Opinion filed April 7, 2011

In The

Eleventh Court of Appeals

No. 11-10-00050-CV

TEON MANAGEMENT, LLC AND REPUBLIC OIL & GAS COMPANY, Appellants
V.
TURQUOISE BAY CORPORATION D/B/A BAY OPERATORS ET AL., Appellees

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On Appeal from the 238th District Court
Midland County, Texas
Trial Court Cause No. CV45986

O P I N I O N

Turquoise Bay Corporation d/b/a Bay Operators et al.[1] filed suit against Teon Management, LLC, et al.[2] seeking a declaratory judgment that seven oil and gas leases had not terminated and that Turquoise Bay was the operator of four wells located on those leases. Teon

[1]The plaintiffs/appellees are Turquoise Bay Corporation d/b/a Bay Operators; Gloria Ruth Johnson; Lois Fay Echols; R & C Land & Cattle Co.; Adam Praisnar; Ann Praisnar; JDJMT, Ltd.; Petroleum Growth Fund 2003, Ltd.; B & F Company; B.J. Blackstock; James P. Chonka; Preasley Cooper; Donnell Echols; First National Bank of Denver City; G. Murthy Gollapudi; Luis Gomez; Mitzi Griffith; John Holdridge; Natalie Jarrett; Ray Holdridge; Davey & Patrick Lawson; Locker Brothers Partnership; John M. Lowrance; Jackie Mitchell; James Mitchell; Myrle Mitchell Estate; Doris & Stanley Neujahr; C.E. Nipp; Martha J. Nugent; Joyce Rodriguez; Michael C. Smith; Telluride Company (Stann); Telluride Company (Wulfe); Trobaugh Properties; Daniel R. Walsh; James R. Weber; Marvin L. Wigley; Marc Hellinghausen; Sidney R. Hutchinson; and W. Olin McMillian. We will collectively refer to them as Turquoise Bay.

[2]The defendants were Teon Management, LLC; Republic Oil & Gas Company; Kynn and Jan Maxwell; Dovie Nichols; Claudia Chase; Tammy N. Dyer; Grady Lee Grantham; Glenn (Bud) Grantham; Katherine N. Grantham; Sandra N. Hodnett; Joe Hughes; Kay Long; Kathy J. Maxwell; Chad Nichols; Donald Nichols; Danny Lee Nichols; John Roy Nichols; John P. Nichols, Jr.; Mark Nichols; Jennifer Dawn McNeill; Robert Carl Nichols; Jean Parker; Charles A. Peugh; Vicky Ware; J.D. Crawford; Elkin-Kennett Properties; Francis Caldwell Elkin; Francis C. Elkin Trust; Virginia Louise Fuller; Louie G. & Evelyn Koonce; P. Bush Elkin Property Company, Ltd.; Claudia Chase; Candelero Oil & Gas Co.; Endeavor Energy Resources L.P.; Rick Reddy; Lewis Reddy Estate Trust; Isramco Energy; Lynn F. Moore Estate; and Candelero Oil & Gas, Co.

Management and Republic Oil & Gas Company filed a counterclaim asking the court to find that the leases had terminated and that Turquoise Bay was a bad faith trespasser. They also requested an accounting and damages. The jury answered several questions favorably for Turquoise Bay, and the trial court entered a declaratory judgment that the leases were still in effect as to specifically described lands but had otherwise terminated, that Turquoise Bay was not a trespasser but was the proper operator of three wells, and that Turquoise Bay was entitled to the suspended production payments. The trial court also awarded Turquoise Bay its attorney's fees. We reverse and render in part and reverse and remand in part.

I. *Background Facts*

This suit arises out of four wells drilled on lands covered by seven leases. The wells are the Nichols No. 2, the Nichols No. 3, the Elkin-Nichols Unit No. 1-1, and the Elkin-Nichols Unit No. 2-1. In 2006, they were operated by McFarland & Scobey. But it filed for bankruptcy on October 22, 2006, and the Texas Railroad Commission shut in all four wells on December 14, 2006. The working interest owners selected Turquoise Bay as the new operator. It commenced operations, and production resumed on March 8, 2007. Meanwhile, in February, Teon Management secured new leases covering the four wells.

Turquoise Bay applied with the Railroad Commission to become the operator. Teon Management contested its application. Because of the controversy, the production purchasers placed all revenue from the four wells in suspense. Turquoise Bay then filed suit against Teon Management seeking a declaratory judgment that it was a valid operator and not a trespasser. Eventually, all royalty, overriding royalty, and working interest owners were joined as parties.

The jury found that Turquoise Bay timely commenced reworking operations on three wells: the Nichols No. 2, the Nichols No. 3, and the Elkin-Nichols Unit No. 1-1. The trial court did not submit an issue on the Elkin-Nichols Unit No. 2-1 well, finding as a matter of law that the leases covering that well had terminated with respect to the land allocated to it. The trial court entered a declaratory judgment holding that the leases covering the Nichols No. 2, the Nichols No. 3, and the Elkin-Nichols Unit No. 1-1 were valid as to the proration units attributable to those three wells; that two other leases were valid as to all lands covered by them; that Turquoise Bay was not a trespasser as to the three wells; and that the leases covering the proration unit attributable to the Elkin-Nichols Unit No. 2-1 well had terminated. The trial court also awarded Turquoise Bay its attorney's fees, and it authorized the purchasers to release all

suspended funds to Turquoise Bay. Teon Management and Republic Oil & Gas Company filed a notice of appeal.[3] The remaining defendants did not.

II. *Issues*

Teon Management challenges the trial court's judgment with six issues. Teon Management argues first that, because Turquoise Bay's suit was primarily one to determine title to land, it was required to file a trespass to try title action rather than a suit for declaratory judgment. In Issues Two and Five, Teon Management contends that the trial court erred by awarding attorney's fees or, alternatively, requests a remand for further consideration of their award. In Issues Three and Four, it challenges the sufficiency of the evidence to support specific jury findings. Finally, in Issue Six, Teon Management contends that the trial court erred by awarding Turquoise Bay the revenue attributable to production from the disputed interests.

III. *Trespass to Try Title*

The first question we must address is whether it was appropriate for Turquoise Bay to prosecute this as a declaratory judgment action rather than as a trespass to try title suit. Teon Management filed special exceptions challenging the propriety of a declaratory judgment action, and it filed a motion for judgment NOV asking the court to disregard the jury's answers because Turquoise Bay failed to plead or prove a trespass to try title claim. The trial court denied both motions.

Teon Management argues that the trial court erred because this suit was one to determine title to land. Turquoise Bay responds that the suit was not, in substance, a trespass to try title action and, therefore, that a declaratory judgment action was appropriate. Both causes of action are statutory creations. TEX. PROP. CODE ANN. § 22.001(a) (Vernon 2000) provides: "A trespass to try title action is the method of determining title to lands, tenements, or other real property." The prevailing party's remedy is title to, and possession of, the real property interest at issue. *Porretto v. Pattterson*, 251 S.W.3d 701, 708 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Conversely, TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (Vernon 2008) allows:

> A person interested under a deed, . . . written contract, or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument, . . . and obtain a declaration of rights, status or other legal relations thereunder.

[3] We will refer to these parties collectively as Teon Management.

There are procedural differences between the two causes of action. One of the most important is the availability of attorney's fees. Trial courts have the authority to award attorney's fees in declaratory judgment actions. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(a) (Vernon 2008) (courts may award costs and reasonable and necessary attorney's fees as are equitable and just). They do not in trespass to try title suits. *See EOG Resources, Inc. v. Killam Oil Co.*, 239 S.W.3d 293, 304 (Tex. App.—San Antonio 2007, pet. denied) (holding recovery of attorney's fees is barred in a trespass to try title action because it is not provided for in the Property Code).

Texas case law indicates that, in most cases, the proper cause of action when title is in dispute is a trespass to try title action.[4] Turquoise Bay argues that this rule is inapplicable here because the relief it sought and was awarded is significantly different from the relief available in a trespass to try title action. It notes that it recovered a declaratory judgment that it was the proper operator of three wells, that it was not a trespasser as to those wells, and that the purchasers were authorized to release all production payments to it. Turquoise Bay also argues that the judgment does not vest any title but merely recites that some of the leases were valid.

Turquoise Bay's argument misreads the trial court's ruling. When the trial court found that Turquoise Bay's leases were valid, the court was not resolving a question about the validity of those leases at the time of their execution or whether they were otherwise proper and enforceable. It found that those leases were still in existence. When the trial court found that Turquoise Bay was the proper operator, it was because Turquoise Bay timely commenced reworking operations; therefore, the leases were still valid. When it found that Turquoise Bay and not Teon Management was entitled to the suspended runs, this was because Turquoise Bay's leases were still in existence. Each of these decisions is a title determination. *See Marshall*, 288 S.W.3d at 453 (case was not a proper declaratory judgment action because it did not involve the construction of a lease but whether the operator had engaged in good faith drilling or reworking operations without a sixty-day cessation and whether it had committed fraud); *Pool*, 30 S.W.3d at 636-37 (case was essentially a trespass to try title action because the suit did not involve the

[4] *See, e.g.*, *Martin v Amerman*, 133 S.W.3d 262, 264 (Tex. 2004); *BP Am. Prod. Co. v. Marshall*, 288 S.W.3d 430, 453 (Tex. App.—San Antonio 2008, pet. granted); *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 627 (Tex. App.—Eastland 2009, pet. granted); *Natural Gas Pipeline Co. of Am. v. Pool*, 30 S.W.3d 618, 636 (Tex. App.—Amarillo 2000), *rev'd on other grounds*, 124 S.W.3d 188 (Tex. 2003); *McRae Exploration & Prod., Inc. v. Reserve Petroleum Co*., 962 S.W.2d 676, 684 (Tex. App.—Waco 1998, pet. denied); *Ely v. Briley*, 959 S.W.2d 723, 727 (Tex. App.—Austin 1998, no pet.); *Bell v. State Dep't of Highways & Pub. Transp.*, 945 S.W.2d 292, 294 (Tex. App.—Houston [1st Dist.] 1997, writ denied), *abrogated by Harris County v. Sykes*, 136 S.W.3d 635 (Tex. 2004); *Barfield v. Holland*, 844 S.W.2d 759, 771 (Tex. App.—Tyler 1992, writ denied).

construction of the leases but an evidentiary determination of whether production had terminated).

Turquoise Bay contends that, nonetheless, a declaratory judgment action was appropriate because the construction of the leases' saving clause was a pervasive issue. Turquoise Bay argues, for example, that there was extensive dispute over the meaning of the phrase "operations for drilling or reworking." But, the jury charge confirms that this case, much like *Marshall* and *Pool*, was ultimately an evidentiary determination of whether Turquoise Bay's leases had expired.[5] The jury was asked:

> Question No. 1[6]
>
> Did production of oil and gas from the wells listed below cease for a period of more than sixty (60) consecutive days?
>
> Question No. 2
>
> Did Plaintiffs commence operations for reworking on the wells listed below within sixty (60) days after production of oil and gas ceased?
>
> You are instructed that "reworking operations" means any and all actual acts, work, or operations in which an ordinarily competent operator, under the same or similar circumstances, would engage in a good faith effort to cause a well or wells to produce oil or gas in paying quantities.
>
> Question No. 3
>
> Was Plaintiffs' failure to commence reworking operations on or the failure to produce oil or gas from the well in question within 60 days excused by operation of force majeure, or Federal or state law or any order, rule or regulation of governmental authority?
>
> You are instructed that effect of a force-majeure "is to excuse the lessee from non-performance of lease obligations when the non-performance is caused by circumstances beyond the reasonable control of the lessee or when non-performance is caused by an event which is unenforceable at the time the parties entered the contract."

[5]Courts have held that a declaratory judgment is proper when a party requests the trial court to construe a deed or lease to determine if the instrument is valid and conveys the purported interest in dispute. *See, e.g., Sunwest Operating Co. v. Classic Oil & Gas, Inc.*, 143 Fed. Appx. 614, 620 (5th Cir. 2005); *Ruiz v. Stewart Mineral Corp.*, 202 S.W.3d 242, 247 (Tex. App.—Tyler 2006, pet. denied). No such questions were raised in this dispute.

[6]The charge contained separate answer blanks for each well. For clarity, that portion of the charge has been omitted. Also for clarity, the instructions that have no bearing on this appeal have been omitted. This includes the limiting instructions. We note that, because the jury answered Question No. 2 yes for all three wells, it was instructed not to answer Question No. 3. Because the jury did not answer Question No. 3, it was also instructed not to answer Question No. 4.

Question No. 4

A. Did any royalty owner or owners repudiate Plaintiffs' title to the leases?

B. State the name and date of repudiation as to any royalty owner whom you have found repudiated Plaintiffs' title to the leases.

Question No. 5

With regard to Question No. 5, you are instructed that to be capable of producing oil or gas, a well must be capable of producing oil or gas in paying quantities without additional equipment or repairs.

The term paying quantities involves not only the amount of production, but also the ability to market the product at a profit. Whether there is a reasonable basis for the expectation of profitable returns from the well is the test. If the quantity be sufficient to warrant the use of the product in the market, and the income therefrom in excess of the actual marketing costs and operating costs, the production satisfies the term "in paying quantities."

In the case of a marginal well, the standard by which paying quantities is determined is whether or not under all the relevant circumstances a reasonably prudent operator for the purpose of making a profit and not for speculation, continue to operate the well in the manner in which the well was operated.

A. On March 12, 2007, were these wells shut-in and capable of producing only gas and not oil in paying quantities?
B. On December 14, 2006, were these wells shut-in and capable of producing only gas and not oil in paying quantities?
C. On March 12, 2007, were these wells shut-in and capable of producing oil or gas in paying quantities?
D. On December 14, 2006, were these wells shut-in and capable of producing oil or gas in paying quantities?

Question No. 6[7]

Did Plaintiffs act in good faith in producing oil or gas from the wells listed below after failing to commence drilling or reworking operations on the wells listed below within sixty (60) days after production of oil and gas ceased?

You are instructed that a person acts in good faith when that person does so with an honest and reasonable belief in the superiority of that person's title.

This charge resolved a title question. It did not resolve a lease construction dispute.

[7]This question was not conditioned. There are yes answers for all three wells. Those answers have been marked out and replaced with "N/A see Ques #2."

Turquoise Bay also argues that Texas courts have allowed declaratory judgment actions in very similar circumstances, and it points to decisions such as *Ridge Oil Co. v. Guinn Investments, Inc.*, 148 S.W.3d 143 (Tex. 2004). In that case, a lease covered two tracts and was maintained by production on only one tract. Ridge Oil, the lessee of the producing tract, shut in the wells and allowed the lease to expire. Guinn Investments was the lessee of the second tract. It filed a declaratory judgment action seeking a determination that the lease was still in effect. The supreme court affirmed a judgment for Ridge Oil, including an award of attorney's fees. 148 S.W.3d at 163. The supreme court did not mention trespass to try title claims, and there is no indication in the opinion that either side ever raised the issue. Conversely, in *Martin*, 133 S.W.3d at 264, the plaintiffs filed a declaratory judgment action over a boundary dispute, and the defendants filed a counterclaim for trespass to try title. The supreme court contrasted trespass to try title suits with declaratory judgment actions and noted that trespass to try title actions are "*the* method for determining title to real property." *Id.* at 265-67 (citing § 22.001(a)).[8]

The two decisions appear conflicting because, although both involved title determinations, in *Martin* the court held that a trespass to try title suit was required, whereas in *Ridge Oil* it affirmed a declaratory judgment without referring to the *Martin* holding or otherwise explaining why a trespass to try title suit was not required. Other courts have held that a party waives its right to insist upon a trespass to try title action when it fails to object. *See, e.g., Krabbe v. Anadarko Petroleum Corp.*, 46 S.W.3d 308, 320-21 (Tex. App.—Amarillo 2001, pet. denied). The supreme court's decisions in *Ridge Oil* and *Martin* can be reconciled using this principle. The trial court does not lose jurisdiction if a title dispute is erroneously filed as a declaratory judgment action and may properly award declaratory relief and attorney's fees if no objection is raised. Because Teon Management objected to proceeding as a declaratory judgment action and to the award of attorney's fees, that situation is not present here.

Turquoise Bay next contends that it was not required to file a trespass to try title action because its suit was more akin to a suit to remove a cloud on title. As Turquoise Bay notes, the purpose of a traditional suit to quiet title is to remove a cloud from the title created by an invalid claim. *See, e.g., Wright v. E.P. Operating Ltd. P'ship*, 978 S.W.2d 684 (Tex. App.—Eastland 1998, pet. denied) (plaintiffs filed a suit to quiet title to challenge the defendant's title to the

[8]The legislature has since amended TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(c) (Vernon 2008) to allow a declaratory judgment action "when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties."

mineral estate); *see also Thomson v. Locke*, 1 S.W. 112, 115 (Tex. 1886) (a suit to quiet title lies "to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right"); *Bell v. Ott*, 606 S.W.2d 942 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (the principal issue in a suit to quiet title is the existence of a cloud that equity will remove).

Turquoise Bay's claim is distinguishable because it is not challenging the validity of Teon Management's leases but, rather, whether they give it a present right to possession. If Turquoise Bay prevails, Teon Management's leases are still valid. They simply represent an assignment of the mineral owner's reversionary rights rather than a conveyance of the mineral estate. Moreover, even if Turquoise Bay is correct and this is a suit to remove a cloud on title, that would not eliminate the need to satisfy the burden of proof required in trespass to try title suits because of the competing claims to title. *See Bell*, 606 S.W.2d at 952 ("The plaintiff is not required to trace his title to either the sovereign or to a common source with the defendant, unless, of course, that proof is necessary to establish plaintiff's superior equity and right to relief.").[9] Nor would it allow Turquoise Bay to recover attorney's fees. *Sani v. Powell*, 153 S.W.3d 736, 745 (Tex. App.—Dallas 2005, pet. denied).[10]

Turquoise Bay argues that this is more than a title dispute because the trial court resolved other issues, such as its entitlement to production from the four wells. The trial court explained its rationale for allowing Turquoise Bay to proceed with a declaratory judgment action as the presence of a request for a declaratory judgment that Turquoise Bay was the lawful operator. In *Martin*, the supreme court held that the case necessarily involved a question of title or else the parties would gain nothing by the judgment. 133 S.W.3d at 267. The same is true here.

The underlying dispute concerned such questions as who was the proper operator of the wells and who was entitled to the production payments, but these are merely restatements of the ultimate question: Whose leases were in effect?[11] We do not hold that questions over who is the proper operator or who is entitled to suspended runs can never be resolved in a declaratory

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[9]One commentator has described the scariest element of a suit to quiet title as the possibility that a confused or inexperienced court will confuse it with a trespass to try title suit and will require a strict proof of title. *See* Andy Carson, *Selected Land Title Litigation Issues*, in ERNEST SMITH INSTITUTE PAPERS (1998). Carson recognizes, however, the necessity to establish title when, as suggested by *Bell*, 606 S.W.2d at 952, the plaintiff must establish a superior right to relief.

[10]*See also Sw. Guar. Trust Co. v. Hardy Road 13.4 Joint Venture*, 981 S.W.2d 951, 957 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) ("Attorney's fees are not available in a suit to quiet title or to remove cloud on title.").

[11]In *Marshall*, 288 S.W.3d at 453, the court held that a request for an accounting did not alter the nature of the suit because it was a form of further relief that accrued because of the underlying title determination.

judgment action. The dispositive question is: What is the nature of the dispute? For example, if Teon Management and Turquoise Bay's dispute over who was the proper operator required a construction of a joint operating agreement to determine if an election was properly conducted or if their dispute over suspended runs required a construction of an assignment to determine the percentage of ownership it conveyed, a declaratory judgment would be appropriate. But this case involved rival claims to the mineral estate, and every substantive issue was resolved when the trial court determined who owned the mineral estate. It was, therefore, a title determination, and Turquoise Bay was required to proceed with a trespass to try title suit. *See Veterans Land Bd.*, 281 S.W.3d at 627 (because case involved rival claims to the executive rights, a trespass to try title rather than a declaratory judgment action was proper). The trial court erred when it denied Teon Management's special exceptions and motion for judgment NOV.

Because Turquoise Bay was required to bring a trespass to try title action, it was required to prove its title by proving (1) a regular chain of conveyances from the sovereign to the plaintiff, (2) a superior title to that of the defendant out of a common source, (3) title by limitations, or (4) prior possession, which prior possession has not been abandoned. *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994). Turquoise Bay relies upon prior possession for its proof of title. Teon Management responds first that Turquoise Bay has waived this ground because it submitted no jury question on prior possession. *See Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964) (prior possession is an independent ground of recovery and is waived if there are fact questions and no jury question is submitted). Teon Management argues second that prior possession does not apply when the defendant has title or an ownership interest because this rebuts the presumption or inference of ownership. *See Clements v. Corbin*, 891 S.W.2d 276, 280 (Tex. App.—Corpus Christi 1994, writ denied) (proof of title in the defendant rebuts the inference of ownership arising from plaintiff's possession).

We need not determine if the evidence raised a fact question on Turquoise Bay's prior possession because it judicially admitted that Teon Management had legal title. In its live pleading, Turquoise Bay stated: "Defendants entered into Oil, Gas and Mineral leases on the same lands on which the wells are located in February 2007. . . . Defendants have intentionally and unlawfully interfered with the leases at issue by obtaining new leases from the Royalty Owners." Turquoise Bay did not admit that Teon Management had a present right to possession, but it did admit that Teon Management had at least an assignment of the mineral owner's reversionary interest. This is sufficient to establish an ownership interest and, therefore, to rebut

the presumption created by prior possession. *See State v. Fiesta Mart, Inc.*, 233 S.W.3d 50, 54-55 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (recitation in pleadings that opposing party is the owner of land constituted a judicial admission of ownership of an interest in the land).

Because Teon Management had an ownership interest, Turquoise Bay cannot rely upon the prior possession presumption. There is no claim of adverse possession, and Turquoise Bay did not otherwise prove its title. The result in such instances is, unfortunately, a harsh one. In *Hejl v. Wirth*, 343 S.W.2d 226 (Tex. 1961), the court wrote:

> It has long been the rule in this State that in a trespass to try title suit, the plaintiff must recover upon the strength of his own title. If the plaintiff under the circumstances fails to establish his title, the effect of a judgment of take nothing against him is to vest title in the defendant. The rule is a harsh one, but it also has been well established as a rule of land law in this State.

343 S.W.2d at 226 (internal citations omitted). Because Turquoise Bay did not prove its title, the trial court erred when it did not enter a take-nothing judgment against Turquoise Bay and vest title with the defendants. Issues One and Two are sustained. This holding moots Issues Three, Four, and Five.

Turquoise Bay notes that only Teon Management and Republic filed a notice of appeal, and at oral argument, it asked us to affirm the judgment against the nonappealing parties in any event. The interests of Teon Management and Republic are interwoven with the nonappealing parties because they involve the same lands and are tied to the same issue: Which leases are in effect? Were we to reverse the judgment as to Teon Management and Republic but affirm as to the nonappealing parties, the effect on title would be confounding. We have previously held in such a situation that it is appropriate to reverse the judgment as to all parties. *See Veterans Land Bd.*, 281 S.W.3d at 617 n.5 (reversing the trial court's declaration for both appealing and nonappealing parties that the developer owned the executive rights because the rights of the parties were interwoven and dependent upon a common question); *see also Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 166 (Tex. 1982) (judgment reversed as to all parties "where the respective rights of the appealing and nonappealing parties are so interwoven or dependent on each other as to require a reversal of the entire judgment."). Consequently, we reverse not only as to Teon Management and Republic but as to all defendants.

IV. *Suspended Revenue, Operational Costs, and Expenses*

Teon Management contends that, if it receives title, it is also entitled to that portion of the suspended runs attributable to the working interest owners. Turquoise Bay asserts a cross-point asking for an award of the costs and expenses it incurred in operating and reworking the wells. Turquoise Bay correctly notes that a good faith trespasser is entitled to recover its drilling and operating costs from any production obtained. *See Mayfield v. de Benavides*, 693 S.W.2d 500, 506 (Tex. App.—San Antonio 1985, writ ref'd n.r.e). Good faith trespassers are also entitled to remove their equipment from the lease. *See Moore v. Jet Stream Invs., Ltd.*, 261 S.W.3d 412, 428 (Tex. App.—Texarkana 2008, pet. denied).

Turquoise Bay contends that the jury's verdict establishes that it was a good faith trespasser because the jury found that Turquoise Bay commenced operations within sixty days after the production of oil and gas ceased. That finding, however, is not synonymous with a finding of good faith trespass. The pattern jury charge good-faith-trespasser question asks: "Did Defendant act in good faith in producing oil and gas from the property of Plaintiff? You are instructed that a person acts in good faith when that person does so with an honest and reasonable belief in the superiority of that person's title."[12] Because of the facts of this case, the two issues are similar; but, because the jury made an objective finding when it found that Turquoise Bay timely commenced operations, and because a good-faith-trespasser determination requires a subjective assessment, we cannot conclude that the jury found Turquoise Bay was a good faith trespasser when it found that Turquoise Bay timely commenced reworking operations.

The trial court did submit a good faith trespass question in the jury charge. That question was not conditioned, and there are "yes" answers for each of the three wells. However, those answers have been marked out and replaced with the notation "N/A see Ques #2." When the jury's answers were read aloud in open court, the court announced that this question was unanswered. We presume the jury foreman marked the answers out. Regardless, neither side contends that the jury answered this issue. Consequently, there is an unresolved fact question on whether Turquoise Bay is a good faith trespasser.

Moreover, there are unresolved fact questions on the allowable costs if Turquoise Bay is a good faith trespasser. A good faith trespasser is liable in damages only for the value of the minerals removed less drilling and operating costs. *Hunt v. HNG Oil Co.*, 791 S.W.2d 191, 193-

[12] *See* Oil, Gas & Energy Resource Law Section Pattern Jury Questions and Instructions, at 12 (2009). Available at: http://www.oilgas.org/uploads/July%2009%20Update%20OGPJC.pdf.

94 (Tex. App.—Corpus Christi 1990, writ denied). The jury made no determinations on either the value of the minerals removed or the allowable costs and expenses. Teon Management contends that we can calculate the available revenue by multiplying the suspended revenue by 75% but acknowledges that the working interest owner's percentage of the revenue was not broken out in the exhibit establishing the amount of revenue held in suspense. Furthermore, we note that Teon Management's leases are not in the record. And Turquoise Bay does not direct us to any evidence establishing, as a matter of law, the allowable costs or expenses.

Because there are unresolved fact questions on whether Turquoise Bay was a good faith trespasser and, if so, the amount of revenue they are entitled to keep, we overrule Teon Management's sixth issue and remand this case for further proceedings.

V. *Conclusion*

The judgment of the trial court is reversed and rendered in part and reversed and remanded in part. That portion of the judgment finding the Nichols Leases, the Elkin Leases, the Oil, Gas and Mineral Leases dated March 9, 1988, between National Locator Service, Inc. as Lessor and Davis Oil Corporation and Carr Oil & Gas Co. as Lessees and recorded in Volume 960, Page 122, of the Deed Records of Midland County, and the Oil, Gas and Mineral Leases dated August 8, 1986, between National Locator Service, Inc. as Lessor and J.C. Davis and Leo C. Carr, as Lessees and recorded in Volume 900, Page 679, of the Deed Records of Midland County valid and subsisting is reversed, and judgment is rendered that Turquoise Bay take nothing. That portion of the judgment finding that Turquoise Bay was not a trespasser and is the proper operator of the Nichols No. 2, the Nichols No. 3, and the Elkin-Nichols Unit No. 1-1 is reversed. That portion of the judgment awarding Turquoise Bay attorney's fees, costs of court and interest is reversed, and judgment is rendered that Turquoise Bay take nothing. That portion of the judgment authorizing purchasers of oil and gas from the wells to release any suspended funds to Turquoise Bay is reversed, and this case is remanded for determination of whether Turquoise Bay was a good faith trespasser and, if so, what revenue it is entitled to keep.

April 7, 2011

Panel consists of: Wright, C.J., McCall, J., and Strange, J.

RICK STRANGE

JUSTICE