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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001047-MR

MILLICENT MAY; RUTH BRUNING;
ROBERT CROOKS; TOM SELF; ROBERT
G. SELF; SYDNEY (SELF) PHILLIPS;
THELMA SEALS; GRETCHEN BOGAN;
MARJORIE WENDT; JANICE TANKSLEY;
WILLIAM C. ROBINSON; REBECCA Q. LOGUE;
JOHN H. ROBINSON; AND H.L. ROBINSON, JR. APPELLANTS

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CI-00104

JOHNSON FAMILY COAL CO.;
LINDA ANDERSON; AND
DR. WILLIAM JOHNSON APPELLEES

AND NO. 2008-CA-001072-MR

KENNY TRIVETTE; SIDNEY TRIVETTE;
MARILYN MAY; AND PATTY BLAIR APPELLANTS

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CI-00104

JOHNSON FAMILY COAL CO.;
LINDA ANDERSON AND
DR. WILLIAM JOHNSON APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND DIXON, JUDGES, GRAVES,[1] SENIOR JUDGE.

ACREE, JUDGE: In consolidated appeals, Millicent May, *et al.*, and Kenny Trivette, *et al.*, (collectively May and Trivette, or Lessors) seek reversal of a Pike Circuit Court judgment that a coal lease between May and Trivette, as lessors, and Johnson Family Coal Company (JFCC, or Lessees), as lessees, remains in full force and effect. Because the judgment is not supported by substantial evidence and is contrary to law, we reverse.

Facts and Procedure

This is the second time these parties have appeared before this Court regarding the subject lease. *See May v. Johnson Family Coal Co*., 2003 WL 21554968 (Ky. App. July 11, 2003)(2002-CA-001493-MR), *disc. rev. denied* May 12, 2004; hereafter "*May I*"). However, the prior appeal was from a different judgment. Nevertheless, JFCC's assertion that the doctrine of *res judicata* should have barred the case now before us makes the prior case relevant to our decision here. We will discuss *May I* as necessary.

On April 1, 1956, May's and Trivette's predecessors-in-title entered into a coal lease with JFCC's predecessors-in-title. The lease provided for payment of a royalty of $0.25 per ton of coal mined by the parties. In 1965, the

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

lease was amended to reduce the royalty, but later informally amended to return the royalty rate to the original figure and to allow for assignment or sublease by the lessee. A minimum royalty of $2,000 per year was payable under the lease regardless of the amount of coal mined. As successors, May and Trivette are entitled to approximately half the subject mineral estate, and JFCC is entitled to the other half. Consequently, in addition to the lessor-lessee relationship, the parties are co-tenants.

Specific provisions of this lease largely determine the outcome of this case. We here quote those provisions in pertinent part.

II. RENTS AND ROYALTIES

> The Lessee agrees to pay to the Lessors [a certain royalty] for each and every ton of coal mined and produced from any other property not contained in this lease which may be hauled through or over any of the leased premises . . . until this lease is terminated.
>
> . . . Lessees shall make a report to the Lessors at the end of each and every month of the coal mined from or hauled over or through the leased premises, during the preceding month and the monthly tonnage and/or haulage royalties shall be paid on the basis of said reports . . . but it is understood and agreed that the amount of tonnage royalties due under this lease shall be ascertained and calculated at the end of each lease year by survey made by a competent engineer approved by Lessors and the royalty adjusted on the basis of said survey at the next succeeding monthly royalty payment date after said survey is completed, said survey and calculation to be made at the expense of the Lessees.

III. MINING METHODS

> The Lessee agrees to pursue a plan of mining in accordance with a plan projected by a competent mining engineer [and] to maintain at all times a map showing such plan and workings of the mine as it progresses, and to furnish the Lessors a blueprint of same at the commencement of mining and at least every six (6) months . . . .
>
> VII. TERMINATION
>
> [F]ailure on the part of the Lessees to pay any installment of rents or royalties herein for a period of thirty (30) days after the due date thereof, or upon any breach of any other covenants or conditions herein provided, this lease shall automatically terminate and be canceled and no forbearance or failure to declare a forfeiture or to enter upon or repossess the leased premises on the part of Lessors shall in any wise waive this provision or prevent the cancellation or termination of this lease.

Additionally, section IX of the lease granted the Lessees, but not the Lessors, the right to cancel the contract on ninety (90) days' notice. And finally, the 1965 lease amendment provided:

> That the Lessee may assign or sub-lease any portion of the lease coal without the written consent of the Lessors; provided, a verified copy of any such assignment or sublease is promptly furnished to [Lessors or their agent] and provided further that no such assignment or sub-lease shall relieve the Lessees from the obligations to pay royalties or from any other provision of this Lease.

