

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLIFTON G. VALENTINE,	:	Case No.: 14-0246
	:	
Plaintiff Below, Petitioner,	:	
	:	
v.	:	
	:	
SUGAR ROCK, INC., <i>et al.</i> ,	:	
	:	
Defendants Below, Respondents.	:	

REPLY BRIEF OF PETITIONER

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ARGUMENT

A. The Iams Oil Company, Iams Gas Company, Keith Oil Company and Cutright Gas Company are mining partnerships.

No fewer than four separate courts have been asked to decide the issues in this case, including the United States District Court for the Northern District of West Virginia, the Circuit Court of Ritchie County, West Virginia, the United States Court of Appeals for the Fourth Circuit, and this Court. This action was originally filed on November 8, 2010. In the over three and one-half years since then, Defendants' position has evolved to the point where it now contradicts what they previously have said in this case, in prior cases, and in other documents that they have prepared relating to the Partnerships.¹

Defendants now appear to understand that, if this Court accepts the threshold fact that the Iams Oil Company, Iams Gas Company, Keith Oil Company, and Cutright Gas Company are mining partnerships, the trial court's decision does not withstand scrutiny. Thus, in a backdoor attempt to finagle an affirmation on alternate grounds, Defendants have officially retreated from one of the trial court's most critical assumptions. According to the trial court, "the parties have agreed that the four partnerships in question in this case, the Cutright Oil and Gas Co., the Iams Gas Co., the Iams Oil Co., and the Keith Gas Co., are properly classified as 'mining partnerships' under the common law of West Virginia." 4th Cir. Appx. p. 776. Defendants now ask this

¹The words "Partnerships," "Wells," "Leases," "2011 Ritchie County Action," "2001 Complaint," and "Assignments" shall have the same meaning as in Mr. Valentine's opening brief.

Court to believe that the Partnerships are “not mining partnerships in the proper sense of that term.” Brief, p.15.

Defendants first attempted to deny the existence of any mining partnerships in their Answer to the Complaint in the 2011 Ritchie County Action, which they filed after the trial court’s ruling in this case. Supp. Appx. pp. 52, 67. It was Defendants’ attempt to backtrack on the status of the Iams Gas Company, Iams Oil Company, Keith Oil Company, and Cutright Gas Company as mining partnerships that prompted Mr. Valentine to file a motion to supplement with the Fourth Circuit, which the court saw fit to grant in its March 12, 2014 Order.

Until only recently, Sugar Rock, Inc. (“Sugar Rock”) had freely acknowledged and admitted that the Iams Gas Company, Iams Oil Company, Keith Oil Company, and Cutright Gas Company were mining partnerships. In paragraph 3 of its Answer to Plaintiff’s Complaint in this action, Defendants admitted that “Sugar Rock, Inc. is the operator of the wells of the mining partnerships” (emphasis added). 4th Cir. Appx. p. 22. Defendants referred to the Iams Oil Company, Iams Gas Company, Keith Oil Company, and Cutright Gas Company as “mining partnerships” in their third affirmative defense (4th Cir. Appx. p. 22) and in the second paragraph of their Counterclaim. 4th Cir. Appx. p. 26. In a document filed on behalf of Defendants in this case, they said that the existence of mining partnerships was “not an issue” (emphasis added).² 4th Cir. Appx. p. 622.

²This year, less than four months ago on April 11, 2014, Defendants recorded a November 30, 2011 Assignment, Bill of Sale, Surrender, and Release with the Clerk of the Ritchie County Commission at Book 271, Page 788. This assignment was prepared by Sugar

Prior to the filing of this action in 2010, Defendants repeatedly referred to the Iams Oil Company, Iams Gas Company, Keith Oil Company and Cutright Gas Company as “mining partnerships.” Sugar Rock made that allegation in the 2001 Complaint filed in the Circuit Court of Ritchie County against Mr. Valentine. 4th Cir. Appx. pp. 403-411. From 2000 through 2004, Sugar Rock received ten separate Assignments and Bills of Sale from other, now former, minority partners in the Iams Gas Company, Iams Oil Company, Keith Oil Company, and Cutright Gas Company conveying their interests in the Wells, Leases, and “oil and gas mining partnerships.” 4th Cir. Appx. pp. 366-402.

