STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**Robert Cawthon, d/b/a B & J Gas and Oil,
John J. Haney, Jr., Agent of the Tierney Heirs and
Robert Cawthon as Attorney in Fact for Joyce Haney,
Douglas E. Johnston, Lynn Trowbridge, Sarah McBride,
Richard McBride, Joseph McConahy, John Wesley McConahy,
James F. Boyle, Kathryn Broaderick, Patricia Warbelton,
Jacqueline Greenawald, David Thomas, Kathleen Thomas,
Robert A. Haney, Marianne Peterson, Barbara L. Barron,
Jack Atchison, Barbara McDonald, Kathryn Martin, Terrance
Tierney, Roseanne Mattingly, Mary Tierney, Matt Ryan,
Dana Thomas Dodds, Terrance E. Haney, Jean P. Cawthon,
Cynthia L. Johnston, Christopher M. Johnston, James G. Warder,
Charles Webster, Cindy McCready, James Robert Warder,
Jennifer Johnston, Kathleen Price, Charles Webster, Thelma Boyle,
Cheryl McCall, John J. Haney, Martha J. Hooper, James P. Risner, Jr.,
Linda Mowe, Sandra Frazzini, Mary Beth Cabell, Patty Arrendondo,
Debra Tierney, James Holden, Mary Holden, Jeannie McDonald,
John Ryan, Marilyn Miller, Jennifer Ryan, Christine Taylor,
Barbara Urban, and Patrick Ryan,
Plaintiffs Below, Petitioners**

vs) **No. 11-1231** (Lewis County 10-C-1)

**CNX Gas Company, LLC, formerly known as CONSOL Gas Co.,
formerly known as Dominion Exploration and Production, Inc.,
Dominion Transmission, Inc., and John Tierney,
Defendants Below, Respondents**

MEMORANDUM DECISION

Petitioners, Robert Cawthon d/b/a B & J Gas and Oil, et al., by counsel, Erika Klie Kolenich, seek a reversal of the Lewis County Circuit Court's "Order Granting Motion to Dismiss of Defendants Dominion Transmission, Inc., CNX Gas Company, LLC, and John Tierney" entered by the Lewis County Circuit Court Clerk on August 3, 2011. Respondents, CNX Gas Company, LLC, and Dominion Transmission, Inc. (collectively referred to "the

Dominion respondents"),[1] appear by their counsel, Lori A. Dawkins and Allison J. Farrell. Respondent, John Tierney, appears by his counsel, W.T. Weber Jr.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no prejudicial error and determines that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Respondent Dominion Transmission, Inc. states that it holds a valid lease, which the parties refers to as the "DTI lease," to the oil and gas rights underlying a 200-acre tract of land in Lewis County, West Virginia. This property is also known as the "Tierney tract" or the "Tierney family farm." The Dominion respondents state that the Tierney tract is currently held by approximately seventy individuals,[2] collectively referred to by the parties as the "Tierney heirs," who own an undivided interest in the minerals and surface of the Tierney tract.

The DTI Lease was first executed in 1937, and it was modified in 1943. Petitioner Cawthon asserts that he has "top leased"[3] and/or purchased ninety-three percent of the oil and gas interest of the Tierney heirs in the Tierney tract and that he is also the attorney-in-fact for twenty-seven Tierney heirs who seek, as he does, to invalidate the DTI lease so that he can develop the oil and gas interests underlying the property. The Tierney heirs who do not agree with petitioner Cawthon's position were joined as defendants in the action below and one of those heirs, respondent John Tierney, appeared by separate counsel below, as well as before this Court, in opposition to petitioners.

Petitioner Cawthon states that he sought permission from the Dominion respondents to drill through the "protective storage field" on the subject property and that he made several attempts to inform the Dominion respondents that the DTI lease was invalid and unlawful. Petitioner Cawthon contends that the Dominion respondents have breached the terms and conditions of the DTI lease for several reasons, including underdevelopment of the lease. The

[1] The corporate respondents do not explain their relationship to one another in their appellate brief, and we could not find a description of their relationship in the appendix. Because they refer to themselves as the "Dominion respondents" in their appellate brief, we do the same for purposes of this memorandum decision.

[2] In the supplement to the appendix record, there is a letter dated June 1, 2006, wherein Petitioner Cawthon states that there are sixty-seven Tierney heirs.

[3] "[A] 'top lease' is the leasing by a subsequent lessee from the same lessors of a mineral interest currently under lease to another lessee. To enforce [the] rights under the top lease, [the top lessee] must defeat the lease of the original lessee . . . ." *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W.Va. 185, 187 n.6, 663 S.E.2d 639, 641 n.6 (2008).

Dominion respondents state that petitioners have never made a demand upon them for additional development under the DTI lease.

