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TWENTY-NINTH JUDICIAL CIRCUIT COUNTIES OF BUCHANAN, DICKENSON, RUSSELL AND TAZEWELL

May 24, 2007

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Re: *Sheffield, Trustee of the Oryn Treadway Sheffield Trust and Oryn Treadway Sheffield Trustee of the John Tolman Sheffield Trust v. CNX Gas Co., Levisa Coal Company, et al.*, Case No. 271-06

Dear Ladies and Gentlemen:

This case is before the Court on a Special Plea filed by Defendants Levisa Coal Company *et al.* and on a Demurrer filed by Defendant CNX Gas Company. On December 7, 2006, the Court heard oral arguments by counsel, admitted evidence, and took the Special Plea and Demurrer under advisement. The Court has reviewed the pleadings and memoranda filed in this case at great length. After examining the evidence, reviewing applicable law, and weighing counsels' arguments, the Court grants Defendants' Special Plea and Demurrer and issues the following opinion:

I. Facts

This dispute arises from a series of transfers of property interests, which are not in dispute.

A. The Original Transfer

On December 4, 1937, the Prater Coal Land Company conveyed to H. Claude Pobst and F. H. Combs "all of the coal, oil and gas as well as all such other minerals, metal and timber" on certain parcels of land located in Buchanan County (the Property) by deed. (Defs.' Ex. 1 at 1.) As a result of that transfer, H. Claude Pobst and F.H. Combs each owned one-half of all the coal, oil, gas, other minerals, metal, and timber located on the Property. On December 28, 1937, H. Claude Pobst and F. H. Combs transferred their interests in "all the coal, metals and timber" on the Property to Levisa Coal Corporation by deed. (Defs.' Ex. 2 at 1.) After this transfer to Levisa Coal Corporation, H. Claude Pobst and F. H. Combs each retained ownership rights to one-half of the oil, gas, and other minerals on the Property. Levisa Coal Corporation, now Levisa Coal Company (Levisa), is a Defendant in this case.

B. The Pobst Transfers

On April 23, 1947, by deed (1947 Gas Severance Deed), H. Claude Pobst and his first wife, Mary Alice Pobst, conveyed to their three children, John W. Pobst, Nancy S. Ellis, and W. Kent Pobst (Pobst Children), each an undivided one-third share of his one-half interest in "all of the oil and gas in, on and under" the Property. (Defs.' Ex. 3 at 1.) This transfer conveyed H. Claude Pobst's interest in the oil and gas in the Property in its entirety and left H. Claude Pobst owning only "the other minerals" located on the Property. The heirs and successors of the Pobst Children, Richard K. Pobst, Nancy C. Pobst, John W. Pobst, Jr., Lynda L. Pobst, Virginia Lee Linwick, and Meredith Ellis Jennings (Pobst Heirs) are Defendants in this suit. (Defs.' Special Plea ¶ 5.)

Years after the above transfer to his children, H. Claude Pobst died and left his remaining interest in the "other minerals" on the Property to his second wife, Jessie Maie Pobst, by a will dated September 6, 1965. (Defs.' Exs. 7-8.) After H. Claude Pobst's death, the Pobst Children contested their father's will and as a result, entered into a settlement agreement with Jessie Maie Pobst that transferred one-half of H. Claude Pobst's real property to the Pobst Children by a deed dated December 1, 1972. (Defs.' Ex. 6; Defs.' Special Plea ¶ 9.) After this transfer, the Pobst

Children owned one-half of the oil and gas on the Property and one-quarter of the other minerals on the Property, which left Jessie Maie Pobst with ownership rights in one-quarter of the other minerals on the Property.

At her death on August 12, 1988, Jessie Maie Pobst's property was transferred to her children by will, which included her one-fourth ownership rights to the other minerals on the Property. (Defs.' Ex. 9.) The successors or heirs of Jessie Maie Pobst are Plaintiffs in this suit.

