

RENDERED: AUGUST 27, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001974-MR

B & H GAS, INC.

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 96-CI-00628

TRACEY R. KENDRICK
AND CORBIE L. KENDRICK

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

CLAYTON, JUDGE: This case is before this Court on an appeal from a decision
of the Floyd Circuit Court regarding the right of a surface owner to free gas

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

produced by a well upon his property. Based upon the following, we affirm the trial court's decision.

BACKGROUND INFORMATION

Appellees Tracy and Corbie Kendrick owned property on Mare Creek in Floyd County, Kentucky. The couple divorced and the property is now owned by Tracy Kendrick ("Kendrick") alone. As part of his ownership of the property, he contends that he has title to surface rights to land containing minerals. As part of the surface rights, he argues he has title to receive free gas associated with a gas well located upon the property.

Appellant B & H Gas, Inc. ("B & H") contends that it has no contract with Kendrick for free gas associated with the well. Bud Rife removes the gas from the well on Kendrick's property and sells the gas to B & H Gas. Consequently, B & H argues that Kendrick is in no way entitled to receive free gas. The trial court, relying upon the expert testimony of an attorney specializing in property law, found that Kendrick's rights to the free gas stemmed from a covenant which ran with the land. B & H now appeals the decision.

STANDARD OF REVIEW

In reviewing the trial court's decision, we must determine whether said decision was clearly erroneous or an abuse of discretion. *See Phillips v. Akers*, 103 S.W.3d 705 (Ky. App. 2002). In determining whether a finding of fact is clearly erroneous, an appellate court must determine whether the finding was supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954

(Ky. 1965). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

DISCUSSION

The trial court found that the testimony and expert opinion of Will Kendrick, an attorney, was sufficient to conclude that Kendrick has clear title to receive free gas associated with his ownership of the surface of the property.

Given the abundance of mineral deposits within the Commonwealth and the bifurcation of mineral and surface rights in many instances, this is not a unique question of law. In *Warfield Natural Gas Co. v. Small*, 282 Ky. 347, 138 S.W. 2d 488 (Ky. App. 1940), the highest court within the Commonwealth found that:

A covenant or agreement in a gas lease that the lessor shall have a part of the gas free is a covenant running with the land. . . . As the free gas covenant is a covenant running with the land, it runs with the surface of the land and not with the oil, gas and mineral rights since the covenant could be a benefit only to one occupying and using the surface of the land.

The trial court found as follows regarding Kendrick’s right to free gas.

1. Based on the testimony of attorney Will Kendrick, the Court finds in favor of the Plaintiff on his claim to “free gas.”

2. The right to receive free gas in this case granted Tracy Kendrick a real covenant running with the land which was attached to the surface of the land. This was not a personal obligation between the original parties, rather it was a clause intended to bind the heirs and assigns of the original parties.

3. The right to free gas under the clause in this case runs with the land and, specifically, runs with the ownership of the surface of the land. . . . attorney Ralph Stevens' opinion was based on his misunderstanding that the right to receive free gas was a mineral right which could be transferred with a purported transfer of mineral rights.

4. The right to receive free gas is a covenant running with and attached to the surface of the land and is separate and apart from any claim or right to the mineral rights.

In *Harmon v. McMasters*, 57 S.W.3d 850 (Ky. App. 2001), and *Salisbury v. Columbian Fuel Corp.*, 387 S.W.2d 864 (Ky. 1965), Kentucky appellate courts held that, under Kentucky law, a covenant for free gas ran with the land and could be transferred by the lessor of the gas lease from one dwelling to another on the subject property as long as it was only one dwelling and was located upon the leasehold property. It was not, therefore, a right associated with the mineral rights of the property. We agree.

Given Kendrick's ownership of the property and its surface rights, the existence of the covenant on his title and the gas production of the well, we find the trial court had substantial evidence to determine Kendrick was entitled to free gas.

Having determined that there is a covenant allowing Kendrick to receive free gas from the well located upon his property, we must now determine whether Kendrick is entitled to gas from B & H Gas.

B & H argues that Kendrick has taken gas from the public line, not from the line that obtains gas from the well located upon his property. It contends that the well on Kendrick's property only produces gas a few months of the year, but Kendrick had been receiving gas from the B & H line continuously throughout the year.

While Kendrick does have a covenant to receive gas, said covenant only governs a gas well located upon the surface of his property. The trial court found Kendrick only had a right to gas taken from the well on his property. We agree. The trial court also gave the parties an opportunity to show the pro rata amount Kendrick would be entitled to from the well. We find this appropriate.

Thus we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Earl M. McGuire
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Thomas W. Moak
Prestonsburg, Kentucky