

RENDERED: NOVEMBER 4, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000429-MR

VESTER RAY WAGNER AND
CHRISTINE WAGNER

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NO. 11-CI-00610

BRYAN WAGNER,
in his capacity as personal representative
of the Estate of Vester Ray Wagner, II
and RAY SMITH

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, D. LAMBERT, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Vester Ray Wagner (Father) appeals from the February 24, 2015 order of the Knox Circuit Court granting summary judgment in favor of

Vester Ray Wagner II (Son).¹ Father sued Son after Son obstructed a natural gas line that ran from a well on Son's property to Father's home. Father claimed access to the natural gas through a mineral lease agreement. Son argued the lease was no longer valid. After review, we affirm the summary judgment.

I. BACKGROUND

On October 11, 1984, Father entered into a mineral lease agreement with the FORB Corporation (FORB). Under the mineral lease, Father granted FORB the right to extract minerals from certain real property located in Knox County, Kentucky. The primary term of the lease was five months and was to continue "as long thereafter as any crudes are produced from said leased premises or operations for drilling are continued as hereinafter provided, or operations are continued for secondary or tertiary recovery of any crudes." Further, as long as FORB paid the royalties due under the lease, the lease was to remain in effect and Father was entitled "to have gas free of charge from any gas well on the leased premises for stoves and inside lights in the principal dwelling house on said land by making his own connections with the well[.]" The lease was recorded on October 12, 1984.

In November 1997, FORB dissolved and ceased its production operation at the well. The well, however, did not stop producing natural gas. As a result, Father continued to consume free natural gas from the well for his domestic purposes.

¹ During the pendency of this action, Vester Ray Wagner II died, and Bryan Wagner was appointed as the personal representative of his estate and substituted as a party.

On June 5, 2006, Son bought the property on which the well was located. And, Father continued to sap free natural gas from the well until Son installed clamps on the natural gas line in 2011. Father responded by suing Son on December 6, 2011, claiming he was entitled to access the well. A contentious legal battle ensued.

After deciding several preliminary issues, most of which focused on whether the clamps should be removed during the winter and whether FORB should be joined as a party in the proceedings, the circuit court granted summary judgment in favor of Son. The circuit court concluded Father asserted rights to the natural gas under a terminated lease and dismissed his claims. Father argued the lease was still valid in a subsequent motion to alter, amend or vacate. In denying this motion, the circuit court explained that FORB had abandoned the lease by its dissolution and failure to pay royalties for many years. The circuit court also explained that a prior judgment extinguishing FORB's rights to the leasehold justified its conclusion that FORB had abandoned the lease. This appeal followed.

II. STANDARD OF REVIEW

Summary judgments are reviewed *de novo* to resolve whether there were any genuine issues of material fact and whether the moving party was entitled to judgment as a matter of law. CR 56.03; *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992). The interpretation of a contract is also a matter of law reviewed *de novo*. *Cumberland Valley Contractors, Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

III. DISCUSSION

On appeal, Father challenges the circuit court's conclusion that the lease had been terminated. Father contends the circuit court's previous judgment did not terminate the lease because the prior litigation did not involve this particular lease. Father also contends the circuit court did not make a specific finding as to how the lease terminated. For the following reasons, we are not swayed by Father's arguments.

To begin with, a mineral lease is abandoned when the lessee surrenders the property with intent to relinquish the lease. *Browning v. Cavanaugh*, 300 S.W.2d 580, 582 (Ky. 1957). A mineral lease is also abandoned, in the absence of demonstrated intent by the lessee to relinquish the lease, when the lessee "fails to carry on the work imposed upon him by the expressed or implied covenants of the lease" or ceases all efforts to explore or develop his lease. *American Wholesale Corp. v. F. & S. Oil & Gas Co.*, 46 S.W.2d 498, 501 (Ky. 1932); *see also*

Browning, 300 S.W.2d at 583 (citing *Ison v. Edra Lee Oil & Gas Co.*, 241 Ky. 754, 45 S.W.2d 3 (1931)) (no development of a five-year lease after first year). Indeed, when the lease is abandoned, the lessor or his successor in interest may “enter and take possession of the leased premises and assume control . . . or he may institute an action in equity for a cancellation of the lease; or an action at law for damages for breach of the expressed or implied covenants.” *American Wholesale Corp.*, 46 S.W.2d at 501.

Here, the lease specifically provided that Father would only be entitled to free natural gas for his domestic use while the well was in production and FORB was paying royalties. And, according to the circuit court, no effort to develop the lease was made in the decade preceding Son’s installation of the clamps. In fact, FORB did not pursue any production activities or pay any royalties after going out of business in 1997. Consequently, FORB abandoned the lease and Father was no longer entitled to free gas. Son, as the owner of both the surface and mineral estate of the property containing the well, was thus within his legal rights in entering his land and asserting control of the natural gas flowing from his well.

Accordingly, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Travis A. Rossman
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Scott M. Webster
London, Kentucky