

12-0152

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

ARTHUR THORNSBURY and  
VIRGINIA THORNSBURY,

Plaintiffs,

v.

CIVIL ACTION NO. 08-C-255-S  
The Honorable Booker T. Stephens, Judge

CABOT OIL & GAS CORPORATION,

Defendant.

ORDER GRANTING THE MOTION FOR SUMMARY JUDGMENT  
OF CABOT OIL & GAS CORPORATION

ON THE TWENTY-EIGHTH day of November, 2011, pursuant to proper notice, came the defendant, Cabot Oil & Gas Corporation (sometimes hereinafter referred to as "Defendant"), by its counsel Christopher L. Hamb, and Robinson & McElwee PLLC, and came the plaintiffs, Arthur and Virginia Thornsby, (sometimes hereinafter referred to as "Plaintiffs") by their counsel, Christopher L. Brinkley, Esquire, and The Masters Law Firm, L.C., and the Defendant did bring on for hearing its Motion for Summary Judgment.

Based upon the Defendant's Consolidated Motion For Summary Judgment and Memorandum Of Law In Support Thereof and Exhibits attached thereto, Plaintiffs' Response to Defendant's Consolidated Motion For Summary Judgment and Exhibits attached thereto, the Defendant's Reply to Plaintiffs' Response to Defendant's Consolidated Motion For Summary Judgment, argument of counsel, as well as the pleadings, depositions, answers to interrogatories, and admissions on file herein, mature consideration of all of which, and the totality of all the related circumstances, the Court is of the opinion to and doth hereby finds that there is no genuine issue as to any material fact in this matter, and makes the following findings of material fact:

## FINDINGS OF FACT

1. This civil action involves claims by Arthur Thornsby and Virginia Thornsby ("Plaintiffs") against Defendant for damages to a portion of approximately 30 acres, more or less, located on the waters of Negro Branch in McDowell County, West Virginia. (This real estate is hereinafter referred to as the "Property").

2. On or about October 22, 2001, Plaintiffs purchased the Property from Drenda Carol Coleman, aka Drenda Carol Auvil, for the purchase price of \$4,350.00. Said deed is of record in the Office of the Clerk of the McDowell County Commission in Deed Book 470 at page 746.

3. At all times material to the matters complained of in this civil action, Tug Fork Land Company has owned all the oil and gas underlying the Property and Defendant has been the lessee of the oil and gas underlying the Property by virtue of that certain lease from Tug Fork Land Company. Said lease is of record in the Office of the Clerk of the McDowell County Commission in Deed Book 188 at page 561, as extended by a document of record in the Office of the Clerk of the McDowell County Commission in Deed Book 246 at page 488, as assigned by assignment of record in the Office of the Clerk of the McDowell County Commission in Deed Book 259 at page 684, as assigned by assignment of record in the Office of the Clerk of the McDowell County Commission in Deed Book 364 at page 289, as assigned by assignment of record in the Office of the Clerk of the McDowell County Commission in Deed Book 393 at page 265. (Said lease is sometimes hereinafter referred to as the "Cabot Lease").

4. On or about May 19, 1941, McDowell-Wyoming Land Company, Plaintiffs' and Defendant's common predecessor in interest, conveyed unto F.J. Vance and Florence Vance, his wife, Plaintiffs' predecessors in interest, the surface and surface only of the lands then owned by

it lying on the watersheds both on the left-hand side and the right hand side of Negro Branch in McDowell County, West Virginia, by virtue of that certain deed of record in the Office of the Clerk of the McDowell County Commission in Deed Book 87 at page 248. The deed between McDowell-Wyoming Land Company as grantor and F.J. Vance and Florence Vance as grantees is a severance deed in that the grantor McDowell-Wyoming Land Company reserved unto itself all the minerals, oil and gas underlying the real estate conveyed thereby along with additional rights for itself, its successors and assigns to go upon and use the surface conveyed by said deed to explore for and exploit the minerals, oil and gas so reserved. (Said deed is sometimes hereinafter referred to as the "Severance Deed").

