Application for Interlocutory Appeal Denied and Memorandum Opinion filed February 9, 2016.

In The

Fourteenth Court of Appeals

NO. 14-16-00010-CV

ARMOUR PIPE LINE COMPANY, ET. AL., Appellants

V.

SANDEL ENERGY, INC., ET. AL., Appellees

On Appeal from the 12th District Court
Grimes County, Texas
Trial Court Cause No. 32962

M E M O R A N D U M O P I N I O N

Pending before this court is the application for an interlocutory appeal of Mary Patricia Cashman, Joan Cashman, Noreen Cashman, Cathleen Cashman and Caroline DeChant (collectively, "Intervenors") and Armour Pipe Line Company. Intervenors and Armour ask this court to allow an appeal based on the Amended Order Granting Permission to Appeal Interlocutory Summary Judgment Orders signed by the Honorable Donald L. Kraemer of the 12th District Court, Grimes

County, Texas on December 22, 2015.

The appellees are Sandel Energy, Inc., Double H Investments, LP, Laura Sandel Gilbreath, Kerco Asset Management, LLC, successor in interest to Kerri A. Coleman dba Kerco, Eddie Thompson and Edna Ann Tepe Thompson, co-Trustees of the Edgar Carmen Thompson Family Trust B, Bill and Lynn Mizell, Joe B. Sandel and Ricky W. Sledge (collectively, "Sandel").

We deny the application for interlocutory appeal without prejudice to refiling if the deficiencies identified below are addressed.

ANALYSIS

Intervenors and Armour have failed to demonstrate that an interlocutory appeal is warranted for the following reasons.

I. The Trial Court's Order is not Specific.

The trial court's order must (1) identify the controlling question of law as to which there is a substantial ground for difference of opinion, and (2) state why an immediate appeal may materially advance the ultimate termination of the litigation. Tex. R. Civ. P. 168; *Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 543–44 (Tex. App.—Houston [14th Dist.] 2015, no pet.). An application for interlocutory appeal may be denied if the trial court's order fails to meet either requirement. "Rule 168 plainly requires the court, in the portion of the order that grants permission to appeal, to identify the controlling question of law at issue." *Long v. State*, 03-12-00437-CV, 2012 WL 3055510, at *1 (Tex. App.—Austin July 25, 2012, no pet.) (denying application for interlocutory appeal because the trial court's order does not identify the controlling question of law). *See also Estate of Marshall*, 04-15-00521-CV, 2015 WL 5245268, at *1 (Tex. App.—San Antonio Sept. 9, 2015, no pet.) (denying application for interlocutory appeal because the trial court's order did not state why an immediate appeal may materially advance

the ultimate termination of the litigation).

The Amended Order Granting Permission to Appeal includes the following summary judgment rulings:

A. Hearing held on September 22, 2014

> On the 22nd day of September 2014, the Court considered the Plaintiffs' Motion for Summary Judgment against Defendant Armour Pipeline Company. Having considered the timely filed pleadings and summary judgment evidence, authorities, and arguments of counsel, the Court finds that the Plaintiffs' Motion is proper and should be GRANTED.
>
> It is ORDERED, ADJUDGED, DECREED AND DECLARED that the reservation in favor of Armour Pipe Line Company found in that certain "Assignment of Oil, Gas, and Mineral Leases and Bill of Sale" with an effective date of July l, 1999 found at Vol. 928, Page 826 of the Official Records of Grimes County is of no legal force and effect, resulting in Armour Pipeline Company, its successors and assigns having no claim to any rights otherwise evidenced by such reservation.

B. Hearing held on April 27, **2015**

> On the 27th day of April, 2015, the Court considered (1) Defendant and Counter-plaintiff Armour Pipe Line Company's and Intervenors' Joint Motion for Partial Summary Judgment on Issues Concerning the Existence and Ownership of Disputed Overriding Royalty Interests and (2) Plaintiffs' Motion for Summary Judgment against Intervenors. Having considered all timely filed pleadings, evidence, authorities, and the arguments of counsel, the Court finds that (1) Armour Pipe Line Company's and Intervenors' joint motion for partial summary judgment should be denied and (2) Plaintiffs' Motion for summary judgment against Intervenors should be granted.
>
> It is therefore ORDERED, ADJUDGED and DECREED that the claims of Intervenors be in all things denied.
>
> It is further ORDERED, ADJUDGED and DECREED that this Court's ORDER granting summary judgment dated December 1, 2014 be and hereby is confirmed as the judgment of this Court with respect to all claims of Plaintiffs against Armour Pipe Line Company and

Intervenors.

Although the Amended Order states that these summary judgment rulings involve controlling questions of law as to which there is a substantial ground for difference of opinion, it does not identify these questions of law with specificity as required by Rule 168.

Intervenors and Armour identify four appellate issues in their application:

ISSUES PRESENTED

1. Whether an intended reservation in the assignment of mineral leases could be held to be void because the beneficiary of the reservation is alleged to be a stranger in title to the properties despite having a prior equitable interest in the properties, and despite the fact that the assignee/grantee had notice of the equitable interest, and despite the application of the doctrine of estoppel by deed, and also despite there being language of conveyance to that reservation beneficiary in the assignment of mineral leases.

2. If such a reservation is held to be void, whether the properties intended to be reserved remain with the grantors or instead should be deemed to have been transferred to the grantee when their exclusion from the grant is admittedly a part of the economic basis of the transaction.

3. Whether a foreign corporation owning overriding royalty interests (but doing no other business in Texas) which had a valid certificate of authority to do business in Texas when those interests were acquired but subsequently allowed the certificate to lapse for more than three years before it was reinstated should lose those properties pursuant to §11.359 of the Texas Business Organizations Code.

4. Who is entitled to ownership of the real property interests of a foreign corporation if the application of §11.359 of the Business Organizations Code extinguishes the foreign corporation's rights to such property.

These stated issues do not appear in the Amended Order, which makes it difficult to determine whether the issues decided by summary judgment are the same issues being advocated on appeal. Moreover, because the four issues stated in the application do not appear in the Amended Order, it cannot be determined whether the trial court agrees that these are ***controlling*** questions of law ***as to which there is a substantial ground for difference of opinion*** that should be addressed on appeal. Rule 168 specifically requires the court to not only identify the questions of law, but to find that these questions are controlling and that there is a substantial ground for a difference of opinion. *See* Tex. R. Civ. P. 168.

Additionally, the Amended Order makes only a conclusory assertion that an immediate interlocutory appeal may advance the ultimate termination of the litigation because (1) the claims of a non-appealing party and of several non-parties are dependent on the ownership determination, and (2) the ruling on appeal will curtail unnecessary discovery. This statement falls short because it does not identify what claims and issues remain to be decided in the litigation so that our court may evaluate whether the remaining disputes and issues are substantial and dependent on the questions of law that appellants seek to appeal. The application indicates that claims for attorney's fees remain to be decided, but it is not clear whether there are other claims or issues that have not been decided.

II. The Absence of Disputed Material Fact Issues is not Clear.

"The statute does not contemplate permissive appeals of summary judgments where the facts are in dispute. Instead, permissive appeals should be reserved for determination of controlling legal issues necessary to the resolution of the case." *Diamond Prods. Int'l, Inc. v. Handsel*, 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.). "The scope of a permissive appeal does not include an appeal of a summary judgment when the facts are disputed." *King-A*

Corp. v. Wehling, 13-13-00100-CV, 2013 WL 1092209, at *3 (Tex. App.—Corpus Christi Mar. 14, 2013, no pet.).

Intervenors and Armour assert that the facts are not in dispute. However, their application asserts that Sandel has misstated at least two material facts:

> At times, however, there have been erroneous recitations of fact. For example, in order to set up its argument that the reservation to Armour in the 1999 assignment failed resulting in Sandel getting more than it bargained for, Sandel's summary judgment motion alleged "that Armour in fact owned no interest in these leases at the time of the execution of the [1999] Assignment." That allegation was unsupported by any summary judgment proof submitted on behalf of Sandel and it was refuted by the proof submitted by Armour.

Appellants' application at 7.

> After the 2000 transaction, Armour was no longer doing any business in Texas. In 2003, Armour allowed its certificate of authority to do business in Texas to lapse. Seizing on this event Sandel fashioned an argument that the temporary loss of its authority to do business in the state translated to loss of the Delaware corporation's real property interests. Again, the "facts" pertinent to this issue were never actually in dispute but they were sometimes misstated in a way that may have contributed to the erroneous ruling. In a post submission brief to the trial court Sandel wrongly asserted that "Armour concedes that its charter was forfeited on February 14, 2003." However no such concession was ever made because Armour's charter was never forfeited. *See* Tab F, p. 14, n. 27.