In 1992, JFCC entered into a sub-lease with Enterprise Coal Company. Mining began during this time but ended in the mid-1990s. No claim of abandonment was ever asserted.[2] In 1997, JFCC provided to May and Trivette a

[2] In fact, there were several periods, some of several years' duration, in which no mining was taking place. JFCC continued making the minimum royalty payment but, in the absence of mining, and construing the lease as a whole, no compliance under sections II and III would have been required under the lease and we suspect the Lessors did not expect them then.

notice that its rights under the lease had been assigned,[3] and in November 2000, Pike-Letcher Land Company resumed the mining operation previously suspended.

From the inception of the lease, JFCC timely tendered all royalty payments required by the lease. However, it is significant that, beginning with the second payment tendered after Pike-Letcher resumed mining, around December 2000, May and Trivette expressed to JFCC's attorney their refusal to accept royalty payments, and those royalties have been held in escrow since that time.

In January 2002, May and Trivette filed an action against JFCC to terminate the lease under section VII for JFCC's failure to provide: (1) monthly reports of the amount of coal mined (section II); (2) year-end reconciliation reports performed by an engineer approved by May and Trivette (section II); (3) mining maps upon the commencement of mining and every six months thereafter (section III); and (4) notice of assignments of the lease (1965 amendment).

The case proceeded to trial before the court, Judge Charles E. Lowe presiding, on October 31, 2002. Judge Lowe resigned from the bench before rendering a judgment. Judge Steven Daniel Combs replaced Judge Lowe and, on August 15, 2005, May and Trivette moved the circuit court for entry of judgment. On May 26, 2007, JFCC filed a Motion for Court to Conclude Adjudication. The Pike Circuit Court's Findings of Fact, Conclusions of Law and Judgment were finally entered on May 6, 2008.[4] This appeal followed.

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[3] JFCC states in its brief that notice of the 1992 assignment to Enterprise Coal was given in 1997. However, in the trial court's ruling, JFCC gave notice of the assignment to Pike-Letcher in 1997.
[4] We do not find it necessary to comment on this delay except to recognize it.

May and Trivette assert the circuit court erred in two ways. First, they claim that certain of the circuit court's findings of fact lack the support of substantial evidence. Second, they argue the court misapplied *Cameron v. Lebow*, 338 S.W.2d 399 (Ky. 1960), thereby committing reversible error. We agree with both contentions.

Lack of Substantial Evidence for Certain Findings

When reviewing a trial court's findings of fact, we apply the clearly erroneous standard of review. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Under this standard, the Court will uphold the factual findings of a trial court if those findings are supported by substantial evidence on the record. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence means "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id*.

May and Trivette claim seven of the trial court's findings of fact lack the support of substantial evidence. We will narrow the objections to those that are necessary to our analysis.

One specific finding of fact merits particular attention. The circuit court found that "all mining maps required under the Lease were provided by JFCC to" May and Trivette. This is clearly contrary to the evidence. May's and Trivette's agent under the lease presented uncontradicted testimony that from November 2000 until after May and Trivette filed suit in January 2002, JFCC

provided no maps whatsoever to May and Trivette. There is clearly no substantial evidence supporting the circuit court's finding to the contrary.

The circuit court's error in this regard is not inconsequential. As a condition of the right to continue mining the property, the lease requires JFCC to provide the Lessors with a map of mining operations "at the commencement of mining and at least every six (6) months" thereafter. Generally, the purpose of such a requirement in a coal lease is to assist the property owners in determining how and to what extent the mining operation is affecting their property, to confirm that no waste is being committed, and to help assure the recovery of coal is maximized under the lease. Specifically, the provision in this lease allowed May and Trivette to independently assess whether the coal operator was "conduct[ing] the mining in a workmanlike manner and in accordance with modern and approved mining methods." Therefore, when JFCC failed to comply with the requirements of section III, it was in breach of this condition of the lease.

Many of the other challenges to the circuit court's findings of fact center on its determination that May and Trivette failed to notify JFCC of their objections to certain of JFCC's breaches of the lease. Consistent with their complaint, these objections were to JFCC's failure: (1) to provide an annual reconciliation under section II of the lease; (2) to engage a competent engineer approved by May and Trivette to conduct the reconciliation; (3) to provide those mining maps under section III of the lease; and (4) to provide a verified copy of the subleases under the 1965 lease amendment. May and Trivette argue that, as a

matter of law, they were not required to give such notice, and we will address that issue later. For now it is sufficient to note the fact that by finding May and Trivette failed to give notice to JFCC of its breaches, the court implicitly acknowledged that the breaches occurred. In fact, the record is clear that they did.

Again without contradiction, the Lessors' agent testified that no annual reconciliation was conducted under section II of the lease; however, his testimony also established that there had been no reconciliation for over forty-six (46) years prior to May's and Trivette's request in conjunction with their lawsuit, even when mining was actually occurring.

Obviously, since no reconciliation was undertaken, no competent engineer was engaged in accordance with section II to conduct it, nor had one been demanded by the Lessors for those forty-six (46) years.

We already recognized that, contrary to the circuit court's finding, no maps were provided to May and Trivette prior to their filing of the lawsuit. Again, no maps had been provided for the life of the lease to that time, but it is more important to note that JFCC failed to comply with this condition, and the other conditions, after May and Trivette began refusing JFCC's tender of royalty payments in December 2000.

On the other hand, substantial evidence does support the circuit court's finding that JFCC provided notice to May and Trivette when the lease was assigned. On this matter, May's and Trivette's agent testified that he had not received such notice before the complaint was filed in this case. However, JFCC's

agent testified that she mailed a notice to May and Trivette every time the lease was assigned. It is within the discretion of the trial court as fact-finder to accept the testimony of a witness, even to the exclusion of evidence to the contrary. *Moore v. Asente,* 110 S.W.3d at 354. Even if we have some doubt as to the correctness of the findings, JFCC's agent's testimony constitutes substantial evidence upon which the trial court can rely. We cannot say the circuit court made an incorrect finding that May and Trivette were notified of the assignment.

Finally, May and Trivette assert that substantial evidence does not support the circuit court's finding that "all of the breaches complained of in the herein action existed at the time of the Trial [in *May I*] on February 18, 2002." May and Trivette are correct. The evidence clearly demonstrated that, with the exception of providing a mining map in January 2002, JFCC's noncompliance with the remainder of sections II and III of the lease continued until October 31, 2002, the date of trial in this action. Furthermore, the post-trial record indicates the breaches continued thereafter. Therefore, substantial evidence does not support a factual finding that all of JFCC's breaches occurred before February 18, 2002.

In the context of these facts, we turn to consideration of May's and Trivette's assertion that the circuit court misapplied the case of *Cameron v. Lebow*.

Misapplication of <u>Cameron v. Lebow</u>

As with oil and gas lessees,[5] a coal lessee may lose his interest in the lease in three ways: "The first ground is forfeiture. . . . The second ground is abandonment . . . . The third and final ground occurs when the lease terminates by its own terms." *Hiroc Programs, Inc. v. Robertson*, 40 S.W.3d 373, 377 (Ky.App. 2000). These three grounds are not entirely distinct. In our jurisprudence, concepts of forfeiture and abandonment have overlapped. *See Clark v. Wilson*, 316 S.W.2d 693, 696 (Ky. 1958)("[a]bandonment and breach of the condition to develop the property forfeited the rights which passed under the . . . lease"). The

[5] Caution must be exercised when construing coal leases by utilization of legal principles developed in the interpretation of oil and gas leases. "[C]onditions that are peculiar to the gas and oil industry have, to some extent, influenced the application of the general principles governing the interpretation of ordinary contracts to the interpretation of gas and oil leases." 38 Am. Jur. 2d *Gas and Oil* § 105 (2009). The primary factor influencing such interpretation is "the fugitive nature of the substance to be extracted." *Flanigan v. Stern*, 204 Ky. 814, 265 S.W. 324, 325 (1924). "[B]ecause of the peculiar nature of the substance, the lessor might be deprived of his royalty profits on account of the oil under his land being drained by surrounding wells, [so] that the chief purpose of the parties to such a contract was the development of production as speedily as possible under the prevailing circumstances and conditions." *Id.* In 1942, the Kentucky legislature recognized the distinctive nature of oil and gas leases by enacting KRS 353.020, captioned "Oil and gas lease or contract, when lessor may avoid"; no such similar legislation addresses coal leases. *See Walter v. Ashland Oil & Refining Co*., 300 Ky. 43, 187 S.W.2d 425, 426 (1945)("recogniz[ing] the distinction which this court has always made between oil and gas leases and other types of agreements affecting real estate - a distinction which has been recognized and approved by the legislature"). However, in the case before us, the distinction between oil and gas leases on the one hand and coal leases on the other is less important than the fact that the subject lease includes an automatic termination clause, or "forfeiture clause." As discussed *infra*, when such a lease provision is present, even in oil and gas leases, the analysis is wholly different than when there is no such provision, as was the case in *Cameron v. Lebow*.

same overlap has occurred with forfeitures and terminations by the lease's own terms, the terms "self-executing *forfeiture*" and "automatic *termination*" often being used interchangeably. *See* 53A Am. Jur. 2d *Mines and Minerals* §§ 205, 208 (2009), citing *Marcum v. Brock*, 257 S.W.2d 55, 55 (Ky. 1953). Sometimes appellate opinions have referenced all three to explain how the lessee's rights came to an end. *See Taylor v. Newman*, 318 S.W.2d 407, 408 (Ky. 1958)(because "the wells had been completely *abandoned* . . . lease of the tract of 54 acres had been *forfeited* under the *terms of the lease*"; emphasis supplied). Courts attempting to determine which of these three grounds applies in a particular case must proceed cautiously since the term "forfeiture" appears in nearly all of these cases.

