



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0923

GREAT LAKES ENERGY PARTNERS, LLC
N/K/A RANGE RESOURCES—APPALACHIA, LLC,

vs.

CECIL L. HICKMAN

Appeal of: RANGE RESOURCES—APPALACHIA, LLC

PETITIONER'S BRIEF

**Appeal from the Order of the Circuit Court of
Ohio County entered on August 7, 2014, at Civil Action No. 12-C-11**

Kenneth J. Witzel, W.Va. I.D. No. 11031
BARNES DULAC WATKINS
Two Gateway Center, 17 East
603 Stanwix Street
Pittsburgh, Pennsylvania 15222
(412) 434-5544
kwitzel@barnesdulac.com

*Counsel for Petitioner:
Range Resources—Appalachia, LLC*

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ASSIGNMENT OF ERROR

The Circuit Court erred by ordering Petitioner Great Lakes Energy Partners, LLC n/k/a Range Resources—Appalachia, LLC (“Range”) to participate in any future arbitration proceedings that may be initiated by Respondent Cecil L. Hickman (“Respondent”) even though Range is not a party to, has no interest in, and had no involvement in procuring, the oil and gas lease that would be the subject of any such proceedings.

STATEMENT OF THE CASE

1. Factual and Procedural History

A. The Property and the Oil and Gas Leases

As alleged in Respondent's Complaint and Request for Declaratory Relief (the "Complaint"), Respondent owns a ¼ undivided interest in the oil, gas and coalbed methane gas underlying a 143.77 parcel of land located in Tridelpia District, Ohio County, West Virginia (the "Property"). (Appeal Appendix ("AA") 19 (Complaint, ¶1).) Each of his three siblings, John Mark Hickman, Lawrence Grant Hickman and Carol Sue Criswell (collectively, the "Siblings"), also owns an undivided ¼ interest in the oil, gas and coalbed methane underlying the Property. (AA 20-21 (Complaint, ¶¶7-9).)

On December 21, 2005, the Siblings entered into an oil and gas lease (the "2005 Lease") with Petitioner Range. (AA 22 (Complaint, ¶21).) Respondent, who lives in Ohio, alleged that he was unable to attend the lease signing for the 2005 Lease and that it was to have been forwarded to him for his signature. (AA 19, 22 (Complaint, ¶¶1, 22).) Instead, Range sent a separate oil and gas lease (the "2006 Lease") to Respondent in July 2006 for him to sign. (AA 23 (Complaint, ¶25).) Respondent signed the 2006 Lease on July 19, 2006, but, allegedly, did not date it, and sent it back to Range. (*Id.*) Upon receiving the 2006 Lease, Range allegedly dated it as of the date Respondent signed it, July 19, 2006. (*Id.*; *see also* AA 65-76.)

By means of an Assignment and Conveyance of Oil and Gas Leases, dated October 19, 2010 and effective July 1, 2010, Range assigned its interest in the 2006 Lease to Defendant Chesapeake Appalachia, L.L.C. ("Chesapeake"). (AA 23 (Complaint, ¶29), 77-82.) The 2005

Lease terminated at the end of its primary term on December 21, 2010. (AA 23 (Complaint, ¶28).)

On January 5, 2011, approximately 2 ½ months after Range assigned its interest in the 2006 Lease to Chesapeake, the Siblings and Respondent signed a new oil and gas lease with Chesapeake (the “January 2011 Lease”). (AA 24, 38-43 (Complaint, ¶32 and Exh. 3).) Chesapeake subsequently determined that the 2006 Lease remained in effect and Respondent signed, allegedly under duress, both an amendment to the January 2011 Lease that removed him as a lessor under that lease, and a new lease with Chesapeake, dated February 15, 2011 (the “February 2011 Lease”). (See AA 24-25 (Complaint, ¶¶35-38), 184-89.)

B. The Claims Against Range

Respondent initiated these proceedings on January 5, 2012 by filing the Complaint against Chesapeake, Range, and several other defendants. (AA 19-45.) The Complaint raised various claims against Range, each of which pertained to the 2005 Lease and the 2006 Lease. (See *id.*) More particularly, the Complaint advanced the following claims against Range: (i) actual fraud in connection with the dating of the 2006 Lease; (ii) breach of contract in connection with the assignment of the 2006 Lease to Chesapeake; and (iii) slander of title in connection with the recording of memoranda of lease that were signed in connection with the 2005 Lease and the 2006 Lease. (See AA 30 (Complaint, ¶¶1-54, 84-92).) None of Respondent’s claims against Range related to the January 2011 Lease or the February 2011 Lease.

C. The Motions to Dismiss

The 2006 Lease, the January 2011 Lease and the February 2011 Lease each contain arbitration provisions. (AA 40, 74, 186.) On May 18, 2012, Range filed a Motion to Dismiss, or

in the Alternative, to Compel Arbitration of Defendant Great Lakes Energy Partners, L.L.C., now known as Range Resources–Appalachia, LLC, and an accompanying Memorandum of Law in Support (collectively, “Range’s First Motion to Dismiss”). (AA 56-92.) Range’s First Motion to Dismiss was filed pursuant the Federal Arbitration Act and sought to enforce Range’s rights under the arbitration provision in the 2006 Lease. (*See, e.g.*, AA 62-64). By Order dated July 5, 2012, the Circuit Court deferred ruling on Range’s First Motion to Dismiss and similar motions to dismiss filed by other Defendants, and ordered the parties to conduct discovery on the factual issues related to the arbitration provisions in the leases. (AA 108-11.) After discovery was completed on the relevant issues, on April 10, 2014, Range filed a Renewed Motion to Dismiss or, in the Alternative, to Compel Arbitration and an accompanying Memorandum of Law in Support (collectively, “Range’s Renewed Motion”), again seeking to compel arbitration pursuant to the Federal Arbitration Act. (AA 239-366.)

D. The Circuit Court’s Final Order

After considering Range’s Renewed Motion and similar motions filed by other Defendants, the Circuit Court entered an Order dated August 6, 2014 (the “Final Order”). (AA 1-18.) In the Final Order, the Circuit Court made the following key holdings:

- the 2005 Lease (referred to in the Final Order as the “Great Lakes lease”) was the “controlling lease” between Respondent and Range (AA 12 (Final Order, Conclusions of Law, ¶29));
- the 2006 Lease was “void as a matter of law” because it had been “mistakenly procured” and because there “was no meeting of the minds” or “mutual assent” as to its material terms (AA 12-13 (Final Order, Conclusions of Law, ¶¶29-30));
- Range assigned its interest in the 2005 Lease—the “controlling lease” between Respondent and Range—to Chesapeake on or about October 19, 2010 (AA 4 (Final Order, Findings of Fact, ¶25));

- the 2005 Lease expired when its primary term ended on December 21, 2010 (AA 4 (Final Order, Findings of Fact, ¶27));
- the January 2011 Lease (referred to in the Final Order as the “Chesapeake lease”) is the “controlling contract by and between [Respondent] and his siblings, as lessors, and Chesapeake, as lessee” (AA 13 (Final Order, Conclusions of Law, ¶¶35-36)); and
- the January 2011 Lease’s arbitration provision is valid and enforceable. (AA 17 (Final Order, Conclusions of Law, ¶56).).

Consistent with the above holdings, the Final Order ordered: “... [A]fter entry of this Order, if any issues remain with regard to the Chesapeake lease [January 2011 Lease], the Court grants Defendants’ various Motions to Compel Arbitration of the remaining issues and accordingly orders this matter stayed pending arbitration.” (AA 17 (Final Order, Conclusions of Law, ¶58) (emphasis added).). Despite the plain language in the Final Order limiting any future arbitration proceedings to claims regarding the January 2011 Lease, the next paragraph of the Final Order further directed:

All parties herein, including non-signatory Defendants, shall participate in the arbitration proceeding based upon common law principles of contract and agency, See, Syl. Pt. 3, *State ex rel. United Asphalt Homes v. Sanders*, 204 W. Va. 23, 511 S.E.2d 134 (1998); *State ex rel. Richmond Homes v. Saunders*, 228 W. Va. 125, 717 S.E.2d 909 (2011). See also, *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128, 690 S.E.2d 322 (2009), finding the enforcement of a forum selection clause foreseeable to non-signatories. Given the relationship of the parties herein and the intertwined nature of the claims, all remaining claims involving all parties herein shall be arbitrated.

(AA 18 (Final Order, Conclusions of Law, ¶59) (emphasis added).)

As Range is not a party to the January 2011 Lease, has no interest in it, and had no involvement in its procurement, it respectfully submits that it is not a proper party to any future arbitration proceedings that Respondent may initiate. By this Appeal, Range seeks relief from

the Order to the extent it compels Range to participate in any such future arbitration proceedings.¹

¹ Two other appeals have been filed from the Final Order and are currently pending before this Court. One was filed by Chesapeake, Redsky Land, L.L.C., Red Sky-West Virginia, L.L.C. and Terry L. Murphy, and is docketed at No. 14-0921. The other was filed by Geological Assessment & Leasing and William Capouillez, and is docketed at No. 14-0922.

