STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Marie Gassaway,
Plaintiff Below, Petitioner

vs) No. 11-0535 (Doddridge County No. 08-C-6)

Dominion Exploration and Production, Inc.,
Defendant Below, Respondent

FILED
October 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Marie Gassaway, plaintiff below, appeals from the circuit court's order denying her Rule 59(e) motion to alter or amend the circuit court's prior order entering summary judgment in favor of respondent Dominion Exploration and Production, Inc., defendant below. Petitioner seeks a reversal of the summary judgment order and a remand so that she may proceed with her adverse possession and accounting claims.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

I. Factual and Procedural Background

Petitioner states that her predecessors-in-title granted to respondent's predecessors-in-interest all of the oil and gas in and under what is now a 192-acre tract in Doddridge County in exchange for payments to the lessors if gas was produced. In 1957, petitioner's parents (now deceased) acquired the surface and a one fourth interest in the oil and gas underlying the 192-acre tract by deed. For the next fifty years, the royalties on those mineral interests were paid to either petitioner's parents or to petitioner, notwithstanding the fact that petitioner's parents had not owned the property since 1964, when it was foreclosed upon.[1] In 1965, following the foreclosure, title to the 192-acre tract was transferred to D.A. and

[1] Petitioner states that in 2001, her parents conveyed their oil and gas interest in the 192-acre tract (which had been foreclosed upon around thirty-seven years earlier) to her.

Delphia Davis and, upon their death, title passed to their daughter Gertrude Dotson and her heirs.

In 1960, petitioner's parents acquired the surface and one-half of the oil and gas underlying a separate ten-acre tract in Doddridge County, which came out of a 265-acre tract containing the 192-acre tract. Petitioner's parents later deeded this ten-acre tract to petitioner, and her entitlement to the royalties on this tract is apparently not at issue.

Petitioner states that after respondent conducted a title update in 2007, it ceased making the royalty payments to either her or her parents on the 192-acre tract and, instead, began making them to Gertrude Dotson. In January of 2008, petitioner filed a complaint against respondent alleging that she owned an interest in the oil and gas under the 192-acre tract by adverse possession. She sought, *inter alia*, a determination of ownership of mineral rights, an accounting, and permission to amend her complaint to add defendants if they were discovered to be necessary.

On June 26, 2009, after the expiration of the discovery deadline, respondent filed its motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure arguing that petitioner could not prevail on her claim of adverse possession of the oil and gas as a matter of law and that she had failed to join an indispensable party, Gertrude Dotson. Petitioner filed a response opposing the motion for summary judgment setting forth legal arguments regarding estoppel and the need to bring in additional parties.

On September 9, 2009, a hearing was held before the circuit court on respondent's motion for summary judgment. Soon thereafter, petitioner's counsel died and petitioner's current counsel filed a notice of appearance in October of 2009. A telephonic hearing was held on January 4, 2010, after which a second amended pretrial/scheduling order was entered by the circuit court giving the parties until August 13, 2010, to complete discovery.

In February of 2010, petitioner filed a supplemental brief in opposition to respondent's motion for summary judgment attached to which was petitioner's Rule 56(f) affidavit seeking a refusal of respondent's summary judgment motion so that discovery could take place. At the same time, petitioner filed a motion to amend her complaint to join indispensable parties. Attached to petitioner's motion to amend was an amended complaint which petitioner describes as including a more thorough adverse possession claim and a clarification of her accounting claim so as to include those claims that she opted out of in *Jones v. Dominion Resources Services, Inc.*, 601 F.Supp.2d 756 (S.D.W.Va. 2009).[2]

[2] *Jones* was a federal class action involving, *inter alia*, claims for underpayment of royalties to mineral owners by gas companies.

On July 13, 2010, a second hearing on respondent's motion for summary judgment was held. Petitioner argued at the hearing that it was premature to consider respondent's summary judgment motion because answers to the discovery requests she served on respondent five days earlier were necessary for her to fully respond to respondent's motion.

On September 15, 2010, the circuit court entered an order granting respondent's motion for summary judgment and denying petitioner's motion to amend her complaint. The circuit court found that additional discovery would not change petitioner's adverse possession claim; that petitioner had to be the mineral producer in order to claim adverse possession; and that respondent was entitled to judgment as a matter of law on the claims of adverse possession. The circuit court also granted summary judgment in favor of respondent on petitioner's claims of estoppel and attornment[3] and accounting. The circuit court found that although it had previously ordered petitioner to join Gertrude Dotson, joinder was no longer necessary because granting summary judgment in favor of respondent did not adversely impact the title of Ms. Dotson or her heirs. Last, the circuit court concluded that an amendment to the pleadings would be futile.

On September 24, 2010, petitioner filed a motion under Rule 59(e) of the West Virginia Rules of Civil Procedure asking the circuit court to alter or amend its summary judgment order. A hearing was held on the motion on November 15, 2010.[4] The circuit court denied the motion reasoning that additional discovery would not assist petitioner; that there had been no change in the applicable law since the circuit court's summary judgment order entered September 15, 2010; that no previously unknown evidence had been identified; and that there had been no showing of a clear error of law or manifest injustice.

II. Adverse Possession

Petitioner asserts that the circuit court erred in granting summary judgment because she either established each element necessary to obtain the oil and gas interest in the 192-acre tract through adverse possession or would have done so through discovery. Petitioner contends that she and her parents enjoyed complete and continuous possession of a one quarter interest in the minerals underlying the 192-acre tract from 1957 to 2007, without any interference or claim of right by any other person or persons, which is more than adequate for adverse possession. Petitioner argues that her title gained through the adverse possession by her parents is as good and legal a title as she would have received had the Davises or the

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[3] To attorn is to agree to be the tenant of a new landlord. *Black's Law Dictionary* (9th ed. 2009).

[4] This hearing was held before the Honorable Robert B. Stone, Senior Status Judge, given the untimely death of the Honorable Robert L. Holland, Jr., before whom the matter had been pending.

Dotsons conveyed a deed to her. Syl. Pt. 2, *Harman v. Alt*, 69 W.Va. 287, 71 S.E.709 (1911) ("[a]ctual, open, notorious, exclusive and continuous adverse possession of land for more than ten years, confers good legal title . . .") Petitioner asserts that this Court has anticipated a claim for adverse possession in minerals. *See Welch v. Cayton*, 183 W.Va. 252, 395 S.E.2d 496 (1990) (citing *Trust Co. v. Harless*, 108 W.Va. 618, 152 S.E. 209 (1930)(to establish adverse possession by mining a mineral, one must "keep his flag flying in a visible and hostile manner.")). Petitioner argues that respondent began flying petitioner's flag with her parent's 1957 deed to the 192 acres, which respondent kept flying until 2007.

Respondent asserts that the circuit court properly exercised its discretion in granting summary judgment because there is no genuine issue of material fact and respondent is entitled to judgment as a matter of law on the entire action. Respondent argues that petitioner cannot show adverse possession of the one-fourth undivided interest in the mineral rights underlying the 192-acre tract because she has failed to take actual, hostile possession of the oil and gas by drilling a producing well herself. Respondent argues that merely collecting a royalty payment is not actual, hostile possession of oil and gas, and that royalty payments are personal property to which adverse possession does not apply. *See Welch*, 183 W.Va. 252, 255, 395 S.E.2d 496, 499 (1990) (citing *Kiser v. McLean*, 67 W.Va. 294, 297, 67 S.E. 725, 726 (1910) ("[one] can only take possession of [oil and gas] by drilling wells.")). As to petitioner's argument regarding her need for additional discovery, respondent asserts that the circuit court correctly reasoned that petitioner's Rule 56(f) affidavit was insufficient to demonstrate good cause for her failure to conduct discovery during the nearly two and one half years that this action was pending prior to the circuit court's award of summary judgment. Respondent adds that the circuit court correctly concluded that additional discovery was unnecessary because petitioner could never establish that she had drilled her own well, which is an essential element of a claim for adverse possession of oil and gas.

