IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0572

EQT PRODUCTION COMPANY,

Petitioner/Defendant Below

v.

ANTERO RESOURCES CORPORATION,

Respondent/Plaintiff Below.

PETITIONER'S REPLY BRIEF

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I. ARGUMENT

The Circuit Court's ruling that Respondent's Top Lease takes priority over Petitioner's Base Lease as amended by the Lease Amendment is erroneous and should be reversed. Petitioner and the Lemasters, as parties to the Base Lease, had the absolute right under well-settled principles of contract law to amend that Lease and extend its primary term.

Respondent's contention that Petitioner was precluded from extending the term of its Base Lease on the ground that Petitioner had knowledge of the existence of Respondent's Top Lease or that the Top Lease included language purporting to preclude modification of the Base Lease (the "no modification clause") is without merit. Neither the existence of the Top Lease nor its "no modification clause" preclude Petitioner, as the lessee with a valid, superior, and existing lease with respect to the subject property, from acting to preserve its interests with respect to that property. Moreover, neither West Virginia's Recording Act, W. Va. Code §§ 40-1-8 and 40-1-9, nor the cases discussing reformation of deeds which are relied upon by Respondent direct otherwise.

The purpose of West Virginia's Recording Act and the principles/priorities concerning reformation of deeds discussed by Respondent in its Brief are to protect innocent third-party purchasers who are *without notice of existing property rights*. *See e.g.*, W. Va. Code §§ 40-1-8 and 40-1-9; *Heck v. Morgan*, 88 W. Va. 102, 106 S.E. 413 (1921) (discussing priority of leases under recording statutes); *Stickley v. Thorn*, 87 W. Va. 673, 106 S.E. 240 (1921) (recognizing that a "person cannot become a bona fide purchaser for a parcel of real estate unless he received the conveyance and paid the price for the land before he received notice of any equities relating to the real estate"). Those protections are, however, inapplicable where a purchaser has notice of an

existing property right. As stated by the Court in *Wells v. Tennant*, 180 W. Va. 166, 169, 375 S.E.2d 798, 801 (1988) (involving a deed reformation):

> That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand; and a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser.

Wells v. Tennant, 180 W. Va. 166, 169, 375 S.E.2d 798, 801 (1988) (citations omitted). Indeed, in *Heck*, which is cited in Respondent's Brief, the Court found that the subsequent lessee in that case was not a bona fide purchaser without notice having superior rights to the subject property as provided by the recording statutes where the subsequent lessee had inquiry notice of a previous lease relating to the subject property. *Id.* at 417.

The protections afforded to purchasers without notice are not applicable here. Respondent is not a purchaser without notice for whom the protections provided by recording laws are intended. Respondent undeniably had notice and knowledge of the existence of Petitioner's Base Lease and property right, as well as the fact that the Top Lease would not go into effect unless or until that Base Lease expired or terminated, an event that never occurred. (AR 32-39; 94-101). The cases and statutes cited by Respondent to support its argument that its Top Lease should take priority over Petitioner's Lease are, therefore, not persuasive, much less controlling.[1]

Respondent's right to amend its Base Lease does not depend upon whether that expressly stated right is included within that Base Lease. Rather, Petitioner and the Lemasters, as parties to

[1] The out-of-state cases cited by Respondent to support its claim that Petitioner's Base Lease, as extended by the Amended Lease, is subordinate to the Top Lease are also not controlling. In fact, *Rorex v. Karcher*, 224 P. 696 (Okl. 1923), which is relied upon by the Nebraska court in *Willan v. Farrar*, 124 N.W.2d 699 (Neb. 1963), includes no discussion to indicate what law the court considered in deciding the issue of whether principles of contract or other law applicable in those states (as opposed to language in the contracts) might have permitted the original lessee and lessor a right to amend their leases.

the Base Lease, had the right under well-settled principles of contract law to amend their Base Lease and extend its primary term. *See e.g., Thornsbury v. Cabot Oil & Gas Corp.*, 231 W. Va. 676, 680, 749 S.E.2d 569, 573 (2013); *Wilkinson v. Searls*, 155 W. Va. 475, 184 S.E.2d 735 (1971); *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159, (1978); *Sanford v. First City Co.*, 192 S.E. 337, 341 (W.Va. 1937). Accordingly, while the Base Lease may not have included language expressly providing that the parties had the right to modify its terms, the right to amend or modify by mutual consent is implicit with any contract. *Id.*

Further, the "no modification clause" included within Respondent's Top Lease - which purports to interfere with and circumvent Petitioner's (and the Lemasters') right to lawfully modify their existing contract - contravenes public policy and provides no basis upon which to find that the Top Lease is superior to Petitioner's Base Lease as extended by the Lease Amendment. The Top Lease does not convey a vested property interest to Respondent that would preclude Petitioner from extending the term of its Base Lease. *See e.g. Cawthon v. CNX Gas Co., LLC*, No. 11-1231, 2012 WL 5835068, at *1 (W. Va. Nov. 16, 2012), *quoting*, *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 187 n. 6, 663 S.E.2d 639, 641 n. 6 (2008) (recognizing that, "[t]o enforce [the] rights under the top lease, [the top lessee] must defeat the lease of the original lessee..."). Rather, Respondent's Top Lease was taken subject to Petitioner's valid prior Base Lease covering the same lease premises and would not become effective as to those same premises unless or until that Base Lease expired or terminated. (AR 32-39; 94-101). *See e.g., Chesapeake Appalachia, L.L.C.*, 236 W. Va. at 434, 781 S.E.2d at 211; *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W. Va. 185, 187 n. 6, 663 S.E.2d 639, 641 n. 6 (2008); Patrick H. Martin and Bruce M. Kramer, 8 *Williams & Meyers Oil and Gas Law* 1081 (2017).

Here, in particular, where Respondent had knowledge and notice of Petitioner's valid Base Lease, application of the Top Lease's "no modification clause" is unreasonable and unenforceable as applied to the rights of the existing parties to continue the term of that Base Lease, all of which is contrary to the public policy of this State. *See e.g.* Syl. pt. 1, *Town of Newton v. Rumery*, 480 U.S. 386, 386 (1987); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931); *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984); *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 39, 614 S.E.2d 680, 86 (2005).

The Circuit Court's finding in favor of Respondent on its claim for tortious interference against Petitioner in the underlying proceeding also provides no valid basis upon which conclude that Respondent's Top Lease is the superior lease with respect to the subject property. That ruling is not the subject of this appeal nor is it a final judgment currently available for review by this Court. *See* AR 1-16; and, W. Va. Code § 58-5-1.

Respondent's recording of its Top Lease provided no basis upon which to find that Petitioner's Base Lease as amended by the Lease Amendment was taken subject to the Top Lease. No present property interest was conveyed by that Top Lease and the Top Lease was not in effect at the time that Petitioner amended its Base Lease to extend its primary term. Rather, Petitioner's Base Lease was in effect on September 24, 2016, at which time the Amended Lease was executed, and the subject property was held by the Base Lease at that time. Petitioner had the right under well-settled contract principles to amend its Base Lease by mutual consent. The Circuit Court's ruling adversely impacts the right of freedom to contract between parties to an oil and gas lease, which freedom includes the right to modify or amend a valid existing contract upon the mutual consent of the parties to that contract. Petitioner's Base Lease, as amended, should be the only valid, effective, and enforceable lease affecting the subject property.

II. CONCLUSION

The Circuit Court's ruling that the Top Lease takes priority over Petitioner's Base Lease as amended by the Lease Amendment on the ground that Petitioner had knowledge of the existence of Respondent's Top Lease or that the Top Lease included the "no modification clause" is erroneous and should be reversed. Respondent had knowledge and notice of the existence of the valid Base Lease and Petitioner's interest with respect to the subject property prior to the execution of the Top Lease. Respondent's Top Lease conveyed no property interest to Respondent to preclude Petitioner from extending the term of its Base Lease. The Circuit Court's ruling in favor of favor of Plaintiff/Respondent Antero Resources Corporation on its declaratory judgment claim and denial of Defendant/Petitioner EQT Production Company's Motion for Summary Judgment on the same claim is erroneous and should be reversed.

EQT PRODUCTION COMPANY,

By Counsel.

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