STATE OF MICHIGAN

COURT OF APPEALS

DOMINION MIDWEST ENERGY, INC., and DOMINION RESERVES, INC.,

Petitioners-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

MICH CON GATHERING COMPANY and MICHIGAN CONSOLIDATED GAS COMPANY,

Respondents-Appellees.

UNPUBLISHED
October 27, 2009

No. 280391
MPSC
LC No. 00-014754

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

Petitioners Dominion Midwest Energy, Inc. and Dominion Reserves, Inc. ("Dominion") appeal as of right from an order of the Michigan Public Service Commission, challenging a determination that a dedication of gas reserves, executed in conjunction with an agreement pertaining to the transportation and treatment of gas from the reserves via a pipeline, was a dedication for the life of the pipeline or the reserves. We affirm.

Respondent Mich Con Gathering Company ("MGAT") owns and operates the Antrim Expansion Pipeline. Dominion own reserves of natural gas. Dominion's predecessor, the Wolverine Gas and Oil Company, Inc., entered into an agreement with MGAT's predecessor in interest, Michigan Consolidated Gas Company ("MichCon"). The agreement, an Antrim Gas Service Agreement for Transportation and Treatment of gas known as ASATT #1, provided for the transportation of Dominion's gas via the Pipeline and for the treatment of CO_2 content for a period of ten years. A subsequent agreement, ASATT #16, was between Dominion and MichCon, and was also for ten years. Simultaneously with ASATT #1, a dedication of the natural gas reserves was executed ("the Dedication"). A commitment of reserves was executed with ASATT #16, which included some of the reserves referenced in the ASATT #1 Dedication.

Dominion claims that the Dedication under ASATT #1 was intended to cover only the ten-year period of ASATT #1. MGAT maintains that, in contrast with the commitment of reserves executed with ASATT #16, which had a fixed term, the Dedication under ASATT #1 was intended to continue for the life of the reserves or the Pipeline.

The ASATT #1 was executed on September 14, 1994 and provided in pertinent part:

ARTICLE II

DEDICATION OF RESERVES

2.1 For any Antrim Gas to be transported and treated on a firm basis pursuant to this Agreement, the party who owns or controls the acreage from which the gas to be transported and treated is produced shall have first committed, by a Letter of Dedication, all previously undedicated Antrim reserves which it owns and controls. . . . Such dedications shall be made on a form provided or approved by Mich Con.

ARTICLE III

TERM

3.1 All terms and conditions of this Agreement . . . shall be effective on the in-service date . . . of the Antrim Header System, . . . and shall terminate ten (10) years later unless terminated earlier as provided in section 3.2 [not pertinent here].

The Dedication of Antrim Reserves, which was also executed on September 12, 1994, provides in pertinent part as follows:

1. Producer hereby dedicates to the transportation and treating services provided by MichCon on the Antrim Header System all of the natural gas produced from the Antrim shale formation which it owns or controls and is produced from the utilized acreage set forth in exhibit A ("Dedicated Reserves"). Producer represents that it either owns valid leases covering the interests in or under, or that it has the legal right to dedicate, the real property described on Exhibit A.

* * *

3. It is the intent of the Parties that the description of reserves provided for in this Agreement is a transfer of an interest in the real property described on Exhibit A and, as such, shall bind all subsequent transferees of any interests in that real property. Accordingly, . . . Producer agrees to execute an instrument(s), . . . in proper recordable form, that will place any such subsequent transferees on notice that they are bound by this Agreement and to record such instrument(s) in the appropriate governmental office. . . .

> 4. This Agreement constitutes the entire agreement between MichCon and Producer concerning the subject matter hereof. Any prior understandings, representations, promises, undertakings, agreement or inducements, whether written or oral, concerning the subject matter hereof not contained herein shall have no force and effect. This agreement may be modified or amended only by a writing duly executed by both parties.

Sidney J. Jansma, Jr., who negotiated ASATT #1 and the Dedication on behalf of Wolverine, testified that ASATT #1 and the Dedication were presented as one agreement. He further testified that Wolverine did not agree to a dedication for the life of the reserves; he maintained the intention was that the Dedication would expire after ten years, simultaneously with the expiration of the term of ASATT #1. According to Jansma, this was standard industry practice with respect to gas transportation agreements. Jansma acknowledged that a dedication for the life of the reserves was possible, but he asserted that it would not be done without an agreement for treating and transportation that would also span the life of the reserves.

