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August 28, 2020

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Via FedEx

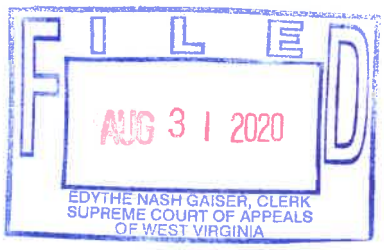
Edythe Nash Gaiser, Clerk
Supreme Court of Appeals of West Virginia
State Capitol Rm. E-317
1900 Kanawha Blvd. East
Charleston, WV 25305

Re: ***Pachira Energy LLC v. Northeast Natural Energy LLC and NNE Water Systems LLC*, Case No. 18-C-369 (Circuit Court of Monongalia County, West Virginia)**

Dear Ms. Gaiser:

Enclosed please find Pachira Energy LLC's Reply in Opposition to Motion to Refer Case to the Business Court Division for filing in the above-referenced matter.

If you have any questions, please do not hesitate to contact me.



Very truly yours,

/s/ Katherine M. Gafner
Katherine M. Gafner

cc: The Honorable Cindy Scott (via FedEx)
Jean Friend, Clerk (via FedEx)
Central Office – Business Court Division (via FedEx)
Charles F. Johns, Esq. (via electronic mail and U.S. Mail)
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Jeffrey C. King, Esq. (via electronic mail)
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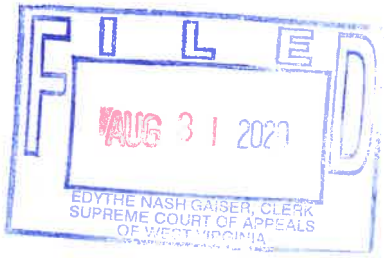
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PACHIRA ENERGY LLC, Plaintiff, v. NORTHEAST NATURAL ENERGY LLC and NNE WATER SYSTEMS LLC, Defendants.	)	In the Circuit Court of Monongalia County, West Virginia Case No. 18-C-369 The Honorable Cindy Scott



PACHIRA ENERGY LLC'S REPLY IN OPPOSITION TO MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Plaintiff Pachira Energy LLC ("Pachira"), by and through its counsel, K&L Gates LLP and Simmerman Law Office, PLLC, and pursuant to Trial Court Rule 29.06(a), submits this Reply in Opposition to Motion to Refer Case to the Business Court Division.

I. INTRODUCTION

This case was filed on ***September 11, 2018***. Nearly two years later, defendants Northeast Natural Energy LLC and NNE Water Systems LLC (collectively, "NNE") move to transfer the case to the Business Court Division. This case should not be transferred. Contrary to NNE's assertions, this case does not meet the definition of "business litigation" because (i) a transfer to the Business Court Division is not "likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable" and (ii) such a transfer is nothing more than a stall and delay tactic that will prejudice Pachira. TCR 29.04(a)(2).

II. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns majority interest owners, NNE, breaching agreements and abusing their power to benefit themselves to the detriment of the minority interest owner, Pachira. Pachira and NNE have been in the business of acquiring and developing oil and gas interests in West Virginia since 2011. *See* NNE's Motion to Refer Case to the Business Court Division (the "Motion"), ¶ 12. Separate and apart from the business relationship regarding the oil and gas interests, NNE and Pachira entered into a separate business venture for the development and ownership of a water line, related handling facilities and easements, rights-of-way and fee interests in which the water line and facilities are located (collectively, the "Water Line and Handling Facilities"). *See* Second Amended Complaint ("Complaint"), ¶¶ 52-55, Ex. B to the Motion.

A. Pachira's Claims

1. Seismic Imaging Claims

As part of their business venture, NNE and Pachira jointly own seismic imaging and geophysical interpretations of the minerals that they own or could own (collectively, "Seismic Data"). *See* Complaint, ¶¶ 66-74. NNE used Pachira funds to pay for the Seismic Data. *See id.* Pachira requested access to the Seismic Data, but NNE refused to do so. *See id.*, ¶ 78. Due to NNE's conduct with respect to the Seismic Data, Pachira brought claims for breach of contract, fraud, and conversion. *See id.*, Counts I, VI, and VII. None of these claims are unique to business disputes, nor are they outside the norm for the Circuit Court.

2. Water Line and Handling Facilities Claims

It is undisputed that there is no written agreement governing the Water Line and Handling Facilities. Pachira's position is that the Water Line and Handling Facilities are joint venture property, governed by the Uniform Partnership Act of West Virginia, W. Va. Code § 47B-1-1, *et*

seq. (the "Partnership Act"). *See* Complaint, ¶ 57. NNE claims that the Water Facilities are jointly held through a tenancy in common. *See id.*, ¶ 59. Pachira brings claims for breach of contract, declaratory judgment, and preliminary and permanent injunction against NNE arising out of its conduct with respect to the Water Line and Handling Facilities. *See id.*, Counts II, III, IV, and V.

B. Procedural Posture

That docket makes clear that this is not a case that has floundered with little docket activity over the past two years. *See* Ex. D to the Motion. To the contrary, prior to the Covid-19 pandemic and resignation of Judge Scudiere, this case was slated for an August 2020 trial. A high-level overview of the some of the most relevant case activity may be beneficial.

1. Preliminary Injunction Proceedings

On September 13, 2018, Pachira filed an Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing (the "PI Motion") seeking to enjoin NNE from its improper use of the Water Line and Handling Facilities. On October 25, 2018, the Circuit Court granted the PI Motion. *See* October 25, 2018 Order Granting in Part and Denying in Part Plaintiff's Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing (the "PI Order"), a true and correct copy of which is attached hereto as Exhibit A. NNE appealed the PI Order to this Court on November 20, 2018.

On June 15, 2020, this Court issued an opinion affirming the PI Order. *See Ne. Nat. Energy LLC, et al. v. Pachira Energy LLC*, 844 S.E.2d 133 (W. Va. 2020), a true and correct copy of which is attached hereto as Exhibit B.

2. Partition Proceedings

On December 17, 2019, Pachira filed its Motion for Partition by Allotment or Sale (the "Partition Motion"), seeking to partition the Water Line and Handling Facilities. Pachira filed the

Partition Motion to enforce its absolute right to compel a partition of the Water Line and Handling Facilities under NNE's belief that the Water Line and Handling Facilities were jointly held as a tenancy in common. On February 25, 2020, the Circuit Court held a hearing on the Partition Motion, but NNE's counsel objected to presenting their side of the case on that day. Due to the Covid-19 pandemic, the hearing was initially continued until June 15, 2020. However, on June 11, 2020, the parties received communications from the Circuit Court cancelling the hearing on the Partition Motion due to Judge Scudiere's resignation.

