

15-0124

IN THE CIRCUIT COURT OF RITCHIE COUNTY, WEST VIRGINIA

D. MICHAEL WASHBURN,
LISA A. BUZZARD, CLAIRE ROBINSON,
EDWIN L. DEEM, REA WEDEKAMM,
MARY WAKEFIELD, KENNETH A. TOWNSEND,
ANNA LEE TOWNSEND WELLS,
CLYDE TOWNSEND, MICHAEL RUBEL,
JEROME RUBEL, KEITH WHITE AS EXECUTOR
OF THE ESTATE OF BERTIE C. COX, AND J.F. DEEM,

Plaintiffs,

vs.

CASE NO.: 11-C-61

SUGAR ROCK, INC.,
a West Virginia corporation,
GERALD D. HALL,
IAMS GAS COMPANY, IAMS OIL COMPANY,
CUTRIGHT GAS COMPANY, AND
KEITH OIL COMPANY,

Defendants.

DECISION AND JUDGMENT ENTRY

This matter came before the Court upon Plaintiffs' Second Motion for Partial Summary Judgment to Declare Dissolution of Partnerships, Wind up the Affairs of the Partnerships, Appoint Special Master/Receiver for the Winding up of Affairs, and Declare Leases as Partnership Property ("Second Motion for Summary Judgment"), which was filed on July 17, 2013. Defendants filed a Response in Opposition to Plaintiffs' Second Motion for Summary Judgment on August 30, 2013. Plaintiffs filed a Reply Memorandum in Support of their Second Motion for

Summary Judgment on October 7, 2013. Defendants filed a Supplemental Brief in Opposition to Plaintiffs' Second Motion for Summary Judgment on October 7, 2013. Plaintiffs filed a Supplemental Memorandum in Support of their Second Motion for Summary Judgment on November 26, 2014. Defendants filed a Response in Opposition to Plaintiffs' Supplemental Memorandum in Support of their Second Motion for Summary Judgment on December 15, 2014.

A hearing on Plaintiffs' Second Motion for Summary Judgment was held on September 4, 2013, at 10:45 a.m. Further arguments were heard on Plaintiffs' Second Motion for Summary Judgment at a subsequent hearing which was held on October 17, 2013, at 11:00 a.m. A final hearing on Plaintiffs' Second Motion for Summary Judgment was held on December 17, 2014, at 1:30 p.m.

I. Dissolution of the Partnerships.

Plaintiffs have asked this Court to declare that the Iams Gas Company, Iams Oil Company, Keith Oil Company, and Cutright Gas Company (the "Partnerships") are dissolved. Plaintiffs have requested a dissolution of the Partnerships in equity under the common law of West Virginia and under the West Virginia Revised Uniform Partnership Act ("RUPA"), specifically

A. Procedure.

In their response in opposition to Plaintiffs' Supplemental Memorandum in Support of their Second Motion for Summary Judgment, and at the hearing on this matter on December 17, 2014, Defendants continue to focus on the distinction between mining partnerships and general partnerships in mining. Since Plaintiffs' Second Amended Complaint characterized the Partnerships as mining partnerships, Defendants expressed grave concern about Plaintiffs' attempt to proceed under a different legal theory. Plaintiffs responded that they did not initiate this action simply to assert a legal theory; rather, they initiated this action in order to obtain relief. Thus, according to Plaintiffs, the precise nature of the Partnerships at issue is immaterial to this action unless it would make a difference in the relief that Plaintiffs have requested.

