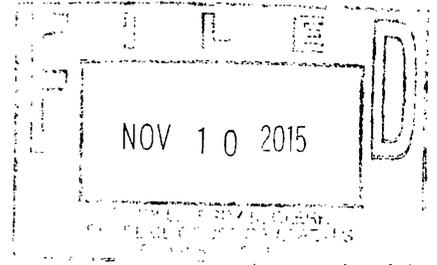


BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

Cheryl Wilhelm,
Plaintiff Below, Petitioner
vs.) No. 15-0768



Jay-Bee Production Company,
Defendant Below, Respondent

Petitioner's Brief

D. Conrad Gall, Esq.
3497 Fairmont Ave., Suite 2
Fairmont, WV 26554
(304) 363-5632 WV Bar #4984
dcgall4@frontier.com

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PETITIONER'S ASSIGNMENT OF ERROR

The Trial Court erred by not finding that when the Respondent failed to pay the royalty due after being Noticed of Default under the lease that the lease was null and void and that the Petitioner was entitled to the full 100% share of the gas and oil rather than 1/8th.

STATEMENT OF THE CASE

Petitioner, Cheryl Wilhelm, is a fractional owner (37.9 acres, Exhibit A) of oil and gas and mineral rights in McElroy District of Tyler County, West Virginia. The Petitioner, on April 20, 2010, executed and entered into an oil and gas lease with the Respondent individually, with said lease being recorded in the Office of the Clerk of Tyler County, WV in Deed Book 374 at Page 45 (Exhibit A).

Pursuant to the lease, the Petitioner was entitled to 1/8th of the royalty payable quarterly (Exhibit A) expressly stating, "The Lessee shall deliver to the credit of the Lessor free of cost in the pipeline to which he may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved from leased premises, payable quarterly, provided Lessee shall pay Lessor a royalty at the rate of fifty dollars per year on each gas well while, through lack of market, gas therefrom is not sold or used off the premises, and while said royalty is being so paid said well shall be held to be a paying well under paragraph 2 hereof."

The Respondent drilled and developed 2 wells: McIntyre/HD and McIntyre/HF that contained portions of the Petitioner's leased property in September 2013.

The Respondent, prior to the payment of the aforementioned royalty, submitted to the Petitioner a "Division Order" (Exhibit B), containing clauses titled: Terms of Sale, Payment, Disputes-Withholding of Funds, Termination, Notice and Default – all of which contained additional terms to the lease which the petitioner found

objectionable and advised the Respondent of this, and declined to execute the Division Order with the additional proposed terms. (Exhibit C)

The original lease contained an Entireties clause which indicates that it contains all of the terms of the lease and bound the parties, their heirs and assigns. The lease (Exhibit A) contained nothing about a Division Order or required the execution of a Division Order prior to the issuance of royalty being paid by the Respondent.

The petitioner made clear that she did not object to a Division Order providing for payment of her fractional interest, but stated she would not accept the additional proposed terms and repeatedly advised the Respondent of this prior to bringing her suit after noticing the Respondent that the Lease was null and void.

The specific additional terms contained within the Division Order that the petitioner found objectionable and not within her original lease were terms that except for a monthly rather than quarterly payment were only favorable to the Respondent despite the language on proposed Division Order stating, "This agreement does not amend any lease or operating agreement between the interest owners and the lessee or operator or any other contracts for the purchase of oil and gas".

The specific terms were: "Payments....Proceeds from the sale of production from this pooled unit will be paid monthly. Payments of less than \$50 will be accrued before disbursement until the total amount equals \$50 or more, or December 31 of each year, whichever occurs first. Owner agrees to refund payor any amounts attributable to an interest or part of an interest that owner does not own."

“Indemnity – The owner agrees to indemnify and hold payor, its successors or assigns, and its agents, servants and employees harmless from all liability resulting from payments made to the owner in accordance with said Division of interest...”

“Disputes-Withholding of Funds: If a suit is filed that affects the interest of the owner, written notice shall be given to payor by the owner together with a copy of the complaint of petition filed. In the event of a claim or dispute that affects title to the division of interest credited herein, payor is authorized to withhold payments accruing to such interest, without interest unless otherwise required by applicable statute until the claim or dispute is settled.”

“Default: If a working interest owner is in default in the payment of its share of the lease expenses, operator of the above lease, may withhold payment of any monies due the undersigned until operator has recovered all monies it is due for lease expenses.”

