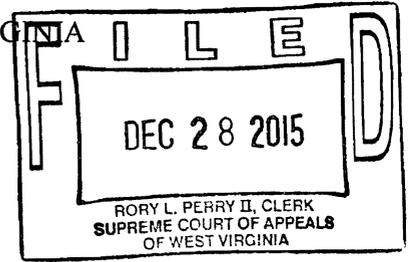


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.: 15-0768



Cheryl Wilhelm,

Plaintiff Below, Petitioner,

vs.

Jay-Bee Production Company

Defendant Below, Respondent.

RESPONDENT'S BRIEF

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I. ASSIGNMENT OF ERROR

Petitioner has assigned the following Assignment of Error, which is rephrased as follows:

Whether the trial court erred by not enforcing the forfeiture provision contained in the oil and gas lease after finding that Respondent's failed to pay a royalty pursuant to an oil and gas lease when Petitioner had other adequate remedies at law available?

Answer: No.

II. STATEMENT OF THE CASE

A. Material Facts

Petitioner and Respondent Jay-Bee Production Company (hereinafter "Jay-Bee") entered into an "Oil and Gas Lease" (hereinafter "Lease") on April 20, 2010. Exhibit A, A.R. 1-4, "Oil & Gas Lease". Pursuant to the Lease, Petitioner was entitled to certain royalties for all oil and gas produced and saved from Petitioner's oil and gas interests. Exhibit A, A.R. 1-4. Subsequent to entering into this agreement, Jay-Bee began harvesting and producing oil and gas from Petitioner's property. Exhibit B, A.R. 5-6. Specifically, Petitioner's property was pooled with numerous other tracts in order to more economically produce the oil and gas. Exhibit B, A.R. 5-6. Because Petitioner's tract was included in a pooled well and because oil and gas was produced, Petitioner became entitled to certain royalties. Exhibit B, A.R. 5-6. As a result, Petitioner was sent a Division Order outlining the proportion of her tract that was included and stating the decimal interest that she was entitled. Exhibit B, A.R. 5-6. The Division Order required her to provide certain tax information and return the same in order to receive her royalty payment. Exhibit B, A.R. 5-6.

Despite the Division Order clearly stating that it does not modify or amend the terms of the Lease, Petitioner ultimately refused to execute the Division Order. Petitioner informed Jay-

Bee that it was in default, thereby asserting that the forfeiture provision contained in the Lease was in effect. Exhibit D, A.R. 8. Ultimately, Petitioner filed a Complaint seeking to void the Lease and payment of royalties. Attachment 4, A.R. 8, Petition for Declaratory Judgment at “Prayer for Relief”.

B. Procedural History

After limited discovery, Petitioner filed a Motion for Summary Judgment. Attachment 5, A.R. 28-35. In response, Jay-Bee filed a Response in Opposition and a Cross-Motion for Summary Judgment. Attachment 6, A.R. 36-47. A hearing was held before Judge Karl. After Judge Karl’s retirement, a subsequent hearing was held before Judge Cramer. After the hearing, the trial court entered an Order granting in part and denying in part Petitioner’s Motion for Summary Judgment. Exhibit G, A.R. 14-21. In response to this Order, Jay-Bee tendered payment in accordance with the Order, which included interest on all owed royalty and was planning to comply with the remaining portions of this Order when Petitioner filed the Notice of Appeal. There is no dispute that Petitioner received this payment of royalties with interest.

III. SUMMARY OF ARGUMENT

The trial court properly did not enforce the forfeiture provision of the Lease. Specifically, the law in this jurisdiction disfavors the enforcement of forfeiture provisions, particularly when the triggering of said forfeiture provision is based upon the non-payment of money. Further, the law in this jurisdiction does not favor the enforcement of forfeiture provision when the injury can be remedied by other means, such as compensation. Here, Petitioner can be and was fully compensated all past due royalties, plus interest. Finally, the law requires a showing of irreparable injury before a court will enforce a forfeiture provision. Here, Petitioner did not and has not shown irreparable injury, frankly because she cannot because all

she is and was ever entitled to as a result of the Lease was money. She has received her money, plus interest. Clearly, she is not irreparably harmed. For those reasons, the trial court's Order must be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent states that oral argument under Rev. R.A.P. 18(a) is not necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

V. STANDARD OF REVIEW

On appeal, the standard of review for a trial court's decision on a motion for summary judgment is *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

VI. ARGUMENT

A. THE COURT'S ORDER NOT VOIDING THE LEASE WAS PROPER

The trial court found that Jay-Bee breached the Lease and therefore, Petitioner's notice of default triggered the issue of whether the forfeiture provision contained in the Lease should be enforced. While Jay-Bee disagrees with the trial court's finding that Jay-Bee breached the contract by withholding payment pending execution of a Division Order, Jay-Bee does not cross-assign error and will accept said ruling.¹ While Jay-Bee disagrees that it breached the contract, there can be no disagreement that the trial court was correct to not void the Lease due to the withholding of payment pursuant to the forfeiture provision in the Lease. In West Virginia, forfeiture clauses are a remedy that is looked upon with great disfavor and will not be enforced when a party's interest can otherwise be substantially protected. *McCartney v. Campbell*, 114 W. Va. 332, 333, 171 S.E. 821, 822 (1933). Specifically, "forfeitures still remain so obnoxious

¹ Specifically, Jay-Bee had a legitimate basis to withhold the royalty payment pending execution of the Division Order because this is common industry practice and this extra-contractual requirement has been held valid in other jurisdictions, as argued on summary judgment. See Attachment 6 A.R. 38-40.

to judicial minds that ‘slight circumstances are eagerly seized to avoid their enforcement when the substantial rights of parties insisting thereon can otherwise be adequately protected.’” *Id.*, 114 W. Va. at 333-34, 171 S.E. at 822 (quoting *Geffert v. Geffert*, 98 Kan. 57, 59, 157 P. 384, 385 (Kan. 1916)).

Because the enforcement is so “obnoxious”, when “compensation can be made, relief ordinarily goes in equity *as a matter of course*, for the non-performance of pecuniary covenants.” *Id.*, 114 W. Va. at 334. 171 S.E. at 822 (emphasis in original). The Court has given guidance as to the *narrow* circumstance in which a trial court should enforce a forfeiture provision. Specifically:

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.

Id., 114 W. Va. at 334, 171 S.E. at 823 (emphasis added).

Here, the trial court found that Jay-bee’s failure to pay was willful. Exhibit G, A.R. 19, at Conclusion of Law ¶ 17. Jay-Bee disagrees with the trial court’s finding that its withholding payment pending execution of a Division Order was “willful” in the sense to trigger a forfeiture clause, but Jay-Bee does not cross-assign error and will accept said ruling. The trial court also found that, because Petitioner was not irreparably harmed and did not suffer a material injury, the forfeiture provision of the Lease should not be enforced. Exhibit G, A.R. 19, at Conclusion of Law at ¶ 18. This finding was based on the fact that Plaintiff could be fully and sufficiently compensated for the breach of contract by paying of the royalties plus interest. Exhibit G, A.R.

19, at Conclusion of Law at ¶ 19; *see also McCartney*, 114 W. Va. at 334, 171 S.E. at 822 (“Interest will seemingly be sufficient compensation in this case.”).

In response to this proper application of the law, Petitioner argues that the trial court should ignore this straight-forward interpretation of the law and uphold the forfeiture provision based upon nothing else but for the “express” language of the forfeiture provision. In other words, despite the clear holding of the this Court that states that even an express forfeiture clause will not be enforced as a general rule, *see McCartney*, 114 W. Va. at 334, 171 S.E. at 823, Petitioner sole argument is for an application of the express language. Based upon the trial court’s findings, Petitioner must establish irreparable harm in order to get the relief desired, which is the enforcement of the forfeiture clause. However, Petitioner has not set forth now, and did not establish to the trial court, irreparable harm as required by *McCartney*.

The reasoning Petitioner refuses to attempt to establish “irreparable injury” is because Petitioner cannot establish such harm. This is solely a case about money. Petitioner demanded royalties, i.e. money, and a dispute arose regarding whether an extra-contractual step was necessary in order to release the money. Because money is what Petitioner was entitled to at the time the dispute arose and money is what Petitioner has been paid as a result of the Order from the trial court, there is no irreparable injury. Petitioner’s injury was remedied with payment of what she was owed, plus interest. The paying of interest has previously been held to be sufficient additional compensation for the delay in receiving the money. *Id.*, 114 W. Va. at 334, 171 S.E. at 822. As a result, based upon a clear application of *McCartney* and the failure of Petitioner to establish irreparable injury, the trial court’s refusal to enforce the forfeiture provision was correct and must be upheld.

There are additional reasons that support the trial court's decision to not enforce the forfeiture provision of the Lease. West Virginia adheres to the doctrine of prohibition of inconsistent rights when seeking to enforce forfeiture clauses. See Syl. Pt. 1, *Orenstein-Arthur Koppel Co. v. Martin*, 77 W.Va. 793, 88 S.E. 1064 (1916). Under this doctrine, a person may not seek to enforce a forfeiture provision, as well as seek to recover the unpaid portion due owed under the Lease seeking to be forfeited. *Id.*; see also *id.* at 1065; *McCausland v. Wagner*, 78 A.3d 1093 (PA. Super 2013). Here, Petitioner sought, and was ultimately awarded, past due royalties. Base upon *Orenstein-Arthur Koppel Co.*, Petitioner is precluded from also enforcing the forfeiture provision in the Lease. In essence, Petitioner's election to pursue the paying of the held royalties' acts as a bar for her to enforce the forfeiture provision contained in the Lease. Because of this prohibition of inconsistent rights, the trial court properly ruled that the forfeiture provision in the Lease was not to be enforced in this situation.

Finally, it is well-settled law in West Virginia that forfeiture will not be granted when there is merely a disagreement over the construction of a contractual clause or right. Specifically, the Supreme Court of Appeals of West Virginia held that "[t]here is no repudiation, when the party, standing on one reasonable construction, is willing to perform according to it, but declines performance agreeable to another such construction." *Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, 464, 105 S.E. 517, 526 (1920). Here, Jay-Bee had a reasonable construction regarding the extra-contractual requirement to execute the Division Order before payment would be issued. First, such a practice is common in the industry. See 4 Williams, Oil and Gas Law, Section 701. Second, this requirement has been upheld in at least one neighboring jurisdiction and is commonly used in Texas. See *Blausey v. Stein*, 61 Ohio St.2d 264, 267 (Ohio 1980); see also Chapter 91, subchapter J of the *Texas Natural Resources Code*. Obviously,

because this extra-contractual requirement has been judicially upheld in other jurisdictions, it is a reasonable interpretation that this same type of mineral rights lease contains the same extra-contractual requirement. Moreover, Jay-Bee has always protected the interest of lessor under the Division Order or pooling instrument as identified and authorized within Paragraph 7 of the Lease, and did nothing more than advise Petitioner that payment would be released when the Division Order was executed. Under *Peerless Carbon Black Co.*, because Jay-Bee has a reasonable interpretation that it will perform the Lease Agreement, the trial court was correct to hold that forfeiture is improper in this matter. Thus, the trial court's Order must be affirmed.

VII. CONCLUSION

Based upon the foregoing, it is clear that the trial court's decision to not enforce the forfeiture provision was supported by the relevant law and facts contained in the record. Therefore, the trial court's decision to not enforce the forfeiture decision must be **affirmed**.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing “**Respondent’s Brief**” has been served this day via U.S. Mail upon the following:

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Done this 28th day of December, 2015.



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