

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 25-ICA-144

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Heritage Resources-Marcellus Minerals, LLC,
Petitioner

v.

JB Exploration I, LLC
Plaintiff Below, Respondent

and

Lewis C. Wilson, Henry Alfred Thomas,
Maude D. Thomas, Thelma W. Thomas Hitchcock,
Calvin W. Thomas, James C. Thomas, Mary E. Thomas,
Ruth E. Thomas, Henry A. Thomas, Safrona C. Thomas,
Bertha E. Thomas, Sophrona Thomas, Tobias Wesley Thomas,
James E. Thomas, Absalom M. Thomas, and the remaining
unknown heirs, devisees, successors, assigns and/or creditors
of any of the above and all other unknown persons or defendants
who own or claim to own an unleased interest (unleased to JB
Exploration I, LLC) in and to the oil and gas within and underlying
that certain tract or parcel of real estate situate on the water of
Indian Creek, McElroy District, Tyler County, West Virginia,
said to contain 28.25 acres, more or less,
Defendants Below, Respondents

Respondent JB Exploration I, LLC's Brief

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Statement of the Case

JB Exploration I, LLC leased 25% of the oil and gas underlying a 28.25 acre tract of land in the McElroy District of Tyler County, West Virginia (the “Subject Tract”) [APP 019 at ¶ 2.] JB Exploration was unable to locate the owners of the remaining 75% interest. [APP 024 at ¶ 44.]

On February 4, 2014, pursuant to Article 12a of the West Virginia Code, JB Exploration filed a petition for the appointment of a special commissioner to lease the remaining 75% (the “Petition”). [APP 018–046.]

JB Exploration’s Petition was supported by a title opinion, dated February 28, 2013, prepared by Alex Miller, Esq. [APP 029–045.] According to this title opinion, the heirs of Lewis C. Wilson owned a 50% interest in the mineral estate of the Subject Tract and the heirs of Henry A. Thomas owned the remaining 25% interest. [APP 032.] The heirs of Lewis C. Wilson and Henry A. Thomas, however, were either abandoning owners or missing or unknown heirs, as those terms are defined in Article 12a. [APP 056.]

Pursuant to West Virginia Code section 55-12A-5(d), the circuit court appointed Frederick M. Dean Rohrig, Esq. to serve as guardian ad litem “for the [d]efendants including any and all unknown, missing, infant or incompetent owners of the oil and gas interests described in the Petition and their unknown heirs, successors and assigns not known to be alive.” [APP 048–049.]

In compliance with West Virginia Code section 55-12A-5(c), an order of publication was filed and then published in the Tyler Star News on February 12, 2014; February 19, 2014; and February 26, 2014. [APP 051–052, 057 at ¶ 6, 105 at ¶ 8.] This order of publication identified “ALL OTHER UNKNOWN PERSONS OR DEFENDANTS, who own or claim to own an un-leased interest in and to the oil and gas within and underlying” the Subject Tract. [APP 052, 105 at ¶ 9.]

In further compliance with the notice requirements in section 55-12A-5(c), a lis pendens was filed in “the county clerk’s office of the county wherein the mineral estate or the larger portion thereof lies.” [APP 057 at ¶ 6.]

Other than the answer of the guardian ad litem, no answer, responsive pleading, objections, or any other defenses were filed in response to the Petition. [APP 105 at ¶ 10.]

On May 1, 2014, the circuit court issued the order appointing special commissioner for the sale, execution and delivery of an oil and gas lease for the Subject Tract. [APP 054–59.] In this order, the circuit court decreed the ownership of the mineral estate in the Subject Tract as follows:

4. Ownership of the oil and gas within and underlying the Subject Property is vested as follows:		
<u>Name</u>	<u>Oil and Gas Leasing Rights</u>	<u>Leased</u>
Joseph Boyd	25%	Yes
Lewis C. Wilson Heirs, Successors and Assigns	50%	No
Henry A. Thomas Heirs, Successors and Assigns	25%	No

[APP 055 at ¶ 4.]

The court further concluded, as a matter of law, that JB Exploration “made a diligent effort to identify and locate the present unknown owners, missing owners and/or abandoning owners.” [APP 057 at ¶ 7.] The court then appointed William Crichton, Esq. to serve as special commissioner with the authority to lease the remaining 75% interest in the Subject Tract. [APP 058.]

On August 7, 2014, the special commissioner executed the Paid Up Oil & Gas Lease with JB Exploration covering 75% of the oil and gas underlying the Subject Tract. [APP 075–084.] This lease included a Memorandum of Oil and Gas Lease to be filed in the Office of the Clerk of Tyler County, West Virginia. [APP 075–077.]

Petitioner Heritage Resources—Marcellus Minerals, LLC contends that its “interest stems from a tax sale deed of record in the Tyler County Clerk’s Office in Deed Book 156, page 29.” [Heritage’s Brief at 5.] Heritage’s cited tax

sale deed is dated October 17, 1960¹; however, Heritage did not acquire its purported interest until December 29, 2014.²

For more than ten (10) years, the mineral interests underlying the Subject Tract were leased to JB Exploration, without any objection or appeal. Heritage now seeks to challenge the circuit court's findings regarding the ownership of the Subject Tract. This challenge fails, as a matter of fact and as a matter of law.

Summary of Argument

Under West Virginia Code sections 55-12A-6(g) and 55-12A-9, any unknown or missing owner, abandoning owner, or any heir, successor or assign thereof, has seven (7) years from the date on which the special commissioner's lease is signed to move to reopen the proceedings to recover any right, title or interest subject to the lease.

Heritage acquired its purported interest in the Subject Tract in late 2014—shortly after the special commissioner's lease was signed—but now seeks to reopen the underlying proceedings more than ten (10) years after the lease was

¹ Heritage did not attach to its motion to reopen the real property records it is relying on for its purported interest. As such, with this brief JB Exploration has filed a Motion for Leave to Supplement the Record to include the referenced documents for the Court's consideration.

² While this interest was originally acquired by American Energy—Marcellus Minerals LLC, on or about July 26, 2016, American Energy—Marcellus Minerals LLC's name was changed to Heritage Resources—Marcellus Minerals, LLC.

signed. Based on the express provisions of the West Virginia statute, Heritage's motion to reopen was filed three (3) years too late and is time barred.

To avoid this seven-year statute of limitations, Heritage contends that it was neither an abandoning owner nor an unknown or missing owner and was thus entitled to personal service. Heritage, however, did not own any purported interest in the Subject Tract prior to the execution of the special commissioner's lease. Moreover, even if Heritage has standing to assert this argument on behalf of its predecessor in interest (which it has not shown), the West Virginia Legislature did not carve out such an exception in Article 12a. Instead, Article 12a specifically states that "all persons whether in being or not in being, having any interest, present, future or contingent, in the mineral interests sought to be leased, **shall be fully bound by the proceedings hereunder.**" W. Va. Code Ann. § 55-12A-5(a) (emphasis added).

Article 12a provides for personal service *if possible* but further requires the petitioner to publish a Class III legal advertisement and file a notice of lis pendens in the county clerk's office. *Id.* § 55-12A-5(c). Both of these requirements were satisfied here. Article 12a further provides for the appointment of a guardian ad litem. *Id.* § 55-12A-5(d). Moreover, any purported owner has seven (7) years to come forward after the execution of the special commissioner's lease. *Id.* § 55-12A-6(g). Heritage did not. Based on these

provisions, Heritage's contention that Article 12a operates as an unconstitutional violation of due process is without merit.

Statement Regarding Oral Argument and Decision

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, oral argument is appropriate in this case based on the issues of first impression under Chapter 55, Article 12a of the West Virginia Code, and Petitioner's challenge that this statute violates constitutional due process.

Argument

I. STANDARD OF REVIEW

In reviewing the circuit court's denial of Heritage's motion to reopen, this Court reviews "the final order and the ultimate disposition under an abuse of discretion standard." *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995). The circuit court's factual findings are reviewed under a clearly erroneous standard, and any questions of law are subject to a *de novo* review. *Id.*

II. UNDER WEST VIRGINIA LAW, HERITAGE'S CLAIM TO AN INTEREST IN THE SUBJECT PROPERTY IS TIME BARRED.

A. Any challenge to the special commissioner's lease or any interest in and to the mineral interest subject to the lease must be brought within seven years.

Under the procedure enacted by the West Virginia Legislature in 1986, JB Exploration leased the oil and gas underlying the Subject Tract—and Heritage

(or its predecessors in interest) had seven (7) years to ask the circuit court to reopen these proceedings to establish any purported interest in the Subject Tract.

The legislative intent of Article 12a was “to facilitate development of coal, oil, gas, and other minerals, as part of the public policy of the state, by removing certain barriers to such development caused by interests in minerals owned by unknown or missing owners or by abandoning owners.” W. Va. Code Ann. § 55-12A-1. Therefore, the Legislature gave circuit courts the power to appoint special commissioners to lease the mineral interests of any unknown or missing owners, or any abandoning owners. *Id.* § 55-12A-4(a). Under this procedure, JB Exploration leased a 75% interest in the Subject Tract.

During the pendency of proceedings under Article 12a, “the unknown or missing owner or an abandoning owner, or any heir, successor or assign of an unknown or missing owner or abandoning owner, may appear as a matter of right at any time prior to the entry of judgment confirming the special commissioner’s lease, for the purpose of establishing his title to a mineral interest.” *Id.* § 55-12A-6(e).

Even after the special commissioner’s lease is signed, Article 12a provides that “[w]ithin seven years after the date of the special commissioner’s lease, any unknown or missing owner or abandoning owner of a mineral interest leased hereunder may file a motion with the court to re-open the action, and

may thereupon present such proof as the court may deem necessary to establish the movant's identity and title to the mineral interest or any part thereof." *Id.* § 55-12A-6(g) (emphasis added). In fact, the statute provides that if an unknown, missing, or abandoning owner does not come forward for a period of seven (7) years, then the circuit court can order the special commissioner to convey the subject mineral interest to the surface owners. *Id.* § 55-12A-7(a)(1).

The West Virginia Legislature went even further, specifically stating:

After the expiration of seven years from the date of the special commissioner's lease, no action may be brought by any unknown or missing owner or abandoning owner or any heir, successor or assign thereof either to recover any past or future proceeds accrued or to be accrued from the lease herein authorized, or to recover any right, title or interest in and to the mineral interest subject to the lease.

Id. § 55-12A-9.

Accordingly, under the provisions of Article 12a, Heritage had until August 7, 2021 to come forward to recover (1) any past or future proceeds under the special commissioner's lease, or (2) any right, title or interest in and to the mineral interest subject to the lease. Heritage, however, did not file its motion to reopen until January 22, 2025. Because Heritage's motion was more than three years too late, the circuit court properly denied Heritage's motion to reopen.

B. Heritage has not and cannot show that the seven-year statute of limitations does not apply.

Heritage contends that it was “a known or reasonably knowable owner,” and thus neither an abandoning owner nor an unknown or missing owner under West Virginia Code section 55-12A-2. Because of this, Heritage contends that the provisions of Article 12a—including the seven-year period to re-open the case—do not apply. This argument, however, is not supported by the express provisions of Article 12a.

Article 12a defines an abandoning owner as “any person, vested with title to any interest in minerals, who is proved to have abandoned the interest, that is, to have relinquished any right to possess or enjoy the interest with the expressed intention of terminating ownership of the interest, but without vesting the ownership in any other person.” *Id.* § 55-12A-2(1).

Article 12a defines an unknown or missing owner as “any person, vested with title to any interest in minerals, whose present identity or location cannot be determined from the records of the clerk of the county commission, the sheriff, the assessor and the clerk of the circuit court in the county in which the interest is located” *Id.* § 55-12A-2(5).

For its argument that it was “a known or reasonably knowable owner,” Heritage relies solely on an exhibit to a *separate* oil and gas lease in an attempt

to establish JB Exploration's purported knowledge of its predecessor's interest. [Heritage's Brief at 5.]

In 2012, JB Exploration leased numerous tracts of land in Tyler and Doddridge Counties, West Virginia from Mary Maxine Welch and Mary Anne Ketelsen. [APP 098.] The exhibit to the memorandum of lease specifies at least 87 different deeds subject to the lease. [APP 101–02.] Heritage contends that the 67th deed included in this exhibit provided JB Exploration with actual notice of Heritage's purported interest in the Subject Tract. [Heritage's Brief at 5.] It did not, as there is nothing tying this referenced deed to the Subject Tract.

Regardless, Article 12a is clear that “**all persons** whether in being or not in being, **having any interest**, present, future or contingent, **in the mineral interests sought to be leased, shall be fully bound by the proceedings hereunder.**” *Id.* § 55-12A-5(a) (emphasis added). The West Virginia Legislature did not exempt any “known or reasonably knowable owner” from the provisions of Article 12a or the seven-year statute of limitations. As such, Heritage's claims are subject to the statutory seven (7) year period.

III. HERITAGE'S PURPORTED INTEREST WAS NOT KNOWN AND PERSONAL SERVICE WAS NOT REQUIRED.

Heritage contends that it “should have been named in and joined” in the underlying proceedings. [Heritage's Brief at 12.] When this proceeding was

initiated in 2014, JB Exploration was not aware of any interest in the Subject Tract claimed by Heritage, or its predecessor in interest. In fact, Heritage did not acquire its purported interest until December 27, 2014—*after* the circuit court’s judgment in the underlying case and *after* the special commissioner’s lease was signed.³

Heritage relies on Rule 19 of the West Virginia Rules of Civil Procedure to contend that it was a necessary party. Article 12a, however, does not expressly incorporate Rule 19; instead, section 55-12A-5 specifically addresses the persons to be joined as defendants and the notice required.

Section 55-12A-5(a) provides that the petitioner “shall join as defendants to the action all unknown or missing owners or abandoning owners having record title to the particular minerals sought to be developed, and the unknown heirs, successors and assigns of all such owners not known to be alive.” This same subsection further provides that “all persons whether in being or not in being, having any interest, present, future or contingent, in the mineral interests sought to be leased, shall be fully bound by the proceedings hereunder.” *Id.* § 55-12A-5(a).

³ In fact, at the time that Heritage acquired its interest, a lis pendens related to the underlying proceedings had been recorded.

As it relates to notice of an action under Article 12a, section 55-12A-5(c) provides that “[i]f personal service of process is possible, it shall be made as provided by the West Virginia rules of civil procedure.” But this section further requires the petitioner to (1) “publish a Class III legal advertisement” and (2) “file a lis pendens notice in the county clerk’s office of the county wherein the mineral estate or the larger portion thereof lies.” *Id.* § 55-12A-5(c). JB Exploration published the requisite advertisement and filed the lis pendens in compliance with these statutory requirements. [APP 057 at ¶ 6.] Thus, the notice requirements in Article 12a were satisfied.

To further protect the interests of the unknown, missing or abandoning owners and their unknown heirs, Article 12a further provides for the appointment of a guardian ad litem. *See id.* § 55-12A-5(d). In accordance with this provision, the circuit court appointed Frederick M. Dean Rohrig, Esq. to serve as the guardian ad litem. [APP 048–49.]

Section 55-12A-5(c) further provides that “the court may in its discretion order advertisement elsewhere or by additional means if there is reason to believe that additional advertisement might result in identifying and locating the unknown or missing owners.” That did not happen here, because the circuit court expressly found that JB Exploration met the notice requirements under section 55-12A-5(c) and “made a diligent effort to identify and locate the present

unknown owners, missing owners and/or abandoning owners.” [APP 057 at ¶¶ 6–7.] Such findings by the circuit court are not only not clearly erroneous but were proper based on the record. Further, because the issue of joinder and notice are expressly addressed in Article 12a, Heritage’s reliance on Rule 19 and the cases applying the same are inapposite and/or misapprehended.

Although Heritage contends that it is neither an abandoning owner nor an unknown or missing owner, it did not own *any* purported interest in the Subject Tract prior to the execution of the special commissioner’s lease. Heritage conveniently omits any references to the date of the “Tax Sale Deed” it references for its interest—and the deed was not included with Heritage’s motion to reopen or in Heritage’s appendix record. [Heritage’s Brief at 5.] However, such deed is dated October 17, 1960. Yet, the circuit court found that the subject property “is entered and assessed on the 2012 Land Books in the Office of the Assessor of Tyler County, West Virginia” for only Joseph Boyd and that “[a]fter due inquiry and investigation . . . no other interests are currently being assessed on said land books.” [APP 055–056.]

Under West Virginia Code section 55-12A-2, Heritage’s predecessor falls within the definition of either an abandoning owner or an unknown or missing owner. Therefore, even if Heritage now purports to hold an interest in the Subject Tract, its claim is barred by Article 12a:

After the expiration of seven years from the date of the special commissioner's lease, *no* action may be brought by any unknown or missing owner or abandoning owner or any heir, *successor or assign* thereof to recover any past or future proceeds accrued or to be accrued from the lease herein authorized, or to recover any right, title or interest in and to the mineral interest subject to the lease.

Id. § 55-12A-9 (emphasis added).

As such, there is no question that Heritage is bound by the circuit court's proceedings. Heritage had seven (7) years to come forward to prove its purported ownership of the Subject Tract. Because it did not, it is time barred and cannot now seek to reopen these proceedings based on the express language of Article 12a.

IV. THE SUBJECT STATUTE DOES NOT OPERATE AS AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS.

Heritage has not proven that it has standing to assert any claims related to the Subject Tract. The relevant real property records in Tyler County show that Heritage did not acquire its purported interest under the "Tax Sale Deed" until December 27, 2014. Thus, at the time that Heritage acquired its interest, there was a lis pendens on file in the real property records in Tyler County, and Heritage was on notice of the underlying proceeding. Now, ten (10) years later, Heritage contends that the seven-year statute of limitations operates as an unconstitutional violation of due process.

Even if Heritage has standing to assert a constitutional due process challenge based on whether its predecessor in interest received personal service (although Heritage has not proven how), the West Virginia Legislature properly safeguarded the due process rights of any abandoning owners or unknown or missing owners. Specifically, the Legislature required:

- (1) The petitioner to file a lis pendens in the real property records;
- (2) The petitioner to effectuate service via publication; and
- (3) The appointment of a guardian ad litem for the abandoning, unknown or missing owners.

Id. § 55-12A-5(c), (d). All of these safeguards were complied with in the underlying proceedings in 2014.

In addition, any party claiming an interest had *seven* years from the date the special commissioner's lease was signed to ask the circuit court to reopen the proceedings. *Id.* §§ 55-12A-6(g), 55-12A-9.

Instead, Heritage waited more than ten (10) years to ask the circuit court to reopen this proceeding based on its purported ownership—and thus its motion to reopen was too late. This result, however, does not violate constitutional due process requirements.

In challenging due process, Heritage relies on the Supreme Court of Appeals of West Virginia's opinion in *Lily v. Duke*, 180 W. Va. 228, 376 S.E.2d

122 (1988). In *Lily*, the Court concluded that the prior version of the tax forfeiture statute (West Virginia Code Ann. § 11A-3-2) violated the due process rights of property owners because it permitted a tax sale without personal notice to the affected owners who were “reasonably ascertainable.” *Id.* at 231–32, 376 S.E.2d at 125–26. There, “the county sheriff posted and published in the local newspaper a notice of the tax delinquency.” *Id.* at 123, 376 S.E.2d at 229. Within the following year, the property owners filed suit to challenge the tax deed, which was ultimately set aside by the Court because of the failure to provide actual notice to the reasonably identifiable owners of the property. *Id.* at 231–32, 376 S.E.2d at 124–26.

This case is distinguishable from the present case. First, the provisions of Article 12a were not addressed or even at issue in *Lily*. Further, Article 12a provides for more than just a publication notice. As discussed previously, Article 12a provides for personal service if possible; publication of a Class III legal advertisement; and filing of a lis pendens in the county clerk’s office. W. Va. Code Ann. § 55-12A-5(c). In addition, a guardian ad litem is also appointed to protect the interests of any unknown, missing, or abandoning owners. *Id.* § 55-12A-5(d). Further, the West Virginia Legislature also expressly provided for a seven-year period to re-open the action and correct any title concerns. *Id.* §§ 55-12A-6(g), 55-12A-9.

While the express provisions of the statute are sufficient to overcome Heritage's due process challenge, the facts in the record on appeal also show that neither Heritage nor its predecessor was a reasonably identifiable owner of the Subject Tract. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950) (distinguishing between "known present beneficiaries" and "beneficiaries whose interests or addresses are unknown"). While there is still a question as to Heritage's purported interest, the circuit court's orders include findings of fact relating to the ownership of the Subject Tract. These findings were in accord with the assessments on the 2012 Land Books in the Office of the Assessor of Tyler County, West Virginia. [APP 055–056 at ¶¶ 5–6.] In addition, JB Exploration's Petition was supported by the title opinion of Alex Miller, Esq. [APP 019 at ¶ 4, APP 029–045.]

Again, by referencing a single deed in an exhibit to an oil and gas lease, Heritage has not established that it (or its predecessor) was a reasonably identifiable owner of the Subject Tract. But such proof is not required as it relates to its due process challenge because the West Virginia Legislature provided both specific instructions as it related to the notice required in Article 12a and an opportunity for a property owner to challenge any such findings by the circuit court for seven years. Due process does not require anything more.

Conclusion

For the reasons stated above, JB Exploration respectfully requests that the Court affirm the circuit court's denial of Heritage's motion to reopen this case.

Respectfully submitted,

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