5. The reservation of minerals, oil and gas contained in the Severance Deed is expressed in the following language:

**EXCEPTING and RESERVING from the operation of this deed all the coal, oil, gas, stone, water and other minerals of every kind and character in, on, and underlying said land, together with the right on the part of the grantor, its successors, lessees and assigns, at any time or times hereafter to mine and remove any and all of said coal and other minerals and to engage in any and all undertakings in, upon, under and across said land which the grantor, its successors, lessees, and assigns may at any time deem expedient, all without liability on the part of the grantor, its successors, lessees and assigns, to the grantees, or to any person or persons claiming or to claim through or under the grantee for any injury to the surface of said land or to any structure or other property thereon by reason of such mining or removing of such coal and other minerals or by reason of caving or pumping out or the escape of water on said land, or by placing thereon refuse from any mine or mines; the right to drill, sink, construct and operate in, and upon said land all such prospect holes, prospect shafts or water and hoisting shafts, and all such slopes as the grantor, its successors, lessees and assigns shall at any time deem expedient, and to have and use sufficient right of way to and from the same; the right to appropriate and use the surface of said land at or about any prospect, air, water or hoisting shafts; the right to transport upon, under and across said land coal and other minerals to and from any other lands that are now or that any time hereafter may be owned or leased by the grantor, its successors, lessees and assigns; the right to transport upon, under and across said land to and from any other lands that are now or that at any time hereafter may be owned or leased by the grantor, its successors, lessees and**

assigns, workmen, material and supplies; the right to use, operate, maintain, replace, change the location of, and remove any wells, pumps, pipe lines, tanks and filter plants now upon said land.

Every right, title and interest in and to the land hereby conveyed and the use thereof not expressly by this deed conveyed to the grantees is reserved to the grantor, its successors, lessees and assigns. *Emphasis added.*

6. On or about May 24, 2006, Plaintiffs and Defendant executed a Right-of-Way Grant which document is of record in the Office of the Clerk of the McDowell County Commission in Deed Book 505 at page 399. (Said grant is sometimes hereinafter referred to as the "Thornsbury Right-of-Way") As part of the Thornsbury Right-of-Way, Cabot agreed to provide a gate across the access road and to stack all timber ten (10) inches and larger. A consideration document, which was executed contemporaneously, reflects that Defendant agreed to pay the Thornsburys five hundred dollars (\$500.00) for a two hundred foot access road. The Thornsbury Right-of-Way does not reference the Severance Deed.

7. On or about September 27, 2006, Arthur Thornsbury, one of the plaintiffs herein, executed and had notarized a document which he subsequently delivered to Defendant entitled Affidavit of Person in Possession. This document provides Mr. Thornsbury's lawfully sworn statement that, among other things: (1) he is in possession of the Property; (2) he recognizes Tug Fork Land Company, its successors and assigns as the owners of the oil and gas and the oil and gas interests in and under the Property; (3) he recognizes the right of the owner of the oil and gas to lease said oil and gas and the right of any lessee to "go upon the land and explore, prospect, drill, produce, use, and develop" said oil and gas; and (4) he recognizes Defendant as the oil and gas leaseholder in and to the Property. (Said document is sometimes hereinafter referred to as the "Thornsbury Affidavit").

8. Thereafter, pursuant to its rights under the Severance Deed and Cabot Lease, and in reliance on the statements contained in the Thornsbury Affidavit, Defendant cleared a right-of-

way and constructed a road way over the Property to a duly permitted gas well site located on the Property. Defendant constructed a gas well site on the Property and drilled a gas well on said site. Defendant also constructed a pipeline over the Property to transport the gas away from the gas well.