While Pachira's Partition Motion has been pending, this Court issued its June 15, 2020 Opinion, affirming the PI Order. The Court stated that "[t]he evidence presented below indicates that Pachira and [NNE] are, in fact, partners in a partnership, and that the [Water Line and Handling Facilities are] partnership property." *Ne. Nat. Energy LLC*, 844 S.E.2d at 138. As a result, Pachira filed a Notice of Supplemental Authority Providing Alternative Ground for Relief. This Court's statement bolstered Pachira's claim that the Water Line and Handling Facilities is joint venture partnership property and, therefore, Pachira has ***an absolute right*** to a partition of the Water Line and Handling Facilities ***regardless of whether the Water Line and Handling Facilities are held as tenants in common or as a joint venture partnership.***

3. Discovery

Under the existing scheduling order, discovery closed on December 1, 2019.[1] For more than a year, the parties conducted voluminous discovery, which involved numerous discovery motions filed by both parties. The Circuit Court appointed a Discovery Commissioner to oversee

[1] Despite the close of discovery, the parties agreed to postpone depositions with the hope that the parties could reach an amicable resolution through settlement. Depositions remain outstanding.

the majority of the discovery disputes and the parties invested significant time and resources attempting to work through those issues.

As a result of NNE's conduct throughout discovery, on March 24, 2020, Pachira filed a Motion to Compel and for Discovery Sanctions (the "Discovery Motion"), seeking sanctions because NNE forced Pachira to file two motions, attend two hearings (a third was scheduled for June 15, 2020, but was also cancelled by the Circuit Court on June 11, 2020), hours of preparation, document review, technical analyst time, and discussions with NNE's counsel over NNE's improper designation of nearly 18,000 documents as "CONFIDENTIAL – ATTORNEYS' EYES ONLY."

4. Current Status

Due to the Covid-19 pandemic and the resignation of Judge Scudiere, a continuation of the hearing on Pachira's Partition Motion and an initial hearing on Pachira's Discovery Motions are pending. Judge Cindy Scott has been assigned to the case and held a scheduling conference on August 18, 2020. At that time, Judge Scott rescheduled the pending hearings for October 26, 2020.

III. OBJECTIONS TO REFERRAL

A. This dispute does not require specialized treatment to improve the expectation of a fair and reasonable resolution.

While it is true that this dispute is between businesses and involves business transactions, the mere fact that this is a business dispute is not a mandatory or even compelling reason for referral of this matter to the Business Court Division. This litigation does not satisfy the definition of "business litigation" because a transfer to the Business Court Division is not "likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." TCR 29.04(a)(2). Here, while this case may have been

appropriate for referral to the Business Court Division at the outset, the Circuit Court has been successfully navigating the business issues in this case for two years.

NNE claims that the issues at the heart of this case "turn on complex legal analysis[.]" Motion, at ¶ 21. Two of those key issues are (i) the nature of the business relationship between NNE and Pachira with respect to the Water Line and Handling Facilities and (ii) whether NNE's conduct breaches its obligations and duties under that relationship. What NNE fails to point out is that this analysis ***has already taken place***.

NNE is correct, "Pachira seeks to enjoin Defendants' use of the Water Line and Handling Facilities." *Id.* at ¶ 23. However, omitted from the Motion is the fact the Circuit Court ***has already analyzed this issue and granted a preliminary injunction enjoining NNE's conduct.*** *See* PI Order, Ex. A. Not only has the Circuit Court issued a preliminary injunction, which implicitly recognized that Pachira is likely to succeed on the merits of its claim, but NNE appealed the preliminary injunction to this Court. This court not only affirmed the PI Order, it stated that "the language of the West Virginia Uniform Partnership Act . . . supports the circuit court's conclusion that Pachira is likely to succeed in its claims. The evidence presented below indicates that Pachira and [NNE] are, in fact, partners in a partnership, and that the [Water Line and Handling Facilities are] partnership property. The evidence also supports the conclusion that [NNE] is using that partnership property for personal gain, to the future detriment of both the partnership and its partner, Pachira." *Ne. Nat. Energy LLC*, 844 S.E.2d at 138.

In other words, the Circuit Court and this Court ***have already determined that Pachira is likely to succeed in demonstrating that NNE and Pachira are in a joint venture partnership with respect to the Water Line and Handling Facilities and that NNE's conduct breached the duties owed to Pachira under that joint venture partnership.*** *See id.*

With that determination, Pachira filed its Partition Motion to enforce its absolute right to partition the Water Line and Handling Facilities. When NNE filed this Motion, the Partition Motion was already in the midst of consideration. An initial hearing had already taken place in February and, after a delay due to Covid-19 and Judge Scudiere's resignation, the proceedings will resume on October 26, 2020 before Judge Scott. So while final adjudication of the issues underlying the Water Line and Handling Facilities has not occurred, this Court and the Circuit Court have already provided a roadmap to resolve this case when it determined that Pachira is likely to succeed on the merits of its claims regarding the Water Line and Handling Facilities. That roadmap is Pachira's pending Partition Motion, where Pachira is entitled to partition the Water Line and Handling Facilities ***as a matter of right***.[2] As a result, there is no "need for specialized knowledge or expertise" on these issues in order to "improve the expectation of a fair and reasonable resolution" because that work has already been done over the past two years. TCR 29.04(a)(2).

B. NNE's motion for a referral is nothing more than a delay tactic.

There is no advantage to transferring this case to the Business Court Division. Trial Court Rule 29.08(g) states that:

> The Business Litigation should proceed to final judgment in an expedited manner. The time standards for general civil cases set forth in Trial Court Rule 16.05 shall apply, provided, however, that the Presiding Judge shall make all reasonable efforts to conclude Business Litigation within ten (10) months from the date the case management order was entered.

[2] Pachira's seismic claims have not been the focus of the litigation to date. However, as stated above, breach of contract, fraud, and conversion are not complex issues that would be unfamiliar to the Circuit Court.

This case has been pending for two years. However, as stated above, most of the work has already been done. The only outstanding activity in this case involves (i) a continuation of the hearing on Pachira's Partition Motion; (ii) a hearing on Pachira's Discovery Motion; (iii) possible depositions; (iv) potentially a second mediation; (v) dispositive motions; and (vi) trial. It is Pachira's position that the adjudication of Pachira's pending Partition and Discovery Motions could ultimately resolve this dispute. It is also Pachira's position that due to the procedural posture of this case, the case can be litigated within ten (10) months. *See* TCR 29.08(g). Accordingly, it simply makes no sense to transfer a case where significant decisions on the merits have already been made and significant motions are pending.