The persons involved in the creation of the Iams Oil Company, Iams Gas Company, Keith Oil Company and Cutright Gas Company referred to them as “mining partnerships” long before Sugar Rock ever became involved in them. In fact, they were expressly referred to as “mining partnerships” at the moment they were first created in 1958 and 1959. Of the 17 separate Assignments that Mr. Valentine has produced from 1958 and 1959, four pertain to the Iams Gas Company, two pertain to the Iams Oil Company, three pertain to the Keith Oil Company, and eight pertain to the Cutright Gas Company. 4th Cir. Appx. pp. 322-634; Supp. Appx. p. 375. In each of these

Rock and it conveyed to Sugar Rock the interest of A.B. Conway in a certain “mining partnership interest(s)” which was more particularly described as “the KEITH OIL COMPANY, a mining partnership” Because Mr. Valentine did not receive a copy of this document until after it was recorded, it is not in the record, but this Court can take judicial notice of its existence, since it is a public record. The records for the Clerk of the Ritchie County Commission are available online at www.landaccess.com. Just as with the interest of Mr. Valentine, counsel is unaware that the partnership assets of the Keith Oil Company were ever actually titled in the name of A.B. Conway, and yet Sugar Rock agreed to purchase this interest for “good and valuable consideration.”

Assignments, the Iams Oil Company, Iams Gas Company, Keith Oil Company and Cutright Gas Company are referred to as a “mining partnership” at least twice by F.A. Deem, the man who originally owned each of the four Leases, who created the mining Partnerships, who drilled the Wells, and who operated the Wells until his death in the mid 1970s. Thus, the Assignments identify the Iams Oil Company, Iams Gas Company, Keith Oil Company, and Cutright Gas Company as “mining partnerships” no fewer than 34 times.

Defendants can do no better than ask this Court to pretend that the Iams Oil Company, Iams Gas Company, Keith Oil Company, and Cutright Gas Company are “not mining partnerships in the proper sense of that term.” Brief, p. 15. In order to do so, this Court must disregard what Defendants have previously admitted in the pleadings and memoranda in this case, in a prior case, in documents that they previously prepared, and in documents prepared by F.A. Deem over fifty (50) years ago.³ This Court cannot simply re-imagine the facts at this stage of the proceedings in order to answer Defendants’ desperate cry for help.

The fact that Defendants would even think to ask this Court to indulge in such an absurd fantasy reflects their fundamental misunderstanding of the different ways in which a mining partnership can arise. A mining partnership may be created by joint ownership and joint operation with mining interests and it may be created by express contract. See *Kimbolton v. Wolverton*, 142 Tx. 422, 428, 179 S.W. 2d 252 (1944) (citing

³And, incredibly, Defendants accuse Mr. Valentine of being “stubborn[.]” (Brief, p. 22) for simply insisting that all the documents in this case actually mean what they say.

Munsey v. Mills & Garrity, 115 Tx. 469, 483-484, 283 S.W. 754 (1926); *Bolding v. Camp*, 6 S.W. 2d 94, 95 (1928); Summers' *The Law of Oil and Gas*, Vol. 4, pp.144-145, Sec. 721; 12 Texas Law Review, pp.410, 413-414). In this particular case, the mining Partnerships did not arise simply by operation of law based on the conduct of the parties. Rather, they arose by the express agreement of the parties.

Defendants have gone on and on and on about the "three essential elements" of mining partnerships. As this Court held in *Childers v. Neely*, 34 S.E. 828, 829 (1899), however, a court must undertake such an analysis only when "there is no express agreement" (emphasis added). When there is express agreement, as in this case, such an analysis is unnecessary. There is nothing under West Virginia law which says two or more persons cannot form a mining partnership when they expressly intend to do so in writing. Defendants' argument flips West Virginia law on its head: instead of recognizing that a mining partnership may arise by the conduct of the parties notwithstanding the lack of a written agreement, they propose that a mining partnership may not arise, even when the parties have expressly agreed to do so in writing.

