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I. CASES

A. Hite v. Falcon Partners

Lessors brought a declaratory judgment action seeking to terminate several oil and gas leases executed in 2002 and 2003.[1] The leases' habendum clause provided for a primary term of one year and a secondary term continuing so long as lessee produced oil or gas, there were production operations on the leasehold, or lessee tendered delay rental payments.[2] Assignee-lessees made delay rental payments but did not make any efforts to drill any wells on the leaseholds.[3] The trial court granted summary judgment for lessors on the grounds that leases would not be construed to create a perpetual term unless the

1. *See* Hite v. Falcon Partners, 13 A.3d 942, 944 (Pa. Super. Ct. 2011).
2. *Id.*
3. *Id.*

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intention is clear and unequivocal.[4] The Superior Court initially noted that an oil and gas lease conveys an inchoate interest that becomes vested as a fee simple determinable upon production.[5] The court then affirmed, holding that delay rental payments could not hold the leases during the secondary terms, relying heavily on the rationale that the purpose of a lease is to promote the development of the leasehold.[6] The court additionally held that to find that a lease can be held indefinitely by delay rental payments was inconsistent with the nature of a lease as a fee simple determinable, because it only becomes such a vested interest when production in paying quantities is achieved.[7]

B. Hoffman v. Arcelormittal Pristine Resources, Inc.

A surface owner brought a declaratory judgment action seeking a declaration that she was the owner of the oil and gas.[8] Defendants took title from a prior owner who had conveyed the property in 1928 reserving "all gas and oil within and underlying [the] premises."[9] Plaintiff's deed specifically excepted and reserved "coal, oil and gas, and other minerals."[10] Plaintiff nonetheless executed oil and gas leases in 1971, 1981, and 2006.[11] Plaintiff argued that "all gas" referred only to gas in sandstone formations and not shale formations. Plaintiff cited *U.S. Steel Corp. v. Hoge,* which held that coalbed methane gas is owned by the severed coal owner.[12] In *Hoge,* the Pennsylvania Supreme Court stated that "[w]e find implicit in the reservation of the right to drill through the severed coal seam for 'oil and gas' a recognition of the parties that the gas which was generally known to be commercially exploitable."[13] Plaintiff used this rationale to argue that because Marcellus shale mining was not commercially exploitable at the time of the 1928 Deed, then the language in the 1928 Deed reserving rights to "all oil and gas" is somehow ambiguous,

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4. *See id.* at 947–48.

5. *Id.* at 945 (citing Calhoon v. Neely, 50 A. 967, 968 (Pa. 1902); Burgan v. S. Penn Oil Co., 89 A. 823, 826 (Pa. 1914); Barnsdall v. Bradford Gas Co., 74 A. 207, 208 (Pa. 1909)).

6. *Id.* at 948 ("To find as Falcon urges, that it may pay delay rental indefinitely, thereby denying Plaintiffs the opportunity to reap the financial benefits of actual production, would be contrary to the decisions of our Courts, at odds with the presumed intention of the parties in executing the leases in the first place, and in stark contrast to the clear opinion of the courts of Pennsylvania that the obligation to pay delay rentals is intended to 'spur the lessee toward development.'") (citing Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759, 789 (W.D. Pa. 2004)).

7. *Id.* at 949–50 (quoting *Jacobs*, 332 F. Supp. 2d at 791).

8. Hoffman v. Arcelormittal Pristine Res. Inc., No. 11cv0322, 2011 WL 1791709, at *1 (W.D. Pa. May 10, 2011).

9. *Id.* at *2.

10. *Id.* at *3.

11. *Id.*

12. *Id.* at *4–5 (citing U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1383–84 (Pa. 1983)).

13. *Id.* at *5 (quoting *Hoge*, 468 A.2d at 1385).

and that "the intent of the parties was to except and reserve only the geological formations capable of the production of natural gas with then existing technology."[14]

The district court found that the reservation of "all gas" was unambiguous, relying on the interpretational principle that all the words must be given effect.[15] The court then distinguished *Hoge* in part based on the fact that in *Hoge* the mineral estate was subdivided between the coal owner and the oil and gas owner.[16]

The court also rejected plaintiff's adverse possession claim, following the general rule that when there has been a severance of a mineral estate, it can only be adversely possessed by production of the mineral for the applicable statutory period.[17] The court cited a prior Pennsylvania Common Pleas Court case involving oil and gas rights,[18] as well as cases in other jurisdictions with a history of oil and gas production.[19] The court granted summary judgment for the Defendants.[20]

C. Lauchle v. Keeton Group LLC

Lessor plaintiffs brought an action to invalidate oil and gas leases under Pennsylvania's Minimum Royalty Act for permitting deduction of post-production costs.[21] The claim was subsequently dismissed upon defendants' motions under Rule 12(b)(6), following the Pennsylvania Supreme Court's decision in *Kilmer v. Elexco Land Services, Inc.*[22] Operator defendants filed a counter-claim for equitable tolling of the leases' primary terms during the litigation.[23] Defendants argued that the declaratory judgment actions initiated by plaintiffs forced them to forego operations on the subject properties due to uncertainty about the validity of the leases, depriving them of the benefits of each lease's full term.[24]

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14. *Id.*

15. *Id.* (citing Highland v. Commonwealth, 161 A.2d 390, 402 (Pa. 1960)).

16. *Id.* ("The facts in this case are distinguishable from *Hoge* because in the instant the mineral estate was not subdivided, and there are not multiple parties with different and potentially conflicting interests in the same mineral estate. In this case, the 1928 Deed, which the parties agree is controlling, reserves and excepts *all* subsurface oil and gas rights to the predecessor of ArcelorMittal Pristine.").

17. *Id.* at *6 (citing Plummer v. Hillside Coal & Iron Co., 28 A. 853, 853 (Pa. 1894); Shaffer v. O'Toole, 964 A.2d 420, 423 (Pa. Super. Ct. 2000)).

18. *Id.* (citing Thomas v. Oviatt, 5 Pa. D. & C.4th 83, 83 (Pa. Com. Pl. 1989)).

19. *Id.* (citing Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 193 (Tex. 2003); Schaneman v. Wright, 470 N.W.2d 566, 577 (Neb. 1991); Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394, 401 (Ky. 1934); Lyles v. Dodge, 228 S.W. 316, 317 (Tex. Civ. App.—Amarillo 1921, no writ)).

20. *Id.* at *8.

21. 58 PA. CONS. STAT. ANN. § 33 (West 1996).

22. Lauchle v. Keeton Grp. LLC, 768 F. Supp. 2d 757, 758 (M.D. Pa. 2011) (citing Kilmer v. Elexco Land Services, Inc., 990 A.2d 1147 (Pa. 2010)).

23. *Id.* at 760.

24. *Id.*

Plaintiff cited *Derrickheim v. Holm*, a Pennsylvania Superior Court case to argue that the action to invalidate the leases did not constitute a repudiation of the leases.[25] In *Derrickheim*, a lessee stopped drilling operations once they became aware of a cloud in the title of the lessor, and did not resume activities until the cloud was judicially determined.[26] The Superior Court reversed the trial court's initial order that the term of the lease was equitably tolled, holding that "since oil and gas was not being produced in paying quantities, the lease did not continue to run past the primary term of four years. The fact that it was 'prudent' for [lessee] to suspend operations upon learning of the cloud on the title does not justify disregarding the express language of the lease."[27]

Defendants attempted to distinguish *Derrickheim* by emphasizing that in this case litigation was initiated by the lessors themselves and was tantamount to a repudiation of the lease. Defendants relied on established authority in Texas, Oklahoma, and Louisiana.[28] The court ignored these arguments, emphasizing that the lease challenge was initially meritorious, citing the lessee's traditional role in drafting leases and insisting that equitably extending the leases would discourage lessors from bringing meritorious challenges to leases.[29] The court granted the lessors' cross-motion for summary judgment.[30]

D. Pinebrook Minerals, LLC v. Anadarko E & P Co., LP

Lessor-assignee brought a declaratory judgment action to invalidate oil and gas leases. Defendant filed a motion to dismiss the claim as (a) being barred by the statute of limitations; (b) failing to state a claim that lessor's officers acted *ultra vires* by executing the lease; (c) ratification; and (d) failure to join a necessary party.[31]

The Magistrate Judge held that the four-year statute of limitations applicable to contracts under 42 Pennsylvania Constitutional Statute section 5525 applied to a lease dispute under the catchall provision under section 5525(a)(8).[32] However, the Magistrate Judge held that plaintiff lessor-assignee had no notice of the lease dispute until its as-

25. *Id.* at 760–61 (citing Derrickheim v. Holm, 451 A.2d 477, 479–80 (Pa. Super. Ct. 1982)).

26. *Derrickheim*, 451 A.2d at 479–80.

27. *Lauchle*, 768 F. Supp. 2d at 761 (quoting *Derrickheim*, 451 A.2d at 480).

28. *Id.* (citing Rougon v. Chevron, USA, Inc., 575 F. Supp. 95 (M.D. La. 1983); Barby v. Cabot Petroleum Corp., 944 F.2d 798, 799–800 (10th Cir. 1991); Cheyenne Res., Inc. v. Criswell, 714 S.W.2d 103, 105 (Tex. App.—Eastland 1986, no writ)).

29. *Id.* at 762.

