NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GEORGE W. LINDER, SENIOR, TRUST, WILLIAM H. LINDER, II, TRUSTEE, Appellants v. EAST RESOURCES MANAGEMENT, LLC, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 730 MDA 2012

Appeal from the Judgment Entered April 4, 2012
In the Court of Common Pleas of Tioga County
Civil Division at No(s): 983CV2010

BEFORE: BOWES, OLSON, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 13, 2013**

This appeal follows the trial court's grant of summary judgment in favor of Appellee, East Resources Management, LLC, in this declaratory judgment action originally filed by George W. Linder, Sr. During the litigation, Mr. Linder, Sr. passed away and the case continued through the George W. Linder, Sr. Trust with William H. Linder, II, as trustee. We affirm.

George W. Linder, Sr. entered into a lease agreement with Allegheny Energy Development Corporation on September 27, 2000, whereby he leased 122 acres in Lawrence Township, Tioga County, for the purpose of oil and gas drilling. Ultimately, Appellee was assigned the lease. The agreement guaranteed a lease for ten years, ending on September 27, 2010. Appellee wrote Mr. Linder, Sr., a letter dated June 26, 2010, asking that he

renew the lease. At that time, no well had been drilled on the property. However, on September 9, 2010, Appellee supplied Mr. Linder, Sr. with an additional letter. That letter provided notice that Appellee intended to exercise an option to extend the lease. Attached to the letter was a check in the amount of $367.14, for the purpose of exercising the option. Counsel for Mr. Linder, Sr., refused and returned the check in a letter dated September 25, 2010, indicating that the lease was only for ten years and no extension option existed. In the letter, counsel also stated that Mr. Linder, Sr. would file an action canceling the lease if Appellee neglected to do so. Appellee did not cancel the lease and Mr. Linder, Sr. filed the underlying declaratory judgment action. Appellee filed an answer and new matter, and Mr. Linder, Sr. responded to the new matter.

Thereafter, Mr. Linder, Sr., who was 94 years old, was deposed. He indicated that the lease was only for a term of ten years and could not be extended by the payment of any additional sum. The dispute centers on the interpretation of the following lease provision:

> EXTENSION OF TERM: Lessee may extend the primary term for one additional period equal to the primary term by paying to Lessor at any time within the primary term an Extension Payment equal in amount to the annual Delay Rental as described, multiplied by a factor of N/A, or by drilling a well on the Leasehold which is not capable of commercial production.

Oil and Gas Lease, 9/27/00, at 1.[1]

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[1] The N/A is handwritten on the lease form.

According to Appellee, this language permitted it to renew the lease by paying the landowner the delay rental amount of $367.14.[2] Thus, it

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[2] We recently defined and discussed delay rental payments.

> With their long history of use in the oil and gas industry, delay rentals provisions have a well-settled meaning. [***Jacobs v. CNG Transmission Corp.***]*,* 332 F.Supp.2d [759, 785 W.D. Pa. 2004].
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> > It is customary for parties to an oil and gas lease to agree that a minimum advance royalty shall be paid for the lessee's right to forego immediate development of the leasehold for production. Such advance minimum payments are in the nature of liquidated damages for the lessee's decision to forego production and are viewed as the consideration paid to the landowner in lieu of the royalty that would be paid if production operations were to be undertaken immediately.
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> ***Id****.* 332 F.Supp.2d at 785 (citing ***Hutchison*** [***v. Sunbeam Coal Corp.***]*,* 519 A.2d [385, 388 (Pa. 1986)]. Typically, the clause in a modern oil and gas lease which provides for delay rental is known as the "drilling and rental clause," and is concerned with the requirements for maintaining the lease in effect during the primary term expressed by the habendum clause. ***Id****.,* 332 F.Supp.2d at 785 (citing William and Meyers, OIL AND GAS LAW, § 605) (emphasis added). ***See also Glasgow v. Chartiers Oil Co.****,* 152 Pa. 48, 25 A. 232 (1892) (The ability to postpone exploration and development of the property through the payment of a delay rental was construed to be limited to primary term of the lease.); ***Bertani v. Beck****,* 330 Pa.Super. 248, 479 A.2d 534, 535, 537 (1984) (Wherein the Court construed a delay rental clause in a lease with a ten year primary term as vesting in the lessee the option to pay an annual delay rental or forfeit the right to develop the leasehold. The delay rental was due annually during the primary term and the effect of each annual

(Footnote Continued Next Page)

implicitly read the provision as containing a multiplier of one. In contrast, Appellants argued that the term "N/A" meant that no agreement to extend the lease was reached. Appellants pointed out that the same company entered an identical document on the same date that included the word "one" written in the multiplier blank. Appellee, however, filed a motion *in limine* to exclude this evidence based on an integration clause in the contract and the parol evidence rule.

The trial court determined that Appellants' parol evidence was inadmissible, that no ambiguity existed in the contract, and agreed with Appellee's reading of the contract. Accordingly, it granted Appellee's motion for summary judgment. This appeal ensued. The trial court directed Appellants to comply with Pa.R.A.P. 1925(b) and, following the submission of Appellants' 1925(b) concise statement, issued its Pa.R.A.P. 1925(a) opinion. The matter is now ready for our review. Appellants present one question for this Court's consideration.

> Did the trial court err in entering judgment in favor of a lessee gas company and against a lessor landowner when there exists

(Footnote Continued) ———————————

> payment was to "extend for twelve months the time within which drilling operations or mining operations may be commenced.").

Hite v. Falcon Partners, 13 A.3d 942, 946-947 (Pa.Super. 2011). Instantly, the delay rental was $3.00 per net mineral acre. The parties do not dispute the amount of payment tendered for the extension was equal to the annual delay rental amount. Appellants also do not assert that Appellee failed to pay the delay rental sum for 2010 in addition to the "Extension of Term" payment.

> an ambiguity in the gas lease rising to the level of a material fact requiring ultimate interpretation by a fact finder given the benefit of all evidence concerning the written lease and relevant circumstances existing at the time of the execution of the lease?

Appellants' brief at 4.

We examine the grant or denial of a motion for summary judgment under settled precepts.

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
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> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Michael Salove Co. v. Enrico Partners*, *L.P., 23 A.3d 1066, 1069 (Pa.Super. 2011). Additionally, we add that because this matter involves contractual interpretation, it involves a question of law, and no deference is due to the trial court's legal conclusions relative to its interpretation of the contract in question. ***See Quinn v. Bupp***, 955 A.2d 1014, 1017 (Pa.Super. 2008).

Appellants argue that the contract provision entitled, "EXTENSION OF TERM[,]" is subject to two reasonable but varying constructions. Accordingly, it maintains that the court erred in determining that the agreement was unambiguous. Concomitantly, Appellants assert that because the contract was ambiguous, the court erred in holding that parol evidence was inadmissible to resolve the ambiguity. Specifically, Appellants contend that the insertion of the phrase "N/A" in the place of the multiplier to be used for determining the amount to be paid for an extension of the lease could mean either that no extension was contemplated or that there was no multiplier and the extension payment was equal to the annual delay rental sum. Since both interpretations are reasonable, according to Appellants, it was improper to award summary judgment.

Appellants continue that parol evidence in the nature of an identical form contract used on the same day by the same company in the same county included a multiplier factor of one and not "N/A." Lastly, Appellants note that the term "N/A" appears in one other portion of the contract. The parties, in describing the real property, used the phrase to fill in a blank which read, "on the waters of _____[.]" Since there were no waters, the parties used the "N/A" term. Appellants submit that, by inserting not applicable in the space for a multiplier for determining a payment amount for an extension of term, no extension of term was contemplated.

Appellee responds that the only reasonable interpretation of the proviso at issue is that it had the right to extend the lease by paying $367.14, which was equal to the annual delay rental. Simply put, Appellee's position is that the insertion of the phrase "N/A" reflected that a multiplier of one existed. Appellee adds that the parties did not strike through the entire extension proviso, which would have clearly manifested that the parties intended that there be no extension. It reasons that the other usage of "N/A" in the document did not render the entire description provision inapplicable, but Appellants' interpretation would cause the entire extension of term paragraph to be erased from the document. Hence, it argues that Appellants' interpretation asks the court to read "N/A" inconsistently in two separate paragraphs.

Next, Appellee posits that Appellants cannot create an ambiguity in the lease by looking at parol evidence from a separate agreement where the present lease was fully integrated. Lastly, Appellee highlights that there is no need to construe the contract against it as the drafter because that principle applies only where the contract is ambiguous.

As this matter involves the interpretation of an oil and gas lease, it "is in the nature of a contract and is controlled by principles of contract law." ***T.W. Phillips Gas and Oil Co. v. Jedlicka***, 42 A.3d 261, 267 (Pa. 2012). Hence, we construe the lease "in accordance with the terms of the agreement as manifestly expressed and 'the accepted and plain meaning of

the language used, rather than the silent intentions of the contracting parties[.]'" ***Id***. "Further, a party seeking to terminate a lease bears the burden of proof." ***Id***.

The principal problem with Appellants' interpretation is that the lease could still be extended by ten years if a well was drilled that was not capable of commercial production. Thus, it is evident that an extension could be granted and that the entire extension proviso was not intended to be eviscerated by the inclusion of the phrase, "N/A." The fact that an extension could be afforded in at least one fashion is plainly inconsistent with Appellants' view that no extension could be granted at all. Since an extension was contemplated by the parties as to the drilling of a commercially unviable well, it would be unreasonable to assume that the insertion of "N/A" in the multiplier blank eviscerated the entire extension paragraph. Accordingly, Appellants' interpretation is unreasonable. Since the contract was not subject to two reasonable interpretations, the trial court did not err in finding the agreement unambiguous.

Judgment affirmed.

Judge Wecht files a Dissenting Memorandum.

Judgment Entered.

Mary A. Krawchell

Interim Deputy Prothonotary

Date: 5/13/2013