Defendants' argument creates an obvious problem: if the Iams Gas Company, Iams Oil Company, Keith Oil Company, and Cutright Gas Company are not mining partnerships "in the proper sense of that term," what are they, exactly? A quick search of the records (available online) of the West Virginia Secretary of State reveals nothing, so they cannot be corporations or limited liability companies, which require articles of incorporation and articles of organization, respectively. Is it possible to have an unincorporated association of persons involved in the business of producing oil and

gas that is not considered a mining partnership? And if it is possible, are there any differences in the fiduciary relationships between the persons involved in such an association that would be material to the relief sought in this case? Would such persons not still be entitled to demand an accounting related to the production operations, as Mr. Valentine has done?

Mr. Valentine, along with others, made a capital contribution toward the cost of drilling the Wells and shared in the net profits from the production from the Wells right up until Sugar Rock began operations in 1999. Defendants' fanatical attempt to reconceptualize the status of the Iams Gas Company, Iams Oil Company, Keith Oil Company, and Cutright Gas Company over fifty (50) years after they were created causes far more problems than it solves. Sometimes the best answer is the most obvious one: they are mining partnerships.

If the 1958 and 1959 Assignments merely conveyed a working interest in the Wells and Leases, there would have been no reason for the parties to include any of the language that appears after the first two paragraphs. That language exists solely for the purpose of defining the rights and obligations of the parties with respect to each "mining partnership." Defendants' would have this Court casually disregard the plain and ordinary meaning of the words the parties chose as if they had no meaning, which is directly contrary to the principles of interpretation this Court routinely employs in construing contracts and instruments of title. *See Meadows v. Belknap*, 199 W.Va. 243, 246-47, 483 S.E. 2d 826 (1997) ("In ascertaining the intent from the instrument, the language of the agreement must be afforded its 'plain and ordinary meaning' without

resort to judicial construction”) (citing *Williams v. South Penn Oil Co.*, 52 W.Va. 181, syl. pt. 4, 43 S.E. 214 (1903)). There is no need for this Court to wander into Defendants’ weird, alternate universe or to undertake some kind of obtuse metaphysical analysis. The words “mining partnership,” as they appear in the 1958 and 1959 Assignments, have a clear meaning under West Virginia law that cannot and should not be ignored.

Moreover, even if this Court wishes to examine the elements of a mining partnership imposed by operation of law, i.e., when there is no express agreement, Mr. Valentine clearly satisfies the ownership element. Each mining partner, including Mr. Valentine, has an ownership (equity) interest in all the partnership assets, including the Wells.⁴ Defendants assert that this requires a “direct ownership in the leases that satisfies the statute of frauds.” Brief, p. 1. In other words, Defendants assert the partnership assets must be titled in the name of each partner. Defendants believe that such a requirement is impliedly bound up with the ownership element. Brief, p. 15. However, as stated by the Ritchie County Circuit Court in its July 18, 2013 Order, upon a review of this Court’s opinion in *Childers*, there is “no reference therein to the statute of frauds or to the quality or quantity of evidence required in order to satisfy the ownership element.” Supp. Appx. p. 29.

Moreover, if West Virginia law required the partnership assets to be titled in the name of each mining partner, it would create an anomaly in a situation where mining partners chose to title the partnership assets in the name of the mining partnership itself, rather than in the names of the individual partners. Without legal title in each of

⁴Defendants do not appear to dispute that the Wells are partnership assets.

their names, none of the partners could claim an ownership interest, according to Defendants, and the result would be a partnership without any partners! This is, of course, absurd.

There is nothing in any of this Court's prior cases requiring that the assets of a mining partnership be titled in the name of each individual mining partner. Counsel are not aware of any such case anywhere in the country and, not surprisingly, Defendants have been unable to identify one. The only West Virginia case that discusses the statute of frauds in connection with mining partnerships is *Lantz v. Tumlin*, 74 W.Va. 196, 81 S.E. 820 (1914). *Lantz* expressly states that:

Where persons engage in a joint enterprise for profit, by associating themselves together as partners or otherwise, a relationship of trust and confidence is thereby established, and that as between them in the conduct of the joint or partnership business, the statute of frauds has no application.⁵

Defendants repeatedly emphasize that since an oil and gas lease conveys an interest in real property, any conveyance, transfer, or assignment of an interest in a lease must likewise be expressed in writing. Brief, p. 16. This case, however, does not arise out of a conveyance, transfer, or assignment of an oil and gas lease; rather, it arises out of a claim by a mining partner for an accounting from his fellow mining partner.⁶ Mr. Valentine is not arguing that the Wells or Leases are his separate property. He agrees that

⁵For the reasons already set forth in Mr. Valentine's opening brief, *Lantz* was not abrogated by the enactment of W.Va. Code § 36-1-4. Mr. Valentine has never argued that he was the beneficiary of an express, oral trust. He has, however, invited the courts to consider whether his ownership interest exists by virtue of a resulting or constructive trust.

⁶Defendants apparently do not dispute that a claim for an accounting is equitable in nature.

legal title to partnership real estate can only be divested by deed or will, but for partnership purposes, i.e. the purpose for which this action was originally filed, it is converted into personalty, in equity. Since an action for an accounting does not arise out of a conveyance, transfer, or assignment of an interest in real estate, the statute of frauds is irrelevant to this case.

Once again, Defendants cannot resist citing to *Arbaugh v. Raines*, 155 W.Va. 409, 184 S.E. 2d 620 (1971). Not even the trial court thought this case was worth mentioning and it is easy to see why. The parties in *Arbaugh* were not partners. Neither the well nor the lease were owned by a mining partnership; nobody alleged that a mining partnership even existed. Thus, to the extent this Court described the arrangement in *Arbaugh* as a “practice common in the area of oil and gas development,” it is dissimilar from the facts in this case where the parties expressly formed mining partnerships.

Arbaugh stands for a rather unremarkable proposition of law: since the written agreement purported to convey shares of an interest in the well and nothing more, it did not also convey an interest in the lease. This Court simply enforced the terms of the written agreement according to its plain and unambiguous language.

Unlike the plaintiffs in *Arbaugh*, Mr. Valentine has never asked the courts in this action to determine whether he has an ownership interest in the Leases, beyond the partnership interest that he has in the Wells.⁷ He has simply asked for an accounting related to Defendants’ operation of the Wells. In *Arbaugh*, this Court did not deny that

⁷To be sure, in the 2011 Ritchie County Action, the partners have asked for additional relief—i.e., dissolution of the mining partnerships, a declaration that the mining partnerships own the Wells and Leases, and a winding of the mineral partnerships.

the plaintiffs were entitled to an accounting related to the defendants' operation of the well. Thus, nothing in *Arbaugh* indicates that Mr. Valentine's claim for an accounting related to the Wells should be dismissed.

Defendants' reliance on *Kimberly v. Aims*, 129 U.S. 5912 (1889) is likewise misplaced. Unlike *Kimberly*, the Partnerships here were not formed to engage in the purchase and sale of minerals or mining properties. The 1958 and 1959 Assignments expressly state that the Partnerships were formed to drill and operate oil and gas wells and to further develop the Leases. The Partnerships have earned their income from the sale of oil and gas, not from buying and selling mining properties. For 40 years, Mr. Valentine received his share of the profits from the production and sale of oil and gas from the Wells.

The mining partnerships that were created in this case are also different in nature from the interest that was assigned in *King v. Mealun*, 128 W.Va. 263, 36 S.E. 2d 211 (1995). There, the plaintiff had received a three sixty-fourths interest in the net proceeds derived under two contracts between the defendant and other third parties. The right to receive a share of profits earned under a contract is different from an ownership interest in an oil and gas well. None of the relevant documents in *King* indicated that a mining partnership had ever been created or that the plaintiff was a mining partner.

B. Defendants' statute of frauds defense is barred by the doctrine of part performance and by their own prior judicial admissions.

With respect to the parties' prior performance and judicial admissions, Defendants can apparently muster nothing more than a footnote on the last page of their

argument. It is undisputed that the parties stipulated to the existence of Mr. Valentine's interest in the mining partnerships in the 2001 Ritchie County Action. Defendants can only hope that this Court will pretend that the prior admissions they have made mean absolutely nothing.

