

FILED
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

SHONK LAND COMPANY, LLC

Plaintiff,

vs.

Civil Action No.: 18-C-193
Presiding Judge Wilkes
Resolution Judge Lorensen

CABOT OIL & GAS CORPORATION, and
CARBON WEST VIRGINIA COMPANY, LLC,

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION TO ENFORCE THE SETTLEMENT
TERM SHEET AND GRANTING DEFENDANT'S MOTION TO ENFORCE THE
SETTLEMENT AGREEMENT**

This matter came before the Court this 1st day of August 2019, pursuant to Plaintiff's Motion to Enforce the Settlement Term Sheet. The Plaintiff, Shonk Land Company, LLC, by counsel, Nicholas Johnson, Esq., and Defendants, Cabot Oil & Gas Corporation and Carbon West Virginia Company, LLC, by counsel, Robert Stonestreet, Esq. and Owen Reynolds, Esq., have fully briefed the issues necessary. On a prior day, the parties came on for a telephonic hearing on the matter before the undersigned. Upon the consideration of Plaintiff's Motion to Enforce the Settlement Term Sheet and Defendant's Response thereto, and oral argument, the Court concludes and finds that Plaintiff's Motion to Enforce the Settlement Term Sheet shall be denied. The Court finds as follows:

FINDINGS OF FACT

1. This matter was commenced with the filing of the complaint on February 27, 2018, wherein Plaintiff alleged Breach of Lease for Assignment Without Lessor's Consent (Count I); Breach of Lease for Non-Payment and Late Payment of Royalties (Count

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II); and Breach of the Ratification's Royalty Calculation Methodology (Count III).

The action surrounded two leases, the Williams and the Larner Leases (hereinafter "Leases"). *See* Pl's Mot., p. 1. Specifically, the action surrounded whether or not Shonk reasonably withheld its consent to assign, in conjunction with a consent to assign provision contained within the Leases.

2. On May 6, 2019, the parties participated in a settlement conference before the undersigned. The parties agreed to settle all claims, and entered into a Settlement Term Sheet at the May 6, 2019 settlement conference.
3. On or about June 7, 2019, counsel for Plaintiff contacted the Court via letter stating the parties could not mutually resolve an outstanding issue related to whether or not the right of first refusal is being added to the current terms or replacing the consent to assign provision that currently exists in the Leases, and seeking this Court to resolve the issue. Said letter is attached to this Order as Exhibit 1.
4. On June 18, 2019, a telephonic hearing was held before the undersigned. *See* Ord. Setting Hearing, 6/12/19.
5. On July 1, 2019, Shonk filed the instant Plaintiff Shonk Land Company LLC's Motion to Enforce Settlement Term Sheet, seeking court clarification that the settlement terms do not remove covenants against assignment contained in the Leases. *See* Pl's Mot., p. 2.
6. On July 11, 2019, Carbon filed its Response to Plaintiff Shonk Land Company LLC's Motion to Enforce the Settlement Term Sheet and Defendant Carbon West Virginia Company LLC's Motion to Enforce the Settlement Agreement, responding to

Shonk's motion and bringing its own motion to enforce the settlement agreement reached on May 6, 2019. *See* Def's Resp., p. 1.

7. On July 19, 2019, Plaintiff filed its Reply in Support of Motion to Enforce Settlement Term Sheet.
8. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Pending before the Court is a motion by Plaintiff Shonk Land Company ("Shonk") seeking an order ordering the parties to execute a lease amendment and ratification consistent with its argument that the settlement negotiations and memorialized term sheet did not remove covenants against assignment contained in the Leases. *See* Pl's Mot., p. 2, 5. Also pending before the Court is Defendant's cross motion, contained within its Response. *See* Def's Resp., p. 1.

Generally, "[a] settlement agreement is favored by law and is to be construed as any other contract". *Certain Underwriters At Lloyd's, London, Subscribing To Policy No. B0711 v. Pinoak Res., LLC*, 223, W. Va. 336 (2008)(internal citations omitted).

As an initial matter, the Court notes that it is undisputed that the parties have agreed that in the event of a dispute as to the settlement Term Sheet, the undersigned is to resolve said dispute. Paragraph 7 of the Term Sheet states, in pertinent part:

The Parties agree that any dispute of this Settlement Term Sheet or the terms of the Settlement Documents will be submitted to the Hon. Christopher Wilkes for resolution, with all parties waiving any conflict to Judge Wilkes's role as Presiding Judge in the Civil Action.

See Pl's Reply, Ex. 3.

The Court FINDS that the settlement agreement, made between the parties at the settlement conference conducted before the undersigned May 6, 2019, included an agreement to add a right of first refusal to the Leases. The Term Sheet was a memorandum to commemorate the settlement between the parties. While the Term Sheet was drafted in and during the settlement conference by counsel, and circulated, edited, and shown to opposing counsel and corporate representatives, it was not, and was not meant to be, a full and final expression of the settlement agreement. Indeed, nowhere in the Term Sheet does it state that the Term Sheet is a full and final expression of the terms between the parties, which is a common provision to include any written instrument that is meant to exhaustively state the entire detail of an agreement.

The understanding at the settlement conference was that the agreed upon Right of First Refusal would replace the existing consent provision currently included in the Leases. This substitution takes away the offending clause that was the basis of the entire litigation.

As this is the parties' second litigation, the undersigned even commented at the settlement conference that if the parties were to end up in litigation again, it wouldn't be due to a reasonable or unreasonable withholding of consent to assign issue, which was the entire basis of this litigation¹. Indeed, the Court finds this replacement would prevent further confusion and ambiguity regarding the consent provision which led to this civil action. As such, the Court must find that Plaintiff's Motion to Enforce the Settlement Term Sheet must be denied, and Defendant's Defendant Carbon West Virginia Company LLC's Motion to Enforce the Settlement Agreement must be granted.

CONCLUSION

¹ The Court notes no court reporter was present for the settlement conference, which took place in the jury room.

It is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Enforce the Settlement Term Sheet is hereby DENIED. It is further ADJUDGED and ORDERED that Defendant's Defendant Carbon West Virginia Company LLC's Motion to Enforce the Settlement Agreement is hereby GRANTED.

It is further ADJUDGED and ORDERED that Plaintiff is ORDERED to fulfill its obligations under the settlement agreement reached on May 6, 2019, as resolved above by the undersigned pursuant to the parties' explicit agreement that the undersigned resolve any disputes resulting from the Term Sheet, by executing the necessary documents. Objections and exceptions to adverse rulings are noted and preserved.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

Enter: August 1, 2019

Date: 8/1/19
 Certified copies sent to:
☒ counsel of record
☐ parties
☐ other (please indicate)
 By: Bur Ct
☒ certified/1st class mail
☐ fax
☐ hand delivery
☐ interdepartmental
 Other directives accomplished:
C. Bagley
S. Isha
N. Johnson
 Deputy Circuit Clerk


 JUDGE CHRISTOPHER C. WILKES
 JUDGE OF THE WEST VIRGINIA
 BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA
 COUNTY OF KANAWHA, SS
 I, CATHY S. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
 AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
 IS A TRUE COPY FROM THE RECORDS OF SAID COURT
 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 6th
 DAY OF August 2019
Cathy S. Batson CLERK
 CLERK OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BAILEY GLASSER LLP

1055 Thomas Jefferson St. NW
Suite 540
Washington, DC 20007
Tel: 202.463.2101
Fax: 202.463.2103

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CLERK
KANAWHA COUNTY CIRCUIT COURT

June 7, 2019

Via Email and Federal Express
Honorable Christopher C. Wilkes
Berkeley County Judicial Center
380 W. South Street, Suite 4400
Martinsburg, WV 25401

RE: *Shonk Land Company LLC v. Cabot Oil & Gas Corporation, et al.*
Kanawha County Circuit Court – Business Court; Civil Action No. 18-C-193

Dear Judge Wilkes:

Shonk and Carbon have been working in good faith to execute the documents necessary to effectuate the terms of the Confidential Settlement Term Sheet ("Term Sheet") executed on May 6, 2019 at the settlement conference and enclosed with this letter.

Thirty days have now passed since the Term Sheet was executed, and one issue remains outstanding that the parties have been unable to mutually resolve. Pursuant to Section 7 of the Term Sheet, Shonk is submitting this dispute to you for resolution.

Shonk and Carbon disagree about whether the right of first refusal ("ROFR") Shonk negotiated for in Section 5 of the Term Sheet is being added to the current terms of the leases or whether the ROFR is replacing the consent to assign provision that currently exists in the leases. Shonk's position, which is consistent with the Term Sheet, is that Shonk negotiated for the ROFR to be added to the leases. Shonk did not "trade" their consent to assign provision for the ROFR. There was no discussion of such a "trade" at the settlement conference and the Term Sheet does not make any reference to deleting the consent to assign provision or replacing it with the ROFR. If Shonk had agreed to give up the consent to assign provision in exchange for the ROFR, it would have been included in the Term Sheet. Carbon's view—that the ROFR replaces the consent to assign provision—significantly changes the deal Shonk made and would deprive Shonk of the benefit of their bargain.

Accordingly, Shonk respectfully requests that you rule on the issue or schedule a telephonic hearing to resolve the dispute. Since the Term Sheet calls for the deal documents to be executed within 30 days of signing the Term Sheet, and that time has now passed, Shonk requests a prompt resolution of the issue.

Sincerely,



Nicholas S. Johnson

NSJ/seg
Enclosure
cc: Counsel of Record

CAMPBELL WOODS

HUNTINGTON OFFICE

ATTORNEYS AND COUNSELORS AT LAW

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2019 AUG -1 PM 3:37
SATHY S. GANSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Owen A. Reynolds
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TELEPHONE (606) 329-1974
FACSIMILE (606) 324-2025

7 June 2019

Via email and U.S. Mail

Honorable Christopher C. Wilkes
Berkeley County Judicial Center
380 W. South Street, Suite 4400
Martinsburg, WV 25401

Re: *Shonk Land Company LLC v. Cabot Oil & Gas
Corporation and Carbon West Virginia Company LLC*
Civil Action No.: 18-C-193
Business Court Division
Circuit Court of Kanawha County, WV

Dear Judge Wilkes:

As Mr. Johnson stated in his letter, Shonk and Carbon have been working diligently to execute the documents necessary to finalize the settlement reached in the above-captioned litigation on May 6, 2019. The parties have come to an agreement on all terms and language in those documents, with one exception. As the thirty days have passed since May 6, 2019, Carbon agrees with Shonk that your assistance in resolving this dispute has become necessary.

The disagreement stems from the Right of First Refusal ("ROFR"). The language of the Settlement Terms Sheet states "[i]f Shonk Land Company, LLC, does not exercise its right of first refusal within thirty days of receipt of the Notice of Intent to Transfer, then the right of first refusal is waived for that specific Transfer, but not as to any future Transfers." Carbon interpreted this to mean that if the ROFR was not exercised, the transfer could proceed. Carbon's interpretation was reflected in Shonk's proposed language in the Second Lease Amendment and Ratification. In truth, Carbon's request to have the consent provision explicitly removed was not intended to be confrontational, and only serve as clarification, as Shonk's proposed language seemed to allow transfer if the ROFR was not exercised.

In Carbon's view, it makes little to no legal sense to have both a ROFR and a consent provision. This gives Shonk absolute power over the assignment of any lease, by allowing them to not exercise their refusal right and then proceed to forbid the transfer from happening altogether. On the other hand, it is Carbon's understanding that

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Honorable Christopher C. Wilkes
7 June 2019
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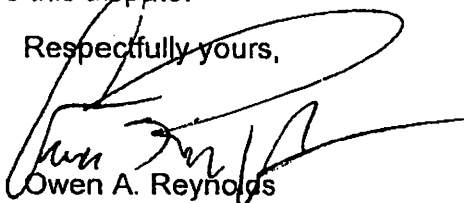
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SALLY E. GILBERT, CLERK
ALABAMA COUNTY CIRCUIT COURT

Shonk wants both the ROFR and the consent provision to remain in the leases in order to ensure that Carbon does not artificially inflate the price of the leases prior to sale. This does not seem like a legitimate concern, as the buyer is the one allocating value to the leases, not Carbon. In an attempt to resolve this conflict, Carbon has proposed several possible compromises, but Shonk has refused to accept any of these compromises or propose its own.

Carbon agrees with Shonk that, pursuant to the Settlement Terms Sheet, Court intervention is necessary to resolve this conflict, and respectfully requests that you schedule a telephonic hearing to resolve this dispute.

Respectfully yours,


Owen A. Reynolds

OAR/fjc

cc: Nicholas S. Johnson, Esq. and Sallie E. Gilbert, Esq – via email and U.S. Mail
Robert M. Stonestreet, Esq. – via email and U.S. Mail
Sharon F. Iskra, Esq. – via email and U.S. Mail
Tessa Bowers – via email
Carol Miller – via email