III. Attornment and Estoppel

Petitioner asserts that the circuit court erroneously stated that West Virginia has never adopted the doctrines of attornment and estoppel for oil and gas leases. Petitioner asserts that estoppel is a doctrine by which a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly, whereas an attornment is a tenant's agreement to hold the land as the tenant of a new landlord. Petitioner argues that her parents were the undisputed landlords of respondent from 1957, through 1965, on the 192-acre tract, and that respondent is estopped from denying that petitioner has acquired title by adverse possession. Petitioner further argues that respondent may not "attorn" to the Dotsons as a new landlord. Petitioner adds that she has relied on respondent to her detriment by paying various taxes on the oil and gas royalties and respondent must be estopped from denying her title. Petitioner further argues that her claim is also supported by the doctrine of negligent estoppel and that any negligence or fault attributable to the payment of royalties would be upon respondent.

Respondent asserts that there are no genuine issues of material fact; that petitioner's estoppel and attornment claims fail as a matter of law; and that the cases relied upon by petitioner are landlord/tenant cases, which do not extend to the context of an oil and gas lease. Respondent argues that it is a lessee of mineral interests for multiple owners with undivided mineral interests and that until petitioner establishes her title to the one-fourth undivided interest in the mineral rights underlying the 192-acre tract, she has no right to be paid a royalty. Respondent asserts that because petitioner was not the lessor at the time the 1899 lease was executed, even if this Court were to recognize estoppel in oil and gas leases, estoppel would not apply here under *Farley v. Thompson*, 101 W.Va. 92, 132 S.E 204 (1926). Respondent states that when it updated its title to determine the proper parties for royalty payments for purposes of a new well on the 192-acre tract, it discovered that petitioner's predecessors lost their one-fourth undivided interest in the oil and gas under the 192-acre tract. Respondent suggests that it is difficult to imagine how petitioner has suffered a detriment by her receipt of royalties to which she had no entitlement.

IV. The Denial of Petitioner's Motion to Amend her Complaint

Petitioner states that the circuit court erred in denying her motion to amend her complaint so as to properly assert her adverse possession claim and to clarify her accounting claim. Petitioner asserts that leave to amend shall be freely given when justice requires under Rule 15(a) of the West Virginia Rules of Civil Procedure, and that this Court allowed a party to amend a complaint *after* appeal where a motion to amend was not filed below. *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983).

Respondent asserts that the circuit court properly exercised its discretion in denying petitioner leave to amend her complaint because the motion was dilatory and the amendment would have been futile. Respondent asserts that the circuit court correctly found that the proposed amendment to add Gertrude Dotson or her heirs was no longer necessary since the award of summary judgment in favor of respondent did not impact Ms. Dotson's title. Respondent adds that while the claims for adverse possession, accounting, and royalty payments in the original complaint might have been clearer, those claims were dismissed on summary judgment because petitioner was already receiving a one-eighth royalty for her one-half ownership interest in the only well for which she was entitled to receive royalties, which was located on the ten-acre tract. Respondent states that it has provided petitioner with an accounting for the production revenues received from that well since its inception in June of 2007, as well as an accounting of royalty payments made to petitioner for her ownership interest in that well. Respondent adds that *Torbett* is distinguishable and does not support petitioner's position.

In addressing petitioner's motion to amend, the circuit court found that the motion was futile because petitioner cannot prevail on either her current claims or those in her proposed amended complaint. The circuit court found that the additional claims were predicated on

petitioner's claim of additional ownership, which she can never establish. This Court agrees and affirms the denial of the motion to amend.

V. Conclusion

This Court reviews the denial of a Rule 59(e) motion under the same standard applicable to the underlying judgment on which the Rule 59(e) motion was based. *Zimmerer v. Romano*, 223 W.Va. 769, 679 S.E.2d 601 (2009) (per curiam). The circuit court's award of summary judgment in favor of respondent is reviewed de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Having reviewed the briefs of the parties and the record on appeal, under the standard set forth above, as well as the circuit court's thorough and well-reasoned summary judgment order, this Court hereby affirms the decision of the circuit court.

Affirmed.

ISSUED: October 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh