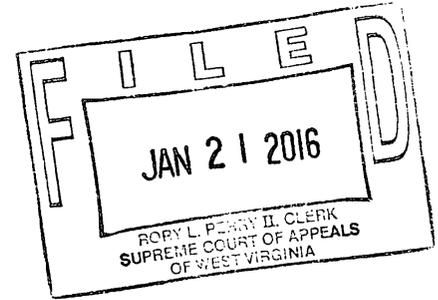


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0655



STANDARD OIL COMPANY, INC.,

Plaintiff Below, Petitioner,

v.

CONSOLIDATION COAL COMPANY,

Defendant Below, Respondent.

RESPONSE BRIEF OF CONSOLIDATION COAL COMPANY

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I. STATEMENT OF CASE

Both Petitioner and Respondent conducted business operations in Wetzel, Harrison, Marion, and Monongalia Counties, West Virginia. Petitioner owned and operated oil, gas and/or coal bed methane wells. Respondent engaged in coal mining operations. In 1998, Petitioner and Respondent entered into a written Option Agreement, which gave Respondent “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* Appeal Appendix (“A.A.”) 25. The agreed upon purchase price for each well purchased is \$25,000.00 per well. *Id.* Respondent paid the agreed upon \$10.00 in consideration for the agreement. The Option Agreement provides that the option is effective for a term of ninety years. *Id.* 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.” A.A. 32.

More than fifteen years after the execution of the Option Agreement, Petitioner 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). A.A. 18–21. All of these allegations fail as a matter of law. Petitioner brought this civil action to ask the Court to let it out of a contract it now regrets signing.

After Respondent filed its motion for summary judgment, Petitioner requested that it have time to conduct discovery. The Circuit Court granted Petitioner’s request and denied Respondent’s summary judgment motion without prejudice. A.A. 53–54. During the discovery period, Petitioner deposed two individuals. After completion of discovery, Petitioner filed a

Motion to File First Amended Complaint to assert a claim for “Guilty of first Breach,” in which it asserts that Respondent breached the Option Agreement more than ten years ago. A.A. 69. Deposition testimony from Joseph O’Ferrell, a former officer, director, and owner of Petitioner Standard Oil Company, Inc., shows that the facts underlying Petitioner’s first breach or breach of contract claim were not newly discovered during discovery, but were known more than ten years ago. A.A. 91. At his deposition, Joseph O’Ferrell testified that these alleged events most likely occurred between 2000 and 2002. *Id.* O’Ferrell further testified that, as the agent of Petitioner, he made the conscious and strategic business decision not to sue Defendant for a breach of contract claim in the early 2000s. A.A. 92. Instead of pursuing a claim in the early 2000s, Petitioner purposely chose not to sue Defendant for breach of contract because it did not want to disturb other deals it had with Defendant. *Id.*

The Circuit Court entered an Order granting Respondent’s renewed motion for summary judgment and denying Petitioner’s motion for leave to file an amended complaint. A.A. 1, 11. Petitioner then filed this appeal.

II. SUMMARY OF ARGUMENT

The Circuit Court correctly entered summary judgment on each and every claim in Petitioner’s complaint. The scope of a Circuit Court’s declaration is dependent upon the relief sought in the complaint for declaratory judgment. In this case, Petitioner did not request the “limited declaratory relief” it now claims to have sought in its complaint. Petitioner requested simply that the Option Agreement be declared void for three reasons: (1) void for inadequate consideration; (2) void for vagueness; and (3) void as violative of the Rule against Perpetuities. Petitioner cannot now assert a new argument for “limited declaratory relief” that it failed to raise in its complaint or at the summary judgment stage.

Additionally, although acknowledging the liberality of Rule 15, this Court has provided for situations where leave to amend should not be granted. Leave to amend should not be granted where, as here, the adverse party will suffer prejudice as a result of the amendment. A suit for declaratory judgment does not affect a court's analysis of the statute of limitations. In this case, Petitioner was aware of the alleged breach and chose not to sue for breach of contract. This is evidenced by the deposition testimony of a former president of Petitioner. He stated that he was aware of the alleged breach, but decided against a civil action for business reasons. Thus, the statute of limitations has passed and Respondent would be prejudiced by amendment of the complaint.

Leave to amend should also be denied where a party could not prevail on the new claims. In this case, even if the statute of limitations did not bar Petitioner's claim, amendment would be improper because Petitioner waived its claim for "first breach" and therefore cannot prevail on its claim. Moreover, if Petitioner's willful waiver of a breach of contract claim did not waive its alleged claim for first breach, certainly its voluntary letter agreement dated May 8, 2013 in which it affirmed the Option Agreement waived any possible claim to "first breach." *See* A.A. 120–23. Finally, Petitioner has been dilatory in pursuing its claim for first breach. In its initial Complaint, Petitioner did not allege any breach by Respondent and waited over eight months to allege such a claim only after recognizing that it had no viable claim against Respondent. This delay is in addition to Petitioner waiting over a decade to assert its alleged claim against Respondent.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not needed in this action because the dispositive issues have been authoritatively decided. In addition, the facts and legal arguments are adequately presented in

the briefs and record, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

1. STANDARD OF REVIEW

A. Summary Judgment

Because the Circuit Court granted summary judgment for Respondents, the Court's standard of review is *de novo*. Syl. Pt. 2, *Ayersman v. W. Va. Div. of Env'tl. Prot.*, 208 W. Va. 544, 542 S.E.2d 58 (2010). Pursuant to West Virginia Rule of Civil Procedure 56, 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." This Court has granted summary judgment under Rule 56(c) of the West Virginia Rules of Civil Procedure using the following standard:

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). 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.

As discussed below, the Circuit Court correctly concluded there are no genuine issues as to any material facts regarding the agreement between the parties—the Option Agreement speaks for itself—and therefore, summary judgment is appropriate in this case as a matter of law.

B. Leave to Amend

The standard of review regarding the Circuit Court's denial of Petitioner's motion to amend the complaint is abuse of discretion:

A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should freely be given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.

Syl. Pt. 2, *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 685 S.E.2d 219 (2009).

2. THE PETITIONER DID NOT ASSERT CLAIMS FOR “LIMITED DECLARATORY RELIEF” AND THE CIRCUIT COURT PROPERLY CONSIDERED ONLY THE CLAIMS BEFORE IT.

A party may not abuse the West Virginia Uniform Declaratory Judgment Act in order to redefine its cause of action on appeal. Petitioner does not contest the merits of the Circuit Court's conclusion that summary judgment was proper on all three counts of its complaint. Instead, Petitioner asserts that the Court did not consider its claims “for limited declaratory relief.” A review of the record will show that Petitioner in fact did not request any relief other than to have the entire Option Agreement voided. Case law, discussed below, clearly provides that a plaintiff is entitled only to what it seeks in its complaint for declaratory judgment.

Undoubtedly, the Uniform Declaratory Judgment Act provides authority to Circuit Courts to declare rights, status, and other legal relations and enables litigants to clarify legal rights. W. Va. Code § 55-13-1. But the scope of a Circuit Court's declaration is dependent upon the relief sought in the complaint for declaratory judgment. *See Black v. St. Joseph's Hosp. of Buckhannon, Inc.*, 234 W. Va. 175, 181, 764 S.E.2d 335, 341 (2014) (concluding the complaint did not seek a declaration on the validity of an option contract, so it was error for the Circuit Court to rule on the issue). Indeed, a Circuit Court commits reversible error where it issues a declaratory judgment in excess of the declaration set forth in a complaint. *Id.*

In this case, Petitioner did not request the “limited declaratory relief” it now claims to have sought in its complaint. Petitioner requested that the Option Agreement be declared void

for three reasons: (1) void for inadequate consideration; (2) void for vagueness; and (3) void as violative of the Rule against Perpetuities. *See* A.A. 18–22. Despite Petitioner’s claims to the contrary, Paragraph 16 of the complaint does not request additional “limited declaratory relief.” Rather, Paragraph 16 informs the Court that the action can proceed either as a declaratory judgment action or as an action for damages for three reasons: (1) Petitioner tried to sell the Leases, but found that the Option Agreement created an impediment; (2) The proposed sale of the Leases will not occur unless the Option Agreement is deemed not to apply to the wells; and (3) Petitioner owns other wells “which would arguably be included within the Option Agreement and would also be unmarketable **unless the Court voids the application of such document.**” *See* A.A.21–22 (emphasis added). Nothing in this paragraph indicates that Petitioner was seeking a declaration of which specific wells were included in the Option Agreement or a declaration of whether a future horizontal well is subject to the Option Agreement.¹ The record is devoid of Petitioner raising any of these issues. Although Petitioner now claims that the resolution of these issues is critical to its ability to market its leasehold interests, it is clear from the face of the complaint alone that Petitioner sought only a declaration that the entire Option Agreement was void. *See* A.A. 18–22.

Moreover, the relief Petitioner sought in its “Wherefore” paragraph further evidences that Petitioner sought only to void the entire Option Agreement. Petitioner demanded that the Option Agreement be declared null and void as to the three leases it described in paragraph 2 of the complaint as well as any other wells and leases owned by the Petitioner. *See* A.A. 22. It is

¹ In addressing Petitioner’s void for vagueness contention, the Circuit Court rejected any argument that the Option Agreement was unclear about which wells are part of the Option Agreement. Specifically, the Circuit Court concluded that “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.” *See* A.A. 7.

undisputed that the Option Area captures more wells than the three wells mentioned in paragraph 2 of the complaint. Again, Petitioner simply sought a declaration that the entire Option Agreement was void. *See* A.A. 18–22. It never requested a declaration regarding which wells are covered by the Option Agreement.

Additionally, the narrow scope of Petitioner’s declaratory judgment complaint was evident during the summary judgment briefing. Petitioner filed two summary judgment response briefs with the Circuit Court and never mentioned its newly found request for “limited declaratory relief.” In its first response brief, Petitioner simply reiterated its three points that the entire Option Agreement should have been voided and that it should be entitled to prove, after discovery, that the Option Agreement lacked sufficient specificity to be enforceable. *See* A.A. 49–51. At Petitioner’s request, the Court provided that opportunity for discovery. *See* A.A. 53. In its second response brief, Petitioner again did not assert that summary judgment was inappropriate because it sought additional “limited” relief. *See* A.A. 100–02.

Finally, Petitioner cannot now assert a new argument for “limited declaratory relief” that it failed to raise in its complaint or at the summary judgment stage. *McKenzie v. Cherry River Coal & Coke Co.*, 195 W. Va. 742, 751, 466 S.E.2d 810, 819 (1995) (“This argument is raised for the first time on appeal and we decline to address this new argument.”). Because of the failure to raise the argument with the Circuit Court, the argument is now waived. *Lin v. Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) (“the appellants have waived their argument . . . by failing to raise it before the circuit court and by raising it for the first time on appeal.”).

For the above stated reasons, the Circuit Court properly awarded summary judgment to Respondent on each and every claim set forth in the complaint.

3. THE CIRCUIT COURT PROPERLY DENIED PETITIONER LEAVE TO AMEND ITS COMPLAINT.

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). This Rule does not require automatic approval of a motion for leave to amend. Otherwise the Rule would allow for amendment at any stage of the proceedings.

Petitioner incorrectly asserts in his brief that motion for leave to amend pleadings should almost always be granted. Although acknowledging the liberality of Rule 15, this Court has provided for situations where leave to amend should not be granted. First and foremost, leave to amend should not be granted where the adverse party will suffer prejudice as a result of the amendment. *Muto ex rel. Muto v. Scott*, 224 W. Va. 350, 355, 686 S.E.2d 1, 6 (2008) (“[p]rejudice to the adverse party is the paramount consideration in motions to amend.”). And “prejudice is obvious when to permit the amendment would virtually eliminate the affirmative defense of the statute of limitations.” *Plumley v. Allstate Ins. Co.*, 772 F. Supp. 2d 922, 924 (S.D. W. Va. 1991). Second, 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) (concluding a motion to amend was futile where the petitioner could not prevail on either her current claims or those in her proposed amended complaint). Third, “[t]he 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). “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. Respondent will address why each of these exceptions is applicable in the present case.

A. Prejudice Would Result From Amendment.

A party is prejudiced where the affirmative defense of the statute of limitations is eliminated as a result of amendment. *See Plumley v. Allstate Ins. Co.*, 772 F. Supp. 2d 922, 924 (S.D. W. Va. 1991) (“In the Court’s opinion prejudice is obvious when to permit the amendment would virtually eliminate the affirmative defense of the statute of limitations.”). In such a case, the Court should deny leave to amend. Petitioner argues that because it seeks declaratory relief, the statute of limitations for the underlying action is not applicable. This contention goes against the weight of case law not only in West Virginia, but also throughout the country.

The fact that a party chooses to bring a suit for declaratory judgment does not affect a court’s analysis of the statute of limitations. *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 587 S.E.2d 701 (Va. 2003); *accord Maynard v. Bd. of Educ. Of Wayne Cnty.*, 178 W. Va. 53, 357 S.E.2d 246 (1987) (determining whether to apply contract or tort statute of limitations to a declaratory judgment action). “The applicability of the statute of limitations is governed by the object of the litigation and the substance of the complaint, not the form in which the litigation is filed.” *Id.* “If the law were otherwise, the statute of limitations could be rendered meaningless merely by the filing of a declaratory judgment action.” *See Id.* (holding that a plaintiff could not use the declaratory judgment statute as a vehicle to circumvent the statute of limitations applicable to the substance of the complaint).

When alleged as a cause of action, a “first breach” action sounds in contract. This is because there is a contract in writing and the liability grows immediately out of the written instrument and not remotely. *Maynard*, 178 W. Va. at 58, 357 S.E.2d at 251. Thus, a ten year

statute of limitations applies. *See* W. Va. Code § 55-2-6 (providing for ten year statute of limitations for breach of contract claims). If the ten year statute of limitations does not apply, then the two-year, catch-all statute of limitations period contained in West Virginia Code § 55-2-12 would govern.

