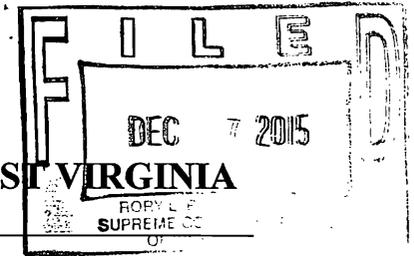


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NO. 15-0655

STANDARD OIL COMPANY, INC.

vs.

CONSOLIDATION COAL COMPANY

Appeal of: STANDARD OIL COMPANY, INC.

PETITIONER'S BRIEF

**APPEAL FROM CIRCUIT COURT OF
WETZEL COUNTY, WEST VIRGINIA CIVIL ACTION NO. 14-C39**

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by granting summary judgment against Petitioner Standard Oil Company, Inc. based on its rulings on Petitioner's requests for broad declaratory relief under the *West Virginia Uniform Declaratory Judgment Act* (the "Act"), without considering Petitioner's alternative claims for limited relief under the Act.

2. The Circuit Court abused its discretion in denying Petitioner's motion for leave to file an amended complaint to add an additional claim under the Act on the legal theory of "first breach," incorrectly finding that amendment was futile due to the statute of limitations that applies to breach of contract actions, where Petitioner raised the claim promptly after learning of it during discovery and never waived its right to raise the claim.

STATEMENT OF THE CASE

1. Factual and Procedural History

A. The Leases and the Option Agreement

Petitioner Standard Oil Company, Inc. operates various oil and gas leases in Wetzel and other counties in West Virginia. (Appeal Appendix (“AA”) 18 (Complaint, ¶1).) Included among these leases are three leases that pertain to properties located in Grant District, Wetzel County. (AA 18 (Complaint, ¶2).) These are the Blake Lease, which covers 82 acres; the Utt Lease, which covers 50 acres; and the Ice Lease, which covers 110 acres (collectively, the “Leases”). (*Id.*) Each of the Leases has a productive well on it (collectively, the “Wells”) and each Lease is in full force and effect. (*See id.*)

On or about September 30, 1998, Petitioner and various other entities and one individual, Mr. Joseph O’Ferrell, as “Optionors,” and Respondent Consolidation Coal Company, as “Optionee,” entered into an Option Agreement (the “Option Agreement”). (AA 19, 24-33 (Complaint, ¶4 and Exh. A); AA 41 (Answer, ¶4).) At that time, Mr. O’Ferrell was Petitioner’s President, and Mr. O’Ferrell signed the Option Agreement on Petitioner’s behalf. (AA 29 (Complaint, Exh. A).)

The Option Agreement includes a “Grant of Option” provision, which provides in pertinent part:

. . . Optionors, and each of them, for and on behalf of themselves, their legal representatives, successors and assigns, hereby grant to Optionee, its Affiliates, and their successors and assigns, the right, option and privilege to purchase, at any time and from time to time during the term hereof, any oil well, gas well, oil and gas well, coalbed methane well and any other well now or hereafter owned, operated or controlled by Optionors, or any of them, or their successors and assigns located within the Option Area, (which right is hereinafter referred to as

“the Option”). This Option applies to any well now or hereafter owned or controlled by Optionors within the Option Area

(AA 25 (Complaint, Exh. A, at 2).) The Option Agreement defines the “Option Area” as “the area reflected on the map attached” as Exhibit A to the Option Agreement (the “Map”). (AA 24 (Complaint, Exh. A, at 1).) The Option Agreement was recorded in multiple counties, including Wetzel County, consistent with the areas identified as being within the Option Area. (AA 19 (Complaint, ¶4).) The Wells and Leases are within the geographical area depicted on the Map. (*Id.*)

Under the Option Agreement’s “Exercise of Option” provision, in order to exercise the Option under the Option Agreement, the Optionee must send the Optionors a written “Notice of Exercise of Option,” specifying “the well(s) which Optionee or its Affiliate intends to purchase, and the date on which Optionee or its Affiliate proposes to consummate such purchase[,]” and representing to Optionors “that such well(s) are being acquired by Optionee and/or its Affiliate(s) for the purpose of plugging in connection with projected coal mining activities.” (AA 25-26 (Complaint, Exh. A, at 2-3).) The Exercise of Option provision further provides that “[t]he Option may be exercised only for purposes related to projected coal mining activities of Optionee and/or its Affiliates.” (AA 26 (Complaint, Exh. A, at 3).)

The Option Agreement specifies a purchase price of \$25,000 for each well. (AA 26 (Complaint, Exh. A, at 3).) The Option Agreement’s “Term of Option” provision provides that the Option “shall be effective for a term of ninety (90) years, commencing on [September 30, 1998] and continuing until 11:59:59 p.m. on that date which is ninety (90) years from and after such commencement date.” (AA 25 (Complaint, Exh. A, at 2).) The Option Agreement

specifies that it “shall be governed by the laws of the State of West Virginia.” (AA 28 (Complaint, Exh. A, at 5).)

The Option Agreement includes an “Addendum to Option Agreement” that includes the following relevant language:

1. The Option Agreement relates only to wells owned, operated or controlled by the Optionors within the Option Area (herein referred to as “Active Wells”). The Option Agreement does not relate or apply to abandoned or inactive wells or former wells located within the Optionors’ leasehold areas but which are not owned or permitted by Optionors (herein referred to as “Abandoned Wells”).

(AA 32 (Complaint, Exh. A).)

B. Uncertainties as to the Option Agreement’s Effect on the Leases and the Wells, and the Suspension of the Sale of the Leases

In recent years, discoveries of oil and gas in the Marcellus and Utica formations and the development of new technologies—such as horizontal drilling in shale formations located beneath the coal seams¹—have opened up additional possibilities for oil and gas operations that simply did not exist at the time the Option Agreement was signed. (*See* AA 19 (Complaint, ¶7).)

Petitioner has attempted to market and sell its oil and gas rights in the Option Area, but has been unable to effectively do so due to concerns with the Option Agreement’s impact on these rights, particularly as to the oil and gas bearing formations located below the coal seams. (*See* AA 21 (Complaint ¶16).) On May 8, 2013, at Petitioner’s request, Respondent and

¹ This information is upon publicly available topographical data for Marcellus Shale and coal measures from the West Virginia Geological and Economic Survey (“WVGES”) database. This Court may take judicial notice of this information and Petitioner requests that this Court do so. *State ex rel. Termnet Merchant Servs. v. Jordan*, 217 W. Va. 696, 698, 619 S.E.2d 209, 211 (2005). (*See also* AA 124-178 (Exh. E to Petitioner’s Motion to Supplement Record Pursuant to West Virginia Rule of Appellate Procedure 6(B), filed on September 10, 2015 (“Pending Motion to Supplement”). The Pending Motion to Supplement is currently pending before this Court.)

Petitioner entered into a letter agreement affirming the parties “agreed upon understanding and clarification” that

the option to purchase the Wells and any other wells situated on the Leases is limited to the well-bore only, together with any and all related working interest, operating right, right-of-ways or easements as may be necessary for CONSOL to access, with full rights of ingress and egress, the leasehold premises solely for the purpose of allowing CONSOL to plug the purchased well(s), to reclaim the leasehold premises, and to conduct any post plugging inspections that may be necessary.²

(AA 120-121 (Exhibit A to Pending Motion to Supplement) (footnote added).) Petitioner and Respondent prepared, but never signed, a second letter agreement, dated September 10, 2013, in an effort to clarify that the Option Agreement’s potential effect on horizontal Marcellus Shale operations. The letter provides, in pertinent part:

EQT Production Company has proposed development of the Marcellus Shale formation under the Leases, wherein only horizontal laterals will be located on the Leases; the vertical well-bore(s) will be drilled upon tracts not included within the Leases.

* * *

. . . [T]his letter will affirm to you our agreed upon understanding and clarification of the Agreement as it relates to the Wells and Leases. . . . CONSOL and its Affiliates have no interest in the Leases other than the Wells, any other existing or future well-bore(s), and the appurtenant rights set forth above. Nevertheless, any horizontal lateral that is drilled below the deepest workable coal bed or coal seam owned or controlled by CONSOL or its Affiliates is not subject to the terms of the Agreement, provided that the vertical portion of any such lateral is drilled upon a tract that is not included within the Leases.³

(AA 122-123 (Exhibit B to Pending Motion to Supplement).)

² The terms “Wells” and “Leases” in the May 8, 2013 letter agreement refer to the same “Wells” and “Leases” addressed in the Complaint.

³ Again, the “Wells” and “Leases” referred to in the unsigned September 10, 2013 letter agreement are the same as those referred to in the Complaint.

Ultimately, although Petitioner had arranged to sell the Leases for \$510,400, the sale was suspended due to uncertainties as to the Option Agreement's applicability to the Leases. (*See* AA 22 (Complaint, ¶16).) Petitioner subsequently initiated these legal proceedings in order to resolve these and other uncertainties with the Option Agreement.

C. The Complaint

Petitioner filed the Complaint on April 22, 2014. (AA 18 (Complaint, at 1).) The Complaint requests declaratory relief both with respect to the Option Agreement's overall validity, and to its applicability to the Leases and the Wells and other oil and gas leases and wells owned by Petitioner. More particularly, the Complaint includes three counts. Count I ("Inadequate Consideration") seeks a declaration that the Option Agreement is void on the basis that the consideration specified in the Option Agreement is "so inadequate as to 'shock the conscience' of the Court[,]" particularly when considered in light of the dramatic increases in the value of oil and gas in the geographical area in question due to unconventional drilling into the Marcellus and Utica formations. (AA 19-20 (Complaint, ¶¶6-8).) Count II ("Void for Vagueness") seeks a declaration that the Option Agreement is void because the map attached to the Option Agreement as Exhibit A is ambiguous as to the properties intended to be subject to the Option Agreement. (AA 20 (Complaint, ¶¶9-12).) Count III ("Rule of Perpetuities") seeks a declaration that the Option Agreement violates the rule against perpetuities, and is, therefore, invalid. (AA 21 (Complaint, ¶¶13-15).)

The Complaint further pleads:

16. This action can proceed either as a Declaratory Judgment action of the West Virginia Code (§55-13-1 et seq.) or for damages because of the following:

a. Plaintiff has attempted to sell the Leases described herein and has been unable to market them because of the impediment created by the “Option Agreement”.

b. Plaintiff’s proposed sale of the Leases for the sum of \$510,400.00 will not occur unless the “Option Agreement” is deemed not to apply to the subject wells.

c. Plaintiff owns additional wells and leases which would arguably be included within the “Option Agreement” and which also would be unmarketable unless the Court voids the application of such document.

(AA 21-22 (Complaint, ¶16) (emphasis added).)

The Complaint includes the following prayer for relief.

WHEREFORE Plaintiff demands:

A. That the “Option Agreement” attached to this Complaint be declared “null and void” as it may apply to the Leases and Wells described in Paragraph No. 2 of this Complaint and any other wells and leases owned by Plaintiff.

B. Judgment against Defendant in an amount which is appropriate to its losses which will be suffered in the event the “Option Agreement” is deemed enforceable.

C. Trial by Jury.

D. Such other relief as may be appropriate in this action.

(AA 22 (Complaint, prayer for relief) (emphasis added).)

D. The Answer, the Motion for Summary Judgment, and the 9/12/14 Order

Respondent filed “Defendant Consolidation Coal Company’s Answer to Plaintiff’s Complaint” (the “Answer”) on May 28, 2014, (AA 40 (Answer, at 1)), and on July 19, 2014, it filed “Defendant Consolidation Coal Company’s Motion for Summary Judgment (the “Motion for Summary Judgment”). In its Motion for Summary Judgment, Respondent argued that it was

entitled to summary judgment as to all of Petitioner's claims because (i) Respondent's consideration for the Option Agreement was "adequate under long-established West Virginia case law[;]" (ii) the Option Agreement "is not vague, but rather is unambiguous and must be given the effect the parties intended when they entered into the option agreement[;]" and (iii) the Option Agreement's plain language "does not violate the Rule against Perpetuities as set forth in the West Virginia Code because it is not clearly impossible for Defendant's interest to vest within the 90-year wait and see period in the statute[.]" (AA 45-46 (Motion for Summary Judgment, at 1-2).) Respondent's Motion for Summary Judgment sought summary judgment as to Petitioner's attempts to render the entire Option Agreement null and void, but did not address Petitioner's claims for more limited declaratory relief.

Following briefing and oral argument, on September 12, 2014, the Circuit Court entered an Order Denying Without Prejudice Defendant Consolidation Coal Company's Motion for Summary Judgment (the "9/12/14 Order"). (AA 53-54 (9/12/14 Order, at 1-2).) The Circuit Court concluded that "the parties should have an opportunity to conduct discovery" and, accordingly, denied the Motion for Summary Judgment without prejudice. (AA 53 (9/12/14 Order, at 1).)

E. The Deposition of Mr. O'Ferrell

On November 3, 2014, Petitioner took the deposition of Mr. O'Ferrell, its former President, who is now retired. During the course of his testimony, Mr. O'Ferrell testified that he had assigned several wells to Respondent under the terms of the Option Agreement, but that Respondent had failed to pay him any amount for them. More particularly, he testified that after

he entered into the Option Agreement with Respondent he bought several wells in the Option Area

and had to spend 60,000 bucks on them to get those in compliance. Consol came through and plugged them all. They told me they weren't coming down that valley for 17 years even though it was permitted that they changed the direction. So I went ahead and got those wells in compliance because I can't file bonafide future use. It's only a five-year deal and you can only do it twice.

Q. You put those wells in compliance?

A. Yes, I did.

Q. And what happened with those wells?

A. Consol came through and plugged them all, all but two.

Q. And did not pay you?

A. No. Gave me pipe out of some of them.

Q. Was that after you signed this deal [the Option Agreement]?

A. Yeah, sure.

Q. Did you ever consider bringing a claim against them for a breach of contract?

A. Yes, but like I told you, I have other deals with them. Trexler is going to pay me \$20 million for the gob pile, I can't kill that goose.

Q. What about the ones that the deal fell apart?

A. Like I said as this went on and maybe it got so far that it looked ridiculous, you know what I'm saying. Basically I signed my rights over to Standard and I retired. So –

Q. When did that happen?

A. I don't know. 2010, I think.

(AA 92 (O’Ferrell Dep., p. 47, ln. 8 to p. 48, ln. 13).) No evidence of record suggests that any party to the Option Agreement ever subsequently attempted to exercise any rights or privileges under the Option Agreement.

F. The Renewed Motion for Summary Judgment, the Motion to File Amended Complaint, and the Opposition to the Motion to File Amended Complaint

On December 31, 2014, following completion of discovery, Respondent filed “Defendant Consolidated Coal Company’s Renewed Motion for Summary Judgment” (the “Renewed Motion for Summary Judgment”), in which Respondent advanced the same arguments that it raised in the Motion for Summary Judgment. (AA 56 (Renewed Motion for Summary Judgment, at 2).)

On January 7, 2015, Petitioner filed a “Motion to File First Amended Complaint” (the “Motion to File Amended Complaint”) with the Circuit Court on the grounds that “new facts were ascertained during discovery which led to the additional cause of action set forth in the proposed amended complaint.” (AA 69 (Motion to File Amended Complaint, at 1).) Petitioner’s proposed “First Amended Complaint” (the “Proposed Amended Complaint”) was filed concurrently with the Motion to File Amended Complaint. (AA 70 to 75 (Proposed Amended Complaint).) The Proposed Amended Complaint is materially identical to the Complaint, except that Petitioner’s Rule of Perpetuities claim at Count III of the Complaint was removed, and was replaced with a new claim, “Guilty of First Breach.” In that claim, Petitioner averred:

Shortly following execution of the “Option Agreement” [Respondent] forced [Petitioner] or its predecessors to assign a number of wells located in Marion and Wetzel Counties of West Virginia to [Respondent] under the supposed authority of the “Option Agreement.” However[,] no consideration was tendered or paid which was a substantial first breach of the said contracts and as such renders further attempts to enforce said contract unenforceable.”

(AA 73 (Proposed Amended Complaint, ¶14).)

Respondent filed “Defendant Consolidation Coal Company’s Response in Opposition to Plaintiff’s Motion to File First Amended Complaint” (“Response in Opposition to Motion to File Amended Complaint”) on January 20, 2015. (AA 76 (Response in Opposition to Motion to File Amended Complaint, at 1).) In it, Respondent argued that the Motion to File Amended Complaint should be denied on two grounds. First, Respondent argued that Plaintiff had “shown a lack of diligence in asserting its claim.” (AA 77 (Response in Opposition to Motion to File Amended Complaint, at 2).) Second, Respondent attempted to re-cast Petitioner’s “Guilty of First Breach” claim as a breach of contract claim, and argued that it was barred by the statute of limitations applicable to breach of contract claims. (*Id.*)

Petitioner filed a Reply to Defendant’s Response in Opposition to Plaintiff’s Motion to File First Amended Complaint (“Reply in Support of Motion to File Amended Complaint”), in which he responded to Respondent’s arguments. As to Respondent’s lack of diligence argument, Petitioner explained that there “is nothing in the record to prove conclusively that Plaintiff should be held to [the] knowledge of a former CEO of the corporation” and that Petitioner first learned of Respondent’s failures to pay for wells assigned to it under the Option Agreement at Mr. O’Ferrell’s deposition. (AA 98 (Reply in Support of Motion to File Amended Complaint), at 2).) As to Respondent’s statute of limitations argument, citing the doctrine of “first breach,” Petitioner explained that “[t]he proposed amended Complaint . . . is not, as Defendant alleges, an attempt to [p]lead a cause of action barred by the Statute of Limitations, but instead a further attempt to declare the [Option Agreement], which Defendant is insisting is still valid, void or unenforceable.” (AA 98 (Reply in Support of Motion to File Amended Complaint), at 2).)

G. The Summary Judgment Order and the Order Denying Amendment

On June 5, 2015, the Circuit Court entered the following two orders: an “Order Granting Defendant Consolidation Coal Company’s Renewed Motion for Summary Judgment” (the “Summary Judgment Order”), and an “Order Denying Plaintiff Standard Oil Company, Inc.’s Motion to File First Amended Complaint” (the “Order Denying Amendment”). (AA 1-10 (Summary Judgment Order); AA 11-17 (Order Denying Amendment).)

The Summary Judgment Order construed Petitioner’s claims as being limited to claims seeking judicial declarations that the entire Option Agreement is null and void. (*See* AA 2, 8 (Summary Judgment Order, ¶9 and 8).) The Summary Judgment Order did not address any of the alternative claims for relief set forth in the Complaint, such as whether the Option Agreement applies to the “subject wells” associated with the proposed sale of the Leases, or whether “additional wells and leases” owned by Petitioner would be “included within the ‘Option Agreement[.]’” (AA 22 (Complaint, ¶16); *see also id.* at prayer for relief (requesting that the Option Agreement be “declared ‘null and void’ as it may apply to the Leases and Wells . . . and any other wells and leases owned by Plaintiff”).)

In the Order Denying Amendment, the Circuit Court found that “Plaintiff is in effect asserting a breach of contract claim, which has a ten year statute of limitations” and that “[b]ecause the alleged factual events underlying any possible claim for breach of contract occurred in the early 2000s, the breach of contract claim is barred by West Virginia’s ten-year statutory statute of limitations for breach of contract.” (AA 13-14 (Order Denying Amendment, ¶¶16-17).) The Circuit Court also held that Petitioner had been “dilatatory in bringing a breach of contract claim” because “[i]n its initial Complaint, Plaintiff did not allege any breach by

Defendant and waited over eight months to allege such a claim only after recognizing that it had no viable claim against Defendant.” (AA 14 (Order Denying Amendment, ¶¶18-19).) Finally, the Circuit Court also held that Petitioner’s proposed amendment would be futile because Mr. O’Ferrell “made a strategic and conscious choice, on behalf of Plaintiff, to ignore any alleged breaching conduct by Defendant” and, therefore, Petitioner waived “any right it may have to allege a claim of first breach.” (AA 15 (Order Denying Amendment, ¶¶26, 29).)

Petitioner has filed this appeal in order to seek relief from the Summary Judgment Order on the grounds that it granted summary judgment against Petitioner without considering Petitioner’s alternative claims for limited declaratory relief. Petitioner also seeks relief from the Order Denying Amendment because: (i) in refusing to allow Petitioner to file the Proposed Amended Complaint, the Circuit Court misconstrued Petitioner’s “Guilty of First Breach” claim as a breach of contract claim, when, in fact, it was alleged as a declaratory judgment claim, and, consequently applied incorrect legal standards and principles to the Motion to File Amended Complaint; (ii) the Petitioner sought leave to file the Proposed Amended Complaint promptly after learning of Respondent’s prior failures to pay under the Option Agreement; and (iii) Petitioner had never waived its right to assert first breach as a defense to any future attempts by Respondent to enforce the Option Agreement

SUMMARY OF ARGUMENT

In its Complaint, Petitioner Standard Oil Company, Inc. requested declaratory relief pursuant to the *West Virginia Declaratory Judgment Act* (the “Act”) both with respect to the overall validity of the Option Agreement between Petitioner and Respondent, and also, in a more limited fashion, the Option Agreement’s applicability to certain oil and gas leases and wells owned by Petitioner. In entering summary judgment against Petitioner, the Circuit Court limited its review of the Complaint to Petitioner’s claims requesting broad relief declaring the Option Agreement to be null and void. It did not consider Petitioner’s claims for more limited declaratory relief, such as whether the Option Agreement applied to certain wells included in a proposed sale of leases to a third-party buyer, or whether additional wells and leases owned by Petitioner were within the scope of the Option Agreement. By entering summary judgment against Petitioner without considering all of Petitioner’s claims, the Circuit Court committed error. Consequently, its order entering judgment against Petitioner must be reversed and the matter remanded so that the Circuit Court may consider all of Petitioner’s claims.

Additionally, the Circuit Court abused its discretion by refusing to grant leave to allow Petitioner to file an amended complaint in which Petitioner sought to add a claim of “first breach” in further support of its claim for declaratory relief. Petitioner’s first breach claim was based on new facts Petitioner learned of a mere two months earlier showing that Respondent failed to pay for wells previously assigned to it under the Option Agreement. Although Petitioner’s motion satisfied the requirements under Rule 15 of the West Virginia Rules of Civil Procedure, which requires leave to amend to be “freely given when justice so requires[,]” the Circuit Court denied the motion. In doing so, the Circuit Court incorrectly found that the first

breach claim, which was raised under the Act and not as a breach of contract claim, was barred by the statute of limitations for breach of contract actions; that Petitioner was dilatory in asserting its claim, despite Petitioner's prompt filing of the motion after learning of the facts supporting the claim; and that Petitioner had waived its claim, even though there is no evidence of record to suggest that Respondent ever attempted to exercise any rights under the Option Agreement following its failures to pay. Under these circumstances, the Circuit Court's refusal to allow Petitioner to file an amended complaint constituted an abuse of discretion.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner 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

A. Summary Judgment Standard

This Court’s standard of review of a Circuit Court’s entry of summary judgment is *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). As explained in *Cunningham v. West Virginia-American Water Co.*, 193 W.Va 450, 457 S.E.2d 127 (1995), this Court has “traditionally adopted a conservative stance toward the use of summary judgment, reasoning that ‘[a] party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances.’” *Id.* at 454, 457 S.E.2d at 131 (citations omitted; emphasis added).

“[I]n reviewing an order granting a motion for summary judgment, any permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion.” *Chichester ex rel. Estate of Cook v. Cook*, 234 W. Va. 183, 188, 764 S.E.2d 343, 348 (2014).

“On a motion for summary judgment all papers of record and all matters submitted by both parties should be considered by the court.” *Beard v. Beckley Coal Min. Co.*, 183 W.Va. 485, 491, 396 S.E.2d 447, 453 (1990) (quoting *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, Syl. Pt. 2, 148 W.Va. 160, 133 S.E.2d 770 (1963)).

B. Leave to Amend Standard

As provided in Syllabus 1 in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004):

A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.

Nevertheless, where an issue on an appeal from the Circuit Court is "clearly a question of law" this Court applies "a *de novo* standard of review." *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 490, 566 S.E.2d 624, 627 (2002) (citation omitted).

2. The Circuit Court Erred by Granting Summary Judgment against Petitioner Without Considering Petitioner's Alternative Claims for Limited Declaratory Relief

A. The *West Virginia Uniform Declaratory Judgment Act* "is Designed to Enable Litigants to Clarify Legal Rights and Obligations Before Acting Upon Them" and "is to be Liberally Construed and Administered"

The *West Virginia Uniform Declaratory Judgment Act* (the "Act") grants courts the

. . . power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

W. Va. Code § 55-13-1 (1941). The Act authorizes "[a]ny person interested under a . . . written contract" to "have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder."

W. Va. Code § 55-13-2. “A contract may be construed either before or after there has been a breach thereof.” W. Va. Code § 55-13-3.

The Act’s express purpose “is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.” W. Va. Code, § 55-13-12 [1941] (emphasis added). Indeed, as recognized by this Court, the Act “is designed to enable litigants to clarify legal rights and obligations before acting upon them.” *Black v. St. Joseph’s Hospital of Buckhannon, Inc.*, 234 W. Va. 175, 180, 764 S.E.2d 335, 340 (2014) (citation omitted; emphasis added). *See also Christian v. Sizemore*, 181 W. Va. 628, 632, 383 S.E.2d 810, 814 (1989) (“The purpose of a declaratory judgment proceeding ... is to anticipate the actual accrual of causes for equitable relief or rights of action by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved.”)

B. The Complaint Requests Both Broad and Limited Declaratory Relief

In addition to requesting broad judicial declarations that the entire Option Agreement is null and void, the Complaint requests more narrow declaratory relief. More particularly, the Complaint avers that Petitioner had arranged to sell the Leases for \$510,400, but that uncertainties concerning the Option Agreement’s applicability to the Leases were preventing the sale from taking place. (*See* AA 22 (Complaint, ¶16).) The Complaint further avers that Petitioner “owns additional wells and leases which would arguably be included within the ‘Option Agreement’ and which also would be unmarketable unless the Court voids the application” of the Option Agreement to these additional wells and leases. (*Id.* (emphasis added).) Consistent with these averments, the Complaint invokes the *West Virginia Uniform*

Declaratory Judgment Act, W. Va. Code, § 55-13-1, *et seq.*, and seeks a declaration as to the Option Agreement’s validity and applicability to “the Leases and Wells described in Paragraph No. 2 of this Complaint and any other wells and leases owned by Plaintiff.” (AA 22 (Complaint, prayer for relief) (emphasis added).)

C. The Circuit Court Erred by Granting Summary Judgment Without First Considering Petitioner’s Claims for Limited Declaratory Relief

Respondent’s Renewed Motion for Summary Judgment sought summary judgment only as to Petitioner’s attempts to render the entire Option Agreement null and void, and, in turn, the Circuit Court granted summary judgment to Respondent, refusing to void the entire Option Agreement. But the Circuit Court never considered whether summary judgment was proper as to Petitioner’s narrower declaratory judgment claims. For instance, the Circuit Court never considered to what extent the Option Agreement—even if not entirely null and void (which, for the reasons set forth in Section 3 of this Brief, below, Petitioner denies)—may apply to future wells and operations on leases owned by Petitioner in the Option Area. One such issue is whether a future horizontal well that is drilled to a depth below the deepest workable coal seam is subject to the Option Agreement where part of the well runs horizontally underneath property leased, in whole or in part, by Petitioner, but where the entire vertical portion of the well (including all portions of the well that penetrate the coal seam) is located on property that is not leased by Petitioner but is included in a production unit with Petitioner’s lease. (*See* AA 122-123 (Exhibit B to Pending Motion to Supplement).) The resolution of this issue is critical to Petitioner’s ability to market its leasehold interests.

The Act granted the Circuit Court the power to consider Petitioner’s limited claims, and under the standards applicable to motions for summary judgment it had an affirmative obligation

to address them before dismissing the Petitioner's case. *See Cunningham*, 193 W.Va. at 454, 457 S.E.2d at 131 (“A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances.”) (citations and quotations omitted; emphasis added). Because these claims were never considered, Petitioner was deprived of its right to be heard on all of its claims. Because the Circuit Court did not consider all of the Petitioner's claims, its entry of summary judgment was in error and the matter must be remanded so that the Circuit Court may consider all of Petitioner's claims. *See Provident Life and Accident Ins. Co. v. Bennett*, 199 W.Va. 236, 241-42, 483 S.E.2d 819, 824-25 (1997) (reversing order granting summary judgment and remanding case for trial on the merits; “Neither the summary judgment order nor Provident's brief addresses this issue. We believe that this issue creates a material factual dispute which was not in the purview of summary judgment disposition.”); *Aetna Cas. & Sur. Co.*, 148 W.Va. at 173-75, 133 S.E.2d at 778-79 (reversing grant of summary judgment and remanding case for trial; “As previously indicated the circuit court did not consider and determine the question For that reason this Court, having no original jurisdiction but only appellate jurisdiction of this action, will not determine that question upon appeal.”); *Beard*, 183 W.Va. at 491, 396 S.E.2d at 453 (reversing grant of summary judgment and remanding to circuit court; “In its decision to dismiss and grant summary judgment, the court . . . did not address the products liability theory. Although dismissal under this theory was clearly warranted, the court should have considered each of the grounds on which the appellant's suit was based.”).

3. The Circuit Court Abused its Discretion in Refusing to Allow Petitioner Leave to File an Amended Complaint

A. Leave to Amend is To “Be Freely Given When Justice so Requires”

Rule 15(a) of the West Virginia Rules of Civil Procedure provides that “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” *Id.* (emphasis added). “The goal behind Rule 15, as with all the Rules of Civil Procedure, is to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties.” *Boggs v. Camden-Clark Mem. Hosp. Corp.*, 216 W. Va. 656, 662, 609 S.E.2d 917, 923 (2004) (quotations and citations omitted).

This Court, in Syllabus Point 7, *Bowden v. Monroe County Commission*, 232 W. Va. 47, 750 S.E.2d 263 (2013), further explained the meaning of Rule 15(a) as follows:

The purpose of the words “and leave [to amend] shall be freely given when justice so requires” in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.

Id. (emphasis added).

B. The Additional Claim Petitioner Sought to Raise in the Proposed Amended Complaint Was Viable, and Leave to Amend Was Required

By means of the Motion to File Amended Complaint, Petitioner sought leave of court to raise a new claim, titled, “Guilty of First Breach.” (AA 73 (Proposed Amended Complaint, ¶14).) As with Petitioner’s other claims, the claim was primarily in the nature of a declaratory

judgment claim. In it, Petitioner avered that after the Option Agreement was executed, Respondent compelled Petitioner or its predecessors to assign a number of wells located in the Option Area to Respondent under the Option Agreement; however, Respondent failed to pay for any of the wells, as required under the Option Agreement. (*Id.*) Respondent's failure to pay was a "substantial first breach" that "render[ed] further attempts to enforce [the Option Agreement] unforceable." (*Id.*) The claim was not a breach of contract claim. Rather, it was a declaratory judgment claim in which Petitioner was asserting that Respondent's prior breaches of the Option Agreement had rendered the contract unenforceable.

1. The Rule of First Breach is Recognized Under West Virginia Law and is Proper in the Context of a Declaratory Judgment Claim

West Virginia has long recognized the rule of "first breach." *See, e.g., Blue v. Hazel-Atlas Glass Co.*, 106 W. Va. 642, 147 S.E. 22, 26 (1929). A "party to a contract is guilty of the first breach who fails to do what he contractually is bound to do." *Id.* Moreover, "[t]he mere fact that one party to the contract does not terminate it on a breach by the other party of its provisions does not establish a waiver." *Id.* Although it has not been frequently discussed in published West Virginia cases, the rule was clearly and succinctly stated in *Hurley v. Bennett*, 163 Va. 241, 176 S.E. 171 (1934), as follows: "The party who commits the first breach of a contract is not entitled to enforce it, or to maintain an action thereon, against the other party for his subsequent failure to perform." *Id.* at 253, 176 S.E. at 175.

