

IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA

ANTERO RESOURCES CORPORATION,

PLAINTIFF,

v.

**Civil Action No. 17-C-3
Judge Jeffrey Cramer**

**EQT PRODUCTION COMPANY, LARRY
W. LEMASTERS, AND LINDA J.
LEMASTERS,**

DEFENDANTS.

FILED
JAN 11 2019
Candy L. Warner
Tyler Co. Circuit Clerk

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER GRANTING THE MOTION FOR PARTIAL SUMMARY JUDGMENT
OF ANTERO RESOURCES CORPORATION (COUNTS II AND III)**

Plaintiff, Antero Resources Corporation ("Plaintiff" or "Antero") on November 5, 2018 filed the Motion for Partial Summary Judgment of Antero Resources Corporation (Counts II and III) ("Antero's Motion"). On November 26, 2018, Defendant EQT Production Company ("EQT") served EQT Production Company's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment of Antero Resources Corporation (Counts II and III) and Memorandum in Support of Motion for Summary Judgment on EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment ("EQT's Response") and Defendant EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment ("EQT's Motion"). Antero requested that the Court grant summary judgment in its favor as to Counts II (intentional interference with contract) and III (declaratory judgment), arguing that the undisputed facts show that Antero's top lease is superior to the EQT base lease extension.

This Court has considered the following:

1. Motion for Partial Summary Judgment of Antero Resources Corporation (Counts II and III);
2. EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment;
3. EQT Production Company's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment of Antero Resources Corporation (Counts II and III) and Memorandum in Support of Motion for Summary Judgment on EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment;
4. The exhibits attached to the pleadings referenced above; and
5. All pertinent legal authorities.

The Court hereby grants Antero's Motion, denies EQT's Motion and makes the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. Defendants Larry W. Lemasters and Linda J. Lemasters (collectively the "Lemasters") own 100% of the oil and gas within and underlying a certain tract of land containing 15.25 acres, located in Ellsworth District, Tyler County, West Virginia, designated for tax assessment purposes as Tax Map 23, Parcel 20 (the "Subject Property")¹.
2. The Lemasters executed and entered into an oil and gas lease with PetroEdge Energy, LLC, dated December 13, 2011, which covered the Subject Property ("Base Lease").
3. A Memorandum of the Base Lease was recorded January 12, 2012, in Deed Book 390, page 635.

¹ This tract is more particularly described in the deed of record in the Office of the Clerk of the County Commission of Tyler County, West Virginia, in Deed Book 328, page 325.

4. The Memorandum of Base Lease provided that the primary term of the lease commenced on December 13, 2011 and terminated five years thereafter, on December 13, 2016 unless oil and gas was produced during the primary term.

5. The Base Lease did not grant to the lessee an express right of first refusal, right of renewal or automatic option to extend the primary term of the Base Lease. Accordingly, the Memorandum of Base Lease did not provide for, and thus did not provide notice of, a right of first refusal, right to renew or right to extend the primary term of the Base Lease.

6. EQT was assigned the Base Lease through certain mesne conveyances.

7. The Lemasters executed and entered into a written oil and gas lease with Antero, dated June 24, 2016, but made effective December 14, 2016, covering the Subject Property for a primary term of five years from the effective date (the "Antero Top Lease").

8. A Memorandum of the Antero Top Lease was recorded August 30, 2016, in Deed Book 542, page 794.

9. In consideration for the Lemasters executing the Antero Top Lease, Antero paid the Lemasters an initial bonus check in the amount of \$2,478.13, which the Lemasters accepted.

10. An additional payment of \$47,048.38 was subsequently mailed to the Lemasters, but the Lemasters returned the check to Antero.

11. The Antero Top Lease and the Memorandum of the Antero Top Lease provided, among other things:

Lessor covenants and agrees that, as of the date Lessor executes this Lease, Lessor has not agreed to extend, amend, modify, or renew the Existing Lease [the Base Lease], or to take any action which would result in such extension, amendment, modification, or renewal of the Existing Lease, and Lessor further covenants and agrees that Lessor shall not enter into any such agreement or take

any such action at any time after the date Lessor executes this Lease.

12. The Lemasters and EQT entered into an Amendment and Ratification of the Base Lease dated September 24, 2016 and recorded December 12, 2016, in Deed Book 550, page 517 (the "Base Lease Amendment").

13. In the Base Lease Amendment, the Lemasters and EQT agreed to, among other things, extend the primary term of the Base Lease for an additional five years.

14. Prior to the execution of the Base Lease Amendment, multiple EQT employees were aware of the Antero Top Lease and multiple EQT employees had a copy of the Memorandum of Antero Top Lease.

15. One EQT employee acknowledged that he knew and understood that, in the Antero Top Lease, the Lemasters had covenanted with Antero not to voluntarily extend or amend the Base Lease.

16. The Antero Top Lease did not preclude EQT from commencing operations under the Base Lease during the primary term, which ended on December 13, 2016.