Petitioners instituted this action on May 5, 2010. The circuit court denied an initial motion for summary judgment by the Dominion respondents. Thereafter, the circuit court granted petitioners' motion for leave to file an amended complaint in which they sought to invalidate the DTI lease under various theories. In response, the Dominion respondents filed a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and respondent John Tierney joined in that motion. Following a hearing on the motion and supplemental briefing by the parties, the circuit court granted respondents' motion to dismiss.

Citing *Fredeking v. Grimmett*, 140 W.Va. 745, 762, 86 S.E.2d 554, 564 (1955), the circuit court found that West Virginia law requires all cotenants to seek invalidation or forfeiture of a lease. Because some, but not all, of the Tierney heirs/mineral owners had agreed to seek an invalidation of the DTI Lease, the circuit court dismissed six of the seven counts in the amended complaint for failure to state a claim upon which relief can be granted and for the additional reason that certain counts were time-barred by the applicable statute of limitations and because an implied covenant of good faith and fair dealing generally does not provide a cause of action separate and apart from a breach of contract claim. As to the count that sought a reversal of a final order of the circuit court entered on July 5, 2005, in a separate and unrelated eminent domain proceeding, the circuit court found that the time had passed to seek appellate or other review of that order under the West Virginia Rules of Civil Procedure and, therefore, petitioners had again failed to state a claim upon which relief could be granted. The circuit court also suggested that under *Law v. Heck Oil Co.*, 106 W.Va. 296, 145 S.E. 601 (1928), if mineral owners cannot agree on how to develop the mineral estate, the proper procedure is to seek partition. It is from the circuit court's dismissal order that petitioners appeal.

Although petitioners assert that *Fredeking* is inapplicable because it involved a forfeiture provision in a lease and there is no forfeiture clause in the DTI Lease, we find the equitable reasoning *Fredeking* Court to be persuasive:

> "If the right to enforce a forfeiture accrues and a part of the tenants in common are allowed to elect to enforce the forfeiture, then the lessee is placed in the inequitable position of being bound by the lease as to part of the tenants and discharged by a part, which means that the lessee is still liable as a lessee to some of the tenants in common, although he cannot enjoy any of the benefit of his lease without becoming a trespasser and liable for damages to the other owners of the land.
>
> . . .
>
> Under the American authorities, the lessee's covenants, unless expressed otherwise, are joint and indivisible under a lease executed jointly by all tenants in common."

Fredeking, at 762-63, 86 S.E.2d at 564 (quoting *Howard v. Manning*, 79 Okla. 165, 192 P. 358 (1920)). Thus, the underlying principle requires all lessors to concur in terminating or invalidating a lease and, here, only a portion of the Tierney heirs are challenging the DTI lease. Further, although petitioners rely upon *St. Luke's United Methodist Church v. CNG Dev. Co.*, 222 W.Va. 185, 663 S.E.2d 639 (2008), to argue that under the implied covenant of development, the Dominion respondents are in violation of the DTI lease, which requires them to fully develop the property, we note that the *St. Luke's* Court also found that the lessee under an oil and gas lease should be given a reasonable time period to further develop the leased property, after which the trial court should take evidence on the issue of whether the lessor has breached the implied covenant of development or whether evidence can be produced on the issue if hardship due to underdevelopment. *Id.* at 193, 663 S.E.2d at 647. While not determinative of our decision herein, we note that the Dominion respondents contend that petitioners never made a demand upon them for additional development and that when they sought a permit to drill another production well on the Tierney tract in 2007, their efforts were blocked by petitioners.

We also note that the circuit court stated in its dismissal order that where mineral owners cannot agree on how to develop the mineral estate, the proper procedure is to seek partition. While petitioners argue that partition would not be feasible, essentially due to the complications associated with the fluid nature of oil and gas, a partition can be achieved through a sale. *See* Syl. Pt. 3, *Renner v. Bonner*, 227 W.Va. 378, 709 S.E.2d 733 (2011), citing Syllabus Point 3, *Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782, 247 S.E.2d 712 (1978)("By virtue of W.Va. Code, 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interests of one or more of the parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale.").

"'Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.' Syllabus point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)." Syl. Pt. 1, *Albright v. White*, 202 W.Va. 292, 503 S.E.2d 860 (1998). [4] For the foregoing reasons, we affirm the circuit court's "Order Granting Motion to Dismiss of Defendants Dominion Transmission, Inc., CNX Gas Company, LLC, and John Tierney" entered on August 3, 2011.

Affirmed.

[4] Petitioners assert that the motion to dismiss was actually a motion for summary judgment because respondents referenced exhibits from their earlier motion for summary judgment that was denied. As petitioners concede, the circuit court's dismissal order does not reference any of these documents and, from our review of the circuit court's order, it does not appear that the circuit court relied upon those documents in reaching its decision.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin