

15-0768

IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA

CHERYL WILHELM,

PLAINTIFF,

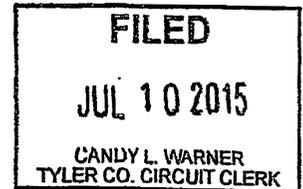
V.

CIVIL ACTION NO. 13-C-45

HONORABLE JEFFREY D. CRAMER

JAY-BEE PRODUCTION COMPANY,

DEFENDANT.



ORDER GRANTING IN PART & DENYING IN PART

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On July 2nd, 2015, came the Plaintiff, by counsel, D. Conrad Gall, and Defendant, by counsel, Michael W. Taylor, of Bailey & Wyant, PLLC, and presented the Court with oral argument regarding the Plaintiff's Motion for Summary Judgment.

Whereupon, the Court having reviewed the said Motion, Plaintiff's Memorandum in Support of said Motion, the Defendant's Response to the said Motion and the proposed Findings of Fact and Conclusions of Law submitted by both parties, hereby ORDERS, ADJUDGES and DECREES the following, to-wit:

FINDINGS OF FACT

- 1) Plaintiff, Cheryl Wilhelm, is a fractional owner of approximately 37.90 acres of Oil and Gas Mineral Rights in McElroy District of Tyler County, West Virginia.
- 2) On or about April 20th, 2010, the Plaintiff executed and entered into an "Oil & Gas Lease" with the Defendant, JAY-BEE PRODUCTION COMPANY. Said lease was recorded in the Office of the Tyler County Clerk at deed book 374, page 432.

- 3) The primary term of said lease was three (3) years and "as long thereafter as operations for oil and gas are being conducted on the premises... ."
- 4) Subsequent to said lease being executed by the Plaintiff, the Defendant did develop said property and drill two (2) wells (McIntyre 1HD & McIntyre 1HF).
- 5) The Plaintiff's parcel or a portion thereof, is contained within the pooled units in both wells.
- 6) Said wells began producing Oil and/or Gas on or about September 12th, 2012.
- 7) Pursuant to the lease at paragraph three (3), "the lessee shall deliver to the credit of the lessor free of cost, in the pipeline to which he may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved from leases premises, payable quarterly;."
- 8) Prior to paying said royalty to the Plaintiff, on several occasions the Defendant forwarded to her a "Division Order," which contained clauses entitled: "Terms of Sale," "Payments," "Indemnity," "Disputes-Withholding of Funds," "Termination," "Notices" and "Default."
- 9) The Plaintiff, declined to execute the said "Division Order."
- 10) The Defendant advised the Plaintiff that without an executed "Division Order", they would withhold and not pay her royalties pursuant to the lease.
- 11) Paragraph 15 of the lease states: "This lease embodies the entire contract and agreement between the lessor and lessee, and no warranties, representations, promises, or inducements not herein expressed have been made or relied upon by either party. The terms, conditions, and stipulations hereof shall extend to the

respective heirs, executors, administrators, successors, and assigns of the parties hereto.

12) Paragraph 16 of the lease titled "Special Conditions:" is blank.

13) No reference to the Defendant's "Division Order" or the requirement of the lessor to execute a "Division Order" prior to receiving royalties is included within the lease. An exemplary "Division Order" is not attached to the lease as an exhibit or addendum and is in no manner incorporated into the lease by reference.

14) Paragraph 5 of the lease states:

5. ALL MONIES COMING DUE HEREUNDER SHALL BE PAID OR TENDERED TO:

NAME: CHERYL WILHELM

ADDRESS: 201 POWELL AVENUE, STONEWOOD, WV 26301

BY CHECK PAYABLE TO HIS (HER) ORDER MAILED TO THE ABOVE ADDRESS AND NO DEFAULT SHALL BE DECLARED AGAINST THE LESSEE BY THE LESSOR FOR FAILURE OF THE LESSEE TO MAKE ANY PAYMENT OR PERFORM ANY CONDITIONS PROVIDED FOR HEREIN UNLESS THE LESSEE SHALL REFUSE OR NEGLECT TO PAY OR PERFORM THE SAME FOR TEN DAYS AFTER HAVING RECEIVED WRITTEN NOTICE BY CERTIFIED MAIL FROM THE LESSOR OF HIS INTENTION TO DECLARE SUCH DEFAULT.

15) On or about February 5th, 2013, Plaintiff noticed her intent to declare default of the lease by certified mail, return receipt requested. Said notice was received by the Defendant on February 11th, 2013.

16) The Defendant's response to the Plaintiff's notice of declaration of default was to send another copy of its "Division Order" highlighting certain parts of the same.

17) Defendant made no further response to said default declaration until its "Answer To Suit for Declaratory Judgment To Void Lease" filed by counsel on October 16th, 2013.

18) Subsequent to the present action being filed, the Defendant has tendered to the Plaintiff her royalty checks pursuant to the lease without requiring she execute a "Division Order."

CONCLUSIONS OF LAW

- 1) Rule 56(c) of the West Virginia Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of 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) The Court concludes that no genuine issue of material fact exists in the present action regarding the question of whether the Defendant's refusal to pay the Plaintiff's royalties pursuant to the lease until she executed the said "Division Order" constituted a breach of said lease.
- 3) The Court finds no statutory, common-law or contractual right of the Defendant to withhold paying the Plaintiff's royalties until she executed the "Division Order." In fact, in "Defendant's Response to Plaintiff's Motion for Summary Judgment" at page three (3), the Defendant, by counsel, states: "West Virginia courts and statutory law is silent regarding the use of division orders and whether a division order must be signed before royalty payments are released."
- 4) The Defendant's reliance upon "common industry practice" and out of jurisdiction non-binding precedent to support its argument that the Plaintiff must execute the "Division Order" to receive her royalties pursuant to the lease are not persuasive to this Court.

- 5) The Court finds that despite the language within the "Division Order" that it "...DOES NOT AMEND ANY LEASE...", it does in fact attempt to modify at least the payment portions of the lease, and imposes additional responsibilities and liabilities upon the Plaintiff not contained within the lease.
- 6) The subject lease in this case was drafted by the Defendant, with what appears to be little or no changes or amendments by the Plaintiff.
- 7) The lease executed on April 20th, 2010, did not require the execution of a "Division Order" by the lessor as a condition precedent to receiving royalty payments pursuant to the same.
- 8) The Defendant had no legal right to hold the Plaintiff's royalty payments for ransom until she executed their "Division Order."
- 9) Defendant's refusal to pay the Plaintiff's royalties pursuant to the lease until she executed a "Division Order" constitutes a breach of the lease.
- 10) Plaintiff performed all required actions pursuant to the lease to declare a default of said lease.
- 11) Defendant continued to refuse or neglect to pay or perform the same for ten days after having received written notice by certified mail from the lessor of his intention to declare such default.
- 12) The default provision within the lease was drafted by the Defendant and is clear and unambiguous.
- 13) "Provisions of a contract, effecting a forfeiture or exacting a penalty, are strictly construed against the party for whose benefit they were incorporated in the

instrument." Syllabus Point 1, *Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, 105 S.E. 517 (1920).

14) It is an "elementary principle of equity jurisprudence that equity looks with disfavor upon forfeitures, and that equity never enforces a penalty or forfeiture if such can be avoided." *Sun Lumber Co. v. Thompson Land & Coal Co.*, 138 W. Va. 68, 76, 76 S.E.2d 105, 109 (1953).

15) "[a] contract should not be forfeited because the vendee's failure to pay was not intentional or willful and the vendor did not suffer material injury." *McCartney v. Campbell*, 114 S.E. 332, 171 S.E. 821 (1933)

16) "A forfeiture caused by the non-payment of money, however express may be the language of the contract, will, as a general rule, be relieved from, on the theory that interest is a sufficient compensation. But the failure to pay must not be willful, nor the delay in payment be unreasonably long, and the Plaintiff seeking relief from his default must show that it was not intentional and has not caused irreparable injury to the Defendant." *McCartney*, citing *Abbott v. L'Hommedieu*, 10 W. Va. 677, 713.

17) The Court finds that the Defendant's failure to pay the Plaintiff's royalties in the present matter was willful and the delay in payment was unreasonably long.

18) However, the Court finds that the Plaintiff was not irreparably harmed and did not suffer a material injury such that forfeiture of the lease should be enforced in this matter.

19) The Court finds that the Plaintiff can be fully and sufficiently compensated for the Defendant's breach of the lease without declaring the lease forfeited.

- 20) "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syllabus point 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).
- 21) The Court finds that the Plaintiff has prevailed in her declaratory judgment action against the Defendant, which had imposed additional terms and conditions upon her as a condition precedent to receiving the royalty payments owed to her pursuant to the clear and unambiguous terms of the lease.
- 22) The Court finds that the Defendant had no statutory, common-law or contractual right to impose such additional terms and conditions, i.e., executing the "Division Order" upon the Plaintiff prior to paying her said royalties.
- 23) The Court further finds that the Plaintiff, faced with the Defendant's pre-suit actions, had no choice but to employ legal counsel and pursue the current action.
- 24) The Court finds that given the disparate financial situations of the Plaintiff, Cheryl Wilhelm, a small mineral rights holder, and the Defendant, Jay-Bee Production Company, a multi-million dollar corporation, an award of attorney's fees in this matter to the Plaintiff is just, equitable and proper.

WHEREFORE, it is the determination of the Court that the Defendant's refusal to pay the Plaintiff's royalties until she executed the Defendant's "Division Order" was a breach of the lease entered into by the parties on or about April 20th, 2010. However, the Court further determines that said breach does not warrant forfeiture or default of said lease.

THEREFORE, it is **HEREBY ORDERED**:

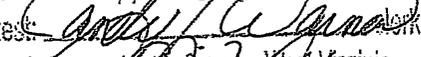
- 1) The Defendant SHALL NOT require the Plaintiff to execute a "Division Order" prior to paying her past, present or future royalties pursuant to the said lease;
- 2) The Defendant SHALL within 10 days of the receipt of this Order pay unto the Plaintiff, through counsel, the following:
 - A) All royalties due and owing to the Plaintiff for her interest in the aforementioned wells, namely McIntyre 1HD & McIntyre 1HF, along with pre-judgment interest on said royalties from the dates they became due pursuant to the lease, in the amount of 7% pursuant to W. V. Code 56-6-31;
 - B) Plaintiff's attorney's fees, in an amount to be determined by the Court.

Objections and exceptions are noted and saved for any party aggrieved by the Court's ruling herein this Order.

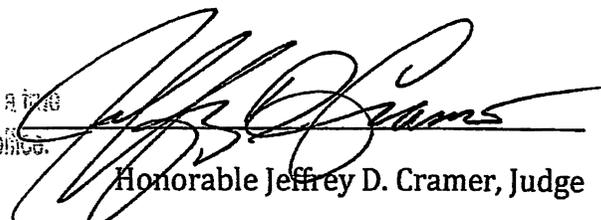
A hearing on the Court's determination of the Plaintiff's attorney's fees award shall be held at the Tyler County Courthouse on the **19th day of August, 2015, at 1:15 p.m.** or as soon thereafter as the same may be heard.

ENTERED THIS 7TH DAY OF JULY, 2015

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

Attest: 
Circuit Court of Tyler County, West Virginia

By:  Deputy



Honorable Jeffrey D. Cramer, Judge
Second Judicial Circuit, West Virginia