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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000833-MR

CLAUDE JOHNSON, GRANVILLE JOHNSON,
MOLLIE THORNBURY, PRISCILLA STILTNER,
ESTATES OF BEN JOHNSON AND HAZEL JOHNSON,
MARTHA KINDER and CHARLIE JOHNSON — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 98-CI-00698

RAY THORNBURY, CHURCH AND
MULLINS CORPORATION, APPALACHIAN
MINERAL DEVELOPMENT CORPORATION
AND PANTHER LAND CORPORATION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Several heirs and estates of deceased heirs of John Johnson appeal from a summary judgment entered by the Pike Circuit Court in favor of Ray Thornbury, Church and Mullins Corporation, Appalachian Mineral Development Corporation, and Panther Land Corporation. We affirm.

John Johnson owned 375 acres of land known as Tract 42 on Three-Mile Creek in Pike County, Kentucky. In 1964, Bethlehem Minerals Company claimed ownership to the mineral rights of this property contrary to Johnson's ownership rights. After Johnson forcefully evicted a survey team from Bethlehem from the property, Bethlehem filed suit against Johnson in the Pike Circuit Court. Bethlehem was allowed to continue with its survey operations during the pendency of the case, and in 1968 it removed more than 3,000 tons of coal from the disputed property without giving notice to the court or Johnson that it was conducting mining operations on the property.

In 1970, Johnson entered into a lease agreement with another coal company, Church and Mullins Corporation. In 1971, Bethlehem filed an amended complaint in the Pike Circuit Court adding Church and Mullins as a named defendant and seeking to quiet title to the mineral rights to the property. Bethlehem also obtained a temporary injunction against Johnson and Church and Mullins prohibiting them from conducting further mining pending a determination as to the ownership of the mineral rights. Bethlehem continued its mining operations while the case was pending, and it eventually removed several hundred thousand tons of coal from the property.

In 1975, Johnson and Church and Mullins learned of Bethlehem's continued operations and filed suit claiming willful

trespass.[1] While the claim was pending, Johnson came into contact with Ray Thornbury. Thornbury was then active as a "go between" for labor and management for the United Mine Workers Union. Johnson apparently sought out Thornbury to seek assistance in carrying his end of the pending litigation with Bethlehem.

On October 21, 1977, Johnson, Thornbury, and Church and Mullins signed an agreement addressing issues concerning the pending legal action with Bethlehem. The agreement first addressed how litigation expenses would be handled as well as how any recovery would be divided. The agreement specified that one-third of the proceeds from any recovery from Bethlehem would be paid to Johnson and that the remaining two-thirds of the proceeds would go to Church and Mullins. The agreement also addressed the parties' intent to enter into future agreements. According to the terms of this portion of the agreement, Church and Mullins was to release any and all interest it held based on the original 1970 lease back to Johnson. Johnson then agreed to lease to Thornbury, and Thornbury agreed to sublease to Church and Mullins.

On February 21, 1978, Johnson entered into a set of agreements concerning the mineral rights to the disputed

[1] It is unclear from the record whether this claim was asserted as a counterclaim in the 1964 case or was filed as a separate action.

property. The first document, identified as the "Master Lease," was between Johnson and Thornbury. The second document, known as the "Master Sublease," was from Johnson and Thornbury to Church and Mullins. The Master Sublease was for a 25-year period with an option to renew for an additional 25 years.

The Master Lease did not contain any contingent provisions. The Master Sublease contained at least two provisions tied to the entry of a nonappealable order in the litigation with Bethlehem. The first provision stated that minimum royalties would be due Thornbury "commencing sixty (60) days after the entry of the final nonappealable order adjudicating the leasor [Johnson] as owner of the minerals on Tract 42." The second provision stated that Church and Mullins agreed to commence operations upon Tract 42 within six months after the entry of a final nonappealable order adjudicating Johnson as the owner of the minerals on the property.

Johnson died in 1984. After a 1986 judgment by the trial court and subsequent appellate proceedings before this court, the Kentucky Supreme Court rendered an opinion on June 4, 1992, finally deciding the dispute between Bethlehem, Johnson, and Church and Mullins. See Church and Mullins Corp. v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321 (1992). The court upheld the trial court's recognition of Johnson's ownership interest and its determination that Bethlehem was a willful

trespasser. As the Johnson heirs and Church and Mullins had stipulated to the terms contained in the 1977 agreement, the Johnson heirs received one-third of an award of $16,947,778 (after expenses and attorney fees were first deducted). The supreme court denied a petition for rehearing in November 1994.