Regardless of which statute of limitations applies in this case, it has passed. Deposition testimony from Joseph O’Ferrell, a former officer, director, and owner of Petitioner Standard Oil Company, Inc., shows that the facts underlying Petitioner’s breach of contract claim were not newly discovered during discovery, but were known more than ten years ago. At his deposition, Joseph O’Ferrell testified that these alleged events most likely occurred between 2000 and 2002. *See* A.A. 91. O’Ferrell further testified that, as the agent of Petitioner, he made the conscious and strategic business decision not to sue Defendant for a breach of contract claim in the early 2000s. *See* A.A. 92. Instead of pursuing a claim in the early 2000s, Petitioner purposely chose not to sue Defendant for breach of contract because it did not want to disturb other deals it had with Defendant. *Id.*

For the above stated reasons, Petitioner cannot avoid the statute of limitations for its “first breach” claim by asserting it in the form of a declaratory judgment. Petitioner cannot claim that it just discovered that it had a breach of contract claim in the early 2000s because the current management was not aware of the past management’s actions. *See Union Bank & Trust Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 74 S.E. 674, 677 (1912) (“And in all cases the president binds the corporation by his acts and contracts when he is expressly authorized so to act or contract, or when he has been permitted by the corporation for some time to act and contract for it.”). Because Petitioner’s former president testified that he was aware of the alleged breach of contract when it occurred, Petitioner was aware of that breach and chose not to sue for breach of

contract. Thus, the statute of limitations, either for contract or catch-all, has passed and Respondent would be prejudiced by amendment of the complaint.

B. Amendment is Futile.

Even if the statute of limitations did not bar Petitioner's claim, amendment would be improper because Petitioner could not prevail on its claim for "first breach." 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. Even if this Court would recognize first breach as an affirmative claim for relief, Petitioner's amendment would be futile because its claim for first breach would fail.

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

In this case, Petitioner intentionally relinquished a known right and waived its right to assert first breach. O'Ferrell testified at his deposition that he made a strategic and conscious choice, on behalf of Petitioner, to ignore any alleged breaching conduct by Defendant. *See* A.A. 92. 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.* Because Petitioner did not want to end the relationship with Defendant, it intentionally relinquished a known right to seek payment for the plugging of wells.

Petitioner argues in its brief that its claim for first breach cannot have been waived because Respondent has not attempted to enforce the Option Agreement. This statement does not comport with the parties' understanding. Although it is not part of the record, Petitioner references two letters in its opening brief in which Petitioner entered into a letter agreement with Respondent. *See* A.A. 120–23. In the letter agreement dated May 8, 2013, Petitioner affirmed the validity of the Option Agreement. *Id.* Specifically, Petitioner agreed that “[p]ursuant to the Agreement, CONSOL has the right, option, and privilege to purchase, at any time and from time to time during the term thereof, any oil well, gas well, oil and gas well, coalbed methane well, and any other well owned, operated, or controlled by Optionors, or any of them, or their successors and assigns located within the Option Area for the purpose of plugging such well(s) in connection with projected coal mining activities.” *See* A.A. 120. Even if Petitioner’s willful waiver of a breach of contract claim did not waive its alleged claim for first breach, certainly its voluntary letter agreement dated May 8, 2013 in which it affirmed the Option Agreement waived any possible claim to “first breach.”

Accordingly, in choosing to relinquish a known right over ten years ago, and subsequently entering into a letter agreement affirming the validity of the Option Agreement, Petitioner waived any right it may have to allege a claim of first breach. Thus, amendment of the Complaint would be futile because Petitioner 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.

C. Petitioner Was Dilatory in Asserting a Claim for First Breach.

As a third, and alternative ground, for denying leave to amend, the Circuit Court correctly concluded that Petitioner was dilatory in asserting a claim for first breach. In its initial

Complaint, Petitioner did not allege any breach by Respondent and waited over eight months to allege such a claim only after recognizing that it had no viable claim against Respondent. This delay, as mentioned above, is in addition to Petitioner waiting over a decade to assert its alleged claim against Respondent. Syl. Pt. 6, *Jones v. Sanger*, 217 W. Va. 564, 618 S.E.2d 573 (“[t]he 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.”).

V. CONCLUSION

For the reasons set forth above, the Respondent, Consolidation Coal Company, respectfully requests that this Court affirm the judgment of the Circuit Court of Wetzel County.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2016, true and accurate copies of the foregoing "Response Brief of Consolidation Coal Company" were deposited in the U.S. mail contained in postage paid envelopes addressed to counsel of record as follows:

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