There were no similar provisions contained within the Lease, and when the Respondent failed to remove the objectionable clauses from the proposed Division Order, the Respondent then refused to pay the Petitioner any royalty without the objectionable Division Order being signed. The Petitioner, through her counsel, sent a Notice via Certified Mail (Exhibit D and E) of her intent to declare the Lease is defective and to terminate the Lease in 10 days as per the Lease.

The Lease in paragraph 5 expressly provided as follows, “All moneys coming due hereunder shall be paid or tendered to: Cheryl Wilhelm at 201 Powell Avenue, Stonewood, WV 26301, by check payable to her order mailed to the above address and

no default shall be declared against the Lessee by the Lessor for failure of the Lessee to make any payment or perform any conditions provided for herein unless the Lessee shall refuse or neglect to pay or perform the same for ten days after having received written notice by certified mail from the Lessor of his intention to declare such default.” (Exhibit A)

The Respondent's response was to send, via Certified Mail, another copy of the same proposed Division Order highlighted with the portion stating that this does not modify the Lease, but no offer to pay unless the objectionable Division Order was executed. (Exhibit F)

The Petitioner had some limited contact with the Respondent after this wherein they continued to demand the proposed Division Order be executed.

It was the Petitioner's position, as per the Lease, that when the Respondent failed to pay her after the Notice was received within 10 days that the Lease was null and void.

When no payment was received or progress in resolving the Division Order, the Petitioner filed suit on September 13, 2013, to have the Lease declared null and void, and requested the Respondent to pay over all the monies due and owing to her.

The Respondent filed an Answer denying that a Breach occurred or that the Lease was void, but still did not pay the Petitioner any monies.

The Petitioner filed some limited Discovery and following that, a Motion for Summary Judgment on the issue of Default. Before the hearing was conducted the Respondent did offer to pay the Petitioner the monies due under the Lease without the

execution of the Division Order, which the Petitioner declined, asserting that there was no Lease and that she was due 100% of the value of the production from her interest.

One hearing was held before Judge Mark A. Karl, on September 4, 2014, whom directed that the parties submit written Memorandums in support of their positions, which was done. No ruling was ever issued. The Petitioner herein requested a Status hearing before Judge Jeffrey D. Cramer, whom had subsequently been appointed Judge of Tyler County Circuit Court. After a very brief questioning by Judge Cramer, he indicated that a ruling would be made forthwith.

An Order was entered on July 10, 2015, (Exhibit G) in which Judge Cramer found the Facts as presented by the Petitioner to be correct and Ordered that the Respondent pay the Petitioner all royalties due under the Lease plus 7% interest within 10 days of receipt of the Order, plus attorney fees to be set at a subsequent hearing. The hearing for attorney fees was stayed following notification of this Appeal.

The Respondent paid the Petitioner the sum of \$67,981.16, which was received August 12, 2015.

The portion of the Petitioner's lands is contained in the designation of unit for McIntyre. (Exhibit H)

SUMMARY OF ARGUMENT

The lease executed by the Petitioner and drafted by the Respondent is clear and unambiguous as to the terms in default/termination. The Respondent's actions in demanding that the Petitioner execute the proposed Division Order with the additional proposed terms to receiving her share of the royalty is clearly a breach/default which the Petitioner advised the Respondent in conformity with the lease by sending the required certified Notice.

The Respondent, rather than using the 10 day grace period to rectify the problem, merely sent another copy of the Division Order and highlighted the section stating that this does not modify the lease (which it clearly did), nor did the Respondent try to, or offer to, pay the Petitioner until just before the Summary Judgment Motion filed by the Petitioner was set for hearing.

Giving meaning to all of the language within the lease means the lease was null and void as of February 15, 2013, and 100% of the gas sales from the Petitioner's share of her interest (.0025398) in the two wells should be paid to her since the voiding of the lease on February 15, 2013.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner does not request oral argument and states that all of the facts are adequately represented in this brief.

ARGUMENT

Voiding of Lease

This case is very simple and the facts uncontroverted. The Lease expressly provided that the Petitioner would be paid 1/8th of the royalties quarterly.

The Respondent refused to pay unless the Petitioner accepted additional terms to the original Lease in a proposed Division Order.

The Lease (Exhibit A) contained express language on how a Lease would be voided, expressly providing that the Lessee gives a 10 day Notice (Exhibit D) sent via Certified Mail (Exhibit E).

The Petitioner, in fact, did that on February 5, 2013.

The Respondent, rather than drop the proposed objectionable terms to the Division Order, refused to pay, but rather insisted that the Division Order (Exhibit F, highlighted) did not modify the Lease and had to be executed to pay. Technically, it did not change the percentage of royalty – 1/8th, but it did provide additional terms that were never negotiated between the parties or contained within the Lease that, with the exception of the monthly payment, only benefited the Respondent.

At its simplest, the Petitioner's position is that she did everything required under her lease to void the lease. The Respondent did nothing during the 10 day period to rectify the dispute other than to insist the Division Order did not change anything and that, until she executed it, she was not going to be paid.

So, for the trial court to find that the default paragraph has no meaning is to say that no termination clause ever has meaning once a contract has been partially performed.

Oil and Gas leases are liberally construed against the Lessor and for the Lessee. Yoke v. Shay, 47 W.Va. 40, 34 S.E. 748 (1895)

And, oil and gas leases that are free and clear of ambiguity are not subject to construction by the court. Donahue v. Bills, 172 W.Va. 354, 305 S.E.2d 311 (1983)

General contract law holds when the parties' contract is free and clear of ambiguity and no doubt exists, the courts do not need to construe the contract, but are obligated to give full force and effect to the language. Continental Coal Co. v. Connellsville Byproduct Coal Co., 104 W.Va. 44, 138 S.E. 737 (1927)

In the case before this Court, the language of the contract is clear, unambiguous, drafted by the Respondent, and clearly provides that if Notice is sent by certified mail of default that, after 10 days, the lease is voided. The purpose of this language, presumptively, is to allow the respondent gas company the opportunity to rectify the default, and not to allow a minor breach to cause the lease to be voided.

The next issue would appear to be: Is the non-payment and withholding of royalties material? A material breach occurs when one party fails to do something it is bound to do according to the contract. Michie's Jurisprudence, 4A §58 What could be a more material breach than failure to pay the royalties for approximately 16 months owed to the Petitioner as in this case?

Not only did the Respondent refuse to pay the Petitioner the royalties due under the lease, but wrongly withheld the Petitioner's royalties because the Petitioner would not execute the "proposed Division Order" that clearly modified the contract by adding provisions the Petitioner would not accept. A written contract can only be modified by

one party with the acquiescence or agreement of the other party. Kanawha Valley Bank v. United Fuel Gas Co., 121 W.Va. 96, 1 S.E.2d 875 (1939)

Despite the language of the Division Order and the Respondent's response to the Notice of voiding the lease and default highlighting that "...this does not modify the lease", the objectionable clauses in the Division Order cannot be found within the lease, which contains an entireties clause and the proposed Division Order clearly modifies the lease.

The Respondent asserts that voiding the lease was not equitable and cited Peerless Carbon Black Company v. E. N. Gillespie, et als, 105 W.Va. 526 (1920). In that case, the lease was ambiguous and uncertain and the parties had been performing the lease under the eyes of the Petitioner without objection and was not afforded an opportunity to rectify the problems. Peerless held "a degree of certainty and definiteness required for strict construction". The language under the lease is certainly definite as to payment, voiding the lease, and the entireties clause. The lease in this case does not refer to a Division Order that contains new terms that the Petitioner would have to accept to be paid. The payment terms are clear – 1/8th paid quarterly and default and voiding the lease equally so by giving Notice of 10 days by certified mail.

The trial court, in its Order citing McCartney v. Campbell, 114 W.Va. 332, 171 S.E. 821 (1933), states, "(a) contract should not be forfeited because the vendees failure to pay was not intentional or willful and the vendor did not suffer material injury". The trial court found that the Defendant's actions were willful and unreasonably long, but the court failed to address the clear and unambiguous terms of the contract that provide for voiding a lease. Had the Petitioner not complied with the lease provisions and

merely filed suit, then the trial court's ruling would have been correct, but the trial court cannot choose to ignore the clear and unambiguous provisions of the lease that provided for default and voiding the lease.

CONCLUSION

Wherefore, your Petitioner prays that this Court overturn in part the Trial Court's Order that does not declare the Lease void and find that the Petitioner is entitled to .0025398 of the gross production.

CERTIFICATE OF SERVICE

I, the undersigned D. Conrad Gall, counsel for the Petitioner, do certify that I have served a true copy of the Petitioner's Brief upon counsel for the Respondent, Michael Taylor, of Bailey & Wyant, PLLC, at the address of P. O. Box 3710, Charleston, WV 25337-3710, on this, the 9th day of November, 2015.

A handwritten signature in black ink, appearing to read "D. Conrad Gall", written over a horizontal line.

D. Conrad Gall
Counsel for the Petitioner
3497 Fairmont Ave., Suite 2
Fairmont, WV 26554
(304) 363-5632 WV Bar #4984