C. The Combs Transfers

Upon his death, F. H. Combs transferred his ownership rights to one-half of the oil, gas, and other minerals on the Property to his children by will. (Defs.' Ex. 11; Defs.' Special Plea ¶ 7.) The heirs and successors to the oil, gas, and other minerals interests owned by F. H. Combs, Elene M. Combs, Executor of the Estate of Frederick H. Combs; Carol C. Irvin and her husband, John C. Irvin; Martha E. Combs, and the Fairview Limited Partnership (Combs Heirs), are Defendants in this case.

D. Oil, Gas, and Coalbed Methane Lease

On August 8, 1989, Jessie Maie Pobst, the Pobst Heirs, the Combs Heirs, and Levisa entered into an Oil, Gas, and Coalbed Methane Lease (the CBM Lease) where in exchange for royalties, said parties leased to OXY USA, Inc.

the right to the oil, gas and associated hydrocarbons and occluded methane and all associated natural gas and other hydrocarbons and occluded methane and all associated natural gas and other hydrocarbons normally produced or emitted from coal formations and seams and any related, associated or adjacent rock material

located on the Property. (Defs.' Ex. 4.) The right to royalties generated by the coalbed methane (CBM) pursuant to the CBM Lease is at issue in this case.

E. The Royalty Division Agreement

On August 31, 1990, the Pobst Heirs, the Combs Heirs, and Levisa entered into a Royalty Division Agreement (the Royalty Division Agreement) with OXY USA, Inc. in which said parties, having previously determined that Jessie Maie Pobst and her heirs had "no interest in the Property which was the subject of the [CBM Lease]" agreed on a division of royalties from the oil, gas, and CBM produced pursuant to the CBM Lease. (Defs.' Ex. 5.) CNX Gas Company (CNX) is the successor in interest to OXY USA, Inc. and is a Defendant in this case.

II. Procedural History

On April 24, 2006, Plaintiffs, John Sheffield, Trustee of the Oryn Treadway Sheffield Trust and Oryn Treadway Sheffield, Trustee of the John Tolman Sheffield (the Jessie Maie Pobst Heirs) filed a Complaint alleging Breach of Contract for Defendants' failure to pay CBM royalties that the Plaintiffs allege are due them under the CBM Lease; for Accounting of the

royalties paid to Defendants by CNX in order to calculate Plaintiffs' alleged damages; and for Constructive Trust for the alleged property owned by Plaintiffs taken by Defendants.

On August 30, 2006, the Pobst Heirs, the Combs Heirs, and Levisa moved this Court by Special Plea to receive evidence as to the deeds and CBM Lease at issue by evidentiary hearing and to grant the Defendants' Special Plea that the Plaintiffs have no interest in the CBM under the Property and therefore no standing to bring this action. On October 23, 2006, CNX filed a Demurrer to Plaintiffs' Complaint and craves oyer of the documents necessary to sustain Plaintiffs' claim that they have a property interest subject to the lease should the Court not grant the Demurrer.

III. Analysis

A. Levisa's Plea

1. Plea Standard

Resolution of a special plea is guided by "well-established principles." *Cooper Industries, Inc. v. Melendez*, 260 Va. 578, 594 (2000). Distinguishing a special plea from a demurrer, the Supreme Court of Virginia explained that

demurrers raise a question of law. Pleas raise a question of fact. The office of a plea is to present a simple issue of fact which operates as a bar to the plaintiff's right of recovery. The fact put in issue by the plea constitutes in itself a complete defense to the bill, or to that part of the bill to which it is pleaded.

Campbell v. Johnson, 203 Va. 43, 47 (1961). Further, in *Tomlin v. McKenzie*, the Supreme Court of Virginia explained that "[t]he moving party carries the burden of proof on that issue of fact." 251 Va. 478, 480 (1996) (citation omitted). In the case at bar, Defendants reduced Plaintiffs' Complaint to the single issue of whether H. Claude Pobst's 1947 conveyance of "all of the oil and gas in, on and under" the Property by deed effectively conveyed the CBM to the Pobst Children. (Defs.' Special Plea Mem., 2.) Should the Court decide this issue in the affirmative, the Jessie Maie Pobst Heirs are not entitled to royalties under the CBM Lease because they own no interest in the CBM.

Plaintiffs argue that the Court should deny Defendants' Special Plea because if the plea is granted, the litigation will be cut short and Plaintiffs will be denied an opportunity to present evidence as to how the CBM royalties should be divided among the Lessors. (Pls.' Special Plea Mem., 10.) In support of their position, Plaintiffs cite *Bethel Investment Company v. City of Hampton*, 272 Va. 765 (2006) and argue that there are factual disputes that must be resolved by a jury. In *City of Hampton*, the Supreme Court of Virginia reiterated the principle that the "Virginia Constitution guarantees that a jury will resolve disputed facts." *Id.* at 769. In that case, the Court considered the issue of whether the trial court deprived Bethel's right to a jury trial when it granted the City's statute of limitations plea to Bethel's claims of negligence, inverse condemnation, continuing trespass, continuous private nuisance, and diversion of surface water where there was a dispute as to when the damage to the plaintiff occurred. *Id.* at 768. The

Court held that under precedent, “the question of when the first actual damage resulted in the injury complained of was an issue of fact for determination by the jury.” *Id.* at 770.

In the case at bar, the single issue before the Court is whether H. Claude Pobst’s 1947 conveyance, which includes the phrase “all gas” in, on and under the Property, effectively conveyed the CBM to the Pobst Children. Unlike the *City of Hampton* case, where precedent held that the issue at bar was a jury question, the issue in this case has been resolved by a previous ruling of this Court. Pursuant to this Court’s prior rulings, a conveyance of “all gas” includes CBM. *Mac Construction, Inc. v. Yukon Pocahontas Coal Company*, Chancery No. 247-96. Further, the fact that the 1947 deed includes the phrase “all gas” is not in dispute. Thus, the Court finds that the plea is properly before the Court.

In resolving a special plea, the moving party must present a single set of facts to prove the single issue presented in the special plea, although the single set of facts may “possibly [be] made up of numerous circumstances.” *Stanardsville Volunteer Fire Co. v. Berry*, 229 Va. 578, 586 (1985). The moving party may present this single set of facts to the trial court through various means. First, evidence may be taken by the trial court *ore tenus*. *Cooper Indus.*, 260 Va. at 595. Also, the moving party may chose not to present evidence, in which case the trial court “must rely solely upon the pleadings in resolving the issue presented.” *Tomlin*, 251 Va. at 480 (enunciating the standard that “[w]hen considering the pleadings, the facts stated in the plaintiffs’ motion for judgment [are] deemed true”) (citation and internal quotation marks omitted). Further the parties can stipulate to the issue and submit an agreed set of facts for the trial court’s consideration. *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 562 (1992) (where the parties agreed “to proceed on the plea in bar . . . [and] submitted to the trial court all legal and factual questions underlying the single issue whether the Tariff barred Kroger’s negligence action against APCO”) (citation omitted). In the present case, Defendants elected to present evidence *ore tenus* in support of their special plea in a hearing on December 7, 2006 where Defendants and Plaintiffs were given the opportunity to submit evidence to the Court.

2. Analysis

- a) Plaintiffs’ claim to CBM royalties is barred because Jessie Maie Pobst owned no interest in the CBM located under the Property.

In support of their special plea, Defendants assert that Jessie Maie Pobst owned no interest in the CBM in which to transfer to her heirs because the 1947 Gas Severance Deed transferred “all of the oil and gas in, on and under’ the Property” to the Pobst Children. Further, although Jessie Maie Pobst was a party to the CBM Lease,¹ because she owned no rights to the CBM located under the Property, the Jessie Maie Pobst Heirs are not entitled to royalties pursuant to the CBM Lease. Thus, the single issue before the Court is whether or not Jessie Maie Pobst had ownership rights in the CBM located under the Property. In support of their plea that Plaintiffs’ claims are barred by lack of ownership of the CBM, Defendants submitted to the Court the deeds relevant to the rights to the CBM under the Property as well as the CBM Lease.

¹ Defendants contest the validity of the CBM Lease as to Jesse Maie Pobst (Defs.’ Special Plea Mem., 8-10); however, it is not necessary for the Court to address that issue in order to resolve the Special Plea.

(1) Rules of Construction

Virginia adheres to the plain meaning rule when construing a written agreement. *See Berry v. Klinger*, 225 Va. 201, 208 (1983) (defining the plain meaning rule as “[w]here an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself”) (citations omitted). When construing a deed, the Supreme Court of Virginia held that

where the language in the deed . . . is clear, unambiguous, and explicit . . . a court called upon to construe such a deed should look no further than the four corners of the instrument under review. Furthermore, if the language is explicit and the intention is thereby free from doubt, such intention is controlling, if not contrary to law or to public policy, and auxiliary rules of construction should not be used.

Irby v. Roberts, 256 Va. 324, 329 (1998). Further, when construing an agreement,

[t]he court must give effect to all of the language of a contract if its parts can be read together without conflict. Where possible, meaning must be given to every clause. The contract must be read as a single document. Its meaning is to be gathered from all its associated parts assembled as the unitary expression of the agreement of the parties. However inartfully it may have been drawn, the court cannot make a new contract for the parties, but must construe its language as written.

Berry, 225 Va. at 208 (citation omitted). In the case at bar, neither party has alleged that any documents before the Court are ambiguous and the Court finds that no document admitted into evidence ambiguous. Thus, the Court should look solely to the four corners of the documents before it in order to determine ownership of the CBM.

(2) Jessie Maie Pobst’s Property Interest

As discussed *infra* Part I. A-B, the Court traced Jessie Maie Pobst’s interest back to the original transfer of the Property to H. Claude Pobst from the Prater Coal Land Company by deed dated December 4, 1937. In that original transfer, H. Claude Pobst obtained a one-half interest in the coal, oil, gas, and other minerals on the Property. (Defs.’ Ex. 1 at 1.) After that transfer, H. Claude Pobst and F. H. Combs transferred their interests in “all the coal, metals and timber” on the Property to Levisa Coal Corporation by deed. (Defs.’ Ex. 2 at 1.) Next, by the 1947 Gas Severance Deed, H. Claude Pobst conveyed to his children, the Pobst Children, his entire interest in “all of the oil and gas in, on and under” the Property. (Defs.’ Ex. 3 at 1.) Pursuant to this Court’s prior rulings, a conveyance of “all gas” includes CBM. *Mac Construction, Inc.*, Chancery No. 247-96. The Court finds that its prior holding in *Mac Construction* applies to the case at bar; therefore, the Court concludes that the 1947 Gas Severance Deed transferred H. Claude Pobst’s interest in the CBM to the Pobst Children.

After H. Claude Pobst’s death, Jessie Maie Pobst inherited his remaining interest in the Property, which was the “other minerals.” (Defs.’ Exs. 7-8.) Further, as a result of a settlement

agreement, Jessie Maie Pobst, conveyed one-half of her interest in the “other minerals” on the Property to the Pobst Children (Defs.’ Ex. 6; Defs.’ Special Plea ¶ 9) and retained ownership rights in one-quarter of the “other minerals” on the Property. At the time of her death, Jessie Maie Pobst therefore owned one-quarter of the “other minerals” on the Property, which was transferred to Plaintiffs. (Defs.’ Ex. 9, 12.) Thus, the Court finds that Plaintiffs are owners of one-quarter of the other minerals on the Property, own no interest in the CBM on the Property, and are not entitled to royalties under the CBM Lease.

(3) Royalties under the CBM Lease are to be paid to Lessors in proportion to CBM ownership.

Plaintiffs argue that they are due royalties under the CBM Lease by virtue of their status as a “Lessor,” regardless of whether or not they actually own the rights to the CBM under the Property. (Pls.’ Special Plea Mem., 10.) Further, Plaintiffs contend that the Court must take evidence to determine how the royalties are to be divided among the Lessors because the CBM Lease is silent on the issue of the division of royalties. (Pls.’ Special Plea Mem., 10.) As stated above, this issue depends on whether the Plaintiffs have ownership to the CBM under the Property. The Court finds no merit to Plaintiffs claim that they are entitled to royalties by virtue of being included as a Lessor to the CBM Lease.²

Although the CBM Lease is silent on the division of royalties among CBM owners, the CBM Lease includes a lessor interest clause, which states the following:

it is agreed that if Lessor owns an interest in said land less than the entire mineral rights and royalty related thereto, then the rentals, royalties and other mineral related payments to be paid Lessor shall be reduced proportionately.

(Defs.’ Ex. 4 ¶ 7.) Giving the words their ordinary meaning, the Court construes this clause to reduce royalties owed to the Lessor in proportion to the Lessor’s ownership in the subject mineral. Here, the Court has determined that Jessie Maie Pobst owned no interest in the CBM under the Property; therefore, she is not due royalties under the CBM Lease.³ Thus, viewing all facts and inferences before the Court in a light most favorable to the Plaintiffs, the Court finds that Plaintiffs’ claim that they are successors in interest to the CBM Lease and are entitled to damages and ongoing rental and/or royalty payments is barred by the fact that Jessie Maie Pobst owned no interest in the CBM located under the Property. Likewise, Plaintiffs’ actions for Accounting of the royalties paid to other Lessors by CNX and for a Constructive Trust are barred by the fact that Jessie Maie Pobst owned no interest in the CBM at issue.

B. CNX’s Demurrer

1. Demurrer Standard

² The Court acknowledges that the Pobst Heirs were not a party to the Royalty Division Agreement (Defs.’ Ex. 5) and that the Royalty Division Agreement is not a basis for the Plaintiffs’ alleged rights to CBM royalties.

³ The Court finds no merit in Plaintiffs’ contention that the \$31,791.06 paid to Jessie Maie Pobst’s estate to enter the CBM Lease established an allocation of CBM royalties (Pls.’ Mem. In Reply to Special Plea, 12) in light of the fact that Jessie Maie Pobst’s estate owned no interest in the CBM at the time of the execution of the CBM Lease.

Setting forth the standard for a demurrer, the Supreme Court of Virginia held that “[a] demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof.” *Eagle Harbor L.L.C. v. Isle of Wight County*, 271 Va. 603, 302 (2006) (internal quotation marks and citations omitted). Further, “[t]o survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.” *Id.* When considering a motion for demurrer, in a “light most favorable to the plaintiff,” a trial court must accept “as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts.” *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 318 (2006) (internal quotation marks and citations omitted). Although the court must accept the facts alleged as true, the court must not accept “the conclusions of law presented as true for purposes of the demurrer.” *Eagle Harbor*, 271 Va. at 306. Thus, where a “bill of complaint [does not] allege[] sufficient facts to constitute a foundation in law for the judgment sought,” a demurrer must be sustained. *Id.* at 302 (citation omitted).

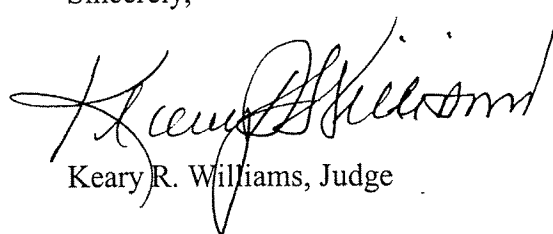
2. Analysis

Under Virginia law, “[t]he essential elements of a cause of action for breach of contract are: (1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that right or duty, and (3) a consequential injury or damage to the plaintiff.” *Westminster Investing Corp. v. Lamps Unlimited*, 237 Va. 543, 546 (1989) (footnote, citation, and internal quotations omitted); *Accord Filak v. George*, 267 Va. 612, 619 (2004). Here, Plaintiffs fail to allege facts that give rise to a legal obligation of Defendant that would require CNX to pay CBM royalties to Plaintiffs. An allegation that Defendant owes Plaintiffs royalties under the CBM Lease is not a legally sufficient fact that gives rise to a right to royalties from CBM not owned by the Plaintiffs. Likewise, Plaintiffs allege no facts that would entitle them to an accounting of the royalties due Defendants and have not alleged facts that would tend to show ownership of the CBM to support their action for a Constructive Trust.

IV. Conclusion

For the reasons stated above, the Court sustains Defendants’ Special Plea and Demurrer and dismisses Plaintiffs’ Complaint. Counsel for Defendant shall prepare the Order in accordance with this Court’s opinion herein, and forward the same to Counsel of Record for endorsement and then to the Court for entry.

Sincerely,



Keary R. Williams, Judge

KRW/svl

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF BUCHANAN

JOHN SHEFFIELD, TRUSTEE of the)
ORYN TREADWAY SHEFFIELD TRUST)
and ORYN TREADWAY SHEFFIELD,)
TRUSTEE of the JOHN TOLMAN SHEFFIELD)
TRUST, *et al.*,)

Plaintiffs,)

v.)

Case No. 271-06

CNX GAS COMPANY LLC,)
LEVISA COAL COMPANY, LP, *et al.*,)

Defendants.)

FINAL ORDER AND JUDGMENT FOR DEFENDANTS

On December 7, 2006, the parties to this action appeared, by counsel, and presented evidence and argument on the Special Plea filed by Levisa Coal Company, LP, et al., and presented argument as to the Demurrer filed by CNX Gas Company, LLC. For the reasons stated by this Court in its Memorandum Opinion dated May 24, 2007, the Court sustains the Special Plea of Defendants Levisa Coal Company, L.P., et. al. The Court specifically finds that the single issue properly presented by the Special Plea must be resolved in favor of Defendants, and that this finding serves as a complete bar to all claims by Plaintiffs against these Defendants.

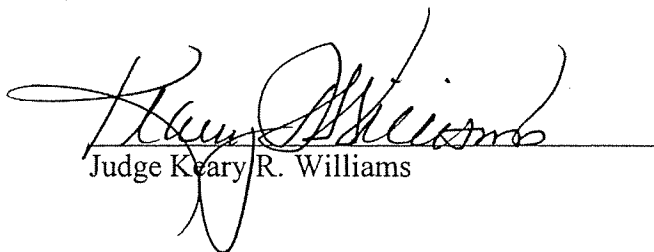
As to the Demurrer filed by Defendant CNX Gas Company, LLC, the Court finds, after taking as true all facts properly pleaded in the Complaint and drawing all reasonable and fair inferences in favor of Plaintiffs, and viewing the Demurrer in a light most favorable to Plaintiffs, that the Complaint does not allege sufficient facts to constitute a foundation in law for the judgment sought by Plaintiffs. Accordingly, for the reasons stated in the May 24, 2007 Memorandum Opinion, the Court sustains the Demurrer.

These rulings having disposed of all issues as to all parties in this matter, the Court ORDERS that the Plaintiffs' Complaint is dismissed with prejudice and without leave to file an amended complaint. The May 24, 2007 Memorandum Opinion is hereby incorporated into and made part of this Order, which represents a final judgment in favor of all Defendants in this matter as to all claims.

The Clerk shall certify copies of this Order to all counsel of record and remove this matter from the Court's docket.

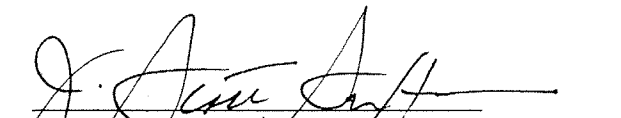
Endorsement of counsel is waived pursuant to Rule 1:13.

Entered this 21st day of AUGUST, 2007.

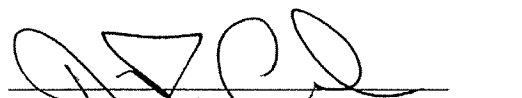


Judge Keary R. Williams

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