9. Thereafter, Plaintiffs filed this civil action asserting causes of action for: (1) breach of contract, alleging Defendant's use of the surface of the Property exceeded the terms of the Thornsbury Right-of-Way (Count I of Plaintiffs' Complaint); and (2) tort claims based on wrongful damage to real and personal property and timber, alleging destruction of timber and taking surface property exceeding the Thornsbury Right-of-Way as well as conversion (Count II of Plaintiffs' Complaint).

10. It is undisputed that when Defendant built the road, it did not stack the timber ten (10) inches and larger; that the access road to the well site is approximately thirteen hundred feet in length; and that the Defendant constructed an aboveground pipeline which runs across a significant portion of the Property.

#### CONCLUSIONS OF LAW

Based upon the hereinabove material facts, which are not controverted by admissible evidence of record, and based further upon argument of counsel, the Court hereby makes the following conclusions of law:

1. Even though Defendant did not produce the Severance Deed in response to Plaintiffs' discovery requests seeking all materials upon which the Defendants asserted the right to operate on the Plaintiffs' surface estate and was first disclosed by Defendant to Plaintiffs when it was attached to Defendant's Consolidated Motion For Summary Judgment and Memorandum Of Law In Support Thereof on October 17, 2011, Plaintiffs are not entitled to have the Severance

Deed excluded from evidence in this civil action. The case Plaintiffs cite in support of their motion that the Severance Deed be excluded from evidence in this civil action is *Prager v. Meckling*, 172 W.Va. 875, 310 S.E 2d 852 (1983). *Prager* is a case in which plaintiff objected to the circuit court's admission into evidence of a document not previously produced during the course of discovery. The West Virginia Supreme Court of Appeals affirmed the circuit court's ruling admitting the document into evidence at trial despite the previous non-production. The West Virginia Supreme Court of Appeals went on to affirm the holding of *W.L. Thaxton Construction Co. v. O.K. Construction Co.*, 170 W.Va. 657, 295 S.E.2d 822 (1982) that a trial court that excluded evidence on the basis of non-production during discovery abused its discretion in doing so in the absence of surprise to the other party. In this case there can be no surprise or prejudice to Plaintiffs caused by the recent disclosure of the Severance Deed where: (a) trial is more than two (2) months away; (b) Plaintiffs have been provided a copy of the Severance Deed on October 17, 2011; (c) Plaintiffs have been on notice of the Severance Deed since the date it was recorded more than seventy (70) years ago; (d) the rights, reservations, covenants, conditions and restrictions heretofore granted or reserved by all predecessors in title to the property were expressly referred to and incorporated by reference in Plaintiffs' vesting deed; (e) the nature of the rights conveyed to Plaintiffs by their vesting deed (or not conveyed as the case may be) are essential elements of Plaintiffs' case in chief in this civil action and accordingly Plaintiffs' claims herein rely directly on Plaintiffs' chain of title; and (f) the Property was burdened with the reservations contained in the Severance Deed of record at the time the Plaintiffs purchased the Property and Plaintiffs had record notice of the provisions of the Severance Deed prior to their purchase of the Property.

2. The surface estate Plaintiffs purchased in 2001 for the price of \$4,350.00 was burdened with the mineral reservation contained in the Severance Deed duly recorded in 1941 and Plaintiffs had record notice of said mineral reservation and the burden it placed on their surface estate at the time they purchased their surface estate. *West Virginia Code* § 40-1-9.

3. The Severance Deed contains a reservation of minerals, oil and gas coupled with a covenant against liability on the part of the mineral, oil and gas owner, its successors or assigns for damages to the surface estate caused by its activities in exploiting its mineral oil and gas interests as more fully set forth therein. This reservation and covenant against liability are clear, unambiguous and run with the land. This reservation and covenant are each fully enforceable in accordance with all of the terms and conditions thereof. *Preston County Coke Co. v. Elkins Coal & Coke Co.*, 82 W.Va. 590, 96 S.E. 973 (1918); *Ison v. Daniel Crisp Corp.*, 146 W.Va. 786, 122 S.E.2d 553 (1961). The covenant against liability or waiver of surface damages at issue in this civil action is not unlike the waiver contained in the deed which was at issue in *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W.Va. 832, 42 S.E.2d 46 (1947).