The statement of the rule in *Hurley* is consistent with the statement of the rule provided in various authoritative texts and treatises. For example, Restatement, Second, Contracts § 369, titled "Effect of Breach by Party Seeking Relief," provides: "Specific performance or an

injunction may be granted in spite of a breach by the party seeking relief, unless the breach is serious enough to discharge the other party's remaining duties of performance. *Id.* Its accompanying comment "a" further explains: "If a party has himself committed such a serious breach of contract, whether by non-performance or repudiation, as to discharge the other party's remaining duties under the contract, the party in breach is not entitled to relief, equitable or otherwise, if the other party refuses further performance." Restatement, Second, Contracts § 369, comment a. In 12-64 Corbin on Contract § 64.14, the rule is explained as follows: "In the case of a bilateral contract in which the promised performances constitute an agreed exchange of equivalents, one who has broken the contract in some material respect cannot get a decree for specific performance. . . . The plaintiff's material breach or the prospective inability operate to discharge the other party from the reciprocal duty to the plaintiff."

Although the rule of "first breach" is commonly raised as an affirmative defense to a breach of contract claim, the law does not restrict it from being used in the context of a declaratory judgment claim. Its application is entirely appropriate in this case, particularly given the express statutory directive that the Act "is to be liberally construed and administered" in order to help parties "settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[.]" W. Va. Code, § 55-13-12; *see also Black*, 234 W. Va. at 180, 764 S.E.2d at 340 (explaining that the Act "is designed to enable litigants to clarify legal rights and obligations before acting upon them").

2. Petitioner’s Proposed Amended Complaint Satisfies Each of the Requirements of Rule 15 of the West Virginia Rules of Civil Procedure

As stated above, motions to amend “should always be granted” when the following three elements are met: “(1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.” Syl. Pt. 7, *Bowden, supra*.

In denying the Motion to File Amended Complaint, the Circuit Court denied Petitioner an opportunity to present “the merits of the action.” Petitioner was prevented from advancing a legitimate claim, of which it had only recently become aware, in further support of its request for broad declaratory relief under the Act. Respondent would not have been “prejudiced” by the Proposed Amended Complaint because trial had not yet been scheduled in the case and to the extent additional discovery was deemed necessary, the Circuit Court could extend the discovery period. Furthermore, Respondent would have had the opportunity to file an amended answer and affirmative defenses addressing the averments in the Proposed Amended Complaint. For these same reasons, Respondant would have had “ample opportunity to meet” the issues presented by the Proposed Amended Complaint. Under these circumstances, leave to amend was required. *See Syl. Pt. 7, Bowden, supra; see also Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 287, 445 S.E.2d 219, 228 (1994) (affirming circuit court’s decision permitting plaintiffs to amend his complaint to assert a new claim “two weeks before trial and six and one-half years after the action was begun[;]” “Unless the amendment of the pleading will prejudice the opposing party by not affording him an opportunity to meet the issue, it should be allowed so as to permit an adjudication of the case on its merits”) (quotations and citations omitted).

C. The Reasons for Denying the Motion to File Amended Complaint Given by the Circuit Court Do Not Justify the Denial

The Order Denying Amendment provides three reasons to support its denial of the Motion to File Amended Complaint. First, the Court Court found that “Plaintiff is in effect asserting a breach of contract claim, which has a ten year statute of limitations” and that “[b]ecause the alleged factual events underlying any possible claim for breach of contract occurred in the early 2000s, the breach of contract claim is barred by West Virginia’s ten-year statutory statute of limitations for breach of contract.” (AA 13-14 (Order Denying Amendment, ¶¶16-17).) Second, it found that Petitioner had been “dilatory in bringing a breach of contract claim” because “[i]n its initial Complaint, Plaintiff did not allege any breach by Defendant and waited over eight months to allege such a claim only after recognizing that it had no viable claim against Defendant.” (AA 14 (Order Denying Amendment, ¶¶18-19).) Finally, the Circuit Court held that Petitioner’s proposed amendment would be futile because Mr. O’Ferrell “made a strategic and conscious choice, on behalf of Plaintiff, to ignore any alleged breaching conduct by Defendant” and, therefore, Petitioner waived “any right it may have to allege a claim of first breach.” (AA 15 (Order Denying Amendment, ¶¶26, 29).) As discussed below, none of these reasons justify denial of the Motion to File Amended Complaint.

1. Petitioner’s Additional Claim is Not a Breach of Contract Claim and is not Barred by the Statute of Limitations that Applies to Breach of Contract Claims

The Circuit Court’s finding that Petitioner’s “Guilty of First Breach” claim is barred by the statute of limitations stems from a misunderstanding as to the nature of Petitioner’s additional claim. As discussed above in Part 3.B. of the Argument section of this Brief, the claim is not a breach of contract claim. Petitioner is not seeking damages for Respondent’s failures to pay the

Optionors under the Option Agreement. Rather, the claim is a proper declaratory judgment claim in which Petitioner is seeking “to clarify” of the parties’ “legal rights and obligations” under the Option Agreement. *Black*, 234 W. Va. at 180, 764 S.E.2d at 340. Consequently, the ten year statute of limitations that applies to breach of contract claims has no application here.

2. Petitioner Was Not Dilatory in Advancing the Motion to File Amended Complaint

The second reason given in the Order Denying Amendment for denying the Motion to File Amended Complaint—that Petitioner was “dilatory in bringing” the claim is unsupported by the facts and circumstances surrounding Petitioner’s filing of the Motion to File Amended Complaint. As this Court has previously recognized, “[t]he liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in assertion claims or to neglect his or her case for a long period of time.” *Walker v. Option One Mortgage Corp.*, 220 W. Va. 660, 664, 649 S.E.2d 233, 238 (2007). Nevertheless, lack of diligence may only justify a denial of leave to amend “where the delay is unreasonable[.]” *Id.*

Here, Petitioner first learned that Respondent had failed to pay for wells transferred to it under the Option Agreement when Petitioner took Mr. O’Ferrell’s deposition on November 3, 2014. (AA 98 (Reply in Support of Motion to File Amended Complaint, at 2).) On January 7, 2015, a mere two months later, with the entire case having only been active for less than nine months, Petitioner filed the Motion to File Amended Complaint. Under these circumstances, it can hardly be said that Petitioner was less than diligent in seeking leave to file an amended complaint or that the short period between Mr. O’Ferrell’s deposition and Petitioner’s filing of the Motion to File Amended Complaint was unreasonable. *See Dzinglski*, 191 W. Va. at 287,

445 S.E.2d at 228 (affirming order granting plaintiff leave to amend his complaint to assert a new claim two weeks before trial and six and one-half years after the case was filed, even though the plaintiff's new claim "arose from the same set of facts as those in the original complaint").

3. There is no Evidence that Mr. O'Ferrell Ever Waived His Right to Assert Respondent's Failures to Pay for Wells as Affirmative Defenses

Finally, as to the last reason given by the Circuit Court for denying the Motion to File Amended Complaint—that Petitioner's former president, Mr. O'Ferrell waived Petitioner's right to allege a claim of first breach—because Respondent never attempted to obtain any more wells from Mr. O'Ferrell after it failed to pay him, he cannot have waived the right to assert Respondent's failures as an affirmative defense to any further attempts by Respondents to enforce the Option Agreement.

"The essential elements of a waiver . . . are the existence, at the time of the alleged waiver, of a right, advantage, or benefit, the knowledge, actual or constructive, of the existence thereof, and an intention to relinquish such right, advantage, or benefit." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 712-13, 57 S.E.2d 725, 735 (1950). "The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id.*

Here, Mr. O'Ferrell cannot have waived the right to assert Respondent's failures to pay as a defense to any future attempts by Respondent to enforce the Option Agreement, because Respondent never again attempted to enforce it. Therefore, the right to assert Respondent's failures to pay as a defense to any future enforcement efforts by Respondent never existed prior to Mr. O'Ferrell's retirement, and Mr. O'Ferrell could not have intentionally waived the right to

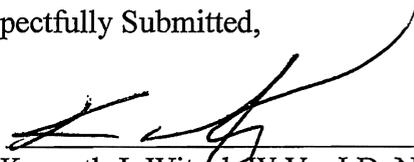
raise the defense, whether under the Act or otherwise. Even if Mr. O’Ferrell had waived his right to bring a breach of contract claim to obtain payment for the wells he assigned to Respondent, there is no evidence that he intended to waive Respondent’s nonpayment as a defense in any future proceedings attempting to compel enforcement of the Option Agreement. Because Respondent never actually made any future attempts to enforce the Option Agreement, any testimony Mr. O’Ferrell could give in this regard would be speculative, at best, and ultimately meaningless for purposes of establishing waiver. *See Blue*, 106 W. Va. 642, 147 S.E. at 26 (“The mere fact that one party to a contract does not terminate it on a breach by the other party of its provisions does not establish waiver.”)

Ultimately, allowing granting the Motion to File Amended Complaint would have allowed all of Petitioner’s claims to be “determined on their merits and not upon legal technicalities or procedural niceties” in accordance with Rule 15’s stated goal. *Boggs*, 216 W. Va. at 662, 609 S.E.2d at 923. The Order Denying Amendment contravened this fundamental goal, constituted an abuse of discretion by the Circuit Court, and the case should be remanded to the Circuit Court for proper consideration of Petitioner’s first breach claim. *See Christian*, 181 W. Va. at 633, 383 S.E.2d at 815 (reversing circuit court’s denial of the plaintiff’s motion for leave to amend and remanding for further proceedings, where plaintiff had sought to amend her complaint to add a declaratory judgment count); *Dzingliski*, 191 W. Va. at 288, 445 S.E.2d at 229 (affirming order granting plaintiff leave to amend his complaint to assert a new claim two weeks before trial and six and one-half years after the case was filed).

CONCLUSION

As discussed above, the Circuit Court committed two clear errors. First, the Circuit Court erred in granting summary judgment against Petitioner Standard Oil Company, Inc. without considering Petitioner's alternative claims for limited relief under the *West Virginia Uniform Declaratory Judgment Act* as to the Option Agreement's applicability to the Leases, Wells and other wells and leases owned by Petitioner. Second, the Circuit Court abused its discretion in denying Petitioner's motion for leave to file an amended complaint to add an additional claim on the legal theory of "first breach." Under these circumstances, Standard Oil Company, Inc. respectfully requests that the Court reverse the Circuit Court's grant of summary judgment as it relates to Petitioner's request for limited declaratory relief, reverse the Circuit Court's denial of Petitioner's Motion to File Amended Complaint, and remand the case for further proceedings.

Respectfully Submitted,

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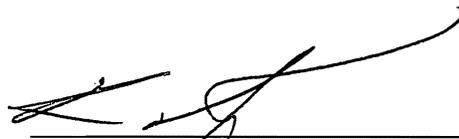
Dated: December 4, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing **Petitioner's Brief** and its accompanying Appendix have been served by first class mail, postage prepaid, on this the 4th day of December, 2015 on the following:

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