IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

THE BRUCE McDONALD HOLDING COMPANY, et al, Plaintiffs, v. ADDINGTON, INC., et al, Defendants.	)	Case No. 16-C-70-LGN Presiding Judge: Hon. James H. Young, Jr. Resolution Judge: Hon. Joanna I. Tabit

JUDGMENT ORDER

On August 14, 2017, this matter came on to be heard, pursuant to notice and agreement of the parties, upon Plaintiffs' Motion for Summary Judgment on Count I – Duty to Mine, Plaintiffs' Motion for Summary Judgment on Count III of the First Amended Complaint, Plaintiffs' Motion for Summary Judgment on Each of Defendants' Affirmative Defenses, Plaintiffs' Motion for Summary Judgment on All Counterclaims by Addington/Brink's for Breach of Contract, Plaintiffs' Motion for Summary Judgment on Defendant Pittston Coal Company's Tortious Interference Counterclaim, and Defendants' Motion for Summary Judgment, upon the Responses and the Replies thereto, and upon the evidence submitted by the parties in support of and in opposition to such Motions. Plaintiffs appeared by their counsel Nicholas S. Johnson, Brian A. Glasser, Sharon F. Iskra, and Sallie E. Gilbert. Defendants Addington, Inc. and The Brink's Company appeared by their counsel Wade W. Massie, W. Henry Jernigan, Jr., and

Alexander C. Ward. Defendant Pittston Coal Company appeared by its counsel Shawn P. George.

Thereupon, the Court heard argument on the Motions. Upon consideration of the argument, pleadings, record, and authorities, the Court, being otherwise sufficiently advised, finds and rules as follows:

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). Once the moving party has shown "by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary." Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). The Court will enter summary judgment "if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party." *Id.* at Syl. Pt. 2. "'Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.'" *Tolliver v. Kroger Co.*, 201 W. Va. 509, 513, 498 S.E.2d 702, 706 (1997) (quoting *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995)). Summary judgment is "'designed to effect a prompt disposition of controversies

on their merits without resort to a lengthy trial,' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335 (quoting *Painter v. Peavy*, 192 W. Va. 189, 192 n.5, 451 S.E.2d 755, 758 n.5 (1994)).

FINDINGS OF FACT

The Court finds that the following facts are not genuinely in dispute:

1. This action involves an Agreement of Lease dated June 19, 1978 ("Lease"), between The Bruce McDonald Holding Company, et al. ("McDonald Companies"), as lessors, and Elkay Mining Company ("Elkay"), as lessee. The Pittston Company ("Pittston") guaranteed the performance of Elkay under a Guaranty Agreement dated June 22, 1978.

2. In 1998, with the consent of lessors, Elkay assigned the Lease to Addington, Inc. ("Addington"). In 2003, Pittston changed its name to The Brink's Company ("Brink's").

3. Through the years, there have been several surrenders of portions of the leased premises and an addendum, but, for purposes of this action, there have been no material changes in terms of the Lease.

4. In 1984, the McDonald Companies filed the first of three actions against Elkay and Pittston involving the Lease. The first action was in the Circuit Court of Boone County and later transferred to the Circuit Court of Logan County and assigned Case No. 84-C-256. The other two actions were filed in the Circuit Court of Logan

County and assigned Case No. 86-C-195 and Case No. 86-C-599. These cases are collectively referred to as the "Prior Litigation."

5. In the Prior Litigation, the Court was called upon to decide what amounts are due under the Lease when there has been no mining on the property. Article XIII of the Lease specifies the tons to be mined each year and the royalties to be paid if the lessee fails to mine those tons. Article XIII states that the annual minimum production royalties are to be calculated based on:

> the average price at which the same quality of coal was sold by Lessee to consumers by arm's length transactions from the same preparation plant from which Lessors' said coal, hereby leased, was sold, which average price shall be obtained by the use of the monthly sales average for such quality of coal sold from said preparation plant during the last three (3) months of said . . . lease year.

6. At the time of the Prior Litigation, no coal had been mined from the property, and there were no sales of coal by lessee from a preparation plant from which lessors' coal was sold.

7. The McDonald Companies argued that royalties should be calculated based upon sales by lessee of comparable coal. Defendants maintained that no royalties were due because there were no comparable sales by lessee from the preparation plant specified in Article XIII.

8. The Court in the Prior Litigation held that royalties under Article XIII should be based on the price of comparable coal "sold by the Lessee."

> Inasmuch, however, as said minimum annual royalty is, by Article XIII of the Lease, to be based upon sale prices for other comparable coals sold by the Lessee at the royalty

> rates provided by Article VIII of said Lease, being ten percent (10%) of the average monthly sales price f.o.b. the mines, for each ton of two thousand (2,000) pounds of coal, or Two Dollars ($2.00) per ton, whichever is greater, an inquiry of damages will be held before this Court at a date and time to be designated by the Court to determine the actual amounts, if any, which are payable by Defendants to Plaintiffs for minimum annual royalties . . . .

See Opinion dated August 26, 1987, and Judgment Order dated May 31, 1988.

9. After an Inquiry on Damages, the Court found that the McDonald Companies failed to meet their burden of proof and held that royalties were to be calculated using the minimum royalty rate of $2.00 per ton, which is contained in Article VIII. See Judgment Order dated November 1, 1988. Specifically, the Court held:

> Inasmuch as there was no "preparation plant from which Lessors' said coal, hereby leased, was sold" (there having been no production whatever of Lessors' coal by Lessee), a strict interpretation of the language of said Article XIII of the Lease, standing alone, would result in a finding for Defendants that no minimum tonnage royalty is payable. However, the purpose and intent of the language used, gathered from the subject Article and the Lease as a whole, is to define damages and not to eliminate damages, as urged by the Defendants. The Court will therefore, in fixing damages, use the Two Dollar ($2.00) minimum, based upon the proposition that there was no evidence from any party of any sales from the [Lessee's] Rum Creek Plant of under Twenty Dollars ($20.00) per ton . . . .

See Judgment Order dated November 1, 1988.

10. Elkay and Pittston appealed the judgment to Supreme Court of Appeals, which refused the appeal. The McDonald Companies did not appeal.

11. From the conclusion of the Prior Litigation to present, there has been no mining on the leased premises, and, during the time at issue in this case, Defendants

were no longer actively engaged in business of producing and selling coal from which markets could be determined. Each year, however, the lessee has paid annual minimum production royalties of $500,000 based on 250,000 tons—the tons required to be mined in Article XIII—multiplied by $2.00 per ton—the royalty rate established in the Prior Litigation for years when there are no sales of comparable coal by the lessee.

12. Each year from the conclusion of the Prior Litigation until the filing of this action, the McDonald Companies accepted the annual minimum production royalties without any complaint or objection based on the Lease minimum production tons or the rate of $2.00 per ton.

13. Not once in this period of 25 years did the McDonald Companies contend that the lessee was obligated to mine more than the 250,000 tons a year specified in Article XIII of the Lease or to pay royalties using a royalty rate of more than $2.00 per ton for the unmined coal.

14. Over this same period, the parties consistently interpreted and applied the Lease and the judgment in the Prior Litigation as requiring annual minimum production royalties of $500,000 when there was no mining on the property.

15. In March of 2016, the McDonald Companies filed this action against Addington and Brink's. Their Complaint contains four counts. Count I seeks a declaratory judgment that the lessee has a duty to diligently mine the coal. Count II seeks damages for the breach of the purported duty of diligent mining. Count III seeks a declaratory judgment that annual minimum production royalties should be based on

comparable sales by other coal producers when there is no mining on the leased premises. Count IV seeks damages for breach of the purported duty to pay on comparable sales.

16. Addington and Brink's filed an Answer denying any liability to the McDonald Companies and asserting affirmative defenses.

17. Addington and Brink's also filed a Counterclaim against the McDonald Companies for breach of the Lease. In their Counterclaim, Addington and Brink's allege that the McDonald Companies wrongfully refused consent to assignments and subleases in violation of their duty of good faith and fair dealing.