30. *Id.*

31. Pinebrook Minerals, LLC v. Anadarko E&P Co. LP, No. 4-11-CV-00177, 2011 WL 3584783, at *1, *2 (M.D. Pa. July 25, 2011).

32. *Id.* at *3, *4.

signment on June 17, 2010, and thus the January 2011 complaint was filed within the limitations period.[33]

Defendant argued that plaintiff failed to state claim that the lease was ultra vires because it could rely on lessor-assignor's officers' apparent authority to execute the lease under section 5506 of the Nonprofit Corporation Law.[34] Plaintiff argued that section 5506 does not apply to the conveyance of real property interests. The Magistrate Judge held that a lease was both a contract and a conveyance of property.[35] The Magistrate Judge further held that section 5503(b) similarly permitted grantees of real property interests to rely on apparent authority, and that plaintiff had no standing to challenge the conveyance as ultra vires under section 5505 (providing that by-laws are of no effect on third parties without notice of their provisions).[36]

The Magistrate Judge held that there was insufficient evidence in the complaint of plaintiff's ratification because recitals in the assignment of lease were not binding judicial admissions under Federal Rule of Evidence 803(d)(2).[37] The Magistrate Judge also concluded that lessor-assignor was a necessary party who should have been joined under FRCP 19(a)(1) as a party whose joinder would not deprive the court of subject matter jurisdiction and whose absence created a risk that defendant would incur double, multiple, or otherwise inconsistent obligations in regard to lessor-assignor.[38] Accordingly, the Magistrate Judge recommended that the court grant defendant's motion to dismiss.[39]

E. Dufour v. Carizzo Oil & Gas, Inc.

Lessors brought an action for unpaid bonus payments after a signed lease was subsequently rejected by lessee on grounds of title defect.[40] The court found that a subsequent delay rental payment tendered by lessee and a lease addendum providing that payment could only be withheld for a cloud on title after judicial determination of a defect were sufficient to state a claim for breach of a contract between the parties.[41] However, an additional fraud claim was barred by the gist

33. *See id.* at *4.

34. *See id.* at *4, *5; 15 PA. CONS. STAT. ANN. § 5506 (West Supp. 2011).

35. *Pinebrook Minerals, LLC*, 2011 WL 3584783 at *5 (citing Hite v. Falcon Partners, 13 A.3d 942, 945 (Pa. Super. Ct. 2011)).

36. *Id.* at *6; *see also* 15 PA. CONS. STAT. ANN. §§ 5503(b), 5505 (West Supp. 2011).

37. *Id.* at *8 (citing Parlette v. Palumbo, 68 Pa. D. & C. 374, 378 (Pa. Mun. Ct. 1949)).

38. *Id.* at *9–10.

39. *Id.* at *10.

40. Dufour v. Carizzo Oil & Gas, Inc., No. 3:10-CV-00013, 2011 WL 1136801, at *1 (W.D. Pa. Mar. 25, 2011).

41. *Id.* at *4.

of the action doctrine because it was solely based on the failure to make the bonus payment.[42]

F. Shafer v. Range Resources-Appalachia, LLC

Landowners filed a breach of contract action relating to unpaid oil and gas lease payments.[43] Lessee brought a motion to dismiss the claim, arguing that plaintiff insufficiently alleged a breach of contract because: (1) the documents demonstrate that no contract was formed, as defendant never manifested its assent to enter into a contract; (2) even if a contract was formed, defendant did not breach it because there was an express condition precedent (i.e., "management approval") to defendant's duty to make the bonus payment; and (3) the contract is unenforceable pursuant to the statute of frauds.[44] Defendants cited three prior cases dismissing similar claims for lease bonus payments.[45]

The court held that the lack of signature was not determinative of defendant's intent to contract.[46] The court further cited a statement in the letter above landowners' signature line that "LESSOR: ACCEPTS AND AGREES" as evidence of an accepted offer from the defendant.[47] The court held that the statute of frauds was an affirmative defense that could not be raised in an initial motion to dismiss, and furthermore that the landman's typewritten name on the letter could constitute a signature.[48] The court then accordingly denied the motion to dismiss.[49]

II. STATUTES

Act 2 of 2011, P.L. 7, No.2 ("Act"), effective May 13, 2011, makes several substantive changes to the Coal and Gas Resource Coordination Act ("Coordination Act").[50]

The Act provides for 2,000 foot spacing between "well cluster," which is defined as the no larger than 5,000 square foot area of a well

42. *Id.* at *6.

43. Shafer v. Range Res.-Appalachia, LLC, No. 2:10-CV-1142, 2011 WL 677479, at *1 (W.D. Pa. Feb. 16, 2011).

44. *See id.* at *3.