Sugar Rock states that it "vigorously opposes" any asserted interest by Mr. Valentine. Brief, p. 19. It felt differently, of course, when it was drafting and filing the 2001 Complaint against Mr. Valentine. In that case, it asserted that Mr. Valentine was liable for his proportionate share of the mining partnerships' expenses.

On the issue of part performance, Defendants are similarly at a loss for words. Faced with the task of explaining away over 50 years of conduct, it is understandably difficult to decide where to begin. If this Court fails to consider the effect of the parties' prior course of dealing, it might as well abolish the doctrine of part performance altogether. It is difficult to imagine a more perfect example of where this well recognized principle of law should apply.

C. There are no other bases for dismissing Mr. Valentine's claim.

In an act of desperation, Defendants completely abandon the reasoning of the trial court, which was based on the statute of frauds, and instead attempt to argue that Mr. Valentine's claims should be dismissed because he was "not involved in the joint operation actively working on the property" and "did not share in the profits and losses." Brief, p. 22. These arguments have nothing to do with the question that has been certified to this Court.

Although these arguments were never presented to the trial court in

Defendants' motion for summary judgment, they attempted to assert these arguments for the first time before the Fourth Circuit. Thus, it is Defendants who have been and who continue to argue this case based on facts that are not in the record. Mr. Valentine's motion for leave to supplement the record in this action is simply a response to Defendants' attempt to change the subject away from the statute of frauds.

Judge Sweeney expressly rejected Defendants' new arguments in his July 18, 2013 Order: "Defendants are incorrect in their assertion that the absence of contribution of labor or other actual physical or managerial involvement defeats an element of a mining partnership. Such involvement is not a legal requirement for such a relationship." Supp. Appx. p. 38. Judge Sweeney further held that the plaintiffs "purported indebtedness is not tantamount to a failure in participation inasmuch as they are recognized participants as evidenced by Defendants' conduct." Supp. Appx. p. 38. The Fourth Circuit declined to affirm the trial court's decision on the alternate grounds advanced by Defendants. This Court should do likewise.

D. The Certified Question.

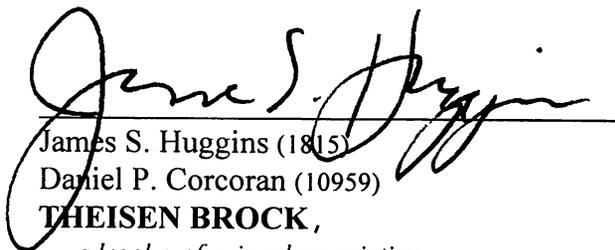
Mr. Valentine agrees that the certified question will be determinative of the cause pending in the Fourth Circuit. In his opening brief, Mr. Valentine simply pointed out that it is only necessary for this Court to determine whether Mr. Valentine has an interest in the Wells, since this is an action for an accounting of monies due for production from the Wells. A working interest may be in a well, an entire lease, or both. Since the relief in the federal action is exclusively concerned with the Wells, there is no need for this Court, at this juncture, to determine whether Mr. Valentine or the mining

partnerships might also have a working interest in the entirety of each of the Leases.⁸ The parties are currently awaiting the adjudication of that issue in the 2011 Ritchie County Action, where it has been fully argued and briefed.

CONCLUSION

For all the foregoing reasons, this Court should hold that Mr. Valentine may prove his working interest in the Wells and enforce his rights thereunder by demonstrating his inclusion within the Partnerships, without resort to proof that the Wells were conveyed to him by deed or will or otherwise in strict conformance with the statute of frauds.

Respectfully submitted,



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⁸To be sure, guidance from this Court would certainly be helpful, but has not been briefed. Significantly, the 1958 and 1959 Assignments transferred a working interest in "certain oil and gas leases, and the leasehold estate thereby created." See 4th Cir. Appx. pp. 322-364.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Reply Brief of Petitioner** was served upon the following party by mailing a copy of same by ordinary U.S. Mail, postage prepaid, on this 6th day of August, 2014:

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