The Pike Circuit Court proceeded as though the lease in this case, like the lease in *Cameron v. Lebow*, lacked an explicit self-executing termination provision, or "forfeiture clause."[6] The circuit court concluded as a matter of law that May and Trivette "failed to provide notice as required by *Cameron v. Lebow* [and that a] lessor cannot forfeit a Coal Lease unless he first notifies the lessee that he will no longer accept the annual rent and permit the land to remain idle and undeveloped but will require the lessee to execute the contract according to the intention of the parties[.]" The circuit court then held that May and Trivette "failed to give appropriate notice as required by law[.]" These conclusions ignore the fact that the lease between JFCC and May and Trivette did include a specific, self-

[6] The leases construed in *Hiroc, supra*, and *Carrs Fork Corp. v. Kodak Min. Co*., 809 S.W.2d 699, 702 (Ky. 1991)(addressing only "forfeiture on due diligence grounds"), like *Cameron v. Lebow*, also lacked a self-executing termination, or forfeiture, provision. JFCC and the circuit court relied on these cases as well.

executing termination clause. Therefore, some principles enunciated in *Cameron v. Lebow*, and relied upon by the circuit court, are inapplicable.

Cameron v. Lebow addressed a particular circumstance of forfeiture that is not at issue in the case before us. As the Court there explained,

> *Forfeiture for nondevelopment*, or *delay in development*, or for a *failure to reasonably develop*, is highly essential in the business of producing oil, but the law does not favor forfeitures, and none should be allowed without the one claiming the right *shall have first placed the other party on notice* that a forfeiture will be demanded, unless the terms of the lease as to development are carried out. (Our emphasis.)
>
> This then, is our basic rule, which is accurately described as "forfeiture."

Cameron v. Lebow at 402 (citation and quotation marks omitted; emphasis in original). Furthermore, it is clear from the emphasized language in *Cameron v. Lebow* that the Court was not interpreting an explicit termination provision or forfeiture clause. Rather,

> [t]he principal controversy . . . raged over the nature of *the implied obligation* of the assignee and whether or not, before his interest may be terminated, he is entitled to *notice and demand to develop* from the lessor.

Id. at 402 (emphasis in original). *Cameron v. Lebow*, therefore, followed

> the general rule that the breach by a lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term *in the absence of an express proviso to that effect in the lease* . . . and the same has been held true as to a mining lease . . . .

Continental Fuel Co. v. Haden, 182 Ky. 8, 206 S.W. 8, 10-11 (1918)(construing a coal lease; emphasis supplied). This exception to the general rule described in *Continental Fuel* is not simply anomalous. "That such a provision in this character of leases is recognized as an exception to the above general rule and *favored by the courts* is *just as well settled in this jurisdiction and quite generally as the rule itself* . . . ." *Bell v. Kilburn*, 192 Ky. 809, 234 S.W. 730, 731 (1921)(emphasis supplied).

May's and Trivette's complaint never utilized the term "forfeiture," but simply claimed that the lease automatically terminated because JFCC failed to satisfy certain conditions in the lease. We conclude that the circuit court, misled by the use of the word "forfeiture" in the termination provision, failed to first recognize that the lease did contain "an express proviso" calling for termination of the lease upon the lessee's breach of specific conditions.[7] The presence or absence of such a termination provision has been the deciding factor in many cases

[7] The lease refers to conditions and covenants somewhat interchangeably. In this case, the distinction between the two is not significant. *See* 49 Am. Jur. 2d *Landlord and Tenant* § 58 (2009)("[t]he primary distinction between a covenant and condition pertains to the remedy in case of a breach; the breach of a condition upon which a leasehold estate is granted results in automatic termination or forfeiture of the estate, whereas the breach of a covenant does not automatically terminate the estate, but instead subjects the breaching party to liability for monetary damages . . . "). The subject lease itself provides that a breach of either shall result in automatic termination.

interpreting both oil and gas leases[8] and coal leases.[9] The presence or absence of the provision has also determined the outcome of cases involving leases created for other purposes.[10]

The lease before us unquestionably contains the type of "express proviso" referred to in *Continental Fuel Co.* and the cases cited in footnotes 8, 9,

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[8] *See, e.g.*, *Ledford v. Atkins*, 413 S.W.2d 68, 70 (Ky. 1967)(disallowing forfeiture in reliance on "*Trammel Creek Oil and Gas Co. v. Server*, 197 Ky. 594, 247 S.W. 753 [1923], where the lease didn't contain a specific provision for forfeiture"); *Kelley v. Ivyton Oil & Gas Co.*, 204 Ky. 804, 265 S.W. 309, 311 (1924)("[b]ut beyond all that *the lease makes no provision for a forfeiture for such failure*"; emphasis supplied); *Flanigan v. Stern, supra*, 265 S.W. at 325 (adjudging forfeiture by distinguishing cases with leases in "which there was no forfeiture clause, or, if one, it was not of automatic operation"); *Jenkins v. Williams*, 191 Ky. 165, 229 S.W. 94, 96 (1921)(the law "will work a forfeiture of the lease, if so provided in the contract"); *Kies v. Williams*, 190 Ky. 596, 228 S.W. 40, 41 (1921)(recognizing "positive, effectual, and unequivocal forfeiture clauses, which gave to the [lessor] the right to terminate the lease entirely if these conditions were not kept and performed.").

[9] *See, e.g.*, *Duff v. Duff*, 205 Ky. 10, 265 S.W. 305, 306 (1924)(action for damages was the only remedy allowed for breach because "there is no forfeiture clause in the lease"); *Cassidy v. E.M.T. Coal Co.*, 204 Ky. 278, 264 S.W. 744, 747 (1924)(Lease provided that lessee's breach of a covenant "gave [lessors] the right to cancel the lease and required the lessees to surrender peaceable possession of the leased property to it without further notice."); *Hogg v. Forsythe*, 198 Ky. 462, 248 S.W. 1008, 1011 (1923)("language in the forfeiture clause [required] that three things must happen before the right of forfeiture accrues"); *Blue Ridge Coal Co. v. Hurst*, 196 Ky. 432, 244 S.W. 892, 893 (1922)("where the lease provides that a breach of one or more of the covenants shall work a forfeiture, the lessor may declare the forfeiture on an occurrence of the breach, even though the condition be a harsh one."); *Ross v. Sheldon*, 119 S.W. 225, 228 (1909)(court found significance in the fact that "[t]here is no forfeiture clause in the contract").

[10] *See, e.g., Marshall v. Fraser*, 258 S.W.2d 12, 14 (Ky. 1953)(commercial building lease; "[i]n the case at bar, the lease . . . contained no forfeiture clause for a breach of covenant"); *McHugh v. Knippert*, 243 S.W.2d 654, 656 (Ky. 1951)(lease of boarding house; "where there is clear and substantive violation of . . . covenants, the courts will enforce an express forfeiture provision"); *Dean v. Stillwell*, 284 Ky. 639, 145 S.W.2d 830, 832 (1940)(lease of hotel; "forfeiture clause . . . reserved to the lessor an option to terminate it [and] lessee could prevent the termination of the lease under the reserved right by complying with its provisions"); *Schwartz Amusement Co. v. Independent Order of Odd Fellows, Howard Lodge, No. 15*, 278 Ky. 563, 128 S.W.2d 965, 969 (1939)(lease of theater; lessor "became alarmed about the future renting of the property and took advantage of the forfeiture clause contained in the lease"); *Pettitte v. Smith*, 261 Ky. 411, 87 S.W.2d 945 (1935)(filling station lease "provides that any failure to comply with any of its stipulations shall terminate the contract at once and possession revert to the first party" lessor); *Elliott v. Marrs*, 222 Ky. 642, 1 S.W.2d 1049, 1050 (1928)(right of way to haul logs; breach of covenant to pay rentals required that "contract should automatically terminate.").

and 10, *supra*, and recognized as favored by the courts in *Bell v. Kilburn*. The relevant portion of this lease's proviso plainly states that "upon any breach of any [of the] covenants or conditions herein provided, this lease shall automatically terminate[.]"

In context, this automatic termination provision is not particularly harsh. *Cf.*, *Blue Ridge Coal Co. v. Hurst, supra,* fn.9. Just as section IX grants the right to cancel the lease to JFCC only, section VII places the power to maintain the lease solely in JFCC's hands, provided JFCC simply complies with the agreed upon conditions. *See Dean v. Stillwell, supra*, fn.10. Such compliance would have guaranteed JFCC's right to continue indefinitely the mining of May's and Trivette's property under the lease terms.

Then the question becomes whether a proper interpretation of section VII requires the Lessors to give the Lessees notice of termination of the lease. It is true that some such clauses explicitly require the giving of notice. *See Reis v. Norton Coal Corp.*, 346 S.W.2d 8, 9 (Ky. 1961)("lessor did not invoke the forfeiture provisions of the lease, which called for the giving of notice"). The termination provision in this lease did not. On the contrary, it specifically states that termination occurs "automatically." Furthermore, in the strongest language, it states that

> no forbearance or failure to declare a forfeiture or to enter upon or repossess the leased premises on the part of Lessors shall in any wise waive this provision or prevent the cancellation or termination of this lease.

Based on this language, May and Trivette argue that no notice whatsoever was necessary. Citing *Elliott v. Marrs*, 222 Ky. 642, 1 S.W.2d 1049 (1928), they argue, "[t]he contract was not to become void at the election of [lessors], but the provision was self-executing." *Elliott* at 1050. Indeed, *Estes v. Gatliff*, 291 Ky. 93, 163 S.W.2d 273, 276 (1942) recognized *Elliott* and two other cases for this very proposition. *Estes* at 276 ("[s]ome provisions for forfeiture, as in the cases cited, are self-executing"), citing *Elliott, supra, Dean v. Stillwell*, 284 Ky. 639, 145 S.W.2d 830 (1940), and *Wender Blue Gem Coal Co. v. Louisville Property Co*., 137 Ky. 339, 125 S.W. 732 (1910).

We agree with May and Trivette on this point, but only to a certain extent. Requiring the kind of notice heralding the lessee's right to cure a breach, as described in *Cameron v. Lebow*, would nullify the purpose of an automatic termination provision. Therefore, notice of a breach and a right to cure is not required where an automatic termination provision is involved.

However, even with an automatic termination provision, "[t]here must be some act upon the lessor's part evidencing his intention to treat the lease as actually forfeited." *Union Gas & Oil Co. v. Gillem*, 212 Ky. 293, 279 S.W. 626, 629 (1925). If this were not so, the *lessee* could unilaterally misuse such a provision to end his obligations under the lease. *Id.* (automatic termination provisions are "for the benefit of the lessor"); *see also Walter v. Ashland Oil & Refining Co*., 300 Ky. 43, 187 S.W.2d 425, 428 (1945)(in lease termination provision, even "the word 'void' means 'voidable' at the election of the lessor.").

The requirement that a lessor engage in some act to proclaim a self-executing forfeiture or automatic termination is simply the complement of our well-understood concept of waiver.[11] That is to say, engaging in some affirmative act declaring an intention to no longer ignore or forgive the lessee's breaches, and treating the lease as terminated by its own operation, is the means by which one avoids a waiver of the breaches and, consequently, of the termination provision. Therefore, knowing how a lessor can waive an automatic termination provision reveals both how that waiver can be avoided and what will suffice as an affirmative act under *Union Gas & Oil*. All of this is touched upon in *Walter v. Ashland Oil & Refining Co*.

Walter involved "what is known in the parlance of oil and gas men, and by the legal profession, as an 'unless' lease," that is, one which under proper circumstances is subject to automatic forfeiture.[12] *Id.* at 426. Ashland Oil, the original lessee in *Walter*, failed to timely commence a well but paid the agreed

[11] The right to the remedy of forfeiture can, of course, be waived. *See Citizens Fidelity Bank & Trust Co. v. Norfleet*, 252 S.W.2d 54, 54-55 (Ky. 1952), and *Hogg v. Forsythe*, 198 Ky. 462, 248 S.W. 1008, 1011 (1923). We see no reason why forfeiture should be treated differently because it occurs automatically. Waiver of any right to claim forfeiture occurs because the underlying breach is waived. *See Simmerman v. Fort Hartford Coal Co*., 310 Ky. 572, 221 S.W.2d 442 (1949), where the court held the coal lease in question never reached the question of forfeiture because lessee's breaches of "certain provisions of the agreement, were *waived* by [lessor's] failure to insist on compliance therewith and her continued acceptance of royalties under the lease *as though all its terms were being complied with*." *Id.* at 576 (emphasis supplied).

[12] Generally, an "or" lease "leaves the lessor to an action at law for a default in rentals and is subject to rescission only on a clear proof of its abandonment by the lessee[,]" while under an "unless" lease "such failure caus[es] an automatic termination of the lease." 38 Am. Jur. 2d *Gas and Oil* § 62 (2009); *see Denniston v. Kenova Oil Co*., 187 Ky. 831, 220 S.W. 1078, 1080 (1920)("[d]rawing a distinction between an 'or' and an 'unless' lease, [the Sixth Circuit Court of Appeals] held that the lease was of the latter character, and the failure to pay the rental when due forfeited all rights of the lessee."), citing *Hopkins v. Zeigler*, 259 F. 43, 46 (6th Cir. 1919).

upon minimum rent which the lessor accepted. Nevertheless, the lessor leased the same property to a second lessee, Walter. Ashland Oil learned of the second lease and brought a declaration of rights action against Walter and the lessor. The trial court determined the Ashland Oil lease had not been forfeited (even though it was an "unless" lease) and held that Walter obtained no rights under the second lease. The discussion of our former Court of Appeals in affirming the trial court sheds much light on the case before us.

> [O]f all the Kentucky cases cited by [Walter] not one of them holds that the termination clause of an oil and gas lease may not be mutually construed by the parties as merely rendering the lease voidable, or that the parties may not avoid its terminating effect by the payment and acceptance of past due rentals. True, there are Kentucky cases, as cited by [Walter], in which we have said that the lease terminated or became void upon the lessee's [breach]; but in each of such instances the lessor was declining to join the lessee in a different construction, or to accept the past due rentals, or to consent to a waiver. So far as we are aware, in every instance in which the lessee has accepted the past due rental, or in which he has suffered the lessee to drill after the time had expired within which the lessee was required to drill, we have accepted the construction adopted by the parties and applied the rules of waiver and estoppel.

Id. at 426-27. By accepting rental payments from Ashland Oil, the lessor waived Ashland Oil's breaches, thereby preventing commencement of the forfeiture provision's operation. *Walter* at 428 ("acceptance would have discharged the obligation [to satisfy the lease's conditions] and prevented the forfeiture.").

For many years, the parties to this appeal conducted themselves in a similar manner. During that period, every time JFCC breached the conditions

contained in sections II and III, May and Trivette waived the breaches by accepting royalties, thereby suspending the contract-terminating effect of section VII.

But, beginning shortly after Pike-Letcher commenced mining operations anew, May and Trivette refused JFCC's payment of royalties. They no longer waived JFCC's breaches of sections II and III. Their change in conduct under the lease evidenced their proclamation that JFCC's breaches would no longer be waived, and the operation of section VII would no longer be suspended. May and Trivette thereby effectively expressed their intent that JFCC's continued breaches would no longer be forgiven and that JFCC's continued failure to perform under sections II and III would terminate the lease. To borrow language from *Walter*, May and Trivette were "declining to join the lessee in a different construction, or to accept the past due rentals, or to consent to a waiver." *Walter* at 426. We believe this is what was contemplated by *Union Gas & Oil, supra,* when the Court said there must be some affirmative act evidencing the lessor's intent to treat the lease as actually forfeited.

Under our analysis, even at the moment when May and Trivette first refused the royalties,[13] we would have been compelled to enforce the lease. That is because, at that precise point in time, all JFCC's prior breaches were waived and section VII was not yet in play. Under section VII, JFCC still retained the sole power to prevent forfeiture by thereafter complying with the lease. In other words,

[13] It does not matter whether the Lessees or the Lessors controlled the escrow account containing the rejected royalties. What matters is that the royalties were not unconditionally accepted. *See Miller v. Tutt*, 264 S.W.2d 649, 650 (Ky. 1954)("the only acceptance of rental by [the lessor] was a conditional one" and therefore the forfeiture was not waived).

to keep the self-executing forfeiture provision from being triggered, JFCC simply had to avoid *future* breaches, or obtain the Lessors' future waiver of those breaches.

JFCC could have complied with section II by making monthly reports to the Lessors of the amount of coal mined, so long as the first report was made within the month in which the royalties were rejected and subsequent reports were made at the end of all months thereafter. Assuming JFCC had complied with the lease in that regard, it had six months to prepare the maps required by section III. If these two conditions had been satisfied, JFCC then had until the end of the year to have an approved engineer conduct the survey and reconcile the royalty payments as called for in section II.

To be clear, we did not just describe JFCC's right to cure prior breaches. There was no need to cure prior breaches because they had been waived. We simply described JFCC's obligation to perform the lease according to its terms.

Unfortunately, subsequent to May's and Trivette's refusal to accept royalty payments, JFCC failed to satisfy these conditions, or otherwise to substantially comply with sections II and III, in a timely manner. And May and Trivette no longer waived JFCC's failure to comply.

Under these circumstances, the circuit court should have determined that JFCC's rights under the lease were forfeited.

Res Judicata

JFCC argues that even if May's and Trivette's cause of action in the case now before this Court has merit, they were barred from bringing it in the first place by the doctrine of *res judicata*. We do not agree.

Two years before May and Trivette filed the complaint in this case, they filed a complaint in the earlier case, *May I*. This was almost a year before Pike-Letcher resumed mining and May and Trivette rejected JFCC's tendered royalty payments. May and Trivette alleged in *May I* that in prior years JFCC had caused waste on the property, and sought cancelation on grounds that changing market conditions rendered the lease "grossly unfair, inequitable, and unconscionable." There was no allegation or proof on the question of termination pursuant to section VII.

In January 2002, May and Trivette filed the complaint in the case *sub judice*. This was less than one month before the trial in *May I* was conducted on February 18, 2002. Before that trial took place, JFCC filed a motion to dismiss the case now before us on the ground that May and Trivette were splitting their cause of action between *May I* and this case. May and Trivette responded that this subsequent complaint for termination of the lease was independently based upon, and arose out of, events occurring several months after they filed the complaint in the prior action, and not until Pike-Letcher resumed mining operations. The circuit court overruled JFCC's motion to dismiss on these grounds.

JFCC then filed its answer in the case before us, asserting the affirmative defense that, once a judgment was entered in *May I*, *res judicata* would

bar May and Trivette from bringing any claim that *could have been presented* to the circuit court in *May I*, including the claim that the lease terminated in accordance with section VII. On June 26, 2002, judgment was entered in *May I*.

