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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002515-MR

ERWIN FRANK

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 99-CI-01294

PHILLIP BROWN

APPELLEE

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: BARBER AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

BARBER, JUDGE: Appellant, Erwin Frank (Frank), appeals from the decision of the Warren Circuit Court awarding fees for use of gas and equipment for obtaining use of gas to Appellee, Phillip Brown (Brown). Frank also appeals an attorney fee award to defense counsel. The trial court's ruling with regard to

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

ownership of a personal use gas well is affirmed. The remainder of the court's ruling is reversed, and the case is remanded.

Frank is the owner/operator of 200 oil wells in Warren County, Kentucky. The wells lie on various tracts of property and rights to the oil and gas are agreed upon between the landowners and Frank. In August, 1979, Frank entered into a gas and oil lease with Dorothy Wareham and her husband. That Agreement authorized him to produce oil from the property. That standard oil lease was recorded with the county clerk. Two additional "Standard Ky. 88 Oil and Gas Leases" contemplating wells on other tracts of land were entered into between Wareham and Frank in 1998. Those wells produce oil. Both those leases were also recorded with the county clerk.

On December 11, 1997 Frank entered into a different type of Gas Well Agreement with Dorothy Wareham. That Agreement was not a standard form, but was drawn up by an attorney on behalf of the parties. That Agreement was not related to the other oil leases between the parties, but was a wholly separate and different Agreement. The terms of the Agreement allowed Frank to operate one of the wells on the Wareham property for the purpose of obtaining gas from the well to heat his personal residence. That well produces gas and a minimal amount of oil which must be removed from the well periodically so that the

well will continue to produce gas. That Agreement stated, in pertinent part:

WHEREAS, Dorothy Wareham has a gas well located on her property from which both parties use gas for the purpose of heating their respective residences; WHEREAS, both parties desire to have a written statement as to their agreement. NOW, THEREFORE, for and in consideration of the mutual covenants, the parties agree as follows (1) Erwin Frank may utilize gas from the well located on the property of Dorothy Wareham for the purpose of heating his residence and shall not be required to meter or pay for said gas. (2) Erwin Frank shall maintain the gas well, the pump, lines and all other attendant devices utilized to deliver gas from the well to the respective residences of the parties at his sole and complete cost and without any cost or expense whatsoever to Dorothy Wareham. (3) Either party may terminate this agreement by giving 30 days written notice of his or her desire to terminate same. Id.

In 1999 Wareham then decided to sell 60 acres of her property, including the land on which the gas well used to heat her home and Frank's home was located. She delivered a handwritten document purporting to be a cancellation of the personal use Gas Well Agreement, which had been entered into between the parties in December, 1997. Wareham delivered the handwritten document to Frank in August, 1999. This cancellation was in accordance with the terms of the Agreement between the parties, which permitted cancellation of the Agreement upon thirty days written notice.

An auction for the Wareham property was conducted on September 25, 1999. At the time of sale the auctioneer indicated that three oil wells on the property were under lease to Frank. The auctioneer stated "This tract has three oil wells which Mrs. Wareham has sold to a neighbor [Frank]. In addition, there is another oil well on the property that has been leased and Mrs. Wareham receives 15% of the earnings. She will transfer her interest in this lease to the new owner of the property." The auctioneer also testified that the property had a gas well on it, which Wareham and a neighbor had used to heat their homes. The auctioneer notified all purchasers that Wareham had provided written notice of termination of the personal use gas lease to Frank. The record contains an affidavit from Dorothy Wareham, dated December 15, 1997 showing that there were no other leased wells on the property. In her deposition testimony, Wareham was clear in differentiating the agreement regarding the gas well used to heat her home and Frank's home and the oil wells leased by Frank for production. She stated that she had terminated the free gas use lease, but that Frank had other leases for the other wells, and that those leases had not been terminated by her.

Appellee, Phillip Brown (Brown), was the successful purchaser of the property. The title opinion on the property, which was received by Brown at the time of sale, indicated that

the property was subject to three oil and gas leases by Frank, one dated August 11, 1979 and two dated April, 1998, which were to continue "as long thereafter as either of them [oil or gas] is produced." All three oil and gas leases are of record in the Warren County Clerk's Office. The terminated personal use gas agreement was not recorded and is not reflected in the title opinion.

Frank has continuously operated and maintained the wells for a number of years. Since Brown's purchase of the property his royalty share of the oil sales has been held by the company which purchases the oil. There is no commercial value to the gas produced by the well Frank and Wareham used to heat their homes. After purchasing the property, Brown obstructed Frank's right to the oil and gas from his three leased wells, as well as his ongoing use of heating fuel from the well subject to the Gas Lease Agreement. Frank sought an injunction and damages. Brown counterclaimed for trespass. A bench trial was held, and the court ruled in favor of Brown on each issue.

At trial Wareham testified that Frank owned two oil wells on the property, which were sold to him by her deceased husband prior to 1997. She also testified that the gas well, which also produced some oil, was the only well actually leased to Frank. Wareham exhibited some confusion about whether Frank owned or leased the oil wells subject to the filed and recorded

leases. She appears to have believed that Frank owned those wells outright. Wareham was not confused as to Frank's right to continue to use those wells and testified that she knew he exercised dominion and control over them. Wareham testified that she continued to receive royalties from the ongoing oil production from the wells owned by Frank after she terminated the separate gas lease agreement on the gas well. The filed and recorded lease agreements for the oil and gas wells expressly provide that the leases shall continue as long as "oil or gas or either of them is produced from said land by the lessee [Frank]." The filed and recorded lease documents do not provide for termination of the lease by any other means. The record does not show that the leases on those wells were terminated in accordance with law. The leases remain valid.

The trial court ruled that the handwritten termination letter terminated "the April 24, 1998 oil and gas lease." Frank contends that the handwritten document did not serve to lawfully terminate his interest in the gas well. The court's ruling with regard to the gas well used to heat Frank and Wareham's homes is supported by the terms of the document, the written notice of termination found in the record, and Mrs. Wareham's testimony before the trial court. The trial court properly found that the lease on the personal use gas well had been terminated by the handwritten document.

Notwithstanding the limiting statement in its judgment or the terms of the contracts at issue, the court then erroneously ruled that the handwritten document terminated not only Frank's lease on the gas well (which was actually a December, 1997 lease), but also Frank's interest in the other oil wells. That ruling is unsupported in the record and not supported by law.

Frank contends that the handwritten document did not terminate his interest in the oil wells. The document states, in relevant part:

. . . As you have probably heard, I am planning to sell all my property. Therefore, I am giving you 30 days notice to terminate our gas well agreement dated Dec. 11, 1997. The agreement will expire on Sept. 12, 1999. I will provide a termination agreement at that time.

The plain language of the handwritten document purported to terminate only the gas lease agreement for the well which provided personal gas to heat Frank's home, as that well was the only one covered in the Agreement of December 11, 1997. The terms of the document were not sufficient to terminate the leases of the other wells.

On appeal, Brown contends that the oil leases were abandoned and that the leases properly terminated due to non-use. Frank testified before the trial court that the wells were in production and that he worked on them and obtained oil from

them during the lease period. A mere lapse of time and non-use is insufficient to show abandonment of a well where production or ongoing work is testified to. Pro Gas Inc. v. Har-Ken Coal Co., 883 S.W.2d 485, 488 (Ky. 1994). Reasonable fairness protects against cancellation of an oil or gas lease absent clear and uncontroverted proof of abandonment of the wells. Little v. Page, 810 S.W.2d 339, 340 (Ky. 1991), citing Reynolds v. White Plains Oil and Gas Co., 199 Ky. 243, 250 S.W. 975 (Ky. 1923). Production does not always require sale of the oil, but can constitute repairs, improvements, or other reasonable use of the well. Greene v. Coffey, 689 S.W.2d 603, 605 (Ky.App. 1985). The record does not support a finding that Frank abandoned the wells or that the lease was properly terminated for non-use. The record contains evidence showing Frank's use, maintenance and improvements of the wells, and Frank's profits obtained through such use. It was clear error for the court to hold otherwise.

The court also ruled that the "terms of sale" granted Brown the right to all Frank's oil and gas equipment on the land. The court ruled that this equipment was previously owned by Wareham. No evidence in the record supports that finding. Photographs in the record show a great deal of equipment on the property being used to extract the gas and oil. Frank is the only party who has used that equipment and the wells for a term

of more than twenty years. The testimony offered by Frank shows that he owned and installed that equipment. Frank contends that the court was in error in awarding all the oil and gas equipment on the property to Brown. A contract must be interpreted as written and all reasonable terms in the contract must be enforced. Cline v. Allis-Chalmers Corp., 690 S.W.2d 764, 765 (Ky.App. 1985). Where the property is sold at auction, the purchasers have the right and the duty to rely on the description of the property sold. Presnell Const. Managers, Inc. v. EH Const. LLC, 134 S.W.3d 575, 581 (Ky. 2004). The purchase deed and terms of auction did not contain the right to purchase the equipment. Finding that the equipment did not belong to Frank is clearly erroneous. For this reason, the court's ruling that Brown is the owner of that equipment is reversed.

Frank argues that the court erred in awarding Brown all "royalties" received by Frank beginning on the date the complaint was filed. Frank states that he receives no royalties for the sale of oil, but has a working interest in the production of the oil. Profits or shares received by Frank due to oil production from the leased wells are the property of Frank pursuant to the terms of the leases. It was clearly error for the court to award any such funds to Brown. If sufficient proof is made, Brown may be entitled to any profit made on the

oil extracted from the gas well used to heat Frank and Wareham's homes, if such profits were received after the date of termination of that particular lease. The court did not differentiate between the wells, hence the ruling as to any profits owed Brown is reversed and remanded for determination.

Frank claims that the court was in error in awarding Brown \$4,800 for gas consumed by Frank at his personal residence. No evidence supporting the sum of that award other than a statement that some homes in the area used that much natural gas in a year. Additionally, that sum was a resale price rather than a wholesale price for gas used and cannot be found analogous to personal use from a not-for-profit well. In the absence of any evidence supporting Brown's claim for reimbursement the guess made by Brown as to the value of the gas which possibly could have been used by Frank is too speculative upon which to base an award. The award is reversed as being unsupported by the record.

Frank argues that the court erred in awarding Brown "all attorney fees and costs associated with defending this action," as no contract or statute authorized the award of such fees. Authority must be shown to support an award of attorney fees. Craig v. Keene, 32 S.W.3d 90, 91 (Ky.App. 2000). Even where a statute may potentially support an award of attorney fees, the court must cite and rely on such authority in making

any award. King v. Grecco, 111 S.W.3d 877, 883 (Ky.App. 2002). The court's award of fees was an abuse of discretion and as such, is properly reversed. Angel v. McKeehan, 63 S.W.3d 185, 190 (Ky.App. 2001). The award of attorney fees is reversed.

We remand this case for entry of an opinion consistent with the record before the trial court. Brown is entitled to an ownership interest in the single gas well previously used by Frank and Wareham to heat their homes. The other gas wells are subject to the terms of Frank's recorded leases, and Brown was put on notice of those valid leases at the time of sale. Brown cannot now claim that he is the owner of those gas wells. For this reason, the trial court's opinion is affirmed in part, reversed in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillip R. Grogan
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BRIEF FOR APPELLEE:

David F. Broderick
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