of the coal rights. *Id.*

30. Following a jury trial, the jury found in favor of the plaintiffs, but it assessed \$0 in damages. *Id.* The plaintiffs appealed. *Id.* On appeal, the defendants did not contest their negligence. *Id.* Rather, the issue was whether their negligence was the proximate cause of the damages claimed by the Keisters. *Id.* The Keisters claimed that the trial court should have

allowed them to present evidence of the value of the coal under the property or of the profits they could have made extracting the coal. *Id.*

31. In upholding the jury verdict, the *Keister* Court noted that the plaintiffs “overlook the proximate cause issue in this case.” *Id.* at 750, 391 S.E.2d at 900. Specifically, “the attorney’s negligence did not cause the loss of the mineral rights.” *Id.* (citation omitted).

32. The *Keister* Court further noted that “[t]he proper method of determining whether a party’s omission to perform an act imposed by a duty is a cause in fact of damage to another is to determine whether performance of that act would have prevented the damage.” *Id.*

33. The *Keister* Court continued,

Had Mr. Talbott correctly examined the title, his discovery of the prior outconveyance would not have altered [the fact that Mrs. Brown had no title to the coal under her property]. Thus, the plaintiffs were not deprived of the coal rights as a proximate result of Mr. Talbott’s negligence. Consequently, the plaintiffs’ damages for the loss of their bargain, i.e., the failure to acquire ownership of the coal, cannot be charged against Mr. Talbott. What they did lose as a result of his negligence was the opportunity to rescind the purchase contract.

Id.

34. The same result must follow here. Had Mr. Morris not been negligent in performing the title examination, it would not have changed the fact that the Declaration of Pooling existed, affecting the subject tract. Accordingly, Mr. Morris cannot be charged with the loss of a contract to sell rights that Rubin never would have owned. As in *Keister*, what Rubin lost was the opportunity to rescind the contract or exercise its right to have WVE substitute property.

35. To the extent Rubin argues that but for Mr. Morris’s negligence, it would have owned valuable property with Marcellus Shale rights to sell to Antero at a later date, recovery under this theory is too remote and speculative.

36. First, one would have to assume that Rubin would have exercised the substitution of property provision. One must also assume that WVE had substitute property and that the substitute property would have been acceptable to Rubin. This substitute property would have had to have been similar in acreage to the subject tract, and one would have to speculate as to Antero's interest in this hypothetical substitute property and its subsequent offer to Rubin.

37. For these reasons, the Court finds that Rubin's Antero-related damages are not recoverable here as a matter of law due to the fact that they are remote, conjectural, speculative, and not reasonably certain.

Attorneys' Fees

38. "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement except when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 10, *Smith v. First Cmty. Bancshares, Inc.*, 212 W. Va. 809, 575 S.E.2d 419 (2002).

39. Rubin cites to no statute, specific case, or contract provision allowing for reimbursement of attorneys' fees. Rubin has not alleged that Mr. Morris has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

40. More importantly, however, is the fact that Rubin has not prevailed in this action. Attorneys' fees are generally available only to prevailing party. See *Schartiger v. Land Use Corp.*, 187 W. Va. 612, 420 S.E.2d 883 (1991); *State ex rel. Div. of Human Servs. v. Benjamin P. B.*, 190 W. Va. 81, 436 S.E.2d 627 (1993).

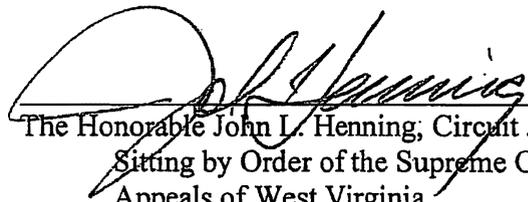
41. Wherefore, it is **ORDERED** that Garold "Gary" W. Morris, II's Motion for Summary Judgment be, and hereby is **GRANTED** and Rubin Resources, Inc.'s Motion for Summary Judgment be, and hereby is, **DENIED**.

The objections and exceptions of Rubin Resources, Inc. are hereby noted and preserved.
The Clerk is directed to transmit certified copies of this Order to all counsel of record and all unrepresented parties:

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Entered this 30th day of December 2014.


The Honorable John L. Henning, Circuit Judge
Sitting by Order of the Supreme Court of
Appeals of West Virginia

STATE OF WEST VIRGINIA, COUNTY OF LEWIS. TO-WIT:
I, JOHN B. HINZMAN, Clerk of the Circuit Court of Lewis
County, do hereby certify that the foregoing is a true copy of
an Order entered in the above styled action on the 6 day
of January, 20 15.
Given under my hand and official seal this the 6 day
of January, 20 15.

JOHN B. HINZMAN

Clerk of the Circuit Court of
Lewis County, West Virginia