The only plausible reason to seek a transfer at this late date is to delay a resolution in this matter, particularly when Pachira's critical Partition Motion is pending. Indeed, NNE could have filed this Motion at any point during the last two years. It could have filed this Motion in January 2018 when it was clear that the original Judge, Judge Clawges, was retiring. It did not. It could have filed this Motion at any time in 2019. It did not. Instead, NNE waited two years to file this Motion, shortly after Judge Scott was assigned to the case and after significant rulings by the Circuit Court and an appeal to this Court. There is no reason to believe that the Business Court Division is better suited than Judge Scott to move this case to resolution, particularly in light of the procedural posture of this case. While Judge Scott may be new to the case, she benefits from court staff and a Discovery Commissioner who have lived with this case for those two years.

NNE cannot be permitted to delay the adjudication of this case and, particularly, Pachira's critical Partition and Discovery Motions, under the guise of a transfer to the Business Court Division.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Pachira Energy LLC respectfully requests that the Court deny the request to refer the matter styled *Pachira Energy LLC v. Northeast Natural Energy LLC, et al.*, Case No. 18-C-369, pending in the Circuit Court of Monongalia County, West Virginia to the Business Court Division.

Dated: August 28, 2020

Respectfully submitted,

/s/ Katherine M. Gafner

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Counsel for plaintiff Pachira Energy LLC

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

PACHIRA ENERGY LLC,

Plaintiff,

v.

Case No. 18-C-369
Judge Russell M. Clawge, Jr.

NORTHEAST NATURAL ENERGY LLC, and
NNE WATER SYSTEMS LLC,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND REQUEST FOR EXPEDITED HEARING

On September 19, 2018, Plaintiff Pachira Energy LLC ("Plaintiff"), by counsel, and Defendants Northeast Natural Energy LLC ("NNE") and NNE Water Systems LLC ("NNE WS") (collectively "Defendants"), by counsel, appeared for a noticed hearing on Plaintiff Pachira Energy LLC's Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing (the "Motion"). The Court heard no testimony, but considered proffered facts by counsel, statements in Plaintiff's verified complaint, the affidavits of Benjamin Statler and Mike John, and the arguments of counsel. At the hearing, the Court requested that Defendants provide additional detail as to the damages they would suffer if an injunction should issue. On September 24, 2018, Defendants submitted a letter to the Court regarding those damages. Plaintiff submitted a response to that letter on September 26, 2018.

Having reviewed Plaintiff's Motion and Defendants' Response as well as Defendants' letter regarding damages and Plaintiff's response thereto, and having heard the arguments of

EXHIBIT A

counsel at the hearing held on September 19, 2018, the Court **GRANTS** the Motion in part and **DENIES** the Motion in part based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 20, 2011, Plaintiff and NNE entered into an Area of Mutual Interest and Exploration Agreement ("AMI Agreement") establishing the Blacksville Area of Mutual Interest—the geographical focus of their business operations—which includes oil and gas interests in Monongalia County, West Virginia as well as parts of Greene County, Pennsylvania (the "Blacksville AMI").

2. Plaintiff and NNE agreed that all leases taken within the Blacksville AMI in which both Plaintiff and NNE participated would be taken with NNE owning a 75% working interest and Plaintiff owning a 25% working interest.

3. The rights and obligations of Plaintiff and NNE concerning the drilling and operation of the wells drilled in the Blacksville AMI are set forth in a separate Operating Agreement (the "JOA").

4. NNE constructed and Plaintiff participated in the cost of constructing certain water line and handling facilities (the "Water Line and Handling Facilities") inside the Blacksville AMI.

5. There is no written agreement governing the construction, operation, or maintenance of the Water Line and Handling Facilities.

6. NNE and Plaintiff shared the direct cost of construction, operation, and maintenance of the Water Line and Handling Facilities using the same 75%/25% ratio used in the AMI Agreement and the JOA.

7. NNE assigned its interest in the Water Line and Handling Facilities to NNE WS.

8. Defendants constructed another water line to connect the Monongahela River to the Water Line and Handling Facilities (the "Monongahela River Trunk Line").

9. The Monongahela River Trunk Line is located outside of the Blacksville AMI.

10. Plaintiff has no interest in and did not share in the cost of construction, operation, or maintenance of the Monongahela River Trunk Line.

11. Defendant NNE WS intends to charge working interest owners such as Plaintiff their proportionate share of $0.50 per barrel for water transported through the Monongahela River Trunk Line to the boundary of the Blacksville AMI.

12. As part of the Water Line and Handling Facilities, NNE also constructed and Plaintiff participated in the cost of constructing a pipeline that connects to the Monongahela Trunk Line at the edge of the Blacksville AMI to bring water sourced from the Monongahela River into the Blacksville AMI, known as the Mon River Extension.

13. Plaintiff had knowledge of the construction of the Mon River Extension and knowledge of its intended purpose to facilitate using water from the Monongahela River inside the Blacksville AMI.

14. The Mon River Extension is part of the Water Line and Handling Facilities and is located completely inside the Blacksville AMI.

15. Because the Mon River Extension is part of the Water Line and Handling Facilities, the cost and ownership of the Mon River Extension is also 75%/25%.

16. There were ongoing negotiations between the parties regarding the Water Line and Handling Facilities.

17. On September 4, 2018, NNE and NNE WS began testing the Monongahela River Trunk Line to transport water to the Mepco wells, which are located within the Blacksville AMI.

18. NNE and Plaintiff jointly own the Mepco wells using the same 75%/25% ratio set forth in the AMI Agreement and the JOA.

19. On September 12, 2018, NNE began hydraulically fracturing the Mepco wells by blending produced water with the fresh water from the Monongahela River that was transported to the Mepco well pad through the Monongahela River Trunk Line and the Mon River Extension.

20. Defendants intend to use the Water Line and Handling Facilities to transport water from the Monongahela River Trunk Line to wells located outside of the Blacksville AMI in which Pachira holds no interest.

21. Defendants also advised Plaintiff of the possibility of using the Water Line and Handling Facilities to sell water to third parties for use outside of the Blacksville AMI.

22. Any damage that Plaintiff may suffer stemming from the use of the Water Line and Handling Facilities to transport Monongahela River water for use inside the Blacksville AMI can be calculated and reduced to monetary damages.

23. Plaintiff seeks to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water from sources located outside of the Blacksville AMI, (ii) transport water to locations outside of the Blacksville AMI, or (iii) sell water to third parties for use outside of the Blacksville AMI.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code § 55-5-1, et. seq., and Rule 65 of the West Virginia Rules of Civil Procedure, Circuit Courts have authority, prior to the final adjudication of a case, to issue a preliminary injunction, if a party establishes the necessity for such an injunction.

2. Under case law from the West Virginia Supreme Court of Appeals:

> 'The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.' Point 4. syllabus, State ex rel. Donley v. Baker, 112 W.Va. 263 (1932).

Jefferson Cty. Bd. of Educ. v. Educ. Ass'n., 183 W. Va. 15, 24, 393 S.E.2d, 653, 662 (1990), citing Syllabus Pt. 2 of Severt v. Beckley Coals, Inc., 153 W. Va. 600, 170 S.E.2d 577 (1969).

3. The West Virginia Supreme Court expanded on the analysis a circuit court should apply in determining whether or not to issue a preliminary injunction, stating:

> Under the balance of hardship test the district court must consider, in 'flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. (Citation omitted).

Jefferson, supra, citing Merril Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985).

4. Therefore, in evaluating a motion for a preliminary injunction, West Virginia law directs the circuit courts to look toward a balancing of a hardship caused to each party were the court to grant the injunction, and, in doing so, to specifically look at four (4) factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction: (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

5. After applying the balance of hardship test, and reviewing each factor, the Court finds that the Motion is **GRANTED** in part and **DENIED** in part.

6. The balance of hardship favors granting the Motion to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville AMI.

(a) The Court finds that Plaintiff has established that it is likely to suffer immediate and irreparable harm before the Court makes its final ruling on Plaintiff's request for permanent injunctive relief if Defendants are not enjoined from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI.

(b) The Court finds that Plaintiff has established that there is a likelihood of success on the merits of its claim to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville AMI.

(c) The Court finds that enjoining Defendants from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI is in the public interest.

7. The balance of hardship favors denying the Motion to enjoin Defendants from using the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

(a) The Court finds that Plaintiff has failed to meet its burden to establish that it is likely to suffer irreparable harm in the absence of injunctive relief with regard to the use of the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

(b) The Court finds that any damage that Plaintiff may suffer stemming from the use of the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE can be calculated and reduced to monetary damages.

(c) The Court finds that there is no public interest served by enjoining Defendants from using the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

ORDER

The Court hereby ORDERS as follows:

1. Plaintiff's Motion is **GRANTED** in part and **DENIED** in part.

2. The Court **GRANTS** the Motion and Defendants NNE and NNE WS are enjoined from using the Water Line and Handling Facilities (i) to transport water to locations outside of the Blacksville AMI or (ii) to sell water to third parties for use outside of the Blacksville AMI.

3. The Court **DENIES** the Motion to the extent it seeks to enjoin Defendants' use of the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

4. Nothing in this Order shall be construed to impair the parties' ability to transport water from Dunkard Creek through the Water Line and Handling Facilities for use at wells located within the Blacksville AMI.

5. This Order is binding on the officers, agents, servants, employees, and attorneys of NNE and NNE WS and on other persons who are in active concert or participation with NNE and/or NNE WS.

6. This preliminary injunction shall continue in effect throughout the pendency of the above-captioned case unless modified by further Order of this Court.

7. Within five (5) days from entry of this Order, Plaintiff shall post a bond with the Clerk of the Circuit Court of Monongalia County, West Virginia in the form of a law firm check or certified money order in the amount of ten thousand dollars ($10,000.00) paid to the order of the Clerk of the Circuit Court of Monongalia County, West Virginia (the "Bond"). The Bond shall be held by the Clerk until an order of Court is entered directing further action.

The Court directs the Circuit Clerk to provide certified copies of this order to all parties and counsel of record.

ENTER: October 25, 2018

Russell M. Clawges, Jr., Judge
17th Judicial Circuit, ~~Division II.~~

ENTERED: Oct 25 2018
DOCKET LINE 39 Jean Friend, Clerk

844 S.E.2d 133
Supreme Court of Appeals of West Virginia.

NORTHEAST NATURAL ENERGY LLC, and NNE Water Systems LLC, Defendants Below, Petitioners
v.
PACHIRA ENERGY LLC,
Plaintiff Below, Respondent

No. 18-1034
|
Submitted: January 28, 2020
|
Filed: June 12, 2020

Synopsis

Background: Purported partner in water system partnership brought action against purported co-partner, with which partner had an earlier agreement relating to exploitation of oil and gas leases, alleging that co-partner was violating its duty as a partner and was using partnership-owned water system for personal gain to transport water to its own wells and to third parties for sale. The Circuit Court, Monongalia County, Russell M. Clawges, J., granted partner's motion for preliminary injunction. Co-partner appealed.

Holdings: The Supreme Court of Appeals, Hutchison, J., held that:

[1] partner demonstrated a likelihood of success on its claims, and

[2] partner demonstrated that it was reasonably likely to suffer irreparable harm absent a preliminary injunction.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (16)

[1] **Appeal and Error** ⇐ Nature and Scope of Decision

Order granting a preliminary injunction is not a final order for purposes of appeal.

[2] **Appeal and Error** ⇐ Interlocutory and Intermediate Decisions

Typically, Supreme Court of Appeals will not review an interlocutory order.

[3] **Appeal and Error** ⇐ Injunction

State constitutional provision granting Supreme Court of Appeals appellate jurisdiction of civil cases in equity includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief. W. Va. Const. art. 8, § 3.

[4] **Appeal and Error** ⇐ Preliminary injunction; temporary restraining order

In reviewing exceptions to findings of fact and conclusions of law supporting granting of temporary or preliminary injunction, Supreme Court of Appeals applies three-pronged deferential standard of review: Court reviews final order granting temporary injunction and ultimate disposition under abuse of discretion standard, reviews circuit court's underlying factual findings under a clearly erroneous standard, and reviews questions of law de novo.

[5] **Injunction** ⇐ Discretionary Nature of Remedy

Injunction ⇐ Grounds in general; multiple factors

The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion, in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

EXHIBIT B

[6] **Injunction** ⇐ Adequacy of remedy at law

Injunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law.

[7] **Injunction** ⇐ Partnerships

Purported partner in water system partnership demonstrated a likelihood of success on its claims, as needed for grant of preliminary injunction in its action alleging that purported co-partner, with whom partner had an earlier agreement relating to exploitation of oil and gas leases, was violating duty as partner and was using water system for personal gain to transport water to its own wells and to third parties for sale; evidence indicated that the parties, who entered into oral agreement to develop and operate water system to transport water for drilling and hydraulic fracturing, were in fact partners, that the jointly-owned water system was partnership property, and that co-partner was using water system for personal gain to future detriment of partnership and partner. W. Va. Code Ann. §§ 47B-1-1(7), 47B-2-2(a), 47B-2-3, 47B-2-4, 47B-4-1(g), 47B-4-5(b)(2)(i).

[8] **Joint Ventures** ⇐ Scope and duration of venture; single or multiple transactions

Partnership ⇐ Joint ventures

A "partnership" relates to general business while a "joint adventure" relates to a single business transaction.

[9] **Injunction** ⇐ Partnerships

Purported partner in water system partnership demonstrated that it was reasonably likely to suffer irreparable harm without a grant of preliminary injunction in its action alleging that co-partner, with whom partner had an earlier agreement relating to exploitation of oil and gas leases, was violating duty as a partner and was using water system for personal gain to transport water to its own wells and to third parties for sale; while co-partner's alleged future use of water system was probably capable of being reduced to some monetary value, the question was whether partnership and partner should be required to submit to having property taken and used without permission, that answer was "no," and a preliminary injunction preserved the status quo. W. Va. Code Ann. §§ 47B-1-1(7), 47B-2-2(a), 47B-2-3, 47B-2-4, 47B-4-1(g), 47B-4-5(b)(2)(i).

[10] **Injunction** ⇐ Clear, likely, threatened, anticipated, or intended injury

Injunction ⇐ Irreparable injury

The term "irreparable," as part of the requirement for a preliminary injunction that a movant be reasonably likely to suffer irreparable harm absent the injunction, does not always mean what it seems to signify, that is, a physical impossibility of reparation.

[11] **Equity** ⇐ Grounds of jurisdiction in general

Equity will entertain jurisdiction to prevent a threatened injury.

[12] **Injunction** ⇐ Partnerships

A partner's breach of fiduciary duty of loyalty to the partnership and to other partners gives rise to a right to injunctive relief. W. Va. Code Ann. § 47B-1-1 et seq.

[13] **Partnership** ⇐ Good faith

The relationship between partners is fiduciary, and the highest degree of good faith is required. W. Va. Code Ann. § 47B-1-1 et seq.

[14] **Injunction** ⇐ Preservation of status quo

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.

[15] **Injunction** ⇐ Prospective, preventive, or future-oriented nature of remedy

Injunctive relief is designed to meet a real threat of a future wrong or a contemporary wrong of a nature likely to continue or recur.

[16] **Injunction** ⇐ Prospective, preventive, or future-oriented nature of remedy

Injunction ⇐ Purpose or function in general

Whether interlocutory or final, injunctive relief is ordinarily preventive or protective in character and restrains actions that have not yet been taken; it is generally not intended to redress, or punish for, past wrongs.

Syllabus by the Court

1. " West Virginia Constitution, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief." Syllabus Point 2, *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003).

2. "In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield,* 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syllabus Point 1, *State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996).

3. "The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion, in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syllabus Point 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932).

***135 Appeal from the Circuit Court of Monongalia County, The Honorable Russell M. Clawges, Judge, Civil Action No. 18-C-369**

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Opinion

HUTCHISON, Justice:

In this appeal from the Circuit Court of Monongalia County, we are asked to examine a circuit court's order granting a preliminary injunction. The circuit court found that the plaintiff below had a likelihood of succeeding on the merits of its underlying claims and found that the plaintiff was likely to suffer irreparable harm in the absence of the injunction. The defendant below challenges these findings.

As we discuss below, we find no error in the circuit court's preliminary injunction order. Accordingly, we affirm the circuit court's decision.

I. Factual and Procedural Background

In 2011, plaintiff Pachira Energy LLC ("Pachira") entered into an agreement with ***136** defendant Northeast Natural Energy LLC ("Northeast"). The agreement established the Blacksville Area of Mutual Interest ("Blacksville AMI") and set forth guidelines for exploiting oil and gas leases and other mineral interests in an area encompassing parts of Monongalia County, West Virginia, and Greene County, Pennsylvania. Pachira and Northeast agreed that all jointly-held leases within the Blacksville AMI would be developed

with Northeast owning a 75% working interest and Pachira owning a 25% working interest. The parties subsequently entered into a Joint Operating Agreement to operate natural gas wells on the leased lands, and again agreed to split costs and profits using the same 75%/25% ratio.

At some later point, Pachira and Northeast entered into an oral agreement to develop and operate a water system. This system was originally designed to efficiently transport water from Dunkard Creek, a stream within the Blacksville AMI, for use in the drilling and hydraulic fracturing ("fracking") of wells within the Blacksville AMI. The parties agree that there is no written agreement governing the construction, operation, or maintenance of the water lines and facilities. Despite no such formal agreement, Pachira and Northeast jointly shared the costs of the water system using the same 75%/25% ratio previously used in the Blacksville AMI agreement and the Joint Operating Agreement. [1]

1 Northeast subsequently assigned its interest in the water lines and facilities to an affiliate, defendant NNE Water Systems LLC. For simplicity, we will hereafter refer to NNE Water Systems LLC jointly with its parent, Northeast.

It appears that at some point in 2018, defendant Northeast began a separate venture: the construction of the "Monongahela River Trunk Line," a water line from the Monongahela River to the Blacksville AMI. Northeast constructed the trunk line at its own expense. Pachira has no ownership interest in the trunk line and paid nothing for the costs of construction, operation, or maintenance. However, Pachira paid for 25% of the costs of an extension line connecting the Blacksville AMI water system to the Monongahela River Trunk Line, while Northeast paid the remaining 75%.

In mid-2018, Northeast informed Pachira that it intended to charge Pachira its 25% share of $0.50 per barrel for water transported through the Monongahela River Trunk Line to the boundary of the Blacksville AMI. Then, in September 2018, Northeast began testing on the Monongahela River Trunk Line, intending to use water from the Monongahela River rather than Dunkard Creek to develop wells within the Blacksville AMI.

However, Pachira had learned that Northeast also intended to use the jointly-owned Blacksville AMI water system to transport water from the Monongahela River and through the Blacksville AMI to wells in southern Pennsylvania. These Pennsylvania wells were outside the Blacksville AMI and were owned, in whole or in part, by Northeast. Pachira had no interest in the wells that Northeast sought to supply. Furthermore, Pachira learned that Northeast intended to use the Blacksville AMI water system to transport and sell Monongahela River water to third parties for use outside of the Blacksville AMI.

On September 11, 2018, Pachira filed a complaint against Northeast generally alleging that Northeast was breaching various agreements and was abusing its power to benefit itself to the detriment of Pachira. Among its various requests for relief, Pachira sought a permanent injunction to stop Northeast's use of the jointly-owned water system within the Blacksville AMI to support Northeast's drilling operations outside the Blacksville AMI, and to sell water to third parties for use outside of the Blacksville AMI.

Contemporaneously, Pachira filed an emergency motion asking the circuit court for a preliminary injunction and an expedited hearing. Until the underlying dispute could be resolved, Pachira asked the court to temporarily enjoin Northeast from using the Blacksville AMI water system to transport water to locations outside of the Blacksville AMI, or to sell water to third parties for use outside of the Blacksville AMI. [2] The circuit *137 court conducted a hearing on September 19, 2018, and thereafter received documents from the parties answering questions raised by the circuit court during the hearing.

2 Pachira also asked the circuit court to enjoin Northeast from using the Blacksville AMI water system to import water from sources outside the Blacksville AMI (that is, water from the Monongahela River Trunk Line at a cost of $0.50 per barrel), and using that water to develop and operate wells jointly controlled by the parties within the Blacksville AMI. The circuit court denied this part of Pachira's motion for a preliminary injunction, and neither party appeals this portion of the circuit court's order.

In an order entered October 25, 2018, the circuit court granted Pachira's motion for a preliminary injunction. The circuit court found that Pachira was likely to succeed in proving its claims, and had shown it was likely to suffer immediate and irreparable harm before the court would be able to issue a final ruling on Pachira's request for a permanent injunction. The

circuit court enjoined Northeast from using the water system inside of the Blacksville AMI to transport water to locations outside of the Blacksville AMI, and enjoined Northeast from using the water system to transport and sell water to third parties for use outside of the Blacksville AMI.

Northeast now appeals the circuit court's preliminary injunction order.

II. Standard of Review

[1] **[2]** **[3]** The order under appeal is not a final order and, typically, this Court will not review such an interlocutory order. However, in Syllabus Point 2 of *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003), we held that "*West Virginia Constitution*, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief."

[4] We apply the following deferential standards for reviewing an order granting a preliminary injunction:

> In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, ... we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo.

Syllabus Point 1, *State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996) (citations omitted).

III. Discussion

[5] Northeast contends that the circuit court erred in granting Pachira a preliminary injunction. We have articulated the following standard for circuit courts weighing motions seeking injunctive relief:

> The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion, in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

Syllabus Point 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932). In more recent times, we have articulated a clearer alternative standard:

> The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Imperial Mktg., 196 W. Va. at 352 n.8, 472 S.E.2d at 798 n.8 (citations and quotations omitted).

Northeast contends that Pachira's claims that Northeast is "trespassing" upon or "misusing" *138 the water system are fundamentally unsound, and therefore that the circuit court erred in finding Pachira had established that there was a likelihood of success on the merits of its claims. Northeast concedes that it jointly owns the water system with Pachira. Northeast, however, argues that the companies share the water system as tenants in common, because each party owns a separate fractional share of undivided property. As tenants in common, it is Northeast's position that each tenant is "equally entitled to the use, occupancy, enjoyment, and possession of the common property." 86 C.J.S. *Tenancy in Common* § 21 (2018). Northeast argues that it shares ownership of the water system, and that is impossible for it to trespass on its own property.

[6] Northeast also asserts that when applying the above-stated guidelines for injunctive relief, the circuit court erred in finding Pachira was likely to suffer irreparable harm. "We have uniformly held that in order to obtain a preliminary injunction, a party must demonstrate the presence of irreparable harm." *Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990). Northeast argues that Pachira essentially argued to the circuit court that a preliminary injunction was needed to preserve the status quo and to stop Northeast from misusing the water system in the future. As this Court has found, "[i]njunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law." *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985). Northeast insists that not only is Pachira unlikely to win on the merits of its claims, but that even if Pachira does win, then it can be compensated with an adequate remedy at law: money damages.

[7] We reject Northeast's position because, as we discuss below, the language of the West Virginia Uniform Partnership Act ("Partnership Act") supports the circuit court's conclusion that Pachira is likely to succeed in its claims. *See* W. Va. Code § 47B-1-1 *et seq.* The evidence presented below indicates that Pachira and Northeast are, in fact, partners in a partnership, and that the Blacksville AMI water system is partnership property. The evidence also supports the conclusion that Northeast is using that partnership property for personal gain, to the future detriment of both the partnership and its partner, Pachira. Hence, we find the record supports the circuit court's conclusion that Pachira will suffer an irreparable harm in the absence of the preliminary injunction.

To begin, the Partnership Act defines a partnership as "an association of two or more persons to carry on as coowners a business for profit[.]" W. Va. Code § 47B-1-1(7) (2003). A partnership is created by "the association of two or more persons to carry on as coowners a business for profit ... *whether or not the persons intend to form a partnership.*" W. Va. Code § 47B-2-2(a) (1995) (emphasis added). "Under this definition, people operating a business together for profit 'may inadvertently create a partnership despite their expressed subjective intention not to do so.' " *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 540, 766 S.E.2d 785, 799 (2014) (quoting Allan Donn, Robert W. Hillman, & Donald J. Weidner, *The Revised Uniform Partnership Act,* § 202, Official Comments (Thomson Reuters 2014)). [3]

3 Northeast repeatedly points to language in both the agreement establishing the Blacksville AMI and in the Joint Operating Agreement that specifically provides that Northeast and Pachira are not, by entering those agreements, forming a partnership. We acknowledge the existence of that language but note that Pachira's claims are based on an entirely different agreement: the oral agreement between the parties to construct, operate and maintain the water system. Northeast has provided no evidence that this oral agreement specifically disclaimed the formation of a partnership.

[8] The evidence before the circuit court showed that, in the absence of a written agreement governing the relationship of the parties regarding the water system in the Blacksville AMI, the conduct of the parties may have inadvertently created a partnership to co-own and operate the water system as a business for profit. [4] In other words, *139 Pachira made a substantial case before the circuit court indicating that the parties formed a water system partnership.

4 Alternatively, Pachira argued that the water system in the Blacksville AMI could also be characterized as a "joint venture." "[A] partnership relates to general business ... while [a] joint adventure relates to a single business transaction." *Nesbitt v. Flaccus*, 149 W. Va. 65, 74, 138 S.E.2d 859, 865 (1964). We have defined a joint venture as follows:

> A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they

> combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.
>
> Syllabus Point 2, *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987).

The question remains, however, whether the water system in the Blacksville AMI could be property owned by this partnership. We believe that it could.

