In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00125-CV

CABOT OIL & GAS CORPORATION, APPELLANT

V.

NEWFIELD EXPLORATION MID-CONTINENT, INC., APPELLEE

On Appeal from the 31st District Court
Wheeler County, Texas
Trial Court No. 12,769, Honorable Steven R. Emmert, Presiding

June 13, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.[1]

This case involves the reservation of an interest in various mineral leases by Cabot Oil and Gas Corporation and whether the affirmative defense of the statute of frauds effectively vitiated a portion of that reservation. Newfield Exploration Mid-Continent, Inc. argued that it did, filed both a traditional and no-evidence motion for summary judgment upon the affirmative defense, and obtained a final summary judgment denying Cabot recovery. Two of the three issues before us pertain to the

[1] Justice Patrick A. Pirtle not participating.

statute of frauds and the satisfaction of its requirements. The third issue concerns various forms of estoppel and whether they barred Newfield from invoking the statute of frauds. We affirm.

Background

Newfield was the operator of the mineral lease in which Cabot purportedly reserved the interest. The reservation appeared in the "Assignment of Oil, Gas and Mineral Leases" (assignment) Cabot executed in favor of Samson Lone Star Limited Partnership. Through the document, Cabot assigned to Samson

> all of its right, title and interest in and to the Oil, Gas and Mineral Leases described on Exhibit "A" attached hereto, hereinafter referred to as said Leases, ***less and except the EEX McCoy #27 -1 wellbore located 791' FSL and 21 07' FWL of Sec. 27 Camp School Lands, Wheeler County, Texas and the 160 acre proration unit surrounding said well from the surface down to 15,500'***.

(Emphasis added). Newfield did not question the legitimacy of that part of the reservation describing the wellbore and its location.

The language in play here is reference to "the 160 acre proration unit surrounding said well from the surface down to 15,500'." No "160 acre proration unit" had ever been designated. That circumstance, coupled with the lack of any further description of the property, prevented one from identifying the encompassed acreage with any reasonable certainty, said Newfield. Due to the inability to identify the acreage, Newfield believed that the statute of frauds voided the portion of the reservation pertaining to the 160 acre proration unit. Cabot disagreed, arguing that the proration unit actually referred to the entire southwest quarter of section 27, Camp School Lands.

Cabot's argument was derived from language appearing in a participation agreement it executed with Newfield's predecessor-in-interest. A portion of that

agreement addressed Cabot's option to participate in the drilling of the initial well, that is, the aforementioned McCoy #27-1 well. In paragraph 5.2 of the document, the parties wrote:

> EEX shall propose the drilling of the Initial Test Well within the Prospect Area. In the event Cabot does not participate in the drilling of the Initial Test Well proposed and drilled within the Prospect Area, Cabot shall assign to EEX all of its interest in a ***640 acre proration unit*** and all of its interest in two (2) adjoining ***640 acre proration units***, ***such proration units*** to be selected by EEX.

(Emphasis added). Apparently, Cabot combined the phrase "640 acre proration unit" in paragraph 5.2 with the fact that a section of land consists of 640 acres. The combination apparently led it to infer that the parties intended reference to a "640 acre proration unit" to mean a particular section of land within the "prospect area" encompassed by the participation agreement.[2] For instance, a 640 acre proration unit in the Camp County School Lands survey apparently would be the entirety of section 16, or 21 or 22, or 23 or 27 or the like.[3] And, because allusion to a "640 acre proration unit" equated a particular section of land as demarcated in a survey within the "area of mutual interest," then a "160 acre proration unit" necessarily equaled a specific quarter section of that particular section, or so Cabot would argue. That, in turn, meant the reservation of the "160 acre proration unit" surrounding the "wellbore" of the McCoy

[2] The "prospect area" was nothing more than the "AMI" or "area of mutual interest" described in the participation agreement. The "area of mutual interest" consisted of multiple tracks of land, such as 1) "Camp County School Lands S/2 of Section 135 and all of Sections 16, 21, 22, 23, 26 and 27," 2) "Block 4, Brooks and Burleson Survey All of Sections 1 and 2," 3) "Block 35, Brooks and Burleson Survey All of Sections 1, 2, 3, 4 & 35," 4) "All of G. W. Jacobs Survey 6, Block E, A-8449," 5) "C & M RR Survey All of Sections 1 & 2," 6) "All of Thomas James Survey, A-399," and 7) "Block A-3, H&GN Co. Survey All of Sections 27, 28, 29, 30, 31, 32, 33, 34, 41, 47, 48, 49 & 350."

