IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0506

WARRIOR OIL AND GAS, LLC
and
WOG MINERALS, LLC,

Petitioners

v.

BLUE LAND SERVICES, LLC,

Respondent

RESPONDENT BLUE LAND SERVICES, LLC'S RESPONSE TO PETITIONER'S BRIEF

Counsel for the Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

West Virginia Code

PARTIES

Plaintiff Blue Land Services, LLC ("Blue Land") is a land abstractor performing title examinations on tracts and parcels of land. Blue Land performs this service in an effort to ascertain ownership interest in the attendant mineral rights associated with these parcels. Blue Land performs this function for the benefit of businesses such as the defendants. Warrior Oil & Gas, LLC ("Warrior"), and WOG Minerals, LLC ("WOG"), engages in companies such as Blue Land to ascertain these ownership interests and then acts as a broker to either lease or purchase these mineral rights. Warrior and WOG broker these rights to entities who then extract these minerals for profit.

STATEMENT OF THE CASE

As Blue Land alleged in its complaint, and the facts elicited therein support, Blue Land did contract with the defendants pursuant to a Master Service Agreement ("MSA") to engage in certain title examinations designed to ascertain mineral ownership interests in several tracts or parcels of land. Defendants were then to use this information in furtherance of their own business interests by acting as brokers to either purchase or lease these mineral interests. While this MSA seemingly outlined the nature and scope of the work Blue Land was requested to perform on behalf of the defendants, this MSA was subsequently modified several times by both words and actions of the defendants.

On or about February 23, 2018, Blue Land was requested to perform title examinations on nine (9) tracts of land in Monongalia County, West Virginia, pursuant to this MSA. Blue Land completed this work as requested and remitted same to Defendants. Subsequently, on March 29, 2018, and September 14, 2018, Blue Land submitted its invoice to the defendants for payment for services rendered. For reasons that were, for the longest time unclear[1] defendants failed to pay Blue Land for the work performed.

[1] Why this remains unclear is due to defendant's refusal to participate in this litigation in any meaningful way. Defendants refused to answer discovery or comply with any of the Court's rulings and, therefore, Blue Land was never able to adequately ascertain the reason why defendants failed to pay for the work performed. Only at the hearing to ascertain damages, after default in favor of Blue Land had been entered by the Court for defendant's failure to prosecute its counterclaim and to comply with Blue Land's discovery requests, did defendants proffer that Blue Land's work product was substandard.

On or about April 20, 2018, Blue Land was again requested to perform certain title examinations on four (4) tracts of land in Monongalia County, West Virginia, pursuant to the aforementioned MSA. Blue Land completed this work as requested and remitted same to defendants. Subsequently, on July 10, 2018, and September 14, 2018, Blue Land submitted its invoice to the defendants for payment for services rendered. Again, inexplicitly, the defendants refused to pay Blue Land for the work performed.

PROCEDURAL HISTORY

This matter commenced with the filing of a complaint in the Circuit Court of Monongalia County, West Virginia on June 15, 2019, in the matter styled Blue Land Services, LLC, ("Blue Land") plaintiff, versus Warrior Oil and Gas, LLC ("Warrior"), and Joseph D. Mann ("Mr. Mann"), Defendants. Mr. Mann was, and still is, the primary principal of original Defendant Warrior. On August 14, 2019, Mr. Mann, on behalf of the defendants and in response to plaintiff's motion for default for failure to answer the complaint, did attempt to file an answer and motion to dismiss the complaint alleging lack of venue. Plaintiff's aforementioned motion for default was denied and the defendant's purported answer was ultimately struck was being filed by an individual, Mr. Mann, who was not a licensed attorney and not permitted to appear on behalf of Warrior.

The Court did then enter its Scheduling Order, noting Blue Land as plaintiff and Warrior was defendant. On or about September 23, 2019 Blue Land did file a motion to amend its complaint to voluntarily dismiss Mr. Mann, individually, from this action and to add as a defendant WOG Minerals, LLC ("WOG"), in his stead. This motion was predicated in large part to correspondence from plaintiff's attorney dated September 23, 2019, indicating to undersigned Counsel that WOG should have been a named defendant in this matter. Plaintiff's motion to amend the complaint specifically notes that the amended complaint will be limited to adding WOG as a named defendant. The motion in no way indicated that it intended to relieve Warrior of the liability alleged in the original complaint.

Blue Land's amended complaint dismissed Mr. Mann as a named defendant and added WOG as a named Defendant along with Warrior. At no time did Blue Land dismiss Warrior as a named defendant and, more importantly, the defendants never moved the Court to dismiss

Warrior as a named defendant. In fact, all subsequent pleadings filed by defendants including, but not limited to, what purports to be answers filed by Warrior to plaintiff's request for discovery, are in the name of Warrior.

On November 15, 2019, Blue Land did file its first set of interrogatories and requests for admissions on defendants. While the requests for admissions were timely answered by the defendants counsel at the time[2], no other discovery requests were answered. The defendants' failure to respond, or to engage in discovery in any manner, necessitated the plaintiff's motion to compel answers to discovery. On June 18, 2020, defendants did attempt to answer plaintiff's request for discovery. However, this again was submitted and filed by Mr. Mann and direct contradiction to the Court's previous admonishment that he was not a licensed attorney and could not file documents on behalf of the defendants. These answers were subsequently struck by the Court and the defendants were ordered to pay plaintiff's fees and costs as a sanction for again disobeying the Court's directive and failing to answer discovery as required. Plaintiff's second motion for default for defendant's failure to participate in this matter was denied.

On October 1, 2020, a hearing was held pursuant to the plaintiff's motion for default judgment and motion to dismiss the defendants' counterclaim. Plaintiff's motion was necessitated due to the defendants' refusal to answer any of the plaintiff's interrogatory requests or to prosecute, in any manner, it counterclaim[3]. This mater was granted and a hearing on the Plaintiff's damages was set. The defendants were allowed to call only one witness at this hearing. The rationale was that it would be unfair to allow the defendants to refuse to participate in the prosecution of this case, and not subject its witnesses to depositions under oath, and then to allow them to testify to matters about which the plaintiff could not explore as is allowed under the trial court rules.

This matter was then reassigned to the Honorable Judge Susan B. Tucker after defendants attempted to name the son of the previous judge, the Honorable Phillip D. Gaujot, as its sole witness in this matter. On May 19, 2021, a hearing was held on the plaintiff's alleged damages.

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[2] These requests were essentially denials of the requests and contained no substantive information relative to the requested information.

[3] The defendants' counterclaim alleged that 1) it was required to expend in excess of $50,000.00 to "correct" plaintiff's work product, and 2) it suffered loss of income in excess of $1,000,000.00 due to plaintiff's actions. However, to the amazement of no one involved, at no time during this proceeding did the defendants prosecute this claim of $1,000,000.00 in lost income.

The resulting order from that hearing, and the orders that formed the basis of that hearing, are the impetus of this appeal.[4]

ASSIGNMENT OF ERRORS

1. **The trial court erred in awarding default judgment against Warrior Oil & Gas, LLC**

Petitioner alleges that the trial court erred in awarding damages against Warrior Oil & Gas, LLC, despite the fact that Warrior was a named Defendant since the inception of the complaint. Upon amending the complaint, plaintiff never removed Warrior as a defendant and, importantly, noted in its motion to amend that the amendment was limited to adding WOG as a named defendant. In part, this was due to the fact that a significant amount of correspondence between the parties prior to litigation was between Warrior and Blue Land. Email correspondence from the defendants came from both Warrior and WOG, contact with the defendants was with Warrior and WOG, and there was never anything put forth by the defendants that would differentiate between the two defendants.

Plaintiff's original complaint against Warrior alleged two counts of breach of contract and two counts of unjust enrichment. At no time did plaintiff withdraw or amend that complaint. Defendants now seemingly want this Court to infer something that never occurred. All subsequent pleadings filed after the amendment, including those filed by the defendants, referred to both Warrior and WOG as defendants. It's difficult to imagine now, after judgment has been entered, that Warrior can somehow claim that it was not subject to an award of damages simply, and only, because another defendant was added as a named party.

While defendants counsel at the time indicated that plaintiff needed to add WOG as a named defendant, plaintiff never dismissed Warrior as a defendant and those claims survived the amendment to add WOG to the case. Defendants had every opportunity to move to have Warrior dismissed or, in the alternative, to ascertain its standing in the complaint but they failed to do so. In fact, the defendants failed to participate in any part of this proceeding, said failure resulting in

[4] Of important note, defendants allege in their appeal that they were not allowed to offer testimony evidence at the bench trial to determine plaintiff's damages. That simply isn't true. It was ordered by the Court that they were allowed to offer one witness per corporate defendant. That was the sanction for its refusal to offer any potential witnesses to be subject to deposition testimony during the course of litigation. Defendants simply voluntarily chose not to call any witnesses. It was an unusual trial strategy, but one of defendants' own choosing.

the award of default judgment of which they now complain. The defendants are asking this Court to retroactively grant a motion that should have been brought pursuant to W.Va. Rule Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted.

W.Va. Rule Civ. Pro. Rule 12(d) governs when such a motion should be made. The rule states the following:

> The defenses specifically enumerated in (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

While it would not have had merit to begin with, the defendants failed to bring this matter up through a motion to dismiss. To now claim that this Court should grant a motion that was never made stretches the imagination of defendants' understanding of this Court's authority.

2. The circuit court erred as a matter of law regarding the measure of damages applicable to Blue Land's claim against WOG Minerals

The defendants rely on Thomas and Moran v. Kanawha Valley Traction Company, 73 W.Va. 374, 80 S.E. 476 (1913), in support of its position that it should have been allowed to offer testimonial evidence relative to the purported quality of Blue Land's work and whether or not it was substandard for the purposes intended. What the defendants have failed to mention is that they had every opportunity to make the assertion that Blue Land's work was deficient in some manner but refused to do so.

Again, this matter commenced on June 5, 2019, with the filing of Blue Land's complaint against the defendants. Some four months later the defendants subsequently filed their answer and counterclaim alleging, in part, that Blue Land's work was deficient and, as a result, they spent $50,000.00 to remediate Blue Land's work and that they suffered a loss of income in excess of $1,000,000.00. Of note, however, is that during the entire course of this litigation the defendants refused to substantiate these allegations and refused to prosecute their counterclaim. The defendants failed as aforesaid in that they:

1. Refused to provide documentation of the Blue Land's deficiencies through requested documents in discovery,
2. Refused to answer any interrogatory requests relative to these alleged deficiencies,
3. Refused to prosecute their counterclaim, and
4. Refused to subject any of their witnesses to deposition testimony relative to these alleged deficiencies.

Now, after having their counterclaim dismissed as a sanction for their failure to participate in this litigation the defendants believe they can make an end run around the Court's ruling by offering testimony relative to their claim and asking this court to revisit an issue that has been decided. To allow this would be to put the plaintiff, the only party who actually participated in this litigation, at a significant disadvantage by having to defend an issue that the defendants would not litigate and would not provide information to support.

While the defendants rely on Thomas and Moran to support their position on damages, nothing in that case indicates that the defendants had a counterclaim that had been dismissed for failure to prosecute or failure to engage in the discovery process. Had the defendants felt they were aggrieved to a point where their losses were actually in excess of $1,000,000.00 they had every opportunity to put their evidence of same before a judge or jury. They refused to do so at their own peril.

3. The Court erred in awarding compound prejudgment interest calculated at the rate of 1.5% per month

Again, the defendants believe that they can refuse to participate in this litigation, thus incurring a default judgment as the result, and then utilize certain defenses to their benefit as a result. The defendants claim that, pursuant to W.Va. Code §56-6-27, the plaintiff should have requested that a jury make the determination that prejudgment interest is warranted in this matter. To be clear, the plaintiff did request this matter be heard by a jury upon filing of its complaint. In fact, had the defendants participated in any way during the pendency of this litigation this matter would have been heard by a jury, much like the defendants claim should have occurred. As it was, the plaintiff was granted default judgment and this matter proceeded to be heard by the Court. It is axiomatic that the defendants cannot cause an act to occur and then

turn around and claim that they are being prejudiced by the same set of circumstances that they created. Defendants are correct in that the trier of fact can ascertain whether interest is due and calculate same.

CONCLUSION

The defendants are attempting to utilize the appeal process to achieve objectives that should have been, and certainly could have been, brought forth during litigation. The fact remains that the defendants failed to participate in any way in this litigation, even going so far as to try and call the presiding judge's son as a witness in an effort to delay the inevitable. The defendants now ask this Court to, in effect, grant motions that were never made, disregard their contempt for the trial court's rulings, and to give them another bite at the apple. All without merit or factual support.

The trial court gave the defendants every opportunity to participate in this litigation and they failed to do so. The initial trial court went so far as to recognize that the defendants were "playing games" with the court. To reward them for their malfeasance with simply be travesty. Plaintiff moves this Court affirm the trial court's decision and allow the plaintiff to put this unfortunate matter behind them and to move on.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lance E. Rollo, do hereby certify that on this, the 13th day of December, 2021, I served a copy of the forgoing, Respondent's Respondent to Petitioner's Brief, by mailing a true and accurate copy of same via United States mail, first class, postage prepaid, upon the Petitioner as follows:

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