James. M. Weyland, a senior gas marketer for Dominion Exploration & Production, Inc., gave similar testimony. He asserted that the industry standard for the duration of dedication provisions was that they always be "explicitly expressed" and that common forms were "fixed/stated term of contract or term of lease or reserves." He had never before seen a claim that a dedication referenced in an associated gas service contract was for a longer period than the contract's term. He continued:

> In my experience, its inconceivable that a producer would dedicate its reserves in perpetuity, yet, only agree to having the security of a contract for some portion of "perpetuity"[.] [I]n so doing the producer would be leaving itself open for a nasty surprise when the contract expired and the new one was proposed. . . .

Jansma's and Weyland's testimony was countered by that of Donald J. Mazuchowski, an Intrastate Pipeline Engineer Specialist on the Staff of the MPSC. He was the case coordinator when the application for the Pipeline was filed with the MPSC and developed the staff position. He noted:

> My recollection of the dedication before the pipeline was constructed was that the shippers agreed to dedicate their Antrim gas reserves for transportation for the life of the [Pipeline]. The main reason they agreed was to avoid a demand charge for transportation. . . . [T]he dedication for the ASATT #1 contract . . . demonstrates that the parties may have dedicated for the life of the [Pipeline] both gas transportation and treating. In Michigan, most transportation contracts are done without separate dedications. So the fact that a dedication was used suggests that the parties may have contemplated securing the gas transportation and treating for the life of the AEP pipeline.

Arthur Raymond Lyle II, a staff engineer with MichCon, testified that the Dedication was not tied to the ASATT, had no expiration date, was for the life of the reserves, and was a document complete in itself. He distinguished commitments of reserves, noting that a dedication is a recordable interest in real property. Further, he testified that MichCon operates on the assumption that a dedication is for the life of the reserves unless a specified term is stated. He

explained that the ten-year term of the AGATT, in contrast, allowed for a renegotiation of terms and conditions for transportation and treatment services.

The Commission held:

> The Commission further agrees with the Staff that the Dedication was intended to run for the life of the reserves that are covered by the Dedication. The language of the Dedication appears unambiguous, as is the testimony of Mr. Mazuchowski regarding the parties' and the Staff's understanding of the Dedication at the time of execution. The Dedication is a transfer of an interest in real property to MichCon with no termination date, but with a provision for modification or amendment by "a writing duly executed by both parties." Such a writing was duly executed five months later when the parties entered into ASATT #16 and the associated Commitment Letter which, by its express terms, "cancels and supercedes" the prior agreement. On the record presented to the Commission (which may be incomplete), the acreage covered by the Dedication and the Commitment Letter appears to substantially, but not entirely, overlap. The Commission finds that any acreage covered by the Commitment Letter is no longer subject to the terms of the Dedication, because the Commitment Letter unambiguously cancelled the Dedication as to that acreage. Any acreage not covered by the Commitment Letter (and the many amendments to its Exhibit A) is still subject to the terms of the Dedication, and the gas produced therefore must be transported and treated by MGAT.

In *In re Application of Consumers Energy Co*, 279 Mich App 180, 188-189; 756 NW2d 253 (2008), the Court summarized the standard of review:

> A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). And of course, an order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). In sum, a final order of the PSC must be authorized by law and supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

Dominion argues that the Dedication was part of the ASATT #1, that the documents were intended to be a single agreement and that, as such, they had to be read together. Dominion notes that the agreements were negotiated during a single transaction and that ASATT #1 references the Dedication. Further, Dominion maintains the documents are dependent on each other. Specifically, Dominion asserts that absent the Dedication there would have been no gas to treat and transport and, absent the agreement to treat or transport, the Dedication would serve no purpose since it would be a dedication for shut-in gas.

