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Nate Holland

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By: Nate Holland

I. JAYNE V. TALISMAN ENERGY USA, INC.

Oil and gas lessors sought to invalidate lease ratifications on the grounds that they did not contain statutory notices of the right to cancel within three days of execution.[1] Four siblings jointly owned a parcel of land and in 2000 one brother executed an oil and gas lease that was subsequently ratified by another brother in 2007.[2]

Pursuant to N.Y. General Obligations Law section 5-333, all oil and gas leases executed after January 1, 2006 must contain a printed notice in at least ten-point font that states:

> THIS IS A LEASE OF OIL AND GAS RIGHTS, NOT A SALE, CONTAINING TERMS THAT MAY BE NEGOTIATED BY YOU. YOU HAVE THE RIGHT TO CANCEL THIS LEASE WITHIN THREE BUSINESS DAYS AFTER EXECUTION OF THE LEASE BY NOTIFYING THE LESSEE THAT YOU HAVE CANCELED THIS CONTRACT. IN ORDER TO CANCEL THIS LEASE, YOU MUST EXECUTE A NOTICE OF CANCELLATION IN THE FORM PROVIDED BELOW, MAIL IT TO THE LESSEE AND REFUND ALL AMOUNTS PAID TO YOU BY THE LESSEE WITHIN THE THREE-DAY CANCELLATION PERIOD. THE MAILING MUST BE POSTMARKED WITHIN THE THREE-DAY CANCELLATION PERIOD TO BE EFFECTIVE.[3]

The lease ratifications did not contain the notice.[4]

1. Jayne v. Talisman Energy USA, Inc., 923 N.Y.S.2d 271, 272 (App. Div. 2011).
2. *Id.*
3. *Id.* at 272–73; N.Y. GEN. OBLIG. LAW § 5-333(5) (Consol. 2006).
4. *Jayne*, 923 N.Y.S.2d at 272.

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The court noted that in New York any cotenant may lease or produce minerals from their property.[5] The court concluded that the ratification was not an oil and gas lease, but instead was intended to resolve the potential dispute with the cotenants as to the amount owed to them as cotenants.[6] It also distinguished the ratification on the grounds that it did not restate the terms of the lease, but created the legal fiction that the ratifiers were party to the prior lease: "The plain language of General Obligations Law § 5–333(5) addresses oil and gas leases, not all types of documents or agreements that may affect oil and gas rights. Thus, the ratification agreement, which merely confirmed a valid preexisting lease *nunc pro tunc*, was not required to include the notice provided for by that statute."[7] The court granted defendant lessee-assignee's motion to dismiss.[8]

II. WISER V. ENERVEST OPERATING, L.L.C.

Lessors brought a declaratory judgment action to declare oil and gas leases null and void.[9] The leases were executed in late 1999 and early 2000 and had ten-year primary terms.[10] They contained force majeure clauses and also contained "unless" delay rental clauses providing for the payment of delay rentals dating from ninety days after the leases' execution until the commencement of a well.[11] In 2008 New York Governor David Paterson issued an executive order that lessees allegedly caused a de facto moratorium on the Department of Environmental Conservation issuing drilling permits. No wells were drilled during the leases' primary terms.[12]

The court, following other jurisdictions, held that pursuant to the delay rental clause, the leases would automatically "terminate in the event that the lessor fails to commence drilling of a well or timely pay delay rentals within the primary term of the leases."[13] The court then found that if the moratorium constituted a force majeure event, it con-

5. *Id.* at 1583 (citing LeBarron v. Babcock, 25 N.E. 253, 253-54 (N.Y. 1890); O'Brien v. Ginter, 744 N.Y.S.2d 511, 511 (App. Div. 2002); Wilsey v. Loveland, 167 N.Y.S. 546, 548 (App. Div. 1917), *amended by* 167 N.Y.S. 546 (App. Div. 1917)).

6. *Id.* (citing *O'Brien*, 744 N.Y.S.2d at 512; Abbey v. Wheeler, 62 N.E. 1074, 1077 (N.Y. 1902)).

7. *Id.*

8. *Id.*

9. Wiser v. Enervest Operating, L.L.C., No. 3:10–CV–794(TJM/DEP), 2011 WL 3586014, at *1 (N.D.N.Y. Mar. 22, 2011).

10. *Id.*

11. *Id.* at *2.

12. *Id.* at *1.

13. *Id.* at *8 (citing Rice v. Hillenburg, 766 P.2d 182, 185 (Kan. 1989); Petroleum Eng'rs Producing Corp. v. White, 350 P.2d 601, 604 (Okla. 1960); Phillips Petroleum Co. v. Curtis, 182 F.2d 122, 125 (10th Cir. 1950); Valentine Oil Co. v. Powers, 59 N.W.2d 150, 159 (Neb. 1953)). *But see* Phyfer v. San Gabriel Dev. Corp., 884 F.2d 235, 239 (5th Cir. 1989) (holding that a lease which includes a forfeiture provision imposes upon the lessee an affirmative obligation if the lessee did not drill or pay delay rentals and does not automatically terminate on the lessee's breach).

tinued the primary terms of the leases rather than secondary terms, because the Governor's order occurred during the leases' primary terms.[14] Consequently, delay rentals were owed during the force majeure period and the leases terminated when they were not properly tendered.[15] The court held that the leases' notice of default provisions only applied to covenants under the leases, and did not apply to the proper payment of delay rentals.[16] Consequently, the court granted plaintiffs' motion for summary judgment, declaring the leases to have terminated.[17]

III. WEIDEN LAKE PROPERTY OWNERS ASS'N, INC. V. KLANSKY

The Supreme Court of Sullivan County granted summary judgment in favor of a property owners association in a declaratory judgment action against landowner and operator, holding that deed covenants restricting property use to single family homes and restricting commercial uses barred oil and gas development under a lease.[18] The court also granted summary judgment in favor of the landowner on operator's cross-claims for rescission of lease and fraud in the inducement, finding that operator had notice of the protective covenants prior to taking the lease.[19] The court additionally denied operator's request to file an amended answer with additional cross-claims for unjust enrichment and unilateral and mutual mistake, on the same grounds.[20]

14. *Id.* at *10.
15. *Id.* at *13.
16. *Id.*
17. *Id.*
18. Weiden Lake Prop. Owners Ass'n v. Klansky, No. 3885/09, 2011 WL 3631955, at *1–4 (N.Y. Sup. Ct. Aug. 18, 2011).
19. *Id.* at *5.
20. *Id.*