The Partnership Act states that "[a] partnership is an entity distinct from its partners." W. Va. Code § 47B-2-1 (1995). Because a partnership is a distinct entity, the Act provides the following rule for the ownership of property by a partnership: "Property acquired by a partnership is property of the partnership and not of the partners individually." W. Va. Code § 47B-2-3 (1995). Under the Partnership Act, "Partners are no longer conceived of as co-owners of partnership property. Rather, the partnership entity owns partnership property." Allan Donn, Robert W. Hillman, Donald J. Weidner, *Rev. Uniform Partnership Act*, § 203 (2019). "Even property that is contributed by partners becomes property of the entity rather than property of a cotenancy of the contributing partners." *Id. See generally, Valentine v. Sugar Rock, Inc.*, 234 W. Va. at 541, 766 S.E.2d at 800 (discussing the philosophical underpinnings of property ownership under the Partnership Act). "[I]f property has become partnership property, the individual partners no longer have a direct interest in it." *Id.*, 234 W. Va. at 541, 766 S.E.2d at 800 (quoting Donn, *Rev. Uniform Partnership Act*, § 204).

The Partnership Act provides guidance as to how a partnership – even an accidentally-formed partnership – may acquire property. Paragraphs (a) and (b) of West Virginia Code § 47B-2-4 (1995) outline various ways that partnerships may acquire property in the name of the partnership, or that property may be transferred to the partnership. However, paragraph (c) provides:

> Property is presumed to be partnership property if purchased with partnership assets, *even if not acquired in the name of the partnership* or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

W. Va. Code § 47B-2-4(c) (emphasis added). Under this paragraph, "property purchased with partnership funds is presumed to be partnership property, notwithstanding the name in which title is held. The presumption is intended to apply if partnership credit is used to obtain financing, as well as the use of partnership cash or property for payment." Donn, *Rev. Uniform Partnership Act* § 204, Official Comments. [5]

5 The presumption created by W. Va. Code § 47B-2-4(c) "is rebuttable. Note that it may not be obvious whether partnership assets have been used to pay for the property. In analyzing the kind of facts that should be shown to rebut the presumption, care should be taken to distinguish disputes among the partners from disputes with third parties." Donn, *Rev. Uniform Partnership Act* § 204.

The evidence before the circuit court suggested that both Pachira and Northeast invested significant amounts of money, time, and labor to construct, operate, and maintain the water system in the Blacksville AMI. Even though the water system was not titled in the name of a particular partnership (instead, the system appears to have been titled in the name of Northeast Natural Energy before being transferred to its subsidiary, NNE Water Systems), the water system was constructed using assets pooled by Pachira and Northeast for the purpose of constructing, operating and maintaining a water system to support natural gas production in the Blacksville AMI. On this record, Pachira has a substantial likelihood of establishing that the water system in the Blacksville AMI was partnership property purchased with partnership assets, and not, as Northeast argues, ***140** property jointly owned by the parties as tenants in common.

[9] The final question we must address is whether Pachira demonstrated that it was reasonably likely to suffer irreparable harm, harm that could not (as Northeast contends) be compensated by money damages. We again turn to the Partnership Act which plainly provides that Pachira, in its capacity as a partner, has a right to seek equitable, injunctive relief against its co-partner Northeast. The Partnership Act provides that "[a] partner may maintain an action against the partnership or another partner for legal or *equitable* relief[.]" W. Va. § 47B-4-5(b) (emphasis added).

A partner may bring an action to protect rights and enforce duties created under the Partnership Act. *See* W. Va. Code § 47B-4-5(b)(2)(i). Key to this case is the following duty imposed on every partner: "A partner may use or possess partnership property only on behalf of the partnership." W. Va. Code § 47B-4-1(g). Pachira's suit alleges that Northeast is violating this duty and is using the partnership-owned water system for personal gain, to transport water to its own wells in southern Pennsylvania and to third parties for sale, and not on behalf of the partnership to support wells in the Blacksville AMI.

As to *past* conduct, the Partnership Act says that partners must "account to the partnership and hold as trustee for it any ... profit or benefit ... derived from a use by the partner of partnership property[.]" W. Va. Code § 47B-4-4(b)(1). The reason the rule is so clear in the context of past conduct is because, usually, partners and partnerships do not discover past misuse of partnership property "until there is an accounting on liquidation of the partnership." Donn, *Rev. Uniform Partnership Act*, § 501 Authors' Comments, n.15. [6]

6 Partners can also be prosecuted for past theft or embezzlement of partnership property, and "can no longer defend on the ground the property was theirs ... [because W. Va. Code § 47B-5-1] now states that the property is not theirs, it is the partnership's." Donn, *Rev. Uniform Partnership Act*, § 501.

Stated differently, as to *past* losses, when a partner misuses partnership property for personal gain and profit, that partner must repay the partnership for the *past* misuse of partnership property. In these instances, cash damages are likely sufficient compensation for the past misconduct; injunctive relief is usually not appropriate because the damage has been done and, if the misconduct will not continue, there is nothing to enjoin.

[10] **[11]** In the instant case, Pachira is asserting it will suffer irreparable harm caused by *future*, threatened misuse of partnership property. "[T]he term 'irreparable' does not always mean what it seems to signify, that is, a physical impossibility of reparation." *Mullens Realty & Ins. Co. v. Klein*, 85 W. Va. 712, 102 S.E. 677, 680 (1920). West Virginia law is clear that "[e]quity will entertain jurisdiction to prevent a threatened injury[.]" *Summers v. Parkersburg Mill Co.*, 77 W. Va. 563, 88 S.E. 1020, 1021 (1916). An "irreparable injury" is one that is "actual and imminent" and "it is likely that the [past] offensive conduct will recur." 3 N.Y. Practice, Com. Litig. in New York State Courts § 18:9 (4th ed.). *See also*, *Fretz v. Burke*, 247 Cal. App. 2d 741, 744-45, 55 Cal.Rptr. 879 (1967) ("[A]n injunction may be granted as to past acts if there is evidence that they will probably recur.").

[12] **[13]** The Partnership Act charges a partner with a fiduciary duty of loyalty to the partnership and to other partners; a breach of this fiduciary responsibility gives rise to a right to injunctive relief. "The relationship between partners is fiduciary, and the highest degree of good faith is required." *Barker v. Smith & Barker Oil & Gas Co.*, 170 W. Va. 502, 509, 294 S.E.2d 919, 926 (1982). Accord *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S.E. 457, 460 (1888) ("it is a violation of good faith for a partner to clandestinely stipulate with third persons for any private and selfish advantage and benefit to himself, exclusive of the partnership."). "The partnership may bring an equitable action in the event of a breach of fiduciary duties by a partner and, in such case, the court may remedy the breach through monetary damages *or injunctive relief*." J. William Callison, Maureen ***141** A. Sullivan, *Partnership Law and Practice: General and Limited Partnerships*, Remedies § 12:14 (2019).

As we noted earlier, one duty imposed by the Partnership Act is that "[a] partner may use or possess partnership property only on behalf of the partnership." W. Va. Code § 47B-4-1(g). "Violation of this rule [by a partner making personal use of partnership property] would be a breach of the duty of loyalty under R.U.P.A. Section 404(b)(1)." Rev. Uniform Partnership Act, "Partner's Rights and Duties," Section 401. Restated in the context of West Virginia's Partnership Act, violation of the rule prohibiting a partner's individual use of partnership property for personal gain (W. Va. Code § 47B-4-1(g)) would be a breach of the partner's duty of loyalty W. Va. Code § 47B-4-4(b)(1). In other words, a partner's use or possession of partnership property for personal gain is a breach of the partner's fiduciary duty of loyalty that can support an award of both monetary damages and injunctive relief.

Moreover, courts that have examined this question have found that when a partner intends to misuse partnership property *in the future*, the partner is imposing an irreparable harm on the partnership and the other partners. In such cases, an injunction to prevent the future harm is warranted.

An example of a trial court granting a preliminary injunction to prevent a partner's future, personal misuse of partnership

property is *Shepard v. Patel*, 2012 WL 6019036 (D. Ariz. Nov. 27, 2012). In *Shepard*, individuals formed a partnership to operate a hotel. One partner (the defendant) began using partnership property to pay himself excessive fees to manage the partnership's hotel; used partnership assets to lease and repair a Mercedes for himself; and disbursed partnership profits to himself for payments he purportedly made on behalf of the partnership (and for which he could produce no receipts). Another partner (the plaintiff) sued to dissolve the partnership and discovered the misuse of property. The plaintiff moved for a preliminary injunction to stop the defendant partner from continuing to dissipate partnership property through self-dealing.

[14] The trial court noted the standard for granting a preliminary injunction, including the requirement that the plaintiff show "a likelihood of irreparable harm in the absence of preliminary relief." The trial court then pointed out that "[a] preliminary injunction properly issues in actions seeking dissolution and accounting of partnerships to maintain the status quo pending adjudication on the merits." 2012 WL 6019036, at *4. This is because "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Hence, "[t]o prevent any further improper disbursements of partnership assets and to ensure an accurate accounting at the time of trial, a preliminary injunction is appropriate and necessary." *Shepard*, 2012 WL 6019036, at *4.

The trial court in *Shepard* relied upon a seminal case from California, *Wind v. Herbert*, 186 Cal. App. 2d 276, 8 Cal.Rptr. 817 (1960). The California court found that a trial court properly issued a preliminary injunction to preserve the status quo and to prevent future misuse of partnership property by one partner. The court explained that the granting of a preliminary injunction "rests largely in the discretion of the trial court," and that the general purpose of a preliminary injunction "is to preserve the status quo until the merits of the action can be determined."

The California court then expansively addressed the requirement of an "irreparable injury," and indicated that when a court examines irreparable harm caused by the future misuse of partnership property, the court can go beyond monetary damages and consider whether a partner should have *the right* to inflict harm on other partners.

Defendants argue that there was no showing that a preliminary injunction was necessary to prevent "irreparable injury" to the partnership assets. They contend that any conceivable future injury would be readily ascertainable and could be compensated by money damages and that there is no claim that defendants could not ***142** respond in damages. However, this argument is without merit.

The concept of "irreparable injury" which authorizes the interposition of a court of equity by way of injunction does not concern itself entirely with injury beyond the possibility of repair or beyond possible compensation in damages. Rather, by definition, an injunction properly issues in any case where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. Further, the equitable rule ... is that: "The term 'irreparable injury' ... means that species of damages, *whether great or small, that ought not to be submitted to on the one hand or inflicted on the other.*" In *Commonwealth v. Pittsburgh & Connelesville R.R. Co.*, 24 Pa. 159, [160 (1854)] the court said ..: "The argument that there is no 'irreparable damage,' would not be so often used by wrongdoers if they would take the trouble to observe that the word 'irreparable' is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by any accurate standard.... Besides this, where the right invaded is secured by ... contract there is generally no question of the *amount* of damages, but simply of the *right.*" In the instant case, the wrongs complained of were obviously of "a repeated and continuing character" and the rule stated in the case last cited is clearly apposite. *Wind v. Herbert*, 186 Cal. App. 2d at 284-85, 8 Cal.Rptr. 817 (cleaned up, emphasis in original).

[15] **[16]** It is obvious that plaintiff Pachira would have a right to monetary damages from defendant Northeast for the defendant's alleged future misuse of partnership property for personal gain. It is also true that Pachira's future damages may be capable of exacting calculation. However, the question the trial court was being asked was, does Northeast have *the right* to continue causing damages to the partnership and to Pachira in the future? As this Court once noted:

> Injunctive relief is designed to meet a real threat of a future wrong or a contemporary wrong of a nature likely to continue or recur. Whether interlocutory or final, injunctive relief is ordinarily preventive or protective in character and restrains actions that have not yet been taken. It is generally not intended to redress, or punish for, past wrongs.

Bd. of Educ. of Cty. of Taylor v. Bd. of Educ. of Cty. of Marion, 213 W. Va. 182, 186, 578 S.E.2d 376, 380 (2003).

The case law supports the circuit court's decision to preserve the status quo, and to temporarily halt defendant Northeast's future use of the ostensible partnership's water system for its own personal gain. The circuit court's preliminary injunction was designed to meet a real threat of a future wrong, or a contemporary wrong of a nature likely to continue or recur. While Northeast's future use is probably capable of being reduced to some monetary value, the question is whether the partnership and plaintiff Pachira should be required to submit to having property taken and used without permission. The answer is, obviously, no.

On this record, it was fair for the circuit court to preserve the status quo until the parties resolve the merits of their dispute. The circuit court did not err when it found Pachira was likely to suffer irreparable harm in the absence of action by the court. Accordingly, we find no error in the circuit court's preliminary injunction order. [7]

7 Northeast raises three other issues on appeal. First, Northeast contends the circuit court erred in relying upon an affidavit proffered by Pachira. Second, Northeast asserts the circuit court failed to clearly identify any public interest impacted by Northeast's conduct. Finally, Northeast argues the circuit court failed to properly weigh the harm caused to Northeast by the injunction. After examining the record, we find no merit to these issues and therefore decline to address them.

IV. Conclusion

The circuit court's October 25, 2018, preliminary injunction order is affirmed.

Affirmed.

All Citations

844 S.E.2d 133

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following this 28th day of August, 2020, in the manner referenced below:

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