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IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

FILED

COREY CONLEY,

Plaintiff,

2019 FEB 22 P 12: 26

CLERK CIRCUIT COURT  
BROOKE COUNTY

CAN 14-C-75

(Judge Jason A. Cuomo)

v.

LEE M. RABB, TRIENERGY, INC.,  
TRIENERGY HOLDINGS, LLC,  
and WPP, LLC,

Defendants/third-party plaintiffs,

and

TRINITY HEALTH SYSTEM FOUNDATION,

Intervening Defendant/third-party plaintiffs.

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**ORDER DENYING SWN PRODUCTION COMPANY, LLC'S SECOND  
MOTION TO INTERVENE**

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AND NOW, pending before this Court is SWN Production Company, LLC's (herein after "SWN") *Second Motion to Intervene*. Upon consideration of SWN's Motion and Defendants' *Joint Opposition* thereto, it is **ORDERED, ADJUDGED and DECREED** as follows:

**I. PERTINENT FACTS**

1. Plaintiff Corey Conley (herein after "Plaintiff") filed this civil action on or about May 22, 2014 in the Circuit Court of Brooke County, West Virginia, alleging that he is the owner of all or a share of the mineral interests, including the oil and gas rights, to a 3.763 acre tract of real property located in Brooke

County, West Virginia pursuant to a Deed dated June 26, 2000 recorded in Deed Book 288, page 48 in the Brooke County Clerk's Office.

2. The Conley Deed is part of the chain of title that includes a prior Deed dated June 5, 1959 and recorded in the Brooke County Clerk's Office in Deed Book 148, page 144 (hereinafter "Milliken Deed"), wherein Maria H. Milliken allegedly conveyed the coal underlying a parcel of property totaling 161.53 acres in Brooke County, West Virginia to Eli Rabb as well as interests in the underlying oil and gas.

3. The parties in this civil action dispute whether the Milliken Deed leased or conveyed in fee the subject oil and gas interests.

4. Rabb transferred a portion of his oil and gas rights in and underlying the 161 Acre Tract, including Plaintiff's 3.763 acres, via a "Farmout Agreement," being the operational right to drill on the 161 Acre Tract, to Defendants TriEnergy, and made other assignments or conveyances to Defendants TriEnergy but excepted and reserved a 1.5% overriding royalty interest in all oil and gas saved and produced from the 161 Acre Tract (including the oil and gas underlying Plaintiff's property).

5. Rabb subsequently conveyed the 1.5% overriding royalty interest in and to the 161 Acre Tract as a gift to Trinity by way of a Conveyance and Assignment of Oil and Gas Interests dated May 16, 2008, as recorded in the deed records of Brooke County, West Virginia on May 21, 2008, in Book 882, Page 452.

6. SWN attempted to intervene in this case on or about July 22, 2016 although it had no interest in the subject oil and gas rights, but because it believed that the court's interpretation of the Milliken Deed could affect its ownership interests in other real property in West Virginia and Pennsylvania.

7. By Order dated August 16, 2016, this Court denied SWN's Motion to Intervene, holding that: (1) SWN's motion was untimely being filed more than two years after the Complaint; (2) because SWN had no interest relating to the real property or transaction which is the subject of the case; (3) because the disposition of the case does not impair SWN's ability to protect its interests; and (4) because Plaintiff had aligned himself with SWN; therefore, SWN's interests are adequately protected in the matter.

8. Subsequent to this Court's Order denying SWN's Motion to Intervene, SWN entered into a lease with Plaintiff related to the subject 3.763 acres although it knew that the ownership of the oil and gas rights is in dispute in this case. The lease is recorded in the Brooke County Clerk's Office in Book 34, Page 631.

9. On or about August 17, 2018, SWN served its second motion to intervene in this case arguing, in part, that it should be permitted to intervene because it now has a leasehold in the oil and gas rights to the subject property.

## **II. LAW**

West Virginia Rules of Civil Procedure, Rule 24(a)(2) allows intervention of a party when an applicant meets four conditions:

(1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the actions may as a practical matter, impair the applicant's ability to protect that interest; and (4) the applicant must show that the interest will not be adequately represented by existing parties.

State ex rel. Ball v. Cummings, 208 W. Va. 393, 398, 540 S.E.2d 917, 923 (1999).

## **III. DISCUSSION**

### **A. TIMELINESS**

SWN does meet the Ball requirements and its intervention should be denied. The only factual differences in SWN's second motion to intervene and its first motion to intervene, which was denied, were facts created by SWN more than three years after the Complaint was filed and more than a year after its initial motion to intervene was denied. SWN's application for intervention was untimely under Ball. SWN's initial motion to intervene was filed more than two (2) years after the institution of this action and after summary judgment motions were presented and argued. SWN's Second Motion to Intervene was filed more than four years after the Complaint was filed in this matter. Moreover, SWN's lease with Conley, which SWN claims provides it with an interest in this civil action, was entered on March 7, 2017 and recorded on June 2, 2017. SWN waited nearly a year and a half after its lease with Conley to serve its Second Motion to Intervene. That delay it is also untimely.

**B. SELF-CREATION OF INTEREST**

SWN had no interest relating to the property or transaction which is the subject of the civil action when Conley filed his complaint. This Court has already ruled that, because SWN had no interest in the property or transaction when the Complaint and initial motion to intervene were filed, its motion to intervene should be denied. SWN cannot now intervene based upon conduct it undertook after this case was filed and after the denial of its first motion to intervene.

Nothing within Rule 24, nor the case cited by SWN specifically allows a party to intervene when that party creates the interest after the suit is filed. Because SWN created the “interest relating to the property or transaction which is the subject of the action” after the suit was filed, it does meet the Bell criteria for intervention under West Virginia law.

**C. ABILITY TO PROTECT/ADEQUATE REPRESENTATION OF INTEREST**

Inasmuch as SWN has no interest relating to the property or transaction which is the subject of the action when Plaintiff filed his complaint, the disposition of this action does not impair SWN’s ability to protect that interest, as required under Ball. SWN has aligned itself with the Plaintiff since at least March 7, 2017 when it entered the lease. At the time SWN entered into that lease, the Court had already ruled that SWN’s interests are adequately represented by the Plaintiff in this matter. Moreover, SWN knew that the oil and gas rights related to the Conley property were in dispute when it entered the

lease with Plaintiff. SWN cannot, now, complain that its fate is tied to the resolution of this civil action. If SWN had such concerns, it simply could have waited until this action was resolved to enter a lease with the victorious party.

SWN's motion relies upon arguments that have been previously made in this case and which arguments the Court found unpersuasive. Specifically, SWN alleges that it seeks intervention to establish that the Milliken Deed is a "form" deed identical to all other conveyances into Rabb, in order to cure the risk that any Rabb deeds lurking in the chains of title for any of its leaseholds pose a cloud on title. SWN sites the Court of Common Pleas of Washington County, Pennsylvania, in Case No. 201104841, Caldwell, et al., v. Chevron, U.S.A., Inc., et al., as a basis for its intervention. The Caldwell court examined a separate conveyance into Rabb<sup>1</sup> of coal, oil and gas interests in Washington County, Pennsylvania. This Court has already examined the applicable deed language in various summary judgement motions and has rejected the argument that the pertinent language in the Millen Deed is nearly identical to the Deed in Caldwell. The deed in Caldwell is, in fact, materially different. Additionally, Plaintiff can argue the relevance of the Rabb deed in the Caldwell decision, if any, to the deed in the instant case, to the jury.

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<sup>1</sup> SWN did not attach a copy of the underlying deed examined in Caldwell to its Motion as required by the Trial Court Rules.

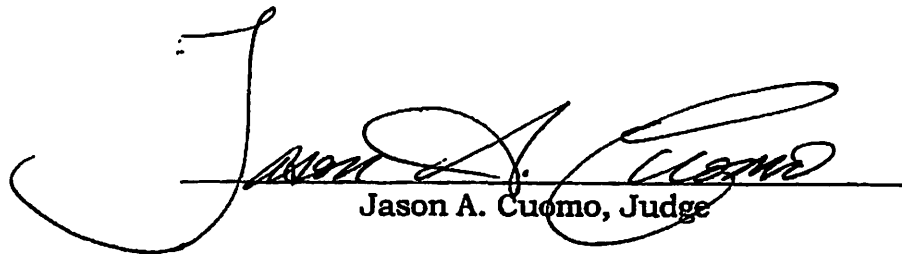
**IV. CONCLUSION**

**ACCORDINGLY**, based upon the foregoing, SWN did not meet the requirements for intervention into this matter under Rule 24(a) of the West Virginia Rules of Civil Procedure or applicable West Virginia law and, as such, its *Second Motion to Intervene* is hereby **DENIED**.

The parties' objections and exceptions to this Order are duly noted.

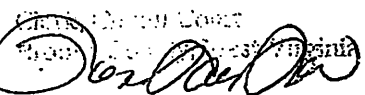
The Clerk is hereby directed to transmit attested copies of this order to all counsel of record as well as counsel for SWN Production Company, LLC.

**DATED this 22<sup>nd</sup> day of February, 2019.**

  
Jason A. Cuomo, Judge

I hereby certify that the annexed  
document is a true and correct  
copy of the original on file in my  
office.

Witness my hand and  
the seal of the Court at  
Martinsburg, West Virginia  
this 22<sup>nd</sup> day of February, 2019.



sent via fax to the following:

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