

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001971-MR

HOLLY CREEK PRODUCTION CORPORATION

APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 00-CI-00068

ROBERT LEE ROSE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: Appellant Holly Creek Production Corporation (“Holly Creek”) seeks reversal of the Wolfe Circuit Court order that Holly Creek pay the costs of burying its pipelines on the property of appellee Robert Lee Rose. For the reasons stated herein, we affirm the circuit court.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

This is the second appeal of this matter. When this case was first presented to the Court, we addressed various issues related to the same lease and refer the reader to that case for a general history. *Holly Creek Production Corp. v. Rose*, 284 S.W.3d 542, 547 (Ky. App. 2009) (“*Holly Creek I*”). For purposes of this second appeal, it is sufficient to note that we reversed the trial court’s finding that Holly Creek’s failure to bury its pipeline upon Rose’s demand constituted a material breach and forfeiture of the lease. We affirmed the trial court’s conclusions that Holly Creek was obligated to bury the pipeline in question, but remanded the case for the sole “determination of which party is to bear the cost for burying the pipelines.” *Holly Creek I*, 284 S.W.3d at 545, 547.

On remand, Rose moved for an order requiring Holly Creek to bear the costs of burying the pipeline. After the parties briefed the issue, the trial judge entered an order compelling Holly Creek to bear the costs. This appeal followed.

The circuit court’s order concludes as a matter of law that “the Lease does not expressly require the Lessor [Rose] to bear the cost” of burying the pipeline that Rose clearly has a right to demand and, to the extent “any ambiguity exists in the terms of the Lease, . . . such ambiguity exists in favor of [Rose] as Holly Creek is the apparent preparer”

“The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the [trial] court [in the first instance, and the appellate courts’] standard of review is *de novo*.” *First*

Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky. App. 2000) (citations omitted).

It is so commonly understood as to need no citation that contracts are to be construed as a whole, giving effect to all parts and every word if possible. Where a contract is silent on a vital matter, as here, a court may, of course, consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, but may also consider the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). The circuit court followed this approach.

This lease is silent as to which party must pay to bury the pipeline. Like the circuit court, we find the provision empowering Rose to require Holly Creek to bury the pipeline a compelling reason to impose the cost of doing so on Holly Creek. If Rose is required to bear the cost, then the language that pretends to grant a powerful right to Rose is transformed into a financial burden, simply a means of compensating Holly Creek for its labor. We cannot read such intent into this contract.

In other words, Holly Creek's obligation to bear this cost is implicit in the authority it granted Rose to require the pipeline be buried. This conclusion is based on the doctrine that "[t]erms are to be implied in a contract, not because they are reasonable, but because . . . they are too obvious to need expression." 17A Am. Jur. 2d Contracts § 369 (2011); *see also Derby Road Bldg. Co. v. Com., Dept.*

of Highways, 317 S.W.2d 891, 894 (Ky. 1958) (“[O]mission of what is necessarily implied is immaterial”); *Warfield Natural Gas Co. v. Allen*, 248 Ky. 646, 59 S.W.2d 534, 536 (1933) (“[I]n the absence of specification of . . . obligations intended to be assumed, the law will imply an agreement to do . . . those things that according to reason and justice the parties should do in order to carry out the purpose for which the contract was made.”) (Citations omitted).

However, Holly Creek presents arguments challenging this interpretation.

First, Holly Creek argues that the circuit court’s interpretation of the lease is “contradicted by Kentucky law, the decision of each and every court in Kentucky and every other jurisdiction that has considered the issue.” This assertion is not borne out by our research. For example, Holly Creek cites *Potter v. Northern Natural Gas Co.*, 441 P.2d 802 (Kan. 1968), in support of this argument while ignoring *Rostocil v. Phillips Petroleum Co.*, 502 P.2d 825 (Kan. 1972), which interpreted the virtually identical lease provision as is now before this Court.² *Rostocil* concluded that “the lease requirement that ‘when requested by the lessor, lessee shall bury his pipe lines below plow depth,’ carries an implied continuing obligation to keep the pipe lines buried below plow depth so as not to interfere with normally anticipated agricultural practices.” *Rostocil*, 502 P.2d at 826.

Setting aside hyperbole, we turn to the case Holly Creek presents to us as most persuasive – *Columbia Gas Transmission Corp. v. Limited Corp.*, 759 F. Supp. 343 (E.D. Ky. 1990). This is the same authority Holly Creek presented to

² In fact, the provision in the case *sub judice* presents an even stronger argument since it utilizes a term of compulsion, “shall”, whereas the provision in *Rostocil* used the term “requested.”

the circuit court. We share the circuit court's view that this case is easily distinguishable. In *Columbia Gas*, the mining activity by the lessor (Limited) interfered with the correlative right of the lessee (Columbia Gas). That mining activity included the building of a coal haul road across on one buried portion of the pipeline and depositing 25 feet of overburden and a retaining bench over another, pushing mine debris and boulders against portions of the pipeline that were above ground, and cracking the pipeline with construction equipment. *Id.* at 346-47. *Columbia Gas* was decided based on the doctrine of correlative rights between the servient and dominant estates. The case before us was not, nor should it have been.

The other cases Holly Creek cites are similarly distinguishable because they involved relocations of existing pipelines for which there was no lease provision or because the reason for relocating the pipeline was not anticipated by either party at the time of the lease. *See, e.g., Tenneco, Inc. v. May*, 377 F. Supp. 941 (D.C. Ky. 1974) (the lease is silent on the issue of relocation and neither party anticipated a road ever crossing the pipeline); and *Hazard Coal Co. v. Kentucky West Virginia Gas Co., LLC*, 311 F.3d 733 (6th Cir. 2002) (the lease does not mention relocation of the pipeline). In such cases, correlative rights cases again, where there is no lease provision addressing the burying or relocating of pipelines, courts have routinely held that the party upsetting the status quo must bear the costs associated with the change. Because there is a specific provision in the subject lease, these cases are inapplicable.

We agree with the trial court that “[t]he cases cited by [Holly Creek], particularly Columbia Gas Transmission Corp. v. Limited Corp., . . . are not relevant to the present case, as Mr. Rose has only requested a burial of the pipelines, . . . not a major relocation of lines as was contemplated in the Limited case.”

Holly Creek also asserts that the circuit court erred by interpreting the lease from its language alone and without a hearing. He argues that if the language of the lease alone could have decided the issue, then this Court in *Holly Creek I* would have decided it rather than remanding the case. However, this argument is flawed.

Holly Creek I was presented to this Court after the trial court determined the lease had been forfeited and with it Rose’s right to have the pipeline buried. Necessarily, the issue of the cost of burying it was never engaged. By reversing the trial court’s judgment that the lease was forfeited, Rose’s right to have Holly Creek bury the pipeline was resurrected. With our decision in *Holly Creek I*, the issue of which party was to pay to bury the pipeline became legally significant for the first time.

Furthermore, when we remanded the case, we did not mandate that the trial court undertake a particular course of action. Specifically, we did not require an evidentiary hearing.

In summary, absent a provision imposing the costs of burying the pipeline on Rose, it is implied by the provisions of the lease, taken as a whole, that those cost should be borne by Holly Creek.

For the foregoing reasons, the opinion of the Wolfe Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Frank C. Medaris, Jr.
Hazard, Kentucky

BRIEF FOR APPELLEE:

Brian N. Thomas
Christopher M. Davis
Winchester, Kentucky