4. To the extent the covenant against liability contained in the Severance Deed is construed as an exculpatory clause, it is fully enforceable in accordance with all of the terms and conditions set forth therein. *Preston County Coke Co. v. Elkins Coal & Coke Co.*, 82 W.Va. 590, 96 S.E. 973 (1918); *Ison v. Daniel Crisp Corp.*, 146 W.Va. 786, 122 S.E.2d 553 (1961); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W.Va. 832, 42 S.E.2d 46 (1947).

5. To the extent the covenant against liability contained in the Severance Deed is construed as a provision in a deed diminishing the compensation and damages provided for by *West Virginia Code* § 22-7-1, *et sequens*, said covenant is not in violation of the stated public policy of West Virginia in that it was executed prior to the ninth day of June, 1983 and it is fully

enforceable in accordance with all of the terms and conditions set forth therein. *West Virginia Code* § 22-7-1(c). *Preston County Coke Co. v. Elkins Coal & Coke Co.*, 82 W.Va. 590, 96 S.E. 973 (1918); *Ison v. Daniel Crisp Corp.*, 146 W.Va. 786, 122 S.E.2d 553 (1961); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W.Va. 832, 42 S.E.2d 46 (1947).

6. As a matter of law, Defendant's rights in and to the use of the surface of the Property is defined by the reservation contained in the Severance Deed. Plaintiffs have no proper claim against Defendant for breach of contract for exceeding the terms of the Thornsbury Right-of-Way (Count I of Plaintiffs' Complaint) because Defendant's use of the surface of the Property does not exceed the rights in and to the use of the surface of the Property as defined by the reservation contained in the Severance Deed. Furthermore, Plaintiffs' predecessors in interest in and to the surface of the Property waived and relinquished all such claims by acceptance of the Severance Deed.

7. Nothing contained in the Thornsbury Right-of-Way had any legal effect on the rights the owner of the oil and gas and Defendant already possessed in and to the use of the Property pursuant to the Severance Deed and Cabot Lease.

8. There is no admissible evidence of record but that Defendant's use of the surface of the Property does not exceed the rights in and to the use of the surface of the Property as defined by the Severance Deed and Cabot Lease.

9. As a matter of law, Plaintiffs can have no proper claim against Defendant for the tort claims of destruction of real and personal property and conversion (Count II of Plaintiffs' Complaint) because Defendant's use of the surface of the Property does not exceed the rights in and to the use of the surface of the Property as defined by the Severance Deed. Furthermore,

Plaintiffs' predecessors in interest in and to the surface of the Property waived and relinquished all such claims by acceptance of the Severance Deed.

10. As clearly and unambiguously set forth in the reservations contained in the Plaintiffs' chain of title to the Property, Defendant, as successor in interest to the grantor in the Severance Deed has the right to remove the oil and gas, and to engage in any undertakings in, upon, under and across the Property which Defendant deems expedient, all without liability to grantee and their successors, including Plaintiffs herein, for any injury to the surface of said land or to any structure or other property located thereon by reason of said activities. The activities Defendant is permitted to engage in under said mineral reservation include, but are not limited to: (1) drilling; (2) using sufficient rights-of-way to and from wells; (3) appropriation of the surface and use of same; (4) transport upon, under and across said land oil and gas; (5) cross said land in order to obtain access to other lands thereafter acquired or leased.