[3] How this concept would comport with tracts comprised of less than a full section of land, *e.g.* "S/2 of Section 135" of the Camp County School Land survey, was not addressed. If Cabot's analysis rang true, then EEX would not be able to include that parcel within a "640 acre proration unit" because it comprised less than a full section of land.

#27-1 well encompassed the entire southwestern quarter section of section 27 since the well was located in that quarter section.

The trial court rejected Cabot's interpretation of the phrase "160 acre proration unit" when it granted Newfield's motion for summary judgment. It also rejected Cabot's effort to use the theory of estoppel as a means of preventing Newfield from invoking the statute of frauds. As previously mentioned, we have been asked to revisit those decisions.

Issues One and Three – Statute of Frauds

Under issues one and three, Cabot suggests that summary judgment was not warranted under the statute of frauds. Being an affirmative defense, it allegedly could not form the basis of a no-evidence summary judgment (*i.e.* issue one). Nor could it provide the basis for a traditional summary judgment (*i.e.* issue three) since its requirements were allegedly not met. We overrule the issues.

No one disputes that the assignment from Cabot to Samson had to have complied with the statute of frauds. *See Long v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2006) (stating that oil and gas interests are real property and contracts for the transfer or assignment of them are subject to the statute of frauds); *Beverly Foundation v. Lynch*, 301 S.W.3d 734, 739-40 (Tex. App.—Amarillo 2009, no pet.) (stating that an agreement to convey a working interest in a mineral lease is a contract subject to the statute of frauds). Nor do they dispute that the statute of frauds applied to the reservation of interest within the assignment at bar. *See Lewis v. Midgett*, 448 S.W.2d 548, 551-52 (Tex. Civ. App.—Tyler 1969, no writ) (concluding that the deed passed all of the estate owned by the grantor despite the attempted reservation since the latter

failed to comply with the statute of frauds). Disagreement comes in whether one particular element of the statute was satisfied, and that element concerns the need to describe the property being conveyed or reserved.

Among other things, the statute of frauds requires that certain transactions be in writing and signed by the parties against whom it is to be enforced. TEX. PROP. CODE ANN. § 5.021 (West 2014). Where the transaction involves a conveyance of realty, the writing memorializing it must furnish within itself, or by reference to some other existing writing, the means or data by which the property being conveyed may be identified with reasonable certainty. *Long v. Griffin*, 222 S.W.3d at 416; *Boddy v. Gray*, 497 S.W.2d 600, 603 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.). If the writing does not, then the contract is void. *Boddy v. Gray*, 497 S.W.2d at 603.

Similarly, when the writing attempts to exclude or reserve certain property from the transfer, the instrument must also identify with reasonable certainty the property being excluded or reserved. *Fuentes v. Hirsch*, 472 S.W.2d 288, 293 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); *Lewis v. Midgett, supra*; *see also State v. Dunn*, 574 S.W.2d 821, 824 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.) (holding that the Buskes retained no right, title, or interest in the tracts because the exception failed to state with requisite certainty the description of the excepted area). If it does not, then the instrument actually conveys that which the grantor sought to exclude. *Fuentes v. Hirsch*, 472 S.W.2d at 293; *Lewis v. Midgett*, 448 S.W.2d at 551-52. Finally, exceptions and reservations generally are strictly construed against the grantor. *State v. Dunn*, 574 S.W.2d at 824.

Again, no one questions that Cabot described with reasonable certainty the wellbore it sought to reserve. The task before us is to decide whether the phrase "160 acre proration unit surrounding" the well was sufficient to demarcate the rest of the property Cabot intended to keep. To that end, we reiterate that a proration unit relating to the McCoy #27-1 well had yet to be designated. Nor was any particular geographic proration unit named in either the Cabot / Samson assignment or in any writing to which the assignment alluded.[4] Similarly missing is citation to any legal authority by Cabot suggesting either that 1) a proration unit must necessarily include particular acreage extending in particular directions from the well or 2) the acreage in a proration unit must necessarily form some geometric shape wherein the well lies at the center or any other specific location.

All we have here is reference to a quantum of geographically unidentified acreage labelled a "proration unit" which surrounds a specific well. This differs little from the description found insufficient to satisfy the statute of frauds in *Clegg v. Brannan*, 190 S.W. 812, 814 (Tex. Civ. App.—Austin 1916), *aff'd on other grounds*, 234 S.W. 1076 (Tex. 1921). There, a portion of the property being conveyed was described as "one-fourth acre of land surrounding the well." *Id.* at 813. In assessing whether it was enough to identify the land with reasonable certainty, the reviewing court said "in that it fails to describe the one-fourth acre of land mentioned therein surrounding the well; as no field notes are given, it would be impossible to indentify [sic] same." *Id*. at 814. Thus, the requirements of the statute of frauds were not met. *Id.*

[4] Cabot and Samson mentioned two other writings in the sixth paragraph of the assignment. There were the "Participation Agreement effective July 19, 2000, by and between [Cabot] and EEX E&P Company L.P." and the "Purchase Offer dated January 22, 2001 by and between [Cabot] and [Samson]."

Indeed, whether it be a quarter acre around a well or 160 acres around a well, what to include is unknown given the nature of the description. Here, the "prospect area" or area of mutual interest included section 27 of the Camp County School Lands survey, which obviously included at least 640 acres. Furthermore, a 160 acre swath of land surrounding a well drilled in that section could include acreage to the north, south, east or west of the well. The geographic shapes formed by the acreage someone could opt to include in a particular swath could be rectangular, square, triangular or potentially round and still "surround" the well. A majority could lie to the east or west or north or south of the well depending upon what was selected. Given these potentialities, verbiage that simply alludes to 160 acres surrounding a well hardly identifies with reasonable certainty the acres that will be or are actually included.

Moreover, this lack of certainty is not clarified by Cabot's argument that the "160 acre proration unit" means nothing more than the 160 acres comprising the southwest quarter of section 27. As illustrated in its response to Newfield's motion for summary judgment, the contention is founded upon language incorporated in paragraph two of the Purchase Offer from Samson to Cabot.[5] In paragraph two the parties stated that:

> Cabot hereby agrees to execute a formal Assignment of Oil and Gas Leases in favor of Samson covering lands listed on Exhibit "A", less and except the EEX McCoy #27-l wellbore located 791' FSL and 2107' FWL of Section 27, Camp County School Lands, Wheeler County, TX and ***the 160 acre proration unit surrounding said well*** from the surface down to 15,500'. In the event an additional well is drilled in the NW/4 of Section 27 and is also completed in the Atoka or a zone from surface to 15,500', the proration units will not overlap. The acreage will be re-assigned to allow Cabot ***the full 160 acres surrounding the McCoy #27-1 well*** and Samson/EEX ***the full 160 acres surrounding an additional test well in the NW/4***.

[5] Since the Purchase Offer is a writing expressly mentioned in the assignment, we assume *arguendo* that it may be viewed as another writing susceptible to consideration under *Long v. Griffin*.

(Emphasis added). The language relied upon by Cabot is that which we italicized. According to Cabot, "[t]he phrases '160 acre proration unit surrounding said well' and 'the full 160 acres surrounding the McCoy #27-1 well' in paragraph 2 are . . . used interchangeably." So too did "Samson and Cabot intend[] that these phrases refer to a quarter section of property, a square 160 acres in a standard-sized section, like the Participation Agreement used the phrase '640 acre proration unit' to refer to a full section." Consequently, "Paragraph 2 of the Purchase Offer thus describes the quarter section in Section 27 'surrounding' the McCoy #27-1 well – *i.e.*, the southwest quarter." Interesting as the argument may be, it is flawed in several respects.

First, we earlier quoted that paragraph of the Participation Agreement mentioning the "640 proration unit," *i.e.* paragraph 5.2. Actually consisting of more than one, the 640 acre units were to be "selected" by EEX upon the contingency of Cabot's opting to forgo participation in the drilling of the initial well, *i.e.* McCoy #27-1 well. While 640 acres may equal the number of acres generally in a section of land, nothing in paragraph 5.2 defines the phrase "640 proration unit" as meaning a particular section of land demarcated on any recorded survey or plat. Nor did Cabot cite (nor do we know of) legal authority holding that the boundaries of a 640 acre proration unit must necessarily follow the boundaries of a section of land drawn on a recorded survey or plat. And, it would strain logic to simply deduce that the phrase "640 acre proration unit" means a particular section of land found on a recorded survey simply because both contain 640 acres. Just because two people both weigh 160 pounds and have blonde hair does not mean that they are the same person and otherwise interchangeable.

Second, the very words of the Purchase Offer cited to us by Cabot negate Cabot's argument. Admittedly, Samson seemed to use the phrases "160 acre proration unit" and "the full 160 acres" interchangeably in paragraph two of the Purchase Offer. Through that paragraph, it also sought to avoid the existence of overlapping proration units if a well were drilled somewhere on the northwestern quarter and above the southwestern quarter. To achieve that end, each well would have its own 160 acre proration unit and, if they overlapped, then the acreage in each would be "re-assigned." Yet, if Cabot's argument is right and the phrase "160 acre proration unit" automatically referred to a particular quarter section of section 27, then we are left to wonder why there would be a need to "re-assign" acreage within the two proration units. The 160 acre proration unit surrounding the McCoy #27-1 well in the southwest quarter would never overlap with any 160 acre proration unit surrounding an "additional well" drilled in the northwestern quarter if Cabot were right. But because the parties obviously thought they could overlap and expressly provided for that happenstance in the Purchase Offer, they must have actually intended that the phrase "160 acre proration unit" refer to something other than simply the 160 acres comprising a specific quarter section. Instead, it appears not only that someone was free to select whatever acreage to include in the proration unit at some time or another but also that the selection could be modified. And because someone was free to pick and choose what acreage to include in the proration unit, the unit could not simply be the southwest or northwest quarter of section 27.

This, then, leaves open the issue of the identity of the acres within the proration unit surrounding each well, and the circumstance again falls within the holding of *Clegg*

v. Brannon. Merely identifying the property as some specific quantum of acreage "surrounding" a well does not meet the demands of the statute of frauds. Where that acreage lay cannot be identified with reasonable certainty from that information. Until designated, it likened to an amoeba with potentially shifting yet unknown boundaries, and, as such, the attempted reservation of the 160 acre proration unit surrounding the McCoy #27-1 well was void. *Boddy v. Gray, supra*.

Consequently, we find no fault in the trial court's ruling that the reservation fell short of satisfying the statute of frauds. And, because the record contained the assignment, Purchase Offer and Participation Agreement, there were no other documents or evidence needed to arrive at its decision. Simply put, the matter was subject to resolution from the face of those documents alone. So, it cannot be said that the trial court adjudicated the affirmative defense of the statute of frauds via a no-evidence summary judgment motion, as suggested by Cabot.

Issue Two – Estoppel

Nor do we find fault in the trial court's rejection of Cabot's judicial and quasi estoppel arguments. Within its third amended petition, Cabot sought declaratory relief. A portion of that relief encompassed a declaration that

> Newfield is estopped from denying that Cabot owns an interest in the property surrounding the McCoy #27-1 well and the Wells, or otherwise challenging the validity of the Assignment, based on its representations to the United States District Court for the Northern District of Texas in *Minco Oil & Gas, L.P. v. Newfield Exploration Mid-Continent Inc*., Case No. 2-08-cv-00184.

It appears that Minco Oil had sued Newfield in federal court and alleged claims that could affect Cabot's interests in the McCoy #27-1 well. During that suit Newfield uttered various statements purportedly conceding that Cabot owned a 160 acre proration unit

surrounding the well. It also argued that Cabot was a necessary party to the suit since Minco's claims affected the interests of Cabot in the well and alleged proration unit. Cabot used these representations as basis for its claims of estoppel.

The estoppel claims were the subject of another traditional and no-evidence summary judgment motion filed by Newfield. Various grounds were urged to support its position that it was not barred from invoking the statute of frauds. Through the first, it argued that the essential elements of a contract could not be supplied by estoppel. The essential term missing here was a reasonably certain description of the property reserved, according to Newfield. So too did it cite authority to support that contention. The authority was our opinion in *Boddy*.

Like the case before us, *Boddy* involved the statute of frauds and whether the multiple writings in question satisfied its requirements. We concluded that they did not. *Boddy v. Gray*, 497 S.W.2d at 604. Nevertheless, Boddy invoked promissory estoppel to avoid application of the effects wrought by his non-compliance with the statute of frauds. That proposition met with rejection because "[t]he essential elements of the contract itself cannot be created by estoppel; rather estoppel serves to prevent a party's conduct and actions from operating as a denial of a contractual obligation already created." *Id.* at 605.

Our opinion in *Boddy* was later cited by the United States Court of Appeals for the Fifth Circuit to support that court's rejection of an estoppel argument. In *Bilmar Drilling, Inc. v. IFG Leasing Co.*, 795 F.2d 1194 (5th Cir. 1986), Bilmar was attempting to enforce an unenforceable agreement. It argued that "by consistently ratifying and acknowledging the continuing existence of the put agreement, IFG and Inter-Regional

[were] estopped from denying its existence." *Id.* at 1198. In response, the Fifth Circuit cited *Boddy* and held that "[s]ubsequent conduct cannot, on an estoppel theory, create a contract where none exists; estoppel operates to deny enforcement of an existing contractual right." *Id*.

As previously mentioned, Newfield asserted various grounds to defeat Cabot's estoppel claims. Yet, the trial court did not specify which one it relied on when granting Newfield's summary judgment. Thus, it was incumbent upon Cabot to illustrate on appeal why none supported the trial court's decision. *Parkhurst v. Office of the Atty. Gen. of Tex*., 481 S.W.3d 400, 402 (Tex. App.—Amarillo 2015, no pet.). While Cabot addressed, in its appellant's brief, many of the grounds averred in the summary judgment motion, little to nothing was said about *Boddy* and its holding. Indeed, Cabot neither mentioned the opinion nor the rule of law that estoppel cannot be used to create a contract or supply essential terms of a contract.

More importantly, what Cabot attempted here is the very thing tried and rejected in *Boddy* and *Bilmar*. Through the defensive theories of quasi and judicial estoppel, Cabot nonetheless tried and tries to create a contractual right where none exists. The right of which we speak is the ownership of a "160 acre proration unit surrounding" the McCoy #27-1 well. Yet, both we and the trial court concluded that the right did not come into existence because that portion of the agreement from which it sprang was void.

When a contract or writing is void, it is as if it did not exist and has no effect from the outset. *Commonwealth Land Title Co. v. Nelson*, 889 S.W.2d 312, 318 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (involving a forged deed which is also void).

Being non-existent, it cannot be revived through ratification, estoppel, waiver, consent or recording. *Id.* Being void, the attempted reservation of the proration unit never existed under Texas law. There was nothing for Cabot to enforce by barring Newfield from questioning its existence through estoppel.[6] Whether judicial or quasi, estoppel was and is no bar here, and the trial court did not err in so concluding.

In sum, we overrule each issue raised by Cabot. Accordingly, the summary judgment is affirmed.

Brian Quinn
Chief Justice

[6] *Bilmar* would tend to negate Cabot's suggestion that application of federal estoppel law would result in a favorable outcome. The court rendering *Bilmar* was a federal court, and it, nonetheless, applied the same law mentioned in *Boddy* and to the same effect.