45. *Id.* (citing Hollingsworth v. Range Res.-Appalachia, LLC, No. 3:CV-09-0838, 2009 U.S. Dist. LEXIS 100371 (M.D. Pa. July 29, 2009); Hollingsworth v. Range Res.-Appalachia, LLC, 3:CV-09-0838, 2009 U.S. Dist. LEXIS 100371 (M.D. Pa. Oct. 28, 2009); Lyco Better Homes, Inc. v. Range Res.-Appalachia, LLC, 4:09-CV-00249, 2009 U.S. Dist. LEXIS 110425 (M.D. Pa. May 21, 2009)).

46. *Id.* at *4 (citing Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 584 (3d Cir. 2009)).

47. *Id.* at *5.

48. *Id.* (citing Blumer v. Dorfman, 289 A.2d 463, 468 (Pa. 1972); Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127–29 (3d Cir. 1997)).

49. *Id.*

50. Act of May 13, 2011, 2011 Pa. Legis. Serv. Act 2011-2 (West); 58 PA. CONS. STAT. ANN. §§ 501–518 (West 1996 & Supp. 2011).

pad intended to host multiple horizontal wells.[51] This change resolves the uncertainty under the prior act as to whether the 1,000 foot spacing for wells barred having more than one horizontal well on a single well pad overlying workable coal. In addition, the change creates greater spacing in between well clusters than between vertical wells.[52]

Under the amended section 6, the Act adds a requirement that any person applying for a drilling permit must forward, by certified mail, a copy of the well plat to the coal owner if coal rights have been severed from the surface where the well is to be drilled or altered, regardless of whether the coal seam is workable.[53] The Act now requires that oil and gas operators provide the coal owner with a copy of the portion of any well bore deviation survey obtained in a well between the surface and to a point below the deepest known coal seam encountered during the drilling operation.[54] This provision supersedes in part the Pennsylvania Commonwealth Court's decision in *Foundation Coal Resources, Corp. v. DEP*, which held that DEP lacked the authority to require an oil and gas operator to provide such surveys to coal owners.[55]

An operator has to obtain the consent as to well location from all owners of an operating coal mine that will be penetrated by the well.[56] This would not necessarily be consequential alone, but because the definition of an operating coal mine has been broadly expanded to include any part of a workable coal seam covered by a mining permit, the effect is quite significant (formerly an "operating coal mine" only included a mine that had actively produced coal in the previous twelve months or a mine to be established within one year).[57]

The Act expands the definition of "active coal mine" to include "the area of the workable coal seam which may reasonably be expected to be mined and permitted for mining by the operator during the five-year period beyond the projected completion of the mining of the currently permitted area."[58] This is significant because the owner of an active coal mine has the right to file objections to the issuance of a well permit under section 12.[59] Previously, under the Oil and Gas Act a coal owner only had standing to object to an oil and gas well

51. § 507(d), (f) (West Supp. 2011).

52. *Id.* § 507(c)–(d).

53. *Id.* § 506(g).

54. *Id.* § 506(e).

55. Found. Coal Res. Corp. v. Dep't of Envtl. Prot., 993 A.2d 1277, 1286 (Pa. Commw. Ct. 2010).

56. § 506(f).

57. *See* 58 PA. STAT. ANN. § 502 (West 1996), *amended by* 58 PA. STAT. ANN. § 506 (West Supp. 2011).

58. § 502 (West Supp. 2011).

59. *Id.* § 512.

permit that would pass through a "projected and platted" area of a coal mine that was not yet being operated.[60]

III. REGULATIONS

41 Pa. Bulletin 805 (adopted October 12, 2010) amends Department of Environmental Protection regulations under 25 Pa. Code Chapter 78 regulating well construction pursuant to the Oil and Gas Act.[61] The amended regulations increase cementing standards,[62] mandate quarterly mechanical inspections of wells,[63] require operators who damage water supply to restore or replace the water supply,[64] heighten requirements for blow-out preventers,[65] increase well casing requirements,[66] mandate gas migration response procedures,[67] and increase reporting requirements upon well completion to include, *inter alia*, information on chemicals used for well stimulation and total water volume used.[68]

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60. *See Foundation Coal*, 993 A.2d at 1287.
61. 41 Pa. Bull. 805 (Oct. 12, 2010); *see also* 25 PA. CODE § 78 (West, Westlaw through Pa. Bull., Vol. 41, Num. 48, Nov. 26, 2011).
62. 25 PA. CODE §§ 78.83, 78.83b, 78.83c, 78.85.
63. *Id.* § 78.88.
64. *Id.* § 78.51(a).
65. *Id.* § 78.72.
66. *Id.* §§ 78.73, 78.81, 78.83, 78.83c, 78.84.
67. *Id.* § 78.89.
68. *Id.* § 78.122.