17. There is no dispute that EQT did not commence operations to produce oil and gas during the primary term.

CONCLUSIONS OF LAW

1. Rule 56 of the West Virginia Rules of Civil Procedure mandates the entry of summary judgment against a party where:

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).

2. “Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

3. “It is the province of the Court, and not of the jury, to interpret a written contract.” Syl. Pt. 1, *In re Joseph G.*, 214 W.Va. 365, 589 S.E.2d 507 (2003).

4. “If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue.” *Payne v. Weston*, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995).

II. The Court Grants Summary Judgment in Favor of Antero as to Count III of the Amended Complaint Because the Antero Top Lease was Validly Executed and Recorded Prior to the Base Lease Extension.

A. Antero’s Top Lease Takes Priority Over The Base Lease Amendment Pursuant to Case Law.

5. In West Virginia, conflicts and priorities among competing leasehold interests are resolved pursuant to well-settled and long-codified rules of notice and basic fairness to good faith purchasers. *See Trans Energy, Inc. v. EQT Prod. Co.*, 743 F.3d 895 (4th Cir. 2014).

6. Bona fide purchasers who purchase real estate interests for valuable consideration and without notice, are protected by the West Virginia recording acts. *Id.* at 904; W. Va. Code § 40-1-9.

7. A landowner and a base lessee may not abrogate and nullify the terms of a valid top lease by amending the terms of the base lease after the execution and recordation of the top lease. *Rorex v. Karcher*, 101 Okla. 195, 224 P. 696 (1923).

8. The *Rorex* court held that “[p]rior to the time the extension was procured, the rights of the plaintiff [top lessee] intervened by reason of his lease, and any extension granted after the execution of the lease to the plaintiff was taken subject to the rights of the [top lessee] under his lease.” *Id.*, 224 P. at 697-98.

9. The Nebraska Supreme Court has also held that actions taken by a base lessee subsequent to the execution of a top lease do not affect the rights of a top lessee. *Willan v. Farrar*, 176 Neb. 1, 124 N.W.2d 699 (1963).

10. The Supreme Court of Appeals of West Virginia has recognized the validity and existence of top leases, and has not held that such leases are void under this State’s public policy. *See Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 781 S.E.2d 198 (2015).

11. While, as EQT contends, it was free to enter into the Base Lease Amendment with the Lemasters under principles of contract, the Lemasters also had the right to enter into the Top Lease with Antero, and their covenant in the Antero Top Lease to not voluntarily extend or otherwise amend the Base Lease does not contravene the public policy of this State.

12. Regardless of the Lemasters’ covenant to not extend the Base Lease, the Antero Top Lease would take priority over the Base Lease Amendment and would be superior to it because, under the West Virginia recording act and applicable case law, the Antero Top Lease was executed and recorded prior to the Base Lease Amendment.

13. This Court also holds that a base lease extension, where there was no express right to extend in the base lease, taken subsequent to the execution of a validly recorded top lease, does not affect the rights of a top lessee and is taken subject to the rights of the top lessee.

B. Under the West Virginia Recording Act, the Base Lease Amendment is Subject to Antero's Top Lease.

14. West Virginia Code § 40-1-9 provides that a contract conveying real estate, such as a lease, “shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record”

15. West Virginia Code § 40-1-8 provides that in lieu of recording the actual lease, a memorandum of lease may be recorded. However, any such memorandum of lease must contain certain information to be valid, including, among other things:

if there is a right of extension or renewal, the maximum period for which, or date to which the lease may be extended, or the number of times or date to which it may be renewed and the date or dates on which such rights of extension or renewal are exercisable.

16. West Virginia Code § 40-1-8 specifically states that “[s]uch memorandum shall constitute notice of only the information contained therein.”

17. “A bona fide purchaser is one who actually purchases in good faith” *Kourt Sec. Partners, LLC v. Judy's Locksmiths, Inc.*, 239 W. Va. 757, 761, 806 S.E.2d 188, 192 (2017). *See also, Wolfe v. Alpizar*, 219 W.Va. 525, 530, 637 S.E.2d 623, 628 (2006) (finding status as bona fide purchaser for value without notice where “innocent purchaser” bought land in absence of “documentation of which [purchaser] could have or should have been aware that would have alerted her to the appellants' claims....”); *Stickley v. Thorn*, 87 W.Va. 673, 106 S.E. 240, 242 (1921) (a bona fide purchaser is “one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him on inquiry.”).

18. The West Virginia Supreme Court of Appeals has considered the impact of a subsequent lessee of oil and gas, and has held that if a subsequent oil and gas lessee does not have notice of the rights of a prior lessee, then the subsequent lessee takes the lease free and clear

of the prior lease. *See Heck v. Morgan*, 88 W. Va. 102, 106 S.E. 413, 417 (1921). *See also Trans Energy, Inc. v. EQT Prod. Co.*, 743 F.3d 895 (4th Cir. 2014) (holding that an oil and gas lessee who has the leasehold title pursuant to a duly recorded assignment of oil and gas leases has superior rights to an oil and gas lessee who has leasehold title pursuant to an unrecorded assignment).

19. Based on the findings of fact and conclusions of law and after consideration of Antero's Motion, EQT's Motion and EQT's Response, the Court therefore grants summary judgment in favor of Antero on Count III of the Amended Complaint and holds that the Base Lease and Base Lease Amendment are subject to the Antero Top Lease and the Antero Top Lease is the valid and existing lease covering the Subject Property.

II. The Court Grants Summary Judgment in Favor of Antero as to Count II of the Amended Complaint Because EQT Intentionally and Wrongfully Entered into the Base Lease Amendment in Spite of EQT's Knowledge that Such an Action Would Cause the Lemasters to Breach the Antero Top Lease.

20. To establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983).

21. Antero had a contractual relationship with the Lemasters pursuant to the Antero Top Lease, and EQT had actual and constructive knowledge of the Antero Top Lease and its terms.

22. In spite of its knowledge of the covenant in the Antero Top Lease that the Lemasters would not voluntarily amend or otherwise extend the Base Lease, EQT intentionally interfered with Antero's contractual relationship with the Lemasters by inducing the Lemasters to

execute the Base Lease Amendment, which purported to extend the primary term of the Base Lease for an additional five years.

23. Prior to the execution of the Base Lease Amendment, several EQT employees were aware of the Antero Top Lease and had a copy of the Memorandum of Antero Top Lease.

24. EQT not only had knowledge of the existence of the Top Lease, but is also charged with knowledge of all the terms contained in the Memorandum of Antero Top Lease.

25. Despite having actual and constructive knowledge of the covenant between the Lemasters and Antero, EQT intentionally entered into the Base Lease Amendment and attempted to extend the Base Lease for an additional five years in violation on the Antero Top Lease.

26. EQT has no valid defense or justification for its intentional and wrongful interference with the Antero Top Lease. If a plaintiff makes a prima facie case, a defendant may prove justification or privilege as affirmative defenses.

27. Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper. Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983).

28. Although EQT and Antero are legitimate competitors in the oil and gas industry, the business competition defense is not applicable in this case. According to the Restatement (Second) of Torts, the business competition defense only applies to (i) prospective contracts and (ii) contract that are terminable at will. Restatement (Second) of Torts § 768 (1979).

29. In this case, Antero and the Lemasters had already entered into the Antero Top Lease and thus the contract was not prospective. Furthermore, the Antero Top Lease was not terminable at the will of the Lemasters. Thus, in this case, the business competition defense or justification is not applicable to EQT's wrongful interference with the Antero Top Lease.

30. "One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for "(a) the pecuniary loss of the benefits of the contract or the prospective relation; [and] (b) consequential losses for which the interference is a legal cause." Restatement (Second) of Torts § 774A(1) (1979).

31. Based on the findings of fact and conclusions of law and after consideration of Antero's Motion, EQT's Motion and EQT's Response, the Court therefore grants Antero's Motion for Partial Summary Judgment with regard to Count II, holds that the Base Lease and Base Lease Amendment are void and will conduct a hearing to determine pecuniary and consequential damages.

CONCLUSION

For the reasons set forth above, the Court hereby FINDS that there is no genuine issue as to the material facts and that Antero is entitled to Partial Summary Judgment as to Counts II and III of Antero's Amended Complaint. Accordingly, the Court hereby ORDERS as follows:

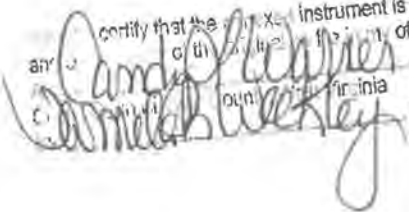
1. Antero's Motion for Partial Summary Judgment as to Count II of Antero's Amended Complaint is GRANTED;
2. Antero's Motion for Partial Summary Judgment as to Count III of Antero's Amended Complaint is GRANTED;
3. EQT is ORDERED to release the Base Lease Amendment within 30 days of the entry of this Order;
4. Antero is ORDERED to pay the Lemasters \$47,048.38 within 30 days of the entry of this Order;

5. the Lemasters are ORDERED to accept Antero's \$47,048.38 payment;
6. the Court will conduct a hearing on the to be set w/ counsel day of _____, 201__ to determine Antero's damages as a result of Count II of the Amended Complaint;
7. Defendant EQT Production Company's Motion for Summary Judgment on its Counterclaim for Declaratory Judgment is DENIED; and
8. The Clerk shall provide an attested copy of this Order to counsel of record.

The Court notes the objections and exceptions of the parties to any and all adverse rulings.

ENTERED: JAN. 3, 2019


JUDGE JEFFREY CRAMER


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Clerk
Deputy

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