Based on the West Virginia Supreme Court of Appeal's recent decision in *Valentine v. Sugar Rock*, Case No. 14-0246, 2014 W.Va. LEXIS 1214 (Nov. 14, 2014), and its explanation of its prior ruling in *Lantz v. Tumlin*, 74 W.Va. 196, 81 S.E. 820 (1914), it appears that the particular labels used by the

¹ Such provision provides that a partnership is dissolved when, on application by a partner, there is a judicial determination that certain grounds exist.

parties and even by the court do not always make a material difference in the relief that should be granted. Although the Supreme Court of Appeal's syllabus in *Lantz* used the phrase "mining partnership," the Supreme Court of Appeals explained that *Lantz* was a "general partnership with its primary business being the purchase, ownership and operation of a mineral interest." *Id.* at 50. The Supreme Court of Appeals granted *Lantz* equitable relief against *Tumlin*, even though the bill sought a winding up and a settlement of a "mining partnership."

The Supreme Court of Appeals held in *Valentine* that "for a person to establish an ownership interest in a mining partnership, the statute of Frauds requires the person to show their interest was created or conveyed by a deed, will, or similar written conveyance."² *Id.* at 40. The Supreme Court of Appeals went on, however, explaining that a member of a general partnership that owns and operates oil and gas wells under a mineral lease is not subject to the same requirement. *Id.* at 40-41. This Court disagrees with Defendants' assertion that the latter portion of the Supreme Court of Appeal's opinion should be casually discarded as meaningless dicta. Thus, even if

² The Supreme Court of Appeals did not expressly address whether the Statute of Frauds could be satisfied by other means, such as by a judicial admission, the conduct and performance of the parties, or by other documents that might constitute a memorandum in writing. The Supreme Court of Appeals also did not address the effect of a Statute of Frauds where a partner initially receives a written assignment but is unable to produce the assignment at a later date.

certain Plaintiffs herein are unable to show their interest in a mining partnership in accordance with the requirements of the Statute of Frauds, the law does not bar them from requesting relief as members of a general partnership.

The evidence on which this Court's July 18, 2013, Order was based has not changed. Nevertheless, to the extent this Court's prior Order specifically concluded that the Partnerships herein were mining partnerships as opposed to general partnerships in mining, that order is hereby amended to reflect the preferred nomenclature expressed by the Supreme Court of Appeals in *Valentine*.³

It appears from the facts in the record that most of the Plaintiffs herein ("Documented Plaintiffs") have produced documentation sufficient to satisfy the statute of frauds but that some ("Undocumented Plaintiffs") have not and cannot.⁴ Given that the Documented and Undocumented Plaintiffs have asserted claims related to the same Wells and Leases, the precise nature of the Partnerships at issue here, i.e., whether they be mining partnerships or general partnerships in mining,

³ The 7-18-13 Order is further amended to reflect that the partnership interests held by Edwin L. Deem have been transferred to and are now owned by J.F. "Frank" Deem.

⁴ It appears that not all the assignments to the Documented Plaintiffs' predecessors were recorded. It certainly seems plausible that the Undocumented Plaintiffs' predecessors might also have received an assignment over 50 years ago and failed to record it, which would explain their inability to produce documentation today. Although not pled, the Doctrine of Lost Instruments recognizes such a possibility and provides relief therefor under certain circumstances.

is unclear. For the reasons set forth below, however, this Court concludes that it need not resolve this issue for the purpose of considering Plaintiffs' Second Motion for Summary Judgment.

What is clear is that Plaintiffs and their predecessors in interest have been continuously recognized by Defendants as participants in the operation of the subject leases and wells. This participation, as more specifically addressed in the Court's July 18, 2013, Order, involved the receipt of K-1s, billings for operational expenses, etc. It is reasonable to conclude that this recognition has some basis in fact and is not the product of the selection of the Plaintiffs' names randomly from a phonebook. Whether documented, undocumented, or dissociated, Plaintiffs legally qualify as partners for purposes of these proceedings as a result of such continuous and ongoing recognition.

The opinion of the West Virginia Supreme Court of Appeals in *Valentine* states that the Revised Uniform Partnership Act ("RUPA") "governs all partnerships." *Id.* at 43. Thus, while the Supreme Court of Appeals recognized that there are some differences between mining partnerships and general partnerships in mining, those differences do not appear to make any material difference in determining whether or not Plaintiffs

are entitled to a dissolution.

To the extent the nomenclature in Plaintiffs' pleadings needs to be revised, Plaintiffs made an oral motion to amend their Complaint at the hearing on December 17, 2014. Leave has since been granted and Plaintiffs have filed their Third Amended Complaint. Defendants' still assert, however, that they are unable to address the issues presented by Plaintiffs' Second Motion for Summary Judgment without knowing the basis of their claims to be a general partnership. This defense seems disingenuous. The facts supporting Plaintiffs' status as partners in a general partnership are virtually identical to the facts presented to establish an interest in a mining partnership. These facts have already been presented to this Court and made known to the parties during the over three (3) years in which discovery has been ongoing.

On the issue of Plaintiffs' standing, Defendants argue that, if the Partnerships are treated as general partnerships in mining, Plaintiffs' predecessors would have been dissociated at death years ago under W. Va. Code § 47B-6-1 and that an heir to a dissociated partner cannot request dissolution.⁵

⁵ Based on the affidavits and other evidence that has been presented, it appears that D. Michael Washburn and Lisa Buzzard acquired their interest at the death of their mother, Mary Ellen Washburn, a.k.a. Mary Ellen Ginanni, who in turn acquired her interest upon the death of F.A. Deem. Rea Wedekamm and Claire Robinson acquired their interest upon the death of their father, Claron Dawson. Mary Wakefield acquired her interest upon the death of her

This court disagrees with Defendants' analysis. As the Supreme Court of Appeals held, the provisions of RUPA are gap fillers to be applied only when the partnership agreement is silent. In this particular case, the evidence is undisputed ~~that~~ the parties did not intend death to be an event of dissociation. The fact that the assignments to Plaintiffs' predecessors identified the Partnerships as "mining partnerships" suggests that the parties intended for certain features commonly associated with mining partnerships to apply to the particular Partnerships at issue here. In every instance where a partner died, the interest passed to his or her heirs and the Partnerships continued. There is no evidence that a dissociated partner's interest was ever purchased for a buyout price under W. Va. Code § 47B-7-1(a). This court therefore concludes that it was a term of the partnership agreement, although not expressed and which need not be expressed in writing, that death was not an event of dissociation.

Even if Sugar Rock is correct, however, that the parties' predecessors were automatically dissociated upon the event of

mother, ~~Miriam~~ Haugh, who in turn acquired her interest upon the death of her husband, George Haugh. Kenneth Townsend, Anna Lee Townsend Wells and Clyde Townsend, acquired their interest upon the death of their father, Cecil B. Townsend. Michael and Jerome Rubel acquired their interest upon the death of their father, Edmund Rubel. The only Plaintiff who did not acquire an interest through death is J.F. "Frank" Deem, who received a written assignment of his interest from Edwin L. Deem, who in turn received a written assignment from his father, E.F. Deem. Even Sugar Rock's predecessor, W.A. Deem, acquired his interest in the Partnerships upon the death of his father, F.A. Deem.

death, this provides all the more reason for the Partnerships to be dissolved and wound up. The right of a partner to seek a judicial dissolution of a partnership under RUPA is so important that it cannot be waived. See W. Va. Code § 47B-1-3(b)(8). Given that even Sugar Rock's predecessor, W.A. Deem, acquired his interest in the Partnerships upon the death of his father, F.A. Deem, Defendants' argument, if accepted, would create an anomaly in which there would not be a single partner in the Partnerships that has not been dissociated or is otherwise prevented from requesting a judicial dissolution.⁶

Even though the Partnerships are treated as a separate entity under W. Va. Code § 47B-2-1, a partnership cannot exist without partners. Thus, if all of Plaintiffs' and Defendants' predecessors have been automatically disassociated, it provides all the more reason to immediately order a judicial dissolution and winding up.

For all the foregoing reasons, this Court concludes once again that West Virginia partnerships exist, whether characterized as mining partnerships, general partnerships, partnerships in mining, or partnerships; that many, if not all, of the Plaintiffs in this action and Sugar Rock, Inc., are

⁶ Defendants have argued that, even if E.F. Deem's interest was transferrable to Edwin L. Deem and then to J.F. "Frank" Deem, that he is still barred from requesting a judicial dissolution for failure to satisfy certain "preliminary requirements."

partners in the Partnerships; and that all the procedural requirements to a decree of dissolution have been satisfied.

B. The Merits.

A partner in the Partnerships has a right to dissolve the Partnerships, *inter alia*, if the partner can prove that the economic purpose of the Partnership is likely to be unreasonably frustrated or it is not otherwise reasonably practicable to carry on the Partnership business in conformity with the Partnership Agreement. W. Va. Code §47B-8-1(5)(i) and (iii).

Plaintiffs assert and have presented unrebutted evidence that they have not received any distributions from any of the Partnerships since Sugar Rock took over well operations in April of 1999. This is undisputed by Defendants. According to the business records kept by Sugar Rock, the Partnerships have suffered losses for many years. In fact, from 1999 through 2010, Defendants' records suggest that the Partnerships have suffered a net loss of \$208,828.89. None of the parties have earned a profit in their capacity as the partners, not even Sugar Rock. Sugar Rock's K-1s for the Partnerships from 2000 through 2010 show that it has lost \$122,693.00.

Defendants argue that, notwithstanding the Partnerships' losses and failure to make any cash distributions, dissolution

is inappropriate because they have reasonably managed the Partnerships. Although W. Va. Code §47B-8-1(5)(ii) does provide for a judicial dissolution when "another partner has engaged in conduct relating to the Partnership business which makes it not reasonably practicable to carry on the business in Partnership with that partner;" this Court need not decide that issue if independent grounds exist under subpart (i) or (iii).

Defendants insist that, notwithstanding the 14- plus years of net operating losses, the Partnerships still have the potential for prosperity and success. There must, however, be a reasonable basis for believing in such potential. This is not a situation where a large capital expenditure in one or two years has masked profits earned in other years. From 1999 through 2010, the Keith Oil Company has never earned a profit; the Iams Oil Company earned a profit in only a single year (2010), which was more than offset by losses in the previous 11 years; the Iams Gas Company earned a profit in only two years (1999 and 2005), which was more than offset by losses in the other 10 years; and the Cutright Gas Company earned a profit in only three years (2001, 2009, and 2010), which was more than offset by losses in the other 9 years.

None of the Partnerships have been profitable overall in over 14 years. There is no reasonable basis for believing that

they are on the verge of becoming profitable. At this point, even if all the Partnerships were instantly and continuously profitable, it would take some time for them to recover the losses that have accumulated. Based on the facts of this case, this Court finds that no reasonable person could conclude other than that the Partnerships' "economic purpose . . . is likely to be unreasonably frustrated" and that "it is not otherwise reasonably practicable to carry on the Partnership business in conformity with the Partnership Agreement."⁷

Therefore, the Court holds that the Partnerships are hereby **DISSOLVED**.

C. Dissociation.

Defendants have previously suggested that, rather than dissolving the Partnerships, this Court should "deem" Plaintiffs' request for dissolution as an attempt to dissociate from the Partnerships pursuant to W. Va. Code §47B-6-1(1). There does not appear to be any statutory authority for doing so. W. Va. Code §47B-8-1(5) plainly provides that a partner is entitled to seek judicial dissolution upon application. Automatically deeming any such application a dissociation under W. Va. Code §47B-6-1(1) would effectively abrogate W. Va. Code

⁷This Court further finds, based on these same facts, the Partnerships are hopeless of prosperity and that grounds exist, in equity, for a dissolution.

§47B-8-1(5).

As noted above, a partner in a Partnership under RUPA has an absolute right to seek a judicial determination of dissolution under W. Va. Code §47B-1-3(b)(8) and §47B-8-1(5). Therefore, Defendants' attempt to impose a choice of remedies on Plaintiffs, contrary to the statutory scheme of RUPA, is rejected.

II. Winding up the Partnerships.

Plaintiffs have requested a declaration that the Partnerships be wound up. Although Defendants have opposed dissolution, they have not presented any argument as to why the Partnerships ought not be wound up in the event they are dissolved. This Court finds that it necessarily follows from a dissolution that a partnership must be wound up. W. Va. Code §47B-8-1 states "a Partnership is dissolved, and its business must be wound up," under certain circumstances, which have already been established. The Court therefore holds that the Partnerships must be wound up.

III. Appointment of Special Master/Receiver.

Plaintiffs have requested the appointment of a special receiver. Plaintiffs have suggested that Rodney Windom, a licensed attorney practicing before the West Virginia Supreme Court of Appeals, who is experienced in oil and gas matters in Ritchie County, be appointed. Plaintiffs have further requested that the special receiver be given certain powers.

Defendants assert that there are no grounds for the appointment of a special receiver. Most of Defendants' arguments, however, are concerned with whether or not there are grounds for a dissolution. Alternatively, Defendants requested that Hayes and Company be considered for appointment as the distribution company. Defendants do not argue that the appointment of a special receiver, would be fundamentally at odds with the nature of partnerships or is inequitable. They also do not show how appointment under W. Va. Code §47B-8-3(a) would be at odds with a mining partnership, general partnership, partnership in mining, or partnership.

The Court has carefully considered the arguments and the nominees of the parties. The Court finds that there is good cause for judicial supervision of the winding up. The Court therefore Orders that Rodney Windom is appointed as special receiver to supervise the winding up of the Partnerships, and

further orders that Hayes and Company be appointed as the distribution company and for such other purposes as the special receiver may direct. The Court further orders that Mr. Windom shall be given the following powers:

1. to recommend a procedure for the winding up and sale of all of the Partnerships' assets, within 30 days of the date of this Order;

2. to review and obtain any financial information, records, contracts, inventory of the Partnerships' assets, or any other matter affecting the operation of the wells or the sale of the leases and wells, from Sugar Rock, Inc., and apply to this Court for relief, as necessary;

3. to, at the special receiver's discretion, hire a substitute operator of the Wells owned by the Partnerships;

4. to apply to this Court for any other relief, which, in the discretion of the special receiver, is necessary to resolve the current operation of the wells, or the sale of the Partnerships' assets.

The Court further orders that the parties shall fully cooperate with Mr. Windom and shall immediately provide any and all information and documentation as he may request in order to carry out his duties.

IV. Leases as Partnership Property.

Finally, Plaintiffs have moved for a declaration that the Partnerships' assets include the leases identified in Paragraphs 47, 49, 51, and 53 of the Second Amended Complaint ("Leases"). In support of their argument, Plaintiffs cite to the language set forth in numerous assignments ("Assignments") to their predecessors in the chain of title for the Leases. These Assignments conveyed a "working interest in and to" a certain oil and gas lease and the "leasehold estate created thereby." Pursuant to these Assignments, Plaintiffs' and Defendants' predecessors created the Partnerships and set forth the rights and obligations of the partners.

The Assignments further state that the Partnerships may undertake further drilling and development of the Leases. They obligate each partner to "bear his proportionate share of the expenses of equipping and operating said well, including casing, and also his proportionate share of rentals" after the first well was completed and "his share of all expenses hereinafter incurred in developing and operating said leases." The Assignments permit the assignor, F.A. Deem, to surrender and release the Leases if the initial well is nonproductive "and the mining partnership elects to do no further drilling hereunder."

Instead of discussing the language in the Assignments, Defendants focus on the language of the Leases themselves. Since the Leases do not indicate that they were acquired with Partnership assets, Defendants assert that they are separate property. This argument misses the point. Plaintiffs are not arguing that the Leases were partnership assets at the time they were originally taken; rather, they are arguing that the Leases became partnership assets at the time that the Partnerships were created. The Partnerships were created at the time Plaintiffs' predecessors acquired their partnership interest, i.e., at the time of the Assignments. Thus, it is the Assignments that reveal whether the Leases became assets of the Partnerships.

Sugar Rock argues that its predecessor, W. A. Deem, owned the leases because he conveyed farmout agreements for several of the Partnerships. It claims that the Partnerships ~~were not~~ involved in these agreements. However, according to Defendants own business records, the overriding royalty income from these farmout wells was paid to and accounted for as income to the Partnerships. If the Leases were not partnership property, then the Partnerships would not have been entitled to receive any of the income. The Income Statements for the Partnerships support that the Leases are Partnerships assets.

The rights granted by the Assignments are not limited to

the wells drilled by the Partnerships; in fact, such rights expressly encompass the entire lease and the leasehold estate created thereby. This is consistent with placing the right to elect further drilling with the Partnerships, not with any of the partners individually. Since the undeveloped acreage described in the Leases was intended to be an asset of the Partnerships, the Leases themselves were intended to be Partnership assets.

The Court finds instructive the language and analysis of *Valentine v. Sugar Rock, Inc.* of the Supreme Court of Appeals and the provisions of RUPA that deal with partnership assets. Specifically, W. Va. Code §47B-2-3 provides:

Property acquired by a partnership is property of the partnership and not of partners individually.

W. Va. Code §47B-2-4 provides:

(a) Property is partnership property if acquired in the name of:

(1) The partnership; or

(2) One or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

(b) Property is acquired in the name of the partnership by a transfer to:

(1) The partnership in its name; or

(2) One or more partners in their capacity as

partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(d) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

Here, although the Leases were not transferred to the Partnerships in their name, under W. Va. Code §47B-2-4(b)(1), they were nevertheless "acquired in the name of" the Partnerships under W. Va. Code §§47B-2-4(a)(1) and 47B-2-4(b)(2) because they were transferred to one or more partners in their capacities as partners in the Partnership. The names of the Partnerships are indicated in the Assignments. Moreover, the Leases have always been treated as Partnership assets.

Furthermore, under W. Va. Code §47B-2-4(a)(2), there is an indication on the Assignments that the assignee is a partner and that there exists a partnership (and, though not required, an indication of the name of the partnership). The Leases are therefore property of the Partnerships under W. Va. Code §47B-2-4(a)(2) and under W. Va. Code §§47B-2-4(a)(1) and 47B-2-4(b)(2).

For all the foregoing reasons, this Court holds that the

Partnerships' assets include the Leases identified in Paragraphs 47, 49, 51, and 53 of Second Amended Complaint.

Defendants have argued that certain lease expenses have never been attributed to the Partnerships and that such expenses have instead been borne by Sugar Rock and its predecessors. Nothing in this Decision and Entry prohibits Defendants from presenting evidence of such expenditures and claiming reimbursement for the same, during the course of the winding up, and on the same bases as any other expenditures for the Partnerships.⁸ Defendants are therefore granted leave to amend their Counterclaim to seek recovery for lease development, investigating, administrative, maintenance costs, and all other lease expenses which they claim are properly chargeable to the Partnerships.

It is so ORDERED.

The Court DIRECTS the Clerk to send a copy of this Order to all counsel of record.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: Rose Ellen Cox

Ritchie County of West Virginia

ENTERED ON 01/16/2015

IN ~~the~~ Order Book No. 48

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August H. Copeland
Circuit Clerk *Deputy*

ENTERED: 1/15/15

[Signature]
TIMOTHY L. SWEENEY, JUDGE
THIRD JUDICIAL CIRCUIT

⁸To the extent Defendants are entitled to recover from the Partnerships for such additional expenditures, the Partnerships are in even worse financial condition than previously indicated by Defendants' records, thus further justifying a dissolution.