Appellants' application at 8–9.

Thus, it appears that there may be disputed issues of fact that would make it inappropriate for this court to accept this appeal.

III. The Application Presents Multiple Issues and Sub-Issues.

Because interlocutory appeals are allowed only in limited situations, we strictly construe section 51.014. *See Bally Total Fitness Corp. v. Jackson*, 53

S.W.3d 352, 355 (Tex. 2001); *State Fair of Texas v. Iron Mountain Info. Mgmt., Inc*., 299 S.W.3d 261, 262-63 (Tex. App.—Dallas 2009, no pet.). To be entitled to a permissive appeal from an interlocutory order that would not otherwise be appealable, the requesting party must establish that the order to be appealed involves "a controlling question of law as to which there is a substantial ground for difference of opinion." Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d); Tex. R. App. P. 28.3(e)(4); Tex. R. Civ. P. 168.

The statute and rules use the singular, "a controlling question of law", which arguably reflects an intent to restrict permissive appeals to interlocutory judgments that involve one controlling question of law. *See Trailblazer Health Enterprises, LLC v. Boxer F2, L.P*., 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.). Even assuming that an appellate court enjoys some measure of discretion in permitting the appeal of more than one question in appropriate circumstances, it is not clear that appropriate circumstances exist here. Intervenors' and Armour's statement of the issues in their application identifies at four questions (and numerous sub-issues) to be decided on appeal, which appear to encompass a number of legal points in multiple summary judgment orders. Rule 168's purpose – to provide a means for expedited appellate disposition of focused and potentially dispositive legal questions – is not served if this procedure is used to obtain piecemeal appellate review of ordinary interlocutory summary judgment orders.

IV. It is not Clear that the Trial Court has Ruled on the Alleged Questions of Law.

Further, it is not clear that Rule 168's purpose would be served by an interlocutory appeal in this case because the Amended Order does not provide the basis for the trial court's summary judgment rulings or identify on which grounds

the court granted Sandel's motions for summary judgment. Nor does the Order expressly state that the trial court has ruled on a controlling question of law. Absent the order providing this information, this court is not able to determine whether the trial court has, in fact, ruled on all of the asserted controlling questions of law.

"Section 51.014(d) is not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it." *Gulley v. State Farm Lloyds*, 350 S.W.3d 204, 208 (Tex. App.—San Antonio 2011, no pet.). "The legislature's institution of the procedure authorizing a trial court to certify an immediate appeal of an interlocutory order was premised on the trial court having first made a substantive ruling on the controlling legal issue being appealed." *In re Estate of Fisher*, 421 S.W.3d 682, 684–85 (Tex. App.—Texarkana 2014, no pet.). A partial summary judgment does not necessarily decide a controlling question of law. *Id.*[1] "When a trial court in its order on a motion for summary judgment provides no basis for its denial, the trial court fails to make substantive ruling on the controlling question of law sought to be appealed." *Great Am. E&S Ins. Co. v. Lapolla Indus., Inc.*, 01-14-00372-CV, 2014 WL 2895770, at *2–3 (Tex. App.—Houston [1st Dist.] June 24, 2014, no pet.). For example, in *De La Torre v. AAG Properties, Inc.*, 14-15-00874-CV, 2015 WL 9308881, at *2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet. h.), this court denied the application for interlocutory appeal because the trial court's order did not state the reason for denying the motion for summary judgment.

[1] Citing *Trailblazer Health Enters., LLC v. Boxer F2, L.P.*, No. 05–13–01158–CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.); *WC Paradise Cove Marina, LP v. Herman*, No. 03–13–00569–CV, 2013 WL 4816597, at *1 (Tex. App.—Austin Sept. 6, 2013, no pet.); *State Fair of Tex. v. Iron Mountain Info. Mgmt., Inc.*, 299 S.W.3d 261, 264 (Tex. App.—Dallas 2009, no pet.).

CONCLUSION

We deny appellants' application for interlocutory appeal without prejudice to refiling of another application addressing the deficiencies discussed above.

PER CURIAM

Panel consists of Justices Boyce, Donovan, and Brown.