SUMMARY OF ARGUMENT

The Circuit Court erred by including Range in its directive requiring “all parties ..., including non-signatory Defendants” to participate in any future arbitration proceedings. (AA 18 (Final Order, Conclusions of Law, ¶59).) The Circuit Court expressly recognized that any such proceedings could only concern the January 2011 Lease. (AA 17 (Final Order, Conclusions of Law, ¶58).) Range is not a party to that lease and did not agree to arbitrate any claims regarding it. Further, there is no suggestion in the Final Order, or even in Respondent’s Complaint, that Range has any interest in the January 2011 Lease; that Range played any role in the January 2011 Lease’s negotiation, procurement or signing; that Range and Chesapeake have any corporate affiliation; or that there is any other valid basis for requiring Range to participate in the arbitration.

The Circuit Court’s reliance on the “nonsignatory exception” to the well-settled rule that only signatories to an agreement with an arbitration clause can be forced to participate in arbitration is contrary to the law regarding the “nonsignatory exception” set forth by this Court in *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 511 S.E.2d 134 (1998).

The Circuit Court’s ruling constitutes clear error, as a matter of law, and the Final Order’s mandate that Range participate in any future arbitration proceedings must be overruled.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Range believes that under the criteria for oral argument set forth in W. Va. R.A.P.

18(a)(3), this appeal presents sufficiently unique issues to necessitate oral argument, and requests that this appeal be set for oral argument pursuant to W. Va. R.A.P. 19.

ARGUMENT

1. Standard and Scope of Review

This Court “will preclude enforcement of a circuit court’s order compelling arbitration” if a *de novo* review of the circuit court’s legal determinations “leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court’s order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.” Syl. Pt. 1, *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, 94, 736 S.E.2d 91, 94 (2012).

2. The Circuit Court Erred by Ordering Range to Participate in any Future Arbitration Proceedings

A. No Agreement to Arbitrate Exists Between Range and Respondents

It is well settled that, generally, agreements containing an arbitration provision cannot be used to compel parties who have not signed the agreement to participate in arbitration. *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 27, 511 S.E.2d 134, 138 (1998) (recognizing “the rule that only parties who have actually signed an agreement containing an arbitration clause can be forced to arbitrate their claims”); *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004) (“Our case law requires that a party must assent to arbitration before it can be forced into arbitration and denied access to the courts.”).

Here, the Circuit Court recognized that the Final Order resolved all issues in the case as to all of the oil and gas leases except the January 2011 Lease. Consequently, it only ordered that future claims concerning the January 2011 Lease must be arbitrated. (AA 17 (Final Order, Conclusions of Law, ¶¶58 (“after the entry of this Order, if any issues remain with regard to the

Chesapeake lease [the January 2011 Lease], the Court grants Defendants’ various Motions to Compel Arbitration”).) Because Range is not a party to the January 2011 Lease, there is no agreement to arbitrate between Range and Respondent as to any such claims.

B. The Court’s Use of the Nonsignatory Exception to Compel Range’s Participation in any Future Arbitration Constituted Clear Error

The Circuit Court found that an exception to the rule against compelling nonsignatories to arbitrate, sometimes referred to as the “nonsignatory exception,” justified its directive that all “non-signatory Defendants,” including Range, participate in any future arbitration proceedings. More particularly, citing *United Asphalt Suppliers, supra.*; *State ex rel. Richmond American Homes of West Virginia v. Saunders*, 228 W. Va. 125, 717 S.E.2d 909 (2011); and *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128, 690 S.E.2d 322 (2009), the Circuit Court concluded that “common law principles of contract and agency” supported its application of the nonsignatory exception. (AA 18 (Final Order, Conclusions of Law, ¶59)). The Circuit Court also found that “the relationship of the parties herein and the intertwined nature of the claims” justified application of the nonsignatory exception. (*Id.*) As explained below, however, at least as to Range, the Circuit Court’s application of the nonsignatory exception constituted plain error.

i. “Common Law Principles of Contract Law and Agency” do not Support the Nonsignatory Exception’s Application Against Range

None of the cases cited by the Circuit Court—*United Asphalt Suppliers*, *Richmond American Homes of West Virginia*, or *Caperton*—supports its application of the nonsignatory exception as to Range.

In *United Asphalt Suppliers*, this Court expressly recognized the existence of the “nonsignatory exception.” *United Asphalt Suppliers, supra.* at 27, 511 S.E.2d at 138-39. While,

ultimately, the Court declined to apply the nonsignatory exception in the case before it, it provided general guidance concerning the exception through the various cases from other jurisdictions that it cited with approval. *See id.* at 26-27, 511 S.E.2d at 137-38.² None of these cases applies to Range's situation.

Perhaps the most instructive of these cases is *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995). In *Thomson-CSF*, the court identified five theories for binding nonsignatories to arbitration agreements: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Id.* at 776. None of these theories applies to Range. Specifically, the incorporation by reference theory does not apply to Range because Range has never entered into "a separate contractual relationship" that incorporates by reference the arbitration clause in the January 2011 Lease; the assumption theory does not apply because Range has never "manifested a clear intention" to assume any obligation to arbitrate under the January 2011 Lease; the agency theory does not apply because Range is not Chesapeake's agent; the veil piercing/alter ego theory do not apply because no corporate relationship exists between Range and Chesapeake; and finally, estoppel does not apply because Range has never accepted any benefits under the January 2011 Lease. *See id.* at 777-78 (describing the basis for each theory).³

² The Court found that the record before it was insufficient to allow meaningful consideration of the issue. *Id.* at 27, 511 S.E.2d at 138.

³ In *Thompson-CSF*, the court also identified an "alternate estoppel theory" for requiring arbitration between a signatory and nonsignatory. *Id.* at 779. However, that theory only applies to situations in which a nonsignatory is attempting to compel a signatory to arbitrate. *Id.* The "alternate estoppel theory" has no application here because Range, the nonsignatory, is not attempting to compel Respondent to arbitrate any claims.

Neither of the other two cases cited in the Final Order, *Richmond American Homes of West Virginia* and *Caperton*, supports the Circuit Court's position as to Range either. In *Richmond American Homes of West Virginia*, citing *United Asphalt Suppliers* and *Thompson-CSF*, this Court again acknowledged the existence of the nonsignatory exception, but expressly declined to consider whether it was applicable, instead finding that the arbitration provisions at issue were unconscionable. See *Richmond Am. Homes of West Virginia*, *supra*. at 132 n.13, 717 S.E.2d at 916 n.13. Finally, *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009), concerned a forum selection clause, not an arbitration clause, and is therefore inapplicable. *Id.* at 135, 690 S.E.2d at 329.⁴

ii. The “Relationship of the Parties” and the “Intertwined Nature of the Claims” do not Support the Nonsignatory Exception’s Application Against Range

The Final Order also suggests that application of the nonsignatory exception is proper as against Range “[g]iven the relationship of the parties herein and the intertwined nature of the claims.” (AA 18 (Final Order, Conclusions of Law, ¶59)). However, because Range has absolutely no interest in the Property or the January 2011 Lease; was not involved in the negotiation, procurement or signing of the January 2011 Lease; and has no corporate affiliation with any other party to this litigation, the Circuit Court’s reliance on the “relationship of the

⁴Moreover, one of the nonsignatories in *Caperton* was the parent corporation of two of the signatories to the agreement at issue and the other was the owner of the parent corporation who had purchased the subsidiary signatories before the agreement containing the forum selection clause was signed. *Id.* at 134-136, 149. Here, no parent-subsiary or other corporate relationship exists between Range and Chesapeake. Moreover, unlike the nonsignatories in *Caperton*, Range has no association with the January 2011 Lease. Range was not involved in any way in the negotiation, procurement or signing of the January 2011 Lease, and has no interest whatsoever in it. Under these circumstances, even if *Caperton* involved application of an arbitration provision, which it does not, arbitration would be improper as to Range.

parties” and the “intertwined nature of the claims” was misplaced as to Range. Ultimately, the Circuit Court’s application of the nonsignatory exception to compel Range to participate in arbitration is not supported by the facts of this case and constitutes clear error as a matter of law.

CONCLUSION

As discussed above, the Circuit Court committed clear error in ordering Petitioner Great Lakes Energy Partners, LLC n/k/a Range Resources—Appalachia, LLC, a nonsignatory to the January 2011 Lease, to participate in any future arbitrations proceedings that may be initiated by Respondent/Plaintiff Cecil L. Hickman, even though Range is not a party to, has no interest in, and had no involvement in procuring, the oil and gas lease that would be the subject of any such proceedings. Under these circumstances, Range respectfully submits that this Honorable Court must overrule the Circuit Court’s Order dated August 6, 2014 to the extent it requires Range to participate in any future arbitration proceedings.

Respectfully Submitted,

By: 

Kenneth J. Witzel, W.Va. I.D. No. 11031
BARNES DULAC WATKINS
Two Gateway Center, 17 East
603 Stanwix Street
Pittsburgh, Pennsylvania 15222
(412) 434-5544

*Counsel for Petitioner:
Range Resources—Appalachia, LLC*

Dated: December 5, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief for Petitioner and its accompanying Appendix have been served by first class mail, postage prepaid, on this the 5th day of December, 2014 on the following:

Gregory A. Gellner, Esquire
GELLNER LAW OFFICES
1440 National Road
Wheeling, West Virginia 26003

Counsel for Respondent Cecil L. Hickman

A handwritten signature in black ink, appearing to read 'K. Witzel', is written above a horizontal line.

Kenneth J. Witzel