

15-0655

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

STANDARD OIL COMPANY, INC.,

Plaintiff,

v.

CONSOLIDATION COAL COMPANY,

Defendant.

CIVIL ACTION NO. 14-C-39  
(JUDGE DAVID W. HUMMEL, Jr.)

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**ORDER GRANTING DEFENDANT CONSOLIDATION COAL COMPANY'S  
RENEWED MOTION FOR SUMMARY JUDGMENT**

On December 30, 2014, Defendant Consolidation Coal Company served a Renewed Motion for Summary Judgment. On April 3, 2015, Plaintiff Standard Oil Company, Inc. responded to Defendant's renewed motion, to which Defendant served a reply on April 13, 2015. The parties appeared before this Court for oral argument on the renewed motion on May 4, 2015. After reviewing the pleadings and hearing the arguments of counsel, this Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Both Plaintiff and Defendant conducted business operations in Wetzel, Harrison, Marion, and Monongalia Counties.
2. Plaintiff owned and operated oil, gas and/or coal bed methane wells.
3. Defendant engaged in coal mining operations.
4. In 1998, Plaintiff and Defendant entered into a written Option Agreement, which gave Defendant "the option to purchase any oil well, gas well, oil and gas well, coalbed methane well and any other well now or hereafter owned or controlled by Optionors, their

successors or assigns, within the area reflected on the map attached hereto as Exhibit A (“the Option Area”), upon the terms and conditions herein provided.” *See* Complaint, Exhibit A.

5. The agreed upon purchase price for each well purchased is \$25,000.00 per well.

6. Defendant paid the agreed upon \$10.00 in consideration for the agreement.

7. The Option Agreement provides that the option is effective for a term of ninety years.

8. At the same time, the parties executed an addendum to the Option Agreement, which states that the “Option Agreement relates only to wells owned, operated, or controlled by the Optionors within the Option Area.” *See* Defendant’s Motion for Summary Judgment, Exhibit 1.

9. More than fifteen years after the execution of the Option Agreement, Plaintiff filed the instant civil action, alleging that the Option Agreement is void for inadequate consideration (Count One), for vagueness (Count Two), and in violation of the Rule against Perpetuities (Count Three).

10. Joseph O’Ferrell, a former officer, director, and owner of Standard Oil Company, Inc. who signed the Option Agreement at issue in this case testified at his deposition that he understood that he was signing an option agreement and that he was agreeable to giving Defendant an option. *See* Deposition of Joseph O’Ferrell at 41

11. O’Ferrell further testified that he had the authority to sign for Plaintiff and knew that an option allowed Defendant to purchase the wells at a later date at a set price. *Id.* at 51–52.

12. Additionally, O’Ferrell testified that he understood the principle of an option contract, that he understood the risk of an option contract at the time, and that he does not regret the price of \$25,000.00 per well. *Id.*

### CONCLUSIONS OF LAW

13. Summary judgment is required if the record shows there is “no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” W. Va. R. Civ. P. 56.

14. 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. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995).

15. Where the evidence is clear that no genuine issue of material fact exists, summary judgment is proper where the movant is entitled to judgment as a matter of law. *Id.*

16. Where parties are competent to contract, “mere inadequacy of consideration would not render their contract void.” *McCary v. Monongahela Valley Traction Co.*, 97 W. Va. 306, 125 S.E. 92 (1924).

17. Plaintiff’s claim that consideration is inadequate will not void the Option Agreement because when “given or stipulated for in good faith, a valuable consideration, however small or nominal, is sufficient to sustain a contract.” *Id.* at Syl.

18. The ten dollars the parties exchanged in this case is sufficient consideration. *See Lawrence v. McCalmont*, 43 U.S. (2 How.) 426, 452 (1844).

19. The adequacy of the consideration should be determined as of the inception of the option rather than according to the increased value of the property at the time of a subsequent civil action. *Shell Oil Co. v. Kapler*, 50 N.W.2d 707 (Minn. 1951); *Imperial Refineries Corp. v. Morrissey*, 119 N.W.2d 872, 945 (Iowa 1963); see also Syl. Pt. 6, *Am. Canadian Expeditions, Ltd. v. Gauley River Corp.*, 221 W. Va. 442, 655 S.E.2d 188 (2007) (“The basic enforceable personal rights of the holder of an option to purchase real estate include the right to purchase the property at a certain price within a prescribed period.”)

20. A change in value of the object of an option agreement is an inherent risk that both parties to an option agreement assume when signing such an agreement. *Imperial Refineries Corp.* 119 N.W.2d at 945 (stating whether “an option contract is so inequitable that it should not be enforced in equity is to be determined not as of the date when it was finally exercised, but upon the situation as it existed when the contract was entered into” (internal quotation marks omitted)).

21. In this case, Plaintiff voluntarily entered into an Option Agreement that gave Defendant the option to purchase and plug Plaintiff’s oil and gas wells in a defined area. At the time the parties executed the Option Agreement, the wells “produced marginal amounts of oil and gas, which barely discharged the operation expenses with a small profit to the operator. The Option’s stated consideration of \$25,000 per well in the event of a sale was based upon the then (1998) estimated value of the leases, wells and leasehold estates.” See Compl. at ¶ 6.

22. At the time the parties entered into the agreement, the consideration was adequate and subsequent valuations of the parties’ relative position at a point later in time—fifteen years in this case—cannot retroactively render the consideration inadequate.

23. Courts “act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise, discreet, and profitable, or otherwise, are considerations not for courts of justice, but for the party himself, to deliberate upon.” *Id.*

24. In this case, Plaintiff does not allege fraud.

25. Because option contracts are a continuing offer to sell rather than a contract to buy or sell real estate, option contracts may result in harsh results, but a “harsh result does not necessarily imply an unfair or unjust process.” *Am. Canadian Expeditions*, 221 W. Va. at 446.

26. The basis of the contract is the right of election to purchase, which has been bought and paid for.

27. These principles “cannot be said to come as a surprise” to Plaintiff. *Id.* at 446; *see also Rutherford v. MacQueen*, 111 W. Va. 353, 161 S.E. 612 (1931) (concluding that holder of an option to purchase real estate was not entitled to the benefit of insurance money for fire damages occurring on the property before the option was exercised).

28. Because the consideration for the Option Agreement was adequate and because there is no allegation, much less proof, of fraud, Plaintiff’s challenge to the consideration of the Option Agreement must fail as a matter of law.

29. West Virginia courts presume “that parties enter into a contract with the intention of accomplishing some purpose by it; and, therefore, courts will not give to the contract a construction which will render it void if it can reasonably be interpreted in such a way as to give it effect.” Syl. Pt. 1, *Phillips v Rogers*, 157 W. Va. 194, 200 S.E.2d 676 (1973).

30. In this case, the parties agreed that Defendant has the option to purchase “any oil well, gas well, oil and gas well, coalbed methane well and any other well now or hereafter owned or controlled by Optionors, their successors and assigns, within the area reflected on the map attached hereto as Exhibit A (“the Option Area”), upon the terms and conditions herein provided.”

31. The Option Agreement includes geographic images and expressly states that any well reflected on the maps which is owned or operated by Plaintiff is subject to the Option Agreement.

32. Extrinsic evidence is allowed to make certain the descriptive matter in a contract for the sale of land. *Meadow River Lumber Co. v. Smith*, 126 W. Va. 847, 30 S.E.2d 392, 396 (1944).

33. All that is required is that the contract itself “contain enough to enable the court, with the aid of extrinsic evidence, to say the words of the instrument select and fix a certain thing, and no other, as the subject matter of the contract.” *Id.*; see also *Pigeon v. Hatheway*, 239 A.2d 523, 527 (Conn. 1968) (“The description of land contained in . . . any option to purchase is sufficiently definite to satisfy the Statute of Frauds whenever it is reasonably certain from the contract itself, or can be made certain through reference to . . . map . . . by resort to extraneous evidence thereof, whether oral or written.”) (internal quotation marks omitted).

34. The maps satisfy as a matter of law the certainty required to identify the wells in the Option Agreement.

35. Because the Option Agreement is sufficiently clear as to which wells are included in the Option Agreement, Defendant is entitled to summary judgment on Count II of the Plaintiff's Complaint.

36. Although the common law Rule against Perpetuities functioned to void any interest not certain to terminate or vest within 21 years if not referencing a measuring life, the West Virginia Legislature altered the rule when it enacted the Uniform Statutory Rule Against Perpetuities in 1992, which added a 90-year "wait and see" alternative to the common law Rule against Perpetuities.

37. The statute says that a nonvested property interest is valid if the "interest either vests or terminates within ninety years after its creation." W. Va. Code § 36-1A-1(a)(2).

38. In this case, the parties stated in the Option Agreement that the "Option shall be effective for a term of ninety (90) years, commencing on the date first hereinabove written and continuing until 11:59:59 p.m. on that date which is ninety (90) years from and after such commencement date."

39. The mere fact that the parties specifically set forth a period of time that is one second short of ninety years indicates that they clearly were aware of this statute and took that into consideration when making the contract such that the contract did not violate the Rule of Perpetuities.

40. The clear intent of the parties at the time of entering into the contract was to satisfy the statutory requirement.

41. Under the Uniform Statutory Rule's "wait and see" approach, "it is not possible to determine whether an interest fails under the rule against perpetuities as of the date the period of the rule begins to run, unless it is clearly impossible for the interest to vest within

90 years from its creation.” *Stephens v. Trust for Public Land*, 475 F. Supp. 2d 1299, 1313–14 (N.D. Ga. 2007); *see also* Uniform Law Commission, Statutory Rule Against Perpetuities Summary (“Rather than invalidating future interests based on hypothetical possibilities, the Uniform Statutory Rule provides a period of time within which an interest can actually vest. If it does, it is saved. If it does not, then it is invalid. We wait and see, in other words, if an interest will, in fact, vest.”).

42. In this case, Defendant could purchase all of the oil and gas wells at one time, which would vest its interest.

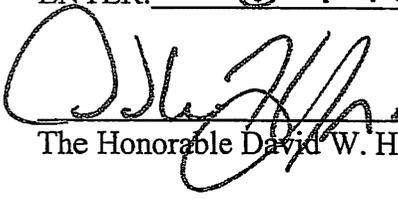
43. Because it is not clearly impossible for Defendant’s interest to vest within the 90-year wait and see period of the statute, the Court is required to wait and see whether it in fact vests within 90 years and, therefore, cannot declare the Option Agreement void as a matter of law for violating the Rule against Perpetuities at this time.

For the foregoing reasons, Defendant Consolidation Coal Company’s Renewed Motion for Summary Judgment is GRANTED.

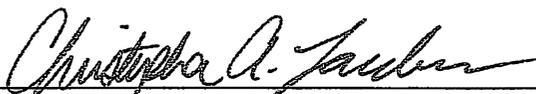
Plaintiff Standard Oil Company Inc.’s exceptions and objections to these rulings are hereby noted and reserved.

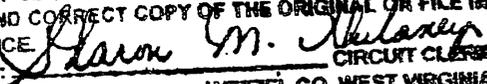
The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: 6.4.15

  
The Honorable David W. Hummel, Jr.

PREPARED AND SUBMITTED BY:

  
Charles F. Johns, W. Va. Bar No. 5629  
William J. O'Brien, W. Va. Bar No. 10549  
Christopher A. Lauderman, W. Va. Bar No. 11136  
STEPTOE & JOHNSON PLLC  
400 White Oaks Blvd.  
Bridgeport, WV 26330  
(304) 933-8000

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A  
TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN  
BY OFFICE.   
ATTEST: Sharon M. Melaney CIRCUIT CLERK  
WETZEL CO. WEST VIRGINIA  
BY: \_\_\_\_\_ DEPUTY CLERK

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of May 2015, I served the foregoing "Order Granting Defendant Consolidation Coal Company's Renewed Motion for Summary Judgment" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Gary L. Rymer, Esq.  
P.O. Box 236  
Middlebourne, WV 26149

  
\_\_\_\_\_

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2015 JUN -5 PM 12:13  
SHAR...  
CIRCUIT...  
WETZEL...  
CIVIL ACTION NO. 14-C-39  
(JUDGE DAVID W. HUMMEL, Jr.)

**ORDER DENYING PLAINTIFF STANDARD OIL COMPANY, INC.'S  
MOTION TO FILE FIRST AMENDED COMPLAINT**

On January 6, 2015, Plaintiff Standard Oil Company served a Motion to File First Amended Complaint. On January 15, 2015, Defendant Consolidation Coal Company responded to Plaintiff's motion, to which Plaintiff served a reply on March 16, 2015. The parties appeared before this Court for oral argument on the motion on May 4, 2015. After reviewing the pleadings and hearing the arguments of counsel, this Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. In 1998, Plaintiff and Defendant entered into a written Option Agreement, which gave Defendant "the option to purchase any oil well, gas well, oil and gas well, coalbed methane well and any other well now or hereafter owned or controlled by Optionors, their successors or assigns, within the area reflected on the map attached hereto as Exhibit A ("the Option Area"), upon the terms and conditions herein provided." *See* Compl. Exhibit A.

2. More than fifteen years after the execution of the Option Agreement, Plaintiff filed the instant civil action, alleging that the Option Agreement is void for inadequate

consideration (Count One), for vagueness (Count Two), and in violation of the Rule against Perpetuities (Count Three).

3. After completion of discovery, Plaintiff filed a Motion to File First Amended Complaint to assert a claim for “Guilty of first Breach,” in which it asserts that Consolidation Coal Company breached the Option Agreement more than ten years ago.

4. Plaintiff claims that, as a result of information obtained during discovery, it wants to add an additional claim entitled “Guilty of first Breach.”

5. Deposition testimony from Joseph O’Ferrell, a former officer, director, and owner of Standard Oil Company, Inc., shows that the facts underlying Plaintiff’s breach of contract claim were not newly discovered during discovery, but were known more than ten years ago.

6. At his deposition, Joseph O’Ferrell testified that these alleged events most likely occurred between 2000 and 2002. *See* Transcript of Deposition of Joseph O’Ferrell at 42.

7. O’Ferrell further testified that, as the agent of Plaintiff, he made the conscious and strategic business decision not to sue Defendant for a breach of contract claim in the early 2000s. *Id.* at 47–48.

8. Instead of pursuing a claim in the early 2000s, Plaintiff purposely chose not to sue Defendant for breach of contract because it did not want to disturb other deals it had with Defendant. *Id.*

9. Other than the allegations in the Complaint, Plaintiff has not alleged any other breach of this agreement in the past ten years by Defendant.

## CONCLUSIONS OF LAW

10. “A party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. W. Va. R. Civ. P. 15(a).

11. “The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time.” Syl. Pt. 6, *Jones v. Sanger*, 217 W. Va. 564, 618 S.E.2d 573 (2005).

12. “Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.” *Id.*

13. A motion to amend is futile where a plaintiff cannot prevail on its current claims or those in its proposed amended complaint. *Gassaway v. Dominion Exploration & Production, Inc.*, 2011 WL 8193596, \*5 (W. Va. Oct. 11, 2011).

14. Plaintiff cannot prevail on the claims in its original complaint.

15. First breach is an affirmative defense to a breach of contract claim, which essentially prevents a plaintiff who has previously breached the contract from bringing a breach of contract claim.

16. When alleged as a cause of action, Plaintiff is in effect asserting a breach of contract claim, which has a ten year statute of limitations. *See* W. Va. Code § 55-2-6 (providing for ten year statute of limitations for breach of contract claims).

17. Because the alleged factual events underlying any possible claim for breach of contract occurred in the early 2000s, the breach of contract claim is barred by West Virginia's ten-year statutory statute of limitations for breach of contract.

18. Moreover, Plaintiff has been dilatory in bringing a breach of contract claim.

19. In its initial Complaint, Plaintiff did not allege any breach by Defendant and waited over eight months to allege such a claim only after recognizing that it had no viable claim against Defendant.

20. Alternatively, even if the West Virginia Supreme Court of Appeals would recognize first breach as an affirmative claim for relief, Plaintiff's amendment would be futile because its claim for first breach would fail.

21. "The party to a contract is guilty of the first breach who fails to do what he contractually is bound to do." *Blue v. Hazel-Atlas Glass Co.*, 108 W. Va. 642, 147 S.E. 22 (1929).

22. The party owed performance, however, may waive its right to assert the first breach as a bar to recovery on its own subsequent breach. *Id.*

23. "[A] waiver may be express, or it may be inferred from actions or conduct; but all the attendant facts, taken together, must amount to an intentional relinquishment of a known right." *Id.*

24. The mere fact that the non-breaching party does not terminate the contract does not necessarily establish waiver. *Id.*

25. In this case, Plaintiff intentionally relinquished a known right and waived its right to assert first breach.

26. O'Ferrell testified at his deposition that he made a strategic and conscious choice, on behalf of Plaintiff, to ignore any alleged breaching conduct by Defendant. *See* Transcript of Deposition of Joseph O'Ferrell at 47–48.

27. Specifically, O'Ferrell said, "I have other deals with them. Trexler is going to pay me \$20 million for the gob pile, I can't kill that goose." *Id.* at 48.

28. Because Plaintiff did not want to end the relationship with Defendant, it intentionally relinquished a known right to seek payment for the plugging of wells.

29. Accordingly, in choosing to relinquish a known right over ten year ago, Plaintiff waived any right it may have to allege a claim of first breach.

30. Accordingly, amendment of the Complaint would be futile as the additional claim for breach of contract pled in the amended complaint is barred by the applicable statute of limitations.

31. Alternatively, amendment of the Complaint would be futile as Plaintiff intentionally relinquished a known right to seek payment for the plugging of wells and therefore waived its ability to assert a claim of first breach.

For the foregoing reasons, Plaintiff Standard Oil Company, Inc.'s Motion to File First Amended Complaint is DENIED.

Plaintiff Standard Oil Company Inc.'s exceptions and objections to these rulings are hereby noted and reserved.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: 6.4.15

*David W. Hummel, Jr.*  
The Honorable David W. Hummel, Jr.

PREPARED AND SUBMITTED BY:

*Christopher A. Lauderman*  
Charles F. Johns, W. Va. Bar No. 5629  
William J. O'Brien, W. Va. Bar No. 10549  
Christopher A. Lauderman, W. Va. Bar No. 11136  
STEPTOE & JOHNSON PLLC  
400 White Oaks Blvd.  
Bridgeport, WV 26330  
(304) 933-8000

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.  
ATTEST: *Sharon M. Anthony* CIRCUIT CLERK  
WETZEL CO. WEST VIRGINIA  
BY: \_\_\_\_\_ DEPUTY CLERK

**CERTIFICATE OF SERVICE**

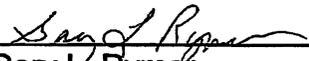
I hereby certify that on the 18th day of May 2015, I served the foregoing "Order Denying Plaintiff Standard Oil Company, Inc.'s Motion to File First Amended Complaint" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Gary L. Rymer, Esq.  
P.O. Box 236  
Middlebourne, WV 26149

  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I, Gary L. Rymer, counsel for Appellant, hereby certify that I served the foregoing Notice of Appeal upon the Appellee, by mailing a true copy thereof to it's counsel of record, Charles F. Johns, William J O'Brien and Christopher A. Lauderman, of Steptoe & Johnson, whose address is 400 White Oaks Blvd, Bridgeport, West Virginia, 26330 and the Wetzel County Circuit Clerk, whose address is P.O. Box 263, New Martinsville, West Virginia, 26155 on this 26<sup>th</sup> day of June, 2015.

  
\_\_\_\_\_  
Gary L. Rymer  
Counsel for Appellant  
Standard Oil Company Inc.  
P.O. Box 236  
Middlebourne, WV 26149  
(304)758-4448