11. The Circuit Court of McDowell County West Virginia lacks *in rem* jurisdiction over the Property sufficient to support a finding of invalidity of any provision of the Severance Deed due to Plaintiffs' failure to name necessary and indispensable parties in this civil action. The owners of the oil, gas and coal are each necessary and indispensable parties to such a proceeding, and they have not been made parties to this civil action. It is the general rule that all persons materially interested either legally or beneficially in the subject-matter involved in a suit, who are to be affected thereby, should be made parties thereto, either as plaintiffs or defendants. Syllabus, *Maynard v. Shein*, 98 S.E. 618 (1919) "When a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an interest in the real property at issue are indispensable parties to the proceeding. Any order or decree issued in the absence of those parties is null and void." Syllabus. Point 2, *O'Daniels v. City of*

*Charleston*, 200 W. Va. 711, 490 S.E. 2d 800 (1997). Moreover, “[i]n a suit to cancel a cloud upon the title to real estate, all parties who have or claim any interest, right, or title under the instrument, or instruments, of writing sought to be cancelled, should be made parties defendant. Syl. pt. 1, *Bonafede v. Grafton Feed & Storage Co.*, 81 W. Va. 313, 94 S.E. 471 (1971).

12. In their Response to Defendant’s Consolidated Motion for Summary Judgment and Memorandum of Law in Support Thereof Plaintiffs attempt to assert that the Cabot Lease is or may be invalid. Plaintiffs are not parties to the Cabot Lease or any other agreement between and among Defendant and the owner(s) of the oil and gas underlying their surface estate and accordingly they do not have standing to assert the enforceability or unenforceability of the Cabot Lease.

13. There is no admissible evidence of record from which a reasonable trier of fact could determine anything but that Defendant was at all times lawfully engaged in pursuing its rights in and to the Property pursuant to the Severance Deed, Cabot Lease, and Thornsby Affidavit at all times relevant to the matters complained of in this civil action.

14. Rule 56 of the West Virginia Rules of Civil Procedure For Trial Courts of record provides that summary judgment is proper in those instances where the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994); *Aetna Cas. & Surety Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963); *Oakley v. Wagner*, 189 W. Va. 337, 431 S.E.2d 676 (1993).

The foregoing affirmatively establish that there is no genuine issue as to any material fact for trial and that Defendant is entitled to judgment in its favor and against Plaintiffs with such clarity as to leave no room for controversy.

WHEREUPON, the Court is of the opinion to and doth hereby GRANT the Motion for Summary Judgment of Cabot Oil & Gas Corporation with respect to the Plaintiffs' claims against it herein. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that judgment be and the same is hereby entered in favor of the defendant Cabot Oil & Gas Corporation and against the Plaintiffs; it is further ORDERED, ADJUDGED, and DECREED that the Plaintiffs' claims contained in the Complaint filed herein shall be, and they are hereby, DISMISSED WITH PREJUDICE.

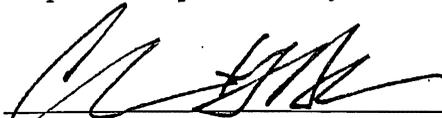
The objections and exceptions of Plaintiffs to the entry herein of this Order are hereby noted and preserved.

The Clerk of this Court is hereby instructed to send certified copies of this Order to counsel of record for all parties and to strike this civil action from the docket of active cases before this Court.

ENTERED this 4<sup>th</sup> day of January, 2012.

  
BOOKER T. STEPHENS, JUDGE

Prepared and presented by:



Timothy M. Miller (WV Bar No. 2564)  
Christopher L. Hamb (WV Bar No. 6902)  
Post Office Box 1791  
Charleston, West Virginia 25326  
(304) 344-5800  
(Counsel for Cabot Oil & Gas Corporation)

Reviewed and approved as to form only by:

*Christopher L. Brinkley*

Marvin W. Masters, Esquire (WV Bar No. 2359)

Christopher L. Brinkley, Esquire (WV Bar No. 9331)

The Masters Law Firm, LC

181 Summers Street

Charleston, West Virginia 25301

(304) 342-3106

(Counsel for Plaintiffs)

A TRUE COPY TESTE  
FRANCINE SPENCER CLERK  
BY *Sarah Cluergen*