Four months later, on October 31, 2002, the circuit court conducted the second bench trial between the same parties, this time in the case *sub judice*. The circuit court did not rule on JFCC's *res judicata* defense, but proceeded with the trial. In its trial brief, JFCC again argued the defense of *res judicata*. However, the judgment did not reach the legal conclusion that May's and Trivette's cause of action was barred by the doctrine. The judgment merely contains a finding of fact – determined, *supra*, to lack the support of substantial evidence – that all of JFCC's breaches were known to May and Trivette when *May I* was tried.

We believe the foregoing circumstances make the doctrine of *res judicata* inapplicable in this case.

The doctrine of *res judicata* is more than satisfactorily described in *Moorhead v. Dodd*, 265 S.W.3d 201, 203-04 (Ky. 2008). However, for a comprehensive (though incomplete) list of qualifications[14] to the doctrine, we will follow the Supreme Court's lead in *Moorhead* and turn to *Asher v. G.F. Stearns Land & Lumber Co.*, 241 Ky. 292, 43 S.W.2d 1012 (1931). *Moorhead* at 204.

[14] "[A] more appropriate designation of such exclusions [from the application of the doctrine of *res judicata*] would be to say that they are *qualifications* of the doctrine and not exceptions thereto." *Asher v. G.F. Stearns Land & Lumber Co*., 241 Ky. 292, 43 S.W.2d 1012, 1014 (1931).

Two of the several qualifications recognized in *Asher* apply here to render the *res judicata* doctrine inapplicable.

The first qualification states that "[t]he doctrine does not apply . . . to facts that subsequently arise . . . ." *Asher* at 1014. Our Supreme Court relied on this qualification in *Moorhead* to reverse a circuit court's decision that a plaintiff's claim was barred by *res judicata* principles. *Moorhead* at 204. It also applies here.

The facts giving rise to May's and Trivette's cause of action for termination of the lease pursuant to section VII occurred ten months after they filed the complaint in *May I*; that is, after Pike-Letcher resumed mining, after May and Trivette rejected JFCC's tendered royalties, and after JFCC's continued noncompliance with sections II and III of the lease. If May and Trivette had filed their complaint in this action before that sequence of events, their cause of action, as discussed *supra*, would have been defeated by the doctrine of waiver. Furthermore, these events were ongoing and continued even "*after entry of the prior judgment.*" *Moorhead* at 204. This qualification takes the case before us from application of the doctrine of *res judicata*.

Asher described a second qualification that applies here.

> The doctrine does not apply . . . where the court in rendering the judgment expressly or by necessary implication reserved the determination of the issues to be later litigated, but against the determination of which the judgment was then interposed as a bar . . . .

Asher at 1014. The appellate court in *Asher* relied on this qualification to reverse a circuit court's holding that *res judicata* barred a plaintiff's claim. The factual and procedural circumstances in *Asher* are remarkably similar to those in the case before us. Consequently, the court's rationale for holding as it did is directly applicable to our case.

The parties in *Asher* contested their respective rights in a contract, though in *Asher* the contract was a deed and not a lease. Like the case before us, however, the plaintiff initiated a second action before the first was resolved. The appellate court took particular note of how the trial court treated the first case vis-à-vis the second.

> [I]mmediately preceding the submission of the first case[,] the court's attention was specifically called to the pendency of this action, and which was done by a motion of plaintiffs to consolidate the two cases, and which motion was either overruled or not acted on, and the trial proceeded . . . in that action. It was tantamount to an exclusion by the court of the issues . . . in this action. . . . [T]he course pursued by the court at that time was tantamount to an express determination on its part to reserve the issues involved in this action for future adjudication . . . .

Id. at 1014-15.

Similarly, JFCC called the court's attention to the pendency of the first action, not by a motion to consolidate, but by a motion to dismiss May's and Trivette's second action on the ground that they were splitting their causes of action between the two cases. As in *Asher*, the circuit court denied the motion. Furthermore, the Pike Circuit Court, apparently discounting JFCC's assertion of

res judicata as an affirmative defense, went forward with the second action by conducting a day-long trial just a few months after judgment was entered in the prior case. And even more, in rendering the judgment in the second case, even after JFCC briefed the issue again, the circuit court declined to resolve the case by applying the doctrine of *res judicata*. These actions by the circuit court, more so than in *Asher*, were "tantamount to an express determination on its part to reserve the issues involved in this action for future adjudication." *Id.* at 1015.

Therefore, because this second qualification applies, May's and Trivette's cause of action in this case was not barred by the doctrine of *res judicata*.

For the foregoing reasons, the judgment of the Pike Circuit Court that the lease remains in full force and effect is reversed, and this case is remanded for proceedings consistent with our opinion.

. ALL CONCUR.

BRIEFS FOR APPELLANTS:

W. Sidney Trivette
Pikeville, Kentucky

Wayne F. Collier
Lexington, Kentucky

BRIEF FOR APPELLEES:

James P. Pruitt, Jr.
Pikeville, Kentucky