18. In December 2016, the McDonald Companies filed a First Amended Complaint. It added Pittston Coal Company ("Pittston Coal") as a defendant and alleged in a new Count V that Pittston Coal tortiously interfered with Addington's performance under the Lease. Pittston Coal is the parent company of Addington and a wholly-owned subsidiary of Brink's.

19. Pittston Coal filed an Answer denying liability and asserting affirmative defenses. Pittston Coal also filed a Counterclaim against the McDonald Companies for tortious interference with an Asset Purchase Agreement that Pittston Coal had with A.T. Massey Coal Company.

20. The parties have now completed discovery and filed cross motions for summary judgment, which the Court has carefully reviewed.

CONCLUSIONS OF LAW

Based on these and other undisputed facts shown by the record, the Court reaches the following conclusions of law:

1. Principles of contract law govern the interpretation of mineral leases. Syl. Pt. 1, *Jolynne Corp. v. Michels*, 191 W. Va. 406, 446 S.E.2d 494 (1994); *Dwyer v. Range Res.-Appalachia, L.L.C.*, No. 5:14CV21, 2015 WL 366441, at *3 (N.D.W. Va. Jan. 26, 2015) (applying West Virginia law). Under the plain language rule, clear and unambiguous lease terms are to be applied and not construed. Syl. pt. 2, *Orteza v. Monongalia Cty. Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984); Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Corp.*, 147 W. Va. 484, 128 S.E.2d 626 (1962); *Dwyer*, 2015 WL 366441, at *3. Courts must give full force and effect to clear and unambiguous language. *Columbia Gas Transmission Co. v. E.I. du Pont de Nemours & Co.*, 159 W. Va. 1, 9, 217 S.E.2d 919, 924 (1975). The Court's task is to enforce the contract as written, "not to rewrite the terms of the contract." *Fraternal Order of Police v. City of Fairmont*, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996).

2. When the contract is ambiguous, courts may consider the practical construction given to contract by the parties themselves. Syl. Pt. 1, *Lee Enters., Inc. v. Twentieth Century-Fox Film Corp.*, 172 W. Va. 63, 64, 303 S.E.2d 702, 703 (1983); Syl. Pt. 4, *Watson v. Buckhannon River Coal Co.*, 95 W. Va. 164, 120 S.E. 390 (1923). When the evidence on practical construction is not in conflict, the contract should be interpreted consistent with that conduct. *Id.* Thus, when the parties have by their conduct placed a reasonable construction upon a contract, that construction will be adopted by the court. Syl. Pt. 4, *State v. Janicki*, 188 W. Va. 100, 422 S.E.2d 822 (1992); Syl. Pt. 1. *Fredeking v. Grimmett*, 140 W. Va. 745, 86 S.E.2d 554 (1955). A "lessor's acquiescence in lessee's interpretation of a coal royalty provision for the term of their lease is persuasive that such

interpretation was the parties' understanding of their agreement." Syl. Pt. 6, *Bethlehem Steel Corp. v. Shonk Land Co.*, 169 W. Va. 310, 288 S.E.2d 139 (1982).

3. A party is generally charged with understanding its own contract, and it is normally no defense for the party to say that it did not know what the contract required. *Hager v. Am. Gen. Finance, Inc.*, 37 F. Supp. 2d 778, 788 (S.D.W. Va. 1999); *Parsons v. Halliburton Energy Services, Inc.*, 237 W. Va. 138, 147, 785 S.E.2d 844, 854 (2010); *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W. Va. 91, 106, 159 S.E.2d 784, 794 (1968); Syl Pt. 1, *Robinson v. Fairmont Tr. Co.*, 109 W. Va. 152, 153 S.E. 909 (1930).

4. From the plain language of the Lease, read as a whole, the Court concludes that there is no duty of diligent mining as claimed by the McDonald Companies in Counts I and II of their First Amended Complaint. While the McDonald Companies have cited numerous provisions of the Lease relating to mining, these provisions all involve the manner and method of mining. They do not state when mining must commence or what quantity of coal must be mined, only how mining is to be conducted when undertaken.

5. For example, Article X of the Lease is entitled "CONDUCTING MINING OPERATIONS." This Article states that mining should be conducted in accordance with a "sound mining plan," one that is "designed systematically to produce and recover . . . all the merchantable and mineable coal . . . ." The Article also provides that "Elkay will diligently prosecute its mining operations . . . so that all of the merchantable and mineable coal herein provided to be mined shall be mined and royalties

paid to McDonalds." These provisions govern the manner of mining if and when mining is conducted.

6. Article XIII of the Lease, on the other hand, specifically states what tons must be mined each lease year and what annual minimum production royalties must be paid if the lessee does not mine the required tons in a given lease year.

7. The Court finds that, by its plain terms, this is a mine-or-pay Lease. That is, the lessee is required to mine annually the tons stated in Article XIII or to pay the required annual minimum production royalties on the tons that remain unmined at the end of the lease year. By either mining or paying the amounts stated in Article XIII, the lessee satisfies its obligations under the Lease.

8. The Court therefore concludes that Article XIII, not Article X, controls what mining is required, and that the lessee has no duty to mine or to pay for more tons than stated in Article XIII.

9. The Court also concludes that the parties did not intend to create any kind of partnership agreement that would allow the lessors to control whether mining occurs, when mining occurs, or how much coal is mined. This would be a potential effect of the alleged duty to diligently mine.

10. Based on the clear language of the Lease and the judgment in the Prior Litigation, the Court concludes that the royalties for failure to mine are stated in Article XIII and that the McDonald Companies are not entitled to recover additional damages for unmined coal.

11. The other issue that the Court must answer involves the royalty rate to be applied to the tons required to be mined under Article XIII in order to calculate the annual minimum production royalties due. This issue was decided in the Prior Litigation. There, the Court found that, in the absence of sales of comparable coal by the lessee, the royalty rate to be applied was $2.00 per ton, which is the minimum royalty rate set forth in Article VIII. In this case, the McDonald Companies have no evidence of any sales by the lessee, and, therefore, the Court concludes that they have no claim to a royalty rate of more than $2.00 per ton.

12. The royalty rate under Article XIII is not based on comparable sales by third parties or the market value of comparable coal as the McDonald Companies now contend. Rather, Article XIII refers specifically to the average price of coal "sold by Lessee."

13. In the Prior Litigation, the Court held that the rate must be based on the price of coal "sold by the Lessee," a ruling that this Court considers binding under principles of res judicata and collateral estoppel.

14. While the Court finds that the parties are bound by the judgment in the Prior Litigation, it notes that Article XIII refers to mining by lessee and processing through a particular preparation plant. If the parties had intended to use sales by third parties or the market value of the coal to set the royalty rate, they would have said so.

15. Based on the clear language of the Lease and the ruling in the Prior Litigation, the Court concludes that when there is no mining on the leased premises the

applicable royalty rate is $2.00 per ton and that the claim based on comparable sales by third parties or the market value of coal is without merit.

16. If and to the extent that there is any ambiguity in the Lease or the judgment in the Prior Litigation, the Court finds that the practical construction or course of performance by the parties confirms the lessee's obligations under the Lease, as this Court has found them to be, and it confirms that the lessee has satisfied those obligations. From the conclusion of the Prior Litigation to present, both parties interpreted the Lease as requiring the lessee to mine 250,000 tons a year or to pay $500,000 per year in years when there is no mining. The parties' actions and conduct are therefore entirely consistent with the language of the Lease and the judgment of the Court in the Prior Litigation. See, e.g., the 30(b)(7) deposition of the McDonald Companies and the exhibits to that deposition, which were provided as Appendix 7 to Defendants' Motion for Summary Judgment.

17. The Court further concludes that the "diligent mining" claim of the McDonald Companies is barred by the affirmative defense of waiver and that the "comparable sales" claim of the McDonald Companies is barred by the affirmative defenses of payment, accord and satisfaction, waiver, and estoppel. For each of the last 25 years, the lessee has paid and the McDonald Companies have accepted $500,000 in satisfaction of the lessee's duties under the Lease. The McDonald Companies knew the provisions in their Lease, they knew there was no mining, they knew what payments were being made and why, and they accepted the payments each year until this action was filed. The McDonald Companies never contended that the lessee was required to mine

more than 250,000 tons each year or that the lessee was required to pay more than $2.00 per ton. For the reasons argued by Defendants, the McDonald Companies' claims are barred by the defenses as stated above.

18. For the reasons previously stated, the Court also concludes that the claims of the McDonald Companies are barred by the defenses of res judicata and collateral estoppel, the Court in the Prior Litigation having determined the amount due for a failure to mine.

19. Because Addington and Brink's have not breached the Lease, the Court concludes that the McDonald Companies do not have a claim against Pittston Coal for tortious interference with the Lease.

20. Based on the negotiations for the 1978 Lease, the Court further concludes that Addington and Brink's do not have a claim against the McDonald Companies for breach of contract as a consequence of their refusal to consent to an assignment or sublease of the Lease and that the McDonald Companies did not have a duty of good faith and fair dealing in considering such assignments or subleases. The Court concludes that the law at the time the Lease was signed allowed for a lessor to arbitrarily withhold consent to an assignment or sublease if the lease was "silent" on the standard to be applied to a request for consent and that this was a bargained-for provision.

21. Finally, the Court concludes that the Counterclaim of Pittston Coal, being based in tort, is barred by the two-year statute of limitations.

It is therefore ORDERED and ADJUDGED as follows:

1. Plaintiffs' Motion for Summary Judgment on Count I – Duty to Mine is denied;

2. Plaintiffs' Motion for Summary Judgment on Count III of the First Amended Complaint is denied;

3. Plaintiffs' Motion for Summary Judgment on Each of Defendants' Affirmative Defenses is denied;

4. Plaintiffs' Motion for Summary Judgment on All Counterclaims by Addington/Brink's for Breach of Contract is granted;

5. Plaintiffs' Motion for Summary Judgment on Defendant Pittston Coal Company's Tortious Interference Counterclaim is granted;

6. Defendants' Motion for Summary Judgment is granted as to all three grounds asserted.

7. The Counterclaim of Addington and Brink's is dismissed with prejudice.

8. The Counterclaim of Pittston Coal is dismissed with prejudice.

9. The First Amended Complaint of the McDonald Companies is dismissed with prejudice.

10. Each party shall bear its own costs.

The parties preserve objections to all adverse rulings.

This is a final, appealable judgment. Nothing further remaining to be done herein, the Clerk shall strike this case from the docket of the Court.

ENTER: this 15 day of August, 2017.

HONORABLE JAMES H. YOUNG, JR.

Prepared By:

W. Henry Jernigan, Jr. (WV Bar No. 1884)
Alexander C. Ward (WV Bar No. 9430)
DINSMORE & SHOHL
P.O. Box 11887
Charleston, West Virginia 25339
Telephone: 304/357-0900
Facsimile: 304/357-0919
henry.jernigan@dinsmore.com
alex.ward@dinsmore.com

Wade W. Massie (WV Bar No. 7267)
PENN, STUART & ESKRIDGE
P.O. Box 2288
Abingdon, Virginia 24212
Telephone: 276/628-5151
Facsimile: 276/628-5621
wmassie@pennstuart.com

By _____

Counsel for Defendants Addington, Inc.
and The Brink's Company

Shawn P. George (WV Bar No. 1370)
GEORGE & LORENSEN, PLLC
1526 Kanawha Blvd., East
Charleston, West Virginia 25311
Telephone: 304/343-5555
Facsimile: 304/342-2513
sgeorge@gandllaw.com

By _____

Counsel for Defendant Pittston Coal Company

Reviewed and Approved By:

Nicholas S. Johnson (WV Bar No. 10272)
BAILEY & GLASSER LLP
1054 31st Street, NW, Suite 230
Washington, DC 20007
Telephone: 202/463-2101
Facsimile: 202/463-2103
njohnson@baileyglasser.com

Sharon F. Iskra (WV Bar No. 6582)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: 304/345-6555
Facsimile: 304/324-1110
siskra@baileyglasser.com

By _____

Counsel for Plaintiffs The Bruce
McDonald Holding Company, et al.