On January 25, 1994, following the supreme court's opinion in the Bethlehem litigation, but before the petition for rehearing was denied, the mineral rights to Tract 42 were subleased yet again. Church and Mullins, along with its sole shareholder, Appalachian Mineral Development Corporation, entered into a sublease contract with Panther Land Corporation. Panther then began the necessary preparatory action required to begin mining operations, including initiating the permitting process.[2]

On May 21, 1998, the Johnson heirs filed a complaint in the Pike Circuit Court against Thornbury, Church and Mullins, Appalachian Mineral, and Panther. Count I of the complaint alleged that the Master Lease and Master Sublease entered into on February 21, 1978, were void because Johnson did not knowingly enter into the agreements. This count essentially alleged fraud and/or mistake. Count II challenged the validity of the agreements based on Johnson's alleged lack of capacity.

[2] Panther did not actually begin removing coal until May 1998.

Count III sought an injunction to enjoy further mining on Tract 42.

The Johnson heirs filed an amended complaint in November 1998 asserting claims for breach of contract. Specifically, they alleged that mining did not begin within six months of the nonappealable order in the Bethlehem litigation as required by the Master Sublease. They further alleged that the terms of the Master Lease were unconscionable as to the amount of royalties to be paid to Johnson.

The trial court entered summary judgment against the Johnson heirs on November 22, 1999. The Johnson heirs filed a motion for reconsideration, but the motion was denied based on a procedural issue. A panel of this court subsequently reversed the trial court on the procedural issue. Upon remand the trial court held a second hearing on the motion to reconsider, and it again denied the motion. This appeal by the Johnson heirs followed.

The trial court awarded summary judgment in favor of the appellees and against the Johnson heirs on two separate grounds. First, the trial court held that the Johnson heirs could not contest the validity of the 1978 Master Lease and Master Sublease because they asserted that the leases were valid in the Bethlehem litigation. Second, the trial court held that the appellees were entitled to summary judgment because the

applicable statutes of limitation had run on the Johnson heirs' claims.

On appeal, the Johnson heirs first argue that their claims contesting the validity of the 1978 leases are neither barred by *res judicata* or any other theory of estoppel nor are they barred by any statutes of limitation. Because we conclude that Counts I and II of the Johnson heirs' complaint were barred by statutes of limitation, we will not address whether their claims were also barred by *res judicata* or any other theory of estoppel.

Count I of the complaint alleged that Johnson did not knowingly enter into the 1978 leases but that he was induced to enter into such leases due to fraud and/or mistake. Citing KRS[3] 413.120(12), the trial court held that the five-year statute of limitation therein was applicable and that any action based on fraud or mistake should have been brought within five years after the execution of the leases.

The Johnson heirs argue that the trial court erred in its holding that the five-year limitation period began to run at the signing of the leases. They contend that their cause of action did not accrue until the conclusion of the Bethlehem litigation. In support of that argument, the Johnson heirs

[3] Kentucky Revised Statutes.

point to the fact that the royalty payments to Thornbury under the Master Sublease were tied to the conclusion of the Bethlehem litigation and that the Master Sublease also contained a clause requiring Church and Mullins to commence operations within six months after the conclusion of the Bethlehem litigation.[4]

In support of their arguments, the Johnson heirs cite Forwood v. City of Louisville, 283 Ky. 208, 140 S.W.2d 1048 (1940). Quoting general authority, the court therein stated that "[w]here a party's right depends upon the happening of a certain event in the future, the cause of action accrues and the statute begins to run *only* from the time when the event happens." 283 Ky. at 214.

We are not persuaded by this argument. Johnson signed the leases in 1978, and the Johnson heirs acknowledged that they were aware of the leases as early as 1982. The Master Lease between Johnson and Thornbury did not contain any condition contingent upon the settlement of the Bethlehem litigation. As for the Master Sublease, while it contained provisions that were contingent upon the conclusion of the Bethlehem litigation, it also gave Church and Mullins rights that could be exercised without restriction. For example, paragraph 12 of the Master Sublease gave Church and Mullins the right to "sell, assign,

[4] The Johnson heirs overlook the fact that the Master Lease from Johnson to Thornbury did not contain conditions tied to the conclusion of the Bethlehem litigation.

transfer and sublease (this sublease) without restriction." In short, we agree with the trial court that Count I of the Johnson heirs' complaint based on fraud and/or mistake was barred by KRS 413.120(12) when it was filed in 1998.

Count II of the Johnson heirs' complaint alleged that Johnson lacked the capacity to enter into the Master Lease and Master Sublease. The trial court held in its judgment that this claim was barred by the statute of limitation set forth in KRS 413.090(2). That statute provides, in part, that an action upon a written contract shall be commenced within fifteen years after the cause of action first accrued. Id. As the leases were entered into in 1978, the court reasoned that the action had to have been brought by no later than 1993. The Johnson heirs again argue that the cause of action did not accrue until after the conclusion of the Bethlehem litigation. Assuming the fifteen-year statute of limitation in KRS 413.090(2) is applicable to this claim, we again agree with the trial court that the action was time-barred for the reasons set forth above.

Next, the Johnson heirs contend that the trial court did not address their contention that the Master Lease from Johnson to Thornbury was unconscionable. While it is true that the court did not address this issue in its judgment, we conclude that it effectively did so when it denied the motion to reconsider. There was no provision in the Master Lease that

Johnson would receive an increase on the price-per-ton for coal mined as the years passed. However, the Master Sublease to Church and Mullins contained a provision for an increase for price-per-ton equal to the standard and customary royalty then in effect for other coal leases in Pike County. The Johnson heirs argue that provisions such as that in the Master Lease have been found to be unconscionable. The only authority cited by the Johnson heirs to support their argument is Kansas Baptist Conv. v. MESA Operating Ltd. Partnership, 864 P.2d 204 (Ks. 1993).

We reject this argument by the Johnson heirs for two reasons. First, other than by their arguments above which we have rejected, the Johnson heirs do not demonstrate why this claim would not also be time-barred due to the fifteen-year statute of limitation set forth in KRS 413.090(2). Second, the Johnson heirs have not cited any Kentucky authority and have not otherwise persuaded us why relief should be given on this ground. In fact, they failed to make reference in their brief to any evidence that the lease term regarding royalties to Johnson was unconscionable. The Master Lease may have been a bad bargain, but there is nothing in the record to indicate that the lease provision was unconscionable.

The Johnson heirs also argue that summary judgment in favor of the appellees was not warranted because there were fact

issues regarding whether the Master Sublease was breached. Again, although the trial court did not specifically address these allegations, we conclude that it rejected these arguments when it ruled on the Johnson heirs' motion to reconsider.

In this regard, the Johnson heirs first argue that the Master Sublease required mining to begin within six months after the entry of a nonappealable final order in the Bethlehem litigation and that such mining did not commence within that time. The Bethlehem litigation was finally concluded in 1994 when the Kentucky Supreme Court denied Bethlehem's petition for rehearing. Panther concedes that it did not begin mining coal until 1998, well after six months from the entry of the nonappealable final order.

Paragraph 6 of the Master Sublease provided that Church and Mullins agreed to "commence operations" upon Tract 42 within six months after the entry of the order. Because Panther, as a subleasee of Church and Mullins, waited four years before beginning mining operations, the Johnson heirs assert that the lease provision was violated. On the other hand, Panther cites Litton v. Mountaineer Land Co., Ky., 796 S.W.2d 860 (1990), and argues that the term "commence operations" has a broader meaning that the mere removal of the first bucket of coal. Panther asserts that it commenced operations "to the extent of permitting, exploration and construction of

infrastructure" within the time period stated in the Master Sublease. The Johnson heirs do not dispute this assertion, but they rely on the fact that the actual mining did not begin until 1998.

We agree with Panther that the Litton case is dispositive. As the court therein stated, "surface mining requires more than mere removal of coal." Id. at 861. In the case *sub judice*, the Johnson heirs do not dispute that Panther began operations, in accordance with the provision in the Master Sublease, which would eventually lead to the actual mining of coal. Again, we find no error in the granting of summary judgment in favor of the appellees.

Finally, the Johnson heirs contend that the trial court erred in granting summary judgment on the breach of lease issue because there were fact issues concerning whether the property taxes were paid in accordance with the Master Sublease. This allegation was not raised in either the complaint or amended complaint. Nevertheless, we find no merit in the argument.

The appellees argue that even if the taxes had not been paid, they were never given notice and an opportunity to cure the breach as required by the contract. Further, citing Duff v. Duff, 205 Ky. 10, 265 S.W. 305, 306 (1924), the appellees assert that even if there was a breach of the lease in

this regard, the remedy would be for a claim for damages not a claim for forfeiture of the entire contract. As the Johnson heirs have not disputed this argument, we accept it.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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