The Commission did not directly address whether the documents were intended to be a single agreement. Rather, it discussed the language of the Dedication, implicitly finding that it was a separate and distinct document. In *Hamade v Sunoco, Inc*, 271 Mich App 145, 167; 721 NW2d 233 (2006), the Court stated:

> In *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), the Court explained the nature of the parol evidence rule: The parol evidence rule may be summarized as follows: "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). This rule recognizes that in "[b]ack of nearly every written instrument lies a parol agreement, merged therein." *Lee State Bank v McElheny*, 227 Mich 322, 327; 198 NW 928 (1924). "The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing." 4 Williston, Contracts, § 631. In other words, the parol evidence rule addresses the fact that "disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts." Fried, Contract as Promise (Cambridge: Harvard University Press, 1981) at 60. n14.
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> Although the parol evidence rule generally bars the submission of extrinsic evidence, there are exceptions to its application. First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. For this reason, "[e]xtrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement." *NAG Enterprises, Inc v All State Indus, Inc*, 407 Mich 407, 410; 285 NW2d 770 (1979).

Despite the rule that a Court will look to parol evidence to determine if a contract is a complete expression of the parties agreement, an exception exists where there is a merger or integration clause. In *UAW-GM Human Resource Center, supra*, 228 Mich App at 502, quoted in *Hamade, supra* at 169, the Court stated:

> [W]e hold that when the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete "on its face" and, therefore, parol evidence is necessary for the "filling of gaps." 3 Corbin, Contracts, § 578, p 411.

Here, the Dedication contains a merger clause. Moreover, there is no allegation of fraud. Thus, the merger clause is conclusive with respect to whether the Dedication is a separate agreement, complete in and of itself. The Commission could not look to parol evidence

regarding whether it was intended as a single agreement. Thus, the Commission properly looked to the Dedication alone in determining the parties' intent.

In *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008)(citations omitted), the Supreme Court recently stated:

> In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law. However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties.

Dominion argues that the language of the Dedication is ambiguous because it contains no express provision as to its term. The Commission found it unambiguous, concluding it was "a transfer of an interest in real property to MichCon with no termination date." The Dedication stated in pertinent part:

> 1. Producer hereby dedicates to the transportation and treating services provided by MichCon on the Antrim Header System all of the natural gas produced from the Antrim shale formation which it owns or controls and is produced from the utilized acreage set forth in exhibit A ("Dedicated Reserves") . . . .
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> * * *
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> 3. It is the intent of the Parties that the description of reserves provided for in this Agreement is *a transfer of an interest in the real property* described on Exhibit A and, as such, *shall bind all subsequent transferees of any interests in that real property*. Accordingly, . . . Producer agrees to execute an instrument(s), . . . in proper recordable form, that will place any such subsequent transferees on notice that they are bound by this Agreement and to record such instrument(s) in the appropriate governmental office . . . .

This provision clearly and unambiguously provides for a transfer of all interests in the property. The lack of a termination date does not render this provision ambiguous, but rather indicates there is not a termination date. There was no need for an express term as to the expiration of the dedication because, having transferred all interests in the reserves, the unambiguous result is that the term would not expire until there was no reserve left. Simply put, Dominion has not demonstrated that the Commission committed an error of law or that its conclusion was unreasonable. Rather, the Commission's ruling was consistent with contract law governing unambiguous contracts with integration clauses.

Dominion also argues that a conveyance of an interest in real estate is subject to contract interpretation rules and does not, by itself, connote that the term of conveyance is perpetual. This does not change the fact that the Dedication in this case was unambiguous and provided for a conveyance of the interest in the reserves without a termination date.

Dominion also asserts that the evidence does not support the Commission's decision. However, the unambiguous Dedication is dispositive regarding the parties' intent. Notably, however, Mr. Mazuchowski and Mr. Lyle provided testimony consistent with the intent expressed in the document. Thus, apart from the document itself, there was competent, material and substantial evidence to support the Commission's decision regarding the parties' intent.

Finally, Dominion argues that the existence of a perpetual dedication in ASATT #1 and the exclusion of a perpetual dedication in other ASATTs, including ASATT # 16, establish discrimination. Dominion notes that the dedications and commitments were required for transportation of the natural gas from the reserves via the Pipeline. While ASATT #1 provides that the Dedication must be on a form "provided or approved by MichCon", the absence of a conveyance without termination in ASATT #16 indicates that the term of the conveyance could be negotiated. Where different terms of a contract may be negotiated, the absence of a term in one negotiation that is not absent in another does not establish discrimination.

The Commission's conclusion, that the Dedication was unambiguous and provided for a transfer of the reserves without termination, is not contrary to law and is not unreasonable. To the contrary, it was supported by competent, material and substantial evidence on the whole record.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly